

FISCAL YEAR 2008
CONGRESSIONAL BUDGET JUSTIFICATION
AND PERFORMANCE BUDGET GOALS



U.S. OFFICE OF SPECIAL COUNSEL

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GRAPHICAL HIGHLIGHTS OF OUR AGENCY'S SUCCESSES

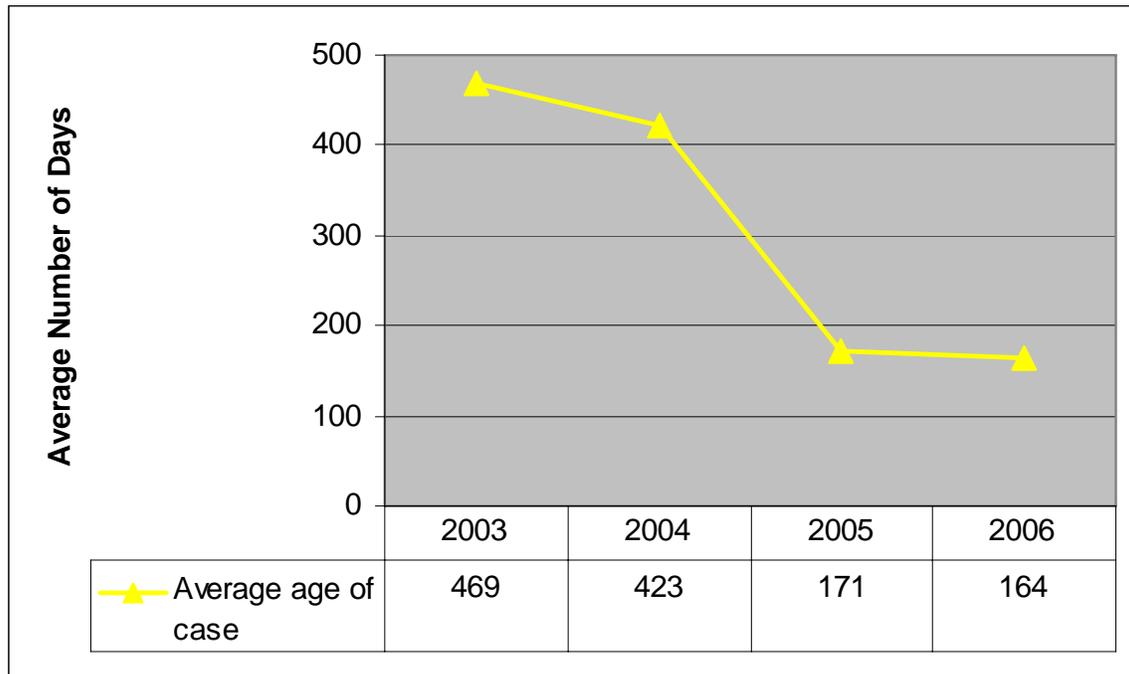
When the new Special Counsel took office in January 2004, two major problems confronted OSC: a serious backlog of cases in all of the units and a cumbersome structure of three separate Investigation and Prosecution Divisions (IPDs). The Government Accountability Office (GAO) issued a report in March 2004 (GAO 04-36) that was critical of OSC's chronic backlog problem in the Complaints Examining Unit and Disclosure Unit. That same month, Special Counsel Bloch created a Special Projects Unit (SPU) to begin immediately investigating the problem of the backlog of cases and to find solutions.

At the end of FY 2004, we had eliminated the backlogged prohibited personnel practice (PPP) cases in the Complaints Examining Unit from 447 to 119 cases and reduced the number of whistleblower disclosure cases in backlog from 674 to 82. Therefore, the overall cases backlog reduction in FY 2004 was 82% and this work continued into the FY 2005 when OSC processed 1,774 prohibited personnel practice cases, including 576 "old" cases, some of which had been in the Investigation and Prosecution Division for two, three and four years.

The next step in solving the difficulties was a reorganization of the agency in January 2005. We eliminated the system of three co-equal investigation and prosecution units doing the same work and consolidated them into one Investigation and Prosecution Division. We also added a new Midwest field office. More importantly, we "flattened" the agency management review structure by reducing the number of supervisors and managers that had to review and approve the staffs' work. The Special Counsel further directed that each operating unit establish standard operating procedures that would establish consistency in case processing, and with that consistency, faster processing times. These improvements have led to further reductions in backlogs and enabled the agency to reach the meritorious cases faster, enabling OSC to seek settlements or initiate prosecutions before evidence became stale and witnesses' memories faded. Decisions are now reached faster, bringing swifter justice to those Federal employees served by the Office of Special Counsel. The Special Counsel expects that swifter and more consistent and reliable decision-making by experienced employees and first-line managers will help prevent resurgent backlogs at OSC. At the same time, OSC has kept at the forefront the paramount goal of maintaining and increasing positive enforcement and results.

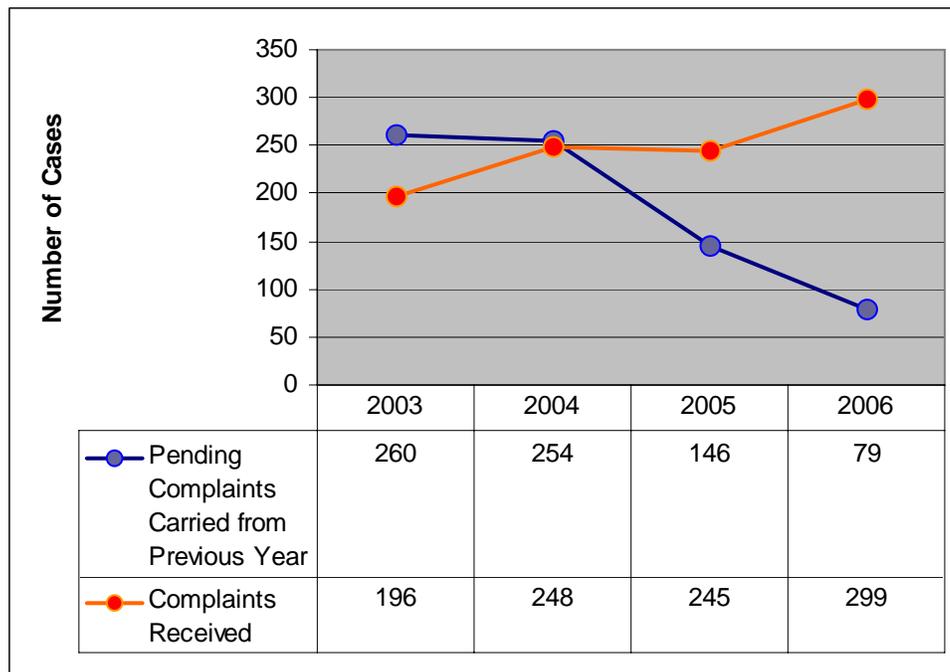
The next seven pages graphically tell the story of the successes of the last three years at OSC, especially the decreased case processing times and the elimination of the backlogs, including those backlogs mentioned by GAO in 2004. These successes were achieved despite increasing caseloads in several units and newly added responsibilities for the agency.

Hatch Act Unit - Average Processing Time per Complaint



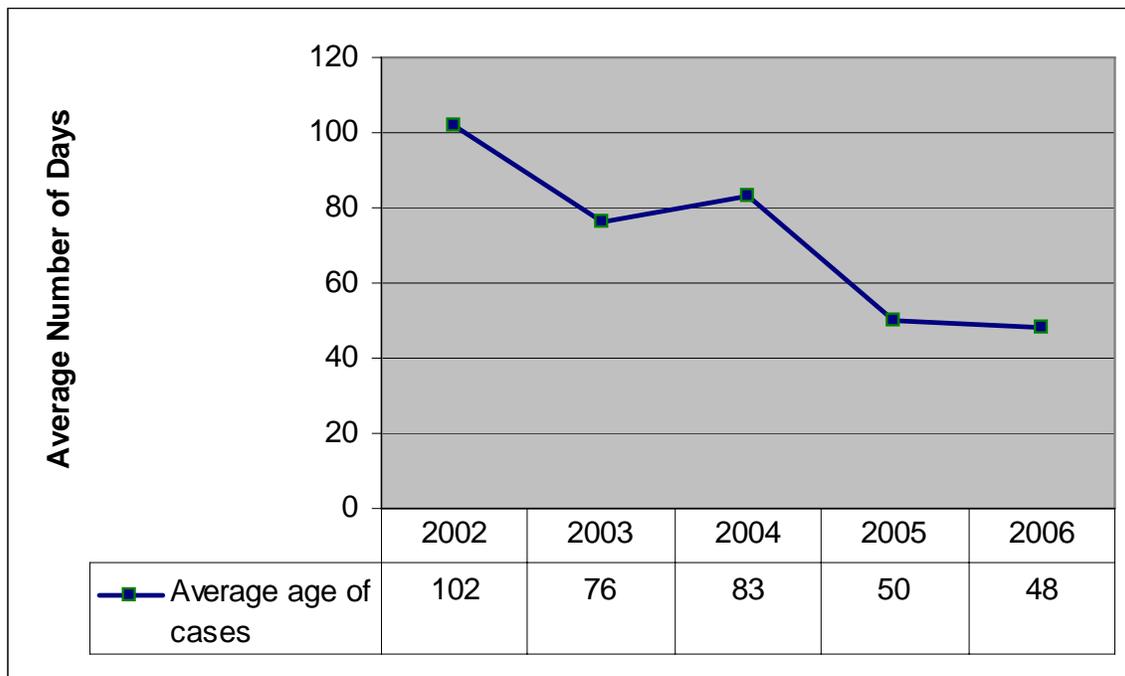
OSC's Hatch Act Unit reduced its case processing time dramatically during the period from FY 2003 to FY 2006. The average number of days to process the case in FY 2006 is one third of what it was in FY 2003.

Hatch Act Complaints



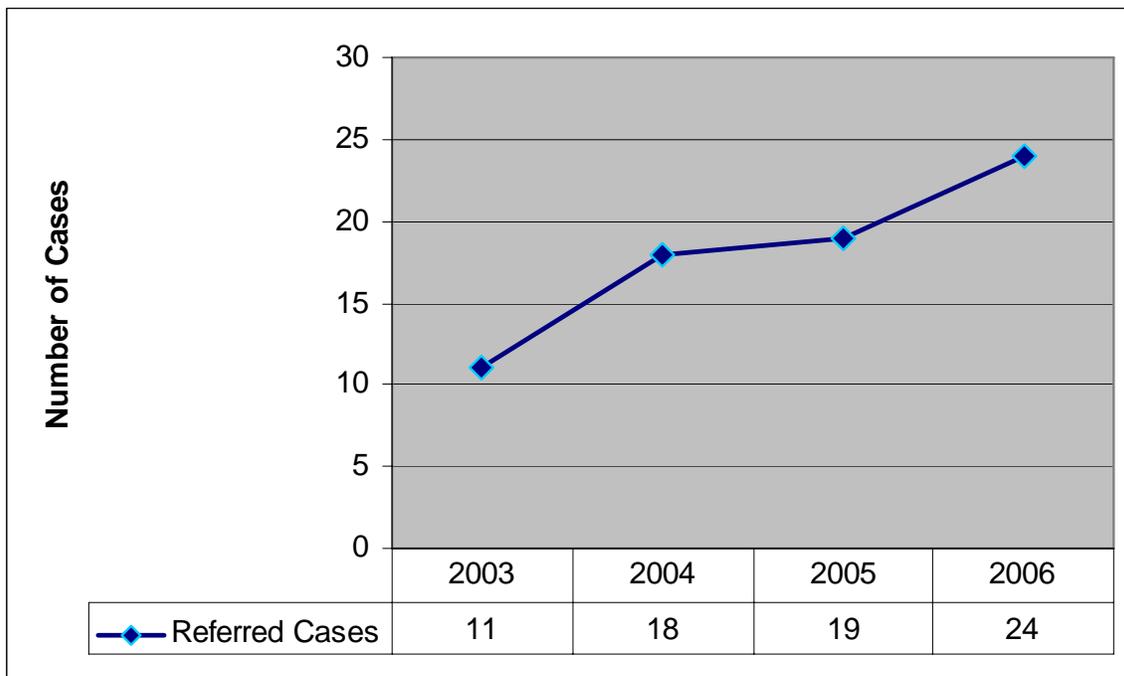
Starting in FY 2005, as OSC reduced its processing time for Hatch Act complaints, the number of pending complaints carried forward from the previous fiscal year sharply declined. From FY 2003 to FY 2006, the overall decline was 70%. During the same period, the number of complaints received increased by 53%. In just three years, the Hatch Act Unit has become much more efficient.

Complaints Examining Unit - Average Processing of PPP Cases in the Unit



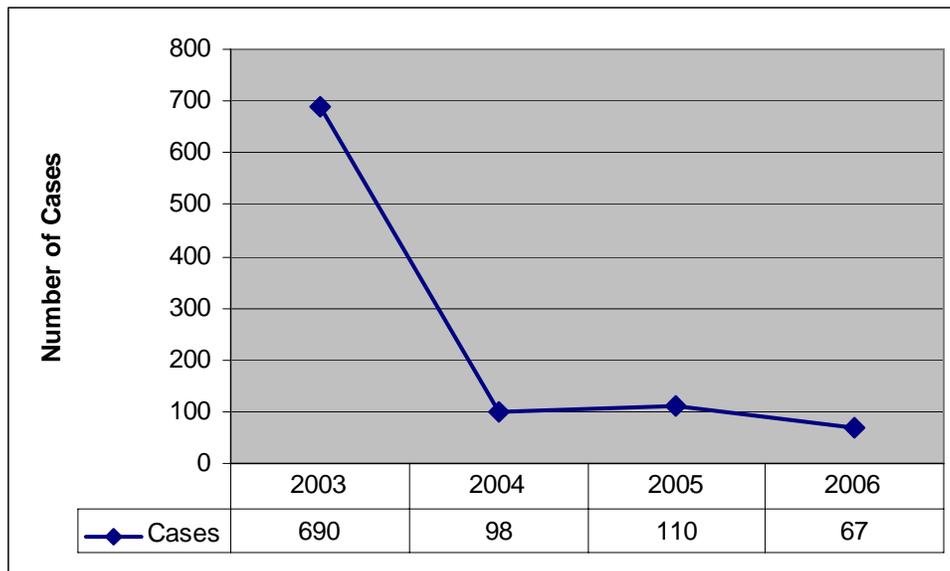
This chart shows the average number of days that a Prohibited Personnel Practice case remained in OSC's Complaints Examining Unit, before the case was either closed or referred to OSC's Investigation and Prosecution Division for further investigation.

Disclosure Referrals to Agency Heads



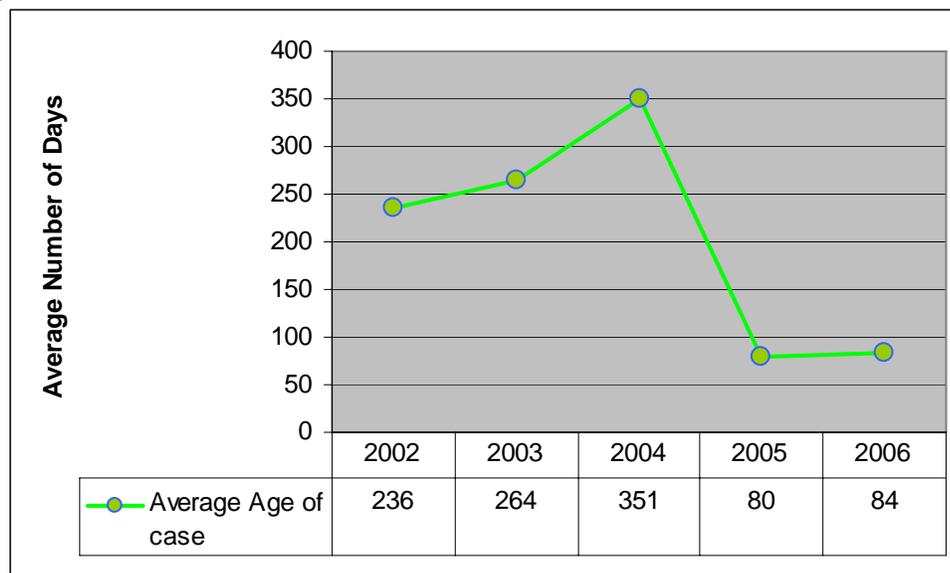
When the Special Counsel analyzes a whistleblower disclosure and determines there is substantial likelihood of wrongdoing, he refers the matter to the head of the appropriate agency, who is then required to internally investigate the matter and report the results to OSC, the Congress, and the President.

Disclosure Unit Cases Pending at End of Year



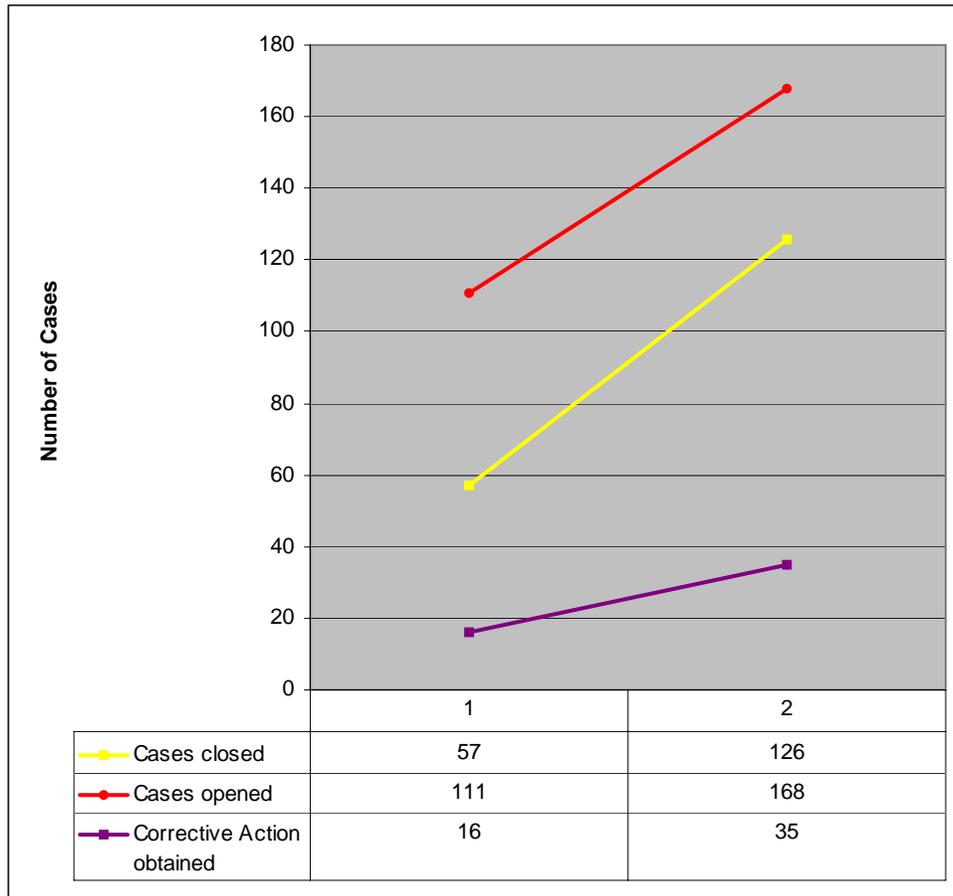
In FY 2003, the Disclosure Unit had a backlog of whistleblower disclosures. OSC reduced the backlog by FY 2004, and has prevented a backlog resurgence in FY 2005 and FY 2006.

Disclosure Unit - Average Processing Time per Disclosure



This chart shows the improvement in processing time in OSC's Disclosure Unit. The average processing time for disclosures in FY 2006 was 84 days. This was a 76% reduction from the high of FY 2004 (an average of 351 days).

USERRA Demonstration Project



The USERRA Demonstration Project began in February of FY 2005, and showed steady growth during FY 2006 in caseload, number of cases processed, and corrective actions obtained.

Executive Summary

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Its primary mission is to safeguard the merit system in federal employment by protecting employees and applicants from prohibited personnel practices (PPPs), especially reprisal for whistleblowing. In addition, the agency operates as a secure channel for federal whistleblower disclosures of violations of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; and substantial and specific danger to public health and safety. OSC also has jurisdiction under the Hatch Act to enforce restrictions on political activity by government employees. Finally, OSC enforces federal employment rights secured by the Uniformed Services Employment and Reemployment Rights Act (USERRA).

In last year's budget request, OSC reported how the chronic problem of backlogged Prohibited Personnel Practice (PPP) cases, Hatch Act cases and Disclosure Unit cases had been reduced through focused and sustained effort by the entire agency over an 18-month period. The good news to report in this year's request is that the agency, through hard work and diligence, has been successful in avoiding a recurrence of any of the three types of backlog. The streamlined processes and logical organizational structure put into place with the agency reorganization during FY 2005 contributed to the agency's ability to avoid resurgent backlogs. The goal of providing timely justice to all federal complainants is the ongoing objective of OSC, along with the active achievement of benchmarks of more corrective actions and finding opportunities for greater litigation to generate public awareness of significant cases.

When Special Counsel Bloch arrived in January, 2004, USERRA cases were a low priority at OSC. The Special Counsel drastically changed the situation by creating a USERRA Unit at OSC, and staffing it with attorneys and investigators dedicated full-time to USERRA enforcement. This unit now handles all of the cases referred from the Department of Labor for litigation, as well as all of the cases that come to OSC as part of the Demonstration Project created by the Veterans Benefits Improvement Act of 2004 (VBIA).

OSC continues to experience a high caseload level. There are a number of factors which contribute to this level of complaint filings with OSC:

- A string of Hatch Act cases involving high-profile employees over the last three years has resulted in significant national press coverage. There is now a heightened awareness of the Hatch Act among Federal employees. The number of Hatch Act complaints received in FY 2006 exceeded the number in FY 2005 by 22%. In fact, the FY 2006 number exceeded the numbers received previously in any year. Hatch Act complaints in FY 2008 are projected to be the highest number yet, due to the upcoming presidential election.
- Due to OSC's more vigorous focus on USERRA complaints from members of our armed forces, increased numbers of such complaints are being filed with OSC.

- Congress passed the VBIA in order to decrease the processing time for USERRA complainants from members of our armed forces. Under the pilot program created by Congress, which began in February, 2005, OSC began processing half of the USERRA cases that would typically be processed by the Department of Labor. OSC has slashed processing times to approximately one third of previous average times. OSC is confident that this pilot program will provide speedier justice to the members of our military who are being denied rights under USERRA.
- In recent years, OSC has had a large number of high-profile whistleblower cases, leading to increased national press coverage of OSC. FY 2006 continued this trend.
- OSC continues to investigate whistleblower retaliation complaints from Transportation Security Agency (TSA) security screeners under OSC's Memorandum of Understanding (MOU) with TSA. This MOU remains viable despite the Merit System Protection Board's decision that the Board does not have jurisdiction to adjudicate these matters.
- During FY 2006, OSC continued to certify more agencies through its outreach program. As agencies implement the certification process, agency employees who might previously have been unaware of their rights and remedies through OSC are becoming informed.
- In addition to OSC's certification program, OSC continues to provide outreach programs to agencies requesting them, or as part of OSC settlements in particular matters.

