



ANNUAL PERFORMANCE REPORT
OF THE
U.S. OFFICE OF SPECIAL COUNSEL
FOR
FISCAL YEAR 2002

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 (WPA) of 1989.¹ Basic OSC authorities and responsibilities are defined at 5 U.S.C. § 1211, *et seq.*

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);² and
- promoting greater understanding of the rights and responsibilities of government employees under the laws enforced by OSC.

¹ Public Law No. 101-12, 103 Stat. 16 (1989).

² 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) 2002,³ 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 5 U.S.C. § 2302(c).

During FY 2002, OSC was organized into five operating divisions: Complaint and Disclosure Analysis, Investigation and Prosecution (I, II, and III), and Planning and Advice.⁴ FY 2002 was the first full year of operations with integrated investigative and prosecution units, following the reorganization described in last year's annual performance report. Responsibilities of each division are 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 is the intake point for all complaints alleging prohibited personnel practices and other violations of civil service law, rule, or regulation.⁵ 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 is warranted. CEU refers any such matter to one of the Investigation and Prosecution Divisions.⁶

³ October 1, 2001 - September 30, 2002.

⁴ The Planning and Advice Division has since been re-named as the Legal Counsel and Policy Division.

⁵ 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).

⁶ 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.

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).⁷ They also represent the Special Counsel when OSC intervenes or otherwise participates in other proceedings before the MSPB.

Hatch Act Unit (IPD I). This unit is responsible for enforcing Hatch Act (HA) restrictions on political activities of federal, and certain state and local, government employees. Attorneys receive and review complaints alleging HA violations and, when warranted, refer a matter to an IPD for further inquiry. Depending on the severity of any violation, the HA Unit may issue a warning letter to the employee, attempt to resolve the violation without litigation, or send the case to an IPD for prosecution before the MSPB. The HA Unit also issues advisory opinions to individuals seeking information about the act's application to particular activities.

Alternative Dispute Resolution (ADR) Unit (IPD III). Established by the Special Counsel in FY 2000, this unit 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

⁷ 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.

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.

3. The Planning and Advice Division provides general legal, planning and policy services to the OSC, including: (a) legal advice on general policy, management, and administrative matters; (b) legal defense of OSC in litigation filed against the agency; (c) strategic planning; policy planning and development; (d) planning, conduct, and/or follow-up on reviews of program and administrative operations; (e) management of the statutorily required annual survey of persons seeking OSC assistance; (f) management of the agency Freedom of Information/Privacy Act programs; (g) management of the agency ethics program; and (h) development and coordination of reports on agency operations to other agencies and Congress.

OSC also has two administrative support units. The Human and Administrative Resources Management Branch provides personnel, procurement, and other administrative services; the Information Systems Branch provides information technology and records management services.

FY 2002 Annual Performance Goals

OSC's annual performance plan for FY 2002 reflected a substantial evolution from previous plans under the Government Performance and Results Act (GPRA). The FY 1999 annual performance plan, OSC's first under the act, defined 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 handled by the agency – *i.e.*, specific numerical targets for reducing the average age of cases pending in each of the responsible program units, along with standard output measures (*e.g.*, numbers of corrective and disciplinary action cases filed).

During FY 2001, however, OSC management and staff engaged in an extensive review of the agency's approach to strategic and annual performance goals for FY 2002 and beyond. While the predominance of quantitative measures in FY 2000 and 2001 plans made results easier to quantify, the measures related to matters only partly within OSC's control, dependent as the agency is on the quality of complaints, disclosures and other matters received. In addition, OSC's leadership was increasingly engaged with the challenge of improving the quality of communications with complainants, effectively allocating investigative and legal resources, and enhancing the quality of investigations and analyses to which those resources were committed.

Though quality of service issues are difficult to apply in an agency like OSC with a law enforcement mission, and results could be more difficult to measure, agency managers concluded that future strategic and annual performance plans needed to incorporate a better balance between traditional quantitative measures, and the Special Counsel's quality goals. OSC, therefore, substantially revised its strategic and annual performance plan for FY 2002.

Both plans focused not only on quantitative workload measures, but also on development of the means by which to address such challenging issues as appropriate allocation of resources and measurement of quality. They incorporated goals, objectives and strategies targeted not just toward management of the age of the agency's caseload, but also toward effective allocation of resources to achieve high-quality analyses and resolutions of cases, in order of established priorities.

