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SAFEGUARDING THE MERIT SYSTEMS PRINCIPLES: A REVIEW OF THE MERIT SYSTEMS PROTECTION BOARD AND THE OFFICE OF SPECIAL COUNSEL

HEARING

BEFORE THE

OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA SUBCOMMITTEE

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

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SAFEGUARDING THE MERIT SYSTEMS PRINCIPLES: A REVIEW OF THE MERIT SYSTEMS PROTECTION BOARD AND THE OFFICE OF SPECIAL COUNSEL

THURSDAY, MARCH 22, 2007

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA,
OF THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:30 p.m., in room 342, Dirksen Senate Office Building, Hon. Daniel Akaka, Chairman of the Subcommittee, presiding.

Present: Senators Akaka and Voinovich.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. With the consent of my friend and Ranking Member of this Subcommittee, Senator Voinovich, I call the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia to order.

I am very pleased to welcome Neil McPhie, Chairman of the Merit Systems Protection Board, and Scott Bloch, Special Counsel at the Office of Special Counsel, to this Subcommittee today to review how both agencies are meeting their statutory missions as Congress begins consideration of their reauthorization requests.

Both the MSPB and OSC were created by the Civil Service Reform Act of 1978 to safeguard the merit system principles and to help ensure that the Federal employees are free from discriminatory, arbitrary, and retaliatory actions, especially against those who step forward to disclose government waste, fraud, and abuse. These protections are essential so that employees can perform their duties in the best interests of the American public. The enforcement of the merit system principles by MSPB and OSC helps ensure that the Federal Government is an employer of choice.

The MSPB is charged with monitoring the Federal Government's merit-based system of employment by hearing and deciding appeals from Federal employees regarding job removal and other major personnel actions. The Board also reviews regulations of the Office of Personnel Management and conducts studies of the merit system.

OSC is charged with protecting Federal employees and job applicants from reprisal for whistleblowing and other prohibited per-

sonnel practices. OSC serves as a safe and secure channel for Federal workers who wish to disclose violations of law, gross mismanagement or waste of funds, abuse of authority, or a specific danger to public health and safety. In addition, the OSC enforces and provides advisory opinions regarding the Hatch Act, which restricts the political activities of Federal employees and protects the rights of Federal employees, military veterans and reservists under the Uniformed Services Employment and Reemployment Rights Act of 1994.

Congress intended OSC and MSPB to be the stalwarts of the merit system. However, both agencies have been criticized for failing to live up to their mission. For example, the most recent employee satisfaction survey conducted by OSC shows that less than 5 percent of the respondents reported any degree of satisfaction with the results obtained by OSC, while over 92 percent were dissatisfied.

Since the year 2000, I have been pushing legislation to reform the Whistleblower Protection Act to address judicial decisions that have been inconsistent with Congressional intent and provide structural reform to the process for protecting Federal whistleblowers. The need for this legislation is very clear. No Federal whistleblower has won on the merits of their claim before the Board since the year 2003. At the Federal Circuit Court, whistleblowers have won on the merits twice out of 178 cases since 1994, when Congress last strengthened the Act.

For OSC, organizations that help whistleblowers claim that OSC has gone from being their first option for relief to their last choice, since OSC no longer works with agencies to achieve informal relief and the percentage of corrective actions and stays has been cut in half since 2002.

As the Administration pushes for changes to Federal personnel laws that decrease the ability of employees to engage in collective bargaining and bring grievances, it becomes even more important for employees to have full confidence in MSPB and OSC.

Two years ago, the Subcommittee held a hearing on how OSC was meeting its statutory mission. At that time, employees, good government groups, and employee unions, alleged that OSC was abandoning its mission to protect employees, especially whistleblowers, from prohibited personnel practices and to act in the interest of employees who seek its assistance and instead had been ignoring whistleblower complaints, had been failing to protect employees subjected to sexual orientation discrimination, and had been retaliating against whistleblowers at OSC. If true, these practices would directly counter OSC's legal responsibility to be the protector of civil service employees.

Given the fact that OSC employees could not make their disclosure to the Special Counsel, the alleged individual who engaged in the wrongdoing and retaliated against them, the employees and stakeholders filed a complaint with the President's Council on Integrity and Efficiency. The OPM Inspector General was then charged with investigating the matter. Unfortunately, the OPM IG is still investigating these allegations, but new evidence suggests that things have not changed. OSC has interfered with the ability of employees to talk to the OPM IG by requiring employees to ar-

range interviews through the Special Counsel's Office. While OSC has since rescinded this policy, this action, combined with the numerous other allegations against the agency, does not instill confidence.

The lead agency charged with protecting Federal employees cannot ignore its responsibility and violate the merit principles or even give the appearance of doing so or else the trust of Federal employees and the American people in the Federal workforce will be compromised. OSC must be a safe haven and a place of hope for employees. As such, OSC must be held to a higher standard and be beyond reproach. Unfortunately, it does not appear that OSC is measuring up.

I hope that today's hearing will allow us to address these concerns and allegations and ensure that MSPB and OSC are meeting their missions.

Now, I would like to turn to my good friend, Senator Voinovich, for any opening statement that he may have. Senator Voinovich.

OPENING STATEMENT OF SENATOR VOINOVICH

Senator VOINOVICH. Thank you, Senator Akaka. Thank you for having this hearing this afternoon. I am anxious to hear from the witnesses. As you said, it was a couple of years ago that we had a hearing on this topic and I am interested to see what progress, if any, has been made.

I would like to extend a warm welcome to our witnesses, the Hon. Neil McPhie, Chairman of the Merit Systems Protection Board, and the Hon. Scott Bloch, Special Counsel.

The United States is well served by professional civil servants hired and promoted based on a series of merit principles. Apart from political parties and disagreements in Congress or the White House, the dedicated individuals of the Federal service ensure that the needs of the American people are met, whether it is guarding our borders or processing Social Security checks. Mr. McPhie, I am proud to say that I believe our system is admired around the world.

Guarding the merit principles that preserve the integrity of the civil service are two important agencies, the Merit Systems Protection Board and the Office of Special Counsel. These responsibilities require that these agencies lead by example and that their personnel management policies reflect the merit principles they are told to uphold.

As an independent investigative and prosecutorial agency, OSC protects current and former Federal employees and applicants for Federal employment from prohibited personnel practices, promotes and enforces compliance of the Hatch Act, and facilitates disclosures by Federal whistleblowers about government wrongdoing.

As an independent quasi-judicial agency, MSPB adjudicates cases brought by the Office of Special Counsel as well as appeals over improper suspensions, removals, retirement benefits, and veterans' preference claims. Furthermore, the MSPB has the authority to conduct studies of the civil service.

Authorization for both of these agencies expires at the end of this fiscal year. Mr. Chairman, I believe it is important for us to act promptly to advance legislation to reauthorize these agencies and

I look forward to a continued bipartisan collaboration with you on introducing and advancing this legislation. Thank you.

Senator AKAKA. Thank you very much, Senator Voinovich.

I again want to welcome our witnesses, Mr. McPhie and Special Counsel Bloch, to this hearing.

As you know, it is the custom of this Subcommittee to swear in all witnesses, and so I ask you to stand and raise your right hand?

Do you swear that the testimony you are about to give this Subcommittee is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. MCPHIE. I do.

Mr. BLOCH. I do.

Senator AKAKA. Thank you very much.

Although statements are limited to 5 minutes, I want our witnesses to know that their entire statement will be included in the record. Mr. McPhie, please proceed with your statement.

TESTIMONY OF NEIL McPHIE,[1] CHAIRMAN, U.S. MERIT SYSTEMS PROTECTION BOARD

Mr. MCPHIE. Thank you, Mr. Chairman and Ranking Member Voinovich. Let me say first that the MSPB welcomes oversight. I am happy to be here to discuss MSPB's role in safeguarding the merit system principles. I am proud and honored to serve as the seventh Chairman of the Board, and today, what I plan to do is highlight some of the Board's accomplishments since the last reauthorization and some legislative proposals we have submitted. Finally, I will discuss some of the challenges that I foresee in the Board's future.

From fiscal year 2002 to 2006, the Board adjudicated 42,145 cases for an average of 8,429 per year. During this period, we reduced the average processing time for initial decisions from 99 days to 92 days. We also made significant progress in reducing the average case processing time at headquarters from 265 days in fiscal year 2005 to 154 days in fiscal year 2006. There has been no sacrifice in quality. The Court of Appeals for the Federal Circuit has affirmed 93 percent of the Board decisions that came before them during that period.

We have embraced technology to help us expedite case processing. For example, since 2002, we have increased the use of video conferencing. In fiscal year 2003, MSPB implemented an electronic appeals process that allows appellants to file an initial appeal using the Internet. Currently, approximately 25 percent of initial appeals are filed electronically.

Our mediation program was implemented nationwide in 2004 and has resulted in the successful settlement of more than 100 appeals.

As you know, the Board conducts independent, nonpartisan, objective research and produces reports that promote the merit system principles that are embodied in Title 5. Between fiscal year 2002 and 2006, the Board issued over 20 reports and Board employees conducted more than 400 outreach presentations.

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[1] The prepared statement of Mr. McPhie appears in the Appendix on page 27.

With respect to general management issues, I am pleased to report that the Board has earned a clean audit in each of the 4 years that Federal agencies have been required to submit a financial audit.

We have submitted for the Subcommittee's consideration six legislative proposals. One proposal seeks to provide for an order of succession for the Board when, one, the Board membership is comprised of two or more Board members but no member has been designated chairman or vice chairman; or two, all three Board positions are vacant. This proposed legislation recognizes the President's prerogative to control key Executive Branch appointments while preserving the continuity of agency operations.

In another proposal, the Board requests summary judgment authority as other agencies, such as the EEOC, already have. It is also worth noting that MSPB will have that summary judgment authority under the new employee appeals processes for the Departments of Homeland Security and Defense.

Pursuant to 5 U.S.C. Section 1203, the chairman of the Board serves as the chief executive and administrative officer of the agency. As such, the Board historically has followed a practice of leaving budget and administrative responsibilities to the chairman. Two of the proposed technical amendments merely reconcile the language of Section 1204 to the plain intent expressed in Section 1203.

The further amendment emphasizes the chairman's authority to delegate certain responsibilities to the employee or employees he or she appoints. As a quasi-judicial agency, the Board functions similar to a court when it deliberates and decides cases. The proposed exemption from the requirements in the Sunshine Act will enable Board members to freely discuss and deliberate cases.

The Board faces several potential challenges in the near future. Several factors could result in an increase in the Board's caseload, including the anticipated increase in retirement throughout the Federal Government and the resultant wave of hiring to fill those vacancies. Also, changes in judicial precedent and new legislation, such as the proposed amendment for the Whistleblower Protection Act now pending before Congress may also result in an increase to the Board's caseload.

Additionally, we will be working with DHS on the implementation of its new expedited employee appeals system, and in the context of the Board's studies, we anticipate that DHS and DOD personnel systems will require greater study as they are implemented. That is why we are currently collecting baseline data.

My red light is on. I have a small paragraph which I would like to finish, with your permission.

Senator AKAKA. Please complete it.

Mr. MCPHIE. Thank you, sir. As the Board prepares for the impact of increased retirements throughout government, we have recognized that the Board itself will be affected. In fact, within 5 years, 40 percent of the MSPB's workforce will be eligible to retire. Almost 20 percent are eligible at this time. To prepare for this wave, my administration has looked for creative ways to attract, develop, and retain employees. For example, I have directed each

office to develop a succession plan. I have also instituted developmental training programs throughout the agency.

In short, Board members, officials, staff have successfully fulfilled the agency's statutory missions. We have been careful stewards of the public funds entrusted to us. We continue to explore ways to achieve new levels of efficiency and to better serve the American public. We believe that the proposed amendments described during this hearing will help the agency meet these goals.

In these times of great changes in Federal human resources management, a strong, vibrant, and independent MSPB is critical. We look forward to continuing to work with you and with the Subcommittee as we fulfill these important responsibilities. Thank you for your patience.

Senator AKAKA. Thank you very much, Mr. McPhie. Special Counsel Bloch, please proceed with your statement.

TESTIMONY OF SCOTT BLOCH,[1] SPECIAL COUNSEL, U.S. OFFICE OF SPECIAL COUNSEL

Mr. BLOCH. Thank you, Mr. Chairman and Ranking Member Voinovich. It is an honor to be before this Subcommittee. John Adams said, "Good Government is an empire of laws." I have quoted this often in my tenure and I believe in its emphasis of the rule of law holding government officials to high standards and holding ourselves accountable to the public trust.

