
**A Report To Congress
From The
Office of Special Counsel**

Fiscal Year 1989

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Section 1218 of Title 5 of the United States Code

The Special Counsel shall submit an annual report to the Congress on the activities of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with it, investigations conducted by it, and actions initiated by it before the Merit Systems Protection Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this subchapter, and the actions taken by the agencies as a result of the reports or recommendations. The report required by this section shall include whatever recommendations for legislation or other action by Congress the Special Counsel may consider appropriate.

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U.S. OFFICE OF SPECIAL COUNSEL

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Washington, D.C. 20005

Honorable Dan Quayle
President of the Senate
and
Honorable Thomas S. Foley
Speaker of the House of Representatives

Dear Mr. President and Mr. Speaker:

I respectfully submit the Annual Report to Congress from the Office of Special Counsel (OSC) for Fiscal Year (FY) 1989, in accordance with 5 U.S.C. §1218. A copy of this report will also be sent to each member of Congress.

I believe that this Annual Report records a year of significant accomplishment by the OSC in the protection of federal employees and the merit system from prohibited personnel practices, especially reprisal for whistleblowing; in our enforcement of the Hatch Act; and in the receipt and disposition of employee disclosures of wrongdoing in the federal government. During the year covered by this report, Congress passed and President Bush signed the "Whistleblower Protection Act of 1989" (P.L. 101-12). The Act contained new legal protections, including several proposed by the OSC, in aid of federal whistleblowers. The OSC made an effective transition to operations as an independent agency with added responsibilities under the Act, and engaged in concerted efforts with other federal agencies to inform employees about their protections under the law. These and other accomplishments described in the accompanying report attest to the continued dedication and professionalism of OSC employees in furtherance of this agency's mission.

I am grateful to be able to assist in carrying out the President's commitment to integrity and efficiency in government. My efforts will continue to be directed to aiding in the attainment of that goal by exercising the full powers of my office to assure the protection of the rights of federal employees, and the integrity of merit system safeguards for those employees.

With respect,

A handwritten signature in cursive script, reading "Mary F. Wieseman".

