First
Annual Report to the Congress
On the Activities
of
The Office of the Special Counsel (1979)

Submitted pursuant to
5 U.S.C. 1206 (m)
(P.L. 95-454)

In Reply Please Refer to:

Your Reference:

Office of the Special Counsel

1717 H Street, N.W.
Washington, D.C. 20419

JUL 3 1980

Vice President Walter F. Mondale
President of the Senate
Capitol Building, S 212
Washington, D.C. 20510

Dear Mr. President:

The enclosed Report of the Office of the Special Counsel's activities for the year 1979 reflects a record of considerable progress.

The Office began with a broad mandate from the Congress charging the Office with the responsibility for the investigation and administrative prosecution of prohibited personnel practices within the Executive branch of the Government, a responsibility which had to be met beginning with the very first day of the Office's existence, January 2, 1979. In this regard, it is important to note that unlike other government agencies which result from reorganizations, the Office of the Special Counsel has been required to meet its responsibilities without the benefit of a prior history of programmatic activity: complaints received from employees had to be serviced at the same time as the Office was undergoing all the tasks involved in establishing a new agency--recruiting new staff, obtaining offices, supplies and the myriad other important administrative tasks. Indeed, overcoming administrative difficulties has not been fully accomplished, for example, the staff continues to labor under adverse office space conditions, as further described in the Report.

A number of housekeeping and programmatic tasks have been met, including most of the concerns identified by the Government Accounting Office in its reports to the Congress on the Office of the Special Counsel of October 22, 1979. A computer retrieval system has been purchased and installed and will be operational shortly; a pamphlet describing Federal employees rights under the Civil Service Reform Act of 1978 and the role of the Special Counsel in assisting employees has been prepared for distribution; a public information officer has been recruited to assist in the Office's outreach program; and a field structure established.

We welcome this opportunity to share with the Congress this Report and will be happy to respond to any questions or observations by the Congress which may be generated by it.

Sincerely yours,

H. Patrick Swygert
Special Counsel
(January 2 - December 21, 1979)

Mary Eastwood
Acting Special Counsel

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Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
2231 Rayburn House Office Building
Washington, D.C. 20515

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INTRODUCTION

The Office of the Special Counsel of the Merit Systems Protection Board was established in January 1979, under the President's Reorganization Plan No. 2 of 1978. The functions and responsibilities of the Office of the Special Counsel, as substantially expanded by the Civil Service Reform Act of 1978, are twofold: first to receive and investigate allegations of activities prohibited by civil service law, rule or regulation, primarily the prohibited personnel practices established under the Reform Act (5 U.S.C. 2302(b)); and to initiate appropriate corrective and disciplinary actions when warranted; and second, to provide Federal employees a safe channel for disclosing information evidencing Government wrongdoing without fear of retaliation and with assurance that their identities are not disclosed without their consent. Such disclosures are commonly referred to as "whistleblowing."

Section 1206(m) of title 5, United States Code, as added by the Civil Service Reform Act, requires the Special Counsel to submit an annual report to the Congress on the activities of the Office, including the number, types, and disposition of allegations of prohibited personnel

H. Patrick Swygert
Special Counsel
(Jan. 2 - Dec. 21, 1979)

practices, investigations conducted, and actions initiated before the Merit Systems Protection Board, together with descriptions of the recommendations and reports made by the Office to other agencies and the actions taken by the agencies as a result of the reports or recommendations. The report must also include whatever recommendations for legislation or other action by the Congress the Special Counsel deems appropriate.

This report covers activities during calendar year 1979, the first year of operation of the Office.

ORGANIZATIONAL ACTIVITIES OF THE OFFICE OF THE SPECIAL COUNSEL

The first Special Counsel of the Merit Systems Protection Board, H. Patrick Swygert, was appointed by the President on January 2, 1979, as a recess appointee. Concurrently, nine professional and five clerical staff were transferred to the Office of the Special Counsel from the former Civil Service Commission to form the initial staff complement. Of the nine professional staff, six were attorneys from the Commission's Office of the General Counsel who had been involved primarily in the area of Hatch Act enforcement. The remaining three professional staff were personnel management specialists of the Commission's Bureau of Personnel Management Evaluation who had been serving as investigators in that Bureau's merit system investigation function.

The initial staff ceiling was 19. The Merit Systems Protection Board loaned an additional six position allocations, enabling the Office to work with a total personnel ceiling of 25 during most of fiscal year 1979, until a supplemental appropriation was received in August of 1979. By the end of December 1979, the Office staff had grown from the initial 14 to a total of 48 professional and support staff. (The personnel ceiling for fiscal year 1980 is 140).

By the end of the year field offices had been established in San Francisco and Dallas, and plans were under way to establish field or branch offices in Atlanta, Philadelphia, Chicago, Boston, Seattle, Denver, New York, St. Louis,

and Los Angeles. (The Atlanta, Philadelphia, Seattle and Los Angeles offices have since been opened). Moratoriums and other restrictions imposed by the General Services Administration on office space have impeded our progress in opening and staffing field offices.

The Office published interim procedures for its operations in the Federal Register on January 30, 1979 (40 FR 6060) and in March 1979, it prepared and distributed to staff and interested agency officials and members of the public an Office of the Special Counsel Operations Manual. Proposed final regulations on procedures for the receipt and investigation of allegations of prohibited personnel practices and other activities of the Office were published on August 24, 1979 (44 FR 49956), and final regulations for the Office of the Special Counsel were published on December 21, 1979 (44 FR 75914), attached as Appendix A.

The Office maintained liaison with agency Inspectors General and General Counsels, and appropriate offices of the Department of Justice, the Equal Employment Opportunity Commission, and the Office of Personnel Management. The Office received support and constructive criticism from Federal employee organizations and various public interest groups throughout the year.

Until it received a supplemental appropriation in August 1979, the Office was hampered by lack of funds and staff, which prevented it from conducting needed investigations and keeping current with the complaint caseload. Throughout the year, the central office staff was also handicapped by lack of private office space in which to work and to communicate with Federal

employee complainants, their representatives, and agency officials, thus making it difficult to afford the privacy necessary to effectively protect the rights of the Federal employees concerned. Only one permanent private office was allocated to the Special Counsel by the Merit Systems Protection Board, which controlled space for the Office. Staff in the Senior Executive Service and other managers shared open space with attorneys, investigators and secretaries. (Overcrowding of staff, lack of privacy, and somewhat unsafe office quarters are still problems). Despite the small staff and heavy workload, and difficult working conditions, staff morale remained high. The Office was greatly aided in overcoming some of its initial start-up problems as a result of the efforts of Senator David H. Pryor and the staff of the Senate Subcommittee on Civil Service and General Services, and Congresswoman Patricia Schroeder and the staff of the House Subcommittee on Civil Service.

In addition to carrying out its functions of investigating allegations and prosecuting violations of civil service law, and referring whistleblowing allegations to agencies for investigation or report on actions taken, the Office made plans for an outreach program. It also made plans for a computerized case tracking system to assist the Office in timely processing of complaints and in ascertaining any patterns of prohibited personnel practices or other violations of civil service law. [The computer system was installed in June 1980 and should be fully operational on or about September 1, 1980].

The first Special Counsel resigned on December 21, 1979, to return to Temple University School of Law, leaving the Office without a Special Counsel until January 11, 1980, when the President designated an Acting Special Counsel pending the appointment of a new Special Counsel.

NUMBER AND TYPES OF COMPLAINTS OR ALLEGATIONS

During calendar year 1979, the Special Counsel received 1925 complaints or allegations. This figure does not include telephone inquiries from Federal employees or other contacts resolved without the need to establish an official case file. It also does not include 109 Hatch Act cases and approximately 500 letters responding to inquiries regarding the Hatch Act. It also does not include cases received directly by field offices in San Francisco and Dallas which were opened late in 1979. The San Francisco Office received 76 complaints and the Dallas Office received 50 complaints, in addition to cases referred from the national office.

Of the 1925 cases, 1226 were closed and 699 were pending on December 31, 1979.

More than 95% of the cases received involved allegations of prohibited personnel practices or other violations of civil service law. The remaining 5% (96 cases) were "whistleblower" allegations which were referred to agencies for investigation or report, discussed at page 20 of this Report.

Precise data for 1979 is not available. The case record system is presently contained on 5" by 7" cards. The information provided herein is based on periodic counting of these cards, which are now contained in two card file indexes ("closed" and "pending"), unless otherwise noted.

A large number of the complaints were "screened out" or closed without investigation or further inquiry beyond a careful review of the complainant's submission to the Office. A case may be closed after the initial review for example, when the complainant is employed by an organization excluded from

coverage, such as the Postal Service or a Government corporation, (see 5 U.S.C. 2302(a)(2)(C)); no personnel action as defined in section 2302(a)(2)(A) is involved, or no prohibited activity is indicated. In an effort to assist in timely responding to complainants, a form letter is used by the Office in many cases, attached as Appendix B, and where appropriate, information concerning the statutory definition of "personnel action" and the prohibited personnel practices is enclosed (Appendix C). An additional form is used to ascertain whether or not the complainant consents to revealing his or her identity to the agency, and to elicit additional information from the complainant in order to aid the Office in determining what further action on the case is appropriate. (Appendix D).

A case closed by the Office is reopened and reviewed upon receipt of additional information from the complainant indicating any matter that may fall within the Office's investigative jurisdiction.

In 520 of the cases received in the Office, the complainant alleged reprisal for whistleblowing or for exercising an administrative appeal right. This represents more than one-fourth of the complaints. The Office staff estimated that between 10 and 15 percent of the complaints alleged prohibited discrimination (§ 2302(b)(1)). Impropriety in promotion actions was a common allegation.

The staff conducted 81 on-site investigations in 1979. In the other cases that were not closed after the initial review, the investigation took the form of a preliminary inquiry, by mail or by telephone, and in some instances, the inquiry by this Office resulted in resolution of the employee's problem by bringing the matter to the attention of higher-level management officials who directed that corrective action be taken.

In the cases where no prohibited personnel practice or other violation of civil service law is found, the investigation was closed and the complainant notified of the reasons for the closure, as required by 5 U.S.C. 1206(a)(2).

In addition to the function of protecting employee rights, the Office of the Special Counsel is responsible for enforcing 5 U.S.C. 7324-7327 and 5 U.S.C. 1501-1508, more commonly known as the Hatch Act. Enforcement of the Hatch Act prohibition on political activities is one of the functions which was transferred to the Office of the Special Counsel from the Civil Service Commission pursuant to Reorganization Plan No. 2 of 1978, and the Civil Service Reform Act of 1978. Along with the transfer of function, 38 active cases were transferred from the Civil Service Commission to the Office of the Special Counsel when the Office was established in January 1979. In addition to these 38 cases, 71 new cases were opened during 1979. Thirty-three of the cases involving Federal employees were closed during 1979. These cases involved alleged prohibited political activity such as management of a partisan political campaign, campaigning for a partisan candidate or being a candidate in a partisan election. Another 36 cases involving state and local employees were

closed during this same period of time. These cases involved alleged prohibited political activity, including candidacy in a partisan election and unlawful political coercion. Of the 40 cases pending at the end of 1979, the Office had requested additional information in 10 cases, was evaluating additional information in 15 cases, had issued warning letters in 4 cases and 11 cases were being investigated. This information pertaining to alleged violations does not include approximately 500 letters which were sent responding to specific requests for formal opinions or information on the interpretation and application of the Hatch Act.

During calendar year 1979, the Special Counsel referred 5 cases involving potential criminal violations to the Department of Justice. Three of the cases concerned matters which were also referred to agency heads for investigation and report under 5 U.S.C. 1206(b)(3). In one of those three cases, the Department of Justice requested that the Special Counsel's request to the agency head be withdrawn so that Justice could conduct the investigation.

In the remaining two of the five cases, the complainant was not a Federal employee and, thus, the Special Counsel was without jurisdiction to conduct an investigation. Consequently, because the matters complained of appeared to involve possible criminal conduct, they were also referred to Justice.

PETITIONS FOR STAYS OF PERSONNEL ACTIONS

Section 1208 of title 5, United States Code, authorizes the Special Counsel to request the Merit Systems Protection Board, or any member of the Board, to order a stay of personnel action if the Special Counsel determines that there are reasonable grounds to believe that a personnel action was taken or is to be taken as a result of a prohibited personnel practice. Under paragraph (a) of section 1208, the Special Counsel may request an order for a stay of personnel action for 15 calendar days, and the stay is automatically granted on the fourth calendar day (excluding Saturdays, Sundays, and legal holidays) unless the Board or member of the Board determines that the stay "would not be appropriate." (§ 1208(a)(2)). The Special Counsel may request an extension of the stay for up to 30 more days under paragraph (b) of section 1208, and for a further period of time under paragraph (c). Under paragraph (c), the Board may extend the stay for any further period, if it concurs with the Special Counsel's determination that there are reasonable grounds to believe that a prohibited personnel action was taken or is to be taken, after opportunity is provided for oral or written comment by the Special Counsel and the agency involved.

The Special Counsel requested stays of personnel actions in nine cases during 1979. */ Three of these cases involved more than one employee. In two

*/ During the first four months of 1980, stays were requested in six additional cases.

of the nine cases, the initial stay request was denied by the Board; in the remaining seven cases the Board granted stays. The personnel action involved was removal in three cases; geographic reassignment in four; reassignment in one, and a detail in one. Four of the cases involved allegations of reprisal for whistleblowing (§ 2302(b)(8)); two alleged reprisal for exercising administrative appeal rights (§ 2302(b)(9)); two alleged prohibited discrimination (§ 2302(b)(1)); two alleged violation of civil service law implementing merit system principles (§ 2302(b)(11), chapter 43, performance appraisal); and one alleged discrimination on the basis of conduct that does not adversely affect performance (§ 2302(b)(10)).

In some instances, agencies have been willing to voluntarily stay personnel actions at the request of the Office of the Special Counsel, obviating any need to file a formal request with the Board.

RECOMMENDATIONS AND REPORTS TO AGENCIES AND COMPLAINTS FOR ORDERS OF CORRECTIVE ACTION

Section 1206(c)(1) of title 5, United States Code, authorizes the Special Counsel to recommend corrective action to agencies when he determines that there are reasonable grounds to believe a prohibited personnel practice has occurred, exists, or is to be taken. Copies of the findings and recommendations are submitted to the agency involved, the Office of Personnel Management, and the President. If the agency has not taken the corrective action recommended

after a reasonable period of time, the Special Counsel may request the Board to consider the matter and the Board is authorized to order such corrective action it considers appropriate, "after opportunity for comment by the agency concerned and the Office of Personnel Management."

Requests for orders of corrective action were filed with the Board in two cases during 1979. Following is a summary of those cases:

In the matter of Robert J. Frazier, et al. and U.S. Marshals Service, Department of Justice

This case, involving four "whistleblower" Deputy United States Marshals in Atlanta, Georgia, was the first case in which the Special Counsel recommended corrective action under 5 U.S.C. 1206(c)(1)(A) and the first case in which the Merit Systems Protection Board (Board) ordered an evidentiary hearing with respect to the Special Counsel's petition for an order for corrective action under 5 U.S.C. 1206(c)(1)(B). Further, it is the first such case to reach the United States Court of Appeals for the District of Columbia Circuit. Thus the Frazier case is precedent setting not only with respect to the meaning of several provisions of the Civil Service Reform Act of 1978, but also with respect to some of the basic functions of the Office of the Special Counsel itself.

