
**A Report to Congress
From The
U.S. Office Of Special Counsel
Fiscal Year 1996**



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

The Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. President and Mr. Speaker:

I herewith respectfully submit to the Congress, in accordance with 5 U.S.C. § 1218, the Annual Report from the Office of Special Counsel (OSC) for Fiscal Year (FY) 1996. As is customary, a copy of this report will also be sent to each Member of Congress.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kathleen Day Koch".

Kathleen Day Koch

Enclosure

Executive Summary

Fiscal Year 1996 was another busy year for the U.S. Office of Special Counsel (OSC). Overall in FY 1996, there were more than 8,000 instances in which the assistance or action of OSC was sought by federal employees and other persons.

OSC had a significant increase in its Hatch Act workload in FY 1996, with the result that the agency issued a record-setting 3,578 advisory opinions (both written and oral). This is the only area of OSC's activities where it is able to issue advisory opinions. The passage of the Hatch Act Amendments of 1993 and OPM's issuance of implementing regulations have greatly contributed to the significant growth in requests for advice under the Hatch Act. For example, in contrast to the number of Hatch Act advisory opinions issued in FY 1996, OSC issued 1,328 such opinions in FY 1993. Thus, OSC has seen a 169 percent increase in this work over the past four years.

Similarly, OSC's Whistleblower Disclosure Unit has seen a marked increase in receipts. This unit receives allegations of violations of laws, rules, and regulations and other wrongdoing, and refers them, under appropriate circumstances, to the agency involved for investigation. In FY 1996, the Disclosure Unit received 341 matters, in comparison to 177 in FY 1994 and 252 in FY 1995. Thus, this unit has seen an increase in workload of 93 percent over the past three years.

During the past five years, OSC has undertaken a review of and made changes in virtually every aspect of its operations. The aim of these efforts has been to make OSC more responsive to those individuals who seek the agency's assistance, to improve the productivity of OSC's employees, and to ensure that OSC is an easily accessible source of information about the rights of government employees. These initiatives, which include the use of interdisciplinary teams and an emphasis on alternative forms of dispute resolution, have improved the operations of the agency and produced tangible results. For example, during fiscal years 1992-1996, OSC has negotiated over 600 favorable actions on behalf of federal employees who have brought prohibited personnel practice and Hatch Act complaints to the agency. This includes the 87 favorable actions obtained in FY 1996. By comparison, in the prior 11 years (Fiscal Years 1981-1991), OSC obtained approximately 250 favorable actions. In other words, OSC has obtained almost 2.5 times more favorable actions in less than one-half the time.

In fiscal year 1996, OSC continued to build on its record of innovation by taking advantage of new telecommunications technologies. In the Spring of 1996, in an effort to widen its reach to federal employees and others served by the agency, OSC initiated a Home Page on the World Wide Web (<http://www.access.gpo.gov/osc>). The Home Page contains a wide range of information related to the agency's programs and operations, including material concerning prohibited personnel practices, permissible and prohibited activity under the Hatch Act, whistleblower disclosure hotline procedures, and current publications and forms. As of October 31, 1996, an estimated 3,500 "hits", or visits, have been made to the Home Page. Also in FY 1996, OSC launched a pilot project to provide access to its Hatch Act advisory opinion service via e-mail. That e-mail address is hatchact@osc.gov.

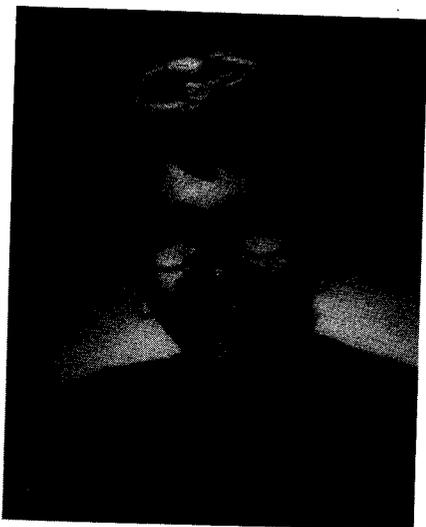
OSC is committed to doing all that is necessary, including developing more effective methods of operation and utilizing the latest technologies, to continue to serve the individuals who seek its assistance.

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Biography of the Special Counsel



Kathleen Day Koch was appointed Special Counsel of the U.S. Office of Special Counsel (OSC) on December 20, 1991, for a five-year term, following Senate approval of her nomination. During her tenure as Special Counsel, Ms. Koch has emphasized the need for improved respect for OSC and trust in its service to the federal community. She has instituted internal measures to streamline procedures and increase accountability, resulting in a determinative process which better serves OSC's customers. In addition, Ms. Koch has underscored education of federal employees on their rights in whistleblower and other protected activity matters.

