

**A Report to Congress
From The
U.S. Office Of Special Counsel
Fiscal Year 1994**





U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

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

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

Dear Mr. President and Mr. Speaker:

I herewith respectfully submit to the Congress, in accordance with 5 U.S.C. § 1218, the Annual Report from the Office of Special Counsel (OSC) for Fiscal Year (FY) 1994.

FY 1994 was a record-setting year for OSC with respect to the number of cases in which we were able to negotiate redress for individuals who sought our assistance and the number of enforcement actions filed before the Merit Systems Protection Board. We have also implemented several new procedures which have positively impacted the operations of and results achieved by the agency.

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

Sincerely,

A handwritten signature in cursive script that reads "Kathleen Day Koch".

Kathleen Day Koch

Enclosure

Executive Summary

Fiscal Year (FY) 1994 was a record setting year for OSC in many respects. First, we negotiated a record number of corrective, disciplinary and other favorable actions on behalf of federal employees who sought the assistance of OSC. In fact, in FY 1994 we obtained **136 favorable actions** in prohibited personnel practice and Hatch Act cases, **an increase of over 40 percent** compared to FY 1993. Similarly, with respect to whistleblower reprisal cases, we obtained 76 favorable actions, for an increase of 17 percent over FY 1993.

OSC also set a record by filing **25 enforcement actions** with the Merit Systems Protection Board, including 12 whistleblower reprisal cases and 3 sexual harassment cases. While it is always our hope to assist parties in reaching mutually agreeable resolutions of their disputes, when necessary OSC is ready and willing to proceed with enforcement actions before the Board.

Many of OSC's accomplishments in FY 1994 are the direct result of changes that have been made in the way we approach our mission. For example, we began a **Pilot Project** in FY 1994 under which interdisciplinary teams of investigators and attorneys were established to handle cases from the inception of a full field investigation through the final disposition of a matter. The object of the Pilot Project is to ensure meaningful input from both investigators and attorneys in the process of identifying issues and developing strategy. The project also instills a healthy sense of competition in the efficiency and quality of case handling. We are very proud of the fact that the monthly rate of corrective actions has improved from 8 per month, prior to the start of the project, to approximately **13 corrective actions per month**, during the first eight months of the Pilot Project.

The agency has also delegated increasing amounts of decision-making authority to lower levels in the agency. These steps have allowed for more efficient use of management resources and have vested more of the decisional authority with those individuals who are closest to the cases. Our experience so far with these steps has been very encouraging.

Finally, within days of the conclusion of the fiscal year, Congress passed the agency's reauthorization bill, which vested OSC with significant new authorities. For example, OSC now has jurisdiction over 80,000 Title 38 employees of the Department of Veterans Affairs, and whistleblower protection jurisdiction over employees of certain government corporations, which employ an additional 80,000 persons. The reauthorization act also created two new personnel actions which will substantially broaden the types of cases that OSC can investigate and prosecute.

OSC efforts in FY 1994 were obviously very important to the individual employees who were the direct beneficiaries of the favorable actions. However, OSC also greatly benefits the government as a whole by helping create an environment which demands better run and more fiscally sound government. Indeed, by protecting and encouraging whistleblowers, OSC has helped identify fraud, waste and abuse and promoted cost savings in the federal government. In FY 1995, we hope to be able to do even more for the cause of good government through the expanded powers Congress gave OSC in last year's reauthorization act.

Table of Contents

	PAGE
BIOGRAPHY OF THE SPECIAL COUNSEL	1
INTRODUCTION	2
Mission of the Office of Special Counsel	2
Office of Special Counsel Policy	3
OVERVIEW OF OSC OPERATIONS	4
Budget and Staffing	4
Procedures	4
Office of Special Counsel Outreach Program	5
PROHIBITED PERSONNEL PRACTICE MATTERS	6
Receipts and Investigations	6
Enforcement Actions	6
Favorable Actions Achieved	7
Corrective Actions	9
Disciplinary Actions	11
Merit Systems Protection Board Stays	11
HATCH ACT MATTERS	13
Overview of Jurisdiction	13
Advisory Opinions	13
Violations and Enforcement	13
Disciplinary Actions	14
WHISTLEBLOWER DISCLOSURES	16
Results of Referrals	17
OSC INITIATIVES IN FY 1994	19
Pilot Project on Interdisciplinary Teams	19
Revised Case Review Procedures	20
CD-ROM Installation	20

