

ANNUAL REPORT TO CONGRESS



U.S. OFFICE OF SPECIAL COUNSEL
FISCAL YEAR 2008



**REPORT TO CONGRESS
FOR
FISCAL YEAR 2008**

U.S. OFFICE OF SPECIAL COUNSEL

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U.S. Office of Special Counsel

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The Honorable Joseph Biden
President of the Senate
Washington, DC 20510

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515

Dear Mr. President and Madam Speaker:

I respectfully submit the Report to Congress for Fiscal Year 2008 from the U.S. Office of Special Counsel. A copy of this report will also be sent to each Member of Congress.

Sincerely,

William E. Reukauf
Associate Special Counsel

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MESSAGE FROM ASSOCIATE SPECIAL COUNSEL WILLIAM E. REUKAUF

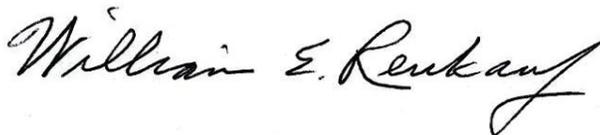
This is the U.S. Office of Special Counsel's (OSC's) Report to Congress for Fiscal Year 2008. The report describes OSC's important mission and responsibilities, significant matters handled by the agency, and summary results of the agency's performance during the last fiscal year (FY).

FY 2008 was a challenging time for this small, but important, agency. Employees were called upon to respond to and cooperate with two extensive inquiries involving the then-agency head, including a grand jury investigation, and execution of search warrants on agency premises.

At the same time, OSC continued to receive increased numbers of cases in all four of its mission-critical areas:

- New prohibited personnel practice complaints rose 5.4% in FY 2008.
- OSC received 445 Hatch Act complaints, and issued 3,991 advisory opinions on the act in FY 2008 – increases of 57%, and 53%, respectively, over the previous fiscal year.
- The Disclosure Unit received 530 whistleblower disclosures in FY 2008, up 10% over the number of disclosures received in FY 2007.
- OSC received 15 referrals from the Department of Labor under the Uniformed Services Employment and Reemployment Rights Act, up from four referrals the previous fiscal year.

These caseload increases were significant, and the upward trend in numbers of cases shows no sign of abating. But the real story conveyed within these pages relates to the efforts expended and results achieved in FY 2008 by dedicated employees, regardless of the challenges, on behalf of those who came to OSC seeking its assistance.

A handwritten signature in cursive script that reads "William E. Reukauf". The signature is written in black ink and is positioned in the lower-left quadrant of the page.

INTRODUCTION TO OSC

Statutory Background

OSC was established on January 1, 1979.¹ From then until 1989, the office operated as the independent investigative and prosecutorial arm of the Merit Systems Protection Board (MSPB, or “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; enforced the Hatch Act, including by advice on restrictions imposed by the 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 federal employment) about wrongdoing in government agencies. The office 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 (WPA).² The statute made OSC an independent agency within the executive branch of the federal government, with continued responsibility for the functions described above. It also strengthened protections against reprisal for employees who disclose wrongdoing in the government, and enhanced OSC’s ability to enforce those protections.

Congress enacted legislation in 1993 that significantly amended Hatch Act provisions applicable to federal and District of Columbia (D.C.) government employees, and enforced by OSC.³ (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 (USERRA) became law.⁴ 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.

Also in 1994, OSC’s reauthorization act expanded protections for federal employees, and defined new responsibilities for OSC and other federal agencies.⁵ It provided, for example, 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 is now the Department of Veterans Affairs (DVA), and to employees of certain government corporations. It also broadened the scope of personnel actions covered under those provisions. Finally, the act made federal agencies responsible for informing their employees of available rights and remedies under the WPA, and directed agencies to consult with OSC in that process.

In November of 2001, Congress enacted the Aviation and Transportation Security Act,⁶ creating the Transportation Security Administration (TSA). Under the act, non-security screener employees of TSA can file allegations of reprisal for whistleblowing with OSC and the MSPB. Approximately 45,000 security screeners in TSA, however, could not pursue such complaints at OSC or the Board. 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.

Mission

OSC is an independent federal investigative and prosecutorial agency. Its primary mission is to safeguard the merit system in federal employment by protecting covered employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing. The agency also supports covered federal employees and applicants by providing a secure channel for disclosures by them of wrongdoing in government agencies; enforces and provides advice on Hatch Act restrictions on political activity by government employees; and enforces employment rights secured by USERRA for federal employees who serve and protect the country in the National Guard or Reserves.

OVERVIEW OF OPERATIONS

Internal Organization

OSC maintains a headquarters office in Washington, D.C., and four field offices (located in Dallas, Texas; Detroit, Michigan; Oakland, California; and Washington, D.C.). Agency components during FY 2008 included the Immediate Office of the Special Counsel, five program/operating units, and several support units (described further below).

Immediate Office of the Special Counsel (IOSC). The Special Counsel and the IOSC staff in FY 2008 were responsible for policy-making and overall management of OSC. This encompassed management of the agency's congressional liaison and public affairs activities, and coordination of its outreach program. The latter included promotion of compliance by other federal agencies with the employee information requirement at 5 U.S.C. § 2302(c).

Program Units

Complaints Examining Unit (CEU). This unit is the intake point for all complaints alleging prohibited personnel practices and other violations of civil service law, rule, or regulation within OSC's jurisdiction. CEU screens approximately 2,000 such complaints each 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 or possible mediation.

Investigation and Prosecution Division (IPD). IPD is comprised of the four field offices, and is generally responsible for conducting field investigations of matters referred after preliminary inquiry by CEU. In selected cases referred by CEU for further investigation, IPD coordinates mediation of complaints in which the complainant and the agency involved have agreed to participate in OSC's voluntary Alternative Dispute Resolution (ADR) Program. In other cases, after field investigation of matters referred by CEU,

legal analyses are done by IPD attorneys to determine whether the evidence is sufficient to establish that a prohibited personnel practice (or other violation within OSC's jurisdiction) has occurred. IPD investigators work with the attorneys in deciding whether a matter warrants corrective action, disciplinary action, or both. If meritorious cases cannot be resolved through negotiation with the agency involved, the attorneys represent the Special Counsel in litigation before the MSPB. They also represent the Special Counsel when OSC intervenes, or otherwise participates, in other proceedings before the Board. Finally, IPD investigators and attorneys assist the Hatch Act Unit and the USERRA Unit, as needed, with cases handled by those components.

Disclosure Unit (DU). This component receives and reviews disclosures from federal whistleblowers. Reporting directly to the Deputy Special Counsel, DU recommends the appropriate disposition of disclosures, which may include referral to the head of the agency involved for investigation and a report to the Special Counsel; informal referral to the Inspector General (IG) of the agency involved; or closure without further action. Unit attorneys review each agency report of investigation to determine its sufficiency and reasonableness before the Special Counsel sends the report to the President and responsible congressional oversight committees, along with any comments by the whistleblower and the Special Counsel.

Hatch Act Unit (HAU). This unit enforces and investigates complaints of Hatch Act violations, and represents OSC in litigation before the MSPB seeking disciplinary action. In addition, the HAU is responsible for providing legal advice on the Hatch Act to federal, D.C., state and local employees, as well as the public at large.

USERRA Unit. This component reviews USERRA cases referred by the Department of Labor (DOL) to OSC for legal representation of the claimant before the MSPB, if warranted. Under a nearly three-year demonstration project established by Congress, the USERRA Unit also directly received and investigated approximately one-half of all federal sector USERRA cases filed between February of 2005 and December of 2007, bypassing DOL.

Support Units

Legal Counsel and Policy Division. This division serves as OSC's office of general counsel, and provides policy advice and support to the agency. The division's responsibilities include provision of legal advice and support in connection with management and administrative matters; defense of OSC interests in litigation filed against the agency; management of the agency's Freedom of Information Act, Privacy Act, and ethics programs; and policy planning and development.

Office of the Chief Financial Officer and Director of Administrative Services. This office provides management support and administrative services to OSC. Component units are the Budget and Analysis Branch, Document Control Branch, Human Resources Branch, Information Technology Branch, and the Procurement Branch.

FY 2008 Budget and Staffing

During FY 2008, OSC operated with a budget of \$17,468,000. By the end of the fiscal year, OSC had a staff of approximately 110 employees.

FY 2008 Case Activity and Results

Table 1, below, summarizes basic OSC case intake and dispositions in FY 2008 (with comparative data for the previous four fiscal years). More detailed data can be found in Tables 2-8, in sections of this report relating to specific components of OSC's mission – prohibited personnel practice cases, Hatch Act matters, whistleblower disclosures, and USERRA cases.

TABLE 1

| Summary of All OSC Case Activity | | | | | |
|--|------------|------------|------------|------------------|------------|
| | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 |
| Matters^a pending at start of fiscal year | 1,605 | 778 | 777 | 667 ^b | 700 |
| New matters received | 2,798 | 2,684 | 2,718 | 2,880 | 3,116 |
| Matters closed | 3,612 | 2,685 | 2,814 | 2,842 | 2,875 |
| Hatch Act advisory opinions issued | 3,913 | 2,558 | 3,004 | 2,598 | 3,991 |
| Matters pending at end of fiscal year | 791 | 777 | 681 | 698 | 937 |

^a "Matters" in this table includes prohibited personnel practice cases (including TSA matters), Hatch Act complaints, whistleblower disclosures, and USERRA cases.

^b Closure entries in the agency case tracking system were made in early FY 2007 for several cases completed during FY 2006.

PROHIBITED PERSONNEL PRACTICE COMPLAINTS

Receipts and Investigations

OSC is responsible for investigating complaints alleging any one or more of 12 prohibited personnel practices defined by law.⁷ Of the 3,116 new matters received by OSC during FY 2008, 67% (2,089 matters) were new prohibited personnel practice complaints.⁸

As the intake unit for all prohibited personnel practice complaints filed with OSC, CEU reviewed all such matters received in FY 2008. Complaint examiners reviewed each matter to determine whether it was within OSC's jurisdiction, and if so, whether it stated a potentially valid claim, by reference to legal elements of a violation defined by law and interpreted by the MSPB and the courts. Complaints consisting of potentially valid claims were referred by CEU to IPD for field investigation. Matters referred during FY 2008 for an investigation included complaints from Federal Aviation Administration (FAA) employees alleging reprisal for disclosing aviation safety violations, from Department of Veterans Affairs (DVA) employees alleging reprisal for disclosing poor patient care for veterans, and from individuals alleging reprisal for filing complaints with or participating in IG investigations. Cases referred also included complaints alleging denials of fair and open competition to veterans and other applicants for federal employment.