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

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

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

Introduction

Mission of the Office of Special Counsel

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

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

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

OSC also has responsibilities under Public Law 103-353, the "Uniformed Services Employment and Reemployment Rights Act," which was enacted in 1994. Among other provisions, the Act authorizes OSC, under certain circumstances, to represent a federal employee who is a veteran or reservist before the Merit Systems Protection Board and the U.S. Court of Appeals for the Federal Circuit in the event a federal agency has failed to reemploy that person in accordance with provisions of the Act.

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

Office of Special Counsel Policy

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

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

Overview of OSC Operations

Budget and Staffing

During Fiscal Year (FY) 1996, OSC operated with a budget of \$7.83 million, and the agency's full-time equivalency (FTE) personnel ceiling was 95.

Procedures

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

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

After a thorough initial examination, the CEU refers matters stating a potentially valid statutory claim to the Investigation Division for more extensive investigation. If the CEU determines that an allegation is not within OSC's investigative jurisdiction, but that information contained in the complaint may constitute a whistleblower disclosure, the Prosecution Division's Disclosure Unit reviews that information for possible transmittal to the agency head concerned. OSC does not disclose the identity of the employee without the employee's consent.

The Prosecution Division reviews completed full field investigations to determine whether the inquiry has established any violation of law, rule or regulation, and whether the matter warrants corrective or disciplinary action, or both. OSC may have discussions with an agency about a case at any point of the investigation or analysis in order to obtain a mutually agreeable resolution. Otherwise, the Special Counsel may refer the matter in writing to the agency head under § 1214(b)(2)(A) with a recommendation for corrective action. If an agency declines to take corrective action, the Special Counsel may request the MSPB to consider the matter under § 1214(b)(2)(B), and the MSPB may order any corrective action it deems appropriate. During FY 1996, OSC continued its policy of early and firm negotiation with agencies to obtain corrective action prior to initiating litigation before the MSPB. If the Special Counsel determines that an apparent violation warrants disciplinary action, OSC files charges against the offending employee under § 1215(a) and prosecutes the case before the MSPB. Finally, if an investigation discloses a violation of any law, rule or regulation not otherwise within the enforcement authority of OSC, the Special Counsel sends

a report of OSC's findings to the agency head concerned under § 1214(e) for certification of any action to be taken on the matter. OSC reports evidence of any possible criminal violations identified during an investigation to the Department of Justice pursuant to § 1214(d).

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

Office of Special Counsel Outreach Program

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

In FY 1996, OSC's outreach efforts resulted in OSC staff participation in 46 briefings and seminars. In addition, OSC has been given greater authority in this regard by its 1994 Reauthorization Act, Public Law 103-424, which directed all executive agencies to inform their employees of the rights and remedies available to them under the Whistleblower Protection Act, and to carry out this function in consultation with OSC. OSC responded by preparing an informational packet for distribution to all covered entities and stands ready to consult with all agencies.

Prohibited Personnel Practice Matters

Receipts and Investigations

During FY 1996, OSC received 1,785 new matters alleging prohibited personnel practices (PPPs) which contained 3,536 separate allegations. Of the 1,628 matters which were actually processed by CEU in FY 1996, OSC lacked jurisdiction in 290 of the matters, leaving 1,338 matters in which the agency was authorized by statute to conduct an inquiry. Following CEU review, 223 matters were referred for full field investigation. In addition, following initial review and inquiry, CEU closed 1,405 matters because of a determination that there was insufficient basis for further OSC action or because of satisfactory resolution of an employee's complaint during the initial review.²

Enforcement Actions

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

If OSC believes a PPP has been committed and it initiates discussions with the agency, the matter is normally resolved through settlement between the requestor and the agency. Thus, historically, in most cases it has not been necessary to send formal letters to agencies and these provisions have resulted in low levels of corrective action litigation. On most occasions when an agency refuses to grant appropriate corrective action after receipt of a formal request from the Special Counsel, OSC proceeds immediately to file a complaint with the MSPB. In addition to rectifying the matter at issue, corrective action litigation often has the additional benefits of clarifying and expanding existing law and of bringing greater public attention to the mission and the work of OSC. This significantly increases the deterrent effect of OSC's efforts.

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

² The types of PPP allegations received in FY 1996 and the types of PPP allegations referred for full field investigation are included in Tables 1 and 2 of the Appendix.

In FY 1996, OSC filed 4 enforcement action complaints -- 1 in a PPP matter and 3 in Hatch Act matters (Hatch Act cases are discussed in the next section). One ruling, favorable to OSC, was handed down by the MSPB during this period for a previously filed matter. The remaining complaints were either settled prior to hearing, are awaiting decision by the Board, or have been scheduled for hearing in FY 1997.

