
**A Report to Congress
From The
U.S. Office Of Special Counsel
For
Fiscal Year 1999**



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The Special Counsel

The Honorable Albert Gore, Jr.
President of the Senate
Washington, D.C. 20510

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. President and Mr. Speaker:

I respectfully submit to the Congress, in accordance with 5 U.S.C. § 1218, the Annual Report from the Office of Special Counsel for Fiscal Year 1999. As is customary, a copy of this report will also be sent to each Member of Congress.

Sincerely,

Elaine Kaplan

Enclosures

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U.S. OFFICE OF SPECIAL COUNSEL



BIOGRAPHY OF ELAINE KAPLAN SPECIAL COUNSEL

On May 8, 1998, Elaine Kaplan was sworn in to serve a five-year term as Special Counsel of the U.S. Office of Special Counsel (OSC). Ms. Kaplan was nominated for the position of Special Counsel by President Clinton in November of 1997, and was unanimously confirmed by the Senate in April of 1998.

Ms. Kaplan came to OSC with extensive experience litigating employment-related issues before federal courts and administrative tribunals. Prior to her appointment as Special Counsel, Ms. Kaplan served as Deputy General Counsel of the National Treasury Employees Union (NTEU), where she represented the interests of 150,000 employees in the areas of civil liberties, administrative law, racial and sexual discrimination, and labor law. During her thirteen years at NTEU, Ms. Kaplan briefed and argued dozens of cases at all levels of the federal courts on behalf of the union and the federal employees it represents. Many of the cases in which Ms. Kaplan participated resulted in important precedent-setting decisions, including among others, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (the first Supreme Court decision addressing Fourth Amendment implications of urinalysis drug-testing in the public workforce) and *National Treasury Employees Union v. United States*, 115 S.Ct. 1003 (1995) (which struck down on First Amendment grounds the statutory “honoraria ban” as applied to federal employees).

Ms. Kaplan began her legal career in 1979 at the U.S. Department of Labor, Office of the Solicitor, where she worked as a staff attorney in the Division of Employee Benefits. In 1982, Ms. Kaplan was selected to serve on the staff of the newly created Division of Special Appellate and Supreme Court Litigation, which was established to handle the Department’s most significant appellate cases and all of its Supreme Court work. She subsequently held the position of staff attorney at the State and Local Legal Center, where she drafted amicus briefs on behalf of state and local governments for submission to the United States Supreme Court.

Ms. Kaplan, who is a native of Brooklyn, New York, received her undergraduate degree from the State University of New York at Binghamton and her law degree from the Georgetown University Law Center.

I. INTRODUCTION AND SUMMARY

The OSC is an independent federal investigative and prosecutorial agency. Under the Civil Service Reform Act (CSRA) and the Whistleblower Protection Act (WPA), the OSC's primary mission is to safeguard the merit system in federal employment by protecting federal employees and applicants from prohibited personnel practices (PPPs), especially reprisal for whistleblowing. The OSC also has jurisdiction under the Hatch Act to enforce restrictions on political activity by government employees. Finally, the OSC facilitates disclosures of wrongdoing in federal government by operating a secure channel for whistleblowers.

A. Fiscal Year (FY) 1999 was the first full fiscal year under the leadership of a new Special Counsel, Elaine Kaplan. Shortly after taking office in May of 1998, and then again in June of 1999, Special Counsel Kaplan convened senior staff for intensive reviews of the practices and procedures followed by each of the OSC program and support units. The reviews have revealed a number of obstacles to OSC's effective fulfillment of its ambitious mission.

1. The foremost obstacle to OSC's success that the reviews identified was and remains the significant backlog of matters pending at the agency. This backlog has resulted in unacceptably long delays in resolving complaints.

In its most recent overhaul of the statutes enforced by OSC, in 1994, and in response to widespread criticism, Congress imposed upon OSC a 240-day deadline for processing and investigation of PPP complaints, including complaints of reprisal for whistleblowing. 5 U.S.C. § 1214(b)(2)(A)(i). As of December 9, 1999, however, 227 pending PPP complaints (out of a total of 837 -- or 27%) exceeded the 240-day statutory time limitation.

2. In addition to the backlog, Special Counsel Kaplan has identified the widespread ignorance in the federal workforce concerning OSC and the laws it enforces as another obstacle to OSC's ability to safeguard the merit system. In 1994, Congress mandated that federal agencies ensure (in consultation with OSC) that their employees are informed of their rights and remedies under chapters 12 and 23 of title 5 of the U.S. Code. 5 U.S.C. § 2302(c). Very few federal agencies, however, have attempted to meet this statutory requirement in any systematic way. As a result, many federal managers are ignorant of the laws that proscribe whistleblower retaliation, and federal employees who might seek OSC's assistance are unaware of its existence.

B. In FY 1999, Special Counsel Kaplan instituted a number of measures to address these concerns. For example, to maximize the full-time equivalents (FTEs) devoted to program functions, OSC eliminated a Senior Executive Service position in the Management Division, as well as a Budget Analyst position, and contracted out OSC's budget execution functions to the Treasury Department's Bureau of the Public Debt.

Further, Special Counsel Kaplan eliminated one of the two positions previously allocated to the Congressional and Public Affairs Office, and deployed the FTE to hire an Outreach Specialist. As a result, for the first time in its history, OSC now has an established program for providing outreach and training, supported by dedicated staffing. The accomplishments of that program in FY 1999 are substantial, and are set forth below.

In addition, to ensure the aggressive enforcement of the laws within its jurisdiction, and the quality of the agency's work, Special Counsel Kaplan has overseen a 10% increase in the number of cases referred out of the Complaints Examining Unit (OSC's intake unit) for a full investigation. In FY 1999, OSC also filed several amicus briefs on legal issues of importance, devoted intensive resources to several high-profile, highly complex cases, doubled the number of enforcement actions brought before the Merit Systems Protection Board (MSPB) and placed increased emphasis on improving the quality of its legal analyses.

Finally, Special Counsel Kaplan has introduced a number of reforms to attempt to reduce the backlog of cases at the agency and to re-prioritize the order in which cases are processed. Among other things, OSC established an Accelerated Case Team within its Investigation Division to handle targeted case categories that involve less serious personnel actions. The ACT experiment, as detailed below, has been a success. In addition, at Special Counsel Kaplan's direction, the Complaints Examining Unit is now devising strategies to prioritize its consideration of new complaints, so as to move forward more quickly cases involving more serious personnel actions. Further, OSC launched its Alternative Dispute Resolution (ADR) program, which OSC expects will help shorten case processing times.

C. While these reform efforts have borne some fruit,¹ they cannot -- by themselves -- address the problem of eliminating the backlog of cases that has arisen at the agency over the past five years. There is no question that significant progress in meeting OSC's strategic goals will be impossible without increases in budget and staffing authority. Existing staff levels are simply inadequate to eliminate the backlog, to ensure the high quality of OSC's work product, and to provide the resources that are needed to ensure that especially important or complex cases are adequately staffed.

OSC received a modest budget increase in FY 2000, and an increase in its personnel ceiling from 91 to 96 FTEs. Further increases are imperative, however, if OSC is to effectively fulfill its statutory mission. Accordingly, Special Counsel Kaplan requested additional funds and staff from the Office of Management and Budget to address the backlog issue. The Administration's FY 2001 budget request proposes to increase OSC's staff by ten FTEs. Should Congress approve the request, OSC will move from 96 FTEs to 106 FTEs to process the thousands of PPP complaints, Hatch Act and disclosure matters filed annually with OSC.

¹ As of December 9, 1999, the number of "overage" PPP and whistleblower disclosure cases was reduced by approximately 10% and 33%, respectively, from the levels existing at the beginning of FY 1999. In FY 1999, OSC achieved a 10 percent increase in the number of PPP cases investigated.

II. THE OFFICE OF SPECIAL COUNSEL

A. Statutory Background

The Office of the Special Counsel was established on January 1, 1979, by Reorganization Plan Number 2 of 1978. 5 U.S.C.A. App.1, § 204, at p. 471. The Civil Service Reform Act (CSRA) of 1978, effective on January 11, 1979, enlarged its functions and powers. Pub. L. No. 95-454, 92 Stat. 1111 (1978). The Office operated as the autonomous investigative and prosecutorial arm of the MSPB until 1989, enforcing the laws concerning PPPs as well as the legal limitations in the Hatch Act on political activity by federal employees.

