

A Report To Congress From The Office of Special Counsel

Fiscal Year 1985

§ 1206. Authority and responsibilities of the Special Counsel

(a) (1) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(2) If the Special Counsel terminates an investigation under paragraph (1) of this subsection, the Special Counsel shall prepare and transmit to the person on whose allegation the investigation was initiated a written statement containing the person's statement of the investigation and the reasons therefor.

(3) In addition to authority granted in paragraph (1) of this subsection, the Special Counsel may, in the course of an investigation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(b) (1) In any case involving

(A) any disclosure of information by an employee or applicant to an employer or by an employee or applicant to a reasonably believes evidences--

violation of a law, rule, or regulation, or
management, or waste of funds, an abuse
of authority, or a substantial and specific danger to public
health or safety;

if the disclosure is specifically prohibited by law and if the
information is not lawfully required by executive order to be
kept secret in the interest of national defense or the conduct of
foreign affairs; or

(B) a disclosure by an employee or applicant for employment to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures of information which the employee or applicant rea-

The Office of the Special Counsel
United States Merit Systems Protection Board

**OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board**



The Special Counsel

September 30, 1985

1120 Vermont Avenue, N.W., Suite 1100
Washington, D.C. 20005

The Honorable George Bush
President of the Senate
and
The Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives

Dear Mr. President and Mr. Speaker:

In accordance with the Civil Service Reform Act of 1978, Section 1206(m) of Title 5 of the United States Code, I respectfully submit the Fiscal Year 1985 annual report to the Congress on the activities of the Office of the Special Counsel (OSC). As is customary, a copy of this report will be forwarded to each member of Congress.

The report reflects a vigorous undertaking by the entire agency staff to execute, within the scope of agency authority, the President's commitment to integrity and efficiency in government.

The law enforcement function of OSC has been manifested by successful prosecutions resulting in imposition of significant sanctions on lawbreakers, thus establishing a credible deterrent to prospective violators. Successful prosecution depends on the effectiveness and thoroughness of investigation and the proper execution of litigation. Both of these complementary functions of OSC are led and staffed by experienced professionals.

The new Planning and Oversight Division, led by the Inspector General of OSC, has established operational plans for FY 1986, which are now in effect. Internal controls which comply with A-123 are in place. The Operations Management Division has instituted fiscal controls and designed management information systems which ensure informed decisions by operating managers. An extensive GAO review of OSC found OSC operating in a proper and effective mode under the enabling statute. FY 1985 operations were concluded exactly on budget, and within the 86 FTE requirement. OSC space utilization generally complies with GSA requirements.

The Special Counsel

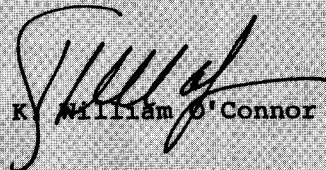
The Honorable George Bush
and
The Honorable Thomas P. O'Neill, Jr.
September 30, 1985
Page Two

The morale and technical expertise now found in OSC staff rival those of the most highly regarded prosecutive and investigative agencies. Staff willingly subordinate personal convenience to the assigned mission of the office.

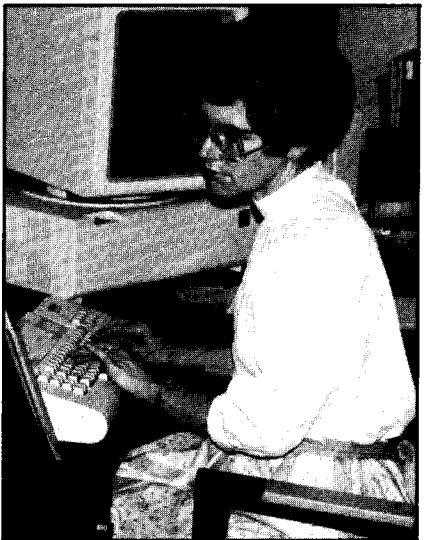
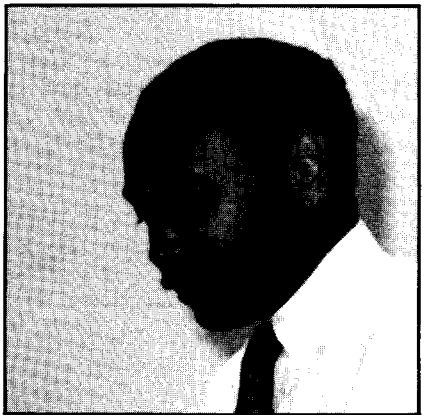
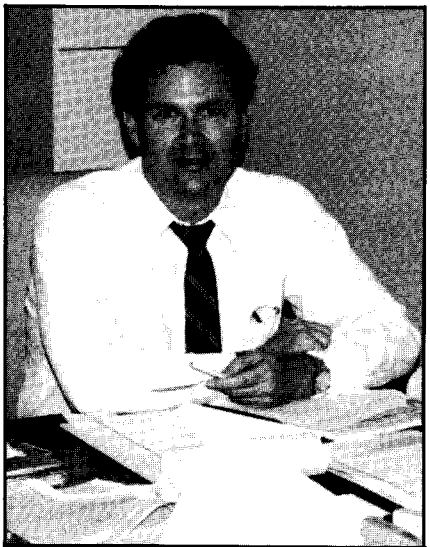
Because of the quality of the work performed by the staff, agency heads now routinely respect and accept OSC recommendations for corrective action. Therefore, no need for such litigation has arisen, for agency heads have consistently voluntarily executed OSC corrective action recommendations.

Since my statutory term as Special Counsel will conclude in the Spring of 1986, I now ask your indulgence in allowing me, by this report, to commend to you the staff members of OSC for their dedication and professional achievements in FY 1985.

With respect,

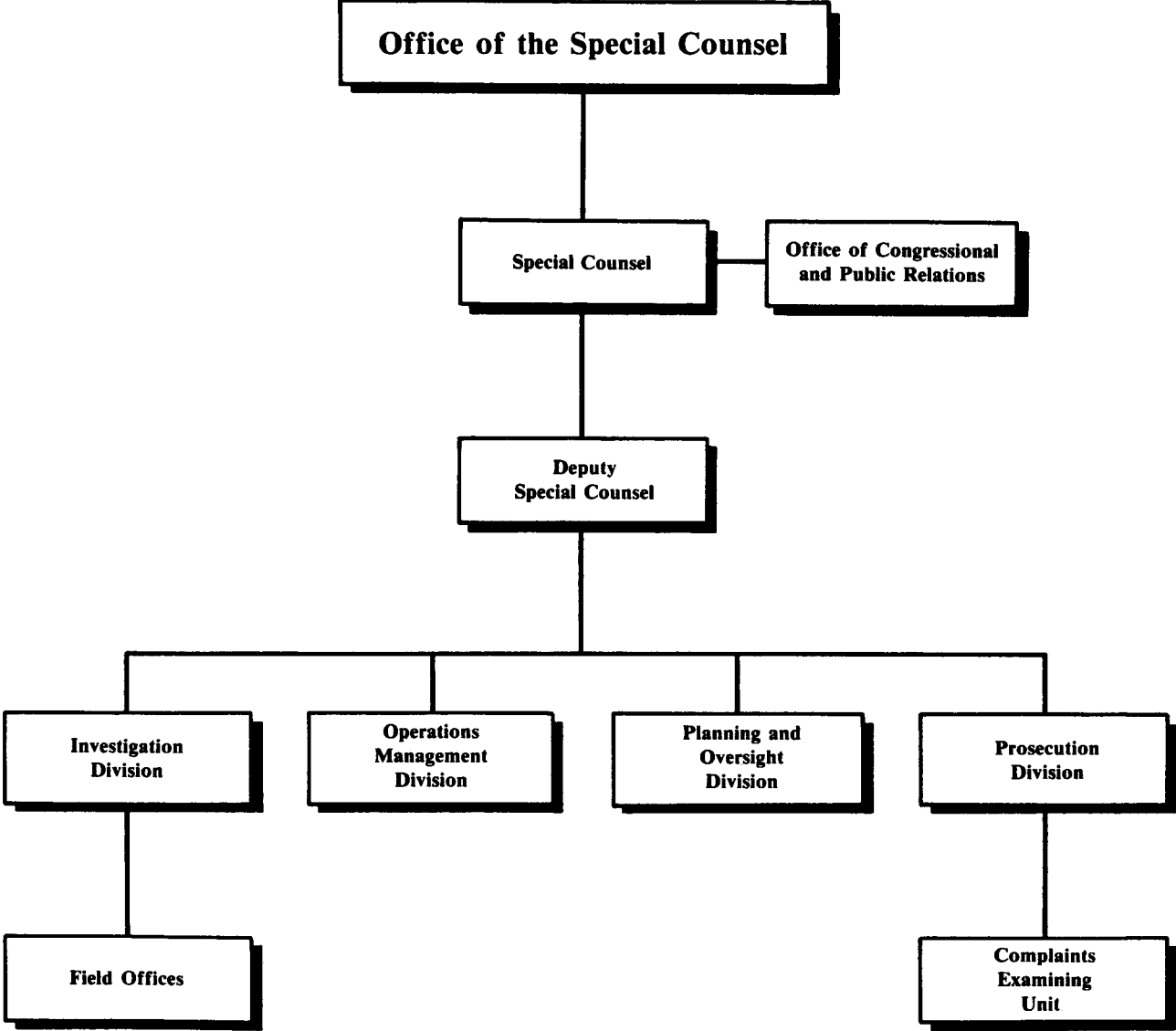


K. William O'Connor

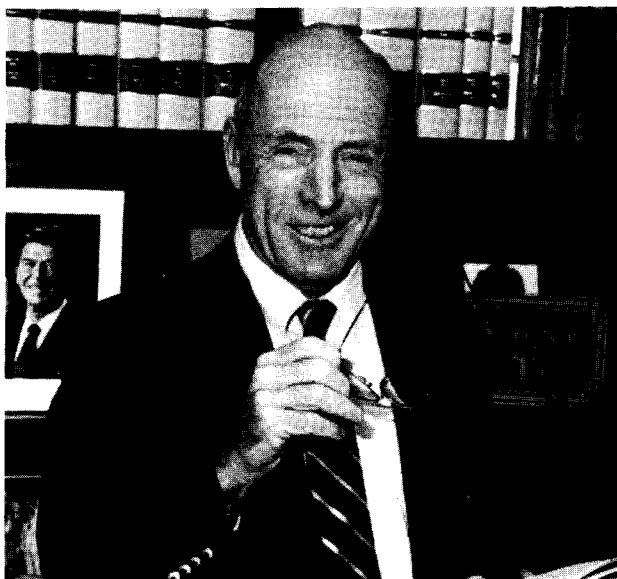


Contents

Preface	1
Operations	4
Operations Management Division	4
Office of Congressional and Public Relations	5
Planning and Oversight Division	5
Investigation Division	6
Prosecution Division	8
Prohibited Personnel Practices and Other Violations of Civil Service Laws and Rules	11
Whistleblowing	15
Hatch Act	17
Legislation	19
Conclusion	20
Appendix A	21
Appendix B	24



