S. Hrg. 109–68

SAFEGUARDING THE MERIT SYSTEM: A REVIEW OF THE U.S. OFFICE OF SPECIAL COUNSEL

HEARING

BEFORE THE

OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA SUBCOMMITTEE

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

MAY 24, 2005

Printed for the use of the
Committee on Homeland Security and Governmental Affairs

U.S. GOVERNMENT PRINTING OFFICE

21–821 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

SUSAN M. COLLINS, Maine, *Chairman*

TED STEVENS, Alaska
GEORGE V. VOINOVICH, Ohio
NORM COLEMAN, Minnesota
TOM COBURN, Oklahoma
LINCOLN D. CHAFEE, Rhode Island
ROBERT F. BENNETT, Utah
PETE V. DOMENICI, New Mexico
JOHN W. WARNER, Virginia

JOSEPH I. LIEBERMAN, Connecticut
CARL LEVIN, Michigan
DANIEL K. AKAKA, Hawaii
THOMAS R. CARPER, Delaware
MARK DAYTON, Minnesota
FRANK LAUTENBERG, New Jersey
MARK PRYOR, Arkansas

MICHAEL D. BOPP, *Staff Director and Chief Counsel*
JOYCE A. RECHTSCHAFFEN, *Minority Staff Director and Counsel*
TRINA D. TYRER, *Chief Clerk*

OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA SUBCOMMITTEE

GEORGE V. VOINOVICH, Ohio, *Chairman*

TED STEVENS, Alaska
NORM COLEMAN, Minnesota
TOM COBURN, Oklahoma
LINCOLN D. CHAFEE, Rhode Island
ROBERT F. BENNETT, Utah
PETE V. DOMENICI, New Mexico
JOHN W. WARNER, Virginia

DANIEL K. AKAKA, Hawaii
CARL LEVIN, Michigan
THOMAS R. CARPER, Delaware
MARK DAYTON, Minnesota
FRANK LAUTENBERG, New Jersey
MARK PRYOR, Arkansas

ANDREW RICHARDSON, *Staff Director*
RICHARD J. KESSLER, *Minority Staff Director*
NANCI E. LANGLEY, *Minority Deputy Staff Director*
TARA E. BAIRD, *Chief Clerk*

CONTENTS

SAFEGUARDING THE MERIT SYSTEM: A REVIEW OF THE U.S. OFFICE OF SPECIAL COUNSEL

TUESDAY, MAY 24, 2005

U.S. SENATE,
OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA SUBCOMMITTEE,
OF THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:06 a.m., in room SD–562, Dirksen Senate Office Building, Hon. George V. Voinovich, Chairman of the Subcommittee, presiding.

Present: Senators Voinovich, Akaka, Levin, Carper, and Lautenberg.

OPENING STATEMENT OF CHAIRMAN VOINOVICH

Senator VOINOVICH. The meeting will please come to order.

Today's Subcommittee hearing entitled Safeguarding the Merit System: A Review of the U.S. Office of Special Counsel is going to provide an in-depth examination of the mission, roles, and responsibilities of a small yet important Federal agency. I would like to thank Senator Akaka for requesting today's hearing on this important human capital topic.

I would also extend a warm welcome to our witness, the Hon. Scott Bloch. Mr. Bloch began his 5-year term as Special Counsel on January 5, 2004, after being confirmed by voice vote on December 9, 2003. As an independent investigative and prosecutorial agency, OSC protects current and former Federal employees and applicants for Federal employment from Prohibited Personnel Practices (PPP). The Agency also promotes and enforces compliance with the Hatch Act. Finally, the Agency facilitates disclosures by Federal whistleblowers about potential government wrongdoing.

Since the foundation of OSC's mission is rooted in the merit system principles, the Agency will play a vital role in the transformation of the 21st Century Federal workforce. Therefore, with OSC in the middle of a 5-year reauthorization, it is appropriate for this Subcommittee to ensure that the Agency is meeting its mission during the most dramatic changes in the civil service system in more than a quarter of a century.

During his short tenure as Special Counsel Mr. Bloch has implemented a number of ambitious steps to transform the mission, culture, and structure of OSC. Some of Mr. Bloch's decisions are per-

ceived as controversial. Although I will go into further detail in my line of questioning, I would like to mention one area specifically in my opening statement.

On January 7, 2005, Mr. Bloch announced several performance improvements and organizational changes to OSC, including his vision for decentralizing some of OSC's Washington-based operations. Mr. Bloch's authority to reorganize OSC is not in question. In fact, the President's Management Agenda required agencies to create a more citizen-centered, results-oriented, market-based Federal Government.

For example, OMB guidelines issued in May 2001 required each agency to develop a strategic workforce plan that redirects employees to service delivery positions in order to improve customer service, and take care of internal and external customers. Even though I believe OSC's restructuring efforts conform to the intent of the President's agenda, I question the urgency of opening a new field office 3 months after the Agency's reorganization plan was announced. As the Agency that protects the merit system, OSC should set a sterling example of how to manage and treat Federal employees.

In this instance, I feel that OSC could have done a better job during this initial phase of the restructuring. Guidance issued by OSC required affected employees to initially accept or decline a transfer within 10 days. OSC extended the deadline by an additional 10 days after receiving a request from numerous congressional offices, including mine. Mr. Bloch, I hope you understand that asking employees to make life-altering decisions in just 10 days may be construed as very insensitive. Even though OSC followed the letter of the law, I believe employees should have been provided a lot more time to make this decision.

Fortunately, Mr. Bloch, this hearing will afford you the chance to provide a detailed explanation of the reasoning behind your actions and I hope you seize this opportunity to do so. To this end, last week Mr. Bloch submitted a comprehensive letter to GAO outlining the organizational improvements at OSC and I ask unanimous consent that Mr. Bloch's May 17, 2005, letter be added to the hearing record.[1]

There being no objection, it is included.

Senator VOINOVICH. Before I yield to my good friend Senator Akaka, I would like to recognize his steadfast commitment to provide Federal whistleblowers with a safe disclosure process which is central to OSC's mission. I do not think there is anybody in the Congress that is a better friend of whistleblowers than Senator Akaka, and that has been part of his whole career here in the Senate. As many of you know, Senator Akaka is the chief sponsor of legislation to strengthen the protections of Federal whistleblowers and I am pleased to be one of its co-sponsors.

I now yield to Senator Akaka for his opening statement.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Thank you very much, Mr. Chairman. I cannot say enough about your leadership in the U.S. Senate and what you

[1] The letter referred to appears in the Appendix as Appendix A on page 210.

have done for the Federal workers of our country. I want to commend you for your commitment to Federal workers and for listening to their concerns. By holding today's oversight hearing on the Office of Special Counsel you have once again demonstrated your leadership in protecting employee rights. I do not have to tell you this, but I am right by your side.

OSC has a special role in the Federal Government. It is charged with making sure that Federal employees are free from discriminatory, retaliatory, and arbitrary actions. These protections are essential so that employees can perform their duties in the best interest of the American public. By enforcing the merit system principles and serving as an advocate for Federal employees, OSC helps ensure that the Federal Government is an employer of choice. As we look at the future, this becomes very important when the baby boomers retire.

As the Departments of Defense and Homeland Security embark on new personnel systems that, in my opinion, severely diminish the rights and protections of Federal employees, the importance of OSC in protecting the merit system principles will increase. Today's hearing examines how well OSC is meeting this extremely important mission.

The role of OSC has evolved. Created by the Civil Service Reform Act of 1978, OSC was established as an independent investigative and prosecutorial agency working on behalf of employees, particularly whistleblowers. But it did not live up to this role. The Whistleblower Protection Act was passed in 1989 in large part because OSC at the time was perceived as ineffectual. At that time, OSC had not brought a single corrective action case since 1979 to the Merit Systems Protection Board on behalf of a whistleblower. A former Special Counsel advised the whistleblowers, "do not put your head up because it will get blown off."

Whistleblowers told Congress that they thought of OSC as an adversary rather than an ally, and urged this Committee to abolish the office altogether. Instead, Congress strengthened rather than abolished the office, and the Whistleblower Protection Act gave OSC a new charter: To protect employees, especially whistleblowers, from Prohibited Personnel Practices and to, again, act in the interest of employees who seek its assistance.

Despite significant changes in OSC after the 1989 Act, employee satisfaction with the office remained surprisingly low. According to the Government Accountability Office in 1993, 81 percent of employees with cases before OSC gave the office a generally low to very low rating for overall effectiveness. Even employees with successful cases before OSC gave the Agency low marks for poor customer service and effectiveness.

Congress passed amendments to the WPA to strengthen protections for whistleblowers and improve OSC's effectiveness in 1994, and we had been encouraged about the direction OSC was headed. For example, in 2001 the Government Accountability Project, one of OSC's stakeholders, said that OSC had won over even the most disillusioned critics by opening channels of communication with stakeholders and developing a genuine docket of ongoing litigation. I was very pleased to see that even though changes are needed to strengthen the WPA, those filing whistleblower cases generally be-

lieved that their cases had a fair evaluation and that OSC was actively pursuing its mission.

Sadly, it appears that this trend is reversing and that OSC may be reverting to the anti-employee practices of the past. For example, employees, good government groups, and employee unions have publicly expressed their concerns over the activities of OSC regarding the backlog of cases. While I appreciate the efforts by Special Counsel Bloch and his staff to reduce the backlog, there are charges that the manner in which the reduction was accomplished is suspect. Very serious allegations have been raised that complaints are not being adequately reviewed, cases have simply been shifted from one office to another, or cases were dumped. If true, these practices are directly counter to OSC's legal responsibility to be the protector of civil service employees.

Moreover, the allegations about the adverse treatment of OSC employees are deeply troubling. Earlier this year, without notice to congressional authorizers or appropriators, OSC initiated a reorganization which resulted in the opening of a new field office in Detroit and the loss of approximately 10 percent of the Agency's workforce. The reorganization announcement came on the heels of a $140,000 external review of OSC which did not recommend such a change.

In addition, the reorganization proposed moving the Alternative Dispute Resolution office, which has been highly successful in resolving disputes, from the Washington, DC headquarters where a majority of the cases are handled, to the new Detroit field office. In my opinion, the business case for a new field office has not been made, and I am alarmed by the way employees were forced to relocate or lose their jobs. Volunteers were not solicited and those selected to relocate were not consulted before the decision was made. In fact, the unilateral action was the impetus for some remaining OSC staff, who have asked to remain anonymous, to write this Subcommittee in support of the fired employees who have joined in filing a complaint against Special Counsel Bloch with the President's Council on Integrity and Efficiency.

Equally troubling, shortly after taking office in 2004, Special Counsel Bloch removed all information relating to sexual orientation discrimination from OSC's web site. This action was taken in spite of repeated questioning by myself and other Members of this Committee during Mr. Bloch's confirmation process as to his views on this subject. He repeatedly assured, under oath before this Committee, that discrimination based on one's sexual orientation is prohibited and is under OSC's jurisdiction.

Only after Senators Collins, Lieberman, Levin, and I questioned this action in a letter to Mr. Bloch, dated February 19, 2004, and after both the Office of Personnel Management and the White House reaffirmed that the long-standing position that sexual orientation discrimination was prohibited, did OSC reverse itself. However, employees are still unsure of the degree of their protection and related subject matter information that was on the OSC web site prior to the legal review of this issue still has not been returned to the site.

Last, Mr. Chairman, some OSC employees claim they have faced retaliation for being "leakers" after alerting Congress and the press

that OSC's policy on sexual orientation discrimination was under review and for filing complaints against Mr. Bloch. These charges, if proven true, could result in Mr. Bloch's dismissal from Federal service. Let me be clear, if the lead agency charged with protecting Federal employees is seen as the most egregious offender of the merit principles, the best and brightest now serving in the Federal Government will want to leave and it will be hard, if not impossible, to recruit young men and women to serve.

With fears over retaliatory and arbitrary action against employees under the new personnel systems at the Departments of Defense and Homeland Security, it is imperative that OSC be a safe haven and a place of hope for employees. As such, OSC must be held to a higher standard. The activities of OSC must be above reproach. To the detriment of employees and the merit principles, it appears that OSC is not meeting this goal.

Mr. Chairman, I hope that today's hearing will allow us to get to the bottom of these concerns and allegations, and ensure that OSC is a safe haven for Federal employees and a staunch advocate for the merit system principles. I want to thank you again, Senator Voinovich, as well as Senator Lautenberg, for supporting my whistleblower legislation. We have received, Mr. Chairman, a letter of support for this hearing from the Government Accountability Project and Public Employees for Environmental Responsibility, and I ask that the letter be included in the record.[1]

Thank you very much, Mr. Chairman.

Senator VOINOVICH. Without objection.

Everyone should understand that Senator Akaka's opening statement was a little longer than what we ordinarily allow in this Subcommittee, but I know he feels strongly about this issue that I thought that he ought to be able to articulate his position before the Subcommittee. Thank you, Senator Akaka.

Senator Lautenberg.

OPENING STATEMENT OF SENATOR LAUTENBERG

Senator LAUTENBERG. Thanks, Mr. Chairman. I listened to Senator Akaka's statement very carefully and I thought that he touched a lot of very important bases, and I congratulate him for the thoughtfulness and the direction that he has taken this hearing into. And also to you, Mr. Chairman.

The one thing that happens is when you get a group of Senators to focus on a particular subject, especially something to do with the innards of government, then it begins to get a lot easier to make the statements with a degree of conviction and knowledge. Mr. Bloch, it does not augur well for your management of this office, at least the reports of your management.

The Office of Special Counsel's central purpose is to safeguard Federal employees from reprisal from whistleblowing. However, the way the office is being managed, it appears that its primary function is to protect arbitrary actions and to inhibit employee criticism or complaint. Now this places the Special Counsel in the position of representing Federal employees while ensuring that the laws and the policies of the United States are upheld. Those are the re-

[1] The letter referred to dated May 23, 2005, appears in the Appendix on page 67.

quirements. It is a challenging balancing act and I appreciate the difficulty of achieving the correct balance.

However, I am really concerned that the office has tilted too far in one direction, Mr. Bloch, since you have taken over in 2004. During Mr. Bloch's confirmation a year-and-a-half ago I noted that you had substantial experience in the private sector handling complex whistleblowing cases on behalf of both plaintiffs and defendants, and I had hoped that such experience would serve well in the new post. Since then, however, a number of concerns have been raised by public watchdog groups, and as Senator Akaka mentioned, labor unions that represent public employees. These concerns include inadequate protection against discrimination on the basis of sexual orientation. Again, I may repeat some of the things said by colleagues but I think they are worth repetition, questionable hiring and contracting practices, allegations of dumping valid cases simply to reduce the backlog.

Mr. Chairman, when I was in private business I ran a company when I came here with almost 20,000 employees, now over 40,000 employees, and we always felt that those employees were the company's greatest asset and strength. We always encouraged employee contributions of thought and ideas as well as listening carefully to legitimate criticisms.

I learned something in now over 20 years about government employees as well. I spent 30 years in business—I am really a relic if you look at the time spent—but I learned something about government employees as well. Loyal, hard-working, easily as qualified as any of those that I met in the private sector. But the loyalty and the skill that they bring to the job is always pleasing, but almost surprising because, and I say this, with relatively modest compensation. It was mentioned that employees can find lots of things to do outside of here, and we are having some difficulties. Those who come to government come for special reason. It is not simply to look at a pension but it is to make a contribution to the well-being of our country.

I learned something about employee transfers, Mr. Chairman. When we first started in business I was always interested to hear that our salesmen who sold us from IBM or other computer companies would come in and they would talk about the transfer they got to Paducah—that is not a name—I am not criticizing Paducah, Kentucky—and they would gladly take these promotions. Years later as we grew, as our company grew outside of its New Jersey presence, if I wanted to transfer someone, a promotion, they would say, I have to talk to my wife and my kids. I thought that is a legitimate thing. The dialogue between management and employee made our company incredibly successful. If anyone wants to look up ADP's history, it is pretty spectacular, in modesty I say.

So I cannot understand the attitude that the Administration repeatedly has taken toward public employees. The Office of Special Counsel is supposed to protect the rights of public employees. It is an important mission, not just for the sake of the employees themselves. Public employees who come forward as whistleblowers serve an important function in our democracy. They provide a check on the bureaucracy by warning the public when there is waste, fraud, or abuse at a government agency. And this Subcommittee, in par-

ticular, has the assignment to review these things as carefully as we can and as diligently. Many times the only people who are aware of such wrongdoing are those who work inside the agency. If we fail to protect those who come forward and do the right thing, we do a disservice to every taxpayer in the country and every citizen who relies on the government to provide quality services.

Again, Mr. Chairman, many thanks for calling this hearing.

Senator VOINOVICH. Thank you, Senator.

Mr. Bloch, it is tradition here on this Subcommittee that we swear in our witnesses. If you will stand and I will administer the oath.

[Witness sworn.]

Mr. Bloch, I would like to remind you to please keep your oral statement to 7 minutes and also remind you that your entire written statement will be made a part of the record. Thank you for being here today.

TESTIMONY OF HON. SCOTT J. BLOCH,[1] SPECIAL COUNSEL, OFFICE OF SPECIAL COUNSEL

Mr. BLOCH. Thank you, Mr. Chairman, Senator Akaka, Senator Lautenberg, and distinguished Members of the Subcommittee. In Shakespeare's immortal drama of political treachery and leadership, *Julius Caesar,* he states, "There is a tide in the affairs of men which, taken at the flood, leads on to fortune. Omitted, all the voyage of their life is bound in shallows and in miseries. On such a full sea are we now afloat, and must take the current when it serves or lose our ventures."

Senators our country is at a high tide of homeland security and national security affairs, and what we do and how we meet the public trust will determine in some part the success of the American venture of limited self-government. At OSC, our ventures into reform and innovation in the Federal workforce have set us on a course toward greater efficiency, greater accountability, and I am proud to be a part of the solutions with you.

Kristin Shott certainly understood the high tide of safety to the public and our state of war when she reported to us the nonconforming welds on the *USS Kitty Hawk* aircraft carrier, which averted a potential loss of life and destruction of jet fighters. As a result, Ms. Shott has suffered greatly for carrying on in her role of whistleblower.

It was the same for an FAA controller who courageously reported to us that her superiors failed to properly investigate and report near misses at a major international airport. In layman's terms, these planes were almost running into each other about every other week.

Another conscientious whistleblower took on the U.S. Air Force to protect the integrity of the Air Force's C–5A Galaxy transport aircraft. The same goes for the TSA employee who was subjected to a retaliatory investigation, placed on paid administrative leave, and ultimately proposed for termination because she reported to TSA's Office of Inspector General that her supervisor illegally brought his privately owned AK–47 to the office. We have pursued

[1] The prepared statement of Mr. Bloch appears in the Appendix on page 33.

protections for these whistleblowers who have been reprised against for their brave reporting.

Or take Judithe Hanover Kaplan, former colonel, U.S. Air Force, who was a nurse in Federal employment with a Ph.D. and an unblemished record who was fired when she was called away on military duty. One of my first acts upon taking office was to take swift action on that case. We filed it as the first ever USERRA case before the Merit Systems Protection Board (MSPB) in the history of OSC, and we got more money for her than was proposed originally in the case that was filed.

OSC is aware of taking the current when it serves to protect whistleblowers, to step up prosecutions for returning service members, and to vigorously prosecute illegal partisanship and illegal personnel practices to bring greater integrity to our Federal Government. The problem of good government is not divided by party but by commitment to principle.

During my confirmation hearing and after I became the Special Counsel, it was apparent that two major problems confronted OSC, a serious backlog of cases and a cumbersome organizational structure. My publicly-stated pledge to this body and to the public has been to give all full, fair and expeditious resolution to all cases, especially the unacceptably high number in backlog.

My recent reorganization is dedicated to the above-stated goals. Indeed, given the widespread press about these historic backlogs and the GAO report issued shortly after I assumed office, it is indeed ironic that we are now being subjected to such scrutiny for having addressed the backlog, studied the source of the problems, and embodied a creative and long-lasting strategic solution to the problem that will benefit the Federal workforce for years to come. I have kept my pledge to Congress and Federal employees and am pleased to report that we have made tremendous progress in our first year.

One of my first priorities in office was to address and eliminate backlogs in the Intake Unit, Complaint Examining Unit (CEU), Disclosure Unit and Hatch Act Unit, within 1 year. At the same time, I made it clear that ultimately the Agency would reorganize into a leaner, better organizational unit. The Agency seemed to lack a vision and needed performance goals and standards. Personnel did not seem strategically placed to solve Agency challenges. Agency structure was process-oriented, not results driven.

I created a Special Projects Unit (SPU), which was new to the Agency, in April 2004, and it managed the Agency's resources and directed the backlog resolution efforts. The SPU became, so to speak, the "fireman" of the Agency. SPU is now the Agency's official watchdog on case backlogs and will ensure that OSC staff will resolve any large inventory of cases before they become backlogged. In addition to the SPU, we hired an independent assessment team to study the Agency and make strategic recommendations. The results of the past year were unprecedented. As we announced on May 17, 2005, in a detailed response to GAO's report in the record here, I am pleased to report that we reduced the overall Agency backlog by 82 percent, from 1,121 to 201 cases in the Intake and Disclosure units, all by the end of calendar year 2004, and all without sacrificing quality.

We gave a full and fair resolution to all claims, such as the TSA whistleblower, the Air Force employee, and Ms. Hanover Kaplan. In fact, we were able to provide even more justice to complainants. During this backlog resolution project we doubled the historic percentages of internal referrals for Prohibited Personnel Practices. This meant an even higher percentage of claims were investigated and are being investigated.

For whistleblower disclosures, we have nearly doubled the number of cases that were referred back to agencies or their Inspectors General for further investigation. The credit for this Herculean effort goes to my career staff that has worked long and hard to meet our goal. Our Hatch Act unit has reduced backlogs of older cases to a very manageable level, provided a record number of advisory opinions—some 600 more than the prior year, done extensive outreach during an election year, and been a model of non-partisan enforcement. Truly amazing results.

In January, I announced an Agency reorganization plan to ensure no future case backlogs would occur and to create internally consistent procedures. I consulted with all senior management as well as my immediate staff throughout the past year in preparation for this. The independent assessment report was not the only source of information that I utilized to reorganize the Agency. It was only one among several tools.

The overall paradigm was to delayer the current OSC organizational structure; we had a "SES" sandwich at OSC, if you will. All SES and several GS–15 level supervisors were in Washington and took turns reviewing what had already been reviewed. I wanted to "power down" decisionmaking to the lowest levels of competence versus having repeated reviews, endless written memoranda, and needless meetings. OSC was a D.C.-centric organization that some saw as "cherry picking" all of the good cases away from the existing field offices, and often the field offices felt as if they were mere appendages of our Agency and I wanted to change that.

The restructuring will also include a new field office in the upper Midwest, in Detroit, for geographic representation throughout the United States. With the various States assigned to this office under the new plan, this office will handle the same number of cases as the other field offices. The management director reassignment was based on the precepts of strategic management of human capital, placing the right people in the right positions to have a winning team.

At the same time, we have implemented a vigorous new training unit that will cross-train personnel to work in other areas of law. The lack of cross-trained personnel was a major impediment to attacking backlogs. Our new customer service unit will better serve the public and Federal employees.

Last, we have stepped up enforcement of Uniformed Services Employment and Reemployment Rights Act (USERRA) cases within the Federal Government. This is the law that guarantees job protections to those service members who go on active duty and want to return to their job when their service ends. With the historic mobilization and demobilization some have faced illegal employment practices after their active service. Although cases have been in the Agency for years, I am the first Special Counsel to take

MSPB actions against agencies that were not in compliance with this important law. As the father of a U.S. Marine who has served in two combat tours in Iraq, the last along the Syrian border from which he recently returned, I do not take these USERRA responsibilities lightly.

Last year, a law was passed giving us additional responsibilities under this law and we have now set up a new USERRA unit within OSC. This new arrangement marries up OSC's investigative and prosecutorial roles, which do not work as effectively when separated.

As Shakespeare said, we must take the current when it serves, and thanks to our excellent career staff we have taken it at OSC, with proud results that have improved the merit system and our government's overall efficiency and safety.

I welcome any questions you have. Thank you, Senators.

Senator VOINOVICH. Thank you, Mr. Bloch. We are going to have 5-minute rounds of questions.

Mr. Bloch, I would like you to provide more details regarding your decision to open the office in Detroit. From what I understand, 10 of the 12 affected employees that were asked to transfer to the field offices have left your Agency entirely. Since you have only about 110 employees, losing nearly 10 percent of your workforce in less than 3 months could negatively impact the progress you have made on this case backlog. Now you must recruit, hire, and train new staff to replace those that left. Your Agency has a specialized mission and I suspect it is not easy to find potential employees to help you accomplish your goals. What steps are you taking to ensure that the new employees have the tools that they need to get the job done? This gives you an opportunity to talk about that office, that decision and the whole issue of the short notice to have folks leave, because there were some allegations that the reason they were asked to move within the 10-day period was that you were unhappy with them and that was one way that you could show your displeasure. We might as well just get that out on the table and give you a chance to respond to it.

Mr. BLOCH. Thank you, Senator. I appreciate your leadership, the leadership of Senator Akaka and Senator Lautenberg and this Subcommittee. I share with you 100 percent commitment to the principles you have expressed and I want to assure this Subcommittee that we are not doing anything contrary to what you have expressed in terms of the vision and the goals for the Federal workforce.

I will take the last part of your question first, Senator, if I might, to simply dispel any notion that there was any attempt to do away with, or retaliate, or hurt any employees. We understand at OSC, and we have discussed this at length, not only with my immediate staff but with the SES and other career staff who are in leadership in OSC, that it was our sincere, and is our sincere desire that each and every one of the employees affected by this reorganization plan would come along with us and be a part of this new team, which was going to be a great success and is still going to be a great success. We were very mindful, and still are mindful, of the human dimension, how this affects people.

We realize the 10 days seemed rather harsh and we immediately gave in, in fact, on the recommendation of our human resource manager who told us originally 10 days was what the case law said was permissible and that is what we understood. We also felt, and I want to make sure that everyone understands this on the Subcommittee, that we were not going to just give them 10 days. They also had all kinds of time to make a decision, even if they decided to initially determine they might want to go, and most of them did say they probably did, that they could always change their mind without any harm to them or any effect, and we were going to work with them at all levels to try to facilitate a good result for them.

Indeed, I want to clarify for the record that each of these employees we were very concerned about and we made recommendations to them for other Federal employment. When we had the opportunity we gave them very high recommendations. We had nothing but good will towards them. They were excellent people who had excellent records and we simply had a difference of opinion about management style perhaps, but it was nothing more than that. I want to assure this Subcommittee that there is no truth whatsoever to that aspect of the question.

With regard to why we opened the Detroit office, we did not seize on Detroit as a city that we were looking for, but rather we talked to employees——

Senator VOINOVICH. What I would like to know is why did you not choose Cleveland.

Mr. BLOCH. We tried, Senator, and your wonderful State of Ohio. We actually have people from Ohio who came into our Agency after I came aboard and they were wanting Cleveland or Columbus. Unfortunately, GSA was in the driver's seat for us on this issue. We wanted to go to Chicago because employees had recommended Chicago to us. They had recommended Ohio, Indianapolis, and Kansas City. GSA was unable to accommodate us and told us, you are not going to be able to get those cities for a year. Chicago was our top pick. That is an MSPB based city and employees that are in our Agency from there, and in fact the head of ADR was from there originally. So that was our first choice.

But GSA said, you can get space now, we have space available in a Federal building in Detroit, with no build out costs. We were quite surprised by that. My immediate staff went and visited, looked at it and it seemed appropriate.

Senator VOINOVICH. So the issue is the GSA basically controlled that decisionmaking that you went to Detroit.

Mr. BLOCH. That is correct.

Senator VOINOVICH. It has been said that the employees who were asked to transfer but decided to leave OSC is because they had a difference of opinion with you in terms of whether that is a good idea or not, or what was it?

Mr. BLOCH. Senator, I do not pretend to say that about them. I am not trying to put words in their mouth. I am saying, at worst it was a difference of management style. But I think what they really expressed to us was, we have human issues in our lives. We have family. We have other issues and we really would prefer to stay here, and was, I think, the basis of much of the decisionmaking. We had a couple of employees who immediately said they

would go and were on board and were getting ready, and in fact, made trips out there to Detroit, two of whom were, I think, from Detroit originally, so the hardship issue was not as great for them. They had family they could stay with.

Senator VOINOVICH. So basically the eight that did not go, or whatever it is, they did not want to go out to Detroit because of family reasons and so on. But they did leave the Agency; is that correct?

Mr. BLOCH. Some of them left the Agency.

Senator VOINOVICH. Of the ones you asked to leave, how many stayed in the Agency?

Mr. BLOCH. We did not ask anyone to leave. We asked them to stay with us. Those who were caught up in the reorganization plan that would have to be reassigned geographically——

Senator VOINOVICH. How many of them stayed with the Agency?

Mr. BLOCH. I believe it is three or four.

Senator VOINOVICH. Then the others left and went somewhere else?

Mr. BLOCH. Right. One retired. Most of the others got other jobs in the Federal Government, thankfully in the whistleblower area, so I think it is a net plus for the Federal sector for the merit system. But in any event, yes. And we made recommendations to those employers, giving them very high marks.

Senator VOINOVICH. Just for the record, why don't you just send as part of this hearing, send me a letter about what happened to these people so it is very clear in the record? Who went out, who did not go out and what happened to them, so the record is clear about what happened there.[1] I will ask one question—my time is up—but two did go out there and how are you doing in terms of recruiting people for that office?

Mr. BLOCH. Thank you, Senator. That was another part of your question I neglected to get to. We had two that went out there, but ultimately they got other jobs in the whistleblower area in Washington, but we had two other volunteers that went out there and they are doing a wonderful job. They have opened the office. One Senior Executive Service has been overseeing that, traveling to various field offices including Detroit, to make sure that is opened correctly.

We have hired, unbelievably, through the tireless efforts of the career staff on the hiring committee, been able to hire all those positions back. I think essentially all the positions that we lost. We have, I think, four investigators and five attorneys we have hired recently through a competitive process. We are very grateful that we got very high quality employees, people who could step right in, who have experience and knowledge and background and a commitment to this area. So we are very hopeful about the future. The Detroit office is looking very promising. We are doing really well with cases, some of which I have cited here. We think the future looks very bright and we are very sorry that some of the employees were aggrieved, and we really hope the best for them.

Senator VOINOVICH. Senator Akaka.

Senator AKAKA. Thank you very much, Mr. Chairman.

---

[1] The letter referred to dated May 31, 2005, appears in the Appendix on page 40.

Mr. Bloch, I am glad to hear about the tremendous progress you feel you have made with the office and the results, as you mentioned, have been unprecedented. You have worked on the backlog and consulted with the employees. I am glad to hear all of that.

I have some questions that will help clarify some of the concerns I have. Just to follow up on Senator Voinovich's question on the reorganization. You did not extend the time for employees to make a decision on the reassignment until Members of Congress protested. How was the "all kind of time to make a decision" relayed to the affected employees?

Mr. BLOCH. Thank you, Senator Akaka.

Senator AKAKA. How was it relayed to them?

Mr. BLOCH. Thank you, I appreciate the question and the concern. We shared the concern. Again, we originally set forth all of the procedures that were going to be used for the reorganization, and giving people notice of their rights and so on, and we relied on our human resource director, the manager of the human resources division, to come up with all of the CFR portions and the various timelines and so on. We did not make this up. It was recommended to us.

After the fact, and indeed thanks to your staffs and yourselves, we were made aware of some of the concerns and the problems with the timeline. We were quite cognizant of the difficulty this posed for some people. Our human resource director came up to us and said, let us give them 10 additional days. Let us do it. And we said, we have no problem with that whatsoever. He went around to each office, for those who were present, related to them immediately orally. We also gave them in writing an additional 10 days. Plus he mailed it to those who were not present on that particular day. We also had him—I think he would have done this any way on his own—but we asked him to make sure they understood, we will work with you.

Senator AKAKA. I am also concerned, Mr. Bloch, by your statements in the press regarding OSC employees, particularly where you said "it is unfortunate that we have a leaker or leakers in our office who went to the press rather than coming to me." Given the specific role that Congress gave to OSC to protect employees from adverse action by Federal agencies, especially whistleblower retaliation, I am deeply concerned about the message this sends to Federal workers.

My question to you is, why did you refer to OSC employees who believed they were disclosing violations of law as leakers?

Mr. BLOCH. Thank you, Senator. That certainly is an unfortunate term and I think that harkens back to an article that appeared in the *Federal Times* some year-and-a-half ago, or at least over a year ago, I think. As I am sure Members of this Subcommittee may have had experience with, sometimes remarks get taken out of context or emphasized in a way that makes them appear far worse than they were. We had a lengthy hour-and-a-half interview or hour or something and the tape recorder and the discussion and the notes do not often reflect things like quote marks being put around something by your fingers and things of that nature.

I certainly did not mean anything inappropriate or derogatory. We were talking about the general issue of the tendency of new

Special Counsel to have people who might disagree with him, and that I was trying to express our willingness to work with anybody on any issue, and it would be better if they came to us. In fact, the reporter may have even used the term "leaker" with quote marks around it and we had that discussion going. I cannot honestly recall the circumstances but that is not how I look at my employees. I look at my employees as valued individuals who are part of a team and who have given me great advice and even greater efforts.

So I reject the notion that people should not be permitted to express their opinions, either to me or to the public or wherever they want. We have made it very clear to everyone in the Agency that we appreciate their rights and they should be able to express themselves.

Senator AKAKA. Do you deny you used the word leaker?

Mr. BLOCH. No, I do not deny that occurred during the interview. All I am expressing to you, Senator, is that in the context I am not sure that it was intended in the way that it has been used.

Senator AKAKA. Mr. Chairman, my time has expired.

Senator VOINOVICH. Senator Lautenberg.

Senator LAUTENBERG. Mr. Bloch, you expressed your concern for the employees and how sensitive you want to be. On the other hand, your actions do not comport with your words, I have got to tell you that. I listened in stark amazement at times at the things you say you care about and you are sorry for and it was misunderstood. We ought to get this straight here. We are going to judge you based not so much on what you say today but on the actions you have taken thus far.

One of the decisions you made earlier this year was that the Department of Treasury officials did not violate the Hatch Act by presenting John Kerry's tax plan and posting the results on the Treasury web site in support or defense of administration tax policy. Do you think that is an appropriate place to be spending taxpayer money, because it was obviously a tactic in a political campaign? But that was your decision.

Mr. BLOCH. Senator, I appreciate your question. As we stated to you in a letter, we took that claim very seriously. The Hatch Act unit, which is in charge of these matters, thoroughly investigated that using an investigator and an attorney. They thoroughly looked through documents and interviewed witnesses at the Department of Treasury and it was their determination, not mine, that the use of the web site and that the defense of administration policy which had been long-standing across all different partisan divides, different administrations had done this, that this was acceptable as long——

Senator LAUTENBERG. You saw no problem with that? I mean, you are the boss.

Mr. BLOCH. No, I disagree with that, Senator. We did see a problem with it. It is just that the Hatch Act Unit, SES and GS–15 career staff are highly capable and know a lot more about Hatch Act than I do, and said it did not cross the line. However, we had concerns, and those concerns were expressed in a letter to the Department of Treasury general counsel's office, do not get into this sticky wicket anymore, to make it clear to employees they are not going to be coerced into doing anything partisan during an election year,

and that they have Hatch Act rights, and that the only thing they are required to do is their job and the defense of administration policy and not crossing over the line.

I mean to tell you, Senator, that we did not get a warm fuzzy from the Department of Treasury when we did that. But we did express difficulties and problems with that.

Senator LAUTENBERG. Thank you. You said before that you tried to be considerate of the employee needs and so forth when you declared that you had 10 days to make a decision as to whether you would move you, your family, your grandmother, whoever else was in your family unit, to Detroit, but you had this mad dash to reduce the staff and the backlog. It seems to me that you had determined that heads would roll if they did not agree.

Now how many employees do you have in the Detroit office?

Mr. BLOCH. Currently we have two full-time equivalents with three new hires which should be joining us shortly.

Senator LAUTENBERG. This decision was made in January; am my right?

Mr. BLOCH. The decision was announced in January. I believe it was made in December, late December.

Senator LAUTENBERG. So obviously this did not meet with thunderous applause from the employee group that was asked to make this move. It is terrible to say to an employee who may have lived in the area here for 20 years or whatever, and has established their family roots, and you say, OK, you have got 10 days, put up or do whatever you want to do. These employees that you now bemoan having lost, I do not think got particularly human treatment.

You said that there was case law to substantiate it, but at what point does soul creep into case law? Is there any point in time, is there anything that says, these are human beings? They have lives to conduct. But case file; you are out of here. How does that strike you? You obviously are proud of your son serving in the Marine Corps. You are proud of your family thusly. But aren't other people entitled to some family pride, some family balance when a decision is made that affects their life, her life, or their lives?

Mr. BLOCH. Yes, Senator, I agree with you, they are entitled to consideration and we never intended to try to hurt anyone, and we did not intend for them to have to move in 10 days. All we were asking them was for their initial decision, will they go along, because we had a lot of planning to do to open the office in 60 to 90 days. I want to take a clear stand here for the record that we had three different offices we were sending 12 different employees to, not just Detroit but also Dallas and San Francisco, to be consistent with our overall plan to have smaller modular units that were more agile, had power down from D.C. and had a lot of innovation and leadership within their own offices.

Now in response to your question, I did discuss with my immediate staff as well as with career staff the very thing that you have raised, which is the human problem here. We have real people that we care about who have real lives, who have real histories with commitment to the workforce and we were having to do a balancing act. This was a management-directed reassignment, which according to the *Government Executive* that did an article on this, happens about 22,000 times a year in the Federal Government. So

each one of those people are affected. Each person is affected by a decision I make, and I am quite well aware of that, and it is something that weighs heavily on my decisionmaking.

However, we thought this was for the best of the Agency. I want to hasten to add that the SES employee who was affected by the Detroit reassignment said to us in the first discussion about whether he would go or not, I think this is a creative solution. I want to go along with this. This might actually work really well. So we were very confident and hopeful that all employees would see their way clear to helping us achieve the results. But yes, Senator, the human dimension really meant something to me then. It means something to me today.

Senator LAUTENBERG. But eight people did not agree with you.

Mr. BLOCH. Thankfully, they have other jobs, most of them, and I am very thankful for that.

Senator LAUTENBERG. That is very thoughtful. Thank you.

Senator VOINOVICH. Senator Levin. Thank you for being here.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Thank you, Mr. Chairman. Thank you for holding this hearing.

First on the question of sexual orientation discrimination. What is the current policy as to whether or not claims of adverse action against an employee based purely on orientation is recognizable and within your jurisdiction?

Mr. BLOCH. Thank you, Senator Levin. Thank you for being here and giving me the opportunity to respond to these questions and set the record straight on these issues. I want to say what I said in my confirmation to you personally, as well as in the hearing, my one hundred percent commitment to those employees who come to us who have complaints, that a complaint of sexual orientation discrimination or any other kind of discrimination based on sexual activity, or any other activity, conduct of any kind, we have enforced the statute that we have that governs this. We enforced it through the process of our legal review, and we enforce it today and we never stopped enforcing it. So they do have protections.

Senator LEVIN. I just want to ask my question, which is, put aside conduct, just about sexual orientation. Somebody says, I am gay; that is it. That is my orientation. And there is some adverse action against that person purely because that person says, that is my orientation. No showing of conduct. Is that within your protection?

Mr. BLOCH. Senator, thank you. The answer to your question is, when you say the term sexual orientation or gay, you are saying something that equates to status or class protection. So the question I would say is, do we give status protection to any employees? The answer is, yes, we do. That is found in Section 2302 (b)(1) of our statutes. The status protections that we have based on just who you are, not on what you have done, are to be found there and are enumerated and they are typically understood as Title VII types of protections, but they also add—we have race, sex, religion, and all those, but they also add marital status, and political affiliation.

Senator LEVIN. I understand those protections under Title VII. I am talking about in your jurisdiction. Will you protect in your jurisdiction an employee against whom adverse action is taken purely because that person is gay, without any information relative to activity? You always use the word activity and I want to drop that word out of there and ask you the direct question, because we keep floating back and forth on this issue.

Mr. BLOCH. Thank you, Senator. The answer is that under (b)(1) sexual orientation does not appear as a class status protection. The only other section of the statute that we have——

Senator LEVIN. Is it within your jurisdiction to protect or is it not? Can you give me——

Mr. BLOCH. Yes, it is within our jurisdiction to protect employees who claim sexual orientation discrimination. When they file a Form 11 with our office the first question we ask them is why do you think you have been discriminated against. If they tell us because of sexual orientation we say, OK, we want to investigate this. The next question is, did you engage in any conduct for which you were terminated or in any other way discriminated against.

Senator LEVIN. The answer is no.

Mr. BLOCH. That does not adversely affect your employment.

Senator LEVIN. Let us assume the answer is no conduct. I just made a statement that I am gay, action was taken against me. Drop the word conduct. This thing has gone back and forth and back and forth for years. Give us a clear answer, yes or no. There is no showing of conduct, no allegation of conduct relative to activities, homosexual activities. It is just, I am gay. Yes or no, is that protected by you or not?

Mr. BLOCH. We are limited by our enforcement statute given to us——

Senator LEVIN. Is it protected or not?

Mr. BLOCH. If given the opportunity to answer I will answer it this way. We are limited by our enforcement statutes as Congress gives them. The courts have specifically rejected sexual orientation as a status protection under our statutes in *Morales v. Department of Justice* in 1993. It is not a part of our—it appears nowhere in our statutes. It is not in the legislative history. The case law has rejected it. Far be it from me to exceed my authority and make law when I do not have that authority.

Senator LEVIN. Why did it take me 5 minutes to get that answer out of you?

Mr. BLOCH. I believe it is more than 5 minutes we have been talking, Senator.

Senator LEVIN. Why did it take me 6 minutes? I do not want to underestimate the amount of time that I have been trying to get a direct answer out of you. Why does it take so long for you to say you do not have that jurisdiction? I disagree with you, by the way, and the White House does, too, but why does it take you so long?

Mr. BLOCH. I think, Senator, in this area we have what I would refer to as ships passing in the night. Some people refer to sexual orientation and they mean conduct. Some people refer to it and they mean class protection and status. So we have to be clear about our terms, and when we are talking about legal protections that could debar a Federal employee, a manager let us say from employ-

ment, we have to know we have statutory authority in that area. We do not see sexual orientation as a term for class status anywhere in the statute or in the legislative history or the case law. In fact, quite contrary to it.

Senator LEVIN. The *American Spectator* a few weeks ago published a letter from you saying that you have been conducting a responsible, common sense, and full review of this issue. Is that under review again?

Mr. BLOCH. I am sorry, no, the original policy that we put out is still in effect and it is on our web site which sets forth not only the original administration position but our enforcement statute. And not only the conduct requirement but our extension of that to implied conduct.

Senator LEVIN. So do you imply conduct with nothing more from a statement that somebody is gay?

Mr. BLOCH. I do not imply anything. But that if there is evidence that it established that there is imputed personal conduct, an inference can be drawn. Yes, Senator, it goes beyond witnessing somebody doing something.

Senator LEVIN. But you have to impute conduct?

Mr. BLOCH. Yes.

Senator LEVIN. It is not enough that somebody says they are gay, adverse action is taken against them, you do not consider that within your jurisdiction because of the word conduct in the statute. The White House has made very strong statements about not allowing discrimination against Federal employees based on sexual orientation. It does not talk about activity, it says sexual orientation. President Bush expects Federal agencies to enforce this policy to ensure that all Federal employees are protected from unfair discrimination at work. That is not something that you believe is binding on you?

Mr. BLOCH. I believe that is binding on me.

Senator LEVIN. If there is conduct.

Mr. BLOCH. No, it is binding on me without conduct. But it is not something I can prosecute on the basis of. It is binding on my Agency. It is binding on the Department of Justice. It is binding on each agency.

Senator LEVIN. It is binding on you but you cannot do anything about it.

Mr. BLOCH. If you look at the Executive Order in question, that you are referring to, it states specifically, no right or remedy is conferred upon a Federal employee against the Government of the United States by virtue of this Executive Order.

I am limited by the enforcement statutes that you give me, Senator.

Senator LEVIN. My time is up. Thank you.

Senator VOINOVICH. I would like to just explain for the record that we talked about the moving of employees and it was brought to my attention that the requirement for moving Federal employees is very common. Military personnel move usually every 2 to 3 years. Federal law enforcement like the FBI special agent—I know one of our agents came to see me, the new head of the Cleveland office—and they are required to move quite frequently, and about 22,000 non-military employees a year are moved around in the

Federal Government. That does not mean that we ought not to be as sensitive as we should in terms of giving them notice, and working with them, and understand their family conditions and so forth. I hope that because of this incident you have learned something in terms of consideration, and that int he future you will allow a little mroe time for this process.

Mr. BLOCH. Yes, Senator, I am learning new things every day.

Senator VOINOVICH. You mentioned the issue of the backlog of cases in your opening statement, but there are some allegations out there that you went through this backlog and arbitraily closed whistleblower cases in a cursory fashion. And the reason for it is because in the prior 3 years, you closed more cases in 1 year than they did in 3 years, so the implication is that perhaps your employees really didn't look at these cases as thoroughly as they should before they were closed. I would like you to just share with us again what process you went through in examining those cases. Also please share the steps you took to ensure your employees had a way to provide feedback in order to improve case processing. So often, we don't ask them.

Mr. BLOCH. Thank you, Senator. Indeed, when I first got there, I met with all of the employees and I said I want your creativity. Like Socrates said, real wisdom is knowing you don't know anything. And I knew I didn't know a lot, but I knew they knew a lot, and I wanted to mine that material, I wanted to mine that talent and get them to tell me how we should look at the world differently. I even said to them, if you have to stand on your desk to look at your files in a different light, let's do that. Let's do it together!. Let's try to come up with solutions. And you know what? They did. We put together this Special Projects Unit and it was like a bull pen. And they would sit together, very talented employees like Pernell Caple, who's one of the leaders of our intake unit, who knows more about personnel law—he's forgotten more than I'll ever know. And people like that were in the bull pen, with ideas going back and forth, and then experienced people from the Investigation and Prosecution Division were coming through and they were interacting with new ideas. And out of that process arose new procedures and new solutions to the backlog that made it possible for us to give full and fair resolution, never sacrificing quality. In fact, we doubled the number of claims that were successful over the rate that had been done in the prior years. I think that speaks very highly for the process.

Senator VOINOVICH. The impression that I originally had, when we talked about the process, is you closed cases just to eliminate the backlog. What you are telling me is that wasn't the case, that you went through them and there were many that were moved on to agencies to be investigated or other action that you took. It didn't mean that because you eliminated the backlog it meant that they were dumped into the circular file.

Mr. BLOCH. That's correct, Senator. What we did is we released the bottleneck in the Agency and we took care of business. But most of all, we took care of employees who were complaining. I said to my staff when I first arrived, also, we do not exist to get rid of cases; we exist to find the good ones that are there. And I want you to change your mentality from one of "they're coming down the

assembly line," kind of like the Lucille Ball episode where all the chocolate keeps coming down, you've got to find a place for it because you can't wrap it all. And I said, "We've got to change our mentality to one of finding the good that is there."

And they've done that, they've done everything I asked them. It's not my doing, Senator. All I did was point to the hill. They took the hill. And if you told my career employees that they threw cases out and didn't do their job and put their bar licenses on the line because of me—it isn't going to come out of their mouths. They didn't do that. In fact, a bipartisan group of staffers from the House side—our oversight committees, Congressman Porter and Congressman Davis—last month came through and spent days with my career staff asking them questions about what we'd done. And they looked through hundreds of files randomly to determine if we'd done a proper job. And they concluded that we had, and they sent us a letter to that effect on May 17, 2005, which, if it isn't already, I'd like to make a part of the record.[1]

Senator VOINOVICH. I would like to make it part of the record, so without objection, it will be.

Senator Akaka.

Senator AKAKA. Thank you, Mr. Chairman.

I want to follow up on the line of questioning of Senator Levin. During your legal review of the scope of protection for employees and role of OSC in protecting employees from sexual orientation discrimination, you removed all information on this topic from OSC's web site, including a training slide and press release. As a result of your legal review, why are these documents not back on OSC's web site? Do you believe they are in any way inconsistent with the results of your legal review? If so, why?

Mr. BLOCH. Thank you, Senator Akaka.

The answer is yes. I think some of the materials are inconsistent with our legal review. There was confusion between Section 2302 (b)(1) status protections and the use of the term "sexual orientation" in our training materials as well as slide presentations as well as press releases. And it doesn't appear anywhere in our enforcement statute, case history, or in the legislative history. In fact, to the contrary, it's been rejected. So we couldn't feel that we were doing the right thing in educating people properly about the law unless we used the proper terminology.

What we put back up on the web site, Senator, was the handout called "Your Rights as a Federal Employee." And in that handout, it sets forth the same protections that were there before under the conduct-based discrimination and it expands the list of categories. But it starts with what was originally on there, which was Jack's employment is terminated because he attended a Gay Pride march. We also expanded it out to include all other categories so we didn't give a mis-impression that we were singling out someone. And that would be, attended a pro-life event, attended an animal rights rally, or attended a gun owners' rights meeting. So any kind of conduct that occurs that people are doing things in their off-hours should have nothing to do with their performance in the Federal

[1] The letter, dated May 17, 2005, appears in the Appendix on page 210.

workforce. We are fully committed to that and we continue to enforce that and never have stopped.

And we think the materials that are on there currently also include our policy statement that in the Federal Government, the President has stated the policy of the Administration, and then we set forth our enforcement statute and we explain how we enforce it.

Senator AKAKA. Will you please provide a copy of the legal review for the record?

Mr. BLOCH. Yes, we will, Senator.

Senator AKAKA. Thank you.

The press reports, Mr. Bloch, that all cases involving sexual orientation discrimination are reviewed and investigated under a special procedure under the supervision of James McVay, your principal legal advisor, who is a political appointee. Please describe the process for reviewing and investigating allegations of discrimination based on one's sexual orientation at OSC and explain how it is different from the process used for reviewing other Prohibited Personnel Practices, such as nepotism, political coercion, or other Section 2302 (b)(10) cases.

Mr. BLOCH. Thank you, Senator. The answer to that is that we have a Special Projects Unit which was created, which is doing a lot of different tasks, including the new USERRA unit, as well as continuing to work on the backlog issues to make sure they don't crop up again, and any other major projects that the Agency has undertaken that are new in nature. One of the undertakings is the new policy that we put out in April of last year concerning sexual orientation discrimination. And we were concerned that cases might not be given the attention that they should be, that they would too quickly work their way through the process because of the new mandates for backlog reduction. And so what we said was let's make sure that they get extra attention, and that is exactly what's happened. Mr. McVay has faithfully carried out the needs of the unit.

But all of these sexual orientation claims receive a higher level of review from an SES and they are worked by a career employee. So there's a misnomer that they've somehow been funneled through a political appointee. As all of you know, agencies throughout the Federal Government always have politicals at various levels of leadership who are the assigned leadership of that particular administration. But that does not in any way express any kind of change of the notion of career staff working these cases and then being reviewed by higher-level employees.

Senator AKAKA. Chairman Voinovich, I wish to note for the record that staff from our Subcommittee asked twice to visit OSC and were told no. However, the request was accepted just a few days before this hearing. Mr. Bloch, can you comment on that?

Mr. BLOCH. Yes, Senator Akaka. My understanding was that my congressional affairs person, Cathy Deeds, had a conversation with staffers in the Senate who heard about the people that were already at our Agency from the House, who had requested to be able to come over, a bipartisan group, to look through our files and talk to our career staff. And they asked, well, can we come over too, and we said yes. I was requested, and I said absolutely, but we want

to make sure they don't come in midstream and not hear the speeches of the career staff and have to reinvent the wheel in the middle of things, so let's make sure they have their own time to come over—we were talking early May—and that's the last I heard. There were two conversations, and I never said no. Absolutely never said no, and was happy to have them over any time they want to come over. We certainly welcome them. We had nothing to hide with the House, and we have nothing to hide with the Senate.

Senator AKAKA. Thank you. Mr. Chairman, my time has expired.

Senator VOINOVICH. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

Just to summarize our previous discussion, basically it seems to me you have acknowledged that it is the policy of the Federal Government that adverse action not be allowed to be taken against employees based on their sexual orientation.

Mr. BLOCH. That is correct, Senator.

Senator LEVIN. But that there is nothing you will do to enforce that.

Mr. BLOCH. No, that's not correct. We will enforce that, and the first thing we'll ask the employee is—sometimes employees don't even know what they have in the way of evidence. And so we ask them—and this happens routinely; I've heard a number of cases where we're able to find out there may be some evidence that we're able to support under Section 2302 (b)(10).

Senator LEVIN. Evidence of conduct.

Mr. BLOCH. Evidence of conduct, actual or imputed.

Senator LEVIN. I understand. But in the absence of conduct actual or imputed, there is nothing you feel that you can do about it even though it is the policy of the government not to allow adverse action against employees based on sexual orientation alone. Is that just a fair summary of where we are?

Mr. BLOCH. Yes, because of the limitations of my authority.

Senator LEVIN. I understand. Now, would you recommend that we clarify the statute, since that is the way you read it, so that we can permit you to protect those employees against adverse action even in the absence of a showing of actual or imputed conduct?

Mr. BLOCH. Far be it from me, Senator Levin, to tell you how to do your job.

Senator LEVIN. I am just asking would you support that?

Mr. BLOCH. If you provide such a statute——

Senator LEVIN. No, I am sure you would——

Mr. BLOCH [continuing]. We will enforce it vigorously.

Senator LEVIN. I am sure you would. But would you recommend that change?

Mr. BLOCH. Well, that's a change that has to come at the level of those who are elected to make those decisions. I will not step in and try to make a comment about whether you should do that or shouldn't do that. My understanding is that it came before this body a couple of times, and it has not passed. But I certainly will enforce it vigorously if it passes, with regard to the Federal workforce.

Senator LEVIN. Given all the confusion about this, how you impute conduct in this area and all the rest, you are not willing even

to say yes or no that you would recommend a clarification of the statute in this area. You say it is just not your job.

Mr. BLOCH. I think we did clarify it as to the statute as it exists now. So I don't think there's a lot to——

Senator LEVIN. In terms of responding to my question as to whether or not, in the absence of direct or imputed evidence of sexual orientation conduct, you are not willing to give us your opinion as to whether or not we should clarify the statute to make it clear that, since it is the policy of the government that sexual orientation per se not be used to discriminate against people or be the basis of adverse conduct, you are not willing to say that you would recommend a clarification of the statute. Is that correct?

Mr. BLOCH. I am going to say that I support the Administration's position. I have told you——

Senator LEVIN. Well, what is the Administration's position on my question?

Mr. BLOCH. The Administration's position——

Senator LEVIN. On my question.

Mr. BLOCH. On your question, I do not know the answer to that.

Senator LEVIN. Thank you.

Mr. BLOCH. So I won't purport to speak for the Administration. And since I am, even though we're an investigative and prosecutorial Agency that's independent, I'm still part of the Administration. I think the Administration should speak for itself on these issues.

Senator LEVIN. Would you find out and let us know for the record?

Mr. BLOCH. I certainly will, if I find out.

Senator LEVIN. Thank you. The next question has to do with the issue which was raised about the transfer, the geographical relocation or reassignment of the OSC employees. I understand that Mr. McVay negotiated a draft settlement with the employees. Is that correct?

Mr. BLOCH. My understanding is that he was running with that most of the time, but I'm not sure if it was all the time.

Senator LEVIN. Was somebody else involved?

Mr. BLOCH. I think my deputy, Jim Renne, also was involved in that at one point. And then at the very end, I was involved in a very small period of time.

Senator LEVIN. All right, well, Section 9 of the draft agreement by whoever worked on it—whether it was one of you, Mr. McVay, or all three of you, Section 9 reads the following: That the employees agree to waive any and all rights, interest, and claims to file any complaints, actions, appeals, requests, or other attempts to obtain relief against the Agency, any entity of the Agency, any individual employed by the Agency itself, including any grievance or complaints process, the Equal Employment Opportunity Commission, any State or Federal court, public official's office, or administrative forum whatsoever.

So you were proposing that they waive any grievance or complaint that they would file with a public official's office. Are you familiar with that language?

Mr. BLOCH. Generally, yes.

Senator LEVIN. Now, there was an e-mail that was sent out saying that there was no intent that the First Amendment rights, WPA, or other statutory rights of employees be curtailed. Well, what was the intent of that language other than to curtail the right of those employees to file complaints with elected officials?

Mr. BLOCH. Senator, my understanding is that those employees were represented by counsel at a very able law firm, by Mr. Bransford, and this was language that had been used in a prior agreement he had with the Pentagon. This is very typical release language, that if you want to get extra things and come to a resolution, a give-and-take occurs. Everybody waives the rights and nobody admits to any liability. It's very typical.

Senator LEVIN. You know, waiving rights and liabilities, however, is something very different than not complaining to Congress.

Mr. BLOCH. Well, they already had complained to Congress.

Senator LEVIN. Are you familiar with the law about this subject? Are you familiar with Section 620, which is put into almost—or a similar provision, which is put into every appropriations law by Senator Grassley and all the, I think, a lot of other supporters around here of whistleblowers? Are you familiar with the language which says that no funds may be used to enforce an agreement, policy, or form if such policy, form, or agreement does not contain the following provisions: These conditions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by—and then they list a number of provisions of the code, including disclosures to Congress. Are you familiar with the annual language in the appropriations bill prohibiting you from enforcing, implementing any agreement which contains the waiver of the type that you had in this draft agreement?

Mr. BLOCH. Senator, if you're referring to the no-gag statute or rule, I am familiar with that. I believe that there is serious question as to whether it applies to agreements to terminate employment or the relationship between employer and employee, and there's significant dispute as to whether it applies at all to the situation at hand. However, we certainly did not run afoul of that because this is a negotiated agreement. If they want to propose language—which they did, and this came from one of Mr. Bransford's agreements with the Pentagon; we were not trying to do anything illegal, we were simply trying to, as amicably as possible, resolve any differences.

Senator LEVIN. So they proposed this language? This didn't come from you folks, it came from the employees?

Mr. BLOCH. Senator, I cannot honestly tell you at what stage what draft came from whom. I know that there was drafting going back and forth. All I do know is that the original language came from an agreement Mr. Bransford had signed off on on behalf of a client with the Pentagon settlement.

Senator LEVIN. Thank you. My time is up, Mr. Chairman.

Senator VOINOVICH. Mr. Bloch, I have no further questions for you. I will defer to Senator Akaka or Senator Levin to maybe have another round of 5 minutes.

Senator AKAKA. Thank you, Mr. Chairman.

Mr. Bloch, following up on the issue of sexual orientation discrimination, how many complaints have been filed by employees claiming sexual orientation discrimination since January 2004? And, what were the results of OSC's review and investigation of those complaints?

Mr. BLOCH. Senator, we get about a handful of these a year, 10 to 20. They are about 13 percent of the Section 2302 (b)(10) claims we get, conduct discrimination claims. They are less than a tenth of a percentage point of the overall allegations we get. We handle each one carefully. We've received approximately 20 to 25 since I have arrived. We have investigated those. Some are still in the investigation phase that are either in the Investigation and Prosecution Division going for full prosecution or they are still being investigated in the Special Projects Unit and have not made it to the Investigation and Prosecution Division. So there are cases that are in the Agency that have gone forward since my arrival in this area of sexual orientation discrimination allegations.

Senator AKAKA. Concerning your efforts to reduce the backlog, I believe the overall referral rate of complaints remains at about 10 percent, plus the number of disclosure cases referred has not doubled. What is the backlog of Prohibited Personnel Practices as defined by Congress?

Mr. BLOCH. Well, we have statutes with deadlines—for instance, under Prohibited Personnel Practices, we have to make a reasonable grounds determination that a prohibited practice occurred within 240 days of the filing. Under the disclosure, whistleblower disclosure statute, we have 15 days to make a substantial likelihood determination that the illegality or waste, fraud, and abuse occurred. We don't have any deadline under Hatch Act, but we impose our own, if you will.

Our concern about backlogs goes much further than statutory deadlines. We feel that if a case gets over the age of 60 to 90 days in the intake unit, it's going to get stale. Witnesses may leave the government, people may not have memories of things, so we want to act quickly on claims. We indeed doubled the number of whistleblower disclosures that went to agencies in my first year. It went from 14 in 2003 to 26 in 2004, and my desire is to increase that even above that.

And the way we were able to do this was we got more efficient and we also lowered the bar by changing the internal legal definition of what substantial likelihood is. It used to be this really high standard that almost came to the level of reasonable doubt, like they have in criminal trials, and we said that doesn't make common sense since we don't have authority to actually do the investigation that the inspectors general do within the Agency. So we lowered the bar and said it's a likelihood, a probability, that when they actually get the case at the inspectors general or wherever the Agency sends it when we refer it, that it will be established by a preponderance of evidence.

So a probability that there will be a preponderance of evidence, a lowering of the bar, and we think this is going to be a net plus for whistleblowers and for the public.

Senator AKAKA. OSC serves a valuable role in protecting Federal employees and applicants from Prohibited Personnel Practices.

However, it is unclear what protections employees at OSC have when reporting allegations of Prohibited Personnel Practices or protected disclosures. Would you please explain what redress options are available to OSC employees and whether these options afford OSC employees the same or similar protections that your office makes available to other Executive Branch employees, such as a comprehensive investigation and representation?

Mr. BLOCH. Senator, like all agencies, we have an EEO program that is administered by the career staff. We have a program, if you complain to our office, to the managers of the Agency about a Prohibited Personnel Practice or a whistleblower disclosure concerning OSC, that it will be handled by the management of the Agency if it concerns the career staff. And if it concerns the managers of the Agency, such as myself, it will be passed on to the President's Council on Integrity and Efficiency (PCIE).

We've had two complaints since I've been there. One was by a career employee about my predecessor, and that was handled by our office and resolved satisfactorily. And the other is the one that was filed recently against me by the affected employees in the reorganization, which, again, is unfortunate, but that's certainly their right. And we forwarded it on to the PCIE and we're very happy that they have it and we'll let them determine it, we'll cooperate fully.

Senator AKAKA. Thank you, Mr. Chairman.

Senator VOINOVICH. Senator Levin.

Senator LEVIN. Just a couple of questions. Thank you, Mr. Chairman.

Just to conclude that nondisclosure agreement line of questions, we understand that the employees objected to that language and asked that it be removed and that there was objection on the part of you folks to removing that. Is that accurate?

Mr. BLOCH. The way I understand—to give you my best recollection truly on that there was a lot of back-and-forth and I wasn't privy to most of it. It was reported to me after the fact. My recollection is that there wasn't fundamental disagreement about the release language, but rather there was some additional language that was batted back and forth in terms of what kinds of complaints would be filed and so on. And we accepted—ultimately we accepted the language the employees proposed through their attorney to maintain their ability to do whatever they wanted as far as continue to complain to Congress—they already had before we even started to negotiate, and we understood that. And we intend to cooperate fully.

So we eventually said your language is good, we'll go with that, and then they didn't want to settle in the final analysis.

Senator LEVIN. For other reasons than this?

Mr. BLOCH. I don't know the honest answer to that, what the other reasons were. But yes, possibly.

Senator LEVIN. My last question is about an article that appeared in the *Wall Street Journal* recently, "Crying Foul at Whistleblower Protector." One of the allegations which you responded to in the article, is about the hiring of a former headmaster of a boarding school attended by your children as a OSC consultant. I

just have two quick questions on that. One is, was that a competed contract?

Mr. BLOCH. OK. The answer to that is no, it was an intermittent consultant, pursuant to 5 USC 3109, and we complied with all Civil Service laws, rules, and regulations. It was all signed off on by our contracting officer and our human resource department and Bureau of Public Debt in the Department of Treasury.

Senator LEVIN. Got it. And second, there was a FOIA request for the report on work from Mr. Hicks to you, which was completely redacted when you sent out the answer to the FOIA request. It's called "Report on Work," to you from Mr. Hicks, dated September 16, 2004.

This is the copy you sent out in response to the FOIA request. It is not too helpful. It has B5—that is the only thing that is unredacted.

In any event, my question is will you submit to the Committee an unredacted version of this report? That is my question.

Mr. BLOCH. Senator, I relied on the head of our Legal Counsel and Policy Division who handles all FOIA matters and the legality under FOIA, and it was their recommendation that there were exceptions and exemptions to the FOIA request concerning specific pre-decisional materials. So I would have to get back to you on that and have my staff confer with your legal staff about what we'll do. I don't want to make a commitment there and step in something I shouldn't step into.

Senator LEVIN. That would be fine. You just let us know if you will do that.

Thank you, Mr. Chairman.

Senator VOINOVICH. Thank you. Senator Carper.

Senator CARPER. Thanks, Mr. Chairman.

OPENING STATEMENT OF SENATOR CARPER

Senator CARPER. I have a couple of questions I would like to ask, but I would ask you, if you don't mind, to just take a minute and share with me what you would like for us to take away from this hearing. If there are only one or two things that we remember from all the things that you have said, what might be those one or two top items to remember?

Mr. BLOCH. Senator, I think the top thing to remember is that we really have done an excellent job, and it's because of the career staff. And anytime some of these unfortunate statements have been aired in the press that are nothing but rumor and innuendo, it really isn't helpful. Because it's the career staff who's done such an excellent job, and it's really kind of denigrating and insulting to them to think that they would just let some guy like me come in and tell them not to do their job correctly. They're not going to do that. They've done a wonderful job. And they're very hurt by the kinds of things that are being said by people, that they're throwing cases in the river, that they're doing bad things. It's absolutely false, it's denigrating, and it's not fair to them.

And that's what I care about, and I hope you take that away from what I'm saying, is that they're the ones that count. And it shouldn't be about me, it should be about them.

Senator CARPER. All right. The first question I would like to ask you is if you could just talk a little bit about backlog. And let me just ask, what was the situation at OSC when you arrived, when you were confirmed, with regard to backlogged cases? And if you have already addressed this, I apologize. I would just ask you to do so again. What was, when you delved into it, the reason for the backlog that existed? What steps have you taken or has been taken under your leadership to address that backlog? And finally, do you believe that OSC has or will soon have the capability to resolve these cases more quickly? And why should we have cause for hope or no hope?

Mr. BLOCH. Senator, thank you for that. We have experienced an unprecedented year of reduction in backlogs while at the same time increasing the rate of referral during that process, doubling it, of positive cases. So we think that's a good model for looking at the good that is in cases rather than trying to get rid of them. We successfully negotiated the waters of bureaucracy to strike a good balance between procedure and results and to look at whether something actually contributes to the end result. The employees came up with the solutions, we've implemented those solutions by reducing unnecessary referral memos. We sometimes would see 10-page referral memos. It might take 2 to 3 weeks for someone to refer something out of the intake unit because they were so busy doing something else, and then that would be duplicated by the lawyers and investigators who would get the case to prosecute it. And so we saw a duplication going on, and we wanted to make sure we were more efficient than that. And yet we contributed to the overall fairness and result to the employee.