The history of the Frazier case at the administrative level extended throughout the final ten months of 1979. A complaint was received by the Office

of the Special Counsel from the American Federal of Government Employees, AFL-CIO (AFGE) on February 26, 1979, indicating that the four Deputy United States Marshals were being geographically reassigned in reprisal for "whistleblowing" and for exercise of appeal rights in violation of 5 U.S.C. 2302(b)(8) and 2302 (b)(9). Stays of these reassignments were granted by the Board on March 8 and 23, 1979, for 15 and 30 days under 5 U.S.C. 1208(a) and (b), respectively. During the pendency of these stays the Special Counsel found as a result of investigation that there were reasonable grounds to believe that a prohibited personnel practice had been taken by the United States Marshals Service with respect to the four deputies in violation of both sections 2302(b)(8) and (b)(9). Thus, on April 11, 1979, the Special Counsel recommended corrective action to the Attorney General under section 1206(c)(1)(A). The corrective action recommended included rescission of the proposed reassignments and review by the Attorney General of the actions of Marshal Ronald Angel and Director of the Marshals Service William E. Hall in initiating the reassignments. The Attorney General declined to comply with the recommended corrective action on May 21, 1979. Thereafter, the Special Counsel filed a petition for order for corrective action with the Board on May 29, 1979, and also requested further extension of the stay of the deputies' reassignments. The Board extended the stay of the reassignments on June 15, 1979, pending a final administrative decision on the matter. On July 12, 1979, the Board granted a motion by AFGE to intervene as attorneys

in behalf of the deputies. Extensive hearings were held before the Board on August 8, 9, 10, and 23, 1979, and final briefs were filed on October 8, 1979. The Board's decision was issued on December 17, 1979.

In its decision in the Frazier case the Board permanently enjoined the involuntary reassignment of Deputy Frazier on the basis that it was taken in reprisal for his exercise of appeal rights, specifically his involvement in the EEO process, in violation of 5 U.S.C. 2302(b)(9), and ordered other corrective action with respect to the EEO process in the U.S. Marshals Service. However, the Board found that the reassignment of Frazier was not in violation of 5 U.S.C. 2302(b)(8) (reprisal for "whistleblowing") and that the reassignments of the other three deputies were not in violation of either section 2302(b)(8) or (b)(9). The Board found that while the four deputies had made protected disclosures, Director Hall did not have actual or constructive knowledge that they had done so. The Board also ruled that it has discretion as to whether a hearing should be held and what type of hearing is appropriate, that the burden of proof in such cases is on the Special Counsel, and that the standard of proof to be met by the Special Counsel is a preponderance of the evidence. */

*/ On January 16, 1980, AFGE filed a petition for review of the Board's decision in Frazier with the United States Court of Appeals for the District of Columbia Circuit where the matter is now pending submission of briefs. Since the Civil Service Reform Act does not expressly authorize the Special Counsel to appeal or to intervene in such appeals, the Acting Special Counsel requested permission from the Solicitor General of the United States to participate as amicus curiae. The Solicitor General denied her request on April 14, 1980. The AFGE filed a motion requesting the Court of Appeals to require the Special Counsel's participation in the appeal.

In the matter of Robert J. Tariela and Ira J. Meiselman, Veterans Administration Medical Center, San Diego, California

Robert J. Tariela is Chief of the Medical Administration Service at the Veterans Administration Medical Center in San Diego, California, and Ira J. Meiselman is the Assistant Chief of the same Service. For a number of years the two had been documenting irregularities and violations of Veterans' Administration policies, rules, regulations, and instances of mismanagement by reporting these incidents primarily through their chain of command at the Veterans Administration Medical Center in San Diego, California and within the Veterans Administration hierarchy. Tariela and Meiselman alleged that as a result of this memo-writing activity they were ordered to be reassigned to Ann Arbor, Michigan and New Haven, Connecticut, respectively.

The Office of the Special Counsel, after conducting an extensive on-site investigation petitioned for stays of the reassignment actions which were granted. After the proposed corrective action sought by the Special Counsel seeking to cancel the reassignment orders was declined by the Veterans Administration, the Special Counsel filed an 118 paragraph complaint requesting the Board to order that the reassignments be cancelled.*/

*/ Both the Veterans Administration and the Special Counsel began preparing for a full scale evidentiary hearing. The Special Counsel's Office assigned two attorneys and one legal intern to work full time on the case. Thirty (30) depositions were taken from prospective witnesses in San Diego, (cont'd)

In other cases where the Special Counsel made formal recommendations to agency heads pursuant to section 1206(c) based on a determination that there were reasonable grounds to believe that a prohibited personnel practice had occurred, or that any violation of any law, rule, or regulation had occurred, the recommendations were implemented by the agency:

- o An employee of the Department of Health, Education, and Welfare whom the Special Counsel had found had been reassigned in reprisal for whistleblowing was restored by the Department to a position suitable to his grade level.

- o After investigation, the Special Counsel determined that the position of an employee of the Department of the Army had been abolished in contravention of Department regulations. The Department cancelled the RIF notice which had resulted in the abolishment of the position.

- o An employee of the Department of Transportation alleged sex discrimination and general abuse and violation of civil service law and regulations.

*/ (cont'd) Miami, Florida, and Washington, D.C. Extensive legal briefs and memoranda were prepared by the Office. After discovery was substantially completed, the Veterans Administration and the Special Counsel sought to settle the case prior to litigation. A settlement agreement was reached in March, 1980, which provided that:

1. the proposed transfers would be cancelled;

2. any reference to the proposed transfers and the protected activities of Tariela and Meiselman would be excised from their official personnel files; and

3. the Veterans Administration would carefully examine the circumstances surrounding the denial of Mr. Meiselman's career ladder promotion to a GS-12.

Subsequently, Mr. Meiselman was granted his targeted promotion.

The Special Counsel recommended that the Department determine the proper classification of positions in the unit concerned, and provide employees with a proper resolution of issues of redistribution of job duties and their entitlement under RIF procedures. The Department advised the Special Counsel it would implement the recommendations.

- As the result of an investigation of a complaint of discrimination based on sex filed by an employee of the Nuclear Regulatory Commission, The Special Counsel, although not finding discrimination, recommended consideration of several systemic changes in the agency's merit promotion procedures. The Special Counsel received a positive response with regard to many of the recommendations.

In another case, the Special Counsel found that the Department of Commerce had removed some of an employee's duties in reprisal for whistleblowing. However, the employee resigned before the Department's response to the recommendation was received by the Special Counsel.

Finally, in a case filed by an employee of the Selective Service System alleging reprisal for whistleblowing, after the Special Counsel had recommended restoration of the employee who had been placed on leave without pay, the matter was resolved through settlement of related litigation.

INFORMAL RESOLUTION OF COMPLAINTS

In a much larger number of cases, agencies agreed to take corrective action recommended by the Special Counsel without submission of an investigative report and formal recommendations to the agency head. In some instances, simply

bringing the allegation to the attention of appropriate agency officials resulted in corrective action for the complainant. In other cases, agency officials agreed to or initiated corrective action after being notified of the Special Counsel's intent to file a petition for stay of personnel action with the Board.

Because the Office's computerized case record system is not yet in place, the Office does not have a complete record of these corrective actions. A complete report would require an exhaustive review of the manual card indexes and in some instances, a review of the case files themselves. In addition, avoidance of a public record of a personnel related problem is sometimes an incentive for an agency to resolve the matter to the satisfaction of the employee and the Special Counsel. It is expected that in future Annual Reports, more complete statistical data on informal resolution of complaints will be available. The following are examples of informal resolutions of complaints during 1979, based on a survey of cases.

- A probationary employee removed in reprisal for whistleblowing (2302(b)(8)) was reinstated with back pay.

- An employee denied a promotion allegedly in reprisal for whistleblowing was promoted.

- An involuntary geographic reassignment allegedly due to discrimination based on conduct not related to job performance (2302(b)(10)) was rescinded.

- A geographic reassignment of a handicapped employee who alleged discrimination (2302(b)(1)) was rescinded and the employee was reassigned to a position of equal responsibility and grade to accommodate his need to remain near his doctor.

- An employee denied special pay benefits allegedly because of discrimination based on race and sex (2302(b)(1) and in reprisal for having filed an EEO complaint (2302(b)(9)) was granted the pay retroactively.

- The proposed removal of an employee based on performance in violation of chapter 43 of title 5, United States Code, was voluntarily stayed by the agency (2302(b)(11)).

- An employee reassigned allegedly in reprisal for whistleblowing (2302(b)(8)) was reassigned to a position in another location more desirable to him.

- Records of a disciplinary action against an employee alleged to have been based on discrimination (2302(b)(1)) were expunged.

- Agency action in removing duties and giving employee an unsatisfactory performance evaluation was rescinded in exchange for the employee's withdrawal of his complaint with the Special Counsel.

- A proposed removal of an employee who alleged racial discrimination (2302(b)(1)) and reprisal for having filed EEO complaints (2302(b)(9)) was withdrawn.

- A proposed five-day suspension of an employee who alleged reprisal for whistleblowing (2302(b)(11)) was first voluntarily stayed, then permanently withdrawn by the agency.

- An agency agreed to hold in abeyance all pending adverse actions for unsatisfactory performance during pendency of the decision of the Merit Systems Protection Board in Wells v. Harris (which invalidated OPM's interm regulations on performance appraisal systems).

The foregoing are only examples of the cases resolved informally. In addition, in a number of instances, agencies agreed to speed up action in processing EEO complaints which employees alleged had not been processed. Although the Special Counsel has direct investigative jurisdiction to investigate discrimination complaints, the Office has adopted a policy of deferring to the EEO processes established in the agencies and the Equal Employment Opportunity Commission even in cases where a personnel action, and therefore a

potential prohibited personnel practice, was involved, in order to avoid duplicative investigations. The Office generally exercised a "monitoring" function or utilized its authority to petition the Merit Systems Protection Board for a stay of personnel action in discrimination cases.*/

AGENCY REPORTS ON WHISTLEBLOWER ALLEGATIONS

In addition to its direct investigative jurisdiction over prohibited personnel practices and other violations of civil service law, rule, or regulation, the Special Counsel is required by 5 U.S.C. 1206(b)(2) to transmit to the appropriate agency head any disclosure of information reasonably believed to evidence a violation of law, rule, or regulation, mismanagement, gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety. Exceptions are made for disclosures specifically prohibited by statute, and disclosure of information specifically required by Executive order to be kept secret in the interest of national defense or in the conduct of foreign affairs. (However, section 1206(b)(1)(E) of title 5, United States Code, authorizes the Special Counsel to receive disclosures prohibited by law or Executive order).

*/ The Special Counsel's policy in discrimination cases is currently being revised due to a May 9, 1980 decision of the Merit Systems Protection Board. In that case, the Special Counsel sought a stay of the removal of an employee who alleged age discrimination, inasmuch as the agency's own EEO Officer proposed a finding of discrimination based on age, until the agency made a final decision on the case or until the matter was resolved by the agency. However, the Board denied the stay requested pursuant to 5 U.S.C. 1208(c).

The Special Counsel may require agencies to conduct investigations and prepare reports on the substance of the whistleblower allegations, and reviews the reports to determine whether they sufficiently address the issues raised by the employee, and propose a reasonable means of correcting any violation of law, rule, or regulation or other wrongdoing.

Reports requested pursuant to transmittal of whistleblower allegations may take two forms. If, upon review of the allegations and supporting documentation the Special Counsel determines that there is a substantial likelihood that the information discloses a violation of law, rule, or regulation or mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety, the Special Counsel requires the agency head to conduct an investigation of the allegations and submit a written report that complies with the requirements of sections 1206(b)(3) and 1206(b)(4). These sections require that the report be reviewed and signed by the agency head and contain (1) a summary of the information received; (2) a description of the conduct of the investigation; (3) a summary of evidence obtained; (4) a listing of any violation or apparent violation of any law, rule, or regulation; and (5) a description of any corrective action taken or planned as a result of this investigation. These reports are submitted to the Congress, the President and to the Special Counsel for transmittal to the complainant. These reports are placed in a public file maintained at the Office of the Special Counsel in Washington, D.C.*/

*/ Additional sets will also be placed in OSC Field Offices.

When the Special Counsel determines that the information received does not warrant the type of investigation and report required by 1206(b)(3), the allegation is forwarded to the agency head for a report pursuant to 1206(b)(7), which requires the agency to inform the Special Counsel within a reasonable time of what action has been or is to be taken with respect to the allegation. These reports are forwarded to the complainant, and are placed in a public file maintained in the Central Office, unless the agency indicates some reason why the report should not be made public. Deletions are made to protect privacy rights, where necessary.

Summaries of agency reports of investigations required by the Special Counsel pursuant to 5 U.S.C. 1206(b)(3) and received during 1979 are set forth in Appendix E.

RECOMMENDATIONS FOR LEGISLATION

The Office of the Special Counsel is not proposing specific legislation at this time. However, experience during the first 17 months of operation indicates that consideration of the following changes in the law is warranted:

1. Litigation Authority.

Pending appellate court action in the Frazier case, cited above, the issue of the Special Counsel's authority to appeal, intervene, or otherwise participate in appeals from decisions of the Merit Systems Protection Board to the United States Court of Appeals is in question. If the Special Counsel is without authority to appear in court, federal employees represented by the Special Counsel before the Merit Systems Protection Board will be left to their own devices, or representation by interested organizations. Such a result would be inconsistent with the President's stated goal of supporting legitimate whistleblower activities, and leave our courts without the assistance of this Office when called upon to interpret and apply the Reform Act. Accordingly, legislation would be necessary to make it clear that Congress wished to utilize the Special Counsel to exercise the full litigation authority as a party in any case in which it is involved.

2. Attorneys fees.

In all cases filed with the Special Counsel involving allegations of prohibited personnel practices or other violations of civil service law, there should be specific statutory authorization for the payment of reasonable

attorney fees by the agency to the employee or applicant where the employee prevails. Such fees can now be paid in discrimination cases and in cases involving the Back Pay Act (5 U.S.C. 5596). In response to questions submitted by the Special Counsel, the Comptroller General decided, in a November 27, 1979, decision letter, that the Special Counsel may recommend to agencies that complainants' attorney fees be paid, and that such fees may be paid in connection with settling a complaint pending with the Special Counsel. Payment of attorney fees would encourage representation of Federal employees in cases where the employee is likely to prevail. In cases involving reprisal against whistleblowers, under existing law, a fee may be paid only where the reprisal takes the form of a personnel action, the correction of which involves backpay. An attorney's fee could not be paid in a case involving a geographic reassignment, without loss of pay, in reprisal for whistleblowing. This is an inequity that should be corrected.

3. Fitness for duty examinations and unwarranted investigation of employees.

The Special Counsel may petition the Board to request a stay of an action reasonably believed to be in reprisal for whistleblowing or for filing an employee appeal only if a personnel action is involved. However, there are reprisal actions that can be taken against an employee that do not involve a personnel action as defined by the statute (§ 2302(a)). For example, an agency may direct the employee to take a psychiatric fitness for duty examination or institute an unwarranted agency investigation of the employee. The Special

Counsel cannot request the Board to stay these actions because they do not involve "personnel actions," as currently defined in the law. The stay provision should be extended so as to be operative in at least these two areas.

4. Disciplinary actions against former employees.

The Special Counsel has not yet filed a complaint for disciplinary action pursuant to 5 U.S.C. 1206(g). However, there is a potential problem with that provision. It is limited to complaints against Federal employees and does not apply to former employees. An official found to have engaged in wrongdoing may resign rather than face potential disciplinary action, then secure a job in another agency. The Special Counsel should be authorized to file a complaint against a Federal official who resigns rather than face a disciplinary proceeding. The former official could then be debarred by the Board from Federal employment for up to 5 years or assessed a civil penalty not to exceed $1000.

