

# ANNUAL REPORT TO CONGRESS



U.S. OFFICE OF SPECIAL COUNSEL  
FISCAL YEAR 2009



**REPORT TO CONGRESS  
FOR  
FISCAL YEAR 2009**

U.S. OFFICE OF SPECIAL COUNSEL

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**U.S. Office of Special Counsel**

**1730 M Street, NW, Suite 218  
Washington, D.C. 20036-4505**

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 2009 from the U.S. Office of Special Counsel. A copy of this report will also be sent to each Member of Congress.

Sincerely,

A handwritten signature in black ink that reads "William E. Reukauf". The signature is written in a cursive style with a large, sweeping flourish at the end.

William E. Reukauf  
Associate Special Counsel

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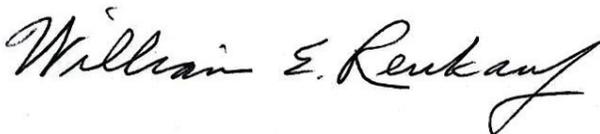
## MESSAGE FROM ASSOCIATE SPECIAL COUNSEL WILLIAM E. REUKAUF

This is the U.S. Office of Special Counsel's (OSC's) Report to Congress for Fiscal Year 2009. 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).

OSC continued to receive increased numbers of cases in all four of its mission-critical areas:

- New prohibited personnel practice complaints rose 17.9% in FY 2009.
- OSC received 496 Hatch Act complaints, an increase of 11.5% over the previous fiscal year.
- The Disclosure Unit received 724 whistleblower disclosures in FY 2009, up 36.6% over the number of disclosures received in FY 2008.
- OSC received 41 referrals from the Department of Labor under the Uniformed Services Employment and Reemployment Rights Act, up from 15 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 2009 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 below the main body of text.

## INTRODUCTION TO OSC

### *Statutory Background*

OSC was established on January 1, 1979.<sup>1</sup> 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 giving 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).<sup>2</sup> 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.<sup>3</sup> (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.<sup>4</sup> 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.<sup>5</sup> 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,<sup>6</sup> 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, Detroit, Oakland, and Washington, D.C.). Agency components during FY 2009 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 are responsible for policy-making and overall management of OSC. This encompasses management of the agency's congressional liaison and public affairs activities, and coordination of its outreach program. The latter includes 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 2,400 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.<sup>7</sup>

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 performed 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 and USERRA Units, 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 investigates and enforces complaints of Hatch Act violations, and represents OSC in litigation before the MSPB seeking disciplinary action. In addition, the HAU is statutorily 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 manages OSC’s budget and financial operations. It also accomplishes the technical, analytical, and administrative needs of the agency. Component units are the Budget and Analysis Branch, Document Control Branch, Human Resources Branch, Information Technology Branch, and the Procurement Branch.

***FY 2009 Budget and Staffing***

During FY 2009, OSC operated with a budget of \$17,468,000. The agency has a staff of approximately 110 employees.

***FY 2009 Case Activity and Results***

**Table 1**, below, summarizes basic OSC case intake and dispositions in FY 2009, with comparative data for previous fiscal years. More detailed data can be found in Tables 2-8, which are 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**

<b>Summary of all OSC Case Activity</b>					
	<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>FY 2008</b>	<b>FY 2009</b>
<b>Matters<sup>a</sup> pending at start of fiscal year</b>	778	777	667 <sup>b</sup>	700	943
<b>New matters received</b>	2,684	2,718	2,880	3,116	3,725
<b>Matters closed</b>	2,685	2,814	2,842	2,875	3,337
<b>Hatch Act advisory opinions issued</b>	2,558	3,004	2,598	3,991	3,733
<b>Matters pending at end of fiscal year</b>	777	681	698	937	1,324

<sup>a</sup> “Matters” in this table includes prohibited personnel practice cases (including TSA matters), Hatch Act complaints, whistleblower disclosures, and USERRA cases.

<sup>b</sup> 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.<sup>7</sup> Of the 3,725 new matters received by OSC during FY 2009, 66% (2,463 matters) were new prohibited personnel practice complaints.<sup>8</sup>

As the intake unit for all prohibited personnel practice complaints filed with OSC, CEU reviewed all such matters received in FY 2009. 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 2009 for investigation included: complaints alleging reprisal for engaging in protected activities, reprisal for whistleblowing, political discrimination, nepotism, and unauthorized employment practices.

### ***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 2009:

- A Police Officer for a federal agency contacted upper management and the agency's Inspector General to report that training records, as well as weapons qualifications, had been falsified at the approval of his first line supervisor. As a result of the employee's disclosures, the IG conducted an onsite investigation and found fourteen violations. Shortly thereafter, the employee was issued a letter of reprimand by the supervisor he implicated in his disclosures. Through mediation the parties settled the case. The agency agreed to pay the employee a lump sum of money and remove the letter of reprimand from his personnel file. In response, the employee agreed to withdraw his complaint.

TABLE 2

ADR Program Activity - Mediation of Prohibited Personnel Practice Complaints						
		FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Matters identified as mediation-appropriate		22	52	38	31	28
Initial acceptance rates by parties	Complainants	27%	83%	71%	54%	61%
	Agencies	22%	59%	59%	94%	88%
Mediated and other resolutions <sup>a</sup>		5	11	10	8	11
Resolution rate by ADR program		100%	55%	50%	50%	36%

<sup>a</sup> 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.

***Examples of Protecting the Federal Workforce from Reprisal for Whistleblowing and Reprisal for Engaging in other Protected Activities***

- Reprisal for Whistleblowing and for Engaging in other Protected Activity. Complainant, an Engineer with a federal agency, alleged that 75% of his job duties were removed following the initiation of an Office of Inspector General (OIG) investigation into his supervisor’s possible misdirection of federal funds. OSC determined that the supervisor believed that complainant had initiated the OIG investigation and that he had provided information regarding the misdirection of funds. The agency agreed to settle the matter by paying the complainant a large lump sum payment. In exchange, complainant agreed to resign from his position.
- Reprisal for Whistleblowing. Complainant, an Assistant United States Attorney, disclosed to agency officials that his supervisor, the United States Attorney, had repeatedly mishandled classified documents concerning domestic terrorist activities in violation of federal regulations and the federal agency’s whistleblowing, the U.S.

internal security program. The OSC investigation revealed that in retaliation for the complainant's Attorney attempted to have him demoted. In reaction to the retaliation, the attorney resigned his position and accepted a demotion to trial attorney. OSC issued a formal corrective action report to the Department head recommending full corrective action. The Department agreed to settle the complaint by providing the complainant with back pay and a clean employment record. The offending official, a political appointee, was relieved of her duties and reassigned by the Department head to a staff attorney position at headquarters for the remainder of the administration.

