
**A Report to Congress
From The
U.S. Office Of Special Counsel
For
Fiscal Year 1997**





U.S. OFFICE OF SPECIAL COUNSEL

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

The Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. President and Mr. Speaker:

I herewith 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 1997. As is customary, a copy of this report will also be sent to each Member of Congress.

Sincerely,

William E. Reukauf
Acting Special Counsel

Enclosure

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Introduction

Mission of the Office of Special Counsel

The U.S. Office of Special Counsel's (OSC) role is to protect federal employees and applicants, especially whistleblowers, from prohibited employment practices; to promote compliance by government employees with the law on political activity; and to facilitate disclosures of wrongdoing in the federal government.¹

OSC carries out this mission by:

- ! investigating possible prohibited employment practices, especially reprisal for whistleblowing, and pursuing appropriate remedies for apparent violations;
- ! providing advisory opinions and enforcing the law on allowable and unallowable political activity;
- ! operating an independent and secure channel for disclosure and resolution of wrongdoing in federal agencies; and
- ! promoting greater understanding of the rights and responsibilities of government employees.

In carrying out this mission, OSC's goals are to:

- ! ensure that actionable matters within its jurisdiction are identified, and appropriate individual and systemic remedies are pursued in a timely and effective manner;
- ! promote broader access to information about legal authorities governing employee rights and responsibilities; and
- ! administer its resources in such a way as to further the accomplishment of the agency's mission.

¹ The Office of the Special Counsel was established on January 1, 1979, by Reorganization Plan Number 2 of 1978. The Civil Service Reform Act (CSRA) of 1978, which became effective on January 11, 1979, enlarged its functions and powers. The office operated as the autonomous investigative and prosecutorial arm of the Merit Systems Protection Board (MSPB) until 1989. In March 1989, Congress enacted the Whistleblower Protection Act (WPA) of 1989, which became effective on July 9, 1989. The WPA established the U.S. Office of Special Counsel (OSC) as an independent agency, separate and apart from the MSPB, within the Executive Branch. Under the WPA, OSC kept its basic investigative and prosecutorial functions, and its role in bringing enforcement actions before the MSPB.

The WPA substantially amended the CSRA to enhance protections against reprisal for those employees who disclose wrongdoing in the federal government, and strengthen the ability of OSC to enforce those protections. Under the CSRA, as amended, the principal responsibilities of OSC are:

- ! the investigation of allegations of prohibited personnel practices defined by 5 U.S.C. § 2302(b)², and other activities prohibited by civil service law, rule or regulation, as well as the initiation of corrective and disciplinary actions when such remedial actions are warranted;
- ! the interpretation and enforcement of the Hatch Act provisions on political activity in Chapters 15 and 73; and
- ! the provision of a secure channel through which federal employees may make disclosures of information evidencing violations of law, rule or regulation, gross waste of funds, gross mismanagement, abuse of authority, or a substantial and specific danger to public health or safety, without disclosure of the employee's identity (except with the employee's consent) and without fear of retaliation.

OSC also has responsibilities under PL 103-353, the "Uniformed Services Employment and Reemployment Rights Act," which was enacted in 1994. Among other provisions, the act authorizes OSC, under certain circumstances, to represent federal employees who are veterans or reservists before the MSPB and the U.S. Court of Appeals for the Federal Circuit in the event a federal agency has failed to reemploy those persons in accordance with the provisions of the act.

² All statutory references to chapters and sections that follow in this report will be to Title 5 of the United States Code, unless otherwise indicated.

Office of Special Counsel Policy

In furtherance of the merit systems principles specified in the CSRA, OSC's principal responsibility has been and continues to be the receipt and investigation of complaints of prohibited personnel practices, especially reprisal for whistleblowing. Although allegations of reprisal for whistleblowing are relatively few in relation to the number of federal civilian employees, OSC regards *any* reprisal for whistleblowing as unacceptable. Accordingly, OSC's priorities are to:

- ! treat allegations of reprisal for whistleblowing as its highest priority;
- ! review allegations of reprisal for whistleblowing intensively for any feasible remedial or preventive action, whether by means of stays, corrective actions, or disciplinary actions; and
- ! use every opportunity to make a public record of OSC's aggressive pursuit of corrective action (especially in whistleblower reprisal cases), both to encourage other whistleblowers, and to affirm the emphasis given to corrective actions by the OSC.