Mary F. Wieseman
Special Counsel

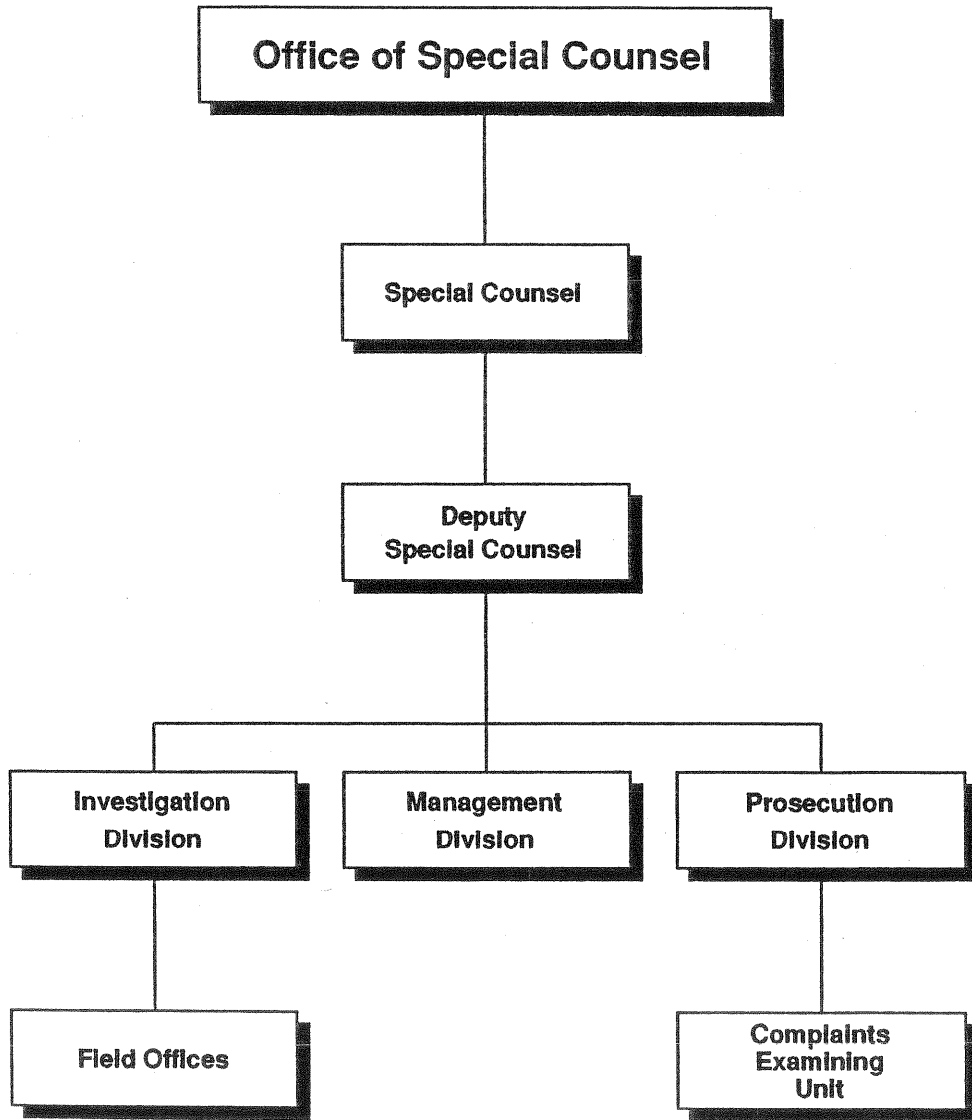


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Introduction

Mission of the Office of Special Counsel

The Office of the Special Counsel was established on January 1, 1979, by Reorganization Plan Number 2 of 1978. The Civil Service Reform Act (CSRA) of 1978, which came into effect on January 11, 1979, enlarged its functions and powers. The office operated as the autonomous investigative and prosecutive arm of the Merit Systems Protection Board (MSPB) until 1989. In March of 1989, the Congress passed the Whistleblower Protection Act (WPA) of 1989, and on April 10 of that year, President Bush signed the legislation into law. The WPA (P.L. 101-12) became effective on July 9, 1989. (See "Legislation"). The WPA converted the Office of the Special Counsel into an independent agency within the Executive Branch, separate and apart from the MSPB, and renamed it the Office of Special Counsel (OSC).¹ Under the new law, the OSC retained its basic investigative and prosecutive functions, and its role in litigating cases before the MSPB.

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

- the investigation of allegations of prohibited personnel practices defined by law at 5 U.S.C. §2302(b),² and other activities prohibited by civil service law, rule or regulation, and to initiate corrective and disciplinary actions when such remedial actions are warranted;
- the enforcement of the Hatch Act provisions on political activity in Chapters 15 and 73; and
- the provision of a secure channel through which federal employees may make disclosures of information evidencing violations of law, rule or regulation

¹ All references in this report to the OSC refer both to the Office of the Special Counsel, for the period October 1, 1988 to July 8, 1989, and to the Office of Special Counsel, for the period July 9, 1989 to September 30, 1989.

² All statutory references to chapters and sections that follow in this report will be to title 5 of the United States Code, as amended by the WPA, unless otherwise indicated.

(such as fraud), gross waste of funds, gross mismanagement,³ abuse of authority, or a substantial and specific danger to public health or safety, without disclosure of the employee's identity (except with the employee's consent) and without fear of retaliation.

OSC Policy

In furtherance of the merit system principles specified in the CSRA, the OSC's principal responsibility has been and continues to be the receipt and investigation of complaints of alleged prohibited personnel practices, especially reprisal for whistleblowing. Although it has not been demonstrated that such reprisals are an endemic problem of massive proportions in the federal service, the OSC regards any reprisal for whistleblowing as unacceptable. Accordingly, the OSC's priorities are --

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

Shared Responsibility for Protecting Whistleblowers

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

For example, §2302(c) makes the head of each federal agency responsible for the prevention of prohibited personnel practices (including reprisals for whistleblowing), and for compliance with and enforcement of civil service laws, rules and regulations. The same responsibility devolves by law on federal supervisors exercising delegated personnel

³ The WPA added the requirement that disclosures of such information evidence "gross" mismanagement. Previously, the law required that disclosures of such information only evidence mismanagement.

authorities. The Inspectors General share a responsibility with the OSC under §7 of the Inspector General Act of 1978 (5 U.S.C. App.) for the protection of employees in their agencies who provide information evidencing violations of law, rules or regulations, or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health and safety.

