
**A Report to Congress
From The
U.S. Office Of Special Counsel
For
Fiscal Year 2000**



U.S. Office of Special Counsel
1730 M Street, N.W., Suite 201
Washington, D.C. 20036-4505



The Special Counsel

The Honorable Richard B. Cheney
President of the Senate
Washington, D.C. 20510

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. President and Mr. Speaker:

I 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 2000. As is customary, a copy of this report will also be sent to each Member of Congress.

Sincerely,

Elaine Kaplan

Enclosures

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U.S. OFFICE OF SPECIAL COUNSEL



BIOGRAPHY OF ELAINE KAPLAN SPECIAL COUNSEL

On May 8, 1998, Elaine Kaplan was sworn in to serve a five-year term as Special Counsel of the U.S. Office of Special Counsel (OSC). Ms. Kaplan was nominated for the position of Special Counsel by President Clinton in November of 1997, and was unanimously confirmed by the Senate in April of 1998.

Ms. Kaplan came to OSC with extensive experience litigating employment-related issues before federal courts and administrative tribunals. Prior to her appointment as Special Counsel, Ms. Kaplan served as Deputy General Counsel of the National Treasury Employees Union (NTEU), where she represented the interests of 150,000 employees in the areas of civil liberties, administrative law, racial and sexual discrimination, and labor law. During her thirteen years at NTEU, Ms. Kaplan briefed and argued dozens of cases at all levels of the federal courts on behalf of the union and the federal employees it represents. Many of the cases in which Ms. Kaplan participated resulted in important precedent-setting decisions, including among others, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (the first Supreme Court decision addressing Fourth Amendment implications of urinalysis drug-testing in the public workforce) and *National Treasury Employees Union v. United States*, 115 S.Ct. 1003 (1995) (which struck down on First Amendment grounds the statutory “honoraria ban” as applied to federal employees).

Ms. Kaplan began her legal career in 1979 at the U.S. Department of Labor, Office of the Solicitor, where she worked as a staff attorney in the Division of Employee Benefits. In 1982, Ms. Kaplan was selected to serve on the staff of the newly created Division of Special Appellate and Supreme Court Litigation, which was established to handle the Department’s most significant appellate cases and all of its Supreme Court work. She subsequently held the position of staff attorney at the State and Local Legal Center, where she drafted amicus briefs on behalf of state and local governments for submission to the United States Supreme Court.

Ms. Kaplan, who is a native of Brooklyn, New York, received her undergraduate degree from the State University of New York at Binghamton and her law degree from the Georgetown University Law Center.

I. INTRODUCTION AND SUMMARY

The OSC is an independent federal investigative and prosecutorial agency. Under the Civil Service Reform Act (CSRA) and the Whistleblower Protection Act (WPA), the OSC's primary mission is to safeguard the merit system in federal employment by protecting federal employees and applicants from prohibited personnel practices (PPPs), especially reprisal for whistleblowing. The OSC also has jurisdiction under the Hatch Act to enforce restrictions on political activity by government employees. Finally, the OSC facilitates disclosures of wrongdoing in federal government by operating a secure channel for whistleblowers.

Fiscal Year (FY) 2000 was the second full fiscal year under the leadership of Special Counsel Elaine Kaplan. During the first year of her tenure, Special Counsel Kaplan identified two significant obstacles to OSC's effective accomplishment of its ambitious mission. The first was the backlog of matters pending at the agency, which has resulted in unacceptably long delays in resolving PPP complaints and disclosure matters. To address this problem, OSC instituted a two-pronged approach: 1) implementing internal management reforms designed to streamline case processing, and maximize the number of Full-Time Equivalents (FTEs) devoted to case handling; and 2) the seeking of additional staffing resources from the Office of Management and Budget (OMB) and Congress. Both of these efforts began to pay off in FY 2000, with the addition of funding for five new FTEs in OSC's FY 2000 appropriation, and full implementation of OSC's new mediation program, which allows complainants and agencies an effective alternative to OSC's traditional investigative and prosecutorial approach. Backlog reduction was hindered, however, by the nearly 15% across-the-board increase in PPP complaints, Hatch Act matters and advisory opinion requests, and whistleblower disclosure filings.

Efforts to reduce the case backlogs, while maintaining high quality in conducting thorough investigations and legal analyses, will continue during FY 2001. OSC received funding for an additional 10 FTEs during FY 2001, which will allow greater case-handling capability, once the newly-hired employees are adequately trained.

Moreover, OSC has recently completed a significant reorganization of its case-handling operations with the merger of the existing Investigation and Prosecution Divisions into integrated attorney/investigator units. This reorganization is designed to maximize teamwork in conducting investigations and legal analyses, and to de-layer management review levels. Accordingly, OSC expects to make significant inroads in reducing case backlogs during the remainder of FY 2001, and particularly in FY 2002, assuming case intake remains stable.

Special Counsel Kaplan identified the second significant obstacle to OSC's ability to safeguard the merit system as the widespread ignorance within the federal workforce of OSC and the laws it enforces. This ignorance persists, notwithstanding Congress' 1994 statutory mandate that federal agencies, in consultation with OSC, inform their employees of their rights and remedies under chapters 12 and 23 of title 5 of the U.S. Code. 5 U.S.C. § 2302(c). To address

that problem, she established a formal Outreach Program to provide education and training, supported by dedicated staffing. The accomplishments of that program during FY 2000 (its first full fiscal year in existence) are substantial, and are set forth below. Moreover, in furtherance of its statutory mandate, OSC has continued to issue press releases when OSC files a significant litigation petition, or achieves significant corrective or disciplinary action through settlement. Press coverage of individual cases filed or settled during FY 2000, many of which are described herein, contributes considerably to increased employee and manager awareness of the merit system protections enforced by OSC.

II. THE OFFICE OF SPECIAL COUNSEL

A. Statutory Background

The Office of the Special Counsel was established on January 1, 1979, by Reorganization Plan Number 2 of 1978. 5 U.S.C.A. App.1, § 204. The Civil Service Reform Act (CSRA) of 1978, effective on January 11, 1979, enlarged its functions and powers. Pub. L. No. 95-454, 92 Stat. 1111 (1978). The Office operated as the autonomous investigative and prosecutorial arm of the Merit Systems Protection Board (MSPB) until 1989, enforcing the laws concerning PPPs, as well as the legal limitations on political activity by federal employees contained in the Hatch Act.

In March of 1989, Congress enacted the Whistleblower Protection Act (WPA) of 1989. Pub. L. No. 101-12, 103 Stat. 16. 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 United States Office of Special Counsel (OSC). Under the WPA, the OSC kept its basic investigative and prosecutorial functions and its role in litigating cases before the MSPB. The WPA also substantially amended the CSRA to enhance protections against reprisal for those employees who disclose wrongdoing in the federal government, and improve the ability of the OSC to enforce those protections.

Five years after passage of the WPA, Congress enacted the Office of Special Counsel Reauthorization Act of 1994. Pub. L. No. 103-424, 108 Stat. 4361 (1994). In response to widespread criticism concerning inordinate delays in the processing of complaints by OSC, Congress imposed a 240-day time limit on the agency, within which it is required to determine whether there are reasonable grounds for believing that a PPP has been committed.¹ The 1994

¹ In the 1994 legislation, Congress also imposed a requirement that OSC's annual report list the number of "cases in which it did not make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken within the 240-day period specified in section 1214(b)(2)(A)(i)." 5 U.S.C. § 1218. The number of cases in which OSC did not meet the 240-day deadline in FY 2000 is listed below at p. 7.

legislation also added approximately 160,000 employees of the Veterans Administration and certain government corporations to coverage under the statutes administered by OSC, and significantly broadened the definitions of the types of personnel actions covered under these statutes.² Finally, the 1994 legislation made federal agencies explicitly responsible for informing their employees of available rights and remedies under the WPA, and directed that OSC play a consultative role in that process. See 5 U.S.C. § 2302(c).

B. OSC's Mission

OSC's mission is to protect federal employees and applicants, especially whistleblowers, from prohibited employment practices; to promote compliance by government employees with legal restrictions on political activity; and to facilitate disclosures of wrongdoing in the federal government. The OSC carries out this mission by:

- investigating complaints of prohibited employment practices, especially reprisal for whistleblowing, and pursuing remedies for violations;
- operating an independent and secure channel for disclosure and investigation of wrongdoing in federal agencies;
- providing advisory opinions on, and enforcing, the Hatch Act;
- protecting the reemployment rights of veterans under the Uniformed Services Employment and Reemployment Rights Act (USERRA); and
- promoting greater understanding of the rights and responsibilities of government employees under the statutes enforced by OSC.

² The Uniformed Services Employment and Reemployment Rights Act, Pub. L. No. 103-353, 108 Stat. 3149 (1994) (codified at 38 U.S.C. § 4301 *et seq.*), also enacted in 1994, gave the OSC additional responsibilities. Among other provisions, the act authorized the OSC, under certain circumstances, to represent a federal employee who is a veteran or reservist before the MSPB and the U.S. Court of Appeals for the Federal Circuit, if a federal agency has failed to reemploy that person in accordance with provisions of the law.