Preface



The Office of Special Counsel (OSC) was established in 1979 by Reorganization Plan Number 2 of 1978. Its functions and powers were enlarged by the Civil Service Reform Act (CSRA) of 1978. During FY 1985, the office operated with a budget of \$4.627 million and a full time equivalency (FTE) personnel ceiling of 86. Budget and staff have remained approximately constant since the beginning of FY 1982; FY 1986 operations will be executed at the same approximate cost as FY 1982.

The OSC is an independent investigative and prosecutorial agency, which litigates before the Merit Systems Protection Board (MSPB). The relationship of the OSC and the MSPB may be likened to that of a judge and prosecutor, the Board performing the former function and the OSC the latter. Both protect the merit system, thereby protecting those who work within that system. As an agency, OSC is independent of the Board operationally and administratively.¹

The primary responsibilities of the OSC are:

1. to investigate allegations of activities prohibited by civil service law, rule or regulation, primarily allegations of prohibited personnel practices and standards of conduct violations, and, if warranted, to initiate disciplinary or corrective actions;

2. to provide a secure channel, through which allegations of waste, fraud, mismanagement, abuse of authority or a substantial and specific danger to public health or safety may be made without fear of retaliation and without disclosure of identity except with the employee's consent;

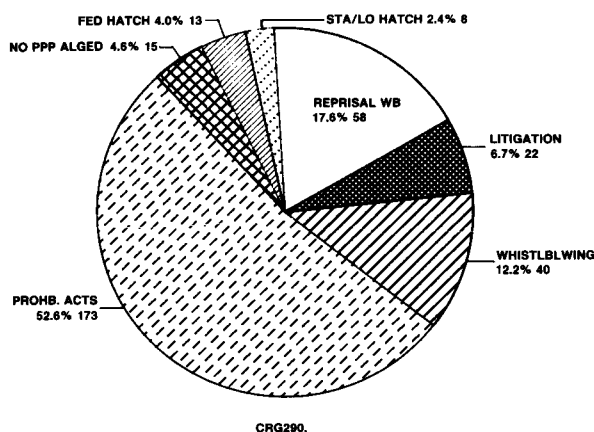
3. to enforce the Hatch Act.

OSC has jurisdiction world-wide, wherever there are federal civil servants. Thus, agency investigators have travelled throughout the United States and to Europe, the Middle East, and South America following leads in investigations.

In 1980, President Reagan vowed support and protection for those who disclosed fraud, waste, and abuse in government. Since inception of the legislative concept, OSC has been classified as a law enforcement agency by opinion of the Department of Justice, Office of Legal Counsel.² In 1981, Attorney General Meese, then Counsel to the President, emphasized that OSC must undertake leadership in the effective execution of the President's promise. In the summer of 1982, responsibility for carrying out this Presidential policy, until June 1986, was assigned to the incumbent, when President Reagan nominated him to be the Special Counsel.

At that time, legislation to abolish OSC had been introduced in the Congress. There was a question as to whether the mission of

FY85 YEAR END PENDING WORKLOAD
329 MATTERS AND CASES



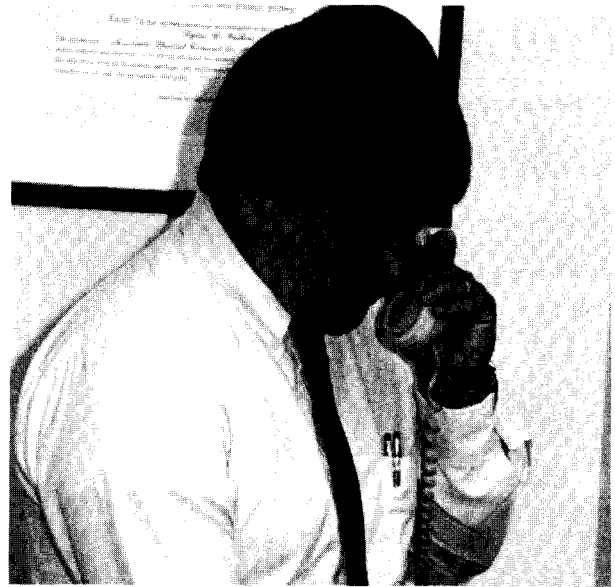
the office could be accomplished, for no successful litigation had been mounted, except involving Hatch Act violations. During confirmation hearings before the Senate Governmental Affairs Committee in the Fall of 1982, the Special Counsel designate vowed to make the OSC function properly or to "lead the parade" to seek to do away with it.

Today the office is unequivocally a success under the terms of the statute the Congress passed in 1978. OSC executes its legal responsibilities effectively, and with dispatch, wasting no resources on matters which are clearly beyond its authority. The parameters of OSC jurisdiction are, of course, still being established by decisional law of the Merit Systems Protection Board (MSPB) and the Courts of Appeal for the several circuits.

OSC's statutory mission is to protect the integrity of the merit system. Like any other law enforcement agency, the OSC has no flesh and blood clients. It is not empowered to represent individual employees, although individual employees are often the beneficiaries of routine enforcement actions. By protecting the merit system, that is, by enforcing the law, the OSC produces protection, and freedom from reprisal, for individual employees. The analogue is to vigorous prosecution of criminals by the state, to inhibit their unlawful conduct and thus execute the duty of the state to protect the citizenry.

Of course, OSC receives many complaints that do not lead to enforcement actions. However, as a recent GAO report pointed out, "In nearly all of the cases... examined, we (GAO) agreed that the case file provided ample documentation that OSC's decision (not to prosecute) was based on a reasonable comparison of the facts in the case with the legal standards that OSC is required to meet for a successful prosecution." Moreover, GAO, in an 18 month review of OSC operations, found no prosecutorial judgement with which it was in disagreement.

Expenditures of limited OSC funds cannot be authorized for filing complaints against federal employees and officials unless there is virtual certainty that the evidence provides sufficient facts to ensure success, and that there is a sufficient legal theory to prevail in



the case. Application of a lesser standard would be an abuse of authority and position, and contrary to the standards of professional prosecutorial conduct and the federal code of ethics. At this writing, MSPB, as final arbiter of such matters under the law, has ruled against OSC in only two out of 40 prosecutions initiated since October, 1982.

A high number of complaints is received by OSC annually with only a low number resulting in prosecution. During FY 1985, exclusive of Hatch Act prosecutions, the ratio of prosecutions to complaints was about 0.7 percent. This is the intended result of screening for substance, and is in accord with the legislative history of the statute.³ GAO found that the fundamental reason for this "boil-down" rate is that the vast majority of complaints made to OSC are simply without merit.⁴

Federal prosecutorial and investigative models provide clear precedent. Thus, analysis of available public records shows that the "boildown" rate of matters by OSC is roughly the same as that for the Inspectors General of the United States nationwide. Statistical comparisons illustrate this point:⁵

- In the first six months of FY 1983, 17 statutory IGs and OPM referred 20.9% of intake system-wide for audit or investigation.

The OSC screening process currently refers 21% of all matters received to the Investigation Division (12.4%) or to the involved agency (8.6%) for investigation.

- In the first six-months of FY 1983, 17 statutory IG's and OPM reported successful individual criminal or civil legal actions in 12% of the total of investigations undertaken.⁶

The OSC percentage of prosecutions since October 1982, excluding Hatch Act cases, is approximately 10% of field investigations undertaken.

These comparisons demonstrate that the OSC screening process operates in a statistically parallel mode to other federal law enforcement processes involved with the same problems and the same population (federal employees), with statistically parallel prosecutive results. There is no significant deviation in the effectiveness of the several allegation-based intake systems.

The primary OSC policy is, and has been, to find violations of the law and to prosecute the violators. There is no other policy.

The statutory powers of OSC permit protection of *bona fide* whistleblowers from prohi-

bited retaliation for their protected disclosures only by credible enforcement of the law. That is accomplished by prosecuting anyone who takes reprisal because of protected disclosures, and by invoking appropriate agency corrective actions. OSC is not empowered to represent individual employees; it is not now, and was never authorized by Congress to be a counselling service. Such a function has no place in an office established by Congress dedicated to prosecution of law violations. To indicate otherwise would be to irresponsibly create or perpetuate a cruel deception upon those who are ignorant of the law enacted.

The Senate Committee on Governmental Affairs stated in its report accompanying the Senate passed version of CSRA, "The Special Counsel is authorized to seek remedial action from the Board to prevent abuses of the merit system, and to initiate disciplinary action against government officials who commit prohibited personnel practices." S. Rep. 969, 95th Cong., 2d Sess. 24 (1978) (emphasis added). That is the mandate of OSC.

¹ 49 Fed. Reg. 40131, 40131 (1984).

² *Civil Service Reform: Hearings on H.R. 11280 Before the Comm. on Post Office and Civil Service of the House of Representatives*, 95th Cong., 2d Sess. 819-20 (1978) (Serial No. 95-65) (Memorandum for H. Patrick Swygert, General Counsel, Civil Service Commission, from Larry A. Hammond, Acting Assistant Attorney General Counsel, Office of Legal Counsel, Department of Justice).