- Reprisal for Whistleblowing.

Complainant, a carpenter employed by a branch of the military, alleged that after he made a series of disclosures he was ordered to submit to a fitness for duty evaluation, including a physical examination and a psychological examination. Shortly thereafter complainant was removed from his position.

Complainant's disclosures included: (1) reports of confined space hazards, an asbestos hazard; (2) an alleged threat involving workplace violence; (3) allegations of a violation of a law, rule or regulation and a substantial and specific danger to public health or safety made to OSC's Disclosure Unit. After OSC provided its initial findings to the military, the agency agreed to a large monetary settlement and to pay the complainant's attorney fees. In exchange, the complainant agreed to withdraw his OSC complaint.

- Reprisal for Engaging in Protected Activity.

Complainant, a Criminal Investigator, filed a grievance challenging his duty rotation. He alleged that in retaliation for this protected activity, his second-level supervisor cancelled his pre-approved paternity leave. OSC determined that the official improperly cancelled complainant's paternity leave in contravention of the Family Medical Leave Act and in retaliation for filing a grievance. The official also denied complainant a cash award. After informal negotiations with the agency, the matter was settled. The complainant obtained back pay for his denied award. The agency agreed to take disciplinary action against the subject official.

- Reprisal for Engaging in Protected Activity. Complainant, a GS-14 Document Automation Manager, alleged that he was given a proposed 10-day suspension for testifying against his agency during a hearing of the Merit Systems Protection Board (Board) appeal of a subordinate's 15-day suspension for failing a drug test. The complainant's testimony in part resulted in the Board reversing the subordinate's suspension. At OSC's request, the agency agreed to rescind the proposed 10-day suspension and pay the complainant's attorney fees. The agency also issued letters of warning to the complainant's first and second level supervisors, and issued letters of instruction to an agency attorney and human resources specialist for their roles in the proposed retaliatory personnel action.

- Reprisal for Engaging in Protected Activity.

Complainant, a Director with a military Morale, Welfare and Recreation office, alleged that he was detailed to a Deputy Director position outside of his normal commuting area in retaliation for disclosing improper accounting and fund-raising activities by his second-level supervisor to a military Office of Inspector General (OIG). A subsequent OIG investigation substantiated some of his allegations. At OSC's request, the military returned the complainant to his former position and OSC granted the agency a 5 U.S.C. § 1214(f) waiver to discipline the subject official by demoting him to a lower graded position.

### ***Examples of Protecting the Merit System through Enforcement of the Other PPP's (non-reprisal)***

- Political Discrimination. The complainant, a political appointee, applied for a career position with his agency. A panel of career officials rated him as the highest qualified candidate on a competitive certificate, and recommended him for selection. The deciding official, also a political appointee, selected the complainant. However, this decision was reviewed by the Secretary, who vetoed it on the grounds that the complainant was a political appointee. The OSC complaint challenged the Secretary's action as an act of political discrimination. OSC determined that

the Secretary illegally discriminated against the complainant and issued a formal corrective action report to the federal agency. After negotiations, the complaint was settled favorably, and the complainant received a career appointment at the agency and consequential damages.

- Nepotism. OSC investigated an allegation that a Logistics Management Officer (“accused manager”) violated nepotism laws by advocating for the selection of his son to a position in his directorate. OSC’s investigation revealed that the accused manager gave the appearance of advocating for his son’s employment. In addition, the accused manager’s supervision of his son during his first assignment violated a department directive pertaining to the employment of relatives. At OSC’s request, the agency transferred the son to another organization on post and issued the accused manager a written reprimand.

- Examples of Unauthorized Employment Preference/Hiring Practice Irregularities. Two complainants alleged that agency managers, one of whom was the Area Office Director and directly supervised the other accused manager, engaged in several prohibited hiring practices with respect to the selection of the Area Office Director’s brother-in-law for a Specialist position. OSC’s investigation corroborated improprieties regarding the hiring of the brother-in-law. In addition to evidence corroborating that the Area Office Director advocated for his brother-in-law’s appointment, OSC found that the lower-level manager deceived the highest ranked applicant regarding the status of the position and encouraged him to withdraw from competition in order to hire the preferred candidate, i.e., his superior’s brother-in-law. At OSC’s request, the agency agreed to offer the injured applicant the position at issue. In addition, OSC granted the agency’s request for 1214(f) approval to suspend the lower-level manager for thirty (30) days and terminate the employment of the Area Office Director. The termination was based on numerous charges in addition to the prohibited personnel practice.

### ***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,<sup>9</sup> corrective actions, and disciplinary actions) obtained by OSC during FY 2009.

**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 from 33 in FY 2008 to 53 in 2009.

**TABLE 3**

<b>Summary of All Favorable Actions - Prohibited Personnel Practice Complaints<sup>a</sup></b>						
		<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>FY 2008<sup>b</sup></b>	<b>FY 2009</b>
<b>Total favorable actions negotiated with agencies (all PPP's)</b>	<b>No. of actions</b>	45	52	29	58	62
	<b>No. of matters</b>	45	48	29	33	53
<b>Total favorable actions negotiated with agencies (reprisal for whistleblowing)</b>	<b>No. of actions</b>	37	40	21	44	35
	<b>No. of matters</b>	37	37	21	20	29
<b>Disciplinary actions negotiated with agencies</b>		3	4	5	3	5
<b>Stays negotiated with agencies</b>		3	8	7 <sup>c</sup>	4 <sup>d</sup>	9
<b>Stays obtained from MSPB</b>		1	1	3	0	0
<b>Corrective action complaints filed with the MSPB</b>		1	1	1	0	0
<b>Disciplinary action complaints filed with the MSPB</b>		1	0	0	3	0

<sup>a</sup> 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.

<sup>b</sup> Actions itemized in this column occurred in matters referred by CEU and processed by IPD.

<sup>c</sup> Incorrectly reported as 4 in OSC's FY 2007 report to Congress due to administrative error.

<sup>d</sup> Represents two stays obtained in each of two cases.