Further changes relating to veterans' reemployment rights were enacted by the Veterans' Employment Opportunities Act of 1998 (VEOA), Pub. L. No. 105-339. VEOA created a new prohibited personnel practice, at § 2302(b)(11), which makes it improper to knowingly take, recommend, or approve (or fail to take, recommend, or approve) any personnel action, if taking (or failing to take) such action would violate a veterans' preference requirement. The former § 2302(b)(11) was re-designated as § 2302(b)(12).

C. OSC's Internal Organization and Procedures

The OSC maintains its headquarters in Washington D.C., and has two field offices: one in Dallas, Texas, and one in Oakland, California. The agency is organized into four divisions, and two administrative support branches: the Human and Administrative Resources Management Branch and the Information Systems Branch. Their functions include budget, finance, personnel, procurement, information technology, and records management services. During FY 2000, OSC was authorized at 96 FTEs.

The Special Counsel and her staff, who are responsible for policy making and the overall management of OSC, including congressional relations and public affairs, are located within the Immediate Office of the Special Counsel (IOSC). The OSC's Outreach Specialist is assigned to the IOSC, and is responsible for developing and/or coordinating proactive outreach efforts by OSC, and for promoting compliance by federal agencies with the employee information requirement at 5 U.S.C. § 2302.

The agency is organized into four operating divisions. These are the Complaints and Disclosure Analysis Division,³ the Investigation Division, the Prosecution Division, and the Planning and Advice Division.⁴ Their functions, briefly, are as follows:

1. The **Complaints and Disclosure Analysis Division** includes OSC's two principal intake units for new matters received by the agency – the Complaints Examining Unit (CEU) and the Disclosure Unit (DU).

CEU. This unit is the intake point for all complaints alleging prohibited personnel practices and other violations of civil service law, rule, or regulation within the OSC's jurisdiction.⁵ The attorneys and personnel management specialists in CEU conduct an initial review of complaints to determine whether they are within OSC's jurisdiction and whether further investigation is warranted. CEU refers all matters stating a potentially valid claim to the Investigation Division.⁶

DU. This unit is responsible for reviewing information submitted by federal whistleblowers, and for advising the Special Counsel on the appropriate disposition of

³ This division was established during FY 2000. Its two constituent parts – the Complaints Examining Unit and the Disclosure Unit – were formerly part of the agency's Prosecution Division.

⁴ As noted above, at p. 2, effective June 4, 2001, OSC completed a significant reorganization of its case-handling operations with the merger of the Investigation/Prosecution Divisions.

⁵ Unless noted otherwise, all successive references to prohibited personnel practice complaints received by CEU include complaints alleging violations of civil service law, rule, or regulation listed at 5 U.S.C. § 1216, except for alleged violations of the Hatch Act. The latter are treated as a separate category of complaints, and are processed by the Hatch Act Unit (described further under "Prosecution Division," at p. 6).

⁶ When a matter is not referred for investigation, CEU must by law provide complainants with a written statement of reasons, to which they may respond. On the basis of the response, if any, CEU decides whether to finalize its preliminary determination to close the matter, or to refer the matter to the Investigation Division.

the matter (including possible referral to the head of the relevant agency for investigation and a report to the OSC, referral to an agency Inspector General, or closure). DU also analyzes agency reports of investigation to determine whether they appear reasonable and meet statutory requirements before the Special Counsel transmits them to the President and appropriate congressional oversight committees.

2. The **Investigation Division (ID)** investigates complaints referred after the preliminary inquiry by CEU. (The division also investigates matters referred by the Prosecution Division's Hatch Act Unit.) Investigators prepare a report or summary of investigation, which the Prosecution Division uses as the basis for its analysis of the legal merits of a complaint.

3. The **Prosecution Division (PD)** consists of the General Law and Litigation Unit and the Hatch Act Unit (HAU).

General Law and Litigation Unit. Attorneys from this unit review all completed investigations to determine whether the inquiry has established any violation of law, rule, or regulation, and whether a request for a stay or an enforcement action is warranted.⁷ If a violation is found and a negotiated resolution with the agency involved cannot be reached, unit attorneys conduct any necessary litigation before the MSPB. The unit also represents the Special Counsel when the OSC intervenes or otherwise participates in other proceedings before the MSPB.

Alternative Dispute Resolution (ADR) Unit. In selected cases that have been referred for further investigation, this unit contacts the complainant and the employing agency to invite them to participate in OSC's voluntary Mediation Program. If both parties agree, OSC conducts a mediation session, led by OSC mediators who have extensive mediation training and experience in federal personnel law. When mediation resolves the complaint that has been filed with OSC, the parties execute a written and binding settlement agreement. If mediation does not bring about resolution, the case is referred for further investigation, as it would have been had the parties not tried mediation.

HAU. This unit is responsible for administration of Hatch Act restrictions on political activity by federal, and certain state and local, government employees. The unit issues advisory opinions to requesters seeking information about the

⁷ The term "enforcement actions" includes corrective action proceedings against an agency, or disciplinary action proceedings against an individual, initiated by OSC before the MSPB, based on the apparent commission of a prohibited personnel practice or other violation of law, rule, or regulation within OSC's jurisdiction.

application of the act's provisions to specific activities. It also receives and reviews complaints alleging Hatch Act violations, referring complaints when warranted to the Investigation Division for further inquiry.

4. The **Planning and Advice Division** provides legal advice and support to the OSC on general administrative matters; engages in strategic planning and policy development, including with respect to outreach and education activities; and manages the agency's Freedom of Information/Privacy Act and ethics programs.

III. OVERVIEW OF OSC OPERATIONS

A. Budget and Staffing

During FY 2000, OSC operated with a budget of \$9,703,000, and the agency's FTE personnel authorization was 96 FTEs.

B. Prohibited Personnel Practice Matters

1. Receipts and Investigations

During FY 2000, OSC received 1,958 new matters alleging PPPs with 3,996 separate allegations. Of the 1,605 matters processed by the CEU in FY 2000, OSC lacked jurisdiction in 267 matters (or 16.6% of the total matters processed), leaving 1,338 matters (83%) in which the agency was required by statute to conduct an inquiry. Following CEU review, 267 matters were referred for field investigation (20% of the matters over which OSC had jurisdiction). In addition, following initial review and inquiry, CEU closed 1,347 matters because there was insufficient basis for further OSC action, or because of satisfactory resolution of an employee's complaint during the initial review. The types of PPP allegations received in FY 2000 and the types of PPP allegations referred for investigation are included in Tables 1-4.

2. Enforcement Actions

Enforcement actions are cases filed by OSC with the MSPB that seek corrective action (relief intended to make an aggrieved employee whole), or disciplinary action (the imposition of discipline on an employee who has committed a violation). Under 5 U.S.C. § 1214, before OSC may initiate proceedings for corrective action before the MSPB, the OSC must report its findings and recommendations to the agency involved. Only when the agency has had a reasonable period of time to take corrective action and fails to do so, may OSC proceed to petition the Board for corrective action.

If OSC believes a PPP has been committed and initiates discussions with the agency, the matter is often resolved through settlement between the complainant and the agency. When an agency refuses to grant appropriate corrective action after a formal request from the Special

Counsel, OSC generally proceeds immediately to file a complaint with the MSPB. In addition to rectifying the matter at issue, corrective action litigation often has the additional benefits of clarifying and expanding existing law, and of bringing greater public attention to the mission and the work of the OSC. This significantly increases the deterrent effect of OSC's efforts. In FY 2000, OSC filed four enforcement action complaints in PPP cases with the MSPB.

Under 5 U.S.C. § 1215, when OSC determines that disciplinary action against an employee is warranted, OSC can file a complaint directly with the MSPB. Should the agency agree to take appropriate disciplinary action on its own initiative, then the matter can be settled without resort to an MSPB proceeding.

3. Favorable Actions Achieved

OSC also obtained 76 informal favorable actions⁸ in FY 2000 (75 in PPP matters, and 1 in a USERRA matter). Of these favorable actions, 14 were disciplinary actions. Cases involving allegations of reprisal for whistleblowing accounted for 51 of the total favorable actions. OSC also obtained 7 stays of personnel actions through voluntary negotiations with agencies and two stays were obtained through petitions to the MSPB.

4. Recent Prohibited Personnel Practice Cases

Several of the cases that have recently been favorably resolved are illustrative of OSC's work protecting the merit system. They include, among others, an Immigration and Naturalization Service employee who claimed that he was demoted and suffered a three-week suspension in retaliation for providing testimony to Congress concerning the "Citizenship USA" program; a Department of Education official who alleged that he was reassigned out of his job because he was suspected of disclosing the agency's improper, preferential treatment of a financially troubled private college; and a research scientist with the Department of Veterans Affairs who claimed that her term appointment was not renewed because she had disclosed scientific misconduct by her supervisor.