³ S. Rep. No. 969, 95th Cong., 2d Sess. 32-33 (1978).

⁴ Whistleblower Protection, 1985: Hearings Before the Subcomm. on Civil Service of the Comm. on Post Office and Civil

Service, House of Representatives, 99th Cong., 1st Sess. 3 (1985) (statement of Milton J. Socolar, Special Assistant to the Comptroller General, GAO).

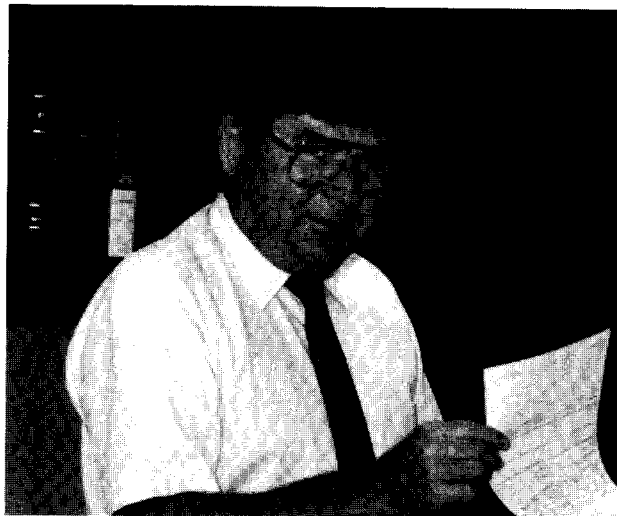
⁵ The source for the following statistics is the report of the President's Council on Integrity and Efficiency for the second six months of FY 1983. After that report the format was changed making later statistics impossible to compare. Earlier reports, however, show generally the same percentage.

⁶ Only the comparison to legal actions is valid since OSC must be prepared to litigate and prevail in every action brought.

Operations

OSC is functionally divided into five basic components. The operating components, Prosecution Division, Investigation Division, Planning and Oversight Division, and Office of Congressional and Public Relations, are supported by the Operations Management Division. In addition, OSC maintains field offices in Dallas, Texas and San Francisco, California.

Operations Management Division



The Operations Management Division, with 17 staff members, supports the other Divisions. It is responsible for all budgeting, personnel, procurement, management information and property activities of the Office of Special Counsel.

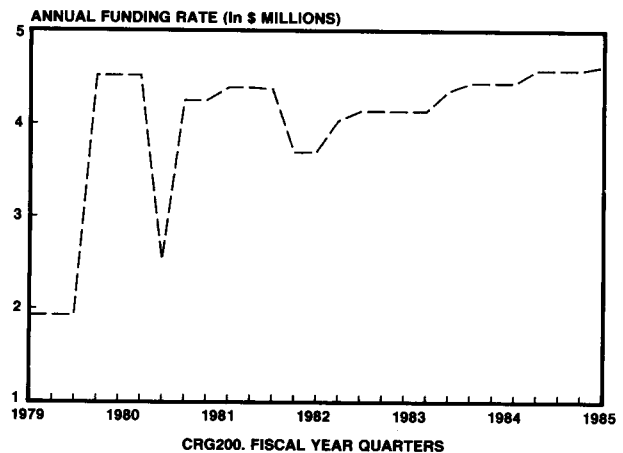
During fiscal year 1985, modern technology and work space design brought about a more efficient work environment. In its FY 1985 review, GSA found the OSC space to be well utilized; no reductions were recommended.

The office has been administratively independent of the MSPB for one year. Service by the USDA National Finance Center for payroll, personnel, accounting and administrative

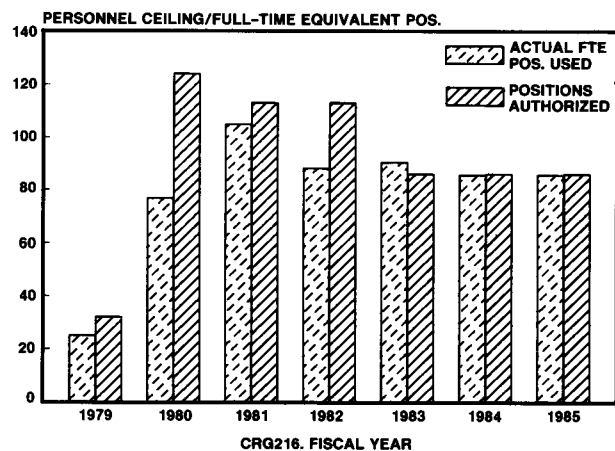
payments has been efficient and inexpensive. The office has improved internal management information systems, installed an extensive litigation reporting system and expanded staff use of personal computers for research.

Budget and staffing levels were stable during the year. The office operated within its 86 full time equivalency (FTE) personnel ceiling and an authorized budget of \$4.627 million. Over 85 percent of the OSC budget is for uncontrollable items such as personnel, rent, communications, and benefits. The other 15 percent must cover travel, maintenance, supplies, court reporting and other expenses. Continued efforts to increase efficiency through modern administrative practices within existing budgetary and personnel constraints are planned for the coming year.

OFFICE OF THE SPECIAL COUNSEL FUNDING RATES
JANUARY 1, 1979 TO PRESENT
AUTH. RATE



PERSONNEL CEILINGS AND ON BOARD STRENGTH
FISCAL YEARS 1979 THROUGH 1985



Office of Congressional and Public Relations



Since October 1982, the Special Counsel has emphasized outreach to improve and maintain proper communications with Congress and the media, and respond to legislative inquiries which span the OSC program. To this end, the Office of Congressional and Public Relations was established to increase awareness among federal employees of the provisions of the CSRA, the Hatch Act and the role and responsibility of OSC.

The Director of Congressional and Public Relations is charged with maintaining a liaison with the Congress, the press and the public. She routinely tasks operating divisions with information retrieval requirements to provide prompt response to frequent Congressional and media inquiries.

During FY 1985, a new information booklet entitled "The Role of the Special Counsel" was published.

In addition, the office distributed over 68,000 copies of OSC informational materials to the public and Congress. Also during the year, the office responded to approximately 300 press and Congressional inquiries per month, and produced and dispatched some 1,180 letters to the press, Congress and the public. Automated systems, including personal computers, have been installed to



promptly and accurately track matter-related inquiries from Congress and the Executive branch. Continued emphasis on outreach and responsiveness is planned in FY 1986.

Planning and Oversight Division



OSC was reorganized in February 1985, with the establishment of the Planning and Oversight Division (POD) and the assignment of the OSC Inspector General, who is the former chief of OSC investigations, as its head.

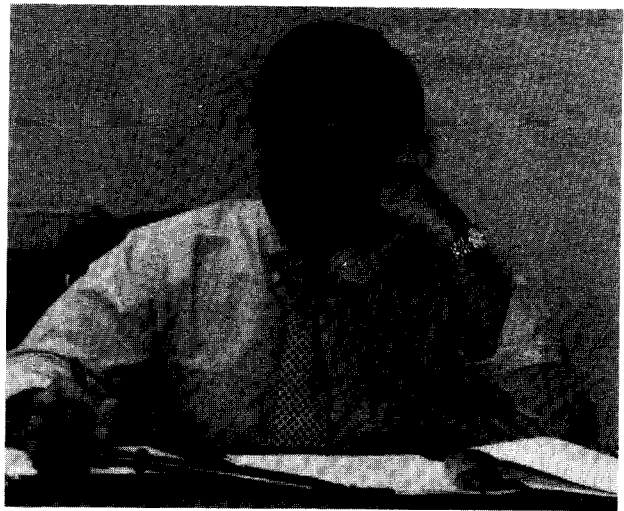
The new division is responsible for coordinating the development, documentation and implementation of OSC policies and proce-

dures. In addition, the division develops the overall operating plans of the OSC. POD is responsible for inspecting, auditing and evaluating programmatic and administrative operations and the adequacy of internal control and financial management systems. POD staff supervise OSC internal training and personnel security programs. OPM rules and regulations are systematically reviewed by POD, pursuant to 5 U.S.C. § 1205 (e)(1)(C). Planning and conducting special inquiries into apparent or possible patterns of prohibited personnel practices or significant merit system abuses in federal agencies is an assigned POD function. Finally, the division personnel serve all legal and investigative staff as a principal source of information concerning the technical aspects of civil service laws, rules, and regulations, including reviewing and reporting on significant MSPB and court decisions which impact on OSC operations. Although the reorganization has been in effect for only a short period of time and it has not been possible to staff the new division fully, the reorganization has resulted in significant improvements in the documentation of office policies and procedures and of the office's management information system.

Additionally, OSC will begin FY 1986 with a comprehensive operating plan, the first such fiscal year planning document produced since the establishment of the office. The operating plan is supplemented by a training plan designed to further strengthen the ability of all staff to carry out their duties and responsibilities more efficiently, effectively and economically. Internal control reviews and program audits are now being conducted on a systematic and continual basis and any corrective actions found necessary therefrom are being taken promptly. Planning for special inquiries into potentially significant merit system abuses in federal agencies has progressed so that they may be initiated in FY 1986, when, and if the staff needed can be freed from other operational work.

By combining the Planning and Oversight functions, the efficiency of the OSC Inspector General's office is enhanced. Any problems the Inspector General identifies are, perforce, the priority issues of POD.

Investigation Division



The Investigation Division was reorganized and strengthened in FY 1985. Field offices in Dallas and San Francisco were brought under the full control of the division. The total authorized strength of the division is now 37 personnel; only six are clerical.

The increase in professional investigative staff directly responds to an increase over the previous year of complaints requiring extensive field investigation. The 19 investigators and attorneys in division headquarters are all involved in field investigation. Recruitment has been concentrated on investigators with extensive experience in law enforcement investigations. The background of OSC investigators include a number of diverse law enforcement agencies, such as: The U.S. Secret Service, the Air Force Office of Special Investigations, the Naval Investigative Service, the Internal Revenue Service, several offices of Inspector General, U.S. Marine Corps Criminal Investigation Division, and a variety of state and local police and law enforcement agencies.

