
**A Report To Congress
From The
U.S. Office of Special Counsel
Fiscal Year 1991**





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The Special Counsel

Honorable J. Danforth Quayle
President of the Senate
Washington, D.C. 20510

Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. President and Mr. Speaker:

I herewith respectfully submit to the Congress, in accordance with 5 U.S.C. § 1218, the Annual Report from the Office of Special Counsel for Fiscal Year 1991. As is customary, a copy of this report will also be sent to each member of Congress.

Sincerely,

Kathleen Day Koch

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Introduction

Mission of the Office of Special Counsel

The Office of the Special Counsel was established on January 1, 1979, by Reorganization Plan Number 2 of 1978. The Civil Service Reform Act (CSRA) of 1978, which came into effect on January 11, 1979, enlarged its functions and powers. The office operated as the autonomous investigative and prosecutive arm of the Merit Systems Protection Board (MSPB) until 1989. In March of 1989, the Congress passed the Whistleblower Protection Act (WPA) of 1989, which became effective on July 9, 1989. The WPA converted the Office of the Special Counsel into an independent agency within the Executive Branch, separate and apart from the MSPB, and renamed it the Office of Special Counsel (OSC). Under the new law, the OSC kept its basic investigative and prosecutive functions, and its role in litigating cases before the MSPB.

The WPA substantially amended the CSRA to enhance protections against reprisal for those employees who disclose wrongdoing in the federal government, and the ability of the OSC to enforce those protections. Under the CSRA, as amended, the principal responsibilities of the OSC continue to be --

- the investigation of allegations of prohibited personnel practices defined by law at 5 U.S.C. §2302(b),¹ and other activities prohibited by civil service law, rule or regulation, and the initiation of corrective and disciplinary actions when such remedial actions are warranted;
- the interpretation and enforcement of the Hatch Act provisions on political activity in Chapters 15 and 73; and
- the provision of a secure channel through which federal employees may make disclosures of information evidencing violations of law, rule or regulation, gross waste of funds, gross mismanagement, abuse of authority, or a substantial and specific danger to public health or safety, without disclosure of the employee's identity (except with the employee's consent) and without fear of retaliation.

¹ All statutory references to chapters and sections that follow in this report will be to Title 5 of the United States Code, unless otherwise indicated.

Office of Special Counsel Policy

In furtherance of the merit system principles specified in the CSRA, the OSC's principal responsibility has been and continues to be the receipt and investigation of complaints of alleged prohibited personnel practices, especially reprisal for whistleblowing. Although allegations of reprisal for whistleblowing are few relative to the number of federal civilian employees, the OSC regards *any* reprisal for whistleblowing as unacceptable. Accordingly, the OSC's priorities are:

- to treat allegations of reprisal for whistleblowing as its highest priority;
- to review allegations of reprisal for whistleblowing intensively for any feasible remedial or preventive action, whether by means of stays, corrective actions, or disciplinary actions; and
- to use every opportunity to make a public record of the OSC's aggressive pursuit of corrective action (especially in whistleblower reprisal cases), both to encourage other whistleblowers, and to affirm the emphasis given to corrective actions by the OSC.

Shared Responsibility for Protecting Whistleblowers

As the General Accounting Office noted in its 1985 report on the OSC's handling of reprisal allegations, the adequacy of whistleblower protections should not be viewed solely by reference to the matters handled by the OSC. Responsibility for establishing and maintaining a climate in which employee disclosures of waste, fraud or abuse are supported, and in which reprisals for such disclosures are not tolerated, is shared by the government as a whole -- including the President, the Congress, agency heads, managers and supervisors, appellate systems, and the Inspectors General.

For example, §2302(c) makes the head of each federal agency responsible for the prevention of prohibited personnel practices (including reprisals for whistleblowing), and for compliance with and enforcement of civil service laws, rules and regulations. The same responsibility devolves by law on federal supervisors exercising delegated personnel authorities. The Inspectors General share a responsibility with the OSC under §7 of the Inspector General Act of 1978 (5 U.S.C. App.) for the protection of employees in their agencies who provide information evidencing violations of laws, rules or regulations, or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health and safety.

Overview of OSC Operations

Budget and Staffing

During Fiscal Year (FY) 1991, the OSC operated with a budget of \$6.608 million, and the agency's full-time equivalency (FTE) personnel ceiling was 89. This represented a budget increase of 27.7 percent, and an increase of 3.4 percent in the FTE personnel ceiling, over FY 1990.