As for the OSC, the office operates at all times within the framework of the law, as interpreted and applied by the MSPB and the courts. It is the same legal framework that applies to claims of reprisal raised by federal employees in appeals of adverse actions before the MSPB and the courts. The OSC has seen no evidence that its dispositions of allegations of reprisal are significantly different from outcomes achieved by employees in those tribunals. Based on its review of a statistical sample of reprisal allegations contained in OSC files closed over a two-year period, the GAO concluded that the OSC evaluated and acted upon reprisal allegations reasonably, appropriately and in accordance with the law. The GAO also confirmed that the complainants in its sample did not fall victim to lack of investigatory effort by the OSC. Since that report by the GAO, the OSC has given particularly close scrutiny to all allegations of reprisal for whistleblowing.

Overview of OSC Operations

Budget and Staffing

During FY 1989, the OSC operated with a budget of \$5 million, and a full-time equivalency (FTE) personnel ceiling of 81. This represents a budget increase of 7.0 percent, and an increase of 6.6 percent in the personnel ceiling, over FY 1988.

Procedures

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

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

The Prosecution Division reviews completed field investigations to determine whether the inquiry has established any violation of law, rule or regulation, and whether the matter warrants corrective or disciplinary action, or both. If so, OSC personnel may discuss the matter with the agency concerned in order to obtain an early resolution of the matter. Otherwise, the Special Counsel may refer the matter in writing to the agency head under § 1214(b)(2)(A) with a recommendation for corrective action. If an agency declines to take corrective action, the Special Counsel may request the MSPB to consider the matter under § 1214(b)(2)(B), and the MSPB may order any corrective action it deems appropriate. During FY 1989, cooperation by agencies in effecting corrective actions sought by the OSC rendered it unnecessary to request the MSPB to order corrective action. If the Special Counsel determines that an apparent violation warrants disciplinary action, the OSC files charges against the offending employee under § 1215(a) and prosecutes the case before the MSPB. Finally, if an investigation discloses a violation of any law, rule or regulation not otherwise within the enforcement authority of the OSC, the Special Counsel sends a report on the OSC's findings to the agency head concerned under § 1214(e) for certification of any action taken on the matter. The OSC reports evidence of any possible criminal violations identified during an investigation to the Department of Justice pursuant to § 1214(d).

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

Investigation of Allegations

At the beginning of FY 1989 (October 1, 1988), the OSC had 169 matters pending initial review and inquiry, and 160 matters under field investigation.

Nature of Allegations Received During FY 1989

During FY 1989, the OSC received 1,239 new complaints. Complainants alleged abuses of merit staffing requirements or procedures in 395 (31.9%) complaints, making it the most frequently cited claim of a prohibited personnel practice. The next most frequently alleged prohibited personnel practice was discrimination based on race, color, sex, national origin, religion, age or handicapping condition. Employees alleged one or more of these forms of discrimination in 333 (26.9%) of the complaints filed with the OSC during this reporting period. The OSC normally defers action on such complaints to the discrimination complaint procedures established in the agencies under the regulations of the Equal Employment Opportunity Commission (EEOC) in order not to duplicate or bypass those procedures. The third largest category of complaints, 245 (19.8%), alleged reprisals for whistleblowing. Alleged reprisal for exercise of an appeal right was the next largest category of complaints (190 or 15.3%).

A complete breakdown of the nature of all complaints received by the OSC during FY 1989 appears in Table 1 on page 10.

Disposition of Allegations

During FY 1989 --

- 1,040 investigative matters (including matters carried over from FY 1988) were closed on the basis of initial review and inquiry, satisfactory resolution of an employee's complaint during the initial review process, or a determination that there was insufficient basis for further OSC action;
- 97 matters were assigned for field investigation; and
- 77 matters were assigned for additional review for possible referral to the agency concerned as a whistleblower disclosure.

The OSC carried over the remaining matters for further action in FY 1990. A breakdown of the types of matters assigned for field investigation appears in Table 2 on page 12.