OSC's annual performance plan for FY 2002 contained the following specific goals, grouped according to the strategic plan goal that they implemented:

FY 2002 ANNUAL PERFORMANCE GOALS

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| STRATEGIC GOAL 1 | TO FULFILL CONGRESSIONAL INTENT THAT OSC USE ITS INVESTIGATIVE AND PROSECUTORIAL AUTHORITY TO PROTECT THE MERIT SYSTEM AND FEDERAL EMPLOYEES FROM PROHIBITED PERSONNEL PRACTICES (PPPs), ESPECIALLY RETALIATION FOR WHISTLEBLOWING. |
| <p>1. <i>Develop clearly identified, written quality standards for case handling, investigation, and legal analyses, including communication with complainants (CPs). Devise measurement system, and incorporate in employees' performance plan.</i></p> | |
| <p>2. <i>Develop written report with recommendations to Special Counsel to enhance investigator/attorney consultation, sharing of best practices, productivity, and overall quality of investigations and legal analyses. Consider options, including but not limited to, restructuring management ranks, consistent with the President's initiative to delay the Federal hierarchy, revamping of time-counting to eliminate distinction between ID and PD, and use of incentives to foster improvements, including elimination of written reports of investigation, and cash awards under established, and measurable criteria.</i></p> | |
| <p>3. <i>Develop and communicate agency policy on referral of cases for investigation, and other agency policies as developed. Communicate to all staff, and make public, where possible, on OSC web-site.</i></p> | |
| <p>4. <i>Develop clearly written policy for case handling by priority (according to particular types of PPP complaints and complexity level, including consideration of resource allocation); develop guidelines for implementation; devise measurement system within OSC 2000; and incorporate in employees' performance plans.</i></p> | |
| <p>5. <i>Develop written agency-wide policies for the elimination of any unnecessary steps in case-handling. Identify case-processing steps that may be eliminated in some or all cases through encouraging ongoing communication among personnel management specialists, attorneys and investigators; develop strategy for implementation; devise measurement system; and incorporate in employees' performance plans.</i></p> | |
| <p>6. <i>Offer ADR option in 100% of appropriate cases, and track results.</i></p> | |
| <p>7. <i>Continue to adhere to OSC's policy of early settlement of meritorious cases; monitor settlement of such cases.</i></p> | |
| <p>8. <i>ISB to participate in development of priority system, and other goal-oriented changes, to ensure that OSC 2000 (OSC's in-house case-tracking system) has the capability to monitor and track all new case actions and priorities.</i></p> | |
| <p>9. <i>Obtain voluntary corrective action; prosecute MSPB cases where voluntary action not forthcoming; and obtain disciplinary action where appropriate. These policies are currently in place, but OSC's measurement system needs refinement. During FY 01, devise system for carefully tracking "reasonable grounds" determination in every PPP case, so that subsequent voluntary corrective actions, MSPB litigation, and disciplinary actions can be more accurately tracked.</i></p> | |
| <p>10. <i>ISB to ensure that OSC 2000 has the capability to monitor and track all "reasonable grounds" determinations.</i></p> | |
| <p>11. <i>Establish formal staff responsibility for monitoring non-OSC, MSPB and Federal Circuit cases for amicus, intervention, or other opportunities for OSC to proactively shape PPP law. Staff responsibility should include regular reporting requirements.</i></p> | |
| <p>12. <i>Include written correspondence quality standard among standards to be developed by process discussed in Objective A, 1; devise measurement system.</i></p> | |
| <p>13. <i>Continue CEU and PD practice of extending offer of telephone conference in pre-determination letters; devise system, with input from ISB, for collecting data on effectiveness of phone conferences by tracking numbers of cases in which complainants call to discuss case before final closure.</i></p> | |

FY 2002 ANNUAL PERFORMANCE GOALS (cont'd)