Favorable Actions Achieved

OSC also obtained 87 favorable actions³ in 84 PPP matters in FY 1996. Of these favorable actions, 77 represented corrective actions and 10 were disciplinary actions, with cases involving allegations of reprisal for whistleblowing accounting for 61 of the total favorable actions. This increased to over 600 the number of favorable actions obtained by OSC since FY 1992. OSC also obtained 10 stays of personnel actions through negotiations with agencies and, in cases where agencies refused OSC's request, 3 stays through petitions to the MSPB.⁴

³ "Favorable actions" include actions taken to directly benefit the complaining employee, actions taken to punish, by disciplinary or other corrective action, the supervisor(s) involved in the personnel action, and systemic actions, such as training or educational programs, to avoid future questionable personnel actions. These encompass: (1) those actions taken by an agency pursuant to a written request for corrective action by the Special Counsel; (2) actions taken by an agency at the request of the OSC as a settlement of a prohibited personnel practice complaint in advance of a written request for corrective action by the Special Counsel; or (3) actions taken by an agency with knowledge of a pending OSC investigation, which satisfactorily resolve those matters under inquiry by the OSC.

⁴ Data concerning PPPs and the Hatch Act are set out separately in this Annual Report.

Summary of Prohibited Personnel Practice Matters

	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996	Total
Matters received	1,891	2,256	1,837	1,884	1,785	9,653
Matters processed by CEU	1,798	1,847	1,353	1,960	1,628	8,586
Matters processed in which OSC had jurisdiction	1,695	1,590	1,208	1,675	1,338	7,506
Matters referred for full field investigation	270	266	316	344	223	1,419
Complaints filed	13	1	16	4	4	38
Stays - negotiated	11	22	20	13	10	76
Stays - obtained from the MSPB	1	2	7	3	3	16
Favorable actions obtained	104	97	131	173	87	592

Summary of Whistleblower Reprisal Matters

	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996	Total
Matters received	575	654	662	603	672	3,166
Matters processed by CEU	606	604	524	705	566	3,005
Matters processed in which OSC had jurisdiction	580	566	498	671	513	2,828
Matters referred for full field investigation	155	146	236	242	161	940
Complaints filed	0	1	12	3	1	17
Stays - negotiated	11	16	17	10	7	51
Favorable actions obtained	65	65	76	120	61	387

Corrective Actions

The following is a representative sample of corrective actions obtained by OSC during FY 1996:

- OSC investigated allegations that an employee received a lowered performance appraisal, was denied training, was not selected for a promotion, and was given a directed reassignment in reprisal for disclosures the employee made concerning violations of the standards of conduct. She disclosed that one of the doctors at the agency utilized government resources for personal and private use. Following OSC's request for corrective action, a settlement agreement was negotiated raising the employee's performance appraisal, canceling the reassignment, providing for appropriate training, a retroactive promotion with back pay and allowances, and attorney's fees.
- OSC investigated allegations that an employee's position was abolished because his supervisor believed the employee initiated an Inspector General investigation against him concerning his supervisor's improper use of travel regulations, improper purchases, and improper use of employees to conduct the supervisor's personal business. As corrective action, and with the employee's consent, the agency agreed to give him a position equal in grade and pay at Headquarters and to fly him to Washington, D.C. before he reported to duty in order to make living arrangements.
- OSC investigated allegations that an employee was geographically reassigned, placed on a Performance Improvement Plan, and issued a lower performance appraisal rating because he reported time and attendance misuse, misuse of government vehicles, and various other infractions to his second level supervisor and the Inspector General's Office. Following OSC negotiations with the agency, an agreement was reached whereby the agency would cancel the reassignment, cancel the Performance Improvement Plan, and raise his performance appraisal rating.
- OSC investigated allegations that an employee received a letter of admonishment, a letter of reprimand, a three day suspension, a lowered performance evaluation, and a denial of a Within Grade Increase because the employee filed a number of grievances and EEO complaints, including a grievance regarding her performance rating. The agency agreed to remove the letter of admonishment and letter of reprimand, remove the suspension, provide the employee with back pay lost due to the suspension, upgrade the performance appraisal rating, and grant the employee the Within Grade Increase. Additionally, the agency agreed to provide training regarding prohibited personnel practices to both the management and legal staff.
- OSC investigated allegations from an employee who was reassigned to a non-supervisory position and not issued performance standards following his disclosures that the agency improperly promoted an employee in violation of the merit systems

principles to the Inspector General's Office. Following discussions with OSC, a settlement agreement was reached between the agency and the employee wherein the agency reassigned the employee to a Senior Program Analyst position.