Results of FY 1989 Investigations

The OSC completed 192 field investigations during FY 1989 (including investigations carried over from FY 1988), and 65 investigations awaited completion at the end of the year. Of the completed investigations, 123 matters were closed following legal review by the Prosecution Division. Legal reviews and decisions as to final disposition in the remaining investigative matters had not been completed at the end of the fiscal year. During FY 1989, the OSC --

- obtained corrective actions or favorable dispositions in 20 matters;⁴
- initiated corrective actions in six matters which were pending at the end of FY 1989;
- determined that a prohibited personnel practice had occurred in one matter, and referred it to the President for appropriate action pursuant to §1215(b);
- filed disciplinary actions in 11 matters, including five Hatch Act matters and six non-Hatch Act matters;
- secured two stays of a personnel action from the MSPB on behalf of an employee during an OSC investigation;
- obtained 14 stays of personnel actions through direct request to the agencies concerned;
- referred apparent violations of law, rule or regulation not within OSC jurisdiction to agency heads in five matters; and
- referred an apparent criminal violation identified during an investigation to the Department of Justice in one matter.

During FY 1989, the MSPB issued three final decisions, and the MSPB Chief Administrative Law Judge (CALJ) issued 16 recommended decisions in OSC cases. These final and recommended decisions resulted from complaints filed by the OSC in FY 1989 and prior fiscal years. The OSC prevailed in all of these decisions.

⁴ "Corrective actions or favorable dispositions" include those actions taken by an agency at the request of the OSC as a settlement of a prohibited personnel practice complaint in advance of a written request for corrective action by the Special Counsel; or actions taken by an agency with knowledge of a pending OSC investigation, which satisfactorily resolve those matters under inquiry by the OSC.

Corrective Actions

The following is a representative sample of corrective actions obtained by the OSC during FY 1989:

- The OSC investigated an allegation that an individual on active duty in the armed services had been selected for a civilian position in his service branch in violation of military regulations, and had been given an unauthorized preference or advantage to the detriment of another employee. The OSC investigation revealed that the position in question had been arbitrarily held open for the sole purpose of selecting the individual, and that his application for employment had been accepted in violation of military time-limit regulations which govern the manner in which a retiring member of the military can apply for and accept civilian employment in his or her service branch. The OSC reported its findings to the agency, after which the military service branch rescinded the selection, and selected the OSC complainant, who was the only other applicant. The military service branch also notified the OSC that it had issued letters of reprimand, and had counselled other senior personnel.
- The OSC conducted an investigation into an allegation that an agency had removed a probationary federal employee from his position in a chemistry lab in reprisal for disclosures about safety and health violations. The OSC investigation confirmed the allegation. The OSC requested that the agency reinstate the complainant, credit him with back pay and benefits, and amend his personnel records to reflect a voluntary resignation. (The complainant did not wish to return to the agency.) The agency agreed to the OSC request.
- The OSC investigated a complaint from an employee who alleged that her agency had proposed a three-day suspension, and later a removal, in reprisal for protected disclosures about her supervisor. The OSC investigation confirmed that she was a victim of reprisal for whistleblowing. The OSC recommended that the agency withdraw both personnel actions in their entirety, and expunge all references to the proposed actions from the complainant's personnel records. The agency agreed to the OSC request for corrective action.

Disciplinary Actions

The following is a representative sample of disciplinary actions filed by the OSC before the MSPB during FY 1989:

- The OSC charged a federal official with three counts of sexual harassment of female subordinates. After a hearing, the CALJ's Recommended Decision, issued in March of 1989, sustained the charge in one count of the OSC's complaint. Noting the employee's retirement from federal service, the CALJ recommended that the MSPB fine the employee \$400, and debar him from federal employment for a period

of three years. The MSPB had not issued a final decision in this matter before the end of FY 1989.

- The OSC filed complaints for disciplinary action against a supervisor and three personnelists. The OSC charged that the four officials had recommended or taken personnel actions against two employees in reprisal for their protected disclosures. The OSC and three of the officials entered into a proposed settlement agreement in which each respondent agreed to admit to one count of the complaint. One respondent agreed to accept a 20-day suspension; another respondent agreed to accept a 10-day suspension; and the third respondent agreed to accept a letter of reprimand and a fine of \$250. In a Recommended Decision issued in July of 1989, the CALJ accepted the proposed settlement agreement. At the same time, the CALJ issued a Recommended Decision in the case of the remaining respondent. The CALJ noted that this employee had failed to file a responsive pleading to the OSC complaint, and thus had admitted the OSC's charges. The CALJ recommended his removal, and debarment from federal employment for a period of three years. Final decisions by the MSPB in all these matters were pending at the end of FY 1989.

