

**A Report To Congress  
From The  
Office Of The Special Counsel  
Fiscal Year 1987**



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*Section 1206(m) of Title 5 of the United States Code*

“(m) 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 Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this section, and the actions taken by the agencies as a result of the reports or recommendations. The report required by this subsection shall include whatever recommendations for legislation or other action by Congress the Special Counsel may deem appropriate.”

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**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

Honorable George Bush  
President of the Senate  
and  
Honorable Jim Wright  
Speaker of the House of Representatives

Dear Mr. President and Mr. Speaker:

I respectfully submit the Fiscal Year 1987 annual report on the activities of the Office of the Special Counsel (OSC) to the Congress in accordance with the Civil Service Reform Act of 1978, Section 1206(m) of Title 5 of the United States Code. As is customary, a copy of this report will be forwarded to each member of Congress.

This report covers the activities of the office during the first full-year that I have been privileged to serve as the Special Counsel. As my report for Fiscal Year 1986 indicated, my predecessors established an efficient and effective organizational structure and a staff of dedicated, experienced professionals. The continuing dedication to mission and professionalism of the staff is reflected in the OSC accomplishments I am pleased to report for Fiscal Year 1987.

Because of strong Congressional and public interest in the adequacy of protection against reprisal for whistleblowing afforded federal employees under current law and OSC procedures, this report highlights the activities of the office relating to the protection of whistleblowers, as well as the substantive nature of the matters dealt with by the OSC. I believe that this report reflects a record of significant achievements in the protection of federal employee rights within the framework of current law.

I am grateful for the opportunity 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 the federal merit system.

With respect,

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

Mary F. Wieseman  
Special Counsel

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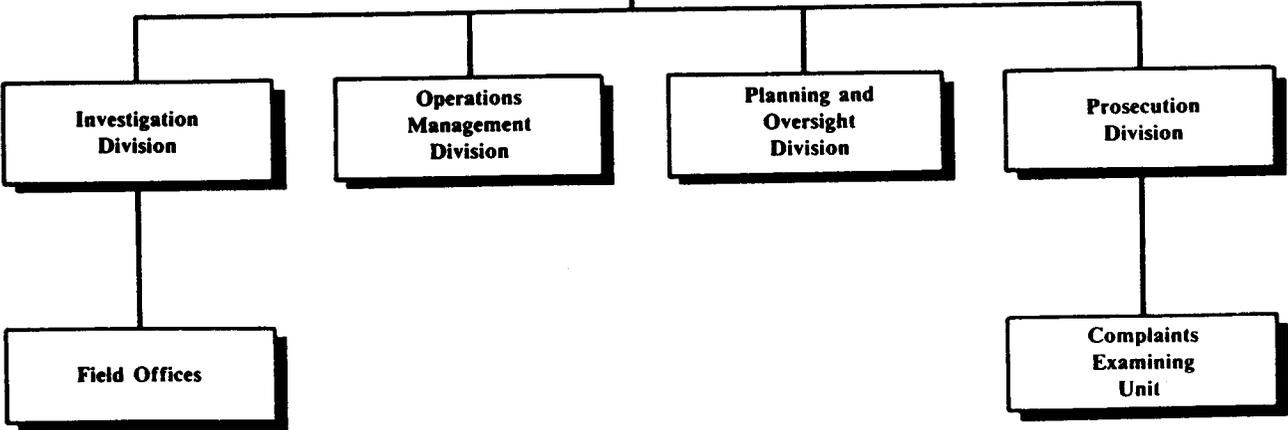
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**Office of the Special Counsel**

**Special Counsel**

**Deputy  
Special Counsel**



# Executive Summary

## Introduction

This report, submitted pursuant to Section 1206(m) of Title 5 of the United States Code, chronicles the activities of the Office of the Special Counsel (OSC) during Fiscal Year (FY) 1987. It is the OSC's ninth Report to the Congress since the establishment of the office in 1979. This summary provides an overview of this OSC report on its investigation and prosecution of prohibited personnel practices, enforcement of the Hatch Act, and disposition of whistleblower disclosures during FY 1987. The OSC's accomplishments, and the nature and substance of the wide variety of matters acted on by the OSC during that period are presented in the body of this report in more detail than in previous Reports to the Congress. The OSC's most significant achievement during this reporting period was its pursuit and accomplishment of more corrective actions on behalf of more federal employees than in any one year since 1981, as a result of the office's emphasis on corrective actions, particularly in aid of employees victimized by reprisal for whistleblowing.

## Policy and Priorities

The principal responsibility of the OSC is to investigate allegations of prohibited personnel practices and to initiate corrective and disciplinary actions when warranted. Of the 11 prohibited personnel practices defined by the Civil Service Reform Act (CSRA) of 1978, the OSC's highest priority is the investigation of allegations of reprisal for whistleblowing, and the initiation of appropriate remedial and disciplinary actions.

## Budget and Staff

During FY 1987, the OSC operated with a budget of \$4.475 million and a full-time equivalency (FTE) personnel ceiling of 84. While the budget and staff

ceiling for the office remained relatively constant from FY 1982 through FY 1987, the number of permanent employees on board was gradually reduced during FY 1987 through attrition in order for the office to be able to reach a reduced personnel ceiling of 76 FTE (a 9.5% reduction) in FY 1988.

## Investigation of Complaints and Allegations

At the beginning of FY 1987, the OSC had 217 matters pending initial review and preliminary inquiry, and 86 matters under full investigation. During FY 1987, the office received 1325 new allegations and complaints.

Complainants alleged reprisal for whistleblowing in 245 (18.5%) of the new matters received by the OSC, making it the most frequently alleged prohibited personnel practice. However, it was not evident in many cases whether the complainant had, in fact, made a disclosure protected by the CSRA. The next most frequently-alleged prohibited personnel practice was discrimination based on race, color, sex, national origin, religion, age, or handicapping condition. Complainants alleged discrimination in 234 (17.7%) of the new matters received during the reporting period. The third largest category of complaints, 199 (15.0%), concerned alleged abuse of merit staffing requirements or procedures. Complainants alleged reprisal for exercise of an appeal right in the fourth largest category of complaints, 90 (6.8%). The fifth largest category of complaints, 78 (5.9%), subject to OSC investigation consisted of alleged Hatch Act violations by Federal, State or local government employees.

During FY 1987 —

- 934 matters were closed on the basis of initial review, preliminary 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;

- 152 matters were assigned for full investigation; and
- 106 matters were assigned for additional review for possible referral to the agency concerned as a whistleblower disclosure under 5 U.S.C. §1206(b).

Of the 152 matters assigned for full investigation, 60 (39.5%) involved an allegation of reprisal for whistleblowing.

During FY 1987, the OSC completed 145 full investigations and carried over 95 investigations into FY 1988. Of the 145 investigations completed, 113 were closed as investigative matters, and 32 investigations awaited legal review and determination of final disposition at the end of FY 1987.

## **Corrective, Disciplinary and Other Actions**

During FY 1987, the OSC initiated or obtained a substantially increased number of formal and informal corrective actions on behalf of employees victimized by prohibited personnel practices, including reprisal for whistleblowing. The increased corrective actions, disciplinary and other remedial actions undertaken by the OSC consisted of the following —

- 8 formal corrective actions
- 30 informal corrective actions
- 1 formal stay obtained from the Merit Systems Protection Board (MSPB)
- 4 informal stays obtained from agencies
- 9 disciplinary actions, including 6 Hatch Act cases and 3 non-Hatch Act cases
- 1 compliance enforcement action
- 1 intervention in an employee appeal before the MSPB
- 6 referrals of violations of law, rule or regulation to agency heads under 5 U.S.C. §1206(c)(3)

## **Hatch Act Enforcement**

During FY 1987, the OSC received 78 new allegations of Hatch Act violations and initiated full investigations into 16 alleged violations. As a result of the review and investigation of these complaints and those carried over from FY 1986, the OSC —

- filed complaints seeking disciplinary actions against one federal employee and five local government employees.
- established that violations had occurred which were not sufficiently egregious to warrant prosecution in 35 cases.
- found no violation and closed the matters in 46 cases.
- undertook compliance enforcement action in one case decided by the MSPB in FY 1986.

For the first time since its establishment in 1979, the OSC filed charges against government employees for coercing political contributions from subordinates in violation of Hatch Act provisions applicable to State and local government employees. The OSC charged three employees of the Akron (Ohio) Metropolitan Housing Authority with coercing subordinate employees to sell or purchase tickets to political events, and/or to telephone registered voters and encourage them to support the candidacy of a mayoral candidate in a partisan election.

## **Whistleblower Disclosures**

During FY 1987, the OSC received and reviewed 106 disclosures of information by federal employees for possible referral to the agency concerned under 5 U.S.C. §1206(b) as disclosures of information evidencing a violation of law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Of these 106 new matters, plus 13 matters carried over from FY 1986 and four matters previously closed but reopened for further consideration, the OSC —

- referred 13 matters under 5 U.S.C. §§1206(b)(3) and (4), and required that the agency head investigate the matter and report the investigative findings and the actions taken thereon.
- referred 37 matters under 5 U.S.C. §§1206(b)(2) and (7), and required the agency to report the action taken or to be taken on the referral.
- referred 35 matters informally to the agency Inspector General.
- closed 32 matters for lack of sufficient basis for further action.
- carried 6 matters over to FY 1988 for completion of review.

Agency reports received during FY 1987 produced the following results from the statutory referrals —

**Section 1206(b)(3) referrals**

Allegation substantiated in whole or in part . . . . .	10 (67%)
Allegation not substantiated . . . . .	5 (33%)

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 . . . . .	8
Disciplinary action taken . . . . .	5
Evidence of a criminal violation referred to the Attorney General . . . . .	1
Other . . . . .	7

**Section 1206(b)(2) referrals**

Allegation substantiated in whole or in part . . . . .	20 (51%)
Allegation not substantiated . . . . .	19 (49%)

In the 20 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 . . . . .	12
Restoration of an aggrieved employee . . . . .	1
Disciplinary action taken . . . . .	3
Other . . . . .	7
No further action taken . . . . .	2

# Introduction

## Overview of the OSC

The Office of the Special Counsel (OSC) was established on January 1, 1979, by Reorganization Plan Number 2 of 1978. The Civil Service Reform Act (CSRA) of 1978 (5 U.S.C. §§1204-1208), which came into effect on January 11, 1979, enlarged its functions and powers. Since its establishment, the OSC has been subjected to intense Congressional scrutiny and to controversy concerning its role and effectiveness. In its first four years, from January 1979 to October 1982, four individuals served as Special Counsel, two of them served in an acting capacity, and none of them served longer than 17 months. In FY 1980, the Congress reduced the OSC's appropriation by 46% in the final quarter of that fiscal year. The OSC's annual budgets did not stabilize thereafter until FY 1983. During 1982, legislation was introduced in Congress to abolish the OSC. At his confirmation hearings in the summer of 1982, K. William O'Connor, who served as Special Counsel from October 1982 until June 1986, pledged to make the office function properly or to "lead the parade" to seek to do away with it. Between 1979 and 1985, the General Accounting Office (GAO) reviewed the operations of the OSC no less than 14 times, culminating in an intensive 18-month audit of the OSC's handling of allegations of reprisal for whistleblowing. GAO's May 1985 report on the results of that audit supported the validity of OSC's decision-making in the handling of allegations of reprisal for whistleblowing.

The tenure of the previous Special Counsel led to significant accomplishments in fixing OSC's organizational structure, streamlining and professionalizing the work of the office, and successfully litigating before the Merit Systems Protection Board (MSPB/Board). Nevertheless, controversy over the role of the

OSC under the CSRA and its effectiveness in fulfilling its statutory mission, particularly with respect to its role in protecting whistleblowers from reprisal, has continued. As a result, legislation which would not only change the role of the OSC, but would also significantly affect all other existing federal employee-management dispute resolution systems, was introduced in both houses of Congress during 1987. Testimony given by witnesses during Congressional committee hearings on both bills suggests that some proponents of radical change to the CSRA, as it affects the OSC, may misapprehend the current law and the actual work and accomplishments of the OSC.

Accordingly, it is appropriate to preface the body of this report with a brief statement of the statutory mission of the OSC and an articulation of the policy which has governed the operations of the agency during the first full year of the current Special Counsel's term, which coincides with the period covered by this report.

## OSC Mission

The OSC is an independent investigative and prosecutorial agency, which litigates before the 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 uncovering abuses of merit system principles, correcting agency actions which constitute or result in prohibited personnel practices or otherwise infringe on certain employee rights, and punishing employees who violate certain civil service laws, rules or regulations. As an agency, the OSC is independent of the Board operationally and administratively.

The primary responsibilities of the OSC are:

1. to investigate allegations of certain activities prohibited by civil service law, rule or regulation, primarily alle-

gations of prohibited personnel practices defined by law at 5 U.S.C. §2302(b)<sup>1</sup> (including reprisal for whistleblowing), and to initiate corrective and disciplinary actions when such remedial actions are warranted.

2. to provide a secure channel through which disclosures of information evidencing violations of law, rule or regulation (such as fraud), gross waste of funds, mismanagement, abuse of authority, or a substantial and specific danger to public health or safety may be made without disclosure of the employee's identity (except with the employee's consent) and without fear of retaliation.
3. to enforce the provisions of the Hatch Act in Chapters 15 and 73.

## OSC Policy

The principal responsibility of the OSC has been and continues to be the receipt and investigation of complaints of alleged prohibited personnel practices in furtherance of the nine merit system principles defined by the CSRA. Of the 11 personnel practices prohibited by the CSRA, the highest priority of the OSC is the investigation of allegations of reprisal for whistleblowing. Although it has not been demonstrated that such reprisals are an endemic problem of massive proportions in the federal service, it is the position of the OSC that *any* reprisal for whistleblowing is intolerable. Accordingly, the OSC's priorities are:

1. to treat allegations of reprisal for whistleblowing as its highest priority;
2. 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
3. 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,

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

and to correct the lingering misperception in some quarters that the OSC is interested solely in the pursuit of disciplinary action against offending employees.