Overview of OSC Operations

Budget and Staffing

During Fiscal Year (FY) 1997, OSC operated with a budget of \$8.12 million, and the agency's full-time equivalency (FTE) personnel ceiling was 93.

Procedures

The OSC is comprised of four divisions: Investigation, Prosecution, Management, and Planning and Advice Divisions. The Investigation and Prosecution Divisions are the primary program units of the agency.

The Complaints Examining Unit (CEU), which is part of the Prosecution Division, initially analyzes all allegations of prohibited personnel practices and allegations of other activities prohibited by civil service law, rule or regulation. The CEU contacts complainants to ensure that the nature of and basis for the allegation is clearly understood, and conducts further inquiry to the extent necessary to determine whether the allegation warrants further investigation.

After a thorough initial examination, the CEU refers matters indicating a potentially valid statutory claim to the Investigation Division for more extensive investigation. If the CEU determines that an allegation is not within OSC's investigative jurisdiction, but that information contained in the complaint may constitute a whistleblower disclosure, the Prosecution Division's Disclosure Unit reviews that information for possible transmittal to the agency head concerned. OSC does not disclose the identity of the employee without the employee's consent.³

When matters are referred for further investigation, OSC investigators conduct field investigations of the complaints. They review all relevant documents, and interview the complainant, witnesses who have knowledge of the matters alleged, and the persons responsible for the alleged violations. Working closely with Prosecution Division attorneys, investigators negotiate with agencies to obtain stays and corrective and disciplinary actions when appropriate. If the complaint is not resolved in the course of the investigation, a full report of the investigation is prepared for legal review and analysis by the Prosecution Division.

³ Possible bases for OSC's closure of a PPP matter without further action include lack of jurisdiction over the agencies or employees involved, failure to state a claim cognizable under law or regulation; absence of an element required to establish a violation; insufficient evidence that a violation occurred, or deferral to the Equal Employment Opportunity Commission pursuant to published policy. In Disclosure Unit matters, OSC's authority is limited by law to review and referral of disclosures for appropriate action by other agencies—*i.e.*, OSC is not authorized to investigate the disclosures received. 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.

The Prosecution Division reviews completed field 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. OSC may have discussions with an agency about a case at any point during the investigation or legal analysis to obtain a mutually agreeable resolution. Otherwise, the Special Counsel may refer the matter in writing to the agency head under § 1214(b)(2)(A) with a recommendation for corrective action. If an agency declines to take corrective action, the Special Counsel may request the MSPB to consider the matter under § 1214(b)(2)(B), and the MSPB may order any corrective action it deems appropriate. During FY 1997, OSC continued its policy of early and firm negotiation with agencies to obtain corrective action before initiating litigation before the MSPB. If the Special Counsel determines that an apparent violation warrants disciplinary action, OSC files charges against the offending employee under § 1215(a) and prosecutes the case before the MSPB. Finally, if an investigation discloses a violation of any law, rule or regulation not otherwise within the enforcement authority of OSC, the Special Counsel sends a report of OSC's findings to the appropriate agency head under § 1214(e) for certification of any action to be taken on the matter. OSC reports evidence of any possible criminal violations identified during an investigation to the Department of Justice pursuant to § 1214(d).

At any time during an investigation, 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 prohibited personnel practice. OSC may obtain a stay upon direct request to the agency, 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 § 7701 without the consent of the individual initiating the proceeding.

Office of Special Counsel Outreach Program

OSC puts great weight on the value of educating federal employees as to their rights and remedies under the WPA, as well as the rights and restrictions of the Hatch Act. To that end, OSC makes representatives available to engage in educational programs as often as possible.

In FY 1997, OSC's outreach efforts resulted in OSC staff participation in 40 briefings and seminars. In addition, OSC has been given greater authority in this regard by its 1994 Reauthorization Act, Public Law 103-424, which directed all executive agencies to inform their employees of the rights and remedies available to them under the Whistleblower Protection Act, and to carry out this function in consultation with the OSC. OSC responded by preparing an informational packet for use by all covered entities and is available to consult with all agencies on their employee education efforts.