Mediations

In selected prohibited personnel practice cases referred by CEU to IPD, OSC continued to offer mediation as an alternative to investigation. Under OSC's program, once a case is identified as mediation-appropriate, an ADR specialist contacts the parties to discuss the process. An offer of mediation is first made to the complainant. If the complainant accepts, OSC then offers mediation to the agency involved. Pre-mediation discussions are conducted in an effort to help the parties form realistic expectations and well-defined objectives for the mediation process.

If mediation resolves the complaint, the parties execute a written and binding settlement agreement.

Resolutions can result in monetary recoveries, including retroactive promotions, attorney fees, and lump sum payments. Benefits that complainants can also receive include revised performance appraisals, transfers, and letters of recommendation. If, however, mediation cannot resolve the complaint, it is referred for further investigation by IPD.

Mediated settlements. The following are examples of complaints resolved by OSC mediators during FY 2008:

- An electronics mechanic disclosed to his agency IG and OSC's Disclosure Unit that a specific aircraft was not being repaired and overhauled according to specifications. He alleged that this could result in an electrical short-circuit and cause a crash. Shortly thereafter, an agency reorganization resulted in the employee's reassignment to another unit where less overtime was worked. He also received a letter of reprimand for alleged misconduct. He alleged that these actions were in reprisal for his whistleblowing. Through OSC mediation, the parties settled the case. The agency agreed to remove the letter of reprimand from the employee's record and to issue him a written commendation and cash award. The employee agreed to withdraw his complaint.
- A scientist alleged he was retaliated against after raising three critical public health and safety issues. He reported that a common cosmetic ingredient was potentially harmful to consumers; objected to the intentional delay of a report detailing 26 areas of environmental problems in the northern region of the United States; and assisted a congressional committee investigating whether or not trailers provided to Federal Emergency Management Agency refugees contained toxic levels of formaldehyde. The scientist was then demoted, placed in untenable working conditions, and given a negative performance appraisal. Through mediation, the parties reached a settlement in the case. The agency agreed to pay the scientist a lump sum and to expunge any unsatisfactory performance reviews or other related documents critical of his work. The agency also agreed to pay attorney's fees. In return, the scientist agreed to retire from federal service.

Table 2, below, summarizes OSC mediation activity in FY 2008 (with comparative data for the previous four fiscal years).

TABLE 2

| ADR Program Activity – Mediation of Prohibited Personnel Practice Complaints | | | | | | |
|---|---------------------|--------------------|--------------------|--------------------|--------------------|--------------------|
| | | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 |
| Matters identified as mediation-appropriate | | 82 | 22 | 52 | 38 | 31 |
| Initial acceptance rates by parties | Complainants | 68% | 27% | 83% | 71% | 54% |
| | Agencies | 64% | 22% | 59% | 59% | 94% |
| Mediated and other resolutions^a | | 18 | 5 | 11 | 10 | 8 |
| Resolution rate by ADR program | | 86% | 100% | 55% | 50% | 50% |

^a Category includes complaints settled through mediation by OSC (including “reverse-referrals” – *i.e.*, cases referred back to ADR program staff by IPD after investigation had begun, due to the apparent potential for a mediated resolution). Category also includes complaints that entered the initial OSC mediation process, and were then resolved by withdrawal of the complaint, or through mediation by an agency other than OSC.

Corrective and Disciplinary Actions

In complaints other than those resolved through mediation by OSC, IPD conducts a field investigation. If, after investigation of a complaint, OSC believes that a prohibited personnel practice has been committed, OSC notifies the agency involved. Typically, OSC obtains corrective action through negotiation between the complainant and the agency. By law, before initiating litigation seeking corrective action at the MSPB, OSC must report its findings and recommendations to the head of the agency involved. Once the agency has had a reasonable period of time to take corrective action and fails to do so, OSC may file a petition for corrective action with the MSPB. If OSC determines that disciplinary action against an employee believed to have committed a violation is warranted, it may file a disciplinary action complaint directly with the MSPB. Should the agency agree to take appropriate disciplinary action on its own initiative, then the matter may be settled without resort to an MSPB proceeding.

Negotiated Resolutions

The following examples highlight corrective and disciplinary actions obtained by OSC in FY 2008 through negotiation with the agency involved:

Reprisal for whistleblowing

- Two complainants, both high-level employees of a federal agency, alleged that various personnel actions were taken because they reported, or were believed to have reported, suspected travel irregularities by an agency IG to the President's Council on Integrity and Efficiency. OSC investigated and concluded that the IG had reassigned the complainants to less important positions and curtailed their year-end bonuses and pay-raise packages because of their protected activity. OSC reported its findings to the President, recommending disciplinary action against the IG, and corrective action for the two complainants. Before any action could be taken against the IG, he resigned. In response to OSC's report, the agency agreed to provide full corrective action to the complainants pursuant to a settlement agreement, including provision for reinstatement of complainants to their former

positions, an increase in salaries and bonuses, and payment of attorney's fees. In exchange, the complainants withdrew their OSC complaints.

- Complainant, a research pilot, alleged that he was grounded from flying, subjected to a psychiatric examination, reassigned to a non-flying position, and coerced into accepting a position at another agency facility because of his whistleblowing. He reported that various managers had engaged in gross mismanagement and a gross waste of funds, abused their authority, caused a substantial and specific danger to public health or safety, and violated various laws and agency aviation safety directives. While there was insufficient evidence to conclude that the complainant had been subjected to retaliation, OSC's investigation found that the agency did not give the complainant adequate notice and opportunity to respond prior to taking the actions described above. The agency agreed to: (1) reassign complainant back to his original duty station; (2) pay him up to \$30,000 for expenses associated with a house-hunting trip, relocation of his family and household belongings, and any associated storage costs for up to 60 days; (3) pay him a lump sum of \$25,000; (4) give him up to a maximum of 75 days of paid administrative leave beginning no later than August 31, 2008; and (5) approve the use of the balance of his annual leave, taking him to retirement on or before March 31, 2009. In return, the complainant agreed to withdraw his OSC complaint and retire by that date.

Reprisal for engaging in protected activity

- Three complainants, a supervisory auditor and two auditors, alleged that various retaliatory personnel actions, including details, were taken because they filed a *qui tam* action under the False Claims Act. The suit involved the government's recovery of millions of dollars in unpaid royalties from an oil company that the complainants had been assigned to audit. OSC's investigation confirmed that the complainants' lawsuit was a significant factor in the agency's personnel actions. During the OSC investigation, the agency unilaterally returned the complainants to their assigned duties and gave them cash awards.

Unauthorized employment preference

- Several complainants, applicants for a supervisory position at a waste treatment plant, alleged that an unqualified applicant was selected for the supervisory position in violation of 5 U.S.C. § 2302(b)(6). OSC investigated and found evidence that the applicant selected lacked minimum qualifications for the position. At OSC's request, the agency demoted the selectee to a non-supervisory position and selected a qualified applicant after re-announcing the vacancy. The agency also suspended the official responsible for the improper selection for four days.

Unauthorized employment preference

- The U.S. Office of Personnel Management (OPM) referred a complaint to OSC alleging several unauthorized preferences involving an agency that had been audited by OPM. In the first allegation, the complaint alleged that a high-level official granted a candidate an unauthorized employment preference in violation of 5 U.S.C. §§ 2302 (b)(6) and (b)(12). OSC's investigation revealed that the agency improperly used an emergency non-competitive hiring authority (issued by OPM in the aftermath of the attacks of September 11, 2001) to hire a preferred candidate. In particular, OSC found that the subject official selected a candidate he had proposed despite strong evidence questioning the agency's "emergency need" to fill the position, and concerns about the candidate's qualifications. At OSC's request, the agency agreed to take corrective action, as follows: (1) re-announce the position in question; (2) ensure that public notice requirements were met; (3) notify all candidates who previously applied for the position about the new vacancy announcement; and, (4) ensure that the selection process was in accordance with merit system principles. OSC filed a disciplinary action complaint at the Board, charging the subject official with granting the unauthorized employment preference.

The second allegation referred by OPM indicated that a candidate for another position had been pre-selected and was unqualified for the position at issue. OSC's investigation did not substantiate the unauthorized preference allegation, but did find that a management

official wrote in an e-mail that he wanted to "vet-proof" the position. The official who made the "vet-proof" statement is no longer a federal employee. At OSC's request, the official's supervisor, who was copied on the "vet-proof" e-mail, was issued a letter of reprimand.

Unauthorized employment preference; violation of veterans' preference

- Complainant, a federal employee, alleged that his employing agency improperly imposed a one-day cut-off in accepting applications for an information technology position. OSC's investigation showed that the agency was authorized to impose the cut-off under OPM procedures. OSC determined, however, that the agency had violated veterans' preference requirements in selecting a requested candidate by name over a higher-standing preference eligible applicant. The investigation showed that the human resources official responsible for the evaluation of the applications made material errors resulting in several erroneous applicant scores. Working in conjunction with an OPM audit team, the investigation sampled other personnel actions processed by the same official and discovered additional material errors in several other actions. Based on the investigation, OSC concluded that the agency had granted the selectee an unauthorized preference and violated veterans' preference requirements, both prohibited personnel practices. As a result, the agency agreed to regularize the appointment by offering the veteran a similar position, and by reassigning the human resource official from the delegated examining unit.

Nepotism

- Complainant, a letter carrier for a federal agency, alleged that the supervisor of customer services at an office in Massachusetts violated 5 U.S.C. § 2302(b)(7) by supervising his nephew. The matter was referred to the agency Chief Counsel's office for investigation pursuant to an MOU between OSC and the agency. The investigation concluded that the nephew falsified his employment application. As a result, the nephew was separated from employment. In addition, both the uncle and the local official were retrained on hiring

practices. Information on nepotism was also issued to all non-bargaining unit employees in the Massachusetts District.

Litigation Filed at the MSPB

The following are descriptions of the three cases filed by OSC at the MSPB during FY 2008. All three sought disciplinary action for the commission of prohibited personnel practices.

Unauthorized employment preference

- In May of 2008, OSC filed separate complaints for disciplinary action with the MSPB, each charging two human resources specialists with granting an unauthorized preference or improper advantage to an agency employee during the hiring process for a GS-11-1801 supervisory position. OSC found that the two human resources specialists (respondents) manipulated the hiring process, primarily by issuing three successive vacancy announcements to reach the preferred candidate. The first was canceled because the preferred agency employee failed to meet the criteria to be placed on the certificate of eligibles. The second was canceled after the respondents realized that the preferred agency employee again did not qualify for the GS-11 level position. Finally, the respondents announced the position a third time, this time lowering the grade of the position to GS-9 so that the preferred agency employee would qualify.