## Shared Responsibility for Protecting Whistleblowers

As the 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 agency responsible for the prevention of prohibited personnel practices (including reprisals for whistleblowing), and for compliance with and enforcement of civil service laws, rules and regulations. The same responsibility devolves by law on Federal supervisors exercising delegated personnel authorities. The Inspectors General share a responsibility with the OSC under Section 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, mismanagement, gross waste, abuse of authority, or danger to public health or safety. Again, according to the GAO, a comprehensive evaluation of the system of whistleblower protections needs to take into account the roles performed by these institutions in the protection of whistleblowers.

As for the OSC, the office operates at all times within the framework of the CSRA, as interpreted and applied by the MSPB and the courts. It is the same law and legal framework that applies to

claims of reprisal raised by employees in appeals of adverse actions before the MSPB and in the courts, and 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 sample of reprisal allegations contained in OSC files closed over a two-year period, the GAO confirmed that the OSC's evaluation of and action upon reprisal allegations was reasonable, appropriate and in accordance with the law, and that the complainants in its sample did not fall victim to lack of investigatory effort by the OSC. Since that report by the GAO, especially during FY 1987, the OSC has given particularly close scrutiny to all allegations of reprisal for whistleblowing and this report reflects the results of these efforts.

## Overview of OSC Procedures

### Introduction

During FY 1987, the OSC operated with a budget of \$4.475 million and a full time equivalency (FTE) personnel ceiling of 84. While the budget and staff ceiling for the office remained relatively constant from FY 1982 through FY 1987, the number of permanent employees on board was gradually reduced during FY 1987 through attrition in order for the office to be able to reach a reduced personnel ceiling of 76 FTE (a 9.5% reduction) in FY 1988.

### Procedures

The Complaints Examining Unit (CEU) of the OSC's Prosecution Division initially analyzes all allegations of prohibited personnel practices and other activities prohibited by civil service law, rule or regulation (except allegations of Hatch Act violations) received by the office. The CEU attempts to contact ev-

ery complainant to assure that the nature of and basis for the allegation is clearly understood, and conducts further inquiry to the extent necessary to determine whether further investigation is warranted. Preliminary review and inquiry may be sufficient to establish that there is insufficient basis for further OSC action on the matter, or to otherwise resolve the matter without further investigative or prosecutive action. For example, the CEU's preliminary inquiry to an agency concerning a disputed personnel action may cause the agency to review its own action, to discover and acknowledge that it erred and to agree to appropriate remedial action which would moot further OSC action in the matter.

If proper disposition of a matter cannot be achieved through the initial examination process, the CEU refers it to the Investigation Division (or in some cases, to the Planning and Oversight Division) for more extensive investigation. If it is determined that an allegation is not within OSC's own investigative jurisdiction, but that information contained in the complaint may constitute a whistleblower disclosure, the OSC Investigation Division's Disclosure Unit reviews the matter for possible transmittal (without disclosing the identity of the employee source) to the agency head concerned under §1206(b)(2).

The Prosecution Division reviews completed investigations to determine whether any violation of law, rule or regulation has been established and whether corrective and/or disciplinary action is warranted. If corrective action is indicated, OSC personnel may discuss the matter informally with the agency concerned in order to obtain early resolution of the matter.<sup>2</sup> Otherwise, the Special Counsel may send the matter to the agency head under §1206(c)(1)(A) with a formal recommendation for corrective action. If an agency declines to take corrective action on the basis of a formal referral under §1206(c)(1), the

<sup>2</sup> These types of informal contacts with agencies are referred to throughout this report as informal corrective actions.

Special Counsel may request the MSPB to consider the matter under §1206(c)(1) (B), and the Board may order any corrective action it deems appropriate. During FY 1987, cooperation by agencies in effecting corrective actions sought by the OSC rendered it unnecessary to request the Board to order corrective action. If the Special Counsel determines that disciplinary action is warranted, the OSC files charges against the offending employee under §1206(g) and prosecutes the case before the Board pursuant to §1207. 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 §1206(c)(3) for certification of any action taken on the matter. Likewise, the OSC forwards evidence of any possible criminal violations identified during an investigation to the Department of Justice.

At any time during an investigation, the OSC may seek a stay of any personnel action if the available evidence shows 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 either informally through direct consultation with the agency concerned, or formally by filing a request with the MSPB under §1208. Also, the Special Counsel may (under §1206(i)) intervene as a matter of right or otherwise participate in any proceeding before the MSPB. Therefore, the OSC may intervene in a complainant's appeal before the Board while investigating an allegation concerning or related to the same matter.

## Investigation of Allegations

At the beginning of FY 1987 (October 1, 1986), the OSC had 217 matters pend-

ing initial review and preliminary inquiry, and 86 matters under full investigation.

## Nature of Allegations Received During FY 1987

During FY 1987, the OSC received 1325 new allegations and complaints. Complainants alleged reprisal for whistleblowing in 245 (18.5%) of the complaints, making it the most frequently-cited claim of a prohibited personnel practice. However, it was not evident in many cases whether the complainant had in fact made any whistleblowing disclosure protected by the CSRA. The nature of the complaints classified by OSC as allegations of reprisal for whistleblowing is described more fully in the *Appendix*.

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 234 (17.7%) of the complaints filed with the office 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, 199 (15.0%), concerned alleged abuse of merit staffing requirements or procedures. Alleged reprisal for exercise of an appeal right was the fourth largest category of complaints (90 or 6.8%), and the fifth largest category of complaints (78 or 5.9%) subject to OSC investigation consisted of alleged Hatch Act violations by Federal, State or local government employees.

A more complete breakdown of the nature of all complaints received by the OSC during FY 1987 is given in Table 1.

**Table 1.**  
**TYPES OF COMPLAINTS RECEIVED**  
**DURING FY 1987 UNDER 5 U.S.C.**  
**§1206**

<i>Nature of Initial Allegation<sup>1</sup></i>	<i>Number of Complaints</i>	<i>Nature of Initial Allegation<sup>1</sup></i>	<i>Number of Complaints</i>
Alleged reprisal for whistleblowing (§2302(b)(8))	245 (18.5%)	Allegations of other activities allegedly prohibited by civil service law, rule, or regulation (§1206(e)(1)(D))	49 (03.7%)
Alleged discrimination on the basis of race, color, sex, national origin, religion, age, or handicapping condition (§2302(b)(1)(A)-(D))	234 (17.7%)	Alleged Hatch Act violation by a Federal employee (§1206(e)(1)(A))	48 (03.6%)
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))	199 (15.0%)	Alleged discrimination on the basis of non-job related conduct (§2302(b)(10))	42 (03.2%)
Allegations which did not cite or suggest any prohibited personnel practice or other prohibited activity <sup>2</sup>	192 (14.5%)	Alleged Hatch Act violation by a State or local employee (§1206(e)(1)(B))	30 (02.3%)
Alleged violation of law, rule or regulation, or mismanagement, waste of funds, abuse of authority, or a danger to public health or safety (§1206(b)(2)) <sup>3</sup>	107 (08.1%)	Alleged nepotism (§2302(b)(7))	15 (01.1%)
Alleged reprisal for exercise of a right of appeal (§2302(b)(9))	90 (06.8%)	Alleged discrimination on the basis of marital status or political affiliation (§2302(b)(1)(E))	11 (0.8%)
Alleged violation of a law, rule or regulation implementing or concerning a merit system principle (§2302(b)(11))	51 (03.8%)	Alleged arbitrary or capricious withholding of information requested under the Freedom of Information Act (§1206(e)(1)(C))	11 (0.8%)
		Alleged coercion of political activity or reprisal for refusing to engage in political activity (§2302(b)(3))	1 (0.1%)
		<b>Total</b>	<b>1325 (100%)</b>

<sup>1</sup> Based on a review of the complainant's initial submission and determination of what appears to be the complainant's *primary* complaint. Complainants frequently allege more than one prohibited personnel practice or other prohibited activity. Moreover, the nature of the allegation often changes upon further OSC follow-up with the complainant.

<sup>2</sup> Although these types of complaints may not, on their face, indicate the existence of any matter within OSC's investigative jurisdiction, follow-up contact is always made with the complainant to ascertain the exact nature of the complaint and to determine whether there is any basis for further OSC action.

<sup>3</sup> These types of allegations are treated as "whistleblowing" allegations which may be referred to the agency concerned under §1206(b)(2) for agency consideration. However, if the allegation concerns an employment matter, it is carefully scrutinized to determine whether the matter may be treated as an allegation of a prohibited personnel practice or other prohibited activity within OSC's investigative jurisdiction. If a basis for OSC investigation is found, the matter is investigated by OSC and not referred to the agency concerned.

# Disposition of Allegations

- During FY 1987 —
- 934 investigative matters (including 197 matters carried over from FY 1986 and 73 Hatch Act matters) were closed on the basis of initial review, preliminary inquiry, satisfactory resolution of an employee's complaint during the initial review process in some instances, and a determination that there was insufficient basis for further OSC action;
  - 152 were assigned for full investigation; and
  - 106 were assigned for additional review for possible referral to the agency concerned as a whistleblowing disclosure under §1206(b)(2).

The office carried over the remaining matters for completion of OSC review in FY 1988.

A breakdown of the types of matters assigned for full investigation is given in Table 2.

**Table 2.**  
**NATURE OF ALLEGATIONS**  
**CONTAINED IN MATTERS**  
**REFERRED FOR FULL**  
**INVESTIGATION DURING**  
**FY 1987**

<i>Nature of Allegations</i>	<i>Number of Matters<sup>1</sup></i>
Reprisal for whistleblowing (§2302(b)(8))	60
Unauthorized preference or advantage granted to improve or injure the prospect of employment of any person (§2302(b)(6))	34
Reprisal for exercising an appeal right (§2302(b)(9))	27
Discrimination on the basis of race, color, sex, national origin, religion, age, or handicapping condition (§2302(b)(1)(A)-(D)) <sup>2</sup>	22
Violation of a law, rule or regulation implementing or concerning a merit	

<i>Nature of Allegations</i>	<i>Number of Matters<sup>1</sup></i>
system principle (§2302(b)(11))	21
Discrimination on the basis of conduct not related to job performance (§2302(b)(10))	21
Deception or obstruction of the right to compete for employment (§2302(b)(4))	15
Violation of the Hatch Act by a federal employee (§1206(e)(1)(A))	14
Appointment, promotion, or advocating the appointment or promotion of a relative (§2302(b)(7))	13
Other activity prohibited by civil service law, rule or regulation (§1206(e)(1)(D))	9
Violation of the Hatch Act by a State or local government employee (§1206(e)(1)(B))	6
Violation of the Freedom of Information Act (§1206(e)(1)(C))	4
Violation of the Standards of Conduct regulations (§1206(e)(1)(D))	4
Unauthorized solicitation or consideration of a recommendation concerning a person for a personnel action (§2302(b)(2))	3
Securement of withdrawal from competition (§2302(b)(5))	2
No prohibited personnel practice alleged	2

<sup>1</sup> The number of types of allegations contained in the matters referred for investigation exceeds the total number of matters referred for investigation (152) since each matter may contain more than one kind of allegation.

<sup>2</sup> Allegations of discrimination are normally deferred to the established discrimination complaint procedures. However, other prohibited personnel practices alleged in conjunction with an allegation of discrimination may be investigated without addressing the discrimination issue.

## Results of FY 1987 Investigations

The OSC completed 145 full investigations during FY 1987 (including 80 investigations carried over from FY 1986); 95 investigations (including seven carried over from FY 1986) awaited completion at the end of the year. Of the 145 investigations completed, 113 matters were closed as investigative matters and 32 matters were pending legal review and a decision as to final disposition at the end of the fiscal year. Of the 113 investigations closed during FY 1987 —

- the Special Counsel initiated formal corrective or disciplinary action in 11 cases;
- the OSC sought or obtained informal corrective action in 13 cases;
- the OSC intervened in an employee appeal before the MSPB in one case;
- the OSC identified Hatch Act violations in four cases, but declined prosecution;
- the Special Counsel referred apparent violations of law, rule or regulation not within OSC jurisdiction to agency heads under §1206(c)(3) in two cases; and
- the OSC found insufficient bases for corrective or disciplinary action in 82 matters.

Additionally, in matters pending final disposition, the OSC secured a formal 15-day stay of an employee's removal in one case, and an informal 30-day stay of a second employee's removal in another case.

The remedial actions initiated or taken during FY 1987, as a result of investigations conducted before and during FY 1987, are described in more detail in the next section.

## Corrective, Disciplinary and Other Actions

The OSC initiated and obtained a substantial number of formal and infor-

mal corrective actions, disciplinary actions, and other follow-up actions during FY 1987 as a result of the initial examination of complaints and full investigations conducted before and during FY 1987. These actions were —

- 8 formal corrective actions
- 30 informal corrective actions
- 1 formal stay obtained from MSPB
- 4 informal stays obtained from agencies
- 9 disciplinary actions, including 6 Hatch Act cases and 3 non-Hatch Act cases
- 1 compliance enforcement action
- 1 intervention in an appeal before MSPB
- 6 referrals of violations of law, rule or regulation to agency heads under §1206(c)(3)

The actions taken are described briefly below.

### Formal Corrective Actions

The Special Counsel referred the following cases to the agencies concerned under §1206(c)(1), following a determination by the OSC that there were reasonable grounds to believe that a prohibited personnel practice had occurred, existed, or was to be taken.