- The OSC sought disciplinary action against a federal manager for illegally influencing a job applicant to withdraw from competition in order to improve the employment prospects of another applicant. The OSC and the respondent entered into a proposed settlement agreement in which the employee admitted to one count of the complaint, and agreed to accept a 30-day suspension. The CALJ accepted the proposed settlement agreement in a Recommended Decision issued in August of 1989. A final decision by the MSPB was pending at the end of FY 1989.

- The OSC charged that a supervisory personnel officer had manipulated reduction-in-force (RIF) procedures to ensure one employee's displacement from his position while insulating another employee from the adverse effects of the RIF. The OSC also accused the employee of illegally influencing an applicant to withdraw from competition for the purpose of improving another applicant's prospects for selection. The OSC and the employee entered into a proposed settlement agreement before a hearing, in which the employee agreed to admit to one count of the complaint, accept a 25-working day suspension, and waive his right to return to his agency following the expiration of his foreign tour of duty. After agreeing to this settlement, the employee filed a motion with the MSPB to withdraw the settlement agreement. In a Recommended Decision issued in September, 1989, the CALJ denied the employee's motion, and accepted the proposed settlement agreement. A final MSPB decision had not been issued as of the end of FY 1989.

Table 1
ALLEGATIONS CONTAINED IN COMPLAINTS RECEIVED
DURING FY 1989 UNDER 5 U.S.C. §1214

| <i>Nature of Allegation</i> | <i>Number of Complaints⁵</i> |
|---|---|
| Alleged abuse of merit staffing requirements or procedures, primarily the alleged granting of unauthorized preference or advantage, or solicitation or consideration of unauthorized recommendations, deception or obstruction of the right to compete, and attempts to secure withdrawal from competition [§ 2302(b)(2), (4), (5) and (6)] | 395 |
| Alleged discrimination on the basis of race, color, sex, national origin, religion, age, or handicapping condition [§ 2302(b)(1)(A)-(D)] | 333 |
| Alleged reprisal for whistleblowing [§ 2302(b)(8)] | 245 |
| Alleged reprisal for exercise of a right of appeal [§ 2302(b)(9)] | 190 |
| Allegations which did not cite or suggest any prohibited personnel practice or prohibited activity ⁶ | 185 |
| Alleged violation of a law, rule or regulation implementing or concerning a merit system principle [§ 2302(b)(11)] | 126 |
| Alleged violation of a law, rule or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a danger to public health or safety [§ 1213(c) or § 1213(g)] ⁷ | 112 |

⁵ This category refers to the number of complaints which contained a particular allegation.

⁶ Although these types of complaints may not, on their face, indicate the existence of any matter within the OSC's investigative jurisdiction, follow-up contact is made with the complainant to ascertain the exact nature of the complaint, and to determine whether there is any basis for further OSC action.

⁷ These types of allegations are treated as whistleblower allegations which may be referred to the agency concerned under § 1213(c) or § 1213(g) for agency review. Nevertheless, if the allegation concerns an employment matter, the OSC carefully reviews it to determine whether the matter may be treated as an allegation of a prohibited personnel practice or other prohibited activity within its investigative jurisdiction. If so, the OSC investigates the matter.

| | |
|--|--------------------|
| Allegations of other activities allegedly prohibited by civil service law, rule or regulation [§ 1216(a)(4)] | 68 |
| Alleged Hatch Act violation by a federal employee [§ 1216(a)(1)] | 63 |
| Alleged discrimination on the basis of non-job related conduct [§ 2302(b)(10)] | 58 |
| Alleged Hatch Act violation by a state or local government employee [§ 1216(a)(2)] | 39 |
| Alleged arbitrary or capricious withholding of information requested under the Freedom of Information Act [§ 1216(a)(3)] | 34 |
| Alleged nepotism [§ 2302(b)(7)] | 33 |
| Alleged discrimination on the basis of marital status or political affiliation [§ 2302(b)(1)(E)] | 9 |
| Alleged coercion of political activity [§ 2302(b)(3)] | 1 |
| | <hr/> |
| Total | 1,891 ⁸ |

⁸ Each complaint may contain more than one allegation. Thus, this total exceeds the total number of complaints actually received by the OSC (1,239).