- OSC investigated charges that an employee was downgraded from a GS-14 position for performance reasons that were not supported by Chapter 43 or Chapter 75. Additionally, the agency did not provide the employee with notice of his appeal rights to the Merit Systems Protection Board, as required by law. OSC requested that the agency take corrective action and the agency agreed to restore the employee to a GS-14 position and give him back pay. Additionally, the employee, who had since retired, received an increased retirement annuity.
- OSC investigated allegations that an agency refused to approve a promotion for an employee because he made protected disclosures to his supervisors and to the Inspector General's Office. The employee disclosed that an agency contractor had a conflict of interest with respect to negotiating the agency's lease. The agency agreed to retroactively promote the employee, give him back pay and interest, and provide attorney's fees.
- OSC investigated the allegations of an employee who complained to her supervisors and to the Inspector General's Office concerning her performance rating. After filing these complaints, she was detailed to a different office. The employee then filed a complaint with the Office of Special Counsel. The agency agreed to raise the employee's performance appraisal rating to "Exceptional", issue her a cash award, and return her to her position of record.
- OSC investigated allegations that an employee's duties and responsibilities were changed by his supervisor and that the employee received a lowered performance appraisal rating in reprisal for the employee's involvement in an Inspector General investigation and for reporting a hazardous material spill his supervisor covered up. Following OSC's request for corrective action, a settlement agreement was negotiated under which the employee's performance appraisal rating was raised and the employee was placed under the supervision of a different supervisor.
- OSC investigated allegations that an agency issued an employee a lower performance appraisal rating because the employee refused to obey an order from his supervisor to lower the performance ratings of his subordinates to ensure that only 50% received outstanding ratings. Following OSC's request for corrective action, a settlement was negotiated raising his performance rating and awarding him a cash award.

Disciplinary Actions

The following is a representative sample of disciplinary actions obtained by OSC during FY 1996:

- OSC obtained disciplinary action against a supervisor of the Bureau of Prisons because he reassigned a subordinate employee to a non-supervisory position in reprisal for filing a grievance, a violation of 5 U.S.C. § 2302(b)(9). The agency agreed to reassign the subject official within 6 months and also to suspend that official for 15 days without pay.
- OSC obtained disciplinary action against two federal employees at the USDA Natural Resources Conservation Service because of evidence that demonstrated they committed prohibited personnel practices. One of the subject officials provided an unauthorized preference to an agency employee by promoting the employee from a GS-9 to a GS-11, and then subsequently from a GS-11 to a GS-12 position in violation of the agency's merit promotion plan. OSC also found that this subject official illegally advocated for the appointment of his first cousin. During the course of the investigation, OSC learned that another employee approved the illegal appointment of the subject's first cousin despite being advised against the action by the personnel officer. As a result of the OSC investigation, the agency agreed to reassign the subject official from his Deputy Chief position to a Special Assistant position. Additionally, the agency indicated that the subject official will retire by January 1997. The agency also imposed a 14-day suspension upon the employee who approved the illegal appointment of the subject's cousin.

Merit Systems Protection Board Stays

The following is a representative sample of the stay cases brought to the MSPB during FY 1996:

- OSC petitioned the MSPB to stay the removal of a GS-12 Special Agent. OSC found reasonable grounds to believe that the employee was removed because he made protected disclosures and exercised his first amendment right to free speech. The MSPB granted the stay request to give OSC time to further investigate the matter. *OSC v. Department of Transportation*, No. CB-1208-96-0027-U-6 (May 23, 1996).
- OSC petitioned the MSPB to stay the agency's decision not to renew the temporary appointment of an attorney. OSC had reasonable grounds to believe that the failure to renew the employee's temporary appointment occurred because he made disclosures protected by 5 U.S.C. § 2302(b)(8). The MSPB granted the stay to permit OSC to conduct a full investigation into whether the failure to renew the appointment violated section 2302(b)(8). *OSC v. Small Business Administration*, No. CB-1208-96-0069-U-1 (September 17, 1996).

Hatch Act Matters

Overview of Jurisdiction

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

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

Advisory Opinions

During FY 1996, OSC's Hatch Act Unit issued 168 written advisory opinions, provided a record 3,408 advisory opinions orally in response to telephone inquiries, and responded to an additional 170 telephone inquiries requesting general information. The overwhelming increase in demand for advisory opinions can be attributed to the recent passage of the Hatch Act Amendments of 1993 and OPM's issuance of implementing regulations.

Violations and Enforcement

During FY 1996, OSC received 108 new matters alleging violations of the Hatch Act. Following initial review by the Hatch Act Unit, 12 matters were referred for full field investigation.⁵

Following investigations, OSC filed three complaints seeking disciplinary action against two federal employees and one state employee. One Hatch Act case went to hearing

⁵ The Hatch Act allegations received in FY 1996 and the Hatch Act allegations referred for full field investigations appear in Tables 1 and 2 of the Appendix.

before the MSPB during FY 1996. During this period, the MSPB handed down one ruling for other previously filed matters, a ruling which was favorable to OSC. The remaining complaints are awaiting final Board decision or are scheduled for hearing in FY 1997.