In March of 1989, Congress enacted the Whistleblower Protection Act (WPA) of 1989. Pub. L. No. 101-12, 103 Stat. 16 (1989). The WPA established the Office of the Special Counsel as an independent agency within the Executive Branch, separate from the MSPB, and it was renamed the United States Office of Special Counsel. Under the WPA, the OSC kept its basic investigative and prosecutorial functions and its role in litigating cases before the MSPB. The WPA also substantially amended the CSRA to enhance protections against reprisal for those employees who disclose wrongdoing in the federal government, and improve the ability of the OSC to enforce those protections.

Five years after passage of the WPA, Congress enacted the Office of Special Counsel Reauthorization Act of 1994. Pub. L. No. 103-424, 108 Stat. 4361 (1994). In response to widespread criticism concerning inordinate delays in the processing of complaints by OSC, Congress imposed a 240-day time limit on the agency, within which it is required to determine whether there are reasonable grounds for believing a PPP has been committed.² The 1994 legislation also expanded OSC's jurisdiction to cover approximately 160,000 employees of the Veterans Administration and certain government corporations under the statutes enforced by OSC, and significantly broadened the definitions of the types of personnel actions enforced

² In the 1994 legislation, Congress also imposed upon OSC a requirement that its annual report list the number of "cases in which it did not make a determination whether there are reasonable grounds to believe that a PPP has occurred, exists, or is to be taken within the 240-day period specified in section 1214(b)(2)(A)(I)." 5 U.S.C. § 1218. The number of cases in which OSC did not meet the 240-day deadline in FY 1999 is listed below at page 9.

under these statutes.³ Finally, the 1994 legislation made federal agencies explicitly responsible for informing their employees of available rights and remedies under the WPA, and directed that OSC play a consultative role in that process. 5 U.S.C. § 2302(c).

B. OSC's Mission

OSC's mission is to protect federal employees and applicants, especially whistleblowers, from prohibited employment practices; promote compliance by government employees with legal restrictions on political activity; and facilitate disclosures of wrongdoing in the federal government. The OSC carries out this mission by:

- investigating complaints of prohibited employment practices, especially reprisal for whistleblowing, and pursuing remedies for violations;
- operating an independent and secure channel for disclosure and investigation of wrongdoing in federal agencies;
- providing advisory opinions on, and enforcing, the Hatch Act;
- protecting the reemployment rights of veterans under the Uniformed Services Employment and Reemployment Rights Act (USERRA); and
- promoting greater understanding of the rights and responsibilities of government employees under the statutes enforced by OSC.

C. OSC's Internal Organization

The OSC maintains its headquarters in Washington D.C., and has two field offices: one in Dallas, Texas, and one in Oakland, California. The agency is organized into three divisions, and two administrative support branches: the Prosecution Division, the Investigation Division, the

³ The Uniformed Services Employment and Reemployment Rights Act (USERRA), Pub. L. No. 103-353, 108 Stat. 3149 (1994) (codified at 38 U.S.C. § 4301), gave the OSC additional responsibilities. Among other provisions, the Act authorized the OSC, under certain circumstances, to represent a federal employee who is a veteran or reservist before the MSPB and the U.S. Court of Appeals for the Federal Circuit, if a federal agency has failed to reemploy that person in accordance with provisions of the law.

Further changes relating to veterans' reemployment rights were enacted by the Veterans' Employment Opportunities Act of 1998 (VEOA), Pub. L. No. 105-339 (Oct. 31, 1998). The VEOA created a new PPP, at § 2302(b)(11), which makes it improper to knowingly take, recommend, or approve (or fail to take, recommend, or approve) any personnel action, if the taking of (or failure to take) such action would violate a veterans' preference requirement. The former § 2302(b)(11) was re-designated as § 2302(b)(12).

Planning and Advice Division, the Human and Administrative Resources Management Branch, and the Information Services Branch. During FY 1999, OSC operated under a ceiling of 91 FTEs.

The Prosecution Division -- which is one of the two program units responsible for ensuring the enforcement of the statutes under OSC's jurisdiction -- includes four sub-units: the Complaints Examining Unit, the Hatch Act Unit, the Disclosure Unit, and the General Law and Litigation Unit. The majority of the staff of the Prosecution Division is housed in Washington, D.C.; one division attorney is assigned to the Dallas field office and one attorney is assigned to the Oakland field office.

The Investigation Division is the chief program unit responsible for investigating complaints referred after the preliminary inquiry by the Complaints Examining Unit. The majority of the Investigation Division staff is located in Washington, D.C.; seven work out of the Dallas field office and seven in Oakland.

The Planning and Advice Division provides general legal advice and support to OSC staff. It is also responsible for strategic planning and policy, Freedom of Information (FOIA) and Privacy Act, annual survey and ethics program functions. The Planning and Advice Division is located in the Washington, D.C. headquarters.

The Human and Administrative Resources Management Branch is responsible for the administrative support functions of OSC, including personnel, procurement and records management. The Information Services Branch is responsible for OSC's information technology program. Both branches are located in the Washington, D.C. headquarters.

In addition to the three divisions and two administrative branches, the Immediate Office of Special Counsel is responsible for policy making and the overall management of OSC, including congressional relations, public affairs and outreach.

D. Case Processing Procedures

1. Prohibited Personnel Practices

Most of OSC's staff resources are devoted to the processing of complaints alleging the commission of PPPs, including reprisal for whistleblowing. In general, such complaints are processed as follows:

a. Complaints Examining Unit (CEU): CEU receives all allegations of PPPs. CEU performs an initial review of complaints to determine whether they are within OSC's jurisdiction and whether further investigation is warranted. Complaints examiners usually make their determinations solely on the basis of the documentation and information submitted by complainants. Matters stating a potentially valid claim are referred by CEU to the

Investigation Division. Where a matter is not referred for investigation, CEU provides the complainants with a written statement of reasons, to which they may respond. On the basis of the response, if any, CEU makes a determination whether to finalize its closure decision, or refer the matter to the Investigation Division.

b. Investigation Division: The Investigation Division conducts a thorough inquiry into matters referred by CEU. The investigations include in-depth interviews with complainants, witnesses, and the persons alleged to have committed the PPP(s), and review of all relevant documents. Investigations are conducted by investigators in consultation with attorneys from the Prosecution Division, using a team approach. While matters are pending in the Investigation Division, attempts may be made to negotiate settlements and obtain informal corrective actions to resolve the complainants' issues. Where a matter is not resolved informally, the investigator prepares a report or summary of the investigation, which is transmitted to the Prosecution Division.

On October 1, 1998, OSC's Investigation Division launched the **Accelerated Case Team (ACT)** pilot. ACT investigations, unlike others, are conducted primarily through telephone interviews. Further, reporting procedures have been modified to reduce the required written documentation that the investigator must produce. The ACT pilot has been highly successful and was made permanent in FY 2000. In FY 1999, ACT's average of 20 completed investigations per investigator per year was more than twice the average number achieved by non-ACT investigators.

c. General Law and Litigation Unit: This Unit, within the Prosecution Division, reviews completed investigations to determine whether the inquiry has established any violation of law, rule or regulation, and whether the matter warrants corrective or disciplinary action, or both.⁴ OSC attorneys generally first attempt to obtain resolution of complainants' issues informally. If a violation of law is found and informal resolution is not possible, the Special Counsel may refer the matter in writing to the agency head under 5 U.S.C. § 1214(b)(2)(B) with a recommendation for corrective action. If an agency declines to take corrective action, the Special Counsel may file a petition for corrective action with the MSPB under § 1214(b)(2)(C). If the Special Counsel determines that an apparent violation warrants disciplinary action, the OSC files charges against the offending employee under § 1215(a) and prosecutes the case before the MSPB.

Where an investigation discloses a violation of any law, rule or regulation not otherwise within the enforcement authority of the OSC, the Special Counsel sends a report of the OSC's findings to the agency head concerned under § 1214(e) for certification of any action to be taken on the matter. The OSC reports evidence of any possible criminal violations identified during an investigation to the Department of Justice pursuant to § 1214(d).

⁴ Corrective action seeks a remedy for any injury to the individual complaining employee, such as backpay or reinstatement, while disciplinary action seeks to impose discipline on the perpetrator of the PPP(s).