Table 2
ALLEGATIONS CONTAINED IN COMPLAINTS REFERRED FOR FIELD
INVESTIGATION DURING FY 1989

| <i>Nature of Allegation</i> | <i>Number of Complaints⁹</i> |
|--|---|
| Reprisal for whistleblowing [§2302(b)(8)] | 39 |
| Unauthorized preference or advantage granted to improve or injure the prospect of employment of any person [§2302(b)(6)] | 15 |
| Violation of the Hatch Act by a federal employee [§1216(a)(1)] | 14 |
| Violation of a law, rule or regulation implementing or concerning a merit system principle [§2302(b)(11)] | 9 |
| Deception or obstruction of the right to compete for employment [§2302(b)(4)] | 7 |
| Discrimination on the basis of race, color, sex, national origin, religion, age or handicapping condition [§2302(b)(1)(A)-(D)] ¹⁰ | 5 |
| Violation of the Hatch Act by a state or local government employee [§1216(a)(2)] | 5 |
| Other activity prohibited by civil service law, rule or regulation [§1216(a)(4)] | 4 |
| Discrimination on the basis of conduct not related to job performance [§2302(b)(10)] | 3 |
| Appointment, promotion, or advocating the appointment or promotion of a relative [§2302(b)(7)] | 3 |

⁹ This category refers to the number of complaints which contained a particular allegation.

¹⁰ Allegations of discrimination are normally deferred to the established discrimination complaint procedures. Nevertheless, other prohibited personnel practices alleged in addition to discrimination may be investigated by the OSC without addressing the deferred allegation of discrimination.

| | |
|---|-------------------|
| Unauthorized solicitation or consideration of a recommendation concerning a person for a personnel action [§2302(b)(2)] | 2 |
| Securement of withdrawal from competition [§2302(b)(5)] | 2 |
| Violation of the Freedom of Information Act [§1216(a)(3)] | 1 |
| Violation of Standards of Conduct regulations [§1216(a)(4)] | 1 |
| | <hr/> |
| Total | 117 ¹¹ |

¹¹ Each complaint may contain more than one allegation. Thus, this total exceeds the total number of complaints actually referred for field investigation (97).

Hatch Act Matters

During FY 1989, the OSC received 102 new allegations of Hatch Act violations and initiated field investigations of 19 alleged violations. As a result of the OSC inquiries into these matters (including those carried over from FY 1988) the OSC --

- filed complaints seeking disciplinary action against one federal employee, and four state and local government employees;
- established in 29 other matters that violations had occurred, but were not sufficiently egregious to warrant prosecution, with the result that the OSC issued warning letters; and
- found no violation and closed 66 matters.

For the second time in three years, the OSC prosecuted government employees for coercing political contributions from subordinates in violation of the Hatch Act. In FY 1988, the OSC had filed complaints with the MSPB in *Special Counsel v. Gallagher et al.*, charging eight employees of the Niagara Frontier Transportation Authority (NFTA) in Buffalo, New York, with engaging in a scheme of political coercion. The OSC also charged NFTA Chairman, Raymond F. Gallagher, with running for public office in a partisan election. Specifically, the OSC complaints accused Gallagher and seven subordinates with directly or indirectly coercing, attempting to coerce, commanding or advising other NFTA employees to contribute money or services to various candidates for elective office, and to a political party. During FY 1989, the OSC tried the cases against Gallagher and two other respondents before the CALJ, beginning on February 28, 1989. The CALJ issued a Recommended Decision on July 14, 1989, sustaining the OSC's charges against these respondents and recommending their removal from their positions with NFTA. The MSPB had not issued a final decision at the end of FY 1989. The OSC obtained favorable settlements of charges against four other respondents prior to hearing, and moved to dismiss the charges against one respondent based on a lack of jurisdiction.

Whistleblower Disclosures

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

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

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

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

During FY 1989, the OSC received and considered 109 matters for possible referral to the agency concerned under §1213(c) or §1213(g). Of these 109 matters, and six matters carried over from FY 1988, the OSC --

- referred six disclosures for investigation and a report under §1213(c);
- referred 13 disclosures for a report of actions taken or to be taken thereon under §1213(g);
- referred 45 disclosures to the agency Inspector General;

- closed 36 matters due to lack of sufficient basis for further action; and
- carried 15 matters over to FY 1990 for completion of review.