5. Reprisal against witnesses and interference with investigations.

Under the present law, it is not clear whether a witness supporting a complainant (or management) in a case either before the Special Counsel, or in some agency investigation of wrongdoing, would always be protected from reprisal. Although the witness might be considered a "whistleblower" if the nature of his disclosures to the investigator permit that, and thus protected under 5 U.S.C. 2302(b)(8), consideration should be given to expressly protecting witnesses and prohibiting interference by agency officials in Special Counsel investigations.

6. Extension of protection to other Federal employees.

Certain Federal employees are excluded from the prohibited personnel practice provisions of the statute, such as employees of the Library of Congress and employees of Government corporations. The protections of the statute should be extended to those employees.

7. Administrative Independence.

Although the Office of the Special Counsel operates independently of the Merit Systems Protection Board, it is presently administratively connected with the Board for purposes of procurement and space allocation. The current dependency on the Board for procurement and space is both a burden on the Board and an inconvenience, if not an obstacle, to the functioning of the Office of the Special Counsel. The Special Counsel has requested an opinion from the Comptroller General as to whether the Office of the Special Counsel may exercise procurement authority independent of the Board. In addition, the title of the position "Special Counsel of the Merit Systems Protection Board" has created some confusion as to the respective roles of the Special Counsel and the Board. If this confusion continues, or if the Comptroller General rules that the Special Counsel may exercise independent procurement authority only upon delegation by the Board, legislation to accomplish the complete independence of the Special Counsel may be necessary.

Federal Register

Friday
December 21, 1979

Part III

Office of the Special Counsel

Prohibited Personnel Practices and Activities; Procedures for the Receipt and Investigation of Allegations

OFFICE OF THE SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD

5 CFR Parts 1250-1209

Prohibited Personnel Practices and Activities: Procedures for the Receipt and Investigation of Allegations

AGENCY: Office of the Special Counsel.

ACTION: Final rules.

SUMMARY: These regulations set forth the procedures for the receipt and investigation by the Office of the Special Counsel of allegations of prohibited personnel practices in Federal agencies and activities prohibited by other civil service law, rule, or regulation. The regulations also establish procedures for the receipt and referral of whistleblower allegations to agencies for investigation or a report.

EFFECTIVE DATE: December 20, 1979.

FOR FURTHER INFORMATION CONTACT: Mary Eastwood, Associate Special Counsel (Investigations), Office of the Special Counsel, 1717 H. Street, N.W., Washington, D.C. 20419 (202-653-7140).

SUPPLEMENTARY INFORMATION: The Special Counsel published interim procedures for operations in the Federal Register on January 30, 1979 (44 FR 6060). On August 24, 1979, proposed final regulations were published for comment (44 FR 49956). These regulations supersede the interim regulations. Comments were received from eleven Federal agencies, one labor organization, and five public interest groups. Following is a summary of the major comments and changes in the regulations as published on August 24.

Definitions

(§ 1250.3). The definition of "whistleblower" has been revised to make clear that disclosure of information prohibited by statute is not protected except as noted below. The definition is also expanded to make clear that proctected disclosures may be either oral or written, and that the information may be disclosed to any person, whether within or outside the agency. Further, protected disclosures include disclosures to the Special Counsel, an agency Inspector General, or other agency employee designated by the agency head to receive such information, even if the disclosure would otherwise be prohibited by statute or required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

One commentor suggested the deletion of the statement that where the information disclosed affects only the personnel situation of the complainant it will be treated as an allegation of a prohibited personnel practice or violation of other civil service law, rule, or regulation, and the complainant will not be considered a whistleblower. This change has not been made in the regulations because the Special Counsel has direct investigative jurisdiction in such cases. The intent of the statement is to retain investigative authority in this Office rather than referring the matter to the agency, as in the case of whistleblower allegations.

A definition of "abuse of authority" has been added (§ 1250.3(f)).

The definition of prohibited personnel practices (§ 1250.3(b)(9)) relating to reprisal for exercising an appeal right granted by law, rule, or regulation, has been revised to make clear that the exercise of an appeal right includes the initial filing of a complaint or a grievance. Employees who win their complaints or grievances of course do not have to "appeal". It would be contrary to the purpose of the Civil Service Reform Act if only employees who *lost* their complaints or grievances and had to appeal to another entity were protected from reprisals.

One commentor suggested that the definition of prohibited personnel practices (§ 1250.3(b)(10)), relating to discrimination based on conduct that does not adversely affect the performance of the employee or applicant or the performance of others, be amended to make explicit that discrimination based on union activity or membership is covered. Such discrimination is an unfair labor practice and, of course, is within the primary responsibility of the Federal Labor Relations Authority (5 U.S.C. 7116). Although discrimination because of union activities could also constitute a prohibited personnel practice, specific examples of proctected conduct are not set forth in the definition to avoid any construction that may limit the applicability of the provision to the type of conduct expressly mentioned.

Matters Subject to Special Counsel Investigation

(§ 1251.1). A new paragraph (d) has been added to § 1251.1 to include the Special Counsel's authority to investigate matters and order corrective action, under the Freedom of Information Act and the Right to Financial Privacy Act of 1978 on the basis of court findings.

Deferral to Administrative Appeals Procedures

(§ 1251.2). One commenter suggested that the Special Counsel should not investigate any allegation that could have been the subject of an appeal or grievance, except where the complainant can show cause for not filing a timely appeal or grievance. This would be unduly restrictive on the authority of the Special Counsel, particularly since most matters are grievable. Section 1206(e)(2) of title 5, United States Code, contemplates deferral to an administrative proceeding only if the Special Counsel determines that the matter may be more appropriately resolved by that procedure. Many complaints received in the Special Counsel's Office allege that agency procedures are not effective or that there is failure of the agency to process the grievance or other matter. Thus, in some instances where there is an available agency procedure the Special Counsel could not make the statutory determination that the matter may be more appropriately resolved by the agency procedure. Deferral in those situations would not be proper.

Section 1251.2(c) has been revised to provide that where a complainant failed to file a timely administrative appeal, the Special Counsel would not defer if the complainant can show that he was not notified of the time limit and was not aware of it, or that circumstances beyond his control prevented him from filing a timely appeal.

Exhaustion of Agency Procedures as Prerequisite to Special Counsel Action

One commentor suggested that a policy statement can be included in the regulations on whether all other administrative remedies should be exhausted before a whistleblowing complaint is brought to the Special Counsel. Such a statement is not included because the statute clearly provides for direct submission of allegations to the Special Counsel (5 U.S.C. 1206(b)(1)(B)), as well as for submitting allegations tc the Special Counsel after they have been disclosed in the agency or elsewhere.

Notice of Terminating Investigations

(§ 1251.4). One agency recommended that the agency, as well as the complainant, be notified when an investigation is completed or terminated. The statute requires that the complainant be notified in all cases (5 U.S.C. 1206(a)(2)). However, in many cases the inquiry or investigation is terminated after review of the material submitted by the complainant and

without any contact with the agency. There are cases in which, even if all allegations were proven, they could not constitute a prohibited personnel practice or violation of any civil service law, rule, or regulations, and cases in which it is clear the Special Counsel has no jurisdiction. No useful purpose would be served in notifying the agency in these cases. Accordingly, this change has not been made in the regulations. However, the Special Counsel's Office does notify agencies of the results of an investigation or the termination of an investigation if there has been some contact with the agency in the case.

Stay of Personnel Actions

(§ 1254.2). Several public interest groups noted that paragraph (d) of § 1254.2 providing that the Special Counsel will not seek a stay where the taking or failing to take a personnel action does not impose an undue hardship on the employee and the matter can be addressed through an available appeals procedure, is inconsistent with Congressional intent. In order to avoid unduly restricting the stay authority, paragraph (d) has been deleted.

One agency recommended that advance notice of requests for 15 day stays pursuant to 5 U.S.C. 1208(a) be given to the agency. The proposed regulation provided that such notice would be given only "where administratively practicable." This provision for notice to the agency has been deleted entirely because the statute does not contemplate any agency response to a Special Counsel petition for a 15 day stay, and no notice is required. As a matter of policy, the Special Counsel will nevertheless promptly inform agencies of all actions taken by the Office affecting them.

Protection of Rights of Alleged Offenders

One commentor suggested that the regulations should require that an alleged offender be informed when a complaint is filed so that he has an opportunity to defend himself during the course of the investigation. It is the Special Counsel's view that the rights of alleged offenders are amply protected by the statute, the regulations of the Merit Systems Protection Board (5 CFR Parts 1200–1202, as added by 44 FR 38342), and the disclosure policy of the Office of the Special Counsel (Appendix I to Part 1261, § F). Moreover, the normal investigative procedures of the Office include opportunity for all witnesses having information regarding a matter to submit their views to the investigator. Accordingly, no change is made in the regulations.

Internal Operating Procedures

Several of the public interest groups made constructive suggestions relating to internal operating procedures for the Office of the Special Counsel. For example, it was suggested that complainants be furnished copies of Special Counsel referrals of whistleblower allegations to agencies for investigation or report under 5 U.S.C. 1206(b) (3) or (7), and any extensions of time given the agency; that the allegations be clearly defined to the agency; and that the complainant be afforded an opportunity to comment on agency reports prior to the Special Counsel's review under 5 U.S.C. 1206(b)(6). A number of these suggestions will be incorporated into the Operations Manual of the Office.

Accordingly, title 5 of the Code of Federal Regulations is amended by revising Parts 1250–1269, as set forth below.

Dated: December 14, 1979.

H. Patrick Swygert,

Special Counsel.

Subchapter B—Office of the Special Counsel

PART 1250—JURISDICTION AND DEFINITIONS

Sec.

Authority.—5 U.S.C. 1206(k); Sec. 204(g) of Reorganization Plan No. 2 of 1978, unless otherwise noted.

§ 1250.1 General authority of the Special Counsel.

The Special Counsel is authorized to carry out the following general functions, as described in this subchapter:

(a) To receive and investigate allegations of prohibited personnel practices and certain other violations of law, rule or regulation.

(b) To receive and refer to agencies for investigation or a report certain disclosures of information reasonably believed by the discloser to evidence a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) To recommend corrective action to the agency involved when it is determined that there is reasonable ground to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(d) To file with the Merit Systems Protection Board requests to order corrective action (if the agency has not taken the corrective action recommended after a reasonable period), requests for stays of prohibited personnel actions, and complaints for disciplinary action against federal employees, and intervene or otherwise participate in any proceeding before the Board.

§ 1250.2 Scope.

(a) The Special Counsel is required to receive and to investigate allegations of prohibited personnel practices and certain other activities prohibited by civil service law, rule, or regulation involving any Executive agency, the Administrative Office of the United States Courts, and the Government Printing Office, except that the prohibited personnel practices set forth below do not apply to:

(1) A Government corporation.

(2) The Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and certain other intelligence agencies excepted by the President.

(3) The General Accounting Office.

(4) The United States Postal Service and the Postal Rate Commission.

(b) The Special Counsel will investigate allegations of Hatch Act violations in any Executive agency, the U.S. Postal Service, and Postal Rate Commission and the District of Columbia Government.

(c) The Special Counsel will receive and act on information which evidences a violation of any law, rule, or regulation, or of mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, involving any Executive agency.

§ 1250.3 Definitions.

As used in this subchapter:

(a) "Personnel action" means—

(1) An appointment;

(2) A promotion;

(3) An adverse action under chapter 75 of title 5, United States Code or other disciplinary or corrective action;

(4) A detail, transfer, or reassignment;

(5) A reinstatement;

(6) A restoration;

(7) A reemployment;

(8) A performance evaluation under chapter 43 of title 5, United States Code;

(9) A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action; or

(10) Any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level.

(b) "Prohibited personnel practice" means action by an employee who has authority to take, direct others to take, recommend, or approve any personnel action,

(1) That discriminates for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status or political afiliation, as prohibited by certain specified laws (see 5 U.S.C. 2302(b)(1)).

(2) To solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless the recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of an evaluation of the work performance, ability, aptitude, or general qualifications of the individual, or an evaluation of the character, loyalty, or suitability of such individual;

(3) To coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) To deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) To influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) To grant any preference or advantage not authorized by law, rule or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) To appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in 5 U.S.C. 3110) of the employee if the position is in the agency in which the employee is serving as a public official (as defined in 5 U.S.C. 3110) or over which the employee exercises jurisdiction or control as an official;

(8) To take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for being a whisteblower, as defined in paragraph (c) of this section.

(9) To take or fail to take a personnel action against an employee or applicant for employment as a reprisal for the exercise of any appeal right granted by law, rule or regulation;

(10) To 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; or

(11) To take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in 5 U.S.C. 2301.

(c) "Whistleblower" means a present or former Federal employee or applicant for Federal employment who discloses information he reasonably believes evidences a violation of any law, rule or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial or specific danger to public health or safety, if the disclosure is not specifically prohibited by statute and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs. A protected disclosure may be oral or written and to any person within or outside the agency. Disclosure of information to the Special Counsel, agency Inspector General, or other employee designated by the agency head to receive such information is protected even if the disclosure would otherwise be prohibited by statute or is otherwise required by Executive order to be kept secret. Where the information disclosed affects only the personnel situation of the complainant, it will normally be treated as an allegation of a prohibited personnel practice or violation of other civil service law, rule or regulation, and the complainant will not be considered to be a whistleblower.

(d) "Gross waste of funds" means unnecessary expenditure of substantial sums of money, or a series of instances of unnecessary expenditures of smaller amounts.

(e) "Mismanagement" means wrongful or arbitrary and capricious actions that may have an adverse effect on the efficient accomplishment of the agency mission.

(f) "Abuse of authority" means an arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.

PART 1251—INVESTIGATIVE AUTHORITY OF THE SPECIAL COUNSEL

Sec.

§ 1251.1 Matters subject to investigation.

The Special Counsel is authorized—

(a) To receive and investigate allegations of prohibited personnel practices, as defined in section 1250.3 of this subchapter, and to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken (5 U.S.C. 1206(a)).

(b) In addition to matters described in paragraph (a) of this section, to conduct an investigation of any allegation concerning—

(1) Political activity by Federal employees and employees of the District of Columbia Government, prohibited by Subchapter III of Chapter 73 of title 5, United States Code (Hatch Act);

(2) Political activities by certain State and local officers and employees prohibited by Chapter 15 of title 5, United States Code (Hatch Act);

(3) Arbitrary or capricious withholding of information prohibited under section 552 of title 5, United States Code (Freedom of Information Act), except that the Special Counsel shall make no investigation under this subsection of any withholding of foreign intelligence or counter-intelligence information the disclosure of which is specifically prohibited by law or by Executive order;

(4) Activities prohibited by any civil service law, rule, or regulation, including partisan political intrusion in personnel decisionmaking, except when the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure; and

(5) Involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action, except when the Special Counsel determines that such allegation may be resolved more appropriately under an administrative appeals procedure. (5 U.S.C. 1206(e)).

(c) In the absence of an allegation, the Special Counsel is authorized to conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a

prohibited personnel pratice has occurred, exists, or is to be taken.

