

1980
ANNUAL REPORT
OFFICE OF THE SPECIAL COUNSEL

Office of the Special Counsel
U.S. Merit Systems Protection Board
Submitted pursuant to 5 U.S.C. 1206 (m)

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INTRODUCTION

The Office of the Special Counsel has two basic functions: (1) to receive and investigate allegations of violations of civil service law, rule, or regulation, primarily the prohibited personnel practices established under the Civil Service Reform Act of 1978 (5 U.S.C. 2302(b)), and to initiate appropriate corrective and disciplinary actions where warranted; and (2) 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. These disclosures are commonly referred to as "whistleblowing."

Section 1206(m) of title 5, United States Code, as added by the Civil Service Reform Act of 1978, 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 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 annual 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 1980.

ADMINISTRATION OF THE OFFICE OF THE SPECIAL COUNSEL

With the resignation of the first Special Counsel, H. Patrick Swygert, on December 21, 1979, the Office of the Special Counsel began 1980 without a Special Counsel. On January 11, 1980, President Carter announced the nomination of Thomas H. Henderson, Jr. for the position of Special Counsel and designated Mary Eastwood, Associate Special Counsel for Investigation, to serve as Acting Special Counsel pending the appointment of a new Special Counsel. However, confirmation hearings on Mr. Henderson's nomination were never held.

In addition to carrying out the investigative and prosecution functions required by the Civil Service Reform Act, the Special Counsel's Office also had to devote its attention, during its first two years, to acquiring a basic staff and attempting to establish a structure to serve Federal employees outside the Washington, D.C. area. When the former Civil Service Commission was abolished and staff and funds were transferred to the Office of Personnel Management, the Merit Systems Protection Board and the Special Counsel, pursuant to Reorganization Plan No. 2 of 1978 and the Civil Service Reform Act of 1978, both the OPM and MSPB began with a large staff and a complete field structure in place. By contrast, only 14 staff members were transferred to the Special Counsel and there was no field office structure in place.

The Office began 1980 with a small Central Office staff and field offices in San Francisco and Dallas. By the end of the year, additional field and branch offices had been established in Atlanta, Philadelphia, Boston, Seattle, and Los Angeles. (See Appendix A, Field Structure).

The Office began the year with a total of 48 professional and support staff. By the end of December 1980, the staff had increased to 94 permanent employees nationwide.

The Supplemental Appropriations and Rescission Act, 1980, enacted in July 1980, unexpectedly rescinded \$2 million of the Special Counsel's \$4.5 million appropriation for fiscal year 1980. This represented a rescission of 46 percent of the fiscal year budget which had to be reconciled during the last two and a half months of the fiscal year. The Office immediately halted all expenditures other than payroll, cancelled all outstanding obligations, deferred all investigations requiring travel, and made plans to furlough the entire staff in order to avoid a deficiency.

The Acting Special Counsel sought assistance from both the Congress and the President for the funding necessary to stay in operation. The President proposed legislation to authorize the transfer of funds from the Merit Systems Protection Board to the Special Counsel, but no action was taken on the bill. The Director of the Office of Management and Budget first approved, then withdrew, funding assistance for the Office from the President's Unanticipated Needs Appropriation.

A furlough of the Office staff was avoided with the help of the Merit Systems Protection Board which agreed to detail approximately 60 percent of the Special Counsel staff to the Board to perform Board functions during the last five weeks of the fiscal year. During this period, the Special Counsel's branch offices were closed and the four field offices conducted only caretaker functions. The Office continued to receive complaints, which were held for processing until the investigators returned to Office duties on October 1. The Office was assisted during this period by four law students who had been trained in the Civil Service Reform Act by the Government Accountability Project of the Institute for Policy Studies, and worked without compensation, as authorized by 5 U.S.C. 3111(b). This enabled the Office to continue to review and process requests for stays of personnel actions during the period permanent staff was detailed to the Board.

The continuing appropriation resolution in effect from October 1 until December 15, 1980, continued the Office at the rescinded (\$2.5 million) spending rate. Thus, the ability of the Office to fully carry out its investigative functions was severely hampered for the balance of the calendar year. Nevertheless, the Office made considerable progress toward completing its establishment, taking steps to better inform Federal employees of their rights under the Civil Service Reform Act, and in establishing a computerized case tracking system.

In October 1980, the Office established a Case Review and Control Branch within its Investigation Division (see Appendix B, Organization Chart).

Whistleblower allegations (allegations of violations of law, rule, or regulation, mismanagement, abuse of authority, gross waste of funds, and substantial and specific danger to public health or safety) are centralized in this unit. This has improved the quality of the Office's referrals of whistleblower allegations to agencies for investigation or report, as well as the quality of Special Counsel's review of agency reports received.

Centralizing the "whistleblower" function enables the Office to more efficiently followup on agency action on the Special Counsel's referrals, and to develop expertise in reviewing the agency reports to determine whether the findings are reasonable, as required by the statute. Copies of agency reports are sent to the employees who submitted the allegations, for their comments, and those comments are taken into consideration in reviewing the reports. The Case Review and Control Branch also functions as a case screening unit, as contemplated by the Reform Act.