At any time during its processing of a case, the OSC may seek a stay of any personnel action if the available evidence provides reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a PPP. The OSC may obtain a stay upon direct request to the agency concerned, or by filing a request for a stay with the MSPB under § 1214(b)(1). Also, the Special Counsel may, pursuant to § 1212(c), intervene as a matter of right or otherwise participate in any proceeding before the MSPB, except that the Special Counsel may not intervene in a proceeding brought under § 1221 or 5 U.S.C. § 7701 without the consent of the individual initiating the proceeding.

2. Hatch Act Cases

The Hatch Act Unit, a part of the Prosecution Division, is responsible for administration of the Hatch Act's restrictions on federal employee political involvement. Every year, the Unit provides more than 1,000 advisory opinions, enabling individuals to determine whether they are covered by the Hatch Act, and whether their contemplated activities are permitted under the Act. The Hatch Act Unit also enforces compliance with the Act, receiving complaints alleging Hatch Act violations, and, where warranted, referring the complaints to the Investigation Division for further inquiry. Depending on the severity of the violation, the Hatch Act Unit will either issue a warning letter to the employee, or bring a prosecution before the MSPB. In FY 1999, OSC made selected Hatch Act advisory opinions available to the public at its Web site, www.osc.gov.

3. Whistleblower Disclosures

In addition to its investigative and prosecutorial mission, the OSC provides a safe channel through which federal employees, former federal employees, or applicants for federal employment may, under 5 U.S.C. § 1213(a), disclose information they reasonably believe evidences a violation of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety.

The Disclosure Unit is responsible for reviewing the information submitted by the whistleblower, and advising the Special Counsel on whether it reveals a substantial likelihood that the type of wrongdoing described in § 1213(a) has occurred or is occurring. Where a positive determination is made, the Special Counsel must transmit the disclosure to the head of the relevant agency for further action. The agency is required to conduct an investigation and submit a report to OSC describing the results of the investigation and the steps taken in response to the investigative findings. Under § 1213(e), OSC also provides the whistleblower with a copy of the report for comment. The Special Counsel then reviews the report, determines whether it meets the requirements of the statute, and forwards it to the President and appropriate congressional oversight committees.

III. OVERVIEW OF OSC OPERATIONS

A. Budget and Staffing

During FY 1999, OSC operated with a budget of \$8.8 million, and the agency's FTE personnel ceiling was 91.

B. Prohibited Personnel Practice Matters

1. Receipts and Investigations

During FY 1999, OSC received 1,716 new matters alleging PPPs with 3,752 separate allegations. Of the 1,661 matters processed by CEU in FY 1999, OSC lacked jurisdiction in 248 of the matters (or 14.9% of the total matters processed), leaving 1,413 matters (85%) in which the OSC was authorized by statute to conduct an inquiry. Following CEU review, 287 matters were referred for field investigation (20% of the matters over which OSC had jurisdiction). In addition, following initial review and inquiry, CEU closed 1,380 matters because there was insufficient basis for further OSC action, or because of satisfactory resolution of an employee's complaint during the initial review. The types of PPP allegations received in FY 1999 and the types of PPP allegations referred for field investigation are included in Tables 3 and 4, respectively, on pages 16 and 17.

In 1994, Congress imposed upon OSC a requirement that its annual report list the number of "cases in which it did not make a determination whether there are reasonable grounds to believe that a PPP has occurred, exists, or is to be taken within the 240-day period specified in section 1214(b)(2)(A)(I)." 5 U.S.C. § 1218. During FY 1999, 293 PPP cases were closed after pending at OSC for longer than 240 days (17.2% of the total number of 1,705 PPP complaint closures during FY 1999). In addition, at the end of FY 1999, 205 of the pending PPP cases (28.9% of the total of 709 cases pending at the close of FY 1999) had been open for longer than 240 days.

2. Enforcement Actions

Enforcement actions are cases filed by OSC with the MSPB that seek corrective or disciplinary action. Under 5 U.S.C. § 1214, before OSC may initiate proceedings for corrective action before the MSPB, the OSC must report its findings and recommendations to the agency involved. Only when the agency has had a reasonable period of time to take corrective action and has failed to do so, may OSC proceed to petition the MSPB for corrective action.

If OSC believes a PPP has been committed and initiates discussions with the agency, the matter is normally resolved through settlement between the complainant and the agency. Thus, historically, in most cases it has not been necessary to send formal letters to agencies, resulting in low levels of corrective action litigation. On most occasions when an agency refuses to grant appropriate corrective action after a formal request from the Special Counsel, OSC proceeds immediately to file a complaint with the MSPB. In addition to rectifying the matter at issue, corrective action litigation often has the additional benefits of clarifying and expanding existing law, and of bringing greater public attention to the mission and the work of OSC. This significantly increases the deterrent effect of OSC's efforts.

Under 5 U.S.C. § 1215, when OSC determines that disciplinary action against an employee is warranted, OSC can file a complaint directly with the MSPB. If the agency agrees to take appropriate disciplinary action on its own initiative, then the matter can be settled without resort to an MSPB proceeding.

In FY 1999, OSC filed three enforcement actions in PPP matters before the MSPB. The remaining cases which were pending at the close of FY 1999 were either waiting decision by the MSPB or are awaiting hearings to be held in FY 2000.

3. Favorable Actions Achieved

The OSC also obtained 52 favorable actions⁵ in 52 PPP matters in FY 1999. Of these favorable actions, 50 were corrective actions and 2 were disciplinary actions, with cases involving allegations of reprisal for whistleblowing accounting for 36 (69.2%) of the total favorable actions. OSC also obtained 12 stays of personnel actions through negotiations with agencies and, in cases where agencies refused OSC's request, 3 stays through petitions to the MSPB.⁶

4. Referrals of Possible Disciplinary Action Cases from MSPB

As mentioned above, whistleblowers have the option, if their cases are not processed within 120 days by OSC, or if OSC closes their cases, of proceeding directly to the MSPB with an Individual Right of Action (IRA). In adjudicating an IRA, if the MSPB finds reason to believe that a current employee may have committed a PPP, the WPA requires that the MSPB

⁵ "Favorable actions" include actions taken to directly benefit the complaining employee; actions taken to punish, by disciplinary or other corrective action, the supervisor(s) involved in the personnel action; and systemic actions, such as training or educational programs, to prevent future questionable personnel actions. The term encompasses: (1) those actions taken by an agency pursuant to a written request for corrective action by the Special Counsel; (2) actions taken by an agency at the request of the OSC as a settlement of a PPP complaint in advance of a written request for corrective action by the Special Counsel; or (3) actions taken by an agency with knowledge of a pending OSC investigation, which satisfactorily resolve those matters under inquiry by the OSC.

⁶ Data concerning PPPs and the Hatch Act are set out separately in this annual report.

refer those cases back to OSC for evaluation of whether disciplinary action is appropriate. 5 U.S.C. § 1221(f)(3).

In FY 1999, OSC received four referrals for possible disciplinary action from the MSPB pursuant to § 1221(f)(3). One of those matters was referred for further investigation, but no disciplinary actions were initiated during FY 1999 based on referrals from the MSPB. Four MSPB referrals were pending at the end of FY 1999, including one received in FY 1998. (With respect to the FY 1998 matter, OSC closed that matter in early FY 2000 after the agency agreed to impose disciplinary action as recommended by the Special Counsel.)

