REPORT BY THE

Comptroller General

OF THE UNITED STATES

Whistleblower Complainants Rarely Qualify For Office Of The Special Counsel Protection

The Office of the Special Counsel is an independent component of the Merit Systems Protection Board, charged by the Civil Service Reform Act with prosecuting violations of prohibited personnel practices--such as reprisal for whistleblowing--to secure both disciplinary and corrective action. The vast majority of complaints brought to the Special Counsel by federal employees are closed during the office's screening process.

GAO examined a random sample of 76 whistleblower reprisal complaints closed by the Office of the Special Counsel in the past 2 years and found that each case file documented at least one defect that the office believed would prevent successful prosecution of the case under current law. Comparing the facts with the legal requirements for a successful prosecution, GAO found that the Office of the Special Counsel had reasonable grounds to close each case. GAO also found no evidence that the whistleblowers in this sample fell victim to lack of investigatory effort on the part of the office.

In assessing the need for stronger whistleblower protections, the Congress should consider that the Office of the Special Counsel is only one of the institutions involved in deterring reprisals against legitimate whistleblowers.

GAO/GGD-85-53
MAY 10, 1985

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-217796

The Honorable William V. Roth, Jr.
Chairman, Committee on Governmental
Affairs
United States Senate

The Honorable Patricia Schroeder
Chairwoman, Subcommittee on Civil
Service
Committee on Post Office and Civil
Service
House of Representatives

As you requested, this report addresses several aspects of the manner in which the Office of the Special Counsel of the Merit Systems Protection Board performs its mission. We found that whistleblower reprisal complainants rarely qualify for Special Counsel protection.

As arranged with your offices, unless you publicly announce its contents earlier, we plan no further distribution until 10 days from the date of the report. At that time, we will send copies of the report to interested parties and make copies available to others upon request.

Charles A. Bowsher

Comptroller General
of the United States

--potential alternatives for preventing prohibited personnel practices and punishing those who are found guilty of such practices, especially in whistleblowing reprisal matters (ch. 5).

Because both congressional requests emphasized concern with the protection of government whistleblowers from reprisal, GAO's review considered only how the incumbent Special Counsel has implemented the office's responsibility to investigate complaints of prohibited personnel practices, and its authority to seek disciplinary and corrective action by prosecuting complaints before the Merit Systems Protection Board. GAO did not review other functions of the office. Disciplinary actions are initiated by the office to punish the person who committed a prohibited personnel practice, such as seeking to reduce the grade of a manager engaging in whistleblower reprisal. Corrective actions are aimed at helping the victim of a prohibited personnel practice or making system-related corrections, such as seeking to rescind an unfavorable reassignment of a whistleblower reprisal victim or requiring the agency involved to initiate or reemphasize appropriate agency personnel policies. GAO's review addresses the office's actions in the period from late 1982 to January 1985.

THE SPECIAL COUNSEL DOES NOT VIEW HIS ROLE AS THAT OF AN EMPLOYEE ADVOCATE

The Special Counsel does not believe his role is to represent the interests of individual employees. Only to the extent that an employee benefits incidentally from the enforcement of federal personnel laws can the office be considered part of the remedial system available to individual employees.

The Special Counsel believes his role is to protect the merit system itself through the investigation and prosecution of violations of merit system laws, rules, and regulations before the Merit Systems Protection Board. He strongly emphasized to GAO that he does not view complainants, or federal employees in general, as clients of the office, and indeed that the merit system itself is the only client of the office. Some employee

COMPTROLLER GENERAL'S REPORT

WHISTLEBLOWER COMPLAINANTS RARELY QUALIFY FOR OFFICE OF THE SPECIAL COUNSEL PROTECTION

D I G E S T

Established in 1979 under authority of Presidential Reorganization Plan No. 2 of 1978 and the Civil Service Reform Act, the Office of the Special Counsel is an independent investigative and prosecutive component of the Merit Systems Protection Board. The Office of the Special Counsel is responsible for prosecuting violations of merit system requirements before the board, including protecting federal employee whistleblowers from reprisal. For fiscal year 1985 the office has a budget of $4.58 million and a staff of 86.

Members of Congress and various federal employee representatives have questioned how well the office has carried out its whistleblower protection responsibilities. At the request of the Chairman of the Senate Committee on Governmental Affairs, and the Chairwoman of the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, GAO addressed the

--responsiveness of the Office of the Special Counsel to complainants, particularly to those federal employees who have taken career risks to expose fraud, waste, mismanagement or illegality (ch. 2);

--standards, criteria, and priorities that guide the Office of the Special Counsel in selecting complaints for investigation and prosecution (ch. 2 and 3);

--results attributable to the work of the office and the obstacles which are hampering its effectiveness (ch. 4);

--possible deficiencies in the powers of the office or in the statutory definition of prohibited personnel practices which make it impossible for the office to do its assigned job (ch. 3 and 5); and

GAO/GGD-85-53
MAY 10, 1985

Tear Sheet

example, this directive requires an acknowledgement letter to the complainant within 5 days after a matter has been assigned to a staff attorney. Together with a centralization of the initial complaint review function, these policies have resulted in reducing the backlog of matters awaiting resolution by half during fiscal year 1984. (See p. 11.) GAO also reviewed a random sample of 74 closeout letters that the law requires be sent to complainants. All of these letters met the minimum statutory standard in explaining why the office closed the case, and two-thirds of them gave a thorough, detailed explanation. (See p. 12.)

The Office is Developing Better Complaint Review Guidance

Prior GAO reviews and two 1984 Office of the Special Counsel internal evaluations identified the need to improve documentation of internal complaint review policies and procedures. A prosecution manual, which senior officials say would provide substantial written guidance on the key interpretive judgments required in evaluating the prosecutive potential of complaints under investigation, was issued in April 1985. (See pp. 13 to 15.)

WHISTLEBLOWER REPRISAL COMPLAINANTS RARELY QUALIFY FOR SPECIAL COUNSEL PROTECTION

In order to assess the standards, criteria and priorities that guide the Office of the Special Counsel in selecting complaints for investigation and prosecution, GAO reviewed a sample of 76 closed whistleblower reprisal cases selected at random from the 401 closed in the 2 years preceding August 1984.

Mutiplicity of Factors Are Involved in Decisions to Close Cases

Exacting standards of proof are required to secure a judgment against an agency or a supervisor for taking reprisal against an employee because the employee disclosed waste, illegality, or mismanagement to responsible officials or outside investigators. All of the cases that GAO reviewed were investigated

by the Office of the Special Counsel until at least one defect in prosecutive merit was revealed. Many had multiple apparent defects. (See pp. 20 to 26.)

Among the questions that arose in the Office of the Special Counsel's analysis of the prosecutive merit of individual cases were whether personnel actions within the Civil Service Reform Act's definition had been taken, whether they had been taken by individuals covered by the act, and whether the complainants had actually made a disclosure that the act is designed to protect. GAO's review found that complainants use the term "whistleblowing" to encompass a broad range of disputes with agency management, including internal outspokenness.

Even when cases are determined to involve personnel actions, protected disclosures, and supervisors covered by the Civil Service Reform Act, the Office of the Special Counsel must show a causal connection between the employee's disclosure of wrongdoing and an adverse personnel action against the employee. These cases often involve complex determinations of motive. (See p. 24.)

GAO Did Not Disagree With The Special Counsel's Decisions

Comparing the facts with the legal requirements for a successful prosecution, GAO did not find that the Office of the Special Counsel closed any of the cases GAO reviewed without reasonable grounds to do so. GAO also did not find evidence that the whistleblowers in this sample fell victim to any lack of investigatory effort on the part of the office. (See p. 26.)

THE OFFICE'S MEASURABLE RESULTS ARE PRIMARILY SETTLEMENTS AT THE AGENCY LEVEL

Prior to August 1984, the Office of the Special Counsel had not prevailed in litigation before the Merit Systems Protection Board. Thus, GAO's assessment of the results of the office's work required an evaluation of its achievements in negotiating 25 settlements at the agency level. GAO examined 10 of the most recent such settlements achieved over a

2-year period. Four of these were disciplinary action settlements with the agency, in which penalties ranged from a letter of admonishment to a 60-day suspension and a $1,000 fine. Of the six corrective action settlements, three were institutional improvements. One involved firing an illegally hired employee and two involved informing an installation's management that reprisal for whistleblowing is a prohibited personnel practice. In three other corrective action cases, the Office of the Special Counsel was able to secure rescission of proposed reassignments, which did benefit individual whistleblowers. (See p. 31.)

RECENT SUCCESS IN DISCIPLINARY LITIGATION IS A POTENTIALLY USEFUL PRECEDENT

In late 1984, the Office of the Special Counsel prevailed in three cases before the Merit Systems Protection Board. In one case, the Special Counsel prevailed for the first time with an argument that supervisory officials are subject to discipline for a prohibited personnel practice even if there are valid independent grounds for taking adverse action against an employee. This precedent applies only to disciplinary action cases. It will not directly benefit individual whistleblowers and other complainants seeking corrective action on adverse personnel actions. (See p. 28.)

DISCUSSION OF ISSUES RELATED TO CONGRESSIONAL REVIEW OF THE OFFICE OF SPECIAL COUNSEL

GAO's review of closed whistleblower reprisal cases did not pinpoint a single, specific legal hurdle that makes the Office of the Special Counsel's protections inapplicable to most complainants. Nor did the review demonstrate whether protections should be made stronger for individual whistleblowers or other employees who allege that they are victims of prohibited personnel practices. Ultimately this is a value judgement that must be made by the Congress and involves an assessment not only of the benefits the Office of the Special Counsel's role provides, but also

the unmeasurable deterrent effects of the law and the role other institutions play in protecting individuals from improper treatment. The Congress must also weigh the objective of stronger protection for whistleblower disclosures against the objectives of management authority and accountability. Unrestrained whistleblowing could raise levels of dissidence and insubordination to the point where efficiency could be affected. GAO presents observations on three broad options for statutory revision: abolishing the office, strengthening the Special Counsel's authority, or transferring its functions to the Department of Justice. (See pp. 38 to 41.)

AGENCY COMMENTS

The Special Counsel reviewed a draft of this report. His comments provided clarification of several legal points, and updated several of GAO's observations with information that is current as of mid-April, 1985. (See app. VIII).

Contents

ABBREVIATIONS

CEU	Complaints Examining Unit
CSRA	Civil Service Reform Act
EEOC	Equal Employment Opportunity Commission
FBI	Federal Bureau of Investigation
GAO	General Accounting Office
HUD	Department of Housing and Urban Development
MSPB	Merit Systems Protection Board
OSC	Office of the Special Counsel

CHAPTER 1

INTRODUCTION

This report addresses several aspects of the manner in which the Office of the Special Counsel (OSC) of the U.S. Merit Systems Protection Board (MSPB) performs its mission. The report was prepared at the request of the Chairman of the Senate Governmental Affairs Committee and the Chairwoman of the Subcommittee on Civil Service of the House Post Office and Civil Service Committee. In her initial request letter of October 18, 1983, the Chairwoman noted that congressional oversight of OSC had raised doubts about its effectiveness in pursuing and prosecuting complaints of prohibited personnel practices from federal employees. Following a GAO initial pilot study of OSC's case handling practices, and an informal staff report, the Chairwoman revised and refined her request in a subsequent letter, dated September 12, 1984 (see app. I). This letter asked us to address five specific questions on OSC's policies, responsiveness to complainants, achievements, powers, and alternative ways of performing OSC's mission.

More generally, the request letter and subsequent correspondence expressed the Chairwoman's concern as to whether Congress' intent of prohibiting certain personnel practices and protecting whistleblowers was being realized. This concern was concurrently expressed to us in a request letter of September 11, 1984, from the Chairman of the Senate Governmental Affairs Committee. This letter (see app. II) asked for our comments on the effectiveness of statutory protection for whistleblowers, and on legislative proposals regarding changes in the authority of the OSC. At least four legislative proposals have been introduced to change the current powers of the OSC, ranging from abolishing the office to increasing its power.

This report has also been prepared under GAO's statutory obligation, pursuant to Section 2304 of the Civil Service Reform Act of 1978, to report annually on the activities of the MSPB.

BACKGROUND

Established in 1979 under authority of Presidential Reorganization Plan No. 2 of 1978 and the Civil Service Reform Act (CSRA), the OSC is an independent investigative and prosecutive component of the MSPB. The relationship of OSC to the MSPB may be likened to that of a prosecutor to a court. The Special Counsel is appointed by the President, with the advice and consent of the Senate, for a term of 5 years. He may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. The three primary responsibilities of the OSC are to:

(1) investigate allegations of activities prohibited by civil service law, rule or regulation, primarily allegations of prohibited personnel practices as defined in the CSRA and, if warranted, to initiate a disciplinary or a corrective action;

(2) provide a secure channel through which allegations of waste, fraud, mismanagement, illegality, abuse of authority, or a substantial and specific danger to public health or safety may be made without fear of retaliation and without disclosure of identity except with the employee's consent; and

(3) enforce the Hatch Act, which restrains partisan political activities of civil servants.

As identified in (1) above, the OSC can initiate a disciplinary action to punish the person who committed a prohibited personnel practice. For example, the OSC could seek to reduce the grade of a manager engaging in whistleblower reprisal. Corrective actions can be aimed at helping the victim of the prohibited personnel practice or making system-related corrections. For example, the OSC could seek to rescind an unfavorable reassignment of a whistleblower reprisal victim or require the agency involved to initiate or re-emphasize appropriate agency personnel policies. The OSC also has responsibility to investigate, and, if warranted, prosecute allegations of arbitrary or capricious withholding of information under the Freedom of Information Act, but does not regard this as a primary statutory responsibility.

TYPES OF ALLEGATIONS RECEIVED BY OSC

During fiscal year 1984, the OSC received 1,605 matters for evaluation relating to its three primary statutory responsibilities. Of these, 204 were complaints alleging reprisal for whistleblowing activities, 1,179 were complaints alleging other prohibited personnel practices, 129 were employee disclosures of alleged wrongdoing and mismanagement, and 93 were allegations of Hatch Act violations. A more detailed breakdown of various types of allegations of prohibited personnel practices is included in appendix III.

As of January 9, 1985, OSC's central office consisted of the Special Counsel's office, an operations management division, an investigation division, and a prosecution division. OSC also has 2 field offices, located in Dallas and San Francisco. There were 81 permanent staff, including 67 at the central office and 14 at the field offices. OSC also had 5 temporary employees, all at the central office. OSC's fiscal year 1985 appropriation was $4.58 million and it has requested a supplemental appropriation of $44,000. OSC has requested a budget of $4.59 million for fiscal year 1986.

PRIOR GAO REPORTS

Since April 1979, GAO has issued 13 reports containing information on the operations of the OSC. Several of these reports commented extensively on startup and other problems experienced by OSC. For example, in a report to the Congress dated June 9, 1980, covering the first year activities of MSPB and OSC,[1] we reported that:

--The first year operations of OSC were affected by start-up and transition problems which hindered it from fully carrying out its statutory functions.

