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I am pleased to present testimony on behalf of the U.S. Office of Special Counsel and our Fiscal Year 2005 budget request. As the new Special Counsel, I look forward to 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, as well as imposing corrective action to protect those employees and bringing disciplinary action against negligent supervisors.

GOALS

My goals for the agency are twofold:

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 Re-Employment Rights Act (USERRA).

GUIDING PRINCIPLES FOR ACHIEVING THESE GOALS

- The integrity of the civil service merit system depends on the alertness and effectiveness of its watchdogs. The most significant challenge we face into next year is to eliminate our pending case backlog and to develop methods to make the agency more efficient and effective in its main mission, while at the same time assuring complainants a fair review. No federal employee should have to wait years, in some instances, for a valid complaint or situation to be addressed or an offending supervisor disciplined.

We will accomplish this by asking for great energy and focus of the current staff, and by bringing on new talent, skilled at locating issues and understanding problem solving, keen on protecting rights and mindful of the need to address cases that lack jurisdiction or do not meet the requisite thresholds. 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. If we can do all of that, then we can institute a mode of operation that prevents us from allowing such a backlog of cases to surface again.

- During this challenging time in our nation, the security of the country depends on our armed forces. And our armed forces depend as never before on the vital roles played by national guardsmen and reservists. Every reservist and guardsman must know that the United States stands fully behind them, and will investigate and fight for justice on their behalf regarding their employment and re-employment after active service deployments. Without extremely strong enforcement in this area, serving in the guard and reserves becomes less attractive, and the entire military system currently in use becomes weakened.
- The teeth behind our effectiveness in enforcing each of our mandates lie in our ability to litigate in pursuit of justice. To become a more effective enforcer implies an increase in meritorious litigation, which I hope to pursue.
- Finally, I know that Congress also shares our desire to protect federal whistleblowers; however, the protection does not occur if federal employees do not know about the existence and purpose of the Office of Special Counsel. Therefore, a critical function is our extensive outreach and training efforts so that federal employees know they can call us when they have a complaint or problem within their agency.

RELEVANT FUNDING FACTORS

For Fiscal Year 2005, the OSC is requesting \$15.449 million, in order to fund approximately 113 full-time employees (FTE) and related non-personnel costs.

The purpose of this requested increase is to manage and process the agency's steadily increasing workload since FY 2000 of prohibited personnel practice complaints, whistleblower disclosures, and Hatch Act matters, and to reduce persistent case processing backlogs – including serious backlogs in the processing of whistleblower disclosures. Given the increasing workload of OSC, 113 FTE is a modest request.

Looking at the data for the past several years, I believe several factors account for or contribute to this workload increase. They include: publicity about an increased number of high-profile cases handled by the OSC, including whistleblower disclosures, and four Public Servant Awards issued to whistleblowers by the OSC; heightened awareness and concern over national security disclosures after the events of September 11, 2001; increased public interest in elections since the 2000 presidential election, and the start of the 2004 campaigns; the OSC's 2302(c) Certification Program; and significant improvements in OSC's web site, increasing awareness by government employees and others of the OSC and its functions.

I will highlight specific areas that I believe warrant an increase in staffing:

- In April 2004, soon after I became the new Special Counsel, I established a new Special Projects Unit (SPU) specifically to examine the organization's system for handling cases, to handle the pending backlogs, and to consider and experiment with new methods for

increasing the efficiency and effectiveness of all other aspects of the OSC. Several of the most experienced OSC attorneys are now assigned to the unit to help remove the current backlog of cases and to prevent such problems in the future. This includes a careful look at the agency's web site and methods of electronic filing.

- Given the increasing numbers of complaints and cases in all units of the agency, increased levels of labor and staff costs are required to ensure no backlogs will build up again.
- Regarding prohibited personnel practice complaints, increased staff costs are also required for higher compliance with the 240-day prosecution deadline currently required by statute.
- I am confident of our ability to fulfill our stated goal of providing a more visible level of enforcement of USERRA, even in (and especially in) the midst of one of the largest-ever demobilizations of reservists from overseas in the coming year. In conjunction with other federal entities, we will aggressively prosecute USERRA claims. But this may require a higher number of staff focused in the USERRA area.
- Public awareness of the OSC's Disclosure Unit (DU) has grown in recent years and the greater awareness of national security issues, following the terrorist attacks of September 11, 2001, and subsequent events, have also caused a record number of whistleblower disclosure filings with the OSC. During FY 2002-2003, for example, the DU received 535 or more disclosures each year – compared with 380 disclosures in FY 2001 and an average of 360 in the preceding four fiscal years. Many of the disclosures filed after FY 2001 have dealt with national security issues (some involving complex and sensitive classified material) that have required the work of more than one DU staff attorney.