OSC stands in a vastly improved position entering FY 2007 – with virtually no case backlogs and processing times that are significantly less than before 2004 (decreased as much as 75%, depending upon which unit of OSC is involved). Even the high number of PPP cases in the Investigation and Prosecution Division (internal referrals) has been handled. The agency has been successful in hiring, and is now operating at a staff level (109 FTE) as close to its approved levels (113 FTE) as possible, given the funding of the agency for FY 2007 and the impact of the pay raises of FY 2006, FY 2007 and the projected pay raise of FY 2008. For OSC to continue operating at approximately 110 FTE, a slight funding increase over FY 2007 levels is necessary for FY 2008.

OSC'S SUCCESSES IN FY 2006

1. The Special Counsel's willingness to prosecute federal agencies for violations of the law again achieved strong results. Prior Special Counsels had never filed any USERRA enforcement actions with the U.S. Merit Systems Protection Board (since USERRA was passed in 1994). In FY 2005, OSC set a precedent by filing three USERRA cases in one year, receiving full corrective action in all three cases. In FY 2006, OSC filed and successfully prosecuted one USERRA appeal and obtained full corrective action on behalf of the claimant - who had been informed by the U.S. Department of Labor that his case had no merit. This willingness to prosecute USERRA violations also causes more corrective action settlements prior

to litigation. OSC achieved a record 38 USERRA corrective actions during FY 2006.

2. During FY 2006, the Special Counsel again focused on raising the profile of the Uniform Services Employment and Re-employment Rights Act (USERRA), so that returning reservists and veterans are aware of their rights and of the existence of OSC. In early 2005, OSC's role in enforcing USERRA again expanded. Pursuant to a demonstration project established by the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, signed by President Bush on December 10, 2004, OSC, rather than the Department of Labor's Veterans Employment and Training Service (DOL VETS), has the authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. Under the project, OSC also receives and investigates all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person's social security number. During FY 2006, the second year of the demonstration project, OSC received 168 cases including approximately 60 cases that come directly to OSC from veterans. OSC's corrective action rate was an unheard of 28% on these cases. This pilot project has already shortened the processing times for members of our armed forces who are discriminated against in employment.

3. OSC's Outreach Program efforts have succeeded in educating federal agency managers and employees concerning their responsibilities and rights. OSC also assisted federal agencies to fulfill their statutory obligation to consult with OSC concerning informing federal employees of their rights under the laws that OSC enforces.¹ OSC formally launched its government-wide 2302(c) Certification Program in October 2002. Since that time, 51 agencies (including Cabinet-level agencies such as the Departments of Labor, Energy, State, Transportation, Education, Health and Human Services and Veterans Affairs) have registered for the program.

4. OSC continues to enhance its resources for conducting mediations. Instead of having one full time mediator, seven people from different parts of the agency have received training in conducting mediations. OSC now has a cadre of professionals with varied skills and legal expertise in multiple areas from which to draw.

5. Army Reservist James Harris, a letter carrier from Alabama, suffered serious back and neck injuries in a truck accident in Iraq. The injuries prevented him from returning to his letter carrier position, and he found himself out of work, even though the USERRA laws required his agency to find him a different position. OSC investigated, and within three months of picking up the case, Harris was re-employed by the post office as a permanent window clerk. The September 5, 2006 edition of Federal Times summarized, "Harris' case illustrates a vast improvement over how many such cases are resolved. Traditionally, complaints of wrongful job loss or demotions under the Uniformed Services Employment and Re-employment Rights Act (USERRA) are handled by the Labor Department and can take years to resolve."

6. Army Reservist Steven Walker suffered a severe back injury in Kuwait in June 2003. The injury prevented him from returning to his civilian federal job as a policeman for the Navy. He inquired about placement in a less physically demanding job at his base in Kings Bay, Georgia. But after a few

weeks on a temporary light duty detail, he was let go. Because his agency was in the process of downsizing, management didn't believe they were obligated to find him a job. But the USERRA law requires agencies to involve the U.S. Office of Personnel Management to assist in locating a position for a reservist if the agency cannot. Walker filed a complaint with DOL VETS, but the Labor staff didn't realize the firing was illegal. Walker complained to the Naval Chief of Legislative Affairs, with no results. Then Walker went to OSC. In August 2006 — two years after his initial complaint — he won his case. OSC had persuaded the Navy to modify its practices, follow the USERRA law for Mr. Walker, and to retrain the human resources employees and management employees at the naval base.

7. The agency hired two extraordinarily qualified employees through the Federal Career Intern program and one highly qualified employee through the Veterans Recruitment Appointment (VRA) program.

8. During FY 2006, OSC's Strategic Plan was rewritten and the agency's Performance Goals were thoroughly redesigned. They are now measurable, finite, and tied directly to the four statutory missions of the agency. They deal with timeliness, quality, and outreach (where applicable) for each enforcement mission. The Senate Appropriations Committee expressed their satisfaction with the changes in the budget hearing in March of 2006.

9. In November, OSC won removal of an agency attorney in California who used his office to effect fund-raising and organizing activities for his political party through his office computer during office hours. The Merit Systems Protection Board upheld this decision in August, 2006.

10. In March, Special Counsel Scott Bloch presented Chairman Neil McPhie with a certificate showing that MSPB has taken the required steps to ensure its employees are informed about their rights under OSC's 2302(c) Certification Program. Increased outreach to inform federal workers of their rights has been cited as a major factor in ensuring that workers are aware of their rights and feel secure in exercising them.

11. In March, OSC won admission of guilt on Hatch Act violations from the former Mayor of Atlantic City, Lorenzo Langford. Langford is temporarily barred from government service. His position as mayor included administration of federal grants, rendering him covered by the Act. Langford had committed multiple violations, including ordering his subordinates to engage in political activities and abusing his office.

12. In April, Special Counsel Scott Bloch sat on a panel at the National Press Club with the MSPB Chairman, moderated by Bill Bransford of the Senior Executives Association. They discussed misconceptions among federal employees and managers that hamper the proper application of employee rights under the law. They also discussed potential changes to the law that would aid employees.

13. In June, OSC achieved corrective action (reinstatement, promotion, back pay) for serviceman Russell Jones from the Army Corps of Engineers. Jones had been told that his case was worthless by the Department of Labor, but OSC was able to obtain full corrective action on his behalf.

14. In June, the Special Counsel presented 2302(c) certification to the General Counsel for the Department of Homeland Security, Phil Perry. OSC is certifying that DHS has taken the required steps to ensure its employees are informed about their rights under the law.

15. In July, the Special Counsel testified before the House Government Reform Committee's subcommittee on the federal workforce. The hearing was regarding a bill to create a commission, on which the Special Counsel would sit, that would study ways to improve the federal employee appeals process. The Special Counsel offered OSC's own efforts at backlog resolution, including vigorous management and a well-regulated screening unit. He expressed an eager willingness to cooperate with the other agencies and the committee to find ways to improve the process.

16. In August, the Special Counsel spoke before nearly 1,000 people from management and rank and file federal workers at the annual Federal Dispute Resolution (FDR) Conference held in San Antonio, TX concerning the "ordinary heroes" of the workforce as well as OSC's achievements in championing their cause.

17. In September, the Public Servant of the Year award was presented to Leroy Smith. As in past years, this award was presented to a public servant who performed an outstanding service to the public through OSC. Smith blew the whistle on unsafe and potentially deadly activities at the Bureau of Prisons, where not only inmates but also staff were at risk due to dangerous chemical recycling operations. Currently, the Justice Department is investigating OSC's allegations that BOP and Federal Prison Industries have failed to take corrective action.

In spite of these successes, OSC faces serious challenges. For fiscal reasons OSC has not hired up to its approved level of 113 FTE during FY 2006. Several positions have been filled with part time employees, in order to further reduce salary and benefit expenditures.

Although the elimination of backlogged cases has helped OSC achieve its strategic goals of protecting federal employees from PPPs, protecting the merit system, and guarding the public interest through its Disclosure Unit, there are other important ways in which the agency must gauge its success. OSC made progress on improving the timeliness to review PPP cases (88% processed in less than 240 days so far in FY 2006, a 22% improvement). OSC's percentage of whistleblower disclosures handled in less than 15 days dropped slightly to 42% in FY 2006 (down from 50% in FY 2005). A major focus of OSC during the next two years will be the measurable realization of more progress in this area.

Highlights of the FY 2008 budget request include:

- OSC requests \$16,368,000 for FY 2008, an increase of \$368,000 over the FY 2007 appropriation. This amount is necessary due to the increased costs for salaries, benefits, and rent. 92% of OSC's budget goes toward salary, benefits, and office space rent. Therefore, the pay raise of FY 2007 and the planned pay raise in FY 2008 have a dramatic impact on the amount of funding OSC needs to pay its mostly professional staff. OSC is not requesting new FTE in FY 2008. Rather, OSC is requesting enough funding to continue paying salaries and benefits to the 110 FTE the agency will have in FY 2007, which is the minimum number of employees needed for OSC to accomplish its statutory missions.
- **The Future of USERRA.** The three-year Demonstration Project created by the Veterans Benefits Improvement Act of 2004 will terminate at the end of FY 2007. Congress will likely make a decision regarding which agency (OSC or DOL VETS) will handle Federal Sector USERRA cases. Section IV of this budget justification discusses the future of USERRA at OSC.
- This budget justification contains for the first time the completely revised Performance Goals of the agency. The old performance goals were cumbersome and very few were actually concretely measurable. The new ones are measurable, and directly tie to the four statutory missions of the agency. The new goals deal with timeliness in terms of investigating and processing cases, quality in investigations and prosecutions, and outreach (for those units that have statutory outreach responsibilities). The new performance goals can be found in Appendix B.
- This budget justification contains for the first time the rewritten Strategic Plan (FY 2006 – FY 2010), which lines up with the agency's new performance goals. The plan can be found in the Appendix A.
- In this request, OSC also describes its performance and plans under the President's Management Agenda for: (1) Strategic Management of Human Capital; (2) Competitive Sourcing; (3) Improved Financial Performance; (4) Expanded Electronic Government; and (5) Budget and Performance Integration. This request describes OSC's achievements in each of these areas, as well as planned future efforts.

1. The Office of Special Counsel

A. Statutory Background

OSC was first established on January 1, 1979. From then until 1989, it operated as an autonomous investigative and prosecutorial arm of the Merit Systems Protection Board (“the Board”). By law, OSC received and investigated complaints from current and former federal employees, and applicants for federal employment, alleging prohibited personnel practices by federal agencies; provided advice on restrictions imposed by the Hatch Act on political activity by covered federal, state, and local government employees; and received disclosures from federal whistleblowers (current and former employees, and applicants for employment) about wrongdoing in government agencies. The office also enforced restrictions against prohibited personnel practices and political activity by filing, where appropriate, petitions for corrective and/ or disciplinary action with the Board.

In 1989, Congress enacted the Whistleblower Protection Act. The law made OSC an independent agency within the Executive Branch, with continued responsibility for the functions described above. It also enhanced protections against reprisal for employees who disclose wrongdoing in the federal government, and strengthened OSC’s ability to enforce those protections.¹

The Congress passed legislation in 1993 that significantly amended Hatch Act provisions applicable to federal and District of Columbia (D.C.) government employees, and enforced by OSC.² Provisions of the act enforced by OSC with respect to certain state and local government employees were unaffected by the 1993 amendments.

In 1994, the Uniformed Services Employment and Reemployment Rights Act became law. It defined employment-related rights of persons in connection with military service, prohibited discrimination against them because of that service, and gave OSC new authority to pursue remedies for violations by federal agencies.³

OSC’s 1994 reauthorization act expanded protections for federal employees, and defined new responsibilities for OSC and other federal agencies. It provided that within 240 days after receiving a prohibited personnel practice complaint, OSC should determine whether there are reasonable grounds to believe that such a violation occurred, exists, or is to be taken. The act extended the protections of certain legal provisions enforced by OSC to approximately 60,000 employees of what was then known as the Veterans Administration (now the Department of Veterans Affairs), and to employees of certain government corporations. It also broadened the scope of personnel actions covered under these provisions. Finally, the act made federal agencies responsible for informing their employees of available rights and remedies under the Whistleblower Protection Act, and directed agencies to consult with OSC in that process.⁴

In November of 2001, Congress enacted the Aviation and Transportation Security Act,⁵ which created the Transportation Security Administration (TSA). Under the act, non-security screener employees of TSA could file allegations of reprisal for whistleblowing with OSC and the MSPB. The approximately 45,000 security screeners in TSA, however, could not pursue such complaints at OSC or the MSPB.

OSC efforts led to the signing of a memorandum of understanding (MOU) with TSA in May 2002, under which OSC would review whistleblower retaliation complaints from security screeners, and recommend corrective or disciplinary action to TSA when warranted. The MOU did not (and could not), however, provide for OSC enforcement action before the MSPB, or for individual right of action (IRA) appeals by security screeners to the MSPB.

B. OSC's Mission

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

- investigating complaints of prohibited personnel practices, especially reprisal for whistleblowing, and pursuing remedies for violations;
- providing advisory opinions on, and enforcing Hatch Act restrictions on political activity;
- operating an independent and secure channel for disclosures of wrongdoing in federal agencies;
- protecting reemployment and antidiscrimination rights of veterans under the USERRA; &
- promoting greater understanding of the rights and responsibilities of federal employees under the laws enforced by OSC.

C. OSC's Internal Organization and Functions

OSC maintains its headquarters office in Washington, D.C. Four field offices are located in Dallas, Oakland, Detroit, and Washington, D.C.

Agency components during FY 2006 include the Immediate Office of the Special Counsel (IOSC), five operating units/divisions and five supporting offices explained in detail below. (See Organizational Chart on p. 21.)

Immediate Office of the Special Counsel. The Special Counsel and staff in IOSC are responsible for policymaking and overall management of OSC. They also manage the agency's congressional liaison and public affairs activities, and its outreach program, which includes promotion of compliance by other federal agencies with the employee information requirement at 5 U.S.C. § 2302(c).

Complaints Examining Unit. This is the intake point for all complaints alleging prohibited personnel practices and other violations of civil service law, rule, or regulation within OSC's jurisdiction.⁶ This Unit is responsible for screening up to 1,700 prohibited personnel practice cases per year. Attorneys and personnel management specialists conduct an initial review of complaints to determine if they are within OSC's jurisdiction, and if so, whether further investigation is warranted. The unit refers all matters stating a potentially valid claim to the Investigation and Prosecution Division for further investigation.⁷

Disclosure Unit. This unit is responsible for receiving and reviewing disclosures received from federal whistleblowers. It advises the Special Counsel on the appropriate disposition of the information disclosed (including possible referral to the head of the agency involved for an investigation and report to OSC; referral to an agency Inspector General; or closure). The unit also reviews agency reports of investigation, to determine whether they appear to be reasonable and in compliance with statutory requirements before the Special Counsel sends them to the President and appropriate congressional oversight committees.

Investigation and Prosecution Division. The Investigation and Prosecution Division (IPD) is comprised of four field offices. The IPD conducts field investigations of matters referred after preliminary inquiry by the Complaints Examining Unit. Division attorneys conduct a legal analysis after investigations are completed to determine whether the evidence is sufficient to establish that a prohibited personnel practice (or other violation within OSC's jurisdiction) has occurred. Investigators work with attorneys in evaluating whether a matter warrants corrective action, disciplinary action, or both.

If meritorious cases cannot be resolved through negotiation with the agency involved, division attorneys represent the Special Counsel in litigation before the Merit Systems Protection Board. They also represent the Special Counsel when OSC intervenes, or otherwise participates, in other proceedings before the Board. Finally, division investigators and attorneys also investigate alleged violations of the Hatch Act and the Uniformed Services Employment and Reemployment Rights Act. However, under a new pilot program, most USERRA functions will be housed in a new USERRA unit in the Special Projects Unit to assure uniformity of policy regarding the new pilot.

Hatch Act Unit. The unit issues advisory opinions to individuals seeking information about Hatch Act restrictions on political activity by federal, and certain state and local, government employees. The unit is also responsible for enforcing the act. It reviews complaints alleging a Hatch Act violation and, when warranted, investigates and prosecutes the matter (or refers the matter to the Investigation and Prosecution Division for further action). It will also oversee Hatch Act matters delegated out to the IPD.

USERRA Unit. Special Counsel Scott Bloch has made OSC's enforcement of USERRA a top priority. Thus, given the new, additional investigative responsibilities Congress assigned to OSC with the passing of the demonstration project, Mr. Bloch established OSC's USERRA Unit. The USERRA Unit is centrally located at OSC's headquarters in Washington, D.C. It is the specialized unit designated to receive, investigate, analyze, and resolve (via voluntary agreement or prosecution before the U.S. Merit Systems Protection Board) all USERRA and related veteran-employment claims. As part of OSC's outreach program, the USERRA Unit also educates federal agencies on their USERRA obligations.

SUPPORTING UNITS:

Alternative Dispute Resolution Program. In selected cases referred by the Complaints Examining Unit for further investigation, the agency contacts the complainant and the agency involved, and invites them to participate in OSC's voluntary Mediation Program. If mediation resolves the complaint, the parties execute a written and binding settlement agreement; if not, the complaint is referred for further investigation. The mediation program for Alternative Dispute Resolution has been reorganized. Rather than have a single ADR specialist under the leadership of an SES employee, the agency has expanded the program through cross-training multiple individuals from each of OSC's operating units. As a result the agency now has a broad pool of trained mediators with different legal areas of expertise.

Legal Counsel and Policy Division. This division provides general counsel and policy services to OSC, including legal advice and support on management and administrative matters; legal defense of OSC in litigation filed against the agency; policy planning and development; and management of the agency ethics program.

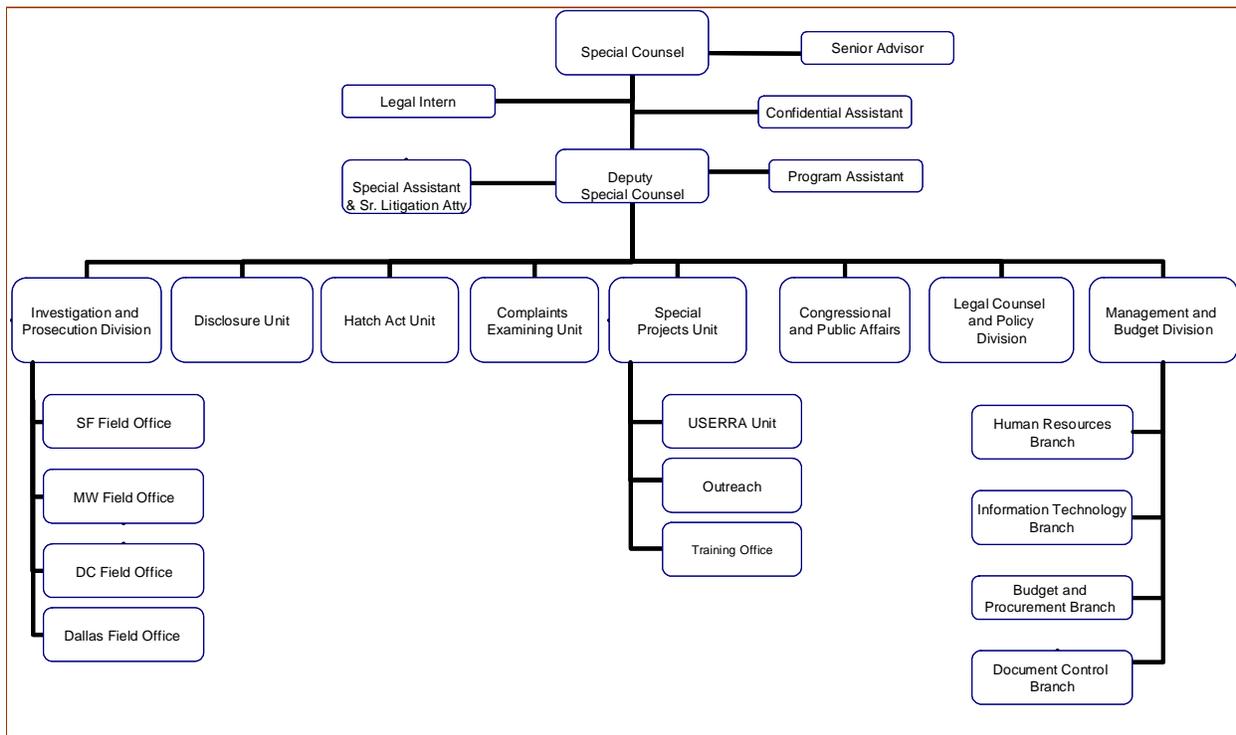
Management and Budget Division. This division provides administrative and management support services to OSC, in furtherance of program, human capital, and budget decisions. Division also includes the Information Technology Branch, Human Resources Branch, Document Control Branch, Customer Service Unit, and the Budget and Procurement Branch. The purpose of this division is to put the administrative support functions under one authority.

Training Office. A training office has been created to train all new employees, cross train existing employees, and develop specialized training in areas such as litigation skills. Specifically, the Training Office will cross train attorneys and investigators to enable them to traverse organizational boundaries within the agency. They will develop sufficient expertise in several areas of the law, giving management the ability to detail employees to address any potential backlogs that could form in the various units.

Special Projects Unit. This unit uses senior trial lawyers to work cases of high priority and has also been used by the Special Counsel to conduct internal research on the processes and procedures of the operational units at OSC. In addition, this unit handles the new special project assigned by P.L. 108-454 that requires OSC to investigate the re-employment rights of military service members under USERRA, which involves new functions, increased caseload, and new personnel.

D. Organization Chart

U.S. Office of Special Counsel – Organization Chart



II. SUMMARY OF FY 2006 PROGRAM CASELOAD AND ACTIVITY

A. Prohibited Personnel Practices

Unlike many other investigative entities or agencies, OSC must, as a general rule, conduct an inquiry after receipt of complaints alleging the commission of a prohibited personnel practice.⁸ Compare, for example, 5 U.S.C. § 1214(a)(1)(A) (“The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.”) with 5 U.S.C. app. 3, § 6(a) (“[E]ach Inspector General ... is authorized— ... (2) to make such investigations and reports relating to the administration of the programs and operations of the [agency] as are, in the judgment of the Inspector General, necessary or desirable[.]”) and § 7(a) (“The Inspector General may receive and investigate complaints or information from an employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.”). The nature of the inquiry ranges from the CEU screening process to the IPD field investigations, but one must be conducted after a complaint is filed. Complaints received by OSC can and often do involve multiple allegations, some of which can involve different prohibited personnel practices. In all such matters, an OSC inquiry requires the review of, and a legal determination about, each allegation and prohibited personnel practice.

After a complaint is received by OSC, CEU attorneys and personnel management specialists conduct an initial review to determine whether it is within OSC’s jurisdiction, and whether further investigation is warranted. CEU refers all matters stating a potentially valid claim to the IPD for further investigation. All such matters are reviewed first by the ADR Unit.⁹

In selected cases that have been referred for further investigation, a trained OSC ADR specialist contacts the complainant and the employing agency to invite them to participate in the agency’s voluntary ADR Program. If both parties agree, OSC conducts a mediation session, led by OSC trained mediators who have experience in federal personnel law. When mediation resolves the complaint, the parties execute a binding written settlement agreement. If mediation does not resolve the complaint, it is referred for further investigation, as it would have been had the parties not attempted mediation.