The most successful recruitment has been from annuitants from state and federal law enforcement systems which typically provide for retirement while the employees are relatively young. OSC has managed to recover for the government the vast expertise and expe-

rience of many such highly skilled investigators.

The division workload is heavily concentrated on those prohibited personnel practices which prohibit reprisal and various forms of discrimination. These violations always involve difficult questions of motivation and intent and are, thus, the most complex to



investigate. The most highly qualified investigators are assigned these matters, which also receive the greatest share of supervisory attention.

Close supervision of OSC investigative activities is a key feature of the division's operations. Investigative supervisors in headquarters and field offices make weekly status and progress reports to the Associate Special Counsel for Investigation, as well as special reports, when necessary. Status data is retained on a personal computer in the division, where it is frequently reviewed and analyzed.

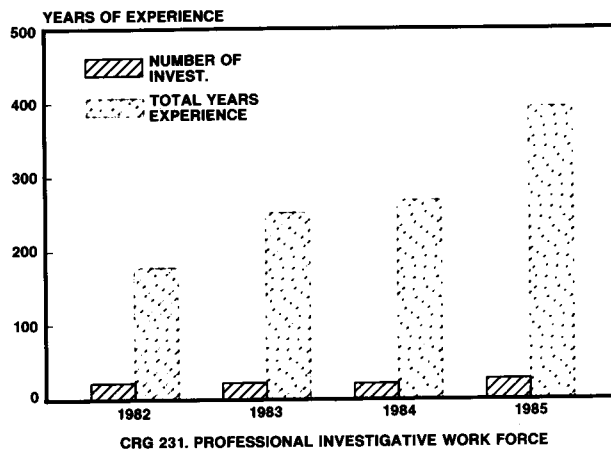
Complex or unusual investigations are analyzed in detail by the assigned investigators and supervisors. The operating mode is to aggressively investigate any potential violation until sufficient evidence to support prosecutive action is developed, or it becomes evident that no violation occurred or that, even if one is believed to have occurred, reliable evidence

of that violation cannot be obtained. A judgment that prosecution is not warranted or supported must be shared by all investigative supervisors, including the Associate Special Counsel, as well as the assigned trial attorney from the Prosecution Division, before any matter is finally closed. Those matters believed to constitute violations are pursued until they are believed to be prepared for trial, at which point they are referred to the Prosecution Division for formal legal analysis and prosecution.

In FY 1985, the division completed 155 field investigations. At the end of the fiscal year 127 additional matters were under active investigation.

The Investigation Division also processes all whistleblowing disclosures brought to OSC. Under new procedures, most disclosures are immediately assigned to a staff investigator to develop the information through further contacts with the source of the disclosure, to analyze the information developed, and to recommend further action. The system ensures that the disclosure is fully developed, so that further handling is based on a firm understanding of the information disclosed. In FY 1985, 135 disclosures were received and 115 disclosures were forwarded to the heads of agencies or Inspectors General. A more detailed description of these activities is contained in the report section on whistleblowing.

INCREASE IN TOTAL YEARS OF INVEST. EXPERIENCE
FISCAL YEARS 1982 THROUGH 1985



CRG 231. PROFESSIONAL INVESTIGATIVE WORK FORCE

Prosecution Division



The focus of all OSC operations is protection of the merit system through prosecution of those who violate the law. To this end, under an agreement between OSC and the U.S. Attorney for the District of Columbia, most OSC Headquarters trial attorneys have served, or are serving, as Special Assistant U.S. Attorneys in criminal trials. This program has enhanced the prosecutive capabilities of the office by expanding the skills of the trial attorneys.

Within the Prosecution Division, the Complaints Examining Unit (CEU), first established in September 1983, conducts initial examination and statutorily required preliminary inquiry into all new non-Hatch Act complaints and allegations. This centralized front-end review ensures consistent policy application and early assessment of the substance and prosecutive potential of each new matter received. Those matters found through these screening procedures to merit further inquiry are assigned to the Investigation Division for full field investigation. This procedure ensures quality control over all initial determinations and expedites the disposition of matters not warranting full field investigation. The procedure also assures official OSC staff contact with each complainant, so there is no misunderstanding of the nature and scope of the complaint.

FY 1985 was the second full year of activity for CEU. The unit has materially aided in reducing the average time required for final resolution of matters from over 200 to 78 days.

After referral by CEU to the Investigation Division and completion of the investigation, a Report of Investigation is prepared and returned with documents and other evidence to the Prosecution Division for legal analysis. Such legal analysis was completed on 132 matters during the fiscal year.

Increased efficiency in analyzing case files, and preparing briefs and memoranda, has been achieved by procuring personal computers for attorneys in the division.

In FY 1985, all staff were provided refresher training in interview skills and investigative analysis and procedures, and new employees were given orientation training in federal personnel practices, systems and terminology. Highly qualified personnel specialists within the Planning and Oversight Division are available to the division's investigators for expert consultation, where necessary during investigations. Finally, the Investigation Manual was revised after an annual review to conform to certain procedures adopted since the previous revision.

Cooperation with counterparts in Offices of Inspectors General and internal affairs bureaus in agencies continues to be excellent. In several instances, investigative activities were coordinated between OSC and Inspectors General and their assistance in providing records and facilities for field investigations has been invaluable and consistently helpful. Formal and informal cooperation with the IG community is assured by the participation of the Special Counsel in the President's Council on Integrity and Efficiency established by Executive Order 12301.

During FY 1985, OSC for the first time initiated disciplinary prosecutions against employees for discrimination in the workplace. OSC initiated action against two supervisors, one charged with sex discrimination and another charged with religious discrimination. In another action, a non-supervisory employee was charged, under a heretofore

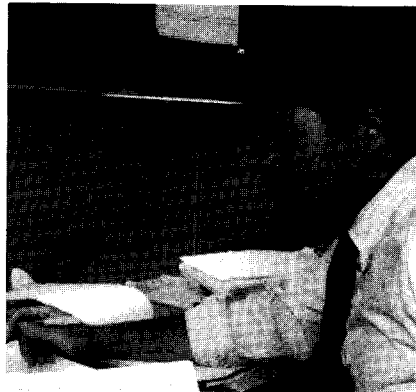
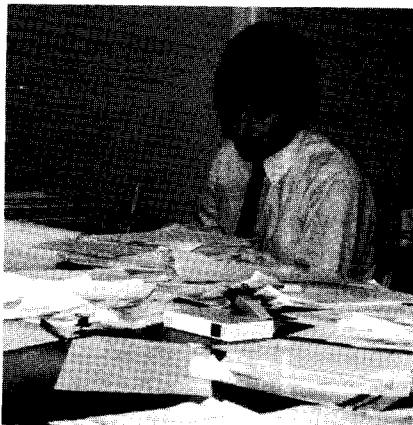
unused section of the law, with involvement in prohibited discrimination. In addition, charges were prosecuted against six other employees for prohibited personnel practices and against six employees for Hatch Act violations. OSC sent two formal corrective action letters to agency heads and corrective or disciplinary action was initiated by agencies on receipt of information and reports from OSC



in nine other matters. During FY 1985, OSC intervened in two cases before the MSPB. In addition, the MSPB issued two decisions pertaining to OSC interventions filed previous to FY 1985.

During the fiscal year, seven cases involving disciplinary complaints went to trial before Administrative Law Judges. Two involved prohibited personnel practices and discrimination and five were Hatch Act cases. Additionally, three other disciplinary action cases involving prohibited personnel practices were settled favorably to OSC before trial.

Since October 1982, OSC initiated formal disciplinary or corrective action or intervened in sixty-nine cases. Emphasis has been placed on OSC's authority to seek discipline, before the Board, of employees who violate the Civil Service Reform Act (CSRA). This emphasis is based upon the belief in the basic tenet of common law that the punishment of lawbreakers educates the public and deters would-be lawbreakers from violating the rights of others. Oliver Wendell Holmes observed over 100 years ago, "The purpose of the criminal law is to induce external conformity to rule." So it is with any law which imposes sanctions — it is, if its enforcement be credible, a deterrent to trespass on the rights of others. Imposition of sanctions depends on credible law enforcement. Credible law enforcement ultimately depends on successful prosecution. That is the core of what OSC has accomplished.



Prohibited Personnel Practices and Other Violations of Civil Service Laws and Rules

The personnel practices specifically prohibited by the CSRA of 1978 are codified at 5 U.S.C. § 2302(b) and provide the standard for CEU and OSC general operations. Complainants generally allege violations of one or more of these provisions. The statute provides that any person who has the authority to take, direct others to take, recommend or approve any personnel action, shall not, with respect to such authority:

- Discriminate on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation;
- Solicit or consider employment recommendations based on factors other than personal knowledge or records of job related abilities or characteristics;
- Coerce the political activity of any person;
- Deceive or willfully obstruct any person from competing for employment;
- Influence any person to withdraw from competition for any position in order to improve or injure the employment prospects of any other person;
- Give unauthorized preference or advantage to any person to improve or injure the employment prospects of any particular employee or applicant;
- Engage in nepotism (hire or promote relatives or advocate such activity);
- Take reprisal against a whistleblower;
- Take reprisal against an employee for exercising an appeal right;
- Discriminate on the basis of personal conduct which does not adversely affect job performance of the employee, applicant or others;
- Take or fail to take a personnel action vio-

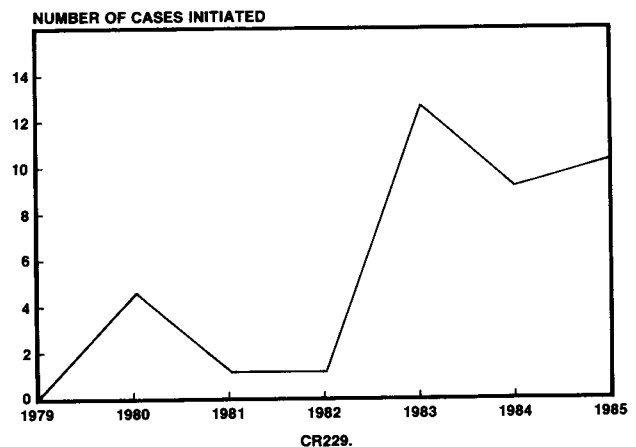
lating any law, rule or regulation implementing or directly concerning merit system principles codified at 5 U.S.C. § 2301.