Prohibited Personnel Practice Matters

Receipts and Investigations

During FY 1997, OSC received 1,841 new matters alleging prohibited personnel practices (PPPs) with 3,789 separate allegations. Of the 2,127 matters processed by CEU in FY 1997, OSC lacked jurisdiction in 311 of the matters, leaving 1,816 matters in which the agency was authorized by statute to conduct an inquiry. Following CEU review, 269 matters were referred for field investigation. In addition, following initial review and inquiry, CEU closed 1,858 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 1997 and the types of PPP allegations referred for field investigation are included in Tables 3 and 4 on pages 14 and 15.

Enforcement Actions

Enforcement actions are cases filed by OSC with the MSPB that seek corrective action (relief intended to make an aggrieved employee whole), or disciplinary action (the imposition of discipline on an employee who has committed a violation). 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 failed to do so, may OSC proceed to petition the Board 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 the 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. Should the agency agree to take appropriate disciplinary action on its own initiative, then the matter can be settled without resort to an MSPB proceeding.

In FY 1997, OSC filed 4 enforcement action complaints -- 1 in a PPP matter and 3 in Hatch Act matters (Hatch Act cases are discussed in the next section). Three rulings, favorable to OSC,

were issued by the MSPB during this period in these and other previously filed matters. The remaining complaints which were pending before the MSPB were either settled prior to hearing, are awaiting decision by the Board, or have been scheduled for hearing in FY 1998.

Favorable Actions Achieved

OSC also obtained 82 favorable actions⁴ in 64 PPP matters in FY 1997. Of these favorable actions, 65 represented corrective actions and 12 were disciplinary actions, with cases involving allegations of reprisal for whistleblowing accounting for 56 of the total favorable actions. OSC also obtained 13 stays of personnel actions through negotiations with agencies and, in cases where agencies refused OSC's request, 4 stays through petitions to the MSPB.⁵

Table 1

Summary of Prohibited Personnel Practice Matters			
	FY 1995	FY 1996	FY 1997
Matters received	1,884	1,785	1,841
Matters processed by Complaints Examining Unit (CEU)	1,960	1,628	2,127
Matters processed in which OSC had jurisdiction	1,675	1,338	1,816
Matters referred for full field investigation	344	223	269
Matters closed by CEU	1,616	1,405	1,858
Enforcement actions	4	1	1
Stays - negotiated	13	10	13
Stays - obtained from the MSPB	3	3	4
Favorable actions obtained	173	87	82

Table 2

⁴ "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.

⁵ Data concerning PPPs and the Hatch Act are set out separately in this Annual Report.

Summary of Whistleblower Reprisal Matters			
	FY 1995	FY 1996	FY 1997
Matters received	603	672	817
Matters processed by CEU	705	566	891
Matters processed in which OSC had jurisdiction	671	513	807
Matters referred for field investigation	242	161	218
Matters closed by CEU	463	405	673
Enforcement actions	3	1	0
Stays - negotiated	10	7	12
Favorable actions obtained	120	61	56

Corrective Actions

The following is a representative sample of corrective actions obtained by OSC during FY 1997:

- ! OSC investigated allegations that an agency reassigned an employee from a supervisory investigator position in Texas to nonsupervisory position in Denver, and then to a nonsupervisory investigator position in New Mexico, in reprisal for his testimony for other special agents concerning their OSC complaints. Following OSC's request for corrective action, the agency agreed to cancel the reassignment and restore the employee to his former position. The agency also agreed to pay the employee's attorney fees.
- ! OSC investigated allegations that an employee received a five-day suspension and an unsuccessful performance appraisal rating, followed by placement on a Performance Improvement Plan, in reprisal for reporting violations of law to management and to the Inspector General. As corrective action, the agency agreed to cancel the suspension, upgrade the employee's performance appraisal to "fully successful," purge all records of the Performance Improvement Plan, and reassign the first-level supervisor from the field office to a regional office.
- ! OSC investigated allegations that an agency denied an employee credit time and annual leave, threatened to deny her awards or promotions, and lowered her performance appraisal rating from "outstanding" to "excellent" in reprisal for disclosing that the chief of a field office refused to grant employees credit time for

overtime worked during recruiting trips. The employee also alleged that the agency disallowed her performance of certain duties based upon her national origin. The agency agreed to settle the OSC complaint and discrimination complaint by reassigning the employee and awarding her relocation costs; permitting her to perform duties previously denied; revising her performance appraisal rating; reinstating portions of her annual leave; awarding her medical and out-of-pocket expenses; and awarding her pain and suffering damages and attorney fees.