There is reason for hope because we reduced the backlog in 1 year by 82 percent, while doubling the rate. And we can continue to do this into the future by having a better structured Agency, more agile and cross-trained, and that's what we've tried to do in the reorganization.

Senator CARPER. You talked a little about victims of Prohibited Personnel Practices. Do you think that you have made it easier during your tenure at OSC for whistleblowers who do believe that they have been victims of Prohibited Personnel Practices, do you think you have made it easier for them to come forward? And if so, how?

Mr. BLOCH. Yes, absolutely, Senator. We have made it easier. We lowered the bar for what we would accept as a claim, the whistleblower disclosure. We reduced it from a very high standard of proof, which was approaching reasonable doubt, down to a preponderance of evidence based on what the Agency would ultimately investigate, since we don't have investigatory authority for the whistleblower disclosures themselves, although we do on the Prohibited Personnel Practices side. And so we did make it easier for them to file claims, and the proof of that is we doubled the number that we sent to the agencies as substantiated whistleblower claims.

Over and above that, we have stepped up our efforts to do outreach to employees to say we really care, and we want you to file these claims. And we're doing that routinely. I'm giving speeches on it, putting out op-eds about it. There's an op-ed in this week's *Federal Times* about the need for protection of whistleblowers and

how much we welcome them, and the whole history of whistleblowing and how important it is to our country.

Senator CARPER. Mr. Chairman, I know my time has expired or is just about to expire. Could I ask one more question?

Senator VOINOVICH. Sure.

Senator CARPER. My last question, Mr. Bloch, is, as I understand it, there has been a restructuring during your tenure of OSC field offices. I don't fully understand what the restructuring is and I don't know that I need to do, but I have been led to believe that restructuring has compelled some of the affected employees to leave the Agency.

Senator VOINOVICH. Senator Carper, I might just say that there has been extensive testimony by Mr. Bloch on that issue. Maybe you could just summarize it for Senator Carper, OK?

Mr. BLOCH. All right.

Senator CARPER. And before you do, let me just ask my question as part of it. Are you concerned about the impact that these departures will have on your efforts on OSC's case backlog, and are you concerned about the potential impact on employee morale. If you could just address those two issues, I would be grateful. Thank you.

Mr. BLOCH. Thank you, Senator. We are very concerned——

Senator VOINOVICH. Two questions that weren't asked, Senator Carper. That is great.

Mr. BLOCH. We are very concerned about employee morale. We've implemented new policies. I have an employee advisory committee that I established last year, that I receive their recommendations and then we implement their recommendations. We've changed policies. We're implementing a new student loan repayment program, retention bonuses, and a cross-training program. We're having an offsite retreat in June. All staff are coming in. We really need to pull back together and once again recognize and realize the mission of the Agency.

We are very concerned about those employees who were not able to go along with our reorganization for one reason or another—their personal lives, they wanted to stay in Washington, they got other jobs. We tried to help them get those jobs. Again, we're very concerned about that. But this was about an overall management decision that we felt we really needed to take the Agency in a new direction, a positive direction, and a winning direction. And we think we're there, and we've hired new employees to be able to make up for the shortfall and they're—I think we've got them all in place now.

Senator CARPER. Thanks, Mr. Bloch, and Mr. Chairman, thanks for the chance to ask these questions.

Senator VOINOVICH. Thank you, Senator Carper.

Senator Akaka has a couple more questions that he would like to ask.

Senator AKAKA. Oh, thank you so much, Mr. Chairman. You have been most generous in granting this hearing and granting additional time.

Mr. Bloch, Military and Professional Resources, Inc. (MPRI) review called OSC's Alternative Dispute Resolution unit, "an invaluable tool," and stated that the unit's mediation practice is "a growth industry which should be expanded."

These words of praise are consistent with the findings of a GAO report I requested on the use of ADR in Federal agencies. However, in March, the ADR unit employee responsible for this praise resigned rather than accept the involuntary relocation to Detroit. Since most Agency officials with authority to mediate are located in Washington, what was the basis for moving the sole ADR employee to Detroit?

Mr. BLOCH. Senator, when I first arrived at the Agency, I expressed the same kind of praise for the ADR program and the desire to expand it. I told all of my employees that I wanted to get them to be involved in it. Some of them are trained in this and have done some team ADR. So we talked with Linda, who is our ADR person, a very capable person whom I've relied on greatly, about expanding the program and we've been working on that. This was part of our overall vision and mission, was to expand it by making the Detroit office a leader, a center for the country, where people would come in and have more face-to-face, because it was my sense from 15 years of law practice that the more you got people in the room together, the more chance of success you had. And so I wanted to step up our use of ADR and make that a national center for that.

At the same time, we wanted others in the other field offices to have some ability to work as a team. And we've actually been able to do that since Linda left—and we were very sorry to see her go. And in fact, when we had an employee advisory committee meeting back—I can't remember the exact dates here, maybe March or February—she was a part of that. And I was trying to express to her that we were interested in keeping ADR in D.C. if all these other employees did not end up going to Detroit and didn't accept the reassignment.

There was apparently—and again, I can't speak for others and why they did things or didn't do things, but all I know is there was not an approach there that she seemed to be interested in staying. And that is unfortunate. But we did make that clear that we would be very willing to work with the employees and to do something in D.C. because of the change of circumstances when the employees did not take the reassignment—or if they did not.

Senator AKAKA. Mr. Chairman, I have one last question. Mr. Bloch, it has been alleged that under your direction the Complaint Examining Unit has dumped an increasing number of cases into the Investigation and Prosecution Divisions, IPDs, without giving adequate review of the complaints. As a result, the backlog in the IPDs has doubled, especially since the cases referred for investigation require significantly more time and attention than those being considered in CEU because CEU employees cannot discuss the cases with the complainants.

My question is, how many cases are in the IPDs and how are you going to fully investigate them, especially now that seven experienced career staff are no longer at OSC?

Mr. BLOCH. Senator, it would be a real surprise to my employees in the CEU that they don't discuss cases with employees. I was just sitting in one's office about 3 days ago and they said, I was on the phone with an employee for an hour today. And I was congratulating her on her years of experience and ability to interact with

employees and how important that is. And they were asking when are we going to get the new customer service unit to take some of that burden off them, and we were coming up with solutions there.

They interact with employees. There's been no dumping whatsoever. There was no effort to simply transfer one backlog to another. The backlog refers to cases that are over-aged. It doesn't refer to number of cases. If we got a million cases in tomorrow in OSC, they wouldn't be in backlog because they're not old. They're moving through the Agency. Now, if you can't move the million and they get bottlenecked, that's a problem. That becomes a backlog over time, when they become over-aged. We do not have that problem with the cases we recently have referred to the IPDs.

However, there is what we called, after we finished our backlog reduction process last year, there is—what we discovered was what I call a "silent backlog" in the IPD, which is cases that are over a year to 2 to 3 and sometimes 4 and 5 years old that have never been filed with MSPB, and some of them have been just sitting essentially in corners in a pile without any action taken on them, some of which had already been slated for 16-day closure letters, but just no action had been taken. And so we're really stepping up our efforts to make sure that doesn't occur anymore and that we don't have this so-called "silent backlog" in the IPDs that I inherited.

But we don't have another problem in terms of the cases that we referred, and we certainly don't engage in any dumping. And that's just an absolute fact.

Senator AKAKA. Thank you very much for your responses.

Senator VOINOVICH. Thank you, Mr. Bloch, we really appreciate your being here and your candor in answering our questions. Without objection, I would like to submit in the record the May 17, 2005, letter from Tom Davis and John Porter to Mr. Bloch commending his efforts to improve OSC's service to whistleblowers. To my understanding, that is—was it their staffs that were in your shop going over things?

Mr. BLOCH. Theirs and others. Congressman Waxman and some others, yes.

Senator VOINOVICH. Then a May 18, 2005, *Government Executive* article on OSC. And the May 11, 2004, *Stars & Stripes* article on OSC's involvement in the whistleblower case dealing with defective welding on the *USS Kitty Hawk.* And the April 29, 2005, *Federal Times* article, "OSC's Involvement in Reemployment of Reservists." [1]

We will leave the record open for Senators if they want to submit anything for the record, and then we will give people a chance, if they have some differences of opinion on the record, to submit their statement so that we have a complete statement here for this Subcommittee in regard to your responsibilities there at the OSC.

Mr. BLOCH. Thank you, Mr. Chairman.

Senator VOINOVICH. Thank you very much for coming.

[Whereupon, at 11:48 a.m., the Subcommittee was adjourned.]

---

[1] The letter and articles appear in the Appendix on page 210, and 75 through 94, respectively.

APPENDIX

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

Testimony before the Senate Oversight Subcommittee on Management, the Federal Workforce and the District of Columbia

"Safeguarding the Merit System: A Review of the U.S. Office of Special Counsel"

May 24, 2005

Hon. Scott J. Bloch

Special Counsel

U.S. Office of Special Counsel

Mr. Chairman, Senator Akaka, distinguished Members of the Subcommittee, In *Julius Caesar,* Shakespeare's immortal drama of political treachery and leadership, there appears these famous lines,

"There is a tide in the affairs of men which, taken at the flood, leads on to fortune. Omitted, all the voyage of their life is bound in shallows and in miseries. On such a full sea are we now afloat, and must take the current when it serves or lose our ventures."

Senators, our country is at the high tide of homeland security and national security affairs, and what we do and how we meet the public trust will determine in some part the success of the American venture of limited, self government. Our ventures into reform and innovation in the federal workforce have set us on a course toward greater efficiency, greater accountability, and I am proud to be a part of the solutions with you.

One courageous whistleblower, Kristin Shott, certainly understood the high tide of safety to the public and our state of war when she reported to us the nonconforming welds and deficient training on the aircraft carrier USS Kitty Hawk, which could have endangered the fighter jets and other aircraft and personnel critical to the success of our military. As reported a few weeks ago in *U.S. News and World Report*, Ms. Shott has suffered greatly for carrying on in her role of whistleblower. It has taken a serious toll on her and her family, but we have done everything in our power to protect her, and are working with the Navy to get additional corrective action on her behalf. We do this on behalf of each person who has a reprisal claim or other Prohibited Personnel Practice (PPP).

An FAA controller certainly understood the venture of American commitment to air safety and courage when she reported to us that her superiors failed to properly investigate or report near misses

at a major international airport. In layman's terms, these planes were almost running into each other about every other week. However, many of the incidents went unreported. These allegations were found to meet our substantial likelihood test and were sent to the FAA for investigation.

To me this is a perfect example of a case where a civil servant was willing to take on "the establishment" to protect us all. She believed in this job and more than anything, believed in our safety. For me, this is most gratifying and is why I practiced law and why I am now in public service -- because responsible citizenship must be championed by those of us who proclaim a commitment to principle over power, to the rule of law over the will to power.

Another conscientious whistleblower took on the U.S. Air Force to protect his fellow service members from having the engine fall from one of our military's main transport plane. OSC referred allegations that employees at the Department of the Air Force approved a request for repair to a main engine component of a C-5A Galaxy aircraft which was improper and jeopardized the flight safety of that aircraft. The whistleblower alleged that, despite warnings from the component manufacturer and the Air Force's own Technological Industries Office that the repair would be unsound, field mechanics were permitted to make the repair to the aft engine mount spherical bearing, which serves as one of three points that hold the main engine in place, and the aircraft was returned to service.

The Air Force's report confirmed the repair was made, but concluded that it did not pose a danger to public safety. My report to the President and the oversight committee in Congress stated that the Agency's conclusion that the repair made to the aft engine mount bearing "represents no measurable increased risk to the C-5 fleet or the public at large" does not appear reasonable. In light of this determination, and because this matter involves the safety of a military aircraft currently in use, I asked the Air Force to perform an independent investigation into the particular repair at issue in this matter. In addition, I recommended further inquiry regarding the steps, if any; the Agency has taken to survey the C-5 fleet as recommended in the technical report.

Consider the TSA employee who alleged that she was subjected to a retaliatory investigation, placed on paid administrative leave, and ultimately, terminated because she reported to TSA's Office of Inspector General that her supervisor illegally brought his privately owned assault rifle onto government premises. Under a settlement, without admitting liability, TSA rescinded the employee's termination, reassigned her to a new airport and agreed to pay the large majority of the relocation costs, raised her salary by 5%, and paid her attorney's fees.

Consider Judithe Hanover Kaplan, former Colonel, U.S. Air Force, who was a Veterans Administration (VA) nurse with a Ph.D. and an unblemished record who was fired by VA when she was called away on reserve duty. It took her two years to get justice, but when I took office one of my first acts was to take swift action on that case. We filed it as the first ever Uniformed Services Employment and Reemployment Rights Act (USERRA) case before the Merit Systems Protection Board (MSPB) in the history of OSC. We were able to obtain more than she had asked for in back pay and interest and made an example of those employers who dishonor those who protect us.

OSC is aware of taking the current when it serves to protect whistleblowers, to step up protections for returning service members, and to vigorously prosecute illegal partisanship and illegal personnel practices to bring greater integrity to our federal government. The problem of good government is not divided by party but by commitment to principle.

John Adams said, "Good government is an empire of laws."

As you know, the independent Office of Special Counsel is the guardian of the federal merit system principles. I share with you a one hundred percent commitment to protecting federal whistleblowers, the merit system principles, and bringing justice to the federal workforce through vigorous enforcement of our empire of laws.

During my confirmation hearing in late 2003, and shortly after I became the Special Counsel on January 5, 2004, it became apparent that two major problems confronted the Agency; a serious backlog of cases and a cumbersome organizational structure. It was not patently clear whether the problems stemmed from procedural inefficiencies, lack of adequate personnel in the correct units, or a combination of these.

I have often quoted Gladstone's famous saying, "Justice delayed is justice denied." My publicly-stated pledge has been to give full, fair, and expeditious resolution to all cases, especially the unacceptably high number in backlog. These ideals can only be served by reducing the historic backlog in this Agency that I inherited. These backlogs serve only to impede employees' ability to secure justice in a timely manner. My recent reorganization is dedicated to the above-stated goals. Indeed, given the widespread press about these historic backlogs and the GAO report (GAO 04-36) issued shortly after I assumed office, it is indeed ironic that we are now being subjected to such scrutiny for having addressed the backlog, studied the source of the problems, and embodied a creative and long-lasting strategic solution to the problem that will redound to the credit of the federal workforce for years to come.

I have kept my pledge to Congress and federal employees, and am pleased to report that we have made tremendous progress in our first year.

Backlog Resolution Project

One of my first priorities when I began office was to address and eliminate the backlogs in the Intake Unit (CEU), Disclosure Unit, and Hatch Act Unit, within one year.

At the same time, I made it clear that ultimately the Agency would reorganize into a leaner, well organized operational unit. The Agency seemed to lack a vision and needed performance goals and standards. Personnel did not seem strategically placed to solve Agency challenges. Agency structure was process oriented, not results driven. What was clear even then was that the cumbersome structure was in large measure responsible for the lingering backlogs.

I created a new Special Projects Unit (SPU), in April 2004, which managed Agency resources and directed the backlog resolution efforts. The SPU was the "fireman" of the Agency. SPU directed that the more experienced litigators in the Agency from the investigation and prosecution divisions review and make final determinations on cases. Because of SPU's exemplary efforts in helping reduce the OSC case backlog, they now are the Agency's official watchdog on case backlogs, particularly on the total PPP and DU cases, and will ensure that OSC staff resolves any large inventory of cases before they become backlogged.

In addition to the SPU, I created an Employee Advisory Committee where I meet regularly with employee representatives and go over their concerns and ideas, which have led to internal policy changes and creative solutions to Agency concerns nationwide. We also hired an independent assessment team to study the policies, procedures, and personnel of the Agency and make strategic recommendations. Its intent was to give me the best possible advice on how to restructure and manage this Agency.

Backlog Results

The results of the past year were unprecedented. As we announced on May 17, 2005, in detailed response to the GAO report, I am pleased to report that we reduced the overall Agency backlog by 82%, from 1121 to 201 cases (in the Intake and Disclosure units) by the end of Calendar Year 2004. The GAO response provides more detailed numbers.

We were able to do this without sacrificing quality. We gave a full and fair resolution to all claims, such as the TSA whistleblower, the Air Force employee, and Ms. Hanover Kaplan. In fact we were able to provide even more justice to complainants. *During the backlog resolution project, we doubled the historic percentages of internal referrals for Prohibited Personnel Practice (PPP) cases.* This meant an even higher percentage of claims were investigated. *For whistleblower disclosures, we nearly doubled the number of cases that were referred back to Agency heads or Inspectors General for further investigation.* The credit for this Herculean effort goes to my career staff that worked long and hard to meet our goal.

Disclosure Unit

The Disclosure Unit is responsible for reviewing the information submitted by whistleblowers, and advising the Special Counsel whether there is a substantial likelihood that the type of wrongdoing described in § 1213(a) has occurred or is occurring. Where a substantial likelihood determination is made, the OSC must transmit the disclosure to the Agency head for further action and investigation. The Agency report and OSC's conclusions are forwarded to the President and appropriate Congressional oversight committees. An example is Kristin Shott's disclosure about faulty welding on the USS Kitty Hawk, which I transmitted on May 9, 2005.

The Disclosure Unit's more complex cases are very labor-intensive and often require the attention of more than one attorney. These cases can take more than a year to complete for a number

of reasons—agencies routinely request additional time to conduct the investigation and write the report, whistleblowers request additional time to prepare their comments, and OSC's professional staff must review the report to determine whether it contains the information required by statute, the findings are reasonable, and to prepare associated comments. It is important to note that the historic backlog of cases in the Disclosure Unit further lengthened and delayed this process.

This Unit had severe backlog issues, and with hundreds of cases sitting in backlog, justice was not being given to federal whistleblowers. Although we processed hundreds of disclosures last year, a majority of these were slated for closure by my predecessor as low priority cases as far as severity of potential harm. Many of these cases had languished in the Agency for several years, and were the focus of the initial backlog resolution efforts. Even so, we nearly doubled the number of referrals during the same time.

Hatch Act Unit

Our Hatch Act Unit has reduced backlogs of older cases to a very manageable level, provided a record number of advisory opinions - some 600 more than the prior year, done extensive outreach during an election year and been a model of non partisan enforcement. Truly this unit has embodied principles of good government and deterred coercion and illegality at a time of harsh partisan rhetoric in the country.

Agency Reorganization

Under my authority in 5 U.S.C. § 1211 and § 1212, I announced an Agency reorganization plan consistent with OSC mission, in early January 2005. The reorganization was needed to ensure no future case backlogs would occur and to create internally consistent procedures. I consulted with all the senior management as well as my staff repeatedly throughout the past year.

The independent assessment report was not the only source of information that I used to reorganize the Agency. It was only one tool among several used to help me to decide how to re-shape the Agency to make it more efficient and more about promotion of good government through leadership and example. My management decisions were made by using and consulting all sources of information afforded to me over the first year as the Special Counsel.

The overall paradigm, consistent with the mission of the Agency, was to delayer the current OSC organization structure; we had an "SES sandwich" at OSC. All SES and several GS-15 level supervisors were in Washington and they took turns reviewing what had already been reviewed. I wanted to "power down" decision making to the lowest levels of competence versus having repeated reviews, endless written memoranda and needless meetings by managers. OSC was a D.C.-centric organization that some saw as "cherry picking" all of the good cases away from the existing field offices.

The basic sense of employee fairness and efficiency was suffering. The use of investigators was not consistent, and in many cases not efficient; attorneys were requiring too much writing and were often duplicating the efforts of investigators. Investigators reported a sense of having been cut out of the process. We have sought to resolve these problems.

The restructuring included a new field office in the upper Midwest, in Detroit, for geographic representation throughout the U.S. With the various states assigned to this office under the new plan, this office will handle the same number of cases as the other field offices. This has generated much interest and concern by some, but I assure you there is good reason for the new office. Pursuant to my authority (under 5 C.F.R §§ 335.102 and 317.901), the management directed reassignment was based on the precepts of strategic management of human capital. As you know, relocation is a fairly common practice in the federal workplace. In FY 2003, for example, 22,000 federal employees were relocated, according to a recent OMB report, as reported in GovExec.Com on January 27, 2005. Recently, I read reports that the CIA made a decision to reassign many employees to Denver for some of the same reasons.

Please keep in mind that the new field office is only one of many parts of the reorganization that will help OSC better meet our mission. We are preparing to change and implement new standard operating procedures that will cut out needless reviews and meetings and power down decision making to those employees in the best position to make decisions. This is a large undertaking and can only be accomplished with strong SES leadership in the field to ensure that these changes actually occur and become the culture of OSC.

At the same time we will implement a vigorous new training unit that will cross-train personnel to work in other areas of the law. In the past, the lack of cross-trained personnel was a major impediment to attacking backlogs. The new smaller modular field offices will be more easily trained and capable of addressing future backlogs. Without senior leadership in the field offices, the new standard operating procedures and cross-training would have little chance of success.

In addition, a new customer service unit will be created to better serve the public and federal employees. Having specific personnel assigned for this purpose will help OSC gain a reputation of better customer service within the federal workforce.

USERRA

Another important responsibility over which we have jurisdiction is enforcement of USERRA within the federal government. USERRA is the law that guarantees civilian job protections to those service members that go on active duty and want to return to their job when their service ends. With the historic number of mobilization and the demobilization of service members, some have faced unfair and illegal employment practices after their active service. I have zero tolerance for violations of USERRA and will enforce the law vigorously. Although there have been several cases in the Agency for years, I am the first Special Counsel to take MSPB actions against agencies that were not in compliance with this important law.

Because of OSC's aggressive stance, Congress decided to give us additional responsibilities under this law and we set up a new USERRA unit within OSC. Service members that believe that their USERRA rights have been violated can now come directly to OSC with their complaints. Before this new law (P.L 108-454), members had to go through Department of Labor's investigative process and then after months and even years were given the option to seek OSC's involvement. This new arrangement marries up OSC's investigative and prosecutorial role – which do not work as effectively when separated.

Why have we done all of this? It is to better serve the federal workforce, the whistleblowers, returning service members, the brave people who help us function as a country, those who protect us and are often unsung and sometimes victimized for their valor in public service.

We, at the Office of Special Counsel believe in an empire of laws, which create good government and inspire integrity and public trust. This can only be accomplished at the OSC by properly aligning our Agency to prevent recurrent backlogs.

Indeed, as Shakespeare said, we must take the current when it serves, and we have in order to improve the merit system and our government's overall safety and efficiency. OSC's proud career staff deserves the credit for taking the rising tide of cases and finding the good that is there in so many cases, have given us reason for hope in the merit system.

Thank you very much.

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

May 31, 2005

The Honorable George Voinovich
Chairman
Subcommittee on Oversight of Government Management,
The Federal Workforce and the District of Columbia
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for the opportunity to explain my successes and management decisions at the May 24, 2005 hearing, "Safeguarding the Merit System: A Review of the Office of Special Counsel." In response to your request, I submit the following answers and materials for the hearing record.

First, in response to your questions about the management directed reassignments, please refer to Attachment A for a chart that lists the status of OSC personnel who were asked to be reassigned to Detroit and other OSC field offices.

Second, in response to a question about our legal review of "sexual orientation," as it relates to the federal merit system, please refer to Attachment B which includes:

- Copy of four Executive Orders
- Copy of Morales v. Department of Justice, 77 M.S.P.R. 482 (1998)
- Copy of Department of Justice, Office of Legal Counsel opinion, 7 U.S. Op. Off. Legal Counsel 46, dated March 11, 1983
- Copy of OSC Press Release on Legal Review of Discrimination Statute, dated April 8, 2004

Third, I would like to respond to the letter and fact sheet addressed to you and your colleagues from the advocacy groups, Government Accountability Project and Public Employees for Environmental Responsibility, which was critical of my employees, my management decisions, and unfairly characterizes my May 17, 2005 response back to the Government Accountability Office (GAO). Please see my response in Attachment C.

I share with you and Senator Akaka a total commitment to protecting federal whistleblowers, the merit system principles and bringing justice to the federal workforce through vigorous enforcement of existing laws. I look forward to working with the Subcommittee on these shared principles.

Sincerely,

Scott J. Bloch
Special Counsel

Attachments

Attachment A

REORGANIZATION REASSIGNMENT ACTIONS

NAME	ACCEPT	DECLINE	REMARKS
Lenny Dribinsky DC Field Office	X		Accepted reassignment.
Bill Reukauf San Francisco Field Office	X		Accepted reassignment. Currently overseeing the field operations of San Francisco, Dallas and the Midwest Field Offices (MWFO)
Caprice Andrews Dallas Field Office		X	Declined management directed reassignment.
Joan Howell Dallas Field Office	X		Declined Dallas position, accepted an HR Specialist position in the CEU.
Michael Lipinski Dallas Field Office	X		Accepted Dallas position, requested reassignment to the MWFO, reassigned to MWFO.
Alberto Rivera Dallas Field Office		X	Accepted an Attorney position with the Federal Trade Commission.
David Brooks Midwest Field Office		X	Accepted an Attorney position with the Department of Transportation.
Travis Elliott Midwest Field Office	X		Initially accepted reassignment to MWFO, then accepted another Attorney position with the Defense Contract Audit Agency.
Ronald Engler Midwest Field Office	X		Initially accepted reassignment to MWFO, then accepted another Attorney position with the Department of Transportation.
Sharon Lee Midwest Field Office		X	Declined management directed reassignment, retired under Discontinued Service Retirement.
Linda Myers Midwest Field Office		X	Accepted an ADR Specialist position with the Department of Air Force.
Cary Sklar Midwest Field Office		X	Declined management directed reassignment.
Brian Uryga Midwest Field Office	X		Initially accepted reassignment to MWFO, then accepted Attorney position with the Department of Transportation.

Attachment B

Please see attached copies of documents related to legal review of sexual orientation protection

Executive Order 11478--Equal employment opportunity in the Federal Government

Source: The provisions of Executive Order 11478 of Aug. 8, 1969, appear at 34 FR 12985, 3 CFR, 1966-1970 Comp., p. 803, unless otherwise noted.

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

Section 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

[Preamble deleted and sec. 1 amended by Executive Order 12106 of Dec. 28, 1978, 44 FR 1053, 3 CFR, 1978 Comp., p. 263]

Sec. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for periodically evaluating the effectiveness with which the policy of this Order is being carried out.

Sec. 3. The Equal Employment Opportunity Commission shall be responsible for directing and furthering the implementation of the policy of the Government of the United States to provide equal opportunity in Federal employment for all employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) and to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age.

[Sec. 3 amended by Executive Order 12106 of Dec. 28, 1978, 44 FR 1053, 3 CFR, 1978 Comp., p. 263]

Sec. 4. The Equal Employment Opportunity Commission, after consultation with all affected departments and agencies, shall issue such rules, regulations, orders, and instructions and request such information from the affected departments and agencies as it deems necessary and appropriate to carry out this Order.

[Sec. 4 amended by Executive Order 12106 of Dec. 28, 1978, 44 FR 1053, 3 CFR, 1978 Comp., p. 263]

Sec. 5. All departments and agencies shall cooperate with and assist the Equal Employment Opportunity Commission in the performance of its functions under this Order and shall furnish the Commission such reports and information as it may request. The head of each department or agency shall comply with rules, regulations, orders and instructions issued by the Equal Employment Opportunity Commission pursuant to Section 4 of this Order.

[Sec. 5 amended by Executive Order 12106 of Dec. 28, 1978, 44 FR 1053, 3 CFR, 1978 Comp., p. 263]

Sec. 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code, and executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions. This Order does not apply to aliens employed outside the limits of the United States.

Sec. 7. Part I of Executive Order No. 11246 of September 24, 1965, and those parts of Executive Order No. 11375 of October 13, 1967, which apply to Federal employment, are hereby superseded.

Sec. 8. This Order shall be applicable to the United States Postal Service and to the Postal Rate Commission established by the Postal Reorganization Act of 1970.

[Sec. 8 added by Executive Order 11590 of Apr. 23, 1971, 36 FR 7831, 3 CFR, 1971-1975 Comp., p. 558]

Presidential Documents

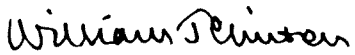
Executive Order 13087 of May 28, 1998

Further Amendment to Executive Order 11478, Equal Employment Opportunity in the Federal Government

By the authority vested in me as President by the Constitution and the laws of the United States, and in order to provide for a uniform policy for the Federal Government to prohibit discrimination based on sexual orientation, it is hereby ordered that Executive Order 11478, as amended, is further amended as follows:

Section 1. The first sentence of section 1 is amended by substituting "age, or sexual orientation" for "or age".

Sec. 2. The second sentence of section 1 is amended by striking the period and adding at the end of the sentence ", to the extent permitted by law.".



THE WHITE HOUSE,
May 28, 1998.

[FR Doc. 98–14689
Filed 6–1–98; 8:45 am]
Billing code 3195–01–P

Executive Order 13152

Further Amendment to Executive Order 11478, Equal Employment Opportunity in Federal Government

By the authority vested in me as President by the Constitution and the laws of the United States, and in order to provide for a uniform policy for the Federal Government to prohibit discrimination based on an individual's status as a parent, it is hereby ordered that Executive Order 11478, as amended, is further amended as follows:

Section 1. Amend the first sentence of section 1 by substituting "sexual orientation, or status as a parent." for "or sexual orientation."

Section 2. Insert the following new sections 6 and 7 after section 5:

> Section 6. 'Status as a parent' refers to the status of an individual who, with respect to an individual who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:
>
> - a biological parent;
> - an adoptive parent;
> - a foster parent;
> - a stepparent;
> - a custodian of a legal ward;
> - in loco parentis over such an individual; or
> - actively seeking legal custody or adoption of such an individual.
>
> Section 7. The Office of Personnel Management shall be authorized to develop guidance on the provisions of this order prohibiting discrimination on the basis of an individual's sexual orientation or status as a parent.

Section 3. Amend section 4 by substituting "and appropriate to carry out its responsibilities under this Order." for "appropriate to carry out this Order."

Section 4. Renumber current sections 6, 7, and 8 as sections 8, 9, and 10, respectively.

Section 5. Add a section 11 to read as follows:

> "Sec. 11. This Executive Order does not confer any right or benefit enforceable in law or equity against the United States or its representatives."

WILLIAM J. CLINTON
THE WHITE HOUSE,
May 2, 2000.

THE WHITE HOUSE

Office of the Press Secretary

(Chula Vista, California)

For Immediate Release June 23, 2000

EXECUTIVE ORDER 13160

NONDISCRIMINATION ON THE BASIS OF RACE, SEX, COLOR, NATIONAL ORIGIN, DISABILITY, RELIGION, AGE, SEXUAL ORIENTATION, AND STATUS AS A PARENT IN FEDERALLY CONDUCTED EDUCATION AND TRAINING PROGRAMS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 921-932 of title 20, United States Code; section 2164 of title 10, United States Code; section 2001 et seq., of title 25, United States Code; section 7301 of title 5, United States Code; and section 301 of title 3, United States Code, and to achieve equal opportunity in Federally conducted education and training programs and activities, it is hereby ordered as follows:

Section 1. Statement of policy on education programs and activities conducted by executive departments and agencies.

1-101. The Federal Government must hold itself to at least the same principles of nondiscrimination in educational opportunities as it applies to the education programs and activities of State and local governments, and to private institutions receiving Federal financial assistance. Existing laws and regulations prohibit certain forms of discrimination in Federally conducted education and training programs and activities -- including discrimination against people with disabilities, prohibited by the Rehabilitation Act of 1973, 29 U.S.C. 701 et seq., as amended, employment discrimination on the basis of race, color, national origin, sex, or religion, prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-17, as amended, discrimination on the basis of race, color, national origin, or religion in educational programs receiving Federal assistance, under Title VI of the Civil Rights Acts of 1964, 42 U.S.C. 2000d, and sex-based discrimination in education programs receiving Federal assistance under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq.

Through this Executive Order, discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, and status as a parent will be prohibited in Federally conducted education and training programs and activities.

1-102. No individual, on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, or status as a parent, shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination in, a Federally conducted education or training program or activity.

Sec. 2. Definitions.

2-201. "Federally conducted education and training programs and activities" includes programs and activities conducted, operated, or undertaken by an executive department or agency.

2-202. "Education and training programs and activities" include, but are not limited to, formal schools, extracurricular activities, academic programs, occupational training, scholarships and fellowships, student internships, training for industry members, summer enrichment camps, and teacher training programs.

2-203. The Attorney General is authorized to make a final determination as to whether a program falls within the scope of education and training programs and activities covered by this order, under subsection 2-202, or is excluded from coverage, under section 3.

2-204. "Military education or training programs" are those education and training programs conducted by the Department of Defense or, where the Coast Guard is concerned, the Department of Transportation, for the primary purpose of educating or training members of the armed forces or meeting a statutory requirement to educate or train Federal, State, or local civilian law enforcement officials pursuant to 10 U.S.C. Chapter 18.

2-205. "Armed Forces" means the Armed Forces of the United States.

2-206. "Status as a parent" refers to the status of an individual who, with respect to an individual who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:

(a) a biological parent;

(b) an adoptive parent;

(c) a foster parent;

(d) a stepparent;

(e) a custodian of a legal ward;

(f) in loco parentis over such an individual; or

(g) actively seeking legal custody or adoption of such an individual.

Sec. 3. Exemption from coverage.

3-301. This order does not apply to members of the armed forces, military education or training programs, or authorized intelligence activities. Members of the armed forces, including students at military academies, will continue to be covered by regulations that currently bar specified forms of discrimination that are now enforced by the Department of Defense and the individual service branches.

The Department of Defense shall develop procedures to protect the rights of and to provide redress to civilians not otherwise protected by existing Federal law from discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, or status as a parent and who participate in military education or training programs or activities conducted by the Department of Defense.

3-302. This order does not apply to, affect, interfere with, or modify the operation of any otherwise lawful affirmative action plan or program.

3-303. An individual shall not be deemed subjected to discrimination by reason of his or her exclusion from the benefits of a program established consistent with federal law or limited by Federal law to individuals of a particular race, sex, color, disability, national origin, age, religion, sexual orientation, or status as a parent different from his or her own.

3-304. This order does not apply to ceremonial or similar education or training programs or activities of schools conducted by the Department of the Interior, Bureau of Indian Affairs, that are culturally relevant to the children represented in the school. "Culturally relevant" refers to any class, program, or activity that is fundamental to a tribe's culture, customs, traditions, heritage, or religion.

3-305. This order does not apply to (a) selections based on national origin of foreign nationals to participate in covered education or training programs, if such programs primarily concern national security or foreign policy matters; or (b) selections or other decisions regarding participation in covered education or training programs made by entities outside the executive branch. It shall be the policy of the executive branch that education or training programs or activities shall not be available to entities that select persons for participation in violation of Federal or State law.

3-306. The prohibition on discrimination on the basis of age provided in this order does not apply to age-based admissions of participants to education or training programs, if such programs have traditionally been age-specific or must be age-limited for reasons related to health or national security.

Sec. 4. Administrative enforcement.

4-401. Any person who believes himself or herself to be aggrieved by a violation of this order or its implementing regulations, rules, policies, or guidance may, personally or through a representative, file a written complaint with the agency that such person believes is in violation of this order or its implementing regulations, rules, policies, or guidance. Pursuant to procedures to be established by the Attorney General, each executive department or agency shall conduct an investigation of any complaint by one of its employees alleging a violation of this Executive Order.

4-402. (a) If the office within an executive department or agency that is designated to investigate complaints for violations of this order or its implementing rules, regulations, policies, or guidance concludes that an employee has not complied with this order or any of its implementing rules, regulations, policies, or guidance, such office shall complete a report and refer a copy of the report and any relevant findings or supporting evidence to an appropriate agency official. The appropriate agency official shall review such material and determine what, if any, disciplinary action is appropriate.

(b) In addition, the designated investigating office may provide appropriate agency officials with a recommendation for any corrective and/or remedial action. The appropriate officials shall consider such

recommendation and implement corrective and/or remedial action by the agency, when appropriate. Nothing in this order authorizes monetary relief to the complainant as a form of remedial or corrective action by an executive department or agency.

4-403. Any action to discipline an employee who violates this order or its implementing rules, regulations, policies, or guidance, including removal from employment, where appropriate, shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act of 1978, Public Law No. 95-454, 92 Stat. 1111.

Sec. 5. Implementation and Agency Responsibilities.

5-501. The Attorney General shall publish in the Federal Register such rules, regulations, policies, or guidance, as the Attorney General deems appropriate, to be followed by all executive departments and agencies. The Attorney General shall address:

a. which programs and activities fall within the scope of education and training programs and activities covered by this order, under subsection 2-202, or excluded from coverage, under section 3 of this order;

b. examples of discriminatory conduct;

c. applicable legal principles;

d. enforcement procedures with respect to complaints against employees;

e. remedies;

f. requirements for agency annual and tri-annual reports as set forth in section 6 of this order; and

g. such other matters as deemed appropriate.

5-502. Within 90 days of the publication of final rules, regulations, policies, or guidance by the Attorney General, each executive department and agency shall establish a procedure to receive and address complaints regarding its Federally conducted education and training programs and activities. Each executive department and agency shall take all necessary steps to effectuate any subsequent rules, regulations, policies, or guidance issued by the Attorney General within 90 days of issuance.

5-503. The head of each executive department and agency shall be responsible for ensuring compliance within this order.

5-504. Each executive department and agency shall cooperate with the Attorney General and provide such information and assistance as the Attorney General may require in the performance of the Attorney General's functions under this order.

5-505. Upon request and to the extent practicable, the Attorney General shall provide technical advice and assistance to executive departments and agencies to assist in full compliance with this order.

Sec. 6. Reporting Requirements.

6-601. Consistent with the regulations, rules, policies, or guidance issued by the Attorney General, each executive department and agency shall submit to the Attorney General a report that summarizes the number and nature of complaints filed with the agency and the disposition of such complaints. For the first 3 years after the date of this order, such reports shall be submitted annually within 90 days of the end of the preceding year's activities. Subsequent reports shall be submitted every 3 years and within 90 days of the end of each 3-year period.

Sec. 7. General Provisions.

7-701. Nothing in this order shall limit the authority of the Attorney General to provide for the coordinated enforcement of nondiscrimination requirements in Federal assistance programs under Executive Order 12250.

Sec. 8. Judicial Review.

8-801. This order is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or its employees. This order is not intended, however, to preclude judicial review of final decisions in accordance with the Administrative Procedure Act, 5 U.S.C. 701, et seq.

WILLIAM J. CLINTON

THE WHITE HOUSE,

June 23, 2000.

###

Westlaw.

77 M.S.P.R. 482

(Cite as: 77 M.S.P.R. 482)

Merit Systems Protection Board.
Frank MORALES, Appellant,
v.
DEPARTMENT OF JUSTICE, Agency.
CB-7121-97-0047-V-1.

Feb. 10, 1998.

After agency decided to remove employee, he requested union to pursue grievance. Arbitrator denied grievance, and employee filed request for review. The Merit Systems Protection Board held that discrimination alleged by employee, based on his sexual orientation, was not among forms of prohibited discrimination included under statute which prohibits an employee with authority to take any personnel action from discriminating for or against any employee or applicant for employment, and thus Board lacked jurisdiction over employee's request, based on alleged discrimination, for review of arbitration decision denying his grievance.

Request dismissed.

West Headnotes

[1] Merit Systems Protection ⚿63.5
450k63.5 Most Cited Cases
(Formerly 450k63)

[1] Merit Systems Protection ⚿103
450k103 Most Cited Cases
Discrimination alleged by employee, based on his sexual orientation, was not among forms of prohibited discrimination included under statute which prohibits an employee with authority to take any personnel action from discriminating for or against any employee or applicant for employment, and thus Board lacked jurisdiction over employee's request, based on alleged discrimination, for review of arbitration decision denying his grievance. 5 U.S.C.A. §§ 2302(b)(1), 7121(d).

[2] Merit Systems Protection ⚿9
450k9 Most Cited Cases

[2] Merit Systems Protection ⚿478
450k478 Most Cited Cases
Board must defer to Equal Employment Opportunity Commission (EEOC) with respect to issues of substantive discrimination law.
***483** Frank Morales, Annapolis, MD, pro se.

Joan Slous, Washington, DC, for agency.

Before ERDREICH, Chairman, SLAVET, Vice Chair, and MARSHALL, Member.

OPINION AND ORDER

The appellant has filed a request for review under 5 U.S.C. § 7121(d) of an arbitration decision issued in early October 1996 [FN1] that denied his grievance. For the reasons set forth below, we DISMISS the request for lack of jurisdiction.

> FN1. The arbitrator signed the decision on September 30, 1996, but we are unable to determine the precise date it was issued because the date stamp is illegible, although the decision clearly reflects an early-October issuance. Request for Review File, Tab 1.

BACKGROUND

On February 15, 1996, the agency proposed to remove the appellant from his position as Asylum Officer based on charges that he had engaged in an inappropriate personal relationship with an alien in violation of agency policy (two specifications) and made inappropriate comments to aliens. Request for Review File (RRF), Tab 1. After considering the appellant's reply to the charges, the deciding official issued a decision on May 13, 1996, finding that only the first charge (both specifications) was sustained, but that it warranted the appellant's removal, effective May 17, 1996. The appellant

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

subsequently requested the National Immigration and Naturalization Service Council, American Federation of Government Employees, to pursue on his behalf a grievance without intervening steps through arbitration. Before the arbitrator, the appellant denied the sole remaining charge. Following a hearing, the arbitrator issued a decision sustaining only the first specification of the charge, but nonetheless denying the grievance. *Id.*

On July 10, 1997, the appellant filed a request for review of the arbitrator's decision. *Id.* Because the request appeared to be untimely filed, [FN2] the Board ordered the appellant to set forth any argument showing that his request should be deemed timely filed or, in the alternative, that good cause existed to waive the filing deadline. *Id.* at Tab 2. In addition, because the appellant had failed to clearly identify a claim of discrimination in his filing with the Board, he was ordered ***484** to specify the nature of his claim of discrimination, and to provide argument and documentation in support of it. *Id.*

> FN2. Pursuant to 5 C.F.R. § 1201.154(d), a request for review of an arbitrator's decision must be filed within thirty-five days of the date of issuance of the decision.

In his response, the appellant stated that the filing deadline should be waived because he was never advised that he could request the Board to review the arbitrator's decision. *Id.* at Tab 3. He further stated that the agency had taken the action against him because of his sexual orientation. *Id.* In its reply to that response, the agency argued that the appellant had not shown good cause to waive the filing deadline, and that, in any event, the Board should dismiss his request for review because of his failure to set forth an allegation of discrimination covered under 5 U.S.C. § 2302(b)(1). *Id.* at Tab 4.

ANALYSIS

The Board has jurisdiction to review an arbitration decision under 5 U.S.C. § 7121(d) where the subject matter of the grievance is one over which the Board has jurisdiction, the grievance alleges discrimination as stated in 5 U.S.C. § 2302(b)(1) in connection with the underlying action, and a final decision has been issued. *See Sweeney v. Department of the Army,* 69 M.S.P.R. 392, 393 (1996). Here, the subject matter of the grievance, the appellant's removal, is one over which the Board has jurisdiction, 5 U.S.C. § 7512, and the arbitrator has issued a final decision.

[1][2] However, the only form of discrimination the appellant has described, discrimination on the basis of his sexual orientation, is not among the forms of prohibited discrimination included under 5 U.S.C. § 2302(b)(1). Although that section includes discrimination on the basis of sex as prohibited by Title VII, the Equal Employment Opportunity Commission (EEOC) has consistently held that prohibition does not apply to cases which raise issues regarding an individual's perceived or admitted sexual preference or orientation. *See Harmon v. Pena, Secretary, Department of Transportation,* EEOC Request No. 05950551 (Mar. 27, 1997); *Morrison v. Dalton, Secretary, Department of the Navy,* EEOC Request No. 05930964 (June 16, 1994). The Board must defer to EEOC with respect to issues of substantive discrimination law. *See Crawford v. U.S. Postal Service,* 70 M.S.P.R. 416, 422 (1996).

Accordingly, in the absence of an allegation of discrimination as stated in 5 U.S.C. § 2302(b)(1), the Board lacks jurisdiction over the appellant's request for review of the arbitration decision, *see McClain v. Department of Veterans Affairs,* 58 M.S.P.R. 93, 95 (1993), and it must be dismissed. In view of this disposition, the Board need make no findings on the timeliness of the appellant's request. *See, e.g., Popham v. U.S. Postal Service,* 50 M.S.P.R. 193, 197-98 (1991).

***485** We note that the appellant filed an unsolicited pleading after the agency had replied to his response to the Board's order. In that pleading, which was not served on the agency, the appellant now alleges that, as to his removal, he was a victim of reprisal for whistleblowing, and he has submitted a letter dated August 28, 1997, from the Office of Special Counsel, in which it states that it has terminated its inquiry into his whistleblowing

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

allegations, and that he may seek corrective action from the Board in the form of an Individual Right of Action (IRA) appeal. RRF, Tab 5. Such appeals must first be heard at the Board's regional office level, *see* 5 C.F.R. § 1209.3. Accordingly, we hereby FORWARD this claim to the Washington, D.C., Regional Office for consideration of whether the Board has jurisdiction over this apparent IRA appeal.

ORDER

This is the final order of the Merit Systems Protection Board in this request for review. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

For the Board:

ROBERT E. TAYLOR,

WASHINGTON, D.C.

END OF DOCUMENT

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Westlaw.

7 U.S. Op. Off. Legal Counsel 46, 1983 WL 187355 (O.L.C.)

(Cite as: 7 U.S. Op. Off. Legal Counsel 46)

Office of Legal Counsel
U.S. Department of Justice

*46 TERMINATION OF AN ASSISTANT UNITED STATES ATTORNEY ON GROUNDS RELATED TO HIS ACKNOWLEDGED HOMOSEXUALITY

March 11, 1983

An Assistant United States Attorney (AUSA), a federal employee in the "excepted" service, may not be terminated solely on the basis of his homosexuality, in the absence of a reasonable showing that his homosexuality has adversely affected his job performance.

The burden would be on the Department of Justice to demonstrate a nexus between the AUSA's homosexuality and an adverse effect on his job performance. In this case, it is doubtful whether the Department could meet its burden, because the AUSA has consistently received superior ratings and has been granted a security clearance. Although it may be argued that a prosecutor who violates a state criminal law prohibiting homosexual acts demonstrates a disrespect for the law inconsistent with the Department's standard of prosecutorial **conduct**, the Department would have difficulty establishing the required nexus as a matter of law, because the state law is only enforced against public **conduct**.

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

This responds to your request for advice on the legal implications of failing to retain an Assistant United States Attorney (AUSA) who is an acknowledged homosexual.

As set forth in more detail below, we have concluded that it would be permissible for the Department to refuse to retain an AUSA upon a determination that his homosexual **conduct** would, because it violates state criminal law, adversely affect his performance by calling into question his and, therefore, the Department's, commitment to upholding the law. We must advise, however, that the facts in this case are such that it would be very difficult under existing judicial decisions to prove that there is a nexus between his **conduct** and an adverse effect on job performance. Because the burden of proof would be on the Government to prove that such a nexus exists once the AUSA has established that he was dismissed for homosexual **conduct**, we would suggest consultations with the Civil Division and the Office of Personnel Management (OPM) before making a final decision not to retain a person under these circumstances. Both the Civil Division and OPM have informally expressed concern over our ability to defend successfully any suit that might be filed.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

***47** The AUSA in question has freely admitted his sexual preference, and that he has engaged in and intends to continue to engage in private consensual homosexual **conduct**. As we understand the facts, the only reason the Department would not retain the AUSA is because of his homosexual **conduct**, and that reason would, under the Department regulations, be reflected in the letter of termination. We also assume that the letter would note that homosexual acts are a crime under law of the state in which the AUSA is stationed, and that the Department believes that any such violations of local criminal law reflect adversely on the AUSA's fitness to represent the Government as a prosecutor. [FN1]

I. Limitations on Terminating an AUSA

AUSAs are in what is known as the "excepted service." 5 U.S.C. § 2103(a). The Attorney General's authority to remove them, see 28 U.S.C. § 542(b), [FN2] is tempered, however, in several ways, two of which are relevant here: statute and OPM regulation. [FN3] The statute and regulation that protect AUSAs from prohibited personnel practices are 5 U.S.C. § 2302(b)(10) and OPM/FPM Supp. 731-1, subchap. 3-2(a)(3)(c).

A. Statutory and Regulatory Constraints

***48** The decision not to retain the AUSA may be made for any number of reasons -- for example, budget factors or employment ceilings -- but it may not be made for a reason prohibited by statute or regulation. The Department is prohibited by statute

> from discriminat[ing] . . . against any employee or applicant for employment on the basis of **conduct** which does not adversely affect the performance of the employee or applicant or the performance of others.

5 U.S.C. § 2302(b)(10). [FN4] In addition, OPM has issued guidelines covering suitability for employment in the federal government. [FN5] Although applicants for employment in the excepted service may be disqualified if they engage in "infamous, . . . immoral or notoriously disgraceful **conduct**," 5 C.F.R. § 302.203, the courts have held that neither the status of being a homosexual nor homosexual **conduct** which does not adversely affect job performance falls within this provision. In reversing a decision by the Civil Service Commission (now OPM) to disqualify an applicant for employment because of alleged immoral **conduct**, the U.S. Court of Appeals for the District of Columbia Circuit said over fifteen years ago:

> The Commission may not rely on a determination of "immoral **conduct**," based only on such vague labels as "homosexual" and "homosexual **conduct**," as a ground for disqualifying appellant for Government employment.

Scott v. Macy, 349 F.2d 182, 185 (D.C. Cir. 1965). [FN6] As a result of cases such as this, e.g., Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Society for Individual Rights v. Hampton, 63 F.R.D. 399 (N.D. Ca. 1973), aff'd on other grounds, 528 F.2d 905 (9th Cir. 1975); and Baker v. Hampton, 6 Empl. Prac. Dec. (CCH) ¶ 9043 (D.D.C. 1973), OPM issued a Bulletin on December 21, 1973, placing the following gloss on the regulation:

> [Y]ou may not find a person unsuitable for Federal employment merely because

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

that person is a homosexual or has engaged in homosexual acts, nor may such exclusion be based on a conclusion that a homosexual person might bring the public service *49 into public contempt. You, are, however, permitted to dismiss a person or find him or her unsuitable for Federal employment where the evidence establishes that such person's homosexual **conduct** affects job fitness -- excluding from such consideration, however, unsubstantiated conclusions concerning possible embarrassment to the Federal Service.

Ashton v. Civiletti, 613 F.2d 923, 927 (D.C. Cir. 1980) (quoting Bulletin). In November 1975, OPM issued FPM Supplement 731-1, Determining Suitability for Federal Employment. Subchapter 3-2(a)(3)(c), which discusses infamous or notoriously disgraceful **conduct**, states:

> Court decisions require that persons not be disqualified from Federal employment solely on the basis of homosexual **conduct**. OPM and agencies have been enjoined not to find a person unsuitable for Federal employment solely because that person is a homosexual or has engaged in homosexual acts. Based upon these court decisions and outstanding injunction[s], while a person may not be found unsuitable based on unsubstantiated conclusions concerning possible embarrassment to the Federal Service, a person may be dismissed or found unsuitable for Federal employment where the evidence establishes that such person's sexual **conduct** affects job fitness.

Thus, it is improper to deny employment to or to terminate anyone on the basis either of sexual preference or of **conduct** that does not adversely affect job performance. In short, there must be a reasonable showing that the homosexual **conduct** adversely affects the job performance.

B. Case Law

1. The Nexus Test

An examination of recent case law indicates that the burden is on the Government to demonstrate that the AUSA's homosexual **conduct** has adversely affected or will adversely affect his performance or that of others, and that it will be difficult for the Government to do so. Hoska v. United States, 677 F.2d 131, 136-38 (D.C. Cir. 1982). The U.S. Court of Appeals for the District of Columbia Circuit has articulated four ways in which homosexual **conduct** might adversely affect job performance: (1) if it jeopardizes the security of classified information through potential blackmail; (2) if it constitutes evidence of an unstable personality unsuited for certain kinds of work; (3) if it causes the employee to make offensive overtures at work; or (4) if it constitutes the basis of "notorious" activities that trigger negative reactions from fellow employees or the public. *50 Norton v. Macy, 417 F.2d 1161, 1166 (D.C. Cir. 1969). [FN7] As in Norton, we believe that it be difficult for the Department to convince a court that the particular employee at issue failed any of these tests. Id. at 1166. [FN8] Given his record, it would appear that the only way his ability to function successfully might be jeopardized would be through hostility from the public or his fellow workers, but there is no evidence of any negative reactions. Nor is the AUSA, as an overt homosexual, apparently considered to be a security risk through a blackmail threat. The Department has given him a security clearance, and there is

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

no evidence that the AUSA has an unstable personality: rather, his work is described as consistently superior. His current supervisor has stated that the AUSA's work continues to be excellent, and there are no allegations that he has made offensive overtures at work. [FN9] We are not aware of any evidence that he has engaged in the kind of notorious **conduct** that was found to be sufficient for termination in Singer v. United States Civil Service Comm'n, 530 F.2d 247 (9th Cir. 1976), vacated and remanded, 429 U.S. 1034 (1981), and Childers v. Dallas Police Dep't, 513 F. Supp. 134, 140-42 (N.D. Tex. 1981). [FN10] Rather, the AUSA has apparently been so discreet that the fact of his homosexuality came as a surprise to his superiors. Like the employee in Norton, the AUSA could successfully argue that he is a satisfactory worker who suffered an adverse employment action because of a general policy decision. [FN11]

***51** We are aware of two cases in which the Government has dismissed homosexual employees and defended the dismissals successfully: Singer, supra, and Dew v. Halaby, 317 F.2d 582 (D.C. Cir. 1963), cert. dismissed, 379 U.S. 951 (1964). Dew occurred prior to the issuance of the pertinent OPM regulation. Singer involved the kind of "notorious" **conduct** faulted in Norton: Mr. Singer was a clerk typist whose work was satisfactory but whose off-duty **conduct** included kissing and embracing another man on federal property, discussing gay rights on TV shows in which he identified himself as a federal employee, applying for a marriage license to be married to another man, and receiving "extensive" publicity because of his attempt to obtain a marriage license. 530 F.2d at 249. In both Dew and Singer, the Government received adverse publicity because of the dismissals and eventually reversed its policy, reinstating both employees with back pay.

Because the AUSA has stated that he intends to continue to engage in homosexual **conduct**, and this is now public knowledge, the Department might take the position that an AUSA who habitually engaged in a violation of state criminal law brings discredit upon the Department sufficient to establish the kind of nexus required by current case law. We could argue that the willingness to engage in such acts in violation of local law demonstrates a disrespect for the law that is not consistent with the standard of **conduct** demanded by the Department of someone who is engaged in prosecuting others for violations of the law. We could also note that the local legal community, represented by the state bar, has condemned at least the public practice of homosexuality.

On the other hand, OPM's regulation forbids the federal government from discriminating against those who engage in homosexual **conduct**, absent a nexus between the **conduct** and job performance. The AUSA could argue that OPM's regulation forbids the taking into account of state laws, especially if the AUSA would probably not be prosecuted for private consensual homosexual acts under the state's current enforcement policy. OPM was presumably aware in 1973 that homosexuality violated the laws of many states and did not intend its standard an adverse effect on job performance to be met by merely showing that the **conduct** violates state law.

2. Law Enforcement Exception

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

The only justification in the case law which might support a decision to refuse to retain the AUSA in this context would be to convince the court that private homosexual **conduct** is, once it is public knowledge, detrimental to the performance of the AUSA's job in states where it violates the criminal law. Proving the nexus between questioned behavior and job performance, especially when the behavior occurs outside the work place, is, however, often difficult. [FN12] Courts seem reluctant to find a nexus if the behavior does not occur ***52** during official work hours, and have stated that it is the agency's obligation to spell out how the **conduct** will affect performance or promote the efficiency of the service. Phillips v. Bergland, 586 F.2d 1007, 1012-13 (4th Cir. 1978).

The most effective way to prove adverse effect on job performance would be to prove that the special nature of a prosecutor's job -- his public representation of the entire Department, his duty to uphold the law, and the potential for accusations of hypocrisy for hiring a lawbreaker to enforce the law -- requires that there be no taint of criminality. 28 C.F.R. § 45.735- 2(a). Some cases have emphasized that law enforcement officers can, because of their particularly sensitive positions, be held to a stricter standard of behavior, even in their private lives, than might otherwise be the case. For example, in Masino v. United States, 589 F.2d 1048 (Ct. Cl. 1978), the court approved the dismissal of a United States customs officer because of his voluntary statements that he had smoked marijuana on several occasions:

> Masino in his position as a Customs Inspector was specifically charged with enforcing the laws concerning contraband, including marijuana. Since possession and/or use of marijuana is a violation of federal criminal statutes, he was clearly not conducting himself in a manner to be expected of a Government employee engaged in law enforcement duties. This was what the appeals authority said, and we agree. Further, in addition to the language of the appeals authority, the transportation and use of the very contraband which a law enforcement officer is sworn to interdict, is clearly misconduct which "speaks for itself." Obviously, the disciplinary action of termination taken against Masino to "promote the efficiency of the service" cannot be said to be without a rational basis. His discharge was neither arbitrary nor capricious.

589 F.2d at 1056. A district court has upheld a state law barring all felons, even those who had received pardons, from being policemen. Dixon v. McMullen, ***53** 527 F. Supp. 715 (N.D. Tex. 1981). The court said that it was permissible for the state to examine the individual's prior history and to deny employment to those with a background of lawbreaking in order to insure "that those persons publicly employed in emergency or dangerous situations are sober and alert, and possess qualities such as honesty, integrity, reliability and obedience to the law." Id. at 721. Noting that policemen are acting on behalf of "people at large," the court said:

> Policemen are just simply a special category. Integrity and trust are prerequisites. The law clothes an officer with authority to handle many critical situations, including those that occur in a lightning moment and which can never be reenacted or reversed. . . . A state's legitimate concern for maintaining high standards of professional **conduct** extends far beyond the initial licensing.

Id. See also Upshaw v. McNamara, 435 F.2d 1188, 1190 (1st Cir. 1970); Macchi v.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Waley, 586 S.W.2d 70, 72-74 (Mo. Ct. App. 1979); Vegas v. Schechter, 178 N.Y.S.2d 67, 68-69 (Sup. Ct. 1958). [FN13] Even those whose connections to law enforcement appear more tenuous have come within the sweep of these statements. In upholding the denial of employment to a homosexual who sought work as a property room clerk in the police department, Childers v. Dallas Police Department, supra, the court said:

> No one can disagree that the character and activities of those to whom we entrust the enforcement of our laws must be beyond reproach. The activities of an employee of a law enforcement agency are of paramount interest to that agency, as the police department as a whole must reflect the values of a majority of society. Childers, 513 F. Supp. at 140-41. [FN14] Likewise, it could certainly be argued that public prosecutors must be trustworthy and law abiding, or else the public's confidence in the justice system will erode. Persons deciding whether to bring or decline prosecutions should not be lawbreakers themselves. [FN15]

***54** We must emphasize, however, that none of these cases is dispositive. Furthermore, the fact that the AUSA has apparently, according to those who have evaluated him, continued to perform effectively in his job even after his homosexuality became public knowledge in the United States Attorney's Office will seriously undercut the crucial argument that his homosexual **conduct** is adversely affecting his job performance. In order to prevail, the Department may well have to convince the courts to accept the argument that the continuing violation of local laws that make private consensual homosexual **conduct** criminal establishes the required nexus as a matter of law even though that local law probably would not be enforced against the AUSA and even though such a legal "presumption" might be said to run counter to the pertinent statute and regulations.

II. Constitutional Protections

The AUSA might attempt to argue that failing to retain him would violate certain of his constitutional rights, but we do not believe such arguments would be successful. It is true that federal employees do not give up their constitutional rights upon accepting employment and the federal government may not condition a job upon the waiver of those rights. However, the issue whether the right to privacy, which the courts have determined to be protected by the Constitution, encompasses the right to practice private consensual homosexuality is still a matter of serious dispute. See Berg v. Claytor, 436 F. Supp. 76, 79 (D.D.C. 1977), vacated, 591 F.2d 849 (D.C. Cir. 1978). Although some courts have found protection for homosexuals for certain activities in the First Amendment either in the freedom to speak, [FN16] the freedom to associate, [FN17] or the right to ***55 conduct** one's private life free from government surveillance, see Cyr v. Walls, 439 F. Supp. 697 (N.D. Tex. 1977) (police surveillance of homosexual groups violated right to privacy), [FN18] we do not believe that failing to retain the AUSA would violate these rights. The Department has not invaded the AUSA's privacy by making impermissible inquiries, because the background check is required of all applicants and there has been no further inquiry. Failure to retain the AUSA would not be because he associates with homosexuals or has spoken out about his status but solely because of a determination that knowing,

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

continuing violations of a local criminal law are sufficient to disqualify him from a job as a federal prosecutor.

III. Conclusion

The Department has the right to decline to retain the AUSA if his **conduct** or intended **conduct** are adversely affecting his job performance or the performance of those around him. In this particular case, the individual involved apparently has an excellent record as a litigator and is, according to his present superior, functioning in a satisfactory manner. It would be difficult, given this record, to show that his homosexual **conduct** in fact adversely affects his job performance. Rather, we believe that on these facts it would be likely that he would meet the tests articulated in Norton, supra, especially in view of the fact that the Department is willing to give him the security clearance necessary for his work. The state criminal law he is apparently violating is, we understand, only enforced against public **conduct**. The Department does not have a policy of dismissing people for **conduct** that violates other similar state criminal laws.

Staff members at both the Civil Division, which will be called upon to defend any suit, and OPM, whose regulation we are interpreting, have been informally consulted and have stated that they believe the facts of this case will make it difficult to establish a sufficient nexus between the **conduct** and the job performance, and we tend to agree with their judgment. As long as the OPM regulation remains in force, we also believe it would be difficult to establish the proposition that the violation of local laws on the facts of this case establishes a nexus as a matter of law sufficient to support a decision to dismiss.

We must reiterate that the case law makes it clear that potential embarrassment to the Department is not enough to justify a refusal to retain an AUSA: there must be a supportable judgment made by the appropriate officials that the AUSA's actions are adversely affecting his performance. Unless the Department can reasonably expect to maintain the burden of proof on this issue, it is ***56** not reasonable to expect that the Department would prevail. Without stronger evidence that this particular individual's homosexuality is adversely affecting his performance, we believe that it would be difficult to overcome charges of discrimination on the basis of **conduct** that apparently does not adversely affect the performance of the employee or those around him.

Theodore B. Olson

Assistant Attorney General

Office of Legal Counsel

FN1 We do not address the constitutional validity of such laws. Compare Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982); People v. Onofre, 415 N.E.2d 936 (N.Y. 1980), cert. denied, 451 U.S. 987 (1981); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980); and State v. Pilcher, 242 N.W.2d 348 (Iowa 1976) with United States v.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Lemons, 697 F.2d 832 (8th Cir. 1983); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd mem., 425 U.S. 901 (1976); and Stewart v. United States, 364 A.2d 1205 (D.C. Ct. App. 1976).

FN2 The section states, "Each assistant United States Attorney is subject to removal by the Attorney General." There are no reported cases under this section. Departments of Justice regulations provide that attorneys in the excepted service who are being removed are only entitled to a letter of termination. DOJ Order No 1752.1A (Apr. 27, 1981). The Order states:

GENERAL. The rights of excepted service employees are strictly limited when discipline, including separation, is to imposed. However, some service employees have the same protections as competitive service employees because of Veterans' Preference or prior competitive status.

PROCESSING DISCIPLINE. a. An excepted service employee who is protected under law and the regulations of the Office of Personnel Management because of veterans' preference is entitled to the procedures governing regular civil service employees.

b. An excepted service employee with no protection under law or regulation should be given a letter advising him or her of the action being taken (suspension, separation, etc.) prior to the effective date of the action.

Id. at 19, 20.

FN3 The limitations on the Attorney General's authority may be categorized as: (1) OPM regulations governing employment of those in the excepted service, see 5 C.F.R. §§ 302.101 et seq.; (2) Statutes and OPM regulations governing employment of veterans in the excepted service; (3) Department regulations; and (4) any Department handbooks or informal understandings that may establish a reasonable expectation of continued employment. See Ashton v. Civiletti, 613 F.2d 923 (D.C. Cir. 1979).

A veteran, 5 U.S.C. § 2108(1)(B), (3)(B), who has served for one year in the excepted service, id. § 7511(a)(1)(B), is afforded civil service protection, and action may be taken against him "only for such cause as will promote the efficiency of the service." Id. § 7513 (a). Whether the Attorney General's authority in 28 U.S.C. § 542 (b) prevails over the veterans' preference statute is a question on which this Office expressed considerable doubt some years ago. Memorandum for William D. Ruckelshaus, Assistant Attorney General, Civil Division from Assistant Attorney General Rehnquist, Office of legal Counsel (Sept. 10, 1970); Memorandum for Assistant Attorney General Rehnquist from Leon Ulman and Herman Marcuse (Sept. 4, 1970).

FN4 The statute covers appointments in the excepted service. 5 U.S.C. § 2302(a)(2)(A)(i), (B). AUSA positions do not fall within Schedule C, 5 C.F.R. § 213.3301, and are not, therefore, within any of the exceptions to the coverage of this statute. 5 U.S.C. § 2302(a)(2)(B)(i).

FN5 OPM administers the regulations governing the civil service. 5 U.S.C. § 1103(a)(5). The civil service includes the excepted service. 5 U.S.C. § 2101(1).

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

FN6 After the decision in Scott, the Civil Service Commission again disqualified the applicant, and was again reversed. Scott v. Macy, 402 F.2d 644 (D.C. Cir. 1968).

FN7 Norton involved a veteran who could only be dismissed for "such cause as will promote the efficiency of the service." 5 U.S.C. § 7512(a) (Supp. 1965). The nexus test, however, has been carried over in subsequent cases to disputes involving those in the excepted service. Ashton v. Civiletti, 613 F.2d 923 (D.C. Cir. 1979). Not all circuits use the nexus test, see, e.g., Vigil v. Post Office Dep't, 406 F.2d 921 (10th Cir. 1969), but it is the test employed in the circuits in which it is most likely that the AUSA, if he were so inclined, would bring suit.

FN8 Norton involved an otherwise competent NASA budget analyst dismissed because of a homosexual advance he made one evening while in a car. 417 F.2d at 1162-63. He was arrested for a traffic violation by members of the Morals Squad who had observed the incident. he was then interrogated about his **conduct** by the Morals Squad and NASA security officers. Although sodomy was a violation of the local law. D.C. Code § 22-3502 (1967), the court did not raise the issue of whether such a violation might automatically establish the nexus. The government's brief did, however, note that sodomy was a crime and that the police had probable cause to arrest Mr. Norton on that charge, although they chose not to. Appellee's Brief at 14 n.9, 31 & n.25, Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969). Thus, the Court of Appeals implicitly rejected the proposition that **conduct** violative of the local ordinance was sufficient, standing alone, to establish a nexus between that **conduct** and the job performance required in Mr. Norton's job.