In FY 2000, OSC also obtained the largest disciplinary action settlement in the agency's history as a result of its investigation into an illegal hiring scheme at the National Credit Union Administration (NCUA), which used bogus duty stations to hire pre-selected candidates. Ten NCUA officials were subjected to disciplinary actions that included significant suspensions coupled with salary reductions. See Federal Times, April 3, 2000 ("Credit Union Disciplines 10 Executives").

Table 1

⁸ "Favorable actions" include actions taken to directly benefit the complaining employee; actions taken to punish, by disciplinary or other corrective action, the supervisor(s) involved in the personnel action; and systemic actions, such as training or educational programs, to prevent future questionable personnel actions. The term encompasses: (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 PPP 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.

Summary of Prohibited Personnel Practice Matters			
	FY 1998	FY 1999	FY 2000
Matters received	1,721	1,716	1,958
Matters processed by Complaints Examining Unit (CEU)	1,938	1,661	1,610
Matters processed in which OSC had jurisdiction	1,639	1,413	1,343
Matters closed by CEU	1,678	1,380	1,351
Matters referred for full field investigation	260	287	259
Enforcement actions	3	3	4
Stays – negotiated	10	12	7
Stays – obtained from the MSPB	0	1	2
Favorable actions obtained	65	52	75

Table 2

Summary of Whistleblower Reprisal Matters			
	FY 1998	FY 1999	FY 2000
Matters received	691	749	773
Matters processed by CEU	863	741	647
Matters processed in which OSC had jurisdiction	774	670	598
Matters closed by CEU	656	519	470
Matters referred for full field investigation	207	224	177
Enforcement actions	1	1	2
Stays – negotiated	8	10	4
Favorable actions obtained	42	36	51

Corrective Actions

The following is a representative sample of corrective actions obtained by OSC during FY 2000:

- In October 2000, OSC facilitated a comprehensive settlement between the Department of Energy (DOE) and eighteen special agent nuclear material couriers of the Oak Ridge, Tennessee section of the DOE's Transportation Safety Division, in response to retaliation claims. The couriers alleged that they had suffered whistleblower retaliation in violation of 5 U.S.C. § 2302(b)(8) for engaging in various protected activities, such as providing information to management and outside review teams concerning potential dangerous radiation exposure and security risks arising out of driver fatigue. The OSC worked with agency counsel and the complainants' attorneys to fashion a creative and responsive settlement agreement. Among other things, the settlement included \$600,000 in backpay and attorneys' fees and the agency's agreement to engage an outside mediator through which the couriers could disclose to high-level agency officials issues related to safety and security in the agency's Transportation Safety Division.
- In September 2000, OSC secured a favorable settlement on behalf of two drug enforcement agents who had alleged whistleblowing reprisal by the Department of Justice, Drug Enforcement Administration (DEA). The first complainant, a supervisory agent at the DEA, had made a protected disclosure regarding allegations of misuse of government funds and other illegal and unethical activities by supervisors at his foreign field office. As a result of the agency's investigation, the complainant and two other supervisors were reassigned to field offices in the United States. The first complainant alleged that the reassignment was in retaliation for his disclosures. The second complainant, who worked in the same field office, alleged that his co-workers perceived him to be the person who made the disclosures that led to the investigation and, as a result, was subjected to a hostile work environment. The second complainant requested a reassignment to a preferred location, but the agency stated that there were no vacancies at that particular location, and reassigned him to a location unacceptable to the employee. OSC's investigation determined that there existed reasonable grounds to believe that both reassignments violated the Whistleblower Protection Act because they occurred as a result of the internal agency investigation sparked by the protected disclosures. The internal DEA investigation ultimately sustained a number of the whistleblower's allegations. OSC obtained full corrective action for the first complainant, including rescission of the reassignment, restoration of the agents' leave, and reasonable attorneys' fees and expenses. OSC favorably resolved the second complainant's case through a mutually acceptable settlement agreement.

- In September 2000, the Internal Revenue Service (IRS) agreed to individual and systemic corrective action in a case involving clerical staff in its Nashville, Tennessee call site office. A complainant alleged that she was hired for a specific position, but immediately placed in a higher-graded position with different duties. She also alleged that although she was performing duties of a higher-graded position, she was being paid at the lower-graded position of her initial appointment. OSC's investigation of a possible violation of 5 U.S.C. § 2302(b)(12) uncovered three other employees in a similar situation. The IRS agreed to offer complete corrective action by providing retroactive promotions upon eligibility, backpay where appropriate and reassignment of the employees to their initial positions at their request. In addition, the investigation uncovered possible misuse of seasonal appointments. The agency agreed to investigate this matter and develop uniform agency-wide guidance on the subject.
- In September 2000, OSC secured a favorable settlement for a complainant, a former Research Health Scientist for the Department of Veterans Affairs Medical Center, West Roxbury, Massachusetts, who alleged that her term appointment at the agency had not been renewed because of her whistleblowing. The complainant disclosed that a colleague had engaged in scientific misconduct when he submitted a scientific paper for publication that he knew contained false representations. The disclosure led to an investigation by Harvard Medical School, which was associated with the agency. A Harvard panel found the colleague's conduct "deplorable" and "unconscionable." The confidential settlement agreement provided full corrective action.
- In June 2000, OSC assisted a member of the U.S. Naval Reserve in obtaining a favorable settlement of a complaint he filed against the IRS under the USERRA. The reservist alleged that the IRS withdrew an offer of initial employment as a Tax Examining Assistant (TEA) when it discovered that his reservist obligations prevented him from attending a required five-week training session for newly hired TEAs. The reservist opted to allow OSC to review his complaint after the Department of Labor, Veterans Employment and Training Service (VETS) said his complaint did not have merit. OSC's investigation determined that the reservist was entitled to relief under USERRA and successfully brokered a settlement between the parties that included the complainant's retroactive reinstatement to a TEA position and monetary damages compensating him for the delay in his initial hiring.
- In May 2000, the OSC secured a favorable confidential settlement on behalf of a complainant who alleged that he was retaliated against by the Department of Interior, Bureau of Land Management, for exercising his First Amendment right to free speech. The OSC investigation found that the complainant was reprimanded and reassigned to a non-supervisory position based upon his letter to the editor of *Government Executive* magazine. The complainant's letter, critical of his agency's affirmative action policies, responded to an article in the same magazine, which had

highlighted a high-ranking agency official's opinions on affirmative action, with which the complainant differed.

- In March 2000, the OSC secured a favorable settlement on behalf of a complainant who alleged whistleblowing retaliation by the Immigration and Naturalization Service (INS) concerning his testimony before a House subcommittee. The complainant's congressional testimony included disclosures of possible fraud and abuses at the INS. The OSC investigation uncovered significant evidence that the complainant's 21-day suspension and proposed reassignment were in retaliation for his congressional testimony. As a result of the settlement, the complainant was reassigned to an office of his choosing, with relocation expenses paid for him and his family, restoration of annual leave and sick leave, backpay with interest on 19 days of his 21-day suspension and a lump sum payment of \$30,000.
- In February 2000, the MSPB granted OSC's petition for corrective action on behalf of a complainant who had alleged unlawful removal by the INS for expressing his opinion on a matter of public concern. The complainant had expressed his opinion in a private conversation with other INS colleagues regarding the agency's policy towards Haitians, in the context of HIV and AIDS. Within days, the agency issued a notice of termination to the complainant based on his comments. The MSPB agreed that the INS violated the complainant's First Amendment right to free speech when it fired him on the basis of his remarks on a matter of public concern, without affording him due process. OSC secured complainant's reinstatement with backpay, plus interest and benefits, retroactive to his date of removal.
- In December of 1999, OSC reached a favorable settlement on behalf of a complainant who had alleged whistleblowing retaliation by the Department of the Air Force. In December 1996, the complainant disclosed to the Environmental Protection Agency (EPA) that his first-level supervisor was "shielding" sites from the EPA and the state environmental agency. The complainant then told his second-level and first-level supervisor of this disclosure. One week after making these disclosures, the complainant's first-level supervisor reassigned the complainant's job duties to other employees and told him to return any government documents or computer files to the office. Within two months of the disclosures, the same supervisor arranged for the complainant's term appointment to expire two years earlier than scheduled. The OSC investigation confirmed the retaliation allegations. OSC secured a settlement that provided the complainant with backpay and interest for the approximately six-month period he was unemployed.