	PAGE
OSC On-Line	20
LEGISLATION	21
Reauthorization of Appropriations	21
Reauthorization of the Office of Special Counsel	21
Uniformed Services Employment and Reemployment Rights Act of 1994	22
FURTHER INFORMATION	23
OSC Publications	23
Prohibited Personnel Practice Complaints	23
Whistleblower Disclosures	23
Hatch Act Questions	24
Outreach Programs	24
APPENDIX	25
Allegations Contained in Matters Received During FY 1994	25
Allegations Contained in Matters Referred for Field Investigation During FY 1994	27
Organization of the Office of Special Counsel	28

Biography of the Special Counsel



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

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

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

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

Introduction

Mission of the Office of Special Counsel

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

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

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

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

Office of Special Counsel Policy

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

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

Overview of OSC Operations

Budget and Staffing

During Fiscal Year (FY) 1994, the OSC operated with a budget of \$7.992 million, and the agency's full-time equivalency (FTE) personnel ceiling was 96.

Procedures

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

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

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

The Prosecution Division reviews completed full field investigations to determine whether the inquiry has established any violation of law, rule or regulation, and whether the matter warrants corrective or disciplinary action, or both. OSC may have discussions with an agency about a case at any point in the investigation or analysis in order to obtain a mutually agreeable resolution. Otherwise, the Special Counsel may refer the matter in writing to the agency head under §1214(b)(2)(A) with a recommendation for corrective action. If an agency declines to take corrective action, the Special Counsel may request the MSPB to consider the matter under §1214(b)(2)(B), and the MSPB may order any corrective action it deems appropriate. During FY 1994, OSC continued its policy of early and firm negotiation with agencies to obtain corrective action prior to initiating litigation before the MSPB. If the Special Counsel determines that an apparent violation warrants disciplinary action, the OSC

files charges against the offending employee under §1215(a) and prosecutes the case before the MSPB. Finally, if an investigation discloses a violation of any law, rule or regulation not otherwise within the enforcement authority of the OSC, the Special Counsel sends a report of the OSC's findings to the agency head concerned under §1214(e) for certification of any action to be taken on the matter. The OSC reports evidence of any possible criminal violations identified during an investigation to the Department of Justice pursuant to §1214(d).

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

Office of Special Counsel Outreach Program

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

In FY 1994, the OSC's outreach efforts resulted in OSC staff participation in 64 briefings and seminars. In addition, OSC has been given greater authority in this regard by our reauthorization act, P.L. 103-424, which directed all executive agencies to inform their employees of the rights and remedies available to them under the Whistleblower Protection Act, and to carry out this function in consultation with OSC. OSC has responded by preparing an informational packet for distribution to all covered entities, and stands ready to consult with agencies so that this requirement is carried out expeditiously.

Prohibited Personnel Practice Matters

Receipts and Investigations

During FY 1994, the OSC received 1,837 new matters alleging prohibited personnel practices (PPPs) which contained 3,471 separate allegations. Of the 1,353 matters which were actually processed in FY 1994, the OSC lacked jurisdiction in 145 of the matters, leaving 1,208 matters in which the agency was authorized by statute to conduct an inquiry. Following CEU review, 316 matters (26.2 percent of the matters over which OSC had jurisdiction) were referred for full field investigation. In addition, following initial review and inquiry, CEU closed 1,037 matters because of a determination that there was insufficient basis for further OSC action or because of satisfactory resolution of an employee's complaint during the initial review².

Enforcement Actions

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

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

Under 5 U.S.C. §1215, when the OSC determines that disciplinary action against an employee is warranted, the OSC can file a complaint directly with the Board. Should the

² The types of PPP allegations received in FY 1994 and the types of PPP allegations referred for full field investigation are included in Tables 1 and 2 of the Appendix.

agency agree to take appropriate disciplinary action on its own initiative, then the matter can be settled without resort to an MSPB hearing.

In FY 1994, the OSC filed 25 enforcement action complaints -- 16 in PPP matters and 9 in Hatch Act matters (Hatch Act cases are discussed in the next section). This caseload constitutes the highest level of litigation in the OSC's fifteen-year history. Of the 16 PPP enforcement actions, there were 12 whistleblower reprisal cases, 3 sexual harassment cases, and 1 case involving a violation of an employee's First Amendment rights. These complaints included 6 requests for corrective action and 10 requests for disciplinary action.