While unlawful discrimination is a prohibited personnel practice within OSC jurisdiction, Congress has left intact the procedures for investigating certain discrimination complaints already established in the agencies and the Equal Employment Opportunity Commission (EEOC).⁷ Accordingly, the OSC normally exercises discretion to defer such matters to agency or EEOC procedures rather than initiating redundant independent investigations (5 C.F.R. § 1251.3). During FY 1985, 252 such complaints were so deferred. However, where there is evidence of particularly egregious misconduct, the OSC investigates certain allegations of sexual harassment, and racial and religious discrimination, rather than defer to the EEOC procedures. This is done in selected cases in order to seek disciplinary sanction against the law violator, a remedy unavailable to EEOC.

Allegations of unlawful discrimination not under the jurisdiction of EEOC (discrimination because of marital status and political affiliation, 5 U.S.C. § 2302 (b)(1)(E)), are processed by the Special Counsel as any other allegation of a prohibited personnel practice.

Resolution of complaints of prohibited personnel practices may be achieved in a number of ways if the investigation shows

DISCIPLINARY ACTION CASES BEFORE MSPB INVOLVING PROHIBITED PERSONNEL PRACTICES
CASES



that the law was broken. For example, the OSC may:

- Investigate and, if necessary, request an order from MSPB to stay any personnel action pending completion of the investigation.
- Report the findings of the investigation to the agency head, the MSPB, the Office of Personnel Management and, if appropriate, to the President and recommend that the agency take corrective action. If the corrective action recommended by the Special Counsel is not taken, he may petition the MSPB to order corrective action. Such an action is civil in nature and lies against the agency, rather than an individual.
- Initiate disciplinary action before the MSPB against the lawbreaker individually. In such cases the agency is not a named party. The array of sanctions which the MSPB may impose upon the law breaker includes: removal from federal service; reduction in grade; debarment from federal employment for a period not to exceed five years; suspension; reprimand; and assessment of a civil penalty not to exceed \$1,000.

During FY 1985, 1,280 complaints that alleged prohibited personnel practices and other violations of civil service law, rule, or regulation (other than Hatch Act) were received. This number represents 84.2 percent of the total intake of the office during FY 1985 (1,520). Of the 1,280 non-Hatch Act complaints received, 239 (18.7 percent) alleged reprisal for whistleblowing.

Non-Hatch Act disciplinary actions, including interventions in adverse actions before the MSPB, were initiated against 11 employees during the fiscal year. A brief synopsis of the non-Hatch Act cases and interventions filed or decided during FY 1985 may be found in Appendix A.

For the past three years, OSC policy has been to seek agency corrective action by request of the agency head rather than by litigation. This policy has been increasingly successful as the agencies have been acquainted with the current quality of OSC investigation. This is not a policy against lit-

igation for corrective action, if such litigation is ever required. It is, instead, a policy of achieving sound results in a prompt and efficient manner with minimal disruption of the functions of government. Corrective action was requested in letters sent to agency heads on two occasions in FY 1985. In five cases, some of which were initiated prior to FY 1985, corrective action had been taken at the end of this fiscal year by the agency head. In one, the agency counseled the offending official and ordered reconsideration of his denial of a within grade salary increase. In another, the agency reconstructed a merit promotion action. In three others, respectively, the agency in question granted back pay from the period of the employee's removal until his rehiring; rescinded a reprimand; and awarded back pay and eligibility for rehiring. The remaining requests for corrective action were pending at the end of FY 1985.

During FY 1985, several matters were settled by OSC and the agency prior to the initiation of formal action:

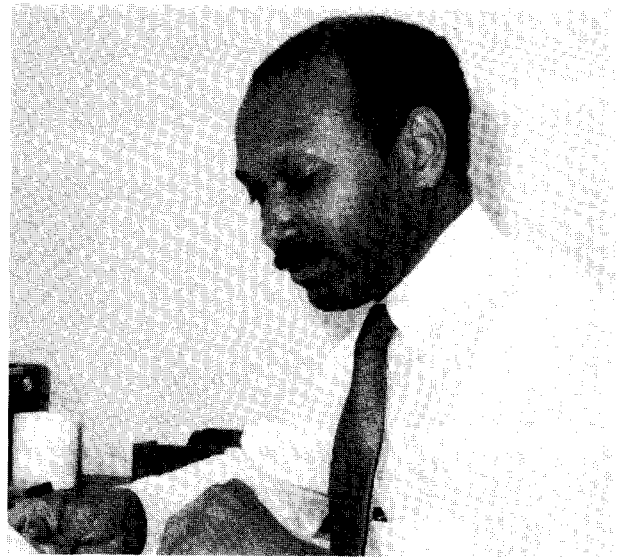
- In one matter, the agency agreed that the performance appraisals of three employees had been lowered in reprisal for their whistleblowing; the agency ordered the performance appraisals raised to their levels of the previous appraisal period and issued letters of reprimand to the responsible officials.
- In another matter, OSC requested an agency to instruct responsible officials that it is a prohibited personnel practice to take reprisal against an employee for disclosures to an Inspector General. No other corrective action was feasible since the employee had voluntarily resigned from the service.
- Regarding an agency internal memorandum which could initially have been construed as a restriction upon the rights of the agency employees to petition Congress, OSC obtained a clarification from the agency that the memorandum was intended only to restrict agency employees' official contact with Congress, without trespass upon the employees' statutory right under 5 U.S.C. § 7211.
- During an investigation of allegations

made by an employee terminated under procedures applicable to probationary employees, OSC determined that the agency had erred since the employee in question had served his probationary period prior to termination. The agency promptly cancelled the termination upon notification of its error.

- During an investigation of allegations made by a restored employee, OSC notified the agency of the impropriety of involuntarily restoring an employee to a position at a grade level lower than that previously occupied by the employee. The agency thereafter voluntarily promoted the employee retroactively to the proper grade level.
- With the approval of OSC and based upon an OSC investigation, an agency suspended an employee for 45 days for off-duty use of a controlled substance.
- On the basis of an investigation, OSC concluded that an employee had been denied an incentive award because of her protected disclosures to her agency and OSC regarding sexual harassment. While OSC declined to pursue formal disciplinary action because the responsible officials were no longer federal employees, OSC reported the findings to the head of the agency, and voluntary corrective action was ordered by the agency head.

At the close of FY 1985, there were three outstanding informal requests for corrective action:

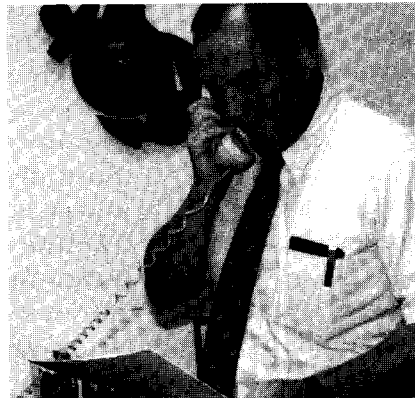
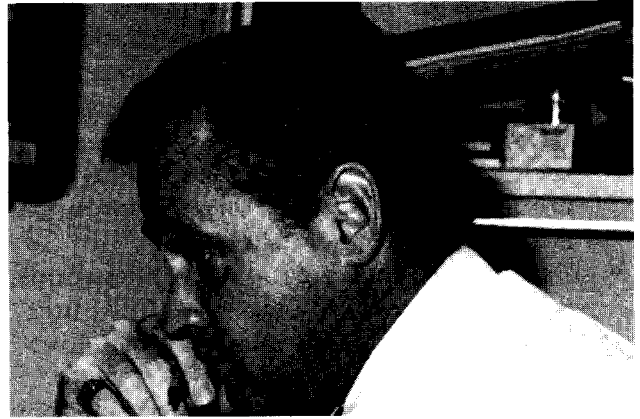
- In the case of a supervisor's alleged sexual harassment of an employee, OSC requested the agency to conduct an investigation to determine whether a standards of conduct violation occurred.



- On the basis of an investigation, OSC found that a personnel official granted an applicant an unauthorized preference or advantage by certifying as qualified and appointing the applicant after being informed by two staffing specialists on two separate occasions that the applicant was unqualified—a determination in which the Office of Personnel Management later concurred. While OSC declined prosecution because the agency rescinded the appointment, OSC forwarded a copy of the report of investigation to the head of the agency for appropriate action. At the close of the fiscal year, the agency was reviewing the matter.
- On the basis of an investigation, OSC found that unlawful preferences had been granted in summer hire and trainee hire programs. At the close of the fiscal year, the agency was reviewing the evidence prior to proposing action to correct the situation.

⁷ Under the OMB determination order which effected the transfer of funds, personnel, property and records pursuant to Reorganization Plans No. 1 and No. 2 of 1978 as implemented by Executive Orders Nos. 12106 and 12107, December 28, 1978, \$427,000 and 19 full-time permanent positions were transferred to the Office of the Special Counsel from the Civil

Service Commission. Under that order, 14 employees of the Commission were actually transferred. The same order transferred \$2.048 million and 221 full-time positions (including 63 investigator and investigative support positions) to the Equal Employment Opportunity Commission from the Civil Service Commission.



Whistleblowing

In addition to its investigative and prosecutive mission, OSC also operates as a channel to receive disclosures of wrongdoing and mismanagement from current and former Federal employees. The Civil Service Reform Act created this system and gave the Special Counsel unique authority to require the heads of agencies in the Executive Branch to investigate serious allegations and to furnish written reports to OSC of the investigative findings and consequences.