FN9 See, e.g., Safransky v. State Personnel Board, 215 N.W.2d 379, 381, 385 (Wisc. 1974).

FN10 Compare Singer, 530 F.2d 249, 252-55; McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), cert. denied, 405 U.S. 1046 (1972); Childers, 513 F. Supp. at 140-41 with Aumiller v. University of Delaware, 434 F. Supp. 1273 (D. Del. 1977). See also Ross v. springfield School Dist. No. 19, 641 P.2d 600, 608 (Or. Ct. App. 1982) (teacher properly dismissed where public practice of homosexuality resulted in "notoriety" which impaired his teaching ability).

FN11 In ben Shalom v. Secretary of Army, 489, F. Supp. 964 (E.D. Wisc. 1980), the court found that the dismissal of an otherwise suitable soldier because of her homosexuality violated the soldier's substantive due process rights under the Fifth Amendment. Id. Given that the soldier had received high marks on her military performance, the court found that there was no nexus between her status as homosexual and her suitability for service. "it was , therefore, arbitrary, capricious and unreasonable for the Army to conclude that the petitioner was anything other than a 'suitable' soldier under is regulations." Id. at 977. See also Martinez v. Brown, 449 F. Supp. 207 (N.D. Ca. 1978) (same; Navy regulations). But see Beller v. Middendorf, 632 F.2d 788 (9th Cir.) (rejecting same analysis when applied to Navy regulations), pet'n for reh'g en banc denied sub nom. Miller v. Rumsfeld, 647 F.2d 80 (9th Cir. 1980), cert denied, 452 U.S. 905 (1981). The

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

denial of the petition for rehearing en banc elicited a long dissent. Miller, 647 F.2d at 80-90.

FN12 See Bonet v. United States Postal Service, 661 F.2d 1071 (5th Cir. 1981) (indictment for child molestation, standing alone, insufficient); Young v. Hampton, 568 F.2d 1253 (7th Cir. 1977) (conviction for drug use, standing alone, insufficient); Tygrett v. Barry, 627 F.2d 1279 (D.C. Cir. 1980) (reaffirming analysis in Tygrett v. Washington, 543 F.2d 840 (D.C. Cir. 1974)) (probationary policeman's advocacy of illegal "sick out" insufficient); Grebosz v. United States Civil Service Comm'n, 472 F. Supp. 1081 (S.D.N.Y. 1979) (convictions for possession of marijuana and sale of cocaine insufficient). Even questionable **conduct** while at work does not automatically provide the nexus. In Phillips v. Bergland, 586 F.2d 1007 (4th Cir. 1978), the court declined to find that assaulting a fellow employee in the stairwell, albeit during the lunch hour, was facially sufficient to prove the nexus:

> Typical of **conduct**, which carries on its face prejudice to the service as contemplated in § 7501(a), are falsification of work records or expense accounts, theft of government property, assault on one's supervisor at work, and insubordination. All of these. . . are quite different from misconduct which is entirely unrelated to the employee's work and which occurs when the employee is off duty. And the courts have recognized distinction and have made plain the greater burden which rests on the agency to justify its action in the latter case.

Id. at 1011 (footnotes and citations omitted). But see Yacovone v. Bolger, 645 F.2d 1028 (D.C. Cir.), cert. denied, 454 U.S. 844 responsibilities); Wathen v. United States, 527 F.2d 1191 (Ct. Cl.) (murder committed in public sufficient), cert. denied, 429 U.S. 821 (1976); Gueroy v. Hampton, 510 F.2d 1222 (D.C. Cir. 1974) (manslaughter conviction sufficient).

FN13 But see Smith v. Fussenich, 440 F. Supp. 1077 (D. Conn. 1977) (law barring all felons from work as private security guards struck down as overbroad).

FN14 However, Childers offers less support for the decision not to retain the AUSA than at first appears. First the case involved a property room clerk, the same kind of low-level job involved in Ashton, supra, in which the D.C. Circuit came to the opposite conclusion about an FBI mailroom clerk. Second, Childers involved a homosexual who, as in Singer, was not discreet and who openly advocated homosexuality while identifying himself as a public employee. The notoriety led the Court to conclude that the applicant failed one of the tests laid out in Norton, supra. Childers, 513 F. Supp. at 142 n.11.

FN15 Law enforcement is not the only profession the courts have recognized as being one in which the public's confidence in the employee is important. An air controller's job has been described by courts as a "a sensitive one" in which misconduct may erode the public's faith in reliability of the national air control system. Dew v. Halaby, 317 F.2d 582, 587 n.11 (D.C. Cir. 1963) (homosexual act), cert. dismissed, 379 U.S. 951 (1964); McDowell v. Goldschmidt, 498 F. Supp. 598, 605 (D. Conn. 1980) (conviction for possession of marijuana). Dew's continued validity has been undercut by Norton, decided five years later, in which the D.C.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Circuit was much more willing to question and overrule OPM's rationale.

FN16 See Aumillier v. University of Delaware, 434 F. Supp. 1273, 1311-12 (D. Del. 1977); Acanfora v. Bd. of Education, 491 F.2d 498, 501 (4th Cir.), cert. denied, 419 U.S. 836 (1974). In Aumillier, the court awarded punitive damages in an action brought under 42 U.S.C. § 1983 against a university president who refused to rehire an untenured teacher because the teacher had discussed his homosexuality in public. But see Suddarth v. Slane, 539 F. Supp. 612, 616 (W.D. Va. 1982) (denied recovery under § 1983 on ground that participation in illegal act -- adultery -- precluded recovery for allegedly wrongful dismissal). Damages were also awarded in Johnson v. San Jacinto Junior College, 498 F. Supp. 555, 577-79 (S.D. Tex. 1980) (adultery punished by summary demotion without a hearing).

FN17 See Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir. 1977) (freedom of speech and association protects homosexual students), cert. denied, 434 U.S. 1080 (1978); Gay Alliance v. Mathews, 544 F.2d 162 (4th Cir. 1976) (same); Gay Students Org. v. Bonner, 509 F.2d 652 (1st Cir. 1974) (same); Lesbian/Gay Freedom Day Committee, Inc. v. INS, 541 F. Supp. 569 (N.D. Cal. 1982) (holding unconstitutional per se exclusion of homosexual aliens as violative of First Amendment associational rights of homosexual citizens); Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980) (homosexual high school student's rights to freedom of speech and association covered bringing homosexual date to high school prom); Student Coalition for Gay Rights v. Austin Peay State University, 477 F. Supp. 1267 (M.D. Tenn. 1979; Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation, 417 F. Supp. 632 (D.R.I. 1976) (upholding right of access to public forum; Gay Activists Alliance v. Bd. of Regents, 638 P.2d 1116 (Okla. 1981); Alaska Gay Coalition v. Sullivan, 578 P.2d 951 (Ala. 1978). See also Nemetz v. INS, 647 F.2d 432 (4th Cir. 1981) (private homosexual **conduct** does not preclude finding of "good moral character" necessary for naturalization). Even the military's per se exclusion of homosexuals has been successfully attacked in some cases despite the traditional deference given to arguments about discipline and upholding the law. ben Shalom v. Secretary of Army, 489 F. Supp. 964 (E.D. Wisc. 1980) (discharge for homosexuality violated rights of association and personal privacy). See also Bruns v. Pomerleau, 319 F. Supp. 58 (D. Md. 1970) (refusal to accept employment applications from practicing nudist violated his right to freedom of association. Some courts have also found protection in state constitutions. Gay law Students Ass'n v. Pacific Tel. & Tel., 595 P.2d 592, 597 (Cal. 1979).

FN18 See also Shuman v. City of Philadelphia, 470 F. Supp. 449, 459 (E.D. Pa. 1979) (inquiry into off-duty personal activities -- affair with an 18-year-old -- violated right of privacy in the absence of any showing of impact on job performance); Major v. Hampton, 413 F. Supp. 66 (E.D. La. 1976) (dismissal of IRS officer who rented apartment for off-duty extramarital affairs impermissible); Mindel v. United States Civil Service Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970) (termination of postal clerk for cohabiting violated Ninth Amendment); Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328 (W.D. Pa. 1977), aff'd, 578 F.2d 1374 (3d Cir.) (employees' open adultery not protected by right of privacy, cert.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

denied, 439 U.S. 1052 (1978).

7 U.S. Op. Off. Legal Counsel 46, 1983 WL 187355 (O.L.C.)

END OF DOCUMENT

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

RESULTS OF LEGAL REVIEW OF DISCRIMINATION STATUTE

FOR IMMEDIATE RELEASE - 4/8/04
CONTACT: CATHY DEEDS
(202) 254-3600

Special Counsel Scott J. Bloch today announced the results of the legal review to determine the extent of jurisdiction of the office to process claims under Title 5, Section 2302(b)(10).

"It is the policy of this Administration that discrimination in the federal workforce on the basis of sexual orientation is prohibited," Bloch stated. "The Office of Special Counsel (OSC) has been engaged in a review of its authority to process claims of sexual orientation discrimination under Title 5, Section 2302 (b)(10), which prohibits discrimination on the basis of 'conduct which does not adversely affect the performance of the employee or applicant or the performance of others.' OSC has always enforced claims of sexual orientation discrimination based on actual conduct. Based on its review, OSC has concluded that such authority exists in cases other than actual conduct when reasonable grounds exist to infer that those engaging in discriminatory acts on the basis of sexual orientation have discriminated on the basis of imputed private conduct. Such inferences apply to all claims under Section 2302(b)(10), including, but not limited to, sexual orientation discrimination claims. The materials formerly on OSC's Web site were not clear about the statutory basis for OSC's authority. OSC believes that the materials currently on its Web site are consistent with the view of the law described above, but intends to review and revise those materials as necessary to ensure that employees are fully aware of the protections provided."

The Office of Special Counsel is an independent investigative and prosecutorial agency. Its primary mission is to safeguard the merit system in federal employment by protecting federal employees and applicants from prohibited personnel practices, especially retaliation for whistleblowing. OSC also has jurisdiction over the Hatch Act and the Uniformed Services Employment and Reemployment Rights Act.

For more information about OSC, please visit our Web site at www.osc.gov.

***

May 23, 2005

Honorable George Voinovich, Chair,
Honorable Daniel Akaka, Ranking Member
Subcommittee on Oversight of Government Management

Honorable Susan Collins, Chair
Honorable Joseph Lieberman, Ranking Member,
Homeland Security and Governmental Affairs Committee

U.S. Senate
Washington, D.C. 20510

Dear Senators:

Thank you for calling this oversight hearing on the U.S. Office of Special Counsel. (OSC). It is a badly needed opportunity to begin the process of separating facts from disinformation in an increasingly heated debate about a question fundamental for accountable government: Is the OSC under the leadership of Special Counsel Scott Bloch serving or undermining the merit system in general, and rights secured by the Whistleblower Protection Act (WPA) in particular?

Earlier this year our groups joined an unprecedented Whistleblower Protection Act complaint charging that Mr. Bloch had engaged in retaliation to purge whistleblowers on his own staff who protested the agency's deteriorating commitment to its mission. The reason was simple. Under the prior Special Counsel the Office was a good faith, modestly effective resource to enforce whistleblower rights. Due to the battered condition of the WPA after hostile judicial activism, it doesn't get any better than that for whistleblowers in the federal government. As a result, often the OSC was the first, and only realistic option, for a whistleblower to "commit the truth" and survive professionally.

Now we warn federal whistleblowers that they may be signing their own professional death warrant by seeking the Special Counsel's help. Since Mr. Bloch's arrival, the service function we once relied on has dried up completely. And matters could get far worse. The agency either forced out or exiled veteran, highly effective staff who either blew the whistle on betrayal of the OSC's mission or were perceived to have done so.. This agency responsible for protecting the federal workforce from illegal gag orders has issued an illegal, blanket gag order on its own staff, claimed it was all a "misunderstanding," but never withdrew it. We fear the OSC could revert to déjà vu for the 1980's nightmare when the agency was a legalized plumbers unit that helped identify and eliminate "disloyal" employees from the federal government.

Mr. Bloch has repeatedly defended his controversial policies by claiming that he has been trying to improve the efficiency of OSC's operations, by reducing the "backlog" of overage cases, while at the same time improving service to complainants and

whistleblowers. As described in the accompanying Fact Sheet, however, this defense is based on a manipulation of the relevant statistics, which show quite the opposite. While Mr. Bloch is certainly closing more cases in his intake units, he is dramatically reducing the quality of the review complaints receive, as well as the number of whistleblowers helped, and simply moving backlogs around within the agency..

Beyond statistical issues, from everyday experience we know the facts of life. At best, going to the Special Counsel for help is putting good energy after bad. To our knowledge, very few whistleblowers have been helped since Mr. Bloch's arrival. While we do not doubt that exceptions have occurred, there is no mystery about the rule. Employees threatened or victimized by merit system violations are not grounded in reality if they seek the Special Counsel's help against harassment or retaliation.

The dynamic is the same for whistleblowers who want to challenge government misconduct such as fraud, waste or abuse. They should go to Congress, the media or another outlet. In terms of making a difference, filing a whistleblowing disclosure at the OSC has become akin to spitting in the wind..

These conclusions are based on a careful comparison of statutory law with the OSC's recent public denials of any misconduct; our organization's ongoing patterns of analogous frustrations; reports from 60 whistleblowers so far in an ongoing GAP survey of employees who filed cases at the OSC since Mr. Bloch's arrival; and documents obtained by PEER in Freedom of Information Act requests. This letter summarizes information in the more detailed, attached fact sheet. Condensed summaries illustrating our concerns are listed below.

1. Backlogs. The Special Counsel asserts drastic backlog reductions both for reprisal investigations and whistleblowing disclosures. Unfortunately, it appears that the OSC's approach to reducing backlogs has been to arbitrarily abandon those who have been waiting. Further, the claims that backlogs have been reduced and that enforcement has been increased are based upon a selective and distorted statistical analysis, as is described in the attached Fact Sheet.

* The Complaints Examining Unit (CEU) arbitrarily has been limited to writing no more than 1.5 pages on whether to conduct potentially high-stakes, multi-year investigations on whistleblower disputes that could affect the lives of all Americans.

* OSC claims of reducing the intake backlog have not been matched by data about the backlog of cases in the investigation divisions, which means the delays may just be shifting from one office to another. Further, the increased backlog in the investigative divisions has resulted in a precipitous decrease in the number of complainants being helped by OSC

* The backlog of whistleblowing disclosures has been reduced for the most part by closing out 500 pending "low priority" cases without even contacting the whistleblowers, on the excuse that the prior Special Counsel did not plan to either. In

fact, the prior Special Counsel's policy was to contact both high and low priority whistleblowers to follow through on initial queries, because frequently whistleblowers as lay people who do not communicate in the legal format or jargon used by the OSC. In fact, clarification calls to a low priority whistleblower on Navy welding led the prior Special Counsel to order a significant investigation that Mr. Bloch has taken credit for, after sitting on the completed report for some eight months before forwarding it to the President. That wouldn't have happened under Mr. Bloch's streamlined case closing policy.

* To illustrate further, in January 2004 a high level Department of Energy whistleblower whom the prior Special Counsel backed on nationally prominent charges of a homeland security breakdown at a nuclear weapons facility issued comments rebutting an agency whitewash that had denied any security problems exist. As of May 2005, the Special Counsel has not responded, and there has been no corrective action to better protect America from vulnerable to terrorists attacking our nuclear facilities.

2. Track record.

Mr. Bloch has asserted that the OSC is doubling its enforcement record of results. A careful reading of his statistics reveals just the opposite. Corrective action for all prohibited personnel practices has dropped roughly in half over the last two years. The number of whistleblowing disclosures referred for some form of agency investigation has not increased; in fact, as a percentage of the overall disclosures received, the number referred has dropped dramatically.

Beyond statistics, the response of a whistleblower in the GAP survey illustrates why OSC professionalism has become a bitter joke.

> "In the reprisal charge, they [the OSC] did not contact key witnesses I suggested; appropriately review evidence I identified as critical; ask for additional evidence, of which I have plenty; afford me the opportunity to provide evidence to counter the subjects' response....The OSC did not wait for or consider my comment before closing my complaint. As a federal investigator with another agency, I would probably face disciplinary action for handling investigations or treating complainants in th[is] manner.... For the whistleblower disclosures, the OSC did not contact me until 19 months after I filed my complaint to discuss the evidence in my case. The OSC did not explain why they would/did not order an agency investigation."

This individual got far better service than most. The OSC opened a field investigation of his reprisal complaint, and spoke with him about his whistleblowing disclosure.

3. Reorganizations and reassignments. In addition to charges of being a pretext for staff purges, they have stripped the agency of its most veteran employees with track records of obtaining results. Attorneys and investigators have been replaced without explanation to affected complainants. Litigation and corrective action commitments have

been arbitrarily dropped without explanation, after being developed for months or years by a prior team. For all practical purposes the OSC's Alternative disputes Resolution (ADR) unit has been abolished and its mediator forced out, although she was credited with helping resolve and constructively obtain relief from more prohibited personnel practices than any other single agency employee.

4. Buddy system replacements. After Special Counsel Alex Kozinski purged veteran employee rights professionals from the staff in 1981 and 1982, his next step was far more destructive to the merit system. In a series of buddy system hires, he systematically replaced them with intelligence, law enforcement and similar personnel who were openly hostile to whistleblowing. Symptoms of déjà vu are recurring. The competitive process increasingly is being bypassed. New inexperienced professional staff have been recruited from among the personal acquaintances of the Special Counsel and his Deputy to replace effective career veterans. Mr. Bloch hired his son's boarding school headmaster as a special consultant, and then gave him access to sensitive disclosure files. The number of political appointees has doubled. The agency's Director of Human Resources, who had been with OSC since it was created in 1979, resigned abruptly some 10 months into Mr. Bloch's tenure, in what many members of OSC staff believe was concern over these and other policies.. It is essential that the merit system against political hiring start at home for the OSC.

5. Budgetary priorities. Mr. Bloch did not fill 16 of 113 positions Congress allocated for the agency in FY 2004. To illustrate, while doubling political appointments he has passively refused to double the disclosure Unit staff from five to ten, despite congressional funding approval. Positions to serve reprisal victims remain unfilled, while the agency approves six figure contracts for work that is ignored or of questionable value.

6. Twisted mission. Neglect of whistleblower rights is not an aberration. For all practical purposes enforcement of merit system rights protecting sexual orientation has become dormant, although the OSC is the only agency with enforcement authority against that prohibited personnel practice. Further, resources are increasing for steadily more partisan, and controversial, Hatch Act investigations and prosecutions. In one case, Mr. Bloch has been accused of delaying until after the election an investigation of a Hatch Act complaint concerning political activity by then-National Security Advisor Condolleeza Rice, by assigning the case to himself and his political deputy.

The OSC's sharply deteriorating record must be nipped in the bud, before the agency becomes more dangerous. Already GAP has received a pattern of complaints from employees who filed OSC whistleblowing disclosures that they were subsequently retaliated against for going to the Special Counsel, after which the OSC declined to investigate. If this controversy follows the 1980's pattern, the next steps will be far worse. Empathetic OSC staff will be replaced with those hostile to whistleblowers, and the agency will start to become a resource to help agencies retaliate. *See confirmation Hearinhgs on Federal Appointments before the Senate Judiciary Committee,* 99th Cong., 2d Sess. (1986). All of us have a responsibility to insure that unacceptable disaster for the merit system does not recur.

The first step is for Congress to obtain transparency about what is happening at this sick agency, and about how much damage has occurred already. The Special Counsel simply is not playing it straight about policy reversals that are occurring throughout the agency, and the disastrous consequences for whistleblowers. He is not playing it straight about case processing statistics. He is not playing it straight about his hiring practices or the actions he has taken against his own staff. This hearing is a major step forward. It inspires us to step up ongoing vigilance. We will keep investigating the Special Counsel, and keep blowing the whistle on the OSC, unless and until its commitment to defend the merit system is born again.

Sincerely,

Tom Devine
Legal Director
Government Accountability Project

Jeff Ruch
Executive Director
Public Employees for Environmental Responsibility (PEER)

Attachment C

OSC Response to the GAP/PEER Letter

The recent letter from Tom Devine of the Government Accountability Project (GAP), and Jeff Ruch of Public Employees for Environmental Responsibility (PEER), is riddled with inaccurate statements. Over the past year, the Office of Special Counsel (OSC) has made many impressive accomplishments including, significantly reducing the recurring and persistent case backlogs within the Disclosure Unit (DU), the Complaints Examining Unit (CEU) and the Hatch Act Unit (HAU). I would like to highlight OSC's accomplishments over the last year and also discuss some of the most glaring inaccuracies in the GAP/PEER letter.

First, OSC has significantly reduced the DU and CEU backlogs. Moreover, OSC has always stated that the DU and CEU case backlogs have been reduced by 82%, to say we have not is false. Moreover, the DU increased by almost 100% the number of whistleblower disclosure cases referred to federal agencies for investigation from FY 2003 to FY 2004. Although some may not like to acknowledge OSC's successes, it certainly does not diminish or reduce the impressive accomplishments of the career staff.

The Hon. Tom Davis, R-Va., the Chairman of the House Government Reform Committee, and Hon. Jon Porter, R-Nev., the chairman of the House Government Reform Subcommittee on the Federal Workforce, in a May 17, 2005, letter praised the Office of Special Counsel for our efforts to cut the case backlog. Moreover, staff members of both Chairman Davis office and Ranking Minority member of the House Government Reform Committee, Hon. Henry Waxman, D-Ca., randomly reviewed dozens of closed DU, HA, and CEU cases, on three separate occasions, and were satisfied that OSC thoroughly reviewed each case. The Chairman's letter said that OSC "did not superficially close meritorious cases during the backlog reduction efforts." The Chairman's letter added that "we continue to be impressed with the sincerity and pragmatism with which you and all your staff approach your jobs." In fact, according to the May 17, 2005, letter one previously critical Congressional staff member admitted to Chairman Davis' staff that "we have satisfied ourselves that they did not throw any folders into the Potomac."

Second, no OSC employee was a "whistleblower." The GAP/PEER letter claimed that certain OSC employees were "whistleblowers." This is incorrect. To be a whistleblower, one must disclose a violation of a law, rule or regulation, however, this never occurred. Moreover, the GAP/PEER letter does not state a single fact that any OSC employee made a protected disclosure, as required by law to claim whistleblower protection. There are occasional professional disagreements on matters but this occurs within every office. In fact, the most vocal OSC senior career staff member who frequently stated his disagreement on matters was promoted to the position of Assistant Special Counsel. Furthermore, I and my immediate staff are unaware of anything any one of the employees involved in the reassignments might have said of a negative nature. There is simply no truth at all to this "whistleblower" allegation. It is being repeated in the hopes that saying it enough times might cause it to stick.

Third, the DU has become more efficient and effective while remaining the safe haven for whistleblowers. I inherited hundreds of DU cases (pre-FY 2004) slated to be closed that were stacked up in offices, but no one had written the official letter closing them. This was a problem that could not be ignored and I tasked DU to resolve it. The DU reviewed and closed approximately 500 old cases in FY 2004. Therefore, many older cases were closed in FY 2004 because only in FY 2004 did OSC actually write the letter that closed the case. Thus, the DU numbers for FY 2004 show a higher percentage of cases being closed than FY 2003. In other words DU employees did in FY 2004 what they should have done in FY 2003 and earlier– officially close cases they planned to close years earlier. Nevertheless, each of those cases was given another review, and at least two of them were converted into positive, substantiated disclosures where previously they were slated for closure and then ignored for years.

Moreover, the number of DU referrals to other federal agencies for investigation increased from 14 in FY 2003 to 26 in FY 2004, an almost 100% increase. The percentage rate of referrals however, did not increase because of the closing of approximately 500 DU cases that were slated to be closed before I arrived at OSC as mentioned-above. In addition, the DU created new standardized operating procedures that should ensure that referrals remain high. The new DU procedures provide the right balance between referring everything to another federal agency for investigation and referring nothing. Previously, the DU standard of proof for a referral to an agency approached beyond a reasonable doubt. This was the wrong standard of proof since OSC matters are administrative, not criminal. The DU now uses a preponderance of the evidence standard on case referrals, which should increase agency referrals. Thus, the DU substantially reduced the backlog of older cases while increasing the number of cases referred for investigation to federal agencies.

Fourth, the CEU has also become more efficient and effective. The CEU is the intake unit for OSC. When I took over at OSC, it was a bottleneck in the Agency. Cases were not being reviewed for months. The average time a case sat in CEU was 90 days and the oldest cases in the unit were over 240 days. After the backlog reduction effort, the average age of a CEU case is now less than 50 days and in most months the oldest cases are less than 60 days old. Moreover, during the CEU backlog reduction effort, from April to September 2004, the SPU doubled the referral rate from the CEU to the Investigation and Prosecution Division (IPDs) to 22%.

OSC made four changes to CEU standard procedures that helped reduce the average age of each CEU case. First we shortened the referral memos to the IPDs, from 10 pages to 2 pages. The additional pages added very little to the process and consumed an inordinate amount of time. Second, OSC does not call complainants on frivolous cases, however, in the vast majority of cases, OSC will still call the complainant. Third, the complainant is now required to fill out OSC Form 11, which requires them to list the alleged violation of a law, rule or regulation. Previously, OSC employees had to pour through many documents from the complainant and waste valuable time before finding the necessary information. Fourth OSC revamped partial IPD case referrals from the CEU. Partial referrals are cases CEU refers for investigation but CEU recommends closing the other issues within the same claim. Instead of CEU keeping these cases until the "16-day letter" process is completed, the IPD receives them as soon as they are processed. All of this streamlining was done by the dedicated staff of the CEU. They are to be

applauded and congratulated for this impressive feat. Information to the contrary is false and obviously comes from persons who do not know.

Fifth, the HAU has also significantly reduced it's backlog. When I became the Special Counsel, the HAU was not being run efficiently of effectively. Its operating procedures bogged down case processing and contributed to the large number of backlogged cases. Some cases were over three years old. To overcome the HAU problems, I powered-down decision-making authority to the HAU attorneys. I streamlined internal procedures on referring cases to the IPDs. In addition, I instituted a cross-training initiative that will allow the HAU to augment its staff with other OSC employees when it becomes overwhelmed with cases. These procedures allowed the HAU to reduce their ending inventory of cases from 255 in FY 2003 to 146 in FY 2004, an almost 50% reduction. With these changes in place, I am confident that the HAU is ready to tackle any future case surges.

Sixth, the GAP/PEER letter is incorrect that the number of complaints OSC received in FY 2003 vs. FY 2004. The actual intake of cases actually increased from FY 2003 to FY 2004, from 1791 cases in FY 2003 to 1964 cases in FY 2004. Thus, federal employees still consider OSC as the staunch defender of the federal merit system.

Seventh, OSC did not "purge" any employees. The reassignment was based purely on an objective basis, in line with the needs of OSC. OSC needed to be less "DC centric" and more field office based. However, OSC had only one intact headquarters IPD team with a Senior Executive Service leadership at the time of the reorganization. The IPD team was the right mix of talent and leadership to start the new Midwest Field Office (MFO) in Detroit, MI. The entire team was moved intact out of OSC headquarters and set down to run the new MFO. This was the most objective way to choose the employees that were to be transferred. OSC also reassigned six other employees from different divisions to three field offices.

Eighth, there was never an illegal "gag order." OSC policy, similar to other Executive Branch agencies, requests employees to refer all outside inquires to our Office of Congressional and Public Relations. Last year I sent an e-mail out to all employees mentioning this policy. Later that day, there was some confusion on this policy. Any confusion was cleared up the next day when I sent an additional e-mail to all OSC employees expressing to them that this policy was not a "gag order". In fact, no OSC employees later expressed any concern after I sent out the second e-mail that this was any kind of "gag order." Therefore, it is not clear why it took a year for this "illegal gag order" inaccuracy to surface again. This, like some much else in the GAP/PEER letter, is a canard that has been repeatedly shot down as false.

Attachment D

OSC News Clips

USNews.com U.S.NEWS & WORLD REPORT SUBSCRIBE NOW | NEWSLETTERS | MEMBER CENTER | | >LOG IN | SEARCH

CURRENT ISSUE | RANKINGS & GUIDES | BUSINESS | HEALTH | TECH | WASHINGTON WHISPERS | COLUMNS | EDUC

Home > News

6/6/05

Cheating down on the border

A kickback scheme among federal agents in Arizona results in some charges--and plenty of questions

By Edward T. Pound

Larry Davenport never thought he had an easy job. For 14 years as an agent of the U.S. Border Patrol, he tracked down illegal immigrants and drug smugglers in the deserts of Texas and Arizona and spent many a lonely night at checkpoint trailers along the Mexican border. But in late 2000, soon after he was detailed to the Border Patrol station in Douglas, Ariz., Davenport quickly learned how tough his job could be. He was denied a promotion, he says, and became *persona non grata* among the station's senior managers.

advertisement

His crime? Davenport says he became a marked man after he and another agent, Willie Forester, disclosed to Justice Department criminal investigators that some Border Patrol agents temporarily assigned to the Douglas station had accepted kickbacks from supervisors who rented rooms to them and from hotels anxious to get their business. Their charges ultimately led to several investigations and the disciplining of 23 Border Patrol agents and three low-level supervisors. Border Patrol records show that at 19 other agents were involved in the scheme but were not disciplined. Two agents indicted in the case are awaiting trial in Arizona. A federal investigation of similar charges, at a Border Patrol facility in Charleston, S.C., led to disciplinary action against nine agents.

Coverup? For Davenport and Forester, however, the story doesn't end there. Both men continued to press their allegations with the U.S. Office of Special Counsel, the government agency in Washington that protects whistle-blowers against reprisals. In papers filed with that office, the two men alleged that David Aguilar--now the head of the Border Patrol in Washington, directing the enforcement efforts of 11,000 agents nationwide--and senior managers in Douglas were aware of the kickback scheme but did nothing to stop it. At the time, Aguilar was the chief patrol agent in Tucson. The whistle-blowers also charged that the Department of Homeland Security, which investigated their allegations, failed to pursue other charges against Border Patrol managers who, they say, participated in the scheme.

returned the funds to the man. Soon, he and his immediate supervisor, Forester--also outraged by the kickbacks--began collecting information on the scheme. Davenport says that another agent, Russ Jensen, who rented a house to a detailed agent, gave him a memo he had written to Aguilar complaining that the agent had demanded a kickback. Davenport turned the memo over to the Tucson office of the Justice Department's inspector general in February 2001, he said.

"Burden." In an interview, Jensen confirmed that he wrote a memo to Aguilar about the alleged kickback but said a copy of a memo in his office computer was dated May 11, 2001, which is three months after Davenport says he took the document to the Justice Department. Jensen said he isn't sure the May 11 memo is the same document he sent to Aguilar. In any event, Jensen said, he was never interviewed by federal investigators who examined the kickback allegations.

Aguilar runs an agency that is a critical component in the nation's war on terrorism, one faced with a daunting task. Among their other duties, agents must cover a 4,000-mile border with Canada and 2,000 miles along the Mexican border. It's tough work, especially on the Mexican border, dealing with illegal immigrants, drug smugglers, and potential terrorists.

advertisement

Aguilar was named head of the Border Patrol in July of last year. Before that, he served as the chief patrol agent for the Tucson region, which includes the Douglas station and covers a 260-mile stretch along the U.S.-Mexico border. The kickback scheme in Douglas took place on Aguilar's watch. What happened is this: Dozens of agents detailed to Douglas to crack down on illegal immigration accepted kickbacks from some supervisors, who rented them places to stay, or from hotel or apartment owners. Some agents, detailed to Douglas, filed expense reports claiming they had paid their full $55-a-day housing allowance when they had actually paid less. Property owners furnished them with a receipt for $55 but kicked back anywhere from $8 to $15 a day, several federal investigations said.

Davenport was one of the agents assigned to work in the Douglas station. Too bad for the Border Patrol, because Davenport soon learned, he says, that some agents who were supposed to enforce the law were breaking it. The way Davenport tells it, he got his first inkling that something was wrong when he first arrived in Douglas, in October 2000. At an orientation meeting for newly detailed agents at the National Guard Armory there, he says, he was talking with Aguilar and two other managers when they were approached by two supervisors who urged Davenport to rent living quarters from yet another supervisor. "I said it was unethical for a Border Patrol agent to have business relations with a subordinate," Davenport recalled in an interview. He says nothing was mentioned about kickbacks.

Not long after, however, Davenport learned of the kickback scheme when a private homeowner who was renting a room to him left $240 of Davenport's rental payment at his office. He says

Now, the Office of Special Counsel, after reviewing the case for more than two years, has rendered its verdict, one that is sharply critical of both the Border Patrol and its parent agency, the Department of Homeland Security. In a letter and analysis of the case that he sent to President Bush late last week, Special Counsel Scott Bloch said that the agency "failed to thoroughly investigate the whistle-blowers' allegations" against senior Border Patrol officials. He concluded: "It is simply not credible that 45 employees at a single Border Patrol station could engage in a pattern of conduct sufficiently egregious to warrant severe discipline without the knowledge of management." In a separate statement to *U.S. News,* Bloch said that there was "a real risk of creating the appearance of a whitewash." Bloch did not specifically address questions about Aguilar, but included in the material he sent to the president are the allegations made against Aguilar and some of his close associates.

Denials. Through a spokesman, Aguilar strongly denied the allegations that he knew of the kickback scheme and did nothing about it. Aguilar, the spokesman said, did not engage in any effort to cover up the matter. In a signed statement he gave to federal investigators last year while he was still running the Tucson region, Aguilar recounted how he first learned of the allegations from senior managers at the Douglas station. But, he said, he could "not recall the exact date that [the] allegations . . . were first brought to my attention."

Both Davenport, who lives in the Dallas area, and Forester, now residing in Las Vegas, left the Border Patrol three years ago. Davenport works for another law enforcement agency, and Forester operates his own business.

advertisement

In his report to President Bush, Special Counsel Bloch detailed the history of the whistle-blowers' efforts to expose the wrongdoing. He was sharply critical of the agencies that investigated the allegations--the Justice Department's inspector general and the Department of Homeland Security's Bureau of Customs and Border Protection. Both agencies, however, say that they conducted thorough and careful investigations.

The Justice Department's inspector general, in a report issued in January 2003, detailed a serious pattern of misconduct, but Bloch's report accused the inspector general's office of dragging its feet. The inspector general, he said, initiated an investigation seven months after Davenport and Forester made their allegations--and then only after, Bloch wrote, "the whistle-blowers reported their allegations" to Rep. Jim Kolbe, an Arizona Republican. Kolbe demanded the inquiry. In an interview, Kolbe said Bloch's findings "illustrate the need" for homeland security officials "to get to the bottom of these things."

In his analysis, Bloch said that even after the Justice Department urged "strong and immediate" disciplinary action against wrongdoers, the Border Patrol refused to act. He cited a memo written in 2003 by a personnel official in what was then the Immigration and Naturalization Service, which then controlled the Border Patrol. The official wrote that it would be an "administrative burden" to discipline the offenders. "Thus, Border Patrol decided not to discipline federal law enforcement employees who broke the law because it would be administratively burdensome," Bloch told the president.

Given that kind of conduct, Bloch said, the special counsel staff demanded further investigation in

November 2003. By that time, the Border Patrol had merged into the new Department of Homeland Security, as an arm of the Bureau of Customs and Border Protection. In the next year, prodded by the special counsel's office, the customs agency conducted two reviews. Neither satisfied Bloch.

In the end, while some agents and a few supervisors were disciplined, he wrote, the investigations did not pursue evidence indicating that some senior managers at the Douglas station were aware of the kickback scheme. Bloch says Davenport maintains that he reported his concerns to three senior managers at Douglas but was told to "mind his own business."

Bloch also says investigators appeared to have "uncritically accepted" the assertions of senior managers that they were unaware of the kickback scheme. "The agency appears to have discounted without justification evidence implicating management and supervisory personnel in the wrongdoing," he said. Moreover, Bloch wrote, investigators "flouted [his office's] specific request that the whistle-blowers be interviewed regarding their allegations."

Despite the strong support given to them by Bloch and his staff, Davenport and Forester question whether all the facts about the Douglas episode will ever come to light. "Somebody here in Las Vegas, they rob a store of $20, they get 20 years in jail," Forester says. "A lot of these guys stole money, and they got slapped on the wrist. What happened to the integrity of the U.S. Border Patrol?"

U.S.NEWS & WORLD REPORT USNews.com SUBSCRIBE NOW | NEWSLETTERS | MEMBER CENTER | LOG IN | SEARCH

CURRENT ISSUE | RANKINGS & GUIDES | BUSINESS | HEALTH | TECH | WASHINGTON WHISPERS | COLUMNS | EDUC

Home › News

5/16/05

Taking on the Navy

Kristin Shott knows a thing or two about the hot seat. She's a whistle-blower, a gutsy, no-nonsense Navy employee whose persistent complaints about faulty welding on several U.S. aircraft carriers triggered a Navy investigation three years ago. In the end, investigators substantiated Shott's allegations that unqualified welders had performed "critical" welds on the catapult hydraulic piping systems used to help launch fighter jets on the USS Abraham Lincoln, the USS Nimitz, and two other carriers. The Navy also found welding flaws on a fifth carrier, the USS Carl Vinson. For most folks, that would have been vindication enough, but Shott wasn't satisfied. The safety of sailors and aviators was at stake, she says, and she pressed her complaint about welding flaws on a sixth carrier, the USS Kitty Hawk. That carrier was deployed to the Persian Gulf in the early days of the Iraq war two years ago. This week, the U.S. Office of Special Counsel, the government outfit in Washington that handles whistle-blower complaints, is set to disclose that the Navy has also substantiated Shott's claims about inferior welds on some of the Kitty Hawk's catapult piping systems. The Navy rejected other complaints Shott filed about pipefitting and soldering work on Navy ships and aircraft. The Office of Special Counsel is also scheduled to report, in a letter to President Bush, that the Navy has repaired all the defective welds on the Kitty Hawk. "Our brave service members depend on the integrity and safety of their equipment in ongoing operations around the world," says Scott Bloch, the special counsel. "Ms. Shott's decision to blow the whistle averted a potential catastrophic loss of life and equipment."

The life of a whistle-blower isn't easy, however. Shott, 38, a Navy welder based at the North Island Naval Air Depot in San Diego, has also filed a reprisal complaint against the Navy. She was demoted and denied a supervisory promotion, she says, after filing her initial complaints in 1999. "My career has been destroyed," she says. "I am no longer doing critical welds." The Navy insists that it did not punish her, but the Office of Special Counsel doesn't agree. "Because of her whistle-blowing," it said last month in a letter to her attorney, Navy officials "improperly" removed her from an elite repair team and denied her a promotion. *-Edward T. Pound*

16 FEDERALTIMES May 23, 2005

GettingAhead

NEWS AND ADVICE FOR YOUR CAREER AND FINANCES

OSC takes on reservists' discrimination cases

By KAREN JOWERS

Four years after Oregon Army National Guard Cpl. Jason Burris was fired from his job with the U.S. Postal Service because of an injury he received on a drilling weekend, the Office of Special Counsel reached a settlement on his behalf with the Postal Service.

"Fortunately for me, the truth came around," said Burris, who praises the Labor Department and the independent Office of Special Counsel for their work in reaching the settlement in late 2004.

Jason Burris

OSC has had sole authority since 1994 to prosecute federal agencies for violations of the Uniformed Services Employment and Reemployment Rights Act, which prohibits discrimination against employees because of their reserve duties and, among other things, requires that employers re-employ reservists upon return from military duty. The federal government is the largest employer of National Guard and reserve members.

Until recently, all complaints went first to the Labor Department's Veterans' Employment and Training Service, which investigated and attempted to resolve cases before deciding whether to refer them to the special prosecutor.

But under a congressionally mandated test that began in February, half of the complaints are going directly to the Office of Special Counsel for investigation. The test is designed to see if it is more effective for the prosecutors and investigators to get involved earlier in the process.

A four-year wait like Burris' for settlement is no longer acceptable to the Office of Special Counsel, said Jim Renne, deputy special counsel.

"There's a new sheriff in town. USERRA cases are no longer a low priority. They're a top priority," said Renne, who is also a first lieutenant in the Army National Guard.

"Our goal is to prosecute, settle or close the case within months, not years," he said, adding that even one year "is way too long."

OSC has set up a formal USERRA unit with three attorneys and two investigators, Renne said. Two of the attorneys are lawyers in the military reserves.

OSC has filed two prosecutions before the Merit Systems Protection Board since Scott Bloch became special counsel in January 2004, according an OSC spokeswoman. Other cases have since been readied for prosecution, but the federal agencies have decided to settle, Renne said.

About 200 claims are filed by federal employees each year, with an average of about 10 per year being referred to the special prosecutor, Renne said. Most are resolved earlier, either through the Pentagon's National Committee for Employer Support of the Guard and Reserve or the Labor Department.

Many complaints relate to benefits issues, such as vacation time, he said. More serious cases relate to unlawful termination and take priority because of their impact on Guard and reserve members.

Sam Wright, ombudsman for the Reserve Officers Association, said the system is working better. "There's been a 1,000 percent improvement. It's no longer a useless formality," he said.

Guard and reserve members who believe their employment rights have been violated can turn to OSC, the Labor Department's Veterans' Employment and Training Service or the Pentagon's National Committee for Employer Support of the Guard and Reserve for advice.

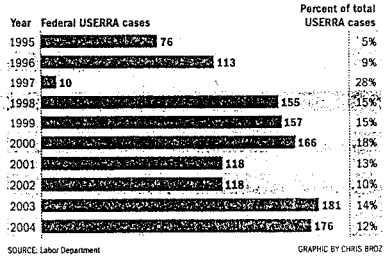
"If you have a question, my first advice is to contact us immediately," Renne said. "We're happy to answer questions, find out what the issue is and advise."

Wright and Renne advise Guard and reserve members that documentation is always important, as is open communication with supervisors, who should receive written notification of a reservist's impending absence for military duty, along with copies of orders.

Even so, "USERRA errs on the side of protecting reservists," Renne said.

RESERVISTS' RIGHTS

The Office of Special Counsel has had the authority since 1994 to prosecute federal agencies' violations of the Uniformed Services Employment and Reemployment Rights Act, which protects the jobs of National Guard and reserve members when they are called to active duty. The number of USERRA cases involving federal employees has peaked in the last two years since the Labor Department began keeping track in 1995:



SOURCE: Labor Department

GRAPHIC BY CHRIS BROZ

FOR MORE INFORMATION

Federal employees in the Guard or reserves who believe their employment rights have been violated have a number of sources to turn to for advice:

- The National Committee for Employer Support of the Guard and Reserve, (800) 336-4590, or www.esgr.org.
- The Labor Department's Veterans' Employment and Training Service, (866) 487-2365, or www.dol.gov/vets.
- The Office of Special Counsel, www.osc.gov, or send e-mail to USERRA@osc.gov.

GOVEXEC.COM FROM THE MAGAZINE January 1, 2005

NEWS+ANALYSIS

Culling Complaints

By Amelia Gruber
agruber@govexec.com

The head of the Office of Special Counsel has nearly cleared the substantial backlog of whistleblower cases he inherited.

For the first time in recent memory, the Office of Special Counsel isn't struggling under stacks of old complaints filed by federal whistleblowers.

A year ago, when Scott Bloch took over as chief of OSC - a small, independent agency created in 1978 to uphold federal merit system principles - there were more than 600 cases in the pipeline involving whistleblower allegations of fraud, waste and mismanagement. Now, hardly any disclosures have been sitting longer than the 15 days federal law affords OSC to review them and decide whether they warrant further investigation.

Early in 2004, OSC also was struggling to deal with 200 old complaints of illegal political activity and 500 prohibited personnel practice cases that hadn't made it through an initial screening process in 60 days, the upper limit of what agency officials consider a reasonable waiting period. With the help of OSC's most seasoned attorneys and investigators - many of whom are unaccustomed to seeing cases until they've been vetted by junior staff members - Bloch has managed to nearly eliminate these holdups as well. "We're sending the message out that we mean business," he says.

Bloch even reviewed a few of the older complaints himself. "I wanted to emphasize to the staff . . . that people who had cases sitting here for too long had [experienced] a second injustice," he says. "You can give people no better reparation than to take their claims seriously."

Now, only one obstacle stands between Bloch and complete victory over OSC's case logjam. It's an issue he has dubbed the "silent backlog" - because it has thus far escaped much attention - involving the prohibited personnel practice complaints (allegations of whistleblower retaliation, discrimination, or other violations of merit system principles).

While few, if any, such complaints are now stuck in OSC's intake, or "complaints examining," unit awaiting initial screening, about 120 have cleared that first hurdle only to end up in limbo. They remain under investigation, without being dismissed or prosecuted. Some have been stuck for years, Bloch says.

The wait simply "prolongs the agony," says one federal employee who saw his allegations pass through OSC's initial screening in about six months only to stall. The employee, who asked to remain anonymous, has talked to at least five investigators, visited a counselor to deal with stress and paid an attorney tens of thousands of dollars to assist him. At first, he just wanted his record

cleared of low performance ratings he believes he didn't deserve. Now he mostly wants closure.

That may come in the next few months, because Bloch is intent on eliminating the silent backlog in 2005. Observers hope that reaching this goal doesn't come at the expense of giving each case the scrutiny it deserves. It's difficult to find the right balance between speed and attentiveness, says Elaine Kaplan, Bloch's predecessor. "I wanted to be sure that when we closed a case, we could defend our decision," she says. "That requires . . . that the staff spend more time on the phone or in person communicating with the whistleblowers and others [seeking] assistance."

Jeff Ruch, executive director of the advocacy group Public Employees for Environmental Responsibility in Washington, says he thinks OSC isn't looking at cases as carefully as it has in the past. In a recent conference call, he says, it became clear that one of the OSC staff members participating hadn't read the 12-page whistleblower disclosure case in question.

Bloch argues that if anything, the quality of work at OSC is improving. Staff members are spotting more cases that need further investigation, he says. The percentage of prohibited personnel practice cases and whistleblower disclosures found to have merit has doubled in the past year.

"It would be easy to [eliminate] the backlog if you didn't look at the complaints seriously," Bloch says. "[It's] important that each person gets full and fair justice."

This document is located at http://www.govexec.com/features/0105-01/0105-01newsanalysis9.htm

purchase dental and vision insurance with pre-tax dollars from a program negotiated with insurers to take advantage of the government's buying power (42 GERR 671, 7/20/04).

Federal workers currently have access to medical coverage through the Federal Employees Health Benefits Program, but the program provides reimbursement for only a small fraction of dental and vision care. The bill is designed to provide a dental and vision benefit patterned after the Federal Employees Long-Term Care Insurance Program, which began accepting enrollees in July 2002 (40 GERR 670, 7/9/02), with employees who choose to participate paying the premium costs.

By leveraging the purchasing power of the federal government, Collins has said, the Office of Personnel Management, which would administer the program, would have the ability to provide access to more affordable dental and vision coverage to employees and retirees than would be available to individuals purchasing this insurance on their own (42 GERR 698, 7/27/04).

Union Applauds Bill, Calls for Contribution. Colleen M. Kelley, president of the National Treasury Employees Union, said Dec. 6 that NTEU welcomed congressional approval of the legislation.

But the union continues to believe that the government should contribute toward the additional benefits, she said.

Kelley also praised the legislation for its requirement that OPM review the possibility of continuing coverage for full-time students under FEHBP family policies beyond age 22. Such coverage is currently prohibited in the FEHBP, although the practice is quite common among private sector employers and state and local governments, she said.

"This family-friendly change in the law would be another step toward making the federal government an employer of choice," Kelley said.

USERRA

OSC to Handle Half of Federal Worker USERRA Complaints in Demonstration Project

The Office of Special Counsel and Labor Department will split the workload for investigating Uniformed Services Employment and Reemployment Rights Act complaints filed by federal employees under a demonstration project bill signed into law by President Bush Dec. 10.

The provision to give OSC responsibility for what was previously the exclusive legal responsibility of DOL is included in the Veterans Benefits Improvement Act (S. 2486) which was approved by the House by voice vote Nov. 17 after passing the Senate Oct. 8 by unanimous consent.

"The Office of Special Counsel is glad to help in investigating USERRA cases," OSC spokeswoman Cathy Deeds told BNA Dec. 6, noting that DOL and OSC already work together on many USERRA cases involving federal employees.

At a June hearing of the House Veterans' Affairs Committee on USERRA issues, Special Counsel Scott J. Bloch noted that the federal government is the largest employer of National Guard members and military reservists (42 GERR 635, 6/29/04). Bloch testified that OSC was interested in getting more involved in the early stages of federal employee USERRA cases.

Expanding Relationship. USERRA provides certain job rights to workers returning from active service in the U.S. military reserves or National Guard, and prohibits discrimination based on such service against those workers when they rejoin the civilian workforce (38 U.S.C. § 4301).

Under USERRA, all initial federal employee complaints must be filed with DOL. However, DOL often engages OSC's participation to assist in resolving cases.

For example, cases involving both USERRA claims and civil service prohibited personnel practice allegations are referred to OSC. Because DOL is not authorized to investigate prohibited personnel practice allegations, while OSC has the primary authority for such investigations, DOL and OSC must work together, Deeds explained.

DOL may also bring OSC into a case because of OSC's expertise in handling informal settlement negotiations with agencies. In an October report, the Government Accountability Office reported on OSC's involvement in USERRA cases which DOL was unable to resolve (42 GERR 1005, 10/26/04).

In OSC comments on the GAO report, Bloch reiterated his office's desire to take on more initial investigation work in USERRA cases.

The inclusion of a more formalized demonstration project in the veterans bill was the logical next step for DOL and OSC, Deeds said.

New Process. The demonstration project would be authorized to begin within 60 days of the bill becoming law.

All federal employee USERRA complaints would still be filed with DOL, but complaints filed by employees with Social Security numbers ending in an odd number would then be sent to OSC for initial investigation.

Deeds said that OSC will be establishing a new organizational unit to handle USERRA investigations. Some existing OSC staff will be transferred to the unit, but OSC will also be hiring additional new workers to staff the unit, Deeds said. No final decisions have been made about how many employees will staff the unit and how many need to be hired, she added.

BY DONALD G. APLIN

Retirement

Bill to Eliminate TSP Open Seasons Passed by Congress, Sent to President

Federal employees will be permitted to make changes at any time to the amount of money they contribute to their Thrift Savings Plan retirement accounts under legislation passed by the Senate by voice vote Dec. 7 and sent to President Bush for his signature.

An identical version of the Thrift Savings Plan Open Elections Act (H.R. 4324) was approved by the House, also by voice vote, on Nov. 19 (42 GERR 1133, 11/30/04). The bill, introduced in May by Rep. Tom Davis (R-Va.), chairman of the House Government Reform Committee, permits participants to begin or stop contributing to the TSP or to alter their contribution

Workers get 3.5% raise, new benefits

Employees will receive a 3.5 percent average pay hike in January, be able to change their retirement contributions at any time, and have new dental and vision insurance options in 2006 under bills Congress passed before adjourning for the year.

The 3.5 percent pay raise was included in the fiscal 2005 omnibus spending bill, which President Bush signed into law Dec. 8. Bush now has until Dec. 31 to determine how much of that raise will be applied across the board to everyone and how much will be allocated as locality pay. His pay advisers have recommended a 2.5 percent across-the-board increase and a 1 percent locality increase that will vary based on where employees work.

The bill to eliminate open seasons for the Thrift Savings Plan was passed by the Senate on Dec. 7. The House passed the bill in November. Current law allows employees to change their contributions to the TSP, the government's retirement plan, only during open seasons that are held every six months. But a new automated record-keeping system eliminates the need for open seasons because employees can make investment changes at any time.

And the House approved legislation Dec. 6 that will enhance dental and vision insurance options for federal employees and retirees. The bill, which already had cleared the Senate, requires the Office of Personnel Management to provide more dental and vision insurance options to employees and retirees through contracts with one or more insurance companies. Unlike other federal health insurance programs, where the government pays the bulk of the premiums, policyholders will pay the entire cost of the enhanced dental and vision benefits. The new benefits will begin in 2006.

Special Counsel drastically cuts backlog of cases

The Office of Special Counsel has reduced its backlog of cases from more than 1,400 at the beginning of 2004 to fewer than 200.

The stubborn backlog has been a source of congressional criticism for years.

The agency handles complaints from federal employees of prohibited personnel practices such as discrimination. It also investigates whistleblower complaints about agency mismanagement and waste and abuse of authority, and it prosecutes government employees who may have illegally engaged in partisan politics.

OSC has 15 days to review a whistleblower complaint and then refer it back to the agency if it appears to be valid. It has 240 days to handle a case of prohibited personnel practices. Despite the time limits, cases often languished in OSC files for years, said Special Counsel Scott Bloch.

Bloch said he took a three-pronged approach to tackle the backlog: hiring new staff, using temporary employees and streamlining how cases are managed.

ROB CURTIS/FEDERAL TIMES

Special Counsel Scott Bloch

The agency created a special project group to tackle the oldest cases and reduced the paperwork required to get a case reviewed. "Instead of a typewritten, 10-page memo, they passed it to the next level with just a one-page handwritten memo," Bloch said.

He also supplemented OSC's staff with law students. "Normally we hired three interns each summer. This year we brought in 10. They got valuable experience, and we got more work done," Bloch said. He also hired 10 more full-time employees.

Creative thinking on the part of agency employees also made a difference. "I asked every employee to look at how they did their jobs and come up with suggestions on how to be more efficient," he said. He said good-natured competition also helped.

Bloch said one potential danger in emphasizing speed was that employees might deny worthy cases just to get them off their desks.

"The opposite happened. We went from 10 percent of the prohibited personnel practices being accepted for further review to 20 percent," Bloch said. There was a similar increase in whistleblower cases being referred for further action, he said.

The next step is to make sure the backlog does not return. Bloch said the agency plans to hire 10 more lawyers, paralegals and investigators next year and is working on a plan to buy software that will speed the processing of cases. He hopes to have some of the technology in place by next summer.

KAREN ROBB

Federal Times 12/13/04

AMERICAN FORCES INFORMATION SERVICE
NEWS ARTICLES

Special Counsel Upholds Job-Protection Rights for Guard, Reserve

By Donna Miles
American Forces Press Service

WASHINGTON, Nov. 3, 2004 -- There's good news for federal employees who have filed claims that their bosses denied them job rights because of their National Guard or reserve service, an attorney with the National Committee for Employer Support of the Guard and Reserve told the American Forces Press Service.

Sam Wright, also a captain in the Naval Reserve, said a new special counsel who took office last January is helping speed along backlogged claims and ensuring that federal employers who violate the law are held accountable.

Wright said Special Counsel Scott J. Bloch is helping ensure the Uniformed Services Employment and Reemployment Rights Act, commonly referred to as USERRA, is effectively enforced.

The law, which has been in effect for the past 10 years, prohibits employers from discriminating against their workers because of their military service. Congress passed the law to safeguard the employment rights and benefits of servicemembers upon their return to civilian life.

USERRA applies to the federal, state and local governments and to private employers, regardless of size.

Employees who believe their employers have violated their rights under USERRA file a complaint with the Department of Labor's Veterans' Employment and Training Service, Wright explained in an article in this month's "The Officer," a publication of the Reserve Officers Association.

If a Department of Labor investigation concludes that the case has merit and the employer is a federal agency, the Labor Department refers the case to the Office of Special Counsel, Wright explained. This small federal agency is headed by the special counsel.

A General Accountability Office report issued last month criticized the speed in which the Office of Special Counsel moved forward on USERRA complaints.

But Wright said the report covered the agency's operations before Bloch took the reins, ushering in a sea change in the way the complaints are handled. "Referring a USERRA case to OSC is no longer a useless formality," Wright wrote.

So far this year, the Office of Special Counsel has processed "about a dozen" USERRA cases, some of which had been backlogged as long as two years, according to spokeswoman Cathy Deeds.

Deeds said all but one of the cases resulted in settlement. One, a complaint filed against the U.S. Postal Service, was referred to the Merit Systems Protection Board for further action.

Wright said this new momentum represents a positive step in protecting Guard and reserve members' job rights.

During a July 8 Pentagon ceremony, Bloch signed a statement of support for the National Guard and reserve and said he supports USERRA, not only as a representative of the administration and a citizen, but as the father of an active-duty Marine. Bloch's son, Lance Cpl. Michael Bloch, recently returned to Iraq for a second tour of duty.

Wright said the Office of Special Counsel's new emphasis on USAERRA enforcement "helps ensure that the federal government stands as a model employer in its treatment of National Guard and reserve employees."

Biography:
Special Counsel Scott J. Bloch

Related Sites:
National Committee for Employer Support of the Guard and Reserve
Uniformed Services Employment and Reemployment Rights Act
Veterans' Employment and Training Service
Office of Special Counsel
General Accountability Office

The Washington Times
www.washingtontimes.com

Special counsel tackles backlog

By Rowan Scarborough
THE WASHINGTON TIMES
Published October 21, 2004

When President Bush's nominee to head the U.S. Office of Special Counsel took the job earlier this year, he found a disturbing backlog.

In a time of war, when the country was relying heavily on guardsmen and reservists to fight the war on terrorism, the office had failed to adequately prosecute government agencies that discriminated against service members. About 20 claims languished.

"I had read about criticism prior to my arrival in press reports," Special Counsel Scott J. Bloch said yesterday. "I made it a high priority to prosecute these cases vigorously."

The OSC is best known within the federal government for protecting whistleblowers from retribution. But in war, the office shields military personnel from federal job discrimination under the 1994 Uniformed Services Employment and Reemployment Rights Act (USERRA).

"The causes range from individual irritation to institutional ignorance of the law, to opposition to service in the military -- none of which are acceptable," Mr. Bloch said.

A Clinton appointee ran the independent office until the five-year term expired in May 2003, more than two years into the Bush presidency. A new Government Accountability Office report on the complaint backlog covered fiscal years 1999 to 2003, a period before Mr. Bloch took office.

As one of his first steps, Mr. Bloch set up a team of lawyers -- the Special Projects Unit -- to aggressively pursue veterans' complaints. It is headed by Army National Guardsman James L. Renne, and includes a former Marine Corps gunnery sergeant.

"Priorities were not established in this office sufficiently for these kinds of cases," Mr. Bloch said.

By June, Mr. Bloch became the first special counsel to prosecute a federal agency under USERRA. He filed suit against the U.S. Postal Service for denying employment advancement training because the veteran did weekend National Guard duty. The OSC filed a second lawsuit in August against the Department of Veterans Affairs for firing a worker because, Mr. Bloch said, he was called to active duty. The postal case is ongoing; a confidential settlement is in the works in the second case.

"I will not hesitate to prosecute anyone who discriminates against you or failed to re-employ you or restore your benefits," is a message that Mr. Bloch delivers to federal workers and on Armed Forces Television Network.

The GAO found that it had taken the OSC an average of 145 days to process a total of 59 USERRA claims referred by the Labor Department between 1999 and 2003. Two cases took 30 months to process.

Congress passed the act in 1994, after veterans returning from the 1991 Persian Gulf war complained of difficulties in returning to their federal jobs. A Justice Department office defends guardsmen and reservists who charge discrimination by local governments or private employers.

Copyright © 2004 News World Communications, Inc. All rights reserved.

GOVEXEC.COM DAILY BRIEFING October 25, 2004

Special counsel says first veterans case will set employment precedent

By David McGlinchey
dmcglinchey@govexec.com

The first case brought brought to the Merit Systems Protection Board involving a federal agency accused of violating the Uniformed Services Employment and Reemployment Rights Act will set an important precedent for federal agencies and managers, according to Office of Special Counsel chief Scott Bloch.

The case, which is being brought by the special counsel against the U.S. Postal Service, was initiated in June and is set for an MSPB hearing in early January.

"That's a rather quick hearing date ... we've really pushed that," Bloch said Thursday during an interview with *Government Executive*. "We feel it is an important case that underscores the importance of enforcing the nondiscrimination parts of USERRA."

The Postal Service declined to comment on the case. A spokesman said the agency typically does not release statements on pending litigation.

USERRA, passed in 1994, protects the employment rights of National Guard members and reservists who are called up to active duty. Under the law, demobilized reservists are guaranteed their old positions, any seniority they would have accrued and full benefits. The act also protects against a federal employee's reserve service from negatively affecting their career.

The Government Accountability Office released a report recently that criticized the amount of time OSC has taken to process USERRA cases. Bloch said, however, that he has made veteran's rights a priority since assuming control of the office in early 2004.

In the Postal Service case, the reservist alleged that his military duties were the motivating factor in his dismissal from a 16-week associate supervisory training program. The Labor Department's Veterans' Employment and Training Service - which is the first office to see veterans' employment cases - determined that the complaint had merit, but the agency could not reach a settlement with the Postal Service. The case was then turned over to OSC.

"We filed that only because the agency would not do the right thing with regard to the Postal Service employee," Bloch said during a July interview with a Defense Department television station.

The Postal Service employee, who has been an Army reservist since 1971, was not able to attend supervisory training on Saturdays because of his military duties. According to the complaint, the Postal Service expressed concern about the missed training time and that the employee would not be able to work on Saturdays after graduating from the course - as junior supervisors are expected to do. In April 2000, the employee was dismissed from the supervisory training program.

Bloch said it was necessary to provide a "disincentive" for other agencies to make similar decisions.

I think it's important to send a strong message to employers that we mean business," Bloch told *Government Executive*. "Not only are the going to suffer a lawsuit, they are going to be publicly held up and held accountable for this."

The Washington Times
www.washingtontimes.com

Jobs on line over 'partisan' e-mails

By Jerry Seper
THE WASHINGTON TIMES
Published September 10, 2004

The U.S. Office of Special Counsel has filed complaints for disciplinary action against two federal employees for purportedly sending what OSC describes as politically partisan e-mail messages while on duty, in violation of the Hatch Act.

The complaints, filed last month with the Merit Systems Protection Board (MSPB) but made public this week, say the employees engaged in political activity while on duty directed toward the success or failure of a political party, candidate for a partisan political office, or partisan political group.

U.S. Environmental Protection Agency employee Maureen Taylor-Glaze was accused of sending an e-mail message to 15 of her EPA co-workers while on duty in her federal office building.

According to the OSC, the message contained a picture of actress Jane Fonda and Democratic presidential nominee Sen. John Kerry speaking at an anti-war rally, under which were numerous negative statements about the Massachusetts senator, including one that said: "Please keep this going. We do not need this man as our president."

U.S. Air Force civilian employee Donald Thompson was accused of sending an e-mail message titled, "George W," to more than 70 recipients while he was on duty.

The OSC said the message contained a document mimicking President Bush's resume and is filled with accusations of incompetence and malfeasance specifically directed at Mr. Bush's defeat in the upcoming election. The agency also said the message contained the phrases, "Please consider me when voting in 2004" and "Please send this to every voter you know."

"The use of Internet and electronic mail is second-nature to almost everyone, and has become a favorite and effective campaign tool, even more so perhaps, than four years ago," said Special Counsel Scott Bloch. "I want to remind federal employees to be vigilant about following the Hatch Act, because we will consider this activity a form of electronic leafleting, and thus a violation of the prohibition on partisan political activity in the workplace."

The Hatch Act prohibits federal executive branch employees from engaging in political activity while on duty, in any room or building occupied in the discharge of official duties by an individual employed or holding office in the U.S. government, wearing a uniform or official insignia identifying the office or position of the employee, or using any vehicle owned or leased by the government.

The OSC provides advisory opinions on the Hatch Act and also enforces the provisions by filing petitions for disciplinary action. Employees who are charged with violations are entitled to a hearing before the MSPB.

Under the act, the presumptive penalty for a violation is removal from federal employment. However, upon a unanimous vote of its members, the MSPB can mitigate the penalty to no less than a 30-day suspension without pay. Employees have the right to appeal the MSPB's decision to the U.S. Court of Appeals for the Federal Circuit.

washingtonpost.com ▼ADVERTISING

Remember to Keep Clear of the Hatch Act

By Stephen Barr

Sunday, May 9, 2004; Page C02

Election Day is months away. But federal workers might spend a few minutes reviewing the Hatch Act now.

That sounds like silly advice. The law has been around since 1939 and was amended in 1993. You're hard-pressed to find a federal employee who doesn't know that the Hatch Act restricts the employee's political activities and seeks to keep politics out of the federal workplace.

Still, it seems that every election cycle, somewhere, somehow, a government worker runs afoul of the law.

Last month, the Office of Special Counsel announced a settlement in a Hatch Act case involving a federal executive who was running for Congress. The senior executive, who was the deputy assistant secretary of defense for counternarcotics, resigned after the OSC filed its complaint.

That's a high price to pay. But employees typically face a choice in Hatch Act cases -- quit campaigning or quit working for the government.

"As we enter the 2004 national election cycle, it is important for federal employees to be well aware of the prohibitions on partisan candidacy, coercion of partisan support and political activity while on the job," **Scott J. Bloch**, the head of the OSC, said in a recent statement.

The Hatch Act also applies to state and local employees who have duties involving federally funded programs. This month, the OSC announced that it was seeking disciplinary action against an administrator with the Alabama Department of Public Health because the official was a candidate in a partisan election.

The OSC, an independent agency that enforces the Hatch Act and tries to protect whistle-blowers from workplace reprisals, explains the do's and don'ts of the Hatch Act on its Web site (www.osc.gov). Among the materials provided are a 13-page booklet, "Political Activity and the Federal Employee," and a two-page fact sheet on the law.

The rules, for example, say: Employees may not engage in political activity while on duty, in a government office, in a government uniform or while using a government car. Employees may not use their official authority to influence an election. They may not solicit or discourage political activity by anyone with business before the government. They may not host a fundraiser in their homes or solicit money at any fundraiser for a partisan candidate. And, of course, federal employees may not become candidates in partisan elections.

But federal employees have substantial leeway to participate in some political activities. They can run in

nonpartisan elections, such as for the D.C. school board. They can vote, express opinions about candidates, contribute money to political parties and attend fundraisers and rallies. They may join a political party, hold office in a political party, sign nominating petitions, campaign for or against a candidate and distribute campaign literature.

Some employees, however, are prohibited from engaging in political campaigns because of their jobs. Administrative law judges and people who work at the Federal Election Commission, the FBI and the CIA are banned from political campaigns.

Interpreting the Hatch Act can get tricky, especially in today's federal workplace.

For instance, employees may use work e-mail to discuss political subjects in a manner similar to the "water cooler" conversations they have with friends. But using the office e-mail system to send messages to a large number of people arguing for or against a candidate will likely land an employee in trouble.

This year, e-mails have been found circulating inside the government that appear to violate the Hatch Act.

One e-mail features a photo that purports to show Sen. **John F. Kerry** (D-Mass.), who is running for president, with actress and Vietnam War protester **Jane Fonda**. The e-mail says Kerry "denounced his military service" and ends with the exhortation: "Please keep this going. We do not need this man as our President."

Another e-mail looks like a résumé and mocks **President Bush**. "I joined the Texas Air National Guard and went AWOL," it says under the heading of "Military." The e-mail ends by urging readers, "Please send this to every voter you know."

An OSC advisory opinion, issued in 2002, suggests that such electronic messages could be tantamount to electioneering while on the job, a violation of the Hatch Act.