Based on complaints filed in PPP cases, the OSC participated in 3 hearings before the MSPB Administrative Law Judge during FY 1994. However, the number of attorney-days in court increased dramatically from 10 days in FY 1993 to 124 days in FY 1994. Five rulings were handed down by the MSPB during this period for these and other previously filed matters. The OSC had 4 rulings in its favor and 1 remanded for a hearing. The remaining complaints were either settled prior to hearing, are awaiting decision by the Board, or have been scheduled for hearing in FY 1995.

Favorable Actions Achieved

The OSC also obtained a record number of favorable actions³ in FY 1994. The OSC obtained 131 favorable actions in 108 PPP matters, compared to the FY 1993 level of 97 favorable actions in 87 PPP matters. This represents an increase of 35 percent in favorable actions obtained in PPP matters. Moreover, the number of cases referred for a full field investigation increased by 19 percent from 266 in FY 1993 to 316 in FY 1994. Of the 131 favorable actions obtained in FY 1994, 110 were corrective actions and 21 were disciplinary actions. Reprisal for whistleblowing accounted for 76 of the favorable actions, compared to the FY 1993 level of 65 favorable actions in whistleblower matters. This represents an increase of 17 percent. In addition, there was a 60 percent increase in the number of whistleblower cases sent for a full field investigation in FY 1994 as reflected in the numbers below. The OSC obtained 20 stays of personnel actions through negotiations

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

with agencies and, in cases where agencies refused OSC's request, 7 stays through petitions to the MSPB.⁴

SUMMARY OF PROHIBITED PERSONNEL PRACTICE MATTERS

	<u>FY 1993</u>	<u>FY 1994</u>
Matters received	1914	1837
Matters processed by CEU	1847	1353
Matters processed in which OSC had jurisdiction	1590	1208
Matters referred for full field investigation	266	316
Complaints filed	1	16
Stays - negotiated	22	20
Stays - obtained from the MSPB	2	7
Favorable actions obtained	97	131

SUMMARY OF WHISTLEBLOWER REPRISAL MATTERS

	<u>FY 1993</u>	<u>FY 1994</u>
Matters received	654	662
Matters processed by CEU	604	524
Matters processed in which OSC had jurisdiction	566	498
Matters referred full field investigation	146	236
Complaints filed	1	12
Stays - negotiated	16	17
Favorable actions obtained	65	76

⁴ Data concerning PPPs and the Hatch Act are set out separately in this Annual Report. In OSC's FY 1993 Annual Report, PPP and Hatch Act data were combined. For ease of comparison, we have broken out the FY 1993 data in this report in the same manner as the FY 1994 data.

Corrective Actions

The following is a representative sample of corrective actions obtained by the OSC during FY 1994:

- OSC investigated allegations that an employee received two letters of caution, a letter of reprimand, a lowered performance appraisal rating, and was subsequently removed from a supervisory position, because the employee made whistleblower disclosures protected under §2302(b)(8) pertaining to inappropriate contract activities. OSC requested that the agency take corrective action. The agency agreed to remove the letters of reprimand and letter of caution, upgrade the performance appraisal rating, and promote the employee to the GS-11 level.
- OSC investigated allegations from an employee who was terminated from federal employment following the employee's protected whistleblower disclosures concerning alleged illegal activities of two agency officials. OSC requested that the agency take appropriate corrective action. The agency subsequently agreed to reinstate the employee, award back pay retroactive to the termination date, and restore the employee's leave balances to the level that the employee would have achieved had the employee never been terminated. The agency also took appropriate disciplinary action against the responsible agency officials.
- OSC investigated allegations that an employee was denied a promotion, not given a performance award, and detailed to another position, because the employee had made protected whistleblower disclosures. OSC requested that the agency take corrective action. The agency agreed to grant the employee a cash award and a quality step increase, reassign the employee to another location, pay attorney fees, and remove all negative information from the employee's Official Personnel Folder.
- OSC investigated the allegations of an employee who made protected whistleblower disclosures and was then subjected to several adverse personnel actions. The employee was subsequently placed on administrative leave for 30 days, given a mid-year appraisal of "minimally satisfactory," had a within-grade increase withheld, and was passed over for a career-ladder promotion. OSC requested that the agency take corrective action. The agency agreed to upgrade the performance appraisal to "fully successful," grant the within-grade increase, promote the employee, pay reasonable attorney fees, and permanently reassign the employee to a location of the employee's choice. In addition, as a result of OSC's investigation, the agency agreed to discipline the two subjects, as well as provide whistleblower training to all employees.
- OSC investigated allegations that an employee was suspended for seven days and then geographically reassigned in reprisal for protected whistleblower disclosures the employee had made concerning violations of law, rule, or regulation. Following OSC's request for corrective action, a settlement agreement was negotiated whereby the seven day suspension was rescinded, all negative information pertaining to the suspension was removed from agency files, the employee's reassignment was canceled,

the employee was geographically reassigned to a location of his choosing, and the agency agreed to pay for all relocation expenses.