The Office has completed the installation of its computerized Case Information System and the linkage of the established field offices to the system. The Office is now improving the accuracy and completeness of the information it contains, and using the system as an effective management tool in the overall operation of the program. The system enables the Office to quickly ascertain the status and disposition of its cases, assists in managing the workload and meeting deadline dates, and provides useful statistics on the types of cases and their disposition.

A public information officer was hired for the Office in July, 1980, to assist in outreach efforts. An employee pamphlet, "For Merit and Honesty in Government," describing the functions of the Special Counsel and how and where to file complaints with the Office, was published in August 1980 and approximately 48,000 copies have been distributed. Informational posters on prohibited personnel practices, whistleblowing, and the Hatch Act were prepared. However, printing was deferred until 1981 because of the budget rescission and its aftermath. */ The Public Information Office publishes a weekly "CASELOG" of documents filed with the Merit Systems Protection Board in Special Counsel cases. The Special Counsel's CASELOG is published in full each week in the Government Employee Relations Reporter, Bureau of National Affairs, as one means to monitor how the Civil Service Reform Act is being implemented.

Throughout the year, the Central Office staff continued to be hampered by inadequate office space, with all but the Acting Special Counsel required to work in crowded conditions and open space. An agreement with the Merit Systems Protection Board to trade some of its private office space in exchange for some of the Special Counsel's open space was not implemented, partly because of the anticipated move of the Board and the Office to a new building.

In August 1980, the Chairwoman of the Board issued directives concerning the Special Counsel's personnel authority, its budget, and communications with Congress and the media, which the Acting Special Counsel believed might result

*/ The posters, employee pamphlet, and a Spanish translation of the pamphlet, are, at this writing, at the Government Printing Office and agencies may purchase copies directly from GPO for their employees. Individual copies will be available from the Office.

in her improperly relinquishing authority of the Special Counsel contrary to the provisions and intent of the statute. Accordingly, she requested a legal opinion on the matter from the Office of Legal Counsel, Department of Justice. The issues were not resolved when, on November 21, 1980, the Board filed a lawsuit against the Acting Special Counsel in both her official and individual capacities, seeking to compel her to comply with the Chairwoman's directives.

The Acting Special Counsel was represented in the lawsuit by former Supreme Court Justice Abe Fortas, with assistance from Special Counsel attorneys Lynn R. Collins, Vincent Fuller, and Kathryn A. Bleecker, who filed a motion to dismiss the Board's complaint. A hearing on the matter was held in the United States District Court for the District of Columbia. The American Federation of Government Employees intervened in the case, and the law firm of Passman, Price and Broida and the U.S. Department of Justice participated as amicus, all supporting the Acting Special Counsel's motion to dismiss. The case is awaiting a decision on the motion to dismiss. See pages 32-33 of this Report.

Despite the unusual problems the Office faced during the year, staff morale continued to be high and a great deal of work was accomplished. The Office lost no permanent staff member as a result of the difficult working conditions brought on by the severe budgetary restrictions necessitated by the rescission.

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 any personnel action 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. 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 Board member 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 additional 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 20 cases during 1980. The Board denied the initial 15-day stay request in two of the cases, and in the remaining 18 cases, the stay was granted or permitted to go into effect by operation of law. The Special Counsel requested 30-day extensions of stays pursuant to section 1208(b) in 14 of those cases; in three cases, the agency agreed to take corrective action or agreed to an informal stay; and in the other

case, after further investigation, the Special Counsel determined not to seek an extension of the initial stay. The Board granted nine of the 14 section 1208(b) extensions of stays and denied five. Further extensions, pursuant to section 1208(c), were requested by the Special Counsel in eight of the cases; of which the Board granted seven and denied one.

The principal prohibited personnel practice alleged in the 20 cases in which the Office requested stays were:

Reprisal for whistleblowing (5 U.S.C. 2302(b)(8))	6 cases
Discrimination (5 U.S.C. 2302(b)(1))	5 cases
Discrimination based on conduct un- related to on-the-job performance (5 U.S.C. 2302(b)(10))	5 cases
Reprisal for exercise of an appeal right (5 U.S.C. 2302(b)(9))	2 cases
Violation of law implementing a merit system principle (5 U.S.C. 2302(b)(11))	2 cases

The personnel actions which the Special Counsel sought to have stayed were: removals in 15 of the cases, reassignments in three, failure to promote in one, and a down-grade (removal from SES) in one.

Four of the cases involved employees in the Department of the Treasury, four in the Department of the Army, three in the Department of Justice, two in the Veterans Administration, and one each in the Departments of the Air Force, Health and Human Services, Labor, State, Transportation, the Equal Employment Opportunity Commission, and the Railroad Retirement Board.

Requests from Federal employees for stays of personnel actions are immediately reviewed by Special Counsel attorneys and a determination is made by the following workday on whether a petition for stay should be filed with the Board. Except in unusual circumstances, the Office contacts the agency prior to filing a petition for a stay of personnel action. In some instances, the agencies are willing to voluntarily defer taking an adverse personnel action against an employee pending a Special Counsel investigation, thus obviating any need to file a formal request with the Board.