#### Section 2302(b)(8) (Reprisal for Whistleblowing)

- OSC investigation disclosed that an employee had been separated during probation in reprisal for her disclosure of safety problems to an agency safety committee. The matters she disclosed concerned laboratory procedures and practices, including the labelling and cleaning of contaminated glassware, the storage of combustible gases, the disposal of chemical wastes, the potential for chemical leakage, lack of storage space, overcrowded work areas, the misuse of equipment, disregard for safety apparel, and insufficient monitoring of radioactivity levels. The complainant's concerns were regarded as criticisms of the laboratory's man-

agement and led to her separation. The Special Counsel recommended, and the agency agreed, to grant the employee back pay and to expunge her personnel file of adverse information. (The complainant did not seek reinstatement as she had found new employment in the private sector.)

- In April 1986, a regional commissioner of the U.S. Customs Service wrote to the Secretary of the Treasury complaining of mismanagement by a Customs official, including the promotions of unqualified or minimally qualified employees to key management positions. Shortly after the Customs official received a copy of the regional commissioner's letter and learned of an ensuing investigation by the Inspector General of the Department, he notified the regional commissioner of the termination of his appointment as a reemployed annuitant. The OSC determined that there were reasonable grounds to believe that the regional commissioner's removal was in reprisal for whistleblowing and obtained a stay from the MSPB. In October 1986, the Special Counsel recommended to the Secretary of the Treasury that the complainant's removal be cancelled and that he ensure that no further personnel actions be taken against him in reprisal for his protected disclosures. In December 1986, the Secretary agreed and cancelled the removal.
- OSC investigation substantially corroborated an employee's allegation that his geographic reassignment was in reprisal for a memorandum critical of health care services at an agency facility. When informal resolution was not achieved, the Special Counsel recommended corrective action under §1206(c)(1). By the close of the reporting period, the agency had taken preliminary steps to effect corrective action by reassigning the complainant to a mutually agreeable location.
- OSC investigation established that a regional administrator for the Depart-

ment of Housing and Urban Development refused to approve an employee's promotion as a reprisal for her disclosure of information to investigators about contacts between the regional administrator and a former agency employee during an Office of Inspector General inquiry into possible improprieties in a grant award. The OSC initiated disciplinary action against the regional administrator in FY 1986, and the MSPB ordered his suspension for 60 days on April 17, 1987. In light of the Board decision, and notwithstanding the employee's belated promotion during the pendency of these actions, the Special Counsel recommended that the employee's promotion be made retroactive to the date it would have been effective but for the reprisal, and that she be granted back pay for the period her promotion was unjustifiably delayed. The agency agreed.

- An OSC investigation established that agency officials removed a complainant in reprisal for disclosures of mismanagement and other improprieties. The complainant, a social worker employed at a Veterans Administration Outreach Center, had disclosed to agency officials on several occasions that his supervisor verbally abused and physically intimidated staff members, used an agency vehicle for his personal use, required staff members to perform personal errands for him, accepted a gift from a contractor, and treated his private patients at the veterans center during official duty hours. The employee had also reported that the supervisor's mismanagement resulted in the disruption of services to Vietnam veteran clients of the center. An agency official to whom the employee made his disclosures during a site visit confirmed morale problems and lack of staff cohesion attributable to mismanagement at the center. These findings were followed by the supervisor's resignation, but not before he removed the complainant, pur-

portedly for poor performance. The OSC's investigation revealed that the reasons cited for the complainant's removal were specious and unsupported, that there was an evident animus by the supervisor toward the complainant because of his disclosures, and that the complainant would not have been separated except for his disclosures. On May 12, 1987, the Special Counsel recommended his restoration with back pay and benefits, and expunction of the record pertaining to his removal. The agency agreed to the recommended actions.

**Section 2302(b)(11)  
(Merit System Principles)**

- OSC investigation corroborated an allegation by a group of employees that their jobs were graded differently from those of employees performing the same work at 17 of 18 other installations identified by the complainants and that the Office of Personnel Management (OPM) had failed to conduct position-to-position comparisons called for under case law when it decided their job grading appeals, resulting in a violation of §2302(b)(11). In November 1986, the Special Counsel recommended to OPM that the specific classification inconsistencies be corrected and that procedures for making position-to-position comparisons, when warranted, be incorporated into the established classification appeal process. After further discussion, OPM strengthened its existing procedures for achieving classification consistency when allegations of disparate classification treatment are raised in a classification appeal to OPM, and followed up with the agencies concerned to assure correction of the specific job grading inconsistencies. The corrective action taken in this case potentially affects 2100 jobs at over 290 installations worldwide.
- OSC investigation confirmed that an unauthorized forced distribution of

performance ratings resulted in the denial of an Outstanding rating for a complainant who would otherwise have received such a rating and a larger cash performance award than she had received, in violation of §§4302a(e) and 2302(b)(11). In June 1987, the Special Counsel recommended that the complainant be granted the performance rating to which she was entitled and the appropriate cash award which would accompany such rating, less the amount she had actually received. In July 1987, the agency agreed to take the recommended corrective action.

- OSC investigation established that the complainant, a probationary employee, had sustained an on-the-job injury which required her to be absent on extended sick leave and that the agency had discharged her for excessive absence from work, then failed to restore her as required by §8151(b)(1), to give her any reason for not restoring her, or to inform her of her right to appeal to the MSPB, when she notified the agency of her recovery. The OSC concluded these agency actions and omissions constituted a violation of §2302(b)(11) and the Special Counsel recommended that the agency reinstate the employee, place her retroactively in a leave without pay status for the period she was unable to work, and award her back pay for the time she was available and able to return to work and was no longer receiving workers compensation. The agency agreed to take the recommended corrective actions.

## **Informal Corrective Actions**

The following summarizes corrective and remedial actions sought by the OSC, or taken by the agency upon OSC inquiry into the matter without formal referral of the matter to the agency head under §1206(c)(1). In some instances, no prohibited personnel practice was in-

volved, but some other irregularity, error or inappropriate personnel management practice was apparent.

### **Section 2302(b)(8) (Alleged Reprisal for Whistleblowing)**

- A complainant alleged that a reprimand, proposed abolishment of his position and detail to a set of unclassified duties was in reprisal for disclosing accounting irregularities in a military club at an overseas post to Army criminal investigators. Pursuant to his grievance, the local commander rescinded the reprimand, but informed him that his job might still be abolished pursuant to a pending reorganization. In December 1986, the complainant's job was abolished and he was informed that he would be returned to the United States where no position existed to which he could return. The OSC requested that the Department of the Army ensure that the complainant be permitted to remain at the overseas post until the scheduled end of his tour, and that he receive the job retention rights due him. The Department acceded to the OSC's request and also initiated its own investigation of the agency officials involved.
- An employee alleged that the termination of her temporary appointment was in reprisal for her disclosures to agency officials of the endangerment of students at a job corps center by their use as informants in a drug investigation at the facility. The employee also disclosed information concerning improper personal relations between a supervisor and a student at the center. The OSC investigation corroborated her claim. The office initiated negotiations with the agency for corrective action on behalf of the complainant and a prosecution seeking disciplinary action against the offending supervisor.
- An employee wrote a memorandum disclosing the unsafe condition of a government vehicle. Two days later, he was summarily placed on an unwanted 120-day detail. The employee complained about the detail and made other allegations of mismanagement. He then received a directed reassignment. During the OSC's investigation, the agency agreed to cancel the reassignment. The OSC also authorized the agency, pursuant to §1206(f), to discipline the supervisor who ordered the reassignment in reprisal for the protected disclosures with a reprimand.
- A complainant alleged that his discharge during the probationary period was in reprisal for disclosures of mismanagement and abuse of authority by his supervisor, i.e. that the supervisor refused to allocate work assignments fairly, refused to inform the complainant of proper work procedures, and performed private activities during working hours. The OSC provided its report of the investigation to the agency for consideration of reinstatement of the employee. The agency had not reached a decision before the close of this reporting period.
- An agency placed an employee on administrative leave (with pay) following the suspension of his security clearance. He alleged that his placement in non-duty status was in reprisal for whistleblowing. The OSC found no evidence of reprisal, but concluded that placement of an employee in a non-duty status with pay for over a year appeared to be irregular. In response to further OSC inquiry about the matter, the agency investigated the matter, restored the employee to duty in a nonsensitive position pending a final decision on his security clearance, and began consideration of the issuance of new agency regulations to govern the use of administrative leave pending resolution of security clearance issues.
- The complainant disclosed evidence to an Inspector General of shortages in

the inventory of a military commissary where she worked. A year later, the complainant received a letter of reprimand for allegedly not following proper procedures when she made her disclosures. The employee alleged to the OSC that her reprimand was in reprisal for her disclosures. On receipt of the OSC's investigative findings, the agency officials responsible for reprimanding the complainant were themselves reprimanded for failing to act upon the complainant's grievance concerning her reprimand, which the agency withdrew during the OSC's investigation and after receiving a Congressional inquiry concerning the matter.

- A complainant alleged that her current and former supervisors had denied her opportunities for training, and had failed to select her for three vacant positions for which she had applied, in reprisal for her disclosures to the Inspector General concerning allegedly improper purchase requests and alleged abuse of overtime. The OSC's investigation disclosed no clear evidence of reprisal, but the OSC's investigative findings were provided to the agency as a basis for possible redress for the complainant. The agency responded that it found no evidence of any prohibited personnel practice, but would give the complainant the training she desired subject to budgetary constraints.

**Section 2302(b)(1)(A)  
(Sex Discrimination)**

- After two complainants alleged sexual harassment, the OSC sent its investigative findings to the agency for consideration of disciplinary action. The agency requested OSC's approval under §1206(f) to initiate removal of the supervisor implicated in the harassment, and to take other disciplinary action against a second agency officer. The OSC approved the agency's request. However, the agency General

Counsel subsequently advised the OSC that based on further agency investigation, agency officials were considering a lesser penalty than previously proposed. The OSC withdrew its approval for the agency's disciplinary action and filed charges against the supervisor.

- An OSC investigation of an anonymous complaint that several employees had been promoted as a reward for sexual favors established that several employees had engaged in sexual relations with their supervisors. The inquiry also established, however, that the employees promoted were qualified for their jobs. Following a meeting with the cognizant Assistant Secretary and OSC officials, the agency instituted changes in management controls to preclude further abuse of authority by managers and to exercise closer supervision over the employees implicated in the complaint.

**Section 2302(b)(1)(B)  
(Age Discrimination)**

- Five employees alleged age discrimination, in that it appeared that their agency had decided to geographically reassign only the eldest employees in a regional reduction-in-force (RIF), apparently for the purpose of inducing their retirement. Local agency managers gave investigators from the OSC and another agency contradictory testimony concerning the reasons for the reassignments. When the OSC presented this evidence to the agency, the agency cancelled the reassignment of all five employees. As of this report, the agency was also considering disciplinary action against the managers involved.

**Section 2302(b)(6)  
(Unauthorized Preference)**

- A complainant alleged unlawful preferential hiring practices at an agency facility. The OSC's investigation disclosed evidence that agency officials

had manipulated the merit staffing procedures by appointing an excepted service employee to a GS-4 competitive position, then promoting the employee without competition to a GS-11 competitive position after only one day in the GS-4 position, in circumvention of OPM rules. The OSC provided its investigative findings to the agency in October 1986 and in January 1987, the agency agreed to take corrective action to regularize the appointment at issue and to counsel the employees involved concerning proper merit staffing procedures.

- A complainant alleged that a supervisor had given an unauthorized preference to particular individuals in hiring and promotions, purportedly on the basis of past associations and favors performed for the supervisor. The OSC's investigation disclosed some evidence of preferential treatment and possible misuse of government facilities. The office sent its investigative report to an agency official for the agency's consideration, and the matter was referred to the head of the installation concerned for possible action with respect to the unauthorized use of agency facilities and possible abuse of merit staffing procedures.
- The OSC received allegations that agency officials had abused their authority by, among other things, cursing at employees, harassing employees by arbitrarily changing their duties, and operating an agency vehicle without a valid driver's license. The complainant also alleged that these same officials had violated merit staffing procedures by directing the rewriting of descriptions of certain positions and the upgrading of the positions without valid justification. Upon initiation of the OSC's inquiry, the office learned that the agency had conducted its own investigation of similar charges against the same officials and was considering disciplinary action against the individuals implicated. The agency requested the OSC's approval under §1206(f) to

take disciplinary action against the officials implicated on the basis of its investigation. The OSC deferred further action on the matter and approved the agency's request to take disciplinary action.

#### **Section 2302(b)(7) (Nepotism)**

- A complainant alleged that an agency official engaged in various management abuses, including nepotism, in that the official's spouse was allegedly hired for a position under the official's authority. Upon inquiry to the agency, the OSC learned that the agency was investigating the same matter and deferred to the agency's investigation with a request that the OSC be kept informed. Subsequently, the agency notified the OSC that it had disciplined the official for violation of §3110 (a suspension, later reduced to a letter of counselling) and that the official's spouse had been separated by the agency.
- Another complainant alleged that an agency official had advocated the appointment of a relative in violation of the anti-nepotism statutes (§§2302(b)(7) and 3110). Upon investigation, the OSC concluded that violations of the anti-nepotism statutes and regulations had occurred and referred the matter to the agency for its consideration of administrative action. The agency, however, based on further inquiry, determined that impermissible advocacy had not occurred. The OSC reviewed and accepted the agency's findings and determination.