E-mail: barrs@washpost.com

© 2004 The Washington Post Company

Gov .com

Daily Briefing

April 8, 2004

Whistleblower agency attacks case backlog

By Amelia Gruber
agruber@govexec.com

Federal employees lodging allegations of waste, fraud and abuse may start receiving more timely responses to their complaints, the head of the office processing those complaints said Thursday.

In recent meetings, senior staff members at the Office of Special Counsel developed an aggressive strategy for eliminating a severe backlog of whistleblower cases and prohibited personnel practice complaints by the end of the year, said Scott Bloch, head of OSC.

The plan calls for senior staff members to take on the cases piling up, he said. OSC will also hire additional attorneys and investigators.

Even if the strategy does not completely eliminate the backlog in a year, the plan should make a significant dent in cases, Bloch said. OSC usually assigns less seasoned staff members to tackle cases that have piled up, he explained. By transferring some of this work to teams with experienced attorneys, the office can dispose of the complaints quickly, and can arrive at a more equitable resolution.

Whistleblowers and victims of prohibited personnel practices deserve to have the "best minds" reviewing their complaints, Bloch said. The workers also deserve a swift response from OSC, especially considering the serious nature of many of the allegations. "We can't sit by and let these conditions fester . . . without taking some action," he said.

OSC is charged with reviewing allegations of government waste, fraud and abuse. The office also protects federal employees against unfair personnel practices, including discrimination and whistleblower retaliation, and prosecutes violators of the Hatch Act, a law restricting the political activities of government workers.

In recent years, OSC has faced a growing pileup of whistleblower cases and a somewhat smaller backlog of prohibited personnel practice complaints, General Accounting Office auditors reported in a study published Wednesday. The law requires the office to decide within 15 days whether to pass allegations of waste, fraud and abuse along for further investigation. For cases alleging prohibited personnel practices, the statute allows OSC 240 days.

From 1997 to 2003 OSC processed 26 percent of whistleblower disclosures and 77 percent

of personnel cases within the statutory time limit, GAO found. OSC faced backlogs of 669 whistleblower complaints and 204 prohibited personnel practice cases at the end of September 2003, the close of the fiscal year. This represents 97 percent of all whistleblower cases and 31 percent of prohibited personnel practice cases.

The personnel complaint backlog remained relatively steady over the seven-year period, peaking at 326 complaints for fiscal 2001, the GAO statistics indicated. But the whistleblower cases accumulated steadily over the same years, rising from a backlog of 229 in fiscal 1997 to a pile of 669 by the close of fiscal 2003.

The backlog exists partly because OSC "becomes very involved in and unnecessarily bogged down in lengthy litigation," Bloch said. Another problem is that some cases are simply not reviewed. "The main problem with the backlog is that nobody's looking at [the cases]," he said.

Bloch's predecessor, Elaine Kaplan, said Thursday that she believes staffing shortages "are the primary cause of the backlog." Kaplan, a Clinton appointee, left OSC in June 2003.

In some ways, OSC also has been "a victim of its own success," Kaplan said. Following a string of high-profile cases, OSC saw a spike in allegations of waste, fraud and abuse. The number of whistleblower complaints OSC received grew from 380 in fiscal 2001 to 555 in fiscal 2002, and 535 the next year, according to GAO data.

Bloch agreed that his office could benefit from a larger staff. In an ideal world, OSC would hire at least 20 attorneys and investigators, he said. But in the meantime, the office is in the process of bringing on seven staff members, and will request funding for additional hires in fiscal 2005.

Past hiring spurts at OSC have not always resulted in more efficient case processing, GAO researchers noted in the report (GAO-04-36). The office disposed of roughly the same number of cases in fiscal 2003 as in fiscal 1999, despite a 16 percent increase in staff attorneys and investigators during that period.

"While resources may be a factor, our analysis of the agency's recent performance after hiring more staff raises questions about whether gaining authority to hire more staff would produce the desired results," GAO stated.

New hires might not necessarily result in a "straight line increase in productivity," Kaplan said. There are other variables at play, including training time and employee turnover, she explained. "I think the agency needs a massive staff increase, in order to make a real dent in the backlog without sacrificing other important values like quality and customer service," she said.

She added that the office should not merely strive to move cases along quickly. "OSC has often been criticized for failing to conduct a sufficiently thorough investigation of complaints," she said. "A more thorough investigation requires more time. There is no simple fix for this - it is a balancing problem."

Bloch said he would focus on hiring the right people to help reduce the backlogs. Ideal

additions to OSC's staff would have talent and experience in practicing law, but would also possess the ability to analyze business processes and move cases along.

OSC also could reduce case processing times by "maintaining open lines of communications and working with whistleblowers," said Tom Devine, legal director of the Government Accountability Project, a nonprofit watchdog group. "I've been doing this for 25 years, and there's no secret on how you get more bang for the buck," he said. "You work with the whistleblowers."

Often whistleblowers filing complaints do not include all of the facts that OSC needs, Devine explained. Rather than simply dismissing the case, the office should let the complainants know what is missing, and give them an opportunity to produce the appropriate information, he said.

By talking with the whistleblowers more, OSC also would arrive at better informed decisions, Devine said: "OSC close out letters explaining why the case didn't have merit often reflect an embarrassing ignorance of easily obtainable facts."

Brought to you by GovExec.com

Project On Government Oversight
Exposing Corruption Exploring Solutions www.POGO.org

May 31, 2005

Hon. George V. Voinovich, Chairman
U.S. Senate Subcommittee on Oversight
Of Government Management, the Federal
Workforce and the District of Columbia

Hon. Daniel K. Akaka, Ranking Member
U.S. Senate Subcommittee on Oversight
Of Government Management, the Federal
Workforce and the District of Columbia

RE: Letter for the Record of Congressional hearing on Office of Special Counsel

Dear Senators Akaka and Voinovich:

The Project On Government Oversight would like to thank you for holding oversight hearings on the Office of Special Counsel (OSC) last week. We have become increasingly concerned about the handling of whistleblower cases by that office.

At the hearing held last week, an op-ed was introduced into the Congressional Record written by U.S. Special Counsel Scott Bloch. This op-ed, as well as statements made by Scott Bloch, distort the Office of Special Counsel's track record. The Project On Government Oversight wrote a response to this op-ed for the *Federal Times* which is enclosed.

Mr. Bloch has claimed that the number of whistleblower cases that he has referred to agency heads has doubled. In fact, referrals have been cut in half when compared to the total number of whistleblower disclosures processed by OSC.

Please continue to investigate how whistleblower cases are being handled. Serious questions have yet to be answered about whether the concerns of whistleblowers are being properly investigated and handled. Please include this in the record of the hearing. Thank you.

Sincerely,

Danielle Brian
Executive Director

Enclosure

666 Eleventh Street, NW
Suite 500
Washington, DC
20001-4542
Phone: 202-347-1122
Fax: 202-347-1116

www.POGO.org
pogo@pogo.org

LETTERS

Whistleblowers' reality

In a recent *Federal Times* op-ed, Special Counsel Scott Bloch wrote: "There is good news for whistleblowers coming to the Office of Special Counsel. Last year, OSC's dedicated staff doubled the number of substantiated, valid whistleblower claims over prior years." ["OSC protects whistleblowers as they shine light of truth," May 23 issue.] Bloch's statement wrongly gives federal employees the impression that his office would defend them if they disclosed corruption or mismanagement.

Even under the best circumstances, the challenges whistleblowers face are insurmountable. Once an employee highlights the agency's faults, he or she is traditionally targeted for reprisal by superiors.

Their desks are moved to the basement. Their computers are confiscated. They are given projects that fall far short of their qualifications. They are suddenly "caught" doing something wrong, usually something petty and meaningless. Co-workers are told the whistleblower is not to be trusted. And whistleblowers who seek employment elsewhere — inside or outside the government — may find that they have been blacklisted in their profession.

For these and other reasons, the Project On Government Oversight (POGO) has advised federal employees not to blow the whistle, at least publicly. The risks are simply too great. We have seen so many honest and conscientious employees lose their job responsibilities, career, house, marriage or family. In most cases, these individuals have stumbled into a controversy with little appreciation for the lengths that government bureaucrats will take to crush criticism.

During Bloch's tenure the situation appears to be worsening for whistleblowers, contrary to his public statements. For example, Bloch makes the misleading claim that OSC has doubled the number of whistleblower cases that are referred to agencies for investigation. In fact, those referrals have been almost cut in half when they are measured against the total number of cases processed by OSC. Referral rates are not a meaningful indicator of whether OSC is meeting its mission. Referrals don't equal remedies, particularly since they go back for more study by the agency under scrutiny.

The system for protecting whistleblowers through the OSC has been flawed for many years. Few whistleblowers get the protection they need. Almost none get protection once their cases are appealed to the federal courts, where, according to the nonprofit Government Accountability Project, whistleblowers have won 1 out of 102 cases since 1994.

Federal employees should not have to sacrifice their lives and liberty for telling the truth about government operations. There are anonymous ways to alert the public and the authorities to danger, corruption and fraud: working through intermediary organizations such as the media, Congress and investigative outfits like ours.

The laws protecting federal workers are weak; the office charged with protecting them is ineffective; and the whole nation suffers when corruption and waste go unchecked. The time has come for Congress to take a serious look at how whistleblowers are treated and whether lawmakers' vision of employee protection has been implemented as intended. Nothing could be more important for our nation's ability to protect itself, and to ensure that our increasingly scarce taxpayers' dollars are well spent.

DANIELLE BRIAN, EXECUTIVE DIRECTOR,
PROJECT ON GOVERNMENT OVERSIGHT
Washington

■ We welcome letters from our readers. Write Editor, Federal Times, 6883 Commercial Drive, Springfield, Va., 22159-0190, or send e-mail to fedlet@federaltimes.com. Include your address and phone number. Letters may be edited. Unsigned letters will not be published, but the names of letter writers will be omitted upon request. Letters to the editor, opinion and editorial columns and articles submitted to Federal Times may be published or distributed in print, electronic or other forms.

KEN CEDENO

FOR THE RECORD

'Asking employees to make life-altering decisions in just 10 days may be construed as very insensitive.'

George Voinovich, R-Ohio

On the Office of Special Counsel asking employees to relocate to other cities **Page 14**

May 23, 2005

VIA FACSIMILE AND FIRST CLASS MAIL

The Honorable George Voinovich
Chairman
Subcommittee on Government Management
United States Senate
Washington, DC 20510

The Honorable Daniel Akaka
Ranking Member
Subcommittee on Government Management
United States Senate
Washington, DC 20510

Dear Chairman Voinovich and Senator Akaka:

On behalf of the National Treasury Employees Union, I would like to add NTEU's voice to the voices of other organizations requesting an oversight hearing on conditions at the United States Office of Special Counsel (OSC). NTEU has a strong interest in OSC's impartial and effective performance of its mission of promoting the merit system, protecting whistleblowers against retaliation, and impartially enforcing the Hatch Act. In recent months, OSC has taken a series of actions that appear inconsistent with this mission, culminating recently with the decision to conduct a reorganization under which a dozen senior career employees have been subjected to involuntary geographic reassignments.

We believe actions the Committee may wish to review include:

- The announced reorganization under which, for the first time in OSC's history, enforcement of the Hatch Act would be supervised by a political deputy, rather than a career senior executive;

- The transformation of OSC into a case-closing factory, in which agency personnel are directed not to speak with whistleblowers who are seeking OSC's assistance, but to dispose of their cases solely on the basis of their written submissions;

- The practice of noncompetitive hiring of individuals with personal connections to the OSC Special Counsel and/or his political staff into career positions and actions which have caused existing career staff to resign, including the recent reorganization;

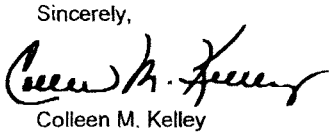
- The use of no-bid contracts;

- The existence of a culture of fear at the agency, including the issuance of a gag order to OSC employees forbidding them from communicating with anyone outside of the agency (including members of Congress), without OSC's permission; and

- The repudiation of the long-standing view of the Executive Branch that OSC is empowered to investigate and prosecute cases in which federal agencies discriminate against employees on the basis of their sexual orientation.

For these reasons and others, NTEU urges that oversight hearings be held as soon as possible concerning the state of OSC under its current leadership.

Sincerely,



Colleen M. Kelley
National President

Linda Myers
2993 Oakleigh Lane
Oakton, VA 22124

Ranking Member Daniel K. Akaka
Subcommittee on Oversight of Government Management,
The Federal Workforce, and the District of Columbia
Senate Committee on Homeland Security and Governmental Affairs
U.S. Senate
Washington, DC 20510

RE: May 24, 2005 Oversight Hearing of the U. S. Office of Special Counsel

Dear Senator Akaka:

My name is Linda Myers. Until I left the Office of Special Counsel (OSC) in April 2005, I was the OSC Alternative Dispute Resolution (ADR) Specialist. I resigned from my OSC position after the Agency informed me that I would be involuntarily reassigned to the new Detroit field office.

I did not attend the May 24, 2005 Oversight Hearing of the Office of Special Counsel, but was shocked to hear Mr. Bloch's statements regarding the OSC ADR Program. In response to your questions, Mr. Bloch stated that he was interested in retaining the ADR Program in Washington, DC, if other people scheduled for the reassignment to Detroit chose not to accept the move to the new field office. Presumably, he meant if Cary Sklar, my supervisor, chose not to accept the assignment to Detoit that the ADR Program could stay in Washington.

In fact, this suggestion did not originate with Mr. Bloch. It came from several of my colleagues in an Employee Advisory Committee (EAC) meeting. The EAC meetings were designed to provide the Special Counsel with feedback from staff on a variety of issues. I served as a member of the EAC, and attended the EAC meeting Mr. Bloch mentioned at the May 24 hearing. After the reorganization was announced, many of the topics at the EAC meetings were devoted to the Detroit field office. I have attached a copy of the minutes for your review. The minutes reflect Mr. Bloch's comments to the EAC members as well as comments provided by staff without identifying the individual. The minutes reflect that there was a suggestion from a staff member, echoed by others, to leave the ADR Program in Washington. This suggestion did not come from Mr. Bloch, and he was non-committal on this issue at the meeting.

Mr. Bloch indicated at the hearing that "an approach" was made to me to see if I was interested in staying in Washington as the ADR Specialist at Office of Special Counsel. He did not at any time speak to me about the possibility of remaining in Washington at the Office of Special Counsel, nor did any member of his staff.

I thank you for holding these oversight hearings and I urge you to carefully follow up on these and other matters related to Mr. Bloch's actions.

Employee Advisory Committee Minutes

The Employee Advisory Committee (EAC) met on February 9, 2005.

Those in attendance were: Special Counsel Scott Bloch, Grace Rojas (via tele-conference), Dennis Whitebook (via tele-conference), Linda Myers, Caroline Heard, Hope Riley, Frank Greenwell, Ellen Oskoui and Stephanie Polk

The focus of the meeting was the Office Reorganization. What follows is a summary of our discussion.

The Detroit Field Office

Mr. Bloch indicated that one person that had previously accepted the reassignment to the Detroit office has taken another job. Therefore, the problem of how to staff the office still remains. It was noted that it would be counterproductive to have another round of directed re-assignments due to the declination rate that resulted from the first announcement of re-assignments. In addition, this could lead to decreased unit cohesion, and the lowered morale within the agency. Suggestions as to how to staff the office were given to Mr. Bloch.

Two employees have volunteered for short term TDY to Detroit to help with staff shortages. Another suggestion was to create an in-house mentoring program where new hires are given a mentor to help them adapt to the agency and the workload quickly.

Bob Wise had a collection of resumes from a previous vacancy announcement. Some of the applicants from those resumes indicated that they were willing to relocate. Mr. Bloch indicated that IOSC will look at the resumes of those willing to relocate and discuss them with senior staff of the agency. Another thought expressed was to post vacancy announcements both internally and externally.

One person suggested sending members of SPU to the Detroit office. The "special project" would consist of setting up the new field office and they could recruit and hire staff for the office while on site. Mr. Bloch noted that he would consider this option, but noted that the USERRA unit is part of SPU and the staff assigned to that unit needed to stay in D.C. to address the needs particular to the pilot program under the new law.

ADR Program

Mr. Bloch noted that IOSC was working on how to continue to operate the ADR program. It was suggested that there could be one representative to handle ADR matters in each field office as a collateral duty. There was also a suggestion to leave the ADR program in headquarters. Several others echoed that suggestion. They noted that the reason that was given to move the program to Detroit was that under Cary Sklar's leadership the program functioned extremely well.. Because he has declined to move to Detroit, that reason no longer appears valid. It was also pointed out that there is a cost for

sending files back and forth from different offices, there are security risks when transporting files, and the ADR applicant pool is deeper in Washington than in Detroit.

Case Distribution

IOSC is considering the best way to handle case file distribution as employees who have declined the re-assignment leave the agency. One consideration is to try to get as many cases closed as possible prior to the employees departure. This would be similar to the ACT team that worked to quickly close cases. Those staff that has been assigned to the USERRA will continue with their PPP cases along with the USERRA cases as long the amount of cases the unit receives from the Department of Labor is manageable.

The agency will also be getting interns for the summer that will be able to assist with getting cases closed.

Congressional Inquiry

There have been several articles in the press addressing congressional concern over the reassignment. Mr. Bloch pointed out that IOSC is responding to all questions from Congress. In addition, if GAO requests an investigation IOSC will cooperate. However, the reorganization will move forward as planned.

Phase 2 of the Reorganization

Operating Procedures for all divisions are being drafted. The purpose of the procedures is to establish ways to move cases forward efficiently and effectively.

May 31, 2005

Hon. George V. Voinovich, Chairman
U.S. Senate Subcommittee on Oversight
Of Government Management, the Federal
Workforce and the District of Columbia

Hon. Daniel K. Akaka, Ranking Member
U.S. Senate Subcommittee on Oversight
Of Government Management, the Federal
Workforce and the District of Columbia

Re: Special Counsel Scott Bloch's Refusal to Enforce Sexual Orientation Discrimination Protections for Federal Workers

Dear Senators Akaka and Voinovich:

On behalf of more than 600,000 members of the Human Rights Campaign, and the federal workers whose interests are represented by Federal GLOBE (Gay, Lesbian, Bisexual, and Transgendered Employees of the Federal Government) we write to express our deep disappointment at the testimony of Special Counsel Scott Bloch at Tuesday's hearing before Chairman Voinovich's subcommittee. In that testimony, Mr. Bloch finally made it clear after more than a year of controversial and misleading statements, that, at his direction, the U.S. Office of Special Counsel (OSC) is no longer enforcing long-established legal protections against discrimination on the basis of sexual orientation for the federal workforce. Mr. Bloch's admission flies in the face of 30 years of precedent, and is directly contrary to President Bush's publicly-stated support of an Executive Order specifically prohibiting such discrimination.

We review here the well-established basis for OSC's jurisdiction to enforce sexual orientation discrimination protections for federal workers. We also refute Mr. Bloch's verbal testimony, for which he has never supplied any written legal analysis despite repeated

requests from several members of Congress and others, claiming that such enforcement jurisdiction has no legal support and, indeed, has been specifically rejected in case law. Mr. Bloch's claim, as we show below, is completely meritless. Finally, we ask that the Committee support efforts to compel Mr. Bloch to appropriately enforce the law, and if he continues to refuse, to support efforts to secure his dismissal from office.

The statutory provision at issue, 5 U.S.C. § 2302(b)(10), makes it unlawful to discriminate against a federal employee or applicant "on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others." Enacted more than 25 years ago, as part of the Civil Service Reform Act of 1978, this provision has since been uniformly interpreted by the Executive Branch (including both Republican and Democrat Administrations) to prohibit discrimination against federal workers on the basis of their sexual orientation, whether that discrimination is based solely on the employee's sexual 'orientation' or 'status,' or on sexual 'conduct'.

Thus, in 1980, then-Director of the U.S. Office of Personnel Management Alan Campbell wrote a memorandum to the heads of all executive agencies advising that, under 5 U.S.C. § 2302(b)(10), "applicants and employees are to be protected against inquiries into, or actions based upon, non job-related conduct, such as religious, community, or social affiliations, or sexual orientation." (Emphasis added). This position was reaffirmed in 1994 by then-OPM Director James King, in a letter to Congressman Barney Frank. It has since been reaffirmed by both of Mr. King's successors as OPM Director, Janice LaChance (President Clinton's appointee), and Kay Coles James (President Bush's first OPM director). Indeed, OPM issued government-wide guidance in 1999 in a publication that remains available today on OPM's web-site, "Addressing Sexual Orientation Discrimination in Federal Civilian Employment: A Guide to Employee's Rights." In that guidance, OPM stated that it "has interpreted this statute [2302(b)(10)] to prohibit discrimination based upon sexual orientation. Sexual orientation means homosexuality, bisexuality or heterosexuality." See http://www.opm.gov/er/address2/Guide04.asp.

The Justice Department issued similar guidance, in a written opinion issued more than 20 years ago by Theodore Olson, who was then an Assistant Attorney General in the Reagan Administration, heading DOJ's Office of Legal Counsel. In that opinion, Mr. Olson reviewed the statutory language of 2302(b)(10), as well as an extensive body of judicial decisions issued by the Courts of Appeals in the 1960's and 1970's that had led OPM's predecessor, the U.S. Civil Service Commission, to conclude that applicants and employees may not be found unsuitable for federal government employment solely because they were homosexual. On the basis of those legal precedents, he concluded that "it is improper to deny employment or to terminate anyone on the basis either of sexual preference or of conduct that does not adversely affect job performance." See 7 Op.O.L.C. 58 (1983) (attached hereto as Ex. 1).

Prior to Mr. Bloch's tenure as Special Counsel, OSC also interpreted this provision to prohibit discrimination based on sexual orientation. In one well-publicized case, settled by OSC in June 2003, OSC's investigation revealed that a manager had declined to select the best-qualified applicant for a position because, the manager was overheard to have said, he was a "flaming queer." In that case, OSC obtained monetary damages for the job applicant and the manager was removed from her supervisory position for a year and

suspended without pay for 45 days. See June 20, 2003 OSC Press Release (attached hereto as Ex. 2).

Within weeks of taking office in January 2004, Mr. Bloch abruptly ordered the removal of all references to OSC's jurisdiction to enforce sexual orientation discrimination protections from OSC's web-site and printed materials, including the press release cited above. He did so without either conducting a full legal analysis or consulting OPM or any other executive branch agency. Mr. Bloch's reasoning, which he finally admitted at Tuesday's hearing under repeated questioning by Senator Levin, is apparently that the civil rights laws, including Title VII, do not make sexual orientation a "protected class" like race, gender, or age. Further, § 2302(b)(10) prohibits discrimination based on "conduct" and does not mention discrimination based on sexual "orientation." Therefore, he apparently concludes, OSC would exceed the bounds of its statutory jurisdiction if it were to investigate and prosecute cases alleging discrimination based on sexual orientation. Moreover, during Tuesday's hearing, and contrary to all of the above-cited precedent, Mr. Bloch claimed there was no support in the statute or legislative history for OSC's jurisdiction over such claims, and, for the first time during this controversy, cited a case, Department of Justice v. Morales, which he claimed rejected OSC's jurisdiction over such cases. See May 25, 2005 hearing archived web-cast, at 56:35—56:55. (http://www.senate.gov/~gov_affairs/index.cfm?Fuseaction=Hearings.Detail&HearingID=238).

First, the distinction that Mr. Bloch appears to be drawing between discrimination based on sexual "conduct" and discrimination based on sexual "orientation" is, frankly, incomprehensible. His suggestion that such a distinction exists in this context has confused the federal workforce and made OSC the object of ridicule. When a federal agency denies an applicant a job or otherwise discriminates against an employee because he or she is gay, the discrimination is inevitably rooted in disapproval of their sexual conduct or other manifestatations of their 'lifestyle'. It is almost inconceivable that such discrimination would be rooted in some abstract disapproval of their inchoate "orientation." There is no meaningful real world distinction to be drawn between discrimination based on sexual "conduct," and discrimination based on sexual "orientation." In this context, "orientation" is inextricably intertwined with "conduct." See Steffan v. Perry, 41 F.3d 677, 689 (D.C. Cir. 1994)(en banc) (Silberman, J.)(upholding the rationality of the military's 'don't ask, don't tell' policy on the grounds that "homosexuality, like all forms of sexual orientation, is tied closely to sexual conduct," and observing that "[a]lthough there may well be individuals who could, in some sense, be described as homosexuals based solely on inchoate orientation, certainly in the great majority of cases those terms are coterminous.").

Second, the case cited by Mr. Bloch in his testimony--Department of Justice v. Morales--as allegedly supporting his claim that OSC jurisdiction over claims of sexual orientation discrimination under § 2302(b)(10) has been rejected by the courts, stands for no such thing, and is completely irrelevant to the question. That case, not decided by a court at all, but by the Merit System Protection Board, stands only for the proposition that "discrimination on the basis of [] sexual orientation, is not among the forms of discrimination prohibited by 5 U.S.C. § 2302(b)(1)," which includes the types of discrimination prohibited by Title VII. See Morales v. Department of Justice, 77 M.S.P.R. 482 (1998) (attached hereto as Ex. 3). Indeed, after conducting extensive legal research, we

are unaware of any decision by any court, or by the MSPB, holding directly or indirectly that OSC has no jurisdiction under 5 U.S.C. § 2302(b)(10) to enforce claims of sexual orientation discrimination.

Mr. Bloch has repeatedly attempted to confuse the issue by claiming that prior OSC enforcement actions were based not on 5 U.S.C. § 2302(b)(10), but on an Executive Order issued by President Clinton in 1998, and re-affirmed by President Bush in public statements made last year.[1] He did so once again at Tuesday's hearing, in which he noted that the Executive Order conferred no right or remedy upon a federal employee claiming discrimination. Mr. Bloch's claim that OSC previously based its jurisdiction on the Executive Order is blatantly false, and despite repeated requests that he refrain from making such misstatements and correct the erroneous press release that remains on OSC's web-site, he has refused to do so. Indeed, the material he ordered removed from the web-site earlier in 2004, including the press release attached hereto as Ex. 4, explicitly cited 5 U.S.C. § 2302(b)(10) as the basis for OSC's jurisdiction.

We note that, at Tuesday's hearing, Mr. Bloch was again asked to supply his legal analysis supporting his radical departure from the 30 years of precedent discussed above. We encourage the Committee to insist that Mr. Bloch supply this analysis, so that it can be subjected to appropriate scrutiny.

Finally, we note that, in reality, contrary to his claims at Tuesday's hearing that he has continued to enforce claims of sexual orientation discrimination based on actual or imputed private conduct, Mr. Bloch's record of enforcement of this provision is dismal. Thus, Mr. Bloch refused to investigate the complaint of Michael Levine, a 32-year veteran of the Forest Service, who alleged that he was subjected to a 14-day suspension in retaliation for engaging in whistleblowing, and based on sexual orientation discrimination. The disposition of Mr. Levine's case without investigation is particularly shocking because he provided a written statement from a witness to whom the personnel officer responsible for drawing up the charges against Mr. Levine stated, in reference to Mr. Levine: "Don't you just hate these [expletive and derogatory term]." Mr. Levine's sordid treatment at the hands of Mr. Bloch and OSC are fully detailed in a March 2, 2005 letter from HRC to Mr. Bloch, demanding that his case be reopened and properly investigated. HRC never received a response to that letter, further illustrating Mr. Bloch's deliberate indifference to claims arising in this area.

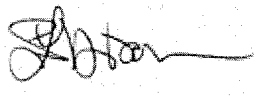
The Human Rights Campaign is the nation's largest gay, lesbian, bisexual and transgender (LGBT) civil rights organization, and Federal GLOBE has long advocated for the these same interests among the federal workforce. Our organizations strongly oppose the roll back of workplace protections for LGBT federal workers that has clearly occurred under Mr. Bloch's tenure as Special Counsel. We strongly believe that the federal government functions best when staffed with the most talented and qualified workers, regardless of their sexual orientation. Accordingly, we ask for the Committee's help in compelling Mr. Bloch

[1] See OSC Press Release, Feb. 27, 2004 ("It appears that, beginning five years ago, this Office based jurisdiction in this area on the amendment to Executive Order 11487 made by Executive Order 13087. But Executive Order 11487, as further amended by Executive Order 13152, expressly states that it 'does not confer any right or benefit enforceable in law or equity against the United States or its representatives.' Further, Executive Order 11487, as amended, expressly places responsibility for its enforcement and implementation in the EEOC, not in OSC. This raises questions as to my power to enforce this Executive Order and reinforces my decision to conduct a full legal review of this policy.")

to follow well-established law in enforcing sexual orientation discrimination protections for federal workers. If Mr. Bloch continues to refuse to do so, we ask the Committee's help in securing Mr. Bloch's dismissal from office. If you have any questions, please do not hesitate to contact the Human Rights Campaign at (202) 216-1520 or Federal GLOBE at (202) 633-4788.

Sincerely,

Joe Solmonese
President, Human Rights Campaign



Len Hirsch
President, Federal GLOBE

Attachments

cc: Hon. Joseph I. Lieberman, Ranking Member
Hon. Carl Levin
Hon. Susan Collins
Hon. Frank Lautenberg

HUMAN RIGHTS CAMPAIGN
1640 RHODE ISLAND AVENUE, NW WASHINGTON, D.C. 20036
PHONE (202) 628 4160 *FAX* (202) 347 5323 *E-MAIL* HRC@HRC.ORG

FEDGLOBE
PO BOX 23922
WASHINGTON, D.C. 20026-3922

U.S. Office of Special Counsel
1730 M Street, N.W., Suite 201
Washington, D.C. 20036-4505

U.S. OFFICE OF SPECIAL COUNSEL SECURES CORRECTIVE AND DISCIPLINARY ACTION IN CASE OF FEDERAL JOB APPLICANT DENIED JOB BECAUSE OF HIS HOMOSEXUALITY

FOR IMMEDIATE RELEASE - 6/20/03
CONTACT: KAREN DALHEIM
(202) 653-7984

The U.S. Office of Special Counsel (OSC) today announced that -- on the basis of the results of an OSC investigation -- the Internal Revenue Service (IRS) has agreed to provide backpay to a job applicant who was denied a federal position because of his homosexuality. IRS also agreed, at OSC's request, to suspend the discriminating supervisor for 45 days, without pay, and to detail the individual to a non-supervisory position for one year.

The job applicant, a GS-12 computer specialist, applied for a GS-13 computer specialist position with the IRS in 2000. The individuals who interviewed him recommended that he be hired. The applicant, however, never heard back from the IRS. He assumed that he had not been selected.

In September 2001, the applicant was contacted by one of the individuals who had interviewed him. That individual told the applicant that he had recommended to his supervisor, the hiring official, that the applicant be hired. According to the individual, the supervisor responded that she had a "good friend" who had worked at a federal agency where the applicant formerly worked and that she would ask for a reference. Later, when this individual asked about the status of the application, the supervisor replied that the IRS would not hire him because of his homosexuality, referring to that sexual orientation in a derogatory manner.

Thereafter, the applicant filed a complaint with OSC, alleging that the IRS had discriminated against him on the basis of his sexual orientation when it refused to hire him. After an investigation, OSC concluded that there were reasonable grounds to believe that the IRS supervisor who had refused to hire the complainant had violated 5 U.S.C. § 2302(b)(10). That provision makes it a "prohibited personnel practice" to discriminate against a federal employee or job applicant on the basis of off-duty conduct that does not affect job performance, including sexual orientation.

Upon being advised of OSC's findings, the IRS promptly agreed to offer the complainant the job he had been denied, as well as backpay. The complainant declined the job offer, but accepted a monetary settlement. The IRS also agreed to discipline and detail the supervisor who had rejected the complainant's application. The supervisor agreed not to challenge those actions.

OSC thanked the IRS for its cooperation in resolving the case, and noted that discrimination based upon sexual orientation, or any other factor that has no bearing on an employee's ability to do the job, is irreconcilable with the fundamental principles that underlie the merit-based civil service, and should not be tolerated.

OSC is an independent federal agency that investigates and prosecutes complaints alleging the commission of a prohibited personnel practice. In cases where an OSC investigation reveals reasonable grounds to believe that a prohibited personnel practice has been committed and an agency declines to voluntarily provide corrective and/or disciplinary action, OSC will prosecute the case before the Merit Systems Protection Board. In many cases, such as this one, OSC obtains corrective and disciplinary action through negotiations with the employing agency.

FRANK MORALES, Appellant, v. DEPARTMENT OF JUSTICE, Agency.

DOCKET NUMBER CB-7121-97-0047-V-1

MERIT SYSTEMS PROTECTION BOARD

77 M.S.P.R. 482; 1998 MSPB LEXIS 152

February 10, 1998

[*1]

Frank Morales, Annapolis, Maryland, pro se.

Joan Slous, Washington, D.C., for the agency.

OPINIONBY: TAYLOR

OPINION:

BEFORE

Ben L. Erdreich, Chairman.

Beth S. Slavet, Vice Chair

Susanne T. Marshall, Member

OPINION AND ORDER

The appellant has filed a request for review under *5 U.S.C. § 7121*(d) of an arbitration decision issued in early October 1996 n1 that denied his grievance. For the reasons set forth below, we DISMISS the request for lack of jurisdiction.

n1 The arbitrator signed the decision on September 30, 1996, but we are unable to determine the precise date it was issued because the date stamp is illegible, although the decision clearly reflects an early-October issuance. Request for Review File, Tab 1.

BACKGROUND

On February 15, 1996, the agency proposed to remove the appellant from his position as Asylum Officer based on charges that he had engaged in an inappropriate personal relationship with an alien in violation of agency policy (two specifications) and made inappropriate comments to aliens. Request for Review File (RRF), Tab 1. After considering the appellant's reply to the charges, the deciding official issued a decision on May 13, [*2] 1996, finding that only the first charge (both specifications) was sustained, but that it warranted the appellant's removal, effective May 17, 1996. The appellant subsequently requested the National Immigration and Naturalization Service Council, American Federation of Government Employees, to pursue on his behalf a grievance without intervening steps through arbitration. Before the arbitrator, the appellant denied the sole remaining charge. Following a hearing, the arbitrator issued a decision sustaining only the first specification of the charge, but nonetheless denying the grievance. *Id.*

On July 10, 1997, the appellant filed a request for review of the arbitrator's decision. *Id.* Because the request appeared to be untimely filed, n2 the Board ordered the appellant to set forth any argument showing that his request should be deemed timely filed or, in the alternative, that good cause existed to waive the filing deadline. *Id.* at Tab 2. In

addition, because the appellant had failed to clearly identify a claim of discrimination in his filing with the Board, he was ordered to specify the nature of his claim of discrimination, and to provide argument and documentation in support [*3] of it. *Id.*

n2 Pursuant to 5 C.F.R. § 1201.154(d), a request for review of an arbitrator's decision must be filed within thirty-five days of the date of issuance of the decision.

In his response, the appellant stated that the filing deadline should be waived because he was never advised that he could request the Board to review the arbitrator's decision. *Id.* at Tab 3. He further stated that the agency had taken the action against him because of his sexual orientation. *Id.* In its reply to that response, the agency argued that the appellant had not shown good cause to waive the filing deadline, and that, in any event, the Board should dismiss his request for review because of his failure to set forth an allegation of discrimination covered under *5 U.S.C. § 2302*(b)(1). *Id.* at Tab 4.

ANALYSIS

The Board has jurisdiction to review an arbitration decision under *5 U.S.C. § 7121*(d) where the subject matter of the grievance is one over which the Board has jurisdiction, the grievance alleges discrimination as stated in *5 U.S.C. § 2302*(b)(1) in connection with the [*4] underlying action, and a final decision has been issued. *See Sweeney v. Department of the Army, 69 M.S.P.R. 392, 393 (1996).* Here, the subject matter of the grievance, the appellant's removal, is one over which the Board has jurisdiction, *5 U.S.C. § 7512,* and the arbitrator has issued a final decision.

However, the only form of discrimination the appellant has described, discrimination on the basis of his sexual orientation, is not among the forms of prohibited discrimination included under *5 U.S.C. § 2302*(b)(1). Although that section includes discrimination on the basis of sex as prohibited by Title VII, the Equal Employment Opportunity Commission (EEOC) has consistently held that that prohibition does not apply to cases which raise issues regarding an individual's perceived or admitted sexual preference or orientation. *See Harmon v. Pena, Secretary, Department of Transportation*, EEOC Request No. 05950551 (Mar. 27, 1997); *Morrison v. Dalton, Secretary, Department of the Navy*, EEOC Request No. 05930964 (June 16, 1994). The Board must defer to EEOC with respect to issues of [*5] substantive discrimination law. *See Crawford v. U.S. Postal Service, 70 M.S.P.R. 416, 422 (1996).*

Accordingly, in the absence of an allegation of discrimination as stated in *5 U.S.C. § 2302*(b)(1), the Board lacks jurisdiction over the appellant's request for review of the arbitration decision, *see McLain v. Department of Veterans Affairs, 58 M.S.P.R. 93, 95 (1993),* and it must be dismissed. In view of this disposition, the Board need make no findings on the timeliness of the appellant's request. *See, e.g., Popham v. U.S. Postal Service, 50 M.S.P.R. 193, 197-98 (1991).*

We note that the appellant filed an unsolicited pleading after the agency had replied to his response to the Board's order. In that pleading, which was not served on the agency, the appellant now alleges that, as to his removal, he was a victim of reprisal for whistleblowing, and he has submitted a letter dated August 28, 1997, from the Office of Special Counsel, in which it states that it has terminated its inquiry into his whistleblowing allegations, and that he may seek corrective action [*6] from the Board in the form of an Individual Right of Action (IRA) appeal. RRF, Tab 5. Such appeals must first be heard at the Board's regional office level, *see* 5 C.F.R. § 1209.3. Accordingly, we hereby FORWARD this claim to the Washington, D.C., Regional Office for consideration of whether the Board has jurisdiction over this apparent IRA appeal.

ORDER

This is the final order of the Merit Systems Protection Board in this request for review. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See 5 U.S.C. § 7703*(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals for the Federal Circuit

717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See 5 U.S.C. § 7703* [*7] (b)(1).

FOR THE BOARD:

Robert E. Taylor

Clerk of the Board

OPINION OF THE OFFICE OF LEGAL COUNSEL

TERMINATION OF AN ASSISTANT UNITED STATES ATTORNEY ON GROUNDS RELATED TO HIS ACKNOWLEDGED HOMOSEXUALITY

1983 OLC LEXIS 109; 7 Op. O.L.C. 58

March 11, 1983

NOTICE: THIS OPINION IS A PRELIMINARY VERSION AND HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT VOLUME.

SYLLABUS:
[*1]

An Assistant United States Attorney (AUSA), a federal employee in the "excepted" service, may not be terminated solely on the basis of his homosexuality, in the absence of a reasonable showing that his homosexuality has adversely affected his job performance.

The burden would be on the Department of Justice to demonstrate a nexus between the AUSA's homosexuality and an adverse effect on his job performance. In this case, it is doubtful whether the Department could meet its burden, because the AUSA has consistently received superior ratings and has been granted a security clearance. Although it may be argued that a prosecutor who violates a state criminal law prohibiting homosexual acts demonstrates a disrespect for the law inconsistent with the Department's standard of prosecutorial conduct, the Department would have difficulty establishing the required nexus as a matter of law, because the state law is only enforced against public conduct.

ADDRESSEE:

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

OPINIONBY: OLSON

OPINION:

This responds to your request for advice on the legal implications of failing to retain an Assistant United States Attorney (AUSA) who is an acknowledged homosexual.

As set forth in [*2] more detail below, we have concluded that it would be permissible for the Department to refuse to retain an AUSA upon a determination that his homosexual conduct would, because it violates state criminal law, adversely affect his performance by calling into question his and, therefore, the Department's, commitment to upholding the law. We must advise, however, that the facts in this case are such that it would be very difficult under existing judicial decisions to prove that there is a nexus between his conduct and an adverse effect on job performance. Because the burden of proof would be on the Government to prove that such a nexus exists once the AUSA has established that he was dismissed for homosexual conduct, we would suggest consultations with the Civil Division and the Office of Personnel Management (OPM) before making a final decision not to retain a person under these circumstances. Both the Civil Division and OPM have informally expressed concern over our ability to defend successfully any suit that might be filed.

The AUSA in question has freely admitted his sexual preference, and that he has engaged in and intends to continue to engage in private consensual homosexual conduct. [*3] As we understand the facts, the only reason the Department would not retain the AUSA is because of his homosexual conduct, and that reason would, under the Department regulations, be reflected in the letter of termination. We also assume that the letter would note that homosexual acts are a crime under law of the state in which the AUSA is stationed, and that the Department believes that any such violations of local criminal law reflect adversely on the AUSA's fitness to represent the Government as a prosecutor. n1

n1 We do not address the constitutional validity of such laws. Compare *Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982); People v. Onofre, 415 N.E.2d 936 (N.Y. 1980),* cert. denied, *451 U.S. 987 (1981); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980);* and *State v. Pilcher, 242 N.W.2d 348 (Iowa 1976)* with *United States v. Lemons, 697 F.2d 832 (8th Cir. 1983); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975),* aff'd mem., *425 U.S. 901 (1976);* and *Stewart v. United States, 364 A.2d 1205 (D.C. Ct. App. 1976).*

I. Limitations on Terminating an AUSA

AUSAs are in what is known as the "excepted [*4] service." *5 U.S.C. § 2103*(a). The Attorney General's authority to remove them, see *28 U.S.C. § 542*(b), n2 is tempered, however, in several ways, two of which are relevant here: statute and OPM regulation. n3 The statute and regulation that protect AUSAs from prohibited personnel practices are *5 U.S.C. § 2302*(b)(10) and OPM/FPM Supp. 731-1, subchap. 3-2(a)(3)(c).

n2 The section states, "Each assistant United States Attorney is subject to removal by the Attorney General." There are no reported cases under this section. Department of Justice regulations provide that attorneys in the excepted service who are being removed are only entitled to a letter of termination. DOJ Order No. 1752.1A (Apr. 27, 1981). The Order states:

> GENERAL. The rights of excepted service employees are strictly limited when discipline, including separation, is to be imposed. However, some service employees have the same protections as competitive service employees because of Veterans' Preference or prior competitive status.
>
> PROCESSING DISCIPLINE. a. An excepted service employee who is protected under law and the regulations of the Office of Personnel Management because of veterans' preference is entitled to the procedures governing regular civil service employees.
>
> b. An excepted service employee with no protection under law or regulation should be given a letter advising him or her of the action being taken (suspension, separation, etc.) prior to the effective date of the action.

Id. at 19, 20. [*5]

n3 The limitations on the Attorney General's authority may be categorized as: (1) OPM regulations governing employment of those in the excepted service, see 5 C.F.R. § § 302.101 et seq.; (2) statutes and OPM regulations governing employment of veterans in the excepted service; (3) Department regulations; and (4) any Department handbooks or informal understandings that may establish a reasonable expectation of continued employment. See *Ashton v. Civiletti, 613 F.2d 923 (D.C. Cir. 1979).*

A veteran, *5 U.S.C. § 2108*(1)(B), (3)(B), who has served for one year in the excepted service, id. § 7511(a)(1)(B), is afforded civil service protection, and action may be taken against him "only for such cause as will promote the efficiency of the service." Id. § 7513(a). Whether the Attorney General's authority in *28 U.S.C. § 542*(b) prevails over the veterans' preference statute is a question on which this Office expressed considerable doubt some years ago. Memorandum for William D. Ruckelshaus, Assistant Attorney General, Civil Division

> from Assistant Attorney General Rehnquist, Office of Legal Counsel (Sept. 10, 1970); Memorandum for Assistant Attorney General Rehnquist from Leon Ulman and Herman Marcuse (Sept. 4, 1970).

[*6]

A. Statutory and Regulatory Constraints

The decision not to retain the AUSA may be made for any number of reasons -- for example, budget factors or employment ceilings -- but it may not be made for a reason prohibited by statute or regulation. The Department is prohibited by statute

> from discriminating . . . against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others.

5 U.S.C. § 2302(b)(10). n4 In addition, OPM has issued guidelines covering suitability for employment in the federal government. n5 Although applicants for employment in the excepted service may be disqualified if they engage in "infamous, . . . immoral or notoriously disgraceful conduct," 5 C.F.R. § 302.203, the courts have held that neither the status of being a homosexual nor homosexual conduct which does not adversely affect job performance falls within this provision. In reversing a decision by the Civil Service Commission (now OPM) to disqualify an applicant for employment because of alleged immoral conduct, the U.S. Court of Appeals for the District of Columbia Circuit said over fifteen [*7] years ago:

> The Commission may not rely on a determination of "immoral conduct," based only on such vague labels as "homosexual" and "homosexual conduct," as a ground for disqualifying appellant for Government employment.

Scott v. Macy, 349 F.2d 182, 185 (D.C. Cir. 1965). n6 As a result of cases such as this, e.g., *Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Society for Individual Rights v. Hampton, 63 F.R.D. 399 (N.D. Ca. 1973),* aff'd on other grounds, *528 F.2d 905 (9th Cir. 1975);* and Baker v. Hampton, 6 Empl. Prac. Dec. (CCH) | 9043 (D.D.C. 1973), OPM issued a Bulletin on December 21, 1973, placing the following gloss on the regulation:

> You may not find a person unsuitable for Federal employment merely because that person is a homosexual or has engaged in homosexual acts, nor may such exclusion be based on a conclusion that a homosexual person might bring the public service into public contempt. You, are, however, permitted to dismiss a person or find him or her unsuitable for Federal employment where the evidence establishes that such person's homosexual conduct affects job fitness -- excluding from such consideration, however, [*8] unsubstantiated conclusions concerning possible embarrassment to the Federal Service.

Ashton v. Civiletti, 613 F.2d 923, 927 (D.C. Cir. 1980) (quoting Bulletin). In November 1975, OPM issued FPM Supplement 731-1, Determining Suitability for Federal Employment. Subchapter 3-2(a)(3)(c), which discusses infamous or notoriously disgraceful conduct, states:

> Court decisions require that persons not be disqualified from Federal employment solely on the basis of homosexual conduct. OPM and agencies have been enjoined not to find a person unsuitable for Federal employment solely because that person is a homosexual or has engaged in homosexual acts. Based upon these court decisions and outstanding injunctions, while a person may not be found unsuitable based on unsubstantiated conclusions concerning possible embarrassment to the Federal Service, a person may be dismissed or found unsuitable for Federal employment where the evidence establishes that such person's sexual conduct affects job fitness.

Thus, it is improper to deny employment to or to terminate anyone on the basis either of sexual preference or of conduct that does not adversely affect job performance. In [*9] short, there must be a reasonable showing that the homosexual conduct adversely affects the job performance.

n4 The statute covers appointments in the excepted service. *5 U.S.C. § 2302*(a)(2)(A)(i), (B). AUSA positions do not fall within Schedule C, 5 C.F.R. § 213.3301, and are not, therefore, within any of the exceptions to the coverage of this statute. *5 U.S.C. § 2302*(a)(2)(B)(i).

n5 OPM administers the regulations governing the civil service. *5 U.S.C. § 1103*(a)(5). The civil service includes the excepted service. *5 U.S.C. § 2101*(1).

n6 After the decision in Scott, the Civil Service Commission again disqualified the applicant, and was again reversed. *Scott v. Macy, 402 F.2d 644 (D.C. Cir. 1968).*

B. Case Law

1. The Nexus Test

An examination of recent case law indicates that the burden is on the Government to demonstrate that the AUSA's homosexual conduct has adversely affected or will adversely affect his performance or that of others, and that it will be difficult for the Government to do so. *Hoska v. United States, 677 F.2d 131, 136-38 (D.C. Cir. 1982).* The U.S. Court of Appeals for the District of Columbia Circuit has articulated four ways in which [*10] homosexual conduct might adversely affect job performance: (1) if it jeopardizes the security of classified information through potential blackmail; (2) if it constitutes evidence of an unstable personality unsuited for certain kinds of work; (3) if it causes the employee to make offensive overtures at work; or (4) if it constitutes the basis of "notorious" activities that trigger negative reactions from fellow employees or the public. *Norton v. Macy, 417 F.2d 1161, 1166 (D.C. Cir. 1969).* n7 As in Norton, we believe that it be difficult for the Department to convince a court that the particular employee at issue failed any of these tests. *Id. at 1166.* n8 Given his record, it would appear that the only way his ability to function successfully might be jeopardized would be through hostility from the public or his fellow workers, but there is no evidence of any negative reactions. Nor is the AUSA, as an overt homosexual, apparently considered to be a security risk through a blackmail threat. The Department has given him a security clearance, and there is no evidence that the AUSA has an unstable personality: rather, his work is described as consistently superior. His [*11] current supervisor has stated that the AUSA's work continues to be excellent, and there are no allegations that he has made offensive overtures at work. n9 We are not aware of any evidence that he has engaged in the kind of notorious conduct that was found to be sufficient for termination in *Singer v. United States Civil Service Comm'n, 530 F.2d 247 (9th Cir. 1976),* vacated and remanded, *429 U.S. 1034 (1981),* and *Childers v. Dallas Police Dep't, 513 F. Supp. 134, 140-42 (N.D. Tex. 1981).* n10 Rather, the AUSA has apparently been so discreet that the fact of his homosexuality came as a surprise to his superiors. Like the employee in Norton, the AUSA could successfully argue that he is a satisfactory worker who suffered an adverse employment action because of a general policy decision. n11

n7 Norton involved a veteran who could only be dismissed for "such cause as will promote the efficiency of the service." *5 U.S.C. § 7512*(a) (Supp. 1965). The nexus test, however, has been carried over in subsequent cases to disputes involving those in the excepted service. *Ashton v. Civiletti, 613 F.2d 923 (D.C. Cir. 1979).* Not all circuits use the nexus test, see, e.g., *Vigil v. Post Office Dep't, 406 F.2d 921 (10th Cir. 1969),* but it is the test employed in the circuits in which it is most likely that the AUSA, if he were so inclined, would bring suit. [*12]

n8 Norton involved an otherwise competent NASA budget analyst dismissed because of a homosexual advance he made one evening while in a car. *417 F.2d at 1162-63.* He was arrested for a traffic violation by members of the Morals Squad who had observed the incident. He was then interrogated about his conduct by the Morals Squad and NASA security officers. Although sodomy was a violation of the local law, D.C. Code § 22-3502 (1967), the court did not raise the issue of whether such a violation might automatically establish the nexus. The government's brief did, however, note that sodomy was a crime and that the police had probable cause to arrest Mr. Norton on that charge, although they chose not to. Appellee's Brief at 14 n.9, 31 & n.25, *Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).* Thus, the Court of Appeals implicitly rejected the proposition that conduct violative of the local ordinance was sufficient, standing alone, to establish a nexus between that conduct and the job performance required in Mr. Norton's job.

n9 See, e.g., *Safransky v. State Personnel Board, 215 N.W.2d 379, 381, 385 (Wisc. 1974).*

n10 Compare *Singer, 530 F.2d at 249, 252-55; McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971),* cert. denied, *405 U.S. 1046 (1972); Childers, 513 F. Supp. at 140-41* with *Aumiller v. University of Delaware, 434 F. Supp. 1273 (D. Del. 1977).* See also *Ross v. Springfield School Dist. No. 19, 641 P.2d 600, 608 (Or. Ct. App. 1982)* (teacher properly dismissed where public practice of homosexuality resulted in "notoriety" which impaired his teaching ability). [*13]

n11 In *ben Shalom v. Secretary of Army, 489 F. Supp. 964 (E.D. Wisc. 1980),* the court found that the dismissal of an otherwise suitable soldier because of her homosexuality violated the soldier's substantive due process rights under the Fifth Amendment. Id. Given that the soldier had received high marks on her military performance, the court found that there was no nexus between her status as homosexual and her suitability for service. "It was, therefore, arbitrary, capricious and unreasonable for the Army to conclude that the petitioner was anything other than a 'suitable' soldier under its regulations." *Id. at 977.* See also *Martinez v. Brown, 449 F. Supp. 207 (N.D. Ca. 1978)* (same; Navy regulations). But see *Beller v. Middendorf, 632 F.2d 788* (9th Cir.) (rejecting same analysis when applied to Navy regulation), pet'n for reh'g en banc denied sub nom. *Miller v. Rumsfeld, 647 F.2d 80 (9th Cir. 1980),* cert. denied, *452 U.S. 905 (1981).* The denial of the petition for rehearing en banc elicited a long dissent. *Miller, 647 F.2d at 80-90.*

We are aware of two cases in which the Government has dismissed homosexual employees [*14] and defended the dismissals successfully: Singer, supra, and *Dew v. Halaby, 317 F.2d 582 (D.C. Cir. 1963),* cert. dismissed, *379 U.S. 951 (1964).* Dew occurred prior to the issuance of the pertinent OPM regulation. Singer involved the kind of "notorious" conduct faulted in Norton: Mr. Singer was a clerk typist whose work was satisfactory but whose off-duty conduct included kissing and embracing another man on federal property, discussing gay rights on TV shows in which he identified himself as a federal employee, applying for a marriage license to be married to another man, and receiving "extensive" publicity because of his attempt to obtain a marriage license. *530 F.2d at 249.* In both Dew and Singer, the Government received adverse publicity because of the dismissals and eventually reversed its policy, reinstating both employees with back pay.

Because the AUSA has stated that he intends to continue to engage in homosexual conduct, and this is now public knowledge, the Department might take the position that an AUSA who habitually engaged in a violation of state criminal law brings discredit upon the Department sufficient to establish the kind [*15] of nexus required by current case law. We could argue that the willingness to engage in such acts in violation of local law demonstrates a disrespect for the law that is not consistent with the standard of conduct demanded by the Department of someone who is engaged in prosecuting others for violations of the law. We could also note that the local legal community, represented by the state bar, has condemned at least the public practice of homosexuality.

On the other hand, OPM's regulation forbids the federal government from discriminating against those who engage in homosexual conduct, absent a nexus between the conduct and job performance. The AUSA could argue that OPM's regulation forbids the taking into account of state laws, especially if the AUSA would probably not be prosecuted for private consensual homosexual acts under the state's current enforcement policy. OPM was presumably aware in 1973 that homosexuality violated the laws of many states and did not intend its standard an adverse effect on job performance to be met by merely showing that the conduct violates state law.

2. Law Enforcement Exception

The only justification in the case law which might support a decision to [*16] refuse to retain the AUSA in this context would be to convince the court that private homosexual conduct is, once it is public knowledge, detrimental to the performance of the AUSA's job in states where it violates the criminal law. Proving the nexus between questioned behavior and job performance, especially when the behavior occurs outside the work place, is, however, often difficult. n12 Courts seem reluctant to find a nexus if the behavior does not occur during official work hours, and have stated that it is the agency's obligation to spell out how the conduct will affect performance or promote the efficiency of the service. *Phillips v. Bergland, 586 F.2d 1007, 1012-13 (4th Cir. 1978).*

n12 See *Bonet v. United States Postal Service, 661 F.2d 1071 (5th Cir. 1981)* (indictment for child molestation, standing alone, insufficient); *Young v. Hampton, 568 F.2d 1253 (7th Cir. 1977)* (conviction for drug use, standing alone, insufficient); *Tygrett v. Barry, 627 F.2d 1279 (D.C. Cir. 1980)* (reaffirming analysis in

Tygrett v. Washington, 543 F.2d 840 (D.C. Cir. 1974)) (probationary policeman's advocacy of illegal "sick out" insufficient); *Grebosz v. United States Civil Service Comm'n, 472 F. Supp. 1081 (S.D.N.Y. 1979)* (convictions for possession of marijuana and sale of cocaine insufficient). Even questionable conduct while at work does not automatically provide the nexus. In *Phillips v. Bergland, 586 F.2d 1007 (4th Cir. 1978),* the court declined to find that assaulting a fellow employee in the stairwell, albeit during the lunch hour, was facially sufficient to prove the nexus:

> Typical of conduct, which carries on its face prejudice to the service as contemplated in § 7501(a), are falsification of work records or expense accounts, theft of government property, assault on one's supervisor at work, and insubordination. All of these . . . are quite different from misconduct which is entirely unrelated to the employee's work and which occurs when the employee is off duty. And the courts have recognized that distinction and have made plain the greater burden which rests on the agency to justify its action in the latter case.

Id. at 1011 (footnotes and citations omitted). But see *Yacovone v. Bolger, 645 F.2d 1028* (D.C. Cir.), cert. denied, *454 U.S. 844 (1981)* ($ 8 theft by Postmaster sufficient because of fiduciary responsibilities); *Wathen v. United States, 527 F.2d 1191* (Ct. Cl.) (murder committed in public sufficient), cert. denied, *429 U.S. 821 (1976); Gueroy v. Hampton, 510 F.2d 1222 (D.C. Cir. 1974)* (manslaughter conviction sufficient). [*17]

The most effective way to prove adverse effect on job performance would be to prove that the special nature of a prosecutor's job -- his public representation of the entire Department, his duty to uphold the law, and the potential for accusations of hypocrisy for hiring a lawbreaker to enforce the law -- requires that there be no taint of criminality. 28 C.F.R. § 45.735-2(a). Some cases have emphasized that law enforcement officers can, because of their particularly sensitive positions, be held to a stricter standard of behavior, even in their private lives, than might otherwise be the case. For example, in *Masino v. United States, 589 F.2d 1048 (Ct. Cl. 1978),* the court approved the dismissal of a United States customs officer because of his voluntary statements that he had smoked marijuana on several occasions:

> Masino in his position as a Customs Inspector was specifically charged with enforcing the laws concerning contraband, including marijuana. Since possession and/or use of marijuana is a violation of federal criminal statutes, he was clearly not conducting himself in a manner to be expected of a Government employee engaged in law enforcement duties. This was what [*18] the appeals authority said, and we agree. Further, in addition to the language of the appeals authority, the transportation and use of the very contraband which a law enforcement officer is sworn to interdict, is clearly misconduct which "speaks for itself." Obviously, the disciplinary action of termination taken against Masino to "promote the efficiency of the service" cannot be said to be without a rational basis. His discharge was neither arbitrary nor capricious.

589 F.2d at 1056. A district court has upheld a state law barring all felons, even those who had received pardons, from being policemen. *Dixon v. McMullen, 527 F. Supp. 715 (N.D. Tex. 1981).* The court said that it was permissible for the state to examine the individual's prior history and to deny employment to those with a background of lawbreaking in order to insure "that those persons publicly employed in emergency or dangerous situations are sober and alert, and possess qualities such as honesty, integrity, reliability and obedience to the law." *Id. at 721.* Noting that policemen are acting on behalf of "people at large," the court said:

> Policemen are just simply a special category. Integrity and trust [*19] are prerequisites. The law clothes an officer with authority to handle many critical situations, including those that occur in a lightning moment and which can never be reenacted or reversed. . . . A state's legitimate concern for maintaining high standards of professional conduct extends far beyond the initial licensing.

Id. See also *Upshaw v. McNamara, 435 F.2d 1188, 1190 (1st Cir. 1970); Macchi v. Waley, 586 S.W.2d 70, 72-74 (Mo. Ct. App. 1979); Vegas v. Schechter, 178 N.Y.S.2d 67, 68-69 (Sup. Ct. 1958).* n13 Even those whose connections to law enforcement appear more tenuous have come within the sweep of these statements. In upholding the denial of employment to a homosexual who sought work as a property room clerk in the police department, *Childers v. Dallas Police Department, supra,* the court said:

> No one can disagree that the character and activities of those to whom we entrust the enforcement of our laws must be beyond reproach. The activities of an employee of a law enforcement agency are of paramount interest to that agency, as the police department as a whole must reflect the values of a majority of society.

Childers [*20] , *513 F. Supp. at 140-41.* n14 Likewise, it could certainly be argued that public prosecutors must be trustworthy and law abiding, or else the public's confidence in the justice system will erode. Persons deciding whether to bring or decline prosecutions should not be lawbreakers themselves. n15

n13 But see *Smith v. Fussenich, 440 F. Supp. 1077 (D. Conn. 1977)* (law barring all felons from work as private security guards struck down as overbroad).

n14 However, Childers offers less support for the decision not to retain the AUSA than at first appears. First, the case involved a property room clerk, the same kind of low-level job involved in Ashton, supra, in which the D.C. Circuit came to the opposite conclusion about an FBI mailroom clerk. Second, Childers involved a homosexual who, as in Singer, was not discreet and who openly advocated homosexuality while identifying himself as a public employee. The notoriety led the Court to conclude that the applicant failed one of the tests laid out in Norton, supra. *Childers, 513 F. Supp. at 142 n.11.*

n15 Law enforcement is not the only profession the courts have recognized as being one in which the public's confidence in the employee is important. An air controller's job has been described by courts as a "a sensitive one" in which misconduct may erode the public's faith in reliability of the national air control system. *Dew v. Halaby, 317 F.2d 582, 587 n.11 (D.C. Cir. 1963)* (homosexual acts), cert. dismissed, *379 U.S. 951 (1964); McDowell v. Goldschmidt, 498 F. Supp. 598, 605 (D. Conn. 1980)* (conviction for possession of marijuana). Dew's continued validity has been undercut by Norton, decided five years later, in which the D.C. Circuit was much more willing to question and overrule OPM's rationale. [*21]

We must emphasize, however, that none of these cases is dispositive. Furthermore, the fact that the AUSA has apparently, according to those who have evaluated him, continued to perform effectively in his job even after his homosexuality became public knowledge in the United States Attorney's Office will seriously undercut the crucial argument that his homosexual conduct is adversely affecting his job performance. In order to prevail, the Department may well have to convince the courts to accept the argument that the continuing violation of local laws that make private consensual homosexual conduct criminal establishes the required nexus as a matter of law even though that local law probably would not be enforced against the AUSA and even though such a legal "presumption" might be said to run counter to the pertinent statute and regulations.

II. Constitutional Protections

The AUSA might attempt to argue that failing to retain him would violate certain of his constitutional rights, but we do not believe such arguments would be successful. It is true that federal employees do not give up their constitutional rights upon accepting employment and the federal government may not condition [*22] a job upon the waiver of those rights. However, the issue whether the right to privacy, which the courts have determined to be protected by the Constitution, encompasses the right to practice private consensual homosexuality is still a matter of serious dispute. See *Berg v. Claytor, 436 F. Supp. 76, 79 (D.D.C. 1977),* vacated, *591 F.2d 849 (D.C. Cir. 1978).* Although some courts have found protection for homosexuals for certain activities in the First Amendment either in the freedom to speak, n16 the freedom to associate, n17 or the right to conduct one's private life free from government surveillance, see *Cyr v. Walls, 439 F. Supp. 697 (N.D. Tex. 1977)* (police surveillance of homosexual groups violated right to privacy), n18 we do not believe that failing to retain the AUSA would violate these rights. The Department has not invaded the AUSA's privacy by making impermissible inquiries, because the background check is required of all applicants and there has been no further inquiry. Failure to retain the AUSA would not be because he associates with homosexuals or has spoken out about his status but solely because of a determination that knowing, continuing violations [*23] of a local criminal law are sufficient to disqualify him from a job as a federal prosecutor.

n16 See *Aumillier v. University of Delaware, 434 F. Supp. 1273, 1311-12 (D. Del. 1977); Acanfora v. Bd. of Education, 491 F.2d 498, 501* (4th Cir.), cert. denied, *419 U.S. 836 (1974).* In Aumillier, the court awarded punitive damages in an action brought under *42 U.S.C. § 1983* against a university president who refused to

rehire an untenured teacher because the teacher had discussed his homosexuality in public. But see *Suddarth v. Slane, 539 F. Supp. 612, 616 (W.D. Va. 1982)* (denied recovery under § 1983 on ground that participation in illegal act -- adultery -- precluded recovery for allegedly wrongful dismissal). Damages were also awarded in *Johnson v. San Jacinto Junior College, 498 F. Supp. 555, 577-79 (S.D. Tex. 1980)* (adultery punished by summary demotion without a hearing).

n17 See *Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir. 1977)* (freedom of speech and association protects homosexual students), cert. denied, *434 U.S. 1080 (1978); Gay Alliance v. Mathews, 544 F.2d 162 (4th Cir. 1976)* (same); *Gay Students Org. v. Bonner, 509 F.2d 652 (1st Cir. 1974)* (same); *Lesbian/Gay Freedom Day Committee, Inc. v. INS, 541 F. Supp. 569 (N.D. Cal. 1982)* (holding unconstitutional per se exclusion of homosexual aliens as violative of First Amendment associational rights of homosexual citizens); *Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980)* (homosexual high school student's rights to freedom of speech and association covered bringing homosexual date to high school prom); *Student Coalition for Gay Rights v. Austin Peay State University, 477 F. Supp. 1267 (M.D. Tenn. 1979); Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation, 417 F. Supp. 632 (D.R.I. 1976)* (upholding right of access to public forum); *Gay Activists Alliance v. Board of Regents, 638 P.2d 1116 (Okla. 1981); Alaska Gay Coalition v. Sullivan, 578 P.2d 951 (Ala. 1978).* See also *Nemetz v. INS, 647 F.2d 432 (4th Cir. 1981)* (private homosexual conduct does not preclude finding of "good moral character" necessary for naturalization). Even the military's per se exclusion of homosexuals has been successfully attacked in some cases despite the traditional deference given to arguments about discipline and upholding the law. ben *Shalom v. Secretary of Army, 489 F. Supp. 964 (E.D. Wisc. 1980)* (discharge for homosexuality violated rights of association and personal privacy). See also *Bruns v. Pomerleau, 319 F. Supp. 58 (D. Md. 1970)* (refusal to accept employment application from practicing nudist violated his right to freedom of association). Some courts have also found protection in state constitutions. *Gay Law Students Ass'n v. Pacific Tel. & Tel., 595 P.2d 592, 597 (Cal. 1979).* [*24]

n18 See also *Shuman v. City of Philadelphia, 470 F. Supp. 449, 459 (E.D. Pa. 1979)* (inquiry into off-duty personal activities -- affair with an 18-year-old -- violated right of privacy in the absence of any showing of impact on job performance); *Major v. Hampton, 413 F. Supp. 66 (E.D. La. 1976)* (dismissal of IRS officer who rented apartment for off-duty, extramarital affairs impermissible); *Mindel v. United States Civil Service Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970)* (termination of postal clerk for cohabiting violated Ninth Amendment right to privacy). But see *Suddarth v. Slane, 539 F. Supp. 612 (W.D. Va. 1982)* (adultery not protected by the First Amendment); *Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328 (W.D. Pa. 1977),* aff'd, *578 F.2d 1374* (3d Cir.) (employees' open adultery not protected by right of privacy), cert. denied, *439 U.S. 1052 (1978).*

III. Conclusion

The Department has the right to decline to retain the AUSA if his conduct or intended conduct are adversely affecting his job performance or the performance of those around him. In this particular case, the individual involved apparently has an excellent [*25] record as a litigator and is, according to his present superior, functioning in a satisfactory manner. It would be difficult, given this record, to show that his homosexual conduct in fact adversely affects his job performance. Rather, we believe that on these facts it would be likely that he would meet the tests articulated in Norton, supra, especially in view of the fact that the Department is willing to give him the security clearance necessary for his work. The state criminal law he is apparently violating is, we understand, only enforced against public conduct. The Department does not have a policy of dismissing people for conduct that violates other similar state criminal laws.