CORRECTIVE ACTION COMPLAINTS

Section 1206(c)(1) of title 5, United States Code, authorizes the Special Counsel to recommend corrective action to agencies when, on the basis of an investigation, it is determined that there are reasonable grounds to believe a prohibited personnel practice has occurred, exists, or is to be taken. Copies of the findings of the investigation and recommendations are submitted to the agency concerned, the Merit Systems Protection Board and the Office of Personnel Management, and may be submitted to the President. If the agency does not take the corrective action recommended by the Special Counsel 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."

A corrective action complaint filed against the Veterans Administration alleging reprisal against two employees in the VA Medical Center in San Diego was settled between the Office of the Special Counsel and the Veterans Administration in March 1980. The VA agreed to cancel proposed geographical reassignments of the two employees and promoted one of the employees who had alleged that his promotion had been denied because he disclosed irregularities and violations of VA regulations.

During 1980, five additional complaints for corrective action were filed by the Special Counsel, after agencies declined to accept recommendations based on investigations of allegations of prohibited personnel practices, summarized below:

Coffield. The Special Counsel requested the Board to order the Department of Labor to cancel the removal of a coal mine safety inspector in West Virginia, alleging that the removal was in reprisal for Coffield's whistleblowing (reporting safety violations) and for exercising appeal rights. The Board stayed Coffield's removal at the request of the Special Counsel, and the Special Counsel intervened in Coffield's appeal of his removal. The Board's Administrative Law Judge, who heard the adverse action appeal, ordered the removal cancelled, but found that there was no reprisal and directed that Coffield be suspended for 30 days in lieu of the removal. A petition for reconsideration of the Administrative Law Judge's decision has been filed. That petition and the Special Counsel's corrective action complaint are still pending with the Board.

Rohrmann. The Special Counsel requested the Board to order cancellation of a proposed geographic reassignment of Rohrmann, an employee in the State Department's New York Passport Office, alleging that the reassignment was directed in reprisal for Rohrmann's disclosing information concerning the failure of the Passport Office to seek law enforcement action in cases involving passport fraud. The reassignment was stayed at the request of the Special Counsel and the corrective action complaint is awaiting a decision by the Board.

SBA District Directors. The Special Counsel conducted an extensive investigation of allegations that certain district directors of the Small Business Administration had been targeted for reassignment based upon their political affiliation (Republican). The Small Business Administration declined to accept

the Special Counsel's recommendation that the district director rotation policy be cancelled and the affected district directors be given an opportunity to return to their former positions. The corrective action complaint, and a related disciplinary action complaint filed by the Special Counsel, are pending with the Board.

Munoz. The Special Counsel alleged that the proposed removal of Munoz, an employee at Kelly Air Force Base in San Antonio, Texas, was in reprisal for his having exercised appeal rights. The removal was proposed on the basis of Munoz' testimony at his EEO complaint hearing. The Air Force later found that Munoz had been discriminated against on the basis of national origin. The removal was stayed at the Special Counsel's request, and the Special Counsel intervened in Munoz' adverse action appeal. In April 1981, the Board's Administrative Law Judge found that Munoz' removal was based on reprisal and ordered Munoz' reinstatement. The Special Counsel's corrective action complaint is still pending with the Board.

Mortensen. The Special Counsel requested the Board to order the Department of the Army to cancel the proposed removal of Mortensen, an employee at Dugway Proving Ground, Utah, alleging that the removal was proposed in reprisal for Mortensen's exercise of appeal rights. Mortensen had filed several EEO complaints alleging discrimination based on sex, some of which she won. In the proposed removal letter, the Department of the Army alleged that Mortensen had

abused the EEO process by filing multiple complaints. Her removal was stayed at the request of the Special Counsel. The Special Counsel's corrective action complaint is pending with the Board.

DISCIPLINARY ACTION COMPLAINTS

The Special Counsel is authorized to file complaints with the Board for disciplinary action against Federal officials (5 U.S.C. 1206(g)). The statute gives employees against whom disciplinary complaints have been filed the right to answer the complaint and to be represented, to a hearing before the Board or Administrative Law Judge and to a transcript of the hearing, a written decision and reasons therefor. The Board is authorized to impose disciplinary action such as removal, reduction in grade, debarment from Federal employment for up to five years, suspension, reprimand or a civil penalty of up to \$1,000. (5 U.S.C. 1207).

In addition, the Office is responsible for enforcement of the Hatch Act, and is authorized to file disciplinary complaints against certain State and local employees as well as Federal employees for Hatch Act violations.

The Office of the Special Counsel filed ten complaints for disciplinary action in 1980, described below:

In July, the Special Counsel filed a complaint against the Associate Deputy Administrator for Support Services, Small Business Administration, after an investigation of allegations that district directors had been targeted for reassignment based on their political affiliation. The hearing has been completed and post-hearing briefs have been filed. The case is awaiting decision by the Board.