--OSC lacked resources under its original budget allocation to effectively carry out its full range of responsibilities. Its operations were also impaired by insufficient office space.

--Because of a lack of specificity in the CSRA and the President's reorganization plan, there was uncertainty concerning the relationship between MSPB and OSC.

--Most whistleblower complaints were not processed within the time period required in the CSRA.

--The OSC had not taken steps immediately to establish itself as the focal point for receiving and investigating complaints of prohibited personnel practices and did not provide active leadership in encouraging federal employees to report potential prohibited personnel practices and other merit system abuses.

In subsequent reports, we commented on other problems related to OSC's operations between 1979 and 1982. Such problems included:

--Inadequate communication between OSC and government whistleblowers.

--Inability of OSC to clearly identify the issues in referrals of whistleblowers' disclosures to agencies.

--Confusion on the part of federal employees about the role and responsibility of the Special Counsel.

--Missing case files and files in disarray.

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[1] First-year Activities of the Merit Systems Protection Board and the Office of the Special Counsel (FPCD-80-46, June 9, 1980).

--Lack of criteria for evaluating and investigating complaints.

--Lack of communication and ineffective working relationships with other agencies.

--Budget reductions in fiscal year 1982 which caused several problems including delayed and curtailed investigation activity.

A bibliography of reports issued by GAO which contain this information on OSC's operations is included as appendix IV. This is the first report specifically on the OSC covering the period since the incumbent Special Counsel took office in October 1982.

THE OSC DOES NOT VIEW ITS ROLE AS THAT OF AN EMPLOYEE ADVOCATE

The Special Counsel does not regard the function of his office as that of providing representational or advocacy services for federal employees who have, actually or allegedly, suffered from unjust treatment within the federal personnel management system. Rather, the Special Counsel believes his role is to protect the merit system itself through the investigation and prosecution of violations of merit system laws, rules, and regulations before the Merit Systems Protection Board. He strongly emphasized to us that he does not view complainants, or federal employees in general, as "clients" of the office, and indeed that the merit system itself is the OSC's only client.

We previously reported in Survey of Appeal and Grievance Systems Available to Federal Employees (GAO/GGD-84-17, Oct. 20, 1983) that the OSC is not, in the strictest sense, a remedial system for individual employees. Only to the extent that an employee benefits incidentally from the enforcement of federal personnel laws can OSC be considered part of the remedial system available to individual employees.

The office likens its role to that of a prosecutor in the criminal justice system. A prosecutor represents the public interest rather than the interests of the victim of a criminal act.

The legislative history of the CSRA had been interpreted by the U.S. Court of Appeals for the District of Columbia Circuit in the Frazier case (Frazier v. MSPB, 672F 2d 150 (D.C. Circuit 1983)) to support the concept of OSC's primary role as a prosecutor. This case is the primary interpretation of the role, authority, and jurisdiction of the OSC in corrective action cases. In this case, the Court stated that the Special Counsel is "fundamentally concerned with the integrity of the

merit system," and that this concern was different from that of the individual employee who "seeks personal restoration." In this view of the CSRA, "the principal recourse for individual employees who have suffered cognizable injury from a personnel action is to a Chapter 77 appeal--and not to the Office of the Special Counsel." Chapter 77 of title 5, United States Code provides individual employees and applicants with the right to appeal certain adverse personnel actions--such as removal or demotion--directly to the MSPB. Certain personnel actions--including a performance evaluation, relocation, and change in duties with no reduction in grade or pay--are reviewable by the MSPB only if brought before it by the Special Counsel and only if they are allegedly taken as a result of a prohibited personnel practice.

The OSC's authority to seek "corrective action" on violations of the merit system, under 5 U.S.C. §1206(c), is not inconsistent with the concept that the OSC protects the system rather than the individual. While the term as used in this section of the statute is not defined, the OSC's focus is on institutional corrective action. It can, and sometimes does, seek and secure corrective action that is irrelevant to a complainant's direct interests, such as securing an agency's commitment to adhere to merit system principles in the future. In explaining that complainants may be dissatisfied or displeased with the corrective actions OSC negotiates with agencies, the Special Counsel stressed that the OSC's role is not "to gratify the individual's personal wishes as to what he or she believes ought to be done for them."

The Frazier case, cited above, supports this view of corrective action petitions:

> "If Chapter 77 appeals can be analogized to civil proceedings in which the immediate interests are personal to the litigants, corrective action petitions are comparable to criminal prosecutions designed to vindicate the public interest."

In some instances, OSC's corrective action settlements do benefit individual complainants by revising adverse personnel actions. The Special Counsel told us, however, that corrective action settlements are incidental to the primary agency focus on disciplinary prosecution.

While the current prosecutorial priority of the OSC is consistent with the statute, it is also a product of discretionary choice and emphasis by the Special Counsel as the administrator of the office. Both the incumbent Special Counsel and his immediate predecessor made deliberate efforts to redirect the priorities of the office to its prosecutive role, as opposed to offering assistance to individual employees. The incumbent Special Counsel testified in March 1983 that he inherited an

investigative staff that was "inexperienced in conducting investigations with prosecutive ends clearly in mind." In filling all new vacancies, he initiated a policy of seeking out individuals with extensive experience in conducting criminal investigations leading to prosecution of offenders.

Some attorneys and organizations representing government whistleblowers express an alternative view of the appropriate role of the OSC. In this view, for which support can also be found in the legislative history, the OSC is responsible for providing meaningful protection to individual whistleblowers and other aggrieved federal employees. For example, in March 1983 civil service oversight hearings before the House Subcommittee on Civil Service, OSC was criticized by the Government Accountability Project, an organization that offers legal counsel and representation to whistleblowers, for failing to achieve the "heart of the Special Counsel's mission; that is, the lack of effective service to and results for its constituency--victims of prohibited personnel practices and whistleblowers seeking reform." Other parts of the testimony made it clear that this organization sees the role of the OSC as providing "effective service to federal employees," and "protecting the interests of federal employees and whistleblowers."

Another organization, the Project on Military Procurement, wrote us that it felt the OSC's prosecutorial function should be to protect the system and, necessarily, the aggrieved federal employee from prohibited personnel practices. It criticized the OSC for an impersonal approach to whistleblowers and said that the office should be prepared to offer them moral support as well as representation in court. In communications with us, the Federal Managers Association and the Senior Executives Association also questioned OSC's orientation and priorities, saying that OSC had deviated sharply from its original protective purposes.

OBJECTIVE, SCOPE AND METHODOLOGY

Objective

Our objective was to provide information that will assist the Congress in making an overall evaluation of the effectiveness of the OSC and the statute which governs the agency's operations, and in determining whether additional legislation is needed to protect government whistleblowers. (See app. I.) We gave special emphasis to the following matters in conducting our review:

--standards, criteria, and priorities that guide the OSC in selecting complaints for investigation and prosecution;

--responsiveness of the OSC to complainants, particularly to those federal employees who have taken career risks to expose fraud, waste, mismanagement or illegality;

--results attributable to the work of OSC and the obstacles which are hampering its effectiveness;

--possible deficiencies in the powers of OSC or in the statutory definition of prohibited personnel practices which make it impossible for OSC to do its assigned job; and

--potential alternatives for preventing prohibited personnel practices and punishing those who are found guilty of such practices, especially in whistleblowing reprisal matters.

The Special Counsel's operations are heavily determined by legal requirements based on the MSPB's interpretation of the CSRA. We were not able to develop clear criteria to justify alteration of these requirements. This limited our ability to meet the fourth and fifth objectives noted above.

Scope

Because OSC's startup problems have been documented in previous reports, and because the current Special Counsel instituted a number of changes in OSC's policies, priorities and operations beginning in late 1982, we limited the scope of our review to cover the past two years. Our field work was performed from November 1983 through January 1985. It was done at OSC's headquarters and at the three regional offices that were in existence at the time of our review. (The Chicago field office closed September 30, 1984).

We concentrated on OSC's review and investigation of incoming complaints of prohibited personnel practices, and did not examine OSC's role in referring whistleblowing complaints for agency investigation, enforcing the Hatch Act, or investigating withholding of information requested under the Freedom of Information Act. The OSC's role in investigating and prosecuting prohibited personnel practices is clearly the focus of both request letters, the OSC's top priority, and the function that absorbs by far the predominant share of OSC's resources. We did not attempt to assess the quality of OSC's litigative efforts, nor to assess OSC's use of its authorities to seek "stays" or temporary postponement of adverse personnel actions and to intervene in on-going cases before the MSPB because these are tactical tools rather than ends in themselves.

Methodology

In order to describe OSC's standards, criteria, and priorities for selecting complaints for investigation and prosecution, we examined pertinent regulations, directives, and manuals and interviewed OSC officials and staff at both the headquarters and field office level.

To evaluate the responsiveness of OSC to complainants, we reviewed case files and examined OSC's statistical data on the timeliness of case handling. In performing this segment of our work, we paid particular attention to whether OSC's closeout letters to complainants adequately conveyed its reasons for closure of a case. We also obtained a computer tape which contained information on the number and types of matters received by OSC during most of fiscal year 1984. In transmitting this tape, OSC advised us that little time had been devoted to validating the accuracy of the data. Therefore, we did not use these data extensively for statistical analysis.

In order to assess the results of OSC's work, we obtained a listing of cases on which OSC claimed some positive accomplishment and examined selected case files to determine the nature of the corrective or disciplinary action claimed by OSC.

Our analysis of possible deficiencies in the powers of OSC and the statutory definition of prohibited personnel practices included an examination of the material in 76 randomly selected files on alleged reprisal for whistleblowing, closed between August 1982 and August 1984. We also reviewed 16 other individual case files that were brought to our attention during our review by complainants, or by current and former OSC staff members, and we reviewed 24 randomly selected cases of all types in an initial screening project. We performed legislative research into the history of the CSRA, and read testimony by the Special Counsel and others on problems experienced by OSC in prosecuting cases. In addition, we examined MSPB decisions, court decisions, briefs and other documentation related to the prosecution of major OSC cases.

To assist us in assessing potential alternatives for preventing prohibited personnel practices and punishing those who are found guilty of such practices, we interviewed representatives of complainants and others both in and outside of government who were familiar with the CSRA and with OSC's record of achievement since its inception in 1979. We also examined published reports on OSC prepared by MSPB, GAO, and others and considered data relating to OSC's decisions and accomplishments obtained during our review.

This review was done in accordance with generally accepted government auditing standards.

AGENCY COMMENTS

Beyond pointing out that OSC created a new planning and oversight division in March, 1985, the Special Counsel did not comment on this chapter (see app. VIII). The section on the role of the OSC beginning on page 4, however, is somewhat expanded from the draft version submitted to the Special Counsel for comment.

CHAPTER 2

OSC'S OPERATING POLICIES EMPHASIZE RESPONSIVENESS TO COMPLAINANTS

Since its initial organization in 1979, OSC has gradually accumulated and refined a set of operating standards and procedures that frame its approach to handling the complaints and referrals that it receives. The CSRA does not provide a definitive answer to all of the questions raised by these complaints. Discretionary decisions are required every day, and an understanding of how they are reached within the OSC is essential to determinations of whether OSC is fulfilling its mission under current law. We believe OSC's case handling policies and procedures emphasize timeliness and responsiveness. We also agree with OSC that a larger proportion of OSC's operating and case handling policies should be formally documented.

This chapter describes OSC's operating policies and procedures in several areas. These include its standards for review and investigation of incoming complaints, its treatment of politically sensitive cases, its policies on responsiveness to individual complainants, and its policies for communicating its role to the public. OSC's criteria for selection of individual cases for prosecution are discussed in chapter 3, in the context of protecting government whistleblowers from reprisal, which is of particular interest to our requesting chairman and chairwoman.

MOST CASES ARE CLOSED IN INITIAL SCREENING

Section 1206(a)(1) of Title 5, United States Code, requires that the Special Counsel "shall investigate" any allegation of a prohibited personnel practice "to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." In practice, the vast majority of OSC "investigations" consist of a review of the incoming complaint file, supplemented by a single contact with the complainant. About 8 percent of the complaints survive this screening process to be referred to OSC's investigation staff for in-depth scrutiny and interviews with knowledgeable parties.

We agree that OSC's practice of screening complaints is consistent with the statutory qualification that gives the OSC discretion in determining whether there are "reasonable grounds" to indicate the existence of a prohibited personnel practice.

OSC's written procedures and regulations carefully justify this interpretation of the law's requirement that OSC

investigate incoming allegations. Its key authority for this interpretation is language in the Senate Committee on Governmental Affairs report on the CSRA which notes that the Special Counsel "need not conduct an investigation of a charge which appears groundless or frivolous on its face," and which establishes an expectation "that the Special Counsel will develop a systematic means of screening employee complaints and allegations."

OSC routinely closes after "initial inquiry," or screening, a number of types of incoming complaints when no prohibited personnel practice is evident. These include:

--Matters pending before appeal bodies such as the MSPB, the Office of Personnel Management, the Equal Employment Opportunity Commission (EEOC), the Federal Labor Relations Authority, or an agency grievance proceeding.

--Allegations which do not involve defined "personnel actions," but other complaints against agency management.

--Matters in which an administrative appeal has been completed.

--Allegations from employees of agencies not within OSC's jurisdiction, including government corporations, intelligence agencies, the Postal Service, the General Accounting Office, or the Federal Bureau of Investigation.

--Matters alleging violations in connection with a promotion action, or non-selection for a vacancy, where no prohibited personnel practice is evident.

--Allegations of discrimination, in which OSC normally "defers" to agency investigatory bodies or the EEOC.

--Allegations of unfair labor practices, in which OSC normally defers to the Federal Labor Relations Authority.

In addition to these screening factors, OSC also closes matters during screening based upon a determination that allegations in the complaint cannot be successfully prosecuted before the MSPB. This determination is often discretionary and judgmental in that it requires a projected evaluation of evidence that might be available or discovered in a detailed investigation, likely agency defenses, and applicable legal standards such as whether there was a nexus or causal link between a protected activity and a personnel action that was taken.

According to statistics supplied to us by OSC, the vast majority of incoming complaints are closed in screening. In the period from October 1, 1983, to January 9, 1985, OSC closed, in screening, 1,424 of the 1,868 matters it received, and 119 matters were recommended for further investigation. Thus, for

every case recommended for further investigation, about 12 are recommended for closure after screening. Another 160 matters were referred for consideration as possible candidates for reports by agency heads under OSC's authority to act as a "secure channel" for whistleblowing disclosures, and 165 matters were still in screening, or "initial inquiry," as of January 9, 1985.