Procedures

The Complaints Examining Unit (CEU) in the OSC Prosecution Division initially analyzes all allegations of prohibited personnel practices; other activities prohibited by civil service law, rule or regulation; and Hatch Act violations received by the agency. The CEU contacts complainants to ensure that the nature of and basis for the allegation is clearly understood, and conducts further inquiry to the extent necessary to determine whether the allegation warrants further investigation.

If the CEU cannot determine the proper disposition of a complaint, through the initial examination process, it refers the matter to the Investigation Division for more extensive investigation. If the CEU determines that an allegation is not within the OSC's investigative jurisdiction, but that information contained in the complaint may constitute a whistleblower disclosure, the Investigation Division's Disclosure Unit reviews that information for possible transmittal to the agency head concerned. The OSC does not disclose the identity of the employee without the employee's consent.

The Prosecution Division reviews completed field investigations to determine whether the inquiry has established any violation of law, rule or regulation, and whether the matter warrants corrective or disciplinary action, or both. If so, OSC personnel may discuss the matter with the agency concerned in order to obtain an early resolution of the matter. Otherwise, the Special Counsel may refer the matter in writing to the agency head under §1214(b)(2)(A) with a recommendation for corrective action. If an agency declines to take corrective action, the Special Counsel may request the MSPB to consider the matter under §1214(b)(2)(B), and the MSPB may order any corrective action it deems appropriate. During FY 1991, cooperation by agencies in effecting corrective actions sought by the OSC rendered it unnecessary to request the MSPB to order corrective action. If the Special Counsel determines that an apparent violation warrants disciplinary action, the OSC files charges against the offending employee under §1215(a) and prosecutes the case before the MSPB. Finally, if an investigation discloses a violation of any law, rule or regulation not otherwise within the enforcement authority of the OSC, the Special Counsel sends a report on the OSC's findings to the agency head concerned under §1214(e) for certification of any action to be taken on the matter. The OSC reports

evidence of any possible criminal violations identified during an investigation to the Department of Justice pursuant to §1214(d).

At any time during an investigation, the OSC may seek a stay of any personnel action if the available evidence provides reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice. The OSC may obtain a stay upon direct request to the agency concerned or by filing a request for a stay with the MSPB under §1214(b)(1). Also, the Special Counsel may, pursuant to §1212(c), intervene as a matter of right or otherwise participate in any proceeding before the MSPB, except that the Special Counsel may not intervene in a proceeding brought under §1221 or §7701 without the consent of the individual initiating the proceeding.

Investigation of Allegations

At the beginning of FY 1991 (October 1, 1990), the OSC had 514 matters pending initial review and inquiry and 110 matters under field investigation.

Nature of Allegations Received During FY 1991

During FY 1991, the OSC received 1,600 new matters containing 2,441 separate allegations. Reprisal for whistleblowing accounted for 18.6 percent of the total allegations received during FY 1991, making it the most frequently cited claim of a prohibited personnel practice. The next largest category of allegations (15.1 percent) claimed was discrimination based on race, color, sex, national origin, religion, age or handicapping condition. The OSC normally defers action on such complaints to the discrimination complaint procedures established in the agencies under the regulations of the Equal Employment Opportunity Commission (EEOC) in order not to duplicate or bypass those procedures.

A complete breakdown of the nature of all allegations received by the OSC during FY 1991 appears in *Table 1* on pages 12-13.

Disposition of Matters

During FY 1991 --

- the CEU closed 1,284 matters (including matters carried over from FY 1990) on the basis of initial review and inquiry, satisfactory resolution of an employee's complaint during the initial review process, or a determination that there was insufficient basis for further OSC action;
- 148 matters were referred by the CEU for field investigation; and
- 96 matters received by the OSC (including 60 matters referred by the CEU) were assigned for additional review for possible referral to the agency concerned as a whistleblower disclosure.

The OSC carried over the remaining matters for further action in FY 1992. A breakdown of the nature of allegations referred for field investigation appears in *Table 2* on page 14.