Staff members at both the Civil Division, which will be called upon to defend any suit, and OPM, whose regulation we are interpreting, have been informally consulted and have stated that they believe the facts of this case will make it difficult to establish a sufficient nexus between the conduct and the job performance, and we tend to agree with their judgment. As long as the OPM regulation remains in force, we also believe it would be difficult to establish the proposition that the violation [*26] of local laws on the facts of this case establishes a nexus as a matter of law sufficient to support a decision to dismiss.

We must reiterate that the case law makes it clear that potential embarrassment to the Department is not enough to justify a refusal to retain an AUSA: there must be a supportable judgment made by the appropriate officials that the AUSA's actions are adversely affecting his performance. Unless the Department can reasonably expect to maintain the burden of proof on this issue, it is not reasonable to expect that the Department would prevail. Without stronger evidence that this particular individual's homosexuality is adversely affecting his performance, we believe that it would be difficult to overcome charges of discrimination on the basis of conduct that apparently does not adversely affect the performance of the employee or those around him.

Theodore B. Olson

Assistant Attorney General

Office of Legal Counsel

CARY P. SKLAR
519 South Jefferson Street
Arlington, VA 22204-1221

May 31, 2005

Chairman George V. Voinovich
Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
Senate Committee on Homeland Security and Governmental Affairs
U.S. Senate
Washington, D.C. 20510

Ranking Member Daniel K. Akaka
Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
Senate Committee on Homeland Security and Governmental Affairs
U.S. Senate
Washington, D.C. 20510

Re: May 24, 2005 Oversight Hearing of the U.S. Office of Special Counsel

Dear Chairman Voinovich and Ranking Member Akaka:

My name is Cary Sklar. Until I was fired by Special Counsel Scott Bloch for declining an involuntary geographic reassignment to the new Detroit field office, I served as the senior executive in charge of Investigation and Prosecution Division (IPD) 3. I also created the Alternative Dispute Resolution (ADR) program at the Office of Special Counsel (OSC). I hired Linda Myers, who served as the Chief of the ADR Unit, and I supervised her in that role.

I attended your hearing earlier this week. According to my notes of the hearing, in answering a question from Senator Lautenberg, Mr. Bloch testified that I had described the opening of the Detroit field office as a "creative solution," which I thought would work. I never made that statement or any statement like that. Others could confirm that this was manifestly not my reaction to the opening of the new field office, which (contrary to the suggestion on page 5 of Mr. Bloch's May 24th written testimony) was not discussed with me or, to my knowledge, any of the other senior executives, until the day before it was announced to the entire staff.

Indeed, I submitted a February 28, 2005 written response, through my attorney, in which I stated that the decision to open a Detroit field office, and to involuntarily reassign me to that office, "lacks any legitimate business justification," and further, that my removal from federal service for declining the reassignment would constitute a

"prohibited personnel practice under 5 U.S.C. 2302 (b)(8) (perceived whistleblowing), 2302(b)(10), and 2302(b)(12) (First Amendment)." Mr. Bloch acknowledged, and restated, my response in his March 9, 2005 letter to me in which he informed me of his decision to remove me from the federal service effective March 18, 2005. I have faxed both documents to Senator Akaka's office.

Sincerely,

Cary P. Sklar

cc:
Chairman Susan Collins
Ranking Member Joseph Lieberman
Senator Carl Levin
Senator Frank Lautenberg

LAW OFFICES
BERNABEI & KATZ, PLLC
1773 T STREET, N.W.
WASHINGTON, D.C. 20009-7139

(202) 745-1942
TELECOPIER: (202) 745-2627
E-MAIL: BERKATZLAW@AOL.COM
WEBSITE: WWW.BERNABEIANDKATZ.COM

LYNNE BERNABEI
DEBRA S. KATZ°
LISA J. BANKS
ARI M. WILKENFELD+
ALAN R. KABAT+
AVI L. KUMIN◊
RASHIDA A. ADAMS°
RENEE SERVANCE•
LEMA R. BASHIR*

OF COUNSEL:
DAVID J. MARSHALL

+ ADMITTED IN MD ALSO
° ADMITTED IN NY ALSO
◊ ADMITTED IN CA ALSO
• ADMITTED IN WI ONLY
* ADMITTED IN MD ONLY

By Electronic Mail
May 31, 2005

Senator George V. Voinovich
Chairman
Senator Daniel K. Akaka
Ranking Member
Senate Committee on Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management
340 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Complaint of Prohibited Personnel Practices by Special Counsel Scott Bloch

Dear Senator Voinovich and Senator Akaka:

My law firm, Bernabei & Katz, PLLC, represents several non-profit organizations and a group of anonymous career employees of the U.S. Office of Special Counsel who have filed a complaint alleging the commission of prohibited personnel practices and other misconduct by Special Counsel Scott Bloch. A copy of their complaint (including an amendment thereto) is enclosed for inclusion in the official hearing record.

On behalf of my clients, I would like to thank you for holding an oversight hearing last week on the U.S. Office of Special Counsel (OSC) under Mr. Bloch's leadership. My clients and their colleagues were grateful that Mr. Bloch was finally required to provide answers, under oath, concerning at least some of the many allegations of mismanagement and misconduct that have been lodged against him. It was clear that you and your colleagues take the recent concerns raised about Special Counsel Bloch's stewardship of OSC seriously; my clients and their colleagues were heartened by your interest.

Of course, by necessity, the hearing last week only touched upon a few of the many serious charges against Mr. Bloch. In addition, as has been his pattern from the start of his tenure, in a number of instances, Mr. Bloch was disingenuous and even untruthful in responding to some of the pointed questions posed to him by the Committee.

Ultimately, nothing less than a full scale independent investigation will suffice to shine light on Special Counsel Bloch's record of retaliation, mismanagement, dissembling, crony hiring, and other offenses against the merit system. Unfortunately, as of this time, despite our best efforts, my clients' prospects for securing an independent investigation of their serious allegations remain uncertain.

Thus, the enclosed complaints were filed with the Office of Special Counsel almost three months ago. When we originally filed the complaint, we requested that Mr. Bloch refer it for an investigation by an impartial Office of Inspector General, chosen by the Chairman of the President's Council on Integrity and Efficiency (PCIE). While Mr. Bloch and OSC spokespersons made public statements that he had taken this course of action, in fact, he did not. Instead, Mr. Bloch referred the matter to the Integrity Committee ("IC") of PCIE, despite the fact that the IC has limited jurisdiction and can only investigate charges of misconduct against Inspectors General. Significantly, as a member of the IC, Mr. Bloch had to have known that the IC would not be able to take action on the complaint because it lacks jurisdiction over the Special Counsel.

As a result, despite the seriousness of the allegations, and the continuing damage these allegations have done to OSC's credibility, to date, no investigation has been announced, much less initiated. I started expressing concerns about the likelihood of delay when I first learned that the complaint had been transmitted to the IC, rather than the PCIE. In the enclosed letter of March 28, 2005, I advised Chris Swecker, Chair of the IC, that I understood that the IC does not have jurisdiction to investigate complaints filed against the Special Counsel. I specifically raised my concern that, because the IC does not have jurisdiction over Mr. Bloch, it would simply close the OSC Complaint on that basis. I further reiterated our initial request to have this matter assigned to PCIE for investigation.

Rather than referring the OSC Complaint to the PCIE, by letter dated April 14, 2005, which is also enclosed, the IC sent the complaint to the Office of White House Counsel. In the letter, Mr. Swecker stated that the IC was closing the case, notwithstanding the serious allegations of the complaint (which he listed), because, as we had known from the start, the IC lacked jurisdiction over the Special Counsel.

By letter to White House Counsel Harriet Miers, dated April 25, 2005 (enclosed), I requested an opportunity to meet with her to discuss what actions she intended to take, if any, to investigate the allegations set out in the complaint against Special Counsel Bloch. I stated that "[i]f the Office of the White House Counsel does not wish to conduct this investigation, we continue to believe that the proper course of action is to refer this to the PCIE for investigation."

I received no response to my request for a meeting. Instead, on May 3, 2005, I received a copy of Ms. Miers' letter to Clay Johnson, III, Chairman of the PCIE, referring the Complaint back to the PCIE "in light of PCIE's status as an organization of inspectors general and other officials who regularly receive complaints of this sort." She further stated that "[t]he PCIE may wish to refer the matter to an investigative agency for further action."

In short, as a result of Mr. Bloch's original apparently deliberate misrouting of the complaint, it took some two months for the complaint to even arrive at the PCIE. Now, almost a month later, we have received no communication from the PCIE and no indication that it intends to conduct an investigation as we requested, and as the White House Counsel has suggested.

In the meantime, in the face of proposals to remove them, nine of the twelve employees who were involuntarily reassigned to Detroit and/or Dallas have left the agency. Other experienced OSC career staff are leaving the agency at unprecedented rates. The agency – whose work is essential to the protection of the merit system – is in a shambles.

To summarize, my clients and their colleagues sincerely appreciate the work the Committee and its staff have done over the last few weeks to prepare for and hold the oversight hearing. Nonetheless, I must tell you that my clients and their colleagues are growing increasingly less sanguine that Mr. Bloch will ever be held fully accountable for his abuses of authority and dismantling of the Office of Special Counsel. I therefore urge you, on their behalf, to follow up aggressively on the testimony Mr. Bloch provided, and to continue to monitor his actions. I would also urge that you use whatever influence you can bring to bear, to ensure that a thorough investigation of my clients' complaint is conducted, without further delay.

Sincerely,

Debra S. Katz /hk

Debra S. Katz

Enclosures

Cc: Sen. Susan Collins
Sen. Frank Lautenberg
Sen. Carl Levin
Sen. Joseph Lieberman
Mr. Clay Johnson (by hand delivery)
Harriet Miers, Esquire (by hand delivery)

COMPLAINT OF PROHIBITED PERSONNEL PRACTICES AGAINST SPECIAL COUNSEL SCOTT BLOCH

Submitted by:

Debra S. Katz, Esquire
Rashida Adams, Esquire
Bernabei and Katz, PLLC
1773 T Street, NW
Washington, D.C. 20009
(202) 745-1942

Counsel for:

Anonymous Career Employees of the U.S. Office of Special Counsel

The Government Accountability Project

The Human Rights Campaign

Public Employees for Environmental Responsibility

The Project on Government Oversight

March 3, 2005

STATEMENT IN SUPPORT OF
COMPLAINT OF PROHIBITED PERSONNEL PRACTICES
AGAINST U.S. SPECIAL COUNSEL SCOTT J. BLOCH

I. INTRODUCTION

This statement is filed pursuant to 5 U.S.C. § 1214 in support of the attached complaints alleging the commission of a series of prohibited personnel practices as well as violations of civil service laws, and other acts of malfeasance by U.S. Special Counsel Scott J. Bloch.[1]

A. The Complainants

There are two groups of complainants:

1. An alliance of public interest organizations that have a strong and direct interest in assuring that OSC impartially and effectively performs its mission of promoting the merit system and protecting whistleblowers against retaliation. These organizations are the Government Accountability Project, the Project on Government Oversight, Public Employees for Environmental Responsibility, and the Human Rights Campaign.

OSC has jurisdiction over the complaints of these organizations pursuant to 5 U.S.C. § 1214(a)(1)(A), which provides that "the Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." As OSC has long recognized, this provision permits any individual or organization to invoke OSC's jurisdiction by filing a complaint with the agency, alleging the commission of prohibited personnel practices, or the violation of civil service laws, rules and regulations, whether or not the complainants have themselves been the victims of the illegal actions. This long held interpretation is based on the clear statutory language as well as the broad interest the public possesses in protecting whistleblowers against retaliation and ensuring compliance with the laws that promote the merit-based civil service.

2. The second set of complainants consists of a group of OSC career employees who were subject to the illegal and retaliatory involuntary geographic reassignments described below and/or the hostile work environment arising out of the culture of fear and

[1]Attached hereto is an executed copy of OSC's Complaint Form, which incorporates this Statement by reference.

retaliation that Mr. Bloch has fostered at OSC, as well as an illegal gag order that Mr. Bloch issued in April 2004. Because they fear retaliation by Mr. Bloch, they are filing their complaint anonymously, through their counsel, Debra Katz, of the law firm of Bernabei & Katz, PLLC.

B. Summary of Prohibited Personnel Practices and Violations of Civil Service Law

The prohibited personnel practices and violations of civil service law that Special Counsel Bloch has committed include:

- Creation of a hostile work environment arising out of an escalating series of retaliatory acts against career OSC staff, culminating in the involuntary geographic reassignment of twelve career employees because of protected whistleblowing and/or perceived whistleblowing, and the subsequent proposal to remove those employees who declined the involuntary reassignments.

- Threatening to retaliate against employees by hastening their termination dates and bringing further unspecified charges against them because they refused to enter an agreement waiving their rights to challenge the illegal reassignments and proposed removals.

- Violation of the First Amendment rights of OSC career employees by the issuance of an illegal gag order, which prohibits them from communicating with the press, Congress, or any outside party regarding so-called "confidential or sensitive internal agency matters", without the permission of Mr. Bloch or a member of his political staff.

- Violation of the Anti-Gag statute by imposing a non-disclosure policy on career staff that fails to include required guarantees regarding employees' statutory free speech rights.

- Violation of the Lloyd LaFollette Act, 5 U.S.C. § 7211, which guarantees all federal employees the right to communicate with Congress, through a non-disclosure policy which precludes employees from engaging in such communications without the permission of Mr. Bloch or a member of his political staff.

C. Summary of Other Acts of Malfeasance and Failure to Perform Statutory Duties

As detailed below, the complainants' allegations involve not only the commission of prohibited personnel practices and violations of civil service laws, but also numerous acts of malfeasance by Mr. Bloch and failures to perform statutory duties. These include the abandonment of merit-based competitive hiring for career positions in the agency, the

purging of existing career staff to make way for Mr. Bloch's personal picks, the misuse of special hiring authorities, the refusal to enforce existing statutory prohibitions against sexual orientation discrimination in the federal workforce, the summary closure of hundreds of whistleblower disclosures submitted to the agency, and the politicization of Hatch Act enforcement. In many instances, Mr. Bloch has made misleading statements to the public and Congress about these actions.

Indeed, Mr. Bloch's obsession with secrecy and his aversion to transparency have manifested themselves yet again in connection with the most recent of his illegal personnel actions—the forced geographic reassignments and proposed removals of experienced OSC career staff. As is widely known at the agency, Mr. Bloch offered employees who are being removed for refusing to accept involuntary geographic reassignments several additional weeks of pay, but only if they agreed to waive their legal rights, and submit to a gag order. The waiver of rights included, not only a waiver of employees' rights to file complaints with the Office of Special Counsel or the Merit Systems Protection Board, but also an agreement not to file complaints about Mr. Bloch with the President's Council on Integrity and Efficiency. Further, Mr. Bloch conditioned the additional weeks of pay upon an agreement by the employees not to discuss his illegal actions with anyone at all, unless compelled to do so by subpoena.

To their credit, the employees rejected this offer, whose terms are antithetical to the very mission that OSC was established to promote -- transparency and accountability in government. Thereafter, as detailed below, Mr. Bloch threatened to take further action against the affected employees, by hastening their departure and bringing additional charges against them, for refusing to waive their legal rights.

D. Summary of Relief Requested

The complainants' allegations against Special Counsel Bloch are serious ones, which go to the heart of the OSC's credibility and effectiveness as a watchdog of the merit system. Complainants are entitled by law to an independent investigation of their complaints and to an opportunity for those complaints to be prosecuted on their behalf by the Office of Special Counsel. As is readily apparent, however, Mr. Bloch cannot credibly oversee the investigation of the complaints because he is their subject. Nor can any of his political staff or any members of OSC career staff, who all serve as his subordinates, take part in the investigation or be involved in any decisions related to it. Indeed, the OSC's complainants' ability to remain anonymous would be jeopardized if any OSC staff were assigned to work on this complaint because if the matter was assigned to one of the complainants, they would have to recuse themselves, thereby revealing their identities.

To avoid further injury, complainants request that OSC immediately stay the reassignments and/or removals of affected OSC employees and stay further implementation of the gag order pending an investigation. Further, in light of the fact that OSC cannot investigate these complaints itself, complainants request that they be

referred for an investigation and recommendation of corrective and/or disciplinary action by an impartial Office of Inspector General, chosen by the Chairman of the President's Council on Integrity and Efficiency.

II. STATEMENT OF FACTS AND CHRONOLOGY OF EVENTS

A. Background: Public Controversy Erupts During the Special Counsel's Second Month in Office When He Removes References to Sexual Orientation Discrimination from OSC Website, Resulting in a Rebuke by the White House

Special Counsel Bloch took office on January 5, 2004. One month later, in one of his first official acts, Mr. Bloch ordered that all references to OSC's jurisdiction over complaints by federal workers alleging sexual orientation discrimination be "scrubbed" from OSC's website, and its official publications. The items scrubbed included, among others, references to sexual orientation discrimination contained in OSC's mandatory complaint form and informational flyer. The scrubbed items also included a June 2003 OSC press release announcing the settlement of a sexual orientation discrimination complaint filed by an applicant for a position with the Internal Revenue Service, which resulted in the imposition of disciplinary action against an IRS supervisor. See June 2003 press release, attached and incorporated herein as Exhibit 1.

Almost immediately after Mr. Bloch took these actions, they became publicly known, when the National Treasury Employees Union issued a press release on February 12, 2004, along with a letter from its President, protesting the action. See February 12, 2004, press release attached and incorporated herein as Exhibit 2. A heated public controversy erupted. The controversy triggered significant national media attention and bipartisan expressions of concern by members of Congress.[2]

[2]Among the Congressional inquiries was a February 19, 2004 letter from the Senate Committee on Governmental Affairs, signed by both Chairman Susan Collins (R-Maine) and ranking minority member Joseph Lieberman (D-Connecticut), among others; a March 4, 2004 letter from Rep. Shays (R-Connecticut), Rep. Greenwood (R-Pennsylvania), and Rep. Simmons (R-Connecticut); and a separate March 4, 2004 letter signed by 70 other Members of the House on the Democratic side. See Congressional Letters attached and incorporated herein as Exhibit 3. The letter from Senators Collins and Leiberman expressed concern that Mr. Bloch's decision to remove all references to jurisdiction over sexual orientation discrimination complaints "appears inconsistent with . . .assurances" that Mr. Bloch had given to committee staff in written submissions and conversations during consideration of his nomination two months before, that he would continue OSC's policy of protecting federal employees against sexual orientation discrimination.

Notwithstanding negative media and Congressional reaction, and against the counsel of members of his career staff, Mr. Bloch resisted initial calls to restore the information he had ordered removed from OSC's web site and publications. Instead, he announced that he was conducting a "full legal review" of a question that had already been settled for over 20 years within the rest of the Executive Branch: whether it is a prohibited personnel practice within the meaning of 5 U.S.C. § 2302(b)(10) to discriminate against federal employees on the basis of their sexual orientation. See February 27, 2004 OSC Press Release, attached and incorporated herein as Exhibit 4.

The controversy continued over the next month, until it reached its zenith on March 31, 2004, when several Members of the House and Senate held a joint press conference to condemn Mr. Bloch's rollback of rights, and to call on the White House to assist in the resolution of the matter. The same day, the White House responded, issuing a strongly-worded statement, which was widely interpreted as a rebuke of Mr. Bloch. The White House confirmed that "[l]ong-standing federal policy prohibits discrimination against federal employees based on sexual orientation. President Bush expects federal agencies to enforce this policy and to ensure that all federal employees are protected from unfair discrimination at work." See Statement attached and incorporated herein as Exhibit 5 ("Employees are protected from bias for sexual orientation, White House says," April 1, 2004 Federal Times).

B. The Special Counsel Feigns Compliance With the White House Directive, But Never Restores the Deleted Information to OSC's Website and Continues to Apply His Discredited Interpretation of the Law

Shortly after the White House rebuke, on April 8, 2004, Mr. Bloch issued an OSC press release acknowledging the White House statement, and purporting to announce the results of his "legal review." The press statement was vague and confusing. Rather than simply acknowledging that discrimination based on sexual orientation is a prohibited personnel practice, the statement asserted that OSC would enforce protections against sexual orientation discrimination, where such discrimination was based on "imputed private conduct." See April 8, 2004 statement attached and incorporated herein as Exhibit 6.

It is now clear that Mr. Bloch issued this opaque statement only in order to deflect the criticism being directed against him and to feign compliance with the President's clear statement that he expected federal agencies (presumably including OSC) to enforce prohibitions against sexual orientation discrimination. In fact, Mr. Bloch never shifted his course on this issue; on the contrary, he refuses to this day to enforce the statutory prohibition against sexual orientation discrimination that flows from 5 U.S.C. § 2302(b)(10).

Thus, OSC's practice under Mr. Bloch's direction has been to close complaints by federal employees alleging discrimination based on sexual orientation, even in the most

egregious of circumstances. This is demonstrated in a very recent case involving Michael Levine, a 32 year veteran of the Forest Service, who had an unblemished record until he blew the whistle on another agency manager's misconduct. Mr. Levine, who is gay, was suspended for 14 days on trumped up charges after he made protected disclosures to the agency inspector general alleging that a fellow manager was running a sporting goods business from the worksite, that he was absent from the worksite without authorization, that he had sold equipment to the Forest Service for his own profit, and that he had improperly rented a trailer owned by his parents, on behalf of the Forest Service.

Mr. Levine filed a complaint with OSC in November 2003, alleging that he was suspended in retaliation for whistleblowing and because of his sexual orientation. On January 27, 2005, after sitting on Mr. Levine's complaint for over a year, and refusing to return Mr. Levine's many telephone calls, OSC closed both the whistleblower retaliation and sexual orientation discrimination allegations in his case, without investigation.

OSC declined to investigate Mr. Levine's allegations of whistleblower retaliation despite the fact that the suspension he suffered occurred almost immediately after Mr. Levine made his protected disclosures, and despite the fact that the subsequent charges leveled against Mr. Levine were patently pretexual. OSC declined to investigate the allegations of sexual orientation discrimination despite the fact that the trumped up charges against Mr. Levine were crafted by a personnel officer who remarked to a witness, in reference to Mr. Levine, "don't you just hate these fucking faggots?" Indeed, OSC closed the case without investigation, despite the fact that Mr. Levine provided a written statement from this witness, attesting to the fact that the personnel officer had made this despicable statement of animus. OSC closed the case on the grounds that while the hateful statement was "offensive" and "insensitive," Mr. Levine had apparently not satisfied Mr. Bloch's bizarre legal test, which holds that discrimination based on off duty sexual conduct is illegal, but that discrimination based on sexual orientation is not.

The handling of Mr. Levine's complaint, which is detailed in the attached letter from the Human Rights Campaign, including Mr. Levine's correspondence with OSC was disgraceful. See Letter from Human Rights Campaign to S. Bloch (March 2, 2005), attached and incorporated herein as Exhibit 7. As far as we know, however, it is only the tip of the iceberg. To date, Mr. Bloch has never restored the disputed materials to OSC's website or other publications and he has continually stonewalled Congressional requests that he provide a clear explanation of his policy regarding sexual orientation discrimination.[3]

---

[3]It bears noting that Mr. Levine's case was handled through the special procedure Mr. Bloch instituted, requiring that all sexual orientation claims be processed under the supervision of one of his political appointees, James McVay. The OSC employee who wrote the letter under Mr. McVay's supervision (Thomas Forrest) is one of the employees Mr. Bloch personally brought on board in the last year, as described infra, through a non-competitive secret hiring procedure. Mr. Forrest appears to have secured

C. **Mr. Bloch's Open Expressions of Animus Toward Staff Suspected of "Leaking" to the Press, His Public Statements Denouncing OSC "Leakers," and His Issuance of a Gag Order to OSC Staff**

During the course of the controversy described above, Mr. Bloch made known his belief--and his anger--that OSC staff had "leaked" word to the media of his actions on the sexual orientation issue. Mr. Bloch raised this issue both internally and publicly. Internally, Mr. Bloch complained to career staff that members of the press were calling and telling him that career OSC employees were "agitated" over his actions. He also expressed to members of the career staff his belief that he could not "trust" any of them in light of the public airing of the controversy.

Further, Mr. Bloch expressed his hostility and suspicions of the career staff publicly. In an interview with the Federal Times, which occurred in the midst of the controversy, Mr. Bloch is quoted as stating that "[i]t's unfortunate that we have a leaker or leakers in our office who went to the press rather than coming to me. . . ." See Federal Times (Mar. 22, 2004), attached and incorporated herein as Exhibit 9 ("New counsel reviews whistleblower, bias laws.")

The full text of what Mr. Bloch told the reporter is even more revealing. It is as follows:

> Federal Times: Any regrets over how you kind of entered this office under a bit of controversy? Anything you wish you would have done differently?
>
> Bloch: No I'm proud of the decision I made to follow the law and do a full legal review. It's unfortunate that we have a leaker or leakers in our office who went to the press rather than coming to me and complaining and saying we need to do this differently or I need to have my voice heard or I don't think you're doing the right thing. No one came and said that. I talked to my senior staff and they made suggestions about what to take down from the website. That's all I heard. And the next thing I know the press was calling me and telling me I have people in my office agitated. I think that's unfortunate, because we need to focus on our mission as an agency and pull together to do what's right for the workers and right for the merit system."

---

his position because he is in the same Army reserve unit as Deputy Special Counsel James Renne. Mr. Renne himself is on the public record vehemently opposing the civil rights of gay and lesbian citizens. See http://www.priestsforlife.org/government/sq.htm attached and incorporated herein as Exhibit 8.

In fact, Mr. Bloch's claim that "no one" had raised questions internally about his decision to "scrub" the website, was false. Members of the career staff raised concerns with him about this action, as well as raising concerns about his new "interpretation" of the law. The senior staff did not "make suggestions" to him about what to take off the website; they simply identified for him the parts of the website that referred to OSC's role in enforcing the prohibition on sexual orientation in the federal worksite. Mr. Bloch did not invite the career staff to participate in his "legal review." Indeed, they never received any further information about how that "review" was conducted, much less any notification of how the legal issue was resolved (other than the confusing press release described above).[4]

To forestall further leaks to the media, at the same time he announced the results of his "legal review" on the sexual orientation issue, Mr. Bloch imposed a patently illegal gag order on OSC career staff. Shortly after the April 8 press release referred to above, the staff was sent an e-mail that reads, in its entirety, as follows:

> The Special Counsel has requested that we convey to you that he and his staff have completed their legal review of OSC's jurisdiction to process claims under title 5, section 2302(b)(10), alleging sexual orientation discrimination. Their conclusions can be found in a recently posted press release on OSC's website. If, in the performance of your case-processing duties, current or potential complainants, their representatives, or agency representatives ask about OSC's policy on (b)(10) complaints, you should simply refer them to the press release on our web site as a complete and definitive statement of OSC's policy.
>
> Please also note that the Special Counsel has directed that any official comment on or discussion of confidential or sensitive internal agency matters with anyone outside OSC must be approved in advance by an IOSC official.[5]

See E-Mail to OSC staff, attached and incorporated herein as Exhibit 10.

Mr. Bloch's gag order triggered another round of negative media attention, including coverage in the Washington Post and other media outlets. In remarks to the Washington Post, Mr. Bloch made further disingenuous representations, claiming that neither he nor his staff had approved the final language of this e-mail. In fact, although Mr. Bloch's statement was technically accurate, he and/or his staff definitely did approve

---

[4]Mr. Bloch has never produced a copy of the "legal review" he claimed to have conducted, notwithstanding the request of several Members of Congress that he do so.

[5] "IOSC" stands for "Immediate Office of the Special Counsel"—i.e. Mr. Bloch or a member of his political staff.

an earlier version of the e-mail that was identical to the final version in all material respects. Moreover, it was he who directed that a gag order be issued in the first place.

Further, while Mr. Bloch claims he never reviewed the final language of the gag order, he has never rescinded it notwithstanding that it is directly violative of the Whistleblower Protection Act, the "Anti-Gag" Statute, the First Amendment, and the Lloyd LaFollette Act. OSC staff, including the anonymous complainants, have reasonably concluded that the gag order is still in effect and that Mr. Bloch will punish OSC employees who violate the gag order[6]

D. Mr. Bloch's Ensuing Pattern of Non-Competitive Hiring, Including the Hiring of Unqualified Cronies, and Marginalization of Career Staff

In the months after the controversy over the sexual orientation issue and gag order occurred, Mr. Bloch began to increasingly exclude career OSC staff from any participation in key agency management and policy decisions. He also doubled the number of Schedule C (i.e. political) employees at the agency, and dramatically increased the size of his immediate staff. In doing so, he used positions budgeted for program staff to assemble a palace guard.

In addition, during this period, Mr. Bloch stripped senior executives and mid-level career managers of their longstanding authority to hire their subordinate employees, and began a pattern of personally hiring employees for career positions on a non-competitive basis. Consistent with this new policy, all career hires have been hand-picked by either Mr. Bloch or his political staff. In every case, the career supervisors of these new hires were completely excluded from the hiring process and did not meet the new hires until their first day of work.[7]

---

[6] Mr. Bloch's displeasure with the negative press attention he received in the wake of these controversies continued over succeeding months. Indeed, six months later, in an interview with the hometown newspaper where he had attended college, Mr. Bloch characterized the entire controversy over his actions as resulting in what he called "a huge, unnecessary hullabaloo." See Lawrence Journal-World (Oct. 1, 2004), attached and incorporated herein as Exhibit 11.

[7] In his recent letter to Congressman Waxman, Mr. Bloch asserted that "our hires since coming to OSC have been with the input of senior personnel in the career service. . . ." See Letter to Congressman H. Waxman from S. Bloch, attached and incorporated herein as Exhibit 12. To the extent that Mr. Bloch is asserting that senior personnel in the career service at OSC have had input into his hiring decisions, that claim is inconsistent with the truth. The sole exception to complainants knowledge is Mr. Bloch's agreement to hire one of OSC's incumbent law clerks into an attorney position in the Hatch Act Unit, at the recommendation of the Unit's supervisor. If Mr. Bloch is asserting that senior personnel in the career service at some other agency have had input into the hiring decisions,

In most, if not all cases, the new hires brought on board by Mr. Bloch also had no background in employment or labor law. Worse still, a number of them are known to have a personal connection or affiliation to Mr. Bloch or his Deputy, James Renne. For example, Mr. Bloch hired two attorneys at Mr. Renne's recommendation, one of whom (as noted earlier) serves with Mr. Renne in his Army reserve unit and another who is the brother of an officer in that unit. Neither one has relevant experience in labor or employment law.

Mr. Bloch also hired Alan Hicks, the former headmaster of a Pennsylvania boarding school attended by one or more of his children (St. Gregory's Academy). According to a recent letter that Mr. Bloch sent to Congressman Henry Waxman, he hired Mr. Hicks non-competitively to serve as a "consultant" or "expert" on a "intermittent" basis, purportedly pursuant to 5 U.S.C. § 3109 and 5 CFR § 304.103. See Letter from S. Bloch to H. Waxman, attached and incorporated herein as Exhibit 12.

Mr. Hicks' hiring cannot be justified under these provisions. Under the regulations, a "consultant" is "a person who can provide valuable and pertinent advice generally drawn from a high degree of broad administrative, professional or technical knowledge or experience." 5 CFR § 304.102(b). An "expert" is a person who is "specially qualified by education and experience to perform difficult and challenging tasks in a particular field beyond the usual range of achievement of competent persons in that field." The regulations further provide that "an expert is regarded by other persons in the field as an authority or practitioner of unusual competence and skill in a professional, scientific, technical or other activity." 5 CFR § 304.102(d).

Mr. Hicks is a former school master, who apparently also had some experience teaching logic and philosophy at the University of Kansas (where Mr. Bloch also served on the adjunct faculty). In his letter to Representative Waxman, Mr. Bloch asserted, without further explanation, that he hired Mr. Hicks to "improve [OSC's] procedural operations and advice [sic] on training initiatives." It is unclear exactly what this means. Mr. Bloch has not revealed how Mr. Hicks is being compensated or precisely what it is he has done for the agency in the past, or is expected to do in the future. So far as the career staff is aware, at this point, Mr. Hicks' work has included giving a dry speech at the OSC off-site conference last Spring about the "philosophy of work" and playing some undefined role concerning the processing of cases in OSC's Disclosure Unit. On the basis of the latter, he was provided with copies of confidential OSC disclosure files for his review. So far as anyone at OSC can determine, Mr. Hicks has no experience

---

complainants are unaware of whether that assertion is true or false, but it is clearly beside the point.

relevant to OSC's work, and appears to have been given a federal job only because of his prior personal connection with Mr. Bloch.[8]

In addition to invoking extraordinary statutory authority to give Mr. Hicks a federal job on a non-competitive basis, Mr. Bloch has also personally recruited and hired several inexperienced recent graduates of the Ave Maria School of Law, a law school that is religiously oriented and only provisionally accredited.[9]

Mr. Bloch has engaged in a cover up of his hiring practices by refusing to provide documents concerning his non-competitive hiring and no-bid contracts, which were the subject of a Freedom of Information Act Request made by Public Employees for Environmental Responsibility in June 2004. PEER publicized Mr. Bloch's refusal to comply with FOIA as well as his crony hiring in a press release it issued November 17, 2004. See Press Release from PEER, attached and incorporated herein as Exhibit 16.

Mr. Bloch was deeply angered by PEER's press release. It is entirely reasonable to infer that Mr. Bloch suspected the career staff of "leaking" again, this time by providing information to PEER about his non-competitive hiring practices and the potentially embarrassing hiring arrangement he entered on behalf of OSC with Mr. Hicks.

Finally, during this time period, in October, 2004, Marie Glover, the GS-15 Director of OSC's Human and Administrative Resource Management Branch, resigned abruptly and unexpectedly, giving only a few days notice. At the same time, her senior personnel specialist, Joanne O'Quinn, also retired on very short notice. Ms. Glover's duties included ultimate responsibility for all OSC personnel actions and procurement decisions. She had served at OSC in similar functions since OSC was created in 1979, through the terms of every Special Counsel, and had developed a reputation for very high

---

[8] As noted, Mr. Hicks is the former headmaster of a Catholic boarding school in Pennsylvania (St. Gregory's Academy). Mr. Hicks apparently left that position in the wake of a scandal concerning, among other things, allegations of priests sleeping with young male students at the Academy. See "Scranton Scandal" and "Scranton Scandal-A Follow Up" by Rod Dreher in National Review On Line (February 7 and February 15, 2002) at http://www.nationalreview.com/dreher/dreher020702.shtml and http://www.nationalreview.com/dreher/dreher021502.shtml attached and incorporated herein as Exhibits 13 and 14, respectively. See also, "The Seduction of the Society of St. John" by Michael Chapman, at http://www.rcf.org/docs/seductionssjp1.htm attached and incorporated herein as Exhibit 15.

[9] The mission statement of the Ave Maria School of Law, located in Ann Arbor, Michigan, asserts that the school is "dedicated to educating lawyers with the finest professional skills characterized by the harmony of faith and reason in fidelity to the teachings of the Catholic Church."

integrity and strict compliance with law and regulation in all personnel and procurement actions that she approved.[10]

Ms. Glover's sudden and unexplained departure resulted in a serious loss to OSC of decades of institutional knowledge and experience. To OSC staff, Ms. Glover's abrupt and unexplained resignation was an additional signal of severe management dysfunction, and possible improprieties in the personnel and procurement functions.

E. Mr. Bloch's Purge of Experienced Career Staff through Involuntary Reassignments

On January 6, 2005, Mr. Bloch escalated his attack on the career staff by directing the involuntary geographic reassignment of twelve career OSC employees (approximately 20 percent of the legal and investigative team at headquarters, including two of the four career senior executives at OSC). This reassignment was announced with no notice whatsoever to the staff, except for the two career executives, who had been told of their reassignments only the previous day.[11]

Seven employees, including one of the two career senior executives, as well as the Director of OSC's Alternative Dispute Resolution (ADR) program, were directed to report to a newly created field office in Detroit, Michigan. These seven employees were senior executive Cary P. Sklar (Associate Special Counsel for Investigation and Prosecution Division ("IPD") III), and six members of his staff: Linda Myers (OSC's ADR Director), Ron Engler (Attorney Team Leader, IPD III), Travis Elliott (Senior Attorney, IPD III), Brian Uryga (Attorney, IPD III), David Brooks (Attorney IPD III) and Sharon Lee (Investigator, IPD III). Three other members of Mr. Sklar's staff, along with an attorney in the OSC complaints examining unit, were told that they would be involuntarily transferred to fill vacancies in OSC's existing Dallas field office.[12]

---

[10]Ms. Glover has indicated to several individuals that although she is not willing to discuss the circumstances of her departure, or her tenure under Mr. Bloch with the press, she would be willing to cooperate fully in any official investigation.

[11]Apparently, the only reason these senior executives were given any notice at all, was to feign compliance with 5 C.F.R. § 317.901(b), which requires an agency to consult with senior executives before giving them the required 60 day notice of their geographic reassignment. The "consultation" with Mr. Sklar and Mr. Reukauf was, of course, a farce, as Mr. Bloch was already planning to announce his reorganization to the staff, and give them their 60 day notices, the next day.

[12] The employees reassigned to the Dallas Field Office are Alberto Rivera-Fournier (Senior Attorney, IPD III), Caprice Andrews (Investigator, IPD III), Joan Howell (Investigator, IPD III) and Michael Lupinski (Attorney, Complaints Examining Unit).

Two of the employees subject to the transfer to the Detroit and/or Dallas field offices are openly gay. In addition, Mr. Sklar, Mr. Elliot and Ms. Myers had all previously been employed by the National Treasury Employees Union, the organization that first brought the sexual orientation discrimination controversy to light through a February 12, 2004 press release. Mr. Engler is the staff attorney who had handled the IRS sexual orientation discrimination case that was the subject of the press release deleted from the OSC website by Mr. Bloch, and never restored.

The twelfth employee reassigned was William Reukauf, a career senior executive who has been with OSC since 1983, and has served for extended periods of time as Acting Special Counsel. Mr. Reukauf has been in charge of OSC's Hatch Act enforcement for many years, and is widely perceived by the staff as an individual of high integrity and impeccable impartiality. We understand that Mr. Reukauf has angered Mr. Bloch and been accused of "disloyalty" for raising concerns internally concerning certain policy and management decisions.[13]

Mr. Reukauf was reassigned to head the existing Oakland field office. The Oakland field office has a staff of ten employees. Further, like the Dallas field office, the Oakland field office has been headed successfully for many years by an experienced grade 15 manager.

Mr. Bloch initially advised the affected employees that they must report to their new assignments within 60 days. He also advised them that they would be fired if they did not agree to relocate. Eight of the twelve employees subject to the geographic reassignment have declined them.[14] At least three of the four employees who initially indicated their acceptance of their reassignment did so under duress.[15] Seven of the eight employees who declined the transfer have been given notices of removal. One of the transferred employees who had initially expressed acceptance of the transfer under duress has resigned in the face of the involuntary reassignment, and found another position.

The management justifications for the reassignment of the twelve career employees to the field as part of a "reorganization" are patently pretextual. In a January

---

[13] In addition, Mr. Reukauf may well have been in disfavor because of his role in the Hatch Act prosecution of Alan White, which was undertaken during the term of the prior Special Counsel. Mr. Bloch's political Deputy, James Renne, and Mr. Bloch's Senior Advisor, Brendan McGrath, had previously worked with Mr. White at the Office of the Inspector General, Department of Defense. They held him in high regard and disapproved of his prosecution by OSC.

[14]These employees are Mr. Sklar, Mr. Rivera-Fournier, Mr. Brooks, Mr. Elliot, Ms. Andrews, Ms. Myers, Ms. Lee, Mr. Engler, and Ms. Howell.

[15] Mr. Uryga, Mr. Engler, and Mr. Reukauf.

7th press release, which Mr. Bloch issued as the media and others began making inquiries, he asserted that the new Detroit field office was created "after extensive discussions with staff and an outside assessment team's review of the Agency's structure." See Press Release, attached and incorporated herein as Exhibit 17. In reality, however, none of the affected staff, including the affected senior executives, was notified in advance, let alone a party to "discussions" about the move. Indeed, notwithstanding that he met privately with OSC's senior staff at the end of November and during the month of December, to discuss the possibility of making organizational changes, he never hinted that he intended to open a new field office, much less that two of OSC's career senior executives would be geographically relocated. Further, when Mr. Bloch announced the reassignments, he told the staff that office space had already been leased in Detroit, thus demonstrating that this move had been contemplated for at least a number of weeks, and likely a number of months, before it was announced to anyone outside Mr. Bloch's circle of political appointees.

Similarly, contrary to the insinuation in the press release, the "outside assessment team" did not recommend the creation of a new field office in Detroit or anywhere else. In fact, the team effusively praised the work of the Oakland field office, which, as noted above, has been successfully run for over 20 years by a grade 15 employee who reported to the same senior executive in Washington, D.C. (Mr. Reukauf) who is now being directed to relocate to Oakland. The assessment team also suggested reducing the layers of management in OSC's investigation and prosecution divisions; under Mr. Bloch's reorganization, the layers of management have been increased. Field offices headed by grade 15 supervisors will now report to senior executives in those same field offices who will themselves be reporting to yet another senior executive in headquarters.

There are still more reasons to question the bona fides of the management justification offered for this "reorganization." Under the new structure, if both senior executives had accepted the forced geographic reassignments to Detroit and Oakland, then the two career senior executives with the most litigation experience (Messrs. Reukauf and Sklar) would have been be reporting to Leonard Dribinsky, the career senior executive at headquarters with virtually no litigation experience.[16]

---

[16] Mr. Dribinsky also has very little, if any, experience overseeing OSC investigations. Until the reorganization he had been in charge of the Complaints Examining Unit and the Disclosure Unit for many years. Neither of those units conducts investigations or engages in litigation. Because of his relative lack of relevant experience, it is widely believed by career staff that Mr. Dribinsky emerged as the new leader of these functions because he willingly cooperated in Mr. Bloch's recent and mysterious mass closures of whistleblower disclosures and because he was the only member of OSC's career staff who voiced approval and supported Mr. Bloch's decision to revisit OSC's policy on sexual orientation discrimination.

In addition, under the reorganization, OSC's Hatch Act Unit will, for the first time in OSC's history, report directly to a political deputy. This arrangement strongly suggests an intent to politicize that Unit. This is especially true in light of the otherwise inexplicable reassignment to the Oakland field office of Mr. Reukauf, who had overseen the Act's impartial enforcement for over for 20 years. The staff has reasonably inferred that Mr. Reukauf is being moved out of the way to allow the agency's political leadership to exert unfettered control over Hatch Act enforcement decisions.

Further, under the reorganization, OSC's highly successful ADR program will inexplicably be run out of a field office in Detroit. This odd result continues to obtain notwithstanding that the career executive to whom Linda Myers, the Director of ADR, had been reporting (Mr. Sklar) has declined his reassignment to Detroit and has been given a notice of removal. Mr. Bloch previously justified the ADR Director's transfer to Detroit as a move to keep her under the supervision of Mr. Sklar. He has now taken to justifying her transfer on the grounds that housing her in the "centralized" location of Detroit, rather than at headquarters in Washington, is consistent with his intent that the Director conduct more mediations in person, rather than over the phone. This explanation is absurd on its face, given the fact that most complaints arise in the Washington, D.C. area, and/or require the presence of agency personnel who work in Washington.

In fact, the way that the "reorganization" is being implemented leads to the inescapable conclusion that existing career staff are being purged and that it was designed to ensure that remaining staff would be thoroughly intimidated into silence, and driven to leave. Mr. Bloch did not ask for volunteers to transfer to the new Detroit field office, or to the existing Oakland and Dallas field offices. Employees who were ordered to relocate were told that they were not permitted to switch assignments with others who might be willing to take their places. None of Mr. Bloch's personal picks was subjected to the involuntary reassignments. Further, there were at least eleven vacancies at OSC headquarters when Mr. Bloch announced his "reorganization." It is unclear why at least some portion of the staffing-up of the new and existing field offices could not be accomplished by moving those vacancies to the field and filling them there.

Finally, Mr. Bloch gave affected employees virtually no time to decide whether to accept the reassignments; nor has he given those employees who agreed to take the reassignments, under duress, sufficient time to relocate.[17] Many of the affected employees have homes, spouses and family in the Washington, D.C. area. It is completely unreasonable, punitive, and inconsistent with the practice at other agencies, to conduct a geographic reassignment in this absurdly short time frame.

Notwithstanding all of the above, Mr. Bloch has attempted to justify the directed reassignments by citing the need to reduce the "backlog" of cases at OSC. This is a non-

[17]A single exception to the otherwise applicable deadline for relocation has been provided to Mr. Reukauf. Mr. Bloch has apparently given him a brief extension of time.

sequitur. Mr. Bloch has never satisfactorily explained how ordering experienced employees to transfer against their will from Washington, D.C. to a new field office in Detroit, where OSC has virtually no case load, and where the Merit Systems Protection Board has no regional field office, will help reduce the agency backlog.

Indeed, the proof is in the pudding: as a result of Mr. Bloch's actions, OSC has already lost eight of its most experienced attorneys and investigators, including the Director of its ADR program. The team that it is losing is one that has historically shown the greatest efficiency in processing its cases (in terms of numbers of cases handled), while at the same time securing relief for whistleblowers and other victims of prohibited personnel practices in a number of OSC's most high profile cases.[18]

Although Mr. Bloch has claimed that he transferred these employees for purposes of keeping this highly successful team intact, his actions were clearly designed for precisely the opposite purpose. The team is destroyed. The agency will have to replace all of its members with new and inexperienced staffers (presumably hand-picked by Mr. Bloch). In addition, until those individuals are trained, all of the cases that the eight departing employees have been handling will have to be reassigned to other members of the staff, often in the middle of an on-going investigation, at considerable cost in terms of efficiency and continuity. It is inconceivable that Mr. Bloch will be able to clear the "backlog" in the Investigatory and Prosecution Divisions after having so decimated the career staff there, at least if he intends to fully and fairly investigate those cases.

Moreover, the current backlog of cases in the Investigatory and Prosecution Divisions is of Mr. Bloch's own making. As a result of his decisions not to fill vacant career positions in the IPDs and to reallocate staff in the IPDs to work on cases in OSC's intake unit, the caseload in the IPDs, which had been substantially reduced over the last several years, has doubled on his watch.

Further, while publicly congratulating himself for reducing the caseload in OSC's Complaints Examining and Disclosure Units, Mr. Bloch has failed to explain just what happened to all of the cases he closed. Indeed, it is our understanding that under Mr. Bloch, OSC has adopted a policy under which career staff in the Disclosure Unit are not permitted to contact whistleblowers, but are required to close their cases unless their

---

[18] In addition to handling the sexual orientation case that was the subject of the press release Mr. Bloch ordered removed from OSC's web site, the IPD headed by Mr. Sklar was responsible for, among other things: 1) securing relief for two Border Patrol agents who suffered retaliation for making disclosures related to security risks on the northern border in a highly publicized case in 2002; 2) obtaining a stay and then a reversal of the removal of an FAA employee who was fired after making disclosures in the wake of the September 11th terrorist attacks; and 3) securing relief for an employee in the Department of Energy who was disciplined for providing information to the press about security risks at DOE's nuclear facilities.

written filings are sufficient on their faces to establish a basis for investigation. As a result of this new policy, the Disclosure Unit appears to have closed over 600 cases in only a few months, without referring any of them for investigation.[19]

Similarly, Mr. Bloch has claimed to have reduced the number of prohibited personnel practice cases in the Complaints Examining Unit from over 500 down to 30. The backlogged case figure, however, is grossly inflated. When Mr. Bloch arrived at OSC he directed the Complaints Examining Unit not to send out closure letters in cases that had already been completed, in order to build up the backlog, so that he could take credit himself for its reduction through his "special projects unit." Although the exact number of cases that were held in this manner is not known by the complainants, they believe that it was quite substantial.

Moreover, the Complaints Examining Unit has abandoned its former policy under which complainants alleging retaliation were given an opportunity to speak with the examiner reviewing their cases, before they were closed. In an effort to show progress on the backlog in that unit, CEU has not only closed cases at breakneck speed, it also dumped into the IPDs an increasing number of cases without giving them adequate review, which Mr. Bloch has boasted represents a doubling of the historical rates of referral out of that unit. Since the backlog in the IPDs has doubled, and since the cases referred for investigation require significantly more time and attention that those being considered in CEU, the result of these machinations on the overall backlog at the agency is the equivalent of moving the deck chairs around on the Titanic.

OSC was not created to receive and close cases. As demonstrated by the wholesale dismissal of over 600 whistleblower disclosures, by the apparent paucity of relief achieved on behalf of whistleblowers and other victims of prohibited personnel practices during Mr. Bloch's tenure, and by the appalling disposition of Michael Levine's complaint, the new case handling policies are apparently being implemented at the expense of OSC's core mission of assisting whistleblowers and promoting the merit system.

Finally, the method Mr. Bloch has chosen to staff the new field office and fill vacancies in the Dallas field office is fiscally imprudent, if not an act of gross waste and mismanagement. Relocating a single employee can be quite expensive, much less moving a dozen of them. It would have been far less expensive to hire new staff to fill the vacancies in Dallas and to staff the new office in Detroit, than to move twelve incumbent employees halfway across the country for that purpose. Now that Mr. Bloch's efforts

---

[19] In recent statements to the press, OSC's Director of Public Affairs, Cathy Deeds, has characterized all 600 of these disclosures as either involving "minor" matters or having already been investigated. See OSC press statements, attached and incorporated herein as Exhibit 18. This statement is inherently incredible. Further, the agency cannot possibly make a reliable determination about the merits of 600 disclosures without speaking to the whistleblowers.

have forced the departure of nine experienced career employees, OSC will be required to bear the costs of providing severance pay to departing employees, as well as a lump sum that represents their accrued annual leave.

III. PROHIBITED PERSONNEL PRACTICES AND VIOLATIONS OF CIVIL SERVICE LAWS COMMITTED BY SPECIAL COUNSEL BLOCH

A. Forced Geographic Reassignments and Creation of Hostile Work Environment in Retaliation for Whistleblowing (5 U.S.C. § 2302(b)(8))

Under the Whistleblower Protection Act (WPA), it is a prohibited personnel practice for an agency to take a personnel action against an employee because the employee has disclosed information which he or she reasonably believes evidences a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8). This provision protects both persons who have made protected disclosures, and those who are perceived to have done so.

The perceived or actual disclosures in this matter, which were made to the press and outside interest groups, included disclosures concerning Mr. Bloch's decisions: 1) to "scrub" OSC's website of references to sexual orientation discrimination; 2) to change the agency's interpretation of its authority to enforce a prohibition on such discrimination; 3) to issue an illegal gag order; 4) to use no-bid contracts or other improper hiring authorities; and 5) to engage in a practice of non-competitive hiring including the selection of friends and cronies for career federal jobs. All of these disclosures would be protected under § 2302(b)(8) because they concern actions by Mr. Bloch that would constitute abuses of authority, gross mismanagement, and violations of law, rule or regulation.

Further, Mr. Bloch was aware that these matters had been publicly disclosed, and openly expressed his suspicion that a "leaker" or "leakers" within OSC was responsible for what he later called the "unnecessary hullabaloo" surrounding his actions. He has also expressed explosive anger toward employees who question his policies and initiatives, even internally, dubbing such individuals "disloyal." Over the last year, he has engaged in a pattern of hiring designed to ensure that new employees are appropriately "loyal" to him, and has attempted to cripple the authority of career managers. He also ordered forced geographic assignments of a large percentage of the headquarters staff, in an effort to instill terror in the remaining career staff.

Moreover, there is ample basis to believe that, in implementing his "reorganization", Mr. Bloch targeted particular employees for reassignment because he believed that they either were the "leakers" or because of their association with persons believed to be "leakers." It is significant that the brunt of the impact of the geographic reassignments fell on the division headed by Mr. Sklar, and included Mr. Elliot, Mr. Engler and Ms. Myers, any one of whom might have been a target of Mr. Bloch's

suspicions due either to their previous employment by the National Treasury Employees Union, their sexual orientation, their involvement in the investigation and pursuit of the prior case involving sexual orientation discrimination, or their questioning of some of Mr. Bloch's policy and management decisions.

Mr. Reukauf, who also expressed internal dissent about some of Mr. Bloch's policies, and was in disfavor for his role in the prosecution of Alan White, was reassigned to head a fully functioning field office in Oakland, where there is no apparent need for his services. Even if there were a justification for sending a career executive out to head the Oakland office, Mr. Bloch's decision to send Mr. Reukauf, rather than Mr. Dribinsky, makes no business sense whatsoever.

Further, as described above, the reorganization was implemented in a way that was guaranteed to drive out these employees, and permit them to be replaced with Mr. Bloch's own "loyal" picks. This is consistent with Mr. Bloch's pattern over the last year of hiring new employees himself on a non-competitive basis, without the involvement of their career supervisors.

Indeed, both the surprise reassignments and the bizarre method chosen by Mr. Bloch to inform the twelve employees who were affected seems calculated to have instilled the maximum level of fear among the entire OSC career staff. Thus, Mr. Bloch held a five-minute meeting for all OSC staff the afternoon when he announced the reorganization. During the meeting, at which no questions were solicited or asked, Mr. Bloch stated that certain unidentified career staffers would be reassigned to the Dallas and Oakland offices, and the newly-created Detroit office. To learn whether one's name was on the list for reassignment, Mr. Bloch stated, employees should return to their offices and log onto the OSC Intranet. When employees did so, however, the information had not yet been posted, and considerable anxiety ensued over the next 30 minutes, before the names were finally posted, and employees learned their fates.

As a result of this pattern of conduct, OSC staff is thoroughly demoralized and lives in a culture of fear. Substantial numbers of career staff at headquarters are actively seeking new jobs because of the intolerable and hostile work environment Mr. Bloch has created. Some OSC employees have indicated privately that they would welcome an independent investigation of Mr. Bloch's actions, so that they could share their knowledge of his improper actions. The OSC complainants in this case are so fearful of Mr. Bloch's retaliation, that they have decided to file their complaint on an anonymous basis, through their attorney, Debra Katz.

In short, Mr. Bloch has created a hostile environment, in violation of the WPA, and has ordered geographic reassignments of OSC employees because they have either made protected disclosures, or are perceived to have done so. The creation of a hostile work environment, the involuntary geographic reassignments, and the resulting removal of employees who decline the illegal reassignments constitute prohibited personnel practices, within the meaning of 5 U.S.C. § 2302(b)(8).

B. Threats to Retaliate Against Employees Who Decline to Waive their Legal Rights to Challenge the Illegal Involuntary Reassignments and Removals

Pursuant to 5 U.S.C. § 2302(b)(9)(A) it is a prohibited personnel practice to take or threaten to take a personnel action against an employee because of "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation." On March 1, 2005, Mr. Bloch himself called an attorney who has been representing some of the employees who were given proposed letters of removal after they declined the involuntary reassignments. Mr. Bloch made the call in an effort to secure a settlement of all potential legal claims that the employees might pursue against him. When the attorney representing the employees advised Mr. Bloch that his clients were no longer interested in settling their complaints, Mr. Bloch declared that--in light of that fact--it was his intention, not only to hasten their departures but also to bring additional "charges" against them.

In threatening to hasten the removal of the employees who declined to waive their legal rights, and to bring unspecified additional "charges" against them, Mr. Bloch committed a prohibited personnel practice, in violation of 5 U.S.C. § 2302(b)(9).

C. Violations of Civil Service Laws, Rules and Regulations, Including Regulations Implementing Merit Systems Principles, Arising Out of Issuance of Gag Order

As described above, in the wake of the negative press attention Mr. Bloch received last February and March, he issued an email articulating a new agency policy which directs that "any official comment on or discussion of confidential or sensitive internal agency matters with anyone outside OSC must be approved in advance by an IOSC official." The issuance of this policy, which has resulted in a significant change in OSC employees' conditions of employment, contributed to the creation of the hostile work environment, and violates the "Anti-Gag" Statute, § 622, P.L. 106-554, the Lloyd-Lafollette Act, 5 U.S.C. § 7211, and the First Amendment. All three of these provisions are laws, rules or regulations implementing merit systems principles. 5 U.S.C. § 2302(b)(12). Further, the Anti Gag Statute and the Lloyd LaFollette Act are also "civil service laws, rules or regulations within the meaning of 5 U.S.C. § 1216(a)(4).

1. Violation of Anti-Gag Statute

The Anti-Gag Statute states that "[n]o funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Form 312 and 4414 of the Government or any other nondisclosure policy, form or agreement if such policy,

form or agreement does not contain the following provisions [citing laws protecting disclosures made to members of Congress, the WPA, and other similar laws]."

OSC's nondisclosure policy, expressed in the e-mail gag order, violates this law. First, the language in the e-mail is a nondisclosure policy because it prevents OSC employees from disclosing any kind of information "on confidential internal agency matters" without approval from agency political staff. Second, the nondisclosure policy does not contain the required statutory language, ensuring employees' rights to make protected disclosures under applicable laws. Third, Mr. Bloch has used agency funds to implement the gag order by using salaried employees to distribute it through the agency's e-mail system. In addition, Mr. Bloch has enforced the illegal gag order by geographically reassigning employees he believes spoke to the media without permission from his immediate office. Thus, the nondisclosure policy violates the Anti-Gag Statute.

2. Violation of the First Amendment

The gag order also violates the First Amendment. While the government may impose some restraints on the job-related speech of public employees that would be impermissible if applied to the citizenry at large, it is well settled that public employees retain important rights to free expression under the First Amendment. U.S. v. NTEU, 513 U.S. 454, 465 (1995); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). In evaluating the validity of a restraint on government employee speech, courts must balance the interests of the employee as a citizen commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public service. Pickering, 391 U.S. at 568.

OSC employees have a strong interest as citizens in commenting on matters of public concern, including the Special Counsel's policies and acts of misconduct or malfeasance. The gag order contained in the e-mail established a prior restraint on speech. To defend a prior restriction on employee expression the government must demonstrate that:

> the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expressions' "necessary impact on the actual operation of the Government."

NTEU, 513 U.S. at 465, quoting Pickering v. Bd. Of Educ., 391 U.S. at 571.

Mr. Bloch could not possibly meet his burden of justifying his prior restraint on the speech of OSC employees because the prohibition in the gag order is patently overbroad. The range of information that could fall within the category of "sensitive or confidential internal agency matters" is unlimited.

Courts have routinely struck down as unconstitutional similar prior restraints on the speech of government employees. See Harman v. City of New York, 140 F.3d 111 (2nd Cir. 1998) (striking down press policy forbidding employees from speaking with media regarding any policies or activities of the agency without first obtaining permission from agency's media relations department); International Assoc. of Firefighters Local 3233 v. Frenchtown Charter Township, 246 F.Supp. 2d 734 (E.D. MI 2003) (fire department restricted employees' communications with the media and public); Kessler v. City of Providence, 167 F.Supp. 2d 482 (D.R.I. 2001) (same); Fire Fighters Assoc. v. Barry, 742 F.Supp. 1182 (D.D.C. 1990) (same). Mr. Bloch's gag order is constitutionally invalid on the basis of the reasoning of these and other decisions.

3. Violation of Lloyd-Lafollette Act

Finally, the gag order violates the Lloyd-Lafollette Act. That Act provides that "the right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or a committee or Member thereof, may not be interfered with or denied." 5 U.S.C. § 7211. Special Counsel Bloch's gag order cannot be reconciled with this law, as it encompasses disclosures to members of Congress as well as Congressional committees.

IV. DEMAND FOR STAY OF INVOLUNTARY REASSIGNMENTS AND REMOVALS, WITHDRAWL OF GAG ORDER, AND REFERRAL OF COMPLAINT FOR INDEPENDENT INVESTIGATION

The foregoing statement outlines the multiple prohibited personnel practices, violations of civil service laws, and other acts of malfeasance Mr. Bloch has committed. As relief, the complainants demand that the following steps be taken immediately:

- Special Counsel Bloch must order an immediate stay of the directed reassignments, and resulting removals, as well as the gag order;
- After granting the stay, Special Counsel Bloch and all members of his immediate staff must recuse themselves from making any further decisions in this case;
- Special Counsel Bloch must refer these complaints to the Chairman of the President's Council on Integrity and Efficiency for an independent investigation, including a recommendation for corrective and or disciplinary action, as appropriate; and
- Provide all other appropriate equitable relief.

The complainants request that the Special Counsel rule on their stay request expeditiously and that he refer their cases for independent investigation immediately.

AMENDMENT TO COMPLAINT OF PROHIBITED PERSONNEL PRACTICES AGAINST SPECIAL COUNSEL SCOTT BLOCH

On March 3, 2005, the Government Accountability Project, the Project on Government Oversight, Public Employees for Environmental Responsibility, the Human Rights Campaign, and a group of anonymous career employees of the U.S. Office of Special Counsel filed complaints alleging the commission of a series of prohibited personnel practices as well as violations of civil service laws, and other acts of malfeasance by U.S. Special Counsel Scott J. Bloch. The complainants are now filing this amendment to their Complaint to include additional allegations of prohibited personnel practices, in violation of 5 U.S.C. §§ 2302(b)(8) and (b)(9), and partisan handling of complaints alleging violations of the Hatch Act.

NEW DEVELOPMENTS

1. Additional Acts of Retaliation and Confirmation of Retaliatory Animus Since March 2, 2005

As described in the original complaint, at p. 20, on March 1, 2005, Mr. Bloch called William Bransford, who was then acting as counsel for several OSC employees whom Mr. Bloch had decided to involuntarily reassign to a newly created Detroit field office. During the conversation, Mr. Bloch threatened to take further unspecified action against these staff members and to hasten their departure after their attorney declined OSC's settlement overture.

The next day, on March 2, 2005, Mr. Bloch was alerted to the imminent filing of complainants' March 3 Complaint by a member of the press. That evening, employees who had received notices of removal, including those who were represented by Mr. Bransford, were instructed by email to immediately turn in their work files. The employees learned of this order when they arrived at work the next day (March 3) and complied with it.

A detailed 22 page complaint was delivered to Mr. Bloch on the morning of March 3, 2005. Later that day, Mr. Bloch's spokesperson, Cathy Deeds, issued a statement to the press on his behalf announcing that OSC was transmitting the

Complaint to the President's Council on Integrity and Efficiency.

In the statement, Ms. Deeds disparaged the complainants. She termed their Complaint "a clever press angle," and stated that the allegations were "false" and "baseless", claiming that "most, if not all of the allegations are old and have been previously addressed." This assertion is patently untrue. Concerns had been publicly expressed by Public Employees for Environmental Responsibility, and other groups, about a few of the many actions by Mr. Bloch that are the subject of the Complaint. But many of the allegations in the Complaint have never been previously made at all, and certainly not with the supporting detail provided in the complaint. Moreover, none of the allegations have been "previously addressed" in any manner. Mr. Bloch has either ignored them or issued conclusory and misleading denials, similar to those Ms. Deeds made on his behalf in the March 3rd press statement.

On that same day that the Complaint was filed, another OSC official (who declined to be identified) disparaged the complainants in remarks to the Washington Times that were published in the paper's March 4th edition. This unnamed official termed the complainants a few "disgruntled employees who know or should have known" that their complaint had no merit. He further remarked that "some people are too union-oriented to accept" Mr. Bloch's "strong" leadership. That statement of animus corroborates the original allegations in the Complaint regarding Mr. Bloch's decision to target employees who had formerly worked at the federal sector union which broke the story of Mr. Bloch's decision to remove references to sexual orientation discrimination from OSC's website and other publications. Complaint at 13, 19.

On March 8, 2005 the employees who had turned in their files the preceding Thursday, March 3rd, were instructed to pick up a few of their cases and resume working on them. They were not told how long they would have to perform this work, or when their removals would become effective.

The next day, Wednesday, March 9, 2005 an article appeared in the Washington Post, announcing that the Senate Committee on Governmental Affairs was going to conduct

oversight hearings on the Office of Special Counsel. In addition, that same morning, the Government Accountability Project, the Project on Government Oversight, and Public Employees for Environmental Responsibility issued a press release concerning the mass closings of whistleblower cases under Mr. Bloch's tenure. The release revealed what had transpired at a meeting that Mr. Bloch had held with employees a month earlier. At that meeting, Mr. Bloch had announced that in light of the fact that so many employees had refused their reassignments and were being removed, he intended to step up his efforts to "close" as many pending whistleblower cases as possible before they left. He also stated that he intended to hire interns to "close" cases over the summer.

The minutes of the meeting were posted on PEER's website and widely distributed to the press. As those minutes were only available to OSC employees, Mr. Bloch concluded that there had been an unauthorized disclosure to the press, in violation of his gag order.

That same day, in the afternoon of Wednesday, March 9, 2005, one day after directing employees who had received notices of removal to retrieve some of their cases and resume working on them, Mr. Bloch ordered the very same employees to clear out their offices and turn in their credentials by Friday, March 11. He informed them that they were being put on administrative leave for the week of March 14th, and that their employment would be terminated, effective March 18, 2005.

In the end, ten of the twelve employees who were subjected to the involuntary reassignments, including all seven of the employees reassigned to Detroit, refused the reassignments. Mr. Bloch is currently scrambling to find a way to open the Detroit office in light of the fact that all of the employees he selected for relocation have either found new jobs or been removed for refusing to take the reassignments. Two attorneys who have been working in the intake unit, and have no experience investigating or prosecuting cases, have agreed to relocate to the Detroit office, possibly with relocation bonuses or other monetary incentives.

Complainants have learned that two of the investigators who refused geographic reassignments were offered the opportunity to stay on at OSC headquarters in the Complaints Examining Unit. These two employees are the only ones among the individuals given notices of removal who did not either hire counsel or assert that their reassignments were illegal. One of the two employees accepted the offer to stay on; the other did not.

None of the employees who hired counsel or asserted the reassignments were illegal were offered the opportunity to remain at headquarters. At least one of these individuals, Senior Executive Cary Sklar, asked to be permitted to stay on at headquarters, in another capacity if necessary, but was told that he would not be permitted to do so. Another of the reassigned investigators, Sharon Lee, was more qualified to stay on to work in the Complaints Examining Unit than those who were asked to do so; she had worked in that Unit before, and received outstanding performance appraisals. Ms. Lee, however, was one of the employees who was represented by counsel and was terminated.

Complainants have also learned that another employee who accepted the reassignment to Oakland (senior executive William Reukauf) has now been told that he will not be required to move to Oakland for at least a year. Not surprisingly, Mr. Reukauf, like the other employees who were offered a reprieve, did not hire an attorney or assert that his reassignment was illegal.

Mr. Reukauf's reprieve casts still further doubt upon management justifications that Mr. Bloch originally ordered for his reorganization. He had originally claimed that his "reorganization" was intended to "power down" the agency, and that he wanted the field offices to be headed by senior executives in recognition of their importance. Now that he has driven out the employees he targeted for retaliation (including Mr. Sklar), that pretext has evaporated. Mr. Bloch has decided to assign Mr. Reukauf to oversee the field offices in Oakland, Dallas and Detroit from OSC headquarters in Washington, D.C.

Further, Mr. Reukauf's reprieve also completely undermines another justification previously asserted for the

forced reassignments. Thus, Mr. Bloch has assigned Mr. Reukauf to take over OSC's mediation program.