Complaints for disciplinary action were also filed against three officials of the Department of the Navy in Norfolk, Virginia, alleging that they had proposed the removal of an employee in reprisal for whistleblowing, *i. e.*, reporting asbestos safety hazards to Navy officials. The Special Counsel had conducted an investigation of the employee's allegations, and intervened in the employee's adverse action appeal. The Board's presiding official, on that appeal, ordered the Department of the Navy to reinstate the employee. The Special Counsel's disciplinary action complaints against the officials who allegedly took the action against the employee are pending before the Board.

The other six disciplinary action complaints filed by the Special Counsel alleged violations of the Hatch Act. Four of the complaints were against Federal employees; two were against State employees.

The Board's presiding official ordered one of the Federal employees suspended for 15 days for knowingly taking part in a partisan political campaign. The other three cases are currently before the Administrative Law Judge and are expected to be settled by agreement between the Office of the Special Counsel and the employees. In two of the cases, the employees allegedly took an active part in a partisan political campaign; in the other case, the employee allegedly participated in a precinct meeting and party convention for nomination and election of precinct chairman.

One employee of a Federally funded State agency was removed for violating the Hatch Act by running for public office in a partisan election. The Special Counsel's complaint against the other State employee, who became a candidate for public office in a partisan election, is still pending before the Board.

INTERVENTIONS

The Special Counsel may, as a matter of right, intervene or otherwise participate in any proceeding before the Merit Systems Protection Board (5 U.S.C. 1206(i)). During 1980, the Special Counsel intervened in 12 employee appeals to the Board. In 11 of the cases, the employee had been removed by his or her agency; one case involved the refusal of an agency to reemploy an employee. In each of the cases, the employee's defense was based at least in part on one or more prohibited personnel practices. In five of the cases, the Board's presiding official ordered that the employees be reinstated. In one case, the appeal was dismissed on motion of the employee's representative. The remaining six cases are pending with the Board.

WHISTLEBLOWING

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 receive from employees and transmit to the appropriate agency head, any disclosure of information reasonably believed by the employee 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.

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 may require 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. The reports are placed in a public file maintained at the Office of the Special Counsel in Washington, D.C. and in the Field Offices.

Internal guidelines for reviewing agency reports on allegations referred by the Special Counsel, pursuant to 5 U.S.C. 1206(b)(3) et seq., recently adopted at the suggestion of the Government Accountability Project, are set forth in Appendix C.

When the Special Counsel determines that the information received from an employee does not warrant the type of investigation and report required by section 1206(b)(3), the allegation is forwarded to the agency head for a report pursuant to section 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 and the Field Offices, unless the agency indicates some reason why the report should not be made public. Deletions are made to protect privacy rights, where necessary.

During 1980, the Office received 13 reports from agencies in response to Special Counsel referrals of allegations for investigation pursuant to 5 U.S.C. 1206(b)(3), and 55 reports in response to referrals pursuant to 5 U.S.C. 1206(b)(7). The allegations referred under section 1206(b)(3) related to such matters as mismanagement and waste of funds in procurement, falsification of travel vouchers, unauthorized use of Government vehicles, and poor management. Some

corrective action was noted by the agencies in eight of the 13 reports.

Following is a list of the number of reports received from agencies pursuant to both provisions of the statute:

<u>Agency</u>	<u>§1206(b)(3)</u>	<u>§1206(b)(7)</u>
Agriculture		3
Air Force		4
Army	3	10
Commerce		1
Defense	1	1
Energy		1
EPA		1
EEOC	2	1
GSA		1
HHS		5
HUD	2	1
Interior	1	3
ICA		1
ICC		1
Justice		2
Labor		2
NASA	1	
Navy	1	5
Pension Benefit Guaranty Corp.		1
State	1	
Transportation		2
Treasury		3
Veterans Administration	<u>1</u>	<u>6</u>
Total	13	55

At the close of calendar year 1980, the Office had 83 pending whistleblower cases. In the first four months of calendar year 1981, 20 of these were closed when reports were received, comments solicited, and the reports were accepted (17 were submitted under section 1206(b)(2) and (b)(7) and 3 were submitted under section 1206(b)(3) et seq.). Twenty-two were closed because the complainant withdrew the allegations, failed to respond to requests for additional information, or the information submitted was not sufficient to permit referral to the agency.

Of the 41 whistleblower cases still pending, 6 are in the final process of soliciting comments and reviewing the agency reports. Seventeen are awaiting receipt of agency reports (14 under section 1206(b)(2) and (b)(7) and 3 under section 1206(b)(3) et seq.) and 19 are in the process of developing the information and transmitting it to the agencies.

NUMBER AND TYPES OF CASES RECEIVED

The Civil Service Reform Act requires the Special Counsel to notify persons submitting allegations of the termination of an investigation and of the reasons therefor (5 U.S.C. 1206(a)(2)). When a case is closed after an initial review or an inquiry or on-site investigation, the complainant is notified of the reasons for closing the case and informed of possible other grievance or appeal channels, if appropriate. An investigation is terminated when it does not result in sufficient evidence to support a prima facie finding of a prohibited personnel practice or other violation of civil service law.