- ! OSC investigated allegations from an employee that his agency furnished another employee with an unauthorized preference or advantage when the agency promoted that employee from a GS-5 to a GS-9 without competition, where no exception to competitive procedures applied. As corrective action, the agency agreed to cancel the promotion and reannounce the GS-9 vacancy under merit promotion procedures.
- ! OSC investigated allegations that an employee's supervisor obstructed him from competing for a position by telling him he could not apply because the employee also served as the union president. Following OSC's request for corrective action, the agency agreed to have its Superintendent, rather than the subject official, serve as the selecting official on any position for which the employee applies over a two-year period.
- ! OSC investigated allegations that a group manager telephoned an employee and told the employee that she was not highly qualified for the GS-13 criminal investigator position for which she applied, and that the agency did not intend to select her. The group manager then told the employee that the agency would process her application, though it was not in her "best interest to make the selecting official process unnecessary paperwork." Following these events, the employee withdrew her application for the criminal investigator position. Upon OSC's request for corrective action, the agency selected the employee for a GS-14 supervisory criminal investigator position and paid her a cash award.
- ! OSC investigated allegations that an agency terminated the temporary appointment of an attorney after it suspected that the employee filed a discrimination complaint against his supervisor. The complaint alleged that a female supervisor discriminated against male employees by failing to promote males as quickly as women and by failing to retain males as long as female employees. Males consistently received 30-60 day appointments, but women received one-year appointments and additional benefits and grievance rights. OSC sought corrective action for the employee, and the agency agreed to a monetary settlement, including attorney fees and a "fully successful" performance appraisal rating for the employee's tenure at the agency.
- ! OSC investigated allegations that an agency lowered an employee's performance appraisal rating from "outstanding" to "fully successful" in reprisal for her protected disclosures to the Inspector General. She disclosed that she discovered explosives in

a local college university shed during an audit she conducted on animal and damage control. The agency asked the employee to remove this information from her audit report, but she refused. Following OSC's request for corrective action, the agency raised two of the employee's performance appraisal ratings to "outstanding" and granted her a cash award for her performance on a special assignment.

- ! OSC investigated allegations that employees at an agency were engaging in unsafe pharmaceutical practices; specifically, the employee alleged that other employees were handling prescription drugs without gloves. The employee observed another employee place pills in bottles designated for patients, after the pills had been dropped on the floor. She also observed other employees mixing medications with different lot numbers and expiration dates. The employee disclosed these practices to the superintendent of pharmacy services and to the Inspector General. She alleged that the agency suspended her for seven days in reprisal for her protected disclosures. As part of a settlement reached between the employee and the agency, the agency agreed to expunge the suspension and reimburse the employee for her absence caused by the suspension.
- ! OSC investigated allegations that an agency did not rehire a seasonal employee in a national forest because the employee disclosed that his immediate supervisor drank alcohol on forest premises during duty hours. He also disclosed that his second- and third-level supervisors used an authoritarian management style and yelled at him abusively. The employee did not want to return to a position in the national forest, but desired a letter of apology from his two upper-level supervisors. The agency agreed to OSC's request for corrective action with a letter of apology and a requirement that the upper-level supervisors attend interpersonal skills training and WPA training.
- ! OSC investigated allegations that a first-level supervisor suspended his subordinate employee for 10 days in reprisal for the employee's disclosure that the supervisor violated an internal agency regulation prohibiting employees in his position from working longer than a 10-hour day. At OSC's request for corrective action, the agency agreed to reassign the supervisor and schedule management training on the prevention of PPPs.
- ! OSC investigated allegations that an employee suffered reprisal because she furnished testimony in a General Accounting Office investigation and because she furnished testimony to OSC during its investigation of another matter. The employee, a motor carrier driver, alleged that the agency removed her duties, lowered her performance appraisal rating and denied her a promotion to GS-12 because of her protected activity and disclosures concerning road safety. Following OSC's request for corrective action, the agency agreed to promote the employee to GS-12, and, after a six month supervisory review, promote her to GS-13 if she is performing at the

“fully successful” level. Additionally, the agency agreed to pay the employee’s legal expenses.