As the Special Counsel of the U.S. Office of Special Counsel, I am requesting reauthorization because upholding OSC's laws keeps our government accountable and just.

I am pleased to tell you our agency is functioning better than ever, while still continuing to improve. Morale is high. We have very qualified employees who are doing a great job for the merit system.

I have brought preview copies of our fiscal year 2006 annual report and charts showing some of our numbers.[1] The annual report will soon be up on our website.

I have previously submitted written testimony that contains most of what I want to say to the Subcommittee, but let me give you an overview of how we are functioning better in four areas: Whistleblower disclosures, investigation and prosecution of prohibited personnel practices, the Hatch Act, and then the Uniformed Services Employment and Reemployment Rights Act, or USERRA.

Now, I brought charts here to show how we are doing with our Whistleblower Disclosure Unit and this shows how many were pending at the end of each fiscal year. We see a steep drop-off in the number of cases we roll over from year to year. It kind of has that ski jump look to it which I like to see because it shows that the unit is doing its job.

Next, we have another chart, again regarding our Disclosure Unit, that shows the number of cases rising since I started in the position since the full Committee kindly had me confirmed. It shows an increase in the whistleblower referrals to agencies more than double what was going on before. Now, this translates into a

[1] The prepared statement of Mr. Bloch with attachments appears in the Appendix on page 34.
[2] The charts referred to appears in the Appendix on page 42.

safer, more efficient America, whether it is in resolving of aircraft near misses at Dallas-Fort Worth Airport, or uncovering and fixing environmental hazards at Federal prison facilities, or in greater health and safety at Veterans Affairs or Health and Human Services health facilities, military aircraft maintenance safety, Border Patrol and Customs safety, or rooting out fraud and waste in procurement and in travel reimbursements.

The next chart we have is about our prohibited personnel practices results, showing a decrease in the processing times in our Screening Unit of the PPPs from fiscal year 2002 to less than half of what it was, in 2006, which means more time for the IPD to get results. The IPD is our Investigation and Prosecution Division.

Now, the next chart shows a decrease in the average age of cases in the IPD, which I am very happy because you had many cases that were in the division for 2, 3, 4, and sometimes even 5 years and we have tried to implement new procedures and standard operating procedures so that cases don't spend more than a year there, whether they are filed with the Board or they are mediated or they are resolved in another fashion.

One higher-profile case last year was the forced resignation of an Agriculture Department State Director in Alaska for multiple abuses of a whistleblower. We got her her job back and he left service. We just filed a petition for corrective action before MSPB on a case in which we had already obtained a stay of transfer for a DEA agent who reported illegal and unconstitutional interrogation of his superiors.

Turning to the Hatch Act, we have a chart that shows a decrease, again, in the average processing time for complaints, again, that same kind of steep slope. The next chart shows you an increase in the number of disciplinary and corrective actions corresponding in that same time with a drop in 2005 after the 2004 elections, and then it spiked back up for the 2006 mid-terms.

We have had a variety of interesting cases lately, some high-profile and Hatch Act, but none more important than four Board cases that have come down fairly recently that affirmatively declare that political activity through the use of government e-mail is inappropriate and can result in the loss of Federal jobs.

The final chart shows our USERRA Unit is achieving great results. Starting in February 2005, you see we have taken on several hundred cases there and we have achieved a remarkable corrective action rate for service members who are Federal employees of over 25 percent, which is very high for Federal enforcement agencies. And it wasn't until 2004 that we filed OSC's first-ever USERRA cases at the Board in the 13 years of the statute's history.

One notable case recently was someone, a service member injured in Iraq and he was denied his job back. When he came to us, we got him his job back and restoration of his benefits, and we have many other stories like that.

OSC has partial jurisdiction over initial investigation of these USERRA cases in a demonstration project with the Department of Labor. The project expires at the end of this fiscal year and I know, Mr. Chairman, that you and your staff at the Committee on Veterans Affairs will be looking at that.

We have also included in our request for reauthorization some legislative proposals, some of which have already been proposed by the Chairman in legislation he has sponsored. I would emphasize one provision to take away a chilling effect on filing of disciplinary actions by assessing attorneys fees against OSC if we lose the case.

OSC is doing a good job for Federal employees and the merit system and should be authorized. Now, I welcome any questions you may have. Thank you.

Senator AKAKA. Thank you very much for your testimony, Mr. Bloch.

I have a series of questions about the issue of discrimination related to sexual orientation that I would like to discuss with you to gain clarity on the scope of protection. You have taken the position that Section 2302 does not make it illegal for the Federal Government to deny an applicant a job solely on the basis of his sexual orientation. Is that correct?

Mr. BLOCH. Thank you, Senator. As you may recall from my 2005 testimony before this Subcommittee, I reflected to the Subcommittee that we stand firm on the proposition that we do not believe it is appropriate to discriminate against Federal employees for any reason. I don't believe in it. I have so stated many times throughout my tenure. Sometimes it is printed, sometimes it isn't. And I also explained that we do not have any experience or any knowledge of any experience of such discrimination or of failing to provide all of the remedies that the law provides to Federal executive employees to give them full due process, full consideration, and I have so instructed my staff many times.

I also reflected to the Committee the 12 PPPs that we have in Title 5 U.S.C. 2302(b) and they are not exhaustive of potential rights that people may have, but we are limited, of course, in what we can do to bring a corrective action or a disciplinary action to debar a Federal manager based on the language of the statute as well as the case law that MSPB has used to interpret the statute.

And so when I did the legal review that I explained, we looked to see what the basis for the extension of our statute was by my predecessor. We could not find any reason that was given. We then looked to the language of the statute, which doesn't mention sexual orientation. Then we looked to the case law in the MSPB and we found that it had been rejected by the MSPB in 1998 in a case titled *Morales v. Department of Justice.* So faced with that, had I then said, well, I don't care what the MSPB says, I don't care what the statute says, I am going to extend protections for a class of people, a special class, and provide them a specific protection that may not be in the statute that has come before the Senate and has been rejected specifically.

There was an Executive Order that makes it clear in the Federal Government that agencies are not to discriminate on that basis and I fully support that and that is true of my agency as well as other agencies. But the question for me as a Federal enforcer of laws is do I have the statutory power to enforce a statute and debar Federal employees based on status, and the status protections that we have, which everyone is familiar with, the general ones of Title 7 which are race, color, creed, religion, and so on, and sex and a number of other categories, disability and so on, that these are con-

tained in Section (b)(1) of our statute. Sexual orientation is not contained there.

We do have an anti-discrimination provision in Section (b)(10) which we do enforce and that does subsume into itself some cases that people might colloquially describe as sexual orientation discrimination cases, but the language of the statute and the way in which we enforce it, as I have explained in the policy that I put out in April 2004, states that one may not discriminate against an employee based upon private conduct or adverse action that the employee may take.

Section (b)(10) basically says, no discrimination based on conduct that occurs outside the workplace, as long as it doesn't adversely affect that employee and their performance or the performance of other employees, and that is something we have enforced. That is something we go after aggressively when we have the evidence and the basis upon which to do that.

Senator AKAKA. Mr. Bloch, if a manager signs a written statement that he or she did not hire an applicant because the applicant is gay, would the manager be admitting to discrimination based on sexual orientation or discrimination based on sexual conduct?

Mr. BLOCH. Thank you, Senator. Well, each case obviously would depend on the facts of each case. What we do and what we would do if someone submitted a claim such as that to us is they would fill out a Form 11. They would explain what they had done or what had happened to them and we would then engage in a dialogue with them and find out what the facts of the case were.

So if the facts were to reveal that the manager was taking into account sexual conduct or, to make up facts here, if that is all right, such as someone had an affair with somebody or somebody was seeing and holding hands with somebody or whatever it might be, this clearly would fall within the protections of our statute and so we would just simply go down the line with the employee, asking questions and asking them to comb their memory for any reasons or discussions or what have you that would be able to either present evidence that would fit within the statute or not.

Senator AKAKA. Please identify the facts that OSC would have to investigate to determine which of the two forms of discrimination has occurred, discrimination based on sexual orientation or discrimination based on homosexual conduct.

Mr. BLOCH. As I said, Senator, I think that we would have to ask the employee about that, and if it got further than that, we could ask the manager or other people who might have witnessed what had happened or why the person was not hired or promoted or whatever the case may be, and we would look for evidence by which we could prove at the Board that there was discrimination under the statute and seek corrective action. So the various kinds of conduct, it could vary from anything from what I described and being seen somewhere, being seen with somebody, anything of that nature.

I have also in my policy explained that sometimes you don't have the luxury as a lawyer or as an enforcer of law when you are trying to prove a case to have direct evidence. Sometimes you have to rely on what we call circumstantial evidence or implied or imputed conduct, and so there would be cases where you wouldn't have direct

witnessing of anything, but it might be related by someone, and that would be sufficient.

Senator AKAKA. In this context, aren't sexual orientation and sexual conduct essentially the same thing? In other words, when a manager does not hire an applicant because of his or her sexual orientation, doesn't it follow that the manager is not hiring the applicant because of the kind of sexual or other conduct he or she believes that the employee engages in as a gay person?

Mr. BLOCH. Well, I certainly can see the point that a manager might be basing their decision on conduct, and if you ask them the question, well, what do you mean when you say, "I didn't hire that person because they were gay," or they didn't hire them because they were homosexual, what do you mean by that, and if you peel back the layers very far, you may indeed find conduct. But it may also not be that.

One thing I can't do as a law enforcer is get into social policy and determining the philosophy behind the notion of conduct versus orientation. I am not sure what the answer is and I think a lot of people have tried to grapple with that. I don't make policy. I think that is for the Congress to do and you do a good job of that. But what I do is I simply look at the statute and the case law. If the case law says, you can't go there, I don't go there. I don't go asking philosophic questions. I mean, I do like philosophy, but that is not my job.

Senator AKAKA. OSC's fiscal year 2005 annual report, Mr. Bloch, shows that the number of favorable prohibited personnel practice—or PPP—actions decreased from 126 in fiscal year 2002 to 45 in 2005. According to the report, fiscal year 2005 was the year OSC's Investigation and Prosecution Division, which processes PPP cases, reduced its backlog, that many of the backlogged cases had been in the IPD for 2 or more years, and the majority of these older cases were not strong cases. The report also said that fiscal year 2006 would be the first year the IPD would be able to focus primarily on case received during fiscal year 2006 and expected a higher number of favorable actions.

However, the 2006 annual report shows that only 52 favorable PPP actions. Can you explain why there wasn't a greater improvement in PPP favorable actions?

Mr. BLOCH. Thank you, Senator. There was an improvement, and that much we do know. The numbers were better. They were decreasing since 2002 and 2003, before I took office. They were down to 115, and then in 2004 to 80. And I have talked about this with my senior staff and asked, what is going on here? What is the problem, or is there a problem, and the answer that I have gotten back—obviously, I don't work all these cases, the career staff does—the answer that I have gotten back is two-fold.

One is you can't determine how many favorable actions you have at a given snapshot of time. If maybe you went back to the inception of OSC, you would see a different pattern back to 1979. But statistically, you can't really tell what is going on there. But they have suggested some possible explanations if, indeed, there is any significance statistically to that drop in numbers.

One is that the CEU, or this Complaints Examining Unit, has reported to superiors as well as to me that the quality of cases that

they were seeing in the last 2 years had decreased or dropped off, and I asked, well, what is going on? What do you think is the issue? And they said they don't know, but just the quality was just not as good. And we have struggled and scratched our head to figure out, well, what can we do?

One thing we have implemented is simpler filing procedures on the Internet. We have tried to encourage the CEU examiners to speak with the complainants and find the good that is within their case. It might not be 100 percent good, but maybe there is a PPP in there. I have even sat in on the sort of round-robin sessions of the CEU where they brainstorm and try to figure out, where is the PPP? I have kidded with them that it is kind of like "Where is Waldo?" Where is the hidden PPP?

Because sometimes when a Federal executive employee comes to you, they have a problem and it is a bundle of things. They are not really sure what to call it. They explain the problem, but they don't know what slot to necessarily fit it into. And so what we try to do is try to find a PPP that may not be obvious from the facts, and I think the CEU is to be credited for being very good at that, as well as the Investigation and Prosecution Division. We have expert attorneys and investigators who are always thinking creatively.