As of September 30, 2003, the total number of cases pending in the DU was a record 690 (up drastically from 556 at the end of FY 2002, and 287 at the end of FY 2001). A significant number of these cases were more than a year old, including matters designated after initial review as the highest priority disclosure – an allegation of a substantial and specific danger to public health and safety likely to merit referral to the head of the agency involved for investigation. The OSC is requesting additional FTE allocation to DU backlog reduction efforts (*i.e.*, to provide timelier resolutions of whistleblower disclosures filed with the OSC).

By law, the OSC has 15 days to review a disclosure and to determine whether there is a substantial likelihood that the information provided discloses any violation of law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety. Given the increasing numbers and complexity of disclosures in recent years, as well as the time required to contact whistleblowers, examine information submitted, perform necessary analysis, and draft required correspondence, this timetable has, in reality, proven to be unattainable in most cases. This has resulted in a persistent backlog.

While the OSC is fully committed to directing whatever resources are required to immediately process and refer critical national security disclosures, additional resources (not only in staff but in facilities and other resources needed to properly handle such critical

matters) are needed.

The Disclosure Unit backlog has become an issue of understandable concern to Congress. It has also been a pressing concern to the OSC, which has implemented several measures in recent years in efforts to improve upon its timeliness in processing whistleblower disclosures. For example, the DU has implemented a priority system for matters received; those priorities are tracked using the agency's automated case tracking system; additional employees have been detailed to DU work; and, as funds have permitted, a limited number of additional staff has been allocated to the unit.

- In response to recent calls for the OSC to attack the problem more aggressively, the OSC has begun the process of applying more intensive and focused strategic workforce planning to that problem, as part of a comprehensive strategy to address all areas of backlog in the agency. No strategy can succeed, however, without adequate funding to support additional staff and associated resources. The OSC's FY 2005 budget request will provide funding for the additional staff needed to more adequately comply with the 15-day time limit for DU decisions, and to make progress toward the goal of reducing the Unit's backlog.
- The increased amount of litigation necessary to strongly enforce adherence to the statutes also has a cost in terms of employee resources.
- Next, in this busy election year, we expect our Hatch Act complaints and cases to increase as they always do during the national election cycle. The unit has received a significant increase in the number of complaints alleging federal, state, and local Hatch Act violations, and a steadily growing number of requests for advisory opinions on the act. Between FY 2001-2003, the Hatch Act Unit received an average of 198 complaints per year, compared to 84 complaints on average in each of the previous three fiscal years. Likewise, there has been a significant increase in the number of alleged Hatch Act violations referred for field investigation – *i.e.*, 35 in FY 2003, compared to 8 in FY 2002, and 10 in FY 2001.

Hatch Act enforcement spawned lengthy and resource-intensive MSPB litigation activity by OSC in FY 2003.

The OSC's FY 2005 budget request will provide funding for the staff resources needed to handle increasing numbers of Hatch Act complaints, opinions, and enforcement efforts, including litigation.

- As mentioned, outreach within the federal workforce 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 the agency needs an increase in FTEs and an increased travel budget to keep up with those demands.
- Higher labor funding is also required to better address Freedom of Information Act (FOIA) processing, investigations, and enforcement.

- The OSC's FY 2004 funding was intended to pay for the cost of 113 FTE, but the agency has incurred several unfunded mandates: 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, and unanticipated real estate taxes for its D.C. office. Salaries and benefits make up approximately 83% of OSC's operating expenses for FY 2004, 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 easily swamp a relatively tiny agency like ours, materially having an impact on achieving goals and even core missions.
- To be successful in meeting our goals of vigorously enforcing the statutes for which we are responsible, with the least possible headcount, we are moving to further automate several steps within our processes, which also bears costs in equipment and development resources.

PROGRESS MADE

As noted earlier with respect to prohibited personnel practice complaints, the OSC's ongoing and intensive efforts to improve upon its responsiveness began to yield results in FY 2003. The agency processed 85% of those complaints within the 240-day timetable established by Congress. The OSC intends to build on these results, and achieve close to 100% success in this regard -- all the while avoiding any backlogs.

SUMMARY

The largest part of the requested increase in the FY 2005 budget, therefore, is for the full cost of the FY 2004 FTE increase. The capacity to fund 113 FTEs is needed to properly manage OSC's statutory responsibilities and to reduce, if not eliminate, processing delays.

Our office 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 2005 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.