Disciplinary Actions

The following is a representative sample of disciplinary actions obtained by OSC during FY 2000:

- In October 1999, OSC petitioned for the dismissal of two senior agency officials of the NCUA on the grounds that they initiated and/or approved illegal hiring activity that involved the extensive use of false duty stations to hire pre-selected applicants. OSC began its investigation into the NCUA's hiring practices at the request of the Office of Personnel Management. OSC's investigation revealed that in 1996, a senior official in a regional office of the NCUA devised a plan to avoid normal competitive procedures by hiring pre-selected candidates through the use of false duty locations in remote or otherwise low applicant pool locations throughout the United States. As a result of the scheme, candidates who would otherwise have competed for the positions never applied. Soon after, other regional offices began using the scheme in their hiring procedures. By January 1997, the NCUA's chief personnel officer became aware of the illegal activity and participated in the appointment process. The scheme resulted in multiple prohibited personnel practices, including obstruction of candidates' right to compete for federal jobs and the granting of unauthorized preferences. In March 2000, a settlement was reached whereby the senior officials agreed to significant reductions in salary and lengthy suspensions.

Merit Systems Protection Board Stays

The following are summaries of stay cases brought to the MSPB during FY 2000:

- In November 1999, OSC petitioned the Board to stay the termination of a Computer Specialist at the Department of Veterans Affairs Medical Center (VAMC) in Alexandria, Louisiana. OSC requested the Board to order the stay after the VAMC denied OSC's request for an informal stay. OSC made both its informal stay request to the agency and its subsequent stay petition to the Board after determining that its ongoing investigation provided reasonable grounds to conclude that the complainant's protected activity of filing two union grievances was a significant factor in the VAMC's decision to terminate his employment. The Board granted the stay until December 15, 1999 to enable OSC to complete its investigation and legal review of the evidence obtained.

- In August 1999, OSC petitioned the Board to stay the termination of a complainant who had alleged retaliation for filing a grievance. The complainant began his appointment and one-year probationary term at the Department of the Navy's Naval Support Activity (NSA) in Naples, Italy in August 1998. The complainant, who had been rated outstanding in all his duties by his first-line supervisor, filed a grievance against the NSA Director of the Public Safety Department on January 15, 1999. One month later, the complainant was informed that he would be terminated. The complainant alleged to OSC that the Director decided to terminate him immediately after learning of the grievance. OSC's investigation uncovered that, shortly after learning of the grievance, the Director met with the agency's Human Resources Director and, without consulting complainant's first-line supervisor, took steps to terminate the complainant. The stay was extended a number of times by the MSPB to toll the complainant's probationary period until OSC could seek corrective action from the agency. In May 2000, the agency complied with the corrective action recommendation, placed the complainant back in his job and erased all references of his proposed termination from his official personnel file.

Table 3

Allegations Contained in Matters Received During FY 2000	
Nature of Allegation	Number of Allegations
Reprisal for whistleblowing [§ 2302(b)(8)]	737
Reprisal for exercise of a right of appeal [§ 2302(b)(9)]	674
Discrimination on the basis of race, color, sex, national origin, religion, age, or handicapping condition [§ 2302(b)(1)(a)(D)]	618
Violation of a law, rule, or regulation implementing or concerning a merit system principle [§ 2302(b)(11)]	582
Disclosures of alleged violation of a law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a danger to public health or safety [§ 1213(c) or § 1213(g)]	463
Granting of unauthorized preference or advantage [§ 2302(b)(6)]	418
Deception or obstruction of the right to compete [§ 2302(b)(4)]	266
Allegations which did not cite or suggest any prohibited personnel practice or prohibited activity	181
Discrimination on the basis of non-job related conduct [§ 2302(b)(10)]	119
Appointment, promotion, or advocating the appointment or promotion of a relative [§ 2302(b)(7)]	71
Violation of a veterans preference requirement	66
Solicitation or consideration of unauthorized recommendations [§ 2302(b)(2)]	64
Arbitrary or capricious withholding of information requested under the Freedom of Information Act [§ 1216(a)(3)]	47
Attempts to secure withdrawal from competition [§ 2302(b)(5)]	45
Violation of the Hatch Act by a state or local government employee [5 U.S.C. ch. 15]	38
Violation of the Hatch Act by a federal employee [§§ 7323-24]	33
Discrimination on the basis of marital status or political affiliation [§ 2302(b)(1)(E)]	24
Coercion of political activity [§ 2302(b)(3)]	2
Prohibited activity	2
Total	4,450 ⁹

⁹ Each matter may contain more than one allegation. Thus, this total exceeds the total number of matters received. Moreover, while a matter is being handled by OSC, additional allegations may be added to those initially presented to OSC.

Table 4

Allegations Contained in Matters Referred for Field Investigation During FY 2000	
Nature of Allegation	Number of Allegations
Reprisal for whistleblowing [§ 2302(b)(8)]	171
Violation of a law, rule, or regulation implementing or concerning a merit system principle [§ 2302(b)(12)]	140
Reprisal for exercise of a right of appeal [§ 2302(b)(9)]	126
Granting of unauthorized preference or advantage [§ 2302(b)(6)]	68
Deception or obstruction of the right to compete [§ 2302(b)(4)]	45
Discrimination on the basis of race, color, sex, national origin, religion, age, handicapping condition, or marital status [§2302(b)(1)(A)-(E)]	43
Discrimination on the basis of non-job related conduct [§ 2302(b)(10)]	24
Securing of withdrawal from competition [§ 2302(b)(5)]	17
Appointment, promotion, or advocating the appointment or promotion of a relative [§ 2302(b)(7)]	9
Discrimination on the basis of marital status	9
Solicitation or consideration of unauthorized recommendations [§ 2302(b)(2)]	8
Violation of a veterans preference requirement	4
Violation of the Hatch Act by a federal employee [5 U.S.C. § 7323-24]	4
Violation of the Hatch Act by a state or local government employee [5 U.S.C. Ch. 15]	3
Arbitrary or capricious withholding of information requested under the Freedom of Information Act [§ 1216(a)(3)]	3
Total	680 ¹⁰

¹⁰ See fn. 7.

C. Hatch Act Matters

1. Overview of Jurisdiction

Under the Hatch Act, as enacted in 1939, federal employees, employees of the District of Columbia (D.C.) government, and certain employees of state and local governments have faced significant restrictions in their ability to participate in political activities. Following amendments enacted in 1993, many federal and D.C. employees are now permitted to take an active part in political management and in political campaigns. Nevertheless, there continue to be important restrictions on the political activities of federal employees, including partisan candidacy, solicitation of contributions, and political activity while on duty. The 1993 amendments did not change the provisions applying to state and local government employees.

OSC receives and investigates complaints of Hatch Act violations, and where warranted, will prosecute violations before the MSPB. In matters in which violations are not sufficiently egregious to warrant prosecution, OSC will issue a warning letter to the employee. In addition, OSC issues advisory opinions upon request, enabling individuals to determine whether they are covered by the Hatch Act and whether their contemplated activities are permitted under the act.

2. Advisory Opinions

OSC's Hatch Act Unit saw a 40% increase in requests for assistance during FY 2000, due in part to state, local and federal primaries and general elections held during the year. During FY 2000, the OSC issued 2,810 advisory opinions in response to telephone, written and e-mail inquiries, as compared to 2,063 in FY 1999.

3. Violations and Enforcement

During FY 2000, OSC received 98 new matters alleging violations of the Hatch Act. Following initial review by the Hatch Act Unit, five matters were referred for field investigation. OSC issued 21 warning letters during this period and four Hatch Act enforcement actions were filed in FY 2000.

D. Recent Hatch Act Cases

The Hatch Act Unit generated increased litigation activity at OSC. Many of these cases resulted in significant public and media interest. As mentioned, press coverage contributes considerably to increased employee and manager awareness of the merit system protections enforced by OSC. For example, in August 2000, a Regional Administrator for the Environmental Protection Agency was suspended from his position without pay for 100 days, in settlement of OSC's petition for disciplinary action alleging that he violated the Hatch Act by soliciting campaign contributions. See Govexec.com, Sept. 6, 2000 ("As Elections Near, Don't Get Caught in the Hatch Act"). In November 2000, the Acting Administrator of the Health Care Financing Administration agreed to resign from his position for holding a political fundraiser in

his home, in violation of the Hatch Act. See Washington Post, Dec. 16, 2000 (“Head of HCFA Is Forced To Quit For Hatch Act Violation”). And, just days before last November’s presidential election, OSC was sued in federal court by the American Postal Workers Union, which challenged an OSC advisory opinion that the display of a partisan political poster on union bulletin boards nationwide violated the Hatch Act. See Washington Post, Nov. 3, 2000 (“As Election Looms, Postal Service and Union Wrangle Over Hatch Act”); Federal Times, Dec. 4, 2000 (“Appeals Court to Hear Hatch Arguments”).