Employee disclosures are received and analyzed in OSC's Investigation Division. The analysis, which usually involves a series of contacts with the discloser, is to determine whether there exists a substantial likelihood that the information disclosed evidences one of the categories of wrongdoing or negligence enumerated in the statute, 5 U.S.C. § 1206 (b)(1). Once a determination is made, the information is referred to an agency in one of three ways:

1. In serious matters, under the statute the Special Counsel by letter formally requires the head of the agency to cause an investigation of the allegation and report the results to OSC in writing, personally signed by the agency head. 5 U.S.C. §§ 1206 (b)(3),(4).
2. In less serious matters, under the statute, the information is referred by letter to the head of the agency for appropriate action. The agency head is required by statute to report to OSC what action will be or was taken on the information. 5 U.S.C. §§ 1206 (b)(2),(7).
3. Where the source of the information is anonymous or is not a Federal employee, or where the merits of the information cannot be assessed, the Special Counsel informally transmits the information to the agency Inspector General for action as appropriate. Inspectors General may, in their discretion, provide reports of any results from the information.

The identity of the discloser of information to OSC is never revealed without that person's consent. Where necessary, the infor-

mation sent to the agency head is redacted to conceal the identity of the source. If the agency official responsible for the investigation requires additional information in the course of the investigation, OSC acts as intermediary unless the source waives confidentiality.

When a report is received from an agency, Investigation Division officials evaluate it and frequently request comments from the source. Once the agency's report is determined to be reasonable as to findings and sufficiently thorough, OSC accepts it, and provides copies to the President and the Congress. The discloser is given a copy of the report from which any information protected by law from disclosure is deleted. An identical version is placed in a file available to the public.

A failure by an agency head to provide such a report must be reported by the Special Counsel to the President and the Congress. No such failure has occurred in this reporting period.

OSC is only authorized to review, rather than investigate, whistleblower allegations unless the allegations implicate a complaint of a prohibited personnel practice or other violation subject to OSC jurisdiction. In evaluating agency action on whistleblower allegations beyond OSC investigative jurisdiction, OSC may confer with the source of the information and the Inspector General of the agency. The reports of agency heads are evaluated based on the statutory standard, logic, and investigative experience. Where agency Inspectors General have been assigned by the agency head to investigate a Special Counsel complaint, the results are uniformly satisfactory. The overwhelming trend is for agency heads to commit these whistleblower investigations to their Inspectors General.

FY 1985

Whistleblowing Disclosures Processed

Disclosures on Hand	
Beginning FY 1985	98
New Disclosures Received	135
	<hr/>
Total Processed	131
	<hr/> <hr/>
FY 1985 Ending Balance	
(On Hand at FY End)	12

**FY 1985
Referrals to Agencies**

Referrals	
— Investigation and Report Required (5 U.S.C. §§ 1206 (b)(3), (4))	17
— Report Only Required (5 U.S.C. §§ 1206 (b)(2), (7))	33
— Informal Referral to IG	65
Sub-total	115
Closed without Referral ⁹	116
FY 1985 Total	131

Reports Received From Agencies

FY 1985 Beginning Balance	
Report of Investigation (5 U.S.C. § 1206 (b)(4))	1
Report of Action Today (5 U.S.C. § 1206 (b)(7))	1
Sub-total	2
FY 1985 New Reports Received	
Reports of Investigation (5 U.S.C. § 1206 (b)(4))	20
Reports of Action Taken (5 U.S.C. § 1206 (b)(7))	43
Informal Reports (from IG's) (not required by statute) (not included in total) 14	14
Sub-total	65
FY 1985 Reports Accepted	
5 U.S.C. § 1206 (b)(4)	12
5 U.S.C. § 1206 (b)(7)	40
Sub-total	52
FY 1985 Ending Balance (Reports Pending Acceptance Review) 13	
	13

The following are illustrative of the type of disclosures referred and the improvement of government management which resulted.

- The Secretary of Defense reported in reply to a referral under 5 U.S.C. § 1206 (b)(3), that as a result of a subsequent investigation by the Department of Defense Inspector General, \$122 million in costs were suspended from payment to a subcontractor. The costs were withheld because, as the OSC whistleblowers alleged, the subcontractor improperly denied government

auditors access to its books and records. Other matters referred continued under investigation to determine whether civil fraud proceedings were appropriate.

- The Secretary of Agriculture reported in reply to a referral under 5 U.S.C. § 1206 (b)(3) that an Inspector General investigation substantiated allegations that an employee of the U.S. Forest Service had falsified his time and attendance records, and had been negligent in the performance of contract enforcement duties, had misused government vehicles, and had engaged in a conflict of interest relationship with a contractor. The Secretary reported that these findings would be presented to the Justice Department and adverse actions taken against the offending employee, who was relieved of contracting officer duties during the investigation.
- The Secretary of the Navy reported in reply to a referral under 5 U.S.C. § 1206 (b)(3) that an investigation of Navy officials substantiated some allegations that civilian fire department officials at a naval station were in conflict of interest by maintaining a business relationship with a contractor to the station. One official was suspended for 10 days and the other reprimanded. Both terminated their relationship with the contractor on orders from their supervisor.
- The Secretary of Agriculture reported that allegations of widespread time and attendance irregularities in the Economic Research Service were substantiated. The allegations were referred under 5 U.S.C. § 1206 (b)(2). The Secretary reported that a series of actions had been implemented to correct the irregularities.
- The Administrator of the Veterans Administration reported that an allegation was substantiated that VA police officers were being used improperly to direct traffic outside the confines of a medical facility. The practice has ceased.

⁸ One disclosure was deleted and investigated by OSC as a prohibited personnel practice.

⁹ OSC does not refer purported allegations which are uncomprehensible or not cognizable under law.

Hatch Act

The OSC is the only federal agency charged with responsibility for enforcing the provisions of the Hatch Act. By statute the office is required to investigate allegations of prohibited political activity and, when appropriate, prosecute employees who violate the law before the MSPB.

A total of 29 allegations were carried over from FY 1984. During FY 1985, a total of 105 allegations of Hatch Act violations were received by the OSC. By the end of FY 1985, a total of 113 Hatch Act matters had been closed, leaving 21 matters carried over to FY 1986.

Since October of 1982, emphasis on OSC Hatch Act enforcement has focused primarily upon educating those covered by the law to encourage voluntary compliance, proceeding upon the generally accepted law enforcement theory that prevention of violation is more efficient than apprehension and prosecution. During FY 1985, 750 employees were provided informal telephone advice pertaining to the Act and 108 employees received formal written advisory opinions from the OSC.

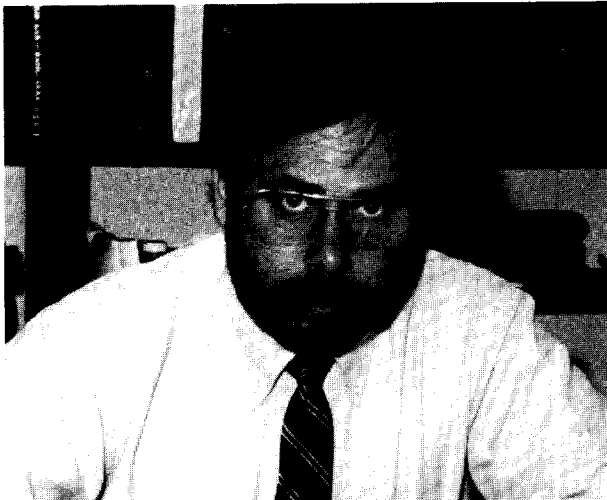
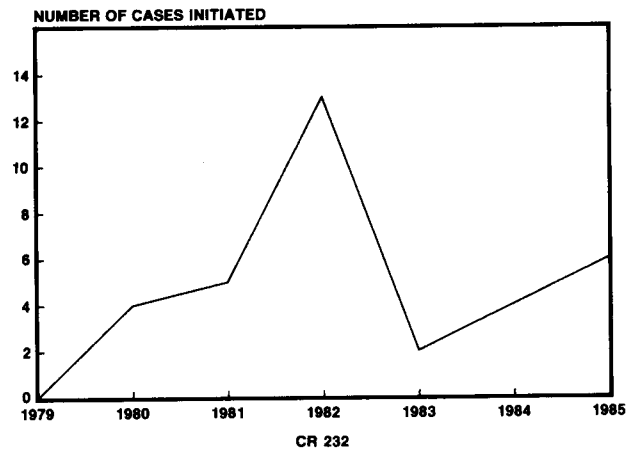
In an effort to conserve resources and to apply the law fairly, the office makes extensive use of advisory opinions and warning letters. In appropriate cases, these letters advise individuals that OSC has received information indicating a violation of the Hatch Act, and provide an opportunity for the employee to correct the situation without undergoing for-

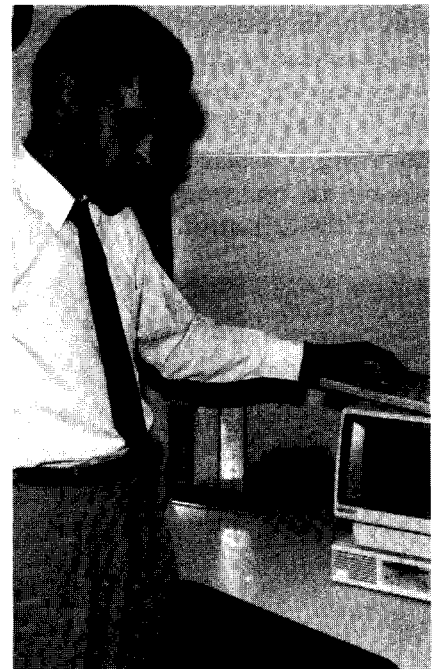
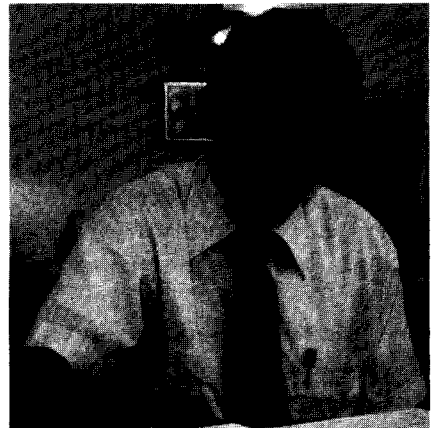
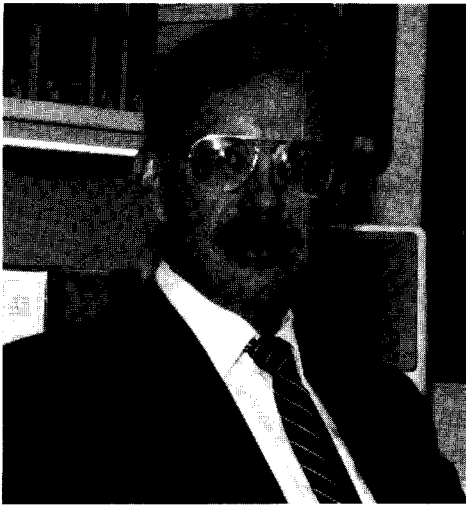
mal prosecution. During FY 1985, 62 individuals received warning letters.