- In June of 2008, OSC filed a complaint with the MSPB seeking disciplinary action against a Senior Executive Service employee. OSC's complaint charged the official with granting an unauthorized employment preference in violation of 5 U.S.C. §§ 2302(b) (6) and (b)(12). OSC found that the official improperly used an emergency, non-competitive hiring authority (issued by OPM in the aftermath of the attacks of September 11, 2001) to hire a preferred candidate. The subject official selected a candidate he had proposed despite strong evidence calling into doubt the agency's "emergency need" to fill the position and raising concerns about the candidate's qualifications. OSC resolved the case favorably during FY 2009, by means of a settlement arrived at before the MSPB hearing. Terms of the settlement are confidential.

Summary of Workload, Activity, and Results

Complaints involving allegations of reprisal for whistleblowing – OSC's highest priority – accounted for the highest numbers of complaints resolved and favorable actions (stays,⁹ corrective actions, and disciplinary actions) obtained by OSC during FY 2008.

Table 3, below, contains summary data for the year (with comparative data for the four previous fiscal years) on all favorable actions obtained in connection with OSC's processing of whistleblower reprisal and other prohibited personnel practice complaints. The number of favorable actions obtained increased substantially in FY 2008, primarily due to a single case that resulted in corrective action for 20 employees.

TABLE 3

| Summary of All Favorable Actions – Prohibited Personnel Practice Complaints^a | | | | | | |
|--|-----------------------|--------------------|--------------------|--------------------|--------------------|--------------------------------|
| | | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008^b |
| Total favorable actions negotiated with agencies (all PPPs) | No. of actions | 80 | 45 | 52 | 29 | 58 |
| | No. of matters | 65 | 45 | 48 | 29 | 33 |
| Total favorable actions negotiated with agencies (reprisal for whistleblowing) | No. of actions | 57 | 37 | 40 | 21 | 44 |
| | No. of matters | 49 | 37 | 37 | 21 | 20 |
| Disciplinary actions negotiated with agencies | | 11 | 3 | 4 | 5 | 3 |
| Stays negotiated with agencies | | 11 | 3 | 8 | 7 ^c | 4 ^d |
| Stays obtained from MSPB | | 1 | 1 | 1 | 3 | 0 |
| Corrective action petitions filed with the MSPB | | 1 | 1 | 1 | 1 | 0 |
| Disciplinary action complaints filed with the MSPB | | 0 | 1 | 0 | 0 | 3 |

^a OSC used a newly developed standardized query tool to generate the numbers for FY 2008. When applied backwards to the years FY 2004 through FY 2007, the query tool generated slightly different numbers for several of the figures. Differences are caused by entry of valid data into the case tracking system after annual report figures were compiled and reported, and by data entry errors in earlier years that have since been corrected.

^b Actions itemized in this column occurred in matters referred by CEU and processed by IPD.

^c Incorrectly reported as 4 in OSC's FY 2007 report to Congress due to administrative error.

^d Represents two stays obtained in each of two cases.

Table 4, below, contains FY 2008 summary data (with comparative data for the four previous fiscal years) on OSC’s receipt and processing of all prohibited personnel practice complaints handled by CEU and IPD.¹⁰

TABLE 4

| Summary of All Prohibited Personnel Practice Complaints Activity – Receipts and Processing^a | | | | | | |
|---|------------------------|----------------|----------------|----------------------------|-----------------|-------|
| | FY 2004 | FY 2005 | FY 2006 | FY 2007^b | FY 2008 | |
| Pending complaints carried over from prior fiscal year | 653 | 524 | 521 | 386 | 358 | |
| New complaints received^c | 1,964 | 1,771 | 1,805 | 1,970 | 2,089 | |
| <i>Total complaints</i> | 2,617 | 2,295 | 2,326 | 2,356 | 2,447 | |
| Complaints referred by CEU for investigation by IPD | 244 | 198 | 143 | 125 | 135 | |
| Complaints processed by IPD | 159 | 216 | 256 | 151 | 88 ^d | |
| Complaints pending in IPD at end of fiscal year | 333 | 283 | 155 | 136 | 185 | |
| <i>Total complaints processed and closed (CEU and IPD combined)</i> | 2,093 | 1,774 | 1,930 | 1,996 | 1,971 | |
| Complaint processing times | Within 240 days | 1,799 | 1,198 | 1,693 | 1,874 | 1,889 |
| | Over 240 days | 294 | 576 | 237 | 121 | 80 |
| Percentage processed within 240 days | 86% | 68% | 88% | 94% | 95% | |

^a Complaints frequently contain more than one type of allegation. This table, however, records all allegations received in a complaint as a single matter.

^b Numbers shown in this column in last year’s annual report were recalculated due to an administrative error. Calculations are now performed with a new standardized query tool.

^c “New complaints received” includes a few re-opened cases each year, as well as prohibited personnel practice cases referred by the MSPB for possible disciplinary action.

^d In FY 2008, IPD not only processed 88 PPP complaints, but also handled 17 USERRA demonstration project cases and one Hatch Act case.

HATCH ACT MATTERS

Overview

Enforcement of the Hatch Act – which restricts the political activity of federal employees, employees of the D.C. government, and certain employees of state and local governments – is another important component of OSC’s mission. The agency’s Hatch Act Unit continued to be responsible for this enforcement responsibility, through investigation of complaints received, issuance of advisory opinions responsive to requests, and proactive outreach activities.

Investigations

The HAU enforces compliance with the Hatch Act by investigating complaint allegations to determine whether the evidence supports disciplinary action. After investigating a complaint and determining that a violation has occurred, the HAU will either issue a warning letter to the subject, attempt to informally resolve the violation, negotiate a settlement or prosecute the case before the MSPB. HAU and IPD representatives also served as advisors to a task force created by the Special Counsel in 2007 to investigate possible violations by Executive Branch officials of the Hatch Act, and certain other civil service laws, rules or regulations. Task force investigative efforts continued during FY 2008, and into FY 2009.

Advisory Opinions

The HAU also is responsible for a nation-wide program that provides federal, state, and local (including D.C.) government employees, as well as the public at large, with legal advice on the Hatch Act, enabling individuals to determine whether they are covered by the act, and whether their contemplated activities are permitted under the act. Specifically, HAU has the unique responsibility of providing Hatch Act information and legal advice to White House and congressional offices; cabinet members and other senior management officials throughout the federal government; state and local government officials; and the media. As the only unit authorized by law to issue legal advice to persons outside the agency, HAU issues all OSC advisory opinions.

Outreach

To complement its investigative and advisory roles, the HAU continued to be an active participant in OSC outreach program activities in FY 2008.

Enforcement Highlights

Investigations

The HAU continued to generate increased investigative and litigation activity at OSC, with many of the cases resulting in significant public and media interest. During FY 2008, which coincided with the presidential election, the HAU saw a considerable increase in both the number of complaints – the 445 received were the highest on record – and the seriousness of Hatch Act violations by federal employees.

Some of the unit’s significant enforcement results for the year are highlighted below:

Soliciting political contributions; engaging in political activity on duty and in the workplace

- OSC negotiated a settlement agreement for a 180-day suspension without pay in a case against a federal employee who violated the Hatch Act’s prohibitions against soliciting political contributions and engaging in political activity while on duty and in the federal workplace. OSC’s investigation had found that on numerous occasions throughout 2006 and 2007, while on duty and in the federal workplace, the employee sent partisan political e-mails to various individuals, including e-mails coordinating the activities of a local partisan organization and assisting a candidate in her campaign for state representative. In addition, OSC found that during the same time period, the employee made numerous partisan political postings to his web log (blog) while on duty and in the federal workplace. These blog postings promoted the campaigns of several candidates, including a gubernatorial candidate and a candidate for state representative. Further, OSC’s investigation revealed that the employee posted to a blog an invitation to a fundraising event for a partisan political organization, soliciting a \$20 donation to that organization. On another occasion, he posted a message on another blog, asking readers to contribute \$10

or more to a candidate's campaign for state representative. Under the terms of the agreement, the employee agreed to serve a 180-day suspension without pay, and OSC agreed to close its file and not file a petition for disciplinary action with the MSPB.

Soliciting political contributions; engaging in political activity on duty

- OSC negotiated a settlement agreement in a case involving a federal employee who, while on duty, forwarded an e-mail to 30 recipients, containing a solicitation for campaign funds for a candidate for the U.S. Senate. The e-mail was an urgent plea for generous contributions to the campaign, and provided links to make the contributions online. After investigating the complaint, OSC determined that the employee violated the Hatch Act's prohibition against soliciting political contributions and engaging in political activity while on duty. Under the terms of the settlement, the employee agreed to serve a 30-day suspension without pay, and OSC agreed to close its file and not file a petition for disciplinary action with the MSPB.

Taking an active part in partisan political campaigning

- OSC investigated two separate complaints involving two employees of an agency subject to greater restrictions on political activity (*i.e.*, employees of the agency are not permitted to engage in any partisan political management or campaigning, either on or off duty). Both complaints alleged that the employees stuffed envelopes – one for a political organization, the other for a U.S. Senate campaign. Under the terms of the agreement, both employees agreed to serve five-day suspensions without pay, and OSC agreed to close its files and not file petitions for disciplinary action with the MSPB.

Candidacy

- OSC filed a petition for disciplinary action with the MSPB against a federal employee for violating the Hatch Act's prohibition on being a candidate for public office in a partisan election. The employee was a candidate for Township Supervisor in 2007. The employee won the primary election before he became

a federal employee, and was a candidate in the general election when he became a federal employee. During his candidacy in the general election, OSC and the employee's agency advised him that he was covered by the Hatch Act and that his candidacy was in violation of the law. Despite these warnings, he pursued the candidacy. The MSPB ruled that the employee violated the Hatch Act and ordered him removed from employment.

Candidacy; soliciting, accepting or receiving political contributions

- OSC filed a petition for disciplinary action with the MSPB, charging a federal employee with violation of the Hatch Act's prohibition against being a candidate in a partisan election, and with soliciting, accepting or receiving political contributions. The employee was a candidate for the U.S. House of Representatives in 2004 and 2006, and solicited and received political contributions for his candidacies through mailings and his campaign website. Both before and during the employee's candidacies, his employing agency provided employees with information about Hatch Act restrictions. The MSPB found that the employee willfully and repeatedly violated the Hatch Act and ordered him removed from federal employment.