Results of FY 1991 Investigations

The OSC completed 206 field investigations during FY 1991 (including investigations carried over from FY 1990), and 52 investigations awaited completion at the end of the year. Of completed field investigations (including investigations completed in FY 1990), 189 matters were closed following legal review by the Prosecution Division. Legal reviews and decisions as to final disposition in the remaining investigative matters had not been completed at the end of the fiscal year. During FY 1991, the OSC --

- obtained corrective actions or favorable dispositions in 74 matters;²
- initiated corrective actions in six additional matters which were pending at the end of FY 1991;
- filed five disciplinary action complaints, including two non-Hatch Act matters and three Hatch Act matters;
- secured six stays of personnel actions from the MSPB in three matters;
- obtained ten stays of personnel actions through direct request to the agencies; and
- intervened in one MSPB appeal on behalf of a whistleblower.

During FY 1991, the MSPB issued nine Final Decisions, and the MSPB Chief Administrative Law Judge (CALJ) issued eight Recommended Decisions in OSC cases. These Final and Recommended Decisions resulted from complaints for disciplinary action filed by the OSC in FY 1991 and prior fiscal years. The OSC prevailed in all but three of these decisions, all three of which are now before the MSPB after the filing of exceptions by the OSC.

² "Corrective actions or favorable dispositions" include (1) those actions taken by an agency pursuant to a written request for corrective action by the Special Counsel; (2) actions taken by an agency at the request of the OSC as a settlement of a prohibited personnel practice complaint in advance of a written request for corrective action by the Special Counsel; or (3) actions taken by an agency with knowledge of a pending OSC investigation, which satisfactorily resolve those matters under inquiry by the OSC.

Corrective Actions

The following is a representative sample of corrective actions obtained by the OSC during FY 1991:

- OSC investigated an allegation that an employee was supervising his first cousin in violation of the prohibition against nepotism, and that the subordinate employee received performance ratings which resulted in monetary awards and preference in the assignment of overtime. The OSC investigation confirmed the nepotism allegation but found no basis for the preferential treatment portion of the complaint. At OSC's request, the agency agreed to reassign the supervisory employee to a position outside his cousin's chain of command. In addition, the agency agreed to publish in its newsletter an article about the prohibitions against nepotism, which included a reference to OSC as a source for further information.
- OSC investigated an allegation that an employee was terminated in reprisal for whistleblowing by another employee. OSC found reasonable grounds to believe a violation of section 2302(b)(8) had occurred, and obtained a stay of the adverse personnel action from the MSPB. In its decision on the stay request, the MSPB agreed with OSC's position that an employee who has not made a protected disclosure is nevertheless entitled to whistleblower protections if a personnel action is taken against him because his supervisors mistakenly believe he was the one who had blown the whistle. Following this decision, at OSC's request, the agency cancelled the employee's termination, upgraded his performance appraisal to the highest possible level, promoted the employee, issued the employee a performance award, and restored his pay for the three-week period between the date of his termination and the date he returned to work.
- The OSC investigated an allegation that an agency placed an employee on a performance improvement plan, harassed her, and gave her a low performance evaluation because she had given testimony during an Inspector General investigation. The OSC confirmed part of her allegation. At the OSC's request, the agency agreed to change her supervisor, rescind the performance improvement plan, and raise her performance evaluation to an "excellent."
- The OSC investigated an allegation by an employee that the agency failed to renew his temporary appointment in reprisal for his protected disclosures. After the employee accepted a position with another agency, OSC closed the case as moot. The employee then filed an individual right of action (IRA) appeal with the MSPB. An administrative judge concluded that the agency's failure to renew an employee's temporary appointment did not constitute a "personnel action," and therefore, the MSPB lacked jurisdiction to consider the IRA. The appellant filed an interlocutory appeal and OSC intervened to argue that the agency's failure to renew the employee's temporary appointment did constitute a "personnel action." The MSPB agreed with the OSC, overturned the administrative judge's decision, and remanded the case for a hearing on the merits.