The IPD conducts investigations to review pertinent records and to interview complainants and witnesses with knowledge of the matters alleged. Matters undergo legal review and analysis to determine whether the matter warrants corrective action, disciplinary action, or both.

If OSC believes a prohibited personnel practice has been committed and initiates discussions with an agency, the matter is often resolved through negotiation. Before OSC may

initiate an enforcement proceeding seeking corrective action (relief intended to make an aggrieved employee whole) at the MSPB, the Special Counsel must make a formal request to the agency involved, reporting on its findings and recommendations. 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 MSPB for corrective action.¹⁰ When an agency refuses to grant appropriate corrective action, OSC generally proceeds immediately to file a complaint with the MSPB.

If OSC determines that disciplinary action (the imposition of discipline on an employee who has committed a violation) is warranted, it can file a complaint directly with the MSPB.¹⁰ 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.

In addition to rectifying the matter at issue, OSC litigation before the MSPB – whether by enforcement actions seeking to obtain corrective and/or disciplinary action, or by intervention or other participation in matters filed by others – often has the additional benefit of clarifying and expanding existing law. It also brings greater public attention to OSC’s mission and work, a factor likely to increase the deterrent effect of its efforts. OSC’s Complaints Examining Unit (CEU), as discussed above, is the intake unit for all prohibited personnel practice complaints.

For FY 2006 OSC received 2,718 new matters, including PPP, Hatch Act, and Disclosure matters (**See Table 3**). The great majority of OSC’s staff resources were devoted to the processing of PPP complaints. Of the total 2,718 new matters OSC received during FY 2006, 1,805 or 66% were new PPP complaints. (**See Table 4**).

Protecting the Federal Workforce from Reprisal for Whistleblowing

Rescinded termination. A GS-12 Facility and Strategic Planner at a federal agency alleged that his termination was proposed because he disclosed to his agency’s Office of Inspector General irregularities in the operations of that area’s local Combined Federal Campaign. Investigation revealed that the disclosures were a factor in the decision to propose his termination. As a result of OSC’s investigation, the VA rescinded the proposed termination.

Rescinded suspension. OSC secured corrective action in a case in which a federal employee alleged that he was suspended for five days because of his whistleblowing. The employee disclosed that senior officials had violated housing assistance regulations. As a result of OSC’s investigation, the agency agreed to rescind the suspension, remove all negative documentation from the employee’s Official Personnel File, and pay the employee’s salary for the five days he was suspended.

Rescinded appraisals and reprimand. OSC secured corrective action in a case in which a former Electronics Engineer at a federal agency alleged that she received two successive marginal annual performance ratings and a reprimand because of her whistleblowing. Her whistleblowing included reports that her first and second-level supervisors had failed to remedy a hostile workplace in her predominantly male work environment. She also reported that her supervisors had supported her

principal harasser. Our investigation verified many of the employee's factual allegations and concluded that she had been retaliated against for her whistleblowing. As a result, the agency ultimately agreed to rescind the employee's performance appraisals, substitute ratings consistent with those received in the past, rescind her reprimand, provide a clean employment record, and forbid her former supervisors from participating in any future employment references.

Employee reinstated with back pay. A Mental Health Specialist assigned to an agency in New Mexico, alleged that he was charged absent without leave (AWOL) and subsequently terminated during his probationary period because of complaints he made to the union about his supervisor. Prior to the OSC investigation, the agency realized that he was not a probationary employee at the time of his termination and had not been given statutory appeal rights. As a result, the agency unilaterally reinstated the Mental Health Specialist and provided him with full back-pay. The agency, at OSC's request, also agreed to remove the AWOL and charge the time to his regular pay and to remove all references to the AWOL and his termination from his Official Personnel Folder.

Corrective action for blacklisted employee. A former border patrol agent alleged that he was not selected for over 200 agent positions nationwide because of his whistleblowing. His disclosures included reports of a widespread pattern and practice of travel fraud by border patrol agents who were serving details along the U.S.–Mexican border. Under this fraudulent scheme, agents received rental kickbacks from hotels and private landlords during their details. Because of the employee's disclosures, the government was able to discipline and prosecute many of these agents. Our investigation found a clear pattern of circumstantial evidence indicating that the employee's supervisor informally blacklisted him in retaliation for his whistleblowing so he could not find another position. OSC settled this matter in a confidential settlement agreement, whereby the agency agreed to provide the employee with appropriate corrective action.

Three retroactive promotions, plus back pay and attorney's fees. OSC secured corrective action in a case in which an appraiser at a federal agency alleged that his agency failed to promote him, significantly changed his working conditions, and took other personnel actions against him because he blew the whistle on the agency's improper appraisal practices. He asserted that these improper practices grossly inflated property values to the detriment of federal taxpayers. The appraiser's whistleblowing led to Office of Inspector General and Government Accounting Office investigations, as well as an Appraisal Foundation review, all of which confirmed his allegations. As a result of our investigation, the agency agreed to give the appraiser three retroactive promotions, to pay \$7,000 in performance awards, to restore 10 days of leave, to pay \$2,000 for career training, to pay attorneys' fees up to \$17,500, and to purge the appraiser's personnel records of all negative references related to his whistleblower status.

Protecting the Federal Workforce from Reprisal for Protected Activity

Reassignment for employee. Resignation of director. OSC secured corrective action in a case in which a secretary at a federal agency alleged that she was detailed for over two years to a lower-graded position because she failed to obey an illegal order. Specifically, she told her director that she would no longer perform secretarial duties connected to his nongovernmental work. Our investigation confirmed that the director had misused his office for personal work and had retaliated against the secretary after she

refused to assist him. In response to a formal corrective action letter from OSC, the agency agreed to reassign the secretary to a new position, pay her reasonable attorney fees, and give her a clean employment record. The director resigned from federal service after OSC gave the results of its investigation to the agency.

Protecting the Merit System through Enforcement of the Other PPPs (non-reprisal)

Due process violation. OSC secured corrective action in a case in which a Port Director alleged he was reassigned to another position without being notified that the position was lower graded. Our investigation found circumstantial evidence indicating that the employee was effectively demoted without being given his Chapter 75 due process rights. As a result of OSC's investigation, the agency paid the employee approximately \$83,000 (equivalent to the amount of pay he lost after the downgrade).

Denial of veterans' preference. OSC secured corrective action in a case in which a disabled veteran alleged that he was improperly denied consideration for an entry-level budget analyst position by a federal agency. Our investigation verified the veteran's allegations. We found that instead of granting the veteran the 10-point preference he was entitled to, the agency selected a non-veteran through the Outstanding Scholar Program. As the Merit Systems Protection Board found in Dean v. Department of Agriculture, using this program to circumvent veterans' preference is illegal. In response to a formal corrective action letter from OSC sent to the Secretary of the agency, the veteran was offered a job, which he accepted.

Recruitment and leave/pay violation. A federal agency installation police officer alleged that following his retirement from a non-appropriated fund position, the agency failed to properly compute his leave and pay in violation of the Portability of Benefits for Non-Appropriated Fund Employee Act of 1990. Investigation substantiated the police officer's claim. At OSC's request, the agency changed his hiring date from the day before he retired to the day after he retired. The agency also retroactively corrected the police officer's time cards, gave him the opportunity to use accrued leave, and agreed to pay him for the leave if he was forced into a use or lose situation.

Obstruction of right to compete. OSC secured disciplinary action in a case in which a district manager with a federal agency told contract representatives that he was only going to be considering external applicants for an upcoming vacancy (the position had not yet been announced). The agency, at OSC's request, suspended the district manager for one day for attempting to influence these contract representatives from competing.

Unauthorized employment preference. OSC secured corrective action in a case in which a Special Agent at a federal agency alleged that an unqualified employee was promoted. As a result of OSC's investigation, the agency re-announced the position to allow qualified individuals to compete.

Influenced to withdraw from competition. A House Keeping Aid with an agency alleged that management officials had attempted to influence him to withdraw from competition for a position so as to improve or injure the employment prospects of another person in violation of 5 U.S.C. § 2302(b)(5). OSC found that management officials at the agency did attempt to influence the complainant to

withdraw from competition for a position, based on their belief that they were looking out for his best interests in attempting to dissuade him from giving up a career appointment for a temporary position. The agency was informed of our findings and agreed to informal disciplinary action. The agency issued memoranda to supervisors at the facility where the complainant is employed, specifically including the managers who attempted to influence him to withdraw from competition for a position. The memoranda reviewed prohibited personnel practices and merit system principles.

Recruitment and unauthorized preference. On May 11, 2006, the OSC entered into a settlement agreement with DHS in which the agency admitted that the border patrol agent had performed IT duties outside of his official position description and that he should not have been recruited and retained in a supervisory border patrol agent capacity from the time he was promoted to a GS-11 supervisory border patrol agent position to the present. DHS agreed to take the following corrective action: 1) document an approximate 9-year detail to IT duties in the border patrol agent's Official Personnel File; 2) reassign the border patrol agent to a properly classified non-supervisory position; 3) update its policies and procedures regarding administration of AUO premium pay; 4) work with OSC to train all border patrol supervisory employees on preventing future prohibited personnel practices; and 5) issue letters of counseling to appropriate border patrol managers admonishing them for assigning/promoting employees to work outside of their official position descriptions.

Procedures for Remediating PPPs.

Working together with investigators, IPD staff attorneys determine whether OSC's investigation has established any violation of law, rule or regulation, and whether the matter warrants corrective or disciplinary action, or both.¹⁴ If a violation is found, OSC generally first attempts to obtain resolution of complainants' issues informally, through negotiated settlements. (**See Table 5** for figures concerning favorable actions). If a violation of law is found and informal resolution is not possible, the Special Counsel may refer the matter in writing to the agency head under 5 U.S.C. § 1214(b)(2)(B) with a recommendation for corrective and disciplinary action, or both. If an agency declines to take corrective action, the Special Counsel may file a petition for corrective action with the MSPB under § 1214(b)(2)(C). 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.

At any time during its processing of a case, 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 PPP. 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, pursuant to §1212(c), the Special Counsel may 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 5 U.S.C. § 7701 without the consent of the individual initiating the proceeding.

B. Case Processing: The Mediation Program for Alternative Dispute Resolution

Among the factors that determine “mediation-appropriate” cases are the complexity of the issues, the nature of the personnel action, and the relief sought by the Complainant. Once a case has been identified as mediation-appropriate, the OSC ADR Specialist contacts the parties to discuss the ADR Program. “Pre-mediation” discussions are designed to help the parties form realistic expectations and well-defined objectives regarding the mediation process.

During fiscal year 2006, the number of resolutions increased from 5 to 11; the number of complaints identified as mediation appropriate went from 22 to 52. (See Table 6).

Mediation settlement outcomes in OSC’s Mediation Program vary, depending on the interests of the parties. Monetary recovery includes retroactive promotions, attorney fees, and lump sum payments. In addition to monetary recovery, the benefits received by complainants in ADR include revised performance appraisals, transfers, and letters of recommendation.

The ADR Unit resolved several significant complaints during FY 2006:

1. The complainant alleged that her supervisor lowered her performance appraisal rating, denied her an award and significantly changed their working relationship, all in reprisal for her whistle blowing to the Inspector General. The parties agreed to engage in mediation, and after meeting with two OSC mediators they reached an agreement to resolve all outstanding issues. Because of this no OSC investigation was needed and we closed the matter.
2. In another case the employee complained to his Congressman about the agency’s revocation of his “hardship” status as a single parent on unreasonably short notice, which led to a charge by the agency that he was AWOL. The agency fired the employee soon thereafter during his probationary period. The parties agreed to mediation and then settled the case. The agency rehired the employee in another office and he agreed to begin a new probationary period. This again obviated the need for an OSC investigation.

In order to provide a dispute resolution process that best meets the needs of the parties, the ADR Unit engages in ongoing self-evaluation. Feedback from participants has been overwhelmingly positive.

C. Case Processing: Hatch Act Violations

OSC is also responsible for enforcing the Hatch Act, including investigating and prosecuting complaints alleging violations of the Act, and providing advisory opinions on the Act's requirements. The Hatch Act Unit, staffed by a Chief and five staff attorneys, is responsible for a nationwide program that provides legal advice on the Hatch Act to federal, state and local employees and the public at large. Specifically, the Hatch Act Unit has the unique responsibility of providing Hatch Act information and legal advice to White House staff, Congressional staff, the national press, senior management officials throughout the federal government, and state and local government officials. The Hatch Act Unit provides all of OSC's advisory opinions. When provided to individuals, the advisory opinions enable them to determine whether they are covered or not by the Act, and whether their contemplated activities are permitted under the Act or not.

The Hatch Act Unit also enforces compliance with the Act by receiving complaints alleging Hatch Act violations, conducting preliminary inquiries into complaint allegations and, (where warranted) further investigating allegations or referring the complaints to OSC's IPD (for further investigation). Depending on the severity of the violation, the Hatch Act Unit will either issue a warning letter to the employee, attempt to informally resolve the violation, prosecute the case before the MSPB or send it to the IPD to prosecute before the MSPB.

In FY 2006, OSC received 299 complaints, a 22% increase over FY 2005 (245 complaints were received in FY 2005). OSC has processed and closed 266 complaints during this period. Also, the Unit attempted to informally resolve as many ongoing Hatch Act violations as possible without resorting to litigation. Thus, corrective actions obtained in FY 2006 significantly increased. For example, employees who agreed to come into compliance with the law by withdrawing from partisan races or by resigning from their employment increased 125% and 120%, respectively. (See Table 7).

To further its advisory role, the Hatch Act Unit is very active in OSC's outreach program; the unit conducted 13 outreach presentations in FY 2006 to various federal agencies and employee groups concerning federal employees' rights and responsibilities under the Act. Many of these programs involved high-level agency officials. Advisories concerning partisan activity surrounding upcoming state and local elections have accounted for much of the unit's work this fiscal year. In FY 2006, the Hatch Act Unit received 237 written requests. This represents a 24% increase in intake compared to FY 2005 (191 written requests were received in FY 2005). This year, the unit issued 230 written formal opinions, 919 email advisories and responded to 1,855 oral advisory requests. (See Table 7).

Hatch Act Disciplinary Actions Filed:

State/Local Employee Violations. OSC filed two complaints for disciplinary action against state or local employees or officers for using their official authority and influence for the purpose of interfering with or affecting the result of an election and/or coercing subordinates to make political contributions. In one complaint, OSC sought disciplinary action against a Sheriff of a local county Sheriff's Department for asking his subordinate employees to appear in a political campaign commercial on behalf of a gubernatorial candidate. The Sheriff asked his employees to appear in this campaign ad while they were on duty and

asked them to appear in the commercial wearing their official Sheriff County uniforms and standing next to Sheriff Department official vehicles. The complaint also contained a separate count that alleged the Sheriff invited his subordinate employees to political fund-raisers that the Sheriff held on behalf of his own re-election campaign. In the other case, the former mayor of Atlantic City was charged with holding several meetings during which he asked subordinate employees, mainly city department directors, to collect absentee ballots for a candidate in a then-upcoming primary for City Council. It was further charged that the former mayor held subsequent meetings where he requested his directors to inform him of the number of ballots they had collected. In a separate count the former mayor was also charged with using his official position in an endorsement letter on behalf of the same candidate, in violation of the Hatch Act's restrictions on use of official authority.

Federal Employee Violations. During FY 2006, OSC filed three complaints for disciplinary action against federal employees. For example, in one complaint an Assistant United States Trustee (AUST) was charged with using her official authority or influence to affect the result of an election and for soliciting a political contribution from a subordinate. Specifically, the AUST handed an invitation to a political fund-raiser to a subordinate employee while the AUST admitted to the employee that she knew "it was a little outside the rules." The AUST had received training on the Hatch Act a mere two weeks prior to this incident.

OSC also filed a complaint for disciplinary action against a federal employee for sending politically partisan electronic mail messages while on duty in violation of the Hatch Act. Specifically, the complaint was against an agency employee who sent an e-mail message to over 30 coworkers while on duty and in his federal office. The e-mail contained a letter from then-Chairman of the Democratic National Committee Terry McAuliffe, which urged its recipients to take immediate action after the Presidential Debates "to help Kerry win on November 2."

Lastly, OSC filed a complaint for disciplinary action against an employee of the Department of Veterans Affairs for distributing campaign materials while on duty in his government work place and obtained a favorable settlement in this matter.

Hatch Act Disciplinary Actions Obtained:

Federal Employee Cases. In this fiscal year, OSC obtained eight disciplinary actions (through negotiated settlements or from the Merit Systems Protection Board). For example, OSC obtained disciplinary action against a federal employee for sending a partisan political e-mail, which advanced the re-election campaign of a Congressional candidate, while on duty and in the federal workplace. The e-mail was titled "Halloween Party for Tim Holden" and contained an attached invitation that encouraged people to attend the party and "meet Tim Holden," a U.S. Representative seeking re-election to the 17th Congressional District, Pennsylvania. The federal employee sent the e-mail and invitation to over 300 recipients. In February 2006, an Administrative Law Judge (ALJ) recommended that the employee be suspended for 60 days for violating the Hatch Act. The ALJ noted that the e-mail described the candidate in highly favorable terms and strongly encouraged attendance at the event, and the ALJ concluded that the text and the attachment of the e-mail "obviously were directed toward the success of Mr. Holden's reelection campaign." In June 2006, the Merit Systems Protection Board upheld the ALJ's decision and ordered that the employee be suspended for 60 days.

Also in FY 2006, OSC obtained disciplinary action against an attorney with the Small Business Administration, who OSC had charged with knowingly and willfully violating the Hatch Act by engaging in political activity over a three year period on behalf of a political party while on duty in his government office (e.g., using his government office equipment to send and receive more than 100 e-mails, to draft documents and to have telephone conversations in support of a political party and its candidates). The Merit Systems Protection Board upheld the initial decision finding that the employee's activities as charged warranted removal from his employment.

In April 2006, the Merit Systems Protection Board upheld an initial decision suspending a federal employee for 30 days for violating the Hatch Act's solicitation prohibitions. OSC had charged the employee with soliciting political contributions when he permitted a campaign committee to send a letter identifying him as the sender to 144 people requesting political contributions for a candidate for partisan public office.

In yet two other cases, OSC reached settlement agreements with two federal employees who e-mailed invitations to a political fund-raiser while they were on duty and in their federal workplace. One of the employees sent the invitation to subordinates. Their actions violated the Hatch Act's prohibitions on soliciting political contributions, using official authority or influence to interfere with the result of an election, and engaging in political activity while on duty and/or in a federal building. Under the terms of the settlement agreements one employee served a ten day suspension, while the other employee served a twelve day suspension.

State and Local Employee Cases. In March 2006, OSC reached a settlement agreement with the former Mayor of Atlantic City. OSC filed its petition seeking disciplinary action on November 9, 2005. He left office on December 31, 2005, after being defeated in his re-election bid. As described in greater detail in the preceding section, OSC had charged this official with violating the Hatch Act by asking several subordinates employees to collect absentee ballots for a candidate in a partisan election and by using his official position in an endorsement letter on behalf of the same candidate. Under the terms of the settlement agreement, the former mayor admitted violating the Hatch Act and he agreed not to seek or accept employment with the State of New Jersey for a period of eighteen months.

In yet another example, in November 2005, the Merit Systems Protection Board upheld an initial decision finding that an executive director of a New Jersey county agency had violated the Hatch Act when he ran for partisan public office. The Board found that the executive director's violation was willful and ordered his county agency to remove him from his position.

D. Case Processing: Disclosure Unit

In addition to its investigative and prosecutorial mission, the OSC provides a safe channel through which federal employees, former federal employees, or applicants for federal employment may, under 5

U.S.C. § 1213(a), 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. At present, the Disclosure Unit staff is comprised of the Chief, six attorneys, one paralegal and one student intern.

The Disclosure Unit is responsible for reviewing the information submitted by whistleblowers, and advising the Special Counsel whether it shows that there is a substantial likelihood that the type of wrongdoing described in § 1213(a) has occurred or is occurring. Where a substantial likelihood determination is made, the Special Counsel must transmit the disclosure to the head of the relevant agency for further action. The agency is required to conduct an investigation and submit a report to OSC describing the results of the investigation and the steps taken in response to the investigative findings. Under § 1213(e), the whistleblower is also provided with a copy of the report for comment. The Special Counsel is then required to review the report in order to determine whether it meets the requirements of the statute and its findings appear reasonable. Finally, the report is forwarded to the President and appropriate Congressional oversight committees.

In the Disclosure Unit, 435 new matters were received in FY 2006. During FY 2005, the Unit referred 19 matters for investigation under § 1213(c), and closed 473 matters due to lack of sufficient basis for further action. In FY 2006, the unit referred 24 matters for investigation under § 1213(c), a 26% increase over FY 2005, and closed 478 matters due to lack of sufficient basis for further action. **(See Table 8).**

The Disclosure Unit's caseload remains high due to growing public awareness of the Unit's work. In recent years, it has handled several high profile cases that have received widespread national press attention. In addition, after the terrorist attacks of September 11, 2001, more federal whistleblowers came to OSC with national security allegations and concerns. Many cases handled by the Disclosure Unit involve complex issues; some involve classified material and must be handled according to federal requirements.

The Disclosure Unit's more complex cases are very labor-intensive and often require the attention of more than one attorney. These cases can take more than a year to complete for a number of reasons—agencies routinely request additional time to conduct the investigation and write the report, whistleblowers request additional time to prepare their comments, and Disclosure Unit attorneys and the Special Counsel must review the report to determine whether it contains the information required by statute, its findings appear reasonable, and to prepare any comments the Special Counsel may have on the report.

The following is a representative sample of cases that have been referred by the Special Counsel to the heads of the agencies pursuant to 5 U.S.C. § 1213(c) and closed after receipt and review of the agency report. Also included are summaries of cases that are presently under investigation by agency heads. In many cases, OSC's efforts have resulted in significant media coverage and reform efforts.

CLOSED CASES

Disclosures of Substantial and Specific Danger to Public Health and Safety

Substandard Mental Health Care at Indian Hospital. OSC referred to the Secretary of Health and Human Services allegations that the mental health staff at Pine Ridge Indian Hospital was not properly licensed or qualified and that the staff was subject to the clinical supervision of an unlicensed administrator. According to the whistleblower, the quality of mental health care at the hospital routinely fell below Indian Health Service and Medicaid standards. The whistleblower further alleged that the hospital was engaged in ongoing Medicaid fraud insofar as it billed South Dakota Medicaid for mental health services that were not covered by the program. An agency investigation confirmed that improperly qualified staff members had provided mental health services for which Pine Ridge Indian Hospital sought and received Medicaid reimbursements. The agency reported that administrative recovery proceedings were underway and that additional quality assurance procedures were adopted to ensure proper care. In addition, the agency referred this matter for possible criminal prosecution. *Referred February 2005; OSC's Analysis of Disclosure submitted to the President and Congressional oversight committees October 26, 2005.*

Mishandling and Improper Storage of Expensive Military Equipment. The whistleblower disclosed to OSC violations of regulation in connection with the storage of military equipment at the Department of Defense (DOD) Defense Logistics Agency, Defense Distribution Depot, Anniston, Alabama, (DDAA). Specifically, he alleged that 1) expensive military equipment stored at DDAA is often packaged and stored improperly, 2) DDAA employees are not conducting required inspections of incoming supply containers nor are they conducting timely inspections of inventory already in storage, and 3) DDAA employees fail to seek reimbursement from other agencies for packaging materials.

