

**ANNUAL PERFORMANCE REPORT**  
**OF THE**  
**U.S. OFFICE OF SPECIAL COUNSEL**  
**FOR**  
**FISCAL YEAR 2001**



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List of Acronyms Used

ADR .....	Alternative Dispute Resolution
CEU.....	Complaints Examining Unit
DU.....	Disclosure Unit
FTE .....	Full-Time Equivalent
FY .....	Fiscal Year
GPRA .....	Government Performance and Results Act
HAU.....	Hatch Act Unit
ID .....	Investigation and Prosecution Division
IOSC .....	Immediate Office of the Special Counsel
IPD .....	Investigation and Prosecution Division
MSPB.....	Merit Systems Protection Board
OSC.....	Office of Special Counsel
PD .....	Prosecution Division
SES.....	Senior Executive Service
USERRA.....	Uniformed Services Employment and Reemployment Rights Act



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**Introduction**

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. First established in 1979, it became an independent federal agency with the enactment of the Whistleblower Protection Act of 1989.<sup>1</sup> Basic OSC authorities and responsibilities are defined at 5 U.S.C. § 1211, *et seq.*<sup>2</sup>

OSC's primary mission is to safeguard the merit system in federal employment by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing. The agency also facilitates disclosures of wrongdoing in the federal government, and enforces restrictions on political activity by government employees. OSC carries out this mission by:

- investigating complaints of prohibited employment practices, especially reprisal for whistleblowing, and pursuing remedies for violations;
- operating an independent and secure channel for disclosure and investigation of wrongdoing in federal agencies;
- providing advisory opinions on, and enforcing, Hatch Act restrictions on political activity by government employees;
- protecting the rights of veterans under the Uniformed Services Employment and Reemployment Rights Act (USERRA);<sup>3</sup> and
- promoting greater understanding of the rights and responsibilities of government employees under the laws enforced by OSC.

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<sup>1</sup> Public Law No. 101-12, 103 Stat. 16 (1989).

<sup>2</sup> Unless indicated otherwise, all references to statutory sections that follow are to title 5 of the U.S. Code.

<sup>3</sup> Public Law No. 103-353, 108 Stat. 3149 (1994) (OSC enforcement provisions codified at 38 U.S.C. § 4324).

### **Agency Staffing and Organizational Structure**

OSC maintains its headquarters in Washington, DC, and has two field offices: one in Dallas, Texas, and one in Oakland, California (known as the San Francisco Bay Area Field Office). While not under a formal staffing ceiling during fiscal year (FY) 2001,<sup>4</sup> the agency operated with a staffing target of approximately 106 full-time equivalent (FTE) employees.

Special Counsel Elaine Kaplan, with her staff in the Immediate Office of the Special Counsel (IOSC), is responsible for policy making and overall management of the agency. IOSC responsibilities include congressional relations, public affairs, and outreach. The outreach program director develops and/or coordinates proactive educational efforts by OSC, and promotes compliance by federal agencies with the employee information requirement at § 2302(c), as amended.<sup>5</sup>

Until June of 2001, OSC was organized into four operating divisions: Complaint and Disclosure Analysis, Investigation, Prosecution, and Planning and Advice. A restructuring in early June led to the consolidation of OSC's investigative and prosecutorial functions, and the creation of three parallel Investigation and Prosecution Divisions.<sup>6</sup> Since that reorganization, agency functions are organized as follows:

1. The Complaints and Disclosure Analysis Division consists of OSC's two intake units for new matters received by the agency – the Complaints Examining Unit (CEU) and the Disclosure Unit (DU).

CEU. This unit serves as intake point for all complaints alleging prohibited personnel practices and other violations of civil service law, rule, or regulation.<sup>7</sup> The attorneys and personnel management specialists in CEU conduct an initial review of complaints to determine whether they are within OSC's jurisdiction, and whether further investigation

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<sup>4</sup> October 1, 2000 - September 30, 2001.

<sup>5</sup> Public Law No. 103-424, 108 Stat 4361, amended § 2302 in 1994 to read as follows:

“The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.”

<sup>6</sup> The reorganization is discussed further at pp. 7-8.

<sup>7</sup> Unless noted otherwise, all references to “prohibited personnel practice” complaints acted on by CEU include complaints alleging violations of civil service law, rule, or regulation listed in § 1216, except for alleged violations of the Hatch Act. The latter are processed by the Hatch Act Unit (described on p.3).

is warranted. CEU refers any such matter to one of the Investigation and Prosecution Divisions.<sup>8</sup>

DU. This unit is responsible for reviewing information submitted by federal whistleblowers, and for advising the Special Counsel on the appropriate disposition of the matter (including possible referral to the head of the relevant agency for investigation and a report to OSC, referral to the agency Inspector General, or closure). DU attorneys also analyze agency reports of investigation to determine whether they appear reasonable and meet statutory requirements before the Special Counsel sends them to the President and appropriate congressional oversight committees.

