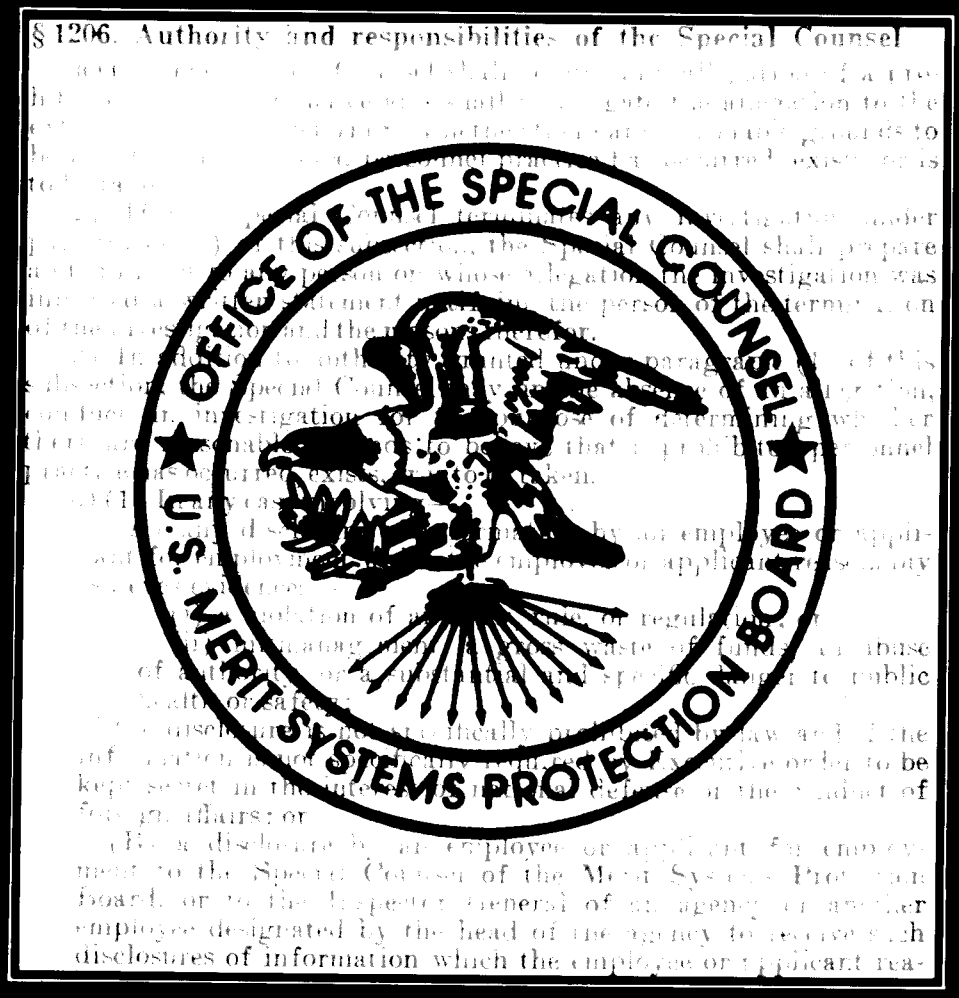
# A Report To Congress From The Office of Special Counsel

## Fiscal Year 1986




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**

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

December 29, 1986

The Honorable George Bush
President of the Senate
and
The Honorable Jim Wright
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 1986 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.

My term as Special Counsel began in September 1986, the end of the reporting period. Therefore, this report reflects, for the most part, the work of the OSC under the leadership of former Special Counsel, K. William O'Connor. Following his departure in June 1986, the statutory mission of the office continued under the able direction of the Acting Special Counsel, Lynn R. Collins. I am pleased to report significant accomplishments under their stewardship.

This report chronicles a continuing record of achievement on the part of the OSC. The Office has in place an efficient and effective organizational structure and a staff of dedicated, experienced professionals determined to successfully implement the statutory responsibilities of the office.

I am grateful for the opportunity afforded me as Special Counsel to assist in the President's commitment to integrity and efficiency in government. My efforts will be directed to that goal, and to assuring the continued effectiveness of the OSC.

With respect,

Mary F. Wieseman
Special Counsel

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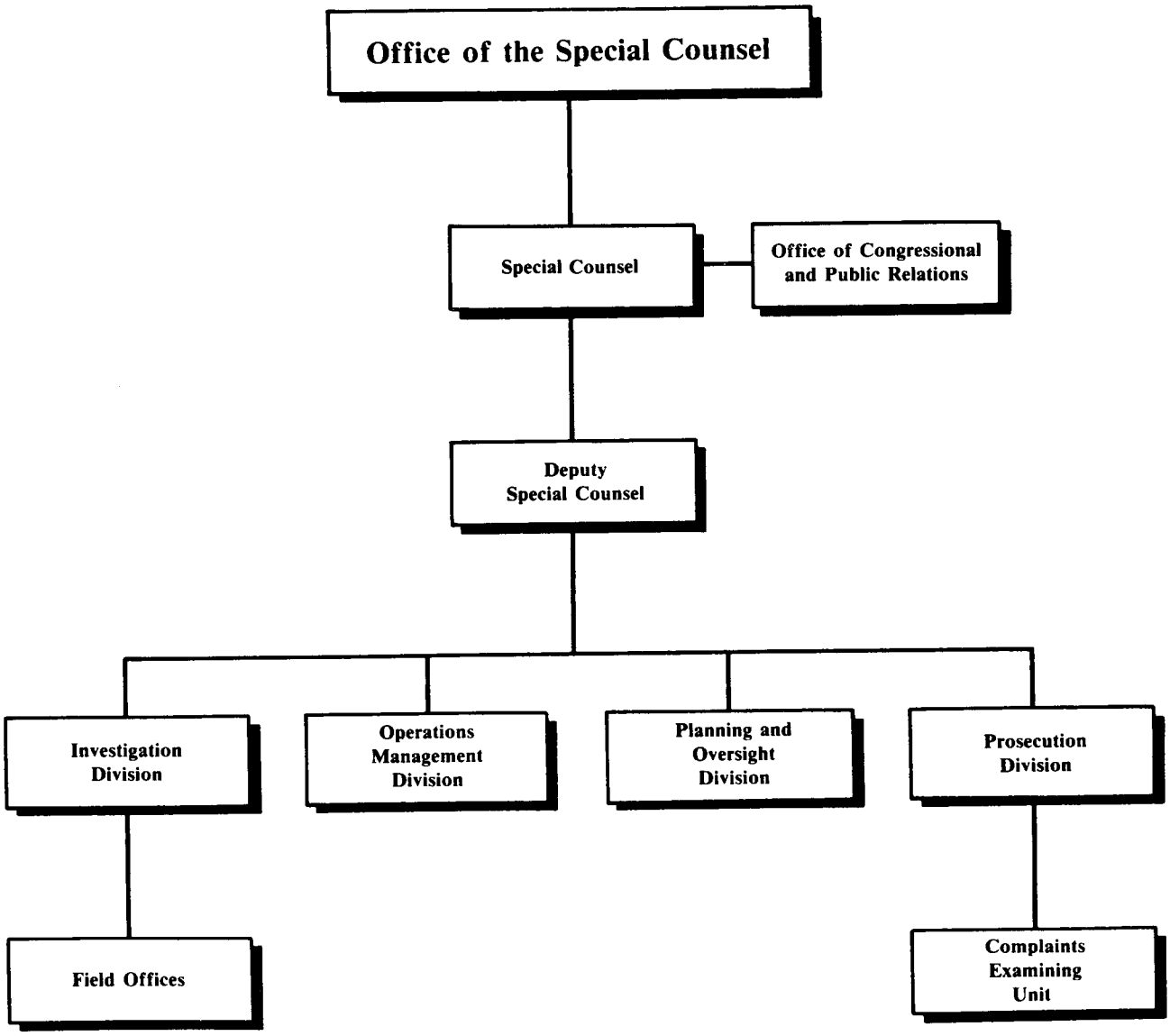

