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**To the Subcommittee on Transportation, Treasury, the Judiciary and Housing and Urban
Development
Committee on Appropriations
United States Senate**

Fiscal Year 2006 Budget Request

May 29, 2005

I am pleased to present testimony on behalf of the U.S. Office of Special Counsel (OSC) and our Fiscal Year 2006 budget request. I look forward to another productive year working with the U.S. Senate in my role as independent guardian of the merit system of civil service by protecting federal employees from unfair workplace discrimination or mistreatment, including reprisal for whistleblowing, protecting returning service members' jobs, as well as imposing corrective action to protect those employees and bringing disciplinary action against negligent supervisors.

GOALS

My goals for the agency are:

1. To continue to strengthen the civil service merit system by vigorously enforcing the three statutes for which the Office of Special Counsel bears responsibility: the Civil Service Reform Act, the Whistleblower Protection Act, and the Hatch Act.
2. To provide an intense, more visible level of enforcement of the Uniformed Services in Employment and Reemployment Rights Act (USERRA).

GUIDING PRINCIPLES FOR ACHIEVING THESE GOALS

My top priorities have been an agency-wide focus on backlog reduction, swifter resolution of cases, and raising the visibility and enforcement of employee rights. Soon after taking office, I formed a Special Projects Unit (SPU) to begin to investigate the reasons for the chronic backlog of cases and to find solutions to the problem.

U.S. Office of Special Counsel

Page 2

On May 17, 2005, we announced in a detailed response to the Government Accountability Office (GAO) report (GAO 04-36), 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. We have also eliminated our backlog of FOIA requests.

We were able to do this without sacrificing quality. We gave a full and fair resolution to all claims and 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.* We also gave a more common sense interpretation of law and enforcement as Congress intended it. The credit for this Herculean effort goes to my career staff that worked long and hard to meet our goal.

We will build on this success by continuing to ask for great energy and focus of the current staff, and by bringing on new talent that is skilled at locating issues and understanding problem solving and keen on protecting rights. In all of this, we will be guided by the understanding that this is being done so that we can better service the merit system and protect whistleblowers. Reaching full authorized strength will enable the agency to operate in a way that prevents recurrent backlogs.

RELEVANT FUNDING FACTORS

For Fiscal Year 2006, the OSC requests \$15,325,000 – an amount equal to its net FY 2005 appropriation after rescission - to fund approximately 113 full-time employees (FTE) and related non-personnel costs.

The primary purpose for this level of funding is to manage and process the agency's steadily increasing workload (since FY 2000) of PPP complaints, whistleblower disclosures, Hatch Act matters, and new USERRA cases, and to further reduce remaining case processing backlogs.

I will discuss several specific areas that highlight the growing workload and the need for the agency to operate at its full authorized strength of 113 in order to ensure backlogs do not build up again.

- After a year of analysis of the existing processes and challenges of the agency, under my authority in 5 U.S.C. § 1211 and § 1212, I announced an **Agency reorganization plan** consistent with OSC's mission, in early January 2005, and utilizing concepts of strategic management of human capital. The reorganization was needed to ensure no future case backlogs would occur and to create internally consistent procedures and case handling. I consulted with all the senior management, career staff, as well as my immediate staff repeatedly throughout the past year.

U.S. Office of Special Counsel

Page 3

- Besides implementing critical process improvements, this reorganization powered down decision-making to the well-qualified career staff of OSC. We strengthened the field offices by providing SES leadership and additional personnel to the existing offices. We created a team concept of cross-trained persons in smaller, more agile field offices. We also opened a **Midwest field office in Detroit** as one of many parts of the reorganization that will help OSC better meet our mission. In addition, we created a **Washington, D.C. field office**. We are implementing new standard operating procedures that cut out needless reviews and meetings and power down decision making to those employees in the best position to make decisions, including giving attorney's authority to sign routine letters. This effort 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.
- We have implemented a **vigorous new training unit** that is starting to 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. Without senior leadership in the field offices, the new standard operating procedures and cross-training would have little chance of success.
- A new **customer service unit** is being created to better serve the public and federal employees. Having specific personnel assigned for this purpose will help OSC gain a reputation for better customer service within the federal workforce
- **The Special Projects Unit** will continue to handle the "silent" backlogs in the Investigation and Prosecution (IPD) Division, help prevent recurrent backlogs in other Units, and consider new methods for increasing the efficiency and effectiveness of all other aspects of the OSC. Several of the most experienced OSC attorneys will be assigned to the unit, as needed, to help with these issues. This includes a careful look at the agency's methods of electronic filing.
- Increased use of **Alternative Dispute Resolution (ADR)** will ensure a continued rate of success with resolving matters through mediation, which benefits employees and agencies and saves resources.
- **Increased cost factors:** During FY 2006, OSC anticipates incurring several continuing unfunded mandates: the new USERRA demonstration project, increased benefit costs (transit subsidy increases), new requirements for financial statements and audits, significant increase in costs under an interagency agreement for receipt of administrative services. Salaries and benefits make up approximately 84% of OSC's operating expenses, so the agency has little ability to reprogram funds when salaries and benefits for authorized FTE exceed appropriations. While these types of costs may be easily absorbed by most agencies' budgets that dwarf OSC's, these types of expenses can materially affect a small agency's ability to achieving goals and core missions.
- **Process automation:** To be successful in meeting our goals of vigorously enforcing the

U.S. Office of Special Counsel

Page 4

statutes for which we are responsible, with the least possible headcount, we are moving to further automate several steps within our processes. These steps bear costs in equipment and development resources and significantly contribute to efficiency, and accomplishing our goals.