THE SPECIAL COUNSEL HAS EMPHASIZED TIMELINESS AND RESPONSIVENESS

The incumbent Special Counsel has established a policy that responsiveness to complainants, in the form of prompt acknowledgment and disposition of their complaints, is one of OSC's top priorities. In one of his first formal directives to the OSC staff, the Special Counsel instituted a set of standards he expected the staff to meet in dealing with incoming complaints. For example, this directive required an acknowledgment letter to the complainant within 5 days after a matter has been assigned to a staff attorney. The directive also required a recommendation, within 30 days from receipt, that the complaint either be closed or referred for investigation. Within 90 days, the directive establishes an expectation that the matter will either be closed or recommended for prosecution, with further investigation to be considered as an option in only extraordinary circumstances. Together with a centralization of the initial complaint review function, these policies have resulted in a substantial reduction of OSC's backlog of matters awaiting resolution. According to OSC's fiscal year 1984 annual report, 844 matters were carried over at the beginning of fiscal year 1983, and less than half that number, or 416, were carried over into fiscal year 1985.

Direct Contact with the Complainant

The Special Counsel's November 1, 1982, directive also required that, at a minimum, everyone who makes a complaint to OSC be contacted by an OSC investigator or attorney (this was usually accomplished by telephone). A principal purpose of this contact is to ascertain whether the written complaint may have omitted key facts or allegations that would bring the matter within OSC's jurisdiction or its prosecutorial standards. We did not verify the implementation of this policy, but did observe that a May 6, 1983, internal review of operations at the San Francisco regional office reported that this requirement was resulting in some delays in case processing because telephone numbers of complainants were unavailable, or they could not be reached on given telephone numbers.

Closeout Letters are Required by Law

The Civil Service Reform Act (5 U.S.C. §1206) requires the Special Counsel to give each complainant "a written statement notifying the person of the termination of the investigation and the reasons therefore." Explanatory language in the conference report accompanying the CSRA indicated that the reasons for termination of the investigation need not be detailed, but that the act required a brief notification and the "summary reasons" for closure.

A former Special Counsel issued written guidance on the content of closeout letters in May 1982. He found some letters curt, uninformative, and unconvincing that anyone had evaluated the complaint. He cautioned against formulistic language and said that closeout letters should deal with each legal issue raised. The incumbent Special Counsel has not issued specific instructions to the staff on the content of its closeout letters to complainants. He testified in March 1984 that complainants received responses from OSC that are "in detail," and "in writing."

In our review of 74 letters sent to complainants whose allegations of reprisal for whistleblowing were closed by OSC, we found that about two-thirds of them conveyed the key reasons why OSC decided not to pursue the case, as described in OSC's internal analysis. These letters went beyond a recitation of the general finding required by the CSRA, and gave a clear, though succinct, indication of the key defect or defects in each case from the standpoint of prosecutive merit. For example, one letter told the complainant that:

> "Our investigation revealed that your non-promotion in June, 1983 was due to the fact that you lacked the requisite number of years of nursing experience for promotion. We also determined that your non-promotion in September, 1983 was the result of performance problems made known to you well before you made disclosures to your Congressman. As a consequence, we are unable to conclude that your non-promotion constituted reprisal for your disclosure."

About one-third of the closeout letters we examined were written in more general terms. They usually said only that OSC found insufficient evidence that a prohibited personnel practice or other prohibited activity within its investigative authority had occurred. When we discussed this matter with the Associate Special Counsel for Prosecution he noted that some complaints are so unspecific that a specific response is impossible. He also explained that in cases where OSC believes that an agency was completely justified in taking adverse action against an employee, OSC sometimes uses discretion to avoid language which would be embarrassing or provocative to the complainant.

On the whole, given the discretion allowed to the Special Counsel in this matter by the legislative history of the CSRA, we believe that OSC's closeout letters in all cases we examined met the minimum statutory standard, and in most cases were fully responsive to the complainant's interest in how his or her complaint was evaluated.

OSC PROCEDURES FOR HANDLING SENSITIVE MATTERS

Sensitive matters, such as those which could result in irreparable harm to individuals if improperly handled, have received special treatment by OSC. According to the Special Counsel, the initial review and investigation of complaints was handled by OSC's field offices prior to November 1982. Subsequently, a special investigative unit was established in headquarters to handle the more sensitive or complex matters. However, the need for the special investigative unit declined with the centralization of initial review of all complaints in the headquarters' complaints examining unit and the increased control of all investigations by the investigations division.

Currently, all matters to be investigated beyond initial screening are assigned and controlled by the Associate Special Counsel for Investigations in coordination with the Associate Special Counsel for Prosecution. Matters are assigned to investigators or teams of investigators on the basis of the nature of the matter (including its sensitivity) and any particular investigative skills which may be required.

Congressional inquiries are routed to the Director of Congressional and Public Relations who is responsible for coordinating a response. Furthermore, OSC staff members have been instructed not to reply to inquiries from the press. All such inquiries are handled by the Director of Congressional and Public Relations or by the Special Counsel himself.

OSC IS DEVELOPING BETTER GUIDANCE FOR SUBSTANTIVE REVIEW OF COMPLAINTS

In a 1981 report almost 2 years after OSC was established, we observed that OSC had no criteria or guidelines for performing investigations, and noted that similar complaints could be treated differently depending on the individual investigator or office involved.[2] Since that time OSC has compiled and distributed internally an investigations manual that codifies some of its criteria and guidelines for conducting investigations. It has also conducted training sessions on investigatory techniques. While the investigations manual offers guidance

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[2]Observations on the Office of the Special Counsel's Operations (FPCD-82-10, Dec. 2, 1981).

with regard to OSC's jurisdiction, and techniques for interrogation and gathering of evidence, it does not contain guidance relating to substantive distinctions between cases that are likely to be prosecuted successfully and cases that ultimately will be closed because one or more critical defects have been revealed.

A March 1984 internal management evaluation of OSC's field network concluded that the investigations manual, while helpful, did not adequately fill the staff's need for information of a policy nature. The evaluation noted "a general, unfocused perception that policy needs to be clearer," and said that more discussion of "grey areas" in legal issues was desirable. The field staff reported that verbal opinions from the central office often conflicted with the manual, and that there were conflicting memoranda in circulation on nepotism cases. According to May, 1983 internal memoranda from the Assistant and Associate Special Counsels for Investigation, at least one of OSC's regional offices was conducting investigations with a remedial rather than a prosecutive objective. This was criticized as a "'law-firm' and 'client' approach to a law enforcement mission which tends relentlessly to swell the pending caseload and produce results which are better negotiated than prosecuted."

In addition, OSC's latest internal control review, completed by its Inspector General on July 2, 1984, identified a need to improve the documentation of internal policies and procedures concerning investigative, prosecutive, and administrative functions. It noted that staff members "have difficulty determining what current policy or procedure is, while supervisors may have insufficient basis or standards for supervising the work of subordinates." The report identified initial review of complaints as "the keystone to efficiency and economy of OSC operations," and noted the inherent and significantly high risk "that a matter meriting investigation or other action could be erroneously screened out."

This risk has been substantially ameliorated by the incumbent Special Counsel's policy of centralizing the operations of OSC. Regional offices in Washington, Atlanta, Philadelphia, Los Angeles, Seattle, and Chicago were closed in fiscal years 1983 and 1984. The remaining two regional offices, in Dallas and San Francisco, are no longer authorized to make an initial evaluation of complaints. They simply carry out the investigations assigned to them by OSC headquarters, which also reserves the most sensitive matters for investigation by staff at headquarters.

On September 16, 1983, OSC created a specialized Complaints Examining Unit (CEU) to centralize the initial review and evaluation of all incoming complaints in a single place. An internal staff paper proposing this centralization asserted that complaint processing is policy intensive and that centralizing the

function would permit "policy exceptions to become identifiable and resolvable instantly," while making it easier to maintain both statistics on and consistency in the review of complaints.

OSC's policy of centralization also somewhat reduces the need for detailed written internal guidelines and criteria. Policy level officials are available on a daily basis for consultation on matters of law, policy, or priority. Nevertheless, we agree with the recommendation of the Inspector General, as contained in his internal control review, that OSC should have a written directive on the receipt, processing, and review of complaints. The Inspector General informed us that although work on such a directive was in progress, it had not been issued by the target deadline of September 1, 1984, nor by the end of 1984.

OSC has also been working on a prosecution manual that will cover many points of legal interpretation. The prosecution manual was issued in April, 1985, and the Special Counsel forwarded to us a copy with his comments on this report. We have not, however, reviewed the new manual to determine the extent to which it will meet the need for more clearly defined prosecutorial guidelines to ensure consistent treatment of incoming complaints.

OSC HAS TAKEN STEPS TO CLARIFY UNDERSTANDING OF ITS ROLE

The incumbent Special Counsel has recognized the importance of outreach efforts to expand public knowledge of the functions of OSC, in part because of a reasonable assumption that the lack of such knowledge largely accounts for OSC's receipt of hundreds of complaints annually that are outside of its proper jurisdiction.

In past reports, we have criticized OSC for failing to adequately explain its role and responsibilities to federal employees. In its earliest years, this failure was in large part attributable to an inadequate outreach budget. In fiscal year 1982, for example, funds for informational material, lectures, and seminars to explain OSC's mission were severely curtailed in a governmentwide budget reduction. We have recommended in the past that OSC should expand and improve its efforts to convey an understanding to federal employees of the roles and responsibilities of the Special Counsel.

Shortly after his confirmation, the Special Counsel established an Office of Congressional and Public Relations, in response to a perceived need, identified by GAO, for public outreach to improve federal employee understanding of the functions and responsibilities of the Office of the Special Counsel. The budget for this operation was $33,000 in fiscal year 1983, and $52,000 in fiscal year 1984. The publications budget increased

from $2,500 to $19,000 in this same period. With these new resources, OSC published a new, clearer basic explanatory pamphlet that it sends out in response to inquiries and made new efforts to explain its role, and its limitations, in the media.

AGENCY COMMENTS

The Special Counsel's comments on this chapter (see app. VIII) pointed out that some of our observations were out of date by the time the report was drafted. The prosecution manual was completed in April 1985 and is being distributed to OSC staff. While OSC still takes the sensitivity of an investigation into account in assigning cases internally, the special investigations unit no longer exists. The Special Counsel said that congressional inquiries, which are now routed through the Office of Congressional and Public Relations for coordination, do not influence the sensitivity of matters under OSC's consideration. The Special Counsel's comments also provide supplemental information on the role of the office of the inspector general and on OSC's public information activities.

We qualified our description of factors routinely considered in OSC's complaints screening process to accommodate the Special Counsel's comment that these screening factors apply directly to cases where no prohibited personnel practice is involved. Our interviews with OSC staff who had been involved in complaint processing cited these factors as largely jurisdictional rather than substantive determinations. We continue to believe that OSC should have a directive on the receipt, processing, and review of complaints covering issues like this. We removed a sentence, however, which could be read as implying that such a directive should be a part of the investigations manual.

CHAPTER 3

WHISTLEBLOWER REPRISAL COMPLAINANTS RARELY QUALIFY FOR SPECIAL COUNSEL PROTECTION

One of the major innovations of the Civil Service Reform Act (CSRA) was its provision for the protection of government whistleblowers--those who disclose evidence of waste, abuse, or mismanagement--from retaliation by agency management. As of December 1984, 42 percent of all matters under active investigation by OSC were whistleblower reprisal cases. Nevertheless, an extremely small proportion of these complaints meet the legal standards that OSC is required to meet for a successful prosecution of a corrective or disciplinary action case. Our review of a sample of 76 closed whistleblower reprisal complaint files found no cases where the Office of the Special Counsel failed to pursue the matter to the point where at least one critical defect in prosecutorial merit was revealed.

WHISTLEBLOWER REPRISAL CASES AT THE OSC--AN OVERVIEW

The CSRA sought to use OSC to protect government whistleblowers from reprisal. Currently, OSC devotes a significant amount of its resources to investigating whistleblower reprisal cases. Most of the initial whistleblowing reprisal complaints are closed in OSC's own internal review. The MSPB has established evidence standards that the OSC must meet to prosecute these cases successfully. In addition, the Special Counsel has established a policy that cases will not be prosecuted before the MSPB unless there is a "75 to 80 percent" chance that the OSC will prevail.

CSRA sought to protect role of whistleblowers

The Congress recognized, during passage of the CSRA, that individual federal employees are often in the best position to identify incidents of law violation, mismanagement, waste, or abuse in their agencies, but they are deterred from revealing these incidents to appropriate investigators by the prospect of retribution from superior managers in their agencies who bear responsibility for these conditions. Therefore, the CSRA defined as a prohibited personnel practice, the use of personnel authority in reprisal for disclosure of information which an employee or applicant "reasonably believes evidences a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. . . . " The Special Counsel was given responsibility for investigating allegations of prohibited personnel practices and prosecuting them before the MSPB to secure corrective and/or disciplinary action.

Whistleblower reprisal cases currently make up 42 percent of all matters under investigation

During fiscal year 1984, according to its annual report, OSC received 204 allegations of reprisal for whistleblowing activities, or violation of Title 5 U.S.C. §2302(b)(8). These constituted about 15 percent of all allegations of prohibited personnel practices, and about 13 percent of all matters received by the office. This is an estimate, because OSC's statistics are inexact. Matters are classified by OSC upon initial receipt of an allegation, and often complainants use the term "whistleblowing" to refer to a broad range of disputes with agency management. OSC generally does not alter its original classification of a whistleblowing complaint even if subsequent analysis reveals that whistleblowing as described in the statute did not actually occur.

As of December 1984, 42 percent of the matters under active investigation by OSC were cases in the reprisal for whistleblowing category. The Deputy Associate Special Counsel for Investigation told us that this mix of cases was normal. To some extent, this disproportionate investigatory commitment is accounted for by the fact that reprisal cases, because they involve complex considerations of motive, intent, and causal relationships between events, require more complicated and lengthy investigations than do simpler allegations, such as nepotism.

The vast majority of whistleblower reprisal complaints are closed in OSC's own internal review

OSC's classification of complaints received in early years is not reliable, but we can estimate that more than 1,500 reprisal for whistleblowing cases have been closed over OSC's history, assuming that the current proportion of whistleblowing reprisal complaints to all complaints has prevailed since 1979, when OSC was established. Sixteen of these complaints resulted in some disciplinary or corrective action by the end of 1984, either ordered by MSPB or negotiated by OSC with individual agencies. Except for a few cases OSC lost before the MSPB, the remainder of the complaints were closed in OSC's internal review.

Exacting standards of proof are required to prosecute whistleblower cases successfully

In order to make a prima facie case of prohibited reprisal, the MSPB has held that the Special Counsel is required to prove, by a preponderance of evidence, an exacting series of elements. These were initially set forth by the MSPB in Robert J. Frazier,

Jr., (1 MSPB 159 (1979)), the first case involving the Special Counsel's authority in prohibited personnel practice cases, and extended in Gerlach v. FTC (8 MSPB 599 (1981)) and Rohrmann (9 MSPB 14 (1982)). The Special Counsel must show that (1) the employee engaged in activity protected by the law; (2) the employee was subsequently treated in an adverse fashion by the agency; (3) the deciding official had actual or constructive knowledge of the protected activity; and (4) there was a causal connection between the protected activity and the agency's adverse treatment of the employee.