#### **Section 2302(b)(11) (Merit System Principles)**

- An agency had proposed and then withdrawn an employee's suspension, purportedly for failing to report violations of office procedures by another employee. The OSC investigation disclosed that the employee had followed what appeared to be the lawful orders of her supervisor, and the office re-

requested agency management to expunge the employee's official personnel file of all references to the proposed suspension. The agency initially declined to take the recommended action, but agreed (in FY 1988) to take the corrective action requested.

- In a companion to the preceding case, the agency suspended a second employee purportedly for failing to report certain actions being taken by a supervisor. The OSC informally recommended that the agency rescind the suspension, restore the employee's pay for the suspension period, and remove any record of the suspension from the employee's personnel file. The agency initially declined to take the recommended actions, but agreed (in FY 1988) to take the corrective action sought by the OSC in this case also.
- A complainant alleged that his agency removed him from his position because he participated in meetings with union officials and an official of the General Services Administration concerning problems in the timely receipt of subsistence checks. The OSC's investigation disclosed that the decision to separate the employee, allegedly for poor performance, was not supported by the facts and did not comply with the standards required for Veterans Readjustment appointments. The OSC provided its investigative findings to the agency, and the agency agreed to rehire the complainant and to grant back pay.
- An employee alleged that her proposed removal was in reprisal for her prior complaints of discrimination and was also discriminatory on the basis of sex and national origin. The OSC's preliminary inquiry indicated that the facts did not support the proposed removal, and that reprisal and/or discrimination could be involved. Following the OSC's contact with the agency's General Counsel, the agency agreed to stay a final decision on the proposed removal for 30 days. Later,

the agency's deciding official cancelled the proposed removal. He also reviewed a 7-day suspension previously imposed on the employee, cancelled that action and awarded back pay for that period.

- A complainant alleged that he received a notice of proposed removal, a suspension, letters of reprimand, and an unsatisfactory performance appraisal, allegedly in reprisal for the exercise of his appeal rights. The complainant had grieved the failure of the agency to pay him overtime and night differential pay for two years. The complainant prevailed in his grievance and was granted compensation for his previous overtime work. In the course of the OSC's investigation, during which the agency stayed the complainant's removal at the OSC's informal request, the agency cancelled the removal action and one reprimand and agreed to change his performance rating to satisfactory. The OSC's investigation continues.

#### **Procedural Violation or Error**

- An employee alleged that an agency's denial of his requests for military leave violated law. The OSC's inquiry disclosed that in one instance, the complainant did not have sufficient military leave balance, but that the agency had been misapplying military leave procedures. The agency agreed to new procedures which would correct complainant's military leave problems.
- An employee alleged that his detail to a position for two years was discriminatory on the basis of his race, retaliatory for his acceptance of a prior detail to the agency EEO office, and improperly documented. Although the OSC deferred the discrimination allegation to EEO procedures, further inquiry confirmed that the agency had failed to properly document the employee's details. The agency agreed to document the details as required by OPM instructions.

- A complainant alleged that his proposed removal was in reprisal for filing a grievance; he further charged that the agency had failed to purge his official personnel folder of all references to the proposed removal as the agency agreed to do when the complainant resigned in lieu of being removed. The OSC found no nexus between the complainant's proposed removal and the filing of the grievance. However, the office found that the agency had not purged the official personnel folder as agreed. When the OSC brought this lapse to the agency's attention, the agency agreed to remove all references to the proposed removal from the complainant's personnel folder.
- A complainant alleged discrimination based on political affiliation in connection with the abolishment of her SES position and her proposed separation in a resulting reorganization. The OSC found no evidence of political discrimination, but did find that the agency's failure to establish a GS-15 position for the complainant as directed by OPM violated the statutory SES RIF procedures. The OSC recommended informally that the agency withdraw the notice of proposed separation and that it establish a GS-15 position for the complainant. The agency agreed to cancel the proposed separation and to establish a GS-15 position if OPM could not place the complainant in a suitable SES position.
- A complainant claimed that she submitted her resignation, then withdrew it the same day and notified the personnel office that she would not resign. The following day, the complainant reported for duty as usual, but her supervisor refused to allow her to return to work. On determining that the agency's refusal to allow the employee to withdraw her resignation was not justified, the OSC recommended that it restore the complainant. The agency agreed and restored the employee with full pay and benefits for the period of her improper removal from the rolls.
- Complainant alleged that his agency had improperly placed him on administrative leave and was about to improperly demote him from his supervisory position on the basis of the results of an agency employee attitude survey. The complainant claimed that he had completed his supervisory probation period and that he had not been given an opportunity to improve his allegedly deficient performance. Based on the OSC's review of the matter, the office contacted the complainant's supervisor to advise that the reported actions appeared not to comply with applicable law regarding performance-based actions and suggested that the supervisor contact his personnel office for further guidance. Subsequently, the agency's personnel office notified the OSC that no adverse action would be taken against the complainant. Later, the agency informed the OSC of its intent to send the complainant to a managerial training course and to restore him to supervisory duties upon his return from that training.
- A complainant alleged an improper demotion during his supervisory probation period. During the OSC's preliminary inquiry, the agency acknowledged the occurrence of a procedural error and proposed to restore the employee to his former position with back pay.
- An OSC complainant was released by her agency to accept a position with another agency. The hiring agency, however, withdrew its employment offer based on a suitability question, and the former agency refused to permit the complainant to return to work. The OSC advised her former agency that its refusal to retain the employee on its rolls appeared to violate OPM

regulations. The agency restored the complainant without any loss of pay or benefits.

#### **Freedom of Information Act**

- A complainant alleged that agency officials had arbitrarily and capriciously denied requests for information pursuant to the Freedom of Information Act (FOIA). OSC inquiries to the agency's Office of General Counsel as to the reasons for the denial of the FOIA request led to a decision by the complainant's agency to comply with her FOIA request.

#### **Standards of Conduct**

- As a collateral result of a prohibited personnel practice investigation, the OSC obtained information indicating that a supervisory employee may have breached agency standards of conduct. The OSC referred this information to the agency for appropriate action. The agency suspended the employee concerned for engaging in commercial solicitation during duty hours, misusing government facilities and property, and providing false statements to an agency investigator.

### **Formal Stay Requests**

Because of cooperation by the agencies in staying personnel actions pursuant to informal OSC requests, the OSC had occasion to petition the MSPB for a stay in only one case during FY 1987. The OSC petitioned the Board to stay the proposed separation of an employee who alleged that his removal was in reprisal for his reports of irregularities in medical and surgical procedures. A 15-day stay under §1208(a) went into effect by operation of law when no member of the Board ruled on the OSC's petition. The OSC subsequently determined that an extension of the stay was not necessary and did not request an extension.

### **Informal Stay Requests**

In four other cases, agencies volun-

tarily stayed decisions on proposed or planned personnel actions at the OSC's request. Three of those cases are described previously under *Informal Corrective Actions*. In the fourth case, a complainant alleged that his proposed removal for purportedly unacceptable performance was in reprisal for his assistance to a co-worker in filing a discrimination complaint. The OSC asked the agency to stay a final decision on the proposed removal for 60 days pending the OSC's investigation of the matter. The agency agreed, then cancelled the complainant's removal when an agency performance appraisal review panel concluded that the record did not support the unacceptable rating on which the proposed removal was based. The OSC continued its investigation and final disposition of the matter was pending at the end of this reporting period.

### **Disciplinary Actions**

- *Special Counsel v. Davis O. McBride*

On April 12, 1987, the OSC charged Davis O. McBride, a manager in the Bureau of Reclamation, Department of the Interior, with approving the discharge of an employee in reprisal for her disclosure of information which she reasonably believed to be evidence of mismanagement, violation of agency rules or regulations, or a substantial and specific danger to student safety. The parties filed a Joint Motion for Approval of Settlement; the accused waived his right to a hearing and did not contest the allegations in the complaint or the OSC's offer of proof showing that he violated §2302(b)(8). The MSPB Chief Administrative Law Judge (CALJ) issued a recommended decision on October 1, 1987, finding that there was preponderant evidence to support the alleged violation of §2302(b)(8). He further recommended that the Board approve the Settlement Agreement debarring the accused, who had retired from federal service while the OSC action was

pending, from federal employment for a period of two years. The MSPB had not approved the settlement by the close of the reporting period.

- *Special Counsel v. James Heyel*

The OSC filed a complaint on January 5, 1987, charging James Heyel, a GM-14 auditor with the Defense Contract Audit Agency, with influencing a candidate to withdraw from competition in order to injure the prospects of that candidate, or to improve the prospects of another in violation of §2302(b)(5) and 5 C.F.R. §§4.3 and 330.601. The parties filed a Joint Motion for Approval of Settlement in which the accused admitted certain facts and agreed that the facts established the violation alleged. The accused agreed to the imposition of a \$1,000 fine. The CALJ issued a decision on May 22, 1987, recommending that the Board grant the Joint Motion and impose a fine of \$1,000 on the accused. The MSPB had not approved the settlement by the close of the reporting period.

- *Special Counsel v. Morris F. Wingard*

The OSC charged Morris F. Wingard, a supervisor at a Naval Air Station, with regularly engaging in unsolicited, unwelcome sexually-oriented verbal and physical conduct toward female subordinate employees, creating an intimidating, hostile and offensive working environment, in violation of §2302(b)(1)(A). A hearing in this case was pending before the CALJ at the close of this reporting period. (This is a case discussed previously under *Informal Corrective Actions*, in which the OSC gave the agency its approval under §1206(f) to take disciplinary action, then withdrew that approval when agency representatives informed the OSC that the agency was considering imposition of a lesser penalty than that originally proposed.)

## **Intervention Before the MSPB**

An employee alleged that his agency had coerced him into retiring on the basis of a handicapping condition. He claimed that a management official threatened removal if he did not report to work in spite of previously-submitted medical documentation that he was unable to perform the job. He further alleged that the agency refused to accept any additional medical statements or consider his request for further leave without pay and placed him in an Absent Without Leave (AWOL) status. The complainant resigned rather than face removal for AWOL. He then appealed to the MSPB, but an MSPB Administrative Judge dismissed the appeal for lack of jurisdiction on March 31, 1987. The OSC filed a petition for review of the appeal decision with the Board on May 1, 1987, supporting the employee's position based on a recent Federal Circuit Court of Appeals decision on the same issue (*Schultz v. Navy*, 810 F.2d 1133 (Fed. Cir. 1987)). The MSPB had not decided the matter by the close of the reporting period.

The OSC concluded in this case that in light of the complainant's appeal to the MSPB, the most expeditious means of obtaining resolution of the legal issues involved with respect to a possible prohibited personnel practice would be through intervention before the Board in the complainant's appeal, rather than through corrective action procedures.

## **Referrals Under Section 1206(c)(3)**

During FY 1987, the OSC referred six cases in which it found evidence of violations of law, rule, or regulation not otherwise within the enforcement jurisdiction of the OSC to the head of the

agency concerned pursuant to §1206(c)(3). The agency heads' certifications of the actions taken were received on three of the matters, and final agency actions on the three other matters were pending at the end of the fiscal year. The following describes the matters referred.

- An OSC investigation disclosed evidence that an employee of the Bureau of Indian Affairs, Department of the Interior, solicited funds from a private individual having business relations with the agency to support a recreational activity of employees in an agency office. The OSC concluded that the employee's conduct violated the governmentwide standards of conduct regulations at 5 C.F.R. §735.202. The agency agreed that the employee's conduct was improper, but in light of his previous good work record, decided that disciplinary action was not warranted. However, the agency cautioned him to avoid actions which might bring discredit on himself or the Bureau.
- Testimony by employees of the Federal Aviation Administration, Department of Transportation, indicated that a manager of that agency had interfered with the rights of employees to furnish information to a Member of Congress in violation of §7211. The matter was referred to the Secretary of Transportation. Final agency action awaited the results of the Department's further inquiry into the matter.
- An investigation disclosed that over an extended period, a manager at a Department of the Army activity had failed to issue performance standards and to complete the performance appraisal of his subordinates as required by §4302, 5 C.F.R. §430.406, and the activity's internal directives. The OSC sent the matter to the Secretary of the Army. The Secretary confirmed the OSC's determination and certified that the Army had reprimanded the supervisor concerned and that it would take further corrective action to provide redress for the employee who may have

been adversely affected.

- A previous OSC investigation in 1983-84 had shown that a senior executive in the Federal Mediation and Conciliation Service (FMCS) had violated the standards of conduct regulations at 5 C.F.R. §§735.201a and 735.202(a) by accepting gifts, gratuities, favors and/or entertainment from a subordinate employee. Accordingly, the OSC filed disciplinary action charges against the official concerned before the MSPB in 1984. Subsequently, the parties entered into a Joint Motion for Approval of Consent Disposition in which the accused stipulated to certain allegations of fact set forth in the complaint and agreed that he should be removed from the Senior Executive Service (SES) and fined \$1000. In March 1985, the Board issued a final decision granting the Joint Motion, and the accused was removed from the SES and placed in a GS position. The Office of Personnel Management then requested the Board to reconsider its decision, challenging the OSC's and the Board's jurisdiction over the case.

Upon denial of its petition for review, OPM filed an appeal with the U.S. Court of Appeals for the Federal Circuit. On March 24, 1987, the court held that OSC did not have the authority to file a complaint with the Board where the violation in question did not relate to personnel practices, Hatch Act violations, or merit system abuse. *Horner v. Merit Systems Protection Board*, 815 F.2d 668 (Fed. Cir. 1987). The court vacated the Board's order and remanded the case to the Board with instructions to dismiss the complaint for lack of jurisdiction. On May 28, 1987, the Board ordered the dismissal of the Special Counsel's complaint, remittal of the \$1000 fine to the respondent, and the cancellation of respondent's removal from the SES.