One of the things that I emphasized when I arrived at OSC was we do not exist to get rid of cases. We exist to find the good that is there. We exist to improve the merit system. We need to make better case law. We need to be aggressive. We need to file more before MSPB, when appropriate. So we are really trying to locate those good cases, and it is quite earnest and we have the staff to do it. It is just they report that the quality of the PPPs may not be quite as good.

So then there is one final possible speculative reason, is there has been a slight shift in philosophy within the directorate of the IPD/CEU. New management is in place that believes it is not appropriate to go for corrective action if the law does not permit it. In other words, to essentially go to an agency and say, hey, give us corrective action and we won't burden you with 2 years of bothersome investigation and possible prosecution for an MSPB, a kind of implied threat. This was something that was fairly common before, according to what has been reported to me.

I did not tell anyone to stop that per se. I have said nothing really particularly. I have just been informed that the IPD does not permit that anymore, and so there may be a shift of philosophy to we are going after stronger, bigger things and more litigation when possible rather than perhaps something that might be a little more insubstantial and not based on law and authority to do so, and those are the only possible reasons I can explain, Senator.

I wish those numbers were tripled. Anyone in the agency will tell you that I love good numbers. You can see from those charts. And I love to get corrective action for people and I love to go after cases. It is just in my blood, and everybody knows that and I preach that constantly. So we are really trying to find those.

We have found some very positive cases in the USERRA area which we consider another PPP. I mean, you have got a service member who is a Federal executive employee and they are not being given their job back, and so we consider that essentially an

unwritten PPP as part of USERRA and we are getting a lot of corrective actions there. If you add that number in here, it is certainly up to about 100. So we are really proud of the work we are doing for the Federal employees. It is just we can't make up the evidence. We can't make the cases good when they come in. We have to follow the law.

Senator AKAKA. Thank you. Thank you very much, Mr. Bloch, for your responses. Now I would like to ask Senator Voinovich for his questions.

Senator VOINOVICH. How many cases have you had where people complained that they weren't hired because of sexual orientation?

Mr. BLOCH. Well, the CEU, Complaints Examining Unit, doesn't track that specifically because it is not mentioned in our statute. But in asking them that question, there are approximately 2 percent of the Section (b)(10) cases that come in that may be fairly described as having to do with sexual conduct or sexual orientation.

That is the statute concerning nondiscrimination on the basis of conduct that doesn't adversely affect the job.

Senator VOINOVICH. So it is 2 percent, you think, about——

Mr. BLOCH. Two percent of the 100—of those PPPs, which would be about two. I would have said if you asked me last year or the year before, I would have said a handful of about five percent, maybe ten percent in certain years. And so it is really a very small percentage.

Senator VOINOVICH. OK. This is a question for both of you. Your agencies share responsibility for enforcing laws protecting veterans' rights in the Federal workplace, is that right?

Mr. MCPHIE. That is correct, sir.

Mr. BLOCH. Yes, sir.

Senator VOINOVICH. And as a practical matter, your respective caseloads are likely to increase given the returning veterans from Iraq and Afghanistan?

Mr. MCPHIE. Yes, sir.

Senator VOINOVICH. Have you seen that kind of an increase at all yet?

Mr. MCPHIE. I tell you, we have had more veterans types of cases even before the Iraq and Afghanistan issues. It was when the Court of Appeals changed existing precedent regarding the way the government would allocate or track military leave. The government was doing it one way for many years and the Circuit Court said that was wrong. We have seen a whole lot of those cases. I believe the case is *McCormick.* I could be wrong. *Butterbaugh.*

Senator VOINOVICH. *Butterbaugh*?

Mr. MCPHIE. Yes, the *Butterbaugh* lines of cases.

Senator VOINOVICH. When was that precedent——

Mr. MCPHIE. In 2003.

Senator VOINOVICH. OK. So after 2003, you have had more cases brought because of the court case?

Mr. MCPHIE. Because of the court case. We anticipate, and we say it in our comments that we have submitted, that the returning veterans could indeed push up our caseload.

Senator VOINOVICH. OK. So the question I have, then, is what are your respective agencies doing to prepare, in terms of the peo-

ple that you need to get the job done, with the growing expectations that you are going to have?

Mr. MCPHIE. If I may take the first shot, as you can tell, we are becoming more productive and more efficient. We have been forced to. We have a really good cadre of administrative judges throughout the regions who currently are averaging 89 days to do a case from start to finish. They are the persons that would be getting these cases. I believe some of them can come directly to the Board. I don't want to get into a discussion of jurisdiction.

We are familiar with the statute. We have been issuing more opinions under USERRA and VEOAA, the statutes that you are referring to. My Chief Counsel on my staff is a person who has developed a particular expertise in that area and the AJs that work for the Board are up to snuff on that particular area of the law, and I feel very certain that they are up to issuing decisions at the same rate at which we are doing it now.

Now, mind you, if we get a whole bunch of cases at the same time, I may be coming to a committee of Congress saying, help. But absent that, we will triage it. We have had those kind of issues before——

Senator VOINOVICH. In other words, you are working harder and smarter and doing more with less.

Mr. MCPHIE. Yes. We have a legal conference coming up real soon. USERRA and VEOAA are front and center at that conference.

Senator VOINOVICH. How about you, Mr. Bloch?

Mr. BLOCH. Thank you, Senator. USERRA is a growth area for us, has been since I started in the job. We went looking for it, if you will, and with the demonstration project we have established a USERRA Unit with specialized individuals, some of whom are reservists, to attack the growing number of veterans' types of claims due to the historic mobilization of troops and demobilization that constantly is occurring and a greater awareness about it because of news and the experience of some veterans who have been discriminated against, and it happens, unfortunately, more often than we would like to see in the Federal Government.

So we have really ramped up. We have this wonderful USERRA Unit headed by a GS–15 who is an expert in USERRA, does a lot of outreach, does a lot of litigation. I really wanted to send a message that this is an important area that I think had been——

Senator VOINOVICH. What I understand is that you are being proactive and getting the word out to the various agencies saying that they have got veterans coming back. You want to remind them of this, so that you can nip it in the bud before it happens.

Mr. BLOCH. That is correct, Senator, and we are finding a great deal of cooperation in that area, and I do some outreach myself. I just spoke to the Reserve Officers Association here on the Hill a couple of weeks back. So it is something we do——

Senator VOINOVICH. This is important, I think you ought to redouble your efforts and make sure these agencies understand what rights veterans have and make sure that we don't have a big front-page article in the *Washington Post* or the *New York Times* saying that these people coming back are not being treated the way they ought to be treated, OK?

Mr. BLOCH. Yes, sir.

Senator VOINOVICH. OK. The other thing I would like to do is, Mr. McPhie and Mr. Bloch, Congress continues to debate the personnel system for the TSAs. My colleagues have expressed concern that TSOs do not have appeal rights to MSPB and that the OSC does not have full statutory authority to investigate complaints. Mr. Bloch, OSC has a Memorandum of Understanding with TSA receiving whistleblower complaints, and how would OSC's authority be enhanced if TSA was covered by the same statute as other Federal agencies?

And Mr. McPhie, do you believe TSOs are lacking a fair appeal process without OSC appeal rights?

Mr. MCPHIE. Senator, since I am the chairman of an adjudicatory agency, I try not to engage in giving opinions as to what I believe the law should be—whether it is a good law, a bad law, and that type of thing. My job really is to interpret the law and to enforce the law as the law is written.

I can tell you, I have been a lawyer in employment law for quite a while. I believe that third-party appeal systems work. I have seen them work. The Board is a third-party appeal system. By that, I mean the parties to the dispute don't decide the dispute. That has been my general observation over time, but I don't want to comment on regulations that would emerge in some form of which I don't know and then have to sit in judgment on cases.

Senator VOINOVICH. Could you give me the number of complaints that have come before MSPB from TSA?

Mr. MCPHIE. No. We don't have jurisdiction at this point in time over TSA. The new statute—the statutes that are currently up here, the whistleblower statutes, would, in fact, give those folks MSPB appeal rights.

Senator VOINOVICH. OK.

Mr. MCPHIE. And if that occurs, yes, we have them. But at this point in time, we don't.

Senator VOINOVICH. So you don't get them. Mr. Bloch, you have got a Memorandum of Understanding. How is that working? How many whistleblower complaints have you gotten out of TSA?

Mr. BLOCH. We have had—when I first arrived, we had about 45 in the pipeline, and overnight they kind of dried up because a decision came out that said there was no jurisdiction. Now, I have great respect for Mr. McPhie and so I don't want to tread on their ground, but we did advocate that we felt that the Homeland Security Act did cover TSA screeners owing to the provision, I think it was Section 803, that said, notwithstanding anything else in the Act, these employees will have (b)(8), (b)(9) rights, which are whistleblower reprisal rights and if they filed an appeal, rights if they were retaliated against for filing an appeal.

So we operated from the premise that that actually was already there in the law, but it was a complex, interwoven——

Senator VOINOVICH. Do you have a Memorandum of Understanding with TSA regarding whistleblower complaints?

Mr. BLOCH. Yes, we do, and we have had since 2003. That has worked fairly well, but we don't have powers to demand corrective action. We can't send a corrective action report. We can simply say, here is what we found out. It is up to you to do what you want

to do. When you lack the teeth that comes with the power to come before the Board to seek a stay, to seek corrective action, to seek disciplinary action, our experience has been the results aren't going to be quite as good. However, I will say that we have found in favor of whistleblowers at the TSA and those matters have been taken up by TSA, and to the best of my knowledge, some corrective action has occurred.

I am assured that it is true, yes. Some corrective action has occurred on behalf of the employees due to our MOU. But again, I am going to defer to my colleague from the MSPB as to what the state of the law is there.

Senator VOINOVICH. Well, I guess the bottom line is that what both of you would like to see these rights granted to TSO's. If this ends up going to conference, I would like to see these rights provided to the individuals. Do you think that would provide added benefits to the TSO's, if your jurisdiction was clear?

Mr. MCPHIE. Yes, sir.

Mr. BLOCH. Absolutely.

Senator VOINOVICH. OK. Senator Akaka, would you allow me a few more minutes, or do you want to take over?

Senator AKAKA. You may.

Senator VOINOVICH. Mr. McPhie, the Board is seeking an exemption from the requirements under the Sunshine Act when it exercises its adjudicatory function. The Sunshine Act already allows adjudicatory meetings to be closed. What makes the Board's operational procedures different from similar appellate agencies, such as the Equal Employment Opportunity Commission?

Mr. MCPHIE. Well, I can't speak for other agencies, but I can tell you how the Board operates in its case deliberations. Here is what happens. I have a chief counsel. He understands my position in a case, so he goes off and he talks to another Board member's chief counsel and they sort of talk about different positions. And then a third chief counsel gets involved, and then these things are communicated back to Board members. Terribly cumbersome, and it doesn't really——

Senator VOINOVICH. The purpose of doing that is to avoid the Sunshine Act?

Mr. MCPHIE. Well, the purpose of doing that is if you can't decide these cases in the flow of business. I mean, we have a lot of cases and time pressures in getting cases and getting them out right the first time. I told you 93 percent of our cases have been affirmed by the Court of Appeals, so we do a good job on that. And my Board members are here. They know that we all work very hard. We try to get positions clarified. We try to meet to reach consensus. And we really like it when we are 3–0 opinions. It is clear. It sends the right message——

Senator VOINOVICH. How would this help?

Mr. MCPHIE. It would permit, I believe, Board members to respond to each other the way judges do all of the time. You have a really robust deliberative discussion and you cut through a lot of the bureaucracy and you end up with a well-informed decision perhaps in a shorter time frame. And you have to understand also, whatever the Board's decision, it is published. It is not like this is some secret society that never sees the light of day. It is published,

and people take appeals from the Board decisions, and if the Board is wrong, the Court of Appeals will tell us we are wrong and then we conform.

Senator VOINOVICH. OK, the fact is that you are under the Sunshine Law, and if you all got together in a room and started talking about a case, then the Sunshine Law would apply?

Mr. MCPHIE. Would apply, and the Sunshine Law has requirements. You have to give notice. You have to give time and place, agenda, and you have to invite the public. We have no—the issue for us is not transparency.

Senator VOINOVICH. Yes. I just thought the Sunshine Act, according to what I have been told from my staff, already allows that adjudicatory meetings be closed, and that you can do that right now.