**Table 4**, below, contains FY 2009 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.<sup>10</sup>

**TABLE 4**

<b>Summary of All Prohibited Personnel Practice Complaints Activity - Receipts and Processing<sup>a</sup></b>						
		<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>FY 2008</b>	<b>FY 2009</b>
<b>Pending complaints carried over from prior fiscal year</b>		524	521	386	358	474
<b>New complaints received<sup>b</sup></b>		1,771	1,805	1,970	2,089	2,463
<b><i>Total complaints:</i></b>		2,295	2,326	2,356	2,447	2,937
<b>Complaints referred by CEU for investigation by IPD</b>		198	143	125	135	169
<b>Complaints processed by IPD</b>		216	256	151	88 <sup>c</sup>	150
<b>Complaints pending in IPD at end of fiscal year</b>		283	155	136	185	201
<b><i>Total Complaints processed and closed (CEU and IPD combined)</i></b>		1,774	1,930	1,996	1,971	2,173
<b>Complaint processing times</b>	<b>Within 240 days</b>	1,198	1,693	1,874	1,889	2,045
	<b>Over 240 days</b>	576	237	121	80	127
<b>Percentage processed within 240 days</b>		68%	88%	94%	95%	94%

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

<sup>b</sup> “New complaints received” includes a few reopened cases each year, as well as prohibited personnel practice cases referred by the MSPB for possible disciplinary action.

<sup>c</sup> 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 2009.

### *Enforcement Highlights*

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 2009 the HAU saw yet another increase in the number of complaints of Hatch Act violations by federal employees. The 496 received were the highest on record. In addition, the unit issued 3,733 oral and written advisory opinions (226 formal written opinions, 1,480 e-mail opinions, and 2,027 oral opinions) in response to requests for advice on permissible and prohibited activities under the Hatch Act.

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

- OSC filed a petition for disciplinary action with the MSPB, charging a doctor from a federal agency with violating the Hatch Act’s prohibitions against using one’s official authority or influence to affect the result of an election, soliciting, accepting or receiving political contributions, and engaging in political activity while on duty and/or in a federal building. The doctor invited subordinate employees and coworkers to attend a campaign fundraiser for a Presidential candidate by sending a fundraiser invitation to them via e-mail while he was on duty and in the federal workplace. In addition, during OSC’s investigation into these violations, of which the doctor was aware, he again engaged in activity that violated the Hatch Act by forwarding an e-mail from a current candidate for a State Treasurer to a colleague, requesting political contributions for the candidate’s campaign. OSC filed a petition for disciplinary action with the MSPB against a federal Program Analyst and Contracting Officer Technical Representative with

a federal agency, charging the employee with five violations of the Hatch Act including: 1) using her authority or influence over contract employees to affect the result of an election; 2) knowingly soliciting political contributions from coworkers and contract employees; and 3) engaging in political activity by sending five partisan political e-mails while on duty and in her federal workplace. While at work the employee, among other things, twice solicited political contributions; first by inviting sixteen coworkers to attend a Presidential candidate's campaign fundraiser and then by asking coworkers and contract employees alike, via an e-mail solicitation, to make a donation to a Presidential candidate's campaign.

- OSC filed a petition for disciplinary action with the MSPB, charging a federal employee with violating the Hatch Act's restriction against soliciting a political contribution. OSC also charged the employee with using his official authority or influence to affect the results of an election, engaging in political activity while on duty and in a federal room or building occupied in the discharge of official duties. The charges stemmed from the employee's dissemination of an e-mail, while on duty and in the federal workplace, soliciting political contributions for a Presidential candidate. The employee also included his electronic signature in the e-mail, which identified his federal agency and position.

- OSC negotiated a settlement agreement for a 90-day suspension without pay in a case involving a GS-15 supervisor from a federal agency who violated three provisions of the Hatch Act -- the prohibitions against using one's official authority or influence for the purpose of interfering with or affecting the result of an election; soliciting, accepting, or receiving a political contribution; and engaging in political activity while on duty or in a federal room or building. Specifically, OSC found that the supervisor hosted a fundraising event at her home in support of a U.S. Congressional candidate and, while at an office staff meeting, invited subordinate employees to attend that fundraising event. OSC's investigation also found that, a few days before the fundraiser was held, agency management counseled the employee about the Hatch Act and advised her that her actions may have

violated the Act. Management advised her to contact the subordinate employees and let them know she had made a mistake in inviting them to the event. The employee contacted the subordinates and disinvited them to the event, and none attended the fundraiser.

- After filing a petition for disciplinary action with the MSPB, OSC negotiated a settlement agreement in a case involving the Chief of Operations at a federal agency. Under the terms of the settlement agreement, as penalty for violating the Hatch Act, the employee resigned from his employment with the agency and agreed not to seek or accept federal employment in the future. The employee admitted that he violated the Hatch Act by using his official authority and influence for the purpose of affecting the result of the 2008 Presidential election and by engaging in political activity while on duty and in a federal room or building. Specifically, he admitted that prior to Election Day, during a mandatory meeting with his staff, he told his subordinates how he was going to vote in the upcoming Presidential election. He also admitted that he gave his staff reasons why he was going to vote for his favored candidate. He admitted that he polled his subordinates about their candidate of choice.

- OSC filed a petition for disciplinary action with the MSPB, charging a federal employee with violating the Hatch Act's prohibitions on using official authority or influence to affect the results of an election and engaging in political activity while on duty and/or in a room or building occupied in the discharge of official duties. The charges stemmed from the employee's dissemination of an e-mail that, among other things, conveyed a highly negative message about a Presidential candidate. The Administrative Law Judge ruled that the employee violated the Hatch Act's restrictions on using official authority or influence and engaging in political activity while in a room or building occupied in the discharge of official duties, and should be removed from employment. [An appeal in this case is pending.]

- OSC filed a petition for disciplinary action with the MSPB, charging a supervisor from a federal agency

with engaging in political activity while on duty and using his official authority or influence for the purpose of affecting the result of an election. The employee sent an e-mail expressing support for a Presidential candidate in the 2008 U.S. Presidential election to twenty subordinate employees.

- OSC filed a petition for disciplinary action with the MSPB, charging a federal employee with violating the Hatch Act’s prohibitions against engaging in political activity while on duty and in the workplace and against using official authority or influence for the purpose of interfering with or affecting the result of an election. The employee disseminated over thirty political e-mails that were in opposition to a Presidential candidate while she was on duty and in her federal workplace; the employee also included her electronic signature in the e-mails, which identified her federal agency and position.