In light of the final decisions of the court and the Board in this case, the Special Counsel referred the matter to the Director of the FMCS under

§1206(c)(3). The Director certified that extensive action had been taken to educate agency employees about OPM and agency ethics regulations and standards, including the conduct of an Ethics Training Program, and the issuance of new instructions, guidelines and an FMCS Ethics Handbook. Additionally, the agency counselled the employees involved in the particular matter, including the official charged by OSC. The Director also certified that further disciplinary action was not warranted, since an intent to violate the regulations was not evident and the accused and all other employees had been made aware of the ethics program and standards.

- During the course of an investigation, a witness gave sworn testimony to the OSC that Internal Affairs officials of the U.S. Customs Service had conducted a non-consensual search of the witness, and had engaged in coercive and abusive interview techniques which caused the witness to make a signed, sworn statement which was untrue and executed by him solely out of fear. The OSC referred the matter to the Secretary of the Treasury. The OSC had not received a final response by the end of the fiscal year.
- An OSC investigation produced evidence that the director of an Equal Employment Opportunity Commission (EEOC) area office may have violated the standards of conduct regulation at 5 C.F.R. §735.201(a) by directing a subordinate to perform personal tasks during official duty hours. The Special Counsel sent the matter to the Chairman of the EEOC. A final response had not been received by the end of the fiscal year.

## Hatch Act Enforcement

During FY 1987, the OSC received 78 new allegations of Hatch Act violations

and initiated full investigations of 16 alleged violations. As a result of the initial examination and full investigations of complaints (including those complaints carried over from FY 1986) —

- The OSC filed complaints seeking disciplinary actions against one federal employee and five local government employees.
- In 35 other cases, the OSC established that violations had occurred, but were not sufficiently egregious to warrant prosecution, with the result that the OSC issued warning letters.
- The OSC found no violation in 46 cases and the matters were closed.
- The OSC undertook compliance enforcement action in one case decided by the MSPB in FY 1986.

The prosecutive actions taken by the OSC in Hatch Act cases during FY 1987 are described below.

## Coercion of Political Contributions

For the first time since its establishment in 1979, OSC prosecuted government employees for coercing political contributions from subordinates in violation of the Hatch Act. In this case, charges were filed on October 9, 1986, against three current and former employees of the Akron (Ohio) Metropolitan Housing Authority (Authority), as follows —

- *Special Counsel v. Janet B. Purnell*

The OSC complaint charged Janet B. Purnell, the executive director of the Authority, with coercing a subordinate employee to sell tickets to political events; coercing subordinate employees to purchase tickets for political events; and coercing subordinate employees to telephone registered voters and encourage them to support the candidacy of a mayoral candidate in a partisan election.

- *Special Counsel v. Herbert Johnson, Sr.*

The OSC charged Herbert Johnson, a labor relations manager with coerc-

ing employees to purchase tickets to political events.

- *Special Counsel v. Frank J. Fela*

The OSC charged Frank J. Fela, a personnel management administrator, with coercing employees to purchase tickets to political events and coercing an employee to donate her labor to the partisan campaign of a mayoral candidate.

OSC attorneys litigated these coercion cases before the MSPB's CALJ, who recommended (on October 28, 1987) that the MSPB find the accused had violated the Hatch Act and that they be removed from their positions. The Board had not reached a decision on the case by the close of the reporting period.

## Other Hatch Act Violations

- *Special Counsel v. Morris Jones*

The OSC filed a complaint on March 5, 1987, charging Morris Jones, a U.S. Postal Service supervisor, with soliciting votes for a candidate in a partisan election during a press conference and in a campaign flyer. By agreement of the parties, stipulations were submitted to the CALJ and a hearing was waived. Acting on the recommendation of the CALJ, the MSPB held that removal was not warranted, granted the Joint Motion for Approval of the Settlement Agreement on September 22, 1987, and ordered the Postal supervisor suspended from duty without pay for 30-days.

- *Special Counsel v. Jack I. Winkelman*

The OSC prosecuted Jack I. Winkelman, an official of the Connecticut Department of Human Resources (DHR), for running as a partisan candidate for Probate Judge in Wallingford, Connecticut, after ignoring warnings from the DHR personnel director and the OSC that his candidacy was in violation of the Hatch Act. The parties waived a hearing and the matter was submitted to the CALJ upon briefs submitted by the parties. The CALJ

issued a recommended decision on September 28, 1987, found that the accused official, ignoring all warnings, knowingly and willingly violated the Hatch Act, and recommended that he be removed. The MSPB had not reached a final decision by the close of the reporting period.

- *Special Counsel v. Helena S. Hicks*

Helena S. Hicks, an employee of the Maryland Department of Human Resources, was charged with running as a partisan candidate for the Maryland House of Delegates in disregard of an OSC warning letter. In light of information developed during discovery, the OSC moved to withdraw the charges before the scheduled hearing since it appeared that removal of the employee might not be warranted under the particular circumstances of the case.

## Compliance Enforcement Action

- *Special Counsel v. Wayne H. Camillieri*

In FY 1986, the OSC charged that Wayne H. Camillieri, an employee of the Connecticut Department of Human Resources (DHR), ran for reelection as a partisan candidate for the Hartford City Council in disregard of an OSC warning letter. The parties submitted joint stipulations to the CALJ, who issued a recommended decision finding that the accused knowingly and willfully violated the Hatch Act and recommended his removal from employment. The MSPB adopted the recommended decision and ordered the DHR to remove the accused.

Because of the DHR's refusal to comply with the Board order, on June 11, 1987, the OSC requested the Board to direct the U.S. Department of Health and Human Services (DHHS) to withhold federal monies from the DHR in an amount equal to two times the accused's annual pay. On September 29, 1987, the Board ordered DHHS to withhold \$90,150 from the DHR.

# Status of Disciplinary Cases Filed Prior to FY 1987

The status of disciplinary action cases filed or initiated by the OSC prior to FY 1987 and reported in the FY 1986 annual report is given below.

## Prohibited Personnel Practice Cases

- *Special Counsel v. Russell*

In July 1984, the OSC prosecuted William H. Russell, Comptroller of the U.S. Customs Service, for sexually harassing and assaulting female subordinates. After Russell contested the OSC's jurisdiction, the Board ruled on June 26, 1985, that the OSC had authority to prosecute sexual discrimination and Standards of Conduct charges and referred the case to the CALJ for trial on the merits of the charges. On April 11, 1986, the CALJ issued a recommended decision finding that Russell's assaults on three subordinate female employees and his sexual advances towards one female employee violated 5 C.F.R. §§735.209 and 735.201a(c), and that Russell's unwelcome sexual advances constituted harassment in violation of §2302(b)(1)(A). He recommended that Russell be demoted from the SES to a GS-13 or GM-13 position for a period of not less than three years. On February 9, 1987, the Board issued its opinion and order affirming the CALJ's findings and conclusions, but modifying the penalty in light of Russell's resignation from federal service. The Board debarred Russell from federal employment at higher than a grade-13 level for a period of three years from the date of his resignation on May 9, 1986.

- *Special Counsel v. Zimmerman and Pouy*

In February 1985, the OSC charged Dennis L. Zimmerman, a supervisory

operations research analyst, and Michael Pouy, an operations research analyst, employed by the Defense Logistics Agency with religious discrimination against a Jewish employee. Zimmerman was also charged with reprisal against the employee for exercising his appeal rights. The CALJ issued a recommended decision on February 13, 1986, finding preponderant evidence to support the charges against both employees. He recommended that the Board remove Zimmerman from federal service, demote Pouy three grades to a GS-11 position for a minimum period of three years and fine him \$1000. The Board's final decision was still pending at the end of FY 1987.

- *Special Counsel v. Ross and Catledge*

In September 1985, the OSC initiated a prosecution of Sue Abney Ross, the Personnel Officer, and Scott A. Catledge, a Personnel Management Specialist, at a Veterans Administration Outpatient Clinic, charging them with willfully obstructing the rights of applicants to compete, and granting an unauthorized preference in connection with their actions in filling two positions. Both were also charged with Standards of Conduct violations for providing knowingly false information to the OPM regarding the availability for employment of certain candidates and for making false statements to OSC investigators.

On August 7, 1986, the CALJ issued a recommended decision finding that Ross and Catledge violated §§2302(b)(4), (5) and (6), as well as 5 C.F.R. §§4.3, 330.601 and 735.209, and recommending that Ross be suspended for 45 days and Catledge be reduced in grade to a GS-7 position for a minimum period of three years.

On June 26, 1987, the Board issued its final decision, finding violations of §§2302(b)(4), (5) and (6), and ordering Ross demoted from GS-11 to a GS-10 and Catledge demoted from GS-11 to a GS-9 for a minimum period of one

year. The Board also held that the violations of 5 C.F.R. §§4.3 and 330.601 were duplicative of the §2302(b) violations such that it would not rule upon the OSC's authority to prosecute such violations.

- *Special Counsel v. Mongan*

The OSC accused John Mongan, Regional Administrator for Region I of the Department of Housing and Urban Development (HUD), in November 1985 of reprisal in violation of the Civil Service Reform Act and the Inspector General Act of 1978, for failing to promote an employee who made a protected disclosure of unlawful conduct to investigators of the HUD Office of Inspector General. The CALJ issued a recommended decision in May 1986, finding a violation and recommending that the Board impose a 60-day suspension against Mongan. On April 17, 1987, the Board issued its final decision, adopting the recommended decision ordering Mongan suspended for 60 days.

- *Special Counsel v. Cofield*

In December 1985, the OSC filed charges against Earlie W. Cofield, a policeman employed by the Government Printing Office (GPO), for violating Civil Service Rule 5.4 by failing to provide truthful testimony in a previous MSPB proceeding and during an OSC investigation. In April 1986, the CALJ issued a decision recommending to the Board that it find that the doctrine of *collateral estoppel*, which generally precludes the relitigation of issues raised and decided in a prior judgment, precluded the OSC from introducing evidence in support of its case. The OSC filed exceptions to the recommended decision in May 1986. On May 6, 1987, the Board ordered the submission of briefs on the effect of the decision of the Court of Appeals for the Federal Circuit in *Horner v. Merit Systems Protection Board* (cited above) on this case. The OSC filed its brief on May 26, 1987. The case was

still pending before the Board at the close of FY 1987.

- *Special Counsel v. Loney*

This action and *Special Counsel v. Cofield* are companion cases. Eleazer 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 in an OSC investigation. In May 1986, the OSC and Loney entered into a settlement agreement whereby Loney agreed to pay a \$500 civil penalty. On May 28, 1986, the CALJ issued a decision recommending that the Board approve the settlement. On May 6, 1987, the Board ordered the submission of briefs concerning the effect of *Horner* in this case, as in *Cofield*. The OSC filed its brief on May 26, 1987. This case was also pending before the Board at the close of FY 1987.

- *Special Counsel v. Nichols*

In June 1986, the OSC filed a complaint against Jeannette E. Nichols, a manager of the Minerals Management Service, Department of the Interior, in which it charged her with granting an unauthorized preference in connection with a job recruitment action. Following a hearing, the CALJ issued his recommended decision on January 16, 1987, finding that OSC had not established by preponderant evidence that Nichols had engaged in the violations alleged, and recommended that the complaint be dismissed. On February 20, 1987, the OSC filed Exceptions to the Recommended Decision with the Board. The Board had not acted on the case by the close of FY 1987.

- *Special Counsel v. Waddams, Reyes, and Mitani*

In August 1986, the OSC charged Billie J. Waddams, then Acting Regional Administrator of the Department of Education's Region 9 Credit Management and Debt Collection Service, Antonio Reyes, Regional Personnel Officer of Region 9, and Janet

Mitani, a Personnel Management Specialist, with engaging in prohibited personnel practices and violating other civil service laws in connection with their involvement in an agency reorganization. The 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 an unauthorized preference. On December 17, 1986, the CALJ issued a recommended decision, recommending that the Board grant the joint motion for settlement submitted by the parties. Under the settlement agreement, Waddams admitted violation of §2302(b)(5) and agreed to debarment from federal employment for three years and a fine of \$750; Reyes agreed not to contest the allegations that he violated §2302(b)(5) and accepted debarment from federal employment for three years and a fine of \$500; and Mitani admitted violation of 5 C.F.R. §330.601 and accepted imposition of a fine of \$350. The OSC agreed to drop all other charges. The Board adopted the ALJ's recommended decision by order dated June 15, 1987.

## Hatch Act Cases

- *Special Counsel v. Biller, Sombrotto, and Blaylock*

Morris Biller, Vincent Sombrotto, and Kenneth 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 in February 1985 with endorsing and soliciting support for a partisan candidate for President of the United States in their union newsletters. On October

25, 1985, the CALJ issued a consolidated decision recommending that the Board sustain OSC's charges and impose 60-day suspensions against each respondent. On February 5, 1987, the Board issued a decision finding respondents violated the Hatch Act, but that the violations did not warrant removal, and imposed suspensions of 60 days for each of the respondents. Because respondents were on leave without pay, the Board ordered that whatever other federal benefits, if any, they receive should be withheld for 60 days. Respondents' appeals of the Board order were pending in the Federal Courts of Appeal for the 2d and 11th Circuits at the end of FY 1987.

- *Special Counsel v. Kehoe*

In November 1985, the OSC initiated prosecution against Thomas J. Kehoe, an employment interviewer with the Minnesota Department of Jobs and Training, for running as a partisan candidate for State Legislature in a primary and general election after ignoring several OSC warning letters. The CALJ issued a decision recommending to the Board that it find Kehoe knowingly and willfully engaged in misconduct warranting removal. On February 27, 1987, the Board issued an order adopting the CALJ's findings that Kehoe willfully refused to abide by the restrictions of the Hatch Act and that the violation warranted removal, and ordered Kehoe removed.