Mr. MCPHIE. It gives some relief, but not the kind of relief that would facilitate a free exchange. We haven't had a Sunshine Act meeting since 2001 and the reason for that really is you have a meeting, you start off talking about something. When has a meeting matriculated into a discussion of cases? We have to be real careful about that.

We may be at lunch. We may be in a conference someplace and we have lunch together. We have to always remind ourselves that even if the case has been in the office for a long time and we all want to get that case out, we dare not talk about it. And we don't. We reserve it for when we get back to the office and we explain to our surrogates what our positions are and they sort of are the front persons to get consensus, and then it is shown to us and then we sign off if we have reached consensus.

I am not suggesting the MSPB is going to stop functioning if we don't get this exemption. All I am suggesting to you is, look, we are quasi-judicial. The Court of Appeals expects us to act like they do. And I can tell you, their practice is right after an argument is made, they sit down and immerse themselves and get the sense of whether this case is going to be a difficult one to decide or whether it is going to be an easy one.

Senator VOINOVICH. And you are saying you can't do that because of the law?

Mr. MCPHIE. We can't do that.

Senator VOINOVICH. So you think that the Sunshine Act does apply to adjudicatory meetings being closed and that is why you want to change it?

Mr. MCPHIE. Well, you can do it if you—you can do it under (b)(10), but you still have to do everything that the Sunshine Act requires of you. You have got to give the notice. You have got to have an agenda, I mean, say what the agenda is. And you can close that portion of the meeting and engage in a discussion. But suppose that discussion of one case leads to, well, what do we do with cases like it on which we have——

Senator VOINOVICH. OK, and you are saying that because the requirement of the Sunshine Law, you have to lay out what you will be discussing, even though it is not going to be open to the public, if you move into something, another area—you don't have the same kind of freedom of discussion that you might have with a court where maybe they are talking about one case and they get into another case.

Mr. MCPHIE. Another case.

Senator VOINOVICH. OK, I understand. Thank you.

Senator AKAKA. Thank you. We will move into a second round here of questions.

Mr. McPhie, you noted that six meetings covered by the Sunshine Act were held in the year 2001 and that some of those meetings discussed particular cases. Were those cases closed or open to the public, and if they were closed, how did MSPB avoid crossing the line between policy discussions and case deliberations?

Mr. MCPHIE. Senator, I wasn't there. I don't know. I came to the Board in 2003. In 2001, I was still in Richmond, Virginia. So I don't know. I could only assume that my predecessors in office followed the law, but I just don't know.

Senator AKAKA. Mr. McPhie, the Board's legislative proposal would permit the MSPB to grant motions for summary judgment or rule on a matter when there are no disputes of the facts in the case. However, I am concerned with the impact this change could have on employees who represent themselves before the Board. How would the Board handle summary judgment cases for employees who do not have attorneys, and would the Board assist or give guidance to those employees?

Mr. MCPHIE. Senator, the Board has a long history of deciding cases brought by pro se individuals. We understand it is a "David and Goliath" story a lot of times when these cases are brought. Summary judgment is a tool, and that is all it is. It comes into play only when there are no disputed facts, no material facts in dispute, only when—so it is not appropriate for all cases. If, in fact, an issue will turn on, say, credibility of witnesses, you can't, without having the person in front of you, you cannot render a judgment on—decide a case based on summary judgment.

But let me say this. I have used that tool myself. In all my years of practice, I have seen it used. I think in this country, we have—I know the Supreme Court of the United States has frequently laid out the rules for summary judgment. One of the things a summary judgment does and does quite well, it focuses a case.

A lot of times, people come to the Board, they don't know what their case is. They have got a bunch of facts and they throw the facts up. What summary judgment can do for people is really focus the case and help not just the party bringing the case recognize when they have a strong or a weak case, but help the agency recognize when it has a strong or weak case. And if you can get people to focus and be realistic with what is going to happen based on the quality of their case, you may get, for example, an agency saying, this is not one we want to fight. So you can get a settlement. Conversely, an employee can recognize weaknesses in his or her case and decide, this is not one I want to fight. I mean, it cuts both ways.

The thing that I believe is important to recognize, there are checks and balances. If the Board doesn't follow the rules, I can assure you the Federal Circuit is going to reverse it and send it right back to the Board.

I mean, some of it spreads fear. I have heard that over time. But I have seen summary judgment work and work quite well. It is a tool, and we operate in a time when the Board has been forced to

decide cases under time constraints. In the DHS–DOD bills, that time is 90 days per case. In the proposed whistleblower legislation, I believe on the House side, that time is 180 days. We are in a new environment. We can't hold onto cases for months and years and so on. It is not right, in any event. The person deserves an answer. It is a tool to get to that point efficiently, with a full-blown explanation.

Senator AKAKA. Mr. McPhie, talking about summary judgment, the Board's justification of this proposal noted that, if granted, the summary judgment authority would rarely be used. So in how many cases in the past year would summary judgment have been helpful?

Mr. MCPHIE. I don't know because our Court of Appeals said we don't have that authority. That is why we have to ask for it. I am reminded that the new statutes under the DOJ and DOD personnel changes clearly give the Board summary judgment authority. Now, one of the things that is going to be somewhat incongruous is to have a system where you have summary judgment for some cases but not for other cases. The development of jurisprudence that governs the workplace in an orderly and effective manner ought to be as uniform as we can make it with respect to the rules around bringing these cases to conclusion.

But I couldn't tell you. I just couldn't tell you which cases. I have read many cases where you go on and on and sometimes in the end, the employee loses. For goodness sake, if you told an employee up front, maybe they wouldn't have spent the money. Maybe they won't have hired the lawyer. Maybe they won't have to travel and spent money in depositions and discovery and that kind of thing. It is a tool that can work, I believe, if handled well, to bring some sense of order in those cases that it applies.

Senator AKAKA. Thank you, Mr. McPhie.

Let me ask the next question to Special Counsel Bloch. Under a demonstration project, OSC shares the responsibility with the Department of Labor to receive and investigate claims from Federal service members under the Uniformed Services Employment and Reemployment Rights Act. As Chairman of the Senate Veterans Committee and the Federal Workforce Subcommittee, I am very interested in how the demonstration project is working. How has the addition of the USERRA Unit affected OSC's ability to adequately staff and process cases in other OSC divisions and units?

Mr. BLOCH. Thank you, Senator. The demonstration project has given us half the cases that normally go to the Department of Labor Veterans' Employment and Training Service Office, which amounts to about 200 cases a year extra. Now, if you look at our overall picture, we get about 2,000 PPPs a year. We get about 250 to 300 Hatch Act cases and about 2,000 requests for advisory opinions for Hatch Act in an off year, that is to say, a non-Presidential election year. In a Presidential election year, we went up in the last one to 4,000 advisory opinions. In the Whistleblower Disclosure Unit, we have approximately 500 claims, disclosures, filed with us per year.

So the 200 that have been filed with USERRA in addition to what we normally would get from the Veterans' Employment and Training Service that works its way through their investigatory

process then ends up at our door to prosecute potentially, it has not in any way really affected our ability to process claims, to deliver justice in a timely way, and I think the charts have shown that, that you would expect in 2005 to have seen an increase in time of cases spent in divisions, but we haven't seen that. I think we are doing—people are doing an excellent job, as Senator Voinovich put it, doing more with less.

What we did, Senator, and the way I would explain how could we do that and not have the USERRA project affect our overall efficiency with the other areas without additional FTEs and additional budget is that we became more efficient through the way in which we looked at our processes and procedures and reorganized the agency, so that before when I arrived, there were many procedures in place that caused memos to be written that were three, four times as long as they needed to be and that they were reviewed by three or four people and it would get bounced back and forth and sit on desks for a month at a time.

So we looked at those kinds of procedures and said, what is the net benefit to the merit system? What is the net benefit to the Federal employee? We did away with anything that wasn't benefitting the process, wasn't benefitting justice, wasn't benefitting the Federal merit system or the employee, and we stripped it down to what it takes to deliver justice to an employee without a lot of internal bureaucratic frills, and without sacrificing any quality, we really did remove those impediments and those bottlenecks and those excess procedures that didn't really go to benefit the system.

By doing that, we really freed up the ability of employees to look at these USERRA claims that had been taking a back burner, and I don't think we want our veterans, whether it is a USERRA claim or a veterans' preference claim, to take any back seat to anybody. They have the same rights that other Federal employees have, and indeed, when you go off to fight for your country, you would hope that your Federal Government agencies would welcome you back rather than turn you away. So this is the kind of philosophy that we have developed.

And I would add that we have also seen an increase in the number of PPPs that accompany USERRA claims. We call these mixed cases and they also come to us in the demonstration project, when a PPP accompanies a USERRA claim. And so, really, there is a complementarity between USERRA and PPP and we often have a great deal of interaction between those people that do PPPs and those who do USERRA and it is very complementary to our entire operation, I think, and we are very happy with the demonstration project and certainly would like to see it made permanent for the benefit of the veterans who are getting more timely and a greater percentage of corrective action, we believe.

Senator AKAKA. Thank you for your response, Senator Voinovich.

Senator VOINOVICH. Thank you. In 2004, GAO recommended that the OSC present a strategy to Congress to allow more consistent processing of cases within the existing statutory time limits. The expectation was that the strategy would provide details on what, if any, staffing, organizational, or legislative changes could help reduce the backlog.

Has OSC ever developed and submitted to Congress the comprehensive strategy recommended by GAO. If GAO were to conduct a follow-up review, do you think the recommendations would be different?

Mr. BLOCH. Thank you, Senator. I have retired from prognosticating on what would happen with GAO, but——

Senator VOINOVICH. But have you ever submitted a comprehensive strategy recommended by GAO?

Mr. BLOCH. Yes, we have. In 2005, I believe it was prior to the hearing in May 2005 before your Subcommittee, and we submitted the response. It was a, I am guessing, 25, 30-page response to GAO's initial investigation that came out very shortly after I arrived, maybe 2 months after I arrived. And we welcomed that report and we welcomed the opportunity to report on what we had done. If I recall correctly, Senator, we submitted that to the Subcommittee as part of the record of that hearing, our response to GAO, and we also had supplied a copy of our reorganization memorandum, which was about 15 pages long, and it also outlined the methodologies that we used to put in place, standard operating procedures to make it essentially next to impossible for these backlogs to occur again.

And so we believe that problem is a thing of the past and we are very proud of the work of the career staff to take personal responsibility for the caseload and for the timeliness of decisions and weigh that in the balance to make sure quality is also assured for all Federal applicants.

Senator VOINOVICH. At your last hearing we discussed the creation of the Detroit Field Office. At the time, affected employees felt that you were moving them to Detroit because of a personality conflict. How has the creation of the Detroit Field Office played out?

Mr. BLOCH. Thank you, Senator. I was just there, actually, 2 weeks ago.

Senator VOINOVICH. How many of the people that were initially assigned left OSC?

Mr. BLOCH. I think we supplied the numbers to you there. We had one physically actually go there and then decided he wanted to live where his fiance was in Ohio, and so moved from there. We had two or three others plan to go, but then before they could actually make the transition, they got other jobs in town. And then I think we had two or three, maybe four—I honestly can't give you the exact numbers—who just decided they didn't want to go and told us so up front and got other Federal jobs.

Senator VOINOVICH. So basically, most of them that were assigned to Detroit did not transfer?

Mr. BLOCH. Most did not choose to go to Detroit.

Senator VOINOVICH. Did anyone go?

Mr. BLOCH. Yes, two, one that I described who went and was actually working there and then decided to go to Ohio, from your wonderful State, and then another who is the chief of the office, and he is there still and doing a wonderful job. I was really pleased with the progress of the office. It is functioning very well. The people there are very happy. Morale is high. They are a real contributor to the overall team.

So the overall reasoning and rationale for the reorganization and how I had hoped things would work out has come true. In other words, nothing has worked out badly. It has worked out extremely well. All the field offices are very strong functioning parts of the OSC. They have independence, in a sense. They are very competitive. They have teamwork. So it is working out very well. And I had a number of employees tell me in Detroit how happy they were to have their jobs and how glad they were that we established an office there. I was just delighted by the morale and the level of achievement that we are seeing there, as well as with our other field offices.

Senator VOINOVICH. But these were new people that you brought on?

Mr. BLOCH. No, the chief of the office was from Washington.

Senator VOINOVICH. Yes, but the other people were mostly from the Detroit area?