Table 5

Summary of Hatch Act Matters			
	FY 1998	FY 1999	FY 2000
Advisory opinions issued	2,124	2,063	2,810
Matters received	83	71	98
Matters referred for investigation	6	3	5
Disciplinary action complaints filed with MSPB	0	3	4
Disciplinary actions obtained			
Before MSPB and through negotiation	5	1	2
Warning letters issued	20	21	21

The matters summarized below were filed with the MSPB in FY 2000:

- On April 11, 2000, OSC filed a complaint for disciplinary action against an employee of the Environmental Protection Agency, charging that the employee violated the Hatch Act by knowingly soliciting political contributions. OSC entered into settlement negotiations with the employee and it was agreed that the employee would be suspended without pay for 100 days. After the terms of the settlement agreement were completed, OSC withdrew its complaint for disciplinary action. (Special Counsel v. Yellowtail, MSPB Docket No. CB-1216-00-0014-T-1)
- OSC filed a complaint for disciplinary action against a U.S. Postal Service employee, charging that the employee violated the Hatch Act’s ban on partisan candidacy when he filed as both a Democratic and Republican candidate for School Board Director. On November 12, 1999, the parties filed a Joint Motion for Approval of Settlement and Settlement Agreement with the MSPB. The parties agreed that the employee had

violated the act and that the employee would be suspended without pay for 30 days. The MSPB approved the settlement. (Special Counsel v. Pierce, MSPB Docket No. CB-1216-99-0063-T-1)

- OSC filed a complaint for disciplinary action against an employee of the Connecticut Department of Mental Retardation, charging that the employee violated the Hatch Act by being a candidate for elective office in a partisan election. As part of a negotiated settlement agreement, the State of Connecticut conceded that the employee violated the Hatch Act and that a penalty was warranted. The State of Connecticut, citing a state law prohibiting it from removing employees for engaging in political activities, voluntarily agreed to forfeit \$67,592.20 from its next federal Medicaid grant. The MSPB approved the settlement on November 19, 1999, and ordered the U.S. Department of Health and Human Services to withhold Medicaid funds. On January 3, 2000, HCFA withheld the funds from the State of Connecticut's Fiscal Year 2000 second-quarter payment. (Special Counsel v. Moore, MSPB Docket No. CB-1216-99-0061-T-1)
- On August 4, 2000, OSC filed a petition for disciplinary action with the MSPB against a Home Support Specialist, employed by the Washington State Department of Social and Health Services, because of her partisan candidacy for elective office. (Special Counsel v. Ledesma, MSPB Docket No. CB-1216-00-0025-T-1)
- On September 1, 2000, OSC filed a petition for disciplinary action with the MSPB against a Social Service Worker, employed by the Alabama Department of Human Resources, because of her partisan candidacy for elective office. (Special Counsel v. Tinker, MSPB Docket No. CB-1216-00-0029-T-1)

E. Uniformed Services Employment Rights

The Uniformed Services Employment and Reemployment Rights Act (codified at 38 U.S.C. § 4301, *et seq.*), prohibits discrimination against persons because of their service in the Armed Forces Reserve, the National Guard, or other uniformed services. USERRA prohibits an employer from denying any benefit of employment on the basis of an individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. USERRA also protects the right of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment after being absent due to military service or training.

Where the employer is a federal executive agency, OSC may appear on behalf of, and act as attorney for, the aggrieved person. In such a case, however, the person must first file his/her USERRA complaint with the Department of Labor's Veterans' Employment and Training Service (VETS). If VETS is unsuccessful in resolving the complaint, the claimant may request that VETS refer the complaint to OSC. If the Special Counsel believes there is merit to the complaint, OSC will initiate an action before the MSPB.

OSC received eight USERRA referrals from the Department of Labor during FY 2000. OSC declined representation in six USERRA referrals (including three referrals from FY 1999). Six USERRA referrals were under review at the end of FY 2000. Although OSC initiated no USERRA actions before the MSPB during FY 2000, it obtained corrective action in one case.

F. Whistleblower Disclosures

In addition to its investigative and prosecutorial mission, OSC provides a safe channel through which federal employees, former federal employees, or applicants for federal employment may disclose information they reasonably believe evidences a violation of law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 1213(a).

Upon receipt of such information from a current or former federal employee or applicant for federal employment, the Special Counsel is required by § 1213(c) to transmit the information to the head of the agency concerned if the Special Counsel determines that there is a substantial likelihood that the information discloses the kind of wrongdoing described in the statute. OSC will not divulge the identity of an employee who provided the information unless he or she consents. The agency head is then required to conduct an investigation and submit a report to the Special Counsel on the findings of the investigation. OSC is not authorized to investigate allegations of the kind described in § 1213(a). The Special Counsel sends the agency report, along with any comments provided by the whistleblower who made the disclosure, and any comments or recommendations by the Special Counsel, to the President, and the congressional committees having jurisdiction over the agency. A copy of the report and any comments are also placed in a public OSC file in accordance with 5 U.S.C. § 1219(a).

After review of the information received from a whistleblower, the Special Counsel may determine that although there is not a substantial likelihood that the information discloses the type of wrongdoing described in § 1213(a), the information nonetheless merits attention. In such cases, the Special Counsel may, under § 1213(g)(2), with the consent of the whistleblower, require the agency head to review the matter and inform the Special Counsel of what action has been or is being taken. OSC then notifies the whistleblower.

Disclosures are processed by the Disclosure Unit. Complainants often include with their allegations information which may be covered by § 1213(a). Disclosures are referred to the Disclosure Unit by the CEU for further review and follow-up with the complainant as needed to confirm the facts and issues involved. After completion of its review, OSC decides whether to: (1) transmit the information developed to the agency concerned under §1213(c) or §1213(g)(2); (2) refer the matter to the agency Inspector General or comparable office for any appropriate action; or (3) close the matter without further action.

During FY 2000, OSC received 422 disclosure matters for possible referral to the agency concerned under §§ 1213(c) or 1213(g). In addition, 209 disclosure matters were carried over from FY 1999. A disclosure matter usually contains multiple allegations of a violation of law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety. In FY 2000, the Disclosure Unit referred eight matters to agency heads for their review and completed action on 389 matters.

Table 6

Summary of Disclosure Matters			
	FY 1998	FY 1999	FY 2000
Matters received	331	369	422
Disclosures referred for investigation and a report under § 1213(c)	2	15	8
Disclosure allegations referred to agency Inspectors General	65	71	106
Disclosure allegations closed due to lack of sufficient basis for further action	247	349	303
Remaining disclosures carried over to next fiscal year for completion of review	257	209	245

Results of Referrals

During FY 2000, OSC closed 12 reports from agencies to which statutory referrals had been made. OSC reviews of agency reports disclosed the following results from statutory referrals:

Section 1213(c) Reports

Cases in which allegations were substantiated in whole or in part	9
Cases in which allegations were not substantiated	3

Disclosure Unit Matters

The following is a representative sample of matters that were either referred by the Special Counsel to the head of the agency pursuant to 5 U.S.C. § 1213(c) during FY 2000, or in which reports were received from the agency and the matter closed during FY 2000:

- OSC referred allegations of violations of law, rule, or regulation and a substantial and specific danger to public safety in the operation by the National Park Service (NPS) of a tour boat concession at Crater Lake National Park (Crater Lake), Oregon. Seasonal employees with the NPS at Crater Lake disclosed extensive violations of state and federal marine laws. Their concerns included insufficient training and lack of Coast Guard certification for boat operators, lack of safety equipment, unreliability of boat engines and dangerous operation of boats in inclement weather.

The Interior Department/NPS investigation revealed that there were legitimate safety concerns regarding the boat tour operations at Crater Lake prior to 1996, but that since 1996, the safety of the boat operations has improved markedly, particularly with the involvement of the U.S. Coast Guard in the inspection and certification of the tour boats and boat operations, in improved training, and in upgrades to the maintenance of the boats. Although no violations of law, rule, or regulation were found, the Interior Department/NPS report concluded that there was inconsistent policy guidance on the scope of the applicable NPS boating regulations. The agency proposed to remedy the NPS policy inconsistency through the work of the NPS Boating Regulations Task Force, a national task force convened in 1997 to update NPS boating regulations.

The Interior Department/NPS represented that it has made, and will continue to make, improvements in the tour boat program at Crater Lake, including revisions to written standard protocols for safety, boat operations, staff training, weather communications, and continued involvement of the U.S. Coast Guard in annual boat inspections and certifications. The report also identifies long-range plans for the enhancement of safety and enjoyment at Crater Lake, including the acquisition of new vessels utilizing alternative fuel technologies that would provide increased protection for water quality. *Referred May 1999; closed February 2000.*

- OSC referred allegations of a substantial and specific danger to public health and safety at the Carl T. Hayden VAMC, Phoenix, Arizona. The resulting Department of Veterans Affairs investigation was triggered by a disclosure made to the OSC by a physician anesthesiologist at the VAMC. The whistleblower alleged that he observed an extremely high rate of complications occurring in patients under the care of a particular Nurse Anesthetist. He alleged that this individual falsified medical records by pre-recording patient's vital signs during the administration of anesthesia, and that he left patients unattended during procedures. It was alleged that the Nurse

Anesthetist's behavior caused at least four patient deaths, and resulted in the collapse of at least eight patients after surgery.