In cases where there is evidence of both legitimate and illegitimate reasons for the adverse treatment, the MSPB adopted the Mt. Healthy test as a logical and efficient method of determining whether a prohibited personnel practice is the motivating factor in corrective action cases. The Mt. Healthy test requires that once OSC establishes that the protected activity was a significant factor in the reprisal, the agency must be provided an opportunity to show that it would have taken the same action even if the protected conduct had not taken place. If the agency can do so, MSPB would not order corrective action.

At the time of our review of OSC's disposition of complaints, the legal standard for both corrective and disciplinary cases was the same. That is, if an agency was able to prove that it had legitimate grounds to take adverse action against an employee, neither disciplinary nor corrective action would be authorized by the MSPB. In December 1984, OSC prevailed before the MSPB with an argument that the Mt.Healthy test should not apply to disciplinary action cases. This case is currently under appeal to the courts. Some cases that were closed under the previous standard might have been regarded more favorably as candidates for prosecution to achieve disciplinary objectives under this new standard.

OSC'S DECISIONS TO CLOSE WHISTLEBLOWER REPRISAL COMPLAINTS APPEAR REASONABLE

Examining a random sample of 76 whistleblower reprisal case files closed by OSC, we found that in nearly all cases[3] the case file documented that OSC's decision was based on a reasonable comparison of the facts in the case with the legal

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[3]In one disciplinary action matter involving an employee of a departmental inspector general, we found that the apparent basis for OSC's decision to close the matter was disputed by evidence in the file. The Special Counsel told us that the decision to close the case was made on information not in the file. We agree that there was a reasonable basis for closing the case, though it was not the basis explained to the complainant.

standards that OSC is required to meet for a successful prosecution. We found that many factors are involved in the decision to close a complaint. In particular, 49 of these 76 cases were closed in part because OSC anticipated that the agency or officials involved could argue persuasively that there was no causal connection between the complainant's whistleblowing and the disputed personnel action.

To examine OSC's disposition of whistleblower reprisal allegations, we used a randomly drawn sample of 76 cases from the population of 401 whistleblower reprisal complaints closed between August 31, 1982, and August 31, 1984. Our sample is projectable to the population with a sampling error of plus or minus 10 percent at a confidence level of 95 percent. (A discussion of the characteristics of our sample is presented in app. V.)

MULTIPLICITY OF FACTORS ARE INVOLVED IN OSC DECISIONS TO CLOSE CASES

While there are only four basic elements of proof required to prosecute a reprisal for whistleblowing case successfully, in fact a nearly limitless array of individual circumstances were weighed in OSC's evaluation of the prosecutive potential of the 76 case files we examined in detail. In each of these cases, OSC pursued the investigation to the point where it found a critical defect in the case from the standpoint of prosecutive merit. In many of these cases, more than one such defect emerged in OSC's investigation, as summarized in the prosecutive memoranda prepared by OSC staff. Although only about 8 percent of incoming complaints are referred by the Complaints Examining Unit to the investigation staff, 41 percent of the cases in the reprisal sample had received an investigation in more depth than the CEU now provides. (See app. VI.)

In the following sections we categorize some of these factors, in order to illustrate the variety of prosecutive defects that occurred in the sample of cases we examined. Some cases appear more than once in the statistics and examples we use because they clearly exemplify more than one defect from a prosecutive perspective. About two-thirds of the 76 cases hinged on OSC's anticipation that the agency or the targeted officials could argue persuasively that there was no causal connection between the complainant's whistleblowing and a personnel action. OSC's investigation revealed evidence that, if it were presented to the MSPB, would probably refute a charge that the personnel action was taken in reprisal for the act of whistleblowing.

As we pointed out in chapter 2, OSC had not yet established written criteria or standards for evaluation of the prosecutive potential of complaints it receives at the time of our review.

We were told that some of these points of law and interpretation would be covered in the prosecution manual, but this was not available to us nor to OSC staff members who prepared prosecutive analyses of the cases we reviewed. Lacking such a guide, we drew our characterization of the questions and criteria OSC applies to case analysis directly from the prosecutive memoranda that form OSC's own internal system for decisionmaking and accountability on individual matters. It is likely that opinion on some of these questions and arguments will differ within OSC itself.

Personnel action not taken within OSC's jurisdiction

In 12 of the cases, OSC staff raised a significant question about whether the action that prompted the complainant's contact with OSC was a personnel action. Some employees objected to what they described as general harassment or prejudice that they attributed to their status as whistleblowers, but OSC can act only if a personnel action meeting the statutory definition is involved. The Special Counsel has written to the Chairman of the Senate Committee on Governmental Affairs that

> "there is no OSC implemented statutory protection against reprisal or retaliation which may occur in the form of management action or collegial pressures and treatment which do not meet the statutory definition of a personnel action."

For example, OSC raised questions about whether such actions would be covered as: denial of permission to attend a conference; a bad employment reference; withdrawal of responsibilities that were inconsistent with an employee's low-level rank and job description; revocation of an employee's contract warrant authority; assignment of a nurse to a rotating night shift in a different ward; requiring unusually strict accounting for attendance; and removing a partition so an employee's work habits could be closely observed.

Although an agency can effectively take reprisal against a disfavored employee by failing to select him or her for competitive promotion, this is a particularly difficult personnel action to challenge in view of the large degree of discretion vested in the selecting official. OSC's regulations (5 CFR 1251.2(d)) specify that the office will normally not investigate allegations of wrongdoing in connection with promotion actions unless a prohibited personnel practice (such as reprisal for whistleblowing) is involved. In fact, eight cases in our sample involved allegations that the complainant was not selected for or denied a promotion in retribution for whistleblowing. OSC's investigation of some of these cases revealed that other applicants than the complainant had superior or comparable competitive ratings, providing the agency with a defense against

a charge that the selecting official allowed his or her choice to be influenced by a complainant's whistleblower status.

Case Withdrawn, Mooted, or Abandoned by Complainant

Four cases were closed because agencies had rescinded the personnel actions or reached a mutually satisfactory settlement with the employee. While OSC may still pursue complaints for disciplinary objectives even if the original complainant withdraws, OSC saw little value to continuing these cases. One case was closed because the agency had already taken disciplinary action against the supervisor involved. Another complainant had already secured corrective action from the MSPB by the time OSC became involved, and OSC's only role was to evaluate the possibility of disciplinary action against his supervisor.

In three other cases, OSC was not able to persuade the complainants to provide detailed information necessary to evaluate an overly general initial complaint. In our opinion, evidence in these files demonstrated that OSC made an adequate, good-faith effort to get this information from the employees.

Responsible Official Not Within OSC's Jurisdiction

The sample did not include any complaints from employees in agencies that are not within OSC's jurisdiction, such as employees of government corporations, GAO, or the FBI. OSC would not pursue such a case. Three complaints from civilian employees of the Defense Department were closed, after corrective action was ruled out, because the allegations were against active duty military officers who are arguably not subject to OSC's jurisdiction.

Complainant's Disclosure Not Protected

Significant questions were raised in 16 cases about whether the employee had made disclosures that qualified for protection against retribution. If an employee voices internal criticism of agency practices or individual misconduct, without a revelation to responsible agency officials or to an independent entity such as the inspector general, the Congress, or the media, OSC often questions whether there was protected whistleblowing, notwithstanding the circumstance that internal dissidence can expose an employee to reprisal as well as outside disclosure. Six complainants asserted that internal outspokenness led to disciplinary proceedings. For example, one complainant alleged that his suspension could be traced to his refusal to cooperate with a request that he arrange a trip on an agency airplane for congressional staff members because he thought it was improper.

Partly because no disclosure was involved, OSC closed the case. OSC also questioned that a "casual" internal discussion of wrongdoing by a supervisor was protected, and closed another case in part because an employee's defensive insistence that others rather than himself were responsible for office procedural violations did not constitute a protected disclosure of wrongdoing.

OSC does not need to demonstrate that the disclosure in question is factually accurate, but the complainant must "reasonably believe" in the accuracy of his or her disclosure. One employee's disclosure of cheating on a time card by a fellow employee was so easily refuted during investigation that OSC questioned whether the complainant could have reasonably believed it was true. Another complainant's vituperative letter to the press, for which he was reprimanded, alleged abuse of authority in his having been unjustly charged personal leave. OSC doubted that this and similar letters in other cases would be protected since they concerned matters purely personal to the complainant. Another complainant's "disclosure" involved a letter to his congressman complaining that his supervisor was obstructing his efforts to propose a patent application on a formula he developed. OSC determined that this allegation involved none of the conditions specified in the statutory description of protected disclosures.

Independent Grounds for Disciplinary Action

In 15 cases we examined, OSC determined that the agency had legitimate, verifiable grounds for disciplining an employee, based on his or her conduct, that were not related to his or her status as a whistleblower. Among the infractions that warranted such discipline were drug and alcohol abuse while on duty, carrying an unauthorized weapon, stealing government property, and refusal to obey lawful instructions. Since several of these alleged infractions emerged from investigations by inspectors general, or had already been separately appealed by the complainants through the MSPB, OSC typically relied on these records to determine that the disciplinary action had been justified rather than pretextual.

Documented Performance Problems

In 13 cases, OSC determined that the agency could present a documented case of deficient on-the-job performance with a history of progressive discipline to justify its decision to take action against an employee, notwithstanding his or her status as a whistleblower. OSC investigators recognize that agency officials can, over a period of time, carefully document a case of deficient performance as a means of taking reprisal against an employee for motives unrelated to his or her actual accomplishments on the job. Unless there is an abrupt

commencement of performance criticism following closely upon a whistleblowing disclosure, or procedurally improper documentation, or failure to allow the employee an opportunity to improve, this is a difficult case to make in prosecution. If a record of performance problems existed before any disclosure took place, OSC regarded such matters as unpromising.

Legitimate Management Reasons for a Transfer or Reduction in Force

Not all of the personnel actions that are brought to OSC's attention by complainants involve disciplinary measures. In eight cases we examined, employees complained to OSC that their involvement in unwanted transfers to different jobs or locations was prompted by reprisal for whistleblowing activities.

If OSC's investigation shows that legitimate management considerations prompted these personnel actions, this is treated as an indication that a reprisal case would be difficult to prove. Evidence on this point is often the existence of management improvement, streamlining, or cost-cutting studies or directives that bear on the decision to transfer, reduce, or eliminate a function or an organizational unit. If several people other than the complainant are affected, as is often the case, a charge of reprisal directed against the complainant is tenuous.

Timing of Disclosure Does Not Precede Personnel Action

In 13 of the cases we reviewed, OSC's investigation determined that the employee's disclosures followed rather than preceded the detrimental personnel action that prompted an employee's complaint to OSC. Obviously, it is impossible to establish the necessary cause-and-effect relationship in such cases. The law does not protect an employee who feels wronged by an adverse agency personnel action and is thereby motivated to "punish" the agency, or the persons responsible for the action, by revealing evidence of wrongdoing that he or she may have known about for some time. While their disclosures may nevertheless serve a public purpose, they will not invoke the Special Counsel's authority on the complainants' behalf. Two complainants were apparently aware of this limitation, because the case files indicate that they took steps to disguise from OSC the fact that they knew detrimental personnel actions were pending when they made public disclosures.

While disclosures that occur after a personnel action are not covered, it is also prejudicial to a case if the disclosures are made long before a personnel action is taken. Not only is it difficult to procure reliable testimony in such "stale" cases, but it becomes more difficult to prove a cause-and-effect relationship the longer an agency has exercised apparent

forbearance. This consideration was mentioned in the analysis of several cases, and was determinative in one case.

Acting Officials Do Not Have Knowledge or Motive

Several of the investigations we reviewed hinged on determinations of the motives of agency officials who were personally responsible for personnel actions that disadvantaged whistleblower complainants. Unless OSC can demonstrate that the acting official acted for a prohibited motive--specifically retaliation in these cases--there will be no finding of a prohibited personnel practice. In eight cases, OSC was unable to find evidence that the acting official knew of an employee's protected disclosures when he or she took a detrimental personnel action. This situation is particularly disadvantageous to employees who have deliberately sought to make confidential disclosures or otherwise to shield their whistleblowing activities from others in their agencies. To the extent that they are successful, they render themselves ineligible for Special Counsel prosecutive protection even though their disclosures are legitimate and significant. For example, an employee of a small commission quietly conveyed documentary evidence to an Office of Management and Budget examiner, through an intermediary, of substantial waste in the commission's operations. This resulted in a large budget cut for the commission. When her own job was eliminated in the subsequent reduction in force, OSC was unable to find evidence that the commission's managers knew who was responsible for "leaking" the damaging documents, and thus was unable to sustain an allegation of reprisal for the disclosure. The investigation confirmed that even the budget examiner did not know the source of his inside information.

Motive is also at issue when the acting officials have not been personally disadvantaged by a complainant's disclosures. The case of a nurse who reported generally bad management policies at a government hospital, for example, was closed largely because these allegations were not targeted at either the nurse's supervisor or members of a qualifications review board who determined that the nurse was not qualified for promotion. Management turnover can also spoil a potential retaliation case. Another whistleblower failed to demonstrate retaliation for disclosures that preceded a detrimental personnel action by 2 years, because all the officials affected by his disclosures had left the installation in the meantime. Retaliation for whistleblowing directed solely against an employee's peers is difficult to prosecute because they are not in a position to take retaliatory personnel actions against the whistleblower.

We could not disagree with OSC's decision to close these cases

As a prosecutor, the Special Counsel is authorized to use prosecutorial discretion--or subjective judgment--to decide

whether or not to file a particular complaint with the MSPB. In nearly all of the cases we examined, we agreed that the case file provided ample documentation that OSC's decision was based on a reasonable comparison of the facts in the case with the legal standards that OSC is required to meet for a successful prosecution. Each case file documented at least one and often more than one critical defect in the case from the standpoint of prosecutability.

CONCLUSION

Our review of 76 closed cases of alleged reprisal for whistleblowing does not demonstrate the existence of a single, specific legal issue that makes the protections in the law ineffective for most whistleblower complainants. Rather, there was a very broad array of potential defects in these cases, with no one factor predominating. Many potential cases displayed more than one defect, even though OSC moves to close a case as soon as it is evident that it cannot be successfully prosecuted. We did not find evidence that the whistleblowers in this sample fell victim to lack of investigatory effort on the part of the OSC. On the contrary, allegations of reprisal for whistleblowing more often get a full OSC investigation than other cases.

AGENCY COMMENTS

The Special Counsel's comments on this chapter were limited to technical clarifications relating to our discussion of the Mt. Healthy defense.