Office of the Special Counsel
Special Counsel
Office of Congressional and Public Relations
Deputy Special Counsel
Investigation Division
Operations Management Division
Planning and Oversight Division
Prosecution Division
Field Offices
Complaints Examining Unit

# 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 1986 the office operated with a budget of $4.396 million and a full time equivalency (FTE) personnel ceiling of 84. Budget and staff have remained relatively constant since the beginning of 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 integrity of the merit system by preventing and correcting conduct which undermines the merit system principles, thereby protecting the rights of those who work within that system. As an agency, OSC is independent of the Board operationally and administratively.

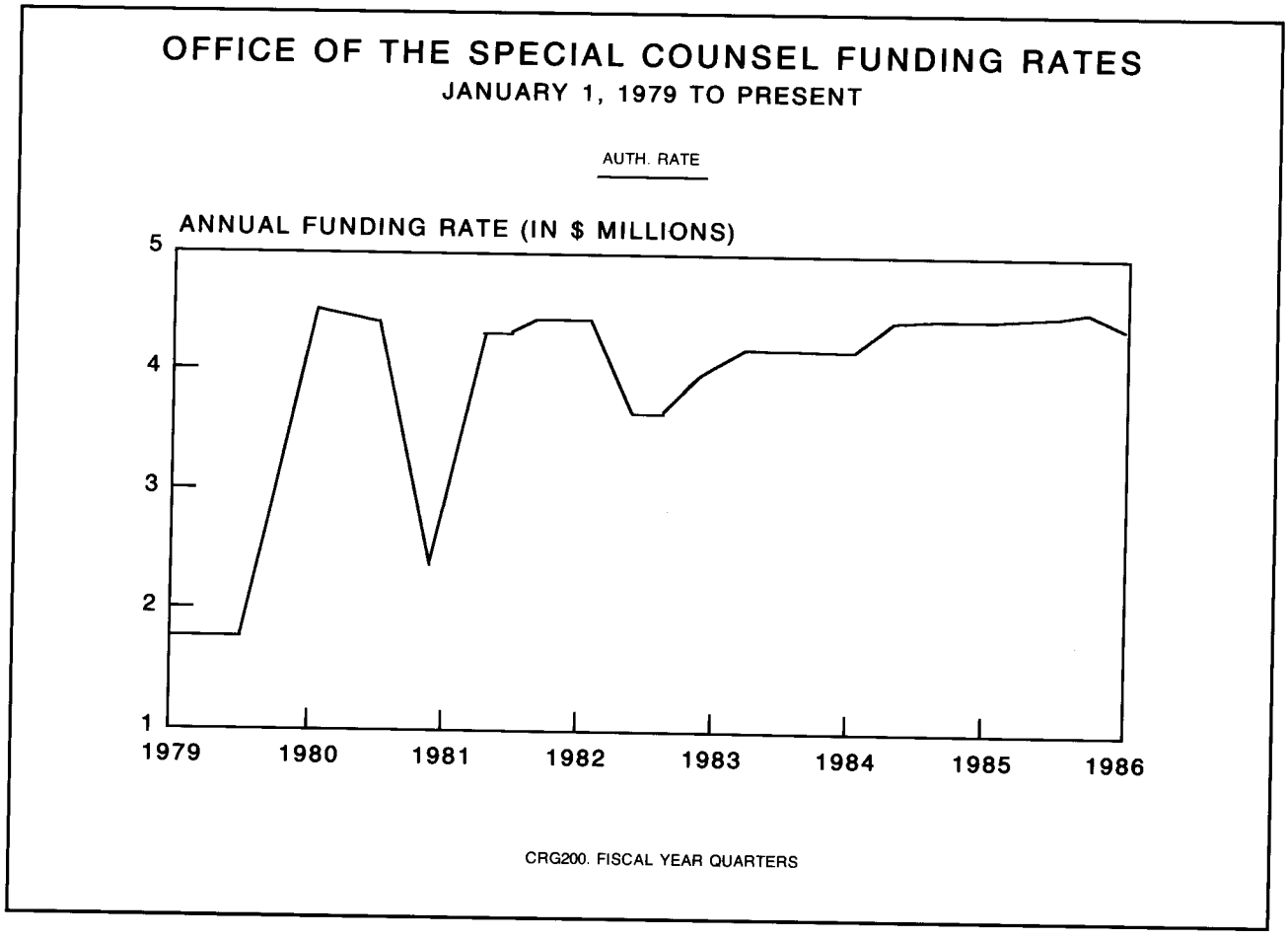
The primary responsibilities of the OSC are:

1. to investigate allegations of activities prohibited by civil service law, rule or regulation, primarily allegations of prohibited personnel practices, and, 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 the employee's identity except with the employee's consent;

3. to enforce the Hatch Act.

OSC has jurisdiction world-wide, wherever there are federal civil servants. In this capacity, agency staff have followed leads in investigations throughout the United States, Europe, the Middle East, the South Pacific, Central America and Africa.