- **Enforcement litigation:** The increased amount of litigation necessary to strongly enforce adherence to the statutes also has a cost in terms of employee resources.
- **Outreach:** Outreach to other federal agencies is critical to the mission of OSC. Success in outreach obviously generates a greater numbers of complaints, whistleblower disclosures, allegations and requests for assistance than in previous years. I believe our excellent professional staff will rise to the occasion, but agency resources must continually be redirected towards important outreach activities at other agencies.

UNITS' SUCCESS

Complaints Examining Unit (CEU): The CEU or intake unit, 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 CEU is a very well organized and efficient unit. The unit has a good mix of personnel between the lawyers and the human resource (HR) specialists. The lawyers bring analytical skills and the HR specialists bring their expertise in federal human resources regulations.

In FY 2004, OSC received 1,964 new PPP cases compared to 1,791 in FY 2003. We processed 21% more in FY 2004 -- 2093 complaints processed in FY 2004, compared to only 1,732 in FY 2003.

Disclosure Unit (DU): This Unit had severe backlog issues, and with hundreds of cases sitting in backlog, sometimes for years, justice was not being given to federal whistleblowers. Although we processed hundreds of disclosures in 2004, a majority of these were slated for closure by my predecessor as low priority cases as far as severity of potential harm and as probable closures that resulted in our giving them a second look and, in some cases, taking a closure and turning it into a referral to agencies. 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.

During FY 2004, the Disclosure Unit received a 7% increase of disclosures over those received in FY 2003. Many of these disclosures deal with national security issues (some involving complex and sensitive classified material) that have required the work of more than one DU staff attorney.

U.S. Office of Special Counsel

Page 5

Management of the DU backlog remains a pressing concern for OSC, which has implemented several measures to improve upon its timeliness in processing whistleblower disclosures. For example, the Disclosure Unit has implemented a priority system for matters received; those priorities are tracked using the agency's automated case tracking system; employees have been detailed to Disclosure Unit work; one additional FTE was placed in the unit during FY 2004 and two FTE have been added to the unit in FY 2005; and, most importantly, the Special Project Unit spent nearly two months directly assisting the Disclosure Unit by working cases.

USERRA Investigations and Prosecutions: Service members that believe that their Uniformed Services in Employment and Reemployment Rights Act (USERRA) rights have been violated can now come directly to OSC with their complaints. Before the new law (P.L 108-454), members had to go through Department of Labor's investigative process and only after months and even years were then given the option to seek OSC's involvement. Under a three year pilot project, OSC will be responsible for investigating half of all federal USERRA claims made. Partial funding for this will be reimbursed to OSC from DOL. The remainder is unfunded and the agency will have to absorb the costs. This function may require a higher number of staff focused on USERRA cases. OSC has filed two prosecutions before MSPB, the first-ever USERRA prosecutions in USERRA's history at OSC and successfully resolved those cases. OSC is aggressively pursuing the rights of returning service members in this historic time of mobilization and demobilization of Guard and Reserve units.

Hatch Act Unit: In the past, Hatch Act complaints were in backlog, and investigations would take up to three years, during which candidates could already have assumed or left office. In one case, the subject died. 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.

In FY 2004, the Unit experienced a 26% increase in Hatch Act complaints over the number of complaints received in FY 2003. Likewise, there has been a corresponding increase in the number of alleged Hatch Act violations referred for field investigation.

Thirty corrective actions were taken by agencies as the result of warning letters from OSC. The Hatch Act Unit also generated lengthy MSPB litigation activity, and seven disciplinary actions complaints were filed by OSC in FY 2004.

FOIA: Freedom of Information Act (FOIA) processing, investigations, and enforcements are also increasing, with a corresponding increase in the labor required to handle them. OSC has eliminated a backlog of over 100 requests that were pending in the agency for too long.

SUMMARY

U.S. Office of Special Counsel

Page 6

OSC stands in a good position already in FY 2005 – with greatly reduced backlogs but with a critical need to fill the remainder of its vacancies. With requested funding, the Agency will be able to meet the challenge of ever increasing case numbers, prevention of recurrent backlogs, and meeting new mandates such as the USERRA pilot program.

OSC requests \$15,325,000 for FY 2006, the same as its FY 2005 appropriation. With this funding, OSC will manage and process the agency's steadily increasing workload. The items below highlight the areas in which this funding will be used:

1. Increased costs for salaries and benefits
2. Staffing up to 113 FTE, with focus on adding critically needed clerical staff, replacing retired investigators, adding attorneys where needed, and freeing up resources to handle disclosure cases and USERRA enforcement cases
3. A document management system
4. Progress on several other information technology initiatives to comply with requirements for increased security and e-government (described above)
5. Increased cost to investigate and prosecute a larger share of USERRA cases. A new law, Veterans Benefits Improvement Act of 2004 (PL 108-454), provides for a three-year demonstration project that authorizes OSC to investigate about half of the federal sector USERRA claims. This project began in February 2005.

The Office of Special Counsel exists to ensure good government. When people behave in ways that do not promote good government, or jeopardize safety and health in the nation, we must take corrective and disciplinary action. We exist to promote good, efficient, fair government, and integrity for the nation among the federal workforce. The FY 2006 budget request will enable OSC to reach its mission to promote good government in an expeditious way.

Thank you for your interest in the Office of Special Counsel.