An investigation by the DOD Office of the Inspector General (OIG) substantiated the whistleblower's allegations. As a result of the investigative findings, the OIG recommended several corrective actions, including 1) inspection of all items stored in location P127 for proper packaging and preservation, 2) refresher training on receiving/packing/inspection procedures for relevant personnel, 3) and development and implementation of a method to provide accountability for night vision devices. *Referred August 2004; OSC's Analysis of Disclosure submitted to the President and Congressional oversight committees January 2006.*

Deficiencies in Security at Nuclear Research Laboratories and Facilities. OSC referred to the Secretary of the Department of Energy allegations of security deficiencies and violations of law, rule or regulation in DOE's Safeguards and Securities Program. The whistleblower alleged that the nation's class "A" nuclear research facilities and laboratories were vulnerable to terrorist attack, theft, and sabotage. DOE's class "A" facilities are charged with several different functions including research, disassembly of nuclear weapons stockpiles, storage of nuclear components and raw materials including Special Nuclear Material used for the production of nuclear weapons, and the replacement and refurbishment of nuclear weapons components presently in use by the U.S. military.

DOE did not substantiate the allegations. The report stated that because the referral was based on information dating from August 2002, the allegations did not accurately reflect the agency's present safeguards and security posture. Significant changes had been made to the security apparatus since August 2000 after the National Nuclear Security Administration was established. Congress created the NNSA, in part, in response to previous concerns about security in the nuclear weapons complex. The report states that the changes to security and protection have been reviewed and evaluated by independent organizations even more so after the terrorist attacks of September 11, 2001. The Special Counsel commented that it appeared DOE had taken action to address security issues but that given recent concerns identified by GAO, continued Congressional oversight of DOE's security program was needed.

The whistleblower also raised security and vulnerability concerns about the Office of Transportation Safeguards, the DOE division responsible for transporting DOE assets, including nuclear weapons and materials, throughout the United States. This disclosure was classified. OSC determined that the classified disclosure involved counterintelligence information. Thus, in accordance with 5 U.S.C. § 1213(j), the information was transmitted to the National Security Advisor, the Senate Select Committee on Intelligence and the House Select Committee on Intelligence on June 7, 2002. *Referred October 2002; OSC's Analysis of Disclosure submitted to the President and Congressional oversight committees February 2006.*

Improper Denial of Medical Services. OSC referred allegations to the Secretary of the Department of Health and Human Services (HHS), that, from July 2004 until October 2004, Dr. Stephen Ryter, then-Clinical Director, HHS, Indian Health Service, Acoma-Canoncito-Laguna (ACL) Service Unit, Albuquerque, New Mexico, routinely denied all requests for contract medical services. The ACL Service Unit relies upon contracts with other hospitals as a means of providing advanced medical services to its patients. The whistleblower alleged that Dr. Ryter's practice of denying all requests for contract services created a substantial and specific danger to the health of the hospital's patients because patients were not receiving proper medical care.

The HHS OIG Dallas Regional Office, Albuquerque Field Office, investigated the allegations and found them to be unsubstantiated. The investigators found that Dr. Ryter implemented the case priority system properly. They also reviewed the medical records of the eight patients specifically mentioned in the disclosure and, in each case, found that there was a satisfactory explanation for the ACL Service Unit's decision not to pay for further treatment. *Referred April 2005; OSC's Analysis of Disclosure submitted to the President and Congressional oversight committees March 2006.*

Mistreatment of VA Psychiatric Patients. OSC referred to the Secretary of Veterans Affairs allegations that the Greater Los Angeles Healthcare System, West Los Angeles Medical Center (Medical Center) has allocated psychiatric resources in a manner that endangers patients, staff, and the public. In particular, the whistleblowers alleged that the Medical Center created a fictitious ward, Ward 1 East, into which suicidal, homicidal, and other psychiatric patients are admitted when there are no other beds available. According to the whistleblowers, patients admitted to Ward 1 East may be left on gurneys in the emergency room for as many as three days, thereby aggravating their psychiatric conditions. Other patients presented for emergency psychiatric care, the whistleblowers maintained, are denied immediate treatment and referred to an outpatient facility. In addition, the whistleblowers alleged that the Medical Center reduced the

number of psychiatric beds available to its patients and closed its Psychiatric Emergency Service in violation of 38 U.S.C. § 1706. Finally, the whistleblowers alleged that management is engaging in an ongoing waste of funds in connection with the long-term care contracts for mental health patients.

After investigation the agency reported, that it had experienced some difficulties when reorganizing the Medical Center but the problems had been resolved through the use of working groups that involved frontline practitioners. The agency further explained that the designation “Ward 1 East” represented an administrative mechanism for tracking patient treatment which actually improved the quality of care for patients who were awaiting admission to an inpatient ward. *Referred July 2005; OSC’s Analysis of Disclosure submitted to the President and Congressional oversight committees March 2006.*

Dangers to Public Safety at Prison Factories. OSC referred to the Attorney General allegations that inmates working in computer recycling facilities operated by Federal Prison Industries (FPI) at United States Penitentiary (USP) Atwater, California, and other Bureau of Prisons (BOP) facilities were being exposed to hazardous materials, including lead, cadmium, barium and beryllium, released when computer monitors were intentionally broken as part of the recycling process. The whistleblower further alleged that prison officials abused their authority by ordering the reactivation of operations in the computer recycling facility after they were suspended on the grounds that they presented imminent danger to the health of factory workers. Finally, the whistleblower alleged that a food service area in the computer recycling facility at USP Atwater was exposed to the factory floor and toxic contaminants in violation of Occupational Health and Safety Administration regulations.

In response to OSC’s referral, the agency reported that “BOP[,] FPI and Safety Staff appear[ed] to have adequately addressed” the safety concerns raised in the disclosure. The whistleblower vigorously disputed these findings and provided OSC with documentary evidence to support his account of events. Upon review of the agency’s submissions and the whistleblower’s comments, the Special Counsel determined that the agency’s findings were unreasonable and recommended an independent and impartial investigation into BOP’s recycling activities. It is our understanding that such an investigation is currently being conducted by the Office of Inspector General for the U.S. Department of Justice and that this investigation comprises all computer recycling facilities located in BOP institutions. *Referred November 2004; OSC’s Analysis of Disclosure submitted to the President and Congressional oversight committees April 2006.*

Over-Exposure of Human Subjects without Informed Consent. OSC referred to the Administrator of the Environmental Protection Agency (EPA) allegations that researchers at EPA’s National Health and Environmental Effects Research Laboratory (NHEERL), Research Triangle Park, North Carolina, were violating regulations governing the conduct of human research studies. The whistleblower, a senior research scientist, alleged that research scientists at NHEERL experimented on human subjects without obtaining their informed consent and that EPA officials covered up this wrongdoing when it was brought to their attention.

In particular, the whistleblower alleged that Chong Kim, a research scientist in the Human Studies Division (HSD) of NHEERL, led a research team which exposed human subjects to doses of di-2-ethylhexyl sebacate (sebacate) and other potentially dangerous compounds as much as one hundred times greater than the doses to which the subjects consented. The whistleblower further alleged that EPA officials repeatedly mischaracterized the wrongdoing identified as merely technical violations of EPA protocol. EPA's Office of the Inspector General (OIG) investigated the allegations and found that although test subjects were exposed to sebacate in amounts greater than that to which they consented, the overexposure was not proved to be intentional. Rather, the overexposure resulted from a mistake in the researcher's mathematical calculations. The investigation also found that the overexposure posed no health risk to the subjects, as sebacate is not a hazardous substance; there was no evidence of intentional or willful misconduct on the part of Dr. Kim, and that EPA timely addressed the issues raised by the overexposure. In response to the investigation, EPA took actions to assure better compliance with human subject experiments including disciplining and indefinitely banning Dr. Kim from human subject testing. Subjects were notified of the overexposure, and there was no evidence that any subjects suffered any adverse health consequences as a result of the overexposure. Human subject testing was not resumed until additional controls were put in place agency-wide according to the recommendations of the Human Subject Review Panel. *Referred November 2004; OSC's Analysis of Disclosure submitted to the President and Congressional oversight committees April 2006.*

Nebulizer Treatments Improperly Administered to Respiratory Patients. The whistleblower alleged that medical personnel at the Department of Veterans Affairs (VA), Miami VA Medical Center (VAMC), Miami, Florida, are endangering the health of respiratory patients by administering the medications albuterol sulfate and ipratropium bromide in diluted doses and at incorrect intervals of time in order to cut costs. He also alleged that management at the VAMC instructs medical personnel to falsify medical records in order to conceal this wrongdoing.

The VA Office of the Medical Inspector (OMI) investigated the allegations and found them to be unsubstantiated. However, the investigation did uncover other problems in the VAMC's Respiratory Care Unit, including a shortage of staff and poor documentation of medical treatments. To correct these deficiencies, the OMI recommended that the VAMC: 1) document respiratory treatments with greater consistency, 2) increase staffing levels in the Respiratory Care Unit, 3) improve recruitment and retention strategies for respiratory therapists, and 4) clarify the policy on the administration of medications via aerosol delivery devices. *Referred November 2005; OSC's Analysis of Disclosure submitted to the President and Congressional oversight committees May 2006.*

Disclosures of Gross Mismanagement

Physician Misconduct at Veterans Affairs Medical Center. OSC referred to the Secretary of Veterans Affairs allegations from four health care professionals, including a physician, employed at the U.S. Department of Veterans Affairs (VA), VA Canandaigua Medical Center, Canandaigua, New York, that Dr. Susan Sharza, a VA physician, repeatedly refused to see patients, falsified medical records, repeatedly failed to respond to her pager in emergency situations, and failed to communicate important medical information regarding patients to specialists at the facility. In addition, they alleged that VA Medical Center management officials, in particular Chief of Staff, Dr. Robert Babcock, failed to address her conduct and impeded the efforts of one of the

whistleblowers to correct the problems. The whistleblowers alleged that this gross mismanagement and abuse of authority resulted in neglect and mistreatment of veterans.

At the request of the Secretary, the VA Veterans Health Administration investigated. The allegations were partially substantiated with the investigation confirming two instances of substandard care involving Dr. Sharza and two instances when she refused to see patients. The investigation concluded that she did not falsify medical records and was unable to determine whether or not she intentionally failed to respond to her pager. Even though the investigation uncovered instances of substandard care and poor conduct, the agency ultimately concluded that these incidents were insufficient evidence to support a finding of gross mismanagement. The agency also found no evidence that Dr. Babcock abused his authority. *Referred June 2004; OSC's Analysis of Disclosure submitted to the President and Congressional oversight committees November 2005.*

Disclosures of Violation of Law, Rule or Regulation

Violation of Procurement Laws and Regulations. OSC referred to the Secretary of the Army that contracting personnel at the U.S. Army Corps of Engineers (USACE), Great Lakes and Ohio River Division, Louisville District, routinely disregarded applicable federal contracting laws, rules, and regulations, including the Federal Acquisition Regulation (FAR), Engineering FAR Supplement, Department of Defense FAR Supplement, the Chief Financial Officers Act of 1990 (31 U.S.C. § 901 *et seq.*), the Competition in Contracting Act (10 U.S.C. § 2304), and the Brooks Act (40 U.S.C. § 541 *et seq.*).

The USACE Office of Chief Counsel investigated and substantiated the allegations in part. The investigators found that Administrative Contracting Officer authority had been improperly delegated on service contract, DACA27-98-D-0001. In response, Internal Review recommended that the agency reissue guidance from the Office of the Chief of Contracting to contracting personnel regarding the proper authority for modifications on service contracts. Internal Review also recommended that contracting officers review contract records every 12 months to ensure compliance with the terms of the contract. A follow-up investigation in April 2004 confirmed that the Contracting Division was implementing the recommendations. The Office of Chief Counsel found that several of the other allegations had been previously investigated by Internal Review or the Department of Defense Office of Inspector General, and, when warranted, USACE had already taken appropriate corrective action. *Referred February 2005; OSC's Analysis of Disclosure submitted to the President and Congressional oversight committees December 2005.*

AGENCY REPORTS UNDER REVIEW

Disclosures of Substantial and Specific Dangers to Public Health and Safety

Incompetence of the Chief of Cardiology at VA Medical Center. OSC referred to the Secretary of the Veterans Affairs (VA) allegations that the Chief, Cardiology Division at the St. Louis VA Medical Center did not accurately interpret 12-lead electrocardiogram and Holter monitor rhythms, and mismanaged the Cardiology Division. According to the whistleblower, the Cardiology Chief made significant errors in interpreting ECG and Holter monitor recordings, which could lead to serious injury or death for patients. The whistleblower also alleged that the Cardiology Chief publicly misrepresented his standing as a Fellow of the American College of Cardiology, failed to report for his regularly scheduled duties in the Cardiology Division, failed to review echocardiograms on days he scheduled himself to be responsible for such reviews, and failed to manage attending physician and call schedules in a timely and equitable manner. All of these actions, according to the whistleblower, constituted gross mismanagement and significantly compromised patient care and the safety of veteran patients. *Referred October 2005; agency report under review.*

Ineffective Border Security Tactics Mandated by Sector Management. OSC referred to the Secretary of Homeland Security allegations that Blaine Sector management ordered agents to discontinue their successful low-visibility tactics and adopt high-visibility tactics that stand no reasonable chance of deterring smuggling activities along a particular section of the U.S. Canada border. According to the whistleblowers, management allocated 3 agents to patrol a 75-mile stretch of border and adopted policies which left the border unprotected for at least 16 hours per day. These policies also impede cooperation with other federal and local law enforcement agencies. Given the recognized risk that terrorists may target the unprotected border area as a point of entry into the United States, the whistleblowers alleged that management's new policies amount to a substantial and specific danger to public safety as well as gross mismanagement. In addition, the whistleblowers also alleged that the now retired Patrol Agent-in-Charge for the station in question engaged in violations of law, rule or regulation, gross mismanagement, and a gross waste of funds. *Referred November 2005; agency report under review.*

Misallocation of Funds Earmarked by Congress for Wireless Initiatives at the Southwest Border. OSC referred to the Secretary of the Department of Homeland Security (DHS) allegations that in 2004, and 2005, DHS failed to allocate sufficient funds to support the acquisition of wireless telecommunications equipment and technologies as intended by Congress, and instead used the monies for non-wireless procurements. According to the whistleblower, the failure to support wireless communications at the southwestern U.S. border has rendered the border unsafe for agents and vulnerable to terrorist infiltration. *Referred September 2005; agency report under review.*

Collection of Human DNA Cell Lines Without Informed Consent. OSC referred to the Secretary of Health and Human Services allegations that a contract researcher conducting human research studies with the National Institutes of Health collected genetic material from infant subjects, for the creation of immortalized cell lines for future research, without proper informed consent of the study participants. The collection occurred incident to a comprehensive study examining the use of the drug hydroxyurea in infants with Sickle Cell Disease, the Pediatric Hydroxyurea Phase III Clinical Trial, a project known as BABY HUG. According to the whistleblower, neither the trial protocol nor the consent forms provided to subjects contemplated the creation of

living DNA cell lines. The whistleblower alleged the collection of this genetic material without informed consent constituted a violation of law, rule, or regulation, gross mismanagement, an abuse of authority, and a substantial and specific danger to public health and safety. *Referred March 2006.*

Mistreatment of Mental Health Patients by the Navajo Area Indian Health Service. OSC referred to the Secretary of the Interior allegations of systematic and willful mistreatment of patients in need of mental health intervention by physicians employed at the Crownpoint Health Care Facility (Crownpoint), an Indian Health Service (IHS) facility located in within the Navajo Area. The whistleblower alleged that physicians at Crownpoint repeatedly participated in the involuntarily commitment of patients to secured psychiatric hospitals without due process and in violation of applicable law. The whistleblower further alleged that physicians at Crownpoint were prescribing psychotropic drugs to patients in need of mental health intervention without adequate regard for the viability of non-pharmacological treatment alternatives or proper safety precautions. According to the whistleblower, many of these drugs have serious side effects such as depression and can even lead to suicidal ideations in some patients. The whistleblower asserted that the prescription practices he disclosed constituted a substantial and specific danger to public health and violated both New Mexico Medicaid regulations and IHS policy. *Referred June 2006.*

Falsification of Secure Database at Airport. OSC referred to the Secretary of the Department of Homeland Security allegations that management officials directed the entry of false records of customs inspections to inflate statistics at the Sanford International Airport (Sanford), Sanford, Florida. According to the six whistleblowers, Customs and Border Patrol (CBP) Agents, during the summer and fall, 2005, they were detailed to work at Sanford. During their shifts in the secondary agricultural inspections area, they were instructed by Sanford CBP Supervisors to take stacks of passenger and crewmember customs declarations, and enter the names into the enforcement database as reports of enforcement screens, or IO25s. They were told to guess at the information that would otherwise be obtained during direct interview and inspection of the passenger or crewmember, such as race, length of stay, and number of bags. They also alleged that they were instructed to enter an "ENF" code, rather than the code for an agricultural secondary inspection, "PPQ." This would falsely reflect that the passenger or crewmember had been stopped, interviewed, and bags inspected in connection with a suspicion of possessing contraband or engaging in unlawful activity. *Referred April 2006.*

Federal Air Marshal Policies Endanger Marshals and the Public. OSC referred to the Secretary of Homeland Security allegations that Federal Air Marshals are required to wear dress clothing inconsistent with most passenger attire on many flights, that Marshals are required to pre-board flights in plain view of passengers, and that they must identify themselves as Federal Air Marshals at hotels. The whistleblower, a Federal Air Marshal, also disclosed that the agency has released to the media highly sensitive tactical information about training and in-flight procedures used by Marshals, which has further jeopardized the safety of both Federal Air Marshals and the flying public. The whistleblower alleged that these practices violate the Intelligence Reform and Terrorism Prevention Act of 2004 and thereby constitute a serious breach of established law enforcement practice and procedure, and constitute gross mismanagement and a substantial and specific danger to public safety. *Referred August 10, 2006.*

Lack of Audible Fire Alarm System at Training Center. OSC referred to the Secretary of the Department of Navy allegations that the fire alarm system was inaudible in the classrooms at the Safety and Environmental Training Center, Naval Air Depot North Island, San Diego, California. The whistleblower

alleged that the inability to hear the fire alarm places instructors and students in substantial danger in the event of a fire. According to the whistleblower, the fire detection system has not functioned properly since a contractor accidentally damaged the system, rendering it inoperable. *Referred September 2006.*

Overpayment of Air National Guardsmen. OSC referred to the Secretary of the Department of Defense (DoD) allegations of systematic abuse of time and attendance regulations which cost DoD hundreds of thousands of dollars in man-hours and paid leave at the North Carolina Air National Guard (NCANG), Charlotte, North Carolina. According to the whistleblower, civilian and military personnel at the NCANG routinely claim compensatory time for hours that were not spent on standby status or performing mission-related work. Instead, civilian and military personnel claim hours spent at the beach, golfing and relaxing by the hotel pool as overtime hours eligible for compensatory time or leave passes. In particular, the whistleblower alleged that support personnel for the Modular Airborne Firefighting System (MAFFS) claimed an unjustifiable amount of compensatory time (up to 59 hours per work week) for missions that required little, if any, overtime work. *Referred September 2006.*

Disclosures of Violations of Law, Rule or Regulation, Gross Mismanagement and Gross Waste of Funds and Abuse of Authority

Misrepresentation of Air Marshal Flight Statistics. OSC referred to the Secretary of the Department of Homeland Security allegations that a computer generated report summarizing the activity of Air Marshals in December 2004, misrepresented the number of flights covered by Federal Air Marshals. This report, the whistleblower alleged, showed that Air Marshals flew on a different number of flights as actually covered by the agency. According to the whistleblower, current staffing levels and existing operating procedures would make it impossible for Air Marshals to cover the number of flights represented in the report he reviewed. As a result, the report overstated the number of flights covered. The whistleblower also alleged that the inflated statistics factored in the bonuses awarded to FAMS Special Agents in Charge and were provided to Congress in order to demonstrate compliance with staffing requirements. *Referred April 2005.*

Faulty Repairs of F/A-18 Fighter Jets. OSC referred to the Secretary of the Navy allegations that mechanics in Shop 93503, Naval Air Depot, North Island, California, attached generator conversion units (GCUs) onto F/A-18 fighter jets incorrectly. Specifically, he alleged that, from March 2005 until July 2005, the mechanics did not have the necessary torque tools required to properly torque the screws used to attach the GCUs to the wings of the aircraft. Although Shop 93503 mechanics finally received torque tools in July 2005, the whistleblower stated that the GCU screws on hundreds of F/A-18s currently deployed by the U.S. military and several foreign militaries still have not been properly torqued. The whistleblower also alleged that Shop 93503 does not perform mandatory quality assurance inspections on all GCU components. *Referred February 2006.*

Dangerous Airflow in Biohazard Laboratory. OSC referred to the Secretary of the Department of Health and Human Services allegations that an airflow problem at a Biohazard Level 3 laboratory at the National Institutes of Health, National Institute of Neurological Disorders and Stroke, Rocky Mountain Laboratory, Hamilton, Montana, poses a danger to public health. He advised that scientists in this laboratory

are conducting research on several contagious, dangerous diseases, including tuberculosis and mad cow disease. According to the whistleblower, the doors to this laboratory do not close properly due to an airflow problem, thereby posing a risk that employees working elsewhere in the building could become infected. *Referred March 2006.*

Unlicensed Practice of Pharmacy at VA Facility. OSC referred to the Secretary of Veterans' Affairs an allegation that prescriptions filled on the super-tote line at the Department of Veterans Affairs, Mid-South Consolidated Mail Outpatient Pharmacy (Mid-South CMOP) in Murfreesboro, Tennessee, were not being verified by pharmacists before they were sent to patients. According to the whistleblower, this failure to properly verify prescriptions violated general principles of pharmacy law, the applicable Veterans Health Administration Manual, and the instructions of both the National CMOP Director and the Chief Consultant for the Pharmacy Benefits Management Strategic Healthcare Group. OSC previously referred this matter to the Honorable Richard J. Griffin, VA Inspector General, on December 14, 2004, requesting information related to the whistleblower's allegation. OIG declined to provide the information requested, resulting in OSC's referral for formal investigation under 5 U.S.C. § 1213. *Referred April 2006.*

Disclosure of Violation of Law, Rule or Regulation

Unethical Post-Employment Activities. OSC referred to the Secretary of the Air Force allegations that Col. Ron Oholendt, former Commander, U.S. Department of the Air Force, Space Battlelab, Schriever Air Force Base, Colorado Springs, Colorado, and Lt.Col. Allan Cassidy, former Space Battlelab Chief of Concept Evaluation, violated 18 U.S.C. § 207 by engaging in illegal post-employment communications with government employees in an attempt to influence the Space Battlelab to fund a project in which they had previously participated personally and substantially as government employees. She also alleged that Col. Patrick Rhodes, Space Battlelab Commander, and other government employees were aware of the illegal nature of these communications, yet allowed them to continue. We transmitted her allegations to the Secretary of the Air Force on November 10, 2005. *Referred November 2005.*

Purchasing Personal Items with Government Funds. OSC referred to the Secretary of the Department of Veterans Affairs allegations that, on November 2, 2004, Anita Johnson, Purchasing Agent, Prosthetic and Sensory Aids Service, Veterans Affairs Medical Center (VAMC), Alexandria, Louisiana, used VAMC funds to purchase seven pairs of shoes for personal use. OSC initially referred the allegations to the VA Office of the Inspector General (OIG) on January 3, 2006. The OIG did not investigate the allegations nor respond to OSC's request for assistance in this matter. The allegations were then referred to the Secretary for a formal investigation. The agency has referred the matter for criminal review. *Referred April 2006.*

E. Case Processing: USERRA Violations

OSC's Enforcement Role under USERRA: Background

With the passage of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301, *et seq.*, Congress expanded OSC's role as protector of the federal merit system. USERRA is the law that protects the reemployment rights of persons who are absent from their respective civilian employment due to the performance of military duties. USERRA also makes it illegal for an employer to deny any benefit of employment on the basis of past, current, or future performance of military service.