2. The Investigation and Prosecution Divisions (IPDs) consist of three parallel investigative and prosecutorial units – IPD I, II, and III. These divisions investigate complaints referred after a preliminary inquiry by CEU. Each unit conducts investigations to review pertinent records and to interview complainants and witnesses with knowledge of the matters alleged. Matters not resolved during the investigative phase undergo legal review and analysis to determine whether the matter warrants corrective action, disciplinary action, or both. If a negotiated resolution with the agency involved cannot be reached, division attorneys conduct the litigation of any enforcement proceedings filed by OSC with the U.S. Merit Systems Protection Board (MSPB).<sup>9</sup> They also represent the Special Counsel when OSC intervenes or otherwise participates in other proceedings before the MSPB.

Hatch Act Unit (HAU). This unit, located in IPD I, is responsible for enforcing Hatch Act restrictions on the political activities of federal, and certain state and local, government employees. HAU attorneys receive and review complaints alleging Hatch Act violations and, when warranted, prosecute violations before the MSPB. The unit also issues advisory opinions to individuals seeking information about the provisions of the act.<sup>10</sup>

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<sup>8</sup> When a matter is not referred for investigation, CEU must by law provide complainants with a written statement of reasons, to which they may respond. § 1214(a)(2)(A). On the basis of the response, if any, CEU decides whether to adopt its preliminary determination to close the matter, or to refer it for further investigation.

<sup>9</sup> The Special Counsel may file a petition for corrective action with the MSPB under § 1214(b)(2)(C). If the Special Counsel determines that an apparent violation warrants disciplinary action, the OSC files charges against the offending employee under § 1215(a) and prosecutes the case before the MSPB.

<sup>10</sup> Depending on the severity of the violation, the HAU may either issue a warning letter to the employee involved, or refer the case for prosecution before the MSPB. During FY 2001, the unit generated increased litigation activity at OSC, with many of these cases resulting in significant public and media interest. Due to the substantial increase in Hatch Act activity, the unit's staffing was increased in FY 2001 from one permanent attorney to two. As the need arises, attorneys from other OSC program units are detailed to assist with Hatch Act matters. For example, during several months before and after the November 2000 elections, a third attorney was detailed to the unit.

Alternative Dispute Resolution (ADR) Unit. Established by the Special Counsel in FY 2000, this unit (located in IPD III) operates OSC's Mediation Program. In selected cases that have been referred for further investigation, it contacts the complainant and the employing agency to invite their participation in voluntary mediation. If both parties agree, OSC conducts a mediation session, led by OSC staff with extensive training in mediation and experience in federal personnel law. When mediation resolves the complaint, the parties execute a written and binding settlement agreement. If mediation does not bring about resolution, the case is referred for further investigation, as it would have been had the parties not tried mediation.

4. The Planning and Advice Division provides legal advice and support on general management and administrative matters; engages in planning and policy development; conducts the statutorily required annual survey program;<sup>11</sup> and manages the agency's Freedom of Information/Privacy Act and ethics programs.

OSC also has two administrative support units: the Human and Administrative Resources Management Branch, and the Information Systems Branch. Their functions include administrative operations, personnel, procurement, information technology, and records management services.

### **FY 2001 Strategic and Annual Performance Goals**

The complete text of the five-year strategic plan covering OSC operations during FY 2001 appears at tab 1 ("Strategic Plan"). The annual performance plan for the year contained the following goals, grouped according to the strategic plan goal that they implemented:

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<sup>11</sup> § 13, Public Law No. 103-424.