As a result of hearings and settlements, OSC obtained one disciplinary action from the MSPB and negotiated disciplinary action in one other case during FY 1996. In addition, OSC issued 26 warning letters during this period.

Summary of Hatch Act Matters			
	FY 1994	FY 1995	FY 1996
Advisory opinions issued	2,455	2,821	3,578
Matters received	130	104	108
Matters referred for investigation	25	14	12
Disciplinary action complaints filed (With MSPB)	9	3	3
Disciplinary actions obtained before MSPB and through negotiation	7	4	2
Warning letters issued	35	29	26

Disciplinary Actions

The two decisions summarized below were issued by the Chief Administrative Law Judge (CALJ) in FY 1996.⁶

- OSC filed a complaint for disciplinary action against two District of Columbia employees for violations of the Hatch Act. OSC asserted that both respondents, among other things, became involved in then Mayor Kelly's reelection campaign and solicited campaign contributions from individuals who had, or desired to have, contracts with the District of Columbia Government. A hearing was held, after which the CALJ concluded that both employees violated the Hatch Act and recommended that one of the employees be debarred from employment with the DC Government for a period of 10 years and the other be debarred from

⁶ Other than on a procedural adoption of an OSC motion to dismiss a complaint, *Special Counsel v. Bradford*, 71 M.S.P.R. 441 (1996), the MSPB did not issue any final decisions in Hatch Act cases in FY 1996.

employment with the DC Government for 5 years. *Special Counsel v. Malone and Utley*, Nos. CB1216940015-T-1, CB-1216940016-T-1 (June 13, 1996).

- OSC filed a complaint for disciplinary action against a federal employee for violating the Hatch Act by running for elective office in a partisan election. Following a hearing, the CALJ found that a violation had been established and recommended the employee be removed. *Special Counsel v. Kane*, CB-1216-96-0013-T-1 (August 20, 1996).

Whistleblower Disclosures

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

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

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

OSC is not authorized to investigate allegations of the kind described in § 1213(a). Nevertheless, requestors often include information which may be covered by § 1213(a) with their allegations of other prohibited activities within OSC's investigative jurisdiction. Disclosures are received directly by the Disclosure Unit, which as of July 1995, became a part of the Prosecution Division. Disclosures may also be referred to the Disclosure Unit by the CEU for further review and follow-up with the requestor as needed to confirm the facts and issues involved. After completion of its review, OSC decides whether to: (1) transmit the information developed to the agency concerned under § 1213(c) or § 1213(g); (2) refer the matter to the agency Inspector General or comparable office for any appropriate action; or (3) close the matter without further action.

During FY 1996, OSC received 341 disclosure matters for possible referral to the agency concerned under sections 1213(c) or 1213(g).⁷ In addition, 96 disclosure matters were carried over from FY 1995. A disclosure matter usually contains multiple allegations

⁷ The number of disclosure allegations received in FY 1995 appear in Table 1 of the Appendix.

of a violation of law, rule or regulation, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety.

Summary of Disclosure Matters					
	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996
Disclosures referred for investigation and a report under § 1213(c)	5	14	3	1	30
Disclosure allegations referred to agency Inspectors General	23	102	82	93	82
Disclosure allegations closed due to lack of sufficient basis for further action	93	78	58	140	154
Remaining disclosures carried over to next fiscal year for completion of review	23	54	71	96	212

Results of Referrals

During FY 1996, OSC closed 10 reports from agencies to which statutory referrals previously had been made. OSC review of agency reports disclosed the following results from statutory referrals:

Section 1213(c) Reports

Cases in which allegations were substantiated in whole or in part	4
Cases in which allegations were not substantiated	4

Section 1213(g) Reports:

Cases in which allegations were substantiated in whole or in part	2
Cases in which allegations were not substantiated	0

Agency Corrective Action

In the Reports of Investigation received from the agencies in FY 1996, eight allegations in six matters were substantiated. The agencies reported the following corrective actions:

Agency regulations or practices changed	2
Disciplinary action taken	1
Other	4

Uniformed Services Employment and Reemployment Matters

The enactment of the Uniform Services Employment and Reemployment Rights Act (USERRA) in the 104th Congress strengthened the employment and reemployment rights of federal employees who perform in a uniformed service. Of particular importance to OSC, USERRA provides the Secretary of Labor with the mandate to investigate all federal sector USERRA cases. If the Secretary is reasonably satisfied that a violation has occurred and efforts to obtain voluntary compliance are not successful, upon the request of the claimant, the Secretary shall refer the matter to OSC. If OSC is reasonably satisfied that the individual is entitled to the rights or benefits sought, OSC may appear and act as the representatives of the claimant in an action before the Merit Systems Protection Board and the U.S. Court of Appeals for the Federal Circuits.