As described in the original complaint, the mediation program had long been directed by Linda Myers, a highly experienced mediator. Ms. Myers was involuntarily reassigned to Detroit, along with Mr. Sklar, who was her supervisor. Mr. Bloch had reassigned Ms. Myers to Detroit on the grounds that he wanted her to continue to work for Mr. Sklar. When Mr. Sklar refused the reassignment to Detroit, Mr. Bloch changed his rationale. He stated that he still wanted Ms. Myers to go to Detroit because that would somehow further his goal of conducting more mediations in person.

Despite these original claims, now that Mr. Sklar and Ms. Myers have been driven out of OSC, the mediation program is remaining in Washington, D.C. under Mr. Reukauf. Tellingly, Mr. Reukauf does not have any mediation experience and will have to receive training in order to take over the program. Mr. Reukauf, however, did not protest his reassignment; he accepted it. Mr. Sklar and Ms. Myers had hired Mr. Bransford as counsel to represent them to challenge their involuntary reassignments.

Further, Mr. Sklar and Ms. Myers are also former members of the staff of the National Treasury Employees Union. As described in the original complaint, there is ample basis to infer that Mr. Bloch targeted them for the reassignments because of their perceived whistleblowing and their former union affiliation. His recent decision to keep the mediation program in Washington, D.C. under Mr. Reukauf, who has no mediation experience, provides still more proof of his retaliatory intent.

Critically, while Mr. Reukauf is being given a one year reprieve, he will not be permitted to resume his duties as the senior executive in charge of the Hatch Act Unit. The Hatch Act Unit will report to Mr. Bloch's deputy, James Renne, as originally contemplated.

2. Partisan Handling of High Profile Hatch Act Cases

The decision to continue to have the Chief of the Hatch Act Unit report Mr. Renne, a political deputy, rather than a

career senior executive, appears to be part of pattern of politicization of Hatch Act enforcement. OSC has pursued trivial matters without regard to the political affiliation of the alleged violators (for example, prosecuting low level federal employees for sending out political emails to colleagues prior to the last election). However, its treatment of more significant and high profile allegations is not even-handed.

During the recent Presidential campaign, OSC received at least two such complaints. One of the complaints concerned a visit by Senator John Kerry to the Kennedy Space Center, which was alleged to constitute a violation of the Hatch Act's prohibition against the use of the workplace to engage in political activity. The other was a complaint filed by Representative Conyers against then-National Security Advisor Condoleezza Rice for using government funds to travel around the country in the weeks before the election making speeches, which were alleged to be political.

These two complaints (both of which were reported in the media) were treated very differently. Special Counsel Bloch and Deputy Special Counsel Renne, referred the complaint to the career staff and ordered an on-site investigation of the Kerry complaint within days after the Kerry visit. On the other hand, when the Rice complaint came on October 21, 2004 Mr. Renne assigned it to himself (rather than Mr. Reukauf or any of his subordinates in the Hatch Act Unit). He then sat on the complaint, taking no action, until after the election, when he finally referred it to the Hatch Act Unit for investigation. Under the reorganization, as noted, Mr. Renne will be the executive in charge of the Hatch Act in all cases, and Mr. Reukauf, who had overseen the Act's impartial enforcement for over for 20 years, is being reassigned to head up the mediation unit that Mr. Sklar had successfully headed since its inception over five years ago.

The favorable treatment afforded to the Rice complaint raises very troubling questions regardless of whether the allegations against Secretary Rice are ultimately substantiated. The deliberate decision to sit on the allegations until after the election while expediting the

investigation of the Kerry matter, flies in the face of the Hatch Act itself, which was designed precisely to prevent partisan politics from undermining the impartial conduct of official government business.

3. Religious Discrimination

For the past two years, Mr. Bloch's political appointees have closed OSC Headquarters several hours early on Good Friday and have given OSC employees paid leave for this Christian holiday. They have not provided such a benefit for OSC employees on Jewish, Muslim, or other non-Christian religious holidays. In fact, in 2004, Mr. Bloch scheduled a mandatory off-site retreat for the agency's senior managers during the first few days of the Passover holiday.

ADDITIONAL VIOLATIONS OF LAW

Based on the foregoing, complainants add the following allegations:

1. Mr. Bloch hastened the termination date of the employees who refused the geographic reassignments in retaliation for perceived whistleblowing, First Amendment activity, and/or the assertion of their legal rights to hire counsel and challenge the illegal reassignments. The decision to terminate the employees violates both 5 U.S.C. §§ 2302(b)(8) and (b)(9).

2. Mr. Bloch declined to permit employees to remain on at OSC headquarters in positions they were qualified to hold, in retaliation for perceived whistleblowing, First Amendment activity, and/or the assertion of their legal rights to hire counsel and challenge the illegal reassignments. Mr. Bloch's failure to offer these employees alternative positions at headquarters violates both 5 U.S.C. §§ 2302(b)(8) and (b)(9).

3. Mr. Bloch has abused his authority by affording disparate treatment to the Hatch Act complaints described above, based on partisan political considerations.

In addition, complainants urge that the most recent developments provide further support for their charge that

the reasons proffered for the "reorganization" and involuntary reassignments were pretextual.

Respectfully submitted

Debra S. Katz
Rashida A. Adams
Bernabei & Katz, PLLC
1773 T Street, NW
Washington, DC 20009
202-745-1942

DATED: March 31, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amendment to Complaint of Prohibited Personnel Practices Against Special Counsel Scott Bloch was served on James Renne, Deputy Special Counsel, by mailing a copy by first-class mail, postage prepaid, this 31st day of March 2005, to:

James Renne, Deputy Special Counsel
Office of Special Counsel
1730 M Street, NW, Suite 300
Washington, DC 20036

Debra S. Katz

LAW OFFICES
BERNABEI & KATZ, PLLC
1773 T STREET, N.W.
WASHINGTON, D.C. 20009-7139

(202) 745-1942
TELECOPIER: (202) 745-2627
E-MAIL: BERKATZLAW@AOL.COM
WEBSITE: WWW.BERNABEIANDKATZ.COM

LYNNE BERNABEI
DEBRA S. KATZ°
LISA J. BANKS
ARI M. WILKENFELD+
ALAN R. KABAT+
AVI L. KUMIN◇
RASHIDA A. ADAMS°
RENEE SERVANCE•
LEMA R. BASHIR+

OF COUNSEL:
DAVID J. MARSHALL

+ ADMITTED IN MD ALSO
° ADMITTED IN NY ALSO
◇ ADMITTED IN CA ALSO
• ADMITTED IN WI ONLY
* ADMITTED IN MD ONLY

By Telecopier
March 28, 2005

Mr. Chris Swecker
Chair, Integrity Committee
President's Council on Integrity & Efficiency
935 Pennsylvania Ave., N.W.
Room 3117
Washington, D.C. 20535-001

RE: IC # 465

Dear Mr. Swicker:

I represent the employee complainants and non-profit organizations on whose behalf we filed the Complaint of Prohibited Personnel Practices ("Complaint") against Scott Bloch, Special Counsel, on March 3, 2005. According to your letter dated March 14, 2005, James L. Renne, Deputy Special Counsel, referred the Complaint to the Integrity Committee for review.[1] We have not been provided with a copy of that referral letter, but I have several questions about that referral with which I am hopeful you can assist me.

First, we requested that the Office of Special Counsel refer the Complaint to the President's Council on Integrity & Efficiency ("PCIE") – and not to the Integrity Committee. It is my understanding that the Integrity Committee exists to investigate misconduct by Inspector Generals or individuals so high up in an IG office that the IG can not investigate the complaint himself. It is my further understanding that the Integrity Committee ***does not*** have jurisdiction to investigate complaints filed against the Special Counsel, although the Committee could conceivably do so if directed by the Chairman of the PCIE.

I would appreciate if you could explain to me how the above-referenced complaint came to be assigned to the Integrity Committee. Did Mr. Renne specifically request that the Complaint be treated in that manner or did the Chairman of the PCIE direct that such action be taken? We

[1]For some reason, your letter was not delivered to my offices until March 23, 2005. I would greatly appreciate if you could fax communications to my office – 202-745-2627 – to avoid such lengthy mail delays in the future.

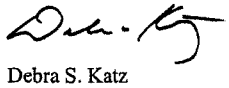
would also like to know what assurances you can give us that the Integrity Committee will not simply close the Complaint on the grounds that it lacks jurisdiction over the Special Counsel. Does the Integrity Committee intend to conduct an investigation into the allegations made by the complainants in the above-referenced matter, and if so, how will the investigation be conducted?

As you know from reviewing the Complaint, the complainants requested that their Complaint be assigned to the PCIE for an independent investigation. We made this request with the understanding that the Chair of the PCIE would then assign an IG to investigate the Complaint. Unless I am misunderstanding the process, we are concerned that by simply referring this matter to the Integrity Committee, the complainants will be deprived of the procedural protections they have requested, and will leave their Complaint vulnerable to dismissal without any investigation or adjudication on the merits.

I would appreciate if you could provide me with the name of a contact person on the Integrity Committee to learn more about how the committee intends to handle this case and to discuss providing the committee with additional information in support of the Complaint. Finally, we intend to file an amendment to the Complaint in the next few days detailing additional actions of retaliation and violations of the Whistleblower Protection Act by the Special Counsel and his advisors after Mr. Bloch was served with a copy of the Complaint on March 3, 2005.

Thank you for your anticipated cooperation with these requests.

Sincerely,



Debra S. Katz

cc: James Renne, Deputy Special Counsel
Senator Daniel Akaka
Senator Susan Collins
Senator Charles Grassley
Senator Carl Levin
Senator Joseph Lieberman
Senator George Voinovich
OMB Deputy Director Clay Johnson
Acting Director of the Office of Personnel Management Dan Blair

PRESIDENT'S COUNCIL on INTEGRITY & EFFICIENCY

April 14, 2005

Ms. Harriet Ellan Miers
White House Counsel
The Office of Counsel to the President
1600 Pennsylvania Avenue
Washington, D.C. 20580

IC # 465

Dear Ms. Miers:

Pursuant to Executive Order (EO) 12993, the Integrity Committee (IC) is charged with receiving, reviewing, and investigating, where appropriate, allegations of administrative misconduct against Inspectors General (IGs) and, in certain cases, members of an IG's staff.

On March 3, 2005, the IC received an anonymous complaint alleging various acts of administrative misconduct by Mr. Scott Bloch, Special Counsel, Office of Special Counsel (OSC). The complaint, enclosed herewith, originated with an anonymous group of OSC employees represented by the law offices of Bernabei & Katz, PLLC. The complaint alleges, among other things, that Mr. Bloch:

- created a hostile work environment with a series of retaliatory acts against career OSC staff members, culminating in the involuntary reassignment of twelve career employees for actual or perceived whistle blowing;

- imposed non-disclosure policies on career staff in violation of the Anti-Gag statute and in violation of the Lloyd LaFolette Act, 5 U.S.C. 7211, which guarantees all federal employees the right to communicate with Congress;

- abandoned merit-based competitive hiring for career positions and misused special hiring authorities;

- refused to enforce existing statutory prohibitions against sexual orientation discrimination in the federal workforce, and in some instances, provided misleading statements to Congress.

Ms. Miers:

In accord with the IC's policy and procedures, the complaint was presented for review at the last bimonthly IC meeting and was determined to fall outside the limited investigative jurisdiction authorized by EO 12993. As stated above, EO 12993 charged the IC with investigating, where appropriate, allegations of administrative misconduct against IG's. Mr. Bloch, serving as Special Counsel is not considered an IG. However, the EO also provides that the IC may refer allegations of administrative misconduct elsewhere within the executive branch. Therefore, the IC decided to refer, and with this communication does refer, the complaint to your office for review and further action as deemed appropriate.

The IC will take no further action concerning this matter and has placed this file in a closed status. Questions concerning this matter may be directed to Supervisory Special Agent Timothy Halodik, Program Manager for the IC, at (202) 324-6343.

Sincerely,

Chris Swecker
Chair, Integrity Committee

Enclosure

1 - Honorable Clay Johnson, III
Chairman, President's & Executive Councils on Integrity and Efficiency
c/o United States Office of Management and Budget (OMB)
Eisenhower Executive Office Building
17th Street & Pennsylvania Avenue, NW, Room 113
Washington, D.C. 20503

1 - Debra S. Katz
Bernabei & Katz, PLLC
1773 T Street, N.W.
Washington, D.C. 20009-7139

LAW OFFICES
BERNABEI & KATZ, PLLC
1773 T STREET, N.W.
WASHINGTON, D.C. 20009-7139

LYNNE BERNABEI
DEBRA S. KATZ°
LISA J. BANKS
ARI M. WILKENFELD+
ALAN R. KABAT+
AVI L. KUMIN◇
RASHIDA A. ADAMS°
RENEE SERVANCE♦
LEMA R. BASHIR*

(202) 745-1942
TELECOPIER: (202) 745-2627
E-MAIL: BERKATZLAW@AOL.COM
WEBSITE: WWW.BERNABEIANDKATZ.COM

OF COUNSEL:
DAVID J. MARSHALL

+ ADMITTED IN MD ALSO
° ADMITTED IN NY ALSO
◇ ADMITTED IN CA ALSO
♦ ADMITTED IN WI ONLY
* ADMITTED IN MD ONLY

By Telecopier and First Class Mail;
Return Receipt Requested
April 25, 2005

Harriet Ellan Miers, Esquire
White House Counsel
The Office of Counsel to the President
1600 Pennsylvania Ave.
Washington, D.C. 20580

RE: PCIE Referral of Complaint Against Scott J. Bloch, Special Counsel, Office of Special Counsel (OSC) to White House Counsel

Dear Ms. Miers:

By letter dated March 3, 2005, I advised President George W. Bush that I had filed a Complaint of Prohibited Personnel Practices Against U.S. Special Counsel Scott J. Bloch ("OSC Complaint") on behalf of a group of career OSC employees, and four public interest organizations. You were copied on that letter, which I am enclosing again for your ease of reference.

Upon filing of the OSC charge, we requested that Mr. Bloch refer the OSC Complaint to the President's Council on Integrity and Efficiency ("PCIE") for an independent investigation. Our expectation was that Mr. Bloch, who is a member of the PCIE, would request that its Chairman identify an independent Office of Inspector General to conduct an investigation and make recommendations regarding appropriate corrective and/or disciplinary action. It was our understanding that this would have been consistent with prior practice, under which PCIE members have occasionally conducted investigations for one and other as a courtesy, where potential conflicts of interest preclude the referring member from investigating a matter themselves.

In public statements OSC spokespersons and Mr. Bloch stated that he had, in fact, referred the allegations to the PCIE for this purpose. However, he did not do so. Instead, Mr. Bloch referred the matter to the Integrity Committee ("IC") of PCIE, which Mr. Bloch (as a

member of the IC) knows only has jurisdiction to investigate charges of misconduct against Inspectors General and not the Special Counsel.[1]

By letter dated March 28, 2005, I advised Chris Swecker, the Chair of the Integrity Committee, of my view that the IC does not have jurisdiction to investigate complaints filed against the Special Counsel and further raised my concern that because IC did not have jurisdiction over Mr. Bloch, it would simply close the OSC Complaint on that basis. See Letter to Chris Swecker dated March 28, 2005, enclosed herein. I further reiterated our initial request to have this matter assigned to PCIE for investigation.

Rather than referring the OSC Complaint to the PCIE, by letter to you dated April 14, 2005, Mr. Swecker referred the Complaint to the Office of White House Counsel. He detailed that the OSC Complaint alleges, among other things, that Mr. Bloch:

> created a hostile work environment with a series of retaliatory acts against career OSC staff members, culminating in the involuntary reassignment of twelve career employees for actual or perceived whistle blowing;
>
> imposed non-disclosure policies on career staff in violation of the Anti-Gag statute and in violation of the Lloyd LaFolette Act, 5 U.S.C. § 7211, which guarantees all federal employees the right to communicate with Congress;
>
> abandoned merit-based competitive hiring for career positions and misused special hiring authorities; and
>
> refused to enforce existing statutory prohibitions against sexual orientation discrimination in the federal workforce, and in some instances, provided misleading statements to Congress.

While these are obviously serious allegations deserving careful investigation and scrutiny, Mr. Swecker concluded his letter stating that "[t]he IC will take no further action concerning this matter and has placed this file in a closed status."

I am writing to request an opportunity to meet with you to discuss what actions the Office of White House Counsel intends to take, if any, to investigate the allegations set out in the OSC Complaint and the Amendment to Complaint of Prohibited Personnel Practices Against Special Counsel Scott Bloch filed on March 29, 2005. If the Office of the White House Counsel does not wish to conduct this investigation, we continue to believe that the proper course of

---

[1]Despite numerous requests, Mr. Bloch has not provided me with a copy of the initial referral letter.

action is to refer this to the PCIE for investigation and recommendations by an independent Office of Inspector General.

I look forward to hearing from you.

Sincerely,

Debra S. Katz/PB

Debra S. Katz

cc: Chris Swecker, Chair Integrity Committee
Clay Johnson, III, Chairman, President & Executive Councils on Integrity & Efficiency
Senator Daniel Akaka
Senator Susan Collins
Senator Charles Grassley
Senator Carl Levin
Senator Joseph Lieberman
Senator George Voinovich
OMB Deputy Director Clay Johnson
Acting Director of the Office of Personnel Management Dan Blair

THE WHITE HOUSE
WASHINGTON

MAY - 3 2005

April 29, 2005

Dear Clay:

By its letter of April 14, 2005, the Integrity Committee of the President's Council on Integrity & Efficiency (PCIE) referred to my office a complaint regarding the Office of Special Counsel. I am referring this request back to the PCIE in light of PCIE's status as an organization of inspectors general and other officials who regularly receive complaints of this sort. The PCIE may wish to refer the matter to an investigative agency for further action. Accordingly, I am forwarding the complaint to you and suggest that you consider whether to refer it to another agency for further action.

Sincerely,

Harriet Miers
Counsel to the President

The Honorable Clay Johnson, III
Chairman
President's Council on Integrity and Efficiency
c/o United States Office of Management and Budget
725 17th Street NW
Washington, DC 20503

cc: Ms. Debra Katz, Bernabei & Katz, PLLC
Mr. James L. Renne, U.S. Office of Special Counsel

QUESTIONS FOR THE RECORD
FROM SENATOR JOSEPH I. LIEBERMAN

Hearing of the
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, of the Committee on Homeland Security and Governmental Affairs
"Safeguarding the Merit System: A Review of the U.S. Office of Special Counsel"
Tuesday, May 24, 2005

1. I understand from your testimony that, before pursuing a sexual orientation discrimination case under 5 U.S.C. § 2302(b)(10) where there is no credible evidence that the personnel action was based on specific conduct by the complainant, you would require evidence from which it can be inferred that the discrimination was based on conduct. This position differs from the views of the Office of Personnel Management (OPM) and the Department of Justice (DOJ), which have consistently interpreted § 2302(b)(10) as imposing a blanket prohibition on discrimination on the basis of sexual orientation for almost 25 years.

    a. As a practical matter, what difference has your position made in the cases that your office does or does not pursue, in comparison to those that you would or would not pursue if you adhered to the OPM and DOJ interpretation?

    b. Since you were confirmed as Special Counsel, how many claims of discrimination on the basis of sexual orientation have been received by OSC (or, if received earlier, have been evaluated by OSC)?

    c. Of those claims –

        i. in how many was there evidence that the personnel action was based on specific conduct by the complainant?

        ii. in how many was there no evidence that the personnel action was based on specific conduct by the complainant, but evidence existed from which it could be inferred that the discrimination was based on conduct?

        iii. in how was there neither evidence that the personnel action was based on specific conduct by the complainant, nor evidence form which it could be inferred that the discrimination was based on conduct?

    d. What was the disposition of each of those claims?

    e. For purposes of comparison, how many claims of discrimination on the basis of sexual orientation were received by the Office of Special Counsel in each of the five years preceding your tenure, and what was the disposition of those cases?

2. Please provide examples of the kinds situations where, even though no evidence is presented proving that a personnel action is based on specific conduct by the complainant, you nevertheless believe that it can be inferred that the discrimination is based on conduct of the complainant. Please provide examples of the kinds of situations where you believe it cannot be inferred that discrimination on the basis of sexual orientation is based on conduct.

3. At the hearing, Senator Levin referred to the Administration forbidding discrimination based on sexual orientation in federal employment, and, in response to his question, you acknowledged that you are bound by that policy. However, federal policy in this area goes beyond refraining from discrimination. OPM is authorized by Executive Order 11478 to develop guidance in this area, and OPM has published guidance stating that employing agencies should commit themselves to promoting a work environment free from sexual orientation discrimination, and advising that they can do this by, among other things, widely distributing the Executive Order or OPM's brochure on employee rights and remedies for sexual orientation discrimination, disseminating information on employees' avenues for redress, and encouraging employees to report to their supervisors instances of discrimination on the basis of sexual orientation. *See* OPM's published brochure, "Addressing Sexual Orientation Discrimination In Federal Civilian Employment," pages 3 and 8 (http://www.opm.gov/er/address2/guide03.asp ; http://www.opm.gov/er/address2/guide08.asp). What practices and programs does OSC have in place to promote a workplace at OSC free from discrimination on the basis of sexual orientation, including efforts to advise OSC's own employees and job applicants of their rights and remedies in this area? When were each of those measures instituted at OSC?

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

www.osc.gov

July 8, 2005

The Special Counsel

The Honorable Joseph Lieberman
Subcommittee on Oversight of Government Management,
the Federal Workforce, and the
District of Columbia
U.S. Senate
Washington, D.C. 20510

Dear Senator Lieberman:

In response to your questions for the hearing record, please refer to my detailed answer to Senator Akaka regarding OSC's review of the previous Special Counsel's sexual orientation policy.

Also, I respectfully disagree with the premises stated in your question. I do not know exactly what policies of DOJ and OPM you are referring to, but there are no opinions that are binding on OSC that would support the assumptions in the question, and all sources of which I am familiar couch the policies or statements in terms of conduct. I also disagree with the premise of your question that assumes this office, which has had sole enforcement authority over 5 USC §2302 since its passage in 1979, ever investigated or prosecuted claims under subsection (b)(10) of this statute other than to require actual conduct. Even under my predecessor, nothing was changed in the prosecution manual to suggest that conduct would not be required except that there was a footnote that contained a description of a case that had been settled, but never filed before MSPB, involving an IRS employee who was alleged to have made statements of animus concerning male homosexuals. Even there, no statement of removal of the requirement of conduct to enforce under this subsection was ever stated, and to my knowledge it has never been written down anywhere expressly by my predecessor in a directive, manual, or other source that would direct the investigators, personnelists or attorneys in my office.

With that objection in mind, the enforcement of the law has not been affected by our release of the document describing our legal review of the issue. There have been no cases in which there has been any competent proof shown after investigation that an adverse personnel decision was made by any person who made statements of animus or described hostility towards any persons due to their sexual orientation, homosexual or other sexual practices. It simply has not been an issue. OSC has appropriately investigated the claims of all persons who have made claims of sexual orientation discrimination.

Sincerely,

Scott J. Bloch

Senator Daniel K. Akaka
Questions for the Record
Safeguarding the Merit System: Oversight of Office of Special Counsel
May 24, 2005

Questions for Mr. Scott Bloch, Special Counsel

I. REORGANIZATION & AGENCY CHANGES

1. The previous Special Counsel held town meetings at the beginning of her term to solicit input from management organizations, unions, good government organizations like the Government Accountability Project and National Whistleblower Center, and attorneys who practice before the Special Counsel. The dialogue served as a basis for structural and policy changes in the Office. How are you communicating with OSC stakeholders?

2. You testified that a Senior Executive Service (SES) employee affected by the Detroit directed reassignment said that the opening of the Detroit field office was a "creative solution," and said, referring to the opening of the Detroit field office, "I want to go along with this. This might actually work really well." The Subcommittee has received a statement from Mr. Cary Sklar, stating that he was the individual referred to in your statement. Mr. Sklar stated that he never made any such comment. Mr. Sklar also states that others can confirm that his reaction to the opening of the new field office was not as you testified, and that the planned opening of the Detroit office was not discussed with him or any other senior executives until the day before it was announced to the entire staff. What is your response to this discrepancy?

3. Earlier this year, OSC leased office space in Detroit for its Midwest Field Office as the centerpiece of a major reorganization. To staff this office, seven staff members from Washington, D.C. were involuntarily assigned to open the Detroit office, all of whom have been fired or left the agency rather than accepting the directed reassignment.

   The Government Accountability Office (GAO) repeatedly has testified that for any major management change to be successful there must be general acceptance by employees. However, the forced reassignment of employees has lowered employee morale at OSC and has unnecessarily deprived the agency of experienced staff.

   Please describe your efforts to improve communication with employees, improve employee morale, and solicit employee buy-in of management decisions.

4. You testified that you wanted to "delayer" the current OSC organization structure because you believed there were too many Senior Executive Service (SES) employees at OSC

headquarters. How many SES employees are now in each field office following the reorganization?

5. How has the reorganization affected OSC's resources, including personnel, funding, etc., available to conduct investigations? What changes have you instituted to address resource gaps?

6. The prior Special Counsel initiated an outreach and training program to prevent agency prohibited personnel practices and to achieve the merit system education goals of 5 U.S.C. § 2302(c). Have you continued this initiative? If so, please describe your specific efforts, identify the agencies OSC has provided outreach and training to, and other results achieved under this program during your term. If the initiative has been modified or eliminated, please explain.

7. As a result of the directed reassignments and the loss of at least nine employees, many cases filed with OSC could have faced delays or other disruptions by the change in agency staff. How many complaints or pending cases were affected by the reorganization as a result of assigning different counsel or investigators on litigation teams, and what steps were taken to minimize or avoid any disruption?

8. After reassigning cases due to the loss of employees in the reorganization, did OSC retract any prior commitments, end any ongoing work, or reverse decisions to seek corrective action for particular clients? If so, how many times did this occur, and what were the circumstances? Please explain the process to make sure that personnel newly assigned to these cases did not arbitrarily reverse decisions or recommendations reflecting many months or even over a year of investigative and other pre-hearing work.

9. Regarding the reorganization and the involuntary transfer of employees, you have stated that you wanted to keep employees in one particular Investigation and Prosecution Division (IPD) together for the transfer. What criteria was used to select this IPD over other IPDs, and what special skills or knowledge did the employees in the affected IPD possess that uniquely qualified them for the transfer?

10. Has OSC undertaken any audits or other specific assessments of the empirical track record for how the reorganization has affected agency operations? If not, is such an assessment of results scheduled? Please provide all relevant information, such as schedule, cost, who will conduct it and the selection process, the scope and methodology for the assessment. If one is not scheduled, please explain.

11. You testified that several cities were considered for the new field office, including Cleveland, Columbus, Indianapolis, Kansas City, Detroit, and Chicago, but that the Detroit location was selected because the General Services Administration (GSA) found available office space. What other cities were considered but were not available?

According to GSA, what other cities had office space available in the Midwest, but were not selected?

12. You and the OSC political staff held an all-day retreat with senior staff on November 22, 2004, apparently for the purposes of soliciting their input on a possible reorganization. It is my understanding that the subject of a Detroit office or involuntary geographic reassignments was not discussed. Please answer the following questions:

    A. Before announcing the reassignments, did you or your political staff ever consult with any of OSC's career senior executives concerning the opening of a Detroit office? If so, what where their responses? If no consultation occurred, why not?

    B. Before announcing the reassignments to Detroit, did you or the OSC political staff ever consult with any of OSC's career senior executives concerning the involuntary geographical reassignments? If so, what were their responses? If not, why not?

    C. Did you or the OSC political staff ever ask OSC's career senior executives or other OSC managers what they thought would be the staff reaction to forced reassignments to Detroit and Dallas? If so, what where their responses? If not, why not?

    D. Before announcing the reassignments, did you ever ask the two SES managers who were reassigned whether they were willing to move to these reassigned posts of duty? If not, why not?

    E. At the November 22, 2004, off-site senior staff meeting, did you or the OSC political staff mention that they had visited Detroit to look at or secure office space? If not, why not?

    F. On what date was the Detroit lease signed, and why is the lease for only one year?

    G. Was the Office of Management and Budget consulted regarding the decision to open a Detroit field office? If so, who was consulted, when, and for what purpose?

    H. Specifically, who recommended the creation of a new field office in Detroit?

    I. Do you consider the reorganization a success, and if so, by what measures?

II. ALLEGED INTERNAL PROHIBITED PERSONNEL PRACTICES

13. Do you agree that as a matter of leadership and legitimacy, the Special Counsel has a unique responsibility to maintain internally the highest standards for compliance with merit system principles in general, and whistleblowing in particular, to set an example for the rest of the civil service?

14. It is my understanding that only two OSC employees, who declined to accept the involuntary geographic reassignments, were offered the opportunity to remain at headquarters in other positions. One accepted this offer and one declined. Why were the other OSC employees who declined the involuntary geographic reassignments not offered the opportunity to remain at headquarters? Is it true that the offer to stay at headquarters was extended only to those employees who did not secure legal representation or otherwise challenge the lawfulness of their involuntary reassignments?

15. As you know, a complaint has been filed against you alleging that you violated the Whistleblower Protection Act by retaliating against members of your staff who had protested the alleged lack of effort defending whistleblower and other merit system rights throughout the civil service. In addition, the media has quoted anonymous staff that OSC personnel are "terrified." What are you doing to restore employee confidence to ensure their rights will be respected and that the merit system principles applies to the Office of Special Counsel?

16. The OSC is the only agency authorized to enforce the anti-gag statute passed annually by Congress since 1988. As you know, the statute prohibits the expenditure of funds to implement or enforce any nondisclosure rule without an addendum specifying that restrictions do not supersede or otherwise cancel free speech rights under the Whistleblower Protection Act and the Lloyd Lafollette Act, thus protecting communications with Congress. Do all of OSC's non-disclosure agreements or posted policies for OSC employees include the legally required addendum? If not, why? Will you pledge to make all changes necessary to OSC disclosure restrictions so that they are in compliance with the anti-gag statute? Please provide copies of OSC's non-disclosure policies.

17. Will you personally pledge that neither you nor anyone under your control or direction will penalize or retaliate against any OSC employee or complainant to OSC with a pending case for testifying or providing information related to the complaint against your Office?

18. You testified that if OSC employees have a complaint against OSC career staff about a prohibited personnel practice or whistleblower disclosure, those cases would be handled by the management of OSC. You further testified that if the complaints are against OSC managers, such as yourself, those complaints will be passed on to the President's Council on Integrity and Efficiency (PCIE).

A. Please detail the internal review process handled by OSC management. How many cases have been reviewed or investigated to date? How does this process differ from the process OSC engages in when investigating cases from other agencies? Please provide a summary of the number, types, and outcomes of the cases submitted to the internal review process since 2000.

B. Regarding complaints against OSC management, who provides disciplinary action or provides for corrective action if the PCIE finds that the complaint has merit? Does OSC have a written policy for referring cases to the PCIE? If so, please provide this to the Committee. What positions fall under the category of OSC management?

C. What other redress and review options might the Congress consider making available to OSC employees?

III. PROHIBITED PERSONNEL PRACTICE & WHISTLEBLOWER CASES

19. You have stated that OSC has doubled the rate of referrals for reprisal investigation while reducing the Complaints Examining Unit (CEU) intake backlog. However, your May 17, 2005, letter to GAO states that for fiscal year 2004, the only entire reporting period available for your term, the referral rate was 10 percent. That is the same as the prior Special Counsel's record for fiscal year 2003 and consistent with OSC historical trends. Could you please reconcile this apparent inconsistency?

20. In your May 17, 2005, letter to GAO, you describe significant reductions in case backlogs achieved under your leadership. In its March 2004 report, GAO reported that from 1997 through 2003, OSC was meeting the 240-day statutory time limit for processing prohibited personnel practice cases 77 percent of the time and the 15-day time limit for whistleblower cases only 26 percent of the time. What progress has OSC made in meeting these time limits, and what factors impede OSC from meeting these time requirements? Do you believe these time limits should be changed?

21. In your public statements about referring as many or more cases for investigation than your predecessors, you have not mentioned CEU referrals of whistleblower reprisal complaints for investigation. These cases are the most visible and are a significant independent measure for the OSC's effectiveness in guarding the merit system. The referral for investigation of whistleblower complaints was 16 percent in fiscal year 2002, 19 percent in fiscal year 2001, and 29 percent in fiscal year 2000. Since you took office, and for fiscal year 2004, how often has the CEU taken that action, in terms of percentages and absolute numbers?

22. According to the complaint filed against you on behalf of OSC employees and stakeholders, you directed the CEU not to send out closure letters in cases that had

already been completed in order to build up the backlog, so that you could take credit for the reduction through the Special Projects Unit. Did you instruct the CEU to delay the sending of completed closure letters?

23. In your May 17, 2005, letter to GAO, you describe in general terms OSC's internal procedures for caseload allocation, including a number of new organizational elements and processes. Could you describe the criteria OSC uses in deciding, within case categories (prohibited personnel practices, Hatch Act, etc.), how individual cases are assigned to an investigator or attorney? Are "high-profile" cases or cases with particular sensitivities assigned or handled differently from more routine cases?

24. You have repeatedly stated that OSC has significantly reduced the backlog of prohibited personnel practice cases since January 2004. Please respond to the following specific questions relevant to that assertion. If you are unable to respond because of a lack of specific data, please explain why such data cannot be retrieved from OSC's case-tracking system.

    A. A March 2004 GAO report entitled "Strategy for Reducing Persistent Backlog of Cases Should be Provided to Congress" (GAO-04-36), defines a "backlogged" prohibited personnel practice case as one which has not been resolved within the 240 day statutory period set forth at 5 U.S.C. §1214(b)(2)(A)(i). Do you agree with this definition? If not, why not? How do you define a "backlogged" case?

    B. Identify the total number of prohibited personnel practice cases within all units of OSC that were over 240 days old (as defined above) as of the following dates:

    - October 1, 2003
    - January 1, 2004
    - October 1, 2004
    - January 1, 2005
    - June 1, 2005

    C. Identify the total number of prohibited personnel practice cases within the Complaints Examining Unit that were over 240 days old (as defined above) as of the following dates:

    - October 1, 2003
    - January 1, 2004
    - October 1, 2004
    - January 1, 2005
    - June 1, 2005

    D. Identify the total number of prohibited personnel practice cases in the Alternative

Dispute Resolution (ADR) Unit that were over 240 days old (as defined above) as of the following dates:

- October 1, 2003
- January 1, 2004
- October 1, 2004
- January 1, 2005
- June 1, 2005

E. Identify the total number of prohibited personnel practice cases within all of the Investigation and Prosecution Divisions (including the field offices) that were over 240 days old (as defined above) as of the following dates:

- October 1, 2003
- January 1, 2004
- October 1, 2004
- January 1, 2005
- June 1, 2005

F. Identify the total inventory of prohibited personnel practice cases (i.e., the total number of cases, without respect to their age) within all units of OSC as of the following dates:

- October 1, 2003
- January 1, 2004
- October 1, 2004
- January 1, 2005
- June 1, 2005

G. Identify the total inventory of prohibited personnel practice cases within the Complaints Examining Unit as of the following dates:

- October 1, 2003
- January 1, 2004
- October 1, 2004
- January 1, 2005
- June 1, 2005

H. Identify the total inventory of prohibited personnel practice cases in the ADR Unit as of the following dates:

- October 1, 2003
- January 1, 2004

- October 1, 2004
- January 1, 2005
- June 1, 2005

I. Identify the total inventory of prohibited personnel practice cases within the Investigation and Prosecution Divisions (including the field offices) as of the following dates:

- October 1, 2003
- January 1, 2004
- October 1, 2004
- January 1, 2005
- June 1, 2005

25. In your May 17, 2005, letter to Comptroller General David Walker, under the caption "The IPD (Investigation and Prosecution Division) Strategy to Reduce the Backlog," you state: "I created four mechanisms that substantially reduced the PPP [prohibited personnel practice] case backlog and will ensure this large backlog never occurs again." Please specifically identify the basis for the assertion that you "substantially reduced the PPP case backlog" in the IPDs. Include statistical information demonstrating that the PPP case backlog in the IPDs has been "substantially reduced."

26. In your public statements, you have frequently claimed that you have increased and even "doubled" the number of prohibited personnel practice cases referred for investigation. Please provide the following information:

A. The total number of prohibited personnel practice cases processed by the Complaints Examining Unit in fiscal year 2004.

B. The total number of prohibited personnel practice cases referred out of the Complaints Examining Unit for investigation in fiscal year 2004.

C. The total number of prohibited personnel practice cases processed by the Complaints Examining Unit in calendar year 2004.

D. The total number of prohibited personnel practice cases referred out of the Complaints Examining Unit for investigation in calendar year 2004.

E. The total number of prohibited personnel practice cases processed by the Complaints Examining Unit in the first six months of fiscal year 2005.

F. The total number of prohibited personnel practice cases referred out of the

Complaints Examining Unit for investigation in the first six months of fiscal year 2005.

27. According to OSC's annual reports, in fiscal year 2002, OSC secured 126 "favorable actions" for complainants. In fiscal year 2003, OSC secured 115 "favorable actions" for complainants. According to the President's Budget request for fiscal year 2005, in fiscal year 2004, the number of favorable actions secured by OSC dropped to 66. Please explain in detail the reason or reasons for the sharp decline in the number of favorable actions secured for complainants in fiscal year 2004. In addition, please identify the number of favorable actions OSC secured for complainants in the first six months of fiscal year 2005. Is OSC taking any steps to reverse this trend?

28. In your May 31, 2005, response to the May 24, 2005, letter from the Government Accountability Project (GAP) and the Public Employees for Environmental Responsibility (PEER) you identified several factors that you assert resulted in a reduction in the average age of cases in CEU. You state, for example, that complainants are now required to fill out OSC Form 11, whereas previously "OSC employees had to pour through many documents from the complainant and waste valuable time finding the necessary information." In your May 17, 2005, letter to GAO, you also state that CEU no longer accepts complaints if the introductory OSC Form 11 for the complaint has not been properly completed. In addition, you state in the May 31 letter that you have changed the procedures for handling "partial referrals"—i.e. cases in which CEU recommends that some issues be closed and others referred for investigation. Under the new procedure, CEU does not close out any of the allegations so long as at least some allegations are going to be referred for investigation. Please answer the following questions:

    A. When did OSC begin requiring complainants to fill out OSC Form 11?

    B. Under the new policy, are OSC employees still required to review the documents provided by complainants along with the submission of an OSC Form 11?

    C. What other policies have been instituted in your term regarding the complaint review process in order to reduce the average age of cases in the CEU?

    D. What constitutes a properly completed OSC Form 11? How many complainant cases have not been processed because they failed to meet those standards?

    E. Are complainants provided with notice that their complaints may not be reviewed if the OSC Form 11 has not been completed? Are potential complainants provided a copy of the standards upon which they must complete OSC Form 11?

    F. Please explain why the merit system would be disserved by calling the aggrieved

employee to obtain any missing information.

G. Now that CEU is not closing any of the complainant's allegations when it makes a partial referral, is it accurate to say that the responsibility for closing those allegations is simply being shifted from one OSC work group (CEU) to another (IPD)? If so, how does the new partial referral procedure decrease the total amount of time OSC must take to resolve a prohibited personnel practice complaint? Further, is it true that the new procedure actually delays the closure of allegations that would previously have been closed in CEU?

29. You have stated that in fiscal year 2004, the Disclosure Unit (DU) processed 1,154 cases as compared to 401 in fiscal year 2003. You have consistently attributed 500 of these case closures to decisions made prior to your arrival at OSC, implying that your sole role in the closure of these cases was to have the DU send out formal closure letters to the whistleblowers. You have used this assertion to provide an explanation for why the total number of whistleblower disclosures referred for investigation in fiscal year 2004 has fallen dramatically as a percentage of the total number of cases processed, as compared to previous years.

For example, in your response to the May 24, 2005, GAP/PEER letter, you state that you inherited some 500 cases that were "slated to be closed...but no one had written the official letter closing them." You also state that "many older cases were closed in fiscal year 2004, because only in fiscal year 2004, did OSC actually write the letter that closed the case." Similarly, you further state that "the DU numbers for fiscal year 2004 show a higher percentage of cases being closed than fiscal year 2003" because "DU employees did in fiscal year 2004 what they should have done in fiscal year 2003 and earlier—officially close cases they planned to close years earlier."

In the same response you make a statement that appears to contradict your claim that the decision to close the 500 cases was your predecessor's decision and not yours. Thus, you state that "[n]evertheless each of those [500] cases was given another review and at least two of them were converted into positive, substantiated disclosures where previously they were slated for closure and then ignored for years."

With respect to these assertions, please provide the following information and/or explanation:

A. For each month in fiscal year 2004 and the first six months of fiscal year 2005, identify the total number of disclosures processed, the total number of processed disclosures closed, and the total number processed disclosures referred for investigation, pursuant to 5 U.S.C. §1213(c), to the head of the federal agency involved.

B. When you state that some 500 cases were already "slated" for closure by your predecessor, are you saying that the DU had completed its review of those cases and decided to close them, so that all that was left to do was to send out the final closure letter? If not, what is the meaning of your expression "slated" for closure?

C. If 500 cases had already been "slated" for closure, what was the purpose of giving each case "another review" and what did this "review" consist of? Further, if another review was conducted, under your direction, would it be fair to say that you are accountable for the decision to close the 500 cases? Alternatively, is it your contention that you are not accountable for the decision to close those 500 cases because they had already been "slated for closure." Please reconcile these conflicting statements.

D. Identify the two cases you have asserted were "converted into positive, substantiated disclosures where previously they were slated for closure and then ignored for years." Explain what steps resulted in those cases being "converted into positive, substantiated disclosures" and why none of the other 498 cases were so "converted."

30. While the overall percentage of disclosures referred for investigation has dropped, you have asserted that the absolute number of DU referrals to other federal agencies for investigation increased from 14 in fiscal year 2003, to 26 in fiscal year 2004. Please provide the following information:

A. According to OSC's annual report, in fiscal year 2003 OSC referred 11 disclosures to heads of agencies for investigation under 5 U.S.C. §1213(c), and in fiscal year 2002, OSC referred 19 disclosures for investigation pursuant to section 1213(c). In the President's budget submission for fiscal year 2006, it is reported that OSC referred 18 disclosures for investigation pursuant to section 1213(c) in fiscal year 2004. Is it accurate to state, therefore, that the number of disclosures referred for investigation under section 1213(c) has not increased as sharply as you have asserted between fiscal years 2003 and 2004 and that it has actually decreased as compared to fiscal year 2002?

B. Would you explain the discrepancy in the use of the figure "26" in your statements to GAO and Congress to represent the number of disclosures referred for investigation in fiscal year 2004, when the President's budget documents show that in fiscal year 2004 OSC referred 18 disclosures pursuant to section 1213(c)?

C. For what purpose did OSC refer eight disclosures to Inspectors General?

D. Is it accurate to state that unless OSC makes a referral under section 1213(c) to the head of an agency, no investigation is statutorily required?

E. What was the disposition of the eight disclosures that were referred to Inspectors General?

F. It has been alleged that 100 of the disclosures closed in Fiscal year 2004 involved a single matter: a petition filed by some 1,000 private citizens concerning the possibility of a link between autism and mercury in childhood vaccines. (See OSC PR 04_07 (May 20, 2004)). Is this accurate? Were either you or a member of your political staff aware that this petition effort was being launched before OSC began receiving the petitions? If so, did either you or a member of your political staff take any action to either encourage or discourage the filing of the petitions? Do you or a member of your political staff have a personal interest in the issue of the link between autism and mercury in childhood vaccines? Do you or a member of your political staff have any association with any of the advocacy groups working on this issue?

31. Regarding discretionary referrals to Inspectors General that, unlike cases referred to agency heads for investigation under 5 U.S.C. § 1213(c) are not required to be investigated by the Inspectors General, how does OSC follow up to ensure that these cases receive proper attention? For the increased number of cases referred to agencies for investigation, what has been the reaction from agencies on the increased number of investigations they need to pursue?

32. For fiscal years 2000-2004, how many complaints have alleged that they were retaliated against because of filing an OSC whistleblowing disclosure? How many times has CEU referred those cases for field investigation? How many times has the OSC concluded that whistleblower retaliation occurred? How many times has OSC concluded that whistleblowing retaliation has not occurred? How many cases are pending? Please describe any stays or other corrective action the OSC obtained after finding related whistleblower retaliation in this circumstance.

33. Since you took office, what changes have you instituted:

A. In policy and standards to screen and conduct both prohibited personnel practice investigations generally and whistleblower investigations in particular?

B. In procedures and standards to make findings of fact and legal conclusions whether a prohibited personnel practice occurred in general and for whistleblower retaliation in particular? Please provide the basis for any changes.

C. In procedures and standards to determine whether to seek corrective action – formal or informal, remedial or disciplinary – with respect to prohibited personnel practices in general and for whistleblower retaliation in particular? Please provide

the basis for any changes.

34. Have you made any changes in OSC's policy on providing proposed material findings of fact and legal conclusions for complainant comment in preliminary closeout letters before reprisal allegations legally can be rejected and for responding to the comments? Please provide any available information on compliance with this policy.

35. I was pleased with your brief filed with the MSPB stating that TSA baggage screeners should have full whistleblower rights, including Individual Right of Action cases before the MSPB. However, MSPB ruled last year that TSA whistleblowers no longer have jurisdiction to pursue IRA appeals. As such, their only possibility for relief is through a Memorandum of Understanding with TSA that your predecessor negotiated. Since you took office and in Fiscal year 2004, how many TSA whistleblowers have sought OSC assistance pursuant to the MOU, how many cases has the OSC opened for investigation, and how many corrective actions in how many cases were obtained through TSA compliance with OSC recommendations?

36. Since you took office and in fiscal year 2004, how many times has OSC asked the Department of Justice for permission to file a brief in federal court, either for alleged prohibited personnel practices in general or for whistleblower retaliation in particular? Please identify the issues and outcome. Please compare with statistical data for the previous four fiscal years.

37. Since you took office and in fiscal year 2004, what has been the average length of time and the minimum and maximum length of time between initial disclosures to OSC and the referral of the disclosures for agency investigation under 5 U.S.C. § 1213(c) or (g)?

38. It is my understanding that OSC now counts cases as closed after they are referred to agencies. Why do you consider a case to be closed before there has been an agency response as required under 5 U.S.C. § 1213(c) or (g)?

39. What are the OSC's evaluation standards under 5 U.S.C. § 1213(e)(2)(A) and (B) to assess whether the report contains all the information required by statute, and is reasonable, respectively? Have there been any changes to those standards since you took office? If so, please describe and explain.

40. Since you took office and in fiscal year 2004, what actions has OSC taken to require improvement of agency reports deemed unacceptable as submitted, based on whistleblower comments submitted pursuant to 5 U.S.C. § 1213(e)(1)?

41. Since you took office and in fiscal year 2004, what has been the average length of time between receiving whistleblower comments and the decision whether to accept a report as submitted, both in terms of average length and the absolute range in extremes? Please

include any cases you inherited upon taking office in response to this question.

42. Since you took office and in fiscal year 2004, how many times have you rejected reports in how many cases for failing to meet the standards of 5 U.S.C. § 1213(e)(2)?

43. Since you took office and in fiscal year 2004, what has been the average length of time, as well as the range in length of time, between receiving the final accepted version of an agency report pursuant to 5 U.S.C. § 1213(b) and transmission to the President and Congress as required by 5 U.S.C. § 1213(e)(3)?

44. During your tenure, precisely how many settlements has OSC won for whistleblowers in retaliation cases? How does the number of settlements compare with the number of whistleblower retaliation complaints?

IV. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

45. A demonstration project, whereby the responsibility for receiving and investigating new USERRA cases would be shared equally between OSC and the Department of Labor, was scheduled to begin in February 2005. What is the current status of this effort? Is it yet evident what impact this will this additional function have on OSC's ability to carry out its other responsibilities? What steps has OSC taken or planned to handle this added workload, including a potential increase in the number of USERRA cases as the number of service members returning to work from active duty rises? What differences in outcomes, if any, have you observed between cases initially assigned to OSC compared to those assigned to the Department of Labor? Are you finding any issues related to the demonstration project that may require congressional action?

46. I recently saw a Department of Labor USERRA poster, which serves as "notice" to employees about their rights under USERRA as mandated by the Veterans Benefits Improvement Act of 2004, that did not have information on OSC's new role in the USERRA process. Do you know if posters and other information provided to employees about their rights under USERRA will be updated to properly reflect OSC's expanded role?

V. SEXUAL ORIENTATION DISCRIMINATION

47. Since you took office and in Fiscal year 2004, what percentage of budget and staff hours has been spent on investigations and efforts to seek corrective action pursuant to 5 U.S.C. § 2302(b)(10) for alleged violation of sexual preference rights?

48. At the hearing, when asked whether existing law makes it a prohibited personnel practice to discriminate against employees based on their sexual orientation, you cited the case of *Morales v. Department of Justice*, 77 M.S.P.R. 482 (1998), for the proposition that sexual orientation is not a "protected class." As you know, in *Morales*, the employee identified 5 U.S.C. § 2302(b)(1) as the source of his right not to be discriminated against on the basis of sexual orientation. Can you identify any case law or other authority, including official statements from other executive branch agencies, which conclude that 5 U.S.C. § 2302(b)(10) does not prohibit discrimination based on sexual orientation or preference?

49. In 1980, then-Director of the U.S. Office of Personnel Management (OPM) Alan Campbell wrote a memorandum to the heads of all executive agencies advising that, under 5 U.S.C. § 2302(b)(10), "applicants and employees are to be protected against . . . actions based upon non job-related conduct, such as religious, community, or social affiliations, or sexual orientation." Please state whether you agree with Director Campbell's conclusion that 5 U.S.C. §2302(b)(10) provides such protection and if not, why not.

50. In 1999, OPM issued government-wide guidance in a publication that remains available today on OPM's website, "Addressing Sexual Orientation Discrimination in Federal Civilian Employment: A Guide to Employee's Rights." In that guidance, OPM states that OPM "has interpreted this statute [2302(b)(10)] to prohibit discrimination based upon sexual orientation. Sexual orientation means homosexuality, bisexuality or heterosexuality." (See http://www.opm.gov/er/address2/Guide04.asp). Please state whether you agree with OPM's position and if not, why not. Further, please state whether you have asked OPM to take this guidance off the OPM website or modify it, given that the guidance advises employees that they may file complaints alleging sexual orientation discrimination with OSC. How do you explain the difference between your views and those of OPM on this issue?

51. Please state whether you consulted with OPM, the Department of Justice (DOJ), or any other executive branch agency concerning whether discrimination based on sexual orientation is a prohibited personnel practice under 5 U.S.C. § 2302(b)(10) and if so, state whether those agencies expressed agreement or disagreement with your position.

52. More than 20 years ago, Theodore Olson, then Assistant Attorney General in the Reagan Administration heading DOJ's Office of Legal Counsel, issued a legal opinion concerning the interpretation of 5 U.S.C. § 2302(b)(10) in the context of discrimination based on homosexuality. In that opinion, Assistant Attorney General Olson reviewed the statutory language of 2302(b)(10), as well as an extensive body of judicial decisions issued by the Courts of Appeals in the 1960s and 1970s, which had led OPM's predecessor, the U.S. Civil Service Commission, to conclude that applicants and employees may not be found unsuitable for federal government employment solely because they were homosexual. On the basis of those legal precedents, the Assistant

Attorney General concluded that "it is improper to deny employment or to terminate anyone on the basis either of sexual preference or of conduct that does not adversely affect job performance." (See 7 Op.O.L.C. 58 (1983)). Please state whether you agree with the analysis and conclusion that Assistant Attorney General Olson applied, and if not, why not?

53. Has OSC ever requested that DOJ's Office of Legal Counsel provide a legal opinion concerning any of the matters within OSC's jurisdiction or whether a matter did or did not fall within OSC's jurisdiction? If so, please provide copies of the correspondence between OSC and DOJ. In addition, please state whether OSC followed the DOJ opinion. Further, please state whether OSC is required to follow opinions issued by DOJ's Office of Legal Counsel and if not, why not?

54. Assume that a supervisor decides that he will not hire a job applicant because the applicant is a homosexual. Assume that the supervisor explicitly tells the applicant the following: "I do not like homosexuals, and I will not hire them, no matter how qualified they are, or how highly recommended." In your opinion, would the supervisor's decision not to hire the applicant on this stated basis be a prohibited personnel practice under 5 U.S.C. § 2302(b)(10)? If not, why not? What further facts or evidence would be needed to establish that the supervisor's discrimination was based on the applicant's "conduct" rather than his "status?"

55. On November 4, 2003, Michael Levine, a 32-year veteran of the Forest Service, filed a complaint with OSC alleging that he was subjected to a 14-day suspension in retaliation for engaging in whistleblowing and based on sexual orientation discrimination. (OSC File NO. MA-04-0355). Mr. Levine provided OSC with a written statement from a witness to whom the personnel officer allegedly responsible for drawing up the charges against Mr. Levine stated, in reference to Mr. Levine: "Don't you just hate these [derogatory and vulgar reference to Mr. Levine's homosexuality]." After an extended delay, OSC closed Mr. Levine's complaint in the Complaints Examining Unit, without referring it for investigation.

I understand that the OSC examiner did not speak to Mr. Levine. In his letter proposing to close the case, the examiner stated that Mr. Levine was not protected by the Whistleblower Protect Act when he complained to the Office of Inspector General that a fellow employee was engaging in illegal and/or unethical activities, without consequence. These activities allegedly included the employee conducting his sporting goods business on government time and unlawfully selling equipment to the Forest Service, as well as renting his parent's trailer to the government for official use. The examiner also stated that Mr. Levine had not submitted sufficient evidence of discrimination based on off-duty "conduct" to justify an investigation of his claim under 5 U.S.C. §2302(b)(10). The examiner found the witness statement Mr. Levine provided was irrelevant and ignored information Mr. Levine submitted explaining that the personnel officer who allegedly

disparaged him on the basis of his sexual orientation was intimately involved in the decision to suspend him. Please answer the following questions:

A. Do you agree with the examiner's decision to close Mr. Levine's complaint without investigation? Please explain.

B. Do you agree with the examiner's conclusion that Mr. Levine's disclosures to the Inspector General were not protected by the WPA? Please explain.

C. Do you agree with the examiner's conclusion that Mr. Levine failed to provide evidence sufficient to merit an investigation into whether he was discriminated against under 5 U.S.C. §2302(b)(10)? Please explain.

D. What additional evidence could Mr. Levine have provided in order to convince OSC to investigate his case?

E. Why did OSC close Mr. Levine's case without ever speaking to him?

56. It has been alleged that cases alleging sexual orientation discrimination have been and continue to be handled differently as a class than other prohibited personnel practice complaints. Specifically, such complaints have been and continue to be subject to supervisory review by your Special Advisor, Jim McVay, who is a Schedule C appointee. Please state when OSC began using this special procedure for supervising the disposition of sexual orientation complaints; the reasoning for this special procedure; and whether the procedure will continue in the future.

57. In a April 8, 2004 press release (PR 04_03) you announced the results of what you called a "legal review to determine the extent of jurisdiction of the office to process claims under Title 5, Section 2302(b)(10)."

A. Who conducted this legal review?

B. State whether the results of this "legal review" were reduced to writing, and if not, why not?

C. Would you agree that it is standard practice for attorneys, in general, and government agencies, in particular, to memorialize their legal analyses in a written memorandum, particularly when the legal issue is complicated, and/or where there is a difference of opinion regarding the appropriate analysis or legal conclusions?

D. In conducting your legal review, the results of which you announced on April 8, 2005, did OSC consult any other government agencies? Please explain.

58. Please provide the Subcommittee with copies of all OSC materials that you have removed from the agency's website or otherwise removed from active publication that address the issue of sexual orientation. For each item removed, please provide an explanation as to how the material is inconsistent with your interpretation of section 2302 (b)(10).

59. In a February 27, 2004, letter responding to my concerns over the removal of materials related to sexual orientation discrimination from OSC's website, you indicated that a key part of your legal review of OSC's authority in this area is to determine whether sexual orientation is a "distinct category or class" under applicable civil service law, and whether civil service law forbids discrimination against a federal employee on the basis of sexual orientation "as a protected class."

    A. Please describe your view of the types of factual situations that OSC would be authorized to investigate and enforce prohibitions against if sexual orientation were considered a "distinct category or class," as opposed to the types of situations OSC can investigate and enforce prohibitions against under 5 U.S.C. § 2302(b)(10).

    B. If an employee lives with a partner of the same sex and the evidence shows that the supervisor took a personnel action because of that cohabitation, would that personnel action be unlawful under § 2302(b)(10)? If not, what else would the employee have to show to demonstrate unlawful discrimination under (b)(10)?

60. In the February 27, 2004 letter you said that you are reviewing a number of OSC's policies and interpretations. Please identify the policies and interpretations that OSC has reviewed or is reviewing other than discrimination on the basis of sexual orientation, provide copies of materials related to those policies and interpretations that OSC has removed from its website, identify the date on which each was removed, and note the outcomes of those reviews.

VI. ALTERNATIVE DISPUTE RESOLUTION (ADR)

61. ADR allows parties to enter into dispute resolution discussions with full confidence in the confidentiality of the process. Keeping the process confidential allows all sides in a dispute to speak more openly, share more information, and explore ideas and options in order to come to a resolution. As Special Counsel, what steps are you taking to ensure complainants that the ADR process is strictly confidential and that individuals outside the dispute resolution discussions will not have access to information discussed or shared during the ADR process?

62. According to the fiscal year 2006 OSC budget justification, the initial acceptance rate by employees for mediation for fiscal year 2004 decreased approximately 14 percent from

the previous two years. Because Congress designated OSC an advocate for employees, why has the mediation acceptance rate by employees dropped so significantly?

63. Is it accurate to state that, using telephone mediations, the ADR program was resolving 85-90 percent of the cases that were mediated, resulting in travel costs of close to zero?

64. One of the few areas of agreement is that Alternative Dispute Resolution or mediation has been a success at OSC. In a consultant report that you commissioned from the MPRI firm, they called the Alternate Disputes Resolution Unit "an invaluable tool" for OSC and stated that the Unit's mediation practice is "a growth industry which should be expanded."

    A. You testified that you urged the ADR specialist to remain at OSC headquarters in Washington, D.C. during an Employee Advisory Committee (EAC) meeting after the other OSC employees involuntarily assigned to Detroit decided to decline the transfer. However, the Subcommittee has received a statement from Ms. Linda Myers, the ADR specialist, stating that you did not recommend that she stay in Washington, D.C., but rather other employees at the EAC meeting made that recommendation. Ms. Myers states that you did not comment on that recommendation. She further states that you did not speak to her at any time about remaining at OSC in D.C. How do you reconcile this discrepancy?

    B. You have indicated that you were interested in having the ADR program conduct more face-to-face mediation. How would moving the program to Detroit, as opposed to keeping the program in Washington, D.C., advance that goal, particularly when most of the ADR cases are located in the Washington, D.C. metropolitan area?

    C. You testified that you wanted the Detroit office to be a leader in ADR. Although the ADR specialist has resigned, do you still plan to have the ADR staff in the Detroit offices as opposed to at the headquarters?

    D. At present, does OSC have any trained mediators? If so, how many, what are their qualifications, and what has been the success record for the ADR program since the former ADR specialist resigned?

VII. HATCH ACT

65. Do the computerized case tracking records of OSC currently indicate every official or employee to whom Hatch Act complaints are assigned for investigation?

66. On October 20, 2004, the Washington Post ran a story describing how then-National Security Advisor Condoleezza Rice had been giving what appeared to be campaign speeches in so-called "battleground" states during the final eight weeks before the

Presidential election. (See Glenn Kessler, "Rice Hitting the Road to Speak", Washington Post, October 20, 2004, at A2.) That same day, Representative Conyers requested that the Office of Special Counsel conduct an investigation into whether Dr. Rice's activities violated the Hatch Act. According to a recent complaint, filed by the Government Accountability Project, the Project on Government Oversight, Public Employees for Environmental Responsibility, the Human Rights Campaign, and anonymous OSC employees, Representative Conyers' request for an investigation of Dr. Rice's activities received unusual treatment, particularly as compared to a matter involving a July 26, 2004, visit by Senator Kerry to NASA headquarters in Florida which was alleged to violate the Hatch Act.

Specifically, according to the complaint, when Representative Conyers' letter was received, it was not referred to the career employees in OSC's Hatch Act Unit, even for a preliminary investigation or inquiry. Instead, Deputy Special Counsel Renne assigned the case to himself, held on to it until after the election without taking any action, and then transmitted it to the Hatch Act Unit for handling after the election. The complaint contends that—by contrast—you ordered an immediate on-site investigation of the complaint involving Senator Kerry last August, only days after Senator Kerry visited the NASA facility. Indeed, an article that appeared in the Washington Post on Sunday, August 1, 2004, states that your agency had already formally requested information from NASA about the Kerry town hall meeting, which had been held only few days earlier on July 26, 2004. (See Steve Barr, "Kerry Visit Could put NASA in the Hot Seat", Washington Post, August 1, 2004, C2.)

A. Please provide a detailed and specific response to the allegations in the complaint regarding the disparate treatment your office afforded in the two cases identified above.

B. On what date did OSC receive Representative Conyers' October 20, 2004, letter concerning Dr. Rice?

C. Describe the handling of Representative Conyers' letter beginning with the date it was received and up until the present time, including but not limited to:

   i. The date the complaint was entered into OSC's case tracking system and the name of the employee who entered it.

   ii. The names of the attorney and investigator who were initially entered into the record of the complaint in the OSC case tracking system and the date their names were entered.

   iii. The names of any attorney and investigator who were subsequently entered into the record of the complaint in the OSC case tracking system and the

date their names were entered.

iv. Whether the case tracking system has been altered to delete any record of the assignment of the case to yourself and/or Deputy Special Counsel Renne, and if so when, why, and at whose direction.

D. Describe your role and that of Deputy Special Counsel Renne in handling the complaint filed by Representative Conyers, beginning with the date that OSC received the letter. Specifically, state whether, and if so on what dates, either you or Deputy Special Counsel Renne met with members of OSC's career staff (i.e. William Reukauf and/or Ana Galindo Marrone) to discuss Representative Conyers' complaint. Is it true that Deputy Special Counsel Renne or another member of your immediate staff maintained possession of the case file until after the election? If so, why?

E. Identify the date that the career staff received possession of the case file from Deputy Special Counsel Renne and/or yourself.

F. Identify the date that career staff began an investigation of Rep. Conyers' complaint.

G. Describe the current status of the Rice investigation.

67. Has OSC concluded that Dr. Rice did not violate the Hatch Act with respect to the allegations raised in Representative Conyers' complaint?

68. Since you took office and in Fiscal year 2004, what percentage of budget and staff hours has been spent on Hatch Act investigations and litigation, compared to corresponding work for prohibited personnel practices? Please compare these figures with the previous four fiscal years.

69. Since you took office and in fiscal year 2004, what percentage of time, budget and staff hours has been spent on Hatch Act investigations and litigation involving alleged violations by Democrats, as compared with Republicans? Please provide the same data for the previous four fiscal years.

VIII. STAFFING AND CONTRACTS

70. Good government groups have raised concerns about the hiring practices at OSC. Could you please explain the notice and review process used in selecting and hiring attorneys at OSC, and state whether you relied on any best practices or information from Office of Personnel Management or the Chief Human Capital Officers Council in your hiring

activities?

71. How many political appointees are currently employed at OSC? How many were employed when you took office? Please identify any new political appointee slots, the justification to create them, the identities of the individuals whom you have selected for political appointments, their qualifications, and the costs to fill the positions.

72. Congress provided OSC funding for fiscal years 2004 and 2005 to hire additional staff. In your May 17, 2005, letter to GAO, you stated that the Disclosures Unit (DU) caseload is expanding significantly for work that is high stakes, complex and often requires more than one attorney. How many employees currently serve in the DU and how many were there when you arrived? What percentage of the additional funding was used for staffing the DU?

73. Has OSC stopped using career supervising attorneys to help select career staff? Please describe all changes to the involvement of career supervising attorneys in hiring decisions since you assumed office. Please explain the basis for changes.

74. Has OSC discontinued the prior competitive selection process for attorneys? If so, please describe all differences between the current system and the system in place when you assumed office, and please explain the basis for the changes.

75. Please describe what you believe should be the background and experience necessary to be considered for an attorney position at OSC. Do all positions require significant experience in labor or employment law?

76. Since becoming Special Counsel in January 2004, how many employees have you hired and for what positions, and how many employees have left OSC since January 2004?

77. Please provide a detailed account of the current staff at OSC, specifically:

    A. The number of attorneys at OSC in each field office and in each division (ex. IPD 1, IPD 2, Hatch Act Division, Special Projects Unit, Complaints Examining Unit, Freedom of Information Act (FOIA) unit, Disclosure Unit, USERRA Unit, etc.).

    B. The number of investigators at OSC in each field office and in each division (ex. IPD 1, IPD 2, Hatch Act Division, Special Projects Unit, Complaints Examining Unit, FOIA unit, Disclosure Unit, USERRA Unit, etc.).

    C. The number of administrative support staff at OSC in each field office and in each division (ex. IPD 1, IPD 2, Hatch Act Division, Special Projects Unit, Complaints Examining Unit, FOIA unit, Disclosure Unit, USERRA Unit, etc.).

D. The number of technology support staff at OSC in each field office and in each division (ex. IPD 1, IPD 2, Hatch Act Division, Special Projects Unit, Complaints Examining Unit, FOIA unit, Disclosure Unit, USERRA Unit, etc.).

E. The number of paralegals at OSC in each field office and in each division (ex. IPD 1, IPD 2, Hatch Act Division, Special Projects Unit, Complaints Examining Unit, FOIA unit, Disclosure Unit, USERRA Unit, etc.).

F. The number of clerks at OSC in each field office and in each division (ex. IPD 1, IPD 2, Hatch Act Division, Special Projects Unit, Complaints Examining Unit, FOIA unit, Disclosure Unit, USERRA Unit, etc.).

G. The number of other personnel, and a description of these other job categories, at OSC in each field office and in each division (ex. IPD 1, IPD 2, Hatch Act Division, Special Projects Unit, Complaints Examining Unit, FOIA unit, Disclosure Unit, USERRA Unit, etc.).

78. Please list the number and types of employees assigned to the Special Projects Unit and the issues they are assigned to (i.e., the number of attorneys working on whistelblowing, the number working on sexual orientation discrimination, the number working on USERRA cases, etc.).

79. What were the qualifications of Military Professional Resources, Inc., (MPRI) to conduct the management review used to justify the reorganization? Was MPRI selected competitively?

80. On March 16, 2004, you hired Mr. Alan Hicks as an expert consultant at an hourly rate of $53.83. Under federal regulations, expert consultants, such as Mr. Hicks, may be hired on a non-competitive basis only if the person is "a specialist with skills superior to those of others in the same profession, occupation or activity." Moreover, Office of Personnel Management guidance warns, "Agencies may not use expert and consultant appointments to avoid employment procedures."