(d) To conduct an investigation for the purpose of determining whether disciplinary action is warranted against an agency officer or employee—

(1) whenever a court orders the production of agency records improperly withheld under the Freedom of Information Act and finds that the circumstances surrounding the withholding raise questions of whether agency personnel acted arbitrarily or capriciously (5 U.S.C. 552(a)(4)(F)), and

(2) whenever a court determines that an agency or department of the United States has violated the Right to Financial Privacy Act of 1978 and finds that the circumstances surrounding the violation raises questions of whether an officer or employee acted willfully or intentionally with respect to the violation (section 1117 of Pub. L. 95–630).

§ 1251.2 Deferral to administrative appeals procedures.

Section 1206(e)(2) of title 5, United States Code, provides that the Special Counsel shall make no investigation of allegations described in § 1251.1(b)(4) or (5) of this part, if he determines that the matter may be resolved more appropriately under an administrative appeals procedure. The Special Counsel generally will not initiate an investigation in the following circumstances:

(a) The employee has a pending appeal on the same matter before the Merit Systems Protection Board, the Office of Personnel Management, the Equal Employment Opportunity Commission, or the Federal Labor Relations Authority, or a pending grievance under a formal agency or negotiated grievance proceeding, unless there is sufficient evidence submitted with the complaint to the Special Counsel to indicate the matter is not being properly processed.

(b) An administrative appeal proceeding has been completed, unless there is sufficient evidence submitted with the complaint to the Special Counsel to indicate the matter was not properly processed.

(c) An administrative proceeding was available to the complainant but the complainant did not file a timely appeal or otherwise failed to pursue the matter, unless the complainant can show that he was not notified of the prescribed time limit and was not aware of it or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limits.

(d) The complainant alleges a violation of law, rule, or regulation in connection with a promotion action, particularly complaints of nonselection or general charges of "preselection", when the information submitted with the complaint to the Special Counsel does not evidence any prohibited personnel practice, as defined in § 1250.3 of this subchapter. In such circumstances the complainant should utilize the agency or negotiated grievance procedure if the matter is grievable.

§ 1251.3 Investigative policy in discrimination complaints.

The Special Counsel is authorized to investigate allegations of discrimination prohibited by law, as defined in § 1250.3(b)(1) of this subchapter. Since procedures for investigating discrmination complaints have already been established in the agencies and the Equal Employment Opportunity Commission, the Special Counsel will normally avoid duplicating those procedures and will defer to those procedures rather than initiating an independent investigation. However, the Special Counsel will—

(a) Assert independent investigative jurisdiction in those circumstances where it appears that the agency is not processing the complaint consistent with provisions of applicable statutes and regulations; and

(b) In lieu of asserting independent jurisdiction over a complaint, monitor agency or EEOC processing of the complaint, whenever he determines this to be necessary or appropriate.

§ 1251.4 Closing cases and terminating investigations.

(a) The Special Counsel will notify the complainant of the closing of the case and the reasons therefore, when the matter complained of is not within the investigative jurisdiction of the Special Counsel.

(b) The Special Counsel will notify the complainant of the termination of any investigation under this part and the reasons therefore, and any action taken by the Special Counsel on the allegation.

§ 1251.5 Actions on results of investigations.

(a) If the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice, as defined in § 1250.3 of this subchapter, has occurred, exists, or is to be taken, which requires corrective action, he reports his determinations, findings and recommendations to the agency, the Merit Systems Protection Board, and the Office of Personnel Management, and may report such finding to the President (5 U.S.C. 1206(c)(1)). If the agency involved fails to take the action recommended within a reasonable period specified by the Special Counsel, the Special Counsel may request the Board to consider the matter pursuant to 5 U.S.C. 1206(c)(1)(B).

(b) If the Special Counsel has reasonable cause to believe any other violation of any law, rule or regulation has occurred (*i.e.*, violations other than or in addition to a prohibited personnel practice), he is required to report this to the agency head concerned and to require, within 30 days, a certificate by the agency head which states that (1) the agency head has personally reviewed the report of the Special Counsel, (2) what action has been, or is to be taken, and (3) when the action will be completed (5 U.S.C. 1206(c)(3)). Agency head certifications are included in the public list, provided for in § 1260.1 of this subchapter.

(c) When the investigation indicates that disciplinary action against any employee subject to disciplinary charges by the Special Counsel is warranted, the Special Counsel may file a complaint, together with a statement of supporting facts with the Merit Systems Protection Board. The complaint and statement of supporting facts shall be served on the employee at the same time it is filed with the Board. Additionally, in the case of violations of provisions of Chapter 15 of title 5, United States Code (political activity of certain State and local officers and employees), the complaint, including the statement of supporting facts, shall be served on the State or local agency as well as the officer or employee (5 U.S.C. 1206(g)).

(d) In the case of a complaint for disciplinary action against an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the Special Counsel shall submit the complaint including a statement of supporting facts and the employee's response to the complaint to the President for appropriate action in lieu of presenting the complaint before the Merit Systems Protection Board. (5 U.S.C. 1206(g)).

(e) When the Special Counsel believes that there is in an agency a pattern of prohibited personnel practices not otherwise appealable to the Merit Systems Protection Board under any law, rule or regulation, the Special Counsel may file a complaint with the Board against the agency involved to obtain an order for appropriate corrective action. (5 U.S.C. 1206(h)).

(f) If, in connection with any investigation under this part, the Special

Counsel determines that there is reasonable cause to believe that a criminal violation by an employee has occurred, he shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget. The referral of an alleged criminal violation to the Attorney General does not preclude the Special Counsel from conducting any investigation or proceeding concerning prohibited personnel practices instituted under this part. (5 U.S.C. 1206(c)(2)).

PART 1252—DISCLOSURES OF INFORMATION (WHISTLEBLOWING)

Sec.

§ 1252.1 Applicability.

This part applies to disclosures of information not specifically required by law or Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs, which the discloser reasonably believes evidences a violation of any law, rule or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to the public health or safety.

§ 1252.2 Referral to agency heads under 5 U.S.C. 1206(b)(3); reports from agency heads.

(a) If after review of the information received under this part the Special Counsel determines that there is a substantial likelihood that the information discloses a violation of any law, rule or regulation, or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public health or safety, he will, if the information was transmitted to him by an employee or former employee or applicant for employment in the agency which the information concerns, or by an employee who obtained the information in connection with the performance of his duties and responsibilities, require the head of the agency to conduct an investigation of the information and any related matters and to submit to the Special Counsel a written report setting forth the findings of the head of the agency.

(b) Any report required by the Special Counsel under this section shall be submitted within sixty (60) calendar days after the date on which the Special Counsel transmitted the information to the head of the agency, or within any reasonable longer period of time agreed to in writing by the Special Counsel or designee of the Special Counsel. In the event the agency finds that it is unable to adequately investigate and report within the time limit imposed by the statute, the agency shall as soon as practicable, but not less than 15 days before the date the report is due to the Special Counsel, the President, and the Congress, submit a written request to the Special Counsel specifying the additional time required and the reasons therefore.

(c) Any report required under this section shall be reviewed and signed by the agency head and shall include: (1) A summary of the information with respect to which the investigation was initiated; (2) a description of the conduct of the investigation; (3) a summary of any evidence obtained from the investigation; (4) a listing of any violation or apparent violation of any law, rule, or regulation; (5) a description of any corrective action taken or planned to be taken as a result of the investigation, including, but not limited to, changes in agency rules, regulations, or practices, restoration of any aggrieved employee, disciplinary action against any employee, and referral to the Attorney General of any evidence of a criminal violation.

(d) Any report required under this section shall be submitted, by the agency head, to the Congress and the President, as well as to the Special Counsel.

(e) The Special Counsel will transmit a copy of the agency head's report to the party who made the disclosure to the Special Counsel, except when the report includes evidence of criminal violations referred to the Attorney General.

§ 1252.3 Referral to agency heads under 5 U.S.C. 1206(b)(7).

If the Special Counsel does not require an investigation by the head of the agency, the agency head shall, within a reasonable time (but no later than 60 days) after the information was transmitted to him by the Special Counsel, review the information, make any inquiry necessary, and inform the Special Counsel, in writing, of what action has been or is to be taken and when such action will be completed. The Special Counsel will inform the complainant of the report of the agency head.

§ 1252.4 Failure of agency head to file report pursuant to § 1252.2.

Whenever the Special Counsel does not receive a required report from an agency head within the time specified in the letter of referral, the Special Counsel may transmit a copy of the information which he sent to the agency head to the President and to the Congress, together with a statement noting the failure of the agency head to file the required report.

§ 1252.5 Review of agency report.

Upon receipt of any report of the head of an agency under §1252.2, the Special Counsel shall review the report and determine whether the findings of the head of the agency appear reasonable and whether the agency's report contains the information required.

§ 1252.6 Foreign intelligence or counterintelligence information.

Any disclosure under this part involving foreign intelligence or counterintelligence information, the disclosure of which is specifically prohibited by law or Executive order, shall be transmitted by the Special Counsel to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

PART 1253—FILING OF COMPLAINTS AND ALLEGATIONS

Sec.

§ 1253.1 Place of filing.

All complaints, allegations, and information under this subchapter should be submitted to the Office of the Special Counsel, Merit Systems Protection Board, 1717 H Street, NW, Washington, DC 20419, or to the appropriate field office listed below:

450 Golden Gate Avenue, Room 11454, Box 36007, San Francisco, CA. 94102

1100 Commerce Street, Room 9E23, Dallas, Texas 75242

§ 1253.2 Form and content.

(a) Complaints, allegations and information may be submitted in any written form, but should include:

(1) The name and mailing address of the complainant or whistleblower, unless the matter is submitted anonymously;

(2) The department or agency, location and organizational unit complained about;

(3) A concise description of the actions complained about, names and positions of employees who took these actions, if known to the complainant, and dates, preferably in chronological order, together with any documentary evidence the complainant may have;

(4) In the case of any allegation of a prohibited personnel practice, the personnel action, as defined in section 1250.3, that has been taken or is proposed to be taken;

(5) In the case of reprisal for disclosure of information by a whistleblower, the information believed to evidence violation of law, rule, or regulation, mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety and when, to whom, and how or in what form it was disclosed;

(6) In the case of reprisal for exercising appeal rights, the action or specific matter that was appealed or grieved, the procedure involved, dates, and name of official or officer appealed to, and decision on or status of the appeal.

(7) A statement as to whether or not the complainant consents to the Special Counsel revealing the complainant's identity to the agency.

(b) If the complainant or whistleblower does not furnish sufficient information, the Special Counsel may request the complainant to do so before acting on the complaint.

§ 1253.3 Withdrawl of complaint.

A complaint may be withdrawn at any time. However, the Special Counsel may conduct an investigation in the absence of a complaint and withdrawal of a complaint does not necessarily result in termination of the investigation.

§ 1253.4 Request for stay of personnel action.

(a) A request for a stay of personnel action should be submitted to the Special Counsel as early as possible and should include:

(1) Any available documentary evidence of the personnel action taken or to be taken; and

(2) A chronology of facts evidencing a prohibited personnel practice, as defined in § 1250.3 of this subchapter, has occurred or is to be taken.

(b) If possible, the facts supporting a request for a stay of personnel action should be sworn to or affirmed by the complainant.

§ 1253.5 Disclosure of identity of complainant or whistleblower.

(a) The identity of any complainant or whistleblower may not be disclosed without his consent, unless the Special Counsel determines that the disclosure of the identity is necessary in order to carry out his functions.

(b) The Special Counsel will determine to disclose the identity of a comlainant or whistleblower without express consent only if:

(1) It is clear from the submissions of the complainant or whistleblower that his identity has already been disclosed with respect to the matter complained of (*e.g.* where the party has filed a grievance, complaint, or appeal on the matter or reported the matter to the agency inspector general or equivalent official without anonymity), or

(2) Immediate action by the Special Counsel is necessary and there is not sufficient time to secure express consent to disclose identity. In such cases, the complainant or whistleblower will be notified of the disclosure immediately.

PART 1254—PROSECUTIONS

Sec.

§ 1254.1 Complaint.

The Special Counsel is authorized to file with the Merit Systems Protection Board, a complaint for disciplinary action against an employee, specifying the law, rule, or regulation violated, together with a statement of supporting facts. The rights of employees against whom complaints are filed are set forth in the Board's regulations (5 CFR 1201.124).

§ 1254.2 Stay of personnel actions.

(a) The Special Counsel may request any member of the Board to order a stay of any personnel action for 15 calendar days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice. The stay shall be effective on order of the Board member or on the fourth calendar day (excluding Saturdays, Sundays, and legal holidays) following submission of the petition to the Board member provided the Board member does not deny the stay within three calendar days of submittal.

(b) The Special Counsel may request any member of the Board to extend the period of any stay for a period of not more than 30 calendar days.

(c) The Special Counsel may request the Board to order a further extension of the stay for such period as the Board considers appropriate.

§ 1254.3 Enforcement of Board decisions.

(a) If the Special Counsel determines that disciplinary action should be taken against an employee for knowing and willful refusal or failure to comply with an order of the Board, he is authorized to file a complaint setting forth the substance of the violation charged with specificity, including a statement of supporting facts, and to file the complaint with the Board.

(b) The complaint, including the statement of supporting facts, must be served upon the employee at the same time it is filed with the Board.

§ 1254.4 Petition for withholding order.

When the Special Counsel determines that a State or local agency has failed to remove an employee after a decision requiring such action by the Merit Systems Protection Board under 5 U.S.C. 1505, or that the employee was reemployed within 18 months in a State or local agency of the same State, the Special Counsel may initiate proceedings for a witholding order as provided under 5 U.S.C. 1506, by filing a petition for a withholding order with an administrative law judge designated by the Board.

§ 1254.5 Hearings on complaints filed by the Special Counsel.

Any employee against whom the Special Counsel presents a complaint to the Merit Systems Protection Board shall, pursuant to the regulations of the Board, have the right to a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer, to be represented by an attorney or other representative, to a hearing before the Board or an administrative law judge designated by the Board, to have a transcript kept of any hearing, to a written decision and reasons therefor, and a copy of any final order on the complaint.

§ 1254.6 Dismissal by the Special Counsel.

The Special Counsel or his designee may, with leave of the Board or administrative law judge, file a dismissal of all or part of a complaint at any time prior to the close of the hearing before the Board or administrative law judge. Prosecution by the Special Counsel with respect to any of the charges so dismissed shall thereupon terminate.

PART 1255—ANCILLARY MATTERS

Subpart A—Discovery

Sec.
1255.1 Subpenas.
1255.2 Testimony and evidence.
1255.3 Depositions and interrogatories.
1255.4 Witness fees.

Subpart B—Prohibition on Disciplinary Action During Pendency of Investigation by Special Counsel

1255.5 Prohibition on Disciplinary Action During Pendency of Investigation by Special Counsel.

Subpart C—Advisory Opinions; Intervention; Requests to Merit Systems Protection Board to Review Office of Personnel Management Regulations

1255.6 Advisory Opinions.
1255.7 Intervention.
1255.8 Requests to Merit Systems Protection Board to Review Office of Personnel Management Regulations.

Subpart A—Discovery

§ 1255.1 Subpenas.

(a) The Special Counsel may issue subpenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States or any territory or possession thereof, the Commonwealth of Puerto Rico, or the District of Columbia. A subpena may be served by a representative of the Special Counsel, or a U.S. Marshal or Deputy Marshal.

(b) The subpena must be signed by the Special Counsel, or by his designee upon a specific delegation by the Special Counsel. Subpenas may not be signed in blank.