The Office began the year with 825 cases pending nationwide. During the year, 1,982 new cases were received, making a total of 2,807 cases pending during the year. Action was completed on 1,547 cases, with a balance of 1,260 active cases as of December 31, 1980:

<u>Caseload</u>	<u>Central Office</u>	<u>Field Office</u>	<u>Total</u>
Cases Pending on 12/31/79	699*	126*	825
Cases Received in CY80	1,294	688	1,982
Cases Closed in CY80	993*	554*	1,547
Cases Pending as of 12/31/80	736*	524*	1,260

* / Cases received in the Central Office but referred to a Field Office for processing are shown as Field Office cases.

It should be noted that some employees file more than one complaint with the Office. In addition, the Office sometimes reopens cases previously closed because of new developments or information received from the employee. These are not counted as new cases and only one case file is maintained per employee or group of employees. The number of cases closed during the year amounted to 78.1 percent of the number of new cases received:

<u>Year</u>	<u>Cases Received</u>	<u>Cases Closed</u>	<u>Percent Closed Per Number Received</u>
79	1,925	1,226	63.6
80	1,982	1,547	78.1
Total	3,907	2,773	70.1

Following is a breakdown of types of allegations received during the year. It should be noted that the tabulation reflects primarily what the complainants alleged, and does not necessarily show what the real issue might have been, as determined after further review, or follow up inquiry or investigation:

Types of Allegations Received

<u>Percentage</u>	<u>Allegation</u>
17.1	Discrimination based on race, sex, national origin, religion, age, handicapping condition, marital status or political affiliation.
16.8	Violation of merit system principles.
10.3	Abuse of authority.*
8.5	Violation of law, rule, or regulation (other than civil service law).*
7.4	Unauthorized preference or advantage given to some employee or applicant--normally related to promotions.
6.2	Reprisal for whistleblowing.
6.1	Reprisal for exercising appeal rights.
3.8	Mismanagement.*
3.5	Deception or obstruction of the right to compete for employment--again normally relating to promotions.
3.5	Gross waste of funds.*
3.4	Federal, State, and local Hatch Act violations.
13.4	All others.

As the chart below indicates, types of personnel actions most frequently complained about involved promotion or failure to promote (22.8 percent), followed by disciplinary or corrective actions, including removals (17.3 percent). (Because two or more personnel actions may be involved in a case, the total percentage exceeds 100):

*/ Although an allegation of abuse of authority or mismanagement may be considered a "whistleblowing" allegation under 5 U.S.C. 1206(b), most of these allegations related to the personal employment situation of the complainant (e.g. an employee alleging that his or her assignment of duties or responsibilities or the disciplinary action taken against the employee constitutes an "abuse of authority.") Thus, most of these types of allegations are treated as an allegation of a prohibited personnel practice rather than as a "whistleblower" allegation under section 1206(b). To a lesser extent, the same is true of allegations of violations of law and waste of funds.

<u>Type Personnel Action</u>	<u>Percentage</u>
Promotion	22.8
Disciplinary or Corrective Action	17.3
Pay, Benefits, Awards	8.1
Performance Appraisal	6.2
Reassignment and Transfer	8.3
Appointment	7.0
Reinstatement, Restoration, Reemployment	3.5
Change of Duties	1.8
Detail	1.3
Education or Training	0.7
More than two personnel actions	1.7
No personnel action specified in complaint	29.7

Complete data regarding final disposition of allegations is not available from the computer for cases closed prior to fiscal year 1981. However, a sampling of closing actions in 377 cases where no prohibited personnel practice was found, during the period of October 1 to December 31, 1980, were reviewed. Of the 377 cases sampled, 4.5 percent were settled or resolved after the Office initiated an inquiry, or were withdrawn by the complainant. On-site investigations were conducted in 11.4 percent of the cases, and inquiries (other than on-site investigations) were made in an additional 25.2 percent of the cases. In 10.4 percent of the cases, discrimination was alleged and the Office deferred to the existing agency or EEOC complaint process. In 5.8 percent of

the cases, the complainant did not respond to a request for further information. Complaints of nonselection for promotion, with no indication of any prohibited reason (such as reprisal or granting of a preference to a particular person) constituted 6.1 percent of the cases. The remaining 36.6 percent of the cases were closed after initial review because no prohibited activity was indicated or alleged, there was no personnel action involved (a prerequisite to finding a prohibited personnel practice under 5 U.S.C. 2302(b)), or the matter was otherwise not within the jurisdiction of the Office.

The figures for closing cases during this period may be distorted by the fact that during the last three months of the year the Office was operating under a continuing appropriation which held funding to the rescinded level and did not permit travel to conduct investigations outside the immediate areas of Special Counsel offices. In addition, the period followed the "down" period of August and September when 60 percent of the staff was working for the Board on detail. When the staff returned to work for the Office on October 1, an effort was made to complete review of cases that did not warrant on-site investigation.

The Office of the Special Counsel is also responsible for enforcing the Hatch Act (5 U.S.C. 7324-7327 and 5 U.S.C. 1501-1508). Enforcement of the Hatch Act prohibition on political activities is one of the functions that was transferred to the Office from the former Civil Service Commission pursuant to Reorganization Plan No. 2 and the Civil Service Reform Act of 1978.