Mr. BLOCH. Well, one was in the honors program at the DOJ here in Washington, DC and decided they wanted to move back to where they were from, which was Detroit, and they joined us in Washington, DC and then went to Detroit.

Senator VOINOVICH. How many are there now?

Mr. BLOCH. Six, I believe, maybe seven.

Senator VOINOVICH. How many regional offices do you have?

Mr. BLOCH. We have four field offices. We call Washington, DC, a field office. The IPD is the Washington Field Office. And then we have three outlying field offices, Detroit, Dallas, and we call San Francisco a field office but it is actually in Oakland. And so you can see we have four corners of the country, if you will, covered, and that has helped in terms of investigations and travel and those sorts of things.

Senator VOINOVICH. All the complaints come in to the Washington office and then you farm them out to the regional offices based on the geography, is that it?

Mr. BLOCH. Well, that is one consideration. Caseload might be another. Expertise might be another. But yes, generally.

Senator VOINOVICH. Senator Akaka, I have no more questions.

Senator AKAKA. Thank you very much, Senator Voinovich.

Special Counsel Bloch, the OSC annual reports for fiscal years 2003 through 2006 failed to report the survey results related to the Disclosure Unit. As you know, Title 5 requires the OSC to conduct an annual survey of all individuals who contact OSC for assistance. Can you tell me why OSC is no longer reporting survey results related to the Disclosure Unit?

Mr. BLOCH. Thank you, Senator. The legal counsel and Policy Division of my agency looked at that question and interpreted the statute and informed me of their interpretation that we need to put out a survey to those who are seeking relief, actual relief for their particular problem and that can get corrective action of their particular employment situation, discipline, retaliation, whatever it might be, under USERRA and the Hatch Act, as well. What did you do to somebody? Did you take discipline? Did you correct something?

With regard to the Disclosure Unit, we don't have investigative powers. We have only the power to review under the statute and

then to declare to the agency we have found a substantial likelihood that the condition, whether it be a health, safety, gross mismanagement, an illegality, or abuse of authority, whatever it might be in the area of whistleblower disclosure, that we find a substantial likelihood that is true based upon simply talking to the whistleblower and looking at whatever materials that person may send us. Then we can tell the agency under Title 5 U.S.C. 1213 that they are required to do an investigation, and they usually will send it to their Inspector General.

We don't have any power over the results. We can't tell them what to do with their agency or how to correct the situation or not correct it, what to do to an employee to discipline them, and so on, and so consequently, as I recall, and we are going back 3 years now, the legal counsel and Policy Division did a legal analysis of the obligation there in order to streamline and make it more timely to get the survey results, and then we also put them into an electronic form so we could get them out by e-mail to people and so we have been able to get them more timely.

That is the explanation that I would give you. I can't, as I sit here, give you all of the legal ins and outs because I don't remember them, but we could certainly supply that to your staff if you would wish.

Senator AKAKA. I hope you will start including summary survey data related to the Disclosure Unit.

Mr. Bloch, you mentioned in your testimony the case involving Leroy Smith, who disclosed environmental hazards at Federal prisons, and noted that he was awarded the Public Servant Award last year. I was troubled to find out, however, that OSC dismissed Mr. Smith's retaliation complaint and he had to hire his own lawyer to address the agency's retaliation and he has since said that the problems he identified as part of the whistleblower's complaint still have not been resolved. So I am deeply disturbed to learn that the Federal employee honored by OSC as being a whistleblower received so little help. What is your response to this allegation?

Mr. BLOCH. Thank you, Senator. Mr. Smith did a very important and brave thing. Conditions have changed because of his disclosure and we honor him and continue to honor him. I have so spoken in recent news articles in the last few months. There are other Federal prisons that are still being investigated and cleaned up. I think what he did is a very important thing, and it is deplorable when any individual is retaliated against and we go after that with a great deal of aggressiveness when we have jurisdiction.

Now, in the case of Mr. Smith, the allegations you are talking about are reckless and slanderous. My career staff did not throw out his claim, and I will supply to your staff the proof of what happened. I will tell you what happened. Mr. Smith got an attorney in California. The attorney got him full relief, got him a transfer that he asked for, and then entered into a settlement agreement which required him in the settlement agreement that he and his lawyer signed to have OSC dismiss its retaliation complaint.

We then received that request along with the settlement agreement. We will supply you with the documents. We have them. We will fax them to your office today, if you like. And then we sent him a letter that said, "Dear Mr. Smith, Because you have asked us to

withdraw your complaint and because your settlement agreement requires that, we are now dismissing or withdrawing your complaint and it is closed." And that is the beginning, middle, and end of it, Senator.

Senator AKAKA. Well, as I said, I was disturbed to learn about that. Please relay copies of those letters to my office.

Mr. McPhie, although DHS is implementing its new appeals system, the U.S. District Court for Washington, DC ruled in 2005 that the litigation standard to be applied by the Board is unfair to employees. While the Court of Appeals reversed this decision on the grounds that the matter was not properly before the court at that time, can you tell me how MSPB will ensure that DHS employees receive a fair hearing?

Mr. MCPHIE. Senator, we don't have them yet. It hasn't been implemented. We don't have the first case yet. I know what you are referring to. It says the matter was premature because the Board hadn't passed on the matter, and the mitigation language is different language from what the Board has utilized in the past. We use the Douglas standard. The DHS mitigation standard is brand new.

We don't have a case yet. I am sure my fellow Board members would take those cases very seriously and try to come up with some sort of standard, some sort of rule, some sort of interpretive guideline. What that interpretation may be, I just can't speculate. It is going to have to be in the context of a case and we don't have the first case yet.

Senator AKAKA. Mr. McPhie, Title 5 currently provides MSPB with the authority to delegate the performance of any of its administrative functions to any employee of the Board. Given this authority, why is the Board seeking a statutory change for succession purposes instead of simply delegating certain authorities to address possible vacancies?

Mr. MCPHIE. I think we are talking about two different things. The legal advice I have been provided by not only the current general counsel, but the one before the current general counsel, who worked many years at the Board, we were confronted in the Board with a most unusual and unprecedented circumstance. My colleague and I, Member Sapin and I, were not confirmed. There was one Board member confirmed and she was at the end of a holdover term. We had to ask the question, what would happen in terms of succession, who is going to run the Board if there is no quorum, or there is no Board member? Now, we have staggered terms so theoretically it shouldn't happen. But it did.

So the general counsel might have been the one who began the conversation. We have got to come up with some kind of succession so if we are in that situation, we know, the public knows, and the Board's operation continues. What they tried to do was to recommend to me, and different people had a say in all of that, what in their view would be a plausible way for the Board to continue in the circumstance that I described. And that is the reason.

Now, I don't know that the Board has authority to delegate its functions, and I am told the Board does not have authorization to delegate anything to anybody with respect to running the agency.

Senator AKAKA. Thank you very much for your responses.

Let me ask my final question to Special Counsel Bloch. Once again, OSC's survey results showed dissatisfaction with OSC's handling of prohibited personnel practices. My question to you is, what steps has OSC taken to determine reasons behind those responses and address any identified problems associated with them?

Mr. BLOCH. Thank you, Senator. We would note that a very small percentage of those who are surveyed respond to our survey, and so if you look at the numbers, out of the small percentage of those surveyed who actually respond to the survey, the vast majority are those who did not get any relief. In other words, they were the people who did not have meritorious cases or there was no jurisdiction or they weren't a Federal executive employee, whatever it might have been.

And as a result of that, we can certainly understand people who don't get the relief they wish for or see justice a different way than the law sees it perhaps would be dissatisfied. I would be if I were them. But we can't really do much about that part of it.

The part that obviously does concern me are those who respond negatively and also would say they didn't feel that they were treated right or they didn't feel that the service provided was timely or courteous or professional, something of that nature. Now that, I take very seriously, and we have trained our people and retrained them about how to deal with Federal executive employees to help them even if we don't have jurisdiction.

In other words, we have employees that will call us and they are worried about their veterans' checks, their disability checks, or their Social Security disability checks. We don't handle that, but we don't turn them away, either. We have instructed our employees to help them out any way they can, give them the right number, give them the right direction, try to find out what their problem is. So that is something we are very keen about.

The other thing I would note is that while you can read these numbers any way you like, I suppose, one way to look at them is that looking at the 2006, for instance, there are 5 percent of PPP complainants who took the survey and received the result they desired. So 95 percent did not receive the result they desired. But an average of 37 percent were not dissatisfied with the service provided. And so even though they didn't get the result they wanted, they described their experience as not unsatisfactory or positive.

Now, I think for an enforcement agency where your life may be topsy-turvy, you are not getting treated well at work, there are difficulties and problems and friction, and you can come away from an experience where you don't get the results you want but you are still not dissatisfied with how you were treated, I think that is a good thing. So we have to try to mine some positives out of this and not simply look at the negativity here.

Frankly, one could, if one had the money, design a survey that would be a lot more adaptive to the positives as well as the negatives and give us some material and some ability to make changes that would actually improve the system, improve the customer service. But I don't think the survey as it now stands really is that helpful.

Senator AKAKA. Special Counsel Bloch, do you know if those who responded negatively were the ones whose cases you had jurisdiction over or not?

Mr. BLOCH. There is no way of telling from the survey.

Senator AKAKA. Well, I want to thank both of you so much for your responses. Thank you, Mr. McPhie.

Mr. MCPHIE. Thank you, Senator.

Senator AKAKA. Thank you, Special Counsel Bloch, for being here today.

Mr. BLOCH. Thank you.

Senator AKAKA. Because of my belief in the merit system and its principles, I want to work with you to make sure that MSPB and OSC are complying with these principles and are working to make sure other agencies are complying, as well. As this Subcommittee considers your agencies' reauthorization requests, be assured that this will be the standard by which your proposals will be measured.

The Federal Government must be free of retaliation for disclosing wrongdoing and discrimination, which is why I plan to introduce legislation to restore protections for employees who are discriminated against based on their sexual orientation. It does not make sense to me to protect employees from discrimination based on their conduct but not on their status, which is established by the very same protected conduct.

With that, again, I want to thank you so much and look forward to continuing to work with you.

The hearing record will be open for 1 week for additional statements or questions other Members may have.

The hearing is adjourned.

[Whereupon, at 4:12 p.m., the Subcommittee was adjourned.]

APPENDIX

U. S. Senate Committee on Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management, The Federal Workforce and the District of Columbia

Hearing:

Safeguarding the Merit System Principles: A Review of the Merit Systems Protection Board and the Office of Special Counsel

March 22, 2007

Mr. Neil McPhie
Chairman, Merit Systems Protection Board

Chairman Akaka, Ranking Member Voinovich and Members of the Subcommittee, thank you for the opportunity to share the Board's accomplishments in safeguarding the merit system principles. These principles reflect acknowledgment on the part of the legislative and executive branches of government that the fair and equitable treatment of Federal employees and applicants is critical to the efficient and effective operation of the Federal government. I am proud and honored to serve as the 7th Chairman of the Merit Systems Protection Board, the lead agency responsible for upholding the merit system principles. I am particularly pleased that in FY 2006, the Board was voted as one of the Best Places to Work in the Federal Government.

The Board's current authorization was enacted in 2002 and expires on September 30, 2007. The authorization of appropriations for MSPB was permanent under its enabling statute, the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. This authorization was changed under the Whistleblower Protection Act of 1989 (WPA) to a 6-year period that expired at the end of FY 1994. (Pub. L. 101-12, 103 Stat. 34, 5 U.S.C. 5509 note). In 1994, the Board's authorization was extended through FY 1997 (Pub. L. 103-424, 108 Stat. 4361), placing it on the same reauthorization cycle as that of the Office of Special Counsel. The Board was subsequently reauthorized for five years, through FY 2002, (Pub. L. 104-208, 110 Stat. 3009) and again through 2007 (Pub. L. 107-304, 116 Stat. 2364). My request for reauthorization would amend Section 8(a)(1) of the Whistleblower Protection Act to authorize the MSPB for an additional 5 years, through FY 2012.

In addition to reauthorization of appropriations, we are requesting the enactment of six legislative proposals designed to increase the efficiency and effectiveness of the Board. These proposals seek: an order of succession for the executive leadership of the agency; the authority to grant summary judgment; an exemption from certain requirements of the Sunshine Act; and three technical corrections to the Board's authorizing statute that clarify the Chairman's authority to make administrative decisions regarding the management of the agency.