- The OSC investigated a complaint that an employee was terminated during his probationary period because of protected disclosures he made to his supervisors and to the Humane Society of the United States. The employee reported safety violations he personally observed while working at a meat plant, including an allegation that cattle were being slaughtered inhumanely. The OSC investigation confirmed the employee's reprisal allegation and, at OSC's request, the agency agreed to settle the matter. The agency canceled the employee's removal and expunged all records related to his termination; gave the employee twenty-two months of back pay; retroactively promoted the employee and restored his benefits, e.g. annual and sick leave; offered the employee a new position and agreed to pay his relocation expenses; and gave the employee assurances that he would not be subjected to any reprisal in the future.
- The OSC confirmed allegations in a complaint from an employee that she was denied consideration for reemployment, denied an extension of a temporary appointment or conversion to a permanent appointment, and denied a monetary performance award, all because of her protected disclosures to the President of the United States. At OSC's request, the agency agreed to give the employee three years of back pay for the denied performance award. The agency also placed a positive letter of recommendation in her official personnel file.
- The OSC confirmed that an employee had been denied an award and had received negative comments on a merit promotion appraisal because of her testimony in an MSPB hearing on a disciplinary action complaint filed by OSC. At OSC's request, the agency gave the employee the award, and took other corrective action to compensate for the retaliation.
- The OSC investigated allegations that an agency had suspended, detailed, reprimanded, placed on AWOL status, and denied sick leave to an employee because she had disclosed information evidencing misappropriation of funds and gross mismanagement at her agency. OSC's investigation confirmed her allegations of reprisal. As a result, the agency agreed to rescind all disciplinary actions taken against her, provide her back-pay for her suspension and AWOL, restore annual leave which she took when her sick leave had been denied, and reassign her to an organizational unit acceptable to her. The agency, with the agreement of the OSC, reprimanded three officials who participated in the various actions, and sponsored training conducted by the OSC for the agency's managers on the Whistleblower Protection Act.

Disciplinary Actions

The following is a representative sample of disciplinary actions filed by the OSC with, and decisions on OSC cases from the previous year issued by, the MSPB during FY 1991:

- The OSC concluded a lengthy investigation of allegations that a District Director and two subordinate managers had harassed and taken or recommended various retaliatory actions against several of their employees. The employees had written letters to members of Congress criticizing a proposed office reorganization, and alleging mismanagement and violations of agency accounting procedures. OSC filed charges against the three managers who participated in the various personnel actions. By settlement agreement, the District Director was demoted one grade and reassigned to a non-supervisory position out of the office. The agency disciplined the two other officials under the settlement during FY 1990.
- The OSC charged a high-ranking regional official with having interfered in a selection process to deny an employee's selection because the employee had testified before a congressional committee about falsified inspection reports by her supervisors. On July 29, 1991, the MSPB sustained the charge and ordered that the official be demoted two grades to a non-supervisory position for a minimum of one year. Although OSC argued the case under the Civil Service Reform Act (CSRA), the Board applied the Whistleblower Protection Act (WPA), finding that under the WPA savings provision no proceeding was pending against respondent until OSC filed its complaint; the MSPB held that the date of the personnel action taken by the respondent in violation of section 2302(b)(8) was not controlling.
- The OSC initiated an investigation into an anonymous complaint alleging that a local government employee who worked in connection with federally-funded activities, violated the Hatch Act by willfully becoming a candidate in a partisan election for City Council. The OSC confirmed the allegation after investigation and filed a complaint for disciplinary action with the MSPB, requesting that the employee be removed from his local government position. The OSC prosecuted the employee after a warning by the OSC for exactly the same partisan political activity in 1988. The Chief Administrative Law Judge held a hearing in August 1991, at which the employee argued that even if he had violated the Hatch Act, the violation did not warrant his removal because he had relied on the advice of counsel and was indispensable to his agency. The OSC argued that the employee's reliance on counsel could not have been in good faith in light of the prior warning from the OSC. A decision in the case is pending.
- The OSC initiated an investigation into a complaint from an employee who alleged that she was the victim of sexual harassment by her supervisor and that she was terminated because of her protected disclosures. The OSC received complaints from three other employees of the agency alleging reprisal by several supervisors for protected disclosures, including sexual harassment of various employees. As a result of the OSC investigation, the agency took the following

corrective and disciplinary actions: (1) a first-level supervisor resigned before receiving a proposed reduction in grade and 30-day suspension for attempting to intimidate subordinates; (2) a second-level supervisor was reduced in grade to a non-supervisory position and suspended for 60 days for attempting to coerce a subordinate employee into withdrawing her reason for resignation, making inappropriate comments to subordinates and attempting to interfere with an investigation; (3) a third-level supervisor was removed from employment for making inappropriate and intimidating comments to subordinates, attempting to influence subordinate employees not to fully cooperate with investigators, and failure to cooperate with an EEO counselor; (4) a fourth-level supervisor was issued a proposed reduction in grade which resulted in the supervisor's resignation, and (5) a fifth-level supervisor was issued a proposed reduction in grade which resulted in the supervisor's resignation. A total of nine EEO complaints were filed by current or former employees directly related to problems caused by the managers listed above. Representatives from the agency EEO Office and the agency's Office of General Counsel visited the complainants and entered into settlement agreements with all nine complainants.