- OSC negotiated a settlement agreement for a 20-day suspension without pay in a case involving a federal employee who disseminated a single partisan political e-mail while on duty and in a room or building occupied in the discharge of official duties concerning a Presidential candidate. The e-mail, among other things, contained information indicating that it was paid for by the candidate, a picture of the candidate, his campaign logo and slogan, and a link to his campaign website. The e-mail also contained statements indicating that the sender was “supporting the candidate’s presidential campaign,” and encouraging recipients to visit the campaign website to learn more about his position on issues, to get the latest news about the campaign, and to be active on the campaign blog.

- OSC filed a petition for disciplinary action with the MSPB, charging a federal employee with violating the Hatch Act’s prohibition against being a candidate for public office in a partisan election. The employee was a candidate for Township Clerk in 2008. Both before and during the employee’s candidacy, her employing agency provided her with information about the Hatch Act’s restrictions.

- OSC filed a petition for disciplinary action with the MSPB, charging a State employee with a violation of the Hatch Act’s prohibition against being a candidate in a partisan election. The employee was a candidate in the 2008 election for State Representative. During his candidacy in the partisan election, OSC advised the employee that he was covered by the Hatch Act and that his candidacy was in violation of the law. Despite these warnings, the employee continued to pursue the candidacy.

### *Outreach*

HAU attorneys made over 50 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*

Growing public awareness of OSC’s enforcement efforts and increased media attention contributed to record numbers of Hatch Act complaints received and advisory opinions issued in FY 2009. The 496 complaints received were an 11.5% increase over the previous year (and the highest on record). Even with increased staffing, greater efficiency, and increased outputs, cases pending at the end of FY 2009 rose by 33%. Continuing surges in both complaints and advisory opinion activity have made the HAU’s workload nearly overwhelming. **Table 5**, below, contains FY 2009 summary data (with comparative data for the four previous fiscal years) on OSC’s Hatch Act enforcement activities.<sup>11</sup>

**TABLE 5**

<b>Summary of Hatch Act Complaint and Advisory Opinion Activity</b>						
		<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>FY 2008</b>	<b>FY 2009</b>
<b>Formal written advisory opinion requests received</b>		191	237	194	292	227
<b>Formal written advisory opinions issued</b>		183	230	176	275	226
<b>Total advisory opinions issued<sup>a</sup></b>		2,558	3,004	2,598	3,991	3,733
<b>New complaints received<sup>b</sup></b>		245	299	282	445	496
<b>Complaints processed and closed</b>		310	266	252	264	388
<b>Warning letters issued</b>		87	76	68	70	132
<b>Corrective actions taken by cure letter recipients:</b>	<b>Withdrawal from partisan races</b>	4	9	18	13	15
	<b>Resignation from covered employment</b>	10	22	6	17	6
	<b>Other</b>	3	2	1	2	3
	<b>Total:</b>	17	33	25	32	24
<b>Disciplinary action complaints filed with MSPB</b>		11	6	1	3	10
<b>Disciplinary actions obtained (by negotiation through negotiation or ordered by MSPB)<sup>c</sup></b>		12	10	5	11	5
<b>Complaints pending at end of fiscal year</b>		79	112	142	323	430

<sup>a</sup> All oral, e-mail, and written advisory opinions issued by OSC.

<sup>b</sup> Includes cases that were re-opened.

<sup>c</sup> 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.

## 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; 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 2009 continued to span a broad range of concerns. Several of those referred by OSC for further action are highlighted below:

#### *Violation of Law, Rule, or Regulation*

- Failure to Administer Appeal Rights to Veterans. OSC referred to the Secretary of the Department of Veterans Affairs (VA) allegations that officials of the National Cemetery Administration (NCA) in Washington, D.C., consistently failed to notify claimants that they have the right to appeal its decisions regarding burial rights, headstones, and markers in national cemeteries. Pursuant to 38 C.F.R. § 20.101(a)(16), the decisions are appealable to the Board of Veterans' Appeals, and the agency has an affirmative duty to provide notice of this right to claimants under 38 C.F.R. § 19.25. In its investigation, the agency confirmed that decisions made by NCA constitute a benefit under 38 C.F.R. § 19.25 and 38 U.S.C. §§ 5104(a) and 7105. The agency also confirmed that NCA is required, under 38 C.F.R. § 19.25, to provide claimants with notice of a decision on their claim, an explanation of the process used to make the decision, and notice of the right to appeal. The agency required NCA to immediately begin providing claimants with specific denial letters that include a VA Form 4107 explaining appeal rights. The NCA Office of Field Programs also worked with the NCA Training Officer to develop a comprehensive training on appeal rights for NCA benefit processing staff, beginning with an initial training at the NCA annual conference in August 2009. In addition, NCA planned to provide all claimants whose applications were denied from March 30, 2009, onward with a written denial letter and Form 4107. The agency

plans to update the 2010 version of the VA pamphlet, “Federal Benefits for Veterans, Dependents, and Survivors,” and other VA and NCA publications, websites, forms, and information systems. Finally, the NCA Legislative and Regulatory Division began developing relevant policy guidance documents or regulations, if necessary. This matter was referred in April of 2009; sent to the President and Congressional oversight committees and closed in September 2009.

- Pornographic and Obscene E-mails and Sharing of Passwords and Common Access Cards. OSC referred to the Secretary of the Army allegations that employees at the Army Training Support Center, Fort Eustis, Virginia, e-mailed pornography and obscene material using government e-mail accounts during official working hours. The whistleblower also alleged that employees shared passwords and Common Access Cards, which are required to access the computer system. The investigation conducted by the Office of the Staff Judge Advocate substantiated both allegations. The agency disciplined the involved employees. This matter was referred July 2008; sent to the President and Congressional oversight committees and closed in June 2009.

- Gambling on Federal Property. OSC referred allegations to the Attorney General that Department of Justice, Bureau of Prisons (BOP) officials violated federal regulations and policies, 5 CFR 735.201 and BOP Program Statement 3721.05, by allowing employees to conduct and participate in gambling activities on government-owned property. BOP substantiated the allegations and found that the winners of the gambling events were awarded with prizes such as a television, stereo system, and digital camera. The report found that there was a misunderstanding between the BOP Ethics Officer and FCI Miami Employee Club representatives, that it appeared that there was no willful intent to withhold information and that employees acted in “good faith.” BOP issued a memorandum to all BOP executive officers to remind them that gambling activities constitute a violation of federal law and BOP regulations and policies. This matter was referred in September 2008; sent to the President and

Congressional oversight committees and closed in April 2009.