- ! OSC investigated allegations that an agency constructively demoted an employee from a GS-15 position because he cooperated with and made protected disclosures during a General Accounting Office audit of the agency’s computer security procedures. OSC sought corrective action for the employee, and the agency agreed to raise his performance appraisal rating from “fully successful” to “highly successful,” award him a retroactive promotion to GS-15, and pay his attorney’s fees.
- ! OSC investigated allegations that an agency did not select an employee for a special agent position because she participated in an Inspector General investigation against her former supervisor. Upon OSC request for corrective action, the agency agreed to convert the employee from a customs patrol officer to a special agent. It also promoted her from GS-9 to GS-11.

Disciplinary Actions

The following is a representative sample of disciplinary actions obtained by OSC during FY 1997:

- ! OSC obtained disciplinary action against a supervisor and another federal employee of an armed forces branch because they committed a PPP in violation of 5 U.S.C. § 2302(b)(8). The evidence demonstrated that the employees placed a subordinate employee in AWOL status, suspended him for one day and threatened to demote him because he disclosed fraud, waste and safety abuses by the supervisory employee. Both subject employees received letters of reprimand.
- ! OSC obtained disciplinary action against two federal employees of a federal agency for violating 5 U.S.C. § 2302(b)(7). An administrative officer received the help of the center director in temporarily hiring her brother to be their subordinate. While the brother was under the personnel authority of the two employees, he received permanent positions with the agency, promotions and performance awards. As disciplinary action, the agency relieved the administrative officer of her administrative responsibilities and she submitted her retirement in lieu of termination. The agency removed the Center Director from his position and reassigned him to a position where he will not have managerial responsibility.
- ! OSC obtained disciplinary action against a federal employee foreman of an armed forces branch because the foreman counseled his subordinate for failing to notify his supervisors of a safety hazard before reporting it to the Occupational Safety and Health Administration. This foreman committed the same action one year earlier against the same employee. The division chief personally counseled the foreman for

his actions. Subsequently, all division foremen received a briefing on the impropriety of prescribing channels by which employees may make protected disclosures.

- ! OSC obtained disciplinary action from the MSPB against a Department of Veterans Affairs supervisor who geographically reassigned his subordinate in reprisal for whistleblowing, a PPP under 5 U.S.C. § 2302(b)(8). The Board ordered a 30-day suspension against the official.

Merit Systems Protection Board Stays

The following is a representative sample of the stay cases brought to the MSPB during FY 1997:

- ! OSC petitioned the MSPB to stay an agency's decisions not to extend or renew the temporary appointment of a GS-12 attorney. OSC had reasonable grounds to believe that the failure to extend or renew the employee's temporary appointment occurred because she filed a grievance with the union about the disparate treatment between her office and field offices on promotions. The MSPB granted two stay requests to allow OSC to conduct a full investigation into whether the agency committed PPPs under 5 U.S.C. § 2302(b)(9). *OSC v. Social Security Administration, No. CB-1208-97-0046 and CB-1208-97-0060 (July 18, 1997)*.
- ! OSC petitioned the MSPB to stay the termination of the probationary period of a guidance counselor at a naval base high school in Cuba. OSC had reasonable grounds to believe that the agency violated 5 U.S.C. § 2302(b)(8) when it terminated the employee because of protected disclosures she made concerning the principal's failure to handle allegations of child abuse properly. The MSPB granted an initial 45-day stay request. *OSC, ex. rel. Joyce Feilke v. Department of Defense Dependents Schools, No. CB-1208-97-0052-U-1 (August 28, 1997)*.
- ! OSC petitioned the MSPB three times in FY 1997 to extend the previously granted stay of a detail and removal of a federal employee (five times altogether). OSC had reasonable grounds to believe that the Department of Transportation detailed a criminal investigator from Colorado to California, and then removed him from federal service, because he discovered violations and politically embarrassing information about high-level government officials and community leaders. *OSC, ex. rel. John Deans v. Department of Transportation Inspector General, CB-1208-96-0027-U-3 (October 16, 1996); CB-1208-96-0027-U-4 (December 20, 1997); and CB-1208-96-0027-U-5 (March 18, 1997)*.

- ! OSC petitioned the MSPB to extend previously granted stays of a reassignment of a United States Customs Service special agent from a supervisory criminal investigator position in Texas, to a non-supervisor position in Colorado, and then to a non-supervisory program security position in Texas. The employee alleged that the agency took these actions against him in reprisal for furnishing information to the agency Office of Internal Affairs or to OSC during the investigation of other special agents' OSC cases. *OSC v. Department of Treasury, CB-1208-96-0028-U-3 (October 7, 1996)*.