The VA report partially substantiated the allegations. It found that the Nurse Anesthetist provided substandard anesthesia care in six of 14 cases over a period extending from 1993 to 1999. The report confirmed that the Nurse Anesthetist had incidents in the post-anesthesia care unit in numbers greater than the other five nurse anesthetists. In six patients, according to the VA report, premature endotracheal extubation at the end of anesthesia appeared to be the primary problem. Of the 14 patients studied, three died. Despite its findings that several patients received substandard care, the VA report concluded that there was no evidence that the Nurse Anesthetist's behavior caused these deaths. The report did confirm that the Nurse Anesthetist had behavioral problems, and was heard to speak about veteran patients in a deprecating, insulting manner. On a broader scale, the VA report found that the VAMC lacked a plan and process to measure and assess data regarding anesthesia quality issues during the period from 1993 to 1999. The report also found that senior VAMC officials did not communicate serious concerns related to anesthesia and surgery upwards. The report found numerous weaknesses in the infrastructure supporting the surgical and anesthesia programs. Finally, the report found that officials at the VAMC violated the law by failing to provide proficiency rating for the Nurse Anesthetist since January 1997.

Based on the findings of the investigation, the VA represented that it has taken several measures to address the serious patient care issues raised by the allegations: (1) standardized extubation guidelines are in place, and no further system-wide action is required; (2) the Nurse Anesthetist remains under appropriate supervision and performance monitoring by the Acting Chief, Anesthesia Section; (3) a supervising Certified Registered Nurse Anesthetist has been appointed to assist in monitoring and to address learning needs of the group; (4) anesthesia staff members have completed an Airway Study, focusing on reintubation in the immediate post-operative period; (5) criteria for endotracheal extubation were developed and implemented by anesthesia staff at the Medical Center in September 1999; and (6) systematic data collection on performance measures in anesthesia began in June 1999 and continues. The Special Counsel transmitted the report to the President and congressional committees with oversight authority for the VA, with comments and recommendations on the findings. The Special Counsel noted that the findings appeared reasonable except to the extent that the VA has not committed to take specific disciplinary or other appropriate action against individuals found to have provided substandard care to patients. The Special Counsel recommended that the VA be encouraged to reexamine any policy or procedures that would permit or force the retention of such employees. *Referred August 1999; closed April 2000.*

- OSC referred allegations of violations of law, rule, or regulation and a substantial and specific danger to public safety by officials of the Department of Transportation, Federal Aviation Administration (FAA), Houston Air Traffic Control Center (ARTCC). It was alleged that the former Air Traffic Manager at ARTCC established a policy of ignoring the first “operational error,” which indicates the lack of the minimum separation distance between two aircraft, if only one incident occurred. Federal Aviation Administration Order (FAAO) 7110.65 defines the minimum separation distance between two or more aircraft. FAAO 7210.3 requires the investigation and reporting of all operational errors. The FAAO requirements provide for escalating safety measures to be taken as the number of operational errors increases. Thus, the under-reporting of operational errors at ARTCC directly impacts public safety. According to the report, there was no credible evidence that ARTCC ignored operational errors; failed to report operational errors based on redrawing of computer measurements of the National Track Analysis Program (NTAP); or improperly classified operational errors as pilot deviations. The Investigation Staff also conducted a technical review in order to substantiate the current facility practices and thoroughness. The technical review found no evidence of “[d]ata being incorrectly reported, misrepresented, or in any way altered to avoid reporting as required by FAA policies and regulations.”

A supplemental report to OSC confirmed that the FAA would be taking additional steps to address the issues raised by the allegations, as follows: (1) the Director of Air Traffic issued a policy statement to all air traffic employees nationwide reiterating the importance of reporting all operational errors, without exception; (2) since January 18, 2000, the Air Traffic Manager of the Houston Center has been personally conducting training for all Houston Center employees to ensure that they are aware of the requirement to report all operational errors, without exception; (3) the Air Traffic Investigations Division is developing a new training module for the agency’s Quality Assurance Course that trains employees on the NTAP. Training is mandatory and will ensure the uniform measurement of NTAP data. *Referred January 1999; closed April 2000.*

- OSC referred allegations of violations of law, rule, or regulation and a substantial and specific danger to public health by employees of the Department of Agriculture (USDA), Food Safety and Inspection Service, Atlanta District Office, Atlanta, Georgia. The whistleblower, who was assigned to Shapiro Packing, a meat processing plant in Augusta, Georgia, alleged that particular line inspectors routinely abandon their assigned duty stations without arranging for other employees to take their places. According to the whistleblower, this practice created a danger to public health because other inspectors had to work more quickly to inspect the carcasses when an inspector was not properly relieved. The whistleblower was concerned that the cows were not properly inspected, increasing the risk that a diseased or otherwise

contaminated cow would be processed, stamped “USDA Inspected,” and distributed for consumer consumption. The USDA’s report supported the whistleblower’s claim that for the last two years line inspectors were improperly leaving their duty stations without arranging for proper relief. The agency has subsequently given the inspectors specific instructions concerning the proper method of relief and the improper conduct has since ceased. The agency denied that these practices created a danger to public health. The report emphasized that all carcasses and parts received proper and thorough inspection and that the inspectors were able to effectively cover an absent inspector’s adjacent station for brief periods of time.

Nevertheless, based on its findings, the USDA has cautioned its inspectors about leaving their duty stations without coverage. The agency also intends to take appropriate action to correct the rotation practices, so that rotation only occurs during breaks or when a floor inspector is present to provide appropriate coverage. Lastly, the agency proposed disciplinary action against the line inspectors’ supervisor who, despite two previous letters of instruction regarding proper line staffing and coverage, failed to take measures to assure compliance with relief procedures. *Referred March 2000; closed September 2000.*

- OSC referred allegations of violations of law, rule, or regulation, and a gross waste of funds by officials of the Department of the Army, U.S. Army Corps of Engineers (Corps), Saint Louis District, Saint Louis, Missouri to the Department of Defense (DOD) for a report. It was alleged that Corps officials exerted improper influence and manipulated a cost-benefit analysis for the purpose of obtaining approval to undertake a navigation improvement project on the Upper Mississippi River and Illinois Waterway. The project involved the expansion of locks along the Upper Mississippi at an estimated cost of between \$750 million and 1.1 billion dollars. In particular, it was alleged that top Corps officials improperly influenced changes to several parameters in the economic analysis portion of the feasibility study in order to alter the computation of the resulting costs and benefits.

According to the report of investigation by the Army’s Inspector General, the primary allegation, that the analysis was improperly manipulated, was substantiated. First, the report found that the Corps’ former Director of Civil Works, and the Mississippi Valley Division Commander, created a climate within the Corps that led to the manipulation of the cost-benefit analysis. Second, the report found that the District Engineer assigned to the project directed a specific value for a key parameter of the cost-benefit analysis when he knew it was mathematically flawed and contrary to the recommendations of Corps economists. The report found that they did so in order to produce a favored outcome, that is, large-scale construction. Third, the report determined that the Division Commander improperly gave preferential treatment to the barge industry by allowing industry representatives to become direct participants in the economic analysis. On a broader scale, the report identified the possible

existence of an institutional bias for large-scale construction projects throughout the Corps, which created an atmosphere where objectivity in the economic analysis was placed in jeopardy.

The Special Counsel transmitted the report to the President and congressional committees with oversight authority for the Corps, with comments and recommendations on the findings. The Special Counsel noted that the findings appeared reasonable with respect to the substantiation of the essential contention that the cost benefit analysis was manipulated in order to justify the expensive extension of locks along the Upper Mississippi River and Illinois Waterway. The Special Counsel determined, however, that while the report identified a number of major areas of concern regarding the Corps' decision-making in this matter, and confirmed serious misconduct and improprieties by three military officers, DOD had not provided a description of the corrective action that the Secretary intends to take in response to the investigatory findings. Instead, it referred those issues to the Department of Army for consideration. The Special Counsel also found that DOD had not yet conducted a thorough analysis of some of the subsidiary allegations regarding the conduct of the cost-benefit analysis. The Special Counsel recommended that these unresolved matters receive appropriate follow-up by the Executive Branch and relevant congressional oversight committees. In addition, the Special Counsel highlighted a number of recommendations made by the whistleblower suggesting implementation of systematic reforms, including independent peer review for navigation projects; organizational independence for project evaluators; and improved methods for analyzing the demand for navigation projects. *Referred February 2000; closed December 2000.*

G. Outreach Program

One of Special Counsel Kaplan's top priorities is to combat the widespread ignorance in the federal workforce concerning OSC and the laws it enforces. During FY 1999, the Special Counsel eliminated one of the two positions previously allocated to the Congressional and Public Affairs Division, and deployed the FTE to hire an Outreach Specialist. As a result, for the first time in its history, OSC now has an established program for providing outreach and training, and FY 2000 was the first full fiscal year of the program's existence.

The Outreach Program has been established to assist agencies in meeting their statutory mandate under 5 U.S.C. § 2302(c), which Congress imposed in 1994. Under that provision, federal agencies are responsible "for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them" under chapters 12 and 23 of title 5. Because of this clear statutory mandate, OSC considers outreach to federal managers and employees to be an essential part of its mission.