### *Substantial and Specific Danger to Public Safety*

- Non-compliant Modifications to Medical Service Helicopters. OSC referred allegations to the Secretary of the Department of Transportation (DOT) concerning non-compliant and potentially unsafe modifications made to hundreds of emergency service helicopters and the failure of the Federal Aviation Authority (FAA) to address this problem. The whistleblower disclosed that more than 300 emergency service helicopters operating across the country were modified with a night vision imaging system (NVIS). After FAA discovered that the modifications did not comply with required specifications, and in many instances created a safety hazard, FAA prepared a Notice of National Policy invalidating the helicopters’ airworthiness certificates and establishing procedures to bring the aircraft into compliance. Following negative publicity in April 2008 on alleged safety problems with the Southwest Airlines and American Airlines, FAA officials decided not to issue the Notice. Helicopter operators were advised of the non-compliance; however, FAA allegedly failed to address the potential safety hazards relating to the NVIS modifications. The whistleblower contended that FAA failed to ensure that the helicopters were brought into compliance in a timely and coordinated manner, thereby allowing aircraft with invalid airworthiness certificates and potential safety hazards to remain in service.

Pursuant to 5 U.S.C. § 1213(c), the Secretary was required to conduct an investigation and submit a written report to OSC within 60 days of OSC’s referral, or within any extension of time agreed to by OSC. OSC granted DOT five extensions of time over more than 12 months. During this time, OSC was advised by DOT that FAA completed an initial investigation in August 2008 and provided a report to DOT’s Office of Inspector General (OIG) for review in September 2008. OSC understood that in October 2008, OIG responded to FAA outlining questions, concerns and recommendations for further FAA investigation. In June 2009, FAA submitted a

supplemental report to OIG. Despite the extensions of time granted, and OSC's notice to DOT that the fifth extension would be final, the Secretary did not submit the required report. Rather, after the close of business the date the report was due, DOT requested an additional 60-day extension of time. Due to the serious safety allegations and the length of time that had passed, OSC concluded that it was no longer in the public interest to grant additional extensions of time. Thus, OSC transmitted the disclosure to the President and the Congressional oversight committees without DOT's report in accordance with 5 U.S.C. § 1213(e) (4). This matter was referred in November 2008; sent to the President and the Congressional oversight committees and closed in July 2009.

- Employees Directed to Use Railroad Bridge and Handling Explosives without Training. OSC referred to the Secretary of the Department of the Interior (DOI) allegations from two whistleblowers that employees at the United States Geological Survey, Western Ecological Resource Center, San Francisco Bay Estuary Field Station, Vallejo, California, were required to cross an active railroad bridge with limited visibility of oncoming trains. One whistleblower also alleged that employees handled explosives without sufficient safety training and explosives were stored in unsafe conditions.

The DOI Office of Inspector General (OIG) investigated and concluded that explosives had been stored inappropriately and no formal explosives training program existed. However, the OIG concluded that employees were not exposed to a substantial and specific danger while crossing the railroad bridge. The agency acted to cure the deficiencies with the handling and storage of explosives. This matter was referred July 2007; sent to the President and Congressional oversight committees and closed in November 2008.

*Substantial and Specific Danger to Public Health and Safety and Gross Mismanagement*

- Agency Failure to Fully Respond To and Investigate Death Threat to Agent. OSC referred to the Attorney General allegations that the Department of Justice

(DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), that ATF did not have adequate policies and procedures for the review and response to threats of violence made against its agents and their families. The whistleblower also alleged that ATF failed to investigate threats made against him. The DOJ Office of the Inspector General (OIG) investigated and partially substantiated the allegations. OIG concluded that ATF's policies and procedures on threats of violence to its personnel were generally adequate, but found that because of a misunderstanding in this case, the whistleblower was relocated under standard Permanent Change of Station procedures, rather than under emergency relocation procedures as recommended. The OIG substantiated the allegation that ATF did not properly respond to threats against the whistleblower finding that the agency failed to adequately investigate and needlessly and inappropriately delayed its response to threats against its own agent. The DOJ OIG recommended that ATF amend its written procedures regarding emergency relocations to require that the notifications of emergency relocations be made in writing to prevent similar misunderstanding in the future. ATF concurred and amended its policies and updated all training materials to ensure that all personnel are aware of the new policy. This matter was referred in February 2007; sent to the President and Congressional oversight committees and closed in June 2009.

*Violation of Law, Rule or Regulation and Abuse of Authority*

- Unauthorized Destruction and Removal of Federal Property. OSC referred to the Secretary of the Interior allegations that 27 Bureau of Reclamation (BOR) owned buildings previously existing as improvements to real property had been removed or demolished without approval or compensation by local utilities in possession of the buildings pursuant to Operation & Maintenance Agreements with BOR. The whistleblower alleged that the improper removal or demolition of these buildings constituted violations of 41 C.F.R. §101-47, which establishes the procedures for reporting unused or underused

real and related personal property to the General Services Administration for disposal, and 18 U.S.C. § 641, a criminal statute prohibiting the theft of public money, property or records. The agency investigation substantiated the allegations, but determined that due to the passage of time, criminal prosecution was not possible and administrative sanctions were not viable. This matter was referred February 2007; sent to the President and Congressional oversight committees and closed in March 2009.

*Violation of Law, Rule or Regulation, Gross Mismanagement, Gross Waste of Funds, Abuse of Authority*

- Missing Government Equipment. OSC referred to the Secretary of the Department of Health and Human Services allegations from two whistleblowers that employees at the Indian Health Service (IHS), Rockville, Maryland, could not locate nearly \$1.9 million of government property, that annual property inventories were not conducted, and that Personal Custody Property Records were not used. The Office of Inspector General found weaknesses in IHS's management of property but did not find evidence of criminal activity. Because the agency had suffered similar property losses in 2004 and refused to hold any employees accountable, the Acting Special Counsel found the agency's report to be deficient. This matter was referred September 2007; sent to the President and Congressional oversight committees and closed in February 2009.

***Summary of Workload, Activity, and Results***

**Table 6**, below, contains FY 2009 summary data (with comparative data for the four previous fiscal years) on DU receipts and dispositions of whistleblower disclosure cases. Despite a 37% increase in disclosures received in FY 2009, the average processing time only increased from 53 to 57 days. Fifty four percent of the disclosures were processed in less than 15 days, reflecting the unit's slightly increased staffing in FY 2009.