Since the MSPB's reauthorization in 2002, the Board Members, managers and staff have worked diligently to continue to earn the public's trust in our ability to carry out our statutory missions. I will first briefly provide an overview of the Board and highlight some of the Board's accomplishments since the last reauthorization. I will then discuss the justifications for the legislative proposals submitted for your consideration. Finally, I will discuss some of the challenges that I foresee in the Board's future.

I. THE MERIT SYSTEMS PROTECTION BOARD: MISSION AND OVERVIEW

The mission of the Merit Systems Protection Board is to protect Federal merit systems and the rights of individuals within those systems. The Board carries out its statutory functions by adjudicating certain employee appeals and conducting studies of the Federal civil service and other merit systems in the Executive Branch.

I am pleased to report that the Board is currently operating with its full complement of 3 Members. I have served as a Member of the Board since April 23, 2003 and was confirmed as Chairman on November 21, 2004. My term will expire on March 1, 2009. Mary M. Rose was confirmed as a Board Member on December 17, 2005, and designated as Vice Chair on January 27, 2006. Her term will expire on March 1, 2011. Barbara J. Sapin was confirmed as a Board Member on November 21, 2004. Her appointment expired on March 1, 2007. She continues to serve as a Member pursuant to 5 U.S.C. § 1202(c) of the Board's enabling statute which permits a member whose term has expired to continue to serve until a successor has been appointed but not longer than one year after the term has expired.

The Merit Systems Protection Board is headquartered in Washington, D.C. with 6 regional offices (Atlanta, Chicago, Dallas, Philadelphia San Francisco, and Virginia) and 2 field offices (Denver, New York). The staff consists of 228 employees; approximately 60 of whom are administrative judges.

II. MSPB ACCOMPLISHMENTS: FY2002-FY2006

A. ADJUDICATION

From FY 2002 through FY 2006, the Board adjudicated 42, 145 cases, for an average of 8,429 per year. More specifically, the Regional and Field Offices issued 35,214 decisions over this period (for an annual average of 7,043) and the Board issued a total of 6,931 decisions (for an annual average of 1,386). During this time period, we reduced the average processing time for initial decisions to 92 days, an improvement from the annual average of 99 days from the previous reauthorization period. In FY 2006, the regions decided 7,110 cases in an average of 89 days. We have made significant progress in reducing the case processing time for cases in headquarters. In FY 2002, the average case processing time for cases in headquarters was 205 days. In FY 2006, the average time was 154 days. These reductions are being accomplished without a loss in the quality of those decisions. During the period covered by FY2002-FY2006, the Court of Appeals for the Federal Circuit affirmed 93% of the Board decisions that were appealed to the Court.

We have employed a number of technological innovations that are designed to expedite case processing at the Board. In FY 2002, we made the option of conducting hearings through

the use of video conferencing a permanent part of our adjudication process. During FY 2003, MSPB implemented an electronic appeals process (e-Appeal) that allows appellants to file an initial appeal using the Internet. Approximately 1000 appeals were filed electronically in its first year. Currently, approximately 25% of initial appeals are filed electronically.

Phase II of e-Appeal was implemented in September of 2004. Phase II permits appellants to upload filings as attachments and provides for same-day electronic distribution of filings, orders and decisions. The system also notifies the appropriate MSPB office of each filing and automatically files submissions into the Board's Document Management System (DMS). The e-Appeal program has improved the Board's efficiency in handling appeals and made it easier for appellants to file appeals and to communicate with the Board.

In addition to our successful adjudication settlement program, the Board makes its Mediation Appeals Program (MAP) available to the parties to appeals in the regional and field offices. When both parties to an appeal agree, a Board-certified mediator is appointed to attempt to mediate their dispute to a mutually beneficial conclusion. We had just begun to develop our mediation program when our reauthorization was under consideration in 2002. Although only a few years old, MAP has enjoyed great success. Announced in 2004 as a nationwide initiative after a successful pilot project, and now staffed by 20 trained Board employee Mediators, MAP has resulted in the successful settlement of more than 100 appeals. In FY 2006, 109 appeals were mediated; 45% of the cases settled. For the past two years, the Board presented two sessions on alternative dispute resolution at the widely-attended Federal Dispute Resolution Conference to promote the use of MAP by familiarizing large audiences with its benefits.

B. STUDIES AND OUTREACH

The Board educates appellants, federal agencies, and the general public in two important ways - - by publishing reports of its studies and conducting outreach throughout the nation. In our studies function, the Board's goal is to conduct independent, nonpartisan, objective research, based on established scientific methods, and produce reports that promote the merit system values in Title V and help ensure the public interest in a viable merit-based civil service. Based upon our recent work, we have identified and reported on some trends that we believe will affect Federal human resources management over the next several years and four areas of need based on such trends: 1) the need for succession planning; 2) the need to focus more attention on retention; 3) the need to improve recruitment and selection procedures; and 4) the need for agencies to change their methods for motivating and rewarding employees. For example, we have issued studies that advise agencies on how to navigate the complex issues that arise when determining whether an employee undergoing a probationary or trial period has appeal rights before the Board; that suggest ways to make hiring practices more effective and cost efficient; and that provide guidance on how to design an effective pay for performance compensation system.

The Board has increased the number of study reports published from six annually to eight annually. In addition, we publish four quarterly versions of the "Issues of Merit" newsletter per year. A significant indicator of the value of our studies, reports and recommendations is the degree to which the recommendations discussed therein are reflected in government-wide policies. Recent examples of our recommendations that are reflected in current Federal civil

service policies and programs include recommendations pertaining to: 1) Adoption of Category Rating to replace Rule of Three; 2) redesign of USA Jobs site and redesign of vacancy announcements; 3) emphasis on assessment tools including structured interviews; 4) development of the Federal Career Intern Program; 5) replacement of the Presidential Management Intern with the Presidential Fellows Program; 6) emphasis on Human Capital practices as a key business function; and 7) expansion of Family Friendly policies.

As for outreach, the Board conducted major efforts to educate the parties to the appeals that come before it about Board practice, procedure, and law. In 2002, the Board produced a training video on MSPB appeals which is available free upon request to practitioners before the Board. During the period FY 2002 through FY 2006 more than 400 outreach presentations were conducted by Board employees and officials. Outreach activities related to the studies function included consultation with Federal Executive Boards and other stakeholders including international visitors; consultation with the Thai Civil Service Commission to create a Thai MSPB; a symposium on the Practice of Merit in agencies operating outside of Title 5; co-sponsorship of a symposium on pay for performance with the Government Accountability Office and the Office of Personnel Management; increased coordination with OPM, GAO, the National Academy of Public Administration and the Partnership for Public Service with periodic meetings on research efforts; and our work on the electronic human resource information system initiative with OPM.

C. MANAGEMENT SUPPORT

With respect to general management issues, I am pleased to report that the Board has earned a clean audit each of the four years that Federal agencies have been required to submit a financial audit pursuant to the Accountability of Tax Dollars Act of 2002. In July 2003 we strengthened our credit card program to provide for additional safeguards in light of government-wide concerns of abuse. We decreased the number of cards issued and added a second level of review of monthly statements.

III. LEGISLATIVE PROPOSALS

In addition to reauthorization of appropriations, we are also requesting the enactment of six legislative proposals. These proposals seek: 1) an order of succession for management of the agency; 2) authority to grant summary judgment; 3) an exemption from certain requirements of the Sunshine Act; and 4) three technical corrections to the Board's authorizing statute that clarify the Chairman's authority to make administrative decisions regarding the management of the agency.

A. ORDER OF SUCCESSION

One proposal seeks to amend section 1203 of Title 5 to provide for an order of succession for the leadership of the Board. In two instances since the Board was last authorized, the agency was faced with the possibility of a vacuum in its chief executive leadership. In one instance, the agency was on the brink of having no Board members at all. The uncertainty of leadership for the agency in such circumstances calls for an effective statutory solution. We are recommending that: 1) in the event that no member has been designated to serve as Chairman or Vice Chairman,

the member who is an adherent of the same political party as the President shall perform the duties and functions of the Chairman; 2) if the only members currently in office are adherents of the same political party as the President and neither has been designated to serve as Chairman or Vice Chairman, the member who was first appointed to the Board shall perform the duties and functions of the Chairman; and 3) in the event that all three Board positions are vacant, the General Counsel of the Board shall perform the chief executive and administrative officer duties and functions of the Chairman. We believe that the proposed legislation recognizes the Presidential prerogative to control key appointments in the Executive branch while preserving the continuity of agency operations in the absence of the affirmative exercise of such prerogatives.

B. SUMMARY JUDGMENT

In another proposal, the Board is requesting summary judgment authority. Its governing statute, at 5 U.S.C. § 7701 (a)(1), provides that: "An appellant shall have the right to a hearing for which a transcript will be kept." In *Crispin v. Department of Commerce*, 732 F. 2d 919 (Fed. Cir. 1984), the Court of Appeals interpreted this provision to mean that the Board does not have authority to grant summary judgment. We believe that such authority would greatly enhance the efficiency of the Board's adjudicatory process without adversely impacting the rights of appellants.

Two additional points are worth noting. First, other Federal adjudicatory agencies, such as the Equal Employment Opportunity Commission, have the authority to issue summary judgments. Second, the MSPB will have summary judgment authority under the Department of Homeland Security's (DHS's) employee appeals process and the proposed Department of Defense (DoD) National Security Personnel System.

C. TECHNICAL CORRECTIONS - AUTHORITIES OF THE CHAIRMAN OF THE BOARD

Pursuant to 5 U.S.C. § 1203, the Chairman of the Merit Systems Protection Board serves as the chief executive and administrative officer of the agency. As such, the incumbent of this position is vested with the authority to make all decisions relating to the administration and management of the agency's operations. One provision, § 1204(g), authorizes the Board, rather than the Chairman, to delegate the performance of administrative functions. A second provision, § 1204(k), creates an ambiguity by appearing to bestow one particular administrative function, preparation and submission of the annual budget, on the Board. Two of the technical corrections are intended to eliminate the ambiguity created by these provisions read together with section 1203 by substituting the words "Chairman of the Board" for "the Board." The third technical correction adds a sentence to § 1204(j) to emphasize the Chairman's authority to delegate certain responsibilities to the employees he or she appoints.

D. ENHANCEMENT OF PETITION FOR REVIEW PROCESS

Finally, the Board requests a limited exemption from the requirements of the Government in the Sunshine Act, U.S.C. § 552b, (Sunshine Act) when it exercises its adjudicatory function. The Sunshine Act requires federal agencies headed by a collegial body, a majority of whose

members are appointed by the President and confirmed by the Senate, to hold open meetings. While Sunshine Act requirements do not apply to informal discussions between Board members or to a meeting scheduled to dispose of a particular case, the difficulty of ensuring that an informal discussion or a discussion of a particular case does not evolve into a "meeting" covered by the Sunshine Act has generally led the Board members to be wary of engaging in such discussions, thus hampering the efficiency of the MSPB's adjudicatory process.

IV. FUTURE CHALLENGES

In the immediate future, now that the civil litigation concerning the DHS regulations has concluded, we will begin to work with DHS to develop an expedited employee appeals system as set forth in its regulations. We look forward to working with DHS on the implementation of this new system. We have already provided training to the Board's AJs, staff attorneys and paralegals and have completed most of the revisions to our regulations to accommodate the new system.

We also anticipate that several factors could result in an increase in the Board's caseload. Both the anticipated increase in retirement and the resultant increase in hiring government-wide will account for a large portion of the increase, but changes in statutes, case law and regulations as well as the increasing need to control the Federal budget will also have a significant impact on the Board's caseload. In FY 2005, retirements accounted for approximately a quarter of MSPB's caseload. In addition to increased retirement claims, the MSPB's caseload will be affected by the changes in the composition of the workforce that replaces retirees. MSPB studies suggest that employees are more likely to experience an adverse action in the first decade of their service. Younger employees also are more likely to experience an adverse action than older employees with a similar length of service. Thus, as agencies hire new employees of all ages, and particularly younger employees, the Board's adverse action appeal rates can be expected to climb.