# Operations

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

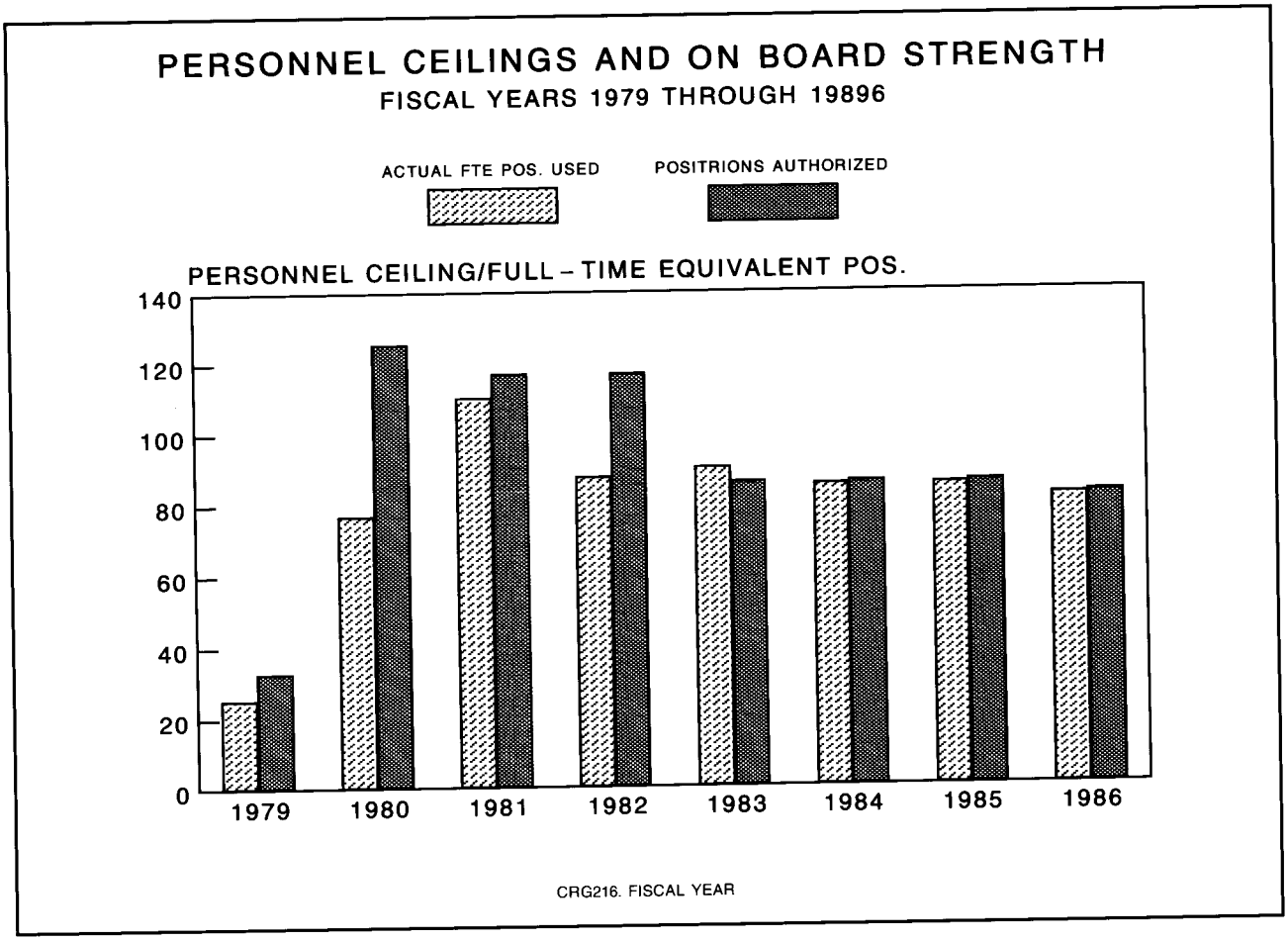
## Operations Management Division

The Operations Management Division, with 16 employees, is responsible for all financial management, budgeting, personnel management, procurement, management information and property management activities of the Office of Special Counsel.

During fiscal year 1986, a funding cut of $198,000 was required in mid-year by the Gramm-Rudman-Hollings law. This necessitated changes in operational techniques, including reductions in travel and the use of court reporters.

Increased emphasis on the use of automated information systems brought about other efficiencies. OSC's personnel management data base was made more useful by adoption of the USDA National Finance Center's position management system. The financial management system was also strengthened through more complete integration with the NFC's central accounting system. The groundwork was laid for future office-wide automation initiatives, including, at year-end, a major conversion to desktop printing capabilities, and expanded use of personal computing.

OSC participation in the GSA administered Diners Club Charge Card Program since



January 1986 has resulted in more timely submission of travel vouchers and processing of payments, and more efficient management of travel advances. A second space audit was conducted by the GSA, which again concluded that the OSC utilization of space was excellent and that no changes were necessary.

Budget and staffing levels were stable during the year. The office operated at its 84 full time equivalency (FTE) personnel ceiling and an authorized budget of $4.396 million. Over 90 percent of the OSC budget is for uncontrollable items such as personnel compensation, rent, communications, and benefits. The balance covers 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 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 inquires which span the OSC program. The Office of Congressional and Public Relations is charged with increasing the 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 maintains a liaison with the Congress, the press and the public. This is accomplished in great part by responding to telephone inquiries by Congress and the press, distributing informational materials to the public and Congress, and arranging for presentation of speeches to various interest groups in both the public and private sectors.

Twenty-five speeches were given around the country by members of the OSC senior staff during FY 1986. In addition, the office distributed over 36,000 copies of OSC informational materials to the public and Congress. Also during the year, the office produced and sent over 300 case-related letters to Congress. Responses to inquires concerning non-case related matters stayed about the same as FY 1985.

## Planning and Oversight Division

The Planning and Oversight Division (POD) is responsible for coordinating the development, documentation and implementation of OSC policies and procedures and the development of the overall operating plans of the OSC. POD also serves as the OSC Office of Inspector General and is responsible for inspecting, auditing and evaluating programmatic and administrative operations and the adequacy of internal control and financial management systems. POD staff oversees 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 a POD function. In FY 1986, POD was also assigned responsibility for reviewing all requests to reopen matters previously closed by OSC and taking or recommending appropriate actions thereon. Finally, the division personnel serve all legal and investigative staff as a 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.

OSC began FY 1986 with a comprehensive operating plan, the first such fiscal year planning document produced since the establishment of the office. The operating plan was 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. Those plans will be updated annually. Internal control reviews and program audits were conducted on a systematic and continual basis.

These reviews have identified areas in which improvements can be made to further enhance OSC operations.