TABLE 6

<b>Summary of Whistleblower Disclosure Activity - Receipts and Dispositions<sup>a</sup></b>						
		<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>FY 2008</b>	<b>FY 2009</b>
<b>Pending disclosures carried over from prior fiscal year</b>		98	110	69	84	128
<b>New disclosures received</b>		485	435	482	530	724
<b><i>Total disclosures</i></b>		583	545	551	614	852
<b>Disclosures referred to agency heads for investigation and report</b>		19	24	42	40	46
<b>Referrals to agency IGs</b>		14	10	11	9	10
<b>Agency head reports sent to President and Congress</b>		16	24	20	25	34
<b>Results of agency investigations and reports</b>	<b>Disclosures substantiated in whole or in part</b>	16	21	19	22	30
	<b>Disclosures unsubstantiated</b>	0	3	1	3	4
<b>Disclosure processing times</b>	<b>Within 15 days</b>	236	203	285	256	394
	<b>Over 15 days</b>	237	275	182	232	333
<b>Percentage of disclosures processed within 15 days</b>		50%	42%	61%	52%	54%
<b>Disclosures processed and closed</b>		473	478	467	488	727

<sup>a</sup> 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.

## USERRA CASES

### *Overview*

USERRA protects the civilian employment and reemployment 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 2009, 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 2009:

## Corrective Action

- Claimant, following two extended tours of active duty in the Army Reserve, returned to his civilian position as a federal claims examiner. Upon his return to work, however, claimant remained in a GS-9 level position while some of his peers had been promoted to the GS-11 level. The agency eventually promoted claimant to GS-11, but did not account for the time he lost serving in the military. USERRA strives to ensure that those performing military service not be disadvantaged in their civilian careers, in part by requiring employers to reemploy them in the “escalator position”- i.e., the position they likely would have achieved had they remained continuously employed and not served in the military. Accordingly, OSC requested that the agency make claimant’s promotion from GS-9 to GS-11 retroactive (for seniority purposes only) to the date he likely would have earned it, re-calculate his within-grade increases based on the retroactive promotion date, and award him the resulting difference in pay. The agency agreed to OSC’s request.

- Claimant, a federal civilian employee and member of the Navy Reserve, was called to active duty from April 2007 to October 2008. In late July 2008, prior to the expiration of his orders, he returned to his home base, out-processed, and was placed on “terminal leave” (paid leave from the military). In early August, his civilian supervisor agreed to his request to return to work in early September, while he was still on “terminal leave” from the military. However, when he reported for work, the agency informed him that he could not return for another month due to prohibitions on “dual compensation” from both military and civilian positions. OSC researched the issue and determined that claimant’s situation fell within an exception to the “dual compensation” rules. In light of this finding and the requirement that federal service members be reemployed within 30 days of their request, OSC sought corrective action. The agency agreed to change claimant’s return date from early October to early September 2008 (approximately one month earlier), award him the corresponding back pay, and adjust his leave and other personnel records accordingly. Claimant informed OSC that the agency

later took the same action for two other Reservists in similar situations.

- Claimant, an Army Reservist, was terminated from his probationary employment as a civil engineering technician position shortly after his return from active military duty. While there was some evidence that claimant’s military service may have been a factor in his termination, there was also evidence that the agency had legitimate, non-discriminatory reasons for its action. Claimant also began work at another federal agency after his termination and did not wish to return. In an effort to resolve the matter, at OSC’s request, the agency entered into a settlement agreement with claimant whereby it rescinded claimant’s termination (changing it to a transfer); restored approximately three months’ worth of annual and sick leave to claimant; and paid him a lump sum of money.

- Claimant, a federal civilian employee and Captain in the Army Reserve, served several short periods of active duty. He alleged that he was not selected for a position in late 2007 by reason of his military service. OSC obtained the selection file on the position in question, and interviewed the selecting official, claimant’s immediate supervisor. In an effort to resolve the matter, the agency agreed (at OSC’s request) to an increase in claimant’s base salary (the same increase the successful applicant received), retroactive to November 25, 2007, the date of the successful applicant’s increase. The agency also agreed to award claimant the associated back pay. In light of this resolution, claimant withdrew his USERRA complaint.

- Claimant, a member of the Air National Guard, was hired in March 2005 for a one-year term appointment as a federal civilian employee. She was called to active duty from August-October 2005, and again from December 2005-September 2006. Her term appointment expired in March 2006, while she was on active duty. At that time, all of her peers were hired as permanent employees, but she was not. When she completed her military service at the end of September 2006, she applied for reemployment, but was not rehired until six weeks later. In February

2007, she had an altercation with her supervisor, and the agency terminated her employment in October 2007. The agency also began recouping military leave it had erroneously given her while she was a short-term employee on active duty, but did so by an excess amount. Claimant alleged that the agency violated USERRA by failing to promptly reemploy her following her military service, failing to consider her for a permanent position while deployed and, once reemployed, terminated her employment in retaliation for asserting her USERRA rights. OSC determined that there was insufficient evidence that her termination was retaliatory or related to her military service. However, OSC also determined that her other allegations had merit. In an effort to resolve the matter, the agency agreed (at OSC's request) to provide claimant six weeks back pay, annual leave, and the excess military leave that was recouped. The agency also agreed to rescind her removal and reprocess it as a voluntary separation (resignation), and to adjust her personnel records to reflect no break in service with the agency between her initial hiring in March 2005 and her separation in October 2007. In light of this resolution, OSC closed the case.

- While employed as a contract security officer at a federal facility, claimant was called to active duty with the Army National Guard in Afghanistan from March 2005 to June 2006. Upon his return in June 2006, he applied for reemployment under USERRA. During claimant's absence, various credentials required by the agency expired, including his state firearms license, the last prerequisite before the agency's Contracting Officer's Technical Representative (COTR) would assign an agency range monitor for his weapons qualification. After claimant renewed his license, the contractor determined that a range monitor could be available on either July 22 or July 28, 2006, and requested that the COTR schedule claimant on one of those days. The COTR, however, denied the request because it did not comply with a 30-day notification period required by the agency. The contractor advised the COTR that claimant was a returning veteran entitled to prompt reemployment, but the COTR refused to make an exception. The COTR did not schedule claimant's weapons qualification until August 18, 2006, which claimant passed. Claimant filed a

USERRA complaint with the Department of Labor (DOL) seeking three weeks of back pay for his failure to be promptly reemployed. After DOL was unable to resolve the complaint, claimant requested referral to OSC. After reviewing the case, OSC determined that the agency could be liable to claimant because it arguably "controlled his employment opportunity" within the meaning of USERRA. OSC engaged in settlement discussions with agency counsel, resulting in an agreement by the agency to pay claimant three weeks lost wages and benefits, plus interest. In exchange, claimant agreed to withdraw his USERRA complaint.