Cases involving Federal employees 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. The Hatch Act cases involving State or local employees alleged candidacy in a partisan election and unlawful political coercion. As noted above, the Special Counsel filed six complaints for disciplinary actions against Hatch Act violators in 1980.

During calendar year 1980, the Office received 108 cases of Hatch Act violations: 55 involving Federal employees, and 53 involving State or local employees. The Office also answered more than 600 written requests for formal opinions or information on the interpretation and application of the Hatch Act, (the sole area in which the Special Counsel is authorized to issue advisory opinions). The number of cases received and the number closed during calendar year 1980 are as follows:

<u>Hatch Act Violations</u>	<u>Cases Received</u>	<u>Cases Closed</u>
Federal employees	55	27
State/local employees	53	32

The Office also closed 15 cases during 1980 that were received during calendar year 1979: 7 involved Federal employees and 8 involved State or local employees (including 1 that was closed in early 1981).

During calendar year 1980, the Special Counsel referred seven cases involving potential criminal violations to the Department of Justice. Of the seven cases, only one concerned matters which were also referred to an agency head for investigation and a report under the provisions of 5 U.S.C. 1206(b)(3).

One of the cases involved an alleged violation of the Hatch Act, which was investigated by the Special Counsel and found to be without merit.

Finally, of the seven cases, only one contained matters which were alleged to be prohibited personnel practices. The Special Counsel, after a preliminary inquiry, determined that the allegations lacked merit.

RECOMMENDATIONS FOR LEGISLATION OR OTHER ACTION BY THE CONGRESS

The Special Counsel's annual report for 1979 set forth several matters to be considered for possible changes in the statute. The following restates those proposals and reflects the further experience of the Office. Proposals for specific legislative changes will await consideration by the new Special Counsel.

1. Litigation Authority. The Acting Special Counsel requested permission from the Solicitor General of the United States to file an amicus brief in the U.S. Court of Appeals for the District of Columbia in an appeal from the Board's decision in In re Frazier et al., 1 MSPB 159 (1979). The appeal was filed by the affected employees in the case, represented by the American Federation of Government Employees, who had intervened in the case before the Board. The Solicitor General denied the Acting Special Counsel's request. The Special Counsel should be given express statutory authority to appeal, intervene, or otherwise participate in appeals from decisions of the Board in cases which the Special Counsel initiated before the Board or in which the Special Counsel has intervened. It should be noted that the Director of the Office of Personnel Management is authorized to petition the U.S. Court of Appeals for the District of Columbia for judicial review of final orders or decisions of the Board, by 5 U.S.C. 7703(d).

2. Attorney Fees. As discussed in the 1979 Report, under existing law a prevailing complainant's attorney fees may be paid by the Government in discrimination cases and in cases involving the Back Pay Act (5 U.S.C 5596). 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 he or she prevails. The Comptroller General ruled 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 cases involving a geographic reassignment 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 in 5 U.S.C. 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 1979 Annual Report noted that 5 U.S.C. 1206(g) might be limited to authorizing complaints for disciplinary action against Federal employees and may not apply to former employees. An official found to have engaged in wrongdoing might resign rather than face potential disciplinary action, then secure a job in another Federal agency. The Special Counsel should be authorized to file a complaint against a former Federal official who resigned 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. The present view of the Office is that a former agency employee may be subject to a disciplinary action complaint if he was employed by the Government when the Special Counsel initiated the investigation leading to a determination that proposing disciplinary action is appropriate.

5. Reprisal Against Witnesses and Interference with Investigations. Under existing 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, could be protected from reprisal. Although the witness might be considered a "whistleblower," depending on the nature of his disclosures to the investigator, 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. The Special

Counsel will consider proposing disciplinary action against officials who interfere with 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. The Comptroller General has recommended extending coverage to Government corporations with employees in covered positions.

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 a handicap to the functioning of the Office of the Special Counsel. In November 1979, the Special Counsel 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 January 1981, the Office of the General Counsel, General Accounting Office, informed the Acting Special Counsel that the Comptroller General would not decide the question because the issue was involved in a lawsuit filed by the Board against the Acting Special Counsel.

In filing the lawsuit, the Board attempted to change the administrative arrangements that had been in effect since the Office was established in January 1979 and to assume control over the personnel authority and the budget of the Special Counsel. The staff of the Senate Governmental Affairs Committee worked

with the Acting Special Counsel and Special Counsel attorneys, and attorneys for the Board in attempting to resolve and clarify the respective roles and responsibilities of the Board and the Office on issues involving administration. A draft memorandum of agreement was proposed, the provisions of which are now incorporated in S. 826. The Office of the Special Counsel continues to operate pursuant to those arrangements. The ultimate resolution of these administrative issues, if the Court dismisses the lawsuit or the Board withdraws the complaint as urged by the Acting Special Counsel, will be a matter for consideration of the new Special Counsel and new Board Chairman.

Appendix A - Field Structure of the Office of the Special Counsel

CENTRAL OFFICE*

Office of the Special Counsel
Suite 215
1717 H Street, N.W.
Washington, D.C. 20419
(202) 653-7188

*(Note: The Central Office plans to move to
1120 Vermont Avenue, N.W.
during the summer of 1981.)