Table 3

Allegations Contained in Matters Received During FY 1997	
Nature of Allegation	Number of Allegations
Reprisal for whistleblowing [§2302(b)(8)]	814
Violation of a law, rule or regulation implementing or concerning a merit system principle [§2302(b)(11)]	734
Reprisal for exercise of a right of appeal [§2302(b)(9)]	655
Discrimination on the basis of race, color, sex, national origin, religion, age, or handicapping condition [§2302(b)(1)(A)-(D)]	551
Granting of unauthorized preference or advantage [§2302(b)(6)]	342
Deception or obstruction of the right to compete [§2302(b)(4)]	219
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)]	215
Allegations which did not cite or suggest any prohibited personnel practice or prohibited activity	195
Discrimination on the basis of non-job related conduct [§2302(b)(10)]	97
Appointment, promotion, or advocating the appointment or promotion of a relative [§2302(b)(7)]	56
Solicitation or consideration of unauthorized recommendations [§2302(b)(2)]	36
Violation of the Hatch Act by a federal employee [§§7323-24]	36
Arbitrary or capricious withholding of information requested under the Freedom of Information Act [§1216(a)(3)]	33
Attempts to secure withdrawal from competition [§2302(b)(5)]	32
Violation of the Hatch Act by a state or local government employee [5 U.S.C. ch. 15]	22
Discrimination on the basis of marital status or political affiliation [§2302(b)(1)(E)]	17
Other activities allegedly prohibited by civil service law, rule or regulation [§1216]	5
Coercion of political activity [§2302(b)(3)]	<u>3</u>
Total	4,062⁶

⁶ 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 1997	
Nature of Allegation	Number of Allegations
Reprisal for whistleblowing [§2302(b)(8)]	216
Reprisal for exercise of a right of appeal [§2302(b)(9)]	157
Violation of a law, rule or regulation implementing or concerning a merit system principle [§2302(b)(11)]	66
Deception or obstruction of the right to compete [§2302(b)(4)]	31
Granting of unauthorized preference or advantage [§2302(b)(6)]	25
Discrimination on the basis of non-job related conduct [§2302(b)(10)]	22
Discrimination on the basis of race, color, sex, national origin, religion, age, handicapping condition, or marital status [§2302(b)(1)(A)-(E)]	10
Violation of the Hatch Act by a federal employee [5 U.S.C. ch. 15]	10
Securement of withdrawal from competition [§2302(b)(5)]	6
Solicitation or consideration of unauthorized recommendations [§2302(b)(2)]	6
Appointment, promotion, or advocating the appointment or promotion of a relative [§2302(b)(7)]	5
Arbitrary or capricious withholding of information requested under the Freedom of Information Act [§1216(a)(3)]	3
Violation of the Hatch Act by a state or local government employee [5 U.S.C. ch. 15]	<u>1</u>
Total	558⁷

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

Hatch Act Matters

Overview of Jurisdiction

Since the 1939 enactment of the Hatch Act, federal employees, employees of the District of Columbia (D.C.) government, and certain employees of state and local governments have faced significant restrictions in their ability to participate in political activities. Following amendments enacted in 1993, many federal and D.C. employees are now permitted to take an active part in political management and in political campaigns. However, 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.

Advisory Opinions

During FY 1997, OSC's Hatch Act Unit issued 106 written advisory opinions, provided 1,700 advisory opinions orally in response to telephone inquiries, and responded to an additional 56 E-mail inquiries.

Violations and Enforcement

During FY 1997, OSC received 75 new matters alleging violations of the Hatch Act. Following initial review by the Hatch Act Unit, 11 matters were referred for field investigation.⁸

Following investigations, OSC filed three complaints seeking disciplinary action against three federal employees. Three Hatch Act cases went to hearing before the MSPB during FY 1997. During this period, the MSPB issued two rulings in other previously filed matters, rulings which were favorable to OSC. The remaining complaint was withdrawn from consideration. In addition, OSC issued 24 warning letters during this period.

⁸ The Hatch Act allegations received in FY 1997 and the Hatch Act allegations referred for field investigations appear in Tables 3 and 4 on pages 14 and 15.