### Litigation

During Fiscal Year 2009, OSC successfully litigated a significant case of first impression before the MSPB, Silva v. DHS, 112 MSPR 362 (2009). The case involved Michael Silva, a federal contract employee and Army Reserve Brigadier General who was deployed to Iraq. After serving honorably for over a year, Silva was released from active duty and sought reinstatement in his former position as a contract employee at the U.S. Department of Homeland Security (agency). However, an agency official informed Silva's nominal employer, SPS Consulting (SPS), a federal staffing contractor, that it was satisfied with Silva's replacement and would "cancel the contract" if SPS attempted to reinstate Silva. Recognizing that his reemployment rights under USERRA had been violated, Silva subsequently filed complaints against both SPS and the agency for failing to reinstate him.

Because USERRA defines "employer" broadly to include "any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including . . . the Federal Government," OSC investigated Silva's complaint. After determining the complaint had merit, OSC represented him and initiated an action before the MSPB. Prior to this case, the MSPB had never before determined whether the federal government could be held liable to a contract employee under USERRA.

After an Administrative Judge initially dismissed Silva's case, OSC filed a successful appeal with the MSPB, which held that OSC's theory that the agency acted as Silva's "employer" was cognizable under USERRA: "We agree with [Silva] that a federal agency could be considered an individual's 'employer' under USERRA, even when the individual was not appointed in the civil service but instead was formally employed by a government contractor." Silva, 112 MSPR at 368.

The MSPB remanded the case to the Administrative Judge for a determination on the merits (the case remained pending at the end of the fiscal year). Federal agencies should take note of the MSPB's decision, which subjects them to potential liability if they interfere with the employment or reemployment rights of Guard and Reserve members who work as civilian government contractors, even though such individuals are not government employees in the traditional sense.

During the fiscal year, OSC also agreed to represent three other military service members in their USERRA claims against federal agencies. OSC expects to file these claims with the MSPB in Fiscal Year 2010.

**Table 7** and **Table 8**, below, contain FY 2009 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**

<b>Summary of USERRA Referral and Litigation Activity<sup>a</sup></b>				
	<b>FY 2006</b>	<b>FY 2007</b>	<b>FY 2008</b>	<b>FY 2009</b>
<b>Pending referrals carried over from prior fiscal year</b>	6	3	3	5
<b>Referrals received from VETS during fiscal year</b>	11	4	15	41
<b>Referrals closed</b>	14	4	13	39
<b>Referrals closed with corrective action</b>	3	0	2	4
<b>Referrals closed with no corrective action</b>	11	4	11	35
<b>Referrals pending at end of fiscal year</b>	3	3	5	7
<b>Litigation cases carried over from prior fiscal year</b>	0	0	1	1
<b>Litigation cases filed during fiscal year</b>	1	1	1	0
<b>Litigation cases closed</b>	1	0	1	0
<b>Litigation closed with corrective action</b>	1	0	0	0
<b>Litigation closed with no corrective action</b>	0	0	1	0
<b>Litigation pending at end of fiscal year</b>	0	1	1	1

<sup>a</sup> 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**

<b>Summary of USERRA Demonstration Project Activity<sup>a</sup></b>			
	<b>FY 2007</b>	<b>FY 2008</b>	<b>FY 2009</b>
<b>Pending cases carried over from prior fiscal year</b>	95	115	13
<b>New cases opened</b>	142	37	0
<b>Cases closed</b>	123	139	10
<b>Closed cases with corrective action</b>	43	26	2
<b>Closed cases with no corrective action</b>	80	113	8
<b>Cases pending at end of fiscal year</b>	114	13	4 <sup>b</sup>

<sup>a</sup> Under the demonstration project authorized by the VBIA, OSC received cases from February 2005 through December 2007.

<sup>b</sup> This includes one case that was re-opened due to changing legal precedent (not reflected in the figures above)."

## ***Education, Outreach, and Policy***

In addition to investigating and favorably resolving service members' USERRA claims, and litigating important USERRA cases in FY 2009, 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 2009, OSC employees spoke at approximately 60 events nationwide, including American Bar Association events, agency training sessions, conferences and meetings. 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.<sup>12</sup> Complainants in prohibited personnel practice cases closed during FY 2009, claimants in USERRA demonstration project matters closed during FY 2009, and recipients of formal Hatch Act advisory opinions during 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 19% 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 71% were satisfied or very satisfied (see Appendix C). All FY 2009 survey questions and response tallies are shown in Appendices A-D.

## **FURTHER INFORMATION**

### ***OSC Web Site***

The agency web site ([www.osc.gov](http://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/RR\\_OSCFORMS.htm](http://www.osc.gov/RR_OSCFORMS.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](mailto: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](mailto: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/RR\\_OSCFORMS.htm](http://www.osc.gov/RR_OSCFORMS.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

### ***Reports to Congress***

This and other OSC reports to Congress are available in the “Reading Room” section of the agency web site. 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*

Form OSC-12 can be used to file a disclosure with OSC. The form is available online ([http://www.osc.gov/RR\\_OSCFORMS.htm](http://www.osc.gov/RR_OSCFORMS.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](mailto:userra@osc.gov)

### ***Outreach Program***

Many OSC forms and publications are available in the “Reading Room” section of the agency web site. 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

## APPENDIX A

### Survey Totals

FY 2009	
Number Mailed	2,011
Number Returned	312
Response Rate	16%

### Response Sources by Type of Matter at OSC

What was the nature of your correspondence to OSC? (Please choose only one)	
Response Options	FY 2009
You filed a complaint concerning a Prohibited Personnel Practice	273
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

<b>1. Did the agency against which you filed the complaint inform you about your rights and responsibilities with regard to prohibited personnel practices?</b>	
<b>Response Options</b>	<b>FY 2009</b>
Yes	52
No	185
Do not recall	32
Never employed by a federal agency	4

<b>2. Did you obtain the result that you wanted from OSC?</b>	
<b>Response Options</b>	<b>FY 2009</b>
Yes	11
No	262