A. For what purpose was Mr. Hicks hired, and what are his qualifications. What is his superior expertise?

B. What work product did Mr. Hicks produce? Please share it with the Subcommittee.

C. How much has Mr. Hicks been paid to date?

D. How may other special consultants have been hired by OSC? Who are they, why were they qualified as experts, what were they paid, what did they produce?

IX. OTHER MATTERS

81. In response to my question about sexual orientation discrimination cases being reviewed by the Special Projects Unit, you stated that several new or major initiatives were being reviewed by the SPU. Other than the USERRA pilot project, the backlog, and sexual orientation discrimination cases, what other initiatives are under the SPU?

82. Since you took office, what do you believe to be your most significant contribution to the merit system, and what are your most significant mistakes and lessons learned?

83. Since you took office and in fiscal year 2004, how many complainants have completed customer satisfaction surveys on OSC performance? What statistical results has OSC compiled as to whether customers believed the Office performed adequately? What was the range of views?

84. Recently your office released a report about a whistleblower disclosure from Ms. Kristin Shott concerning aircraft carrier safety issues. While her disclosure was validated, Ms. Shott was quoted in the Washington Post on May 10, 2005, expressing displeasure that OSC did not insist that responsible officials be held accountable. She also said that she would never blow the whistle again. What is your response to Ms. Shott's remarks about her experience at OSC?

85. In your May 17, 2005, letter to GAO, you stated that the Freedom of Information Act (FOIA) unit has seen "an explosion of claims in the past few years." Since you took office and in fiscal year 2004, what is OSC's record pursuant to 5 U.S.C. § 1216 of opening investigations into alleged FOIA violations at other agencies out of how many requests?

86. During the hearing, you testified that you understood that the language in the proposed settlement drafts with the employees subject to the involuntary reassignment that would have prohibited employees from discussing anything related to their departures from OSC with members of Congress or their staffs was proposed by counsel for the employees, Shaw, Bransford, Veilleux, and Roth, P.C. (hereinafter referred to as employee counsel). Please respond to the following questions:

    A. What was the basis for your statement that employee counsel proposed the gag language on behalf of the OSC employees?

    B. Is it true that the initial employee counsel draft did not contain the gag language described above?

    C. Is it true that the gag language first appeared in the settlement language drafted by OSC which OSC drew up in response to the employee counsel's first settlement draft?

D. Is it true that Deputy Special Counsel Jim Renne told Anthony Vergnetti, employee counsel, that OSC intended the gag language to cover any contacts with congressional staffers, unless the OSC employees were subpoenaed?

E. According to the amended complaint against you, on March 1, 2005, in a telephone call with Mr. William Bransford, you threatened OSC employees with "more charges" in response to the employees' refusal to settle their cases and/or accept the gag language. Is this allegation true?

F. Is it true that until the end of the settlement discussions, OSC continued to insist on gag language that would have prevented the OSC employees from going to Congressional staffers unless subpoenaed?

87. On April 9, 2004, the following e-mail was sent to all OSC staff at your direction:

"The Special Counsel has requested that we convey to you that he and his staff have completed their legal review of OSC's jurisdiction to process claims under title 5, section 2302(b)(10), alleging sexual orientation discrimination. Their conclusions can be found in a recently posted press release on OSC's website. If, in the performance of your case-processing duties, current or potential complainants, their representatives, or agency representatives ask about OSC's policy on (b)(10) complaints, you should simply refer them to the press release on our web site as a complete and definitive statement of OSC's policy.

Please also note that the Special Counsel has directed that any official comment on or discussion of confidential or sensitive internal agency matters with anyone outside OSC must be approved in advance by an IOSC official."

In your May 31, 2005, response to the GAP/PEER letter, you state as follows:

> "OSC policy, similar to other Executive Branch agencies, requests employees to refer all outside inquiries to our Office of Congressional and Public Relations. Last year, I sent an e-mail out to all employees mentioning this policy. Later that day, there was some confusion on this policy. Any confusion was cleared up the next day when I sent an additional e-mail to all OSC employees expressing to them that this policy was not a gag order."

A. Does this passage in your response to the GAP/PEER letter concerning confusion over an e-mail that mentioned an OSC "policy" refer to the e-mail of April 9, 2004, and its language requiring clearance of discussions on "confidential or sensitive internal agency matters"?

B. Why did you conclude that it was necessary to remind employees of this "policy" in the April 9, 2004, e-mail, whose primary purpose appears to advise career staff of the results of the "legal review" conducted concerning "OSC's jurisdiction to process claims under title 5, section 2302(b)(10), alleging sexual orientation discrimination?"

C. Please explain what is meant by your statement that "later in the day, there was some confusion on this policy?" Specifically, who was confused, what was the source of the confusion, and how was the confusion expressed?

D. It has been alleged that the above referenced e-mail of April 9, 2004, was never retracted. Please provide a copy of the e-mail you mention in your response to the GAP/PEER letter that you sent to staff "expressing to them that this policy was not a gag order" for the record.

E. The Anti-Gag Statute states that "[n]o funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Form 312 and 4414 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement does not contain the following provisions [citing laws protecting disclosures made to members of Congress, the WPA, and other similar laws]." It has been alleged that the e-mail of April 9, 2004, violates this statute. Do you agree or disagree with this contention and if so why?

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

July 8, 2005

The Honorable Daniel Akaka
Ranking Member
Subcommittee on Oversight of Government
Management, the Federal Workforce, and
the District of Columbia
U.S. Senate
Washington, D.C. 20510

Dear Senator Akaka:

Thank you for your commitment to the merit system principles and Federal whistleblowers. I am proud of the dedicated professional OSC staff and the tremendous work we accomplished since early 2004, most noticeably, reducing the Agency backlog. Based on the candor of my answers and the clear documentation of our accomplishments, I hope you will put to rest the rumor and innuendo that brought these issues to the fore.

Because of the length and repetition of many of your questions, I will answer them by section and topic.

Section I. Reorganization and Agency Changes (1-21)

As part of my vision of a better, more efficient and more merit-oriented agency, I asked big things of the career staff, which they have achieved in my first year, including tackling historic backlogs and giving greater justice to more civil servants. In January 2005, I announced an Agency reorganization under my authority in 5 U.S.C. § 1211 to ensure no future case backlogs would occur and to create internal and consistent procedures. I consulted with all the senior management and my immediate staff repeatedly throughout the prior year. While there was discussion and debate, at no time did specific employees express any unusual concerns about policies or procedures. There was no gap in communication, and every employee was treated as a peer.

The overall paradigm of the reorganization was to delayer the current OSC organizational structure, "power down" from a DC-centric organization to a field office structure which has worked well, and keep trusted employees in positions of leadership. This meant keeping the teams intact as much as possible, since they have worked well together. Previously, there were three separate Investigative and Prosecution Divisions (IPDs), each headed by an SES, each with different procedures and policies. While the team approach worked well, the structure was not feasible. Under the new structure, there will be one IPD and four field offices, eventually with each led by an SES. The DC/headquarters office is essentially another "field" office, but will include the

CEU (initial intake unit for all complaints), new training unit, customer service unit and USERRA unit, as well as the various supporting units.

The plan also includes a new field office in the upper Midwest (Detroit) for nationwide representation. With the various states assigned to this Detroit office under the new plan, it will handle approximately the same number of cases as the other field offices. Pursuant to 5 C.F.R §§ 335.102 and 317.901, the management directed reassignment of specific employees to the San Francisco (one SES), Dallas (four employees) or Detroit (seven employees) was based on the precepts of strategic management of human capital. As you know, relocation is a fairly common practice in the Federal workplace. In FY 2003, for example, Federal agencies relocated approximately 59,000 employees, according to Office of Management and Budget.

In addition, OSC was facing a shortage of office space. The agency plans to have 113 FTE on board by the end of FY 2005, which requires acquiring additional rented space. Initial consideration was given to possible expansion of the Washington DC office. The cost of a DC space expansion in the same building as the headquarters would be approximately $135,000 in the first year, with escalations every year.

Some career employees suggested, without prompting or solicitation, a Midwest Field Office in Michigan, Illinois, Missouri, Ohio or Indiana. Initially, OSC staff consulted with GSA about a Midwest field office (FO) and we were interested in Chicago, but there was no federal space available for at least a year, and the space was very expensive. GSA gave us federal space in Detroit that was available immediately and required no build-out costs. When it became clear that there were a variety of reasons for a Midwest Field Office, and that the best solution was an office in Detroit, we analyzed the financial aspects of adding space in Detroit instead of acquiring space in the more expensive location of Washington, D.C. At a cost of around $50,000 per year for the expansion space, this move provided an annually recurring savings of approximately $85,000. The fact that these savings are recurring more than makes up for any one-time costs associated with the startup of a new field office.

All of the employees that were reassigned are trusted career investigators or prosecutors that were to be assigned to the IPD. They were chosen based upon their individual merit and the success they had in their units. The personnel assigned to Detroit were all part of the same existing IPD team. In fact they were the only wholly existing IPD team, with SES leadership, that was intact at the time of the reorganization. The other members of this unit had been detailed or reassigned during 2004, before the reorganization. Further, the Alternative Dispute Resolution (ADR) employee was also part of this unit. ADR was also scheduled to be reassigned to Detroit. This is a more central location that will allow for more in-person mediation, and the SES over ADR had been instrumental in organizing and making ADR successful at OSC. Keeping them together made perfect sense. In fact an SES employee who was scheduled for reassignment, when discussing the reorganization plan called it a "creative approach and could lead to good things," and said he was inclined to [take the reassignment] and "be part of it." Unfortunately, he chose not to take the reassignment and found another federal job in the Washington D.C. area.

The individuals assigned to the Dallas office were primarily the remaining members of the unit that had been disbanded throughout 2004. Assigning these employees to Dallas allowed us to keep other teams together. Also, Dallas had suffered great attrition and needed the senior leadership of those being reassigned there. This way only one team was materially changed.

The new field offices are only one of many parts of the reorganization that will help OSC better meet its mission. OSC is preparing to change and implement new standard operating procedures for the administrative and substantive handling of cases. This is a large undertaking and can only be accomplished with strong leadership in the field to ensure that these changes actually occur and become the culture of OSC. At the same time OSC has implemented vigorous new training schedules that will cross-train personnel to work in other areas of the law. In the past, the lack of cross-trained personnel was a major impediment to attacking backlogs. The new smaller modular field offices will be more easily trained and capable of addressing future backlogs. Without senior leadership in the field offices, the new SOPs and cross-training would have very little chance of success.

In addition, the new customer service unit will better serve the public and Federal employees. Having specific personnel assigned for this purpose will help OSC gain a reputation of better customer service within the Federal workforce.

In an effort to deal with a chronic backlog and structural inefficiencies, OSC reassigned 12 persons.[1] Unfortunately, most of the individuals that were reassigned chose not to accept the reassignments. However, the Detroit Field Office is up and running with different personnel and we have hired many individuals over the past month to fill vacancies. Having to staff up the new FO with new personnel was not my goal. It would have been far more efficient if the reassignments would have succeeded and the reorganization would have taken the shape originally envisioned. Nevertheless, we did not give up on the new FO because it is an integral part of the future of OSC. I am pleased to report that to my knowledge, almost all of the affected employees are still working for the Federal government and handling cases in the same area of the law. I was asked to give recommendations for most of the employees, and was pleased to give them excellent recommendations. The employee for ADR took a higher grade job at another agency but I made it clear to her that I was quite open to keeping ADR in Washington, D.C., and she decided to take another job instead.

Section II. Alleged Internal PPP (13-18)

I cannot agree with several assumptions made in these questions. However, I have always been committed to protecting the rights of all Federal employees and enforcing OSC statutes. I have complied with all applicable laws, rules and regulations in my relationship with the employees of OSC. This includes all required internal EEO procedures and policies. All of the issues in these questions and similar questions at the hearing are false and have been refuted several times. The matter is currently before the PCIE, and that is the appropriate forum for any specific comment.

---

[1] See "Employee relocation costs estimated at more than $4 billion," GOVEXEC.COM, Jan. 27, 2005, and May 25, 2005, "Agencies relocated nearly 60,000 employees in 2003," both by Daniel Pulliam.

Section III. Prohibited Personnel Practices and Whistleblower Cases (19-44)

Prohibited Personnel Practice Cases

Complaints Examining Unit

The Complaints Examining Unit (CEU) and the IPD are the two OSC entities responsible for protecting Federal employees from prohibited personnel practices (PPPs). The CEU is the "front lines" for OSC. They screen approximately 1,700 – 1,900 prohibited personnel cases per year. The CEU is staffed by dedicated and professional career employees.

CEU instituted new policies that made them more efficient and effective. When I took over at OSC, the CEU was a bottleneck in the Agency. Cases were not being reviewed for months. The average time a case sat in CEU was 90 days, and the oldest cases in the unit were over 240 days. The average age of a CEU case is now less than 50 days, and in most months the oldest cases are less than 60 days old.

Moreover, OSC made four changes to CEU standard procedures that help reduce the average age of each case. First, OSC shortened the referral memos to the IPD from 10 pages to 2 pages. The additional pages added very little to the process and consumed an inordinate amount of time. Second, on frivolous cases, OSC does not call the complainant. Although in the vast majority of cases, OSC will still call the complainant. Third, the complainant is required to fill out OSC Form 11, which requires them to list the alleged violation of a law, rule or regulation. Previously, OSC employees had to pour through many documents from the complainant and waste valuable time before finding the necessary information. Finally, OSC revamped partial IPD case referrals from CEU. Partial referrals are cases with multiple PPP allegations. Under partial referrals, one PPP allegation is closed while the other PPP allegation(s) are now referred to the IPD for further investigation. Previously, the CEU kept all partial referrals until the IPD finished its investigation, which accounted for cases being very old within the CEU. All of this streamlining was done by the dedicated staff of the CEU. They are to be applauded and congratulated for this impressive feat.

There have been some false clams that CEU closed "good cases." However, the truth is that the CEU did not close any meritorious cases. In fact, the percentage of meritorious CEU cases that the Special Projects Unit (SPU) referred to the IPD for further investigation, doubled during the SPU backlog reduction effort (April-September 2004). *During this time, the SPU referral rate to the IPDs doubled to 22%.*

In addition, there have been some concerns about case assignments, and OSC material findings of fact and legal conclusions in preliminary closeout letters. First, OSC's career management staff makes decisions on cases assignment based upon their employee's workload, experience and knowledge of a given subject. Some employees may have more cases than another but the employee with fewer cases will have more complex cases. Second, OSC has minimally revised its material findings of fact and legal conclusions for complainant comments in preliminary closeout letters. The letters are shorter, but no substantial changes were made.

The Investigation and Prosecution Division

The IPD receives case referrals from the CEU. IPD works together with investigators and IPD staff attorneys to determine whether OSC's investigation has established any violation of law, rule or regulation, and whether the matter warrants corrective or disciplinary action, or both. The IPD conducts investigations to review pertinent records and to interview complainants and witnesses with knowledge of the matters alleged. Matters undergo legal review and analysis to determine whether the matter warrants corrective action, disciplinary action, or both.

In the past, factors existed that impeded OSC's ability to process PPPs and meet the 240-day statutory deadline. OSC previously had three IPDs which became too top heavy and too "stove piped." All three IPDs seemed to work independent of each other, with no central oversight. Each IPD seemed to have its own internal process for case handling. Also, OSC's prosecutorial discretion was used inconsistently. In addition, OSC had many old cases that were collecting dust for over two years. Moreover, the OSC Field Offices (FOs) were being underutilized. There was a strong perception, with supporting statements from employees, that the FOs were not getting their share of good cases. Cases forwarded to headquarters from the Dallas and San Francisco Field Offices were languishing without movement, and little could be done to rectify the problem.

To resolve those problems, OSC created a one IPD structure. Previously we had three IPDs but no one person was in charge. Each division head became an advocate for their own unit. Their focus was on their unit and meeting the demands of that unit, not on the overall mission of OSC. Our new structure provides greater consistency.

Furthermore, OSC is creating a new policy to either prosecute or resolve cases within two years of receipt. Many of the backlogged cases were found in the three IPDs. Numerous cases were sitting idle for years without any action. This is unjust and not consistent with OSC's mission of protecting the merit system. With this new policy, Federal workers will know the result of their complaint within two years of filing a case with OSC. We hope to average better than two years.

In addition, the Agency FO's will be better integrated into OSC. The FO's had procedures and policies that work well in resolving the cases they receive, but were not being effectively used. Cases that were in the field for several years were not moving forward. They languished under a bottleneck of paperwork that they had forwarded to headquarters for approval, and under a lack of reasonable professional autonomy. Moreover, the field offices didn't have an effective advocate for their interests and were considered "second-class citizens."

Finally, to provide more access to senior management for Agency investigators, OSC is creating a senior investigator position that will attend senior staff meetings. This will provide investigators with a "voice at the table." The senior investigator will be able to recommend procedural changes that can make OSC run more efficiently. In the past investigators had excellent ideas to streamline OSC cumbersome procedures, but those recommendations went nowhere because they had no voice with senior management. Moreover, OSC investigators were not utilized efficiently. On many occasions OSC attorneys were both investigating and prosecuting cases when

investigations were clearly the responsibility of the investigator. OSC attorneys were wasting valuable time investigating cases when they should be resolving legal issues.

Whistleblower Disclosure Cases

OSC also 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, or gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. The Disclosure Unit (DU) staffs this extremely important function.

As you are aware, the DU caseload has been increasing due to growing public awareness of the Unit's work. In recent years, it has handled several high profile cases that have received widespread national press attention. In addition, after the terrorist attacks of September 11, 2001, more Federal whistleblowers came to OSC with national security allegations and concerns. Many cases handled by the DU involve complex and technical issues.

OSC did have approximately 500 cases that were slated for closure before I arrived as the Special Counsel under a priority review and handling system in place when I arrived. These cases had already been reviewed and were stacked up in offices waiting to be closed, but no one had written the official letter closing them. Therefore, many older cases were closed in FY 2004 because only in FY 2004 did OSC actually write the letter that closed the case, although before FY 2004, OSC employees slated them to be closed. In the interest of justice, OSC reviewed each of the 500 cases to ensure that no meritorious cases would be in the hundreds of cases previously slated to be closed. Indeed, OSC employees in re-reviewing each those 500 files, found two new referrals.

Thus, the DU numbers for FY 2004 show a higher percentage of cases being closed than FY 2003. In other words DU employees did in FY 2004 what they should have done in FY 2003 and earlier – officially close DU cases that were scheduled to be closed years earlier.

Moreover, the number of DU referrals to other Federal agencies for investigation increased from 14 in FY 2003 to 26 in FY 2004, an almost 100% increase. Of the 26 cases referred for investigation to Federal agencies in FY 2004, 18 were referrals to the Agency Director and eight were to the respective Inspector Generals' (IG). The percentage of referrals, however, did not increase because of the closing of the 500 DU cases that were slated to be closed before I arrived at OSC.

In addition, DU created new standardized operating procedures that should ensure that referrals remain high. The new DU procedures provide the right balance between referring too many claims to Federal agencies for investigation and referring too few. Previously, the DU standard of proof for a referral approached beyond a reasonable doubt. DU now uses a preponderance of the evidence standard on case referrals, which should increase agency referrals. Thus, the DU substantially reduced the backlog of older cases while increasing the number of cases referred for investigation to Federal agencies.

As you are aware, OSC is statutorily limited in following up on IG referrals; OSC can't require IGs to investigate referred cases. OSC refers cases to the IG that are not egregious but are violations of a law, rule, regulation, gross mismanagement, and gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. By creating working relations with the IGs, the DU staff ensures that the IGs take our referrals seriously and expeditiously attempt to resolve them. If the IGs do not resolve the allegations, DU will refer the case in question to the appropriate agency head.

In addition, the DU staff has consistently rejected Federal agency reports that were deemed unacceptable, based upon whistleblower comments submitted pursuant to 5 U.S.C. § 1213(e)(1). The capable DU staff decides if and when an agency report is acceptable. If the agency report is unacceptable, DU sends the unacceptable report back to the agency for revision. Some agency reports have been revised two or more times before the DU accepts them as resolving the whistleblower's complaint.

Finally, concerning your inquiry about cases numbers, that information will be forthcoming in the FY 2004 annual report to Congress. Additional case information about the backlog resolution project may be found in the May 17, 2005 letter to Mr. David M. Walker, Comptroller General of the United States. *(See Attachment A).*

IV. Uniformed Services Employment and Reemployment Rights Act (USERRA) (45-46)

The demonstration project began on February 8, 2005, under P.L. 108-454.

As of June 30, 2005, OSC had received 69 USERRA cases. In short, OSC is actively conducting USERRA investigations under the demonstration project.

OSC is uniquely qualified to receive, investigate, resolve, and prosecute federal USERRA cases. With respect to the types of investigations conducted and legal analyses performed, federal USERRA cases are virtually identical to the prohibited personnel practices cases OSC routinely administers, especially those involving allegations of whistleblower retaliation (i.e., violations of 5 U.S.C. § 2302(b)(8)) and reprisal for engaging in protected activity (i.e., violations of 5 U.S.C. § 2302(b)(9)). Consequently, OSC possesses the knowledge, skill, and experience required to investigate efficiently and resolve expeditiously USERRA cases.

All USERRA cases are administered by OSC's USERRA Unit. The USERRA Unit is the in-take, investigative, and prosecutorial unit for all USERRA cases and related issues.

The USERRA Unit is comprised of federal investigators and attorneys who possess extensive knowledge of federal personnel law, rule, or regulation and vast experience in investigating and resolving prohibited personnel practice and USERRA cases. The investigators and attorneys work closely together throughout all phases of the investigation.

Additionally, the unit manages OSC's telephonic and e-mail USERRA "hot lines" and conducts USERRA outreach. None of that assistance or outreach is required by the demonstration project, nor has Congress funded such voluntary activity by OSC.

The similarity between prohibited personnel practice cases and USERRA cases enables OSC to shift personnel in an almost seamless fashion from its Investigation and Prosecution Division (IPD)—which is the unit that investigates and resolves prohibited personnel practice cases—into the USERRA Unit after brief, in-house training of IPD transferees by the USERRA Unit Chief. Thus, in the event of a sharp rise in the number of federal USERRA cases as service members return to their civilian Federal employment, OSC will be able to shift and train personnel quickly to handle any such influx of cases.

The biggest difference under the demonstration project, as compared to the statutory referral process under 38 U.S.C. § 4324, is OSC's involvement in enforcing USERRA as soon as a violation is alleged. The demonstration project gives service members the right to call upon OSC's investigative and legal expertise as soon as a USERRA violation occurs. This has resulted in OSC obtaining corrective action for service members in a matter of months, rather than years.

Prior to the creation of the demonstration project, service members could not request OSC's assistance to review a USERRA case until after the service member filed a USERRA case with the U.S. Department of Labor, Veterans' Employment and Training Service (VETS), VETS investigated it, and VETS determined that it was unable to resolve it. Only at such time did a USERRA claimant have the right to ask that OSC review his or her case. But even if a service member requested OSC's involvement at that time, delays still ensued because, upon receipt of such a request, VETS would send the its investigative file to the Department of Labor's Office of Solicitor for review, not to OSC. The Office of Solicitor would analyze VETS's investigation and, at times, request additional investigation by VETS. Only after the Office of Solicitor reviewed the matter did the case get sent to OSC. Consequently, USERRA cases may not have been received by OSC for two years after the service member's initial filing of his or her USERRA case with VETS.

Given the above procedure, unresolved meritorious cases became stale for two reasons. First, there are delays arising from Labor's bifurcation of VETS's investigation and the Office of Solicitor's legal analysis. Second, neither VETS nor the Office of Solicitor have prosecutorial authority or other meaningful leverage to persuade an agency to resolve a meritorious case (other than, perhaps, the "threat" of referring the matter to OSC with a recommendation to prosecute). Thus, a USERRA action could not be filed until OSC received and reviewed the USERRA case.

Under the demonstration project, the cases investigated by OSC do not become stale. As mentioned, the USERRA Unit is comprised of investigators and attorneys who work together during all phases of the investigation. The joining of investigative and legal expertise facilitates efficient and thorough investigations. Moreover, Federal employers are likely to resolve meritorious cases now that OSC—as the protector of the merit system and prosecutor of federal USERRA cases—is "knocking on the door" within weeks (not years) after the events giving rise to the alleged violation.

In short, the demonstration project enables service members to choose to have OSC involved at the earliest possible moment that a violation may have occurred. By having OSC's investigative and legal expertise involved at the beginning of an enforcement action, OSC is able to obtain relief for the service member in a significantly timelier manner. No longer is justice delayed in meritorious cases.

There are three USERRA issues that OSC believes require Congressional action. First, USERRA, itself, does not clearly authorize the U.S. Merit Systems Protection Board (MSPB) to discipline Federal employees who willfully violate USERRA. Instead, pursuant to 5 U.S.C. §§1216(a)(4) and (c), it appears that OSC has authority to seek disciplinary action only in those USERRA cases involving widespread, systemic violations of the act, rather than for individual violations. Moreover, because USERRA's definition of "employer," see 38 U.S.C. § 4303(4), is broader than the definition of executive agencies over which OSC may exercise its title 5 investigative and prosecutorial jurisdiction, see 5 U.S.C. § 2302(a)(2)(C), some Federal employers do not fall within the reach of section 1216. Such employers include the U.S. Postal Service, the Federal Aviation Administration, and government corporations such as the Tennessee Valley Authority.

Second, USERRA does not provide OSC with the authority to seek a stay from the MSPB of an agency action that OSC reasonably believes violates USERRA. Congress's granting OSC authority to seek a stay from the MSPB during the course of a USERRA investigation would provide additional and appropriate protection to service members. OSC recommends that Congress amend USERRA to grant OSC stay authority that is consistent with OSC's authority in prohibited personnel practice case pursuant to 5 U.S.C. § 1214(b)(1)(A)(i).

Third, on June 9, 2005, the MSPB held that it did not have jurisdiction over USERRA appeals filed by Transportation Security Administration (TSA) Security Screeners or TSA Supervisory Security Screeners. See Spain v. U.S. Department of Homeland Security (Docket Number PH-0352004-0361-I-1) (citing Conyers v. Merit Systems Protection Board, 388 F.3d 1380, 1382-83 (Fed. Cir. 2004)). To the extent Congress did not intend for TSA Security Screeners and TSA Supervisory Security Screeners to be excluded from the protections of USERRA, a legislative amendment is warranted.

Regarding the DOL poster, on March 29, 2005, VETS informed OSC that it had printed 20,000 posters without OSC's recommended changes.

The current poster lacks information about OSC's exclusive authority to investigate the majority of federal USERRA cases. It does not inform service member of their right to have OSC investigate their cases. As such, the poster contains inaccurate and misleading information about VETS investigative role.

Moreover, the poster does not contain the USERRA Unit's telephone number, the USERRA hotline/e-mail address, OSC's webpage location, or the OSC logo. Such information is undeniably beneficial to Federal employees and applicants for Federal employment who require assistance regarding their USERRA rights.

V. Sexual Orientation Discrimination (47-60)

This issue first arose when a career SES employee, with nearly 25 years at OSC, pointed out information on the OSC website and other educational materials that discussed protection for "sexual orientation" discrimination. This employee explained that the information was controversial under the laws that OSC is given authority to prosecute. It was generated by the prior Special Counsel, as a new interpretation of OSC statutes, apparently.

This information was vague and did not state the statutory authority for its interpretation. The information seemed to slide back and forth between coverage for "sexual orientation" as a special protected class (under § 2302(b)(1)) and coverage under another section that required conduct (under § 2302(b)(10)) as the basis for the discrimination. By way of example, the OSC 11 claim submission form used under the prior SC seems to list "sexual orientation" protections as covered by the same law as other EEOC title VII protections. Yet nowhere within OSC's statutory authority does it list "sexual orientation" as one of the protected classes. This was also true in the educational pamphlet titled "Role of the U.S. Office of Special Counsel." This document once again improperly lists "sexual orientation" with the protected classes under section 2302(b)(1) authority. Another example was a press release that confuses the mere statement of status, i.e. "sexual orientation", with protections afforded under the conduct based discrimination statute, section 2302(b)(10).

Information on OSC's website and any other OSC material should be well founded in the law. A review of OSC statutes and case authority showed that nowhere within the statutes that OSC has responsibility for enforcing does it use the term "sexual orientation" as a special class of people that are entitled to additional protections. There was a concern that OSC may be in violation of the very thing that it is supposed to prosecute: abusive and unauthorized exercise of executive authority. Keep in mind this statute (5 USC §2302(b)) is used to debar Federal executive employees from federal service. Therefore, the information was removed until a thorough review of the law determined whether "sexual orientation" is to be given additional protective enforcement.

The OSC review revealed that there were only two possible ways that "sexual orientation" could be covered under the statutes that OSC enforces; 5 U.S.C. §§ 2302 (b)(1) and (b)(10). As stated, OSC research showed that there were voluminous cases under Title VII (§ 2302(b)(1)) interpreting "sexual orientation", and similar terms, that clearly state it is not covered as a protected class or under a protected status. Further, the Court that OSC practices under, the MSPB (Board), decided in *Morales v. Department of Justice*, 77 M.S.P.B. 482, that OSC has no authority to prosecute these cases under section 2302 (b)(1). The Board states, "...the only form of discrimination the appellant has described, discrimination on the basis of his **sexual orientation**, is not among the forms of prohibited discrimination included under 5 U.S.C. 2302(b)(1). Although that section includes discrimination on the basis of sex as prohibited by Title VII, the Equal Employment Opportunity Commission (EEOC) has consistently held that that prohibition does not

apply to cases which raise issues regarding **an individual's perceived** or admitted **sexual preference or orientation**." (Emphasis added).[2]

The *Morales* case also implies that the term "sexual orientation" is a mere statement of status. The Board did not make the illogical leap that one's status means that OSC can assume specific conduct, and that the case should have been handled under section 2302(b)(10). If a mere statement of "sexual orientation" is the same as "conduct," the *Morales* court would have also analyzed this case under the elements of section 2302(b)(10).

In fact, under all forms of discrimination law, assuming conduct based upon one's status would in and of itself be evidence of discrimination. However, for some reason, under these two sections, advocacy groups want OSC to assume conduct solely based upon one's status. For example, under any other circumstance, if an employer made employment decisions based upon the assumption that all members of a class conducted themselves in a particular fashion, everyone would argue that the employer would be discriminating. Some advocacy groups now want OSC to adopt precisely this biased approach to interpretation and enforcement. Therefore, we are left with section 2302(b)(10) as the sole basis for the prior SC's interpretation. This section reads as follows:

"Any employee who has authority to take... any personnel action, shall not, with respect to such authority –

(10) discriminate for or against any employee or applicant for employment on **the basis of conduct which does not adversely affect the performance of the employee** or applicant or the performance of others..." (Emphasis added).

As anyone can clearly read, this statute has at its core a need for conduct as the basis of discrimination. Furthermore, In Thompson v. Farm Credit Admin., 51 M.S.P.R. 569, 585 (1991), the Merit Systems Protection Board (Board) held that the prohibitions of (b)(10) apply only to "off-duty non-job related conduct." OSC's investigation and research also showed that for the first 20 years this statute was in existence it was interpreted to require "conduct" as the basis for the discriminatory act. This only changed for the first time during the 5 year term of the prior SC. However, for the first 20 years OSC could not prosecute a Federal manager simply because OSC prosecutors thought the manager might have been assuming conduct from a person's sexual orientation or other status.

Nonetheless, I have decided that there is a middle ground that is within OSC's investigative authority. I issued a press release on April 8, 2004, stating:

> "It is the policy of this Administration that discrimination in the Federal workforce on the basis of sexual orientation is prohibited," Bloch stated. "The Office of Special Counsel (OSC) has been engaged in a review of its authority to process claims of sexual orientation discrimination under Title 5, Section 2302(b)(10), which prohibits discrimination on the basis of 'conduct which does not adversely affect the performance of the employee or

[2] On June 30, 2005, The Hon. Henry Waxman introduced a bill that acknowledges "sexual orientation" as a statement of one's status and attempts to grant coverage under the protections of section 2302(b)(1), **not** (b)(10).

> applicant or the performance of others.' OSC has always enforced claims of sexual orientation discrimination based on actual conduct. Based on its review, OSC has concluded that such authority exists in cases other than actual conduct **when reasonable grounds exist to infer that those engaging in discriminatory acts on the basis of sexual orientation have discriminated on the basis of imputed private conduct.** Such inferences apply to all claims under Section 2302(b)(10), including, but not limited to, sexual orientation discrimination claims. The materials formerly on OSC's Web site were not clear about the statutory basis for OSC's authority. OSC believes that the materials currently on its Web site are consistent with the view of the law described above, but intends to review and revise those materials as necessary to ensure that employees are fully aware of the protections provided."

In essence, I decided against having a policy that discriminates against one type of person over another. All off-duty private conduct will now be protected equally. In keeping with this policy, new information was placed on the OSC website that reflected how all off-duty conduct can be protected by using concrete examples. This OSC poster titled "YOUR RIGHTS AS A FEDERAL EMPLOYEE", when describing section 2302(b)(10), reads as follows:

> **Discriminate against an employee on the basis of conduct, which does not adversely affect the performance of the employee.** *EXAMPLE: Jack's employment is terminated because he attended a "Gay Pride" march; or he attended a "Pro-Life" event; or he attended an animal rights rally; or he attended a gun-owners' rights meeting.* _____

Some media outlets and advocacy groups have alleged that other legal memoranda should control this issue. They do not understand that OSC is bound to only prosecute cases within its statutory authority. The Office of Legal Counsel opinion, OLC 1983 WL 187355, is cited by advocacy groups that claim this OLC opinion controls the interpretation of "sexual orientation" discrimination as a protected class or status. These allegations are not founded in sound legal reasoning. In this case the Department of Justice (DOJ) asked whether an AUSA could be terminated because of his off-duty sexual conduct. The very first point made in the OLC opinion is that it is founded on conduct as the basis of the discrimination pursuant to section 2302(b)(10), contrary to the position of groups who want OSC to grant protected class status. The OLC opinion reads:

> "...As set forth in more detail below, we have concluded that it would be permissible for the Department to refuse to retain an AUSA upon a determination that his **homosexual conduct** would , because it violates state criminal law, adversely affect his performance by calling into question his and, therefore, the Department's , commitment to upholding the law. We must advise, however, that the facts in this case are such that it would be very difficult under existing judicial decisions to prove that there is a nexus between **his conduct** and an adverse effect on the job performance. Because the burden of proof would be on the government to prove that such a nexus exists once the AUSA has established that he was dismissed for **homosexual conduct**..." (Emphasis added).

This opinion makes it clear that DOJ management was discriminating based on actual off-duty conduct. Management was not discriminating based upon the AUSA's status of his "sexual

orientation." This opinion is completely aligned with current OSC policy. Contrary to the musings of advocacy groups, this opinion does not answer what happens when it is alleged that a Federal manager discriminates based solely upon one's stated or perceived "sexual orientation."

Some also argue that Executive Orders (EO) EO 13087, EO 13152, and EO 11478 control the interpretation of section 2302(b)(10). These orders were read and reread to ensure that OSC policy was in full compliance. These Executive Orders make it a "policy" to "prohibit discrimination because of ...sexual orientation", but only grants those rights "to the extent permitted by law." And further states under section 11, "This Executive Order does not confer any right or benefit enforceable in law or equity against the United States or its representatives." Remember this is a statement of policy, not a law. On its face this policy holds that it cannot be interpreted contrary to the law, and more on point, it cannot be used to prosecute Federal employees for debarment. Lastly, even the prior Special Counsel agrees that the EO is not the basis for enforcement of "sexual orientation" discrimination.

In a letter to me last year, she stated that EO confers no authority on OSC to prosecute employees of other agencies. She also told me she did not dispute my right to change her policy on sexual orientation. *(See Attachment B).*

Some have even argued that "conduct" and "sexual orientation" are the same thing. To assume they are the same is to ignore the clear reading of the statute. It also means that OSC would have to engage in mind reading and thought control. If OSC uses its prosecutorial authority in a case where there is no evidence that the manager discriminated based upon imputed private sexual conduct, then OSC has elevated the claim to the same level of protection given to status claims under Title VII (§ 2302(b)(1)). This would clearly be a violation of the law. Furthermore, OSC would be guilty of discriminating by assuming that a person would conduct themselves in a particular fashion solely based upon their status.

There are three ways to interpret section 2302(b)(10), but only two have legal merit. The first is to require actual conduct as the basis for OSC action. This is how it was interpreted for 20 years. Second, OSC can act on evidence that a manager discriminated on the basis of imputed private conduct. Finally, the illegitimate method would be to grant status class protections based upon the mere statement or perception of "sexual orientation." OSC's current policy is as expansive as is legitimately permitted by law, and it relies on sound principles of evidence and inferences from evidence.

Let me clear up several misunderstandings about the Levine case. Mr. Levine claimed the personnel action taken against him by the Forest Service (Service) was due to his sexual orientation, in violation of section 2302 (b)(10). The Complaint cites a comment from an individual in the Service HR department who is supposed to have said, "Don't you just hate these f ---- faggots?"

Your questions leave out the most important facts. The person who was supposed to have made this comment was not the person who took the personnel action against Mr. Levine. Furthermore, there was no evidence to indicate that the person who is alleged to have made the comment had any influence over the process and the decision to discipline Mr. Levine. This alone

was sufficient to show OSC could not prevail and prove the elements necessary. Under our law, the employee must prove through competent evidence a nexus between the statement of animus or discrimination based on conduct, and the decision-maker's adverse personnel action. Here, there was neither proof of conduct nor nexus.

Moreover, another factor against Mr. Levine's complaint is that he was properly disciplined for not attending a mandatory training session. Mr. Levine admits that he was ordered to attend. His manager took the time to travel to his duty location and ordered him to go. Even after his managers went out of their way to ensure that he received the training, he left the four day training session on the first morning. He claims to have left due to back pain. Yet he returned to normal duty without seeking medical attention and without contacting his managers. This was documented by management and was one of several substantiated reasons for his discipline, not another individual's crass and inappropriate remark.

Your questions also make some inaccurate assumptions about OSC contact with Mr. Levine. The file has once again been reviewed, and the file reflects more than nine personal contacts with Mr. Levine by direct email and telephone, including review by several layers of management. With the evidence in the file two things are clear: OSC properly handled this case and OSC could not win this case for Mr. Levine due to a lack of any proof of conduct or nexus between conduct and the alleged discrimination, or that the employer's decision was not fully justified. It was properly closed.

VI. Alternative Dispute Resolution (61-64)

The ADR process is separate from the investigative process. There is a separate record keeping procedure, and ADR documentation is walled off from the non-ADR staff. The staff has also been instructed that if they are involved in ADR in a particular case, they can have no involvement in the investigation or prosecution of that case.

Recently, OSC has completed one mediation and three others are in process. We have six trained mediators at OSC. Their qualifications range from one investigator who has mediated more than 100 cases as a volunteer, to others who have received a 40-hour training course at OSC from Ms. Meyers or her predecessor.

My intent in the reorganization was to make the ADR Unit more centrally located and geographically accessible to all corners of the U.S. It was my experience in private practice that face to face mediation has a higher success rate. I wanted to build on the prior success of Linda Meyer's telephone mediation process.

VII. Hatch Act (65- 69)

This office has a strong history of enforcement of the Hatch Act, regardless of party affiliation. OSC's Hatch Act Unit (HAU), comprised of experienced career attorneys, is responsible for a nation-wide program that provides Federal, state and local employees, as well as the public at large, with legal advice on the Hatch Act. The HAU also enforces compliance with the

Act by receiving complaints alleging Hatch Act violations, conducting preliminary inquiries into complaint allegations and, where warranted, further investigating allegations or referring the complaints to OSC's IPD section for further investigation. Depending on the severity of the violation, the HAU will either issue a warning letter to the employee, attempt to informally resolve the violation, prosecute the case before the MSPB or send it to an IPD to prosecute before the MSPB.

The HAU prosecutes Federal employees who violate the Hatch Act based on the facts of a particular case, regardless of political affiliation. Under my short tenure, OSC has prosecuted Hatch Act violators from all political parties, including, Republican, Democrat, and Green Party.

At the request of the career HAU attorneys, OSC has increased it's prosecution of Hatch Act violations, based partly on the surge on Hatch Act cases in FY 2004, and increasing flagrant violation of the Hatch Act. Again, the career employees of the HAU made recommendations on each Hatch Act case.

Finally, in response to your questions about a potential Hatch Act violation by Dr. Condoleezza Rice when she delivered various speeches during 2004, the matter was quickly reviewed and analyzed by career staff of the Hatch Act Unit within days of receipt of Rep. John Conyer's request in late October 2004. Career staff continued to analyze and process this case from that time. Any information to the contrary is incorrect. This review and analysis resulted in a recommendation to the Special Counsel that Dr. Rice's activities did not appear to have violated the Hatch Act. After a complete investigation of this matter, a final determination was made, which was consistent with the preliminary review.

VIII. Staffing and Contracts (70-80)

Since I took office, we have hired approximately 25 career Federal service employees, including 10 attorneys. We have followed both OPM regulations and OSC internal policies in hiring all of the employees, including the attorneys. We've hired individuals of all ethnic backgrounds, including a disabled immigrant from Trinidad, a Hispanic female and several African Americans. We also hired several American veterans, including a disabled veteran.

OSC attorneys are Excepted Service Schedule A attorneys. I was advised by the career staff upon taking office that attorneys could be hired either through competition or by direct appointment by the head of the agency. They explained to me that some Special Counsels have hired attorneys through one of those methods, some through the other, and some had used both methods. Due to the fact that OSC had several critical vacancies when I arrived, I exercised the ability to directly appoint several attorneys who had high credentials and came highly recommended to me. Since that time, we have followed a competitive process of interviewing all attorney candidates by an interview panel headed up by a career SES employee, who makes recommendations to me about which of the candidates should be hired. These candidates are individuals whom I do not know and do not interview. So it is clear for anyone to see that the process for hiring OSC attorneys is very consistent with the processes used in the past by previous Special Counsels.

The qualifications for hiring attorneys are the same or more stringent than they have been in this agency in the past. We hire attorneys right out of law school for our Complaints Examining Unit. They must have a record of excellent academic performance, as well as good legal internships and must demonstrate an interest in Federal employment law. We have hired attorneys from a wide variety of law schools, both from the Washington, D.C. area and from accredited schools across the country.

Attorneys hired into the Investigation and Prosecution Division obviously are more experienced and have experience in employment law.

There are five Schedule C special assistant appointees, a non-career SES and a Schedule C confidential assistant. Each of them has excellent credentials, including extensive legal, policy, process or financial experience within government and the private sector. They were instrumental in implementing the backlog reduction effort and in the process reform that has occurred to date in the agency. They are providing excellent day-to-day leadership, and are essential to the ongoing improvements in claim and case processing, training and reinforcement of my mission and vision. I am proud of them and their accomplishments.

Prior to my arrival at OSC, the Disclosure Unit varied over the years from a chief and two attorneys to a chief and four attorneys. When I arrived, it was a chief and three attorneys. We expanded that staff by adding two full time attorney positions to the unit and added a clerk to help with the processing of documents. We also channeled the full case processing ability of the entire Special Projects Unit for approximately two months, to assist the Disclosure Unit in addressing its backlog of cases.

There are currently six employees in OSC's Special Projects Unit. The new training unit and the new USERRA unit both currently reside in SPU. The other attorney and investigators who were in the SPU have returned to their usual operating units. This unit was used as a backlog reduction unit, as a laboratory for studying case processing methods, and as a cross training and professional development unit. It has at one time handled every type of matter that has come to the agency. It will continue on as-needed basis for handling cases and studying new process changes.

An organizational chart is attached which shows the number of attorneys, paralegals, clerks and investigators in the agency. *(See Attachment C).* There was some attrition in the last year, including several retirements. Most of the non-retirement departures were to other Federal agencies. We have filled the positions that came open at various times during FY04 and FY05. We expect to be even higher than previous staff levels, up to 113 by the end of the year.

The professional consulting firm, MPRI, was in fact uniquely qualified to conduct the organizational and process review of OSC. They have done the same type of analysis successfully for many government agencies, and have the reputation of doing excellent work, with discretion, without going over budget or causing undue disruption to the agency being analyzed.

The U.S. Treasury's Bureau of Public Debt handles the majority of our procurement process. OSC does the market research, and provides the necessary requirements for the Statement of Work. In this procurement, we performed market research, looking at three top Federal contractors (Booz Allen & Hamilton, Price Waterhouse Coopers, and MPRI).

Based on needs, timing and proven qualifications for the type of analysis we needed, we moved forward with a sole source justification to select MPRI, which was accepted by the U.S. Treasury's Bureau of Public Debt, and they performed the procurement.

Pricing was another advantage. We moved forward with MPRI for reasons of needs, timing and proven qualifications, but it would also have been the least expensive of the three, had we waited for full proposals. By timing I mean that MPRI was available quickly for a 3 month on-site work period.

MPRI did an excellent job of fulfilling the requirements of the contract. The contract value was $140,000, which was less than half the price of the Booz Allen proposal.

Finally, as I have explained previously, Alan Hicks was a short term intermittent consultant hire, hired under 5 USC § 3109 and 5 CFR § 304.103 which states that an agency may appoint a qualified expert or consultant to an expert or consultant position that requires only intermittent and/or temporary employment. He has a strong management and teaching background and was hired to assist in a process analysis of the work being performed by the agency, cross training, and curriculum. Mr. Hicks was paid total of $6,621.09 for intermittent work over three months in the amount of 123 hours. Mr. Hicks was not appointed in any way to avoid employment procedures. He was hired as a short term intermittent consultant for appropriate projects, in the way the statute was intended to be used.

Mr. Hicks participated actively in several planning and analysis meetings, presented at an agency wide training conference, and produced a draft report, which is not subject to disclosure.

No other special intermittent consultants have been hired by OSC. However, one technical consultant was hired for his expertise with computer database development and automation, in order to create web-based database and filing systems and automation.

IX. Other Matters (81- 87)

The reduction of the backlog and the restructuring of OSC, along with the reform of our standards and definitions on whistleblower disclosures, Hatch Act advisory opinions automation, reform of procedures for internal referrals, reduction of needless layers of review, and emphasis on team work and cross training, are embodiments of merit system principles and, I believe, will promote a lasting effect within the Executive branch for years to come. We have promoted from within, brought in great talent, and made this little corner of the bureaucracy more answerable, accountable, and results driven. Our employees are proud to have accomplished what few agencies can boast – clearing out the backlog of claims while at the same time increasing the swift justice

that employees of the civil service system deserve. I am proud of the work of the career staff who made this a reality though diligence, high professional standards, and impeccable ethics.

We have nearly doubled the amount of substantiated whistleblower cases that went to agencies for investigation in the last year over prior years. We have seen several important, high profile whistleblower matters come to fruition and make national press, thus giving the public and other Federal employees a sense of the significance of the matters disclosed as well as the fact that OSC vigorously pursues these disclosures when others do nothing. Courageous whistleblowers such as Ms. Shott, Messrs. Davenport and Forrester (Border Patrol fraudulent kickback scheme), and Ms. Whiteman (cover-up of near misses by FAA controller managers) represent only a fraction of the important cases that we substantiated and sent to the President and Congress.

It is a sad fact of what we do that most whistleblowers are reprised against and are, as Senator Grassley has said, about as "welcome as a pig at a barbecue" in their workplaces. It is also true that regardless of what we, or private attorneys do, it is hard to make someone whole who has been targeted and singled out for adverse treatment. Nevertheless, our career employees have tried valiantly to reverse this course, or when it happens, to protect the whistleblowers with everything we have and to see to it that discipline is administered. In Ms. Shott's case, discipline was administered to the supervisors and she received corrective action. It cannot but feel hollow to her and others given the extreme price they pay in terms of their jobs, their families, and their sense of security and appreciation for what they have done. Similarly, in Ms. Whiteman's case, discipline has been administered, the FAA facility in question is on no-notice status meaning that investigators can show up unannounced to make sure they are reporting operational errors. We do not discuss current actions of pending investigations. We are currently working on her case and also on Davenport for corrective action (Forrester retired in 2003).

As a result of our investigation, the Department of Homeland Security has reopened the investigation of the pervasive U.S. Border Patrol kickback scheme to look into management involvement.

If you talk to OSC's senior staff of career employees, as well as career line attorneys and investigators, you will find that they are quite proud of the job OSC has done this last year. We do not always agree with whistleblowers on every course of action, but we do stand up for their rights and do the right thing to discipline agencies when they do the wrong thing. In this, we have contributed to making the system work and to making officials more accountable and agencies more efficient.

Regarding settlement discussions with some former OSC employees, OSC originally provided the employees' attorney with standard settlement language that the employee's law firm had drafted and agreed to in previous settlements with the Federal government. Even setting that aside, OSC fully agreed to remove all language and terms that employees proposed and agreed to, but they would not agree to accept this. At this point, it was obvious that bad faith had entered, and OSC withdrew immediately from the settlement discussions with some former OSC employees.

Next, there was never an "gag order" on OSC staff. OSC did not violate the Lloyd LaFollette Act, 5 U.S.C. Section 7211. Section 5 U.S.C. Section 7211 states that:

"The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

Thus, under 5 U.S.C. Section 7211, for a Federal agency to violate the Lloyd LaFollette Act, the Agency must interfere with a Federal employee's ability to petition Congress. Since OSC never interfered with any OSC employee's right to petition Congress, OSC never violated the Lloyd LaFollette Act.

The allegation implies that "Mr. Bloch" in an April 9, 2004, e-mail somehow violated the Lloyd LaFollette Act and was allegedly a "gag order." However, a member of the career staff drafted and distributed the e-mail to the agency. The April 9, 2004, e-mail stated that all "official" Agency comments to Congress should be routed through OSC's Congressional and Public Affairs Office. However, the e-mail never mentioned, suggested, or even implied that any OSC employee would be denied their right to petition Congress, under the first amendment or Federal whistleblower protection rights. Rather, for OSC to speak with one voice on official Agency business, OSC employees were asked to have OSC's Office of Congressional and Public Affairs be the congressional liaison for all official comments on Agency business. Hence, the April 9, 2004, e-mail was really an OSC "housekeeping" matter to ensure proper OSC coordination.

Surprisingly, it appeared that some employees were confused about this coordination policy, especially since almost all Federal agencies have specific offices assigned for official Congressional matters. Any confusion was cleared up the very next day on April 10, 2004, when the Deputy Special Counsel required all OSC managers to tell their employees that, (1) the April 9, 2004, e-mail was not intended in any way to interfere with OSC employees first amendment rights, and (2) the April 9, 2004, e-mail was not intended in any way to interfere with any OSC employees whistleblower rights.

Therefore, the original e-mail on April 9, 2004, was not a "gag order" because it only concerned guidelines for providing official comments to Congress or official comments to the public on Agency business, and did not limit in any way OSC employees rights to petition Congress under the Lloyd LaFollette Act. In addition, the Deputy Special Counsel's directions to all OSC managers reaffirmed that the OSC policy was not a "gag order."

Finally, the results for FY 2004 annual survey responses will be included in FY 2004 Annual Report.

In closing, we appreciate your interest in OSC and I would ask that you focus on the true success of the career staff in addressing its long standing backlog problem and improving results for whistleblowers and other civil servants.

Sincerely,

Scott J. Bloch

Attachments

Attachment A

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

May 17, 2005

The Honorable David M. Walker
Comptroller General of the United States
Government Accountability Office
441 G Street N.W.
Washington, DC 20548

Dear Mr. Walker:

This letter is in response to the Government Accountability Office Report (#GAO-04-36), dated March 2004, on case management-related operations of the U.S. Office of Special Counsel. We are pleased to provide this follow-up to your initial report.

Upon taking office as the new Special Counsel, two major problems confronted the Office of Special Counsel (OSC): a serious backlog of cases in all of the units within the agency and a cumbersome structure of three separate Investigation and Prosecution Divisions (IPDs). It was not patently clear whether the problems stemmed from faulty organization structures or procedural inefficiencies, lack of adequate personnel, or a combination of these. Moreover, the agency seemed to lack a vision and needed performance goals and standards. Personnel did not seem strategically placed to solve agency challenges. Agency structure was process oriented, not results driven.

The backlog had plagued the agency for several years. The OSC Annual Report to Congress repeatedly discussed this problem. I viewed this as a problem that struck at the heart of the agency. If OSC could not timely address its own case load, Congress may task other agencies to assume the responsibilities of OSC. Moreover, it was my belief that chronic backlogs prevented OSC from "dispensing justice." I often repeated the adage, "justice delayed is justice denied."

Since I have been on board, much has been done to investigate and remedy these problems. I created a comprehensive plan to substantially reduce the chronic case backlog and also to ensure these persistent case backlogs do not occur again. The plan consisted of reorganizing several OSC offices, creating several new offices and streamlining internal OSC procedures.

Backlog Reduced

Because of the success of this plan, I am happy to report that OSC has reduced the overall case backlog by 82 percent, from 1121 to 201 cases, by the end of Calendar Year (CY) 2004. During this time the number of whistleblower disclosure cases in backlog was reduced to 82 from 674 in CY 2004. Moreover, during CY 2004, OSC reduced the backlogged prohibited personnel practice (PPP) cases in the Complaints Examining Unit from 447 to 119. Furthermore, during the backlog reduction project period, OSC increased by 22% the internal referral rate of meritorious cases for further action in the investigation and prosecution unit.

I will next discuss the role of each OSC office that assisted in the backlog efforts starting with the Complaints Examining Unit. In addition, I will also discuss four new OSC entities that will ensure no enormous backlogs occur again, the Special Project Unit, the Document Control Unit, the Training Office and the Customer Service Office.

Complaints Examining Unit

The Complaints Examining Unit (CEU) is the foundation of OSC. It is responsible for screening approximately 1,700 PPP cases per year. The cases that have merit and within OSC's jurisdiction are referred to the Investigation and Prosecution Division (IPD). The cases without merit on their face or not within OSC's jurisdiction are closed. It is the largest undertaking of the agency and is where it all begins. The unit has a strong sense of esprit de corps. The importance of this unit can not be over stated. If the CEU does not do a good job separating the good cases from the bad, it will have a direct effect on the efficiency of the IPD. If the CEU is too selective, OSC cannot accomplish its mission of "dispensing justice" and isn't serving the interest of the merit system. If it's not selective enough, the IPD would be bogged down with non-meritorious or seriously flawed cases and may ultimately have their own back log problems. The CEU must strike a delicate balance between these opposing ideals.

The CEU is a very well organized and efficient unit. The unit has a good mix of personnel between the lawyers and the human resource specialists. The lawyers bring analytical skills to the table and the human resource specialist brings much needed knowledge of federal human resources regulations.

Being that CEU is a screening unit for the IPDs, it must also strike a balance in the amount of work that is performed on each individual case between the two units. If each unit is duplicating the other's work, the benefit gained in the economy of scale (the CEU) is lost in inefficiency. Under this scenario there would be no reason to have a screening unit. Therefore, finding and eradicating duplication and overlapping work on each referral is very important to the success of the overall OSC mission.

Unlike many other investigative entities or agencies, OSC must, as a general rule, conduct an inquiry after receipt of complaints alleging the commission of a prohibited personnel practice.[1] The nature of the inquiry ranges from the CEU screening process to the IPD full field investigations, but one must be conducted after a complaint is filed. Complaints received by OSC can and often do involve multiple allegations, some of which can involve different prohibited personnel practices. In all such matters, an OSC inquiry requires the review of, and a legal determination about, each allegation and prohibited personnel practice.

The CEU Problem

When I took over at OSC, CEU was one of the "bottlenecks" was case processing. Too often cases were being stalled because of internal efficiencies. Moreover, CEU morale needed to be improved because CEU employees were considered "second-class citizens." The low morale was hurting case processing times which contributed to the OSC-wide case backlog.

The CEU Solution

To streamline CEU operations and reduce any future case bottlenecks, OSC created three processes that will make CEU more efficient. First, all CEU referral memos are now limited to one and a half pages of facts, with relevant legal analysis. Previously, CEU referral memos were an exhaustive rehashing of facts and law that was of minimal value to the Agency. Much attorney and investigator time was spent on something that could be completed in days rather than weeks. Moreover, the old CEU referral memos were one of the primary reasons for the CEU slow case processing times. In addition, our investigation showed that when the case was referred to the IPD, the lawyer would simply end up duplicating this effort.

Second, OSC has addressed internal CEU personnel concerns. The CEU examiners said they felt like "second class citizens" and are under appreciated within the agency. This was directly attributed to the lower pay scale. Moreover, as a screening unit, the CEU file work is

---

[2] Compare, for example, 5 U.S.C. § 1214(a)(1)(A) ("The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.") with 5 U.S.C. app. 3, § 6(a) ("[E]ach Inspector General ... is authorized-- ... (2) to make such investigations and reports relating to the administration of the programs and operations of the [agency] as are, in the judgment of the Inspector General, necessary or desirable[.]") and § 7(a) ("The Inspector General may receive and investigate complaints or information from an employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.").

OSC cannot, however, investigate complaints over which it has no jurisdiction, with the result that some complaints are closed without further action after receipt and review. In addition, discrimination based on race, color, religion, sex, or national origin, age, or handicapping condition is illegal under laws enforced by the Equal Employment Opportunity Commission (EEOC), and is also a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). However, since procedures for investigating discrimination complaints have already been established in the agencies and the EEOC, the Special Counsel will normally avoid duplicating those procedures and will defer to those procedures rather than initiate an independent investigation. 5 C.F.R. § 1810.1.

more cursory which does not allow the employees to showcase their legal talents. Their feelings of second-class status and lower pay potential may lead to future OSC leaders leaving the agency. We must retain our good people in the CEU. Therefore, OSC is exploring ways to increase the promotion potential of CEU employees, such as having all CEU employees being at the GS-14 working level, as opposed to the current GS-13 level, and allowing for CEU employees to be detailed to the IPD for more extensive investigations and legal experiences. In the past, the lower morale within CEU also contributed to the OSC-wide case backlog.

Third, OSC has addressed CEU procedural problems that were delaying case processing. On partial referrals, the CEU was forced to keep the cases until the "16 day letter" process was completed. Partial referrals are cases CEU refer for investigation but CEU recommends closing other issues within the same claim. This would cause a delay of up to 25 days on many referrals. Lastly, there was no process that allowed the examiner to demand more clarity when the complainants would not follow the OSC Form 11[2] and/or forwarded voluminous non-catalogued documents. These problems caused overlapping of services and delays in processing. OSC resolved these problems by having the IPDs, not the CEU keep cases on partial referrals. This will avoid the above-mentioned lengthy delays. In addition, CEU will not accept any complaints that did not have a completed OSC Form 11.

While these CEU processes will help reduce future case backlogs, OSC is 100% committed to ensure all cases receive a full and fair resolution. To this end, the CEU referral rate, the rate in which CEU refers cases for further investigation was the same percentage in FY 2004 as FY 2003, 10%. Thus, OSC did not superficially close meritorious cases during the backlog reduction efforts. In fact, the PPP referral rate went up dramatically during the Special Project Unit (SPU) process of attacking the backlogged cases (from April-September 2004), the referral rate more than doubled to 22%.

Table 1: Complaints Examining Unit Cases, CY 2004

Calendar Year[3]	Beginning Inventory	Cases Received	Total Caseload	Processed Cases	Ending Inventory
2004	447	1837	2284	2165	119

Table 1 shows that OSC received 1837 new PPP cases in calendar year 2004 and were able to reduce their caseload to 119 by the end of CY 2004.

Investigation and Prosecution Division

[2] OSC Form 11 is filled out by complainants and sent to OSC detailing their prohibited personnel practice allegation.
[3] FY numbers are not available. OSC recently changed its database to collect the data from this point forward.

After receiving a case referral from the CEU, working together with investigators, IPD staff attorneys determine whether OSC's investigation has established any violation of law, rule or regulation, and whether the matter warrants corrective or disciplinary action, or both. The IPD conducts investigations to review pertinent records and to interview complainants and witnesses with knowledge of the matters alleged. Matters undergo legal review and analysis to determine whether the matter warrants corrective action, disciplinary action, or both.

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).

If OSC believes a prohibited personnel practice has been committed and initiates discussions with an agency, the matter is often resolved through negotiation. Before OSC may initiate an enforcement proceeding seeking corrective action (relief intended to make an aggrieved employee whole) at the MSPB, the Special Counsel must make a formal request to the agency involved, reporting on its findings and recommendations. Only when the agency has had a reasonable period of time to take corrective action and fails to do so, may OSC proceed to petition the MSPB for corrective action.[4] When an agency refuses to grant appropriate corrective action, OSC generally proceeds to file a complaint with the MSPB.

If OSC determines that disciplinary action (the imposition of discipline on an employee who has committed a violation) is warranted, it can file a complaint directly with the MSPB.[5] 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.

The IPD Process

The large number of backlogged and pending cases was due to several factors. First, the three IPD structure was too top heavy and too "stove piped." All three IPDs seemed to work independent of each other, with no central oversight. Each IPD seemed to have its own internal process for case handling. Also, there was a real possibility that OSC's prosecutorial discretion could be used inconsistently.

Second, within the IPD structure, there was a real concern for how the Field Offices (FOs) were being underutilized. Although OSC statistics showed that the FOs were very successful in case handling, there was a strong perception, with supporting statements from employees, that the FOs were not getting their share of good cases. Moreover, cases forwarded to headquarters from the Dallas and San Francisco Field Offices were languishing without movement and little could be done to rectify the problem. If OSC was going to continue to deploy FOs, they needed to be equal members of the team and fully engaged in the mission of the agency.

---

[4] 5 U.S.C. § 1214(b)(2)(C).
[5] 5 U.S.C. § 1215.

Third, it was clear the IPD structure had been too rigid in its approach to the backlog of cases in other units within the agency. Other units within the agency have seen an explosion of claims in the past few years, the Disclosure Unit (DU), the Hatch Act Unit (HAU), and the Freedom of Information Act Unit (FOIA). OSC has had ever increasing backlogs, yet shifting resources to these units from the IPDs have been rare and were resisted due to a lack of support from the previous OSC Administration.

The IPD Strategy to Reduce the Backlog

I created four mechanisms that substantially reduced the PPP case backlog and will ensure this large backlog will not occur again.

First, we created a one IPD structure. Previously we had three IPDs but no one person was in charge. This led to inefficiencies and inconsistent policies and procedures. It is also troubling that no one person is charged with objectively determining what is best for OSC as it relates to the IPDs. Each division head became an advocate for their own unit. Their focus was on their unit and meeting the demands of that unit, not on the overall mission of OSC. This is likely why little was done to shift personnel to address backlogs in other units over the past several years (coupled with a lack of cross-training that is one of OSC's new initiatives).

Moreover, the three IPD structure has led to inconsistent internal procedures. The administrative staff is required to memorize and implement a wide variety of procedures on cases that have the same underlying allegations. Having inconsistent procedures also causes problems when professional staff is detailed to a different IPD. Different procedures can be beneficial when attempting to find the best practices; it's good to test out different methods. However, OSC has been in business long enough that we can settle on one case handling procedure. Rare exceptions may be granted to accommodate personnel staffing matters.

Part of the inconsistent practices of the IPDs has been the contradictory use of investigators. Some units emphasized the use of investigators and others did not. OSC must decide the proper role of the investigator. Previously, investigators and attorneys were placed together to work as teams. Cohesive units were created that had worked well in many cases.

Second, OSC is creating a new policy to either prosecute or resolve cases within two years of receipt. Many of the backlogged cases were found in the three IPDs. Numerous cases were gathering dust for over two years without any action. This is unjust and not consistent with OSCs mission of protecting the merit system. With this new policy, Federal workers will know the result of their complaint within two years of filing a case with OSC.

Third, the Agency FO's will be better integrated into OSC. The FO's had procedures and policies that work well in resolving the cases they receive, but were not being effectively used. As previously mentioned, cases that were in the field for several years were not moving forward. They languished under the rubric of inaction often due to a bottleneck of paperwork that they had

forwarded to headquarters for approval and also due to a lack of reasonable professional autonomy. Moreover, the field offices didn't have an effective advocate for their interests and were considered "second-class citizens".

The new system of powering down from Washington, DC, will provide better knowledge, clout and case management with OSC headquarters. Senior managers in the field can better resolve caseload management that has been a field concern.

The expanded use of FOs is in keeping with the team concept that was implemented in the last agency reorganization. This team concept and cohesive modular unit approach is retained and emphasized in this reorganization. In keeping with the field office concept, OSC opened a new field office in Detroit, MI on March 20, 2005. The Detroit Field Office will provide a presence in the upper Midwest to protect Federal workers and inform them of their legal rights.

Fourth, to provide more access to senior management for Agency investigators, OSC is creating a senior investigator position that will attend senior staff meetings. This will provide investigators with a "voice at the table". The senior investigator will be able to recommend procedural changes that can make OSC run more efficiently. In the past investigators had excellent ideas to streamline OSC cumbersome procedures but those recommendations went nowhere because they had no voice with senior management. Moreover, OSC investigators were not utilized efficiently. On many occasions OSC attorneys were both investigating and prosecuting cases, when investigations were clearly the responsibility of the investigator. OSC attorneys were wasting valuable time investigating cases when they should be resolving legal issues.

Hatch Act Unit

The Hatch Act prohibits federal employees, employees of the District of Columbia (D.C.) government, and some employees of state and local governments from engaging in certain types of political activity. Amendments enacted in 1993 permit most federal and D.C. employees to take an active part in partisan political management and in partisan political campaigns. Nevertheless, there continue to be important restrictions on the political activities of federal employees, including partisan candidacy, solicitation of political contributions, and political activity while on duty.

The Hatch Act Unit, is responsible for a nation-wide program that provides federal, state and local employees, as well as the public at large, with legal advice on the Hatch Act. Specifically, the Hatch Act Unit has the unique responsibility of providing Hatch Act information and legal advice to White House staff, Congressional staff, the national press, senior management officials throughout the federal government, and state and local government officials. The Hatch Act Unit provides all of OSC's advisory opinions, which enable individuals to determine whether they are covered by the Act, and whether their contemplated activities are permitted under the Act.

The Hatch Act Unit also enforces compliance with the Act by receiving complaints alleging Hatch Act violations, conducting preliminary inquiries into complaint allegations and, where warranted, further investigating allegations or referring the complaints to OSC's IPD section for further investigation. Depending on the severity of the violation, the Hatch Act Unit will either issue a warning letter to the employee, attempt to informally resolve the violation, prosecute the case before the MSPB or send it to an IPD to prosecute before the MSPB.

The volume of Hatch Act investigative matters and advisory requests have significantly increased during the last several years due to growing public awareness related to OSC's enforcement efforts and national press attention. In addition, the very nature of their work causes a wide variation of their file count. Every two years they will have a significant change in the number of claims. This causes problems when making decisions on permanent staffing. Staffing for the "high water mark" would mean down time during the off years. Alternatively, OSC could train reserve staff to work in the HAU during the peak years.

The HAU Backlog

The HAU was not being run efficiently or effectively. Its operating procedures bogged down case processing and contributed to the large number of backlogged cases. Moreover, there were not enough OSC employees to assist the HAU during their election year surges.