(c) In the case of contumacy or failure to obey a subpena issued by the Special Counsel or his designee, the Special Counsel may request the United States District Court for the judicial district in which the person to whom the subpena is addressed resides, or is served, to issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Upon any failure to obey an order of the court granted pursuant to the application of the Special Counsel, the Special Counsel may request the court to hold the person or persons to whom the order was directed in contempt of court.

(d) Application to a federal court for enforcement of a subpena issued under this section may be made by the Special Counsel or his designee.

§ 1255.2 Testimony and evidence.

(a) Pursuant to Civil Service Rule V (5 CFR 5.4) all officers and employees in the executive branch, or applicants or eligibles for positions therein, shall give to the Special Counsel, or his authorized representative, all information, testimony, and documentary evidence in regard to matters inquired of arising under the laws, rules, and regulations administered by the Special Counsel.

(b) Whenever required by the Special Counsel or his authorized representative, such persons shall subscribe such testimony and make oath or affirmation thereto before an officer authorized by law to administer oaths. Such oath may be administered by any officer or employee of the Office of the Special Counsel authorized to administer such oaths.

§ 1255.3 Depositions and interrogatories.

The Special Counsel may order the taking of depositions and order responses to written interrogatories. Depositions shall be taken before an officer authorized to administer oaths. Reasonable notice shall be given to the person to be deposed concerning the time, place and subject of the deposition. Answers to interrogatories shall be served upon the Special Counsel or his authorized representative within thirty (30) days of the date of receipt of the interrogatories unless an extension of time has been granted by the Special Counsel or his representative.

§ 1255.4 Witness fees.

(a) Except as provided in paragraph (c) of this section, witness fees and mileage allowances shall be paid by the party requesting the witness to appear, or asking for and receiving a subpena requiring the attendance of a witness or the production of documents or other materials, and shall be tendered to the witness or person who is directed to produce documents or other materials along with the subpena, or, if the witness appears voluntarily, at the time of appearance. When the witness is subpenaed or appears at the request of the United States or an officer or agency thereof, fees and mileage need not be tendered with the subpena or prior to the appearance of the witness or production of evidence; payment shall be made by the agency on whose behalf the witness appeared or was subpenaed, upon the certificate of the Special Counsel or his designee that the witness appeared or produced documents or other evidence.

(b) Witness fees and mileage allowances payable under this section shall be the same as those paid subpenaed witness in the courts of the United States, as set forth in section 1821 of title 28, United States Code.

(c) Employees of the Federal Government who appear voluntarily or pursuant to subpena and who appear in official duty status shall not be entitled to any witness fees or mileage allowance (other than that to which they are entitled under the Federal Travel Regulations). All costs relating to federal employee witnesses shall be paid by the agency against whom the complaint or allegation is filed.

Subpart B—Prohibition on Disciplinary Action During Pendency of Investigation by Special Counsel

§ 1255.5 Prohibition on disciplinary action during pendency of investigation by Special Counsel.

During any investigation initiated by the Special Counsel, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity, without the express approval of the Special Counsel.

Subpart C—Advisory Opinions; Intervention; Requests to Merit Systems Protection Board to Review of Office of Personnel Management Regulations

§ 1255.6 Advisory opinions.

The Special Counsel is not authorized to issue any advisory opinion concerning any law, rule, or regulation (other than an advisory opinion concerning chapter 15 of title 5, U.S. Code, dealing with political activity of State and local officers and employees, or subchapter III of chapter 73 of title 5, United States Code, dealing with political activity of Federal officers and employees).

§ 1255.7 Intervention.

The Special Counsel may intervene or otherwise participate in any proceeding before the Merit Systems Protection Board.

§ 1255.8 Request to the Merit Systems Protection Board to review Office of Personnel Management regulations.

The Special Counsel may file a written complaint with the Merit Systems Protection Board, requesting the Board to review the validity of any provision of any rule, or regulation issued by the Director of the Office of Personnel Management. Such complaint shall specify the manner in which application of specific provisions of the rule or regulation has resulted or will result in causing any employee or agency to take a prohibited personnel practice.

PARTS 1256 THROUGH 1259 [RESERVED]

PART 1260—PUBLIC INFORMATION

Sec.
1260.1 Public list.
1260.2 Freedom of Information Act policy.
1260.3 Procedures for obtaining records.
1260.4 Service charge for information.
1260.5 Appeals.
1260.6 Disclosures by authorized officials.

§ 1260.1 Public list.

A public list of certain noncriminal whistleblower allegations and Special Counsel findings of violations of law, rule, or regulation, together with reports and certifications by heads of agencies, pursuant to 5 U.S.C. 1206(b)(3) and (c), is available to the public between 8:30 a.m. and 5:00 p.m., weekdays (except legal holidays) in the Office of the Special Counsel, Room 215, 1717 H Street, NW., Washington, D.C. 20419,

§ 1260.2 Freedom of Information Act policy.

Upon receipt by the Office of the Special Counsel of a request for agency records under the Freedom of Information Act (5 U.S.C. 552) that are reasonably described, the records shall be provided promptly unless it is determined that one or more of the exemptions under subsection (b) of that Act should be applied to withhold the records. See Appendix I, Disclosure Policy of the Office of the Special Counsel.

§ 1260.3 Procedures for obtaining records.

Requests for records may be made in person or in writing and, except in unusual circumstances, a determination shall be made on a request within 10 days (excluding Saturdays, Sundays, and legal holidays). Requests in writing should be addressed to the Office of the Special Counsel, 1717 H Street, NW., Washington, D.C. 20419. Requests in person may be made by appearing at that address during business hours on a regular business day. Requests in writing should be clearly and prominently marked "Freedom of Information Act Request".

§ 1260.4 Service charge for information.

(a) Requests for records of the Office of the Special Counsel are subject to the following fees for search and duplication:

Photocopies, per page, $0.10.

Manual record search, $5.00 per hour.

Where copies of records have already been made available to an individual in the course of agency proceedings or otherwise, the cost of photocopies to that individual or his representative shall be fifteen (15) cents per page. Fees for search and duplication of automated records shall be provided upon request.

(b) Requests that do not specify that whatever fees are involved shall be acceptable or acceptable up to a designated amount will be deemed not received for purposes of the time limits for a determination until the requester, after being promptly notified of the anticipated fees, agrees to payment.

(c) When the anticipated fees exceed fifty ($50.00) dollars, a deposit of twenty (20%) percent of that amount must be made within thirty (30) days after the requester is so advised. Records will not be released until the deposit is received.

§ 1260.5 Appeals.

Any denial, in whole or in part, of a request for records of the Office of the Special Counsel may be appealed to the Special Counsel or his designee. The appeal shall be in writing and addressed to the Special Counsel at 1717 H Street, NW., Washington, D.C. 20419. Except in unusual circumstances, the Special Counsel or his designee shall make a determination on the appeal within twenty (20) days (excluding Saturdays, Sundays, and legal holidays) after it is received. When a request is denied on appeal, the requester shall be advised of his right to seek judicial review.

§ 1260.6 Disclosures by authorized official.

No employee or former employee of the Office of the Special Counsel shall, in response to a demand of a court or other authority, produce or disclose any information or records acquired as part of the performance of his official duties or because of his official status without the prior approval of the appropriate offical of the Office of the Special Counsel. This section does not apply in cases where the Government is a party.

PART 1261—PRIVACY

Sec.
1261.1 Records maintained on individuals.
1261.2 Access to records and identification.
1261.3 Medical records.
1261.4 Requests for amendment of records.
1261.5 Appeals.
1261.6 Exemptions.
Appendix I—Disclosure Policy of the Office of the Special Counsel.

Authority: 5 U.S.C. 522a.

§ 1261.1 Records maintained on individuals.

Information on individuals that are maintained in any group or system of records by the Office of the Special Counsel and which are retrieved by the name of the individual or some identifying particular assigned to the individual, is subject to the Privacy Act (5 U.S.C. 552a). The terms used in this part that are defined in that section shall have the meanings set forth therein.

§ 1261.2 Access to records and identification.

(a) Individuals may request access to records pertaining to them that are maintained as described in section 1261.1 by addressing an inquiry to the Office of the Special Counsel either by mail or by appearing in person at the offices of the Special Counsel at 1717 H Street, NW., Washington, D.C. 20419, during business hours on a regular business day. Requests in writing should be clearly and prominently marked "Privacy Act Request". Requests for copies of records shall be subject to duplication fees set forth in § 1260.4 of this subchapter.

(b) Individuals making a request in person shall be required to present satisfactory proof of identity, preferably a document bearing the individual's photograph. Requests by mail or submitted other than in person should contain sufficient information to enable the Office of the Special Counsel to determine that the requester and the subject of the record are one and the same. To assist in this process, individuals should submit their name and address, date and place of birth, social security number, and any other known identifying information such as an agency file number or identification number and a description of the circumstances under which the records were compiled.

§ 1261.3 Medical records.

When a request for access involves medical records that are not otherwise exempt from disclosure, the requesting individual may be advised, if it is deemed necessary, that the records will be provided only to a physician designated in writing by the individual. Upon receipt of the designation, the physician will be permitted to review the records or to receive copies by mail upon proper verification of identity.

§ 1261.4 Requests for amendment of records.

Individuals may request amendment of records pertaining to them that are subject to this part. Requests should be addressed, in writing, to the Special Counsel and be clearly and prominently marked "Privacy Act Request". Requests for amendment should include identification of the records together with a statement of the basis for the requested amendment and all available supporting documents and materials. Requests for amendment shall be acknowledged not later than ten (10)

days (excluding Saturdays, Sundays, and legal holidays) after receipt and a determination on the request shall be made promptly.

§ 1261.5 Appeals.

When a request for access or amendment has been denied, a written appeal may be submitted to the Special Counsel or his designee. A final determination on the appeal shall be issued within thirty (30) days (excluding Saturdays, Sundays, and legal holidays) after receipt. Where unusual circumstances prevent a determination within that time period, the time for a determination may be extended an additional thirty (30) working days after the requesting individual has been advised in writing of the reasons for the extension and the estimated date a determination will be made. Where the final determination denies a request for amendment, the requesting individual shall be notified of his right to file a concise statement of reasons for disagreeing with the final determination. A copy of the statement shall be appended to the disputed record and provided to persons to whom the record is disclosed and to prior known recipients of the record. The Office of the Special Counsel may also attach to the statement a concise account of its reasons for not making the amendments requested. The final determination shall contain a notice of the right to judicial review.

§ 1261.6 Exemptions.

The Office of the Special Counsel may claim exemptions from the provisions of the Privacy Act at subsections (c)(3) and (d) as permitted by subsection (k) for records subject to the Act that fall within the category of investigatory material described in paragraphs (2) and (5) and testing or examination material described in paragraph (6) of that subsection. The exemptions for investigatory material are necessary to prevent frustration of inquiries into allegations of prohibited personnel practices or political activity and to protect identities of confidential sources of information. The exemption for testing or examination material is necessary to prevent the disclosure of information which would potentially give an individual an unfair competitive advantage or diminish the utility of established examination procedures. The Office of the Special Counsel also reserves the right to assert exemptions for records received from another agency that could be properly claimed by that agency in responding to a request and the Office of the Special Counsel may refuse access to information compiled in reasonable anticipation of a civil action or proceeding.

PARTS 1262 THROUGH 1269 [RESERVED]

Appendix I to Part 1261.—Disclosure Policy of the Office of the Special Counsel.

A. *General Statement of Policy.* The purpose of this statement is to express the policies of the Office of the Special Counsel regarding the disclosure of information about cases handled by the office in order to both protect the rights of individuals involved and meet the legitimate informational needs of the public through responsible disclosure.

The Office of the Special Counsel has broad statutory authority to receive and investigate allegations of prohibited personnel practices and certain disclosures of information ("whistleblowing"). To carry out these responsibilities, the identity of persons who provide information and cooperate during an investigation must be protected. Unless the Special Counsel can be assured of a free flow of information from complainants, witnesses, and agencies, the investigative and enforcement functions of the Office of the Special Counsel cannot be discharged in an effective and timely manner. If complainants and witnesses are subjected to reprisal, intimidation, or coercion, they may refuse to come forward with complaints and be hesitant to cooperate.

In the same vein, unless agency management officials feel confident that they will not be subjected to embarrassment and unfair publicity based on unwarranted disclosure of complaints and charges, cooperation from agencies may be limited to only that required by law.

At the same time, complainants and the Congress, as well as interested members of the public and press, should be kept fully informed about activities of the Special Counsel and the disposition of matters brought to his attention. The legislation creating the Office of the Special Counsel contains specific statutory mechanisms for disclosure of information to Congress, complainants, and the public. The legislation also contains restrictions on disclosure of information.

Where there appears to be a conflict between the enabling legislation of the Office of the Special Counsel and other statutes governing disclosure and nondisclosure of information, it shall be the policy of the Special Counsel to favor the former where such an interpretation is necessary to carry out its investigative and enforcement functions absent a well-defined and overriding public interest.

B. *Protecting the Identity of Complainants.* The Special Counsel is precluded from disclosing the identity of a complainant without his consent unless it is determined that disclosure is necessary in order to carry out the Special Counsel's functions. Where circumstances surrounding an investigation create a likelihood that the identity of the complainant may become known, the Special Counsel will weigh the public interest in proceeding with the investigation (based on the seriousness of the charges involved and the likelihood of obtaining corrective action) against the possibility of harm to the complainant arising from disclosure of his identity. Except where it would jeopardize the likelihood of success in investigation and enforcement, the complainant will be notified when disclosure of the complainant's identity appears imminent.

C. *Protecting the identity of Witnesses.* It shall be the policy of the Special Counsel to protect the identity of witnesses and sources of information who cooperate during an investigation. However, witnesses who provide affidavits or sworn statements will ordinarily be advised that the affidavit or statement is given without a pledge of confidentiality to the extent that it may be used in a proceeding or for official action arising from the investigation. Agency officials and other interested persons shall not, as a matter of right, be given access to statements of witnesses or information from sources collected by the Special Counsel during an investigation.

D. *Protecting the Privacy of Persons Named in an Investigation.* While an investigation is pending, disclosure of the identity of persons who are being investigated shall be limited to disclosures necessary to proceed with the investigation. When an investigation has been terminated, disclosure of information that would reveal the identity of persons associated with the investigation will be based on a determination of how the public interest would be served by disclosure when balanced against the invasion of personal privacy involved. Unless and until an agency official or employee is formally charged with a violation, the focus of the investigation, for disclosure purposes, shall be on prohibited personnel practices or violations of law of the agency concerned. The identity of a person together with the nature of the charges will be revealed when he is made the subject of a written complaint by the Special Counsel or an agency charging violations of law or prohibited personnel practices.

E. *Access to Information by the Complainant.* The Special Counsel will take reasonable steps to assure that a complainant is advised of the status of an investigation and is given the opportunity to provide information relevant to the investigation. When an investigation is terminated by the Special Counsel, the complainant whose allegation led to the investigation will be advised in writing why the investigation was terminated and the reasons for termination. Where the information provided results in an agency report at the direction of the Special Counsel, the report will be transmitted to the complainant, except when it contains evidence of a criminal violation or when disclosure of the information involved is specifically prohibited by law.

If the information provided by the complainant evidences a violation and the Special Counsel transmits the information *to* the agency head but does not require an investigation, the Special Counsel will inform the complainant in writing of the matters reported *by* the agency head.

F. *Access to Information by Employees Subjected to Disciplinary Action.* When the Special Counsel determines that disciplinary

action should be taken against any employee and has prepared and presented a complaint against the employee together with a statement of supporting facts to the employee and the Merit Systems Protection Board, the employee shall be entitled to review the documents and records relied upon to support the disciplinary action.