POD also assumed responsibility in FY 1986 for processing requests by complainants for reconsideration of OSC decisions to close their files without action. By the end of FY 1986, requests for reconsideration were normally processed within 30 days.

In FY 1986, POD also initiated special inquiries into potentially significant merit system problems in federal agencies. For the first time, an investigation into an allegation of unequal pay for equal work involving three military departments and the Office of Personnel Management was conducted pursuant to Federal court holdings which have further defined the jurisdiction of OSC in position classification matters.

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

A comprehensive legislative history covering the establishment of the Office of the Special Counsel, the merit system principles, and the prohibited personnel practices under Reorganization Plan Number 2 and the Civil Service Reform Act of 1978, was published in March 1986. The title of the book is "Protecting the Integrity of the Merit System."

# Investigation Division

The Investigation Division ended FY 1986 with 32 employees, only three of whom are clerical. Despite this reduction in staff of seven positions from FY 1985, this division increased its output and reduced the pending investigative workload. These gains in the face of resource reductions were largely the product of training as new staff became fully familiar with OSC's unique jurisdiction and trial-oriented procedures.

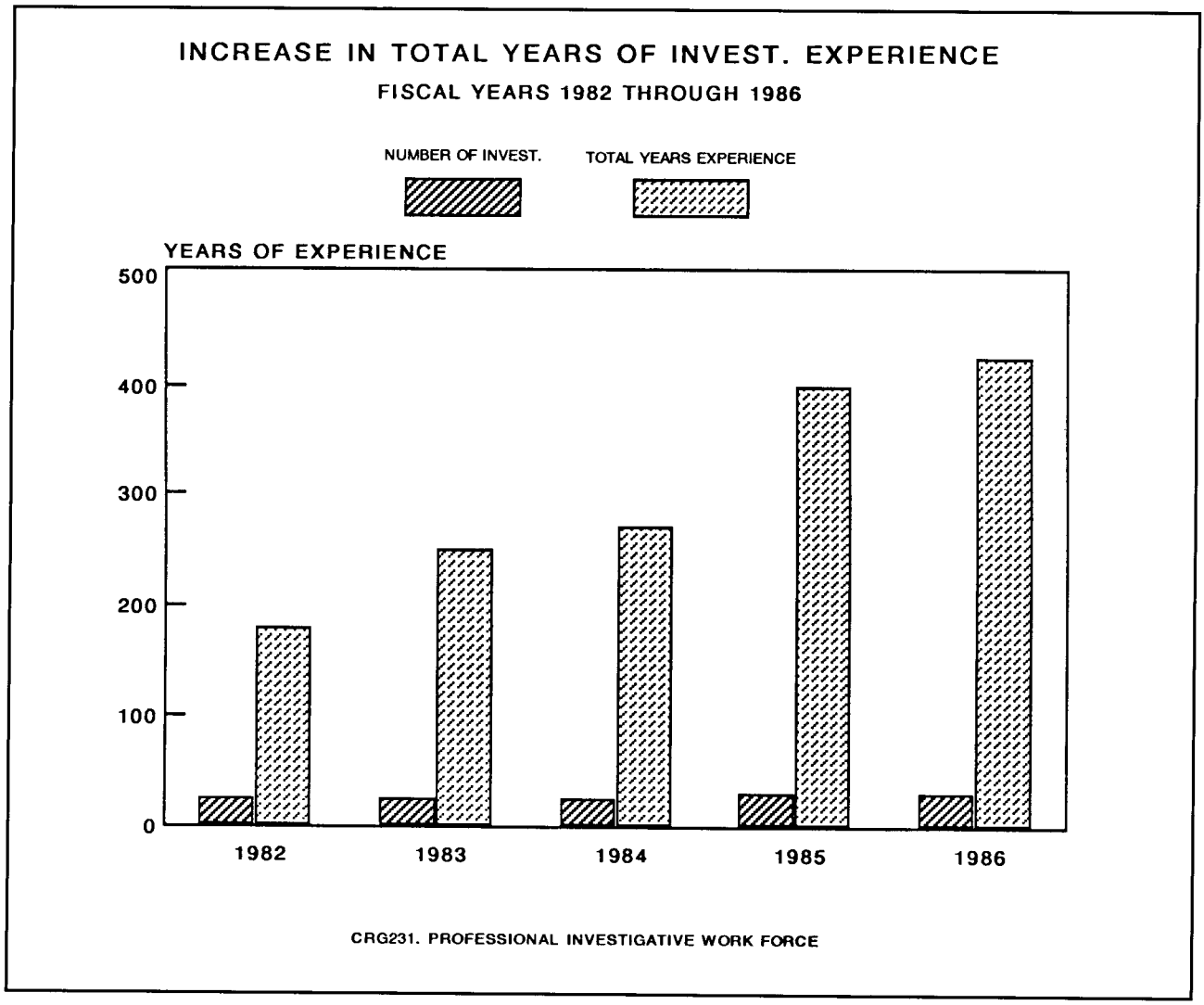
The division workload is heavily concentrated on those prohibited personnel practices which prohibit reprisal and various forms of discrimination. These violations frequently involve complex questions of motivation and intent and are, thus, the most difficult to investigate. The most experienced investigators 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. Investigation 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 procedure is to investigate aggressively 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 investigation is 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 1986, the division completed 197 field investigations. At the end of the fiscal year 86 additional matters were under active investigation. These results compare favorably to the 155 investigations completed in FY 1985 and the 117 investigations pending at the end of FY 1985.

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 submitted. In FY 1986, 133 disclosures were received and 105




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.

# Prosecution Division

The focus of all OSC operations is protection of the rights of employees under the merit system through corrective actions and when warranted, the discipline of those who violate the law.

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 1986 was the third full year of activity for CEU. The unit has materially aided in reducing the average time required for final resolution of matters.

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 243 matters during the fiscal year.

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 on 120 day details, 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. Increased efficiency in analyzing case files, and preparing briefs and memoranda, has been achieved by procuring personal computers for attorneys in the division.

During FY 1986, OSC initiated disciplinary prosecutions against nine employees and intervened in two cases before the Board. (See Appendix A). OSC sent two formal corrective action letters to agency heads and corrective action was initiated by agencies on receipt of information and reports from OSC in four other matters.