A chief focus of the Outreach Program is to work proactively with federal agencies to design employee education programs. A significant step towards achieving that goal came in FY 2000 with OSC's conduct of a survey of federal agency efforts to comply with § 2302(c). The results of that survey will guide future program design and compliance efforts. Moreover, the conduct of the survey itself caused many agencies to implement stepped-up measures to inform their employees of their rights.

Other outreach achievements during FY 2000 included a significant number of presentations by OSC speakers (80 presentations at 75 events). Among these presentations were eight Hatch Act forums conducted by OSC nationwide, prior to the 2000 federal, state and local elections, to explain the laws governing political activity by federal employees. In addition, FY 2000 saw a significant increase in use of OSC's web-site (www.osc.gov), which has now become an established and highly utilized source of information about OSC and the laws it enforces. The number of user sessions increased 32% (from 175,444 sessions in FY 1999 to 231,342 sessions during FY 2000).

H. Mediation Program

During FY 2000, Special Counsel Kaplan directed the creation of OSC's first Alternative Dispute Resolution Unit, which directs OSC's Mediation Program. The Mediation Program became operational in the second half of FY 2000.

In its first year, OSC's Mediation Program offered mediation to complainants in 42 cases, representing 15% of the cases referred by CEU for further investigation. Over half of the complainants and agencies to which we offered a mediation invitation accepted our invitation to mediate. Specifically, 23 of the 42 complainants to whom we offered mediation accepted our invitation. We subsequently offered mediation to agencies in 22 of those 23 cases. Twelve agencies accepted our invitation. Accordingly, twelve cases went to mediation, resulting in four case resolutions, representing a 33% resolution rate.

IV. ANNUAL SURVEY PROGRAM

Each year, as required by law, the OSC surveys persons who have contacted the agency for assistance and whose cases were closed during the previous fiscal year. Survey forms are sent to all identifiable persons in closed matters (with or without favorable action) who: (1) alleged a PPP or other prohibited employment activity;¹¹ (2) received a written Hatch Act advisory opinion; or (3) filed a report through the whistleblower channel operated by the OSC Disclosure Unit.

¹¹ Related violations include other matters investigated by the OSC pursuant to law – *e.g.*, complaints alleging Hatch Act violations, or arbitrary and capricious withholding under the FOIA. For ease of reference in describing survey types, the term “PPP” includes these related violations.

During FY 2000, OSC surveyed individuals whose matters were closed in FY 1999; individuals whose matters were closed in FY 2000 received surveys during the first quarter of FY 2001. This report covers the results of both survey cycles.

The forms used for the FY 1999 and FY 2000 surveys asked the following questions required by law: (1) whether potential respondents were fully apprised of their rights; (2) whether they were successful at the OSC or the MSPB; and (3) whether, successful or not, they were satisfied with the service received from the OSC.¹² In addition to these required questions, the forms asked recipients to indicate how they first became aware of OSC program services, the nature of their complaint or disclosure, and the disposition of any individual right of action appeal filed with the MSPB in connection with allegations of reprisal for whistleblowing.¹³

Concerted efforts by OSC staff contributed to improved response rates to two of the three surveys covering FY 2000 matters, producing the highest response rate to PPP surveys (32%), and the second highest response rate to Hatch Act surveys (49%), since the survey program began in 1995. Nevertheless, the universe of potential respondents to surveys for each of the two fiscal years covered by this report continued to be small, and response rates in the three survey categories ranged from 25-43% in FY 1999, and 28-49% in FY 2000. Still, some results in both survey cycles corresponded to patterns noted in earlier years.

¹² Section 13, Public Law 103-424 (1994), codified as 5 U.S.C. § 1212 note. Survey forms queried recipients on service received in terms of courtesy, oral communications, written communications, timeliness, and the result obtained. Survey recipients are also invited to provide comments or suggestions on ways in which the OSC can improve its service to persons seeking its assistance.

¹³ OSC takes several measures to address potential concerns about participation in its surveys. Persons who have sought OSC assistance do not receive a survey form until after the OSC has completed action on their complaint, disclosure, or request for Hatch Act advice. The forms advise recipients that their response is completely voluntary, and that inclusion of their name and case number is optional. OSC provides postage-paid return envelopes for completed survey forms, and sends a post card reminder to all survey recipients. An OSC unit other than those that process complaints, disclosures, and requests for Hatch Act advice carries out the survey program. Consistent with the decision to allow respondents to reply anonymously if they choose, the survey format does not permit crosschecking of results with case files.

Survey responses for both FY 1999 and FY 2000 – especially those dealing with PPP and whistleblower disclosure matters – continued to suggest, as they have since the surveys began, that federal agencies are not systematically implementing their employee information responsibilities under 5 U.S.C. § 2302(c) (requiring agencies to inform employees of their rights and remedies under the laws enforced by the OSC).

Respondents continued to report more favorably about service received in connection with OSC's advisory functions; conversely, respondents generally were more negative about service issues in connection with the agency's enforcement and compliance responsibilities. Broad correlations also continued to appear between the degree to which respondents obtained the results they sought from OSC, and the degree to which they reported being satisfied with OSC service in connection with those results.

Survey questions and responses to those questions in surveys covering matters closed during FY 1999 and FY 2000 appear in Tables 7, 8, and 9.

Table 7

PROHIBITED PERSONNEL PRACTICE SURVEY RESPONSES (FY 1999 - FY 2000)

FY 1999		FY 2000	
<i>Number Mailed</i>	1564	<i>Number Mailed</i>	1621
<i>Number Returned</i>	426	<i>Number Returned</i>	516
<i>Response Rate</i>	27%	<i>Response Rate</i>	32%

Questions

1. Has the federal agency by which you are employed (or were most recently employed, if you no longer work for a federal agency) informed you about your rights and remedies in connection with prohibited personnel practices?		
<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
Yes	69	76
No	320	376
Don't recall	17	21
Never employed by a federal agency	8	23

2. How did you first become aware that you could file a complaint with OSC?		
<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
OSC Web site	43	91
OSC speaker	2	5
OSC brochure	33	28
OSC poster	6	12
News story	20	32
Agency personnel office	23	15
Union	47	62
Co-worker	106	112
Other	137	146

3. What was the subject matter of your complaint? (CIRCLE ALL THAT APPLY.)		
<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
Combination of reprisal for whistleblowing and other prohibited personnel practices	229	251
Reprisal for whistleblowing <i>only</i>	43	45
Prohibited personnel practice other than reprisal for whistleblowing	162	232
Hatch Act	24	30
Uniformed Services Reemployment Rights Act	11	14
Arbitrary and capricious withholding under the Freedom of Information Act	33	40
Other	67	82

PROHIBITED PERSONNEL PRACTICE SURVEY RESPONSES (FY 1999 - FY 2000) (cont'd)

4. Were you successful in obtaining the action you sought from OSC?

<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
Yes	16	23
Partly Successful	33	30
No	363	431
Not Applicable	7	19

5. Regardless of the subject of your complaint, if OSC closed the matter without obtaining all the relief you sought, what was the reason given for closure? (CIRCLE ALL THAT APPLY.)

<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
No OSC jurisdiction over agency involved, your position, or agency official(s) involved in your complaint	60	69
No personnel action taken by agency involved	41	47
Insufficient evidence that a law or regulation was violated by the action(s) you complained of to OSC	127	165
OSC could not disprove stated reason(s) of the agency involved for the action(s) you complained of	47	55
You or OSC settled the matter with the agency involved	16	19
You declined corrective action offered by the agency involved	2	2
You withdrew your complaint	9	20
OSC filed a petition with the Merit Systems Protection Board (MSPB) for corrective Action	7	9
OSC obtained a decision in the corrective action matter filed with the MSPB	6	5
Matter was deferred to EEO processes	25	56
Other	129	152
Do not recall	30	33

6. If your complaint alleged reprisal for whistleblowing (alone, or with other allegations), what was the reason given for closure of the whistleblower reprisal allegation(s)? (CIRCLE ALL THAT APPLY.) If your complaint was not about reprisal for whistleblowing, go to next question.