Access to the identity of a complainant or sources of information consulted during the investigation leading to the disciplinary action will not routinely be made available. Where the circumstances surrounding the proposal for disciplinary action and the information relied upon to support the complaint make it apparent that the employee should be entitled to such information as a matter of due process, access to the identity of the complainant or sources of information will be granted, as necessary, to meet this standard after the complaint against the employee is served on the employee and Merit Systems Protection Board.

G. *Disclosure of Information to Congress.* By statute, when the Special Counsel requires an agency to conduct an investigation and submit a written report within 60 days after a determination that there is a substantial likelihood of prohibited matters within its authority, the report shall be submitted to the Congress, to the President, and to the Special Counsel for transmittal to the complainant.

Agencies that are directed to submit a report under this authority shall transmit the report directly to the President of the Senate and the Speaker of the House of Representatives to satisfy the reporting requirement to Congress.

When any Member of Congress requests access to records or reports prepared by the Office of the Special Counsel or at its direction, and disclosure is not prohibited by law or Executive order, the records or reports requested, depending on the source of the request, shall be transmitted to the oversight committee for the Office of the Special Counsel in the House of Representatives or the oversight committee for the Office of the Special Counsel in the Senate, to be transmitted to the Member.

H. *Disclosure of Information Pertaining to a Pending Investigation.* While an investigation is pending, the Special Counsel will disclose the following information to a member of the public, generally only upon a written request, except where to do so would interfere with enforcement proceedings, constitute an unwarranted invasion of personal privacy or disclose the identity of the complainant:

(1) Confirmation that an investigation of the matter described by the requester is pending, including the name and location of the agency or agencies involved;

(2) The nature of the matters under investigation;

(3) A description of any formal action taken by the Special Counsel.

Generally, any request for access to records or documents pertaining to an investigation will be denied while the investigation is pending.

I. *Public Disclosure of Noncriminal Matters.* In the public interest, the Office of the Special Counsel has statutory authority to make available to the public a list of noncriminal matters referred to heads of agencies together with the reports and certifications by heads of agencies specified by statute.

The list available to the public shall contain the following information in chronoligical sequence:

(1) The nature of the matter;

(2) The name and location of the agency involved;

(3) The disposition of the matter, including a description of any corrective action ordered;

(4) The names and position titles of any agency officals or employees disciplined by adverse action or by action of the Special Counsel, together with the nature of the action arising from the matter.

The information contained in the list together with any related reports or certifications shall be made available within 10 calendar days after final action by the Special Counsel in the matter.

J. *Control of Records.* Records, reports and related materials prepared by or submitted to the Office of the Special Counsel shall be subject to the exclusive control of the Office of the Special Counsel for purposes of disclosure. Any request for access to such records or reports shall be referred to the Special Counsel. When the request for access to reports or records prepared by agencies involves information that may be lawfully protected from disclosure, the Special Counsel will, where practicable, consult with the agency involved. Requests for access to reports or records of an agency in the custody of the Office of the Special Counsel, but not under its control as described above, shall be referred to the agency concerned.

[FR Doc. 79-38919 Filed 12-20-79; 8:45 am]

BILLING CODE 6325-20-M

Office of the Special Counsel
1717 H St., N.W.
Washington, D.C. 20419

Reference:
Date:

TO:

IN RE:

This concerns your communication dated _____ referred to us by: _____).

This Office is authorized to receive and investigate allegations of certain activities prohibited by civil service law, rule, or regulation (primarily the prohibited personnel practices set forth in 5 U.S.C. 2302) and may recommend (but not order) corrective action when it is determined that a prohibited personnel practice has been or is being committed. This Office, however, is not authorized to deal with or seek redress for employee complaints or grievances which may be resolved more appropriately under established complaint, grievance, or appeals procedures unless it involves a prohibited personnel practice specified in 5 U.S.C. 2302. [5 U.S.C. 1206(a)(1) and (e)]

This Office is also authorized to receive and transmit to the agency concerned information that evidences a violation of any law, rule, or regulation, or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety by or within the cognizance of a Federal agency. This Office, however, is not authorized to investigate these types of allegations. [5 U.S.C. 1206(b)]

We have reviewed the information you have provided and marked below our disposition, action or need for further information from you.

☐ 1. We will make further inquiry into the matters raised and inform you of the results and of any further action by this Office.

☐ 2. We have referred the information provided to the agency concerned pursuant to 5 U.S.C. 1206(b)(2) and will inform you of the agency's report of the action taken or to be taken.

☐ 3. We have referred the information provided to the agency concerned for an investigation and report pursuant to 5 U.S.C. 1206(b)(3). We will send you a copy of the report when received.

☐ 4. We cannot act on the information provided without your consent to disclose your identity to the agency involved. If you wish us to pursue this matter, please complete and sign the enclosed form in the appropriate places and return it to this Office.

☐ 5. Your communication does not provide enough information (of the type we need) for us to determine what action we can take. If you wish us to pursue this matter, please complete the enclosed form and return it to this Office with the additional information we need. (See Item 13, below, for any particular information or documentation we will need.)

☐ 6. Discrimination in violation of law is one of the prohibited personnel practices which the Special Counsel is authorized to investigate (5 U.S.C. 2302(b)(1)). However, the statute was not intended to divert all discrimination cases to this Office for investigation and thereby bypass or duplicate the procedures for such complaints already established in the agencies and in the Equal Employment Opportunity Commission.

- ☐ a. If you have not already filed a complaint with the agency, you may wish to contact the appropriate agency EEO official.
- ☐ b. We intend to monitor the processing of your complaint and will inform you of any action we take.
- ☐ c. Please write to us if you believe the agency is not processing your complaint in accordance with the applicable statutes and regulations.

☐ 7. We have determined that your allegations deal with matters that may be resolved more appropriately under an administrative appeals procedure or applicable grievance procedure. We, therefore, will not undertake an investigation in your case at this time. (5 U.S.C. 1206(e)(2)).

☐ 8. We are not authorized to take action on your allegations because the information you have provided does not indicate that a prohibited personnel practice or any other activity prohibited by civil service law, rule, or regulation has occurred. We have marked the reason(s) for this determination below:

☐ a. No "personnel action" has been taken or is to be taken, as defined by the statute (see enclosed Summary).

☐ b. There is not sufficient evidence to indicate that a prohibited personnel practice as defined in the statute (see enclosed Summary), or other prohibited activity, has occurred.

☐ c. Nonselection for promotion is not subject to investigation unless there is evidence that activity prohibited by law, rule, or regulation is involved. If you believe a promotion was accomplished improperly, Section 1-6 of FPM Chapter 335 quoted below may apply:

"Employees have the right to file a complaint relating to a promotion action. Such complaints shall be resolved under appropriate grievance procedures. The standards for adjudicating complaints are set forth in Part 300 of title 5, Code of Federal Regulations. While the procedures used by an agency to identify and rank qualified candidates are proper subjects for formal complaints or grievances, nonselection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance. There is no right of appeal to the OPM but the OPM may conduct investigations of substantial violations of OPM requirements."

☐ 9. We are not authorized to take action on your allegations because the Civil Service Reform Act came into effect on January 11, 1979. The prohibited personnel practices, established thereunder do not apply to actions taken prior to that date (except for certain matters not relevant in your case).

☐ 10. The provisions of the Civil Service Reform Act relating to prohibited personnel practices do not apply to Government corporations, the FBI, the CIA, the Defense Intelligence Agency, the National Security Agency, the General Accounting Office, the U.S. Postal Service and Postal Rate Commission, employees of the Army and Air Force Exchange Service and similar non-appropriated fund activities (including Open Messes), or Government contractors.

☐ 11. The matters you have complained of are not within the jurisdiction of the Special Counsel. Therefore, we have referred your correspondence to:

☐ 12. You may wish to submit your allegations or concerns to:

☐ 13. Other.

Assistant Special Counsel

SUMMARY OF PROHIBITED PERSONNEL PRACTICES

NB: Since this is a summary of the prohibited personnel practices, section 2302 of title 5, United States Code, should be consulted if the specific statutory language is needed for any purpose.

Persons Protected by the Prohibited Personnel Practices

The employees and applicants protected by the prohibited personnel practices are those employees in and applicants for:

(1) any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service (with certain exceptions) which is in--

(2) an Executive agency, the Administrative Office of the U.S. Courts, or the Government Printing Office--but is not in--

(a) a Government corporation;

(b) the FBI, CIA, DIA, NSA, and certain other intelligence agencies excepted by the President;

(c) the General Accounting Office; or

(d) the U.S. Postal Service and the Postal Rate Commission.

The Prohibited Personnel Practices

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action (as defined below), shall not, with respect to such authority--

1. discriminate for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;

2. solicit or consider any unauthorized recommendation;

3. coerce the political activity of any employee or applicant;

4. deceive or willfully obstruct any person with respect to such person's right to compete for employment;

5. influence any person to withdraw from competition for the purpose of improving or injuring the prospects of any other person for employment;

6. grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for the purpose of improving or injuring the prospects of any particular person for employment;

7. appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement any individual who is a relative of such employee to a position in the employee's agency over which the employee has jurisdiction or control;

8. take or fail to take a personnel action with respect to any employee or applicant as a reprisal for the employee or applicant's disclosure of information which the employee or applicant reasonably believes evidences a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety--or for the exercise of any appeal right granted by any law, rule, or regulation;

9. 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; or

10. take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of title 5, United States Code.

Personnel Actions Covered

The specific personnel actions covered by the prohibited personnel practices are:

1. an appointment;

2. a promotion;

3. a removal, suspension, reduction in grade or pay, a furlough of 30 days or less, or other disciplinary or corrective action;

4. a detail, transfer, or reassignment;

5. a reinstatement;

6. a reemployment;

7. a performance evaluation under chapter 43 of title 5, United States Code;

8. a decision concerning pay, benefits, or awards, -- or concerning education or training if the education or training may reasonably be expected to lead to any other action listed here; and

9. any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level.

INFORMATION TRANSMITTAL FORM Appendix D

TO: Office of the Special Counsel DATE: _____

FROM: _____ ON BEHALF OF:
(Name)

_____ _____
(Address)

_____ _____

_____ _____

The following information is to: (Check one)

( ) Report an action or activity which I have reason to believe constitutes a prohibited personnel practice under section 2302 of title 5, United States Code, or other activity prohibited by civil service law, rule, or regulation.

( ) Disclose information which I believe evidences a violation of law, rule, or regulation, or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety by or within the cognizance of a Federal agency which I wish to have referred to the agency involved for investigation pursuant to 5 U.S.C. 1206(b)(2) (the "whistleblower" provisions of the Civil Service Reform Act of 1978).

I consent to the disclosure of my identity to the agency involved should such disclosure be necessary in conducting further inquiry.

_____
Signature

I do not consent to the disclosure of my identity outside the Office of the Special Counsel.

_____
Signature

I report the following information which I believe to be true and correct to the best of my knowledge and belief:

1. The agency involved is: _____
Agency (including organizational unit)

_____
(Address)

_____

2. The facts in the matter are: (Please use continuation sheets. Please state as concisely but specifically as possible the facts you believe evidence the wrongdoing of concern, particularly in regard to who or what office did what or took what action(s) affecting whom, when, and where. If the matter relates to personnel actions, please be specific as to the nature of the action e.g appointment, reassignment, reduction in grade, etc. Attach copies of supporting documentation or other evidence.)

3. I believe the information provided evidences the following wrongdoing:

_____

_____

Enclosures

_____
Signature

APPENDIX E - Summaries of agency reports of investigations required by the Special Counsel pursuant to 5 U.S.C. 1206(b)(3)

1. Report of the Secretary of the Navy on the complaint of an employee of the Naval Weapons Center, China Lake, California, June 8, 1979. The complainant alleged a "cover-up" of mismanagement and safety problems in the development and testing of the HARM Rocket Motor. The Secretary of the Navy reported that an independent investigator from the Naval Civilian Personnel Command Field Division, San Diego, California found no uncorrected management problems or safety violations in the HARM Rocket Motor effort.

The complainant was made Project Engineer for the HARM Rocket Motor in November 1976 and stated that shortly thereafter he became aware of mismanagement and safety problems with the development and testing of the motor casing. He called this problem to management's attention and was not satisfied with their response. In December 1976, complainant set forth his concerns and recommendations in a memorandum and widely distributed the memorandum. The agency's report states that complainant's 1976 memo was essentially accurate and that at that time there were serious technical and managerial problems with the rocket motor. Other problems connected with the project were also identified. Corrective action was, according to the report, immediately undertaken.

2. Report of the Secretary of the Air Force on allegations of an employee of the Commissary at Scott Air Force Base, Illinois, June 13, 1979. Complainant, a meat cutter in the Commissary, Scott Air Force Base, alleged mismanagement and improprieties in the meat department occurred during the past four years. He listed as unnecessary costs to the government: purchasing unnecessary equipment; improper supervision resulting in unnecessary overtime by employees; unneeded extension of Commissary hours; unlawful procurement of government property; sale of government property to unauthorized personnel; and cheating on meat purchases. Complainant further alleged the following management problems: improper supervision; lack of personal hygiene by employees; failure of supervisor to take necessary disciplinary action; belittling employees and making examples of them in front of others; incorrect rating of employees by supervisors; discouraging employees from making suggestions; unsafe working conditions; being imposed upon to provide transportation for another employee; and getting the "run around" when trying to gain job information.

The investigation, according to the Secretary of the Air Force, disclosed no substantial violations of laws or regulations. It did, however, disclose some management deficiencies, some questionable operating procedures, and some discrepencies in the Commissary's property control records. The report states that as a result of the investigation, the Commander of Scott Air Force Base has: requested the Air Force Commissary Service to furnish an expert to assist in auditing and correcting the Scott Commissary's property records; directed that hazardous working conditions within the Commissary's meat department be corrected; directed that basic rules of hygiene be observed at all times within the meat department; and directed the Commissary officer to insure that proper management principles and techniques are used by supervisory personnel at the Commissary.

According to the report, the Air Force Office of Special Investigations had recently closed a file regarding the alleged thefts by employees, unauthorized purchase of Commissary items, and cheating on Commissary purchases, stating that insufficient specific information was developed to warrant further investigation. A collateral investigation by the Federal Bureau of Investigation for alleged extortion of money from vendors and acceptance of gratuities had also been closed for lack of positive information on illegal activity.

3. Report of the Secretary of Health, Education, and Welfare, concerning certain practices at the Social Security Administration's Teleservice Center in Parlin, New Jersey, June 29, 1979. The Secretary of the Department of Health, Education, and Welfare, transmitted to the Special Counsel a report on anonymous allegations concerning the following issues: the Center Manager arrives approximately 20 minutes late each day after allegedly picking up the mail at the Post Office located "only 50 yards away" from the office; the Manager "assigns himself overtime on a rather peculiar basis . . . being approximately a half hour late every morning and then assigning himself overtime for about the same time period for which he has appeared to failed to appear at work."; the Manager "refuses to divulge to the Union representatives . . . the amount of overtime that he has allotted to himself . . . ."

The agency report stated that the Manager did periodically arrive at the office late after having picked up the mail, and has been cautioned by the Area Director to discontinue this practice. Since the investigation, a clerical employee has been assigned this duty.