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

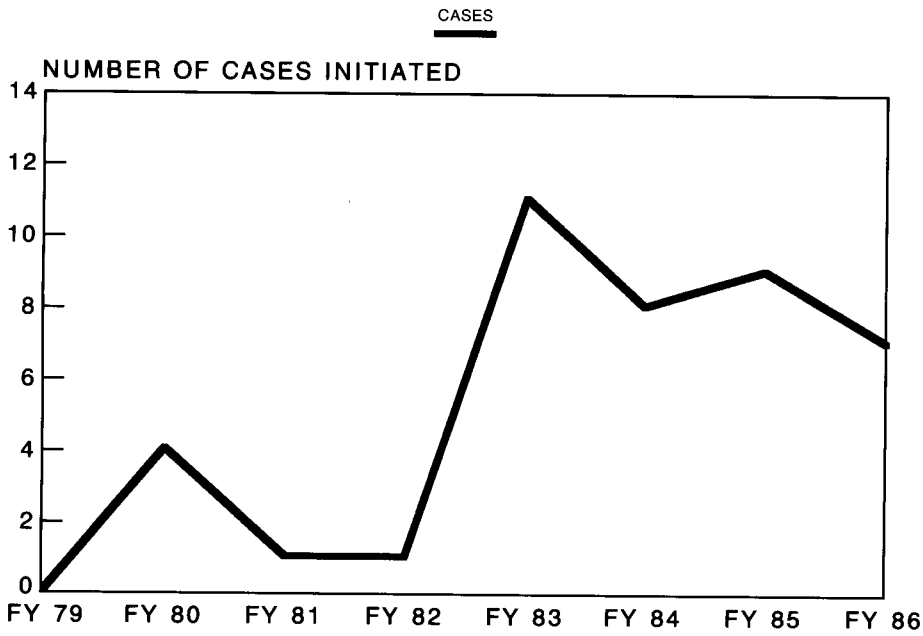
The personnel practices specifically prohibited by the CSRA of 1978 are codified at 5 U.S.C. §2302(b) and provide the standard for CEU and OSC general operations. Complainants generally allege violations of one or more of these provisions. The statute provides that any person who has the authority to 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 an employee for whistleblowing;
- 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 violating 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). 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 1986, 247 such complaints were 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 a 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,

## DISCIPLINARY ACTION CASES BEFORE MSPB
### INVOLVING PROHIBITED PERSONNEL PRACTICES

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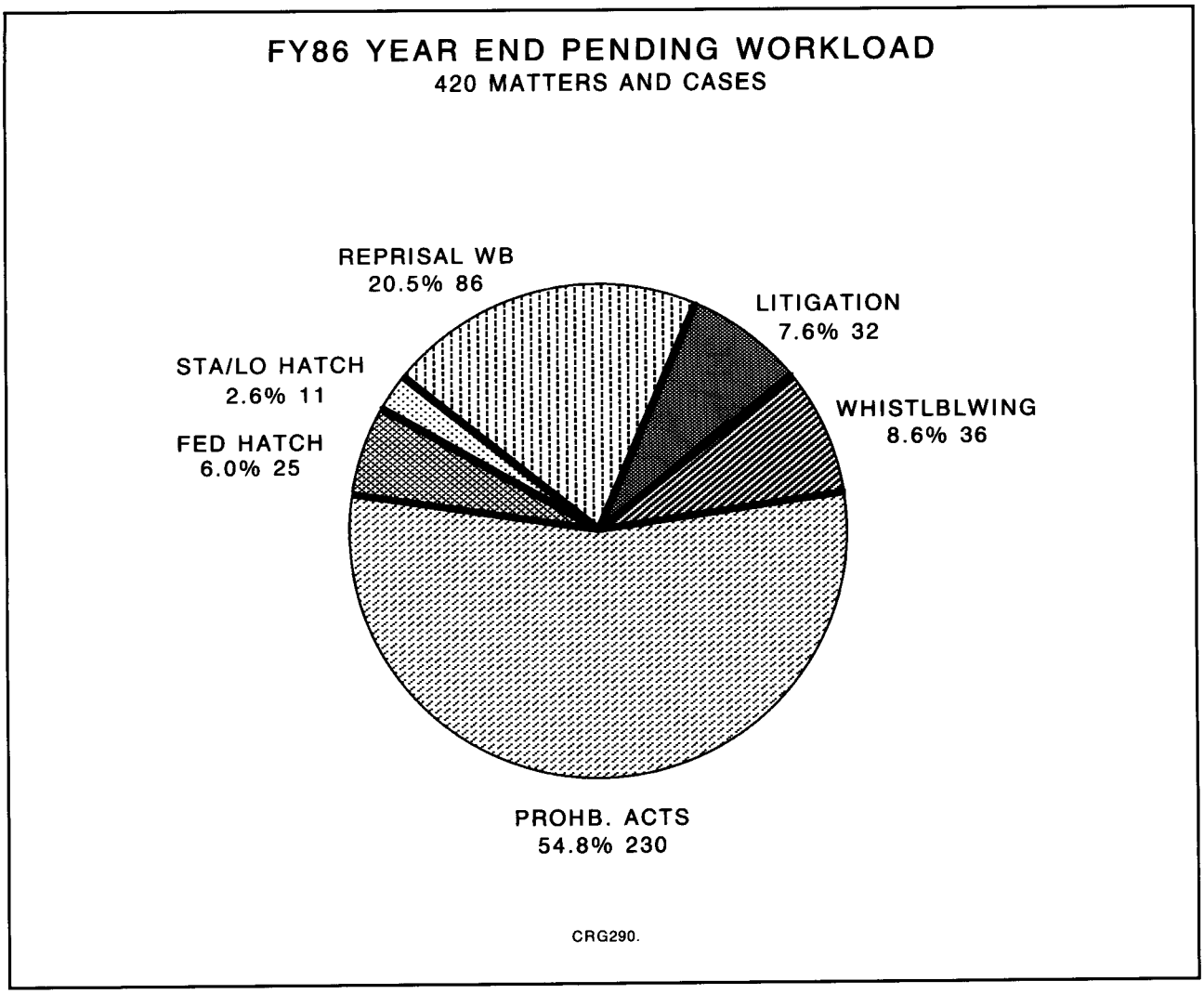
5 U.S.C. §2302(b)(1)(E)), are processed by the Special Counsel as any other allegation of a prohibited personnel practice.

Resolution of complaints of prohibited personnel practices may be achieved in a number of ways if the investigation shows 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, she 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; or assessment of a civil penalty not to exceed $1,000.

During FY 1986, 1307 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 85.6 percent of the total intake of the office during FY 1986 (1526). Of the 1307 non-Hatch Act complaints received, 262 (17.2 percent) alleged reprisal for whistleblowing.

Non-Hatch Act disciplinary actions, including interventions in adverse actions before the MSPB, were initiated against nine employees during the fiscal year. A brief synopsis of the non-Hatch Act cases and interventions filed or decided during FY 1986 may be found in Appendix A.