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| STRATEGIC GOAL ② | TO FULFILL CONGRESSIONAL INTENT THAT FEDERAL AND COVERED STATE AND LOCAL EMPLOYEES COMPLY WITH THE HATCH ACT'S RESTRICTIONS WHEN THEY ENGAGE IN POLITICAL ACTIVITY. |
| 1. <i>Develop modification to OSC 2000 to log and track response time to advisory opinion requests.</i> | |
| 2. <i>Working with outreach specialist, develop and implement a written plan to specifically target Hatch Act outreach to appropriate state and local government groups and associations.</i> | |
| 3. <i>Review current postings of selected Hatch Act advisory opinions on OSC web-site, and revise and update as necessary.</i> | |
| 4. <i>Develop clearly identified, written quality and timeliness standards applicable to Hatch Act investigations and legal analyses, devise measurement system, and incorporate in employees' performance plans.</i> | |
| 5. <i>Develop system within OSC 2000 for recording within the Hatch Act matter profile a code denoting OSC's belief that a violation has been established, and a capability to track the issuance of warning letters, or penalties resulting from such matters.</i> | |
| STRATEGIC GOAL ③ | TO FULFILL CONGRESSIONAL INTENT THAT OSC PROMOTE THE PUBLIC INTEREST IN THE DISCLOSURE OF VIOLATIONS OF LAW, RULE OR REGULATION, GROSS WASTE OF FUNDS, GROSS MISMANAGEMENT, ABUSE OF AUTHORITY, OR SUBSTANTIAL AND SPECIFIC DANGERS TO THE PUBLIC HEALTH AND SAFETY, BY SERVING AS A SECURE CHANNEL FOR FEDERAL EMPLOYEES, FORMER EMPLOYEES AND APPLICANTS ("WHISTLEBLOWERS") TO BLOW THE WHISTLE IN ACCORDANCE WITH 5 U.S.C. § 1213. |
| 1. <i>Develop clearly identified, written standards and procedures for disclosure handling, by priority (according to particular topics of disclosure, and complexity level), devise measurement system within OSC 2000, and include compliance with priority system in employees' performance plans.</i> | |
| 2. <i>Create disclosure manual to describe policies and procedures of Disclosure Unit, including criteria for referral of matters from CEU to Disclosure. Make available internally to all OSC employees.</i> | |
| 3. <i>Develop clearly identified, written quality standards for: 1) conducting legal analyses of disclosure allegations and agency reports; and 2) communication between OSC and those making disclosures, including correspondence. Devise measurement system, and incorporate in employees' performance plans.</i> | |
| 4. <i>Devise plan for educating federal agencies (including agencies' Inspectors General) of obligations for investigation and report once matter is transmitted. Consider disseminating information through President's Council on Integrity and Efficiency, and Executive Council on Integrity and Efficiency.</i> | |
| 5. <i>Devise improvements to system for tracking OSC's action in matters in which agencies fail to conduct an investigation and report back to OSC within statutory time limits.</i> | |
| 6. <i>Continue to adhere to policy of issuing press releases on a case-by-case basis when agency findings are transmitted to Congress and the President, and consider establishing criteria for other appropriate circumstances under which to issue press releases. Compile list of interested groups and associations to whom releases should be directed. Devise system for tracking frequency of media reporting of agency findings.</i> | |
| 7. <i>ISB to ensure that OSC 2000 has capability to monitor and track data relevant to measure baselines, and progress towards meeting objectives.</i> | |

FY 2002 ANNUAL PERFORMANCE GOALS (cont'd)

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| STRATEGIC GOAL 4 | TO RAISE GOVERNMENT EMPLOYEES' AND MANAGERS' AWARENESS OF THEIR RIGHTS AND RESPONSIBILITIES UNDER CHAPTERS 12 AND 23 OF TITLE 5. |
| | <ol style="list-style-type: none"> 1. <i>Develop systematic baseline information on agency compliance with 5 U.S.C. § 2302(c) (congressionally mandated training requirement). During FY 02, conduct the second bi-annual OSC survey of covered title 5 agencies' efforts to comply with § 2302(c), to measure progress from first survey during FY 00.</i> 2. <i>Facilitate implementation of agency-wide education programs on title 5, chapters 12 and 23 rights and remedies. During FY 02, design and implement program whereby agencies can be certified by OSC as being in compliance with § 2302(c).</i> 3. <i>Include systemic training as part of OSC's corrective actions, with agency that is a party to the settlement agreement.</i> 4. <i>Maintain and enhance training and education materials for use by OSC, employing agencies, and other trainers. During FY 02, design and implement a web-based training program for use by agency managers, as part of the certification program.</i> 5. <i>Maintain and enhance OSC web site. Consistent with the President's initiative on e-government, make as many outreach and educational materials as feasible available on OSC's web-site, including the web-based manager training program.</i> 6. <i>Convene or participate in forums for practitioners and agency representatives, in conjunction with other federal agencies, unions, federal management associations, and private training sources to enhance awareness of employee rights and responsibilities. Systematically collect data on effectiveness of forums by regular practice of participants' completion of evaluation forms.</i> 7. <i>Issue press releases when OSC obtains stays, corrective or disciplinary actions, through settlements or litigation; files a complaint before the MSPB in a significant PPP or Hatch Act matter; transmits a disclosure report to Congress and the President; or in other situations in which issuance of a press release would further OSC's mission.</i> |
| STRATEGIC GOAL 5 | TO MAINTAIN A HIGHLY SKILLED, WELL-TRAINED, CUSTOMER-ORIENTED WORKFORCE TO CARRY OUT THE AGENCY'S MISSION. |
| | <ol style="list-style-type: none"> 1. <i>Develop an exit interview procedure, including a standard form, to elicit information from departing employees about their experiences with OSC, including suggestions for enhancing OSC's operations and internal policies, with emphasis on feedback on the unit from which they are separating.</i> 2. <i>Revise existing incentive awards and employee recognition policy to provide greater flexibility for rewarding performance and special acts/service, including non-monetary recognition.</i> 3. <i>Enhance hiring and retention strategies, by providing information on employee benefits such as retention bonuses, recruitment bonuses, and tuition loan reimbursement. Encourage and publicize work-family initiatives. Develop automated databases for distributing vacancy announcements to enhance the diversity of OSC's workforce.</i> 4. <i>Develop challenging and rewarding work environment.</i> 5. <i>Ensure division and individual performance plans connect with OSC Strategic Plan.</i> 6. <i>Assist in planning and site arrangements.</i> 7. <i>Assess all employees to identify competency needs.</i> 8. <i>Communicate the benefits of ADR for internal conflict resolution.</i> 9. <i>Survey current inventory of leadership available and identify expected replacement needs for the future.</i> 10. <i>Develop a Supervisory/Managerial Handbook that provides guidance for new as well as veteran managers and supervisors.</i> 11. <i>Develop and implement managerial/supervisory training and development proposal.</i> 12. <i>Develop a competitive program to give employees an opportunity to qualify for executive positions.</i> |