Historically, the Board has experienced an increase in its appeals workload when long-held government policies are modified by the courts. For example, in *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003), the Court changed the way by which agencies accounted for military leave. The decision was responsible for a significant number of Board appeals in the past 3 years. Similarly, the Board anticipates an increase in its caseload if new legislation is enacted, such as the separate bills concerning whistleblower protections that are currently under consideration in each chamber of Congress. Although no action has yet been taken on the Senate bill, S. 274, the House Committee on Oversight and Government Reform recently passed H.R. 985, the "Whistleblower Protection Enhancement Act of 2007," which would expand the scope of whistleblower protections and increase the number of covered employees. The Board welcomes the opportunity to adjudicate all appeals, including those of whistleblowers, to the extent and in the manner that policymakers deem appropriate. Beyond the foreseeable increase in the Board's workload, the House Bill amends the framework for judicial review of whistleblower appeals and incorporates a 180-day standard for the Board to adjudicate whistleblower appeals, both of which may create procedural uncertainties that are not clearly resolved by the Bill.

Another factor that could increase the MSPB workload is the increasing need to reduce the size of the Federal budget. As this pressure continues, it may lead to the need for some agencies to reduce the size of their workforces. This, in turn, could lead to an increase in the number of employees who are involuntarily separated through reduction-in-force (RIF) procedures. If historical trends are an accurate predictor, this could lead to a potentially large increase in the number of RIF appeals to MSPB. Further, the complexity of appeals has increased with expanded appeal rights under Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA) and Veterans Employment Opportunities Act of 1998 (VEOA), and the numbers of these appeals working their way to MSPB has increased. The sheer numbers of returning veterans from Iraq and Afghanistan may be predictive of an increased USERRA and VEOA caseload.

In the context of the Board's studies function, we anticipate that the DHS and DoD personnel systems will require greater study as they are implemented. The Board is developing baseline data of organizations in both DHS and DoD. This baseline data will be helpful in comparing and analyzing the personnel system changes that occur in both Departments. We will study and survey more specific impacts of the varied human resources initiatives as they are deployed.

As the Board prepares for the impact of increased retirement on its customers, we recognize that the MSPB itself will be directly affected. Within 5 years, 40 percent of the MSPB's workforce will be eligible to retire. Almost 20 percent are eligible at this moment. To prepare for these retirements, my administration has looked for creative ways to attract, develop and retain employees. For example, I have directed each office to develop a succession plan. I have also instituted developmental training programs throughout the agency. Under my leadership, MSPB managers also work to enhance employee training opportunities in a number of ways, beginning with the use of individual development plans. I am particularly proud of the MSPB Senior Management Fellows program, in which high-potential employees are identified and provided with training and developmental assignments to prepare them to become the future leaders at MSPB. We have also created a mentoring program for Board paralegals, helping them to contribute even more to our agency's success.

V. CONCLUSION

In short, the Board Members, officials and staff have successfully fulfilled the agency's statutory missions. In addition, we have been careful stewards of the public funds that have been entrusted to us for the purpose of fulfilling those missions. The Merit Systems Protection Board has made great strides in improving all aspects of the agency's operations. However, we continue to explore ways to achieve new levels of efficiency and to better serve the American public. We believe that the proposed amendments described during this hearing will help the agency meet this goal. In these times of great change in Federal human resource management, a strong, vibrant and independent MSPB is critical. We look forward to the opportunity to continue our important work over the next 5 years.

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218

Washington, D.C. 20036-4505

Testimony before the Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia

"Safeguarding the Merit System Principles: A Review of the Merit Systems Protection Board and the Office of Special Counsel."'

March 22, 2007

The Honorable Scott J. Bloch

Special Counsel

U.S. Office of Special Counsel

In 1776, John Adams wrote that "Good government is an empire of laws." I have quoted this often in my tenure, and I believe in its emphasis on enforcing laws and the rule of law, holding our officials and managers in the federal government to a higher standard of fidelity to the law, and holding ourselves accountable to the law and our public charge to make a difference.

I'd like to thank the committee for inviting me to testify. It's an honor to be here before Chairman Akaka, Ranking Member Voinovich and the subcommittee. It's also an honor to be here beside Chairman Neil McPhie, who's done so much for the Merit System and the rule of law.

My name is Scott Bloch and I am the Special Counsel of the U.S. Office of Special Counsel, or OSC. I am here to seek reauthorization of the U.S. Office of Special Counsel because it is upholding our small empire of laws that keep our federal government accountable, honest, efficient, and just for more people in a timely way than at any time in its history. Building on the excellent work of my predecessor in outreach and whistleblower disclosure publicity, we have sought to bring to the attention of the public, and in particular the federal employees, the fine work that our career staff is doing in government accountability and protections for the ordinary heroes who blow the whistle. I have written and spoken often about these matters, as have my staff, because it is important that people know there is someone there who will stand up for them, who has powers to bring redress, who will not countenance reprisal when citizens show their concern by blowing the whistle on waste, fraud and abuse.

I also come before the Committee to request several legislative fixes that, while not complicated, may allow our agency to improve on our record for the benefit of the federal government. I am also pleased to note that Chairman Akaka has himself endorsed several of these fixes in legislation of his own.

Three and a half years ago I had the high privilege to receive a favorable recommendation from the Committee on Homeland Security and Government Affairs, and I return again to report on our agency's status in upholding our statutory obligations.

Senators of the Committee, it is my pleasure to tell you that our agency is functioning better than at any other time in its history, and I believe that we will continue to improve on even that record.

To support my bold claim, I have brought with me today early copies of the final language from our annual report for Fiscal Year 2006, and charts demonstrating our improved numbers. Unfortunately the report is currently at the Government Printing Office, but I can assure you the materials I have distributed to your staff in recent days will not change substantively. It will have a very pretty green cover that is not part of the handout, and you can look forward to that in a few weeks.

OSC, as most of you know, is an independent watchdog agency established as part of the post-Watergate reforms of the late 1970s. We essentially operate within the executive branch to protect worker rights and the merit system under four statutory functions. Those are:

Number One, to review and validate whistleblower disclosures,

Number Two, to investigate and prosecute complaints of Prohibited Personnel Practices, with a special focus on discrimination against whistleblowers,

Number Three, to enforce the Hatch Act, the law that limits the political activity of government employees,

And Number Four, to enforce the Uniformed Services Employment and Reemployment Rights Act, or USERRA. USERRA, of course, is the law that protects the job rights of military servicemembers when they return from active duty.

Right now OSC has part of the federal sector jurisdiction over USERRA in a demonstration project with the Labor Department. Congress established the demonstration project in 2004 as part of the Veterans Benefits Improvement Act. The demonstration project expires this year, and I know, Chairman Akaka, that you and your fine staff over at the Committee on Veterans Affairs will be sorting through that later this year. In fact, I'm told that here at this committee there may be consideration of USERRA matters, and we certainly will be happy to have discussions about our enforcement powers in whatever venue Congress sees fit.

On matters of general agency functioning, when I was taking office, we were heavily criticized – and rightly so – by the Government Accountability Office. The GAO issued a report pointing up our essential dysfunction as an agency. We were saddled with a tremendous backlog and bureaucratic disorganization that made it a challenge to fulfill our mission of protecting the rights of federal workers and the merit system.

And previously, during my confirmation process this committee was justifiably firm with me that I was expected to dramatically improve the operations of the agency.

I believe we've done that. Our central achievement is our backlog resolution and increased enforcement in all areas. Hundreds of cases stacked up, moldering away for years, and I cited Gladstone as my rallying cry that **Justice Delayed is Justice Denied**. Over the first year and a half, we were able to get that backlog down and find some great cases in the process. I remind the committee that while the career staff resolved the backlog, we doubled the percentage of positive findings in whistleblower disclosure and PPPs. I was proud to be a part of that effort; I and my political team rolled up our sleeves and worked files along with the career staff. I cannot claim that I worked very many. Perhaps two or three. But sometimes you have to lead by example and show others that you are serious about what you want to accomplish. Leadership is often simply knowing what is inside others and finding a way to let that out. We did that at OSC. And I am quite proud of their achievements.

We also had transparency to the process, and we were very gratified by the review of our backlog resolution effort that took place in the spring of 2005. The House Committee on Government Reform (now Oversight and Government Reform) sent staffers from both then-Chairman Tom Davis and then-Ranking Member Henry Waxman to review OSC's work. These staffers pored over OSC's case files and interviewed numerous career attorneys over a three-week period to examine each aspect of the operation. At the conclusion, all the staffers expressed satisfaction, and Mr. Davis and Subcommittee Chairman Jon Porter sent us a very kind letter praising our hard work and smart work for whistleblowers.

But that's not all. Our agency had been saddled with a dysfunctional system of organization that was a major cause of the backlog. One example is our Investigation and Prosecution Division, or IPD, which goes after Prohibited Personnel Practices. Here in our headquarters we had three different IPDs, and each had different operating procedures and approaches to policy implementation.

By melding the procedures here in DC we were able to create a stable order. But we felt it was also important for geographic balance to establish a third field office in the Midwest to balance offices in Dallas, Oakland, California and, of course, here in Washington. But we also had organizational problems abetting the backlog. An example was our Investigation and Prosecution Division, or IPD,

which goes after PPPs. Well, we had three different IPDs, with **different operating policies**.

We also felt it was important for geographic balance and to provide equivalent smaller teams that could aid each other but also work in a sort of team work model, and also compete amongst each other, to establish a third field office in the Midwest to balance offices in Dallas; Oakland, California; and, of course, here in Washington. So now we have four field offices, and we are not so DC-centric, which I believe presented some morale and case assignment problems.

We worked with GSA, which offered us space at minimal cost to the taxpayer in Senator Levin's great state of Michigan, in the city of Detroit, an office I just returned from visiting. It's thriving and contributing mightily to our success. I was quite impressed with the view in the federal building looking out on the river, and into Windsor, Ontario to the North. It is a very impressive view.

Now the results speak for themselves. We have no backlogs. The cases in the pipeline are appropriate by age and status, and each field office is keeping up and providing strong production and strong results. We're doing aggressive outreach to educate federal workers, and geographic balance has helped there as well as it has in the arena of investigations.

I'd like to show a few charts that we've brought along today – here is our chart [Disclosure Unit Cases Pending at End of Fiscal Year] showing the steep dropoff in the number of cases we were rolling over from one year to the next, starting here at the end of Fiscal Year 2003 and through our backlog effort in Fiscal Year 2004 and continuing through the present day. Here we have another chart [Disclosures Referred to Agency Heads and IGs] showing the increase we have been able to generate of whistleblower referrals to agencies. This is critical, and results from good case analysis by the hard-working attorneys in that unit and also from the common-sense fix we instituted early on in my tenure to have our standard be more in line with what other agencies practice.

When our agency receives whistleblower disclosures, we were looking to see whether the allegation merited a Preponderance of the Evidence finding, which equates to about an 80 or 90% likelihood of the allegation being true. But the agencies themselves only use a Substantial Likelihood finding – which is to say,

just more likely than not. It was absurd for OSC to have a higher standard of proof than the agencies to whom we refer these claims. So, we changed the standard, and literally doubled the number of solid agency referrals.

And this is the meat of whistleblower disclosures – where we're able to contact an agency and tell them, you have a problem that needs fixing, and we're going to be grading you.

We've had some signature successes in recent years. Many of you should remember the Anne Whiteman case involving aircraft near-misses at Dallas-Fort Worth International Airport, one of the world's busiest. I believe issues at DFW were also the topic of a recent ABC news piece, and we've been encouraged by congressional interest in the matter as well. We are looking at the continuing issues of whistleblower retaliation there, as well as problems in the follow through with the IG investigation of DFW.

We also substantiated Leroy Smith's disclosure involving environmental hazards within federal prison facilities. That case resulted in pushing and pulling between us and the Bureau of Prisons, and really required some work on our part to get attention to a frankly deficient report delivered by the target agency. As a result of our efforts, and that of the Whistleblower, the investigation by the DOJ IG has expanded to other prison facilities, and it has changed the system for how such facilities function. Safety and health have benefited because of his brave disclosures. We awarded him our Public Servant Award at the end of last fiscal year.

The next chart I'd like to look at is our Prohibited Personnel Practice results [Complaints Examining Unit – Average Processing Time of PPP Cases]. Here you can see the reduction in case processing times, from just over a hundred days in Fiscal Year 2002 to less than half of that in Fiscal Year 2006 – again, this is just time spent in our screening unit to determine whether the case should be referred to our Investigation and Prosecution Division for further action. And speaking of that Division, here [Average Age of Open Cases in IPD] we see the steady decline in the average age of cases. We have also had some higher-profile cases here, including the forced resignation of the Agriculture Department's state rural

director for Alaska because of some real abuses on his part – political malfeasance as well as discrimination.