Corrective action was requested in letters sent to agency heads on two occasions in FY 1986. In the first instance, OSC recommended that the agency restore back pay and leave to an employee who was placed on enforced leave. OSC action was based on the agency's failure to provide the employee with timely notice of his right to appeal the enforced leave decision to the MSPB. At the close of FY 1986, the response was pending.

In the second matter, the OSC apprised the agency head of its investigation of a department's long-standing, unlawful practice of detailing intermittent excepted service employees to competitive service positions. OSC brought this matter to the agency's attention so that appropriate action could be taken to ensure that civil service law will be strictly enforced. The agency advised OSC that cautionary letters had been issued to the offending officials and that a memorandum was distributed by the head of the agency expressing concern over the improprieties which had occurred, and an expectation that future civil service violations would be avoided.

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

During FY 1986, five matters were settled by OSC and the agency prior to the initiation of formal action:

- During an investigation, OSC uncovered

evidence indicating that certain officials had improperly implemented summer hire programs. As a result of OSC action, the agency issued a suspension, reprimand, warning notice and counseling letter to four involved employees.

- In FY 1985, OSC conducted an investigation which disclosed evidence indicating that an official may have engaged in unlawful reprisal action. Based on information indicating that the target employee, then employed in another office, planned to retire in January 1986, OSC determined not to file disciplinary action. However, OSC transmitted its findings to the agency in October 1985. In January 1986, OSC was informed that the target official retired from service. OSC was also advised that the agency and one complainant had reached an informal resolution of related EEO actions.
- In FY 1985, OSC conducted an investigation of alleged sexual harassment by an employee. While OSC declined prosecution because of the age and nature of the complaint, it referred the matter, in November 1985, to the agency for appropriate agency action. In response, the agency indicated that it would initiate inquiry. OSC was informed that the target employee resigned from federal service in July 1986.
- In FY 1986, OSC investigated charges of sexual harassment by a supervisor. Because the target employee later accepted a demotion to a nonsupervisory role at another facility, OSC referred the matter for appropriate agency action. A response was pending at the close of FY 1986.
- Following a reprisal investigation, OSC notified the agency of its findings and requested appropriate agency action. The response regarding prospective corrective or disciplinary action was pending at the close of FY 1986.

In FY 1986, OSC or its employees were named defendants in 11 civil actions. At the close of FY 1986, motions for dismissal had been granted in eight of those actions. Two actions, which were still pending, were initiated to obtain OSC investigative material, under the Freedom of Information Act. In other lawsuits, the plaintiffs sought damages or writs of mandamus.

In one notable mandamus case, *Vick v. Block,* Civil Action No. 85-H-1304-S (M.D. Ala.), OSC was named as a co-defendant by a GS-5 Food Inspector (trainee) in Alabama who had been discharged by the Department of Agriculture. The court dismissed the action against OSC. Memorandum Opinion, March 28, 1986. In support of its decision, the court determined that fact finding conducted by OSC's Complaints Examining Unit (CEU) satisfied OSC's investigatory responsibilities under law. The court also affirmed that OSC stay authority was discretionary and therefore not a subject for judicial review.

A major whistleblower reprisal case prosecuted by OSC before the MSPB was reversed by the Fourth Circuit during the reporting period. *Starrett v. MSPB,* 792 F.2d 1246 (4th Cir. 1986). The Court held that there was no substantial evidence to support the MSPB's decision imposing discipline on a review official of the Defense Contract Audit Agency (DCAA). OSC had alleged, and the Board had found, that the official had denied an employee's request for a waiver of a reassignment in reprisal for blowing the whistle on improper activities within DCAA. The Court relied on the fact that the employee was seeking a *waiver* of an established rotation policy in finding that reprisal was not a significant factor in the official's decision.

# 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 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 in-

formation disclosed evidences one of the categories of wrongdoing or mismanagement 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 referral of the information.

The identity of the discloser of information to OSC is never revealed without that person's consent. Where necessary, the information 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 refer these whistleblowing investigations to their Inspectors General.

**Whistleblowing Disclosures Processed**

| | |
|---|---|
| Disclosures on Hand Beginning FY 1986 | 12 |
| New Disclosures Received | 133 |
| Total Processed | 132 |
| FY 1986 Ending Balance (On Hand at FY End) | 13 |

**Referrals to Agencies**

| | |
|---|---|
| Referrals | |
| — Investigation and Report Required (5 U.S.C. §§1206 (b)(3), (4)) | 14 |
| — Report Only Required (5 U.S.C. §§1206 (b)(2), (7)) | 38 |
| — Informal Referral to IG | 53 |
| Sub-total | 105 |
| Closed without Referral* | 27 |
| FY 1986 Total | 132 |

* OSC does not refer purported allegations which are incomprehensible or not cognizable under law.

**Reports Received From Agencies**

| | |
|---|---|
| FY 1986 Beginning Balance | |
| Report of Investigation (5 U.S.C. §1206 (b)(4)) | 6 |
| Report of Action Taken (5 U.S.C. §1206 (b)(7)) | 5 |
| Informal IG Reports | 2 |
| Sub-total | 13 |
| FY 1986 Reports Received | |
| Reports of Investigation (5 U.S.C. §1206 (b)(4)) | 13 |
| Reports of Action Taken (5 U.S.C. §1206 (b)(7)) | 38 |
| Sub-total | 64 |
| Reports Accepted/Closed | |
| 5 U.S.C. §1206 (b)(4) | 19 |
| 5 U.S.C. §1206 (b)(7) | 40 |
| Sub-total | 59 |
| FY 1986 Reports Pending Review | 5 |

Of the nineteen matters closed after receipt of a Report of Investigation pursuant to 5 U.S.C. §1206 (b)(4), nine (47%) substantiated the allegations all or in part and ten (53%) resulted in unsubstantiated allegations.

Twenty-two (55%) of the forty matters closed after receipt of a Report of Action Taken pursuant to 5 U.S.C. §1206 (b)(7), were substantiated in whole or in part. Eighteen (45%) were unsubstantiated.