Results of Referrals

At the beginning of FY 1989, two agency reports received during FY 1988 awaited final OSC review. During FY 1989, the OSC received an additional 29 reports from agencies to which statutory referrals had been made during FY 1988 and FY 1989. At the close of FY 1989, one agency report awaited OSC review and final action. OSC reviews of agency reports disclosed the following results from statutory referrals --

Section 1213(c) Referrals:

| | |
|---|---------|
| Allegation substantiated in whole or in part: | 7 (54%) |
| Allegation not substantiated: | 6 (46%) |

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

| | |
|--|---|
| Agency regulations or practices changed: | 4 |
| Disciplinary action taken: | 1 |
| Evidence of a criminal violation referred to the Attorney General: | 2 |
| Other: | 4 |

Section 1213(g) Referrals:

| | |
|---|----------|
| Allegation substantiated in whole or in part: | 10 (59%) |
| Allegation not substantiated: | 7 (41%) |

In the 10 cases in which allegations were substantiated, the agencies reported the following corrective actions, with more than one action in some cases:

| | |
|--|---|
| Agency regulations or practices changed: | 6 |
| Disciplinary action taken: | 2 |
| Evidence of a criminal violation referred to the Attorney General: | 2 |
| Other: | 3 |

Legislation

Whistleblower Protection Act

During FY 1989, the 101st Congress passed the WPA to strengthen protections under the CSRA for federal whistleblowers, and to enhance the ability of the OSC to enforce those protections. President Bush signed the WPA into law on April 10, 1989, and it became effective on July 9 of that year. In signing the new law, President Bush declared that "a true whistleblower is a public servant of the highest order. And I share the determination of the Congress that we do everything possible to ensure that these dedicated men and women should not be fired or rebuked or suffer financially for their honesty and good judgment."

No hearings were held on the WPA in the 101st Congress. The Special Counsel had testified previously on similar legislation in the 100th Congress. She strongly supported the protection of whistleblowers, and endorsed the concept of strengthening whistleblower protections. After hearings in the House of Representatives and the Senate, the Congress passed the Whistleblower Protection Act of 1988. President Reagan pocket-vetoed this legislation on October 26, 1988. In his veto message, the President stated that the legislation would have recast the whistleblower protection process so that employees who are not genuine whistleblowers could manipulate the system to their advantage simply to avoid or delay appropriate personnel actions. The President also expressed constitutional objections to certain provisions which would have given the OSC independent litigating authority, and the right to seek judicial review of MSPB decisions. Following the veto of this legislation, OSC staff worked with other agencies in the Executive Branch in a joint effort with the Congress to respond to the President's objections, while still developing effective legislation to enhance legal protections for whistleblowers. The WPA included several enhancements of protections for whistleblowers proposed by the Special Counsel.

The WPA made changes to the CSRA which are applicable to any personnel action recommended, proposed or taken on or after July 9, 1989. The following are some of the major changes made by the new legislation --

- The OSC is no longer a part of the MSPB; instead, the OSC is now an independent agency within the Executive Branch.
- A showing of reprisal no longer requires proof that a supervisor had a specific intent to retaliate against a whistleblower. It is enough that a personnel action was taken "because of" a protected whistleblower disclosure.
- Employees alleging that a personnel action was taken because of whistleblowing have a new "individual right of action" (IRA) before the MSPB, with appeal rights to federal court. Before employees may exercise this right, they must first seek assistance from the OSC. Attorney fees and other costs are available to employees who prevail before the MSPB or the courts.

- A threat to take or not take a personnel action because of whistleblowing or the exercise of a lawful appeal right is a prohibited personnel practice.
- Employees who file an IRA, or any appeal in which it is alleged that a personnel action was taken because of whistleblowing, can request a stay of a personnel action from the MSPB.
- Agency heads may grant a preference in transfers or reassignments when the MSPB finds that an employee has been a victim of a personnel action because of whistleblowing.
- The taking of an adverse personnel action because of a refusal by an employee to obey an order which would require the employee to violate a law is clearly defined as a prohibited personnel practice.

Following enactment of the WPA, the Special Counsel sent a letter to department and agency heads emphasizing the OSC's commitment to investigate vigorously allegations of reprisal for whistleblowing, and to seek corrective and disciplinary actions when appropriate. The Special Counsel also emphasized the need for cooperation among all agencies to eliminate reprisals for whistleblowing in the federal workplace, citing the statutory responsibility of each agency head to prevent prohibited personnel practices, and to comply with and enforce applicable civil service laws, rules and regulations.

