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**A Report to Congress  
From The  
U.S. Office Of Special Counsel  
Fiscal Year 1992**

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**U.S. OFFICE OF SPECIAL COUNSEL**

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Washington, D.C. 20036-4505

The Special Counsel

Honorable Albert Gore, Jr.  
President of the Senate  
Washington, D.C. 20510

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

Dear Mr. President and Mr. Speaker:

I herewith respectfully submit to the Congress, in accordance with 5 U.S.C. § 1218, the Annual Report from the Office of Special Counsel for Fiscal Year 1992. As is customary, a copy of this report will also be sent to each member of Congress.

Sincerely,

A handwritten signature in cursive script that reads "Kathleen Day Koch".

Kathleen Day Koch

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## Biography of the Special Counsel

Kathleen Day Koch was appointed Special Counsel of the U.S. Office of Special Counsel (OSC) on December 20, 1991, for a five year term, following Senate approval of her nomination.

Ms. Koch previously held the position of General Counsel of the Federal Labor Relations Authority since December 1988. In her term as General Counsel, she encouraged a heightened emphasis on conflict resolution through cooperation and dispute avoidance. She has been instrumental in creating a conflict resolution seminar program that has been utilized by various federal agencies nationwide.

Ms. Koch's entire legal career has been in public service, where she has developed expertise in federal employee and government ethics issues. Prior to her appointment to the FLRA, she served as Associate Counsel to the President. She was asked to join the White House staff while serving as Senior Attorney in the Personnel Law Division at the Commerce Department. During the significant formative period of the Merit Systems Protection Board (1979-1984), Ms. Koch participated in the development of the adjudicatory agency's procedural and substantive precedents. Her government career began in 1977 when she was appointed an Honors Program attorney at the Department of Housing and Urban Development.



A native of St. Louis, Missouri, Ms. Koch studied at Concordia College, River Forest, Illinois. She received her B.S. degree with honors from the University of Missouri St. Louis in 1971 and was honored that year as a finalist in the competition for the Danforth Urban Leadership Fellowship. Ms. Koch received her J.D. degree from the University of Chicago in 1977.

Ms. Koch and her three children reside in Annandale, Virginia.

# Introduction

## Mission of the Office of Special Counsel

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

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

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

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<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.

## **Office of Special Counsel Policy**

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

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

## **Shared Responsibility for Protecting Whistleblowers**

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

# Overview of OSC Operations

## Budget and Staffing

During Fiscal Year (FY) 1992, the OSC operated with a budget of \$7.776 million, and the agency's full-time equivalency (FTE) personnel ceiling was 101.

## Procedures

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

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

The Prosecution Division reviews completed field investigations to determine whether the inquiry has established any violation of law, rule or regulation, and whether the matter warrants corrective or disciplinary action, or both. If so, OSC personnel may discuss the matter with the agency concerned in order to obtain an early resolution of the matter. Otherwise, the Special Counsel may refer the matter in writing to the agency head under §1214(b)(2)(A) with a recommendation for corrective action. If an agency declines to take corrective action, the Special Counsel may request the MSPB to consider the matter under §1214(b)(2)(B), and the MSPB may order any corrective action it deems appropriate. During FY 1992, OSC continued its policy of early and firm negotiation with agencies to obtain corrective action prior to an adjudicatory order. These efforts resulted in OSC obtaining corrective actions for more than 100 complainants. If the Special Counsel determines that an apparent violation warrants disciplinary action, the OSC files charges against the offending employee under §1215(a) and prosecutes the case before the MSPB. Finally, if an investigation discloses a violation of any law, rule or regulation not otherwise within the enforcement authority of the OSC, the Special Counsel sends a report of the OSC's findings to the agency head concerned under §1214(e) for certification of any action to be taken on the matter. The OSC reports evidence of any possible criminal violations identified during an investigation to the Department of Justice pursuant to §1214(d).

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

## Investigation of Allegations

At the beginning of FY 1992 (October 1, 1991), the OSC had 512 matters pending initial review and inquiry and 52 matters under field investigation.

### Nature of Allegations Received During FY 1992

During FY 1992, the OSC received 1,891 new matters containing 3,156 separate allegations. Reprisal for whistleblowing accounted for 18.2 percent of the total allegations received during FY 1992, making it the most frequently cited claim of a prohibited personnel practice. The next largest category of allegations claimed was Reprisal for exercise of a right of appeal (15.1 percent). This represents an increase of 83.8 percent over the number of reprisal for appeal right allegations received last year. A complete breakdown of the nature of all allegations received by the OSC during FY 1992 appears in *Table 1, Allegations Contained in Matters Received During FY 1992*, on pages 12-13.