<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
Information you disclosed did not appear to be a legally protected disclosure	42	33
Disclosure occurred after personnel action(s) complained of	10	13
Insufficient proof that agency action official(s) knew of the disclosure	21	23
Insufficient proof of connection between disclosure and personnel action(s) complained of	69	63
You filed an Individual Right of Action (IRA) or other appeal with the MSPB	24	22
Other	99	120
Do Not Recall	32	29

PROHIBITED PERSONNEL PRACTICE SURVEY RESPONSES (FY 1999 - FY 2000) (cont'd)

7. How would you rate the following elements of the service you received?						
		<i>Very Satisfied</i>	<i>Satisfied</i>	<i>No Opinion/ Inapplicable</i>	<i>Dissatisfied</i>	<i>Very Dissatisfied</i>
Courtesy	FY 1999	63	116	56	74	103
	FY 2000	79	151	77	75	119
Oral communications	FY 1999	43	89	65	96	114
	FY 2000	48	97	100	104	146
Written communications	FY 1999	34	79	41	117	140
	FY 2000	44	110	46	124	175
Timeliness	FY 1999	39	79	42	98	156
	FY 2000	38	123	66	93	182
Results	FY 1999	17	21	21	68	288
	FY 2000	20	22	50	89	319

8. Did you file an individual right of action (IRA) or other appeal with the MSPB in connection with the same transaction(s) reported to OSC?		
<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
Yes	105	125
No	246	305
Not applicable	32	32

9. Did you ask for the same relief that you sought from OSC?		
<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
Yes	100	120
No	14	30
Do not recall	13	13

10. Were you successful at the MSPB in obtaining the relief you had sought from OSC?		
<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
Yes	21	16
Partially	13	6
No	66	76
Appeal pending	23	51

11. If the answer to [the preceding question was "Yes" or "Partially" how did you obtain that relief?		
<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
Settlement	28	18
Decision after hearing	5	5
Other	4	15

Table 8

HATCH ACT SURVEY RESPONSES (FY 1999 - FY 2000)

		FY 2000	
<i>Number Mailed</i>	136	<i>Number Mailed</i>	105
<i>Number Returned</i>	58	<i>Number Returned</i>	51
<i>Response Rate</i>	43%	<i>Response Rate</i>	49%

Questions

1. Has the federal agency by which you are employed (or were most recently employed, if you no longer work for a federal agency) informed you about your rights and restrictions in connection with political activity under the Hatch Act?		
<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
Yes	22	21
No	7	2
Don't recall	5	0
Never employed by a federal agency	21	26

2. How did you first become aware that you could request an advisory opinion from OSC?		
<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
OSC Web site	3	11
OSC speaker	1	1
OSC brochure	0	3
OSC poster	4	1
News story	1	2
Agency personnel office	10	6
Union	2	1
Co-worker	6	7
Other	27	18

3. Were you successful in obtaining the action you sought from OSC?		
<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
Yes	49	46
Partially	2	3
No	6	0

HATCH ACT SURVEY RESPONSES (FY 1999 - FY 2000) (cont'd)

4. How would you rate the following elements of the service you received?						
		<i>Very Satisfied</i>	<i>Satisfied</i>	<i>No Opinion/ Inapplicable</i>	<i>Dissatisfied</i>	<i>Very Dissatisfied</i>
Courtesy	FY 1999	36	19	1	2	0
	FY 2000	36	14	0	0	0
Oral communications	FY 1999	34	14	0	10	0
	FY 2000	35	12	3	0	0
Written communications	FY 1999	37	17	1	2	1
	FY 2000	37	14	0	0	0
Timeliness	FY 1999	34	17	3	3	1
	FY 2000	32	12	2	4	0
Results	FY 1999	31	18	3	3	3
	FY 2000	35	10	1	3	1

Table 9

DISCLOSURE UNIT SURVEY RESPONSES (FY 1999 - FY 2000)

FY 1999		FY 2000	
<i>Number Mailed</i>	347	<i>Number Mailed</i>	290
<i>Number Returned</i>	86	<i>Number Returned</i>	82
<i>Response Rate</i>	25%	<i>Response Rate</i>	28%

Questions

1. Has the federal agency by which you are employed (or were most recently employed, if you no longer work for a federal agency) informed you about the channels available for, and your rights related to, the reporting of whistleblower disclosures?		
<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
Yes	14	20
No	62	57
Don't recall	6	2
Never employed by a federal agency	3	2

2. How did you first become aware that you could file a disclosure with OSC?		
<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
OSC Web site	8	13
OSC speaker	1	3
OSC brochure	6	6
OSC poster	1	8
News story	3	2
Agency personnel office	5	3
Union	7	7
Co-worker	23	13
Other	30	26

3. Were you successful in obtaining the action you sought from OSC?		
<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
Yes	1	4
Partly Successful	2	10
No	80	64

DISCLOSURE UNIT SURVEY RESPONSES (FY 1999 - FY 2000) (cont'd)

4. Regardless of the subject of your disclosure, what was the reason given by OSC for closure of the matter? (CIRCLE ALL THAT APPLY.)		
<i>Response Options</i>	<i>FY 1999 Responses</i>	<i>FY 2000 Responses</i>
No OSC jurisdiction over agency involved, your position, or agency official(s) involved in your disclosure	17	14
Insufficient evidence of a violation of law, rule, or regulation; gross mismanagement; gross waste of funds; an abuse of authority; a substantial and specific danger to public health or safety	29	14
You withdrew your disclosure	2	4
You resolved the matter with the agency involved	1	0
Your disclosure was referred to the agency involved for a report to the OSC on the agency's inquiry into the matter	7	11
Other	30	33
Do not recall	4	5

5. How would you rate the following elements of the service you received?						
		<i>Very Satisfied</i>	<i>Satisfied</i>	<i>No Opinion/ Inapplicable</i>	<i>Dissatisfied</i>	<i>Very Dissatisfied</i>
Courtesy	FY 1999	8	24	16	16	22
	FY 2000	15	33	11	13	10
Oral communications	FY 1999	5	19	15	16	31
	FY 2000	10	23	13	21	14
Written communications	FY 1999	2	18	13	23	29
	FY 2000	5	18	8	27	21
Timeliness	FY 1999	3	14	11	21	35
	FY 2000	6	14	5	19	37
Results	FY 1999	0	3	6	17	58
	FY 2000	3	2	8	14	54

V. LEGISLATION

A. Pending Appropriations

Consistent with the Administration's budget request, OSC has requested \$11,784,000 for FY 2002. This represents an increase of \$662,000 over OSC's FY 2001 appropriation of \$11,122,000. A large part of this increase, \$252,000 (38%) is to pay for the projected FY 2002 salary increase of 3.6%.

The balance of the increase in funding sought, \$410,000, or 62%, represents modest increases in other categories; *i.e.*, rent, other services, supplies and materials, and equipment. In addition, a portion of this increase is necessary to fund items mandated by law or regulation, including increased costs for OSC's public transit subsidy program, and implementation of the

Government Paperwork Elimination Act. Finally, several OSC employees are eligible to retire during FY 2002, and OSC accordingly has set aside an increased amount to pay possible anticipated lump sum terminal leave benefits.

B. Reauthorization of the Office of Special Counsel

H.R. 3610, the omnibus consolidated appropriations bill for FY 1997, included a reauthorization for OSC through the year 2002.

VI. FURTHER INFORMATION¹⁴

A. OSC Publications

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

Director, Congressional and Public Affairs
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 201
Washington, D.C. 20036-4505
Telephone: (202) 653-5163

Many OSC forms and publications may also be downloaded from OSC's Web site at www.osc.gov/forms.htm.

B. Prohibited Personnel Practice Complaints

Complainants with questions about PPPs may call the OSC Officer of the Week at:

Complaints Examining Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 201
Washington, D.C. 20036-4505
Telephones: (800) 872-9855
(202) 653-7188

The PPP complaint filing form, the use of which is mandatory for initiating a PPP complaint (5 C.F.R. § 1800.1), may be downloaded from OSC's Web site at www.osc.gov/Documents/osc11.pdf.

¹⁴ For callers with hearing/speech disabilities, all of the OSC telephone numbers listed here may be accessed via TTY by first dialing the Federal Relay Service at 1-800-877-8339.

C. Whistleblower Disclosures

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

Disclosure Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 201
Washington, D.C. 20036-4505
Telephones: (800) 572-2249
(202) 653-9125

The whistleblower disclosure filing form may be downloaded from OSC's Web site at www.osc.gov/Documents/osc12.pdf.

D. Hatch Act Questions

Inquiries about the Hatch Act may be made in writing, by telephone, or by e-mail to:

Hatch Act Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 201
Washington, D.C. 20036-4505
E-mail address: hatchact@osc.gov
Telephones: (800) 85-HATCH or (800) 854-2824
(202) 653-7143

The OSC Web site may be visited for additional substantive information about the Hatch Act, including frequently asked questions by federal, state and local employees, as well as a sampling of written advisory opinions on common factual scenarios.

E. Outreach Program

Requests about OSC's outreach efforts should be made to:

Outreach Specialist
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 201
Washington, D.C. 20036-4505
Telephone: (202) 653-6006
Fax: (202) 653-5161

F. OSC Mediation Program

Information about the program can be obtained by:

1. Clicking on the Alternative Dispute Resolution (ADR) link on the OSC Web site;

or

2. Contacting the ADR Unit at:

U.S. Office of Special Counsel
Alternative Dispute Resolution Unit
1730 M Street, N.W., Suite 201
Washington, D.C. 20036-4505
E-mail address: adr@osc.gov
Telephones: (800) 872-9855
(202) 653-7188, ext. 4606

G. OSC Online

Information about OSC can be obtained at its home page on the World Wide Web. OSC's address is: <http://www.osc.gov>.