Between October of 1982 and the end of the fiscal year, 12 disciplinary action complaints were filed with the MSPB against employees for violation of the Hatch Act. Six of those complaints were prosecuted during FY 1985. In all six of these cases the employees prosecuted were either warned directly by OSC or the evidence showed that they were clearly aware that persistence in their course of conduct would result in prosecution. The prosecuted employees all chose to persist in their course of conduct.

A summary of the circumstances that led to each Hatch Act prosecution initiated by OSC or decided by the MSPB in FY 1985, and the current status of the case may be found in Appendix B.

**DISCIPLINARY ACTION CASES BEFORE MSPB
INVOLVING HATCH ACT
CASES**





Legislation

As mentioned in past annual reports, there are ambiguities and lacunae in the enabling legislation establishing OSC. In confirmation hearings in 1982 and oversight hearings in 1985, the Special Counsel adhered to the position that "until a full and fair opportunity to explore and interpret existing legislation has been undertaken," no new law need be passed. The scope of existing OSC jurisdiction had not been fully explored through litigation and judicial interpretation at the end of FY 1985.

The law Congress enacts is interpreted and defined by the courts. The courts define the law in cases which the prosecutor *loses*, as well as those won. It is OSC policy to seek definition of the law by winning cases, not to permit erosion of the law by losing cases and allowing the law to suffer the corrosive consequences of defeat.

This year significant delineation of the jurisdiction of OSC and the Board emerged through MSPB decisions in cases brought by the Special Counsel.

For example, in *Special Counsel v. Williams* the Board made it clear that OSC's jurisdiction is not limited to matters involving prohibited personnel practices or personnel administration, but extends to other prohibited activities, specifically including the standards of conduct. This was reinforced and reiterated in *Special Counsel v. Starrett, et al.*

Prior to this fiscal year, in *Special Counsel v. Department of Housing & Urban Development (Marvin Lesht)*, the Board held that, since it has no authority to interfere with or supervise OSC investigations, it lacked jurisdiction to issue an order enjoining the agency from insinuating agency attorneys into OSC investigative interviews. During the course of *Starrett*, following that jurisdictional guidance, the ALJ ruled that the Board lacked jurisdiction to order the agency to insure that employee witnesses were not intimidated by agency supervisors.

In its recent decision in *Everett*, the Board held that, because of statutory limitations set by Congress, OSC does not have enforcement

jurisdiction over some 42,000 federal employees, who are National Guard technicians.

The decision in *Special Counsel v. Harvey* was discussed in the recent GAO report. In *Harvey* the Board held that the rule established by the Supreme Court in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), is not applicable to disciplinary action cases. *Harvey* also made significant precedent as to the definition of personnel action, and the scope of secs. 2302(b)(9) (protected conduct such as grievances or EEO complaints), (10) (discrimination on the basis of conduct not affecting performance) and (11) (actions which violate law or regulation implementing or directly concerning merit system principles). The decisions in *Special Counsel v. Hoban*, *Special Counsel v. Falt and LeDuc*, *Starrett, et al.*, and *Harvey* more clearly defined the scope of protected conduct - including protected whistleblowing - for purposes of secs. 2302(b)(8) (reprisal for protected disclosures of information) and (9). *Hoban* also addressed the meaning of secs. 2302(b)(4) (deceive or willfully obstruct any person from competing for employment) and (b)(6) (grant any preference or advantage not authorized by law, rule or regulation to any employee or applicant for employment for the purpose of improving or injuring the employment prospects of any person.) *Special Counsel v. Filiberti and Dysthe*, defined action constituting violations of sec. 2302(b)(5) (an attempt to influence a person to withdraw from competition constitutes a violation). *Special Counsel v. Deford and Julian* held that giving an unauthorized preferential advantage for the purpose of improving a person's employment prospects violates Sec. 2302(b)(6) even though the advantage is never actually realized.

The consolidations for imposition of sanctions for violations have been addressed in *Special Counsel v. Verrot* (sanctions specified in Sec. 1207 can be imposed in combination); *Hoban* (the so-called "Douglas" factors are applicable in OSC disciplinary action cases); *Harvey* (multiple prohibited personnel practices involving only one action do not warrant imposition of multiple sanctions); *Filiberti and Dysthe* (the impact on the employing agency

may be considered by the Board in determining the sanction to be imposed on the employee); and *Starrett* (reprisal for whistleblowing is extremely serious and warrants imposition of the most severe sanctions). In addition, *Starrett* approved the concept of "notice pleading" in OSC disciplinary action cases.

During the past year, OSC filed other "first impression" cases, to further define OSC jurisdiction and the elements of offenses under the statute. These cases, currently pending before the Board, will determine what kind of personnel action is necessary to violate sec. 2302(b)(1) (discrimination); whether an employee who does not have personnel action authority may be disciplined under Sec. 1206(e)(1)(E) for his involvement in conduct found by a United States district court to constitute prohibited religious discrimination; and whether a court decision finding that prohibited discrimination has occurred invokes the legal principles of *stare decisis* and *collateral estoppel* in subsequent proceedings before the Board.

Until there have been authoritative interpretations of the extant legislation, no new authority is sought by OSC. The limitation on OSC access to federal courts of appeal was defined by Congress; OSC is working within that legislatively imposed limitation.

Conclusion

OSC is now executing the law enforcement mission assigned by statute. The staff is experienced in law enforcement; comprehensive management systems are now in place. Budget and staffing continue to be stable and employee morale is high. The OSC will continue to vigorously enforce the laws passed by Congress for which it is responsible and to execute the President's commitment to efficient, effective and responsible government.



APPENDIX A

- *Special Counsel v. Starrett, Evans and Tueller* (Pending Appeal in the U.S. Courts of Appeals)

Starrett, the former Director of the Defense Contract Audit Agency (DCAA), Evans, the Director of DCAA's Atlanta Region, and Tueller, the Regional Audit Manager of DCAA's Atlanta Region, were charged with reassigning auditor George Spanton in reprisal for his disclosures of a defense contractor's alleged costing imperfections.

The Board found all three employees in violation. Starrett was ordered removed from federal service and fined \$1,000. The Board also ordered Evans and Tueller reduced in grade to nonsupervisory positions and fined \$500 each. 28 MSPR 60 (1985)

- *Special Counsel v. Brown*

Brown, the former Deputy Director of DCAA, was charged with recommending Spanton's reassignment in reprisal for Spanton's filing of an age discrimination complaint against a supervisor and for his testifying against DCAA in a Board proceeding. The Board, in clarifying the "significant factor" test in disciplinary action cases, held that Brown's actions did not constitute reprisal. 28 MSPR 133 (1985)

- *Special Counsel v. Williams* (Pending on OPM petition for review in the U.S. Court of Appeals for the Federal Circuit)

Williams, former Deputy Director of the Federal Mediation and Conciliation Service (FMCS), was charged with improperly accepting gifts from his subordinates and with violating standards of conduct by accepting gratuities.

The Board held that OSC has jurisdiction to bring disciplinary actions against employees for violations of standards of conduct.

Williams was removed from the Senior Executive Service, demoted and ordered to pay a civil fine of \$1,000. 27 MSPR 97 (1985)

- *Special Counsel v. Russell* (Pending trial before an Administrative Law Judge)

Russell, Comptroller of the U.S. Customs Service, was charged with sexually harassing and assaulting female subordinates. On respondent's contest of jurisdiction, the Board ruled that OSC has authority to prosecute sexual discrimination and standards of conduct charges and referred the case to an ALJ for trial on the substantive allegations. 28 MSPR 162 (1985)

- *Special Counsel v. Harvey* (Pending Appeal in the U.S. Court of Appeals)

Harvey, who was then the Assistant Inspector General for Audits at the Department of Energy, was charged with reprisal against an employee for whistleblowing and for exercise of an appeal right. Harvey was also charged with discriminating against the employee based on his mistaken belief that the employee improperly disclosed an Inspector General report to a Congressional investigator.

The Board found that Harvey engaged in reprisal against the employee for exercise of an appeal right and ordered him removed from the Senior Executive Service and demoted to a non-managerial grade 14 position for a period of three years. No. HQ12068810021 (MSPB December 6, 1984) (unpublished)

- *Special Counsel v. Hoban*

Hoban, formerly chief of the police section at the Veterans Administration Medical Center at Palo Alto and Menlo Park, California, was charged with obstructing an employee's right to compete for employment, granting an unauthorized preference to another employee, and taking reprisal against an employee for whistleblowing. The Board found against Hoban on all charges and ordered him demoted four grades from a GS-9 to GS-5. 24 MSPR 154 (1984)

- *Special Counsel v. Filiberti and Dysthe* (Pending Appeal in the U.S. Court of Appeals)

Filiberti, the civilian personnel officer, and Dysthe, the director of the employ-

ment division, at the Military Sealift Command/Pacific (MSCPAC) of the Department of the Navy in Oakland, California, were charged with influencing an applicant to withdraw from competition.

The Board found the respondents liable on all charges and ordered each suspended for 60 days.