- OSC investigated allegations that an employee was removed because of the employee's protected disclosures. OSC requested that the agency take corrective action. The agency agreed to rescind the removal action, pay the employee for lost wages (with interest), expunge all negative information from agency files, and pay reasonable attorney fees.
- OSC investigated allegations by a Senior Executive Service (SES) employee that she made disclosures of improper expenditures by superior officials, first to her superiors and then to the IG and other offices in the department. She subsequently received lower ratings on her performance appraisals and was reassigned. After determining that the adverse actions were taken because of her disclosures, OSC sought corrective action from the agency and entered into a settlement agreement by which the employee's last four performance appraisals were expunged and replaced with "outstanding" ratings, the employee was given two retroactive SES step increases, and the agency agreed to pay attorney fees.
- OSC investigated allegations that an employee was given a lower performance rating and was denied a performance award, and that his duties were substantially changed in reprisal for having given a deposition and made disclosures in an MSPB proceeding. OSC requested that the agency take corrective action after finding violations of §§2302(b)(8) and 2302(b)(9). The agency agreed to upgrade the performance appraisal to "outstanding," give the employee a \$6,000 performance award, and withdraw the memorandum by which his duties had been changed.
- OSC investigated charges that an employee was sexually harassed by a supervisor. Following an investigation into the charges as a violation of §2302(b)(1), OSC requested that the agency take corrective action. Subsequently, the agency agreed to promote the employee, pay the employee's medical expenses, and rescind a letter of reprimand given to the employee. Prior to institution of an OSC disciplinary action case, the supervisor accepted a two-week suspension and agreed to retire from the federal government.
- OSC investigated allegations that an employee sexually harassed a female employee. After finding that the evidence substantiated a violation of §2302(b)(1), OSC requested the agency to take corrective action. The agency agreed to reimburse the victim for medical expenses related to the harassment and for her legal fees, and promoted her to a GS-12 with assurance that the harasser would have no future contact with her. The harasser agreed to retire.

Disciplinary Actions

The following is a summary of disciplinary actions filed by the OSC in PPP matters on which the MSPB issued decisions during FY 1994:

- OSC had previously filed a complaint for disciplinary action against two employees of the U.S. Customs Service for violating §§ 2302(b)(6) and (b)(11). OSC alleged that a selecting official and a personnel officer had given a job applicant an unauthorized preference in selecting the individual for a Management Program Officer position. Following a hearing, the Chief Administrative Law Judge (CALJ) found that OSC had not proven that the employees engaged in the prohibited activity. In 1994, however, the MSPB, chose not to adopt the CALJ decision; instead, the MSPB agreed with OSC and found that the employees had given the individual an unauthorized preference. The MSPB imposed a fine of \$1,000 on the selecting official (who had retired during the pendency of the litigation) and ordered that the personnel officer be suspended for 60 days (*Special Counsel v. Byrd and Rubenstein*, 59 M.S.P.R. 561 (1993)).
- OSC had previously filed a disciplinary action against two federal employees for committing the prohibited personnel practices described at §§2302(b)(5), (b)(6), and (b)(11). Following a hearing, the CALJ found that OSC had proven that the two employees had committed prohibited personnel practices, and he recommended that one employee be suspended for 60 days and the other for 90 days. The MSPB subsequently adopted the CALJ's recommended decision, although the MSPB modified the penalty for one of the employees from a 60-day suspension to a \$1,000 fine because that employee had since retired (*Special Counsel v. Brown and Nelson*, 61 M.S.P.R. 559 (1994)).

Merit Systems Protection Board Stays

The following is a representative sample of the stay cases brought to the MSPB during FY 1994:

- OSC petitioned the MSPB to stay the proposed removal of a GS-12 Information Systems Analyst. OSC had found reasonable grounds to believe that the employee's removal was proposed and that he was placed on administrative leave because of his protected whistleblower disclosures concerning allegations of security violations and misuse of government property. The stay was granted, giving OSC time to further investigate the matter. The OSC investigation and MSPB stay order continued into FY 1995 (*OSC v. Department of Treasury*, No. CB-1208-94-0040-U-1 (Sept. 8, 1994) (order granting stay by operation of law)).