Pursuant to 38 U.S.C. § 4324, OSC is authorized to act as the attorney for an aggrieved person ("claimant") and initiate legal action against the involved federal employer. Under title 38, OSC serves the federal sector's special prosecutor of meritorious USERRA cases. As special prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or litigation before the U.S. Merit Systems Protection Board (MSPB).

As special prosecutor, OSC objectively reviews the facts and laws applicable to each complaint. Where the Special Counsel is satisfied that claimant is entitled to relief, then it may exercise its prosecutorial authority and represent the claimant before the MSPB and, if required, the U.S. Court of Appeals for the Federal Circuit. *See* 38 U.S.C. §§ 4324(a)(2)(A) and (d)(2).

In early 2005, OSC's role in enforcing USERRA again expanded. Pursuant to a demonstration project established by the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, signed by President Bush on December 10, 2004, OSC, rather than the Department of Labor's Veterans Employment and Training Service (VETS), has the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. Under the project, OSC also receives and investigates all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person's social security number.

Effective February 8, 2005, OSC began investigating federal sector USERRA claims under the demonstration project. The demonstration project ends on September 30, 2007, and Congress will determine whether OSC will continue to have investigative responsibility over federal sector USERRA claims.

USERRA Unit

Special Counsel Scott Bloch created the USERRA Unit on January 6, 2005, in response to the passage of the VBIA, which gave exclusive responsibility for investigating certain federal sector claims arising under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) to OSC. It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of USERRA. *See* 38 U.S.C. § 4301(b). The Special Counsel concurs with that goal and intends for the USERRA Unit to enforce USERRA zealously.

OSC's USERRA Unit has attained exemplary results through its aggressive and objective enforcement of service members' employment and reemployment rights. A small sample of the wide variety of relief obtained by OSC is set forth below:

Protecting Reemployment Rights

- The service member alleged that the agency police failed to reemploy him promptly and did not reemploy him to the appropriate "status" upon being honorably discharged. The service member had served as a police officer in the agency's San Francisco, California, office. The agency reemployed the service member but assigned him to its Washington, D.C., office. OSC's investigation uncovered sufficient evidence to establish that the agency should have reemployed the service member to his former San Francisco duty station and should have reemployed him sooner. OSC successfully persuaded the agency to pay the service member an amount equaling the lost wages he suffered as a result of the delay in reemploying him and as a result of being reemployed to the agency's Washington, D.C., office instead of its San Francisco office (i.e., the difference in locality pay).
- The service member alleged that a U.S. Federal agency denied her a career ladder promotion to the GS-12 level because she was absent from employment due to military service. During its investigation, OSC obtained evidence indicating that, but for the service member's departure for military service, the service member would have attained her promotion. Thus, upon her return from military service, the agency granted OSC's request that it provide the service member appropriate training and, upon successful completion of such training, promote her retroactively and award her back pay.

Correcting Denial of Benefits of Employment

- The service member alleged that the Federal agency prepared its monthly schedule in such a way that discriminated against him because of his reservist duties. The service member and his co-workers are required to work on weekends. The agency, however, gives its employees weekends off on a rotating basis. OSC's investigation confirmed that the agency always scheduled the service member to be off on the weekend he had reservist duties. Although the agency had a business reason for not scheduling the service member to work on weekends that it knew he would be unable to come to work (i.e., his reservist weekend), the agency's scheduling practice violated one of the purposes of USERRA, namely: minimize the inconveniences to civilian careers that arise from military service. Accordingly, at OSC's request, the agency changed the manner in which it prepared its monthly schedule such that it would not automatically schedule the service member to be off the weekends he had military duty.

Preventing Denial of Initial Employment

- The service member alleged that he was offered and accepted a position with the U.S. Military agency. When the agency gave the service member an entry on duty (EOD) date, the service member informed the agency that he could not start on such date because of military service. In response, the agency withdrew the offer of employment. OSC contacted the agency and explained that it is illegal under USERRA to deny initial employment because of military service. In response, the agency re-offered the position, which the service member again accepted, and the parties agreed to a new EOD date.

Securing Competitive Promotions, Career Ladder Promotions, and Step Increases

- Two service members alleged that the U.S. Federal Agency did not consider them for competitive promotions to GS-8 Senior Officer Specialist positions while they were away due to military service obligations. OSC's investigation confirmed that the agency violated federal USERRA regulations requiring that a federal agency's promotion plan provide a mechanism for considering absent service members for promotion. Thus, OSC persuaded the agency to consider the service members for promotion. Subsequently, the warden selected the service members for promotions to GS-8 Senior Officer Specialist positions. OSC also obtained evidence establishing that the service members would have been selected for promotion had the agency considered them earlier. Consequently, OSC requested that the agency provide full corrective action to the service members, and agency officials also agreed to promote the service members retroactively and to award them back pay and other applicable seniority-based employment benefits.
- The service member alleged that a U.S. Federal agency denied her a career ladder promotion to the GS-12 level because she was absent from employment due to military service. During its investigation, OSC obtained evidence indicating that, but for the service member's departure for military service, the service member would have attained her promotion. Thus, upon her return from military service, the agency granted OSC's request that it provide the service member appropriate training and, upon successful completion of such training, promote her retroactively and award her back pay.
- The service member alleged that the U.S. agency did not grant the service member his step increase in salary upon being reemployed after completing 17 months of military service with a different Federal agency. OSC contacted the agency and educated it about its USERRA obligations. In response, the agency made the step increase retroactive and will award back pay to the service member.

- The service member alleged that the Federal agency violated USERRA by not awarding her a “goal sharing” bonus that all the members of her team had received for participating in fulfilling team goals. The agency did not award the service member the bonus because she did not fully participate in the team’s work because of her absence from employment due to military service. Prior to the service member’s deployment, she had participated in the goals for which the other employees were being rewarded. The evidence showed that the service member would have been given a bonus but for her absence due to military service. Under OSC’s interpretation of the statute, which is to be liberally construed in favor of the service member, such team bonuses constitute a benefit of employment different from salary or wages. Thus, OSC contacted agency officials, and they agreed to award the service member the same goal-sharing bonus.

Educating the Federal Sector and Preventing Future Violations

In addition to the individualized corrective action that OSC secured on behalf of many service members, OSC endeavors to improve the federal merit system by obtaining systemic corrective action wherever appropriate. Systemic corrective action (i.e., a change in an agency’s practice or policy) is warranted wherever a federal employer’s practice or policy deviates from USERRA’s requirements. In Fiscal Year 2006, OSC identified two common USERRA violations. The first involved the manner in which federal employers reemployed injured service members. For example, many federal employers are unaware of their obligation to seek placement assistance from U.S. Office of Personnel Management upon determining that they are unable to reemploy an injured service member. The second concerned the kinds of documentation that federal employers demanded where a service member requested a leave of absence due to military service. In response to those common violations, OSC prepared training documents that clearly identify and fully explain federal employers’ obligations. Now, whenever either of those issues are identified during the course of an OSC USERRA investigation (regardless if the issue was one that the service member raised), the training document is sent to the involved agency with the request that the agency disseminate it to managers and human resources staff. In those cases where such documents were sent, the agencies were receptive OSC’s guidance.

Summary of Results

OSC received 11 referrals from the DOL in FY 2006, with 6 referrals carried over from the previous fiscal year; 82% of these referrals were closed during FY 2006. (**See Table 9**).

OSC received 168 Demonstration Project Cases during FY 2006, up from 111 cases in FY 2005 (**See Table 10**). The USERRA Unit obtained corrective action in 35 demonstration project cases in FY 2006, an increase of 119% over FY 2005. Moreover, the Unit anticipates filing three additional cases with the MSPB in the near future should the involved agencies not agree to resolve them voluntarily.

F. Outreach Program

The Outreach Program assists agencies in meeting the statutory mandate of 5 U.S.C. § 2302(c). This provision requires that federal agencies inform their workforces about the rights and remedies available to them under the whistleblower protection and prohibited personnel practice provisions of the Whistleblower Protection Act, in consultation with the OSC.

In an effort to assist agencies in meeting the statutory requirement, in FY 2002, OSC designed and created a five step educational program, the 2302(c) Certification Program. This program gives guidance to agencies and provides easy-to-use methods and training resources to assist agencies in fulfilling their statutory obligation. Agencies that complete the program receive a certificate of compliance from OSC.

The 2302(c) Certification Program was piloted by the Office of Personnel Management (OPM) in the spring of 2002 and OPM received the first-ever certificate of compliance in May of that year. Shortly thereafter, OSC began working with ten large agencies on participation in the program and offered the program government-wide in October of 2002. As of 2006, 51 agencies have been registered in the program and are working towards certification, and 29 agencies have been certified.

In an effort to promote OSC's mission and programs, OSC provides formal and informal outreach sessions, including making materials available on the agency web site. In FY 2006, OSC employees spoke at 50 events, including agency training sessions, conferences and meetings nationwide. Additionally, the Special Counsel has been a keynote speaker at largely attended events such as the Federal Dispute Resolution Conference in August of 2006.

Finally, OSC has continued its policy of issuing press releases when OSC files a significant litigation petition, or achieves significant corrective or disciplinary action through settlement. Most of these generate considerable press coverage. This contributes greatly to employee and manager awareness of the merit system protections enforced by OSC.

III. Fiscal Year 2008 Request

OSC is requesting \$16,368,000 – an increase of \$368,000 over its FY 2007 appropriation of \$16,000,000. The increase for FY 2008 is not for any increased FTE or additional programs. The increase is simply to pay the salaries and benefits of the current employees of the agency during FY 2008, given the salary increases of FY 2006 and FY 2007, and the projected salary increase of 3.0% in FY 2008. Salary, benefits, and rent historically make up approximately 92-93% of OSC's budget, so there is little opportunity to reprogram funds for salaries from other object classes.

OSC has been successful in hiring excellent staff and the agency will operate with 110 employees during most of FY 2007. The agency needs to continue with 110 employees during FY 2008 to manage and process the agency's elevated workload (since FY 2000) of prohibited personnel practice complaints, whistleblower disclosures, Hatch Act complaints, Hatch Act cases, Hatch Act advisory opinions, and USERRA referral cases in a manner that precludes the formation of case backlogs, and to investigate all USERRA cases referred to OSC by the Department of Labor under the Demonstration Project set forth under the Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, § 204, 118 Stat. 3606 (VBIA). Continuing with 110 employees will also enable OSC to continue reducing case processing times.

OTHER BUDGETARY FACTORS

Increased Expenses:

Notable increased expenses for OSC include the higher cost of OSC's existing headquarters rented space and field office rented spaces (average increase is 3.5%), the cost of accounting activities outsourced to NBC (which has increased 114% since FY 2005), the higher cost of legal information services (12% increase), and the higher cost of mandatory security charges payable to DHS (35% increase). An additional \$32,000 will also be needed for Microsoft Enterprise Software Licenses. OSC's transit subsidy costs are also increasing by 14%. As the agency operates with more employees than it has in the past, a marginal increase in expenditures for supplies, travel, equipment, and other services can be expected. The agency's E-travel contract with BPD has also increased. OSC will likely be paying to convert to a more compatible e-travel system managed by NBC.

Fiscal Responsibility:

In order to operate during FY 2008 within the requested funding levels, OSC has made the following adjustments in order to fund the salary and benefits for 110 FTE. Based on changing needs, OSC revised its IT implementation plan. The FY 2008 request reflects the following adjustments:

1. Hardware and software life cycle replacements and case tracking web application development have been rescheduled. Funding has been reallocated to support salaries and benefits of the 110 FTE needed by the agency.
2. The OMB-mandated conversion of the agency's infrastructure (network backbone) to Internet Protocol Version 6 (IPv6) will receive partial funding. All agency networks are supposed to interface with this infrastructure by June 2008. Funding has been reallocated to support salaries and benefits of the 110 FTE needed by the agency.

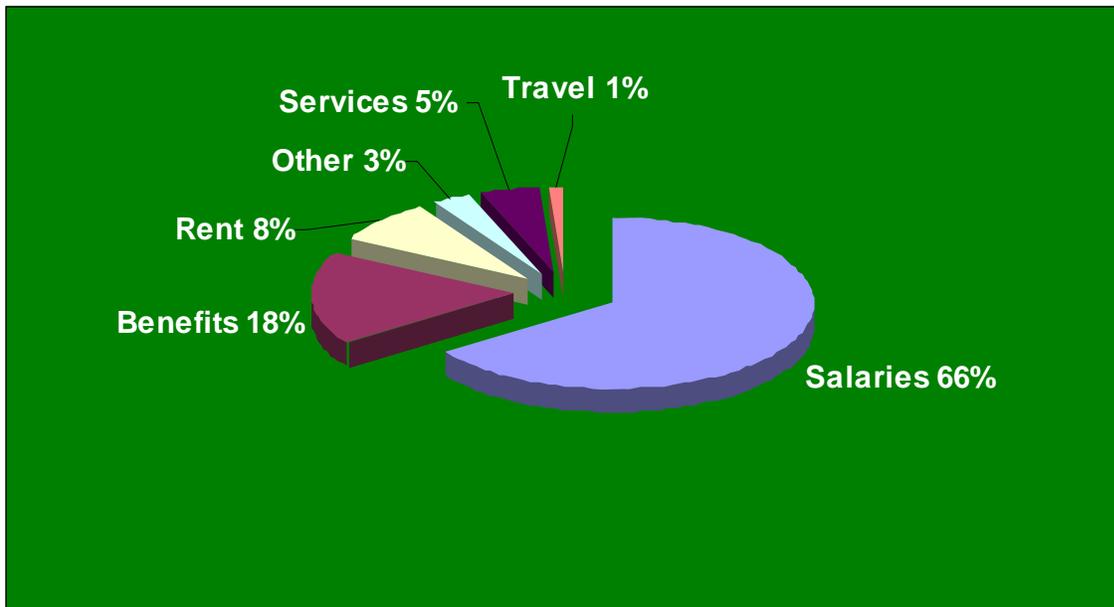
IV. OSC and the Future of USERRA

The 32-month Demonstration Project created by the Veterans Benefits Improvement Act of 2004 will terminate at the end of FY 2007. Congress will likely make a decision regarding which agency (OSC or DOL VETS) will handle Federal Sector USERRA cases. There are several different scenarios in which OSC could be called upon to perform investigatory USERRA responsibilities on a permanent basis for the benefit of the members of the United States armed forces. Each of the scenarios would have a different cost structure for OSC. Rather than present various scenarios and their associated costs here, we will simply make four points:

1. **Technical Expertise.** The agency currently has substantial technical USERRA expertise, and has a training unit in place to train new employees. This expertise has already resulted in significant reductions in processing times for those members of the military for which OSC has responsibility under the Demonstration Project. For example, during FY 2006, the average time to investigate and process a standard USERRA case at OSC was only 115 days. The OSC Investigation and Prosecution Division also has expert investigative and prosecutorial firepower that could be brought to bear on any expanded USERRA responsibility.
2. **Management expertise.** No matter what the requirements would be of an expanded USERRA role for the U.S. Office of Special Counsel, the agency has the experienced management in place to develop a plan, implement it, and achieve highly efficient results for the veterans and members of the military that have rights under USERRA. The current USERRA Unit Chief - an attorney with 20 years of investigation, analysis, and litigation experience – is an expert in USERRA federal sector law and regulations.
3. **Priority.** Protecting the nation's veterans, guardsmen, and reservists has always been one of the highest of all priorities for Special Counsel Bloch at OSC. Taking on an expanded role in providing expeditious enforcement for these brave Americans through USERRA would be an honor for the agency.
4. **Cost models.** OSC is able to provide further information regarding current cost structure or any other USERRA related information.

Components of Budget Request:

The following chart shows how the FY 2008 request will be distributed on a percentage basis:



Field Offices:

Field office expenditures are almost entirely driven by the number of FTE in the field offices. Below is a list of FTE ranges by field office. Staffing levels may be slightly adjusted during the year within these ranges in order to properly meet the management needs of the agency, and its individual units.

Headquarters	70-75 FTE
Midwest Field Office	6-8 FTE
Dallas Field office	9-11 FTE
Oakland Field Office	8-10 FTE
Washington DC Field Office	8-12 FTE

V. Performance under the President's Management Agenda

OSC has developed a results-oriented management agenda that includes many of the core criteria in the President's Management Agenda.

A. Strategic Management of Human Capital

OSC's human capital strategy is aligned with its mission, goals, and organizational objectives: 1) it is integrated into Budget and Strategic Plans; 2) it is consistent with OPM's human capital balanced scorecard and OMB's plan for strategic management of human capital; and 3) it provides for effective merit-based human resource management as described below.

OSC uses existing personnel flexibilities and tools, including leave flexibilities, alternative work schedules, and a telework program. In FY 2006, OSC also drafted and implemented a successful student loan repayment / employee retention program in which 14 employees have participated. And OSC introduced a fitness program for its employees. OSC's performance management systems allow managers to differentiate between high and low performers through the use of appropriate incentives and consequences.

The agency is addressing gaps in human resources competencies talent in its program areas through internal development, upward mobility positions, legal internships, in-house mission-specific training, and hiring additional personnel. OSC also has a highly developed cross training program that enables employees to learn new skills and participate in the work of several units. OSC also captures valuable information and ideas of departing employees through extensive exit interviews. This information is used by senior managers to refine and improve work processes.

In 2006, OSC continued its strategic management initiatives by further refining the reorganization of 2005, in which a Midwest field office, USERRA Unit, Training Unit, Customer Service Unit, and a Document Control Branch were created. OSC now has set agency and division goals for the age of cases under review by the agency. Performance plans are in place for SES members and managers that link to the agency's mission and to strategic goals for that are in place for the individual divisions. OSC also now has measurable finite performance goals in place for each individual employee.

B. Competitive Sourcing

OSC is a small agency, with a highly specialized inherently government mission. 84% of its FTE perform inherently governmental work, and 16% of its FTE are considered commercial in nature. According to OMB Circular A-76 and supplemental guidance issued by OMB, government performance of commercial functions is permitted when, as is the case at OSC, the position activity total is 10 FTE or less.

However, while OSC is small enough that this guidance may exempt a large proportion of OSC's administrative functions that are commercial, OSC is dedicated to the intent of the principles of outsourcing cost-effective performance of all commercial functions. Therefore, personnel resources used to perform any functions considered commercial at OSC are regularly assessed to determine whether they might be more effectively performed by a contractor. OSC looked in depth at this issue in a management assessment it commissioned in the summer of 2004.

OSC now has an interagency agreement with the Department of Interior's National Business Center (NBC) to perform the following services: budget accounting, accounting services and procurement system hosting. OSC has an interagency agreement with BPD for travel services. OSC will review the BPD and NBC interagency agreements semiannually to confirm that they are meeting OSC's needs. OSC also has an interagency agreement with the National Finance Center of the Department of Agriculture to perform payroll and personnel processing functions.

C. Improved Financial Performance

As mentioned above, OSC contracts out certain accounting work under an interagency agreement. The FY 2007 agreement is with the National Business Center (NBC) instead of the Bureau of Public Debt (BPD). This gives OSC a unique opportunity to participate in the design of the processes used for its accounting, and to design specific customized reports that reflect exactly the information most helpful to OSC in managing its funds. Contracting these functions out has provided OSC with more specialized expertise at a lower cost than could be accomplished internally. NBC provides OSC with detailed financial review every quarter. NBC will also provide up-to-date financial information on day-to-day operations for payroll, procurement and travel, as needed by OSC.

As a small agency without an Inspector General, OSC generally submits a combined Inspector General (IG) Act and Federal Manager's Financial Integrity Act report each October. OSC normally reports that it relies on audits and other reviews of BPD operations by the OIG and Office of the Chief Financial Officer (OCFO) in the Treasury Department, as well as information received directly from BPD, for information about any significant issues relating to the services provided to OSC. Now, however, OSC has turned its attention to monitoring reports and reviews concerning NBC.

Historically, OSC received a waiver from OMB for the requirement to have an audit of the agency's financial statements. Since FY 2004, however, OSC has not received an audit waiver. An audit firm selected by BPD evaluated OSC's financial statements and processes, spending time at OSC headquarters and with the Bureau of Public Debt personnel who currently perform the accounting functions for OSC. This audit was completed in November of 2006. The auditors gave an unqualified audit opinion on OSC's financial statements, finding no material weaknesses. The results were similar to those of the FY 2004 and FY 2005 audits.

D. Expanded Electronic Government

OSC provides one-stop service for those who wish to file a complaint or disclosure, or request a Hatch Act advisory opinion. A person can file a Prohibited Personnel Practices complaint on-line. Most of our PPP complaints come into the agency via this channel. A person can also make a complete Whistleblower Disclosure on-line and a Hatch Act advisory opinion may be solicited through the web site.

Those who wish to communicate with a knowledgeable OSC staffer through one of the agency's telephone hot lines will find the relevant information on the web site. OSC's web site is linked to FirstGov, as well as other agency web sites, such as those for the Office of Personnel Management, the Equal Employment Opportunity Commission, and the Office of Government Ethics, among many others. OSC's Information Technology Branch (ITB) staff are continually improving OSC's web site. User sessions on OSC's web site have continued to grow: FY 2006 total number of user sessions was 840,226. This is a 38% increase over the FY 2005 total number of user sessions.

OSC's Information Technology Branch is constantly working to improve OSC's IT efficiencies by continually re-engineering processes for productivity improvements. For example, during FY 2007 and FY 2008 OSC will implement the integrated electronic document management system that was designed and planned during FY 2006. Once completed, this system will be a powerful tool for OSCs staff to search its existing case files, manage current caseload documents, and to process Freedom of Information Act (FOIA) requests. Searches of case files and FOIA requests are currently handled manually. Additionally, OSC will seek to institute computerized tutorials for all electronic filers in order to assure improved understanding of our laws as well as better complaints and improved results.