Dysthe served the suspension. Filiberti retired before serving his suspension, and at OSC's request, the Board ordered the MSC to withhold from the payment otherwise due to Filiberti for accrued annual leave, the amount of salary he would have been required to forfeit had he served the suspension. 27 MSPR 498 (1985); 27 MSPR 577 (1985)

- *Special Counsel v. Everett*

Everett, an Army National Guard technician serving as State Aviation Officer with the North Carolina Army National Guard, was charged with reprisal against a subordinate for exercise of an appeal right. The Board held that although National Guard technicians are federal employees (about 42,000 in number), disciplinary action against them is the exclusive province of the adjutant general of the state's National Guard. The Board therefore dismissed OSC's complaint for lack of jurisdiction. 28 MSPR 348 (1985)

- *Special Counsel v. DeFord and Julian*

DeFord, Director of the Office of Administration, Environmental Protection Agency, Research Triangle Park, North Carolina, and Julian, the EPA Personnel Officer at Triangle Park, were charged with improperly promoting a subordinate employee.

Julian conceded liability and was ordered suspended for 90 days. 28 MSPR 95 (1985)

DeFord, who retired before the case was decided, was found in violation and was ordered to pay a fine of \$750. 28 MSPR 98 (1985)

- *Special Counsel v. Woods*

Woods, formerly Chief of Operations in the Los Angeles Regional Office of the EEOC, was charged with sexually harassing female subordinates. After the com-

plaint was filed, the agency sought and obtained the Special Counsel's approval of an agency removal action against Woods. OSC therefore filed a motion to dismiss the complaint, which the Board granted. Woods appealed the agency disciplinary action, and subsequently reached a settlement with the agency, the terms of which were sealed by the MSPB presiding official. No. HQ12068510008 (MSPB August 7, 1985) (unpublished)

- *Special Counsel v. Zimmerman and Pouy* (Pending ALJ recommended decision)

Zimmerman, a Supervisory Operations Research Analyst, and Pouy, an Operations Research Analyst, at the Defense Logistics Agency, Cameron Station, Alexandria, Virginia, were charged with religious discrimination against an employee. Zimmerman was also charged with reprisal against the employee for exercise of an appeal right. No. HQ12068510015

- *Special Counsel v. Chiarella and Lynn*

Chiarella, the Forest Service's Petersburg District Ranger at the Tongas National Forest, Petersburg, Alaska, and Lynn, the Forest Supervisor for the Stikine Area Ranger District, Petersburg, Alaska, were charged with terminating an employee during his probationary period based on the employee's letter to a newspaper criticizing the agency's employment practices.

OSC gave approval to the agency to take disciplinary action against the employees on the basis of the same conduct as that charged in OSC's complaint. The agency suspended Chiarella for 14 days and Lynn for 30 days. No. HQ12068510014

- *Special Counsel v. Parker* (Pending before an ALJ)

Parker, the Chief of Psychology Service at the Veterans Administration Medical Center, Columbia, Missouri, was charged with influencing an applicant to withdraw from competition for a position. At the close of the fiscal year, the parties jointly proposed a settlement wherein Parker would receive a letter of reprimand

from the agency, and pay a fine of \$1,000. Trial date was deferred pending the ALJ's consideration of the proposed settlement. No. HQ12068510029

- *Special Counsel v. Ponce* (Pending MSPB decision)

Ponce, an Artillery Repairer Foreman in the Department of the Army's Weapons Maintenance Section, Yuma, Arizona, was charged with nepotism. In a settlement agreement, Ponce admitted to the conduct in issue and agreed to a 14-day suspension. The ALJ recommended that the Board approve the settlement. The matter was pending before the Board at the close of FY 1985. No. HQ12068510031

- *Special Counsel v. Ross and Catledge* (Pending trial before an ALJ)

Ross, the Personnel Officer, and Catledge, a Personnel Management Specialist, at the Veterans Administration Outpatient Clinic, Las Vegas, Nevada, were charged with several counts of willfully obstructing the rights of applicants to compete, and granting unauthorized preference in connection with their actions during the selection processes to fill two vacant positions. Both were also charged with violations of employee standards of conduct for allegedly providing knowingly false information to the Office of Personnel Management regarding the availability of certain candidates and for making false statements to OSC investigators. No. HQ12068510034

- *Alexander v. Department of the Navy*

Alexander, a Supervisory Personnel Management Specialist in the Consolidated Civilian Personnel Office of the Department of the Navy, Washington, D.C., was suspended for 21 days and reduced in grade for, among other things, allegedly advocating his daughter for appointment to a summer position with the agency. OSC intervened in the appeal in order to challenge the presiding official's interpretation of the elements necessary to prove a charge of nepotism.

The Board, agreeing with OSC, held that "advocating" may involve either a recommendation or a referral of a relative

for consideration by an official lower in the chain of command. 24 MSPR 621 (1984)

- *Moen v. Department of Transportation* (Pending on Appeal to the U.S. Court of Appeals for the Federal Circuit)

Moen, and air traffic control specialist, was suspended for 45 days for off-duty use of a controlled substance and for lying to a statutory Inspector General investigating substance abuse. OSC intervened in support of the agency's case.

The Board sustained the charges and affirmed the decision. No. SF07528411170 (MSPB August 14, 1985) (unpublished)

- *Golden v. Department of Transportation*

Golden, an air traffic control specialist, was suspended for 45 days for off-duty use of a controlled substance and for lying to a statutory Inspector General, who was investigating drug abuse. OSC intervened in support of the agency's case. Golden withdrew his appeal on December 6, 1984. No. SF07528411211 (MSPB, intervention filed November 26, 1984)

- *In re Public Dissent (Carl Telleen)*

The United States Department of Agriculture's Food Safety and Inspection Service issued a letter of reprimand to Telleen for authoring a newspaper article published in the *Des Moines Register* critical of FSIS meat inspection practices. OSC investigated the matter and recommended that the agency rescind the reprimand and agree not to apply its standards of conduct regulations in such a way as to interfere with or hinder its employees' rights to make disclosures protected under either the Civil Service Reform Act or the First Amendment.

While the recommendations were pending before the agency, Mr. Telleen's representatives filed a request that the Board review the agency's implementation of the regulation. OSC intervened in this proceeding on December 12, 1984, arguing for termination of the proceeding as moot. Subsequently, the agency took the corrective action recommended by OSC, and at OSC's suggestion, the Board dismissed the regulation review proceeding as moot. No. HQ12058510002 (MSPB April 15, 1985) (unpublished)

APPENDIX B

- *Special Counsel v. Johnson*

Johnson was a letter carrier with the United States Postal Service, at the Edison Park Station, South Bend, Indiana. Despite warnings from a postal service personnel manager that partisan political activity is forbidden under the Act, Johnson filed a petition with the Clerk of Cass County, Michigan, to have his name placed on the ballot as a candidate for Cass County Commissioner for the 7th District Democratic primary.

OSC issued a warning letter to Johnson notifying him that he had violated the law by running for partisan political office and that he must not run again.

Despite the warning letter, Johnson ran for re-election. The Special Counsel filed charges with the Board.

Johnson never answered the complaint or the Board's order to show cause. The Board therefore found Johnson in default and ordered him removed. 26 MSPR 560 (1985)

- *Special Counsel v. Suso*

Suso, a Planner and Program Manager for Economic Development and Planning, Northeast Ohio Four County Regional Planning and Development Organizations (NEFCO), was charged with being a partisan candidate in the primary and general elections for the Village Council of Lakemore, Ohio to which she was elected. She refused to withdraw her candidacy even though warned by both the executive director of her agency and OSC that her candidacy violated the Hatch Act.

The Board held that federally funded regional councils of government, like NEFCO, meet the definition of "local agency" for Hatch Act purposes. While finding Suso in violation of the Hatch Act, the Board determined that the violation did not warrant removal since the question of the status of a regional council of government was one of the first impression and since Suso reasonably believed

she was exempt from the Act. The Board warned, however, that Suso and those similarly situated must thereafter comply with the law. 26 MSPR 673 (1985)

- *Special Counsel v. Seastrunk*

Seastrunk, a GS-11 Equal Employment Opportunity Manager for the Department of the Army at Fort Polk, Louisiana, ran for and won a seat on the Vernon Parish, Louisiana, School Board in a partisan election. He had been warned by the agency of its obligation to report his candidacy to OSC and OSC had thereafter warned him prior to the election that his candidacy violated the Hatch Act. OSC filed charges.

The Board found Seastrunk in violation and ordered him suspended for 90 days. 28 MSPR 51 (1985)

- *Special Counsel v. Clause*

Clause, a claims authorizer at the Social Security Administration in Kansas City, Missouri, was charged with writing an article in a union newspaper urging support of certain candidates in the Presidential election.

Clause did not contest the allegations and in settlement agreed to a 45-day suspension, which the Board imposed. 26 MSPR 556 (1985)

- *Special Counsel v. Zanjani*

Zanjani, a research psychologist in the Department of Research Services, Veterans Administration Medical Center, Minneapolis, Minnesota, was charged with soliciting political contributions from subordinates and co-workers. In settlement, he agreed to an 84-day suspension, which the Board imposed. 26 MSPR 192 (1985)

- *Special Counsel v. Carney* (Pending ALJ recommended decision)

Carney, a Heavy Mobile Equipment Mechanic, WG-5803-10, at Keesler AFB, Biloxi, Mississippi, was charged with running for mayor of Biloxi in a partisan primary election. He was warned prior to the election by both the agency and OSC that his candidacy violated the Hatch Act.

OSC filed charged after Carney per-

sisted in pursuing his candidacy. No. HQ 12068510030

- *Special Counsel v. Biller, Sombrotto and Blaylock* (Pending ALJ recommended decision)

Biller, Sombrotto and Blaylock, federal employees on leave without pay from their respective agencies, are also, respectively, presidents of the American Postal Workers Union, the National Association of Letter Carriers, and the American Fed-

eral of Government Employees. Each was charged with endorsing and soliciting support for a partisan candidate for President of the United States in their union newsletters.

The matters were pending before an ALJ for decision on a stipulated record at the close of FY 1985. Nos. HQ12068510016, HQ12068510017, HQ12068510018