- OSC petitioned the MSPB to stay the proposed reassignment of an administrative officer. OSC had reasonable grounds to believe that the employee's reassignment was proposed because she made disclosures protected by 5 U.S.C. § 2302(b)(8). The MSPB granted the stay to permit OSC to conduct a full investigation into whether the reassignment violated §2302(b)(8). (*OSC v. Department of Justice*, 62 M.S.P.R. 193 (1994)).

Hatch Act Matters

Overview of Jurisdiction

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

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

Advisory Opinions

During FY 1994, the OSC's Hatch Act Unit issued 280 written advisory opinions, provided 2,135 advisory opinions orally in response to telephone inquiries, and responded to an additional 500 telephone inquiries requesting general information. In FY 1993, the corresponding figures were 219 written opinions, 1,109 oral opinions, and 718 requests for general information. The sizeable increases can be attributed primarily to questions generated by the 1993 amendments and the 1994 election cycle.

Violations and Enforcement

During FY 1994, the OSC received 130 new matters alleging violations of the Hatch Act. These matters contained 140 separate allegations. Following CEU review, 25 matters were referred for full field investigation.⁵

Following investigations, the OSC filed 9 complaints seeking disciplinary action against 5 federal employees and 4 state employees. One Hatch Act case went to hearing before the MSPB during FY 1994. During this period, the MSPB handed down 22 rulings for these and other previously filed matters. Of these rulings, the OSC had 6 rulings in its favor, one case

⁵ The Hatch Act allegations received in FY 1994 and the Hatch Act allegations referred for full field investigations appear in Tables 1 and 2 of the Appendix.

remanded to the Administrative Law Judge for additional fact-finding, and one matter involving 15 separate defendants dismissed by the MSPB on jurisdictional grounds. The remaining complaints were either settled prior to hearing, are awaiting final Board decision or are scheduled for hearing in FY 1995.

As a result of hearings and settlements, the OSC obtained 7 disciplinary actions from the MSPB and negotiated disciplinary action in 5 cases during FY 1994. In addition, the OSC issued 35 warning letters during this period.

SUMMARY OF HATCH ACT MATTERS

	FY 1993	FY 1994
Advisory opinions issued	1328	2455
Matters received	134	130
Matters referred for investigation	41	25
Disciplinary action complaints filed	24	9
Disciplinary actions obtained	8	7
Warning letters issued	29	35

Disciplinary Actions

The following is a representative sample of disciplinary actions filed by the OSC in Hatch Act matters on which the MSPB issued decisions during FY 1994:

- OSC filed a complaint for disciplinary action against a state employee, charging that the employee was a candidate for elective office in a partisan election while employed in a position covered by the Hatch Act. A hearing was held, after which the CALJ concluded that the employee had violated the Hatch Act and that the violation warranted removal of the employee. The MSPB subsequently adopted the CALJ's recommended decision and ordered that the employee be removed (*Special Counsel v. Kelley*, 60 M.S.P.R. 668 (1994)).
- OSC had filed a complaint for disciplinary action against a county employee for violating the Hatch Act, charging that the employee, while holding a position covered by the Hatch Act, was a candidate for elective office in a partisan election. Following a hearing, the CALJ found that a violation had been established and recommended that the employee be removed. The MSPB adopted the CALJ's decision and ordered the employee removed from employment (*Special Counsel v. Murdock*, 61 M.S.P.R. 403 (1994)).

- OSC requested that the MSPB order the appropriate funds to be withheld from the federal funds given to a county agency, after the agency failed to comply with a MSPB order to remove an employee for violating the Hatch Act. The MSPB granted OSC's request and ordered that an amount equal to twice the employee's annual pay (\$105,657.76) be withheld from the appropriate federal payment to the county agency. In addition, the MSPB denied the county agency's request that the withholding order be stayed pending the outcome of an appeal to federal court (*Special Counsel v. Bianchi*, 59 M.S.P.R. 202 (1993)). The original MSPB decision ordering the employee's removal was later affirmed by the U.S. District Court for the Western District of Pennsylvania (*Bianchi v. Merit Systems Protection Board*, 1994 WL 182046 (W.D.Pa.)).