Use of official authority or influence

- OSC investigated an allegation that the head of an agency may have used his official authority or influence when his title was used during a fundraising event for a U.S. congressional candidate. It was also alleged that the agency official may have solicited the political activity of individuals with business pending before his agency. OSC's investigation, which entailed interviewing over 20 witnesses and reviewing numerous documents, determined that Hatch Act violations had not occurred. OSC, however, advised the agency that it needed to strengthen its process for reviewing political events. The agency acted on OSC's recommendations.

Advisory Opinions

HAU issued 3,991 oral and written advisory opinions (275 formal written opinions, 1,486 e-mail opinions, and 2,230 oral opinions) in response to requests for advice on permissible and prohibited activities under the Hatch Act.

Outreach

HAU attorneys made approximately 60 presentations to various federal agencies, national organizations, and employee groups on employee rights and responsibilities under the Hatch Act. Many of these sessions were attended by high-level agency officials of other agencies. Notably, several presentations were conducted as roundtable discussions with Senate-confirmed presidential appointees and other political appointees; others were sponsored by OPM as part of its program introducing new Schedule C appointees to federal employment.

Summary of Workload, Activity, and Results

OSC had succeeded in reducing Hatch Act complaint processing times dramatically in recent years. Between FY 2003 to FY 2006, the average age of cases declined by 70% (from 469 days to 164 days). Starting in FY 2004, as the unit was reducing the processing time for complaints, the number of open complaints carried forward from previous years also declined sharply (from 254 pending at the end of FY 2004 to 112 pending at the end of FY 2007). The average number of days to process a case by the end of FY 2008 (161 days) was still approximately one-third of what it was in FY 2003.

Alongside these developments, growing public awareness of OSC's enforcement efforts, increased media attention, and the recent presidential election, contributed to record numbers of Hatch Act complaints received and advisory opinions issued in FY 2008. The 445 complaints received were a 57% increase over the previous year (and the highest on record); the 3,991 oral and written advisory opinions issued were a 53% increase over the previous year. Even with increased staffing, greater efficiency, and increased outputs, cases pending at the end of FY 2008 rose by 127%.

Recent surges in both complaints and advisory opinion activity, coupled with task force responsibilities, have made the HAU's workload nearly overwhelming.

Table 5, below, contains FY 2008 summary data (with comparative data for the four previous fiscal years) on OSC's Hatch Act enforcement activities.¹¹

TABLE 5

| Summary of Hatch Act Complaint and Advisory Opinion Activity | | | | | | |
|--|--|--------------------|--------------------|--------------------|--------------------|--------------------|
| | | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 |
| Formal written advisory opinion requests received | | 176 | 191 | 237 | 194 | 292 |
| Formal written advisory opinions issued | | 218 | 183 | 230 | 176 | 275 |
| Total advisory opinions issued^a | | 3,913 ^b | 2,558 | 3,004 | 2,598 | 3,991 |
| New complaints received^c | | 248 | 245 | 299 | 282 | 445 |
| Complaints processed and closed | | 357 | 310 | 266 | 252 | 264 |
| Warning letters issued | | 93 | 87 | 76 | 68 | 70 |
| Corrective actions taken by cure letter recipients | Withdrawal from partisan races | 17 | 4 | 9 | 18 | 13 |
| | Resignation from covered employment | 8 | 10 | 22 | 6 | 17 |
| | Other | 6 | 3 | 2 | 1 | 2 |
| | Total | 31 | 17 | 33 | 25 | 32 |
| Disciplinary action complaints filed with MSPB | | 7 ^d | 11 | 6 | 1 | 3 |
| Disciplinary actions obtained (by negotiation or ordered by MSPB)^e | | 2 | 12 | 10 | 5 | 11 |
| Complaints pending at end of fiscal year | | 146 | 79 | 112 | 142 | 323 |

^a All oral, e-mail, and written advisory opinions issued by OSC.

^b Lower than reported in the President's FY 2006 budget (Other Independent Agencies, Appendix, p. 1209) because of a duplication error.

^c Includes cases that were re-opened.

^d Higher than reported in the President's FY 2006 budget because of case-tracking system entries made after that publication.

^e Numbers revised for all five fiscal years based upon a new query which includes disciplinary actions obtained in both negotiated Hatch Act settlements and litigated Hatch Act cases, not just litigated cases as in the past. As a result, the numbers have increased from what was previously reported (except for FY 2004, which remained the same).

WHISTLEBLOWER DISCLOSURES

Overview

OSC's Disclosure Unit provides a safe channel through which federal employees, former federal employees, or applicants for federal employment, may disclose violations of law, rule or regulation; gross mismanagement; a gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety. Many disclosures involve complex and highly technical matters unique to an agency's or whistleblower's duties, such as disclosures about aviation safety matters, engineering issues, and impropriety in federal contracting.

Upon receipt of a disclosure, DU attorneys review the information to evaluate whether there is a substantial likelihood that the information discloses one or more of the categories of wrongdoing described in 5 U.S.C. § 1213. If the Special Counsel determines that there is a substantial likelihood that the information falls within one or more of those categories, he or she is required by § 1213(c) to send the information to the head of the agency for an investigation. If the whistleblower consents, his or her name is provided to the agency as the source of the information. If the whistleblower does not consent, the agency is notified that the whistleblower has chosen to remain anonymous.

Upon receipt of a referral for investigation from the Special Counsel, the agency head is required to have the allegations in the disclosure investigated, and to send a report to the Special Counsel describing the agency's findings. The whistleblower has the right to review and provide OSC with comments on the report. The DU and Special Counsel review the report to determine whether the agency's findings appear to be reasonable. When that review is complete, the Special Counsel sends the agency report, any comments by the whistleblower, and any comments or recommendations by the Special Counsel, to the President and congressional oversight committees for the agency involved. A copy of the agency report, and any comments on the report, are placed in OSC's public file.

Disclosures not referred to an agency head under § 1213(c) are either referred informally to the IG for the agency involved, or are closed. Referrals to agency heads under 5 U.S.C. § 1213(c) increased significantly during the past two fiscal years, both in number and as a percentage of DU's workload.

Disclosure Highlights

Whistleblower disclosures in FY 2008 continued to span a broad range of concerns. Several of those referred by OSC for further action are highlighted below:

Danger to Public Health and Safety; Gross Mismanagement

- Intentional Cover-up of Operational Errors and Deviations by FAA Management. Three FAA whistleblowers alleged that the safety of the air traffic operation at Dallas/Fort Worth International Airport (DFW) in Dallas, Texas, was compromised because DFW management officials intentionally misclassified operational errors and deviations as pilot deviations, manipulated the reporting of air traffic events, and flouted safety regulations in order to record as few operational errors or deviations as possible. This was the second OSC referral to the Secretary of the U.S. Department of Transportation (DOT) in three years for investigation of alleged misconduct at DFW.

DOT's Office of Inspector General (OIG) substantiated the allegations, concluding that after its investigation in 2004, which found improper reporting at DFW, management began misclassifying operational errors and deviations. The OIG also found that DFW management repeatedly faulted pilots for errors and deviations instead of the controller responsible, and that when pilots were properly cited for an operational error, DFW failed to report the controller's responsibility in the incident. In some cases, DFW incorrectly concluded there was no loss of separation between airplanes and declared the incident a non-event. Underreporting air traffic events continued at DFW – only the manner of the underreporting had changed.

The OIG found that a lack of FAA oversight, and failures by the local Quality Assurance personnel and FAA's Air Traffic Organization-Safety Service, allowed DFW management to continue under-reporting operational errors and deviations, misclassifying 62 air traffic events as pilot deviations between November of 2005 and July of 2007. The investigation found that 11 of the 13 suspected operational errors reported by the whistleblowers were misclassified, and that the TRACON (Terminal Radar Approach Control) Assistant Air Traffic Manager authorized an improper procedure, causing 11 additional operational errors. The report of investigation concluded that he knew or should have known that he was authorizing an improper procedure. The OIG also reported that there was compelling evidence that DFW management intentionally misclassified operational errors and deviations, stating that the DFW culture was to misclassify events so as to avoid assigning responsibility or blame for any air traffic event to the controller or the facility. Referred in July of 2007; sent to the President and congressional oversight committees and closed in November of 2008.

- Failure to Fully Protect the Anonymity of Federal Air Marshals. OSC referred allegations that officials of the Federal Air Marshal Service (FAMS), in the Department of Homeland Security's (DHS') TSA office in Washington, D.C., failed to protect the anonymity of air marshals by employing policies which allowed them to be readily identifiable to the public as marshals. The whistleblower alleged that the failure to protect covert aviation security operations weakened the FAMS mission and endangered the public.

Following OSC's referral of the matter to the Secretary of DHS for investigation, TSA did not report that the allegations were substantiated, nor did it report that the claims were unfounded. Nevertheless, the agency revised several of the policies at issue to better support the air marshals in their missions. Under the revised policies, marshals have the discretion to choose their attire, provided that it does not compromise their ability to execute law enforcement duties. TSA also took steps to amend boarding procedures, so as to further protect the marshals' anonymity. In addition, FAMS developed flexible

policies to adapt to different airport designs and to ensure anonymity. Finally, TSA's Sensitive Security Information (SSI) Office and FAMS are working to improve training techniques for identifying and handling SSI documents correctly. Referred in August of 2006; sent to the President and congressional oversight committees and closed in February of 2008.

Danger to Public Safety; Violation of Law, Rule or Regulation

- Faulty Pumping Equipment in New Orleans. OSC referred to the Secretary of the Department of Defense (DOD) allegations that U.S. Army Corps of Engineers (USACE) employees in New Orleans, Louisiana, were responsible for procurement violations, public corruption, and the installation and subsequent concealment of defective pumping equipment. The agency's investigation concluded that USACE employees were responsible only for performance shortcomings and for failing to follow procurement regulations. The whistleblower, in a highly critical and detailed response, outlined specific deficiencies under each of the 14 allegations discussed in the agency report.

After reviewing the agency report and the whistleblower's comments, the Special Counsel found the report deficient under 5 U.S.C. § 1213, commenting that unnecessary safety risks due to faulty pumping equipment could neither be condoned, nor the lack of government oversight of the project in question left unchallenged. The Special Counsel sent his finding to the President and congressional oversight committees, and closed the matter.