CHAPTER 4

OSC'S MEASURABLE RESULTS ARE PRIMARILY SETTLEMENTS AT THE AGENCY LEVEL

Results directly attributable to OSC's efforts include both prosecuting formal complaints with the MSPB and reaching negotiated settlements at the agency level. Since its inception in 1979, OSC filed 21 formal disciplinary and 6 formal corrective action complaints with MSPB. Of the 21 disciplinary action complaints, 3 resulted in disciplinary actions ordered by MSPB, 1 resulted in a settlement agreement which was subsequently formalized by an MSPB order, 3 resulted in a refusal by MSPB to order disciplinary action, 3 were withdrawn by OSC and 11 were pending before MSPB as of December 31, 1984. Of the 6 corrective action complaints, 1 resulted in a partial corrective action order by MSPB, 1 was dismissed when the agency took corrective action, 3 resulted in a refusal by MSPB to order corrective action, and 1 was withdrawn by OSC. In addition, OSC has achieved 25 settlements at the agency level. The nature and scope of these MSPB and agency settlements vary.

UNTIL RECENTLY, THE OSC WAS NOT SUCCESSFUL IN PROSECUTING CASES AT THE MSPB

The Special Counsel told us that in his view, the success of OSC should ultimately be judged by the criterion of its success in litigation before the MSPB. Historically, a major focus of the criticism of the Office of the Special Counsel has been that OSC had been unsuccessful in prosecuting complaints of prohibited personnel practices before the Merit Systems Protection Board. From 1979 up to October 1984, OSC lost 6 prohibited personnel practice cases before the MSPB, though it won some Hatch Act prosecutions. This record coupled with the fact that during this same time period OSC had received over 11,000 complaints, were factors in producing extensive criticism of the OSC's performance. For example, in testifying before a House Appropriations Subcommittee in March 1984, the Special Counsel stated that:

> "It is my view that the Office of Special Counsel ought not to lose cases. However, the Office of Special Counsel has never won a case before the board. In the final analysis, the Office of Special Counsel has lost case after case and the board has read again and again the law saying, 'lack of prima facie showing, inadequate evidence.'"

Three Recent Cases Could Strengthen OCS's Prosecution of Future Cases

OSC has not lost a case before the MSPB that was originally brought after the incumbent Special Counsel took office in October 1982. Futhermore, in the last 2 months of 1984, the Special Counsel prevailed in three disciplinary action complaints before the MSPB. While two of these cases represent victories only on the merits, the third is particularly significant because it represents acceptance by the MSPB of a principle of law that OSC had been attempting to establish for some time--that the Mt. Healthy test should not be applied to disciplinary prosecutions of prohibited personnel practices.

In Special Counsel v. Jerome Hoban (MSPB Docket No. HQ12068310017, November 5, 1984), a police chief at a Veterans Administration Medical Center was reduced from GS-9 to GS-5 after the MSPB found that he had committed a prohibited personnel practice. His offense was in changing the duties of a subordinate and preparing an unwarranted low performance evaluation in reprisal for the subordinate's allegations, to the inspector general and a Member of Congress, of mismanagement at the hospital. OSC's case was helped by the fact that Hoban had admitted considering the protected disclosures made by his subordinate in taking personnel actions against him.

In Special Counsel v. Ernest Filiberti and Darrell D. Dysthe, (MSPB Docket No. HQ 12068310018, December 6, 1984), the MSPB ruled that the respondents had committed a prohibited personnel practice by influencing an applicant for a position to withdraw from competition for the purpose of improving another applicant's prospects. The respondents' actions followed the discovery that one applicant had unintentionally been denied full veterans preference credit. The error was discovered after the position had been filled. In order to avoid separating the incumbent, who had sold his business and relocated his family to accept the position, the respondents wrote several misleading letters to the veteran in an attempt to dissuade him from accepting the position. The board ordered that both respondents be suspended without pay for a period of 60 days.

The third case is Special Counsel v. Gordon Harvey, (MSPB Docket No. HQ12068810021, December 6, 1984), which established a novel precedent. Harvey was a member of the Senior Executive Service in the Department of Energy. He was found to have retaliated against a subordinate who had sent a complaint letter to OSC. The retaliation included attempts to dismiss the employee, intentionally idling him, denying him consideration for other positions, and transferring him to a contrived position in a different geographical area. The MSPB held that Harvey had violated at least three separate prohibited personnel practices. The board ordered that Harvey be removed from the Senior Executive Service and be demoted to grade GS-14 for a

period of 3 years. Harvey has appealed the MSPB's ruling to a federal court. The complainant obtained a position with another agency and was not a party to the action.

The precedental value of Harvey is the MSPB's holding that the Mt. Healthy test does not apply to disciplinary action cases. The Mt. Healthy test requires that, even if OSC could establish that an employee suffered retaliation for a protected disclosure, it would not prevail if the agency proved by preponderant evidence that it would have taken the same action in the absence of protected conduct. Thus, in a disciplinary action case, whether the agency would be able to establish a legitimate reason for the personnel action is no longer relevant; the agency official will not be able to escape a finding that he had committed a prohibited personnel practice if an unlawful motive played any part in his or her decision to take an adverse personnel action. As the MSPB stated:

> "Our concern here is not whether the actions taken against Gorsey were effected on legitimate grounds, would have been taken despite protected activity, and should be allowed to stand. Our concern in a disciplinary action under section 1207 is whether a respondent should escape discipline for a prohibited personnel practice even if there is a lawful reason for taking the personnel action."

This ruling, unless it is reversed by the courts, will help OSC in prosecuting disciplinary actions based on prohibited personnel practices before the MSPB. The ruling does not apply, however, to corrective action cases and the Special Counsel told us that he does not anticipate a change in his general policy not to litigate such cases.

AGENCY SETTLEMENTS VARY SIGNIFICANTLY IN NATURE AND SCOPE

Another measurable result of OSC's actions can be a settlement at the agency level. OSC officials told us that since its inception, OSC has achieved 25 such settlements, with 21 containing corrective actions and 4 containing disciplinary actions. Our review of recent settlements illustrates the wide nature and scope of these settlements, ranging from actions that do not involve the complainant to actions addressing the complainant's specific situation.

In order to assess the impact of OSC's involvement in such direct negotiations with agencies, we examined OSC's files on 9 of the 10 most recently completed of these actions as of August 1984. We did not review one corrective action case because the file was intermingled with 9 cubic feet of records in a disciplinary action case which had been litigated unsuccessfully. We also reviewed one case that was not on the list provided to us

by OSC. We did not review any cases that were completed before 1982. Table 1 presents a summary of the results of our review. Following the table are brief narrative summaries of three cases illustrating the range of actions contained in the OSC agency settlements. Narrative summaries of the remaining cases can be found in appendix VII.

TABLE 1

Agency Disciplinary and Corrective Action
in Recent OSC Settlements

Prohibited Personnel Practice	Settlement Date	Disciplinary Action	Corrective Action
1. Nepotism	March, 1984	Letter of reprimand and hiring approval authority revoked	
2. Reprisal for whistleblowing	December, 1983		Inform management officials that such reprisal is prohibited.
3&4. Nepotism[a]	November, 1983	Father to be suspended 14 to 30 days[b]	Son's employment terminated
5. Unauthorized preference	October, 1983	-60-day suspension -$1,000 civil penalty	
6. Reprisal for whistleblowing	August, 1983		Reassignment rescinded
7&8. Reprisal for whistleblowing[a]	June, 1983	Letter of admonishment	-Agency directive supporting CSRA and communications with inspector general -Upgrade performance rating -Restore 16 hours leave -Reassignment -Attorneys fees[c]
9. Reprisal for whistleblowing	April, 1983		-Reassignment rescinded -Secretarial protective notices
10. Reprisal for whistleblowing	August, 1982		-Reassignment rescinded -Within-grade salary increase -Upgraded performance appraisal

[a]Combined because only one investigation was involved.
[b]Suspension had not been imposed as of September 5, 1984.
[c]Corrective action rejected by complainant as unsatisfactory.

SUMMARY CASE 1 (Table 1, Case 1 - Nepotism) - This case illustrates a situation where the action achieved by OSC did not directly benefit the original complainant.

In November 1982, an employee of a Navy installation in Florida made allegations of nepotism against the directors of two technical departments. According to the complainant, one director had hired both his wife and his son and subsequently promoted his son. The complainant also alleged that the other director had hired and subsequently promoted his son.

OSC's investigation substantially confirmed these allegations and, by letter of September 30, 1983, the Special Counsel advised the Secretary of the Navy that he had concluded that the federal anti-nepotism laws had been violated. Due to certain mitigating factors, including the Navy's efforts to seek partial repayment of salaries and assertion by the involved officials of a lack of intent to violate the law, the Special Counsel did not file a formal disciplinary complaint. However, the Special Counsel advised the Navy that the involved officials should be sanctioned in some appropriate way and that OSC was willing to consider approving some disciplinary action by the Navy in this matter. Subsequently, OSC approved a range of penalties between a reprimand and a 14-day suspension, leaving the final choice among them to the agency. On March 7, 1984, the Navy's General Counsel advised OSC that it had issued each of the involved officials a letter of reprimand and revoked their authority to approve personnel hiring actions.

The original complainant who brought the nepotism allegation to OSC did not benefit from OSC's involvement in the case. Her allegation that she was fired in reprisal for disclosing existence of nepotism and other violations was closed by OSC, which found evidence of various valid grounds for her removal.

SUMMARY CASE 2 (Table 1, Case 9 - Whistleblower Reprisal) - This case illustrates a situation where the action achieved by OSC directly benefitted the original complainant.

This case involved an auditor for the Defense Contract Audit Agency. OSC found that the agency's action in denying a waiver of its mandatory rotation policy in light of the employee's planned retirement was in reprisal for the auditor's public whistleblowing and testimony in an MSPB hearing. The auditor had presented allegations of cost overruns and unjustified expenditures on defense contracts.

On April 19, 1983, the Special Counsel reported his findings to the Secretary of Defense. OSC's letter recommended that the agency director be ordered to cancel the auditor's rotation and to allow the auditor to remain in his position until his retirement at the end of the year. The letter also recommended that the secretary direct officials of the Defense Contract

Audit Agency to cease their pattern of discrimination and harassment against the auditor, and inform the agency's director in writing of the requirements of the CSRA regarding reprisals for whistleblowing. Two days later, the department's general counsel furnished proof of compliance with these corrective action recommendations. There was also substantial media and congressional interest in the case. A related disciplinary prosecution, involving four defendants, is still pending before the MSPB.

SUMMARY CASE 3 (Table 1, Cases 7 and 8 - Whistleblower Reprisal) - This case illustrates a situation where the actions achieved by OSC were found unacceptable by the original complainant.

Two of OSC's accomplishments at the agency level resulted from a single investigation at an area office of the Department of Housing and Urban Development (HUD). The complainant, a supervisory construction analyst, alleged in August 1981, that his detail out of a branch chief position and a marginally satisfactory performance appraisal resulted from his numerous disclosures of processing irregularities and serious management problems to the HUD inspector general and central office. Subsequently, the department proposed removal of the employee for violation of agency conduct regulations, but OSC petitioned the MSPB for a stay of the removal action, and the agency eventually withdrew it.

OSC and HUD reached a settlement agreement in June 1983, 22 months after OSC received the complaint. A letter of admonishment was issued to the complainant's supervisor for having engaged in illegal reprisal, constituting a disciplinary action attributable to the OSC. Several elements of a corrective action were also agreed to, including a directed reassignment of the complainant, partially upgrading his performance appraisals, payment of attorney's fees, and restoration of 16 hours of the annual leave taken by the complainant to prepare his response to the removal proposal. The settlement also required HUD to issue a directive to all managers stating that communications with the inspector general should remain unfettered and that the agency will not tolerate personnel practices prohibited by the CSRA.

This settlement, to which the complainant was not a party, met strong objections from the complainant. In a June 17, 1983, letter to OSC and HUD, the complainant's attorney said that the settlement did not remedy the complainant's situation and characterized parts of it as reprisal in itself against the complainant for his protected activity. For example, while two elements of one performance appraisal were upgraded, the overall appraisal remained at the "marginally satisfactory" level. The directed reassignment to an unspecified location was termed a "personal hardship" and a further act of reprisal against the complainant. The complainant filed a petition for relief in

federal district court and has refused to accept attorney's fees because it would imply acceptance of the OSC/HUD settlement.

AGENCY COMMENTS AND GAO ANALYSIS

The Special Counsel commented on the 6-year summary of the results of OSC's prosecutive efforts contained in this chapter. We added a sentence to recognize that OSC's losses before the MSPB occurred in cases that were originally brought before the incumbent Special Counsel took office in October 1982. The Special Counsel also provided us with an expanded, updated list of 49 actions undertaken by OSC since November 1982. Eleven of these are Hatch Act cases, which we did not consider in our review. Of the 13 corrective action cases listed, 6 are new cases resolved after we selected closed cases for review in August 1984, 1 is a mooted case, and 1 is a case in which OSC subsequently agreed with us that corrective action preceded OSC involvement. The other 5 cases are included in Table 1, which also includes a case resolved before the incumbent Special Counsel took office. Of the 24 disciplinary actions listed, 13 are still awaiting trial or pending before MSPB, and 4 have been resolved since we selected closed cases for review. The remaining 7 cases are included in this chapter as agency settlements or victories before the MSPB. It should be noted that the Special Counsel's list considers each defendant separately, so that the Filiberti/Dysthe case summarized on p. 28 is listed as two separate actions. One case pending before the Board has four defendants who are separately listed in the Special Counsel's total.

The Special Counsel noted that the MSPB issued a ruling on March 28, 1985, after our review was completed, that confirms OSC authority to prosecute violations of standards of conduct.

CHAPTER 5

DISCUSSION OF ISSUES RELATED TO CONGRESSIONAL REVIEW OF OSC

In its 6-year history, OSC has been the object of criticism from federal employee representatives, GAO, and the Congress. OSC has been described as administratively inept, ineffective in prosecuting violations, and of little benefit to federal employee complainants such as whistleblowers alleging management reprisal for their disclosures. As a result, questions have been raised in the Congress as to whether OSC should continue to exist, and if it should, whether alterations are needed in its powers or in its statutory authorization. Our review, which concentrated on the role the Office of the Special Counsel is now performing, does not demonstrate whether or not protections should be stronger for individual whistleblowers or other employees who allege that they are victims of prohibited personnel practices. Ultimately, that is a value judgment which involves an assessment not only of the benefits OSC provides through its prosecutive role, but also of the role other institutions play in protecting individuals from improper treatment.

OSC HAS RESOLVED MANY OF ITS START-UP ADMINISTRATIVE PROBLEMS

In its earlier years, OSC was hampered by a large number of administrative problems, which we documented in several contemporaneous reports (see ch. 1, p. 3). We did not review OSC's management in detail, but we observed little in the course of this review that would dispute OSC's claims that many of these problems have been resolved. The incumbent Special Counsel has been in office for nearly 2-1/2 years, substantially longer than any of his three predecessors, whose turnover contributed to lack of management continuity before 1982. OSC's budget has also been stable since fiscal year 1983, avoiding the disruptions in funding that prevented OSC from following through on many of its plans when it was a new organization. Several senior OSC officials told us that no meritorious case has been abandoned in recent years because of inadequate staff or other resources to pursue it. Frequent conflicts arising from OSC's ambiguous administrative relationship with MSPB have been resolved by the complete administrative separation of the two organizations on September 30, 1984. OSC's backlog of unresolved complaints has been reduced substantially as a result of centralized processing. While OSC still has problems with the accuracy of data in its computerized information system, these have been recognized and a commitment to improving and broadening the usefulness of the system has been made through OSC's internal control review process.