FIELD OFFICES

States Covered

Atlanta Field Office
Pershing Point Plaza,
Room 317
1365 Peachtree Street, N.E.
Atlanta, Georgia 30309

Alabama, Florida, Georgia,
Kentucky, Mississippi, North
Carolina, South Carolina, Tennessee

Chicago Field Office
175 W. Jackson Blvd.
17th Floor
Chicago, Illinois 60604
(Note: Scheduled to open in 1981)

Michigan, Minnesota, Missouri,
Wisconsin

Dallas Field Office
1100 Commerce Street,
Room 2B 29
Dallas, Texas 75242

Arkansas, Colorado, Louisiana,
Montana, New Mexico, North
Dakota, Oklahoma, South Dakota,
Texas, Utah, Wyoming

Philadelphia Field Office
U.S. Customs House,
Room 806
Second & Chestnut Streets
Philadelphia, Pennsylvania 19106

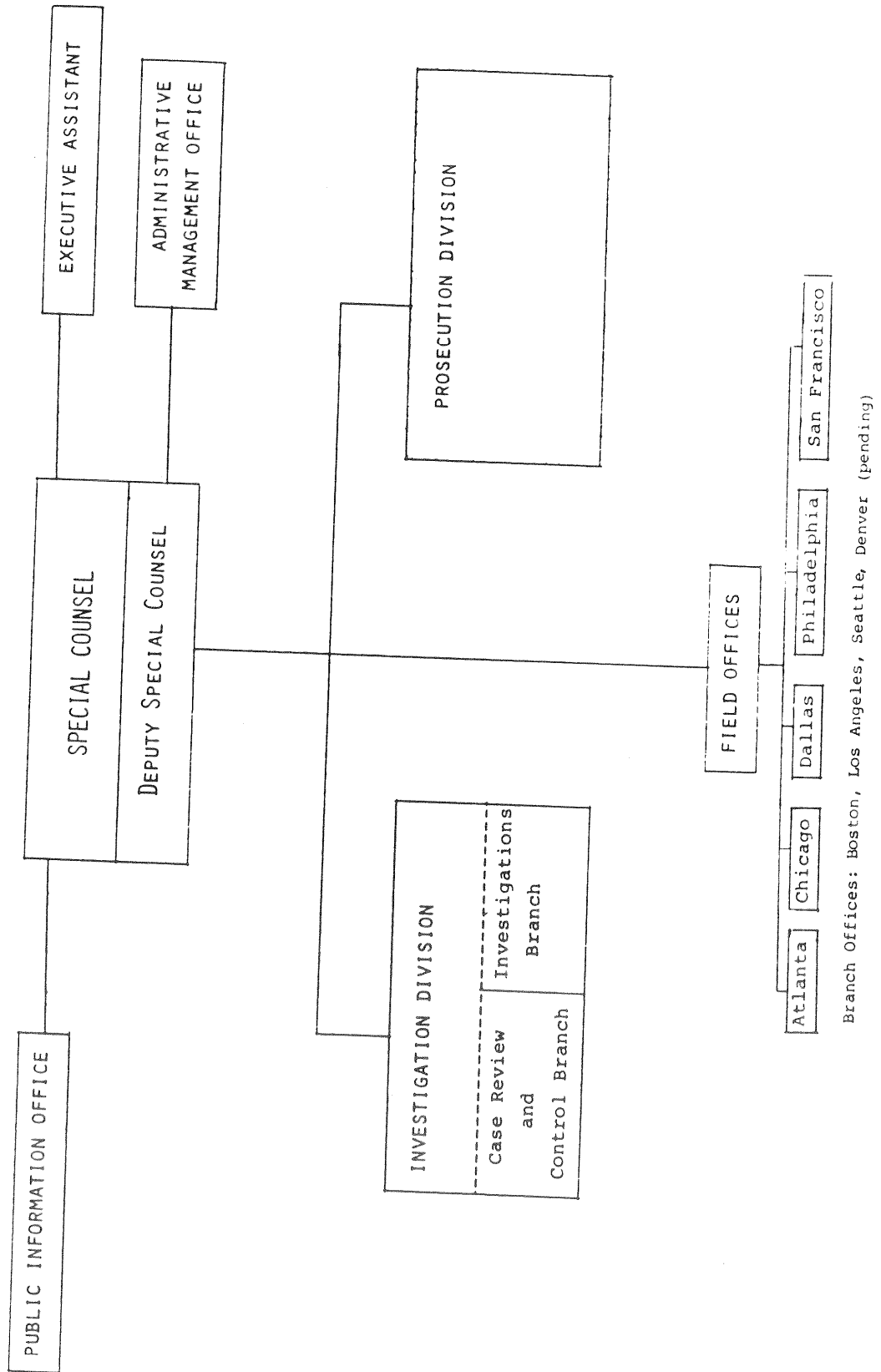
Connecticut, Delaware, Maine,
Massachusetts, New Hampshire,
New Jersey, New York, Pennsylvania,
Puerto Rico, Rhode Island, Vermont,
Virgin Islands

San Francisco Field Office
Post Office 36007,
Room 11454
450 Golden Gate Avenue
San Francisco, California 94102

Alaska, Arizona, California,
Hawaii, Idaho, Nevada, Oregon,
Washington

Branch Offices have been established in Boston, Los Angeles, and Seattle and a
branch office in Denver is scheduled for opening in 1981.