Soon thereafter, based on the Special Counsel's recommendations, DOD's Acting Inspector General hired an outside expert to review the design and installation of the newly installed pumps. OSC re-opened its case, and closed the matter again in FY 2009. (OSC was not persuaded to reverse its previous determination.) Referred in September of 2007; sent to the President and congressional oversight committees as deficient and closed in August of 2008; re-opened in August of 2008.

Violation of Law, Rule or Regulation

- Abuses of Overtime Pay. OSC referred to the Secretary of DHS allegations that Border Patrol employees were misusing overtime pay, including administratively uncontrollable overtime (AUO), in violation of 5 C.F.R. § 550.153 and the Federal Employees Pay Act (FEPA). The violations were reportedly occurring in the Border Patrol's Blaine Sector offices, including the Lynden, Bellingham, and Port Angeles stations in Washington. The agency's investigation substantiated the allegations.

The investigation found that the Blaine Sector Border Patrol had no established procedures for monitoring overtime, as required by FEPA and the Customs and Border Protection (CBP) Handbook; CBP managers allowed excess overtime in violation of DHS' payroll handbook; a senior manager improperly gave blanket authorization for employees to work overtime; CPB managers improperly granted AUO to a supervisor working in an ineligible position; and an administrative employee had been paid excessive and erroneous overtime pay when the employee was not working or earning such pay.

As a result of the investigation, a disciplinary review board proposed the removal of the supervisor and employee. Supervisors and agents were required to participate in web-based AUO training, with annual certification. Finally, in May and June of 2007, the then-acting chief of the Blaine Sector issued memoranda to all sector staff, reinforcing the chain of command and informing them of overtime and compensatory time requirements. Referred in May of 2007 and August of 2008; sent to the President and congressional oversight committees and closed in December of 2007 and November of 2008, respectively.

- Smuggling of Blood Products by DVA Employees. OSC referred to the Secretary of DVA allegations that a research physician at the department's medical center in Albuquerque, New Mexico, directed researchers to go into Mexico and Canada to obtain and smuggle blood products into the U.S. for use in research at the center. The whistleblower alleged that a researcher told him that he had been directed to cross the border into Mexico and Canada to obtain

blood products at least three times during a one-year period, beginning in 2006. The researcher reported to the whistleblower that he purchased the blood products and returned to the U.S., where he delivered the blood to the research department at the medical center for use in ongoing research. The researcher stated that he had also accompanied other researchers to Mexico and Canada to oversee similar smuggling operations. Researchers also informed him that they occasionally went into the blood draw lab at the center after hours to obtain needles with small blood samples for use in research.

The agency investigation substantiated the allegation that researchers transported blood samples obtained in two research protocols across the Mexican border into the U.S. without the appropriate U.S. Customs declarations or approval by DVA's Institutional Review Board. The investigation also found numerous violations of federal and agency requirements, and of ethical standards involving human subjects in two research protocols reviewed. It did not substantiate the allegation that researchers obtained and transported blood samples to the U.S. from Canada, or that researchers obtained blood specimens from discarded needles in the medical center laboratory. The agency took corrective action in response to the findings of non-compliance. OSC was unable, however, to ascertain whether the agency took any administrative or disciplinary action against the research physician in charge of the two protocols. Referred in August of 2007; sent to the President and congressional oversight committees and closed in August of 2008.

- Pornography Stored on Government Computer Server. OSC referred an allegation to the Secretary of Agriculture that over 100 pornographic images were stored on a computer server at the Office of the Chief Information Officer in Washington, D.C. The agency confirmed the existence of the images on the server, concluding that they had been put there during another investigation to determine their source. After the investigation, the files were inadvertently left on the server. The files have since been removed. Referred in November 2007; sent to the President and congressional oversight committees and closed in July 2008.

- Use of Government Contracting Warrant for Personal Benefit. OSC referred to the Secretary of the Interior allegations that a contracting officer for the National Park Service’s (NPS’) Structural Fire Program in Boise, Idaho, violated federal regulations by regularly acquiring and keeping benefits to which she was not entitled by providing her personal account number for business rewards programs offered by Marriott and other hotels when entering into contracts with them on behalf of NPS. The whistleblower also alleged that the contracting officer’s actions deprived NPS employees of benefits that would otherwise have accrued to them. Given the extent of meetings and travel by NPS employees, the contracting officer was alleged to have accumulated substantial personal benefits. Investigators immediately suspended the subject’s contracting authority for the duration of the agency inquiry.

The investigation substantiated the allegations, concluding that the contracting officer had used her public position for private gain. The agency’s report found that she also used her government purchase card to buy merchandise from vendors online, thereby earning more rewards points for her personal use. The report also noted that she was less than forthcoming and truthful with the NPS investigator, and contradicted herself on several occasions.

NPS proposed significant disciplinary action, consisting of permanent revocation of the employee’s contracting warrant and purchase card authority, as well as a 30-day suspension without pay. NPS took other measures in efforts to prevent a recurrence of similar problems in the future. These included prompt issuance by NPS’ contracting chief of clarifying guidance to all contracting officers on the acquisition of rewards points through government contracts, and more frequent and in-depth scrutiny into the activities of contracting officers. The agency’s findings were also referred to the U.S. Attorney’s Office for the District of Idaho, which declined prosecution. Referred in February 2007; sent to the President and congressional oversight committees and closed in March 2008.

Summary of Workload, Activity, and Results

Table 6, below, contains FY 2008 summary data (with comparative data for the four previous fiscal years) on DU receipts and dispositions of whistleblower disclosure cases. Despite a 10% increase in disclosures received in FY 2008, the average processing time dropped to 51 days (down from 351 days in FY 2004), and 52% were processed in less than 15 days – reflecting the unit’s increased staffing, efficiency and effectiveness in FY 2008. The higher number of pending cases at the end of the fiscal year reflected the increase in overall intake and the high number of disclosures referred for investigation pursuant to 5 U.S.C. § 1213(c) in recent years.

TABLE 6

| Summary of Whistleblower Disclosure Activity – Receipts and Dispositions^a | | | | | | |
|---|--|--------------------|--------------------|--------------------|--------------------|-----|
| | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 | |
| Pending disclosures carried over from prior fiscal year | 690 ^b | 98 | 110 | 69 | 84 | |
| New disclosures received | 572 | 485 | 435 | 482 | 530 | |
| <i>Total disclosures</i> | 1,262 | 583 | 545 | 551 ^c | 614 | |
| Disclosures referred to agency heads for investigation and report | 18 | 19 | 24 | 42 | 40 | |
| Referrals to agency IGs | 8 | 14 | 10 | 11 | 9 | |
| Agency head reports sent to President and Congress | 8 | 16 | 24 | 20 | 25 | |
| Results of agency investigations and reports | Disclosures substantiated in whole or in part | 8 | 16 | 21 | 19 | 22 |
| | Disclosures unsubstantiated | 0 | 0 | 3 | 1 | 3 |
| Disclosure processing times | Within 15 days | 135 | 236 | 203 | 285 | 256 |
| | Over 15 days | 1,019 | 237 | 275 | 182 | 232 |
| Percentage of disclosures processed within 15 days | 12% | 50% | 42% | 61% | 52% | |
| Disclosures processed and closed | 1,154 | 473 | 478 | 467 | 488 | |

^a Many disclosures contain more than one type of allegation. This table, however, records each whistleblower disclosure as a single matter, even if multiple allegations were included.

^b Correctly reported in OSC’s FY 2006 report to Congress, but mistakenly published in the FY 2007 report as 269.

^c Incorrectly reported as 599 in OSC’s FY 2007 report to Congress.

USERRA CASES

Overview

USERRA protects the civilian employment and re-employment rights of those who serve the nation in the Armed Forces, including the National Guard and Reserves, and other uniformed services. USERRA is intended to encourage non-career military service and to minimize the disruption to the lives of those who serve by ensuring that such persons: (1) are not disadvantaged in their civilian careers because of their service; (2) are promptly reemployed in their civilian jobs upon their return from duty, with full benefits and seniority, as if they had never left; and (3) are not discriminated against in employment (including initial hiring, promotion, retention, or any benefit of employment) based on past, present, or future uniformed service. The law applies to federal, state, local, and private employers.

Congress intends for the federal government to be a “model employer” under USERRA, and OSC is committed to helping fulfill that goal. In furtherance of that effort, OSC plays a critical role in enforcing USERRA by providing representation before the MSPB, when warranted, to service members whose complaints involve federal executive agencies.

Referral Cases

By law, a claimant alleging a violation of USERRA by a federal executive agency must first file a complaint with the Veterans’ Employment and Training Service (VETS) at DOL. VETS must investigate and attempt to resolve the complaint. If it cannot resolve the matter, the claimant may direct VETS to refer the complaint to OSC for possible representation before the MSPB. If, after reviewing the complaint and investigative file, OSC is reasonably satisfied that the claimant is entitled to relief under USERRA, it may act as the claimant’s attorney and initiate an action before the MSPB.

Demonstration Project Cases

In December 2004, Congress enacted the Veterans Benefits Improvement Act of 2004, Pub. L. No.

108-454 (VBIA). Included among its provisions was the creation of a demonstration project, under which approximately half of all USERRA complaints involving federal executive agencies would be filed directly with, and investigated by, OSC rather than VETS. During the project, OSC received and investigated all federal sector USERRA complaints filed by claimants whose Social Security Number (SSN) ended in an odd digit, and by those (regardless of SSN) who also alleged a prohibited personnel practice under 5 U.S.C. § 2302(b).

The demonstration project began on February 8, 2005, and was originally scheduled to end on September 30, 2007, but Congress extended it through December 31, 2007. Between February of 2005 and December of 2007, OSC received 458 complaints from service members alleging USERRA violations by federal agencies. By the end of the project, OSC had processed 445 complaints, and obtained corrective action for service members in 120 of those matters (27%), a high proportion for federal employment claims.

Individual Corrective Actions

Among other remedies obtained on behalf of service members in FY 2008, OSC ensured that service members were reemployed to the appropriate “escalator” position upon their return from military duty, including the pay, seniority and status they would have achieved had they not served; that they received training, retroactive promotions, and back pay to prevent them from falling behind their peers due to military service; that their performance ratings and bonuses were not adversely affected by military duty; that for periods of military service or convalescence, they received full credit and contributions to their civil service retirement benefits and Thrift Savings Plan accounts, and were not improperly denied military leave or charged AWOL; that their health insurance coverage and premiums were handled properly both during and after military duty; and that they received priority consideration for future positions if they were unable to apply for positions due to military service.