<b>FY 2001 ANNUAL PERFORMANCE PLAN</b>	
<b>STRATEGIC GOAL</b> <b>1</b>	<p><b>TO CONSISTENTLY PROVIDE HIGH QUALITY SERVICES THAT EXPEDITIOUSLY RESOLVE MATTERS BROUGHT BEFORE OSC WITHIN THE TIME GUIDELINES SET BY CONGRESS. TO CONSISTENTLY PROVIDE HIGH QUALITY SERVICES THAT EXPEDITIOUSLY RESOLVE HATCH ACT ENFORCEMENT MATTERS AND REQUESTS FOR ADVISORY OPINIONS.</b></p> <p><b><u>Annual Performance Goals:</u></b></p> <ul style="list-style-type: none"> <li>▪ <i>Ensure that no more than 50% of caseload pending in CEU is more than 30 days old.</i></li> <li>▪ <i>Ensure that no more than 40% of pending caseload has been in ID for more than 120 days.</i></li> <li>▪ <i>Ensure that no more than 46% of pending caseload has been in PD for more than 90 days.</i></li> <li>▪ <i>Maintain timely and accurate response to all HA advisory opinion requests.</i></li> <li>▪ <i>Maintain timely and appropriate processing of all HA enforcement matters.</i></li> <li>▪ <i>Ensure that no more than 69% of pending DU matters is more than 15 days old.</i></li> <li>▪ <i>Evaluate effectiveness of modifications to case-handling procedures to ensure that OSC is meeting its goal of consistently providing timely, high quality services.</i></li> <li>▪ <i>Continue to identify and implement additional improvements to case-handling procedures.</i></li> </ul>
<b>STRATEGIC GOAL</b> <b>2</b>	<p><b>TO FULFILL CONGRESSIONAL INTENT THAT OSC BE MORE AGGRESSIVE IN PROTECTING FEDERAL EMPLOYEES FROM PROHIBITED PERSONNEL PRACTICES, PARTICULARLY THOSE WHO HAVE SUFFERED REPRISAL FOR WHISTLEBLOWING.</b></p> <p><b><u>Annual Performance Goals:</u></b></p> <ul style="list-style-type: none"> <li>▪ <i>Bring before the MSPB more cases in which OSC believes that a prohibited personnel practice (especially reprisal based on whistleblowing) has occurred.</i></li> <li>▪ <i>Seek more stays, corrective actions, and disciplinary actions in cases in which OSC believes that a prohibited personnel practice (especially reprisal based on whistleblowing) has occurred.</i></li> <li>▪ <i>Identify and enter appearances in cases in which OSC's expertise could enhance protections for victims of prohibited personnel practices, with a particular emphasis on favorable developments in whistleblower protection law.</i></li> </ul>
<b>STRATEGIC GOAL</b> <b>3</b>	<p><b>TO RAISE FEDERAL EMPLOYEES' AND MANAGERS' AWARENESS OF THEIR RIGHTS AND RESPONSIBILITIES UNDER THE STATUTES ENFORCED BY OSC.</b></p> <p><b><u>Annual Performance Goals:</u></b></p> <ul style="list-style-type: none"> <li>▪ <i>Implement training / enhanced awareness program based on results of FY 1999 survey of employing agencies' compliance with congressionally mandated training requirement.</i></li> <li>▪ <i>Enhance training and education materials for use by OSC and employing agencies.</i></li> <li>▪ <i>Include systemic training at employing agencies as part of corrective action settlements.</i></li> <li>▪ <i>Maintain and enhance OSC Web page on the Internet and other information technologies.</i></li> <li>▪ <i>Continue to convene practitioners' forums.</i></li> </ul>
<b>STRATEGIC GOAL</b> <b>4</b>	<p><b>TO DEVELOP AND MAINTAIN OSC'S HUMAN RESOURCES, SYSTEMS AND PROCESSES TO SUPPORT A CONTINUALLY IMPROVING, HIGHLY EFFECTIVE ORGANIZATION WITH THE VIGOR TO MEET DEMANDING PROGRAM NEEDS.</b></p> <p><b><u>Annual Performance Goals:</u></b></p> <ul style="list-style-type: none"> <li>▪ <i>Continue to eliminate inefficiencies in the case-handling process.</i></li> <li>▪ <i>Provide a work environment that fosters interdivisional cooperation and superior work performance from each OSC employee.</i></li> <li>▪ <i>Implement plan for necessary upgrades of technology infrastructure, together with staff training.</i></li> </ul>



The complete text of OSC's FY 2001 annual performance plan appears at tab 2 ("Annual Performance Plan"). Results accomplished for the year under each of the four sets of goals listed above are shown at tab 3 ("FY 2001 Results: Strategic Goals 1-4").