<b>3. Did your complaint include any allegation of reprisal for whistleblowing?</b>	
<b>Response Options</b>	<b>FY 2009</b>
Yes	157
No	105

<b>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.)</b>	
<b>Response Options</b>	<b>FY 2009</b>
No OSC jurisdiction over your position, the agency, or agency official involved in the complaint	21
No personnel action taken by the agency involved	13
Information that you disclosed did not appear to be a legally protected disclosure	29
Your disclosure occurred after the personnel action involved in your complaint	0
Insufficient proof that the agency official (who took the personnel action against you) knew about your disclosure.	17
Insufficient proof of connection between your disclosure and the personnel action involved in your complaint	36
OSC could not disprove the reason given by the agency involved for the personnel action taken, as described in your complaint.	17
Insufficient evidence that the personnel action involved in your complaint violated a law or regulation	34
You or OSC settled the matter with the agency involved	4
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)	16
You withdrew your complaint	2
Other	60
Do not recall	13

<b>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?</b>	
<b>Response Options</b>	<b>FY 2009</b>
Yes	63
No	174
Have not decided whether to file	25

<b>6. Did you ask for the same relief that you sought from OSC?</b>	
<b>Response Options</b>	<b>FY 2009</b>
Yes	54
No	7
Do not recall	2

**7. Were you successful at the MSPB in obtaining the same result that you sought from OSC?**

<b>Response Options</b>	<b>FY 2009</b>
Yes	2
Partially	1
No	32
Appeal pending	19

**8. If the answer to the previous question was “yes” or “partially,” how did you obtain that result?**

<b>Response Options</b>	<b>FY 2009</b>
Settlement	1
Decision after hearing	1
Other	1

**9. What reason did OSC give for closing your complaint without obtaining the result that you Desired? (Check all that apply)**

<b>Response Options:</b>	<b>FY 2009</b>
No OSC jurisdiction over your position, the agency. or agency official involved in the complaint	11
No personel action taken by the agency involved	4
OSC could not disprove the reason given by the agency involved for the personnel action taken, as described in your complaint	11
Insufficient evidence that the personnel action involved in your complaint violated a law or regulation	30
You or OSC settled the matter with the agency involved	2
You declined corrective action offered by the agency involved	1
You withdrew your complaint	1
OSC filed a petition with the Merit Systems Protection Board (MSPB) for corrective action	1
OSC obtained a decision in the corrective action proceeding filed with the MSPB	0
Closed for further action on discrimination allegations through EEO processes	5
Rosolved through OSC’s Mediation Program	0
Other	47
Do not recall	10

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

<b>Service Categories to be rated</b>	<b>FY 2009 Ratings</b>				
	<b>Very satisfied</b>	<b>Satisfied</b>	<b>No opinion, or N/A</b>	<b>Dissatisfied</b>	<b>Very dissatisfied</b>
<i>Courtesy</i>	23	54	55	50	91
<i>Clarity of Oral Communications</i>	15	38	47	63	110
<i>Clarity of Written communications</i>	10	37	29	81	116
<i>Timeliness</i>	14	48	49	61	101
<i>Results</i>	7	5	14	47	200

## APPENDIX C

### FY 2009 HATCH ACT UNIT SURVEY RESPONSES

<b>1. As a result of our written advisory opinion given to you concerning the proposed political activity, what was the impact?</b>	
<b>Response Options:</b>	<b>FY 2009</b>
The OSC opinion advised that the person in question was free to carry out his or her planned political activity.	15
The OSC opinion advised that the person in question should not continue his or her planned political activity.	8
The OSC opinion was in response to a general question concerning the application of the Hatch Act.	3
Other	4

<b>2. How would you rate the service provided by OSC in the following areas?</b>					
<b>Service Categories to be rated</b>	<b>FY 2009 Ratings</b>				
	<b>Very satisfied</b>	<b>Satisfied</b>	<b>No opinion/ inapplicable</b>	<b>Dissatisfied</b>	<b>Very dissatisfied</b>
<i>Courtesy</i>	19	4	4	0	3
<i>Clarity of Written Communications</i>	18	5	3	1	3
<i>Timeliness</i>	14	6	2	2	6
<i>Results</i>	14	6	2	2	6

## APPENDIX D

### FY 2009 USERRA UNIT SURVEY RESPONSES

<b>1. Did the agency against which you filed the complaint inform you about your rights and remedies with regard to USERRA?</b>	
<b>Response Options:</b>	<b>FY 2009</b>
Yes	1
No	7
Do not recall	1
Never employed by a federal agency	0

<b>2. Did you obtain the result that you wanted from OSC?</b>	
<b>Response options</b>	<b>FY 2009</b>
Yes	2
No	7

<b>3. What reason did OSC give for closing your USERRA case? (Check all that apply.)</b>	
<b>Response options:</b>	<b>FY 2009</b>
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	0
You or OSC settled the matter with the agency involved	0
You withdrew your complaint	0
Other	5
Do not recall	0

<b>4. Did you file a USERRA appeal with the MSPB in connection with the same events that you reported in your complaint to OSC?</b>	
<b>Response options:</b>	<b>FY 2009</b>
Yes	3
No	1
Do not recall	3

<b>5. Did you ask for the same relief that you sought from OSC?</b>	
<b>Response options:</b>	<b>FY 2009</b>
Yes	3
No	0
Do not recall	0

<b>6. Were you successful at the MSPB in obtaining the same result that you sought from OSC?</b>	
<b>Response Options</b>	<b>FY 2009</b>
Yes	1
Partially	0
No	1
Appeal pending	1

<b>7. If the answer to the previous question was “yes” or “partially,” how did you obtain that result?</b>	
<b>Response Options</b>	<b>FY 2009</b>
Settlement	1
Decision after hearing	0
Other	0

<b>8. How would you rate the service provided by OSC in each of the following areas?</b>					
<b>Service Categories to be rated</b>	<b>FY 2009 Ratings</b>				
	<b>Very satisfied</b>	<b>Satisfied</b>	<b>No opinion, or N/A</b>	<b>Dissatisfied</b>	<b>Very dissatisfied</b>
<i>Courtesy</i>	1	1	3	0	4
<i>Clarity of Oral Communications</i>	1	0	4	2	2
<i>Clarity of Written communications</i>	1	0	1	3	4
<i>Timeliness</i>	1	0	1	1	6
<i>Results</i>	1	0	0	0	8

## 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 Division
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 Administration
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 Payment
WG	Wage Grade
WPA	Whistleblower Protection Act