The following are examples of individual corrective actions obtained by OSC for service members in FY 2008:

- Claimant was refused reemployment with his federal civilian employer upon his return from active military duty with the National Guard in September 2000. After filing a USERRA complaint with VETS in November 2000, it took him until February 2006 to again obtain employment with the federal government (at a different federal agency). His new federal employment, however, did not restore the five-plus years of salary, retirement contributions, seniority and other benefits he lost as a result of the government's failure to promptly reemploy him. After receiving the case from VETS in November 2007, OSC quickly obtained a comprehensive settlement whereby claimant received 65 months of back pay plus interest, full restoration of his seniority and retirement benefits as if he had been continuously employed, and restoration of several hundred hours of annual and sick leave.
- Claimant alleged that his federal civilian employer did not grant him sufficient time off to timely arrive for and return from his military duty and removed him from federal service due to his military obligations (he later obtained other employment and did not wish to return to the agency). Following an investigation, OSC requested that the agency: (1) correct its records and claimant's Official Personnel Folder to reflect a "resignation" rather than a "removal;" (2) reimburse him for the three months' pay he lost from the time of his removal until he obtained other employment; and (3) provide, at agency expense, USERRA training for agency supervisory employees, including his former supervisor. The agency agreed to OSC's requests and the case was closed.
- Claimant alleged that his federal civilian employer violated USERRA by erroneously determining that he was not entitled to receive two within-grade pay increases that it had previously given him when he returned from serving three years in the Air Force Reserve, and by failing to give him full civilian retirement credit for that time period. As a result, the agency assessed a debt of over \$19,000 against him and initiated debt collection procedures. OSC investigated the matter and contacted the agency, which agreed to: (1) give him full civil service retirement credit for the three-year period; (2) make any necessary corrections to his employment records; (3) re-calculate his pay increases; and (4) rescind the debt.
- Claimant accepted a General Schedule (GS)-4 position with a federal agency but was called to active military duty before he could start. During his absence, the agency did not place him on its rolls or credit him with any civil service time. It instead "rehired" him as a GS-4 when he returned from duty 16 months later. At OSC's request, the agency agreed to: (1) adjust its records to credit claimant for the time he spent on active duty; (2) retroactively promote him to GS-5 and provide him back pay; and (3) give him the within-grade pay increases, military leave, and any other benefits to which he would have been entitled had he been hired sooner.
- Claimant alleged that his agency supervisor contacted his Air Force Reserve unit and told his commander that claimant was failing in his civilian job, might be placed on a performance improvement plan, and spent a lot of time on temporary duty. After confirming claimant's allegations, OSC contacted the agency and explained that under USERRA, while the agency supervisor may contact the military commander, such contact should be limited to confirming that claimant has military orders after he has given the agency notice that he will be absent due to military service. As corrective action (there is no disciplinary action in USERRA cases), OSC requested and obtained the agency's agreement to provide USERRA training to the supervisor in question.
- Claimant alleged that, while he was performing military duty in Iraq in May 2004, the agency did not offer him the \$25,000 voluntary separation incentive payment (VSIP) that it offered his non-deployed co-workers. After returning from duty, claimant worked at the agency until his retirement in January 2006. Following OSC's inquiry, the agency initially offered claimant a retroactive VSIP. Claimant, however, would have had to obtain two waivers from the Secretary of Defense (which he was unlikely to get) and would have had his retirement annuity re-calculated and reduced. At OSC's request, the agency instead offered claimant a lump sum payment to approximate the benefit he would have received from the original VSIP. Claimant and the agency agreed on a \$17,000 payment to settle his complaint.

- Claimant, a federal civilian employee and member of the Navy Reserve, was called to active duty. While deployed, claimant suffered a service-connected injury. After his release from military duty, he did not immediately request reemployment. Rather, he informed his employer that he had been injured while on military duty, and needed convalescence time permitted under USERRA before requesting reemployment and returning to work. The agency required claimant to provide medical documentation of his incapacity, which USERRA does not require prior to a request for reemployment. The agency decided that the medical documentation did not support claimant's convalescence under USERRA, began charging him with AWOL, and ultimately proposed his removal. After OSC explained agency obligations under USERRA, the agency agreed to rescind the AWOL charges and the proposed removal, and to offer claimant a new position working for a different supervisor (at claimant's request).

- Claimant, a Wage Grade (WG)-10 technician and member of the National Guard, alleged that his federal employer violated USERRA when it did not select him for a temporary promotion to a WG-13 mechanic position. Specifically, claimant alleged that he was initially selected for the position but an agency official did not promote him because he complained about being required to agree in writing that his temporary promotion would be terminated if he went on active military duty. OSC contacted the agency, which agreed to give claimant a retroactive temporary promotion for one year to WG-13 and a lump sum payment of back pay.

- Claimant alleged that the agency: (1) failed to provide him the contingency leave he requested for his most recent deployment with the National Guard; and (2) as a result of his military service, awarded him a lower "market pay" salary increase than his peers. OSC conducted an investigation and determined that claimant was entitled to both the contingency leave and a higher market pay increase. OSC contacted the agency, which agreed to pay claimant his contingency leave and retroactively award him the average of the market pay increases it had given his peers for the time period in question.

Systemic Corrective Actions

In addition to relief for individual claimants, OSC also sought and obtained systemic corrective action in appropriate cases. Such actions included changes in agency policies and practices to improve USERRA compliance and to prevent future violations. Examples during FY 2008 included:

- After OSC's inquiry in a case in which an employee was improperly denied leave to perform military service, the federal agency involved reminded its personnel that employees are permitted to depart for military duty without exception. The agency also issued a memorandum on USERRA and military leave and posted it at all facilities in the employee's region.

- In another case involving military leave, OSC action prompted an agency to undertake efforts to educate its managers about USERRA and military leave, including the fact that supervisors, not employees, are responsible for finding replacement workers when making shift changes due to an employee's military duty. Also, copies of a USERRA information poster were posted in prominent locations throughout the facility where the employee works.

- During another investigation, OSC discovered that an agency had published a regulation permitting an employee's performance rating to be lowered if absent for an extended period of time (i.e., a "default" rating provision), which affected performance bonuses, among other matters. OSC believed the regulation to be inconsistent with USERRA, which requires that employees who perform military service be treated as if they had never left their civilian jobs, and not be disadvantaged in such jobs because of their military duty. At OSC's request, the agency sent an e-mail to all employees expressing its commitment to USERRA and attaching a copy of a USERRA informational poster. It also agreed that when its internal regulations conflicted with USERRA, it would make exceptions to ensure compliance with the law. Last, the agency worked to identify all employees who might have been adversely affected by the regulation in question and to take any necessary corrective action, such as upgrading performance ratings and bonuses.

Litigation

In a USERRA case in which it was not a party, OSC filed a successful *amicus curiae* (friend of the court) brief at the U.S. Court of Appeals for the Federal Circuit. In that case, the MSPB had ruled that federal employees covered by collective bargaining agreements could only enforce certain USERRA rights through negotiated grievance procedures, precluding them from the independent third-party review and judicial enforcement mechanisms available under USERRA, including OSC representation and MSPB appeals. Recognizing the severe implications of the MSPB's ruling for a large segment of federal employees who are members of the National Guard or Reserve, OSC argued for reversal of that decision. After OSC filed its brief, the MSPB, in its own brief, adopted many of the same arguments put forth by OSC and requested that the Federal Circuit remand the case, which it did. On remand, the MSPB vacated its earlier decision.

Also in FY 2008, OSC filed a case of first impression before the MSPB, arguing that a federal agency is liable to a federal contract employee under USERRA if it "controls" his or her employment opportunities within the meaning of the statute. In this case, an employee of a federal agency contractor left his job to serve in Iraq as a member of the Army Reserve. When he returned and requested re-employment with the contractor, the agency informed the firm that it would cancel the contract if the employee returned to work because the agency did not want to train him on new duties added to his position and was satisfied with his replacement. As a result of the agency's actions, the reservist had to seek other employment and suffered significant economic and other harm. This case was pending before the MSPB at the end of FY 2008.

Summary of Workload, Activity, and Results

Table 7 and **Table 8**, below, contain FY 2008 summary data (with comparative data for previous fiscal years) on OSC's receipt and disposition of USERRA referral cases and demonstration project cases, respectively.

TABLE 7

| Summary of USERRA Referral and Litigation Activity^a | | | | | |
|---|--------------------|--------------------|--------------------|--------------------|--------------------|
| | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 |
| Pending referrals carried over from prior fiscal year | 4 | 12 | 6 | 3 | 3 |
| New referrals received from VETS during fiscal year | 14 | 30 | 11 | 4 | 15 |
| Referrals closed | 6 | 36 | 14 | 4 | 13 |
| Referrals closed with corrective action | 1 | 6 | 3 | 0 | 2 |
| Referrals closed with no corrective action | 5 | 30 | 11 | 4 | 11 |
| Referrals pending at end of fiscal year | 12 | 6 | 3 | 3 | 5 |
| Litigation cases carried over from prior fiscal year | 0 | 2 | 0 | 0 | 1 |
| Litigation cases filed during fiscal year | 2 | 1 | 1 | 1 | 1 |
| Litigation cases closed | 0 | 3 | 1 | 0 | 1 |
| Litigation closed with corrective action | 0 | 3 | 1 | 0 | 0 |
| Litigation closed with no corrective action | 0 | 0 | 0 | 0 | 1 |
| Litigation pending at end of fiscal year | 2 | 0 | 0 | 1 | 1 |

^a This table has been reorganized, and some categories and figures changed from prior reports to correct discrepancies and more clearly present relevant information.

TABLE 8

| Summary of USERRA Demonstration Project Activity^a | | | | |
|---|--------------------|--------------------|--------------------|--------------------------------|
| | FY 2005 | FY 2006 | FY 2007 | FY 2008^b |
| Pending cases carried over from prior fiscal year | 0 | 54 | 95 | 115 |
| New cases opened | 111 | 168 | 142 | 37 |
| Cases closed | 57 | 126 | 123 | 139 |
| Closed cases with corrective action | 16 | 35 | 43 | 26 |
| Closed cases with no corrective action | 38 | 91 | 80 | 113 |
| Cases pending at end of fiscal year | 54 | 96 | 114 | 13 |

^a Under the demonstration project authorized by the VBIA, OSC received cases from February 2005 through December 2007.

^b Figures in this column reflect activity on cases received and pending as of December 31, 2007 (the end of the first quarter of FY 2008), when the demonstration project ended.