We have also criticized OSC in the past for its failure to adopt substantive guidelines on the evaluation of the merit of individual complaints. As discussed in chapter 2, we believe OSC still needs to do a better job of documenting its substantive review policies. Because OSC has prepared a prosecutive manual that is intended to cover many of these questions, we are not now making a recommendation on this subject.

The sum of these developments is that OSC is no longer distinctively vulnerable to criticism on the basis that it is an agency in disarray, unable to carry out its mission effectively because of administrative deficiencies.

PROSECUTIVE EFFORTS HAVE RESULTED IN SOME RECENT SUCCESSES

OSC's record as a prosecutive organization has also been questioned by the Special Counsel and by Members of Congress. Until late 1984, OSC had never won a disciplinary action case before the MSPB, and only one corrective action complaint has been prosecuted with even partial success. OSC's records indicate that 11 cases were lost or withdrawn without result between 1979 and late 1984. Only one of these cases, however, was originally brought by the incumbent Special Counsel.

On the other hand, OSC negotiated 25 settlements at the agency level between January 1979 and January, 1985. Chapter 4 describes 10 of these settlements negotiated between August, 1982 and August, 1984.

While these numbers are small in comparison to the roughly 11,000 complaints of prohibited personnel practices brought to OSC, this is not necessarily an indication that OSC has passed up good prosecutive opportunities in its review of incoming complaints. Our review of a random sample of 76 whistleblower reprisal allegations closed by OSC in its internal review revealed that each case had a prosecutive defect under prevailing legal standards, and many of the cases had more than one such defect.

In November and December, 1984, OSC prevailed in three disciplinary action cases before the MSPB. The Special Counsel's victory in the Harvey case, unless it is reversed on appeal to the courts, provides a significant precedent that may increase the likelihood that OSC will prevail in more disciplinary action cases in the future. The ruling that the Mt. Healthy test does not apply to disciplinary action cases exposes managers to penalties if a prohibited motive, such as retaliation for whistleblowing, plays any part in deciding to take an adverse personnel action against a subordinate employee. Coupled with the Special Counsel's policy of selecting only cases for prosecution with a very high likelihood of victory, the Harvey precedent may allow OSC to improve its prosecutive record markedly in disciplinary action cases.

DESPITE EMPHASIS ON RESPONSIVENESS AND COMMUNICATION, OSC PROVIDES LITTLE ASSISTANCE TO INDIVIDUAL COMPLAINANTS

OSC has improved its responsiveness to individuals who bring complaints to its attention. It has instituted a policy of contacting each complainant personally and has improved its record for timely disposition of cases. Our review of a sample of closeout letters found that two-thirds of them provided a straightforward and informative--though succinct--explanation of the reasons the case had been closed. Nevertheless, these improvements would be of shallow comfort to an individual who wants restoration to his job or reversal of an adverse personnel action.

Our review of incoming complaints to OSC and discussions with several employee representatives, indicate that most of them expect OSC to act as their advocate and protect them from proposed adverse actions. The vast majority of them are disappointed in that OSC eventually closes their files without remedial action. The fact that some personnel actions, including transfer, reassignment, and a change in duties without a reduction in grade, can be reviewed by the MSPB only if brought by the Special Counsel, is a particular source of frustration. A significant proportion of disappointed complainants solicit congressional intervention on their behalf, which has helped generate congressional criticism of OSC. One member of OSC's oversight committee wrote the Special Counsel that "there are no satisfied clients of the Office of Special Counsel."

Judged by this standard, OSC has not been a success. However, as explained in chapter 1, the OSC does not regard this as a legitimate standard and we are unable to disagree with OSC's interpretation that its client, under current law, is the merit system rather than the individual complainant.

To a greater extent than his predecessors, the incumbent Special Counsel has emphasized the prosecutive role of OSC. He has also concentrated on disciplinary action, which is unlikely to benefit individual complainants even if it is successful. The incumbent Special Counsel has never filed a corrective action complaint with the MSPB. As noted in chapter 4, there were 6 corrective actions agreed to by agency officials in the 2 years before August 1984, 3 of which benefitted individual whistleblowers such as by rescinding proposed transfers.

Current law does not impose an "ombudsman" responsibility on OSC. OSC's investigation and analysis of cases brought to it are not oriented toward determining whether the cases have merit from any other perspective than legal prosecutability. As soon as a legal defect in a case is clearly demonstrated, OSC

closes its investigation. An ombudsman given responsibility for investigating these same complaints might well have pursued some of them further, looking for opportunities to conciliate or to address other standards of "merit" and "justice" than prosecutorial ones. For example, an ombudsman for government whistleblowers might seek to arrange a transfer to another job for a legitimate whistleblower who has been harassed or caught in a reduction-in-force.

OPTIONS FOR STATUTORY REVISION

We were asked to apply the results of this review to several proposals that have been made to cure perceived deficiencies in OSC's ability to protect whistleblowers and other federal employees from prohibited personnel practices. Suggestions for reform of the statute include strengthening its role by permitting OSC to appeal decisions of the MSPB to the federal courts, transferring OSC to the Department of Justice, and abolishing OSC altogether.

OSC Authority to Appeal to Court

One of these proposals passed the Senate by unanimous consent and without debate on October 11, 1984, as an amendment to a bill (H.R. 5646) extending a program to provide cash awards to federal employees for certain cost savings disclosures. This proposal, which had been previously introduced as separate bills in the Senate (S. 2927) and the House (H.R. 6145), provided that the Special Counsel could appeal MSPB decisions on corrective and disciplinary action cases to the federal district court. It also permitted employees who were "aggrieved" by the MSPB's decision in a complaint brought by the Special Counsel to file a separate petition and be considered a party to the court proceeding. The House of Representatives did not pass the legislation, at least in part because of objections to it from the Department of Justice on the grounds that it would have dispersed governmental litigation authority. The measure has been reintroduced in the 99th Congress as H.R. 928.

Somewhat similar legislation was introduced in the Senate (S. 1662, 98th Congress) to allow the Special Counsel to "appear as counsel on behalf of any party" in court appeals in connection with any of OSC's functions.

These bills were drafted when the the Office of the Special Counsel had failed to win in any of its complaints before the MSPB. To a certain extent, they are based on a supposition that the federal courts would be more receptive to OSC's legal arguments than was the MSPB. While this premise had always been speculative, it is weakened further by OSC's prosecutive successes in late 1984 before the MSPB in three disciplinary action cases.

Another argument for allowing the Special Counsel access to the courts is that such access is available to agencies and officials whom the Special Counsel has prosecuted successfully. The Special Counsel commented to us that this is principally a matter of symmetry. If one party to a prosecution has appeal rights, so should the other in this view.

There is some indication that the fundamental purpose of these statutory revisions is to increase the protections available to whistleblowers by empowering OSC to press their appeals for individual corrective action in the federal courts. If that is the purpose, we do not believe the suggested change will accomplish that objective. As we pointed out in previous chapters, OSC's complaint review mechanisms and its operating philosophy are directly opposed to a "client" or representational function. The incumbent Special Counsel has not yet found it necessary to bring a corrective action complaint to the MSPB, so authority to pursue such cases further to the courts would seem to have little practical significance. The Special Counsel did not indicate to us that lack of access to the courts had any effect on his general policy not to pursue corrective action through litigation on behalf of individual complainants. Of course, a future Special Counsel with different priorities might be more likely to use the authority if the Congress decides to provide it.

The question of whether or not an additional federal office outside the Justice Department should have independent authority to litigate in the federal courts is beyond the scope of this review.

Transfer OSC to the Department of Justice

In a congressional hearing on November 14, 1983, the Special Counsel suggested that OSC would be more successful if it were placed within the Department of Justice. He noted that it is redundant and replicates the resources the Department of Justice has for investigation and litigation.

We would agree that OSC's top priority function of prosecuting complaints for disciplinary purposes is congruent with the mission of the Justice Department. However, there is no counterpart in Justice to OSC's corrective action functions. We also found no indications in our review that OSC lacks the resources it needs to accomplish its mission. While access to Justice's much greater staff could lead to some efficiencies, it is also possible that the function of investigating prohibited personnel practices could be overshadowed by Justice's other priorities. Finally, the Justice Department is directly accountable to the administration, and assignment of the Special Counsel to that department would raise questions as to its independence from administration control.

Abolish the OSC

H.R. 6392, in the 97th Congress, proposed to abolish OSC and distribute its Hatch Act, Freedom of Information Act, and whistleblower referral functions to MSPB and the Office of Personnel Management. Individuals who felt they were victims of prohibited personnel practices would be empowered to bring civil actions to secure relief either to MSPB or to the courts, but not to both. MSPB would be authorized to award attorney fees to employees who prevail in such litigation. This proposal is based upon an assessment that OSC has failed to do what the Congress intended it to do, and that federal employees would be better protected from prohibited personnel practices through litigation on their own behalf than by application of the corrective and disciplinary action powers of the Special Counsel. It also discounts the value to the merit system of improvements to the system that are achieved by OSC's disciplinary prosecutions and institutional corrective action negotiations, since civil actions filed by individuals would normally be designed to achieve individual rather than systemic benefits.

This proposal, if enacted, may result in opening up the courts and the MSPB to increased litigation by employees who perceive that their treatment by the personnel system has been unjust. The Special Counsel now acts as an effective screening mechanism to limit the volume of complaints that reach the stage of adjudication.

CONCLUDING OBSERVATIONS

Our review does not provide an answer to the question of whether protections should be stronger than present law provides for the class of federal employees who claim that they are victims of reprisal for whistleblowing or other prohibited personnel practices. Ultimately, this is a policy question for the Congress to decide based only in part on an evaluation of the OSC's fulfillment of its mission as presently interpreted. While our review provides indications that OSC's protection of whistleblowers is imperfect, we have no basis to conclude that it is inadequate.

The law is imperfect because it cannot provide an impregnable shield against adverse treatment of individuals who reveal evidence of illegality, waste, or mismanagement in government. Their whistleblower status will not exempt them from the consequences of budget cuts, reorganizations, poor performance, or infractions of rules and regulations. Many forms of harassment and resentment by fellow employees and supervisors would be difficult to define and prohibit even if OSC's powers were not limited to official personnel actions. A clever, patient, and circumspect agency official can conceal evidence of his or her prohibited motive so that even malevolently inspired actions can be plausibly defended as a legitimate exercise of managerial discretion.

An answer to the question whether the law is adequate will require the Congress to consider several factors that this review could not address, or could address only partially. For example, we have no way of measuring the deterrent effects of the law's declaration that reprisal for whistleblowing is a prohibited personnel practice, or of the publicity given to OSC's litigations, whether they are ultimately successful or not. In this regard, the Merit Systems Protection Board recently published a study of perceptions among federal employees of the effectiveness of the CSRA in protecting whistleblowers from reprisal. While the study did not analyze perceptions about the Office of the Special Counsel's role specifically, it concluded that the CSRA whistleblower protections in general, by themselves, have not met all the expectations of the Congress. The study produced "no evidence that the protections have had any type of ameliorative effect on employee expectations or experiences relative to reprisal."[4]

The Congress must also weigh the objective of stronger protection for whistleblower disclosures against the objectives of management authority and accountability. Unrestrained whistleblowing could raise levels of dissidence and insubordination to the point where efficiency could be affected. Our review of allegations brought to OSC is inadequate evidence on this point, since the diversity it revealed in circumstances, disclosures, and adverse actions supports no generalizations. For every disclosure of a broad public policy problem, there were several describing minor disputes with supervisors. While some employees had unblemished records, others had well-documented performance or disciplinary problems.

Finally, the adequacy of whistleblower protections should not be judged solely through an examination of cases brought to OSC, which has been the focus of this report. Other institutions, including the President, the Congress, the media, the courts, agency leadership and appeals systems, the Merit Systems Protection Board, and inspectors general are also involved in support for the role of whistleblowers in government. A comprehensive evaluation of the effectiveness of whistleblower protections would need to consider the roles of these institutions, and what happens to legitimate whistleblowers who have not needed help from OSC. One possible explanation for the relatively small number of cases judged worthy of prosecution by OSC is that one or another of these institutions has resolved the most legitimate complaints or situations before a resort to the Special Counsel became necessary.

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[4] Blowing the Whistle in the Federal Government, Office of Merit Systems Review and Studies, MSPB (Oct., 1984), p. 7.

AGENCY COMMENTS

The Special Counsel did not comment on GAO's summary or observations (see app. VIII). His letter noted that on March 28, 1985, the MSPB ruled that OSC has authority to prosecute violations of standards of conduct, and that all but one of the cases lost or withdrawn by OSC were originally brought before the incumbent Special Counsel took office.

APPENDIX I

U.S. House of Representatives
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON CIVIL SERVICE
122 CANNON HOUSE OFFICE BUILDING
Washington, D.C. 20515
TELEPHONE (202) 225-4028

September 12, 1984

Honorable Charles A. Bowsher
Comptroller General
General Accounting Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Comptroller General:

I wrote you on October 18, 1983, to request that the General Accounting Office (GAO) investigate the thoroughness with which the Office of Special Counsel investigates Federal employee complaints of prohibited personnel practices. In response to this request, GAO auditors examined a small sample of employee complaints and reported informally that:

1. the Office of Special Counsel relies on discretionary professional judgment, rather than written standards to decide whether or not a complaint warrants investigation and prosecution;

2. the Office of Special Counsel conducts an in-depth investigation of only a tiny proportion of the complaints it receives;

3. even if the Office of Special Counsel conducted more thorough investigations of the employee complaints it receives, there is little evidence that those complaints would lead the Office of Special Counsel to uncover more cases of prohibited personnel practices that would sustain prosecution.

Based on these findings, I agreed with the conclusion of your auditors that further concentration on reviewing incoming case files would not be productive.

Nevertheless, the fact remains that few Federal employees or managers believe the Office of Special Counsel is capable of protecting individuals from or punishing supervisors guilty of prohibited personnel practices. This perceived impotence is particularly widespread in the case of reprisals against employees who disclose waste, fraud, mismanagement, or illegality -- that is, whistleblowers. Whistleblower protection was a key element of the Civil Service Reform Act of 1978. Sadly, whistleblower protection has failed to become a reality.

APPENDIX I

Therefore, I am expanding my original request so that Congress can ensure that its intent in prohibiting certain personnel practices and in legislating whistleblower protection is met. Specifically, I request that you address the following questions:

1. What standards, criteria, and priorities guide the Office of Special Counsel in selecting complaints for investigation and prosecution, and are these consistent both with the intent of Congress in establishing the Office and with the need to protect the merit system from improper actions?