In FY 1996, OSC received three USERRA referrals from the Department of Labor. These cases were still under consideration at the close of FY 1996.

OSC Initiatives in FY 1996

OSC On-Line

In an effort to widen its reach to federal, state and local employees with regard to the Hatch Act, OSC launched two initiatives in September 1996 to coincide with Election '96 activities. These initiatives expanded access to timely information and advice on permitted and prohibited activities pursuant to the Hatch Act for government employees and other OSC customers.

E-mail Advisory Opinion Service. OSC launched a pilot project in FY 1996 to provide access to its Hatch Act advisory opinion service via e-mail. By law, OSC is authorized to issue advisory opinions about political activities permitted and prohibited under the Act. Now requesters with Internet access can send their Hatch Act questions to OSC by e-mail (hatchact@osc.gov), and receive an advisory opinion from OSC by return e-mail. In addition, advisory opinion requests can still be submitted by telephone, mail, and fax.

Home Page Update. OSC also updated its World Wide Web Home Page (1) to include an expanded discussion of Hatch Act issues, and (2) to enable visitors to the site to request a Hatch Act opinion from OSC via a hypertext link to its new Hatch Act advisory e-mail address. The Hatch Act amendments of 1993 made it possible for many (though not all) federal and D.C. government employees to participate in political management or in political campaigns. Visitors to OSC's Home Page found new discussion on federal Hatch Act topics, including frequently asked questions, recent regulations, agencies and employees still covered by the pre-1993 law, and the e-mail advisory opinion pilot project. These sections joined others on the Home Page that provide information about Hatch Act provisions applicable to state and local government employees (as well as information and publications about OSC's other responsibilities). OSC's Home Page can be found on the Internet at <http://www.access.gpo.gov/osc>.

Surveys

Section 13 of Public Law 103-424 (effective on October 29, 1994), provided that OSC shall conduct an annual survey of all individuals who contact OSC for assistance. The law prescribed that surveys were to determine (1) if the individuals seeking assistance were fully apprised of their rights; (2) whether the individuals were successful either at OSC or the MSPB; (3) if the individuals, whether successful or not, were satisfied with the treatment received from OSC. The law also required that survey results were to be published in the OSC annual report.

OSC began the survey program in August of 1995, after clearance of survey forms under the Paperwork Reduction Act. Three survey forms were developed for mailing to potential respondents - i.e., one for each of the following categories of individuals seeking

OSC assistance: (1) persons requesting and receiving written Hatch Act advisory opinions; (2) persons filing a report through the OSC whistleblower channel operated by the OSC Disclosure Unit; and (3) persons filing reports of alleged prohibited personnel practices (PPPs). Responses received to all three surveys, in both the initial FY 1995 survey period (August 1st-September 30th) and in FY 1996, are found in Tables 3-5 in the Appendix.

OSC took several measures to allay any concerns that submission of a survey response might impact OSC's processing of a matter. These steps included mailing the appropriate survey form after OSC completed action on a matter; inserting a notice on each form that completion of the survey was voluntary and that provision of the names and case numbers was optional; using forms without codes that could identify the source of completed surveys; and assigning the receipt and analysis of completed surveys to an office other than OSC's operational units. OSC provided postage-paid returns of completed survey forms, and sent a survey reminder to all recipients within two to three weeks of the initial survey mailing.

As a general proposition, with the exception of the Hatch Act survey, the response rate to the surveys was very low. This complicated any meaningful interpretation of survey data. While there was a 52% response rate to surveys in FY 1996 Hatch Act matters, response rates in the PPP and Disclosure Unit categories for the same period were 29% and 23%, respectively. The response rates for August-September 1995 were as follows; Hatch Act 2%, Disclosure Unit 0%, and PPPs 40%.

Nevertheless, some general observations can be made about the responses that were received. Respondents reported more favorably about results obtained and satisfaction with the service rendered when OSC was performing its Hatch Act advisory functions, rather than its enforcement or compliance responsibilities. A majority of the 87 respondents who had obtained a written advisory opinion under the Hatch Act in FY 1996 reported favorably on the results obtained. By comparison, of the 467 respondents (out of 1602 queried) on PPP matters, a majority reported that they had been unsuccessful in obtaining the results sought from OSC; in Disclosure Unit Matters, a majority of the 46 respondents (of the 200 queried) reported being unsuccessful in obtaining the results sought. Even with the limited number of responses, correlations were apparent between the degree to which a respondent obtained the results sought from OSC and the degree to which they reported being satisfied with the service received.