- The OSC investigated an allegation referred by an agency's Regional Office of Inspector General (OIG) that five employees were retired on discontinued service under circumstances which indicated that they were not entitled to such benefits. The OSC investigation confirmed that five employees were spuriously reassigned not for the good of the service, but so that these employees, all of whom were ineligible for voluntary retirement, could retire early on discontinued service. The OSC referred the findings of its investigation to the agency administrator and the director of the Office of Personnel Management (OPM) for appropriate corrective action. The agency has proposed disciplinary action against three responsible agency officials, and has given a letter of counselling to a fourth official for their involvement in these illegal retirements. The OPM issued a memorandum, dated May 21, 1991, to the heads of departments and agencies about the improper use of involuntary separations, urging the imposition of more rigid internal controls.
- In its first disciplinary action case under the WPA, the MSPB Chief Administrative Law Judge (CALJ) issued a decision in FY 1990, finding that a regional personnel director threatened to take adverse personnel actions against a subordinate employee who had made disclosures of serious improprieties and violations of law to the agency's regional Inspector General, and recommending that the personnel director be demoted two grades to a non-supervisory position for a minimum period of three years. On August 16, 1991, the MSPB issued an Opinion and Order sustaining the CALJ's finding that the personnel director had threatened to take personnel actions against his subordinate because of his protected disclosures. However, the MSPB mitigated the CALJ's recommended penalty to a 30-day suspension.

- The OSC charged a regional personnel officer and his supervisor with influencing an OPM-referred Displaced Employee Program registrant to withdraw from competition for a Public Affairs Specialist position. The OSC also charged the two high ranking officials with failure to timely appoint the displaced employee or separate the applicant hired from the certificate on which the displaced employee was referred. An administrative hearing before the CALJ was to be scheduled in FY 1992.
- The OSC prosecuted an administrative officer for violating section 2302(b)(8) by first recommending the termination of a subordinate employee and then terminating the employee in reprisal for his protected disclosures. The employee had written to his agency's Health and Safety officer about his office's violation of smoking regulations. At OSC's request, the agency rescinded the employee's termination. The OSC then filed a disciplinary action against the official. Following an administrative hearing, the CALJ found that the official had recommended the employee's termination because of whistleblowing. The CALJ recommended a two-grade demotion to a non-supervisory position for a period of two years. The MSPB adopted this recommendation on August 16, 1991. Although the Special Counsel argued the case under the Civil Service Reform Act, the Board decided the case under the WPA, finding that under the savings provision of the Act, the date of the Special Counsel's complaint governed which law, the CSRA or the WPA, was applicable without regard to the date of the personnel action taken, or not taken, by the respondent.

Table 1
**ALLEGATIONS CONTAINED IN MATTERS RECEIVED
 DURING FY 1991**

NATURE OF ALLEGATION	NUMBER OF ALLEGATIONS
Reprisal for whistleblowing [§2302(b)(8)]	455
Discrimination on the basis of race, color, sex, national origin, religion, age, or handicapping condition [§2302(b)(1)(A)-(D)]	368
Attempts to secure withdrawal from competition [§2302(b)(6)]	290
Violation of a law, rule or regulation implementing or concerning a merit system principle [§2302(b)(11)]	278
Reprisal for exercise of a right of appeal [§2302(b)(9)]	259
Granting of unauthorized preference or advantage [§2302(b)(4)]	220
Allegations which did not cite or suggest any prohibited personnel practice or prohibited activity ³	212
Disclosures of alleged violation of a law, rule or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a danger to public health or safety [§1213(c) or §1213(g)] ⁴	67
Violation of the Hatch Act by a federal employee [§1216(a)(1)]	53
Discrimination on the basis of non-job related conduct [§2302(b)(10)]	52
Violation of the Hatch Act by a state or local government employee [§1216(a)(2)]	49
Appointment, promotion, or advocating the appointment or promotion of a relative [§2302(b)(7)]	38

³ Although these types of allegations may not, on their face, indicate the existence of any matter within the OSC's investigative jurisdiction, follow-up contact is made with the individual to ascertain the exact nature of the allegation and to determine whether there is any basis for further OSC action.