Education, Outreach, and Policy

In addition to investigating and favorably resolving service members' USERRA claims, and litigating important USERRA cases in FY 2008, OSC also worked to ensure that the federal government is a model employer by: (1) educating federal agencies about their responsibilities under the act; (2) providing technical assistance; and (3) securing a beneficial change in leave policy for federal employees who serve in the National Guard or Reserves.

Educational and outreach efforts included conducting USERRA seminars at two national labor and employment conferences, and presenting USERRA training for several federal agencies. OSC also maintained e-mail and telephone hotlines to provide technical assistance to employees and employers with USERRA questions.

OSC also succeeded in obtaining a change to a government-wide leave policy for federal civilian employees returning from Reserve and National Guard duty in Iraq and Afghanistan. An executive order authorizing an additional five days of uncharged leave (excused absence) had previously been interpreted as applying only to the service member's first deployment. After a National Guard member brought this policy to OSC's attention, the Special Counsel wrote a letter to the Director of OPM, requesting a change in policy to allow service members to use the additional five days of leave each time they return from a deployment (not just the first time), given the disruption to their lives and those of their families, and the increased incidence of psychological problems, such as post-traumatic stress disorder, associated with multiple deployments. OPM responded favorably and issued new guidance to all federal executive departments and agencies, adopting OSC's recommendation that the leave be available after each deployment, and also permitting employees who had already returned to work to use the additional leave if they had not already done so.

OSC OUTREACH PROGRAM

OSC's outreach program assists agencies in meeting the statutory mandate of 5 U.S.C. § 2302(c). This provision requires that federal agencies inform their employees, in consultation with OSC, about rights and remedies available to them under the whistleblower protection and prohibited personnel practice provisions of the WPA. In FY 2002, in an effort to assist agencies in meeting the statutory requirement, OSC designed and created a five step educational program, known as the "2302(c) Certification Program."

The program provides guidance, easy-to-use methods and training resources to agencies to assist them in fulfilling their statutory obligation. Agencies that complete the program receive a certificate of compliance from OSC.

In an effort to promote OSC's mission and programs, OSC provides formal and informal outreach sessions, including making educational materials available on the agency web site. During FY 2008, OSC employees spoke at approximately 60 events nation-wide, including American Bar Association events, agency training sessions, conferences and meetings. OSC employees spoke at the U.S. Office of Government Ethics' annual conference for ethics officers from across the government, and OSC's Director of Communications addressed human resource, equal employment opportunity (EEO) and labor relations specialists (among others) at the annual Federal Dispute Resolution Conference. Finally, OSC continued its policy of issuing press releases when filing significant litigation, or achieving significant corrective or disciplinary actions through settlement. Many of these cases generate considerable press coverage, which contributes to federal employees' and managers' awareness about the merit system protections enforced by OSC.

OSC ANNUAL SURVEY PROGRAM

Each year, OSC surveys persons who have contacted the agency for assistance and whose cases were closed during the previous fiscal year.¹² Complainants in prohibited personnel practice cases and claimants in USERRA demonstration project matters closed during FY 2008, as well as recipients of formal Hatch Act advisory opinions that year, were invited to participate in the survey.

The prohibited personnel practice and USERRA surveys sought the following information: (1) whether potential respondents were fully apprised of their rights; (2) whether their claim was successful at OSC or at the MSPB; and (3) whether, successful or not, they were satisfied with the service received from OSC. Additional questions were asked based on the case type. Survey response rates continued to be low.

Results to the initial question on the prohibited personnel practice and USERRA surveys showed that, on average, only 18% of respondents could recall being informed by their agencies about their rights and responsibilities.

Respondents who received formal Hatch Act advisory opinions continued to report the highest levels of satisfaction with OSC service. Of those individuals who sought advisory opinions, over 70% were satisfied or very satisfied (see Appendix C). All FY 2008 survey questions and response tallies are shown in Appendices A-D.

FURTHER INFORMATION

OSC Web Site

The agency web site (www.osc.gov) has a broad range of information about OSC including answers to frequently asked questions; complaint, disclosure and other forms; and publications, training and educational materials.

Prohibited Personnel Practices

Individuals with questions about prohibited personnel practices not answered on the agency web site can contact the OSC Officer of the Week at:

Complaints Examining Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, DC 20036-4505
Telephone: 1 (800) 872-9855
(202) 254-3630
Fax: (202) 653-5151

Form OSC-11 must be used to file a prohibited personnel practice complaint with OSC. The form is available online (<http://www.osc.gov/forms.htm>), and can be filled out online, printed, and mailed or faxed to the address above. A complaint can also be filed electronically with OSC (<https://www.osc.gov/oscefile/>).

ADR Program

Questions about mediation under OSC's ADR Program not answered on the agency web site should be directed to:

Alternative Dispute Resolution Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, DC 20036-4505
Telephone: (202) 254-3600
E-mail: adr@osc.gov

Hatch Act Program

OSC's web site has additional information about the Hatch Act, including frequently asked questions by federal, state and local government employees, and selected OSC advisory opinions on common factual situations. Requests for other advice about the Hatch Act can be made by contacting HAU staff at:

Hatch Act Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, DC 20036-4505
Telephone: 1 (800) 85-HATCH
1 (800) 854-2824
(202) 254-3650
Fax: (202) 653-5151
E-mail: hatchact@osc.gov

Complaints alleging a violation of the Hatch Act can be made by using Form OSC-13. The form is available online (<http://www.osc.gov/forms.htm>), and can be filled out online, printed, and mailed or faxed to the address above.

Whistleblower Disclosures

Information about reporting a whistleblower disclosure in confidence to OSC is available on the agency web site, or from DU staff at:

Disclosure Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, DC 20036-4505
Telephone: 1 (800) 572-2249
(202) 254-3640
Fax: (202) 653-5151

Form OSC-12 can be used to file a disclosure with OSC. The form is available online (<http://www.osc.gov/forms.htm>), and can be filled out online, printed, and mailed or faxed to the address above. A disclosure can also be filed electronically with OSC (<https://www.osc.gov/oscefile/>).

USERRA Program

The OSC web site has additional information about USERRA, including a link to the complaint form issued by VETS for use by claimants. Questions not answered on the web site about OSC's role in enforcing the act may be directed to:

Director of USERRA
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, DC 20036-4505
Telephone: (202) 254-3600
E-mail: userra@osc.gov

Outreach Program

Many OSC forms and publications are available on the agency web site (under the headings, "Forms" and "E-Library," respectively). Questions not answered on the agency web site about OSC outreach activities and availability of OSC publications should be directed to:

Director of Outreach
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, DC 20036-4505
Telephone: (202) 254-3600
Fax: (202) 653-5151

Reports to Congress

This and other OSC reports to Congress are available on the agency web site (under "E-Library"). Subject to availability, copies of these reports can be requested by writing or contacting:

Director of Congressional and Public Affairs
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, DC 20036-4505
Telephone: (202) 254-3600
Fax: (202) 653-5161

For callers with hearing and/or speech disabilities, all OSC telephone numbers listed in this section may be accessed using TTY by dialing the Federal Relay Service at: 1 (800) 877-8339

APPENDIX A

Survey Totals

| FY 2008 | |
|-----------------|-------|
| Number mailed | 1,776 |
| Number returned | 259 |
| Response rate | 15% |

Response Sources by Type of Matter at OSC

| What was the nature of your correspondence to OSC? (Please choose only one) | |
|--|---------|
| Response Options | FY 2008 |
| You filed a complaint concerning a prohibited personnel practice | 220 |
| You requested a written advisory opinion from OSC concerning a possible violation of the Hatch Act (unlawful political activity) | 30 |
| Your case involved a USERRA complaint | 9 |

APPENDIX B

Survey Responses: Prohibited Personnel Practice Complaints

| 1. Did the agency against which you filed the complaint inform you about your rights and responsibilities with regard to prohibited personnel practices? | |
|---|----------------|
| Response options | FY 2008 |
| Yes | 38 |
| No | 157 |
| Do not recall | 21 |
| Never employed by a federal agency | 4 |

| 2. Did you obtain the result that you wanted from OSC? | |
|---|----------------|
| Response options | FY 2008 |
| Yes | 11 |
| No | 209 |

| 3. Did your complaint include any allegation of reprisal for whistle blowing? | |
|--|----------------|
| Response options | FY 2008 |
| Yes | 119 |
| No | 90 |

| 4. What reason did OSC give for closing any reprisal for whistleblowing allegation in your complaint without obtaining the result that you desired? (Check all that apply.) | |
|--|----------------|
| Response Options | FY 2008 |
| No OSC jurisdiction over your position, the agency, or agency official involved in the complaint | 18 |
| No personnel action taken by the agency involved | 17 |
| Information that you disclosed did not appear to be a legally protected disclosure | 21 |
| Your disclosure occurred after the personnel action involved in your complaint | 4 |
| Insufficient proof that the agency official (who took the personnel action against you) knew about your disclosure | 16 |
| Insufficient proof of connection between your disclosure and the personnel action involved in your complaint | 27 |
| OSC could not disprove the reason given by the agency involved for the personnel action taken, as described in your complaint | 10 |
| Insufficient evidence that the personnel action involved in your complaint violated a law or regulation | 23 |
| You or OSC settled the matter with the agency involved | 1 |
| You declined corrective action offered by the agency involved | 0 |
| You notified OSC that you had filed or would file an Individual Right of Action (IRA) or other appeal with the Merit Systems Protection Board (MSPB) | 13 |
| You withdrew your complaint | 2 |
| Other | 47 |
| Do not recall | 7 |

| 5. Did you file an Individual Right of Action or other appeal with the MSPB in connection with the same events that you reported in your complaint to OSC? | |
|---|----------------|
| Response Options | FY 2008 |
| Yes | 59 |
| No | 121 |
| Have not decided whether to file | 26 |

| 6. Did you ask for the same relief that you sought from OSC? | |
|---|----------------|
| Response Options | FY 2008 |
| Yes | 52 |
| No | 2 |
| Do not recall | 5 |

| 7. Were you successful at the MSPB in obtaining the same result that you sought from OSC? | |
|--|----------------|
| Response Options | FY 2008 |
| Yes | 2 |
| Partially | 2 |
| No | 27 |
| Appeal pending | 21 |

| 8. If the answer [to the previous question] was “yes” or “partially,” how did you obtain that result? | |
|--|----------------|
| Response Options | FY 2008 |
| Settlement | 4 |
| Decision after hearing | 0 |
| Other | 0 |

| 9. What reason did OSC give for closing your complaint without obtaining the result that you Desired? (Check all that apply.) | |
|--|----------------|
| Response Options: | FY 2008 |
| No OSC jurisdiction over your position, the agency, or agency official involved in the complaint | 10 |
| No personnel action taken by the agency involved | 6 |
| OSC could not disprove the reason given by the agency involved for the personnel action taken, as described in your complaint | 6 |
| Insufficient evidence that the personnel action involved in your complaint violated a law or regulation | 41 |
| You or OSC settled the matter with the agency involved | 1 |
| You declined corrective action offered by the agency involved | 0 |
| You withdrew your complaint | 1 |
| OSC filed a petition with the Merit Systems Protection Board (MSPB) for corrective action | 0 |
| OSC obtained a decision in the corrective action proceeding filed with the MSPB | 0 |
| Closed for further action on discrimination allegations through EEO processes | 3 |
| Resolved through OSC’s Mediation Program | 0 |
| Other | 30 |
| Do not recall | 3 |