2. Is the Office of Special Counsel adequately responsive to complainants, particularly to those Federal employees who have taken career risks to expose fraud, waste, mismanagement, or illegality?

3. What results can be attributed to the work of the Office of Special Counsel and what obstacles have proven most significant in hampering the effectiveness of the Office?

4. Is there some deficiency in the powers of the Office of Special Counsel or in the statutory definition of prohibited personnel practices which makes it impossible for the Office of Special Counsel to do its assigned job? Specifically, would the enactment of proposed legislation to provide the Special Counsel with the ability to appeal cases to court (such as H.R. 6145) cure the ineffectiveness of the Office of Special Counsel?

5. Are there alternative ways of preventing and punishing prohibited personnel practices, especially reprisals for whistleblowing, which should be considered? What are the benefits and problems of each?

I request that a final report be completed by March 15, 1985, so that the Subcommittee can begin action on legislation to protect whistleblowers and prevent and punish prohibited personnel practices.

With kind regards,

Sincerely,

PATRICIA SCHROEDER
Chairwoman

APPENDIX II

United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, D.C. 20510

September 11, 1984

The Honorable Charles Bowsher
Comptroller General of the United States
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Chuck:

As you know, the Office of Special Counsel was created by our Committee in 1978 as part of the Civil Service Reform Act. The Office is responsible for investigating employee complaints of unfair personnel practices, especially cases of employees who are allegedly punished by their superiors for "whistleblowing."

Special Counsel K. William O'Connor recently testified before my Committee concerning his views on the effectiveness of the Defense Contract Audit Agency. The information he presented to the Committee was accumulated during his investigations of alleged reprisals against a whistleblower in the DCAA named George Spanton. I asked Mr. O'Connor to provide the Committee with his views on the effectiveness of the whistleblower protection statutes and he sent me a letter on the matter. One of the most interesting and disturbing comments he offers is "If I were approached by an individual who asked me, in my capacity as a lawyer in the private practice of law, whether or not he or she should become a 'whistleblower', I would have to advise against being so identified publicly."

Based on Mr. O'Connor's comments and on the record of the Office in defending federal employees against reprisal actions stemming from their efforts to expose potential waste or fraud, I believe there is reason to be concerned about the effectiveness of whistleblower protection provisions of the Civil Service Reform Act of 1978. Mr. O'Connor makes clear in his letter to me that legislative improvements are needed in order to ensure that whistleblowers are given adequate protection from reprisals when they act in good faith to report on potential mismanagement or illegal activities.

I am aware that the GAO is reviewing the effectiveness of the Office of Special Counsel and is examining the effectiveness of the statutory provisions concerning whistleblowers. In light of your study of these issues, I would appreciate your views on Mr. O'Connor's comments as contained in

APPENDIX II

his letter to me. In addition, I would like your overall assessment of the need for legislative improvements in this area and your comments on the merits of two pieces of legislation which have recently been introduced to enhance the authority of the Special Counsel, S. 1662 and S. 2927. I would appreciate your comments to be as thorough and specific as possible and wherever possible, I would like to have specific legislative language to implement the changes or improvements you believe to be necessary.

I thank you for your attention to this request and ask that your report be made sufficiently early in the first session of the next Congress so that careful consideration can be given to its conclusion. If your staff has any questions on this matter, they may call Mr. Link Hoewing at 224-4751.

Sincerely,

William V. Roth, Jr.
Chairman

WVR/jlm

SUMMARY OF PROHIBITED PERSONNEL PRACTICE ALLEGATIONS RECEIVED BY OSC BY TYPE FROM OCTOBER 1, 1983 TO SEPTEMBER 7, 1984

PROHIBITED PERSONNEL PRACTICE	Number of allegations	Percentage of total[a]
Discrimination on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation.	397	30%
Soliciting or considering employment recommendations based on factors other than personal knowledge or records of job related abilities or characteristics.	11	1%
Coercing the political activity of any employee or applicant.	1	--
Deceiving, or willfully obstructing any person competing for employment	65	5%
Influencing any person to withdraw from competition for any position in order to improve or injure the employment prospects of any other person.	9	1%
Give unauthorized preference or advantage to any person to improve or injure the employment prospects of any particular employee or applicant.	145	11%
Engage in nepotism (hire or promote relatives or advocate such activity).	35	3%
Take reprisal against a whistleblower.	189	14%
Take reprisal against an employee for exercising an appeal right.	161	12%
Discriminate on the basis of personal conduct which does not adversely affect job performance of the employee or applicant.	79	6%

APPENDIX III

PROHIBITED PERSONNEL PRACTICE	Number of allegations	Percentage of total[a]
Take a personnel action violating any law rule or regulation implementing or directly concerning merit system principles.	241	18%
Total	1,333	101%[b]

[a]These percentages were developed from data extracted from OSC's matters reporting system. Because our data tape did not include all of fiscal year 1984, these totals will differ slightly from the full-year figures in OSC's annual report which we have used in our report. According to OSC, these data are about 92 percent accurate when viewed at closeout. Thus these figures provide only a rough indication of the distribution of incoming complaints to the OSC.

[b]Does not add to 100 percent due to rounding.

BIBILOGRAPHY OF REPORTS ISSUED BY GAO CONTAINING INFORMATION ON THE OPERATIONS OF THE OFFICE Of SPECIAL COUNSEL

1. Letter Report on the Transition and Establishment of the Merit Systems Protection Board, Office of Personnel Management, and the Federal Labor Relations Authority to the Chairman of the Senate Committee on Governmental Affairs, FPCD-79-51, 4-20-79.

2. Hatch Act Reform -- Unresolved Questions Report to the Chairmen of the Senate Committee on Governmental Affairs, and the House Committee on Post Office and Civil Service, FPCD-79-55, 7-24-79.

3. Letter Report on Merit Systems and Employee Protection to H. Patrick Swygert, Special Counsel, FPCD-80-15, 10-22-79.

4. First-Year Activities of the Merit Systems Protection Board and the Office of the Special Counsel, Report to the Congress, FPCD-80-46, 6-9-80.

5. Letter Report on Delays in Providing Office Space for the Merit Systems Protection Board and the Federal Labor Relations Authority to the Chairwoman of the Subcommittee on Civil Service, House Committee on Post Office and Civil Service, LCD-81-14, 12-5-80.

6. The Office of The Special Counsel Can Improve Its Management of Whistleblower Cases Report to Ms. Mary Eastwood, Acting Special Counsel, FPCD-81-10, 12-30-80.

7. Implementation: The Missing Link in Planning Reorganizations, Report to the Chairman, Senate Committee on Governmental Affairs, GGD-81-57, 3-20-81.

8. Letter Report on Federal Employees Excluded From Certain Provisions of the Civil Service Reform Act of 1978, to the Chairmen of the Senate Committee on Governmental Affairs and the House Committee on Post Office and Civil Service, FPCD 81-28, 4-7-81.

9. Civil Service Reform After Two Years: Some Initial Problems Resolved But Serious Concerns Remain, Report to the President and the Congress, FPCD-82-1, 11-10-81.

10. Letter Report on Observations on the Office of the Special Counsel's Operations to Alex Kozinski, Special Counsel, FPCD-82-10, 12-2-81.

APPENDIX IV

11. Effects of Fiscal Year 1982 Budget Cuts on the Merit Systems Protection Board and its Office of the Special Counsel, Report to the Chairman of the House Committee on Post Office and Civil Service, the Chairman of the House Subcommittee on Human Resources and Chairwoman of the House Subcommittee on Civil Service, GAO/FPCD-83-20, 4-8-83.

12. Letter Report on the Army's Handling of Whistleblowers Contract Allegations and Merit Systems Protection Board's Investigation to the Honorable James J. Howard, House of Representatives, GAO/AFMD-83-67, 5-23-83.

13. Survey of Appeal and Grievance Systems Available to Federal Employees, Report to the Chairwoman of the Subcommittee on Civil Service, House Committee on Post Office and Civil Service, GAO/GGD-84-17, 10-20-83.

APPENDIX V

REVIEW OF SAMPLE OF WHISTLEBLOWER REPRISAL FILES

In an effort to gain familiarity with OSC's disposition of whistleblower reprisal allegations, we requested a sample of 77 case files randomly selected from the 401 matters classified as allegations of reprisal for whistleblowing and closed between August 31, 1982, and August 31, 1984. Our final sample was 76 cases because we dropped one case from the sample when it was re-opened to active status at the complainant's request. Because of staffing constraints, our examination was limited to the material contained in OSC's investigatory files; we did not try to locate and contact complainants, witnesses, or agency officials to verify the information in OSC's files.

There are limitations on the projectability of statistics from our sample to the universe of whistleblower reprisal complaints considered and closed by OSC. The random sample size that we selected (77 of 401) is statistically projectable to the entire population with a margin for sampling error of plus or minus 10 percent at a confidence level of 95 percent. A distortion is introduced, however, by misclassification of some incoming complaints. OSC's review of a sample of 50 complaints found that 8 percent were improperly classified as to type of allegation. In some cases, this appears to be a simple clerical or interpretive error. In others, it stems from the complainant's own description of his allegation as a whistleblowing reprisal matter when in fact some other action is involved, such as retribution for exercise of an appeal right.

The following table presents data from our sample on the agency actions that have led to these complaints. This table shows only the primary or principal agency action taken. In fact, most of the complaints involve multiple agency actions. For example, an individual may protest not only the initiation of removal proceedings, but also the disciplinary actions and perhaps some alleged harassment that led up to it. In such a case, we list only the most serious action, i.e., the proposed removal.

APPENDIX V

Primary Agency Actions Precipitating Whistleblower Reprisal Allegations in Our Sample

Agency Action	Primary Actions
Removal/proposed removal	22
Suspension/reprimand	17
Harassment; non-personnel actions	8
Demotion/change in responsibilities	8
Non-selection for promotion	8
Reassignment/transfer	6
Denial of within-grade salary increase	3
Reduction in force; elimination of job	2
Objectionable performance evaluation	2
Total	76

It should be noted that some of these actions are reviewable by the MSPB, under the CSRA, only if brought by OSC and only if they are allegedly taken as the result of a prohibited personnel practice. A relocation, performance evaluation, and a change in duties with no reduction in pay or grade, cannot be reviewed by the MSPB except on this basis. This situation may result in a number of complaints being brought to the Special Counsel for prosecution as a prohibited personnel practice, simply because these actions are not appealable directly by individuals on other grounds.

EXTENT OF OSC INVESTIGATION IN WHISTLEBLOWER REPRISAL SAMPLE

	Number of cases	Percentage of total	Sampling error
1. Closed after screening; e.g. after review of material filed with complaint and only one call to complainant.	35	46	± 10.0%
2. Minimal fact-finding and confirmation; e.g. 3 or 4 telephone calls to complainant, agency, or other investigators.	10	13	± 6.7%
3. Extensive investigation with from 5 to more than 15 telephone calls but no on-site interviews or depositions; formal investigation report prepared.	19	25	± 8.7%
4. On-site investigation, with personal interviewing of agency officials, witnesses, etc, and formal investigation report.	12	16	± 7.3%
Total	76	100%	

APPENDIX VII

SUMMARIES OF OSC SETTLEMENTS REVIEWED BY GAO

Case 2, page 31, - Reprisal for Whistleblowing

By letter of May 7, 1982, to the Special Counsel, a complainant alleged that, as a result of his furnishing information to a national magazine concerning cost overruns, schedule slippages, and mismanagement on a Navy contract, he had been detailed from his position as a division head and that the agency planned to permanently reassign him to another position. The complainant retired on December 31, 1982.

OSC investigated the reassignment of the complainant as a possible reprisal for whistleblowing and, by letter of March 31, 1983, informed the Secretary of the Navy that it had found that the installation had committed a prohibited personnel practice in this matter. The Special Counsel recommended that (1) the Secretary advise the employee's second level supervisor in writing that it is a prohibited personnel practice to consider the involvement of an employee in a protected activity in deciding to take a personnel action against that employee and (2) post a notice or otherwise inform management personnel of the installation in writing of this prohibition. On December 2, 1983, the Navy forwarded documentation to OSC that it had complied with the recommendations.

Cases 3-4, page 31, - Nepotism

OSC's statistics list a corrective and, separately, a disciplinary action taken at the agency level. Two separate complainants alleged that various relatives of employees at a Navy shipyard had been hired in violation of anti-nepotism laws. OSC pursued the matter and concluded that one individual who had authority to take or recommend personnel actions violated 5 U.S.C. §2302 (b)(7) in advocating the appointment of his son to two successive metal inspector positions.

By letter of September 28, 1983, to the Secretary of the Navy, the Special Counsel recommended that the Navy take corrective action by terminating the appointment of the son. In the same letter, the Special Counsel advised the Secretary that he planned to file a disciplinary action complaint against the father with the Merit Systems Protection Board.

Two months later, the General Counsel of the Navy advised OSC that (1) the son had been terminated prior to the Navy's receipt of OSC's report based on an internal inquiry and (2) the installation planned to request return of the compensation paid during his appointment. The General Counsel requested, in his letter, that OSC withdraw its disciplinary action complaint

against the father and that the Navy be authorized to initiate the disciplinary proceedings. While the Navy had not decided on what specific action to take, it proposed a suspension ranging between 14 and 30 days.

OSC agreed to withdraw its disciplinary action complaint against the father and allow the Navy to take the disciplinary action. On December 9, 1983, the complaint was dismissed. However, when we asked OSC the current status of the matter, we were advised that, as of September 5, 1984, no such disciplinary action had been taken.

Case 5, page 31, - Unauthorized Preference

On January 29, 1982, a complainant advised OSC that an Air Force GS-11 employee relations specialist made an improper selection of a candidate for promotion. The complainant alleged that the selecting official asked a candidate to withdraw her application for promotion so he could consider other people for the job. The candidate's withdrawal resulted in the substitution of another candidate who was ultimately selected. OSC's investigation revealed that the selectee was the selecting official's girlfriend who subsequently became his wife.

On June 29, 1983, the Special Counsel filed a complaint with MSPB which charged the selecting official with violating 5 U.S.C. §2302 (b)(5) and (6). These sections forbid influencing any person to withdraw from competition for any position for the purpose of improving or injuring the employment prospects of any other person, and granting any unauthorized preference or advantage in hiring decisions. On October 11, 1983, the Special Counsel and the charged official reached agreement on a settlement which included a suspension from duty without pay for a period of 60 days and a civil penalty of $1,000. The penalty was affirmed by an MSPB order of January 13, 1984.

Case 6, page 31, - Reprisal for Whistleblowing

This whistleblowing reprisal complaint involved a personnel officer from a regional office of the Department of Housing and Urban Development (HUD). According to the complainant, his reassignment to HUD's central office in Washington, D.C., was in retaliation for his involvement in three cases investigated by OSC.

By letter of August 3, 1983, 8 months after the complaint was received, the Special Counsel notified the Secretary of HUD that he had determined that there were reasonable grounds to believe that the reassignment resulted from a prohibited personnel practice. The Special Counsel recommended that the reassignment of the complainant be rescinded.