Table 5

Summary of Hatch Act Matters			
	FY 1995	FY 1996	FY 1997
Advisory opinions issued	2,821	3,578	1,700
Matters received	104	108	75
Matters referred for investigation	14	12	11
Disciplinary action complaints filed with MSPB	3	3	3
Disciplinary actions obtained before MSPB and through negotiation	4	2	3
Warning letters issued	29	26	24

Disciplinary Actions

The decision summarized below was issued by the Chief Administrative Law Judge (CALJ) in FY 1997.

- ! OSC filed a complaint for disciplinary action against an employee of the Michigan Department of Social Services (DSS), a federally funded state agency. OSC alleged that the respondent was a candidate in the Democratic Party primary for the office of state representative while principally employed by the DSS in its Medicaid program. The respondent knew that the Hatch Act prohibited state employees in federally funded programs from participating in partisan political elections. However, he mentioned that he identified a possible loophole in the Hatch Act that would permit him to run for office: the Hatch Act covered state employees who worked in activities funded by federal grants and loans, but he asserted that Medicaid funding referred to a “reimbursement” rather than a “grant” or a “loan.” The respondent never consulted the federal statute or regulations governing Medicaid to learn the exact funding mechanism for the program, despite his regular use of the statute and regulations during his job. Review of the relevant regulations revealed that state Medicaid programs are funded by federal grant. The MSPB concluded that the respondent deliberately disregarded the law, thus warranting his removal. *Special Counsel v. Alexander, 71 M.S.P.R. 636 (M.S.P.B., October 4, 1996).*

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, the congressional committees having jurisdiction over the agency, and the Comptroller General. A copy of the report and any comments are also placed in a public 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. The notification is then transmitted to the whistleblower.

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 of other prohibited activities within OSC's investigative jurisdiction. Disclosures are received directly by the Disclosure Unit, a part of the Prosecution Division. Disclosures may also 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) 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 1997, OSC received 306 disclosure matters for possible referral to the agency concerned under §§ 1213(c) or 1213(g).⁹ In addition, 212 disclosure matters were carried over from FY 1996. A disclosure matter usually contains multiple allegations of a violation of law, rule or

⁹ The number of disclosure allegations received in FY 1997 appears in Table 3 on page 14.

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 1995	FY 1996	FY 1997
Matters received	252	341	306
Disclosures referred for investigation and a report under § 1213(c)	1	30	14
Disclosure allegations referred to agency Inspectors General	93	82	72
Disclosure allegations closed due to lack of sufficient basis for further action	140	154	206
Remaining disclosures carried over to next fiscal year for completion of review	96	212	239

Results of Referrals

During FY 1997, OSC closed 18 reports from agencies to which statutory referrals previously had been made. OSC review 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	12
Cases in which allegations were not substantiated	6

Annual Survey Program

Pursuant to § 13 of Public Law 103-424, OSC annually surveys individuals who have contacted the agency for assistance. The surveys ask the following statutorily prescribed questions: (1) whether respondents were fully apprised of their rights; (2) whether they were successful at OSC or MSPB, and (3) whether successful or not, if they were satisfied with the treatment received from OSC.¹⁰ After closing matters in FY 1997 (with or without favorable action), OSC mailed surveys to identifiable complainants who had: (1) alleged PPP or related violations (2,148 matters); (2) asked for and received a written Hatch Act advisory opinion (106 issued); or (3) filed a report through the whistleblower channel operated by the OSC Disclosure Unit (146 matters).

Response rates to the three surveys ranged from a high of 42% (Hatch Act) to a low of 17% (PPPs). Low response rates, especially when coupled with a small universe of potential respondents, make it difficult to draw broad conclusions from the survey data.¹¹

Nevertheless, some general observations can be made about the responses that were received. Respondents continued to report more favorably about results obtained and satisfaction with service rendered when OSC was performing its Hatch Act advisory functions, rather than its enforcement or compliance responsibilities. An overwhelming majority of the respondents who had obtained written advisory opinions on Hatch Act questions in FY 1997 reported favorably on the results obtained and service received. By comparison, a majority of respondents to the PPP and Disclosure Unit surveys reported that they had been unsuccessful in obtaining the results sought from OSC, and were dissatisfied with the service received.¹²

Consistent with survey results outlined in the last annual report, some correlations were apparent between the receipt of the results sought from OSC and satisfaction with the service

¹⁰ 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 within two to three weeks of the initial survey mailing.