10. How would you rate the service provided by OSC in each of the following areas?

| Service categories | FY 2008 Ratings | | | | |
|--|-----------------|-----------|--------------------|--------------|-------------------|
| | Very satisfied | Satisfied | No opinion, or N/A | Dissatisfied | Very dissatisfied |
| <i>Courtesy</i> | 18 | 46 | 57 | 26 | 73 |
| <i>Clarity of oral communications</i> | 15 | 33 | 47 | 39 | 86 |
| <i>Clarity of written communications</i> | 14 | 40 | 25 | 38 | 103 |
| <i>Timeliness</i> | 17 | 48 | 29 | 43 | 83 |
| <i>Results</i> | 4 | 7 | 9 | 31 | 169 |

APPENDIX C

Survey Responses: Formal Hatch Act Advisory Opinions

| 1. As a result of our written advisory opinion given to you concerning the proposed political activity, what was the impact? | |
|---|----------------|
| Response Options | FY 2008 |
| The OSC opinion advised that the person in question was free to carry out his or her planned political activity. | 22 |
| The OSC opinion advised that the person in question should not continue his or her planned political activity. | 8 |

| 2. How would you rate the service provided by OSC in the following areas? | | | | | |
|--|------------------------|------------------|---------------------------|---------------------|--------------------------|
| Service categories rated | FY 2008 Ratings | | | | |
| | Very satisfied | Satisfied | No opinion, or N/A | Dissatisfied | Very dissatisfied |
| <i>Courtesy</i> | 18 | 7 | 3 | 0 | 2 |
| <i>Clarity of written communications</i> | 18 | 6 | 1 | 3 | 2 |
| <i>Timeliness</i> | 12 | 9 | 2 | 3 | 4 |
| <i>Results</i> | 14 | 7 | 2 | 1 | 6 |

APPENDIX D

Survey Responses: USERRA Demonstration Project Cases

| 1. Did the agency against which you filed the complaint inform you about your rights and remedies with regard to USERRA? | |
|---|---------|
| Response Options | FY 2008 |
| Yes | 2 |
| No | 6 |
| Do not recall | 1 |
| Never employed by a federal agency | 0 |

| 2. Did you obtain the result that you wanted from OSC? | |
|---|---------|
| Response options | FY 2008 |
| Yes | 2 |
| No | 7 |

| 3. What reason did OSC give for closing your USERRA case? (Check all that apply.) | |
|--|---------|
| Response options | FY 2008 |
| No OSC jurisdiction over your position, the agency, or agency official involved in the complaint | 2 |
| You declined corrective action offered by the agency involved | 3 |
| Insufficient evidence that the personnel action involved in your complaint violated USERRA | 1 |
| You or OSC settled the matter with the agency involved | 0 |
| You withdrew your complaint | 0 |
| Other | 3 |
| Do not recall | 0 |

| 4. Did you file a USERRA appeal with the MSPB in connection with the same events that you reported in your complaint to OSC? | |
|---|---------|
| Response options | FY 2008 |
| Yes | 0 |
| No | 3 |
| Do not recall | 4 |

| 5. Did you ask for the same relief that you sought from OSC? | |
|---|----------------|
| Response options | FY 2008 |
| Yes | 0 |
| No | 0 |
| Do not recall | 0 |

| 6. Were you successful at the MSPB in obtaining the same result that you sought from OSC? | |
|--|----------------|
| Response options | FY 2008 |
| Yes | 0 |
| Partially | 0 |
| No | 0 |
| Appeal pending | 0 |

| 7. If the answer to previous question was “Yes” or “Partially,” how did you obtain that result? | |
|--|----------------|
| Response options | FY 2008 |
| Settlement | 0 |
| Decision after hearing | 0 |
| Other | 0 |

| 8. How would you rate the service provided by OSC in each of the following areas? | | | | | |
|--|------------------------|------------------|---------------------------|---------------------|--------------------------|
| Service categories | FY 2008 Ratings | | | | |
| | Very satisfied | Satisfied | No opinion, or N/A | Dissatisfied | Very dissatisfied |
| <i>Courtesy</i> | 2 | 2 | 1 | 2 | 2 |
| <i>Clarity of oral communications</i> | 2 | 1 | 1 | 2 | 3 |
| <i>Clarity of written communications</i> | 2 | 1 | 3 | 0 | 3 |
| <i>Timeliness</i> | 2 | 1 | 1 | 1 | 4 |
| <i>Results</i> | 2 | 0 | 1 | 1 | 5 |

APPENDIX E

Endnotes

- 1 Reorganization Plan Number 2 of 1978. See 5 U.S.C.A. App. 1, § 204. The Civil Service Reform Act of 1978 (Public Law No. 95-454, 92 Stat. 1111) expanded OSC's functions and powers.
- 2 Public Law No. 101-12 (1989). Provisions setting forth OSC authorities and responsibilities were codified at 5 U.S.C. § 1211, et seq.
- 3 Public Law No. 103-94 (1993), codified in scattered sections of 5 U.S.C. and 12 U.S.C.
- 4 Public Law No. 103-353 (1994), codified at 38 U.S.C. § 4301, et seq. The Veteran's 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 veteran's preference requirement. See 5 U.S.C. § 2302(b)(11).
- 5 Public Law No. 103-424, 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 WPA, appears at 5 U.S.C. § 2302(c).
- 6 Public Law No. 107-71 (2001).
- 7 The 12 prohibited personnel practices are: (1) discrimination based on race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation (allegations of discrimination, except discrimination based on marital status or political affiliation, are generally deferred by OSC to EEO processes, consistent with 5 C.F.R. § 1810.1); (2) soliciting or considering improper employment recommendations; (3) coercion of political activity; (4) deceiving or willfully obstructing anyone from competing for employment; (5) influencing anyone to withdraw from competition to improve or injure the employment prospects of another; (6) giving an unauthorized preference or advantage to improve or injure the employment prospects of another; (7) nepotism; (8) reprisal for whistleblowing; (9) reprisal for exercising an appeal, complaint, or grievance right; testifying for or assisting another in exercising such a right; cooperating with or disclosing information to the Special Counsel or an Inspector General; or refusing to obey an order that would require one to violate a law; (10) discrimination based on personal conduct that does not adversely affect job performance; (11) violating veterans' preference requirements; and (12) violating a law, rule or regulation implementing or directly concerning merit system principles set forth at 5 U.S.C. § 2301. It should be noted that these are general descriptions of the prohibited personnel practices defined at 5 U.S.C. § 2302(b). That section should be consulted for fuller descriptions of the elements of each of these violations.
- 8 Unless noted otherwise, all references after this to prohibited personnel practice complaints or cases handled by OSC include matters that alleged other violations of law also within the agency's jurisdiction under 5 U.S.C. § 1216, except violations of the Hatch Act.
- 9 An individual may request that the Special Counsel seek to delay, or "stay," an adverse personnel action, pending investigation of the action by OSC. If the Special Counsel has reasonable grounds to believe that the action resulted from a prohibited personnel practice, OSC may ask the agency involved to delay the personnel action. If the agency does not agree to a delay, OSC may then ask the MSPB to stay the action.

10 In addition to matters described in this section, OSC attorneys and investigators worked on a task force created by the Special Counsel in 2007 to investigate allegations of prohibited personnel practices and violations of the Hatch Act. Task force efforts continued into FY 2009.

11 See endnote 10.

12 Pursuant to 5 U.S.C. § 1212 note.

APPENDIX F

List of Acronyms Used In Report

| | |
|--------|---|
| ADR | Alternative Dispute Resolution |
| AUO | Administratively Uncontrollable Overtime |
| AWOL | Absent Without Leave |
| CBP | Customs and Border Protection |
| CEU | Complaints Examining Unit |
| D.C. | District of Columbia |
| DFW | Dallas-Fort Worth |
| DHS | Department of Homeland Security |
| DOD | Department of Defense |
| DOL | Department of Labor |
| DOT | Department of Transportation |
| DU | Disclosure Unit |
| DVA | Department of Veterans Affairs |
| EEO | Equal Employment Opportunity |
| FAA | Federal Aviation Administration |
| FAMS | Federal Air Marshal Service |
| FEPA | Federal Employees Pay Act |
| FY | Fiscal Year |
| GS | General Schedule |
| HAU | Hatch Act Unit |
| IG | Inspector General |
| IOSC | Immediate Office of the Special Counsel |
| IPD | Investigation and Prosecution Divi- sion |
| MOU | Memorandum of Understanding |
| MSPB | Merit Systems Protection Board |
| NPS | National Park Service |
| OIG | Office of Inspector General |
| OPM | Office of Personnel Management |
| OSC | Office of Special Counsel |
| SSI | Sensitive Security Information |
| SSN | Social Security Number |
| TRACON | Terminal Radar Approach Control |

| | |
|--------|--|
| TSA | Transportation Security Administra- tion |
| USACE | U.S. Army Corps of Engineers |
| USERRA | Uniformed Services Employment and Reemployment Rights Act |
| VBIA | Veterans Benefits Improvement Act |
| VETS | Veterans' Employment and Training Service |
| VSIP | Voluntary Separation Incentive Pay- ment |
| WG | Wage Grade |
| WPA | Whistleblower Protection Act |

U.S. Office of Special Counsel

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The U.S. Office of Special Counsel (OSC) is an independent investigative and prosecutorial agency and operates as a secure channel for disclosures of whistleblower complaints and abuse of authority. Its primary mission is to safeguard the merit system by protecting Federal employees and applicants from prohibited personnel practices, especially retaliation for whistleblowing. OSC also has jurisdiction over the Hatch Act and the Uniformed Services Employment and Reemployment Rights Act.

**Internet Web Site:
www.osc.gov**