Although not required by the WPA, the OSC has instituted internal procedures in furtherance of its goal of processing whistleblower reprisal complaints through investigation within 120 days of receipt. The OSC sends 15-day, 90-day and 60-day status letters to complainants as required by the WPA, and has expanded the content of letters sent to complainants when the OSC terminates an investigation, summarizing the evidence that both supports and does not support their allegations.

Also upon enactment of the WPA, the OSC began the first of what will be active, ongoing efforts to publicize the new law. The most prominent of these efforts in FY 1989 was the participation by the Special Counsel and OSC senior staff in conferences throughout the United States. By the end of FY 1989, OSC personnel had conducted or participated in over 30 speaking engagements on the WPA and the mission of the OSC. This speaking program included legislative workshops to acquaint congressional field offices and other staff with the role of the OSC; federal employee union workshops; seminars sponsored by the Office of Personnel Management (OPM); agency workshops; and speeches to groups having an interest in federal personnel and fraud matters. The OSC also drafted an article describing the changes made by the WPA and the role of the OSC generally in affording protections to federal employees who are the victims of prohibited personnel practices. The OSC sent the article to federal departments and agencies with a request for publication in their newsletters. Finally, the OSC participated in a project with OPM to videotape a panel discussion on the WPA.

The OSC recently revised its brochures providing general information about the OSC and the statutes within its jurisdiction -- principally, the CSRA, WPA and the Hatch Act.

The OSC provides these publications in limited quantities upon request to individuals and organizations, and to participants at conferences in which OSC personnel participate as speakers. The OSC has arranged for the Government Printing Office (GPO) to carry the two basic and most frequently requested Hatch Act brochures as stock items in its bookstores so that federal and state agencies, or other interested organizations, can purchase bulk quantities directly from the GPO.

Hatch Act

Also during FY 1989, legislation was introduced in Congress to amend the federal Hatch Act. The House of Representatives passed H.R. 20, without hearings, on April 17, 1989. On July 25, 1989, the Senate Committee on Governmental Affairs held hearings on S. 135, at which the Special Counsel testified. In her testimony, the Special Counsel expressed serious reservations about the bill's fundamental recasting of the Hatch Act, a law which has served to preserve important public values as much as it has served to protect the vast majority of government employees from partisan political influences in the performance of public service. Among the concerns she expressed was that the proposed legislation could result in the politicization of the federal civil service. She expressed the view that even with the strongest of controls against coercion of political activity by government employees, it seemed unrealistic to believe that federal employees would be oblivious to the advantages of political partisanship when competing for promotions or other employment benefits with politically active employees. Her testimony noted that it would be very difficult to regulate the climate that could arise based upon the unspoken belief that political conformity is the route to advancement and security, leading to subtle, self-imposed pressures on employees to conform, or appear to conform, to whatever political tendency will assure greater job security.

The Committee reported S. 135 favorably on July 26, 1989. Both H.R. 20 and S. 135 were pending in the Senate at the end of FY 1989.

Further Information

OSC Publications

Additional copies of this report, or information on other OSC publications, may be obtained by writing or contacting:

Director of Legislative and Public Affairs
Office of Special Counsel
1120 Vermont Avenue, N.W., Suite 1100
Washington, D.C. 20005
Telephone: FTS or (202) 653-7984

Prohibited Personnel Practice Complaints

Complaints of prohibited personnel practices should be reported to:

Complaints Examining Unit
Office of Special Counsel
1120 Vermont Avenue, N.W., Suite 1100
Washington, D.C. 20005
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Toll free number --
1-800-872-9855
Officer of the Week --
FTS or (202) 653-7188

Whistleblower Disclosures

Disclosures of information evidencing violations of law, rule or regulation, gross mismanagement, gross waste of funds, abuse of authority, or a danger to public health or safety may be reported in confidence to:

Disclosure Unit
Investigation Division
Office of Special Counsel
1120 Vermont Avenue, N.W., Suite 1100
Washington, D.C. 20005
Telephone: FTS or (202) 653-9125

Hatch Act Questions

Inquiries concerning the Hatch Act may be made in writing or by telephone to:

Complaints Examining Unit
Prosecution Division
Office of Special Counsel
1120 Vermont Avenue, N.W., Suite 1100
Washington, D.C. 20005
Telephone: FTS or (202) 653-7143