Whistleblower Disclosures

In addition to its investigative and prosecutorial mission, the OSC provides a safe channel through which federal employees may disclose information evidencing a violation of law, rule or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety.

Upon receipt of such information from a federal employee, the Special Counsel is required by §1213(c) to transmit the information to the head of the agency concerned if the Special Counsel determines that there is a substantial likelihood that the information discloses the kinds of wrongdoing described in the statute. The OSC will not divulge the identity of an employee who provided the information unless he or she consents. The agency head is then required to conduct an investigation and submit a report to the Special Counsel on the findings of the investigation. The Special Counsel sends the agency report, along with any comments provided by the employee who made the disclosure and any comments or recommendations by the Special Counsel, to the President, the congressional committees having jurisdiction over the agency, and the Comptroller General.

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

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

During FY 1994, the OSC received and considered 177 disclosure matters for possible referral to the agency concerned under §1213(c) or §1213(g).⁶ In addition, 54 disclosure matters were carried over from FY 1993.

⁶ The number of disclosure allegations received in FY 1994 appear in Table 1 of the Appendix.

A disclosure matter usually contains multiple allegations of mismanagement, fraud, waste and abuse. During FY 1994, the OSC--

- referred 3 disclosures for investigation and a report under §1213(c);
- referred 5 disclosures for a report of actions taken or to be taken thereon under §1213(g);
- referred 82 disclosure allegations in 73 matters to the agency Inspector General;
- closed 58 disclosure allegations due to lack of sufficient basis for further action; and
- carried the remaining disclosures over to FY 1995 for completion of review.

Results of Referrals

During FY 1994, the OSC closed 12 reports from agencies to which statutory referrals previously had been made. OSC review of agency reports disclosed the following results from statutory referrals --

Section 1213(c) Reports:

Cases in which allegations were substantiated in whole or in part	3
Cases in which allegations were not substantiated	<u>4</u>
Subtotal	7

Section 1213(g) Reports:

Cases in which allegations were substantiated in whole or in part	3
Cases in which allegations were not substantiated	<u>2</u>
Subtotal	5
Total	12

Agency Corrective Action

In the Reports of Investigation received from the agencies, eight allegations in six matters were substantiated. The agencies reported the following corrective actions (there was more than one corrective action in some disclosures):

Agency regulations or practices changed	4
Other	<u>4</u>
Total	8

OSC Initiatives in FY 1994

Pilot Project on Interdisciplinary Teams

Beginning in May of 1994, OSC instituted a Pilot Project which significantly altered the way that cases are handled from the inception of a full field investigation to final disposition. At the heart of this project is the use of interdisciplinary teams of investigators and attorneys. The principle underlying the Pilot Project is that OSC will realize improved results and significant increases in the efficiency of case-handling if cases are assigned to teams instead of to individual attorneys and investigators.

Previously, cases were assigned first to the Investigation Division, where the investigative plan was designed and executed, and then to the Prosecution Division, where the legal analysis was performed and litigation initiated. Though a Prosecution Division attorney would be assigned to each case, investigations were often completed with little input from the legal staff. The first meaningful review by an attorney might not occur until the investigation had been completed.

Under the Pilot Project, the investigative and legal staff have been divided into four interdisciplinary teams. Cases are assigned to one of the four teams, with one investigator and one attorney taking primary responsibility for each case. The primary investigator and attorney on a case work together from the inception of the investigation and have joint responsibilities with respect to the investigative plan and case analysis. The full teams meet monthly to discuss cases and serve as a resource for the investigator and attorney handling a particular case.

The goal of the project is to ensure that both attorneys and investigators have meaningful input into the process of identifying issues and designing an investigative strategy. By utilizing the respective skills of attorneys and investigators prior to the investigation, we expect to see investigations become more focused and the subsequent legal analysis become more efficient. In addition, the teams have a ready means of assessing their performance by comparing their results to those of the other teams. Overall, the system instills a healthy competition in both efficiency and quality of case-handling.

While there are several factors that affect the OSC's success in achieving favorable actions, initial reports suggest that the Pilot Project is having a positive impact. During the period from May 1994 to December 1994, the OSC obtained 103 corrective actions at an average rate of approximately 13 corrective actions per month. During the prior two fiscal years, the OSC obtained corrective actions at a rate of approximately 8 per month. This is a significant increase for the OSC; we hope to continue this trend through the coming year.