FY 2002 ANNUAL PERFORMANCE GOALS (cont'd)

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| STRATEGIC GOAL 6 | TO INTEGRATE CURRENT INFORMATION TECHNOLOGY INTO OSC BUSINESS PROCESSES, IN ORDER TO IMPROVE ORGANIZATIONAL PERFORMANCE AND TO COMPLY WITH STATUTORY MANDATES. |
| 1. | <i>(a) Procure sufficient new personal computers so that all obsolete PC's are eliminated; (b) procure new file server to accommodate new users, upgrade performance and storage capacity; and (c) procure upgraded PC server to house OSC web-site in compliance with § 508 access requirements.</i> |
| 2. | <i>Upgrade standard operating system for all agency PC's to Windows 2000/Office 2000.</i> |
| 3. | <i>Research feasibility of reducing number of incoming phone lines, by converting to upgraded voice/data link.</i> |
| 4. | <i>ISB to ensure that OSC 2000 case-tracking system has the capability to monitor and track data relevant to measure baselines, and progress towards meeting objectives.</i> |
| 5. | <i>Research and prepare written report detailing comprehensive plan to implement electronic filing of complaints and disclosures, including cost estimates for all needed hardware and software upgrades, and timetable.</i> |
| 6. | <i>Conduct information technology security and vulnerability assessment study, in accordance with government-wide standards.</i> |

The complete text of OSC's five-year strategic plan covering agency operations during FY 2002 appears under attachment 1 ("FY 2001-2006 Strategic Plan"). The agency's annual performance plan for FY 2002 appears under attachment 2.

FY 2002 Annual Performance Results

OSC met virtually all of its performance goals for FY 2002. Among the year's most significant accomplishments were the following:

- establishment of standards for determining which cases would receive the earliest investigative attention, guidelines on the investment of resources to particular types of cases, and an automated case allocation system;
- creation of the § 2302(c) Certification Program;
- implementation of a flexible workplace pilot program; and
- development of infrastructure for planned process for electronic filing of complaints and disclosures.

Results accomplished for the year, under each of the six sets of goals defined in OSC's FY 2002 annual performance plan, are shown in tables under attachment 3 (FY 2002 Annual Performance Results: Goals 1-6). Accomplishments not directly linked to goals set forth in that plan are shown at the end of the affected tables.

FY 2003 Annual Performance Plan

OSC's annual performance plan for FY 2003 carries forward the approach adopted in its FY 2002 plan – *i.e.*, sustaining a balance between management of the age of the caseload, and between effective allocations of resources to achieve high-quality analyses and resolutions of cases, in order of established priorities. Agency efforts under the plan are focused on: (a) reducing the age of case backlogs; (b) consolidating the progress made in developing quality standards under the FY 2002 plan; (c) taking further steps to develop, implement, and communicate quality standards in processing matters handled by the agency; and to test quality review processes. Agency goals under the FY 2003 plan include the following:

- setting targets for backlog reduction within individual case categories and meeting backlog reduction targets by the end of the fiscal year;
- continuing to implement and refine policies for case handling by priority (according to particular types of matters and complexity level, including consideration of resource allocation); and
- preparing to implement electronic complaint and disclosure filing systems by the start of FY 2004.

Conclusion

OSC's annual performance plan for FY 2002 reflected a significant evolution from previous plans under the GPRA. It evinced the agency's judgment that its strategic and annual performance plans needed to incorporate a better balance between traditional quantitative measures, and the Special Counsel's quality goals, than had been the case in plans implemented between FY 199-2001. Both plans for FY 2002, therefore, incorporated goals, objectives and strategies that designed to achieve a balance between quality, as well as quantity, in relation to the work performed by the agency. OSC met virtually all of its performance goals for FY 2002.

Attachments: FY 2001-2006 Strategic Plan
FY 2002 Annual Performance Plan
FY 2002 Annual Performance Results