On August 12, 1983, the General Counsel of HUD notified OSC that the Secretary had decided to comply with OSC's recommendation and rescind the complainant's reassignment. Documentation of the rescission was forwarded to OSC on November 30, 1983.

Case 10, page 31, - Reprisal for Whistleblowing

This case, which was settled in August 1982, by OSC's regional office in Dallas, resulted in the Department of Energy's decision to upgrade an employee's performance appraisal, retroactively grant a within-grade salary increase, and cancel the employee's directed reassignment to another state. The department's letter confirming these corrective actions attributed them directly to OSC's investigation, which established that "contacts outside the Department" were cited to justify an unsatisfactory performance appraisal. The employee had sent a letter to the Office of Personnel Management, with copies to Members of Congress, objecting to the enforcement of physical fitness standards in his job category. This letter was cited as evidence that the employee failed to "actively support management policies and objectives," a critical element in his supervisory performance evaluation. (This case was not included in the list of achievements given to us by OSC in August 1984).

APPENDIX VIII

OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board

The Special Counsel

1120 Vermont Avenue, N.W., Suite 1100
Washington, D.C. 20005

April 12, 1985

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

Thank you for the opportunity to review and comment on the draft proposed GAO report entitled "Whistleblower Complainants Rarely Qualify for Office of the Special Counsel Protection" you provided on April 1, 1985. We appreciate the thoroughness of the review of the operations of the Office of the Special Counsel conducted by your audit staff and your recognition of the complexity, difficulty and evolving nature of the legal and factual issues which this office must address daily in fulfilling its statutory mission. We also appreciate your acknowledgment of the accomplishments of the office during the past two and a half years in overcoming past difficulties and shortcomings noted in previous GAO reports. We would, however, like to offer the following information to correct what appear to be misunderstandings of certain procedures of the office and to bring you up-to-date on certain actions and developments which were still pending when your review was concluded.

5, 37, 52

Matters "Appealed" to the Merit Systems Protection Board by OSC. The draft report on pages 6, 50 and 67 refers to certain kinds of agency personnel actions as being "appealable" to the Board by only the OSC. The word "appealable" may imply to some readers that, while the employee affected may not "appeal" such actions to the MSPB, the OSC may "appeal" such actions (presumably on behalf of employees.) The term "appeal" may be interpreted to connote the seeking of personal redress. Such an interpretation of OSC actions before the Board would be incorrect and could be misleading, despite the clear understanding to the contrary elsewhere expressed that OSC does not represent individual employees, e.g. as noted on pages iii-iv and 5-6 of the draft report. Therefore, the OSC does not and cannot appeal any agency action on behalf of any employee. The OSC may, however, seek from the Board a stay of any personnel action or appropriate corrective action when investigation discloses reasonable grounds to believe the personnel action at issue results from or in a prohibited personnel practice and staying the action (pending completion of OSC's investigation) and/or corrective action is warranted. 5 U.S.C. §§ 1206(c)(1) and 1208.

5, 37, 52

Accordingly, we suggest that the phrase "certain personnel actions are appealable to the MSPB only by the Special Counsel" be changed on pages 6, 50 and 67 to "certain personnel actions are reviewable by the MSPB only if brought before it by the Special Counsel under a stay application, disciplinary action or corrective action proceeding".

[GAO Note: Page references in this letter are to the draft report. Page references to the final report can be found in the left margin.]

OSC's Basis for Closing Certain Types of Matters. The draft report
10 states on pages 13 and 14 that:

"The OSC routinely closes after 'initial inquiry,' or screening, a number of types of incoming complaints. These include:

-- matters pending before appeal bodies such as MSPB, ...

-- allegations which do not involve defined 'personnel actions' ...

-- matters in which an administrative appeal has been completed.

-- allegations from employees of agencies not within OSC's jurisdiction ...

-- matters alleging violations in connection with a promotion action, or non-selection for a vacancy, where no prohibited personnel pratice is evident.

-- allegations of discrimination, in which the OSC normally 'defers' to agency investigatory bodies or the EEOC.

-- allegations of unfair labor practices, in which OSC normally defers to the Federal Labor Relations Authority."

This statement appears to be based in part on the provisions of OSC's regulations at 5 C.F.R. § 1251.2, Deferral to administrative appeals procedures, and does not accurately reflect OSC procedures. The particular regulation pertains to allegations which do not involve a prohibited personnel practice, but which might otherwise be within OSC's investigative jurisdiction under 5 U.S.C. § 1206(e)(1)(D) or (E) (other activities prohibited by civil service law, rule, or regulation, and discrimination found by a court or appropriate administrative body). The disposition of all allegations of prohibited personnel practices (except for certain discrimination complaints covered by our deferral policy at 5 C.F.R. § 1251.3) is always decided on the basis of sufficient inquiry to determine whether there are reasonable grounds to believe the alleged or other prohibited personnel practice (as defined in 5 U.S.C. § 2302) has occurred, exists, or is to be taken. In this light, also, the absence of a personnel action as defined in the statute and the applicability of 5 U.S.C. § 2302 to the agency involved may be a significant consideration as to whether any provable prohibited personnel practice has occurred or can occur.

13 Procedures for Handling Sensitive Matters. The description, on page 18 of the draft report, of OSC's handling of sensitive matters (including Congressional inquiries) was partially correct during the initial period in which the review was conducted. It was not a current description of the procedures in effect at the end of the review.

Mr. William J. Anderson
U.S. General Accounting Office
Page 3

Prior to November 1982, the initial review and investigation of complaints was handled by OSC's field offices. Beginning in November 1982, the results of field office review of complaints were first reviewed in the headquarters' Prosecution Division before assignment for field investigation or decision to close. At this time, a special investigative unit was established in the headquarters to handle the more sensitive or complex matters. With the centralization of initial review of all complaints in the headquarters' Complaints Examining Unit (CEU), gradual increase in the number of experienced investigators assigned to the Investigation Division and increased direction and control of all investigations by that division, the need for a special investigative unit was obviated so that such a unit no longer exists. Instead, all matters to be investigated, which are referred from the Prosecution Division following initial review in the CEU, are now assigned and controlled by the Associate Special Counsel for Investigation in close coordination and consultation with the Associate Special Counsel for Prosecution. Matters are assigned to investigators (or investigative teams) on the basis of the nature of the matter (including its complexity or sensitivity), any particular investigative skills which may be required, and the relative expertise of the available investigators. In hiring new investigators, emphasis has been given to hiring persons with extensive experience in conducting criminal investigations leading to prosecution of offenders.

Although GAO appears to include Congressional inquiries among sensitive matters, such inquiries, while considered by OSC as important, do not influence the sensitivity of matters or the substantive action taken thereon.
13 Thus, the second paragraph on page 18 appears to reflect a misapprehension of OSC's procedures for processing and tracking Congressional inquiries. All Congressional inquiries on matters at OSC are required to be routed to the Director of Congressional and Public Relations. The Director is responsible for coordinating a response. These inquiries are tracked and synopsized on OSC's matters reporting system.

Development of Guidance for Substantive Review of Complaints. With regard
13-15 to the discussion on pages 19 - 21 of the draft report on the absence of guidance in the Investigations Manual concerning the receipt, processing and review of complaints and legal issues which might be encountered during an investigation, it should be noted that the particular manual was developed and issued to guide the conduct of investigations after the initial review of complaints and the identification and resolution of any relevant legal issues involved by competent legal staff. (The manual was developed after the establishment, in November 1982, of our current procedure for initial review of all complaints by the Prosecution Division.) Additionally, since November 1982, a Prosecution Division attorney has been assigned to all matters under review or investigation to assist in resolving any legal questions which may arise before or during the course of an investigation.

Issuance of Prosecution Manual. The Prosecution Manual, which is mentioned
15 on page 21 of the draft report as being under development and which provides

instructions concerning the initial review of complaints in the CEU and covers pertinent legal guidance for acting on complaints and allegations (to the extent possible given the current fluid state of the evolving case law) has been completed and is being issued to all attorneys and investigators of the office. A copy is enclosed for your reference. We are providing it for your information, and request that you not append it to your report or otherwise make it available to the public.

Establishment of OSC Office of Inspector General. The OSC Inspector General is referred to on pages 20 and 21 of the draft report without elaboration. The office of OSC Inspector General was established in November 1982 in order to give strength to our efforts to improve the efficiency, effectiveness and economy of OSC operations and to assure OSC's full compliance with the Federal Managers' Financial Integrity Act of 1982 and OMB Circular A-123, Internal Control Systems. As indicated on pages 20 and 21 of the report, the Inspector General has, through his internal control reviews, identified a number of areas in need of improvement and steps have been taken to address all his recommendations. And, in order to further emphasize OSC's commitment to further improving the quality and effectiveness of its operations, I have recently reorganized OSC by establishing a Planning and Oversight Division. The new division is responsible for, in addition to the inspection, audit and internal control functions of the Inspector General now designated head of the new division, coordinating and documenting policy development, program planning, and certain other statutory functions of the office. A copy of the directive implementing this reorganization and setting forth the current functional responsibilities of the major divisions of OSC is enclosed for your reference.

Steps Taken to Clarify Understanding of OSC's Role. With regard to the steps taken to clarify public understanding of OSC's role, covered briefly on page 22 of the draft report, we add that the OSC Office of Congressional and Public Relations handled approximately 300 press and Congressional inquiries per month and prepared and dispatched a total of 2300 written responses to the Congress, press and public during FY 1984. In the same time period, the office disseminated 79,000 copies of OSC informational materials and maintained a speakers bureau which provided guest speakers to organizations expressing interest in the OSC. Also, in addition to the new pamphlet explaining the role of OSC, a pamphlet explaining the Hatch Act's application to Political Action Committees was produced, a one page open letter to federal employees informing them of the primary functions of OSC and how to contact the office was distributed to all federal agencies, and two posters dealing with prohibited personnel practices and whistleblower protections were printed since October 1982.

The Mt. Healthy Test and Jurisdictional Issues.

(a) Mt. Healthy. On page 26, the draft report refers to the Supreme Court's formulation of the test for determining the actual cause of an adverse action in cases involving both legitimate and prohibited motivations by the officials taking the action. See Mt. Healthy School District v. Doyle, 429 U.S. 274 [illegible].

This is the so-called "dual motivation" causation test. The report states: "In cases where there are allegations of both legitimate and illegitimate reasons for the adverse treatment ..." Actually, the Mt. Healthy test is not invoked on the basis of "allegations", but rather when there is evidence of both legitimate and prohibited motivations.

29 Likewise on page 41, the draft report equates the Mt. Healthy test with a so-called "significant factor" test. The report would be more accurate if it referred to the Mt. Healthy test as the "dual motivation" test for causation when illegitimate motivation has been shown to have been a significant factor in the adverse action.

29 On page 41, the draft report states that "the Mt. Healthy test requires that, even if OSC could establish that an employee suffered retaliation for a protected disclosure, it would not prevail if the agency proferred other legitimate reasons for the adverse treatment." This statement relates to corrective actions (as opposed to disciplinary actions where the agency generally is not a party) and would be correct if it stated that OSC would not prevail "if the agency proved by preponderant evidence that it would have taken the same action in the absence of protected conduct." As GAO has correctly observed, the
36 Board's decision in Special Counsel v. Gordon Harvey, referred to on page 49 of the draft report, makes it clear that the dual motivation test of Mt. Healthy will not protect an offending employee against disciplinary action.

(b) Recent Legal Development. Additionally, on March 28, 1985, OSC prevailed in another case with possible far reaching implications. In Special Counsel v. Williams, OSC had filed charges against a Federal Mediation and Conciliation Service (FMCS) senior executive for violating agency standards of conduct by going on a trip to Las Vegas paid for by a subordinate employee and an officer of a union whose contract disputes were mediated by FMCS. See 5 C.F.R. §§ 735.201a and 735.202. Williams and OSC had reached a settlement whereby he would be removed from the SES and fined $1,000 for this misconduct. However, the Office of Personnel Management (OPM) had intervened to argue that the agency heads had the exclusive authority to enforce standards of conduct. The Board rejected OPM's argument and ruled that the Special Counsel had concurrent authority to enforce violations of the standards of conduct by filing complaints with the Board.

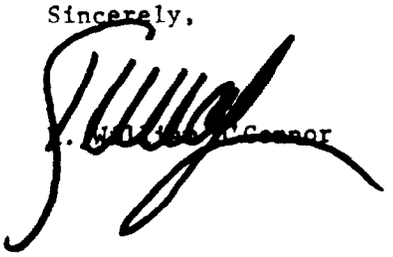
Results of Prosecutive Efforts. The draft report on page 49 states: "OSC's
36 records indicate that at least 10 cases were lost or withdrawn without result between 1979 and late 1984." This summary of prosecutive results without specification of the nature of the actions undertaken or the actual time of the actions may be misleading. The reference to "at least 10 cases" appears to refer to 3 disciplinary action cases (all initiated prior to mid-1982) in which the MSPB declined to order disciplinary action, 3 corrective action cases (also all filed prior to mid-1982) in which the MSPB declined to order corrective action, and 5 cases in which the agency declined to take recommended corrective action and the OSC agreed. Only one of the latter 5 actions was initiated after

October 1982. In that case, OSC closed the case only when corrective action was mooted by the action of the allegedly injured employee. Moreover, during the period of October 1982 through the end of the period reported upon, no agency has declined to take corrective action on any matter initiated, except in the one instance when the proposed action was made moot by factors beyond the control of OSC or MSPB. To be factually accurate, and complete, it would be correct to say that 49 actions have been undertaken by OSC since November 1982. A few are awaiting trial or MSPB action and one was mooted. All which have been concluded have been resolved in favor of OSC. (Table attached.)

Accuracy and Completeness of OSC Data. The draft report contains references to the lack of accuracy and completeness of some of OSC's statistical information concerning its operations in earlier years. The report, however, acknowledges that concerted action is being taken by the office to improve the information system and data base. To that end, action has been taken to assure the accuracy and completeness of information and data now being recorded in the existing computerized information system. Concurrently, substantial staff resources have been assigned to improve the overall management information system and the initial and major result has been the development of a new Litigation Reporting System (LRS) which will provide more complete information and data concerning the litigative activities of the office. This system is now being tested and will be fully implemented shortly. On full implementation of the LRS, OSC's efforts to further improve the management information system will continue to be given top priority. The Associate Special Counsel for Planning and Oversight/Inspector General has been assigned full responsibility for coordinating and overseeing (through his internal control and management reviews) the refinement of OSC management information system requirements, policies, procedures and results, and I and the Deputy Special Counsel will give our personal attention to assuring that any necessary changes and improvements in data collection, recording and compilation are accomplished.

We trust that this information will be helpful to you in putting your report in final form. If we can provide any additional information, please do not hesitate to call me.

Sincerely,



Enclosures

KWOC/SJS

[GAO Note: Attachments have not been included.]

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