E. Budget and Performance Integration

OSC's senior staff meet regularly to discuss the current status of programs and initiatives, general policy, and budget, in light of OSC's annual performance goals. Now that OSC has completely revised its performance goals to be concise, measurable, and strictly aligned with the four statutory authorities of the agency, the agency is more effective than ever before in making budgetary decisions in pursuit of realizing its performance goals.

V. TABLES

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TABLE 1

Budget Object Classification of Obligations: FY2006-FY2008			
<i>(in thousands of dollars)</i>			
Budget Object Classification of Obligations	FY2006 (actual)	FY2007 (projected)	FY2008 (projected)
11.0 Personnel compensation	9,655	10,632	10,775
12.0 Civilian personnel benefits	3,093	2,695	2,857
13.0 Benefits to former personnel	23	15	15
21.0 Travel and transportation of persons	132	212	222
22.0 Transportation of things	17	14	15
23.1 Rental payments to GSA	1135	1,217	1,260
23.3 Communications, utilities and misc. charges	114	160	151
24.0 Printing and reproduction	8	15	16
25.0 Other services	962	798	816
26.0 Supplies and materials	103	92	93
31.0 Equipment	258	150	148
32.0 Land & Structures	9	0	0
42.0 Tort Claims	0	0	0
99.9 Total	15,509	16,000	16,368

Detailed notes concerning object classes in **Table 1**:

Object Class 21.0: In FY 2008, OSC's projected requirements are \$222,000. In FY 2005, OSC spent \$297,000 on travel. Fortunately, the agency's video teleconferencing system now provides the ability to conduct certain investigations without travel.

Object Class 23.1: Rental Payments to GSA in FY 2008 will rise 3.5% over FY 2007 levels.

Object Class 25.0: In the Other Services category, 44% of this amount (\$360,000) is required to cover OSC's Interagency Agreement with the National Business Center for accounting and procurement services. Also included here are the following items: approximately \$58,000 for Westlaw fees, (an 8% increase), \$40,000 for training (including \$4,000 for training of OSC's acquisition workforce), \$32,000 for the FY 2008 financial auditors, \$25,000 (a reduced amount) for program support for a document management system, \$54,000 in DHS reimbursement charges for facility security related services, 32,000 for Microsoft Enterprise Licenses, \$47,000 for annual maintenance contracts, \$35,000 for travel management, \$34,000 for Oracle upgrades, \$20,000 for the agency's HSPD-12 program and fees.

Object Class 26.0: The \$93,000 projected for this object class represents office supplies, subscriptions, and other items for the headquarters and all field offices.

Object Class 31.0: In order to operate at its overall agency wide FY 2008 Budget Request funding level, OSC plans to keep expenditures low in this category. This includes reductions in hardware life cycle replacements, and rescheduling of several other technology investments. These funds are realigned to Object Class 11.0 and 12.0, in order to support the salaries and benefits of the approximately 110 FTE of the agency.

Table 2

Analysis of Resources: FY2006-FY2008			
<i>(in thousands of dollars)</i>			
Description	FY2006 <i>(actual)</i>	FY2007 <i>(projected)</i>	FY2008 <i>(projected)</i>
Budget authority	15,172	16,000	16,368
Outlays	13,476	14211	14538
Approximate full-time equivalent employment (FTE) work years	103	110	110

TABLE 3

Breakdown of Matters^a Pending and Completed FY2002 to FY2006					
	FY2002	FY2003	FY2004	FY2005^b	FY2006
Matters pending at beginning of fiscal year	1,200	1,415	1,605	778	777
New matters received	2,345	2,530	2,798	2,684	2,718
Matters closed	2,118	2,344	3,612	2,685	2,814
Matters pending at end of fiscal year	1,423	1,601	791	777	681

^a The term “matters in this table includes prohibited personnel practice complaints (including Transportation Security Administration matters); Hatch Act complaints, whistleblower disclosures (DU matters); USERRA referrals from the MSPB pursuant to 5 U.S.C. x 1221(f)(3).

^b Includes USERRA Documentation project matters.

TABLE 4

Summary of Prohibited Personnel Practice (PPP) Complaints Activity – Receipts and Processing^a		FY 2002	FY 2003	FY2004	FY 2005	FY2006
Pending complaints carried over from previous fiscal year		740	594	653	524	521
New complaints received (Intake Unit)		1,558	1,791	1,964 ^b	1,771	1,805
<i>Total complaints:</i>		2,298	2,385	2,617	2,295	2,326
Complaints referred for field investigation		191	162	244	198	143
Complaints processed and closed		1,704	1,732	2,093	1,774	1,930
Processing times	< 240 days	1,284	1,471	1,799	1,198	1,693
	>240 days	420	261	294	576	237
Percentage processed in under 240 days		75%	85%	86%	67.5%	88%

^a The numbers in this table, as well as in other tables in this report, may vary somewhat from those in previous years' reports. This is due to the fact that in response to an audit by the General Accounting Office, OSC enhanced its case tracking software system to more accurately track prohibited personnel practice and whistleblower disclosure matters. Use of the improved system has led to recalibration of some statistics from previous years.

^b This figure is higher than reported in the President's FY 2006 Budget because it includes several closed cases that were reopened.

TABLE 5

Summary of Prohibited Practice Complaints Activity – Favorable Actions						
		FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Total favorable actions obtained ^a (all prohibited personnel practices)	<i># of actions</i>	126	115	80	45	52
	<i># of matters</i>	107	83	65	45	48
Favorable actions obtained (reprisal for whistleblowing)	<i># of actions</i>	98	75	57	37	40
	<i># of matters</i>	83	75	49	37	37
Stays negotiated with agencies ^a		7	6	11	3	8
Stays obtained from Merit Systems Protection Board		1	1	1	1	1
Disciplinary actions negotiated with agencies		13	12	11	3	4
Corrective action complaints filed with the Board		0	0	1	1	1
Disciplinary actions obtained from the Board		0	1	0	1	0

^aThe purpose of this breakout is to show the number of favorable actions obtained, and the number of matters involved. A matter (case) can have more than one action (favorable outcome).

^b Stays and disciplinary actions listed in this table (except for disciplinary actions obtained by OSC from the Board) are included in the totals shown in the first two rows above, but are broken out here for further information.

TABLE 6

Summary of Prohibited Personnel Practice Complaints Activity – Mediation Program						
		FY2002	FY2003	FY2004	FY2005	FY2006
Matters identified before investigation as mediation-appropriate		39	43	82	22	52
Initial acceptance rates by parties	<i>Complainants</i>	80%	82%	68%	27%	83%
	<i>Agencies</i>	68%	69%	64%	22%	59%
Mediated and other resolutions ^a		14	23	18	5	11
Resolution rate – OSC mediation program		82%	92%	86%	100%	55%

^a This category includes complaints settled through mediation by OSC (including “reverse-referrals”- i.e., cases referred back to the Alternative Dispute Resolution Unit by an Investigation and Prosecution Division due to the apparent potential for a mediated resolution). Also included in this category are complaints that entered the initial OSC mediation process, and were then resolved through withdrawal of the complaint, or through mediation by an agency other than OSC.

TABLE 7

Summary of Hatch Act Advisory Opinion and Complaint Activity						
		FY2002	FY2003	FY2004	FY2005	FY2006
Advisory opinions issued		3,245	3,284	3,913 ^a	2,558	3,004
New advisory requests received (written)		n/a	159	176	191	237
New complaints received		213	196	248	245	299
Warning letters issued		49	43	93	87	76
Complaints processed and closed in fiscal year		107	201	357	310	266
Corrective actions taken by recipients of cure letters:	Withdrawal from partisan races	12	18	17	4	9
	Resignation from covered employment	5	7	8	10	22
	Other	1	0	6	3	2
	Total:	18	25	31	17	33
Disciplinary action complaints filed with the Merit Systems Protection Board		4	4	7 ^b	11	6
Disciplinary actions obtained (through negotiation or ordered by the Board)		4	4	2	8	8
Complaints pending at end of FY		260	254	146	79	112

^aThis number is lower than reported in the President's FY 2006 Budget (Other Independent Agencies, Appendix, p. 1209) because of a duplication error.

^bThis number is higher than reported in the President's FY 2006 Budget because of system entries made after that publication.

TABLE 8

Summary of Whistleblower Disclosure Activity – Receipts and Dispositions ^a						
		FY2002	FY2003	FY2004	FY2005	FY2006
Pending disclosures carried over from previous fiscal year		287	556	690	98	110
New disclosures received		555	535	572	485	435
Total disclosures		842	1,091	1,262	583	545
Disclosures referred to agency heads for investigation and report		18	11	18	19	24
Referrals to Agency IGs		6	3	8	14	10
Agency head reports sent to President and Congress		10	23	8	16	24
Results of agency investigations and reports	<i>Disclosures substantiated in whole or in part</i>	7	13	8	16	21
	<i>Disclosures unsubstantiated</i>	3	10	0	0	3
Disclosures processed	<i>In more than 15 days</i>	192	290	1,019 ^b	237	275
	<i>In less than 15 days</i>	94	111	135	236	203
Percentage of disclosures processed in less than 15 days		33%	28%	12%	50%	42%
Disclosure matters processed and closed		286	401	1,154 ^c	473	478

^a It should be noted that many disclosures contain more than one type of allegation. This table, however, records all allegations received in a whistleblower disclosure as a single matter.

^b This number is large due to the backlog reduction effort.

^c This number is large due to the backlog reduction effort, and includes approximately 500 cases that had been reviewed in prior years and determined to be low priority and probable closures

TABLE 9

Summary of USERRA Referral Activity					
	FY2002	FY2003	FY2004	FY2005	FY2006
Pending referrals carried over from previous fiscal year	10	8	4	12	6
Referrals received from DOL during fiscal year	19	7	14	30	11
Pending Referrals closed	21	11	6	36	14
Pending referrals at the end of the fiscal year	8	4	12	6	3
Closed cases where corrective action was obtained (including corrective actions obtained in matters referred to litigation)	n/a	3	1	6	3
Closed cases where no corrective action was obtained	n/a	8	5	25	11

Litigation closed; no corrective action obtained	n/a	n/a	n/a	n/a	n/a
Litigation closed; corrective action obtained	n/a	n/a	n/a	3	1
Matters referred for litigation pending	n/a	n/a	n/a	2	1
Pending litigation matters carried over from prior FY	n/a	n/a	n/a	n/a	2

TABLE 10

Summary of USERRA Demonstration Project Activity^a			
	FY2004	FY2005	FY2006
Pending referrals carried over from previous fiscal year		0	54
Cases opened		111	168
Cases closed		57	126
Cases pending at the end of the fiscal year		54	96
Closed cases where corrective action was obtained		16	35
Closed cases where no corrective action was obtained		38	91
Closed cases referred for litigation		0	n/a

^a Under VIBA, P.L. 108-454; OSC started receiving cases in Feb. 05

VII. APPENDICES

OSC's Revised Strategic Plan (FY 2006-2010)

The Five Year Strategic Plan – Introduction

Beginning in 2000, OSC saw an increased interest in Whistleblower Disclosure cases, and in particular following September 11, 2001 there was a sizeable increase in filings, greater awareness of security and health and safety issues, improved outreach by OSC, and widespread publicity about high-profile cases. During this time of dynamic growth and change, the agency focused on establishing standards for prioritizing cases but did not systematically address the growing backlog or the process-driven system that contributed to the backlog. The system in place permitted paperwork and multiple layers of review that did not, in many cases, contribute to any tangible benefit or result to the agency or the merit system or our constituency, the federal executive employees. While there were some advantages gained through the establishment of standards for prioritization, it proved to be very ineffectual in reducing the backlog. In fact the backlog grew worse. In the past several years, the agency experienced an increase in caseload level across all units. This increase, coupled with a top-heavy and process-driven organizational structure and byzantine processes, caused the backlog to escalate even more in 2002, 2003 and early 2004. This was the situation facing the new Special Counsel, as he entered the agency in January of 2004. All of this was reflected in a GAO report that came out early in 2004, shortly after the new Special Counsel's arrival. It called for a radical solution to these problems that would not only solve existing backlogs but assure the structure and processes of the agency would be permanently changed to solve this 10-year backlog trend once and for all.

In the spring of 2004, an outside assessment team was hired to evaluate and assess the workforce, strategic alignment, agency efficiency, training needs, and strategic human capital management of the agency. Concurrently, a Special Projects Unit (SPU) was formed to go into one OSC operating unit at a time and work side by side for months with the unit's personnel in a long and intense backlog reduction effort. At the same time, the SPU was analyzing the processes of the agency, many of which were convoluted. The SPU made recommendations to the Special Counsel, and the final report from the assessment team with specific recommendations was released in September 2004. Soon after, in early 2005, the agency was significantly reorganized, both structurally and procedurally. This reorganization is now bearing fruit in the way the streamlined divisions and empowered individual employees accomplish the business of the agency. The last phases of the reorganization, updates on the standard operating procedures to be used on a day-today basis by individual investigators and attorneys, are being implemented currently.

With the backlog fully controlled in all units for the first time in recent history, OSC is now focusing on the concept of expeditious justice. Since his first days in office, the Special Counsel has been summarizing his views on slow case processing with the phrase "Justice delayed is justice denied." Achievements have been realized in case processing times. Now OSC stands ready to set aggressive goals in case processing times, and to find innovative ways to meet those goals.

During the last five years, the agency organizational structure and case processing procedures were not the only significant challenges facing the agency. The Annual Performance Goals were opaque and close to being meaningless. They were unquantifiable, and seemed to be designed to obscure rather than to provide illumination into the effectiveness of the agency's various operating units.

With a reorganized agency now hitting on all cylinders, it is clear the revision of the Annual Performance Goals is the next step to take. Therefore, the U.S. Office of Special Counsel presents the following very revised Five Year Strategic Plan, and associated FY 2007 Annual Performance Budget Plan.

These goals serve three purposes. They focus the agency on the reasons for its existence. They set aggressive goals that can bring out the best in individuals, units, and management. And they provide an additional way for the public and Congress to see and appreciate what is happening at OSC.

The Five Year Strategic Plan – Where Does OSC want to be in 2010?

- **Timeliness.** The U.S. Office of Special Counsel currently has a reputation for quality. By the year 2010, OSC wants to have firmly established its reputation for speed as well. This means meeting and exceeding statutory time limits associated with two of OSC's missions (PPPs and Disclosures). In the case of the agency's responsibility to examine incoming disclosures, part of the solution may include a change to the statute itself.

For the other two missions of the agency (Hatch and USERRA), in the absence of statutory requirements, OSC will set aggressive goals for timeliness for each mission. A detailed description of the timeliness goal for each mission is included below, in the Revised Goals section.

- **Quality.** OSC's Complaints Examining Unit has long had the motto "We have to be right" when performing legal examinations of incoming claims which allege Prohibited Personnel Practices. And it is true. If CEU ever erroneously closed a case for lack of merit, besides closing an avenue of possible remedy to the Federal employee who made the claim, OSC would soon know about it. If OSC were to make a mistake in the legal analysis, others (outside attorneys, Congress, interest groups, etc.) would soon be pointing out what specific legal mistake was made. This is why such care goes into every incoming CEU case. All cases are discussed with management, and in complex cases, the back and forth discussion includes the Senior Associate Special Counsel, a career SES employee that has been with the agency for many years. The reality is that CEU is practically never wrong in its legal analysis. Perhaps once every several years (with an average of 1800 cases per year being filed with CEU).

Other units within OSC have their own robust sense of quality. The aggregate result is that the agency already has a strong reputation. Every year between now and 2010, we want to build on this existing strength, and raise the level of quality wherever possible. With the help of the measurable quality goals outlined below for each mission of the agency, we look forward to achieving continued progress.

- **Outreach.** Aggressive investigations and enforcement are one good way of slowly educating the management in executive branch agencies, in terms of what types of actions are legal, and what types of actions are violations of the Civil Service Reform Act, the Hatch Act, or the Uniformed Services Employment and Reemployment Rights Act. But the other side of the prevention coin is for OSC to help prevent wrongdoing from occurring in the first place, through outreach and education concerning the laws. OSC takes its outreach responsibilities very seriously, realizing that the overall goal is a Federal workplace free from illegal activity. This is the reason that measurable outreach goals are included in the revised performance plan for several of the missions of OSC.
- **Great place to work.** While the Office of Special Counsel is already a good place to work, another goal is to continue making progress in the creation of an excellent work environment. We see this as a combination of providing meaningful work, having good management at all levels of the organization, and making use of as wide a

variety of innovative benefits as possible, as an aid in attracting and retaining top talent. Part of having good management for the agency is in the development of managers in-house and creating and implementing a thoughtful succession plan for the management that will be the future of the agency. This is in progress at OSC.

As for innovative benefits, besides the flexible schedules and alternate work schedule benefits, OSC has a successful Student Loan Repayment / Employee Retention Plan that is highly valued by the attorneys at OSC. Various units of OSC have been using a Telecommuting Pilot Plan, and in the future this plan will be expanded to more units of the agency.

- **Emphasis on USERRA.** It is becoming well known that the Special Counsel is doing everything possible to raise the profile of the Uniform Services Employment and Re-employment Rights Act, in order to put an end to discrimination against service members in the Federal workforce. Under his leadership, OSC aggressively enforces the Uniform Services Employment and Reemployment Rights Act. In fact, OSC set a precedent in FY 2005 by filing three USERRA cases in one year. Full corrective action was received in all three cases.

In addition, the USERRA Unit does outreach so that returning reservists and veterans are aware of their rights and of the existence of OSC. The Special Counsel himself does outreach for USERRA (on the Pentagon channel and at other high profile venues).

With the signing of the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, OSC's role in protecting service members again expanded. Under a demonstration project created by the VBIA, OSC now has the authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit (instead of the Department of Labor's Veterans Employment and Training Service). Under the project, OSC also receives and investigates all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person's social security number.

Through 2010, OSC will continue to look for ways to provide superb assistance to service members under USERRA. The agency is committed to continue finding the resources to enable this legislation to protect service members at the level at which it was intended to do.

The Five Year Strategic Plan – the Revised Goals

OSC's revised performance goals are organized by the four statutory missions of the agency: (1) to safeguard the merit system in federal employment by protecting federal employees and applicants from prohibited personnel practices (PPPs), especially reprisal for whistleblowing; (2) to enforce restrictions on political activity by government employees covered by the Hatch Act; (3) to facilitate disclosures of wrongdoing in federal government by operating a secure channel for whistleblowers; and (4) to enforce military personnel rights against re-employment discrimination for military service.

The performance goals of the agency are divided into four sections corresponding to the above statutory missions. There is some redundancy between the explanations of the performance goals in this section of the Five Year Strategic Plan, and the explanation of the goals in Appendix B (OSC Annual Performance Budget Goals.) This is intentionally done, since some readers may read only the Strategic Plan and others may read only the Annual Performance Budget Goals.

OSC's Revised Strategic Plan

OSC's Prohibited Personnel Practice Enforcement Mission

Performance Goal 1:

TO PROTECT THE MERIT SYSTEM THROUGH TIMELY CASE PROCESSING

The indicator selected is the percentage of PPP cases processed in less than the statutory requirement of 240 days.

This timeliness indicator measures the combined effectiveness of both OSC's Complaints Examining Unit (CEU) and OSC's Investigation and Prosecution Division (IPD).

OSC receives complaints of Prohibited Personnel Practices into the CEU. If, after initial screening, investigation, and legal analysis, a complaint meets the requirements for merit, it is internally referred to the IPD for further investigation. If the IPD investigates and determines the case does indeed have merit, the IPD either seeks relief for the claimant through mediation, settlement, or prosecution.

The target for FY 2006 is 85% and the targets for FY 2007 and FY 2008 are 92%. The reason the target is less than 100% is because in some cases the settlement process can take a considerable amount of time. In cases involving litigation, the timeframe for events is no longer driven by the speed of work of OSC attorneys and investigators. To strive for 100% would carry the implicit assumption that OSC would not litigate any cases.

Success in achieving the targets set for FY 2006, FY 2007, and FY 2008 would be important steps in providing expeditious justice for PPP claims from employees in the Federal workforce.

Performance Goal 2:

TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS

The important performance indicator for quality is the percent of favorable outcomes in meritorious cases.

The numerator for the equation to determine the percent of favorable outcomes is the number of favorable outcomes. The number of favorable outcomes is defined as the number of successful mediations plus the number of settlements achieved plus the number of successful litigations. The denominator for the equation is the number of meritorious cases.

A meritorious case is one in which the Office of Special Counsel is satisfied that claimant is entitled to relief. In certain meritorious cases, OSC may endeavor to use mediation to secure relief for the claimant. If mediation was not appropriate or did not succeed, OSC may exercise its prosecutorial authority and file for corrective or disciplinary action before the MSPB. As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to prosecute successfully cases warranting corrective action.

Performance Goal 3:

TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES

The indicator is defined as the number of new Federal agencies certified in the 2302 (c) Program by OSC.

OSC has statutory authority to administer the 2302(c) Program, which recognizes the federal sector's need for awareness of Prohibited Personnel Practices and training in avoidance of committing them. However, OSC cannot force any agency to apply for certification. There are no statutory penalties for not being certified. This annual numeric target is not overly aggressive because 1) OSC cannot force compliance, and 2) the number of Federal agencies that may seek certification is limited by the number of agencies in existence. OSC already has 51 certified agencies, including most of the major ones. Nevertheless, OSC has set targets to add participating agencies to the 2302(c) certification program.

Other outreach activities:

- Additionally, members of the Investigation and Prosecution Division and the Complaints Examining Unit regularly accept invitations to provide outreach services designed to educate Federal personnel on these issues so that agencies comply with the law.
- OSC's Customer Service Unit maintains a telephonic hotline for answering PPP-related questions from members of the Federal workforce. Employees from OSC were able to educate employees of many agencies during a presentation at the Federal Dispute Resolution Conference (FDR).
- OSC's website provides a wealth of information regarding PPPs and is a valuable and constantly improving resource for educating the Federal workforce on this subject. Every year the website statistics for user sessions increase, with an average increase in activity of 20% above the previous year.
- The GoLearn project is a new initiative that will bring OSC expertise to thousands of Federal workers. OSC does not have responsibility for this project, other than providing expert content.

OSC's Hatch Act Mission

Performance Goal 1:

TO DEFEND THE MERIT SYSTEM BY ENFORCING THE HATCH ACT THROUGH TIMELY CASE PROCESSING

Performance Indicator A is the percentage of formal written advisory opinions issued in less than 120 days. The target is set at 75% for FY 2006 and 80% for FY 2007 and FY 2008.

Written advisory requests are the requests for an advisory opinion that come in to OSC's Hatch Act Unit that are very complex and require significant analyses before answering.

Performance Indicator B is the percentage of oral and e-mail advisory opinions issued in less than five days. If an oral or e-mail advisory opinion were to take longer than five days, generally it would be treated as a formal written advisory request and be captured by Indicator A. Therefore the goal for processing these oral and e-mail advisories is set at 99% within the five days. With a constant focus on meeting this target, there should be very few times that a requested oral or e-mail advisory opinion is not handled by the Hatch Act Unit within the five days.