Kehoe appealed the Board's order to the U.S. District Court for the District of Minnesota. The District Court found that Kehoe did violate the Hatch Act, but that his violation was not willful or knowing and that the removal penalty was an abuse of discretion. The OSC requested the Board to appeal the District Court decision. The Board agreed and filed a Notice of Appeal with the Eighth Circuit Court of Appeals on August 10, 1987.

## Intervention Before the MSPB/Agency-initiated Cases

- *Hillen v. Department of the Army* (OSC petitions for review filed in October 1985 and July 1986)

Phillip G. Hillen, Executive Director of Operations and Plans, Military Traffic Management Command, was separated by the Department of the Army in April 1985 for allegedly engaging in sexual harassment of subordinate female employees. Hillen appealed his removal to the MSPB. In October 1985, the OSC filed a notice of intervention and a petition for review of the initial decision of the MSPB, which had reversed the agency's action. 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 had failed to prove its case against Hillen. In July 1986, the OSC filed a second petition for review in support of the disciplinary action for sexual harassment. The case was pending before the Board at the close of FY 1987.

- *Lynn v. U.S. Forest Service, Department of Agriculture* (Agency-initiated with OSC approval; OSC intervened in the employee's appeal to the MSPB in February 1985.)

In FY 1985, the OSC filed charges with the Board against Robert E. Lynn, Forest Supervisor, and Joseph A. Chiarella, District Ranger, Stikine Area Ranger District, U.S. Forest Service. The OSC complaint cited them for retaliating against an employee who wrote to a local newspaper editor criticizing an agency hiring program. After the agency agreed to take corrective action consisting of back pay, expunction from the record of any reference to complainant's ineligibility for employment consideration, and consideration of the complainant without prejudice for future employment,

the OSC granted the agency's request under §1206(f) for approval to take disciplinary action. The agency suspended Lynn for 30 days and Chiarella for 14 days. On the OSC's motion, the Board dismissed OSC's disciplinary action complaints against the two employees in January 1986. In response to Lynn's appeal to the Board of his suspension, an MSPB Administrative Judge determined that only a reprimand was warranted. (Chiarella's 14-day suspension was not appealable to the Board.) The OSC then filed a petition for review, which urged the Board to affirm the agency's 30-day suspension. In FY 1987, the Board denied the OSC's petition for review.

## Whistleblowing Disclosures

In addition to its investigative and prosecutive missions, OSC provides a safe channel through which Federal employees may disclose information which they reasonably believe evidences a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. On receipt of such allegations from a federal employee, the OSC is required by §1206(b)(2) to transmit the information to the head of the agency concerned *without disclosing the identity of the source* unless he or she consents. The agency head is then required by §1206(b)(7) to report to the OSC the action taken or to be taken on the information referred.

If, on review of the information received, the OSC determines that there is a *substantial likelihood* that the information received does disclose a violation of law, rule, or regulation, or mismanagement, waste, abuse, or a danger to the public, the Special Counsel may, under §1206(b)(3), require the agency head to

investigate the matter and, in accordance with §1206(b)(4), report the investigative findings and the actions taken thereon to the Congress, the President, and to the OSC (for transmittal to the complainant).

The OSC is *not* authorized to investigate allegations of the kind described in §1206(b). Nevertheless, complainants often misconstrue the OSC's authority and send such allegations to the OSC with the expectation that the OSC will investigate the matter. Also, information which may be covered by §1206(b) is often included in or with allegations of other prohibited activities within OSC's investigative jurisdiction. Therefore, most matters which may be cognizable under §1206(b) are usually identified through the initial review of complaints conducted by the Prosecution Division's Complaints Examining Unit. The Investigation Division's Disclosure Unit then conducts further review and follow-up with the complainant as needed to confirm the facts and issues involved. On completion of such review and inquiry, the OSC decides whether to: (1) transmit the information developed to the agency concerned under §1206(b)(2) only or under §1206(b)(3); (2) refer the matter to the agency Inspector General or comparable office for information and any action deemed appropriate; or (3) close the matter without further action.

During FY 1987, the OSC received and considered 106 matters for possible referral to the agency concerned under §1206(b). Of these 106 new matters, plus 13 matters carried over from FY 1986 and four matters previously closed but reopened for further consideration —

- The Special Counsel referred 13 disclosures for investigation and a report under §§1206(b)(3) and (4).
- The OSC referred 37 disclosures for a report of action taken or to be taken thereon under §§1206(b)(2) and (7).
- The OSC referred 35 disclosures to the agency Inspector General.
- The OSC closed 32 matters due to lack of sufficient basis for further action.

- The OSC carried 6 matters over to FY 1988 for completion of review.

## Results of Referrals

At the beginning of FY 1987, five agency reports received during FY 1986 awaited final OSC review. During FY 1987, 14 §1206(b)(4) reports and 38 §1206(b)(7) reports were received from the agencies to which statutory referrals had been made during FY 1986 and FY 1987. At the close of FY 1987, three agency reports awaited review and closure in the OSC. Final review of the agency reports disclosed the following results from the statutory referrals —

### Section 1206(b)(3) referrals

Allegation substantiated in	
whole or in part . . . . .	10 (67%)
Allegation not substantiated . . . . .	5 (33%)

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

Agency regulations or practices changed . . . . .	8
Disciplinary action taken . . . . .	5
Evidence of a criminal violation referred to the Attorney General . . . . .	1
Other . . . . .	7

### Section 1206(b)(2) referrals

Allegation substantiated in	
whole or in part . . . . .	20 (51%)
Allegation not substantiated . . . . .	19 (49%)

In the 20 cases in which allegations were substantiated, agencies reported the following corrective actions, with more than one action in some cases:

Agency regulations or practices changed . . . . .	12
Restoration of an aggrieved employee . . . . .	1
Disciplinary action taken . . . . .	3
Other . . . . .	7
No further action . . . . .	2

## Nature of Matters Referred Under the Statute

Based on a sample of whistleblowing cases closed in FY 1987, the following are representative of the kinds of allegations referred under the statute and the results of agency actions taken thereon.

*Section 1206(b)(3) Referrals.* The Special Counsel transmitted the following matters to the agency heads concerned under §§1206(b)(3) and (4) for investigation and a report of the results and actions taken thereon.

- The Special Counsel sent an allegation of mismanagement, gross waste of funds, and danger to public safety in the construction of an electrical power substation at a Navy facility to the Secretary of the Navy in FY 1986. The agency's investigation did not substantiate the allegation of mismanagement, waste of funds, or danger to the public, but the Secretary reported that liability for design errors and any increased costs required to correct the errors would be pursued with the two contractors involved, and a study of the design review process would be conducted.
- At the direction of the Administrator of Veterans Affairs, the Inspector General of the Veterans Administration (VA) conducted a thorough investigation into allegations of violations of law and regulation in the alleged misuse of funds at a VA medical center. The Inspector General investigation included a review of similar practices nationwide. The Administrator reported that all of the allegations were substantiated. As a result, the VA collected funds from a former employee, counselled high-level staff on their responsibilities, and strengthened the role of Research and Development Committees in order to better control research activity and funds.
- The Special Counsel transmitted an allegation of widespread use and sale of drugs and excessive use of alcohol by linehandling crews of the Panama Canal Commission, and the failure of management to take appropriate action to correct these problems to the Administrator of the Panama Canal Commission in FY 1986. The Administrator reported that the agency's investigation disclosed that although a drug and alcohol abuse problem did exist, there was no evidence to support the allegation that it was widespread. The Administrator's report concluded that the Commission's program of drug and alcohol abuse prevention, detection and correction was working to minimize the threat this abuse poses to the Commission and its employees; however, the investigation served to highlight the need for constant vigilance and to focus on present needs.
- The Special Counsel sent an allegation that certain supervisory personnel at an Army installation condoned or engaged in fraudulent time and attendance practices, and that incentive and cash awards had been given improperly in violation of law and regulations to the Secretary of the Army in FY 1986. The agency's investigation did not substantiate the allegation, but did disclose that one of the individuals involved used discarded scrap materials in violation of Department of Defense regulations.
- The Special Counsel forwarded an allegation of violations of law and regulations creating a danger to public health in the handling of asbestos at an Air Force base to the Secretary of the Air Force in FY 1987. The agency investigation substantiated numerous violations of regulations, but failed to establish gross negligence. The Air Force took a wide range of corrective actions, from providing proper safety equipment and training to establishing safety performance standards in employee work plans, and counselling managers and supervisors in their responsibilities to provide a safe working environment.
- The Special Counsel sent the Secretary of the Interior an allegation of mis-

management concerning the relocation of a Bureau of Indian Affairs office from one location to another. The agency's investigation concluded that the allegation was not substantiated and that the agency's actions were supported by the facts, were accomplished for reasons of good management, and did not violate law, rule or regulation.

- The Special Counsel reported allegations of violations of law and regulation, gross waste of funds, abuse of authority, actions creating a danger to public safety, and acts of misconduct by officials of the National Oceanic and Atmospheric Administration and one of its ships to the Secretary of Commerce. Investigation by the agency Inspector General did not substantiate the allegations. The inquiry did, however, disclose a number of personnel problems resulting from poor management practices, which were addressed on-site, and the individuals concerned were counselled by the inquiry team.
- The Special Counsel sent allegations of violations of law and regulation involving a contractor employed by an Army Education Center to the Secretary of the Army. The Secretary reported that an investigation of the allegation revealed that the contractor was negligent in verifying the academic credentials of employees as required by the contract, and that an employee had falsified her credentials. This employee was terminated. The Army required the contractor to certify all employee credentials immediately and the Education Center tightened procedures to monitor compliance.

*Section 1206(b)(2) Referrals.* The OSC sent the following matters to the agency heads concerned during FY 1987 under §§1206(b)(2) and (7) for a report on action taken or to be taken thereon.

- The Department of the Interior investigated an allegation of mismanagement and waste of funds by the Minerals Management Service and found no

substantiation of the charge.

- The Secretary of Health and Human Services (HHS) received an allegation that Social Security Administration (SSA) employees were required to accept benefit claims which they knew would result in technical denials and that such claims were used to pad work loads and conceal poor processing times for legitimate cases. The HHS Inspector General reported that a previous program inspection had disclosed that the procedures complained of had been instituted in response to recommendations of the GAO in 1979 to improve management controls. Moreover, the Inspector General inspection report had recommended that the process be maintained, but that in order to remove any misperceptions, SSA issue a directive explaining the rationale for the institution and maintenance of the procedures.
- In response to allegations of mismanagement of personnel at an Air Force installation, the Office of The Inspector General of the United States Air Force conducted an investigation and reported that the allegations were not substantiated. Rather, the assignment of employees to certain projects and work cited as evidence of mismanagement were determined to be prudent actions taken by management to solve complex problems and prevent workload backlogs.
- It was alleged that a supervisor at an Army installation used subordinate carpenters to work on his home during duty hours without charge to leave, that two of these employees received preferential treatment including promotion and awards, that Government-owned lumber was used in the construction of the supervisor's home, and that other employees were required to remove asbestos from installation buildings without proper training or protective equipment. The Army investigating officer concluded that none of the allegations were substantiated.

- The OSC received a disclosure that a supervisor at a U.S. Forest Service activity in the Department of Agriculture had required or allowed his subordinate employees to perform work activities under conditions that were unsafe and unhealthy; directed that motor vehicle accidents not be reported; and verbally abused his subordinate employees through his use of profanity and racial slurs. The Department inquired into the matter and reported that: the agency concerned was aware of the allegations through prior employee grievances, which had been investigated; the safety deficiencies cited by the complainant had been addressed and corrected by the supervisor; the workers had been required to work in an area treated by herbicides, but the supervisor was not aware of the spraying and had removed the workers from the sprayed area when he was informed of the herbicide; the failure to report motor vehicle accidents was substantiated and the supervisor was counselled concerning the requirement to report all motor vehicle accidents; and the use of abusive language had been substantiated as having occurred in the past, but that the supervisor had been counselled and his behavior appeared to have been kept under control during the previous year.
- A source reported that: (1) a plan had been initiated to replace storm windows in the barracks at a U.S. Marine Corps installation at a cost of \$1.5 million whereas the windows currently in place were installed in 1984 and were fully functional; (2) although vinyl windows are more energy efficient, require less maintenance and are less expensive than aluminum windows, vinyl windows were not to be considered in the bidding process for window replacement. The agency's investigation revealed that the allegations were not substantiated and no violations, mismanagement or gross waste of funds were found. Specifically, storm windows were placed *over* the existing windows in 1981, not 1984. However, the existing windows, which were installed in 1931, had deteriorated badly, had rotted wood frames, were inadequately sealed and in poor mechanical operation. The activity planned to replace them with metal frame, thermal pane, energy-efficient units. The storm windows installed in 1981 would not fit over these new, self-contained windows. A recommendation that vinyl windows be used had been considered, but could not be implemented because there were no approved specifications for polyvinyl windows. When vinyl windows had been recommended previously in 1983, there were no testing criteria for polyvinyl windows in the United States; they were manufactured in Europe and had only been used in Europe. Moreover, there were insufficient facts at that time on which to base a request to Navy Facilities Command (NAVFAC) to consider testing the vinyl windows. However, the agency sent a copy of the report of investigation to NAVFAC with a request that they investigate the use of polyvinyl chloride windows to determine whether the specifications for windows should be amended.
- It was alleged that an imprest fund cashier of the Western Area Power Administration (WAPA), Department of Energy, was required to transport approximately \$5000 on an almost daily basis without an escort or other means by which to ensure his safety or that of the funds; and that the Administrator of WAPA did not respond to a letter which expressed concern about the situation. The Department's inquiry confirmed that the cashier was required, on a periodic basis, to travel to a bank about three miles from the office, and to return with cash in an amount varying between \$2000 and \$5000 without an escort. Although the Administrator did not respond directly to the complain-

ant, the Acting Director of Organization and Personnel Management did respond in a letter which, among other things, indicated that his concern would be turned into a suggestion and considered under the employee suggestion program. Subsequently, WAPA changed its procedures for replenishing cash in the Imprest Fund so that checks could be deposited and cash secured from a credit union located in the same building and on the same floor where the imprest fund is maintained.