It should also be noted that the surveys, in conformity with the statutory requirement, asked whether respondents had been successful at OSC (or the MSPB). The surveys did not ask respondents to identify the reason or reasons cited for closure of their matters at OSC and, in order to preserve anonymity, the survey format was not designed to permit cross-checking of results with case files. In PPP matters, possible bases for OSC's closure of a matter without further action include: lack of jurisdiction over the agencies or employees involved; failure to state a claim cognizable under law or regulation; absence of an element required to establish a violation; insufficient evidence that a violation occurred; or deferral to the Equal Employment Opportunity Commission pursuant to published policy. In Disclosure Unit matters, OSC's authority is limited by law to review and referral of disclosures for

appropriate action by other agencies - i.e., OSC is not authorized to investigate the disclosures received. Comments made by several respondents to the Disclosure Unit survey indicated some confusion about the statutory limitations on OSC's role, and dissatisfaction with the time taken by other agencies to review and act on matters. It is possible, therefore, that some of the dissatisfaction reflected in Disclosure Unit surveys was directed at other agencies, rather than at the quality of service received from OSC.

Legislation

Reauthorization of Appropriations

Consistent with the Administration's budget request, the Office of Special Counsel requested budget authority for FY 1997 in the amount of \$8,311,000. This represents an increase of \$394,523 over the FY 1996 authorization.

The House authorized \$7,840,000 while the Senate authorized \$8,116,000. The House receded to the Senate and the Conference Committee recommendation is \$195,000 below the budget estimate and \$276,000 above the House allowance.

H.R. 3610, making omnibus consolidated appropriations for Fiscal Year 1997 was passed and signed by the President on September 28, 1996.

Reauthorization of the Office of Special Counsel

Included in H.R. 3610, the omnibus consolidated appropriations bill for Fiscal Year 1997, was a straight reauthorization for the Office of Special Counsel. The legislation reauthorized OSC until the year 2002.

Further Information

OSC Publications

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

Director, Congressional & Public Affairs
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505
Telephone: (202) 653-9001

Prohibited Personnel Practice Complaints

Complaints of prohibited personnel practices should be reported to the Officer of the Week at:

Complaints Examining Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505
Telephones:
(800) 872-9855 (TDD Equipped)
(202) 653-7188 (TDD Equipped)

Whistleblower Disclosures

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

Disclosure Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505
Telephones:
(800) 572-2249
(202) 653-9125

Hatch Act Questions

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

Hatch Act Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505
Telephones:
(800) 85-HATCH or (800) 854-2824
(202) 653-7143
E-mail Address: hatchact@osc.gov

Outreach Programs

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

Outreach Programs
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505
Telephone: (202) 653-7122

OSC On Line

Information about OSC can be obtained on its Home Page on the World Wide Web.
OSC's address is:

<http://www.access.gpo.gov/osc>

APPENDIX

Table 1

Allegations Contained in Matters Received During FY 1996	
Nature of Allegation	Number of Allegations
Violation of a law, rule or regulation implementing or concerning a merit system principle [§2302(b)(11)]	775
Reprisal for whistleblowing [§2302(b)(8)]	688
Reprisal for exercise of a right of appeal [§2302(b)(9)]	677
Disclosures of alleged violation of a law, rule or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a danger to public health or safety [§1213(c) or §1213(g)]	507
Discrimination on the basis of race, color, sex, national origin, religion, age, or handicapping condition [§2302(b)(1)(A)-(D)]	503
Granting of unauthorized preference or advantage [§2302(b)(6)]	384
Deception or obstruction of the right to compete [§2302(b)(4)]	249
Allegations which did not cite or suggest any prohibited personnel practice or prohibited activity	233
Discrimination on the basis of non-job related conduct [§2302(b)(10)]	103
Appointment, promotion, or advocating the appointment or promotion of a relative [§2302(b)(7)]	63
Violation of the Hatch Act by a state or local government employee [§1216(a)(2)]	55
Violation of the Hatch Act by a federal employee [§1216(a)(1)]	53
Arbitrary or capricious withholding of information requested under the Freedom of Information Act [§1216(a)(3)]	45
Discrimination on the basis of marital status or political affiliation [§2302(b)(1)(E)]	26
Attempts to secure withdrawal from competition [§2302(b)(5)]	35
Solicitation or consideration of unauthorized recommendations [§2302(b)(2)]	30
Coercion of political activity [§2302(b)(3)]	3
Other activities allegedly prohibited by civil service law, rule or regulation [§1216]	<u>5</u>
Total	4,434¹

¹ Each matter may contain more than one allegation. Thus, this total exceeds the total number of matters received.