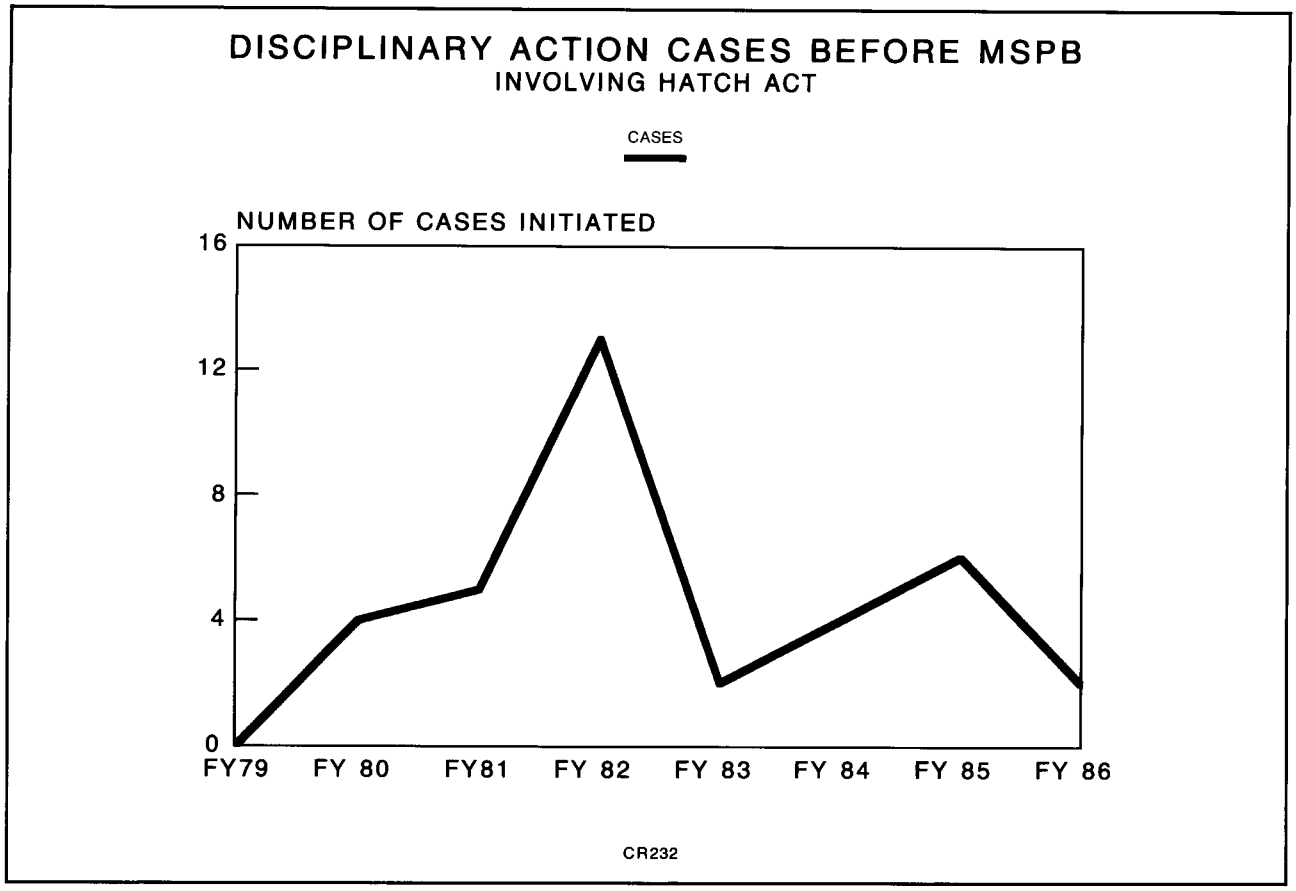
Most of the corrective actions involved changes in agency rules, regulations or practices. A relatively small number (19%) involved disciplinary action against any employee.

The following are illustrative of the type of disclosures referred to agencies and the actions which resulted.

- The Secretary of Defense responded to a disclosure transmitted pursuant to 5 U.S.C. §1206 (b)(3) that a contractor was marking-up charges from 28% to 120% on electronic components supplied to the Defense Electronics Supply Center. The Department initiated action to identify and collect an estimated $500,000 from the contractor, and the manufacturer of the components invited competitive bids to eliminate exclusive distribution rights and bring about ongoing savings.
- The Director of the United States Information Agency reported that a Service Chief at the Voice of America was suspended without pay for fourteen days and other employees were counseled for time and attendance violations as a result of an investigation of allegations transmitted pursuant to 5 U.S.C. §1206 (b)(3). A comprehensive directive on time and attendance policies was issued to prevent further widespread absence from the work-site during normal business hours.
- The Secretary of the Army, in response to a 5 U.S.C. §1206 (b)(3) referral, sent a report of investigation conducted pursuant to 5 U.S.C. §1206 (b)(4), which substantiated charges that senior Army officials had approved the use of Special Active Duty for Training (SADT) tours and extended those tours for reasons not permitted by Army regulations. In addition, officials improperly used Reserve Personnel Army (RPA) appropriated funds for travel of personnel on SADT tours.
- The Administrator of the National Oceanic and Atmospheric Administration responded to allegations, transmitted to him pursuant to 5 U.S.C. §1206 (b)(2) & (7), that a Center Director misused a government vehicle and took excessively long lunch hours. Although the misuse of the government vehicle was not substantiated, the Center Director had to be counseled for practices that may have given the appearance of an abuse of his authority.
- The Secretary of the Army, pursuant to 5 U.S.C. §1206 (b)(2) & (7), reported that allegations of substandard nursing care at an Army Medical Center, although minor and without clinical harm to patients, were substantiated. Employees were counseled and the Surgeon General of the Army was provided a copy of the report to determine if further corrective action was necessary.

# 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 re-




quired to investigate allegations of prohibited political activity and, when appropriate, prosecute employees who violate the law before the MSPB.

A total of 21 allegations were carried over from FY 1985. During FY 1986, a total of 83 allegations of Hatch Act violations were received by the OSC. By the end of FY 1986, a total of 70 Hatch Act matters had been closed, leaving 34 matters carried over to FY 1987.

Since October of 1982, OSC Hatch Act enforcement has focused upon educating those covered by the law to encourage voluntary compliance and to prevent violations. During FY 1986, 1200 employees were provided informal telephone advice pertaining to the Act and 164 employees received formal written advisory opinions from the OSC.

In an effort to conserve resources and to apply the law fairly, OSC 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 formal prosecution. During FY 1986, 35 individuals received warning letters.

At the end of the fiscal year, two disciplinary action complaints had been filed with the MSPB against employees for violation of the Hatch Act. In 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.

A summary of the circumstances that led to each Hatch Act prosecution initiated by OSC or decided by the MSPB in FY 1986, and the current status of the case may be found in Appendix B.