Table 1

Summary of Prohibited Personnel Practice Matters			
	FY 1997	FY 1998	FY 1999
Matters received	1,841	1,721	1,716
Matters processed by Complaints Examining Unit (CEU)	2,127	1,938	1,661
Matters processed in which OSC had jurisdiction	1,816	1,639	1,413
Matters referred for full investigation	269	260	287
Matters closed by CEU	1,858	1,678	1,380
Enforcement actions	1	3	3
Stays – negotiated	13	10	12
Stays – obtained from the MSPB	4	2	3
Favorable actions obtained	82	65	52

Table 2

Summary of Whistleblower Reprisal Matters			
	FY 1997	FY 1998	FY 1999
Matters received	817	691	749
Matters processed by CEU	891	863	741
Matters processed in which OSC had jurisdiction	807	774	670
Matters closed by CEU	673	656	519
Matters referred for full investigation	218	207	224
Enforcement actions	0	1	1
Stays – negotiated	12	8	10
Favorable actions obtained	56	42	36

Corrective Actions

The following is a representative sample of corrective actions obtained by OSC during FY 1999:

- In June 1999, the OSC facilitated a favorable settlement on behalf of a former agency employee, pursuant to which the employee received corrective relief, a lump sum payment, and attorney’s fees. The OSC determined that, as the result of an illegally manipulated recruiting and selection process, the agency committed a PPP under 5 U.S.C. § 2302(b)(6) by denying its former employee a position for which she applied. On the basis of its investigation, the OSC found that two agency officials had changed the grade level, qualifications and recruiting authority for the position to secure it for a questionably qualified friend in lieu of the former employee and four other applicants. At the time of this vacancy, it was the agency’s policy to grant selection priority to “in-house” candidates. The former employee was the sole “in-house” and minority applicant among the candidates competing for this position.
- In conjunction with a settlement reached in June 1999, the OSC agreed to dismiss its Petition for Corrective Action on behalf of an employee whom an agency improperly sought to transfer and then remove. Pursuant to this settlement, the employee received, among other things, a lump sum payment and restoration of benefits. The agency had initially sought to reassign an insignificant portion of the employee’s job functions from its headquarters to a field office. When the employee refused to

accept this transfer, the agency sought to remove him. The OSC determined that the agency committed a PPP under 5 U.S.C. § 2302(b)(12) by seeking to remove the employee for refusing to transfer because the underlying transfer proved to be invalid; thus, the employee's refusal to transfer constituted insufficient grounds for removal.

- In May 1999, an agency cooperated with the OSC to reach a settlement agreement under which two long-time, seasonal employees (who also were husband and wife) received full corrective action, including backpay. In the summer of 1996, the husband reported deficient safety equipment and other safety-related problems associated with the agency's operations that put members of the public in potential jeopardy. Upon investigation, the OSC found that the agency committed PPPs under 5 U.S.C. § 2302(b)(8) by denying seasonal work to both employees during the 1997 and 1998 seasons in retaliation for the husband's whistleblowing activity.
- The OSC secured a favorable settlement on behalf of an employee who complained that the agency violated veterans' preference requirements by failing to select him for a position. The OSC's investigation into the employee's complaint revealed evidence of three PPPs under 5 U.S.C. § 2302(b)(11) and 5 U.S.C. § 2302(b)(12). The agency improperly: (1) requested that the employee waive his veterans' preference rights; (2) selected an active military candidate to fill the disputed position in violation of a federal statute and agency regulations; and (3) exercised temporary term appointment authority illegitimately. As a result of this April 1999 settlement, the employee received a retroactive promotion, a new position, and approximately \$100,000.
- Two employees with an agency filed separate OSC complaints alleging that the agency committed PPPs under 5 U.S.C. § 2302(b)(12) by disallowing them from exercising their rights under 5 C.F.R. § 351.701(c)(3) to retreat to substantially similar positions during a reduction-in-force. In August 1999, the agency agreed with OSC to a settlement agreement whereby the employees were reinstated to the respective positions they would have received had they been permitted to exercise their retreat rights; each also received backpay and attorney's fees.
- In June 1999, OSC facilitated a settlement agreement on behalf an employee, which resolved her 5 U.S.C. § 2302(b)(8) complaint. Concurring with the investigative findings of an outside contractor retained by the agency, the OSC determined that -- by reducing her performance appraisal, denying her promotion, and imposing a letter of admonition -- the employee's supervisors retaliated against her for cooperating with an Inspector General's investigation of mismanagement and abuses of authority. Pursuant to the settlement, the agency purged the adverse information from the employee's personnel records, retroactively promoted her, revised her performance ratings to the Outstanding level, and paid her attorney's fees.

- In March 1999, OSC and an agency entered into an agreement whereby the agency agreed to provide WPA training to particular agency officials and to display posters apprising federal employees of their WPA rights. This agreement was precipitated by an OSC investigation into an employee's complaint that the agency engaged in a PPP under 5 U.S.C. § 2302(b)(8) by temporarily detailing and then removing her in retaliation for making disclosures regarding gross mismanagement, travel abuse, and misuse of government resources. Because the employee elected to challenge her removal under formally negotiated grievance procedures, OSC's role was limited to determining whether it should pursue disciplinary action.

Disciplinary Actions

The following is a representative sample of disciplinary actions obtained by OSC during FY 1999:

- In May 1999, the agency cooperated with the OSC to reach a settlement agreement under which the former supervisor of a married couple who worked as long-time, seasonal employees, received a 30-day suspension for denying the couple seasonal work during the 1997 and 1998 seasons in retaliation for the husband's whistleblowing activity. During the summer of 1996, the husband had reported deficient safety equipment and other safety-related problems associated with the agency's operations. Upon investigation, the OSC found that the agency committed PPPs under 5 U.S.C. § 2302(b)(8).
- In April 1999, the OSC agreed to waive its jurisdiction over a complaint jointly filed by three employees of an agency, alleging that the agency violated 5 U.S.C. § 2302(b)(6) by granting an unlawful preference to a subordinate employee, improperly extending that subordinate's detail beyond 120 days, and delegating to that same subordinate higher grade duties without competition. The OSC closed its investigation upon its approval of the agency's proposal to discipline the subject official with a 14-day suspension.

Merit Systems Protection Board Stays

The following are summaries of stay cases brought to the MSPB during FY 1999:

- OSC petitioned the MSPB to stay the reassignment of an Assistant District Director, Investigations (ADDI) for the U.S. Immigration and Naturalization Service (INS) to a non-supervisory position located in a different office in the same city. OSC had reasonable grounds to believe that the ADDI was suspended for 21 days and reassigned because he made protected disclosures and exercised his right to furnish information to Congress. The MSPB granted an initial stay, four extensions of that initial stay, and then an indefinite stay -- all to enable OSC both to conduct a full

investigation into whether the agency violated 5 U.S.C. § 2302(b)(8) and to secure corrective action. *See Special Counsel ex rel. Jacobs v. Department of Justice*, No. CB-1208-99-0005-U-1 (Nov. 23, 1998); *Special Counsel ex rel. Jacobs v. Department of Justice*, No. CB-1208-99-0005-U-2 (Jan. 6, 1999); *Special Counsel ex rel. Jacobs v. Department of Justice*, No. CB-1208-99-0005-U-3 (Mar. 5, 1999); *Special Counsel ex rel. Jacobs v. Department of Justice*, No. CB-1208-99-0005-U-4 (Apr. 6, 1999); *Special Counsel ex rel. Jacobs v. Department of Justice*, No. CB-1208-99-0005-U-5 (Apr. 21, 1999); *Special Counsel ex rel. Jacobs v. Department of Justice*, No. CB-1208-99-0005-U-6 (June 10, 1999).

- OSC petitioned the MSPB for a stay extending the term appointment of a GS-14 Program Manager working at the Department of Justice (DOJ). OSC had reasonable grounds to believe that the department declined to extend the Program Manager's term appointment because of his protected disclosures. The MSPB granted this stay request to enable the OSC to resume its investigation upon the conclusion of a criminal investigation by the DOJ's Office of Inspector General. *See Special Counsel ex rel. Andersen v. Department of Justice*, No. CB-1208-99-0033-U-1 (Mar. 17, 1999).
- OSC petitioned the MSPB to stay the termination of a GS-7 Safety Technician's excepted service appointment during his probationary period. OSC had reasonable grounds to believe that the agency's decision to terminate was in retaliation for his filing a grievance against the head supervisor of his department. The MSPB granted a 45-day stay, as well as one extension of that initial stay. *See Special Counsel ex rel. Perfetto v. Department of the Navy*, No. CB-1208-99-0062-U-1 (Aug. 3, 1999); *Special Counsel ex rel. Perfetto v. Department of the Navy*, No. CB-1208-99-0062-U-2 (Sept. 10, 1999).