Table 2

Allegations Contained in Matters Referred for Field Investigation During FY 1996	
Nature of Allegation	Number of Allegations
Reprisal for whistleblowing [§2302(b)(8)]	159
Reprisal for exercise of a right of appeal [§2302(b)(9)]	123
Violation of a law, rule or regulation implementing or concerning a merit system principle [§2302(b)(11)]	53
Granting of unauthorized preference or advantage [§2302(b)(6)]	40
Deception or obstruction of the right to compete [§2302(b)(4)]	27
Discrimination on the basis of non-job related conduct [§2302(b)(10)]	17
Discrimination on the basis of race, color, sex, national origin, religion, age, handicapping condition, or marital status [§2302(b)(1)(A)-(E)]	15
Appointment, promotion, or advocating the appointment or promotion of a relative [§2302(b)(7)]	11
Violation of the Hatch Act by a federal employee [§1216(a)(1)]	7
Arbitrary or capricious withholding of information requested under the Freedom of Information Act [§1216(a)(3)]	6
Violation of the Hatch Act by a state or local government employee [§1216(a)(2)]	5
Attempts to secure withdrawal from competition [§2302(b)(5)]	4
Solicitation or consideration of unauthorized recommendations [§2302(b)(2)]	<u>1</u>
Total	468¹

¹ Each matter may contain more than one allegation. Thus, this total exceeds the total number of matters actually referred for field investigation.

Table 3

HATCH ACT SURVEY RESPONSES

Question 1: Has the federal agency by which you are employed (or were most recently employed, if you no longer work for a federal agency) informed you about your rights and restrictions in connection with political activity under the Hatch Act?		
<i>Response options*</i>	<i>August-September 1995 (surveys sent: 30)</i>	<i>FY 1996 (surveys sent: 168)</i>
Yes	5	26
No	0	10
Don't recall	0	3
Never employed by a federal agency	1	37

Question 2: Did OSC's written advisory opinion adequately address your question(s)?		
<i>Response options*</i>	<i>August-September 1995 (surveys sent: 30)</i>	<i>FY 1996 (surveys sent: 168)</i>
Yes	6	79
Partially	0	4
No	0	4

Question 3: Were you satisfied overall with the service you received from OSC staff?		
<i>Response options*</i>	<i>August-September 1995 (surveys sent: 30)</i>	<i>FY 1996 (surveys sent: 168)</i>
Very satisfied	3	70
Satisfied	2	10
No opinion	0	0
Dissatisfied	1	6
Very dissatisfied	0	1

Table 4

DISCLOSURE UNIT SURVEY RESPONSES

Question 1: Has the federal agency by which you are employed (or were most recently employed, if you no longer work for a federal agency) informed you about the channels available for, and your rights related to, the reporting of whistleblower disclosures?		
Response options*	August-September 1995 (surveys sent: 46)	FY 1996 (surveys sent: 200)
Yes	0	8
No	0	29
Don't recall	0	2
Never employed by a federal agency	0	5

Question 2: Were you successful in obtaining the action you sought from OSC?		
Response options*	August-September 1995 (surveys sent: 46)	FY 1996 (surveys sent: 200)
Yes	0	5
Partially successful	0	4
No	0	35

Question 3: Regardless of the outcome of the matter, were you satisfied overall with the service you received in your dealings with OSC staff?		
Response options*	August-September 1995 (surveys sent: 46)	FY 1996 (surveys sent: 200)
Very satisfied	0	7
Somewhat satisfied	0	1
No opinion	0	1
Somewhat dissatisfied	0	7
Very dissatisfied	0	27

Table 5

PROHIBITED PERSONNEL PRACTICE SURVEY RESPONSES

Question 1: Has the federal agency by which you are employed (or were most recently employed, if you no longer work for a federal agency) informed you about your rights and remedies in connection with prohibited personnel practices?

<i>Response options*</i>	<i>August-September 1995 (surveys sent: 326)</i>	<i>FY 1996 (surveys sent: 1602)</i>
Yes	19	69
No	93	346
Don't recall	10	20
Never employed by a federal agency	4	18

Question 2: Were you successful in obtaining the relief you requested from OSC?

<i>Response options*</i>	<i>August-September 1995 (surveys sent: 326)</i>	<i>FY 1996 (surveys sent: 1602)</i>
Yes	15	22
Partially successful	13	45
No	96	378
Not applicable	4	12

Question 3: Regardless of the outcome of the matter, were you satisfied overall with the service you received from OSC staff?

<i>Response options*</i>	<i>August-September 1995 (surveys sent: 326)</i>	<i>FY 1996 (surveys sent: 1602)</i>
Very satisfied	22	58
Satisfied	17	67
No opinion	10	31
Dissatisfied	26	103
Very dissatisfied	52	202

Table 5, Cont.

Question 4: If you filed an appeal with the Merit Systems Protection Board (MSPB) on the same matter(s) covered in your OSC matter, were you successful in obtaining the relief you requested from the MSPB?		
Response options*	August-September 1995 (surveys sent: 326)	FY 1996 (surveys sent: 1602)
Yes	2	15
Partially successful	3	10
No	15	84
Not applicable	86	294