# Legislation

During FY 1986, Congress considered legislation to amend the Civil Service Reform Act in various ways which would impact on the responsibility and authority of the Office of the

Special Counsel. On February 20, 1986, the former Special Counsel testified before the House Civil Service Subcommittee on H.R. 4033. He stated that the bill, if enacted, would cause a significant change in OSC operations and require greatly increased staff and attendant costs. Specifically, there were three areas of major concern:

1. The attorney-client relationship created between OSC and the complainant as proposed in the original bill raised serious concern.
2. Under the proposed bill, the Special Counsel's subpoena authority would be restricted to federal employees, members of the uniform service or contact employees of the Government.
3. Special Counsel's decision to request a stay would no longer be discretionary, and, once a stay was sought, corrective action litigation would be required if the agency declines to take corrective action.

A number of changes were made to the bill following the submission of extensive comments by the Special Counsel. The revised bill, entitled the Whistleblower Protection Act of 1986, was passed by the House of Representatives at the close of the session. The Senate did not act on the bill in the 99th Congress.

# APPENDIX A
# Litigation

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

  Cofield, a Policeman employed by the Government Printing Office (GPO), Washington, D.C., was charged with violating Civil Service Rule 5.4 for failing to provide truthful testimony at a previous MSPB proceeding, and during an OSC investigation. In April 1986, the Administrative Law Judge issued a decision recommending that the doctrine of collateral estoppel precluded OSC from introducing evidence in support of its case. This case was pending before the Board at the close of FY 1986. No. HQ12068610007.

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

  This action and *Special Counsel v. Cofield* are companion cases. Loney, a GPO Policeman in Washington, D.C., was charged with violating Civil Service Rule 5.4 by his failure to provide truthful testimony at Cofield's MSPB hearing, and during an OSC investigation. In May 1986, OSC and Loney entered into a settlement agreement whereby Loney agreed to pay a $500 civil penalty. This settlement agreement was pending final approval by the Board at the close of FY 1986. No. HQ12068610006.

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

  Mongan, Regional Administrator, Region I, Department of Housing and Urban Development, Boston, Massachusetts, was charged with reprisal and violation of the Inspector General Act of 1978, for failing to promote an employee who made protected disclosures of unlawful conduct. Following a hearing, the Administrative Law Judge, in May 1986, issued a decision recommending that the Board sustain OSC's charges and impose a 60-day suspension against Mongan. This case was pending before the Board at the close of FY 1986. No. HQ12068610004.

- *Special Counsel v. Nichols* (Pending before Administrative Law Judge)

  Nichols, a manager of the Minerals Management Service, Department of Interior, Metairie, Louisiana, was charged with granting an unauthorized preference in connection with a job recruitment action. A hearing before the Administrative Law Judge was conducted in September 1986. This case was pending before the ALJ at the close of FY 1986. No. HQ12068610018.

- *Special Counsel v. Waddams, Reyes, Mitani* (Pending hearing before Administrative Law Judge)

  Waddams, then Acting Regional Administrator of the Department of Education's Region 9 (San Francisco) Credit Management and Debt Collection Service (CMDCS), Reyes, Regional Personnel Officer of Region 9, and Mitani, a Personnel Management Specialist, were charged with engaging in prohibited personnel practices and violating other civil service law in connection with their involvement in a CMDCS reorganization. OSC's 13-count complaint cited one or more of the respondents with unlawfully influencing job candidates to withdraw from competition, deceiving and willfully obstructing candidates concerning their right to compete, and granting unauthorized preferences. This case was pending before the Administrative Law Judge at the close of FY 1986. No. HQ12068610026.

- *Hillen v. Department of the Army* (Pending Petition for Review before MSPB)

  Hillen, Executive Director of Operations and Plans, Military Traffic Management Command, was terminated by the Army in April 1985, for allegedly engaging in sexual harassment of subordinate female employees. Hillen appealed his dismissal to the MSPB. In October 1985, OSC filed a notice of intervention and a petition to review the Initial Decision of the MSPB which had reversed Hillen's removal. In January 1986, the Board vacated the Initial Decision and remanded it for further hearing and adjudication. On remand, the Administrative Judge again ruled that the Army failed to prove its case against Hillen. In July 1986, OSC filed a second petition for review in support of

disciplinary action. This case was pending before the Board at the close of FY 1986. No. DC07528510324.

- *Lynn v. Department of Aqriculture, United States Forest Service* (Pending Petition for Review before MSPB)

  Lynn, Forest Supervisor, and Chiarella, District Ranger, Stikine Area Ranger District, U.S. Forest Service, Petersburg, Alaska, were charged by OSC, in FY 1985, with retaliating against an employee who wrote to a local newspaper editor criticizing an agency hiring program. *Special Counsel v. Lynn,* No. HQ12068510014. After the agency voluntarily took corrective action regarding the aggrieved employee, OSC granted an agency request for a waiver of 5 U.S.C. §1206(f) and the agency suspended Lynn for 30 days and Chiarella for 14 days. On OSC's motion, the MSPB dismissed OSC's disciplinary action complaint in January 1986. 29 MSPR 666 (1986). In response to Lynn's appeal of the agency suspension, an MSPB Administrative Judge determined that only a reprimand was warranted. OSC then filed a petition for review which urged the Board to affirm the agency's 30-day suspension. This case was pending before the Board at the close of FY 1986. No. SE07528610020.

# APPENDIX B
# Hatch Act

- *Special Counsel v. Kehoe* (Pending MSPB Decision)

  Kehoe, an employment interviewer with the Minnesota Department of Jobs and Training, St. Paul, Minnesota, was charged with running as a partisan candidate for State Legislature in a primary and general election, after ignoring several OSC warning letters. In defense of his actions, Kehoe argued that case law supported his view that employees on leave of absence were not subject to the Hatch Act.

  Following a hearing, the Administrative Law Judge (ALJ) issued a decision recommending to the Board that Kehoe knowingly and willfully engaged in misconduct which warranted a removal order. A final decision from the Board is pending.

- *Special Counsel v. Camillieri* (Pending Before Administrative Law Judge)

  Camillieri, Acting Chief of the Fair Hearing Unit, Connecticut Department of Human Resources, Hartford, Connecticut, was charged with running for reelection as a partisan candidate for the Hartford City Council, in disregard of a timely OSC warning letter. In defense of the OSC's complaint, Camillieri, along with the State of Connecticut, asserted that State law protected such activity and the Hatch Act was otherwise unconstitutional.

  On agreement of the parties, including the State of Connecticut, stipulations were submitted to the ALJ and a hearing was thereafter waived. A recommended decision from the ALJ was pending at the close of FY 1986.

- *Special Counsel v. Biller, Sombrotto, and Blaylock* (Pending MSPB 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 Federation 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. On October 22, 1985, the ALJ issued a consolidated decision recommending that the Board sustain OSC's charges and impose 60-day suspensions against each respondent.