Table 3

Allegations Contained in Matters Received During FY 1999	
Nature of Allegation	Number of Allegations
Reprisal for whistleblowing [§ 2302(b)(8)]	749
Reprisal for exercise of a right of appeal [§ 2302(b)(9)]	660
Violation of a law, rule or regulation implementing or concerning a merit system principle [§ 2302(b)(11)]	642
Disclosures of alleged violation of a law, rule or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a danger to public health or safety [§ 1213(c) or § 1213(g)]	620
Discrimination on the basis of race, color, sex, national origin, religion, age, or handicapping condition [§ 2302(b)(1)(a)(D)]	498
Granting of unauthorized preference or advantage [§ 2302(b)(6)]	439
Deception or obstruction of the right to compete [§ 2302(b)(4)]	283
Allegations which did not cite or suggest any prohibited personnel practice or prohibited activity	155
Discrimination on the basis of non-job related conduct [§ 2302(b)(10)]	87
Appointment, promotion, or advocating the appointment or promotion of a relative [§ 2302(b)(7)]	67
Attempts to secure withdrawal from competition [§ 2302(b)(5)]	50
Solicitation or consideration of unauthorized recommendations [§ 2302(b)(2)]	47
Arbitrary or capricious withholding of information requested under the Freedom of Information Act [§ 1216(a)(3)]	43
Violation of the Hatch Act by a state or local government employee [5 U.S.C. ch. 15]	46
Discrimination on the basis of marital status or political affiliation [§ 2302(b)(1)(E)]	28
Violation of the Hatch Act by a federal employee [§§ 7323-24]	24
Coercion of political activity [§ 2302(b)(3)]	3
Other activities allegedly prohibited by civil service law, rule or regulation [§ 1216]	<u>1</u>
Total	4,442 ⁷

⁷ Each matter may contain more than one allegation. Thus, this total exceeds the total number of matters received. Moreover, while a matter is being handled by OSC, additional allegations may be added to those initially presented to OSC.

Table 4

Allegations Contained in Matters Referred for Field Investigation During FY 1999	
Nature of Allegation	Number of Allegations
Reprisal for whistleblowing [§ 2302(b)(8)]	218
Reprisal for exercise of a right of appeal [§ 2302(b)(9)]	158
Violation of a law, rule or regulation implementing or concerning a merit system principle [§ 2302(b)(12)]	106
Granting of unauthorized preference or advantage [§ 2302(b)(6)]	78
Discrimination on the basis of race, color, sex, national origin, religion, age, handicapping condition, or marital status[§ 2302(b)(1)(A)-(E)]	52
Deception or obstruction of the right to compete [§ 2302(b)(4)]	46
Arbitrary or capricious withholding of information requested under the Freedom of Information Act [§ 1216(a)(3)]	27
Discrimination on the basis of non-job related conduct [§ 2302(b)(10)]	20
Appointment, promotion, or advocating the appointment or promotion of a relative [§ 2302(b)(7)]	12
Securement of withdrawal from competition [§ 2302(b)(5)]	10
Solicitation or consideration of unauthorized recommendations [§ 2302(b)(2)]	6
Discrimination – political affiliation	5
Violation of the Hatch Act by a state or local government employee [5 U.S.C. ch. 15]	2
Violation of the Hatch Act by a federal employee [5 U.S.C. § 7323-24]	1
Coercion of political activity [§ 2302(b)(3)]	1
Total	742⁸

⁸ Each matter may contain more than one allegation. Thus, this total exceeds the total number of matters received. Moreover, while a matter is being handled by OSC, additional allegations may be added to those initially presented to OSC.

C. Hatch Act Matters

1. Overview of Jurisdiction

Under the Hatch Act, as enacted in 1939, federal employees, employees of the District of Columbia (D.C.) government, and certain employees of state and local governments faced significant restrictions on their ability to participate in political activities. Following amendments enacted in 1993, most federal and D.C. employees are now permitted to take an active part in political management and in political campaigns. Nevertheless, there continue to be important restrictions on the political activities of federal employees, including partisan candidacy, solicitation of contributions, and political activity while on duty. The 1993 amendments did not change the provisions applying to state and local government employees.

OSC receives and investigates complaints of Hatch Act violations, and where warranted, will prosecute violations before the MSPB. In matters in which violations are not sufficiently egregious to warrant prosecution, OSC will issue a warning letter to the employee. In addition, OSC issues advisory opinions upon request, enabling individuals to determine whether they are covered by the Hatch Act and whether their contemplated activities are permitted under the Act.

2. Advisory Opinions

During FY 1999, OSC's Hatch Act Unit issued 2,124 advisory opinions in response to telephone and written inquiries, and responded to an additional 220 e-mail inquiries.

3. Violations and Enforcement

During FY 1999, OSC received 73 new matters alleging violations of the Hatch Act. Following initial review by the Hatch Act Unit, 3 matters were referred for field investigation.⁹

Three Hatch Act enforcement actions were filed in FY 1999. No Hatch Act cases went to hearing before the MSPB in FY 1999.

⁹ The Hatch Act allegations received in FY 1999 and the Hatch Act allegations referred for field investigations appear in Tables 3 and 4, respectively, pages 16 and 17.

Table 5

Summary of Hatch Act Matters			
	FY 1997	FY 1998	FY 1999
Advisory opinions issued	1,700	2,124	2,063
Matters received	75	83	71
Matters referred for investigation	11	6	3
Disciplinary action complaints filed with MSPB	3	0	3
Disciplinary actions obtained before MSPB and through negotiation	3	5	1
Warning letters issued	24	20	21

Disciplinary Actions

The matter summarized below was filed with the MSPB in FY 1999:

- The OSC filed a complaint for disciplinary action against a federal employee, charging that the employee had run for public office in a partisan campaign in violation of the Hatch Act. The OSC entered into settlement negotiations with the employee and it was agreed that the employee would serve a 30-day suspension from his federal position. The MSPB approved the settlement and OSC's complaint for disciplinary action was dismissed. *OSC v. White*, MSPB Docket No. CB-1216-99-0003-T-1 (October 14, 1998).

D. Uniformed Services Reemployment Rights

The Uniformed Services Employment and Reemployment Rights Act (USERRA) (codified at 38 U.S.C. § 4301) prohibits discrimination against persons because of their service in the Armed Forces Reserve, the National Guard, or other uniformed services. The USERRA prohibits an employer from denying any benefit of employment on the basis of an individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. It also protects the right of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment after being absent due to military service or training.

The USERRA authorizes OSC to investigate alleged violations of the Act by federal executive agencies, and to prosecute meritorious claims before the MSPB on behalf of the aggrieved person. OSC, however, is not authorized to receive a USERRA complaint directly

from the claimant. Instead, the claimant must first file his/her complaint with the Department of Labor's Veterans' Employment and Training Service (VETS). If VETS is unsuccessful in resolving the complaint, the claimant may request that VETS refer the complaint to OSC. If the Special Counsel believes there is merit to the complaint, OSC will initiate an action before the MSPB and appear on behalf of the claimant.

OSC received seven USERRA referrals from the Department of Labor during FY 1999. Including one referral that had been pending at the end of FY 1998, OSC declined representation in three USERRA referrals, leaving five USERRA referrals pending at the end of FY 1999. OSC initiated no USERRA actions before the MSPB during FY 1999.

E. Whistleblower Disclosures

In addition to its investigative and prosecutorial mission, OSC provides a safe channel through which federal employees, former federal employees, or applicants for federal employment may disclose information they reasonably believe evidences a violation of law, rule or regulation; or gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety. 5 U.S.C. § 1213(a).

Upon receipt of such information from a federal employee, former federal employee or applicant for federal employment, the Special Counsel is required by § 1213(c) to transmit the information to the head of the agency concerned if the Special Counsel determines that there is a substantial likelihood that the information discloses the kind of wrongdoing described in the statute. OSC will not divulge the identity of an employee who provided the information unless he or she consents. The agency head is then required to conduct an investigation and submit a report to the Special Counsel on the findings of the investigation. The Special Counsel sends the agency report, along with any comments provided by the whistleblower who made the disclosure, and any comments or recommendations by the Special Counsel, to the President, and the congressional committees having jurisdiction over the agency. A copy of the report and any comments are also placed in a public OSC file in accordance with 5 U.S.C. § 1219(a).

After review of the information received from a whistleblower, the Special Counsel may determine that there is not a substantial likelihood that the information discloses the type of wrongdoing described in § 1213(a). In such cases, the Special Counsel may, under § 1213(g)(2), with the consent of the whistleblower, require the agency head to review the matter and inform the Special Counsel of what action has been or is being taken. OSC then notifies the whistleblower.