### Disposition of Matters

During FY 1992 --

- the CEU closed 1,798 matters (including matters carried over from FY 1991) on the basis of initial review and inquiry, satisfactory resolution of an employee's complaint during the initial review process, or a determination that there was insufficient basis for further OSC action;
- 270 matters were referred by the CEU for field investigation; and
- 136 matters received by the OSC (including 65 matters referred by the CEU) were assigned for additional review for possible referral to the agency concerned as a whistleblower disclosure.

The OSC carried over the remaining matters for further action in FY 1993. A breakdown of the nature of allegations referred for field investigation appears in *Table 2, Allegations Contained in Matters Referred for Field Investigation During FY 1992*, on page 14.

## Results of FY 1992 Investigations

The OSC completed 234 field investigations during FY 1992 (including investigations carried over from FY 1991), and 88 investigations awaited completion at the end of the year. Of completed field investigations (including investigations completed in FY 1991), 219 matters were closed following legal review by the Prosecution Division. Legal reviews and decisions as to final disposition in the remaining investigative matters had not been completed at the end of the fiscal year. During FY 1992, the OSC --

- obtained 104 corrective actions or favorable dispositions in 95 matters;<sup>2</sup>
- initiated corrective actions in eight additional matters which were pending at the end of FY 1992;
- filed 13 disciplinary action complaints, concerning Federal, State and local Hatch Act violations;
- secured one stay of personnel actions, and three extensions of that stay, from the MSPB in one matter; and
- obtained 11 stays of personnel actions through direct requests to the agencies.

During FY 1992, the MSPB issued five Final Decisions, and the MSPB Chief Administrative Law Judge (CALJ) issued 11 Recommended Decisions in OSC cases. These Final and Recommended Decisions resulted from complaints for disciplinary action filed by the OSC in FY 1992 and prior fiscal years. The OSC prevailed in three of the recommended decisions; the remaining eight are now before the MSPB.

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

## **Corrective Actions**

The following is a representative sample of corrective actions obtained by the OSC during FY 1992:

- OSC investigated an employee's allegation that he was issued a written reprimand, placed on a detail, subjected to two internal agency investigations, and coerced into resigning in reprisal for making protected disclosures of fraud, waste, and abuse. At OSC's request, the agency agreed to reinstate the employee to his previously held position at a mutually agreeable geographic location.
- OSC investigated a supervisor's allegations that in reprisal for disclosures of gross mismanagement and for filing EEO complaints, the agency refused to approve the supervisor's selection of a specific individual for a vacant position. Further, the agency gave the supervisor lowered annual performance ratings and reassigned him to another position. The OSC investigation disclosed that the supervisor's protected activity was a factor in the personnel actions. The agency agreed to raise the supervisor's performance ratings, including monetary performance awards based on the raised ratings and pay reasonable attorney fees. The agency also agreed to promote the employee whom the supervisor had originally selected for the vacant position, including full back pay and benefits. Finally, the agency disciplined the manager who had taken the improper actions.
- OSC investigated an allegation that an employee was improperly not selected for a reassignment because of her medical condition. The employee also alleged that management cited additional job requirements during the interview which were not reflected in the vacancy announcement in an attempt to influence her to withdraw from competition. The OSC investigation disclosed evidence supporting the employee's allegations. At OSC's request, the agency agreed to settle the matter by reassigning the employee to the position in question.
- OSC investigated an allegation that an agency issued an employee a Minimally Successful performance rating and failed to rehire him as a seasonal firefighter in reprisal for making protected disclosures regarding his supervisor. When OSC's investigation disclosed evidence supporting the allegations, the agency agreed to issue the employee a presumptive fully successful rating and granted him benefits and backpay for the season he was not rehired.
- OSC investigated an employee's allegations that she received a lowered performance rating and was reassigned because she filed a grievance and a complaint with OSC against her second level supervisor and that the appraisal system used to rate her performance was not authorized by the U.S. Office of Personnel Management. OSC confirmed the second part of the employee's allegations. At OSC's request, the agency offered the employee a cash settlement of \$3,500 and agreed to remove the performance appraisals in question from her official personnel file.