OSC met virtually all of its performance goals for the year. It moved closer to, but did not achieve, specific numerical targets for reductions in the average age of pending prohibited personnel practice cases in CEU, ID, or PD, or in whistleblower disclosure matters in the Disclosure Unit.<sup>12</sup> Nevertheless, with the addition of nine new positions to those units,<sup>13</sup> the reorganization of investigative and prosecution functions,<sup>14</sup> employee incentives, and ongoing process improvements, each of four units succeeded in matching or improving upon FY 2000 results for the average age of pending caseloads. These results were accomplished despite the fact that the impact of substantially increased intake in FY 2000 continued to be felt in FY 2001, as matters that had been referred to ID and PD made their way through the complaint handling process.<sup>15</sup>

There were positive developments in other measures of program performance in all four units. These included the following:

CEU. With the addition of two positions to CEU, as well as increased staff turnover,<sup>16</sup> eight of the 17 attorneys and personnel management specialists in the unit had been with OSC for approximately a year or less. It takes considerable time and effort for experienced staff to train new employees in the specialized laws and regulations, policies, and procedures applied by CEU. The unit remained highly productive, however, especially during the latter part of FY 2001, as new employees became more knowledgeable and gained experience. CEU

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<sup>12</sup> See annual performance goals listed for strategic goal 1 at p. 5.

<sup>13</sup> Positions were allocated as follows: two positions to CEU, one to ID, four to PD (distributed between the former General Law and Litigation Unit and the newly created ADR Unit), and two to the Disclosure Unit. (One more new position was allocated to the HAU.)

<sup>14</sup> Described in more detail below, at pp. 7-8.

<sup>15</sup> As OSC noted in last year's annual performance report, the number of incoming matters increased substantially in FY 2000. While case intake increased in all three principal categories of matters handled by OSC, the increase was especially pronounced in the types of matters that require the most time-consuming staff review – *i.e.*, prohibited personnel practice complaints generally, and reprisal for whistleblowing allegations in particular. Prohibited personnel practice complaints (1,958 matters, containing 4,477 individual allegations) increased by 14%; over 700 of these were reprisal for whistleblowing complaints, the largest category of new matters received. Whistleblower disclosures increased by 14.3%; Hatch Act complaints rose by 38%; and requests for Hatch Act advice were up by approximately 19%.

FY 2001 was a somewhat more typical year, at least in terms of the number of prohibited personnel practice and disclosure matters received. Thus, OSC received 1,292 new prohibited personnel practice complaints, containing 2,595 individual allegations. The largest category of new matters again consisted of reprisal for whistleblowing complaints (over 540 received). OSC also received 380 whistleblower disclosures, and approximately 2,806 requests for Hatch Act advice. Hatch Act complaints rose by 38%.

<sup>16</sup> Turnover may include selection for positions in other units, as well as departures from the agency.

closed 1,380 complaints, and referred 287 for further investigation. While there were 697 matters pending in CEU at the beginning of the fiscal year, that number had been reduced to 363 by the end of the fiscal year.

ADR. OSC's Mediation Program began its first full year of operations in FY 2001. Notable results for the year included the following:

- OSC offered mediation to complainants in 42 cases, representing 15% of the cases referred by CEU for further investigation.
- The rate at which OSC offered mediation to parties doubled from 15% in FY 2000 to 30% in the 4<sup>th</sup> quarter of FY 2001.
- The rates at which OSC mediation offers were accepted rose from 59% in FY 2000 to 70% in FY 2001 (for complainants), and from 55% to 60% (for agencies).

Investigation and Prosecution. The productivity of OSC's investigation and prosecution units increased significantly in FY 2001, compared to FY 2000. In FY 2000, 228 cases were resolved by approximately 49 FTEs (in both ID and PD) after referral by CEU – an average of 4.7 cases resolved per FTE. In FY 2001, 410 cases were resolved by approximately 54 FTEs, or an average of 7.6 cases per FTE on an annualized basis.

### **Reorganization**

As part of ongoing efforts during FY 2001 to manage caseloads in a timelier manner, OSC aggressively pursued the goal of continuing to identify and implement improvements to its case-handling processes. This led, in June of 2001, to the most significant agency restructuring in over 15 years.

The reorganization was precipitated by the Special Counsel's belief that OSC's investigative and prosecution structure was unnecessarily stove piped and inefficient; there were too many layers of review; and there was insufficient accountability for the handling of an entire case after referral for investigation by CEU. The restructuring affected 59 employees, or well over half of all OSC staff. The Special Counsel consulted extensively with all affected employees before implementing the reorganization.

The reorganization entailed the merging of investigative and prosecution functions, formerly separated into two units, into three parallel IPDs. Each IPD is staffed with

investigators and attorneys who report to a single Associate Special Counsel at the head of their respective division.

The reorganization permitted closer, more effective and more efficient coordination of strategy between investigators and attorneys. It also eliminated several layers of management review over cases referred for investigation. These measures are expected to reduce case processing times, permit OSC to make better decisions about allocation of investigative resources, and improve the quality of OSC's investigative and legal work.<sup>17</sup>

The cumulative effect of the reorganization, additional FTEs assigned to investigative and prosecution units in FY 2001, employee incentives, and process improvements was evident by the end of the year. There were significant gains in the number of cases resolved by OSC after referral for investigation. The resolution of 410 cases after referral for investigation represented a 79% increase over the 228 cases resolved post-referral in FY 2000. The number of cases pending at the close of FY 2001 was 733, down substantially from the 1,114 cases that were pending at the end of FY 2000.