Disclosures are processed by the Disclosure Unit, a part of the Prosecution Division. OSC is not authorized to investigate allegations of the kind described in § 1213(a). Nevertheless, complainants often include information which may be covered by § 1213(a) with their allegations. Disclosures will be referred to the Disclosure Unit by the CEU for further review and follow-up with the complainant as needed to confirm the facts and issues involved. After completion of its review, OSC decides whether to: (1) transmit the information developed to the agency concerned under § 1213(c) or § 1213(g)(2); (2) refer the matter to the agency Inspector

General or comparable office for any appropriate action; or (3) close the matter without further action.

During FY 1999, OSC received 369 disclosure matters for possible referral to agencies concerned under §§ 1213(c) or 1213(g)(2).¹⁰ In addition, 257 disclosure matters were carried over from FY 1998. A disclosure matter usually contains multiple allegations of a violation of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety.

Table 6

Summary of Disclosure Matters			
	FY 1997	FY 1998	FY 1999
Matters received	306	331	369
Disclosures referred for investigation and a report under § 1213(c)	14	2	15
Disclosure allegations referred to agency Inspectors General	72	65	71
Disclosure allegations closed due to lack of sufficient basis for further action	206	247	349
Remaining disclosures carried over to next fiscal year for completion of review	244	257	209

Results of Referrals

During FY 1999, OSC closed seven reports from agencies to which statutory referrals had been made. OSC reviews of agency reports disclosed the following results from statutory referrals:

Section 1213(c) Reports

Cases in which allegations were substantiated in whole or in part	6
Cases in which allegations were not substantiated	1

¹⁰ The number of disclosure allegations received in FY 1999 appears in Table 3 on page 16.

Disclosure Unit Matters

The following is a representative sample of matters that were either referred by the Special Counsel to the head of the agency pursuant to 5 U.S.C. § 1213(c) during FY 1999, or in which reports were received back from the agency and the matter closed during FY 1999:

- OSC referred allegations of gross mismanagement, a substantial danger to public health and safety, and violations of law, rule or regulation at the Department of Energy (DOE) Brookhaven National Laboratory (BNL), in Upton, New York. It was alleged that DOE officials permitted the contractor at BNL to operate the TRISTAN experiment for more than ten years in non-compliance with various DOE safety orders and procedures. It was discovered that certain analyses were never done following a 1994 fire at the TRISTAN experiment. These analyses require consideration of various risk factors, such as fire potential, industrial hazards, radioactivity, and adequacy of containment, to ensure that radioactive waste was being handled safely. DOE's initial report to OSC confirmed the allegation that the safety analysis reviews relative to the TRISTAN experiment were not performed. Further, the report found that the accident investigation team investigating the 1994 fire did not question why the analysis was not performed. The DOE report reiterated the findings of its Office of Inspector General (OIG) that the investigation of the TRISTAN fire was not properly scoped, but found that there was insufficient evidence of a conscious decision to scope it improperly. The DOE report found that the improper scoping was a department-wide problem with such investigations, rather than an isolated incident. As a result, DOE published Change 2 to DOE Order 225.1, on Accident Investigations. The order requires the scope of investigation to include, as appropriate, all levels of the organization up to and beyond the level of the appointing official; it also requires that the accident investigation board shall be responsible for conducting a thorough investigation of the individuals, organizations, management systems, and facilities having a stake in or potential impact on an accident. The report further stated that a review of DOE records revealed no evidence that managers consciously allowed safety violations to occur, or that there was a cover-up during the investigation of the TRISTAN fire. In response to the Special Counsel's request for additional information and clarification, a DOE supplemental report stated that there was no specific policy requiring a safety review and provided examples of corrective actions that had been taken. The supplemental report also explained the role of the Office of Oversight in overseeing management effectiveness in complying with environment, safety, and health policies and procedures. *Referred June 1997, closed November 1998.*
- OSC referred allegations of violations of law, rule or regulation by officials of the Department of Justice, Immigration and Naturalization Service, Immigration Officer Academy (IOA), Artesia, New Mexico. It was alleged that an employee at the IOA was approached by two other employees to solicit orders for their Amway business during official time and on work premises. The matter was initially referred by OSC to the department's OIG, which corroborated one of the allegations, but failed to take

any action. OSC then referred the matter to the Attorney General for investigation and a report. The investigation confirmed the allegation that the sale of at least one Amway product occurred on government premises. As a result of the findings, the department issued a directive to the Chief, IOA, calling on him to ensure that employees of IOA are aware of their obligation to devote full time and attention to their official duties while at work, and of the prohibition against the operation of private businesses from the work place. *Referred December 1998, closed July 1999.*

- OSC referred allegations of violations of law, rule or regulation and abuse of authority by officials of the Department of Agriculture, Farmers Home Administration (FmHA), now Rural and Economic Community Development (RECD), in Albuquerque, New Mexico. It was alleged that between 1988 and 1992, the then-State Director of FmHA improperly solicited sexual encounters from female borrowers whose FmHA loans came under his jurisdiction, in exchange for his agreement not to collect their delinquent accounts. It was also alleged that FmHA officials failed to take appropriate action on employees' complaints of the State Director's misconduct. An investigation conducted by the OIG found no credible evidence that the State Director engaged in the inappropriate conduct, and was unable to substantiate the remaining allegations. The Special Counsel criticized the report for failing to acknowledge the sworn statements of several employees concerning their knowledge of the misconduct, and for limitations in the investigative process, and transmitted the report and her comments to the President and the appropriate congressional oversight committees. Notwithstanding its findings, the department pledged to continue issuing its annual policy memoranda on appropriate behavior and reporting misconduct. *Referred February 1999, closed November 1999.*
- OSC referred allegations of a substantial and specific danger to public safety by officials of the National Aeronautics and Space Administration (NASA), Lyndon B. Johnson Space Center (JSC), Houston, Texas. It was alleged that officials at JSC were perpetuating a serious risk to public safety, such as the in-flight failure of a space shuttle, by ignoring their own specifications and safety margins for the effects of electromagnetic interference between and among systems within a given space shuttle, and from external sources. It was alleged that for a period of ten years, NASA allowed various vehicles to be sent into space when the electromagnetic interference levels of the vehicles exceeded the established safety margin. A comprehensive investigation by NASA found the need for improvement in the shuttle program electromagnetic effects process and documentation, and the need for specific requirement changes. Among other improvements, NASA pledged to implement new susceptibility test specifications for future hardware procurement, perform another system-level electromagnetic control (EMC) compliance assessment to verify the appropriate margin of safety, update EMC requirements as needed, and apply the requirements to new avionics. *Referred March 1999, closed December 1999.*

- OSC referred allegations of violations of law, rule or regulation and a danger to public health and safety at the Department of the Navy, Naval Air Station (NAS), Alameda, California. It was alleged that as far back as 1983, the Navy had evidence that certain areas regularly used by firefighters for training and storage were contaminated with high levels of polychlorinated biphenyls and lead. The matter included allegations that the Navy violated federal regulations and a Remedial Action Order from the state when it failed to notify firefighters of the hazards, failed to provide annual medical examinations, failed to adequately document medical records, and permitted firefighters to work unprotected in known contaminated areas. Firefighters alleged that they worked regularly in the contaminated areas at NAS, Alameda, from approximately 1985 to 1994, without knowledge of the contaminants and without appropriate protective equipment. An investigation was conducted by the Naval Inspector General, and found that the Navy violated federal and state laws by failing to provide the firefighters with information concerning the contaminants, and to notify them of the risks involved in working on the site. Other allegations were not adequately addressed by the investigation. The Special Counsel found that the Navy report failed to meet § 1213(d) requirements, and was not reasonable under § 1213(e)(2). The report and the comments of the Special Counsel noting the deficiencies were transmitted to the President and the appropriate congressional oversight committees. *Referred March 1999, closed January 2000.*

F. Outreach Program

One of Special Counsel Kaplan's priorities, as mentioned previously, is to combat the widespread ignorance in the federal workforce concerning OSC and the laws it enforces. During FY 1999, Special Counsel Kaplan eliminated one of the two positions previously allocated to the Congressional and Public Affairs Office, and deployed the FTE to hire an Outreach Specialist. As a result, for the first time in its history, OSC now has an established program for providing outreach and training supported by dedicated staffing.

The outreach program has been established to assist agencies in meeting their statutory mandate under 5 U.S.C. § 2302(c), which Congress imposed in 1994. Under that provision, federal agencies are responsible "for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them" under chapters 12 and 23 of title 5. Because of this clear statutory mandate, OSC considers outreach to federal managers and employees to be an essential part of its mission.