- It was alleged that a former federal employee had informed personnel of a Veterans Administration (VA) Regional Office that he was unemployed when applying for disability benefits and rehabilitation training when, in fact, he was employed full-time by a federal agency. As a result, the individual received additional disability pay and full payment of tuition, fees, and books to which he allegedly was not entitled. The agency's inquiry revealed that the veteran was less than fully informative with VA officials and did not disclose that he was a full-time federal employee during the time he applied and was accepted for rehabilitation services. However, in developing the veteran's disability rating, his employment status was not an issue and did not preclude his receipt of the benefits sought. Accordingly, there was no prima facie violation of law.
- It was alleged that an Army medical facility employed unqualified laboratory technicians to conduct rabies tests, resulting in erroneous findings and otherwise avoidable deaths. An inquiry conducted by the Office of the Surgeon General of the Department of the Army determined that the allegations were not supported by any evidence.
- The OSC sent an allegation of mismanagement and danger to public safety at a national forest to the Secretary of Agriculture. The Secretary reported that the allegations had been

investigated in 1986 as the result of a grievance. The investigation substantiated the allegation that funds designated for use on wilderness trails and for wilderness administration were improperly diverted to perform range and wildlife projects. As a result, the agency took disciplinary action against the individuals who diverted the funds and implemented closer oversight of fund use.

## Legislation

During FY 1987, Congress considered legislation to amend the Civil Service Reform Act of 1978 (CSRA) and the Hatch Act of 1939 in ways which would significantly affect the responsibilities and authority of the OSC. The legislation under consideration consisted of —

- H.R. 25, "The Whistleblower Protection Act of 1987"
- H.R. 20, "The Federal Employees' Political Activities Act of 1987" and a related measure, H.R. 21, "The Postal Service Employees' Political Activities Act of 1987"
- S. 508, "The Whistleblower Protection Act of 1987"

## Whistleblower Protection Bills

H.R. 25 and S. 508 are similar bills intended to provide more protection for whistleblowers than that which is perceived as being afforded by the CSRA. The Special Counsel testified on H.R. 25 before the Civil Service Subcommittee of the House Post Office and Civil Service Committee on March 10, 1987, and on S. 508 before the Subcommittee on Federal Services, Post Office, and Civil Service of the Senate Governmental Affairs Committee on July 31, 1987. The Special Counsel strongly supported the protection of whistleblowers in her testimony at both hearings and endorsed the concept of strengthening whistleblower protection through new legislation. Never-

theless, she noted significant problems with both bills. These problems are discussed briefly below.

### H.R. 25

*Employee Representation.* The bill provides that the OSC shall "represent and act on behalf of employees, former employees, and applicants for employment alleging prohibited personnel practices." While the OSC represents the rights of federal employees whenever a stay request or corrective action for an employee is sought, this representation is not equivalent to an attorney-client relationship. If this provision of the bill is intended to create, or is interpreted as creating, an attorney-client relationship, the OSC would cease to be an agency concerned with the protection of both the merit system and the rights of all employees under that system. Rather, the proposed legislation would make OSC a legal services agency whose legal and ethical mandate would be to represent the personal interests of only those individuals who file complaints, whether or not their claims were meritorious. Moreover, the bill does not distinguish between the various types of prohibited personnel practices under §2302 which can be alleged and which would require OSC to represent the complainant. In some cases, as in nepotism or unauthorized preference, the complainant would not necessarily be the victim of a prohibited personnel practice or entitled to any personal redress. Also, discrimination on the basis of race, color, religion, sex, national origin, age or handicapping condition is a prohibited personnel practice under subsections 2302(b)(1)(A)-(D), as well as under the original laws from which the CSRA prohibition is derived. Under its current policy and procedures, the OSC normally defers allegations of such discrimination to the discrimination complaint resolution procedures established under the law and regulations of the Equal Employment Opportunity Commission (EEOC), including *de novo*

suits in the federal courts. However, H.R. 25 would appear to require the OSC to represent employees who allege discrimination before the Merit Systems Protection Board (MSPB), regardless of whether the complaint is being pursued in another forum.

Other troublesome aspects of the representation requirement include:

(1) *Uncertainty as to how far OSC's attorneys must go in pursuing a complaint.*

The bill could be interpreted to require OSC lawyers to prosecute cases which are without merit simply because the allegation may be, legally, nonfrivolous.

(2) *Uncertainty as to the bill's effect on the confidentiality of certain government files and information.*

Thus, if the OSC were held to have an attorney-client relationship with complainants to the office, it may be required to provide complainants with information obtained during investigation or during discovery, including otherwise confidential material or material that would be unavailable to the employee under the Freedom of Information Act (FOIA) or the Privacy Act, or through discovery under current MSPB procedures. If the OSC were required to make all information available to its "clients", FOIA and Privacy Act concerns would inevitably cause agencies to be reluctant about surrendering documents and information to the OSC.

(3) *The potential impact on OSC's discretion in initiating disciplinary actions.*

If the OSC represents an aggrieved employee, the employee may want the OSC to institute disciplinary proceedings against a supervisor. Yet, OSC may conclude that such an action would not be likely to succeed and may result in bad precedent for future cases. Under these circumstances, the OSC would have a conflict of interest between an obligation to represent the interests of the client, on the one hand, and its duty to effectively enforce public law, on the other.

*Individual Right of Action.* The bill provides that "an employee, former employee, or applicant for employment may, with respect to *any* personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice, seek corrective action from the Merit Systems Protection Board." (Emphasis added.) The bill would also authorize those individuals to request the MSPB to order stays of personnel actions, and would permit them to bypass the OSC to obtain direct access to the MSPB. Thus, the bill would establish still another system in addition to the multiple statutory and regulatory employee appeal, grievance and complaint systems and negotiated grievance-arbitration systems which now exist for resolving not only allegations of reprisal for whistleblowing, but many other kinds of employee-management disputes. In addition to those actions now commonly referred to as adverse actions which are appealable to the MSPB under current law or regulation, each and every decision concerning an appointment, promotion, detail, reassignment, performance evaluation, pay, benefits, awards, minor disciplinary action not currently appealable to the Board, or change in duties that could be construed as inconsistent with an employee's grade or pay, would carry with it the potential for litigation before the MSPB and in the federal courts. Since these provisions of the bill would apply to employee allegations of any of the 11 prohibited personnel practices, complainants would have every reason to pursue discrimination complaints through the new individual right of action procedures in lieu of or in addition to existing discrimination complaint procedures under EEOC regulations. In FY 1985, the last year for which published figures are available, a total of 19,386 discrimination complaints were filed by federal employees using the EEO procedures. Thus, these provisions of the bill would substantially increase

the caseload of MSPB, with attendant costs to the MSPB, OSC (which would be required to represent the employees concerned), and the individual agencies concerned without any sound data to suggest that the ultimate results will change from that obtained under the existing appeals, grievance and complaint systems and processes.

## Other Provisions

The bill would change the burden and elements of proof necessary to prevail in a corrective action proceeding. With regard to reprisal for whistleblowing, the bill relaxes the standard of proof for establishing a prohibited personnel practice from preponderance of evidence to substantial evidence, and requires the agency to prove not only that it had legitimate non-prohibited reasons for the personnel decision, but that the decision was based *solely* on those reasons. Thus, the proposed bill seems to provide that if protected conduct played *any part* in the personnel action, corrective action must be ordered. Currently, the OSC must prove that reprisal was a significant factor in the personnel action. The new test would overturn an agency action and protect the employee from *any* personnel action even if the consideration of protected conduct was insignificant or *de minimis*.

The bill would require that when the OSC terminates an investigation of an alleged prohibited personnel practice, the complainant must be notified and given "the findings of fact ascertained during the course of the investigation. . ." The CSRA now requires the OSC to notify the complainant only of the reasons for terminating the investigation. Currently, the OSC obtains evidence through investigation and makes prosecutive decisions on the basis of the evidence; technically, the MSPB is the finder of facts. This provision, therefore, appears to require the OSC to perform a quasi-adjudicatory function inconsistent

with its status as a law enforcement agency.

The bill would require the OSC to petition MSPB for corrective action if an agency does not take such action during the pendency of a stay. This provision appears to deprive OSC of discretion, insofar as corrective action is concerned, once a stay has been sought. Since a stay is in the nature of a preliminary injunction pending further investigation, OSC should retain discretion to avoid further action in a stay matter if the evidence does not warrant further action.

The bill would *require* the OSC to continue an investigation after referral of a criminal violation to the Attorney General. The current law *permits* the OSC to continue its investigation, but allows for discretion should the OSC and the Department of Justice decide that continuing the OSC investigation might compromise a potential criminal case. The discretion to defer to the criminal process is reasonable and necessary, and thus, should not be withdrawn.

The provisions of the bill concerning the referral of whistleblowing disclosures to agency heads appears to foreclose the OSC from transmitting questionable disclosures informally to agency inspectors general or other responsible agency officials as is the current practice. These informal referrals have been made heretofore without compromising the OSC's mission or countenancing agency cover-ups or unlawful retaliation.

The bill would require the OSC to inform a complainant who discloses whistleblower information to the OSC of "any recourse (administrative or otherwise) available under law, rule or regulation, should the individual wish to pursue the matter further." Since complainants making disclosures may be government employees, private citizens or foreign nationals, and the matters involved could span the entire spectrum of programs and activities of the federal government, any legal duty imposed upon the OSC to ascertain the legal remedies which might be available to individual

complainants for their particular concerns would create an onerous burden which would be impossible to discharge.

### S. 508

The Senate bill, S. 508, is in many essential respects similar to H.R. 25. A significant difference between the Senate bill and the House bill is that S. 508 does not establish a representational relationship between the OSC and the complainants to the office. The bill, however, would give employees, former employees and applicants an individual right of action before the MSPB with respect to complaints of any prohibited personnel practice, as in the House bill, but with some procedural differences. Some of the issues of concern raised by S. 508 are discussed below.

*Individual Right of Action.* S. 508 would establish an individual right of action before the MSPB, with appeal rights to the federal courts for employees, former employees and applicants for employment who allege the commission of any prohibited personnel practice in connection with any covered personnel action. Like the House bill, this right of action would apply to *any* prohibited personnel practice allegation (not just reprisal for whistleblowing) relating to *any* covered personnel action, including those which are not considered adverse actions or otherwise appealable actions under current law or regulation. Thus, the scope of these provisions far exceeds the scope suggested by the title of the bill. Unlike the House bill, however, the new right of action would accrue within 60 days after the complainant seeks corrective action from the OSC and is advised that the investigation has been terminated or is not advised by OSC that it will seek corrective action on the complainant's behalf. On the basis of the OSC's experience in dealing with thousands of allegations of prohibited personnel practices, investigation of complaints which may be meritorious and may warrant corrective action require

substantially more than 60 days to complete. There is no sound data to suggest that employees will benefit significantly or at all, at least under current law governing proof of prohibited personnel practices, through the proposed new procedures. On the other hand, the effect on the workload of and costs to the MSPB, the agencies, and the courts would likely be substantial.

*Judicial Review.* The bill would amend 5 U.S.C. §7703 to permit employee appeals of MSPB decisions to be brought in the U.S. Court of Appeals for the Federal Circuit or any Court of Appeals for the circuit in which the employee resides. This amendment would reverse one of the principal changes wrought in the federal court structure by the Federal Courts Improvement Act of 1982. It would disperse decision-making in the field of federal personnel law among 13 different Circuit Courts, defeating the furtherance of a consistent body of federal personnel law to guide not only managers, but also employees, throughout the federal government. The inevitable conflicts between decisions arrived at by 13 separate Courts of Appeal, requiring resolution by the Supreme Court, will only further delay the development of a unified body of law in this important area.

*Informal and Criminal Referrals.* As in the House bill, this bill would prohibit the OSC from transmitting disclosures of alleged violations of law, mismanagement, waste, abuse of authority, or dangers to public health or safety to federal agencies, except through the formal referral processes established in the current law. Likewise, the bill would require the OSC to continue an investigation into an alleged prohibited personnel practice after referral of any possible criminal violation to the Attorney General. As noted above, the OSC believes

these restrictions on the discretion of the OSC to be unwarranted.

Both H.R. 25 and S. 508 were pending in the respective houses of Congress at the close of FY 1987.

## Hatch Act Legislation

The Special Counsel testified on H.R. 20 and H.R. 21 before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service on June 3, 1987. In her testimony, the Special Counsel expressed serious reservation about the fundamental recasting of the Hatch Act, a law that has served to preserve important public values as much as it has served to protect the vast majority of government employees from partisan political considerations in the performance of public service. Among the concerns she expressed was that the proposed legislation would result in the politicization of the federal civil service. Even with the strongest of controls against coercion of political activity by government employees, it seems unrealistic to believe that federal employees will be oblivious to the advantages of political partisanship when competing for promotions or other incidents of employment with other politically active employees. Her testimony noted that overt coercion is comparatively easy to guard against and to enforce; what is not so easily regulated is the climate that can easily arise based on the unspoken assumption that political conformity is the route to achievement 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 legislation, reported out favorably from Committee as H.R. 3400, was pending before the House at the end of FY 1987.