Table 2. Hatch Act Cases Case Inventories, Fiscal Year 2003 vs. Fiscal Year 2004

Fiscal Year	Beginning Inventory	Cases Received	Processed Cases	Ending Inventory
2003	260	196	201	255
2004	255	248	357	146

Table 2 shows that the Hatch Act Unit had an increase in caseload from FY 2003 because of a busy 2004 election season. Typically, the Hatch Act Unit receives about 14 complaints per month on average. In 2004, however, OSC received 43.5 complaints per month from August through October 2004, and received 48 in November 2004 alone. In addition, OSC issued 3,913 advisory opinions (in response to telephone, written and e-mail inquiries) in FY 2004 compared to 3,284 in FY 2003. In other words, the unit was still able to process nearly twice as many cases in that time frame while handling 600 more advisory opinions.

HAU Strategy to Reduce the Backlog

I used six mechanisms to reduce the HAU case backlog. First, we are creating a cadre of Hatch Act knowledgeable employee's on-standby to be used when the Hatch Act unit becomes overwhelmed with cases. Starting in March 2005, Hatch Act employees will be training other non-Hatch Act OSC employees on Hatch Act matters. Moreover, to make matters easier for this reserve Hatch Act employees, the Hatch Act is automating all of its advisory opinions and Hatch

Act advisory and log book procedure so that it can be used by other attorneys to do Hatch Act research. Thus, any increase in Hatch Act cases could be handled by this Hatch Act trained employees that will assist the unit during case surges.

Second, I have powered-down decision-making authority to the capable HAU attorneys. HAU attorneys can now sign their own letters and pleading on routine matters. Previously, either the HAU Chief or the Division Head signed all letters and pleadings generated by the unit, no matter how insignificant, which caused significant delays in each case.

Third, I streamlined its internal procedures on referring cases to the IPDs. The Hatch Act Unit now refers cases to the IPDs with one short memorandum. Previously, OSC guidance required three separate memoranda and four additional meetings whenever a HAU case is sent to the IPDs for investigation and prosecution. All of these meetings and memos were to be vetted by the HAU Chief. These meetings and memos caused several weeks delay in case processing.

Fourth, the HAU is creating an electronic filing form that can streamline needless processing time by requiring the complainant to answer specific questions on the form. Moreover, this will reduce return phone calls from HAU attorney and diminish the number of non-meritorious claims. Previously, the HAU had no electronic filing mechanism. The HAU attorney would have to call the complainants about information that was not in their correspondence. With this new electronic filing form, the HAU attorneys can receive all of their relevant information in one place without delay.

Finally, the HAU is indexing advisory opinions and log book entries so they will be available for legal research, by hard copy or on line. Previously, an OSC attorney needed individual recall of specific legal cases to use this research tool. In the future, with the emphasis on cross-training, lawyers outside the Hatch Act will need this resource during surges such as election years.

The Whistleblower Disclosure Unit

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, or 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 whistleblowers, and advising the Special Counsel whether it shows that there is a substantial likelihood that the type of wrongdoing described in § 1213(a) has occurred or is occurring. Where a substantial likelihood 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), the whistleblower

is also provided with a copy of the report for comment. The Special Counsel is then required to review the report in order to determine whether it meets the requirements of the statute and its findings appear reasonable. Finally, the report is forwarded to the President and appropriate Congressional oversight committees.

The Disclosure Unit's caseload has been increasing due to growing public awareness of the Unit's work. In recent years, it has handled several high profile cases that have received widespread national press attention. In addition, after the terrorist attacks of September 11, 2001, more federal whistleblowers came to OSC with national security allegations and concerns. Many cases handled by the Disclosure Unit involve complex issues; some involve classified material and must be handled according to federal requirements.

The Disclosure Unit's more complex cases are very labor-intensive and often require the attention of more than one attorney. These cases can take more than a year to complete for a number of reasons—agencies routinely request additional time to conduct the investigation and write the report, whistleblowers request additional time to prepare their comments, and Disclosure Unit attorneys and the Special Counsel must review the report to determine whether it contains the information required by statute, its findings appear reasonable, and to prepare any comments the Special Counsel may have on the report. Finally, it is important to note that the backlog of cases in the Disclosure Unit further lengthens and delays this process.

The DU Backlog

This unit had severe backlog issues. At the end of FY 2003, DU had 690 cases in its inventory. With so many cases sitting in backlog, justice was not being given to Federal whistleblowers. Although a majority of these cases were slated for closure by my predecessor as lower priority cases as far as severity of potential harm, we nearly doubled the number of referrals in FY2004. Moreover, the Agency referrals increased from 14 in FY2003 to 26 in FY2004.

The DU Backlog Reduction

The DU case inventory was significantly reduced by the end of FY 2004, as demonstrated by the following table.

Table 3: Whistleblower Disclosure Case Inventories, Fiscal Years 2003 vs. 2004

Fiscal Year	Beginning Inventory	Cases Received	Total Caseload	Processed Cases	Ending Inventory
2003	556	535	1091	401	690
2004	690	572	1262	1154	108

Table 3 shows that OSC substantially reduced the DU backlog from 690 cases in FY 2003 to 108 in Fiscal Year 2004, an 85% reduction. Moreover, DU achieved this large backlog reduction while processed almost three times as many cases in FY 2004 as compared to Fiscal Year 2003. In addition, the FY 2004 ending inventory for DU was over 600% less than FY 2003, 108 cases vs. 690 cases.

Moreover, the Agency referrals (to Agency Head or IG) increased from 14 in FY 2003 to 26 in FY 2004.

The DU Backlog Reduction Strategy

I created four mechanisms that substantially reduced the whistleblower disclosure backlog and ensured that this large backlog will not occur again. First, DU is now using the correct definition of substantial likelihood. The primary procedural delay in processing DU cases stemmed from the legal standard previously used by the DU in defining "substantial likelihood." The DU previously used the following standard:

> *Substantial likelihood is a determination that the allegation is reliable and credible and supported by evidence leading to the conclusion that a strong probability exists that the alleged governmental wrongdoing or misconduct occurred.*

Theoretically this standard was similar to "preponderance of evidence." However, in practice, DU was using a higher standard than "preponderance of evidence", akin to a "clear and convincing evidence" standard. Using this higher evidentiary standard has two major disadvantages. First, it causes delays when DU members search for information to meet this high standard, which was not necessary. Second, being that the federal agencies which would eventually perform a full investigation after the OSC referral use "preponderance of evidence," OSC was not referring cases that ultimately may be substantiated by the agency if the case had been referred.

Using such a high standard, in practice and in theory, seems to fly in the face of OSC's clear statutory mandate. Congress did not give OSC the right to investigate these disclosures. Consequently, OSC will now use the following definition:

> *Substantial likelihood is the determination that the agency is more likely than not to find the allegation substantiated at the conclusion of its whistleblower disclosure investigation.*

Second, we put in place the "3B" pilot project screening unit. The 3B cases are those that are not a substantial and specific danger to public but are still low priority disclosures. In other words, they are important disclosures but not as important as other disclosures such as airplanes falling out of the sky or an Army rocket system not working. We will be adding staff to the DU screening unit later this fiscal year. The goal of this "screening unit" within the DU will be to

resolve 3B cases as efficiently as possible, and free DU personnel to concentrate on the higher level cases as mentioned above.

Third, we created streamlined DU standardized operating procedures that will delayer and power-down to DU employees the ability to resolve cases and make referral and closure recommendations. Previously, the DU employees had several layers of discussion and review before making any recommendations. Moreover, the DU's revised operating procedures will allow for a more efficient DU, concentrating on the most challenging cases and matters.

New OSC Entities Created That Will Reduce Future Backlogs

During my tenure, I created four new OSC entities that will help reduce future backlogs, the Special Projects Unit, the Training Office, the Document Control Branch, and the Customer Service Office. Each will play a major role helping OSC become more efficient and effective.

Special Projects Unit

The Special Projects Unit (SPU), created in April 2004, managed Agency resources directed at the OSC-backlog reduction efforts. It also provided invaluable assistance in tackling the oversight of the backlog. The SPU was the "fireman" of the Agency. SPU directed that the more experienced litigators in the Agency from the investigation and prosecution divisions review and make final determinations on cases. During 2004, when backlog reduction efforts needed a boost, SPU filled in and helped, with manpower and hard work. Because of SPU exemplary efforts in helping reduce the OSC case backlog, they now are the Agency's official watchdog on case backlogs. SPU is keeping a watchful eye on the total PPP and DU cases and ensure that OSC will resolve any large inventory of cases before they become backlogged.

Training Office

A new training office was created to better serve Federal employees. Previously, training of new employees is performed on an ad hoc basis and OSC had no office or personnel that were principally dedicated to training. OSC personnel learned as they performed the mission of the agency. OSC needs to take the time and spend the resources to train personnel before they are thrown into the business of the agency. Eventually it will serve the best interest of the employee and the agency.

Moreover, this lack of a training office contributed to the case backlogs. OSC employees could not assist other units because they did not know that particular area of law. Therefore, when case backlogs began piling up, OSC did not have a "bench" to assist during a crisis. OSC needs to create a culture of cross-training. Once cross-trained, OSC employees will be a ready reserve when other units within the agency develop backlogs.

Document Control Branch

I created a Document Control Branch (DCB) to facilitate and better track Agency records. Previously, records management was performed by a patch-work of OSC employees, but always being a second thought. The old system was not efficient and did not work well. Misplaced or lost files and mail contributed to PPP and DU case backlogs. The DCB must be independent of any of the operational units. This office has four basic functions: (1) intake of all mail, (2) data entry on all mail and new files, (3) distribution of all mail and completed new files and, (4) archive of all closed files.

The key to successful records management is to have personnel that can quickly identify all mail and the different cases handled by OSC and then place them on the proper distribution track. This will require on-going training by the operational units, through the Training Office to explain their needs.

Customer Service Office

To better serve the merit system and the federal workforce, I created a Customer Service Office (CSO). This office will relieve OSC operational personnel from the responsibility of dealing with the general public (which is actually a support function). The CEU will no longer be tasked with telephone duty known as officer of the week duties, a time consuming task that helped contribute to CEU's backlog of cases. OSC employees, however, are still responsible for responding to inquires on their own cases, but will not be tasked with answering general questions from the public. The CSO will take all calls and inquiries from individuals and organizations that do not have pending claims in this agency.

This will have a positive effect on the general reputation of OSC, benefit our customers and our operational units. Having specific personnel assigned for this purpose will help OSC gain a reputation of better customer service within the federal workforce and better serve that community. Our customers will gain by having OSC personnel that are solely dedicated to their needs. Finally, the CSO should be able to cut down on non-meritorious claims by giving realistic advice before a claim is filed. Thus, our operational personnel will be free to focus on claims that truly affect the merit system.

Conclusion

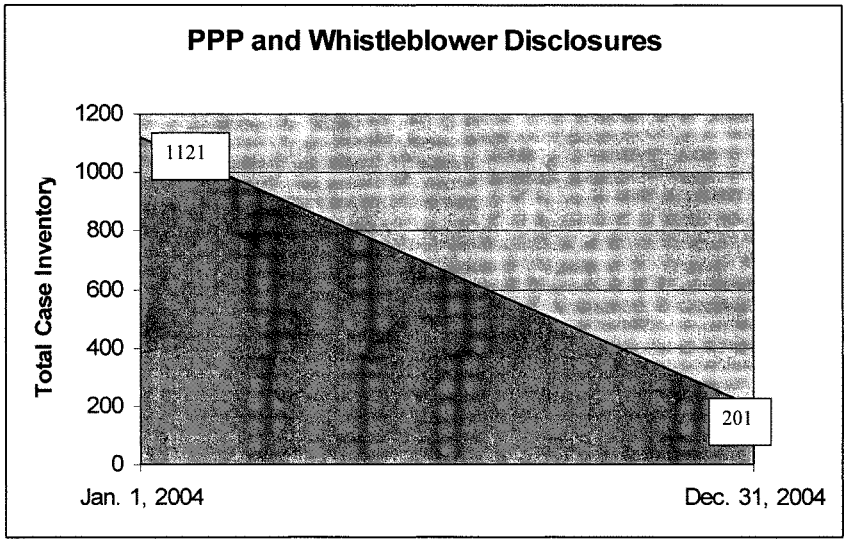
With streamlined OSC PPP and DU procedures, powering-down decisions to the attorneys and investigators and away from Washington, DC, creating a new Training Office, a Document Control Branch and a Customer Service Office. I am pleased that OSC was able to nearly eliminate three separate unit's backlog of cases in one year, while increasing justice for employees and giving cases a closer look. With the new internal policy and procedure changes explained above, I am confident that OSC is ready to tackle the challenges and eliminate future backlogs. We look forward to working with federal employees and Congress to continue this important mission.

Sincerely,

Scott J. Bloch
Special Counsel

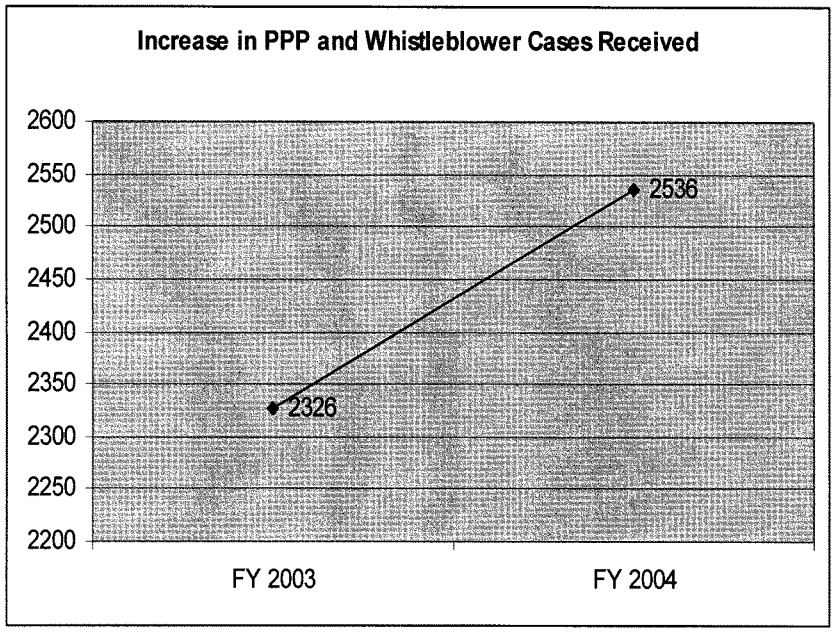
Attachment A: PPP and Whistleblower Disclosure Backlog Case Chart
Attachment B: PPP and Whistleblower Cases Received Chart
Attachment C: PPP and Whistleblower Cases Pending Chart
Attachment D: PPP and Whistleblower Cases Processed Chart

Attachment A: OSC Backlogged Cases in CY 2003 vs. CY 2004



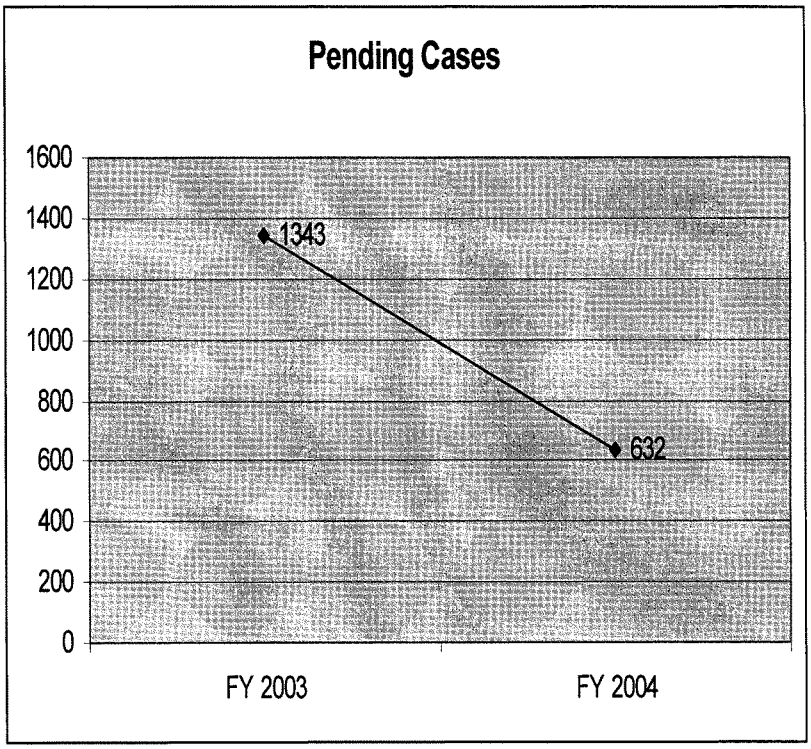
OSC has substantially reduced the backlogged prohibited personnel practice (PPP) cases in the Complaints Examining Unit from 447 to 119 cases. Additionally, OSC has reduced the number of whistleblower disclosure cases in backlog from 674 to 82. **Therefore, the overall case backlog reduction is 82% .**

Attachment B: Cases Received in FY 2003 vs. FY 2004



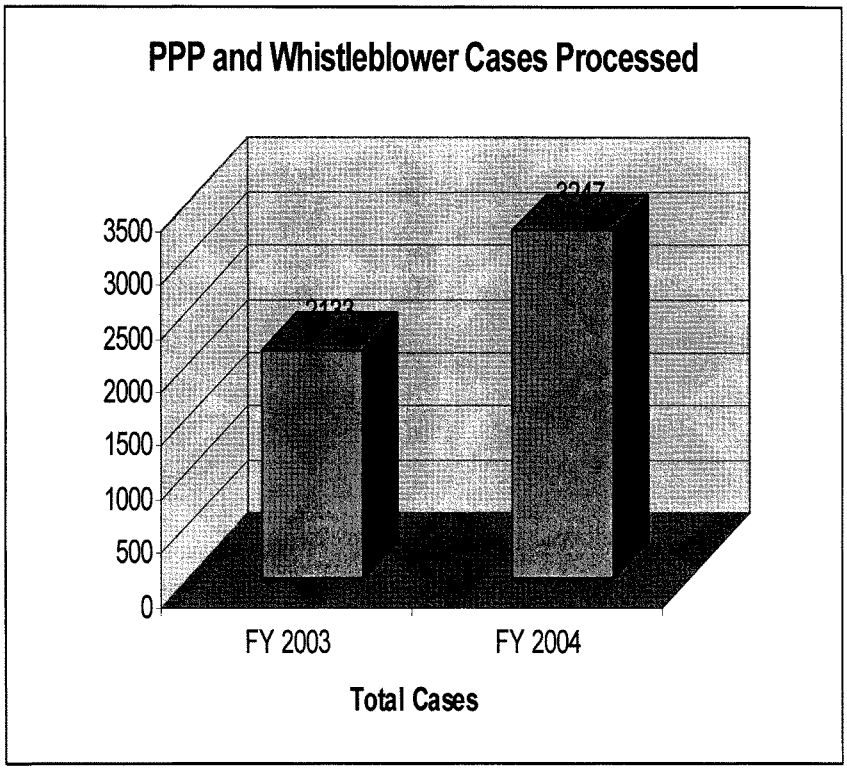
Our total number of PPP and Whistleblower Disclosure cases received increased from 2326 in FY 2003 to 2536 in FY 2004, an increase of almost 10%. Despite this increase, OSC substantially reduced the recurring case backlog.

Attachment C: PPP and Whistleblower Pending Cases FY 2003 vs. FY 2004



OSC has reduced the total number of pending PPP and Whistleblower Disclosure cases from 1343 in FY 2003 to 632 by the end of FY 2004, more **than a 50% reduction in pending cases.**

Attachment D: Total Cases Processed FY 2003 vs. FY 2004



OSC processed over 50% more PPP and whistleblower cases in FY 2004 than FY 2003.

Attachment B

LAW OFFICES
BERNABEI & KATZ, PLLC
1773 T STREET, N.W.
WASHINGTON, D.C. 20009-7139

(202) 745-1942
TELECOPIER: (202) 745-2627
E-MAIL: BERKATZLAW@AOL.COM
WEBSITE: WWW.BERNABEIANDKATZ.COM

LYNNE BERNABEI
DEBRA S. KATZ °
LISA J. BANKS
ARI M. WILKENFELD +
ALAN R. KABAT +
GENA E. WILTSEK °
AVI L. KUMIN *
RASHIDA A. ADAMS

· OF COUNSEL:
DAVID J. MARSHALL
ELAINE D. KAPLAN

+ADMITTED IN MD ALSO
°ADMITTED IN NY ALSO
*ADMITTED IN CA ALSO

BY TELECOPIER AND FIRST CLASS MAIL

March 1, 2004

Honorable Scott J. Bloch
Special Counsel
U.S. Office of Special Counsel
1730 M Street, NW
Washington, D.C. 20036

Re: OSC Press Release "Legal Interpretation of Discrimination Statute"

Dear Mr. Bloch:

I am writing to you concerning the press release that the Office of Special Counsel (OSC) issued on February 27, 2004, entitled "Legal Interpretation of Discrimination Statute." The third paragraph of that release--which suggests that OSC began asserting jurisdiction over sexual orientation discrimination complaints five years ago on the basis of an Executive Order--is demonstrably inaccurate. A review of this issue with the career staff who handled such complaints during my tenure, not to mention an examination of any number of documents that are at your disposal, would confirm that OSC was relying upon the statute – 5 U.S.C. 2302(b)(10) -- and not the Executive Order, in asserting its jurisdiction.

In the release, you are quoted as stating that "beginning five years ago, this Office based jurisdiction in this area [i.e. discrimination based on sexual orientation] on the amendment to Executive Order 11487, made by Executive Order 13087." You then go on to explain that this supposed basis for OSC jurisdiction was questionable because "Executive Order 11487, as further amended by Executive Order 13152, expressly states that it 'does not confer any right or benefit enforceable in law or equity against the United States or its representatives'." You also state that responsibility for the enforcement of Executive Order 11487 rests with the EEOC, and not OSC. The release then quotes you as purporting to base your decision to conduct a "full legal review of this policy" and to stop advising federal employees of OSC's authority to enforce the prohibition on sexual orientation discrimination on the fact that OSC had previously employed this questionable legal analysis based on the Executive Order.

The quoted statements are inaccurate. Indeed, I cannot imagine where you derived this understanding of the basis for OSC's pre-existing policy regarding sexual orientation discrimination complaints. During my tenure, OSC always predicated its jurisdiction over such complaints on a statute-- 5 U.S.C. 2302(b)(10). That statute, as you know, makes it a "prohibited personnel practice" to discriminate against an employee based on conduct that does not affect their performance or the performance of others. I trust that you will acknowledge that there is no question that OSC has the authority to enforce compliance with that provision, notwithstanding that you and I apparently disagree on how the provision should be applied in this context.

Ironically, a review of the very documents that you removed from OSC's website or have otherwise embargoed would confirm that the statute, and not the Executive Order, was the basis for OSC's assertion of jurisdiction in sexual orientation discrimination cases. These documents referred to the statute whenever they cited legal authority, and in no instance did they refer to the Executive Order. For example, in the case of the press release that was removed from the website concerning the Internal Revenue Service employee matter, both OSC's public and internal documents specifically cite the statutory prohibition against discrimination based on conduct that does not affect performance in describing the legal basis for OSC's assertion of jurisdiction. The release does not mention the Executive Order at all. I have enclosed a copy of that press release for your consideration, to refresh your recollection on this point.

The Executive Order in question was issued in June 1998, one month after I began my term as Special Counsel. As a result, throughout my term, I received questions about its impact and had occasion to publicly discuss its effect on the jurisdiction of OSC to receive and investigate complaints alleging sexual orientation discrimination. Each time, I took pains to explain, often to a lay audience, that the Executive Order was largely symbolic in its expression of the President's endorsement of the policy of nondiscrimination, and that there already existed a statutory basis for prohibiting and remedying sexual orientation discrimination—section 2302(b)(10). In fact, OPM's guidance on sexual orientation discrimination, which it issued in the wake of the Executive Order in consultation with OSC, specifically explained that the Executive Order did not create any new enforceable rights, but that federal employees had pre-existing statutory rights to be free of discrimination based on sexual orientation.

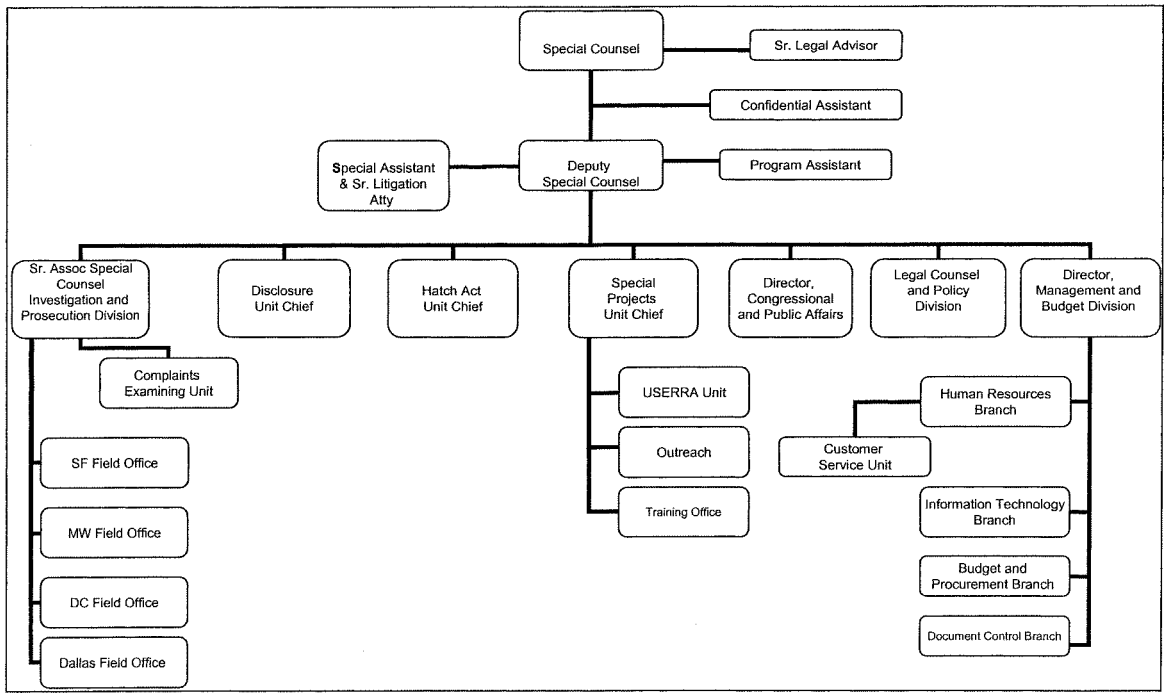
In light of the foregoing, I was frankly astonished when I read your press release. I do not question your authority to conduct a legal review of any of the policies or interpretations followed during my tenure or to reverse them entirely if, in your judgment, they were incorrect. Nonetheless, it is disingenuous at best to publicly mischaracterize the basis for those policies and interpretations, and to use that mischaracterization to justify your decision to conduct a "legal review" in the first instance. If you believe that section 2302(b)(10) does not prohibit discrimination based on sexual orientation, you will eventually be obligated to explain the basis for your conclusion to the public, as well as relevant oversight committees. Mischaracterizing the basis for OSC's previous position on the issue may serve as a temporary distraction, but you cannot postpone the discharge of that obligation forever.

Given the controversy that has arisen out of your recent actions involving this issue and the inaccurate statements contained in your release, I feel compelled to correct the record through this letter. In addition, as you might imagine, your public statement alleging that OSC relied upon a faulty legal analysis when it asserted jurisdiction over sexual orientation discrimination cases five years ago, has lit up my phone lines. Please be advised that, in response to Congressional and press inquiries, it is my intention to share a copy of this letter where I feel it is appropriate.

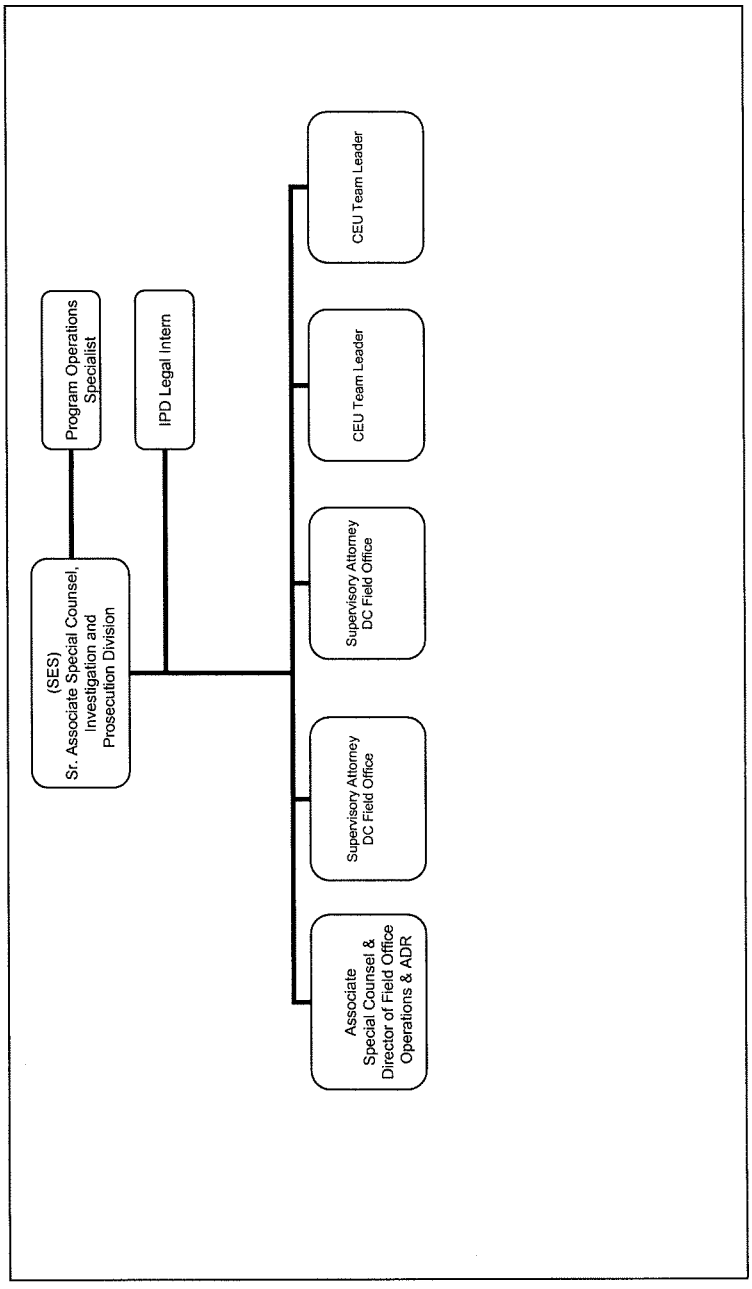
Sincerely,

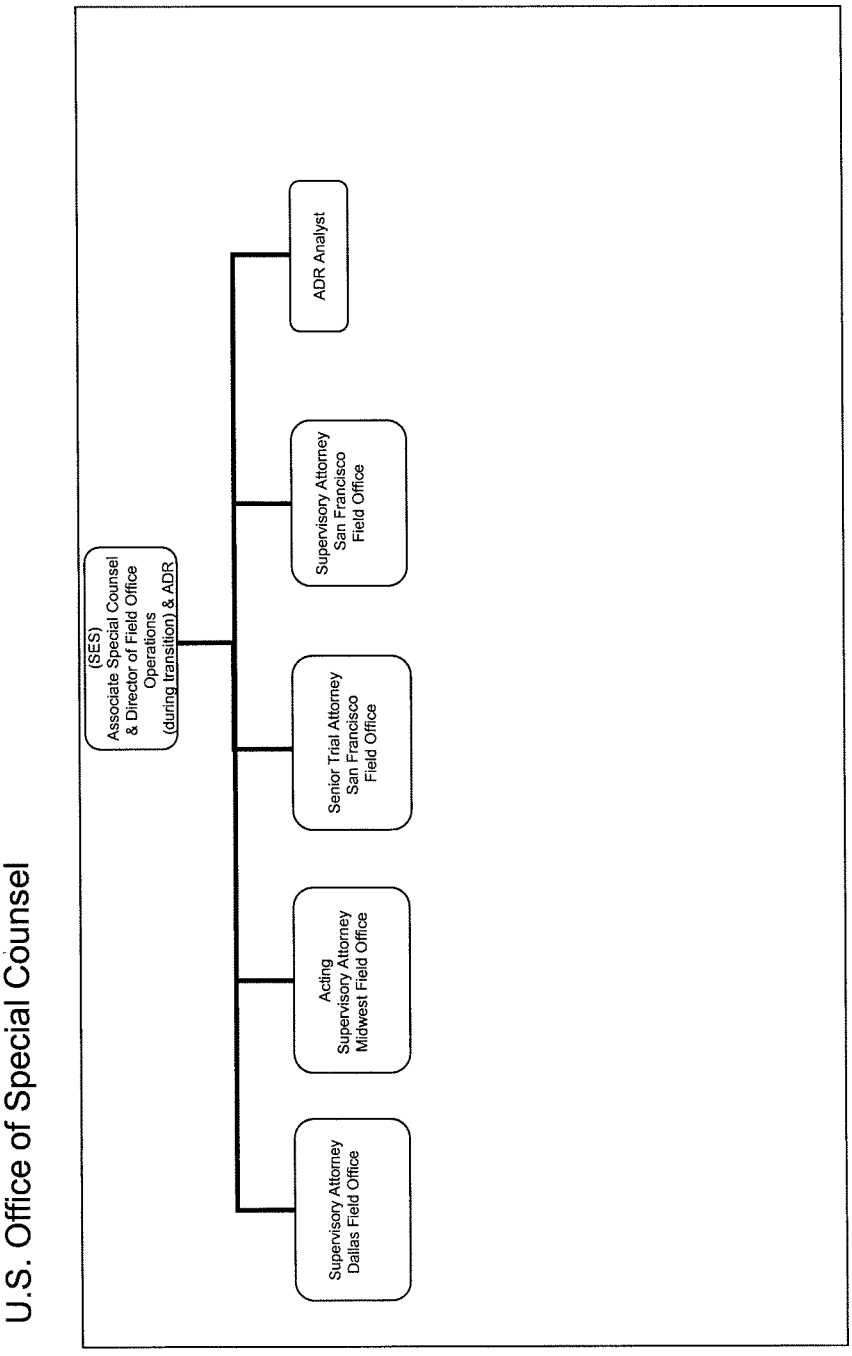
Elaine Kaplan

U.S. Office of Special Counsel

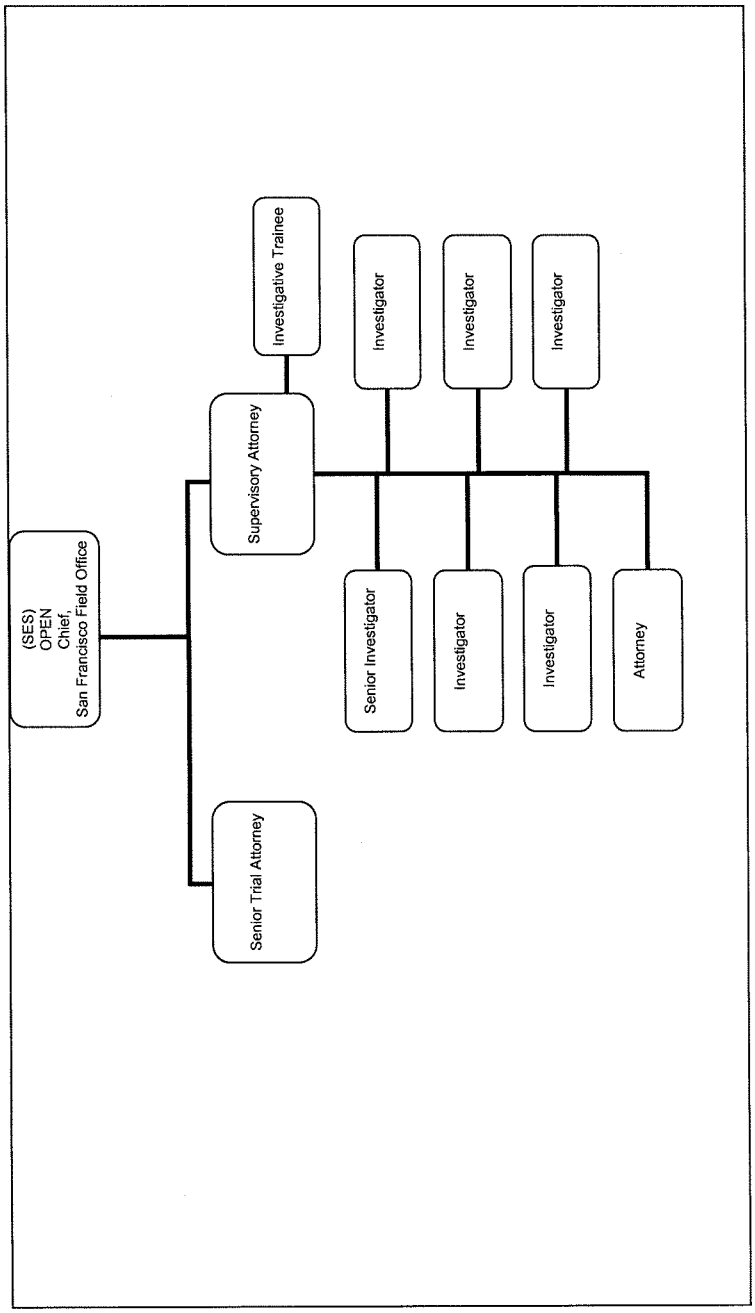


U.S. Office of Special Counsel

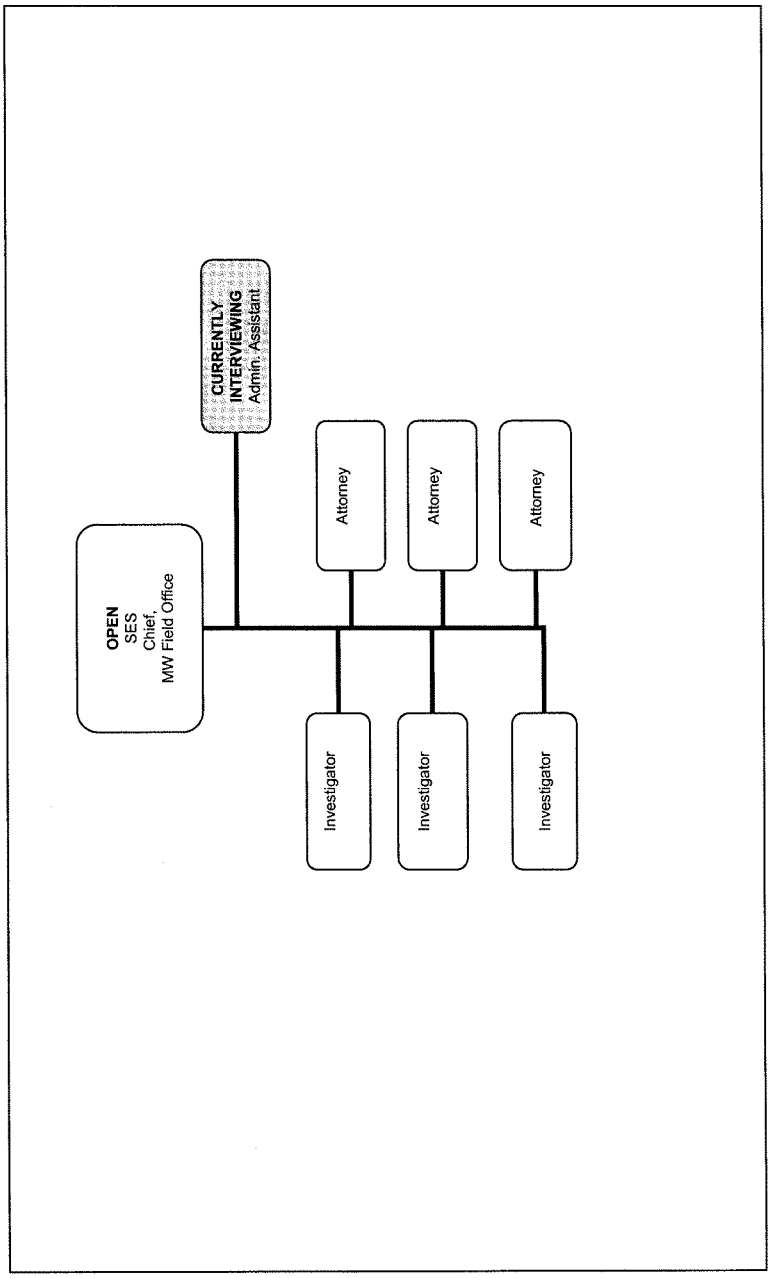


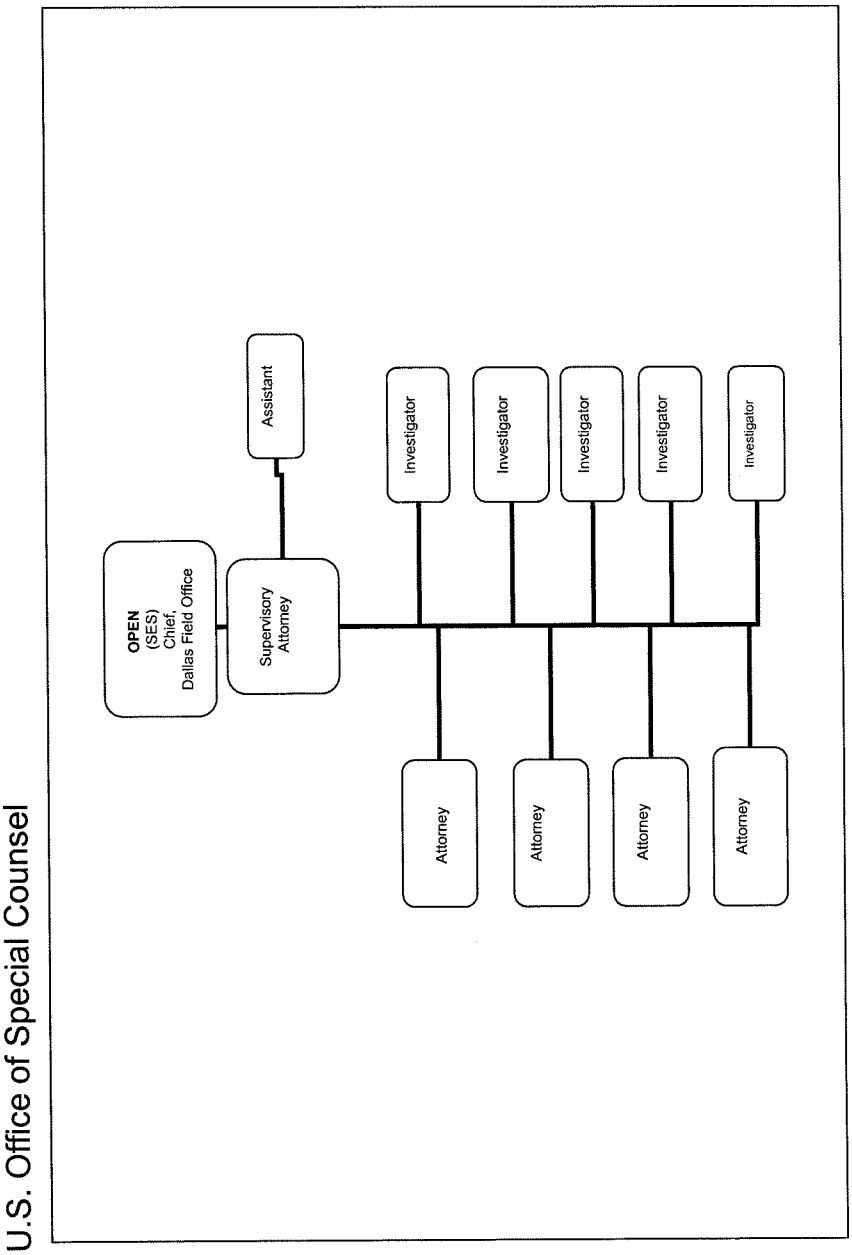

U.S. Office of Special Counsel
(SES)
Associate Special Counsel
& Director of Field Office
Operations
(during transition) & ADR
Supervisory Attorney
Dallas Field Office
Acting
Supervisory Attorney
Midwest Field Office
Senior Trial Attorney
San Francisco
Field Office
Supervisory Attorney
San Francisco
Field Office
ADR Analyst

U.S. Office of Special Counsel

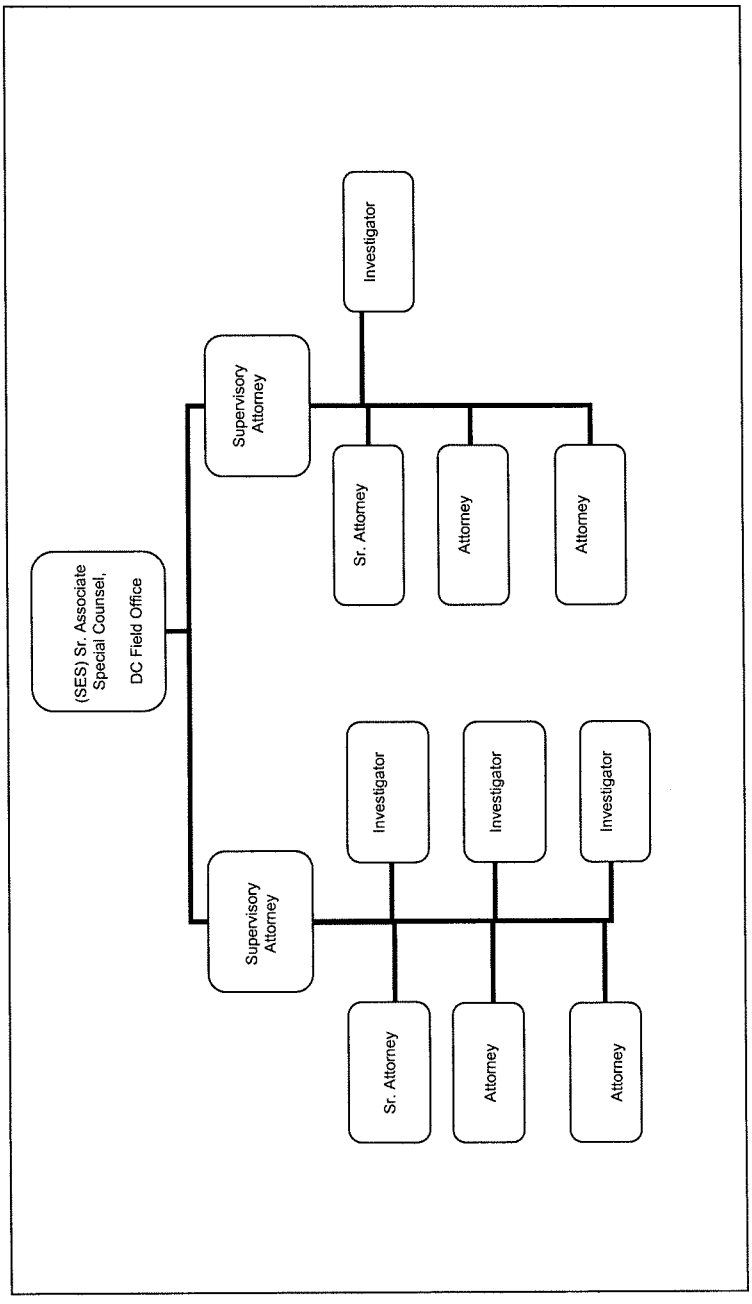


U.S. Office of Special Counsel

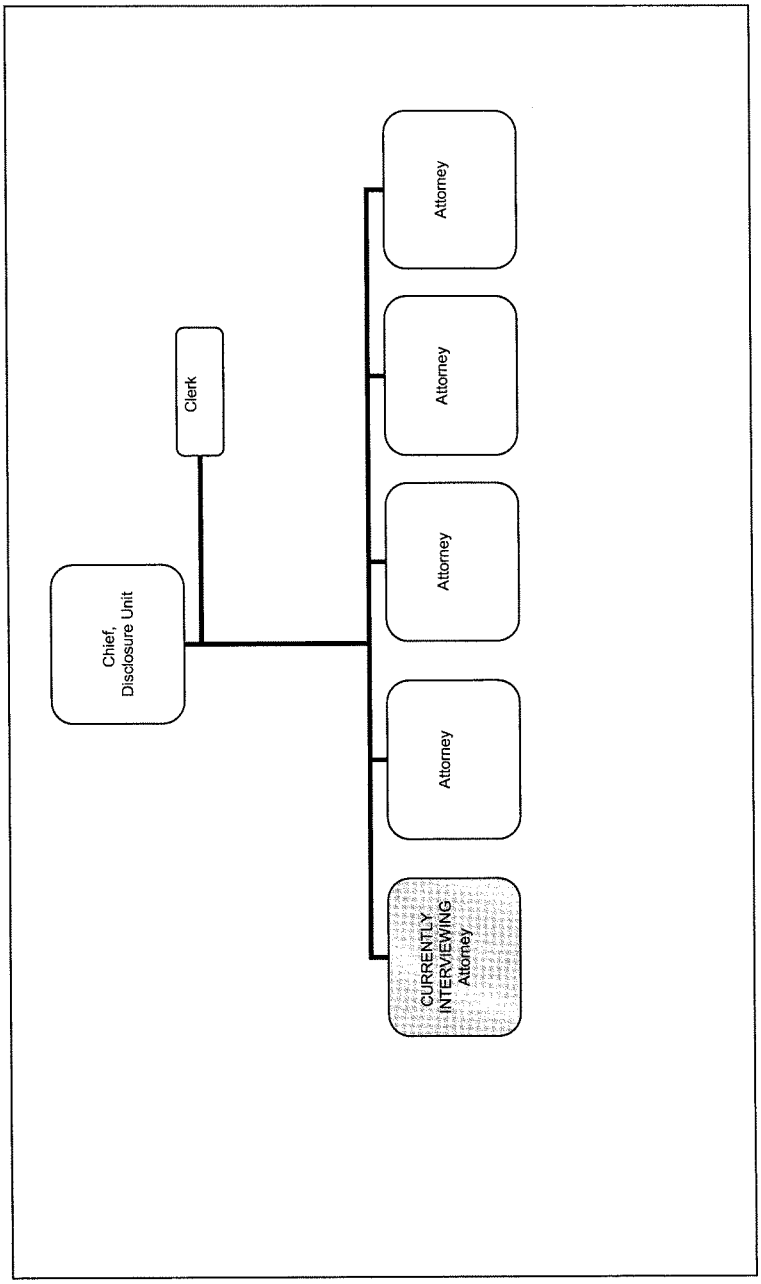



U.S. Office of Special Counsel
OPEN
(SES)
Chief,
Dallas Field Office
Supervisory
Attorney
Assistant
Investigator
Investigator
Investigator
Investigator
Investigator
Attorney
Attorney
Attorney
Attorney

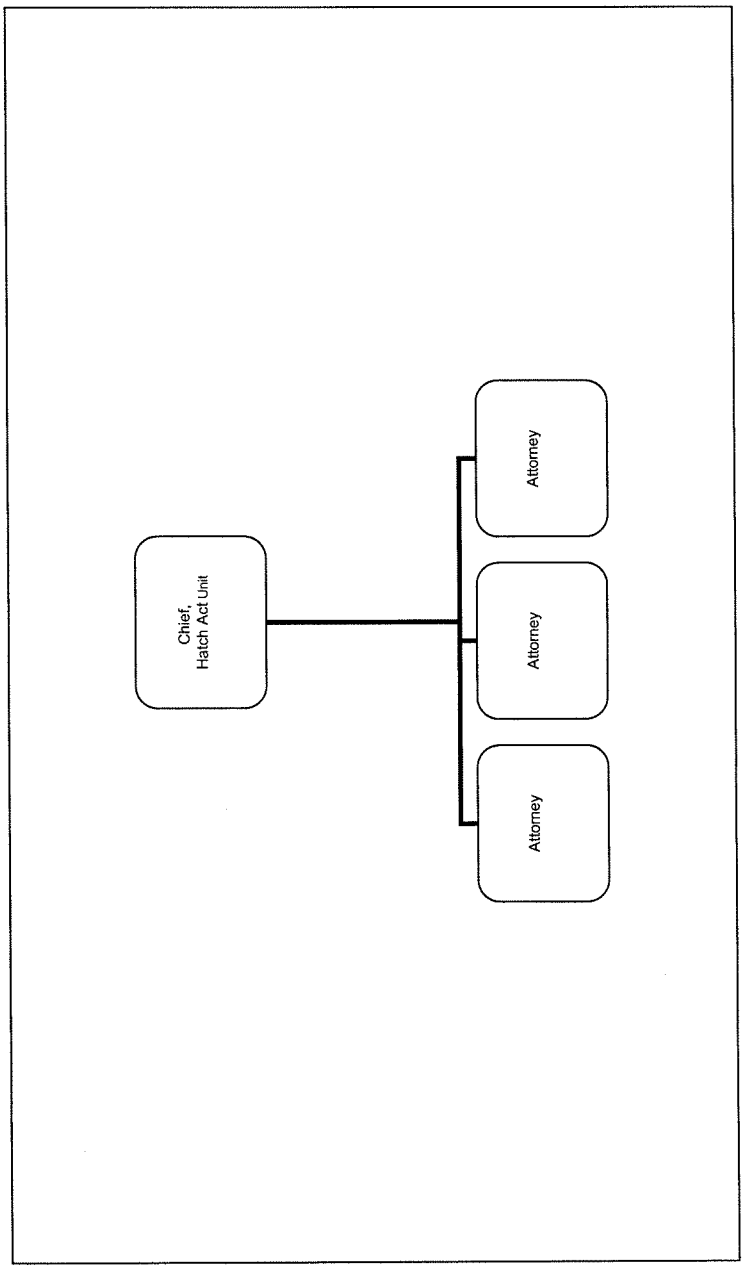
U.S. Office of Special Counsel



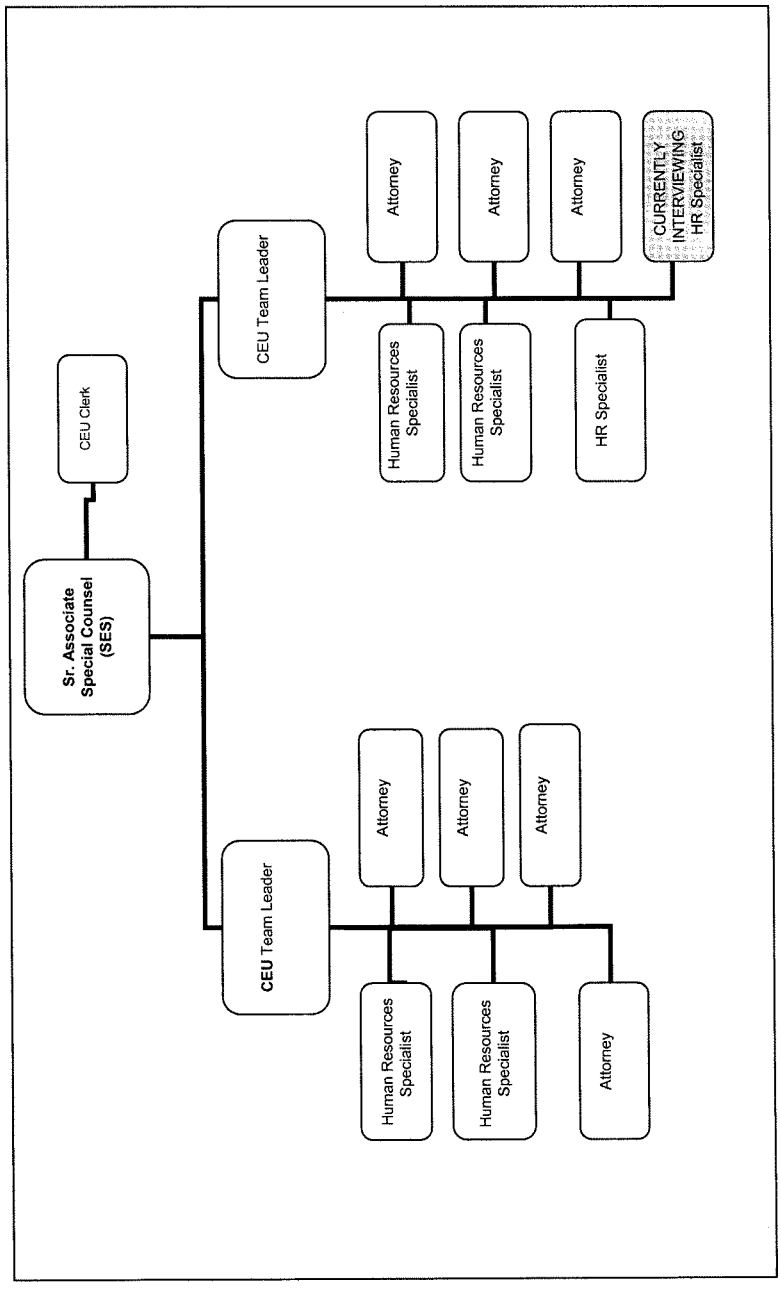
U.S. Office of Special Counsel



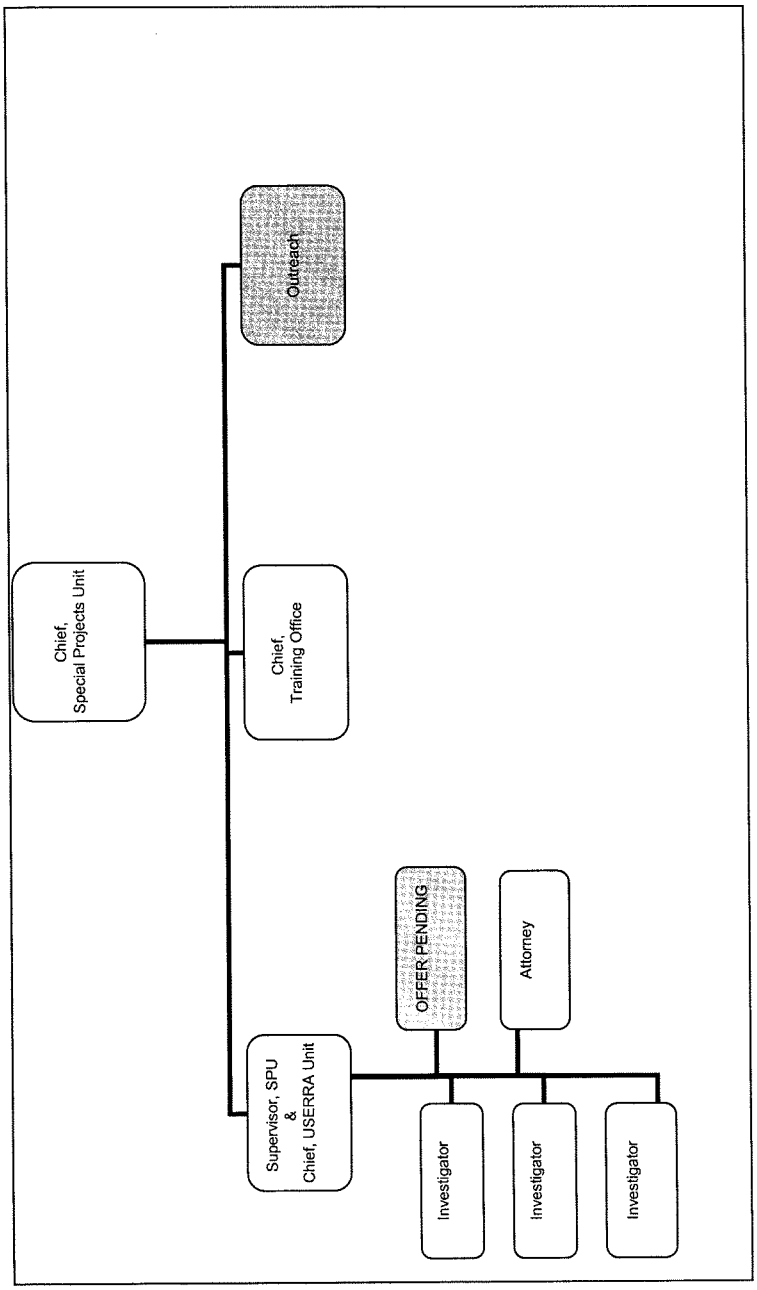
U.S. Office of Special Counsel



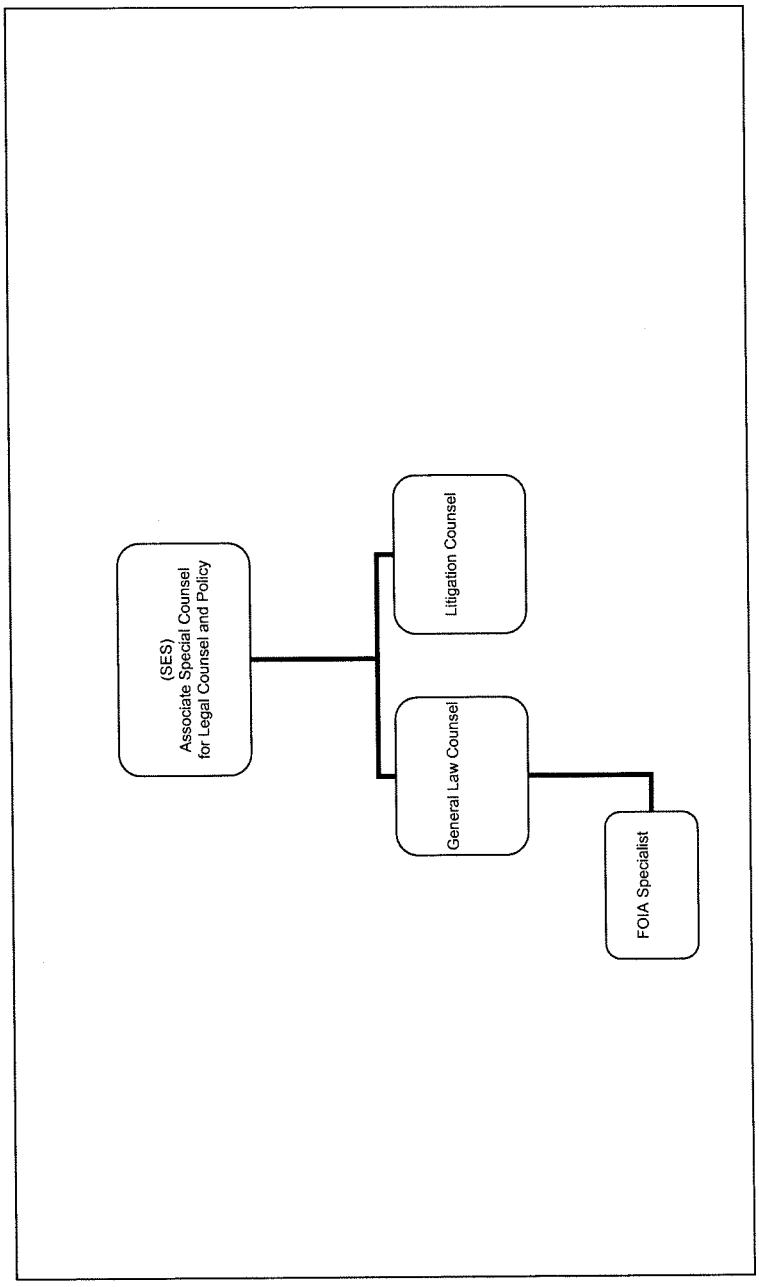
U.S. Office of Special Counsel

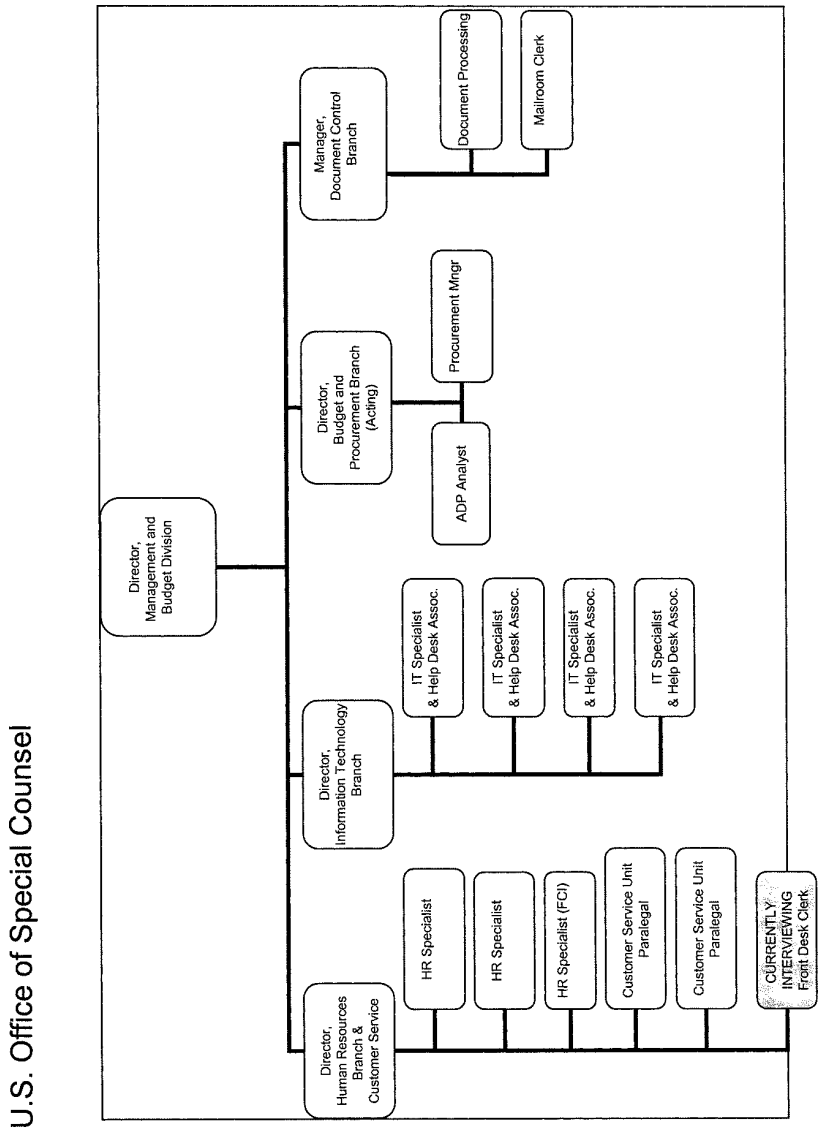


U.S. Office of Special Counsel



U.S. Office of Special Counsel




U.S. Office of Special Counsel
Director, Management and Budget Division
Director, Human Resources Branch & Customer Service
HR Specialist
HR Specialist
HR Specialist (FCI)
Customer Service Unit Paralegal
Customer Service Unit Paralegal
CURRENTLY INTERVIEWING Front Desk Clerk
Director, Information Technology Branch
IT Specialist & Help Desk Assoc.
IT Specialist & Help Desk Assoc.
IT Specialist & Help Desk Assoc.
IT Specialist & Help Desk Assoc.
Director, Budget and Procurement Branch (Acting)
ADP Analyst
Procurement Mngr
Manager, Document Control Branch
Document Processing
Mailroom Clerk