A chief focus of the outreach program is to work proactively with federal agencies to design employee education programs. By the end of FY 1999, the Outreach Specialist had, among other things, coordinated OSC's participation in several high-impact, time-critical employee information initiatives (including joint, agency-wide training programs with three other agencies, described further below), updated existing outreach materials (such as brochures and posters), and developed new materials (*e.g.*, a summary of employee rights, with examples of PPPs).

The following provides more detailed information about the most significant outreach activities undertaken by OSC in FY 1999:

a. Publications. The OSC--

- revised and reissued its basic program brochure, "The Role of the U.S. Office of Special Counsel" (which can be downloaded from OSC's Web site, at <http://www.osc.gov/Documents/oscrole.pdf>);
- created a new, two-page summary for federal employees, suitable for e-mailing, entitled "Your Rights as a Federal Employee" (which can be downloaded from Web site, at <http://www.osc.gov/Documents/rights.pdf>);
- developed a revised guide in Power Point format on employee rights and remedies under title 5, for use by agencies in implementing the statutory informational program requirement (available for downloading from Web site, at http://www.osc.gov/Documents/lpg_TS.ppt); and
- revised posters dealing with PPPs, reprisal for whistleblowing and the Hatch Act, and created a new federal Hatch Act poster.

b. Web site. OSC substantially redesigned its Web site and launched the upgraded version in January of 1999. One of the most concrete measures of the site's success in its first nine months of operation was more than a three-fold increase in user sessions -- from 3,182 in January 1999, to 10,298 in September 1999. In addition to a wealth of information concerning the substance of whistleblower protection, PPP cases, Hatch Act guidance, press releases and OSC procedures, OSC also placed its basic brochure, the two-page employee rights guide, and the Power Point informational program guide on the Web site. Order forms for those and other OSC informational materials, and forms to request agency speakers were also provided at the site.

c. Agency-wide initiatives. OSC worked with representatives of the Department of Energy (DOE), the Department of Veterans Affairs (DVA), the Customs Service, the Internal Revenue Service (IRS), and the Small Business Administration (SBA) to provide broad-based training. Among the employee information measures undertaken by those agencies in cooperation with OSC were the following:

- letters reinforcing and affirming whistleblower protections from the agency head to all employees (DVA, IRS);
- mailings of "The Role of the OSC" brochure to all employees (Customs Service, IRS);

- satellite training for employees, managers, and/or officials serving as ongoing liaisons with OSC (Customs Service, DVA, IRS); and
- e-mailings of the two-page OSC guide on employee rights to all employees (DOE, SBA).

d. *Speaking engagements.* OSC provided a total of 76 speakers to 51 training conferences, forums, or other public events, concerning OSC's role, and the rights and responsibilities of federal employees under the whistleblowing and employee protection laws it enforces.

IV. ANNUAL SURVEY PROGRAM

Pursuant to section 13 of Public Law 103-424, the OSC annually surveys individuals who have contacted the agency for assistance in connection with complaints of PPPs and related violations,¹¹ requests for Hatch Act advice, and whistleblower disclosures. The surveys ask the following statutorily prescribed questions: (1) whether respondents were fully apprised of their rights; (2) whether they were successful at the OSC or the MSPB, and (3) whether successful or not, if they were satisfied with the treatment received from the OSC.¹²

In FY 1999, the OSC mailed surveys to identifiable persons in matters closed in FY 1998 (with or without favorable action) who had: (1) alleged PPPs or related violations (1,678 closures); (2) asked for and received a written Hatch Act advisory opinion (122 issued); or (3) filed a report through the whistleblower channel operated by the OSC Disclosure Unit (318 closures).¹³ In addition to the statutorily required questions, questionnaires mailed for this survey cycle queried respondents on the nature of their complaint or disclosure; the reason(s)

¹¹ Related violations include other matters investigated by the OSC pursuant to law -- *i.e.*, alleged violations of the Hatch Act, USERRA, and arbitrary and capricious withholding under FOIA. For ease of reference in describing the three survey types, the term "PPP" will include these related violations.

¹² Respondents are also invited to provide comments or suggestions on ways in which OSC can improve its service to persons seeking its assistance. OSC took several measures to allay concerns that basic survey responses, and any comments or suggestions, might affect its processing of a respondent's request for assistance. These steps included: mailing a survey only after OSC completed action on a matter; inserting a notice on each form that completion of the survey was voluntary and that provision of names and case numbers was optional; using forms without codes that could identify the source of completed surveys; and assigning the receipt and analysis of completed surveys to an office other than OSC's operational units. OSC provided postage-paid returns of completed survey forms, and sent a survey reminder to all recipients after the initial survey mailing.

¹³ Surveys covering matters closed in FY 1999 and FY 2000 will be reported on in the annual report for FY 2000.

given by the OSC for closing their complaint or disclosure; five components of service (courtesy, oral communications, written communications, timeliness, and results); and the disposition of any individual right of action appeal filed with the MSPB.¹⁴

Response rates to the three surveys ranged from 17% (Disclosure Unit surveys) to 27% (Hatch Act surveys). Low response rates, particularly when coupled with the small universe of potential respondents, make it difficult to draw broad conclusions from the survey data.¹⁵ Nevertheless, some general observations can be made about some responses that were received.

Survey responses -- especially those dealing with PPP and whistleblower disclosure matters -- continued to suggest, as they have since the surveys began in 1995, that agencies are not systematically implementing 5 U.S.C. § 2302(c). That provision requires agencies to inform employees of their rights and remedies under the laws enforced by the OSC.

Respondents also continued to report more favorably about results obtained and service received in connection with OSC's advisory functions; conversely, respondents generally were more negative in connection with its enforcement and compliance responsibilities. Except for the element of courtesy, correlations were apparent between the degree to which respondents obtained the results they sought from OSC and the degree to which they reported being satisfied with other elements of service received.

Responses received from all three surveys for the FY 1998 survey period (October 1, 1997-September 30, 1998) are shown in Tables 7-9.

¹⁴ Consistent with the decision to let respondents reply anonymously if they wished, the survey format was not designed to permit cross-checking of results with case files.

¹⁵ Some surveys were returned because requestors had moved and a forwarding address was not available.

Table 7

PROHIBITED PERSONNEL PRACTICE SURVEY RESPONSES (FY 1998)¹⁶		
NUMBER MAILED: 1920	NUMBER RETURNED: 501	RESPONSE RATE: 26%
<i>Has the federal agency by which you are employed (or were most recently employed, if you no longer work for a federal agency) informed you about your rights and remedies in connection with prohibited personnel practices?</i>		
<i>Response Options</i>		<i>Response Numbers</i>
Yes		74
No		374
Don't recall		27
Never employed by a federal agency		
<i>What was the subject matter of your complaint? (CHECK ALL THAT APPLY.)</i>		
<i>Response Options</i>		<i>Response Numbers</i>
Reprisal for whistleblowing		199
Prohibited personnel practice other than reprisal for whistleblowing		269
Combination of reprisal for whistleblowing and other prohibited personnel practices		204
Hatch Act		39
Uniformed Services Reemployment Rights Act		21
Arbitrary and capricious withholding under the Freedom of Information Act		52
Other		111
<i>Were you successful in obtaining the relief you requested from OSC?</i>		
<i>Response Options</i>		<i>Response Numbers</i>
Yes		20
Partly Successful		26
No		392
Not Applicable		24
<i>Regardless of the subject of your complaint, if OSC closed the matter without obtaining all the relief you sought, what was the reason given for closure? (CHECK ALL THAT APPLY.)</i>		
<i>Response Options</i>		<i>Response Numbers</i>
No OSC jurisdiction over agency involved, your position, or agency official(s) involved in your complaint		66
No personnel action taken by agency involved		52
Insufficient evidence that a law or regulation was violated by the action(s) you complained of to OSC		184
OSC could not disprove stated reason(s) of the agency involved for the action(s) you complained of		72
You filed an Individual Right of Action (IRA) or other appeal with the Merit Systems Protection Board (MSPB)		45
You or OSC settled the matter with the agency involved		25
You declined corrective action offered by the agency involved		1
You withdrew your complaint		13
OSC filed a petition with the MSPB for corrective action		5
OSC obtained a decision in the corrective action matter filed with the MSPB		2
Matter was deferred to EEO processes		54
Do not recall		26

¹⁶ Total responses to each question are not the same, because not all respondents answered every question, and for three questions, respondents were asked to check all responses that applied to their complaint.