Revised Case Review Procedures

In early 1993, the Special Counsel ordered a thorough review of the OSC's procedures for initial case review and approval by senior managers. Following the review, the Special Counsel concluded that too many cases required the review and approval of decisions by upper level managers. She believed that many of these decisions could be made by attorneys and case examiners and their line supervisors. This would allow for more efficient use of management resources and, importantly, would vest more of the decisional authority with those individuals who are closest to the cases. Decentralizing some of the decision-making would lead to an increased sense of ownership of the outcome, encouraging greater creativity in case analysis. As a result of this review, beginning in October of 1993, OSC began to use a more streamlined method of handling cases. In conjunction with those steps, the Special Counsel undertook efforts to ensure that closure letters more clearly explained the basis for OSC's determinations.

Though results of the new procedures are still tentative, the early indications are encouraging. There has already been a significant decrease in cases requiring senior management review. At the same time, the quality of case-handling has been improving, with record levels of favorable actions and litigation. Based on these results, the Special Counsel is very satisfied with the new procedures, and she has recently initiated a project to expand the scope of authority of OSC case examiners.

CD-ROM Installation

The OSC has undertaken several projects during FY 1994 to maximize the capabilities of on-line and CD-ROM information retrieval systems. The most significant project has been the replacement of significant parts of OSC's hard-copy library compilations, with CD-ROM reference materials. Now every employee has access to the complete United States Code, the Code of Federal Regulations, and the decisions of the MSPB through OSC's network of personal computers. This project has eliminated the need for maintaining these collections in the OSC library, resulting in considerable savings in both subscription costs and library staff.

OSC On-Line

The OSC is also in the initial phase of bringing the agency on-line on the information superhighway. Our long term goal is to provide federal employees across the country and around the world with ready access to OSC's resources via the Internet. At present the OSC is already connected to the Internet via OPM's Mainstreet and we are also a member of the IGnet, which facilitates communication and information sharing with the Inspector General community. Our goal in the next year is to have an informational package about OSC and the rights of federal employees available on the Internet, as well as to allow federal employees to access forms and publications, file complaints and have questions answered on-line.

Legislation

Reauthorization of Appropriations

H.R. 4539, the Appropriations bill for Treasury, Postal Service, and General Government, was passed by the House on June 16, 1994 and by the Senate on September 22, 1994. Both chambers agreed to the President's request of \$7.955 million for OSC for FY 1995. The conference report cleared the Congress on September 28, 1994, and the bill was signed by the President on September 30, 1994.

Reauthorization of the Office of Special Counsel

Both the House and the Senate introduced and passed bills, H.R. 2970 and S.622, respectively, to reauthorize the OSC. On October 3, 1994, the Senate substituted the provisions of S.622 for H.R. 2970, while retaining one provision from H.R. 2970 regarding authorities extended to arbitrators. The President signed H.R. 2970 into law on October 29, 1994. The new reauthorization act makes numerous amendments to the rights granted to federal employees and to OSC's operations.

With respect to the rights and duties for employees and supervisors, the changes include the following:

- the act creates two new personnel actions -- (1) a decision ordering psychiatric testing or examination, and (2) any other significant change in duties, responsibilities, or working conditions;
- the act allows OSC, or a whistleblower in the case of an individual right of action (IRA), to prove a *prima facie* case by showing only that the official taking the action had actual or constructive knowledge of the disclosure, and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action;
- the act extends all OSC protections to Title 38 health care employees of the Department of Veterans Affairs, and whistleblower protections to employees of certain government corporations;
- the act extends the definition of "corrective action" to include backpay and related benefits, medical costs, travel expenses, and reasonable and foreseeable consequential damages;
- the act allows the MSPB to award attorney fees to an employee or applicant who prevails in a disciplinary action proceeding brought under § 1215; and

- the act establishes an election of remedies that requires employees covered by collective bargaining agreements who allege a prohibited personnel practice to pursue a MSPB appeal under section 7701, a grievance, or an OSC complaint.

In the area of revised operating requirements for OSC, the Act requires OSC to:

- issue a policy statement regarding the implementation of WPA;
- include in any letter terminating an investigation of a prohibited personnel practice the name and telephone number of an OSC employee who can respond to questions regarding the investigation;
- conduct an annual survey of individuals who contact OSC for assistance;
- provide a letter to complainants ten days prior to closure setting forth proposed findings of fact and legal conclusions, to which the complainant may submit a written response;
- make a determination within 240 days as to whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, unless -- in the event OSC is unable to meet this deadline -- the complainant agrees to an extension of time; and
- prohibit reference to the issuance of an OSC closure letter in any proceeding without the complainant's consent.