# APPENDIX

## Nature of Reprisal for Whistleblowing Allegations

During FY 1987, 245 complaints received by the OSC contained allegations of reprisal for whistleblowing in possible violation of §2302(b)(8). In some instances, the allegation of reprisal was the primary complaint, whereas in other instances, reprisal was suggested in addition to other alleged prohibited personnel practices. The following synopses of a 10 percent random sample of matters docketed by the OSC during FY 1987 involving reprisal claims illustrate the range of matters encompassed within such claims and the basis for the OSC disposition of those claims.

### Matters Closed Following Initial Review and Inquiry

- An excepted service, veterans preference-eligible employee alleged that his agency removed him in reprisal for his disclosure to the agency Inspector General of an alleged violation of personnel law. The complainant also alleged discrimination on the basis of race. The OSC's inquiry disclosed that the complainant was removed for absence without leave (AWOL), and that he had appealed his removal to the Merit Systems Protection Board (MSPB), which sustained the agency action, finding, *inter alia*, that his claim of reprisal was not supported.
- An employee alleged that his non-selection for promotion and a less than "Outstanding" performance appraisal, which was not as high as he thought he deserved, were in reprisal for testifying in an arbitration hearing and filing an unfair labor practice complaint concerning a promotion he had sought. The OSC's inquiry disclosed no evidence of any connection between the agency actions disputed by the complainant and his protected activities. Moreover, he was recommended for several cash awards in the years preceding his performance appraisal by the supervisors who had allegedly retaliated against him.
- An employee alleged that he was denied a promotion in reprisal for complaining to the agency's Office of Inspector General (OIG) about the relationship between a supervisor and a co-worker, and about favoritism accorded the co-worker in her selection for a position sought by the complainant. The OIG investigated the complaint. However, the complainant could not identify any vacancy for which he had applied for which he believed he had been denied proper consideration after his complaint to the OIG. In fact, he was promoted shortly after he made his complaint to the OIG.
- An employee alleged that he was removed in reprisal for complaining to higher management about his supervisor's failure to follow internal personnel policies and procedures. Initial inquiry disclosed that the complainant had been removed for refusing to report for duty as directed, and that there was no indication of any connection between his removal and his complaint. Although closed initially for lack of sufficient evidence of any prohibited personnel practice, the matter was reopened for further investigation when the complainant produced information indicating that he may have reported for duty as directed.
- A complainant alleged that the termination of her probationary appointment to a food service position was in reprisal for telling her supervisor that certain patients were not receiving correct portions of food. The supervisor disagreed with the complainant's conclusion. Complainant also alleged racial discrimination and that her supervisor failed to train her adequately. The OSC's review disclosed no evi-

dence of reprisal, and the agency's grounds for separating the employee could not be shown to be improper.

- Complainant alleged that the termination of his probationary appointment to a clerical position was in reprisal for reporting to agency officials his belief that materials with security classification markings were not being handled properly, and that other alleged security breaches were occurring. The OSC's inquiry disclosed that complainant was discharged on several grounds related to poor performance and misconduct, and based on the revocation of his security clearance after an investigation disclosed that he had sold drugs for profit. Complainant admitted to the agency and the OSC that he had been involved with drugs.
- A complainant had alleged previously to the OSC that his agency threatened to reassign him and revoked his security clearance for reporting health and safety violations. The OSC closed the matter without further action when inquiry determined that the employee's security clearance had not been revoked, and that he had been temporarily reassigned to another office because of his concerns that the presence of hazardous substances in his office made him ill. In 1987, the employee again complained to the OSC that he had been reassigned and that his security clearance had been revoked in reprisal for reporting the alleged health and safety violations. The OSC's inquiry revealed that the disclosures he cited were the same disclosures of alleged health and safety violations involved in his previous complaint, and that three independent reviews of the complainant's allegations of environmental hazards had been conducted by qualified specialists. Each review concluded that there were no hazardous substances in the work environment. Moreover, the complainant was permanently reassigned when the temporary reassignments, which had been effected to accomodate his concerns about his work environment, could no longer be extended, and his security clearance was revoked because his new assignment did not require access to classified information.
- Another complainant alleged that he received a performance rating less than "Outstanding" in reprisal for numerous disclosures to the agency Inspector General, Office of General Counsel and others concerning alleged violations of transportation regulations and procedural irregularities in shipments of materials and in the contracts for such shipments. The OSC's inquiry confirmed that the complainant had made numerous disclosures. However, it could not be substantiated that the complainant was improperly or incorrectly rated on any of his critical or non-critical performance elements, which together equated to an overall "Satisfactory" rating under the applicable rating plan. Moreover, the complainant had made at least four similar disclosures before receiving an "Outstanding" rating the year before, followed by a promotion seven months before the disputed performance rating.
- An employee complained of harassment believed to be in reprisal for his disclosures to the military police and Inspector General's office of numerous alleged violations of law with respect to the use of government equipment and personnel by his supervisor. As an example of the alleged harassment, the complainant was given a letter of counselling for not properly documenting the use and return of a truck to the worksite. The complainant acknowledged that he did not complete the required documentation because he was unaware of the requirement. However, he could not cite any specific action taken against him. The OSC's inquiry disclosed that as a result of an investigation of the complainant's disclosures, which substantiated only one of the allegations,

disciplinary action against the supervisor was planned. However, no adverse action or any other personnel action was proposed or under consideration with respect to the complainant.

- Complainant alleged that he was obstructed in his right to compete for a promotion several years ago, that he was discriminated against because of age when he recently reapplied for the position, and that the person selected for the job he applied for was given unauthorized preference. He alluded to the possibility that his non-selection for promotion was in reprisal for whistleblowing. Complainant told the OSC that several years ago, he had arranged for the sale of used government property and given the proceeds to one of his supervisors, who put the money into a fund for use for office parties. Some time later, one of the complainant's supervisors asked if he had informed other agency officials about the fund. After the complainant denied that he had met with other agency officials to discuss the matter with them, the supervisor did not raise the subject again. The OSC's inquiry disclosed no evidence of any connection between any disclosure by the complainant and his non-selection for promotion.
- An applicant for federal employment alleged that his non-selection for a position may have been in reprisal for his whistleblowing during his employment in another agency. He had been informed of his selection for a job from an OPM certificate of eligibles subject to completion of favorable reference checks. He was later notified that someone else had been hired. The complainant believed that a supervisor in his former agency, with whom he had had a confrontation concerning some missing property, may have given adverse information about him in the reference check. However, complainant acknowledged that he had not conveyed to anyone his belief that

the supervisor concerned had a habit of loaning property to his friends. Moreover, there was no evidence that the particular supervisor (who was not complainant's supervisor in the former job) or any other employee of his former agency had been contacted for a reference check. Thus, there was no evidence that the complainant had actually made a protected disclosure; and even if the confrontation with the supervisor over the complainant's search for missing property could be construed as a protected disclosure, there was no evidence that the incident had any bearing on his failure to obtain the job with the hiring agency.

- The OPM referred a complaint from an employee to the OSC through the MSPB concerning financial hardships resulting from his placement in leave without pay status pending approval of his disability retirement. The employee styled himself a whistleblower and claimed that he had sought help through the agency hotline, the agency OIG, EEOC, and installation commander, but gave the OSC no specific information as to what he had disclosed. The complainant also alleged that he had been harassed because of his whistleblowing before his initial separation for disability. The OSC's inquiry disclosed that the complainant's separation for medical disability was cancelled due to a settlement agreement reached prior to a hearing on his appeal to MSPB, on condition that the complainant provide a medical report from his private physician confirming that he could perform the full range of duties of his regular position. The complainant returned to work for one week, but claimed he felt overwhelmed by what he perceived as supervisory harassment. His physician advised him not to return to work. He applied for disability retirement, but the OPM delayed final approval pending his submission of additional medical information. Eventually, his retirement was

approved retroactively. In the meantime, the agency sent him two checks in recognition of two beneficial suggestions he had made. There was no evidence of reprisal and competent medical authority confirmed his disabling medical condition.

- A complainant alleged reprisal in retaliation for a disclosure which resulted in the conviction of an agency employee for fraud. The complainant claimed that a conspiracy by management officials several years after the disclosure resulted in the employee being wrongfully tried for sexual misconduct involving a minor. The OSC could not conduct full inquiry in the agency since the complainant declined to permit the disclosure of the complainant's identity. Nevertheless, the information provided with the complaint indicated that the sexual misconduct charges had resulted in an acquittal. Further, the agency had cancelled the proposed personnel action complained of by the employee.
- The OSC received an allegation from an employee that his separation during his probationary appointment was in reprisal for whistleblowing and for the exercise of his appeal rights. He alleged that he had called the agency hotline to report waste, fraud, and abuse, but failed to provide the OSC with information as to what he had disclosed, or as to which agency officials knew of his alleged disclosure. (Agency records indicated that allegations of mismanagement and other matters which may have been reported by complainant were received anonymously.) OSC inquiry revealed, however, that the complainant had been separated due to an adverse suitability determination based on information developed by OPM in a background check. OPM's information indicated that the complainant had resigned from another agency in lieu of separation, in the face of charges of (1) falsification of time cards, (2) threatening subordinates with removal for re-

porting his misconduct to law enforcement officials, (3) wrongful disposition of government property, (4) physical abuse of another individual, (5) improper use of compensatory time-off, (6) proneness toward temper tantrums, (7) violence and threats toward subordinates, (8) use of sexist and racist remarks to subordinates, (9) refusal to hire an applicant because her husband was of a different race, and (10) use of drugs on duty. Although the agency investigated the anonymous allegations of mismanagement, the OSC found no evidence of any connection between the complainant's separation and his reporting of any such mismanagement.

- Complainant alleged that her removal for misconduct was in reprisal for her submission of complaints against her supervisor through the discrimination complaint and grievance procedures and to the agency OIG. She subsequently alleged reprisal and discrimination on the basis of sex and race with respect to two previous disciplinary actions. The OSC's inquiry disclosed that the complainant had signed a memorandum of agreement with the head of her office and her union that she would refrain from any further incidents of disruptive and abusive behavior, enroll in the employee assistance program for counseling, and not appeal a decision to suspend her in lieu of a proposed removal. The agreement also called for her reassignment, which was effected when she returned to duty following her suspension, to an organizational unit not under the supervision of the supervisor with whom she had had difficulties in order to minimize the chance of confrontations which were upsetting to the complainant and other staff. However, the current notice of proposed removal cited four instances in which she was involved in confrontations with her former supervisor or members of his staff. In each instance, the complainant had exhibited the

kind of disruptive and abusive behavior she had agreed she would not engage in. Although the complainant disagreed with the agency's characterization of her conduct, she admitted to initiating the contacts and confrontations with agency staff involved.

- An employee alleged that she and other staff were being harassed for causing and providing information during a management review of problems concerning medical care at an agency facility. The complainant, however, did not indicate what information (if any) she or the others had disclosed, nor did she identify the officials purportedly responsible for the actions complained of, the individuals allegedly affected, or any personnel action that had been taken or proposed. Moreover, she requested that the OSC take no further action on her complaint pending the OSC's receipt of additional information requested from her. The OSC failed to receive the information, and she did not return follow-up telephone calls.
- A complainant alleged that his non-selection for promotion was, among other reasons, in reprisal for his whistleblowing disclosures, specifically one such disclosure concerning the cannibalization of a vehicle for spare parts when it could have been cheaply repaired. Inquiry, however, disclosed no evidence of any connection between his whistleblowing activities and his non-promotion or his reassignment. There was no evidence of animus toward the complainant by management officials; in fact, it appeared that management thought highly of his skills and abilities and had recognized his performance with various awards. He had also submitted numerous beneficial suggestions for which he was given several cash awards amounting to thousands of dollars.
- An OSC complainant alleged that a letter of reprimand was in reprisal for his allegations of fraud, waste and abuse to an Inspector General (IG).

The disclosure to the IG consisted of an allegation that certain employees were not performing work commensurate with their grade levels. The IG investigated the matter without disclosing the complainant's identity to agency officials. The reprimand was for traffic infractions, which the complainant admitted. The complainant's grievance of his reprimand was denied; however, the union declined to pursue the grievance further. The OSC found no evidence of reprisal.

## **Matters Assigned for Further Investigation**

The OSC initiated further investigation of the following matters after initial review. Since the investigations were not completed and the merits of the matters not decided as of the closing date of this report, only a cursory description of each matter is provided in order to avoid disclosure of information which might interfere with an on-going investigation.

- An OSC complainant alleged that her performance appraisal was lowered in reprisal for her disclosure that her supervisor made numerous personal telephone calls on a government telephone and failed to reimburse the government for the cost of those calls as he had agreed to do.
- An employee complained of his reassignment from a supervisory position to a nonsupervisory position, on the ground that it was a reprisal for his disclosure in an internal memorandum of a misuse of funds and staff resources. He also alleged preferential treatment in the employment of other employees.
- A complainant charged that a reprimand and a suspension, an excessive delay in his performance appraisal, and efforts to coerce his retirement were in reprisal for his disclosures of misappropriation of government property.
- An employee alleged that a lowered performance appraisal, cancellation of

a promotion, denial of training, and a reprimand were in reprisal for his disclosures of air safety violations.

- An OSC complainant alleged that the termination of her probationary appointment violated due process requirements. Her union representative charged that the separation was in reprisal for whistleblowing, i.e. reporting that her supervisor required her to stay in her office to answer telephone calls while the building was being evacuated because of a fire. The information provided indicated possible procedural errors in the removal action.
- An employee claimed that her reassignment to work she did not believe she could properly perform, and her suspension for refusing to perform the work of the new position, were in reprisal for her disclosure to the OSC (through another person) of mismanagement and violation of regulations in an agency office. The OSC had referred the allegations to the agency, which found them to be unfounded.

Additional information on or copies of this report may be obtained by writing or contacting:

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