Other						182
<i>If the subject of your complaint was reprisal for whistleblowing (alone or with other allegations), what was the reason given for closure of the whistleblower reprisal allegation(s)? (CHECK ALL THAT APPLY.)</i>						
<i>Response Options</i>						<i>Response Numbers</i>
Information you disclosed did not appear to be a legally protected disclosure						29
Disclosure occurred after personnel action(s) complained of						19
Insufficient proof that agency action official(s) knew of the disclosure						27
Insufficient proof of connection between disclosure and personnel action(s) complained of						69
Do not recall						25
Other						122
<i>Regardless of the outcome, how would you rate the following elements of the service you received?</i>						
	<i>Very Satisfied</i>	<i>Satisfied</i>	<i>No Opinion/ Inapplicable</i>	<i>Dissatisfied</i>	<i>Very Dissatisfied</i>	
Courtesy	88	114	53	48	100	
Oral communications	45	88	58	63	151	
Written communications	61	85	32	96	161	
Timeliness	54	79	35	74	186	
Results	9	12	26	53	345	
<i>Did you file an IRA or other appeal with the MSPB in connection with the same transaction(s) reported to OSC?</i>						
<i>Response Options</i>						<i>Response Numbers</i>
Yes						155
No						273
Not applicable						32
<i>Did you ask for the same relief that you sought from OSC?</i>						
<i>Response Options</i>						<i>Response Numbers</i>
Yes						140
No						26
Do not recall						15
<i>Were you successful at the MSPB in obtaining the relief you had sought from OSC?</i>						
<i>Response Options</i>						<i>Response Numbers</i>
Yes						19
Partially						23
No						93
Appeal pending						40
Appeal not filed						12
<i>If the answer to [the preceding question] was "Yes" or "Partially" how did you obtain that relief?</i>						
<i>Response Options</i>						<i>Response Numbers</i>
Settlement						36
Decision after hearing						14
Other						49

Table 8

HATCH ACT SURVEY RESPONSES (FY 1998)¹⁷					
NUMBER MAILED: 122		NUMBER RETURNED: 33		RESPONSE RATE: 27%	
<i>Has the federal agency by which you are employed (or were most recently employed, if you no longer work for a federal agency) informed you about your rights and restrictions in connection with political activity under the Hatch Act?</i>					
<i>Response Options</i>				<i>Response Numbers</i>	
Yes				8	
No				7	
Don't recall				2	
Never employed by a federal agency				13	
<i>Did OSC's written advisory opinion adequately address your question(s)?</i>					
<i>Response Options</i>				<i>Response Numbers</i>	
Yes				28	
Partially				3	
No				0	
<i>Regardless of the outcome, how would you rate the following elements of the service you received?</i>					
	<i>Very Satisfied</i>	<i>Satisfied</i>	<i>No Opinion/ Inapplicable</i>	<i>Dissatisfied</i>	<i>Very Dissatisfied</i>
Courtesy	28	2	2	0	0
Oral communications	24	2	4	1	0
Written communications	28	3	1	0	0
Timeliness	22	9	0	1	0
Results	20	7	1	1	1

¹⁷ Total responses to each question are not the same, because not all respondents answered every question.

Table 9

DISCLOSURE UNIT SURVEY RESPONSES (FY 1998) ¹⁸					
NUMBER MAILED: 318		NUMBER RETURNED: 53		RESPONSE RATE: 17%	
<i>Has the federal agency by which you are employed (or were most recently employed, if you no longer work for a federal agency) informed you about the channels available for, and your rights related to, the reporting of whistleblower disclosures?</i>					
<i>Response Options</i>					<i>Response Numbers</i>
Yes					13
No					35
Don't recall					1
Never employed by a federal agency					2
<i>Were you successful in obtaining the action you sought from OSC?</i>					
<i>Response Options</i>					<i>Response Numbers</i>
Yes					6
Partly Successful					8
No					36
<i>Regardless of the subject of your disclosure, what was the reason given by OSC for closure of the matter? (CHECK ALL THAT APPLY)</i>					
<i>Response Options</i>					<i>Response Numbers</i>
No OSC jurisdiction over agency involved, your position, or agency official(s) involved in your disclosure					5
Insufficient evidence of a violation of law, rule or regulation, gross mismanagement, gross waste of funds, an abuse of authority, a substantial and specific danger to public health or safety					26
You withdrew your disclosure					4
You resolved the matter with the agency involved					6
Your disclosure was referred to the agency involved for a report to the OSC on the agency's inquiry into the matter					6
Do not recall					3
Other					15
<i>Regardless of the outcome, how would you rate the following elements of the service you received?</i>					
	<i>Very Satisfied</i>	<i>Satisfied</i>	<i>No Opinion/ Inapplicable</i>	<i>Dissatisfied</i>	<i>Very Dissatisfied</i>
Courtesy	13	25	7	3	6
Oral communications	9	15	7	10	9
Written communications	6	16	8	14	10
Timeliness	3	9	4	11	25
Results	3	7	6	6	32

¹⁸ Total responses to each question are not the same, because not all respondents answered every question, and for one question, respondents were asked to check all responses that applied to their disclosure.

V. LEGISLATION

A. Pending Appropriations

Consistent with the Administration's budget request, OSC is requesting \$11,147,000 and 106 FTEs for FY 2001. This represents an increase of \$1,444,000 over OSC's FY 2000 appropriation of \$9,703,000, and an increase of 10 FTEs. Forty percent of this increase, or \$578,000, is for the salary and benefit costs necessary to fund the agency at its current level of FTEs and to pay for the projected FY 2001 salary increase of 3.9%.

Funding for the 10 additional FTEs comprises the largest portion of the increased funding sought: \$828,000, or 57%. Only \$56,000 of this amount is for new equipment, software, travel and training costs directly related to the additional FTEs. The other \$772,000 is for salary and benefits related to the 10 additional FTEs.

B. Reauthorization of the Office of Special Counsel

H.R. 3610, the omnibus consolidated appropriations bill for FY 1997, included a reauthorization for OSC through the year 2002.

VI. FURTHER INFORMATION¹⁹

A. OSC Publications

Additional copies of this report, or information on other OSC publications, may be obtained by writing or contacting:

Director, Congressional and Public Affairs
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505
Telephone: (202) 653-5163

Many OSC forms and publications may also be downloaded from OSC's Web site at www.osc.gov/forms.htm.

¹⁹ For callers with hearing/speech disabilities, all of the OSC telephone numbers listed herein may be accessed via TTY by first dialing the Federal Relay Service at 1-800-877-8339.

B. Prohibited Personnel Practice Complaints

Complaints of PPPs should be reported to the Officer of the Week at:

Complaints Examining Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505
Telephones: (800) 872-9855
(202) 653-7188

The PPP complaint filing form may be downloaded from OSC's Web site at www.osc.gov/Documents/oscl1.pdf.

C. Whistleblower Disclosures

Disclosures of information evidencing violations of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a danger to public health or safety may be reported in confidence to:

Disclosure Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505
Telephones: (800) 572-2249
(202) 653-9125

The whistleblower disclosure filing form may be downloaded from OSC's Web site at www.osc.gov/Documents/oscl2.pdf.

D. Hatch Act Questions

Inquiries about the Hatch Act may be made in writing, by telephone, or by e-mail to:

Hatch Act Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505
E-mail address: hatchact@osc.gov
Telephones: (800) 85-HATCH or (800) 854-2824
(202) 653-7143

The OSC Web site may be visited for additional substantive information about the Hatch Act, including frequently asked questions for federal, state and local employees, as well as a sampling of written advisory opinions on common factual scenarios.

E. Outreach Programs

Requests about OSC's outreach efforts should be made to:

Outreach Specialist
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505
Telephone: (202) 653-9485
Fax: (202) 653-5161

F. OSC Mediation Program

Information about the new program can be obtained by:

1. Clicking on the Alternative Dispute Resolution link on the OSC Web site; or
2. Contacting the ADR Unit at:

U.S. Office of Special Counsel
Alternative Dispute Resolution Unit
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505
E-mail address: *adr@osc.gov*
Telephones: (800) 872-9855
(202) 653-2253, ext. 4625

G. OSC Online

Information about OSC can be obtained on its home page on the World Wide Web. OSC's address is: *http://www.osc.gov*.