
**A Report to Congress
From The
U.S. Office Of Special Counsel
Fiscal Year 1995**





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

The Honorable Newt Gingrich
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 (OSC) for Fiscal Year (FY) 1995.

FY 1995 was another record-setting year for OSC with respect to the number of cases in which we were able to negotiate redress for individuals who sought our assistance. We have also implemented several new procedures which have positively impacted the operations of and results achieved by the agency.

As is customary, a copy of this report will also be sent to each Member of Congress.

Sincerely,



Kathleen Day Koch

Enclosure



Executive Summary

Fiscal Year (FY) 1995 was another record-setting year for OSC. For the second year in a row, we obtained a record number of corrective, disciplinary and other favorable actions on behalf of federal employees who sought the assistance of OSC. In fact, in FY 1995 we negotiated **175 favorable actions** in prohibited personnel practices and Hatch Act cases, which represents more than a **28% increase** over the 136 favorable actions obtained in FY 1994. Of particular importance, in FY 1995, 120 favorable actions, or 68.5% of the total, were obtained in whistleblower reprisal cases. Overall in FY 1995, there were more than 5,800 instances in which the assistance or action of OSC was sought by federal employees and other persons.

These accomplishments were the direct result of changes that have been made in the way we approach our work. Of particular note, in FY 1994, OSC reported the trial of a Pilot Project that was based upon the use of **interdisciplinary teams of investigators and attorneys** to handle cases from the inception of a full field investigation through final disposition of a case. This project exceeded our expectations and resulted in the past two years of all time high levels of favorable actions. Accordingly, we have implemented this approach to cases on a permanent basis.

OSC also issued a **record-setting 2,821 Hatch Act advisory opinions** (both written and oral) to employees who sought advice. This is the only area of OSC's activities where it is able to issue advisory opinions, and it is particularly valuable for two reasons. First, because of the significant revisions to the Hatch Act in 1993, which generally broadened the scope of lawful political activities for federal employees, there is much uncertainty in the federal community as to which activities are permissible and which are impermissible. Second, individuals who obtain an advisory opinion from OSC which finds that proposed political activity is lawful, are protected from any enforcement activities should someone subsequently challenge this activity before OSC.

Finally, OSC has taken several steps to help educate and inform the federal workforce. For example, in FY 1995, we published an **informational booklet** of materials for agencies to use to educate their employees about the role of OSC and employee rights and remedies. This booklet has been very well received by the federal community. OSC has also established a **Home Page on the World Wide Web** (address <http://www.access.gpo.gov/osc>), which includes a wide range of information, publications, reference materials and forms relating to OSC's programs and operations.

We are very proud of the fact that OSC has achieved these significant accomplishments despite reduced funding and a smaller workforce. We are committed to doing all that is necessary, including developing and using new and more effective methods of operation, to continue to serve individuals who seek our assistance.



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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. During her tenure as Special Counsel, Ms. Koch has emphasized the need for improved respect for OSC and trust in its service to the federal community. She has instituted internal measures to streamline procedures and increase accountability, resulting in a determinative process which better serves OSC's customers. In addition, Ms. Koch has underscored education of federal employees on their rights in whistleblower and other protected activity matters.

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 OSC, she served as General Counsel to the Federal Labor Relations Authority and before that was 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 in 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 prosecutorial arm of the Merit Systems Protection Board (MSPB or Board) 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 prosecutorial 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),¹ and other activities prohibited by civil service law, rule or regulation, and the initiation of corrective and disciplinary actions when 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.

¹ 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 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;
- intensively review allegations of reprisal for whistleblowing for any feasible remedial or preventive action, whether by means of stays, corrective actions, or disciplinary actions; and
- 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.



Overview of OSC Operations

Budget and Staffing

During Fiscal Year (FY) 1995, the OSC operated with a budget of \$7.955 million, and the agency's full-time equivalency (FTE) personnel ceiling was 96.

Procedures

The Office of Special Counsel is comprised of four divisions: Investigation, Prosecution, Management, and Planning and Advice Divisions. The Investigation and Prosecution Divisions are the primary program units of the agency and are supported by the Management Division and the Planning and Advice Division.

The Complaints Examining Unit (CEU), which is part of the Prosecution Division, initially analyzes all allegations of prohibited personnel practices and allegations of other activities prohibited by civil service law, rule or regulation. The CEU contacts requestors 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.

After a thorough initial examination, the CEU refers matters stating a potentially valid statutory claim 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 Prosecution 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 full 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. OSC may have discussions with an agency about a case at any point of the investigation or analysis in order to obtain mutually agreeable resolution. 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 1995, OSC continued its policy of early and firm negotiation with agencies to obtain corrective action prior to initiating litigation before the MSPB. 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.

Office of Special Counsel Outreach Program

The Special Counsel puts great weight on the value of educating federal employees as to their rights and remedies available to them under the Whistleblower Protection Act, as well as the rights and restrictions of the Hatch Act. To that end, OSC makes representatives available to engage in educational programs as often as possible.

In FY 1995, the OSC's outreach efforts resulted in OSC staff participation in 67 briefings and seminars. In addition, OSC has been given greater authority in this regard by our Reauthorization Act, P.L. 103-424, which directed all executive agencies to inform their employees of the rights and remedies available to them under the Whistleblower Protection Act, and to carry out this function in consultation with OSC. OSC has responded by preparing an informational packet for distribution to all covered entities and stands ready to consult with all agencies so that this requirement is carried out expeditiously.