The amount of overtime worked by the Manager was found to be justified in light of the substantial amount of time required outside of the office by the Manager preparing for arbitration and attending a hearing involving an adverse action case. The agency found that the overtime hours worked by the Manager were both valid and necessary. It was also found that the Manager worked additional overtime for which he did not claim reimbursement or compensatory time.

The Social Security Administration, according to the report, monitors the amount of overtime worked by all management personnel in grade GS-12 and above. Area Directors are asked to investigate those situations where management personnel work in excess of 25 hours of overtime a month. SSA is planning to extend this monitoring to all GS-11 Branch Managers, TSC Managers, and Assistant Managers, beginning May 1979. In addition, SSA has asked the Area Directors to monitor more closely the overtime hours spent by Managers on administrative matters in order to keep this type of overtime to a minimum.

The report found that the Center Manager did inform the Union representatives of the scheduling of overtime pursuant to the contract provisions. Information as to the amount of overtime that Managers work is not required by the contract and was not provided.

4. Report of the Administrator of General Services concerning an allegation of an existing fire hazard to employees in the National Archives Annex (Lansburgh Building). The Administrator of the General Services Administration responded to allegations about an existing fire hazard to National Archives and Records Service employees in the Lansburgh Building by stating that he undertook a complete review of the allegations and ordered that the employees be relocated from the building while an assessment was made of the potential for relocation to an alternate facility. Following this action, it was recommended, and the Administrator approved, permanent relocation of the National Archives and Records Service from the Lansburgh Building.

The Administrator did not include with his letter a report of investigation. The Special Counsel determined that because the General Services Administration did, in fact, investigate the allegations and remove the employees from the Lansburgh Building, no additional information was necessary from the agency.

5. Report of the Secretary of Agriculture on a complaint of an employee of the Forest Service, Mount Ida, Arkansas, October 17, 1979. Complainant, an employee of the Forest Service made the following allegations: a GS-11 management official used real and personal government property to produce molasses for private use and sale; the same individual converted government property to private use; there was gross waste of government funds in the construction and use, by employees, of a dog pen, a livestock impoundment area, and a work center building; certain duties had been allowed to be performed by volunteer workers to the detriment of career employees; the agency failed to comply with a hearing examiner's decision to reinstate complainant to his position; and the agency violated the merit promotion system when they filled complainant's position at the Womble-Caddo Ranger District in 1975.

The Department's inquiry disclosed that a Forest Service official did, in fact, use government property to raise cane for making molasses. It was found however that the official resides on government real property and because of that is allowed to use one acre of property for private use. The inquiry indicated that the official may have sold some of the product derived from the crop. Further, it was disclosed that the same official did have on his own personal property, government property such as wire, fence and sign posts, insecticide, cans, pipes, gates, tool boxes, signs, and fire rakes. Most of the items, taken with the District Ranger's permission, were no longer useful and not worthy to be handled as surplus. Other items were obtained by the employee from a land fill or from the junk site. However, since it appeared that all of these items were not obtained with the District Ranger's permission, they were confiscated. It was found that a dog pen was constructed in 1976 as an approved Youth Conservation Corp project; constructed by YCC personnel using Job Corps materials and approximately $200 of concrete paid for by the Forest Service. The use of the pen by those living in government quarters is authorized, according to the report.

A livestock impoundment corral was constructed in the 1960's; none of the officials presently in the District were involved with the authorization of the corral. Persons occupying government quarters are allowed to use impoundment corrals for domestic purposes; no permit was issued as required, but the supervisor stated that it was not a practice to require a permit where the person occupying government quarters had a cow or horse for domestic purposes as was the case in this instance.

The new Work Center complained of was a Job Corps project prepared and started in 1970. The Job Corps bought the materials, furnished the labor, and paid for construction inspections. Work was stopped when Job Corps was at a point where they no longer had trade skills to complete remaining work; Forest Service could not complete the building because of lack of appropriations.

No support for the allegations that positions at the Forest Service have been affected because of work done by volunteers was found by the investigation. Volunteers were performing duties involving wildlife stand improvement, planting, ground care control, etc.; they did not perform the trade work done by the maintenance workers.

6. Report of the General Counsel of the Department of Navy on allegations of an employee of the Philadelphia Naval Shipyard, Philadelphia, Pennsylvania, August 10, 1979. The allegations received from the employee concerned civilian employees at the Philadelphia Naval Shipyard who allegedly were stealing government property. Complainant also separately transmitted her allegations to the Commander of the Philadelphia Naval Shipyard on December 4, 1978. Following receipt of her letter, the Shipyard Commander directed an investigation, utilizing the assistance of the Naval Base Police. The investigation conducted by the Shipyard Commander revealed the following: it was alleged that an employee misappropriated government property, specifically a snow shovel and an attache case. Both these items were located during the investigation in the Shipyard where they were appropriately available for official use; no evidence substantiating allegations of misconduct was found; the alleged theft of government property by the Administrative Officer, Public Works Department, was not substantiated. No unauthorized purchases for or by the employee were identified by a search of purchasing documents and receipts; the allegation of misuse of a GSA card by another employee was not substantiated; relevant sales slips were verified concerning material for which the employee had acknowledged receipt; it was alleged that an employee had her private automobile repaired in the Shipyard; the employee produced a receipt indicating that the repair work was done at a private garage.

Pursuant to the Special Counsel's request for an investigation and report, the Naval Investigative Service conducted an independent investigation. Most of the findings of the earlier Police investigation were confirmed by the NIS investigation. There were, however, additional disclosures. The Department's investigation and report found the following: (1) NIS found that the snow

shovel and attache case allegedly misappropriated were in fact obtained for official use; the employee alleged to have misappropriated these items, however, was found to have miscellaneous items of government property having an approximate value of $40 at her home. Additional allegations of thefts by another employee were not substantiated. Other allegations of misuse of a GSA card by another employee were not substantiated. Additional documentation was found concerning the repair of a private car; the documentation and testimony confirmed that the car was repaired by a civilian mechanic and not in the Shipyard.

7. Report of the Inspector General of the Department of Transportation on alleged systems errors at the Little Rock, Arkansas TRACON Tower, November 29, 1979. The allegations forming the basis of the Inspector General's investigation of the Little Rock Tower Air Traffic Control Center involved the alleged failure of Supervisory personnel and Traffic Controllers to report, improper reporting, or incorrect reporting of certain incidents involving aircraft, that the Supervisory persons either failed to investigate or improperly investigated certain incidents. It was further alleged that these actions could detrimentally affect the safety of the traveling public.

The Office of the Chief Counsel, FAA, Washington, D.C., investigated the allegations. Several of the alleged systems errors were, in fact, found to have occurred. However, these systems errors were properly reported and investigated by FAA. Other alleged systems errors reported by complainant were found not to have occurred.

FAA found that the nature of system errors and system deviations involve some failure to follow acceptable air traffic control procedures. Because such considerations require in-depth knowledge of Air traffic procedures FAA did not specifically detail each and every allegation contained in complainant's documents. Rather, FAA generally reported that it had people with the expertise necessary to conduct investigations and review each of the specific charges involved and found the procedures followed to be in accordance with agency orders. FAA found that in each of the instances studied, the procedures followed by agency personnel were in accordance with agency orders and that these orders are consistent with the safe movement of aircraft.

FAA noted, however, that the investigation did identify some problems in the reporting of system errors and system deviations with regard to responsibilities and procedures. As a result, it was determined that modifications of the FAA handbook were necessary. The new handbook, issued on October 1, 1979, contains the new procedures which must be followed on the reporting and handling of incidents in a clear and more detailed manner.

8. Report of the Under Secretary of the Treasury on alleged concealment and destruction of official documents at the Bureau of Government Financial Operations, Washington, D.C., December 3, 1979. On June 8, 1979, Special Counsel referred to the Inspector General of the Department of Treasury

allegations dealing with the destruction and/or concealment of records at the Bureau of Government Financial Operations (BGFO). The Treasury Department Inspector General advised that an investigation of the same allegations had been ongoing by that office since February of 1979. It was alleged that the Labor and Employee Relations Branch, BGFO, had conducted a survey relating to an issue of lunch practices which was included in a grievance filed by the National Treasury Employees Union against BGFO and that when NTEU requested a copy of the survey under the Freedom of Information Act (FOIA), BGFO informed the Union that there was no report of such survey in existence, when, in fact, such a report was in existence and was later provided to the NTEU.

The agency investigation, found numerous conflicts in the testimony given by various witnesses; therefore, the Department could neither prove or disprove the allegations. The investigation disclosed that, in response to the filing of a grievance over lunch hour practices, an Assistant Commissioner in BGFO requested a survey to determine what the current policies were regarding lunch and other practices. The survey was completed and a briefing was presented to the Assistant Commissioner. NTEU filed an FOIA request for any report, survey, analysis, test, document, item, record, etc., which dealt with the contract provisions concerning lunch time. BGFO responded that such records were not in existence. NTEU later repeated its FOIA request, and made clear that it was asking for any documents, including notes, which anyone in BGFO had. BGFO again replied that if any such notes had been made, they were no longer in existence. Thereafter, without any further requests from the NTEU, BGFO provided the NTEU with handwritten notes of the telephone survey which had been conducted.

The Labor Management Relations Specialist who conducted the survey (complainant) alleged that when the first FOIA request was made, he was instructed by his Supervisor to inform the FOIA and Privacy Officer that there was no report, only some handwritten reports which had been made for use during an oral briefing. Complainant further alleged that his Supervisor requested his copy of the notes and then destroyed them; the Supervisor was alleged to have been taking his own copy of the notes home each night. The complainant admitted that even though his survey notes comprised a report, that he, his Supervisor, and others in the Bureau had previously referred to the notes as a report, that he lied to the FOIA and Privacy Officer and told him whatever he had been instructed to say because he wanted to please his boss and because he was afraid to disobey him.

The complainant's Supervisor stated that he believed that he and the complainant were in agreement that the handwritten notes did not fall within the coverage of the FOIA request because the notes were not an official report. He denied that he tore up the complainant's copy of the notes or that he instructed the complainant to deny the existence of the survey notes, but admitted that he told the complainant to destroy them so he could have the only copy. He stated further that he did not learn of the second FOIA request, which made specific reference to the notes, until after it had been answered.

During the course of a conversation between the complainant and his Supervisor, which was surreptitiously recorded by the complainant without the knowledge of the Supervisor, the Supervisor admitted that he was playing a game with the Union and was trying to avoid providing the information requested if at all possible. He did this by taking the position that the NTEU request was for a report, and the notes he was in possession of were not a report. When questionned by the Inspector General about these statements, the Supervisor stated he could not recall having made them.

The Assistant Commissioner who requested the survey stated that he was aware that notes had been made but that he was under the impression that those notes had been destroyed after the briefing, and before the first FOIA request had been received. He stated that it was not until after the second FOIA request, when the Labor Relations Officer who had possession of the notes left the notes for him, that he realized that they were still in existence.

The FOIA and Privacy Act Officer stated that he did not know about the existence of notes until after his second negative reply to the Union. It was at that time that he informed the NTEU that notes were available and he would review them to determine if they were disclosable under the FOIA. Thereafter, he informed the Union that the notes were disclosable and would be provided.

Based on the evidence developed during the course of the Inspector General's investigation, it was determined that several employees in BGFO might have violated 18 U.S.C. 1001 (fraud or false statements or entries), and 18 U.S.C. 2071 (concealment, removal, or mutilation of records and reports), and the evidence was referred to the Department of Justice. By letter dated September 14, 1979, the Department of Justice declined to prosecute.

It was also determined that several of the Treasury Standards of Conduct regarding care of documents, falsification of records, and conduct prejudicial to the government might have been violated by several BGFO employees. The findings of the investigation were referred to the Fiscal Assistant Secretary who has jurisdiction over BGFO for consideration of any administrative action which might be appropriate.

9. Report of the Administrator of the Veterans Administration, concerning allegations of mismanagement, abuse of authority, as well as reprisal at the Bedford, Massachusetts VA Hospital, November 20, 1979. By letter dated September 6, 1979, the Administrator of the Veterans Administration forwarded a copy of the report of investigation requested by this Office into allegations of mismanagement, abuse of authority and other irregularities in the operation of the VA Hospital in Bedford, Massachusetts. The Administrator originally concluded that no corrective action was necessary. After reviewing the report, the Special Counsel wrote the Administrator requesting that he again review the Investigator's findings with a view towards corrective action. By letter dated

November 20, 1979, the Administrator reported to the Special Counsel that in light of the Investigator's findings that management of the Rehabilitation Medicine Service could be more effective, several corrective actions were being taken: administrative procedures were being reviewed by local management so that they would be improved where indicated; the Service Chief would be scheduled to receive additional management and supervisory training in order to sharpen his management and administrative skills; and upon completion of these actions the situation would be reviewed again by the Investigator to insure that they have had the desired affect.

The report of investigation began by finding that the policy of the Rehabilitative Medicine Service (RMS) to provide service to all patients in the facility has caused a feeling among the therapists that quality is nearly compromised in the interest of quantity. However, it was found that the quality is generally good. It was found that the management of RMS is fairly rigidly structured along a strict hierarchial design consistent with policy and with the authoritarian management style of the Chief, RMS. It was also found that the staff turnover of RMS has not been unusually high as alleged by complainant.

A number of specific charges against the Chief, RMS which might be categorized as "abuse of authority" were found not to be substantiated. Specifically: the parking place the Chief uses is not marked for handicapped parking as alleged; there are adequate restroom facilities for female employees; a specifically mentioned "insulted" employee states that he has had no problems with the Chief in the past and does not foresee any; opening mail is common in most offices unless the mail is marked Personal Do Not Open; the Chief was counselled in the past by the Chief of Staff for reporting late to work and he has improved; the Chief has traveled regularly to Europe to attend meetings but all were approved by the Hospital and none included excessive authorized absence.

In response to the allegation that the Chief, RMS had psychological problems, it was found that the Chief has on occasion reacted strongly and perhaps out of proportion to situations having to do with strict adherence to his hierarchial authority structure but that all of the clinicians questionned felt that he had no psychological problems. All staff of RMS interviewed felt that they were able to work up to their professional potential and felt that the Chief gave them professional support when required. They did, however, feel that the Chief did not have a good understanding of their programs, nor was he able to direct their treatment planning effectively. However, in other areas he was seen as knowledgeable.

A number of accusations were made by the complainant concerning the Chief, RMS and vice versa. The report found that this apparently had been going on for several years. The investigator found this was apparently based on personality conflicts.

Although no violation of any law, rule, or regulation was found, the Investigator stated that the management of the Service is not as effective as desired and this is partly due to a lack of capability on the part of the Chief, RMS and the inability of the Coordinator, RMS to make a significant impact administratively.

10. Report of the Secretary of Health, Education, and Welfare, regarding alleged violation of laws, rules, regulations, mismanagement, and harrassment on the part of certain officials of the Social Security Administration, December 13, 1979. The investigation of alleged violations of law, rule or regulations and management on the part of officials of the West Los Angeles, California Office of Hearings and Appeals, Social Security Administration, did not reveal any violation of law, rule, or regulation. Rather, some poor management practices, a minor violation of the Fair Labor Standards Act, and an acrimonious relationship between two Administrative Law Judges were found. The Secretary stated that she would direct corrective actions in those areas.

The first allegation investigated involved complaints that the performance appraisal system being used in the office was not based upon appropriate objective standards. The investigation found that the Hearing Office Administrator was the proper person to evaluate the employee's performance, but that he did not use proper methods to implement the system. He had not conducted adequate work product reviews and was using an improper method of evaluating performance, i.e., a curve system rather than comparing work performance with published performance standards. The Hearing Office Administrator was required to conduct periodic reviews of all employee work products so that informed judgments could be made about employee performance, and to cease using any curve system and to begin judging actual performance based upon published work standards.