Charts showing the configuration of OSC investigation and prosecution divisions before and after the reorganization, and the effect of the reorganization on those divisions appear at tabs 4 ("Investigative / Legal Units: Pre- and Post-Reorganization") and 5 ("Effect of Reorganization on Investigative / Legal Decision Levels").

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<sup>17</sup> Before the reorganization, CEU referred matters needing further investigation to ID. In general, staff investigators conducted the investigation, and prepared written reports documenting their findings. Reports on completed investigations were reviewed and approved by a supervisory investigator and by the division head, a Senior Executive Service (SES) employee. After approval of the written report, ID would formally transfer the matter to PD for review and analysis by a staff attorney. Upon completion of the attorney's review, his or her analysis and recommended disposition of the matter would be reviewed by the division head, and sometimes by his deputy as well (both are SES employees).

Since the reorganization, CEU refers matters needing further investigation to one of the three IPDs. Investigative and attorney team leaders oversee and coordinate planning, analysis, and case management activities. Staff investigators and attorneys work together in planning and conducting investigations, and in reviewing investigative results. The division head alone (an SES employee) reviews final investigative results and prosecution recommendations. In addition to encouraging more teamwork between investigators and attorneys in planning, developing, and resolving cases (by closure, settlement, or litigation), the reorganization reduces levels of supervisory review from as many as four levels (including two or three SES employees) to two (including only one SES employee). Investigators and attorneys work for the same Associate Special Counsel, improving efficiency because issues about what to do and how to do it can be resolved by one division head. It also gives the division head an opportunity to focus the investigation during case review meetings with the investigator and attorney.

### **FY 2002 Strategic and Annual Performance Plans**

OSC's strategic and annual performance plans under the Government Performance and Results Act (GPRA) have evolved considerably from their origins in FY 1999. That year's annual performance plan contained broad, general goals. Annual performance plans for FY 2000 and FY 2001 were extensively revised to focus on easily measurable outcomes in connection with prohibited personnel practice and whistleblower disclosure matters – *i.e.*, specific numerical targets for reducing the average age of cases pending in each of the responsible program units.

While pursuing the goals set forth in the annual performance plan for FY 2001, OSC management and staff engaged in an extensive review of the agency's approach to strategic and annual performance goals in FY 2002 and beyond. That review led management to conclude that the plans needed to reflect a better balance between productivity and the Special Counsel's quality goals. While OSC had focused, in practice, on improving the quality of its communication with complainants, and devoted greater attention to enhancing the quality of its investigations and legal analyses, its strategic plan and annual performance goals did not emphasize these efforts through measurement of outcomes. While these are difficult concepts to apply in an agency with a law enforcement mission, OSC determined that that it needed to take the next logical step in the GPRA process, and take on such challenging issues as measurement of quality and appropriate allocation of resources.

OSC, therefore, substantially revised its strategic and annual performance plans for FY 2002. The plans incorporate goals, objectives and strategies targeted not just to management of the age of OSC's caseload, but also to the effective allocation of resources so as to achieve high-quality analyses and resolutions of matters in order of established priorities. Thus, based upon a combination of factors, including but not limited to the age of a case, OSC has established a set of standards for determining which cases will receive the earliest investigative attention. It has also established guidelines for investment of resources to particular types of cases. Finally, OSC has created quality guidance standards and will implement a quality review process that is expected to enable the agency to meet its objective of measuring and improving the quality of its work.

### **Conclusion**

OSC met virtually all of its performance goals for FY 2001. It moved closer to, but did not achieve, specific numerical targets for reductions in the average age of pending prohibited personnel practice cases and whistleblower disclosure matters. Nevertheless, OSC succeeded in matching or improving upon FY 2000 results for the average age of pending caseloads. There were positive results in other measures of program performance.

A major reorganization in June of 2001 produced better coordination between investigators and attorneys and eliminated layers of management review. The reorganization appears to have succeeded in contributing to improved year-end results on a number of fronts, including the number of cases resolved after referral for investigation, and the number of cases pending at the close of the fiscal year.

Finally, OSC has substantially revised its strategic and annual performance plans for FY 2002. Both plans now incorporate goals, objectives and strategies that reflect a balance between quality, as well as quantity, in relation to the work performed by the agency.

Attachments (5)