⁴ These types of matters are allegations of wrongdoing in government programs or operations received from employees through the OSC whistleblower disclosure channel which may be referred to the agency concerned under §1213(c) or §1213(g) for agency review. If the employee alleges that an adverse personal action occurred because of the disclosure, then the OSC carefully reviews it to determine whether the matter may be treated as an allegation of a prohibited personnel practice or other prohibited activity within its investigative jurisdiction. If so, the OSC investigates the matter.

Table 1 (continued)

ALLEGATIONS CONTAINED IN MATTERS RECEIVED
DURING FY 1991

NATURE OF ALLEGATION	NUMBER OF ALLEGATIONS
Arbitrary or capricious withholding of information requested under the Freedom of Information Act [§1216(a)(3)]	30
Solicitation or consideration of unauthorized recommendations [§2302(b)4]	26
Deception or obstruction of the right to compete [§2302(b)(5)]	22
Discrimination on the basis of marital status or political affiliation [§2302(b)(1)(E)]	16
Other activities allegedly prohibited by civil service law, rule or regulation [§1216(a)(4)]	4
Coercion of political activity [§2302(b)(3)]	<u>2</u>
Total	2,441 ⁵

⁵ Each matter may contain more than one allegation. Thus, this total exceeds the total number of matters received.

Table 2

ALLEGATIONS CONTAINED IN MATTERS REFERRED FOR FIELD INVESTIGATION DURING FY 1991

NATURE OF ALLEGATION	NUMBER OF ALLEGATIONS
Reprisal for whistleblowing [§2302(b)(8)]	86
Reprisal for exercise of an appeal right [§2302(b)(9)]	42
Unauthorized preference or advantage granted to improve or injure the prospect of employment of any person [§2302(b)(6)]	13
Deception or obstruction of the right to compete for employment [§2302(b)(4)]	8
Discrimination on the basis of race, color, sex, national origin, religion, age or handicapping condition [§2302(b)(1)(A)-(D)]	8
Violation of a law, rule or regulation implementing or concerning a merit system principle [§2302(b)(11)]	18
Violation of the Hatch Act by a state or local government employee [§1216(a)(2)]	10
Discrimination on the basis of conduct not related to job performance [§2302(b)(10)]	9
Appointment, promotion, or advocating the appointment or promotion of a relative [§2302(b)(7)]	1
Securement of withdrawal from competition [§2302(b)(5)]	1
Other activity prohibited by civil service law, rule or regulation [§1216(a)(4)]	4
Violation of the Hatch Act by a federal employee [§1216(a)(1)]	30
Violation of the Freedom of Information Act [§1216(a)(3)]	1
Solicitation or consideration of unauthorized recommendations [§2302(b)(2)]	<u>2</u>
Total	233 ⁶

⁶ Each matter may contain more than one allegation. Thus, this total exceeds the total number of matters actually referred for field investigation (148).

Hatch Act Matters

During FY 1991, the OSC received 92 new matters alleging violations of the Hatch Act, and initiated field investigations in 33 matters. As a result of the OSC inquiries into these matters (including those carried over from FY 1990) the OSC --

- filed three complaints seeking disciplinary action against one federal employee and two state employees;
- concluded in 20 other matters that violations had occurred but were not sufficiently egregious to warrant prosecution;
- found no violation and closed 122 matters; and
- carried the remaining matters over to FY 1992 for completion of review.

Apart from investigating and prosecuting alleged violations of the Hatch Act, a vital component of the OSC's statutory responsibility is the issuance of advisory opinions to federal, state and local government employees on Hatch Act questions. During FY 1991, the OSC's Hatch Act Unit issued 198 written advisory opinions, provided 563 advisory opinions orally in response to telephone inquiries, and responded to an additional 500 telephone inquiries requesting general information.

Whistleblower Disclosures

In addition to its investigative and prosecutive missions, and pursuant to §1213(a), the OSC provides a safe channel through which federal employees may disclose information evidencing a violation of law, rule or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a specific and substantial danger to public health or safety.