Uniformed Services Employment and Reemployment Rights Act of 1994

Legislation was passed by the House of Representatives and the Senate which would amend existing law to clarify and expand the reemployment rights of veterans and reservists returning to the workplace following active duty with the armed services. This legislation vests OSC with new authority under which it could, in certain circumstances, represent a veteran or reservist before the MSPB, and potentially the U.S. Court of Appeals for the Federal Circuit, in the event that a federal agency has failed to reemploy that person in accordance with the provisions of the Act.

Further Information

OSC Publications

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

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

Prohibited Personnel Practice Complaints

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

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

Whistleblower Disclosures

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

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

Hatch Act Questions

Inquiries about the Hatch Act may be made in writing or by telephone to:

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

Outreach Programs

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

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

APPENDIX

Table 1

NATURE OF ALLEGATION	NUMBER OF ALLEGATIONS
Reprisal for exercise of a right of appeal [§2302(b)(9)]	686
Reprisal for whistleblowing [§2302(b)(8)]	657
Violation of a law, rule or regulation implementing or concerning a merit system principle [§2302(b)(11)]	608
Discrimination on the basis of race, color, sex, national origin, religion, age, or handicapping condition [§2302(b)(1)(A)-(D)]	582
Granting of unauthorized preference or advantage [§2302(b)(6)]	367
Deception or obstruction of the right to compete [§2302(b)(4)]	245
Allegations which did not cite or suggest any prohibited personnel practice or prohibited activity	187
Disclosures of alleged violation of a law, rule or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a danger to public health or safety [§1213(c) or §1213(g)]	98
Violation of the Hatch Act by a state or local government employee [§1216(a)(2)]	81
Discrimination on the basis of non-job related conduct [§2302(b)(10)]	80
Appointment, promotion, or advocating the appointment or promotion of a relative [§2302(b)(7)]	70
Violation of the Hatch Act by a federal employee [§1216(a)(1)]	60
Arbitrary or capricious withholding of information requested under the Freedom of Information Act [§1216(a)(3)]	48
Discrimination on the basis of marital status or political affiliation [§2302(b)(1)(E)]	39
Solicitation or consideration of unauthorized recommendations [§2302(b)(2)]	39

(continued on next page)

Table 1 (continued)

ALLEGATIONS CONTAINED IN MATTERS RECEIVED DURING FY 1994	
NATURE OF ALLEGATION	NUMBER OF ALLEGATIONS
Attempts to secure withdrawal from competition [§2302(b)(5)]	27
Coercion of political activity [§2302(b)(3)]	4
Other activities allegedly prohibited by civil service law, rule or regulation [§1216(a)(4)]	1
Total	3,879 ¹

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

Table 2

**ALLEGATIONS CONTAINED IN MATTERS REFERRED FOR FIELD
INVESTIGATION DURING FY 1994**

NATURE OF ALLEGATION	NUMBER OF ALLEGATIONS
Reprisal for whistleblowing [§2302(b)(8)]	236
Reprisal for exercise of a right of appeal [§2302(b)(9)]	186
Violation of a law, rule or regulation implementing or concerning a merit system principle [§2302(b)(11)]	66
Discrimination on the basis of race, color, sex, national origin, religion, age, handicapping condition, or marital status [§2302(b)(1)(A)-(E)]	36
Granting of unauthorized preference or advantage [§2302(b)(6)]	36
Deception or obstruction of the right to compete [§2302(b)(4)]	25
Violation of the Hatch Act by a state or local government employee [§1216(a)(2)]	15
Discrimination on the basis of non-job related conduct [§2302(b)(10)]	13
Violation of the Hatch Act by a federal employee [§1216(a)(1)]	12
Appointment, promotion, or advocating the appointment or promotion of a relative [§2302(b)(7)]	9
Solicitation or consideration of unauthorized recommendations [§2302(b)(2)]	6
Other activities allegedly prohibited by civil service law, rule or regulation [§1216(a)(4)]	2
Arbitrary or capricious withholding of information requested under the Freedom of Information Act [§1216(a)(3)]	1
Attempts to secure withdrawal from competition [§2302(b)(5)]	1
Total	644²

² Each matter may contain more than one allegation. Thus, this total exceeds the total number of matters actually referred for field investigation (316).

Organization of the Office of Special Counsel