¹¹ Some complainants may not have received surveys because they moved without providing a forwarding address. The number of cases in which this may have occurred is small enough that it is unlikely to have affected survey figures to any statistically significant degree.

¹² While surveys asked whether respondents had been successful at OSC (or the MSPB), they did not ask respondents to identify the reason or reasons cited for closure of their matters at OSC.

received.¹³ For example, over 80% of PPP survey respondents who reported having all or part of the relief requested from OSC were satisfied with the service received; similarly, more than 80% of the respondents who reported that they had not obtained the relief they sought expressed dissatisfaction with the service received. Responses received to all three surveys for the FY 1997 survey period (October 1, 1996-September 30, 1997) are shown in Tables 7-9, on the following pages.

¹³ Comments made by several respondents to the Disclosure Unit survey indicated some confusion about the statutory limitations on OSC's role, and dissatisfaction with the time taken by other agencies to review and act on matters. It is possible, therefore, that some of the dissatisfaction reflected in Disclosure Unit surveys was directed at other agencies, rather than at the service received from OSC. Also, comments received from some respondents who had a Disclosure Unit *and* a PPP matter closed in FY 1997 appeared to be directed towards the PPP allegation, rather than the Disclosure Unit report.

Table 7

Prohibited Personnel Practice Survey Responses - FY 1997¹⁴		
Question	Response Options	Number
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?	Yes	32
	No	282
	Don't recall	22
	Never employed by a federal agency	9
Were you successful in obtaining the relief you requested from OSC?	Yes	12
	Partially successful	33
	No	288
	Not applicable	13
Regardless of the outcome of the matter, were you satisfied overall with the services you received from OSC staff?	Very satisfied	39
	Satisfied	50
	No opinion	24
	Dissatisfied	60
	Very dissatisfied	174
If you filed an appeal with the Merit Systems Protection Board (MSPB) on the same matter(s) covered in your OSC matter, were you successful in obtaining the relief you requested from the MSPB?	Yes	6
	Partially successful	6
	No	69
	No appeal filed	174
	Appeal pending	63

¹⁴ OSC sent out 2,148 survey forms, of which 361 were returned by respondents. The sum of responses to each of the questions is not the same, because not all survey respondents provided answers, or usable answers, to every question.

Table 8

Hatch Act Survey Responses - FY 1997¹⁵		
Question	Response Options	Number
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?	Yes	12
	No	5
	Don't recall	1
	Never employed by a federal agency	26
Did OSC's written advisory opinion adequately address your question(s)?	Yes	43
	Partially	1
	No	1
Were you satisfied overall with the service you received from OSC staff?	Very satisfied	38
	Satisfied	6
	No opinion	1
	Dissatisfied	0
	Very dissatisfied	0

¹⁵ OSC sent out 106 survey forms, of which 45 were returned by respondents. The sum of responses to each of the questions is not the same, because not all survey respondents provided answers, or usable answers, to every question.

Table 9

Disclosure Unit Survey Responses - FY 1997 ¹⁶		
Question	Response Options	Number
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?	Yes	6
	No	25
	Don't recall	1
	Never employed by a federal agency	3
Were you successful in obtaining the action you sought from the OSC?	Yes	3
	Partially successful	3
	No	28
Regardless of the outcome of the matter, were you satisfied overall with the service you received in your dealings with OSC staff?	Very satisfied	5
	Satisfied	1
	No opinion	2
	Dissatisfied	5
	Very dissatisfied	22

¹⁶ OSC sent out 146 survey forms, of which 35 were returned by respondents. The sum of responses to each of the questions is not the same, because not all survey respondents provided answers, or usable answers, to every question.

Legislation

Appropriations

Consistent with the Administration's budget request, OSC requested budget authority for FY 1998 in the amount of \$8,450,000. This represents an increase of \$334,000 over the FY 1997 authorization. OSC received the full amount in its appropriation.

H.R. 3610, making omnibus consolidated appropriations for FY 1997, was passed and signed by the President on September 28, 1996.

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.

Further Information

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) 653-9001

Prohibited Personnel Practice Complaints

Complaints of prohibited personnel practices 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 (TDD equipped)
(202) 653-7188 (TDD equipped)

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

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

Outreach Programs

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

Outreach Programs
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505
Telephone: (202) 653-7122

OSC Online

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