Upon receipt of such information from a federal employee, the Special Counsel is required by §1213(c) to transmit the information to the head of the agency concerned if the Special Counsel determines that there is a substantial likelihood that the information discloses the kinds of wrongdoing described in the statute. The OSC will not divulge the identity of an employee who provided the information unless he or she consents. The agency head is then required to conduct an investigation and submit a report to the Special Counsel on the findings of the investigation. The Special Counsel sends the agency report with any comments provided by the employee who made the disclosure and any comments or recommendations by the Special Counsel to the President, the congressional committees having jurisdiction over the agency, and the Comptroller General.

The Special Counsel may determine, after review of information received from an employee, that there is not a substantial likelihood that the information discloses the type of wrongdoing described in §1213(a). In such cases, the Special Counsel may, under §1213(g), require the agency head to review the matter and inform the Special Counsel in writing of what action has been or is being taken thereon for transmittal to the employee.

The OSC is not authorized to investigate allegations of the kind described in §1213(a). Nevertheless, complainants often include information which may be covered by §1213(a) with their allegations of other prohibited activities within the OSC's investigative jurisdiction. The CEU identifies disclosures that may qualify for statutory referral to an agency in its initial review of complaints. The CEU refers any such disclosures to the Investigation Division's Disclosure Unit for further review and follow-up with the complainant as needed to confirm the facts and issues involved. After completion of its review, the OSC decides whether to (1) transmit the information developed to the agency concerned under §1213(c) or §1213(g); (2) refer the matter to the agency Inspector General or comparable office for any appropriate action; or (3) close the matter without further action.

During FY 1991, the OSC received and considered 96 matters for possible referral to the agency concerned under §1213(c) or §1213(g). In addition, 23 matters were carried over from FY 1990. During FY 1991, the OSC --

- referred five disclosures for investigation and a report under §1213(c);
- referred five disclosures for a report of actions taken or to be taken thereon under §1213(g);

- referred 38 disclosures to the agency Inspector General;
- closed 52 matters due to lack of sufficient basis for further action; and
- carried the remaining matters over to FY 1992 for completion of review.

Results of Referrals

At the beginning of FY 1991, one agency report received during FY 1990 awaited final OSC review. During FY 1991, the OSC received an additional 15 reports from agencies to which statutory referrals had been made during FY 1990 and FY 1991. OSC review of agency reports disclosed the following results from statutory referrals --

Section 1213(c) Referrals:

Allegation substantiated in whole or in part:	9 (82%)
Allegation not substantiated:	2 (18%)

Section 1213(g) Referrals:

Allegation substantiated in whole or in part:	7 (64%)
Allegation not substantiated:	4 (36%)

In the 11 cases in which allegations were substantiated, the agencies reported the following corrective actions, with more than one action in some cases:

Agency regulations or practices changed:	4
Disciplinary action taken:	4
Evidence of a criminal violation referred to the Attorney General:	2
Other:	6

Legislation

Uniformed Services Employment and Reemployment Rights Act of 1991

During FY 1991, Congress considered legislation to revise Chapter 43 of Title 38, United States Code, to clarify and enhance the civilian employment and reemployment rights of those who serve their country in the uniformed services. This legislation was the result of a three-year effort by an Executive Branch task force.

The House Committee on Veterans' Affairs reported H.R. 1578, the Uniformed Services Employment and Reemployment Rights Act of 1991, on May 9, 1991, which incorporated many of the Administration's proposed reforms. The House of Representatives passed H.R. 1578 on May 14, 1991. S. 1095, which would accomplish similar results, was reported favorably by the Senate Committee on Veterans' Affairs to the full Senate on June 26, 1991. Final congressional action on H.R. 1578 and S.1095 was pending at the end of FY 1991.

Both H.R. 1578 and S. 1095 provide, among other things, that a federal executive agency employee may be represented by the OSC before the MSPB when the employee believes that his or her reemployment rights have been violated, and informal efforts by the Secretary of Labor to resolve the matter have been unsuccessful. The provision of legal representation to individual federal employees is a departure from the traditional role of the OSC in enforcing federal laws. The Special Counsel concurred in the assumption of this new role in federal sector veterans cases, the same one now played by the Department of Justice in private sector veterans' cases, in a letter to the Senate Committee on Veterans' Affairs on May 22, 1991. The Special Counsel also noted that the OSC strongly supports the intended purposes of this legislation, and assured the Committee that the OSC would endeavor to do its part to protect the reemployment rights of federal employees who have served, and are still serving, their country in the military services.

Further Information

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