Performance Indicator C is the percentage of Hatch Act complaints resolved in less than 365 days. The target is set at 60% for FY 2006 and 70% for FY 2007 and FY 2008. A number of these involve litigation, and the timeframe for events to transpire during litigation is out of OSC's control. Even for those that do not actually end in litigation, sometimes there are timeframes outside of OSC's control. For example, OSC may not know that the subject of a complaint ignored an OSC warning to pull out of an election or resign employment until the election actually transpires and it can be verified that neither action has occurred.

Performance Goal 2:

TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS

The performance indicator for quality in Hatch Act investigations and enforcements is the percent of favorable outcomes achieved by OSC in meritorious cases.

A meritorious Hatch Act case is a case in which OSC finds a violation of the Hatch Act. A favorable outcome in a Hatch Act case is either (1) successful litigation of the case; (2) successful settlement of the case; or (3) successful corrective action (individual corrected his violation after receiving notice from OSC, for example, by withdrawing his candidacy or resigning from his employment).

The target is set at 90% for FY 2006 and 90% for FY 2007 and FY 2008.

Performance Goal 3:

TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES

This goal denotes the importance of going out to do outreach programs at agencies that make a request of OSC. Performance Indicator A is specifically defined as the percent of Hatch Act trainings and outreaches given, over the number of invitations received. OSC has set a target for the Hatch Act Unit to fulfill 90% of these requests each year, recognizing that there will be times when a staff member can not be spared, due to the caseload at the time and/or trial schedules.

Performance Indicator B deals with the written advisory section of the Hatch Act portion of OSC's website. The Hatch Act Unit commits to adding one complex advisory opinion to the website every month. There are already many written opinions displayed on the website. Strengthening the content provides more ability for federal, state, and local employees subject to the Hatch Act to research their questions online and gain an informed idea of what the law means in their particular situation.

Other outreach activities:

- In addition to the performance of outreach visits and the website enhancement described above, OSC has produced both a Federal Hatch Act DVD and a State & Local Hatch Act DVD that explains the basics of the Hatch Act laws for each of these audiences. OSC is now able to mail the appropriate DVD to certain requestors who require a basic tutorial overview of the Hatch Act.
- OSC continues to provide free Hatch Act posters to requesting agencies, if the quantity requested is less than ten. If the quantity requested exceeds ten, the interested agency can use OSC's rider at the Government Printing Office to order the required number of Hatch Act posters.

OSC's USERRA Mission

Performance Goal 1: TO ENFORCE THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT THROUGH TIMELY CASE PROCESSING

OSC receives four types of USERRA cases—RE, DP-OD, DP-MX, and DP-TSA:

RE cases - USERRA cases referred to OSC for prosecution after investigation by the Dept. of Labor.

DP-OD cases - demonstration project USERRA cases where the claimant has an odd-numbered SS #.

DP-MX cases - demonstration project USERRA cases where the claimant has an odd-numbered SS# and alleges a PPP in addition to the alleged USERRA violation.

DP-TSA cases - Transportation Security Administration USERRA cases.

Given the different nature of each of these types of cases, different performance indicators apply. Therefore, under Goal 1 (timely case processing) there is a Performance Indicator A and a unique set of targets for each of these four types of cases.

RE Cases:

Definition: Under USERRA, certain federal sector claims are investigated by U.S. Department of Labor, Veterans' Employment and Training Service (VETS). Pursuant to 38 U.S.C. § 4324, in the event that VETS is unable to resolve such a claim, a claimant has a right to have his or her claim referred to OSC for a determination on whether OSC will represent the claimant before the U.S. Merit Systems Protection Board (MSPB). Such cases are identified by OSC as "RE cases."

RE cases have already been investigated by VETS and reviewed by a DOL Office of Regional Solicitor (RSOL). The USERRA Unit receives the VETS investigative file and a legal memorandum from RSOL indicating whether RSOL recommends that OSC represent the claimant. USERRA Unit reviews the information and make as "de novo" determination.

Where the USERRA Unit disagrees with an RSOL determination that OSC should represent the claimant, the unit sends the RSOL a report setting forth the factual and legal basis of the unit's preliminary determination not to represent the claim and invites the RSOL to respond. The unit considers any response received from the RSOL in making a final representation determination. The RSOL is typically given two weeks to respond to the report.

It is to be noted that while RE cases have already been investigated by VETS, OSC has found that further investigation is often warranted (e.g., key witnesses need interviewing; important documents need to be obtained; too much time lapsed between alleged initial violations and their referral to OSC). In such cases, the USERRA Unit will always contact the agency and relevant witnesses to obtain the information necessary to allow it to make a well-reasoned determination regarding the prosecutorial merit of a given claim.

The need and extent of any supplemental investigation affects the processing time of RE cases and is reflected in the performance indicator.

Performance Indicator A for the referral cases is defined as the average number of days in which the representation decision is made. The target for this performance indicator is set at 75 days for FY 2007 and FY 2008.

DP-OD cases:

Definition: In late 2004, Congress expanded OSC's role in enforcing USERRA and protecting the employment rights of federal employees and applicants. Pursuant to a demonstration project established by section 204 of the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, OSC was given the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. Under the demonstration project, OSC also investigates all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person's social security number (so-called "mixed claims"). VETS' investigative authority was limited to federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit and who do not allege a prohibited personnel practice. Pursuant to section 204(d)(1) of VBIA, OSC shall administer the demonstration project and DOL shall cooperate with OSC in carrying out the demonstration project. The demonstration project began on February 8, 2005, and ends on September 30, 2007.

Given the new, additional investigative responsibilities Congress assigned to OSC with the passing of the demonstration project and the Special Counsel's desire to revitalize OSC's enforcement of USERRA during his term, Special Counsel Bloch established the USERRA Unit as part of the January 6, 2005, directive reorganizing the agency. The USERRA Unit is the in-take, investigative, and prosecutorial unit for all matters pertaining to USERRA and veteran-related employment issues. The Unit is responsible for investigating USERRA claims to determine whether prosecution is warranted.

DP-OD cases are federal sector USERRA claims filed by persons having an odd-numbered social security number. DP-OD cases typically come from two sources: 1) from VETS, where a claimant files a USERRA Form 1010 (i.e., a USERRA complaint form) with VETS and 2) directly from the claimant, where the claimant files with OSC the OMB approved form OSC-14 "Complaint of Possible violation of USERRA."

The USERRA Unit conducts an investigation of DP-OD cases and determines whether OSC will represent the claimant in a USERRA action before the MSPB. The performance indicator reflects the time reasonably expected to investigate such cases.

Performance Indicator A for the odd-numbered social security number demonstration project cases is defined as the average number of days in which the representation decision is made. The target for this performance indicator is set at 160 days for FY 2007.

DP-MX cases:

Definition: As stated above, OSC is responsible for investigating all federal sector USERRA claims where the claimant, regardless of his or her social security number, alleges a prohibited personnel practice over which OSC has jurisdiction.

The USERRA Unit conducts an investigation of DP-MX cases and determines whether OSC will represent the claimant in an USERRA or prohibited personnel practice action before the MSPB.

The processing time of DP-MX cases is affected by 1) additional complexity of such cases and 2) the USERRA Unit's adoption of OSC's practice in prohibited personnel practice cases of granting a claimant 13 days to respond to OSC's preliminary determination regarding prohibited personnel practice allegations. The performance indicators incorporate those factors.

Performance Indicator A for the demonstration project cases in which a PPP is also alleged (mixed case) is defined as the average number of days in which the representation decision is made. The target for this performance indicator is set at 160 days for FY 2007.

DP-TSA cases:

On June 9, 2005, the MSPB held in Spain v. Department of Homeland Security (MSPB Docket # PH-0353-04-0361-I-1) that USERRA does not apply to Transportation Security Administration (TSA) Security Screeners or TSA Supervisory Security Screeners and, therefore, the MSPB does not recognize jurisdiction over such cases. Consequently, OSC is unable to prosecute USERRA actions involving TSA Security Screeners or TSA Supervisory Security Screeners.

Notwithstanding the Spain decision, TSA voluntarily permits OSC to investigate USERRA claims and reports its findings and recommendations for corrective action to TSA management officials (akin to the manner in which OSC is permitted to investigate and report on allegations of whistleblower reprisal).

The performance indicator for these types of cases reflects the MSPB's decision in the Spain case.

Performance Indicator A for the TSA cases is defined as the average number of days in which a "no merit" determination is made or a request for voluntary corrective action is sent to TSA. The target for this performance indicator is set at 160 days FY 2007.

Performance Goal 2:
TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS

Where the Office of Special Counsel is satisfied that claimant is entitled to relief, then it may exercise its prosecutorial authority and represent the claimant before the MSPB and, in certain circumstances, the U.S. Court of Appeals for the Federal Circuit. See 38 U.S.C. §§ 4324(a)(2)(A) and (d)(2). As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to prosecute successfully cases warranting corrective action. “Meritorious cases” under this performance indicator are to be distinguished from the “test cases” found under Performance Indicator B.

Performance Indicator A is defined as the percent of favorable outcomes in cases determined by OSC to be meritorious. Total favorable outcomes are the sum of the number of successful mediations and the number of settlements achieved and the number of successful litigations. The target for this indicator is set at 90% for FY 2007 and FY 2008.

It is foreseeable that OSC will desire to file cases where the law is not clear (e.g., novel legal issues requiring “test cases” to define the bounds of the law) but will establish legal precedent benefiting all service members, if the litigation is successful. The outcomes of these types of cases do not depend on OSC’s skill in weighing of the evidence, applying of law, and trying the case. Instead, the cases involve questions of law.

It is difficult to define a performance goal that accurately reflects “success” or “failure” of OSC’s identification of cases that are fertile for expanding the law. The mere fact of filing test litigation with an eye toward expanding the law, however, seems appropriate. Performance Indicator B captures this concept.

Performance Indicator B is defined as the number of test cases filed. While not appropriate to set a specific target for this indicator, since there may be years when no viable test case presents itself, the number of such test cases that OSC files is still an important indicator to track, as OSC assists in safeguarding the rights of service members in the parts of the law that are still vague or undefined.

Performance Goal 3:

TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES

OSC recognizes the federal sector's need for USERRA training although it has no statutory obligation to provide it. Thus, the USERRA Unit regularly accepts invitations to provide outreach services designed to educate federal personnel on USERRA issues so that agencies comply with the law. For example, such outreach efforts include USERRA seminars presented by OSC staff to the D.C. Bar in May 2005, at the annual Federal Dispute Resolution Conference in August 2005 in New York, and at an upcoming presentation at the Army's Advanced Labor and Employment Law Course on October 18, 2005, at the Judge Advocate General's Legal Center and School in Charlottesville, Virginia. Additionally, the unit maintains a telephonic and web-based "hotlines" for answering USERRA-related questions from the public and private sectors.

The performance indicator reflects the practical budgetary constraints of providing OSC-sponsored USERRA training to all requesters and OSC ability and desire to provide such training.

Performance Indicator A is specifically defined as the percent of USERRA outreaches given, over the number of invitations received. The USERRA Unit has set a target to fulfill 90% of these requests each year (where the requesting agency is paying for travel), recognizing that there will be times when a staff member can not be spared, due to the caseload at the time and/or trial schedules.

The USERRA Unit will also endeavor to assist those agencies who need outreach or training but are unable to offer reimbursement for expenses. Thus, the target for this Performance Indicator B is 50%. It is estimated that half of the requesting agencies of this sort will be local and therefore the costs would be minimal for OSC to meet their needs.

OSC's Whistleblower Disclosure Mission

Performance Goal 1:

TO RECEIVE AND RESOLVE WHISTLEBLOWER DISCLOSURES WITH TIMELY PROCESSING

Pursuant to § 1213(b), when the Special Counsel receives any disclosure of information by an [employee] which the [employee] reasonably believes evidences: a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, the Special Counsel must review the information within 15 days and determine whether there is a *substantial likelihood* that the information discloses one or more of the above categories of wrongdoing.

OSC handles these whistleblower disclosures under 5 U.S.C. § 1213 in one of several ways. If the Special Counsel makes a positive determination, he must transmit the information to the appropriate agency head, and require the agency head to conduct an investigation and submit a written report on the findings of the investigation. These referrals under § 1213 represent a small percentage (approximately 8% for FY 2006) of the total number of cases resolved by OSC in any fiscal year.

If the Special Counsel does not make a positive determination, the matter is closed. These closures make up the vast majority (92% for FY 2006) of the total number of disclosures resolved by OSC in any fiscal year.

If the Special Counsel is unable to make the substantial likelihood determination on the basis of the information supplied by the whistleblower, the matter may be informally referred to the Inspector General (IG) for the agency involved, with a request that the IG assist OSC in making the determination.

Because of the time involved in preparing cases for referral under § 1213 and in cases referred to the IG, the statutory 15-day time frame is difficult to meet in these cases. As a result the indicator for Goal #1, "percentage of disclosures processed within the statutory 15 day timeframe," is intended to capture only those cases in which the substantial likelihood determination has not been met. It should also be noted that the Special Counsel is considering proposing a legislative change in the statutory language to enlarge the time frame from 15 days to 45 days, a number which would more accurately reflect the average amount of time required to resolve a whistleblower disclosure. The performance indicator for this goal is the percentage of disclosures resolved within the statutory 15 day time frame. The target is 50% in FY 2007 and 50% in FY 2008.

Performance Goal 2:

TO PROMOTE JUSTICE AND PROTECT THE MERIT SYSTEM THROUGH THE QUALITY OF DETERMINATIONS AND REFERRALS

The U.S. Office of Special Counsel does not have investigative or enforcement authority under 5 U.S.C. § 1213. As such, the Indicator for Goal #2 reflects a quality measure based on the number of cases referred under §1213, regardless of the outcome of the referral. The percentage of cases referred out of the total number of cases received in a fiscal year is a relatively low number historically, and as such, the FY 2006 and FY 2007 targets are low. Since OSC's Disclosure Unit processes nearly 500 disclosures annually, this percentage can be seen as an indicator of the average relative height of the "substantial likelihood" bar in a given year.

The Indicator for Goal #2 reflects only one way of measuring quality as defined in Goal #2, to "promote justice and protect the merit system." **Because the statutory mandate of § 1213 contemplates that OSC make a determination whether there is a *substantial likelihood* that the information discloses wrongdoing, a negative determination under the statute, resulting in a closure, is as quality driven as a positive determination resulting in a referral.** OSC's analysis of a whistleblower disclosure may result in a determination not to burden an agency with an inappropriate referral, thus promoting justice and protecting the merit system. Notwithstanding this difficulty in identifying a measure of quality, the individual whistleblower who initiates the disclosure, thus accessing the statutory protections, is more inclined to measure quality by whether or not his or her disclosure is referred. As such, the Indicator for Goal #2 for now reflects this single measurement.

The performance indicator for this goal is specifically defined as the percentage of disclosures referred to agency heads, pursuant to 5 U.S.C. § 1213, or under the informal IG referral process. The target for FY 2007 and FY 2008 is set at 7%.

Performance Goal 3:

TO ENHANCE OUTREACH TO FEDERAL AGENCIES TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES (DISCLOSURE)

OSC's Disclosure Unit does not have a statutorily defined mandate to perform compliance outreach, and as such does not regularly provide training or outreach to other government entities, with the exception of informational presentations to foreign delegations and annually at the Federal Dispute Resolution Conferences.

OSC continues to provide free Whistleblower Disclosure Act posters to requesting agencies, if the quantity requested is less than ten. If the quantity requested exceeds ten, the interested agency can use OSC's rider at the Government Printing Office to order the required number of Whistleblower Disclosure Act posters.

APPENDIX B:

OSC ANNUAL PERFORMANCE BUDGET GOALS (FY 2008)

**OSC Statutory Missions:
 PPP ENFORCEMENT MISSION**

Goal 1: TO PROTECT THE MERIT SYSTEM THROUGH TIMELY CASE PROCESSING	
PPP Enforcement Mission	PROHIBITED PERSONNEL PRACTICES CASES
PERFORMANCE INDICATOR	Indicator A: Percentage of cases processed in less than 240 days.
FY 2006 TARGET	85%
FY 2006 RESULTS	89%
FY 2007 TARGET	92% ^a
FY 2007 RESULTS	
FY 2008 TARGET	92%
FY 2008 RESULTS	

Comments for Goal #1:

1. Indicator A: PPP Cases.

This timeliness indicator measures the combined effectiveness of both OSC’s Complaints Examining Unit (CEU) and OSC’s Investigation and Prosecution Division (IPD).

OSC receives complaints of Prohibited Personnel Practices into the CEU. If, after initial screening, investigation, and legal analysis, a complaint meets the requirements for merit, it is internally referred to the IPD for further investigation. If the IPD investigates and determines the case does indeed have merit, the IPD either seeks relief for the claimant through mediation, settlement, or prosecution.

The reason the target is less than 100% is because in some cases the settlement process can take a considerable amount of time. In cases involving litigation, the timeframe for events is no longer driven by the speed of work of OSC attorneys and investigators. To strive for 100% would carry the implicit assumption that OSC would not litigate any cases.

¹ The FY 2007 target for PPPs processed in under 240 days has been lowered slightly from 95% to 92%. The reason is that OSC has several high priorities in FY 2007 that necessitate the reallocation of resources from both the units that handle PPPs (the Complaints Examining Unit and the

Investigation and Prosecution Division). Several IPD attorneys are on detail to the Hatch Act Unit, because of the high number of Hatch Act cases. The agency does not want to risk development of a Hatch Act backlog. Two CEU attorneys and one IPD attorney are on detail to the USERRA Unit, to assist with handling the high number of USERRA cases. In addition, an IPD investigator has taken a position in the USERRA unit on a permanent basis. In a small agency, reallocation of resources to assist with high priority initiatives has an effect. The effect in this case is that 92% is now an aggressive target for the agency to reach in terms of processing PPPs in less than 240 days.

Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS	
PPP Enforcement Mission	PROHIBITED PERSONNEL PRACTICES CASES
PERFORMANCE INDICATOR	Indicator A: % favorable outcomes in cases determined by OSC to be meritorious = (# successful mediations + # of settlements achieved + # of successful litigations) / (# meritorious cases)
FY 2006 TARGET	99%
FY 2006 RESULTS	100%
FY 2007 TARGET	99%
FY 2007 RESULTS	
FY 2008 TARGET	99%
FY 2008 RESULTS	

Comments to Goal #2

1. Performance Indicator A

A meritorious case is one in which the Office of Special Counsel is satisfied that claimant is entitled to relief. In certain meritorious cases, OSC may endeavor to use mediation to secure relief for the claimant. If mediation was not appropriate or did not succeed, OSC may exercise its prosecutorial authority and file for corrective or disciplinary action before the MSPB. As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to successfully prosecute cases warranting corrective action.

In FY 2006, OSC processed 48 meritorious PPP cases. There was one more case in which a stay was in place at the end of the year. Even though the stay was favorable action, we are not counting that case in the 06 numbers, because we won't have completed its investigation of the case until FY 2007.

In 47 of the 48 meritorious cases, OSC successfully achieved corrective action during or after the investigation of the case. The case went to litigation, but was settled for corrective action, giving a percentage of 100% as the result in FY 2006. This percentage exceeded the previously established target.

Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES	
PPP Enforcement Mission	PROHIBITED PERSONNEL PRACTICES CASES
PERFORMANCE INDICATOR	Indicator A: # of new Federal agencies certified in the 2302 (c) Program by OSC.
FY 2006 TARGET	5
FY 2006 RESULTS	6
FY 2007 TARGET	5
FY 2007 RESULTS	
FY 2008 TARGET	5
FY 2008 RESULTS	

Comments to Goal #3

OSC has statutory authority to administer the 2302(c) Program, which recognizes the federal sector’s need for awareness of Prohibited Personnel Practices and training in avoidance of committing them. However, OSC cannot force any agency to apply for certification. There are no statutory penalties for not being certified. This annual numeric target is not overly aggressive because 1) OSC cannot force compliance, and 2) the number of Federal agencies that may seek certification is limited by the number of agencies in existence. OSC already has 29 certified agencies, including most of the major ones.

Other outreach activities:

Additionally, members of the Investigation and Prosecution Division and the Complaints Examining Unit regularly accept invitations to provide outreach services designed to educate Federal personnel on these issues so that agencies comply with the law. Employees from OSC were able to educate employees of many agencies during a presentation at the Federal Dispute Resolution Conference (FDR).

- OSC maintains a telephonic hotline for answering PPP-related questions from members of the Federal workforce.
- OSC’s website provides a wealth of information regarding PPPs and is a valuable and constantly improving resource for educating the Federal workforce on this subject. Every year the website statistics for user sessions increase, with an average increase in activity of 15% over the previous year.
- The Go Learn project is a new initiative that will bring OSC expertise to thousands of Federal workers. OSC does not have responsibility for this project, other than providing expert content.

The results for the number of certifications exceeded the previously set target of five agencies to be certified during FY 2006.

**OSC Statutory Missions:
 HATCH ACT MISSION**

Goal 1: TO DEFEND THE MERIT SYSTEM BY ENFORCING THE HATCH ACT – THROUGH TIMELY CASE PROCESSING			
HATCH ACT MISSION	HATCH ACT WRITTEN ADVISORY OPINIONS See comment 1.	HATCH ACT ORAL & EMAIL ADVISORY OPINIONS See comment 2	HATCH ACT COMPLAINTS
PERFORMANCE INDICATORS	Indicator A: Percentage of formal written advisory opinions issued in less than 120 days.	Indicator B: Percentage of oral and e-mail advisory opinions issued in less than five days	Indicator C: Percentage of matters resolved in less than 365 days.
FY 2006 TARGET	75%	99%	60%
FY 2006 RESULTS	93%	100%	84%
FY 2007 TARGET	80%	99%	70%
FY 2007 RESULTS			
FY 2008 TARGET	80%	99%	70%
FY 2008 RESULTS			

Comments for Goal #1:

1. Performance Indicator A: written advisory opinions

These are the requests for an advisory opinion that come in to OSC’s Hatch Act Unit that are very complex and require significant analysis before answering.

2. Performance Indicator B: oral or e-mail advisory opinions

If an oral or e-mail advisory opinion were to take longer than five days, generally it would be treated as a formal written advisory request and be captured by Indicator A.

Several employees were detailed into the Hatch Act Unit to assist with the high volume of advisories, complaints, and cases. These employee details, and the extreme dedication of the employees of the Hatch Act Unit, made it possible to exceed all three timeliness targets for FY 2006.

Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS	
HATCH ACT MISSION	HATCH ACT CASES See comment 1.
PERFORMANCE INDICATOR	Indicator A: % favorable outcomes in meritorious cases
FY 2006 TARGET	90%
FY 2006 RESULTS	97%
FY 2007 TARGET	90%
FY 2007 RESULTS	
FY 2008 TARGET	90%
FY 2008 RESULTS	

Comments to Goal #2

1. Meritorious cases

A meritorious Hatch Act case is a case in which OSC finds a violation of the Hatch Act. A favorable outcome in a Hatch Act case is either (1) successful litigation of the case; (2) successful settlement of the case; or (3) successful corrective action (individual corrected his violation after receiving notice from OSC, for example, by withdrawing his candidacy or resigning from his employment).

The results achieved by the Hatch Act Unit for Goal 2 exceeded the target by 7% for FY 2006.

Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES		
HATCH ACT MISSION	HATCH ACT OUTREACH VISITS	HATCH ACT SECTION OF OSC WEBSITE
PERFORMANCE INDICATORS	Indicator A: (# of HA trainings and outreaches given) / (# of invitations to provide HA training or outreach, where the inviter sponsors OSC)	Indicator B: Number of new advisory complex opinions added every month to the website.
FY 2006 TARGET	90%	One
FY 2006 RESULTS	96%	One
FY 2007 TARGET	90%	One
FY 2007 RESULTS		
FY 2008 TARGET	90%	One
FY 2008 RESULTS		

Comments to Goal #3

1. Results:

Indicator A: The outreach results for FY 2006 exceed the set target by 6%.

Indicator B: Ten complex advisory opinions have been posted. This averages to one opinion per month since these goals were established in February 2006.

2. Outreach DVD

In addition to the performance of outreach visits and the website enhancement described above, OSC has produced both a Federal Hatch Act DVD and a State & Local Hatch Act DVD that explains the basics of the Hatch Act. OSC is now able to mail the appropriate DVD to certain requestors who require a basic tutorial overview of the Hatch Act.

OSC Statutory Missions: USERRA MISSION

Explanatory Comments about the Four Types of USERRA Cases

OSC receives four types of USERRA cases—RE, DP-OD, DP-MX, and DP-TSA—each of which are explained in detail below. Given the different nature of such cases, different performance indicators apply.

1. RE Cases

Under USERRA, certain federal sector claims are investigated by U.S. Department of Labor, Veterans' Employment and Training Service (VETS). Pursuant to 38 U.S.C. § 4324, in the event that VETS is unable to resolve such a claim, a claimant has a right to have his or her claim referred to OSC for a determination on whether OSC will represent the claimant before the U.S. Merit Systems Protection Board (MSPB). Such cases are identified by OSC as "RE cases."

RE cases have already been investigated by VETS and reviewed by a DOL Office of Regional Solicitor (RSOL). The USERRA Unit receives the VETS investigative file and a legal memorandum from RSOL indicating whether RSOL recommends that OSC represent the claimant. USERRA Unit reviews the information and make as "de novo" determination.

Where the USERRA Unit disagrees with an RSOL determination that OSC should represent the claimant, the unit sends the RSOL a report setting forth the factual and legal basis of the unit's preliminary determination not to represent the claim and invites the RSOL to respond. The unit considers any response received from the RSOL in making a final representation determination. The RSOL is typically given two weeks to respond to the report.

It is to be noted that while RE cases have already been investigated by VETS, OSC has found that: further investigation is often warranted, e.g., key witnesses need interviewing; important documents need to be obtained; too much time lapsed between alleged initial violations and their referral to OSC. In such cases, the USERRA Unit will always contact the agency and relevant witnesses to obtain the information necessary to allow it to make a well-reasoned determination regarding the prosecutorial merit of a given claim.

The need and extent of any supplemental investigation affects the processing time of RE cases and is reflected in the performance indicator.

2. DP-OD cases

In late 2004, Congress expanded OSC's role in enforcing USERRA and protecting the employment rights of federal employees and applicants. Pursuant to a demonstration project established by section 204 of the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, OSC was given the

exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. Under the demonstration project, OSC also investigates all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person's social security number (so-called "mixed claims"). VETS' investigative authority was limited to federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit and who do not allege a prohibited personnel practice. Pursuant to section 204(d)(1) of VBIA, OSC shall administer the demonstration project and DOL shall cooperate with OSC in carrying out the demonstration project. The demonstration project began on February 8, 2005, and ends on September 30, 2007.

Given the new, additional investigative responsibilities Congress assigned to OSC with the passing of the demonstration project and the Special Counsel's desire to revitalize OSC's enforcement of USERRA during his term, Special Counsel Bloch established the USERRA Unit as part of the January 6, 2005, directive reorganizing the agency. The USERRA Unit is the in-take, investigative, and prosecutorial unit for all matters pertaining to USERRA and veteran-related employment issues. The Unit is responsible for investigating USERRA claims to determine whether prosecution is warranted.

DP-OD cases are federal sector USERRA claims filed by persons having an odd-numbered social security number. DP-OD cases typically come from two sources: 1) from VETS, where a claimant files a USERRA Form 1010 (i.e., a USERRA complaint form) with VETS and 2) directly from the claimant, where the claimant files with OSC the OMB approved form OSC-14 "Complaint of Possible violation of USERRA."

The USERRA Unit conducts an investigation of DP-OD cases and determines whether OSC will represent the claimant in an USERRA action before the MSPB. The performance indicator reflects the time reasonably expected to investigate such cases.

3. DP-MX cases

As stated above, OSC is responsible for investigating all federal sector USERRA claims where the claimant, regardless of his or her social security number, alleges a prohibited personnel practice over which OSC has jurisdiction.

The USERRA Unit conducts an investigation of DP-MX cases and determines whether OSC will represent the claimant in a USERRA or prohibited personnel practice action before the MSPB.

The processing time of DP-MX cases is affected by 1) additional complexity of such cases and 2) the USERRA Unit's adoption of OSC's practice in prohibited personnel practice cases of granting a claimant 13 days to respond to OSC's preliminary determination regarding prohibited personnel practice allegations. The performance indicator incorporates those factors.

4. DP-TSA cases

On June 9, 2005, the MSPB held in *Spain v. Department of Homeland Security* (MSPB Docket # PH-0353-04-0361-I-1) that USERRA does not apply to Transportation Security Administration (TSA) Security Screeners or TSA Supervisory Security Screeners and, therefore, the MSPB does not recognize jurisdiction over such cases. Consequently, OSC is unable to prosecute USERRA actions involving TSA Security Screeners or TSA Supervisory Security Screeners.

Notwithstanding the *Spain* decision, TSA voluntarily permits OSC to investigate USERRA claims and reports its findings and recommendations for corrective action to TSA management officials (akin to the manner in which OSC is permitted to investigate and report on allegations of whistleblower reprisal).

The performance indicator for these types of cases reflects the MSPB's decision in the *Spain* case.

Goal 1: TO ENFORCE THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT THROUGH TIMELY CASE PROCESSING				
USERRA MISSION	USERRA A: RE Cases	USERRA B: DP-OD Cases	USERRA C: DP-MX Cases	USERRA D: DP-TSA Cases
				See Comment 5.
PERFORMANCE INDICATORS	<u>Indicator A:</u> Average number of days in which the representation decision is made	<u>Indicator A:</u> Average number of days in which the representation decision is made.	<u>Indicator A:</u> Average number of days in which the representation decision is made.	<u>Indicator A:</u> Average number of days in which a “no merit” determination is made or a request for voluntary corrective action is sent to TSA.
FY 2006 TARGET	90%	80%	80%	80%
FY 2006 RESULTS	50%	62%	74%	33%
FY 2007 TARGET^a	75 days	160 days	160 days	160 days
FY 2007 RESULTS				
FY 2008 TARGET	75 days	NA ^b	NA	NA
FY 2008 RESULTS				

¹ OSC has refined its performance indicators for timeliness in USERRA case processing to be more descriptive. Since the main concern with timeliness in USERRA investigations is on the actual number of days it takes to investigate cases, we have simplified by making the indicator be exactly that – the average number of days. We have set the FY 2007 target for average number of days to be 160 days for DP-OD cases, DP-MX cases, and DP-TSA cases. This is a slight lowering of the target for DP-OD cases and DP-TSA cases. The initial target was set without baseline data available for this type of USERRA investigation case. After analyzing the baseline data that has become available, it is clear the initial targets were unrealistically high. The FY 2007 targets of 160 days are still quite aggressive. But

they are at the same time realistic in a way the initial targets were not, for a start-up unit with training requirements for a good portion of its employees.

² The Demonstration Project ends at the close of FY 2007. Once the size and scope of OSC's USERRA responsibilities for FY 2008 have been decided, OSC can formulate a relevant timeliness target for that fiscal year.

Comments for Goal #1:

a. For RE cases, in **50%** of them the representation decision was made within 75 days.

- 5 RE cases were resolved in <75 days.
- 5 RE cases were resolved in >75 days.
- Average processing time to resolve these 10 RE cases was **71 days**.

GOAL: 90%

ASSESSMENT: USERRA Unit did not meet this aggressive target.

b. For the DP-OD cases, in **62%** of them the representation decision was made within 120 days.

- 91 DP-OD cases were resolved in <120 days.
- 56 DP-OD cases were not were resolved in < 120 days.
- Average processing time to close 147 DP-OD cases was **115 days**.

GOAL: 80%

ASSESSMENT: USERRA Unit did not meet this aggressive target.

c. For DP-MX cases, in **74%** of them the representation decision was made within 160 days.

- 26 DP-MX cases were resolved in <160 days.
- 9 DP-MX cases were not were resolved in <160 days.
- Average processing time to close 35 DP-MX cases was **123 days**.

GOAL: 80%

ASSESSMENT: USERRA Unit came very close to meeting this aggressive target.

d. For DP-TSA cases, in **33%** of them a “no merit” determination was made or a “request for voluntary corrective action” was sent to TSA within 120 days.

- 2 TSA cases were resolved in <120 days.
- 4 TSA cases were not resolved in <120 days.
- Average processing time to close 6 TSA cases was **161** days.

GOAL: 80%

ASSESSMENT: USERRA Unit did not meet this aggressive target.

In general, the USERRA Unit did not meet the aggressive internal timeliness targets set forth last year because it is a start up unit. As with any “new business,” there are initial inefficiencies that adversely affect performance. As time goes by, those inefficiencies diminish, and the business becomes more efficient.

In the case of the USERRA Unit, the inefficiencies stemmed from the need to assemble (hire, reassign, or detail) and train a new staff of lawyers and investigators to handle the agency’s new mission of investigating USERRA cases. A lot of time has been spent training the staff on the substantive law. As the staff’s expertise in USERRA grows, so will its efficiency, and the goals should be attainable.

Notwithstanding the failure to meet the aggressive timeliness targets for USERRA for FY 2006, it is important to note OSC’s average time to resolve a USERRA claim is exemplary and reflects the dedication of the USERRA Unit members.

Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS		
USERRA MISSION	USERRA CASES	
PERFORMANCE INDICATORS	Indicator A: % favorable outcomes in cases determined by OSC to be meritorious = (# successful meditations + # of settlements achieved + # of successful litigations) / (# meritorious cases)	Indicator B: # of “test cases” filed
FY 2006 TARGET	90%	Inappropriate to set a specific target
FY 2006 RESULTS	100%	NA
FY 2007 TARGET	90%	Inappropriate to set a specific target
FY 2007 RESULTS		
FY 2008 TARGET	90%	Inappropriate to set a specific target
FY 2008 RESULTS		

Comments to Goal #2

1. Performance Indicator A

Where the Office of Special Counsel is satisfied that claimant is entitled to relief, then it may exercise its prosecutorial authority and represent the claimant before the MSPB and, in certain circumstances, the U.S. Court of Appeals for the Federal Circuit. See 38 U.S.C. §§ 4324(a)(2)(A) and (d)(2). As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to prosecute successfully cases warranting corrective action. “Meritorious cases” under this performance indicator are to be distinguished from the “test cases” found under Performance Indicator B.

Detail behind the percentage in the results for FY 2006 Indicator A:

- | | |
|--------------------------------|-----|
| a. # of successful mediations | n/a |
| b. # of settlements achieved | 35 |
| c. # of successful litigations | 1 |
| d. # meritorious cases | 36 |
| e. # test cases filed | n/a |

GOAL = 90 %

RESULTS = 100%

ASSESSMENT: USERRA Unit exceeded the target for this indicator.

2. Performance Indicator B

It is foreseeable that OSC will desire to file cases where the law is not clear (e.g., novel legal issues requiring “test cases” to define the bounds of the law) but will establish legal precedent benefiting all service members, if the litigation is successful. The outcomes of these types of cases do not depend on OSC’s skill in weighing of the evidence, applying of law, and trying the case. Instead, the cases involve questions of law.

It is difficult to define a performance goal that accurately reflects “success” or “failure” of OSC’s identification of cases that are fertile for expanding the law. The mere fact of filing test litigation with an eye toward expanding the law, however, seems appropriate. Performance Indicator B captures this concept. OSC will track how often it files this type of case. However, a target can not be identified because OSC cannot determine how often appropriate “test cases” will come into the agency from claimants.

OSC filed no USERRA test cases during FY 2006.

Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES		
USERRA MISSION	USERRA CASES	
PERFORMANCE INDICATORS	Indicator A: (# of USERRA trainings and outreaches given) / (# of invitations to provide USERRA training or outreach visits {where inviting agency sponsors OSC})	Indicator B: (# of USERRA trainings and outreaches given) / (# of invitations to provide USERRA training or outreach visits {where OSC pays expenses})
FY 2006 TARGET	90%	50%
FY 2006 RESULTS	NA	100%
FY 2007 TARGET	90%	50%
FY 2007 RESULTS		
FY 2008 TARGET	90%	50%
FY 2008 RESULTS		

Comments to Goal #3

OSC recognizes the federal sector’s need for USERRA training although it has no statutory obligation to provide it. Thus, the USERRA Unit regularly accepts invitations to provide outreach services designed to educate federal personnel on USERRA issues so that agencies comply with the law. Such outreach efforts include USERRA seminars presented by OSC staff to the D.C. Bar, at the annual Federal Dispute Resolution Conference, and presentations at the Army’s Advanced Labor and Employment Law Course at the Judge Advocate General’s Legal Center and School in Charlottesville, Virginia. Additionally, the unit maintains a telephonic and web-based “hotlines” for answering USERRA-related questions from the public and private sectors.

The performance indicators reflect the practical budgetary constraints of providing OSC-sponsored USERRA training to all requesters and OSC ability and desire to provide such training.

Detail behind the results for FY 2006 Indicator A:

- a. # of USERRA training & outreaches given, where inviter sponsors OSC = 0
- b. # of invitations for USERRA training/outreach visits, where the inviter sponsors = 0

GOAL = 90 %

ASSESSMENT: N/A (No one invited OSC and offered to sponsor the outreach.)

Detail behind the results for FY 2006 Indicator B:

- a. # of USERRA training & outreaches given, where OSC pays = 2
- b. # of invitations for USERRA training/outreach visits, where OSC pays = 2

GOAL = 50 %

RESULTS = 100% (2/2)

ASSESSMENT: The USERRA Unit exceeded the target for this indicator.

**OSC Statutory Missions:
 WHISTLEBLOWER DISCLOSURE MISSION**

Goal 1: TO RECEIVE AND RESOLVE WHISTLEBLOWER DISCLOSURES WITH TIMELY PROCESSING	
WHISTLEBLOWER DISCLOSURE MISSION	DISCLOSURES See comment 1.
PERFORMANCE INDICATORS	Indicator A: Percentage of disclosures resolved within the statutory 15 day time frame
FY 2006 TARGET	50%
FY 2006 RESULTS	42%
FY 2007 TARGET	50%
FY 2007 RESULTS	
FY 2008 TARGET	50%
FY 2008 RESULTS	

Comments for Goal #1:

1. Performance Indicator A: Timely Disclosure Processing

Pursuant to § 1213(b), when the Special Counsel receives any disclosure of information by a federal employee, former federal employee or applicant for federal employment which the [employee] reasonably believes evidences: a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, the Special Counsel must review the information within 15 days and determine whether there is a substantial likelihood that the information discloses one or more of the above categories of wrongdoing.

OSC handles these whistleblower disclosures under 5 U.S.C. § 1213 in one of three ways. If the Special Counsel makes a positive determination, he must transmit the information to the appropriate agency head, and require the agency head to conduct an investigation and submit a written report on the findings of the investigation. These referrals under § 1213 represent a small percentage (approximately 8% for FY 2006) of the total number of disclosures resolved by OSC in any fiscal year.

If the Special Counsel does not make a positive determination, the matter is closed. These closures make up the vast majority (92% for FY 2006) of the total number of cases resolved by OSC in any fiscal year.

If the Special Counsel is unable to make the substantial likelihood determination on the basis of the information supplied by the whistleblower, the matter may be informally referred to the Inspector General (IG) for the agency involved, with a request that the IG assist OSC in making a substantial likelihood determination.

Because of the time involved in preparing cases for referral under § 1213 and in cases referred to the IG, the statutory 15-day time frame is difficult to achieve. As a result the Indicator for Goal #1, “[p]ercentage of disclosures processed within the statutory 15 day timeframe,” is intended to capture only those cases in which the substantial likelihood determination has not been met. Even in those cases, the actual percentage of cases resolved in less than 15 days is relatively low. It should also be noted that the Special Counsel is considering proposing a legislative change in the statutory language to enlarge the time frame from 15 days to 45 days, a number which would more accurately reflect the average amount of time required to resolve a whistleblower disclosure.

Because of the issues identified above, the Disclosure Unit did not meet the target set for Goal 1 for FY 2006.

Goal 2: TO PROMOTE JUSTICE AND PROTECT THE MERIT SYSTEM THROUGH THE QUALITY OF DETERMINATIONS AND REFERRALS	
WHISTLEBLOWER DISCLOSURE MISSION	DISCLOSURES See comment 1.
PERFORMANCE INDICATORS	Indicator A: % Percentage of disclosures referred to agency head, pursuant to 5 U.S.C. § 1213, or under the informal IG referral process.
FY 2006 TARGET	7%
FY 2006 RESULTS	8%
FY 2007 TARGET	7%
FY 2007 RESULTS	
FY 2008 TARGET	7%
FY 2008 RESULTS	

Comments to Goal #2

1. Indicator A: Whistleblower referrals:

The U.S. Office of Special Counsel does not have investigative or enforcement authority under 5U.S.C. § 1213. As such, the Indicator for Goal #2 reflects a quality measure based on the number of cases referred under §1213, regardless of the outcome of the referral. The percentage of cases referred out of the total number of cases received in a fiscal year is a relatively low number historically, and as such, the FY 2006 and FY 2007 targets are low. Because OSC’s Disclosure Unit processes nearly 500 disclosures annually, this percentage can be seen as an indicator of the average relative height of the “substantial likelihood” bar in a given year.

The Indicator for Goal #2 reflects only one way of measuring quality as defined in Goal #2, to “promote justice and protect the merit system.” **Because the statutory mandate of §1213 contemplates that OSC make a determination whether there is a substantial likelihood that the information discloses wrongdoing, a negative determination under the statute, resulting in a closure, is as quality driven as a positive determination resulting in a referral.** OSC’s analysis of a whistleblower disclosure may result in a determination not to burden an agency with an inappropriate referral, thus promoting justice and protecting the merit system. Notwithstanding this difficulty in identifying a measure of quality, the individual whistleblower who initiates the disclosure, thus accessing the statutory protections, is more inclined to measure quality by whether or not his or her disclosure is referred. As such, the Indicator for Goal #2 for now reflects this single measurement.

The target for this goal was exceeded for FY 2006.

Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES	
WHISTLEBLOWER DISCLOSURE MISSION	NA
PERFORMANCE INDICATORS	NA
FY 2006 TARGET	NA
FY 2006 RESULTS	NA
FY 2007 TARGET	NA
FY 2007 RESULTS	NA
FY 2008 TARGET	NA
FY 2008 RESULTS	NA

Comments to Goal #3

1. Disclosure outreach:

OSC's Disclosure Unit does not have a statutorily defined mandate to perform compliance outreach, and as such does not regularly provide training or outreach to other government entities, with the exception of informational presentations to foreign delegations.

OSC continues to provide free Whistleblower Disclosure Act posters to requesting agencies, if the quantity requested is less than ten. If the quantity requested exceeds ten, the interested agency can obtain extra copies from the Government Printing Office.

Endnotes

¹ Public Law No. 103-94 (1993), codified in scattered sections of 5 U.S.C. and 12 U.S.C.

² Public Law No. 103-353 (1994), codified at 38 U.S.C. § 4301, *et seq.* The Veterans' Employment Opportunities Act of 1998 (Public Law No. 103-424) also expanded OSC's role in protecting veterans. The act made it a prohibited personnel practice 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. See 5 U.S.C. § 2302(b)(11). (The former § 2302(b)(11) was re-designated as § 2302(b)(12).)

³ Public Law No. 103-424 (1994), codified in various sections of title 5 of the U.S. Code. The provision making federal agencies responsible, in consultation with OSC, for informing their employees of rights and remedies under the Whistleblower Protection Act appears at 5 U.S.C. § 2302(c).

⁴ Public Law 107-71 (2001).

⁵ Unless noted otherwise, all references after this to prohibited personnel practice complaints include complaints alleging other violations of civil service law, rule, or regulation listed at 5 U.S.C. § 1216, except for alleged violations of the Hatch Act.

⁶ When the Complaints Examining Unit makes a preliminary determination to close a complaint without further investigation, it must by law provide complainants with a written statement of reasons, to which they may respond. On the basis of the response, if any, the unit decides whether to close the matter, or refer it to the Investigation and Prosecution Division.

⁷ Compare, for example, 5 U.S.C. § 1214(a)(1)(A) ("The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.") with 5 U.S.C. app. 3, § 10(a) ("[E]ach Inspector General ... is authorized— ... (2) to make such investigations and reports relating to the administration of the programs and operations of the [agency] as are, in the judgment of the Inspector General, necessary or desirable[.]") and § 7(a) ("The Inspector General may receive and investigate complaints or information from an employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety."). OSC cannot, however, investigate complaints over which it has no jurisdiction, with the result that some complaints are closed without further action after receipt and review. During FY2004, for example, OSC lacked jurisdiction in 617 (or 31.4%) of the complaints received, leaving 1,347 complaints (69%) in which OSC was required by statute to conduct an inquiry. In addition, discrimination based on race, color, religion, sex, or national origin, age, or handicapping condition is illegal under laws enforced by the Equal Employment Opportunity Commission (EEOC), and is also a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). However, since procedures for 10 investigating discrimination complaints have already been established in the agencies and the EEOC, the Special Counsel will normally avoid duplicating those procedures and will defer to those procedures rather than initiate an independent investigation. 5 C.F.R. § 1810.1. When a matter is not referred for further investigation, CEU must by law provide complainants with a written statement of reasons, to which they may respond. 5 U.S.C. § 1214(a)(1)(D). 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 an Investigation and Prosecution Division. 11 5 U.S.C. § 1214(b)(2)(C). ¹¹ Corrective action seeks a remedy for any injury to the individual complaining employee, such as back pay or reinstatement, while disciplinary action seeks to impose discipline on the perpetrator of the PPP.

⁸ Corrective action seeks a remedy for any injury to the individual complaining employee, such as back pay or reinstatement, while disciplinary action seeks to impose discipline on the perpetrator of the PPP.

⁹ Several factors are believed to account for or contribute to this workload increase. They include: publicity about an increased number of high-profile cases handled by OSC, including whistleblower disclosures, and four Public Servant Awards issued to whistleblowers by OSC; increased public interest in elections since the 2000 presidential election, the public interest generated by the 2004 campaigns; OSC's 2302(c) Certification Program; significant improvements in OSC's web site, increasing awareness by government employees and others of OSC and its functions.

¹⁰ http://www.osc.gov/documents/osc_lst3.pdf