The second issue alleged a change in the performance appraisal of a named employee for improper reasons. It was alleged that the performance appraisal was changed because the employee had discussed with other employees the possible benefits of Union organization in the office and also that the employee had remarked to other employees that she might file a grievance concerning working conditions. The investigation found that there was some disagreement between the Hearing Office Administrator and an Administrative Law Judge over the proper performance appraisal rating to be given the employee. Apparently the Administrative Law Judge wanted to upgrade the rating given the employee and the Hearing Office Administrator wanted to lower at least one of the ratings. The investigation revealed that it was extremely doubtful that the employee's appraisal, which (1) was the highest appraisal of any Hearing Assistant, (2) is higher than her previous appraisal, (3) shows the employee exceeding requirements or better in all elements, could be reasonably perceived as a punitive appraisal or that such appraisal would have a drastic effect on employee Union organizing. Accordingly, the investigation did not find the complainant's arguments to the contrary to be supportable and found no action required.

The third allegation involved threats of reprisals against an Administrative Law Judge. The allegation was that reprisals would be taken against the Administrative Law Judge if charges or complaints were filed concerning the appraisal system. The investigation found conflicting evidence in statements by the two Administrative Law Judges involved and did not establish any linkage between the conversation in which one ALJ allegedly threatened the other with reprisals, and subsequent events which would indicate reprisal by one of the Judges. Some of the statements alleged to have been made were denied, others were allegedly made in a different context which if true would not support a reprisal claim. An additional allegation against one ALJ concerned a memorandum ordering the Judge to cease and desist from engaging in activities which would encourage or discourage membership in a labor organization. The memorandum was based upon the Judge's signature on a pre-complaint charge (a step required before the filing of an unfair labor practice). The memorandum was found to have come from the OHA Headquarters in Virginia and not from the Administrative Law Judge who was alleged to have threatened to take reprisals against the Judge. The investigative report required that OHA Headquarters withdraw the memorandum because there was no evidence to support the charge of the Judge's engaging in Union activities. The investigators were not able to find a connection between the memorandum and an alleged attempt to keep the subject matter from the Merit Systems Protection Board as the Judge alleged.

The fourth allegation dealt with a refusal to provide employees with a labor management relations plan. It was alleged that the Administrative Law Judge had requested a copy of the labor relations plan, a copy of FPM Chapter 430 (Performance Rating), a copy of the Civil Service Reform Act, and any other HEW instruction which might serve as a rating guide for performance appraisal. The HEW Regional Labor Relations Officer allegedly made arrangements with another government agency located in the same building as the Judge requesting the information for him to review FPM Chapter 430 and the Civil Service Reform Act at that agency's location. A copy of the grievance procedures was sent to an employee the Administrative Law Judge had named. The Labor Relations Officer confirmed having spoken to the Judge on several occasions but did not recall having been requested to send a copy of the labor relations plan to him. He stated that if such a request had been made he would of course have sent the plan. The investigative report concluded that the agency did not refuse to provide the Judge with a labor relations plan. Rather, the report finds that there was some confusion in regard to what information was needed and through clerical error or misunderstanding on the part of the Regional Personnel Office staff the Judge did not receive the information requested.

The fifth allegation concerned alleged threats to clerical employees regarding overtime. It was alleged that one of the ALJ's had repeatedly threatened clerical employees and Hearing Assistants with reprisals in the event that those employees do not volunteer to work sufficient overtime. The investigative report found that the ALJ in question did state to the employees

that he would require mandatory overtime if they did not volunteer. He also admitted that if someone did not cooperate by volunteering for overtime it could become a consideration, as far as he was concerned, in those job elements on the appraisal having to do with cooperation. The investigators concluded that the nature of the hearing process requires substantial overtime and that most employees are working the overtime required. The report did detect some vague anxiety on the part of some employees about what might happen if they did not volunteer to work overtime, but found no conclusive evidence that punitive or arbitrary actions were taken against employees who did not make themselves available for overtime. The report concluded that management has a right to mandate overtime if it is necessary to accomplish its mission, but perceived that the comments attributed to the Judge are a poor way to express management's rights. The investigators concluded that the hint, however unintentional, that failure to volunteer for overtime might elicit a form of reprisal was inappropriate.

The sixth allegation involved an alleged abuse of authority and mismanagement of manpower. The allegation was essentially that the Chief ALJ has repeatedly assigned extra staff to his office leaving other ALJ's understaffed. The investigators found no significant evidence which would indicate a pattern of abuse in the general distribution of manpower. They found it reasonable for the ALJ in charge to have a larger staff than the other units because of the administrative load required of the Judge In Charge. The investigators found that the Judge attempted to respond to the needs of all the other Judges as much as possible within staff resources, and found no other Judge who had any strong disagreement about how manpower was allocated.

Additional allegations of improper personnel use involved (a) the use of a Hearing Clerk (typist) to do significant pre-hearing development work which is clearly a Hearing Assistant function. The investigators found that the employee was in fact doing significant pre-hearing work which was outside of her position description and recommended that the office insure that she not be used in this manner in the future; (b) an Administrative Clerk was not performing certain duties which support her grade; the investigation found this allegation to be true and required the office to either assign her the duties as outlined in her position description or develop a new position description which properly identifies her duties; (c) a Hearing Assistant was exclusively assigned as the Acting Hearing Office Administrator in the absence of the Hearing Office Administrator which indicated favortism and mismanagement, found by the investigators to have been improper. The office was required to develop an equitable system which would rotate this grade building experience.

The seventh allegation involved an alleged failure to assign cases in a fair rotation. The investigation found that documentation of case distribution was poor and inadequate to explain why decisions were made. Irregularities were found in the way ALJ's were assigned local cases and travel cases. Whether these irregularities were justified or were arbitrary was impossible to

determine because of a lack of documentation regarding why decisions were made. In regard to travel outside the service area, the investigators found that the Chief Judge's method for determining who will go on travel had the potential for abuse. Although the investigation did not find any pattern which would indicate abuse, the current system of giving out assignments based on random discussions with the ALJ's opens the Chief Judge's decisions to question. The office was required to develop a more formal system for assigning local cases and service area travel cases which would clearly set forth and document all exceptions to normal rotation. In addition, the office was directed to develop a more rational method for allocating travel cases from outside the service area.

The eighth allegation concerned arbitrary requirements regarding travel; specifically it was alleged that the Chief ALJ had harassed and interferred with another ALJ in the performance of official duties by requiring that the ALJ and his Hearing Assistant take annual leave for time spent in travel status returning from a site approximately 500 miles from the home office. Other instances of arbitrary requirements cited by complainants included an alleged refusal by the Chief ALJ to reimburse travel expenses of another ALJ and an arbitrary requirements by the Regional Management Officer that ALJ's and their Hearing Assistants travel outside of the normal work day, frequently without compensation.

The investigators found that there was no attempt to harass the Administrative Law Judge by allegedly requiring him to take annual leave for time spent in travel status. In fact, no annual leave was signed for and none required even though the Judge in question did not report back to the office within the time allotted for his travel. The second alleged harassment related to a trip to Las Vegas by an ALJ. The Chief ALJ originally denied the ALJ's request to conduct a hearing in Las Vegas. This decision was eventually overruled by the Chief Judge for the Region who told the investigators that the only reason he overruled the ALJ in charge was because of the disrupting effect changing the trip at such a late date would have had on the parties and the potential embarrassment to the office. The Regional Chief ALJ further stated that if he had been aware of the proposed trip during the proper lead times his decision would have been materially different and he would have concurred in the ALJ in Charge's original position. Another allegation involved a Regional Management office decision not to pay overtime for travel status outside of the normal work hours. The investigation found that this policy clearly violated the provisions of the Fair Labor Standards Act. Accordingly, the Regional Office was required to review pertinent FPM regulations and FLSA guidance and provide the Los Angeles office with more definitive information on compensation rights of employees. Those employees who may have accrued rights under FLSA to overtime in the past were to be advised regarding their rights to file complaints in order to claim retroactive wage benefits.

The ninth allegation dealt with arbitrary requirements concerning the number of hearings per day while in travel status. The investigative report found that the Office of Hearings and Appeals had, for some time and on an national basis, required the scheduling of a certain number of hearings while in travel status and set a required number of hearings per month. These directives have been national in scope and uniformally applied to all ALJ's. However, a recent court settlement has rendered this issue moot. Under the settement, ALJ's will not be required to hear a specific number of cases either in travel status or in the normal course of a week. No evidence was found that would indicate that local management was using the quota requirements, prior to the settlement of the court case, as a type of retaliation specifically aimed at one of the complainants.

The complainant's tenth allegation dealt with the investigation being conducted of the other allegations. Specifically, complainant alleged that one of the investigators was from the Regional Personnel Office in San Francisco, which, according to the complainants was implicated in substantial portions of the complaint. The investigators' report found that although the complainants alleged that the Regional Personnel Office team member was involved in investigating specific complaints directed at the Regional Office, only one allegation (allegation number 4) directly implicated the Regional Office and that allegation was a relatively minor issue regarding an obvious communications problem. The investigators were satisfied that this allegation was handled objectively.

11. Report of the Army on allegations of mismanagment and waste of funds at Fort Huachuca, Arizona, January 11, 1980. In sum, the allegations were: (1) exorbitant payment of training costs by the government to a private corporation; (2) an illegal and improper decision by the project manager to provide government developed source code to the contractor; (3) ill advised approval of engineering change proposals by the Joint Configuration Control Board and the Project Manager; (4) improperly ordered development of new software by the contractor; (5) an additional $536,000 in in-house programming costs above original estimates; (6) lack of control of "diskettes," increasing possibilities of security leaks; (7) government purchase of firm ware "chip" programming machines at exorbitant cost; and (8) the contention of a series of "unusual things" occurring during the early part of calendar year '79.

A summary of the evidence obtained from the investigation revealed that the allegation concerning exorbitant payment of training costs was attributed to miscalculation of costs relative to the training scheme by the complainant. Monies paid to the contractor for training were negotiated through contract and were not considered excessive. With regard to allegation (2), illegal and improper provision of source code to the contractor, the investigative report found that the Project Manager's decision to provide the contractor "source code" was legal, within his authority to make, and made with the best interests of the government in mind. The benefits of considerable maintenance cost

savings obtained by providing the code overrode the remote possibility of security breach by and competitive advantage to the contractor; increased administrative burden and cost to the agency; and any additional problems of configuration control. Accordingly, the investigative report found that the allegations were not substantiated.

The alleged ill advised approval of engineering change proposals was also found not substantiated. The report found that all engineering change proposals were legitimate. Several were proposed and developed to correct design flaws resulting from lack of specificity or weakness in original specifications; some were required equipment or software enhancements; and contractual cost growth due to engineering change was not found to be inordinately high.

The fourth allegation dealing with improperly ordered development of new software was found to have no substance. The development of "optical character reader software" was offered by the contractor at no cost to the government and was part of the resolution of a contractual problem arbitrated by the GAO and GSA. The investigators found no requirement for competitive bidding for this new software and found that such would be contrary to the GAO ruling on the contractual issues and subsequent GSA directive.

The allegation concerning in-house programming costs above original estimates was based on what the investigators found to be costs unduly attributed to the agency. Certain correction, modification, and update of contractor developed software did occur but not in such quantity as to be considered to be abnormal according to the investigative report.

The sixth allegation concerns lack of control of "diskettes". The investigative report found that the contract specifies that the diskettes are not expendable and that the agency control system requires their return to the agency. Declassification of diskettes as part of normal return procedures was an additional precaution. The diskettes were to be used solely for maintenance diagnostic purposes when the operational system is "off line". If standard operating procedures are heeded, the chance of security compromise is remote. The report found the allegations not substantiated.

The seventh allegation involving purchase of "chip" programming machines at exorbitant cost was, according to the report, based on erroneous data and misinterpretation of government intent. The "chips" were purchased at current market prices and the programming machines were purchased at less than one-tenth the price alleged by complainant which, according to the report, was considered a reasonable price.

The general conclusion of the investigative report was that the allegations presented stem from considerable lack of information and/or understanding of all factors considered in the managerial decisions that have taken place relative to the GSA contract. Additionally, the complainant based a considerable number of

his allegations on misinformation. Accordingly, the report found no basis in fact presented in the testimony of the witnesses or the documentation provided by the complainant that substantiated any irregularity or mismanagement of the contract. Accordingly, no action was recommended.

12. Report the Department of Army on allegations of possible mismanagement and abuse of authority within the Corps of Engineers, February 19, 1980. The report concerned allegations made by an employee of a Corps of Engineers dredge. The first allegation concerned what the complainant believed were collusive acts his supervisors to harass and intimidate, to deny equal protection, and to manipulate the government from their official positions for their own private use and purposes. The investigators found no direct evidence of any alleged collusion and the allegation was not substantiated.

The complainant also alleged that employees aboard the dredge including himself, were forced to work overtime and were not paid for doing so. The investigation found that employees aboard the dredge had worked an unknown amount of overtime on unspecified dates from 1976 through 1978 for which they were not paid. The evidence did not support the allegation that this practice was a Navigation Division policy.

The complainant also alleged that seniority of the dredge crew members was ignored in determining who would work the "seniority watch" (shift for which night differential would be payable). The investigators found that there were some problems in the implementation of this policy and that the "seniority" derived from this policy had on occassion been disregarded. It was also alleged that the seniority of another employee had been disregarded because of race. No conclusive testimony or other evidence to support this allegation was obtained.

Additionally, the complainant alleged that threats of physical and career harm had been made against crew members, including himself. No evidence was found to substantiate the allegation, and according to the report appeared to have been based in part on the complainant's perception of management's proposal to initiate disciplinary action against him. Complainant further alleged that the Navigation Division was maintaining dossiers on Federal employees. The investigators found that this allegation was based on memoranda assembled by the Division to support the proposed disciplinary action against complainant. No evidence was found of any improper marking of files nor the maintenance of improper files.

Complainant also alleged improper administration of the Employee Suggestion Program. The investigators found that for the previous four fiscal years, the Program was somewhat deficient and inadequate. However, it was found that the fiscal year '80 report indicated that there had been great improvement since the previous inspection. No evidence was found to support complainant's claims regarding his own suggestion or that of another employee.

Complainant alleged that Navigation Division supervisors had a policy of discouraging the use of safety equipment (life vests), and encouraging employees not to report accidents. The investigators found, through testimony of other crew members and supervisors, the contrary. It was found that all employees on board the dredge had life vests and that the requirement to wear this equipment was enforced to the limit. Further, it was found that the Navigation Division had established proper procedures and policies for the reporting of employee accidents and injuries.

Complainant's allegation that private armed guards were used to control dredge employees was found to be based on hearsay and not substantiated. The investigators established that the guards in question were, in fact, federal contractor employees, and that daily contract compliance checks were made.

On the basis of the investigation of complainant's allegations, the investigative report found that there was a violation of 5 U.S.C. 5544 to the extent that payment was not made for overtime hours actually worked, and that there had been a violation of the district's policy relating to the priority of crew members for assignments to the night shift. As corrective action, the district engineer was told to identify specific hours for which overtime compensation should have been paid and authorize payment to those employees so entitled. The current master of the dredge had instituted changed procedures to prevent a recurrence of this problem. In addition, the District Engineer would issue instructions to assure adherence to the policy regarding "seniority" for night shift assignments.

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