ORGANIZATION CHART
OFFICE OF THE SPECIAL COUNSEL



Office of the Special Counsel

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

OFFICE OF THE SPECIAL COUNSEL
GUIDELINES FOR REVIEWING AGENCY REPORTS
ON
ALLEGATIONS REFERRED
PURSUANT TO 5 U.S.C. 1206(b)

Following are guidelines to be used in reviewing agency reports submitted to the Office of the Special Counsel pursuant to 5 U.S.C. 1206(b)(3) et seq.

1. Time limits. Was the report submitted within the 60-day time limit provided by §1206(b)(3)(A)(ii), or an extended time limit approved in writing by the Special Counsel?

2. Signed by agency head. To comply with §1206(b)(4), the head of the agency must sign the report to verify that he or she has reviewed it. The signature of any other agency official does not comply with §1206(b)(4) unless the person is serving in an acting capacity as agency head (e.g., an Undersecretary serving as Acting Secretary during an absence or vacancy in Office of the Secretary). For purposes of this section, "agency head" does not include the head of a constituent unit of an agency, such as a bureau director or chief.

3. Summary of information. Section 1206(b)(4)(A) provides that the agency report shall contain "a summary of the information with respect to which the investigation was initiated." To comply with this provision, the report should--

(a) Set forth the allegations submitted by the Special Counsel for investigation; and

(b) Summarize the material evidence relating to each of the allegations.

4. Description of investigation. Section 1206(b)(4)(B) requires agency reports to include "a description of the conduct of investigation." To comply with this provision, the report should--

(a) Identify the personnel who investigated the whistleblower's charges;

(b) Disclose whether or not witnesses were offered confidentiality for their responses;

(c) List witnesses interviewed, including the whistleblower if known, the target(s) of the probe, any witnesses suggested by the whistleblower, and any others, with a summary reference to those witnesses who requested and were granted anonymity;

(d) Disclose the methodology and scope of the investigation, including whether notice was provided for on-site inspections;

(e) Reveal the areas of inquiry investigators covered with each witness; and

(f) Reveal the methodology, as described above, for any other investigative report which the agency relies on as a substitute for an investigation in direct response to the referral under §1206(b)(3).

5. Summary of evidence obtained. Section 1206(b)(4)(C) requires that agency reports include "a summary of any evidence obtained from the investigation." To comply with this provision, the report should--

(a) Summarize all relevant and material evidence that the agency considered in making its conclusions on each of the allegations; and

(b) Certify that the report contains all relevant and material evidence.

6. Listing of violations. Section 1206(b)(4)(D) requires that agency reports include "a listing of any violation or apparent violation of any law, rule, or regulation." To comply with this provision, the report should--

(a) Cite any law, rule, or regulation relevant to the whistleblower's charges, whether or not the report concludes that the disclosure and investigation proves a violation;

(b) State whether or not the investigation revealed a violation of law, rule, or regulation;

(c) When conflicting evidence leads to differing conclusions about a possible violation, disclose which evidence is more credible and explain why; and

(d) Offer the full factual and legal basis for the conclusions on each material element of each allegation in the disclosure.

7. Description of corrective action. Section 1206(b)(4)(E) provides that agency reports shall include a description of any corrective action taken or planned, such as changes in agency rules, regulations, or practices, the restoration of any aggrieved employee, disciplinary action against any employee, and referral to the Attorney General of any evidence of a criminal violation. The report should--

(a) Analyze the public policy consequences of the findings in the report, as an explanation for each decision to take or not take corrective action;

(b) Examine the adequacy of existing laws, rules, and regulations in light of the findings in the report;

(c) Commit the agency to whatever corrective action has been taken or is planned. (If corrective action is prospective, the agency will need to be asked to submit follow-up reports); and

(b) Certify that the report contains all relevant and material evidence.

8. Transmittal of copies of agency reports. Section 1206(b)(5) requires that agency reports be submitted to the Congress and to the President, and to the Special Counsel for transmittal to the complainant (whistleblower). Agencies should send the Congressional copies of the report to the President of the Senate and the Speaker of the House of Representatives. If the agency transmittal letter or the report does not indicate that copies of the report have been sent to the Congress and the President, the reviewer should immediately bring the matter to the attention of an appropriate agency official (e.g., the Inspector General).

A copy of the report should be sent to the complainant and his or her representative, if any, with an invitation to submit comments to the Special Counsel within 15 days. These comments must be reviewed and taken into consideration in reviewing the agency report as to whether the findings of the agency head appear reasonable.

9. Public list. The review memorandum as well as the agency report itself is available to the public. (5 U.S.C. 1206(d)). Before including the report in the public file, the reviewer should make sure that any related criminal matters are excised, and that any personal medical information is deleted.