Moving on to our Hatch Act results [Hatch Act Results – Average Processing Time Per Complaint], this chart shows a similar decrease in processing times over the past four years. Again, as in all of our units, we have a group of hardworking career employees getting good results. And speaking of results, that downward trend in processing times has corresponded with spikes in complaints the past two election cycles, which has helped produced this chart [Hatch Act Unit – Disciplinary and Corrective Actions]. Here we see an upward trend, with a dip for the 2005 off-year. We've had a variety of interesting cases involving the Hatch Act lately – there were the NASA cases that got quite a bit of attention involving names like Senator John Kerry and former Congressman Tom DeLay, although in neither case was the member of congress the target of the complaint.

But of more relevance to Hatch Act-covered employees has been our work on email. Recent decisions by the Merit Systems Protection Board have affirmed our belief that government email must not be used for political purposes.

The final chart I want to show you [USERRA Demonstration Project] is on our USERRA Demonstration Project work. Starting in February of 2005, you can see we've been able to take on several hundred cases and help a number of servicemembers without negatively affecting our work in other units. We've always had some involvement in USERRA as it overlapped with our work on PPPs, but it was minimal. It wasn't until 2004 that we filed OSC's first-ever case at the Merit Systems Protection Board.

Some signal cases here involve a military truck driver who injured his back in Iraq and then was denied his rights to equivalent employment when he returned. He came to OSC and we achieved full corrective action for him.

Another case involved a military serviceman who was illegally denied reemployment, and then he was told by multiple sources within the federal government that his case was a dead end.

Senators of the Committee, I'm proud to say that when this serviceman finally arrived at the U.S. Office of Special Counsel, we wasted no time in getting

him his job back, a promotion that the law requires him to be considered for, and Eighty-Five Thousand Dollars in back pay that he was owed. That may not be much to the government, but it's quite a lot for a person without a job.

Now, for the legislative matters I wanted to bring before the committee: An overzealous provision in the PPP law allows our agency to be tagged with attorneys fees in any case in which OSC's request for disciplinary action has been denied. You can see how this might have a chilling effect on OSC's vigorous pursuit of disciplinary cases. We would ask that the Committee modify this provision, which threatens to inhibit our prosecutorial discretion.

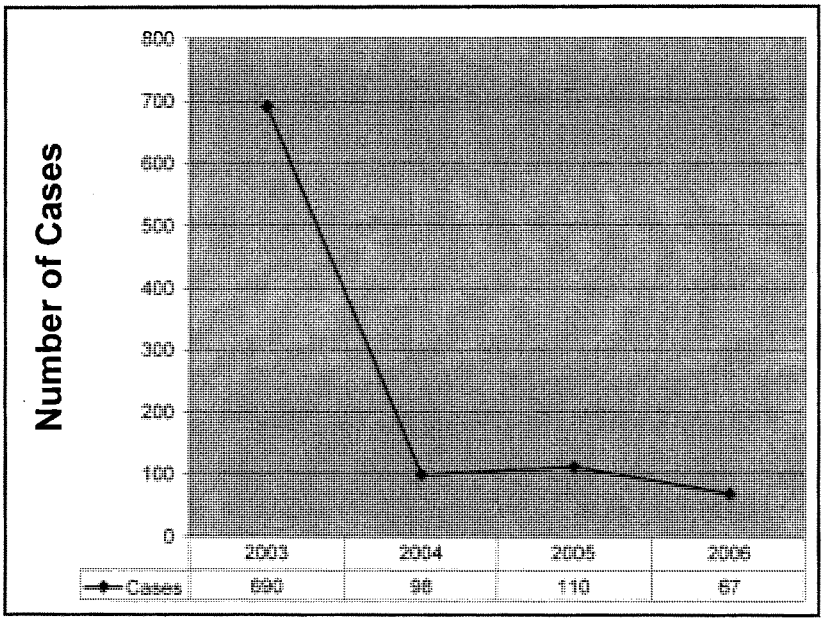
I would also ask the Committee to give our agency the power to file Amicus Briefs in cases of ours that go beyond the Merit Systems Protection Board. This would allow our expertise in both our statutes and the specific cases to complement the work of the Justice Department.

Another provision is the inability of our agency to provide one-stop shopping of the Veterans Preference provision in the Prohibited Personnel Practice law. I know again of Chairman Akaka's interest in this issue, and I candidly admit my desire to foster good relations with the Committee.

It is the case that OSC is able to seek corrective action under other PPP provisions, like the blanket (b)6 and (b)12 provisions against any unauthorized preference, or even under USERRA, as the cases frequently overlap. However, we think it would be much less confusing for service members to understand that we can seek corrective or disciplinary action under any of the PPPs, as well as USERRA – that brings up another point, that USERRA does not have a provision for disciplinary action, but I don't want to get ahead of myself.

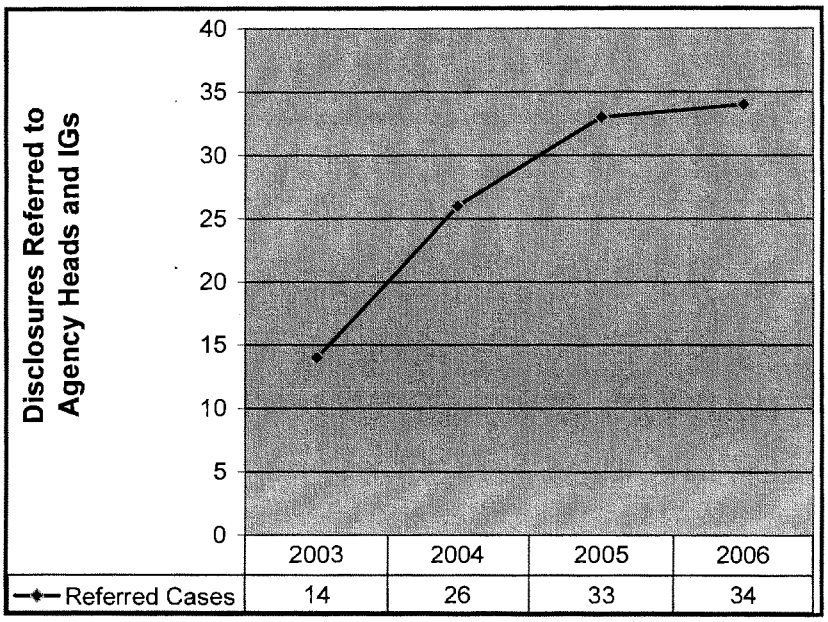
It's my hope that these stories of real people who have benefited from OSC's existence, combined with our slashing of processing times and increased enforcement, show that our agency has improved and is promoting good government. Together with this committee, and other agencies like MSPB and OGE, we can indeed look back on the next five years with the same pride of the last five. I look forward to taking any questions you may have. Thank you.

Disclosure Unit Cases Pending at End of Year



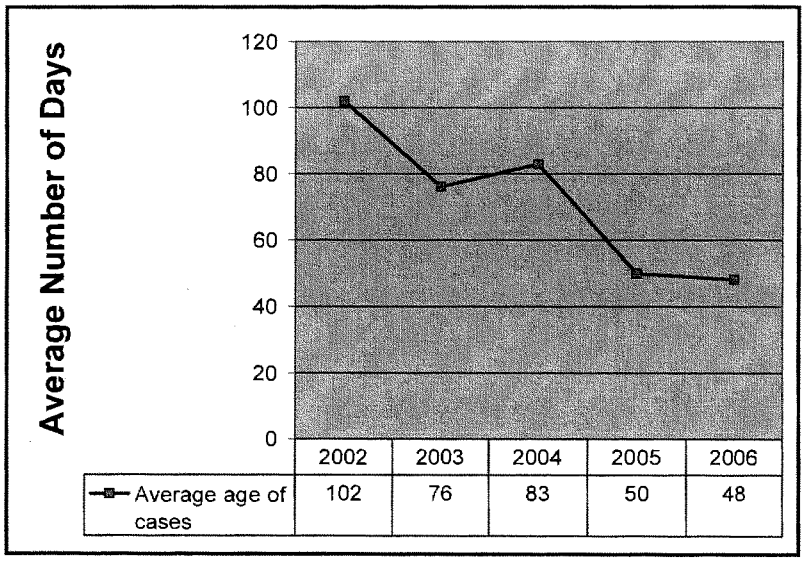
In FY 2003, the Disclosure Unit had a backlog of whistleblower disclosures. OSC reduced the backlog by FY 2004, and has prevented a backlog resurgence in FY 2005 and FY 2006.

Disclosures Referred to Agency Heads and IGs



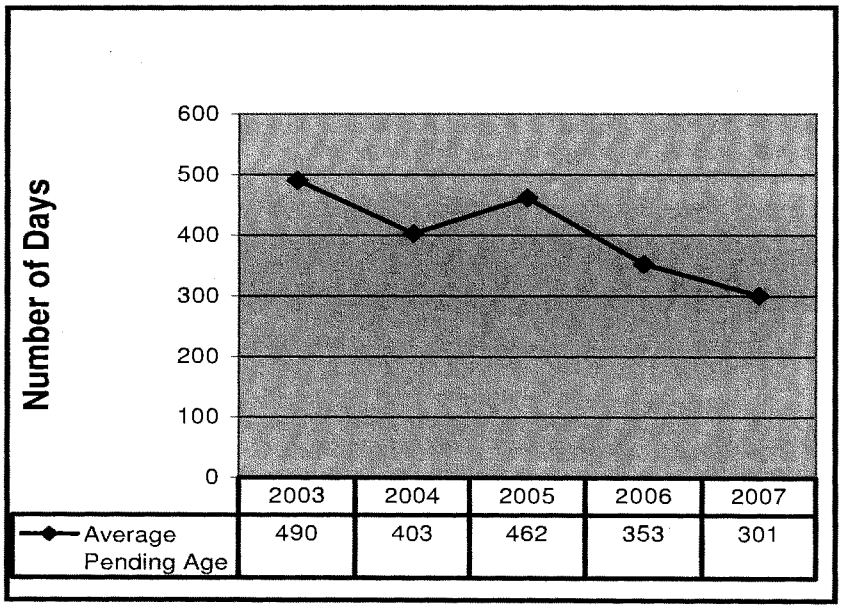
When the Special Counsel analyzes a whistleblower disclosure and determines there is substantial likelihood of wrongdoing, he refers the matter to the head of the appropriate agency, who is then required to internally investigate the matter and report the results to OSC, the Congress, and the President.

Complaints Examining Unit - Average Processing of PPP Cases



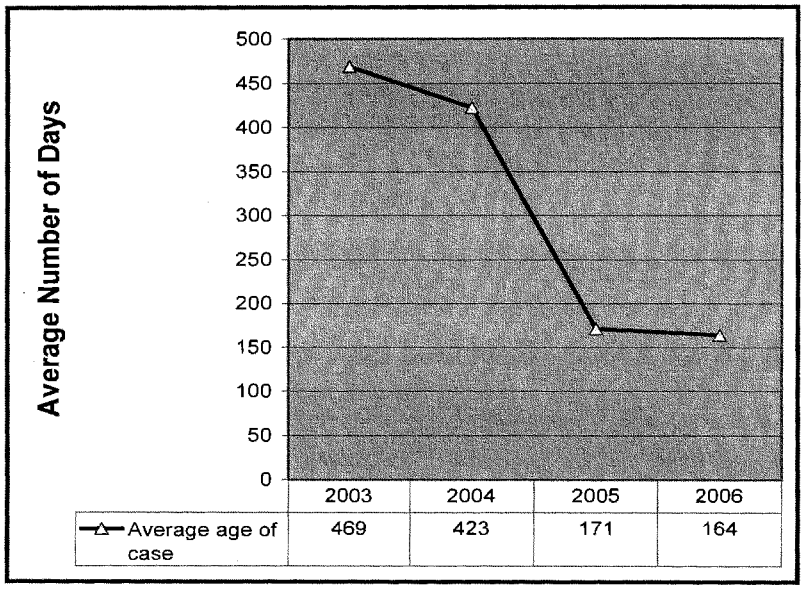
This chart shows the average number of days that a Prohibited Personnel Practice case remained in OSC's Complaints Examining Unit, before the case was either closed or referred to OSC's Investigation and Prosecution Division for further investigation.

Average Age of Open Cases in IPD



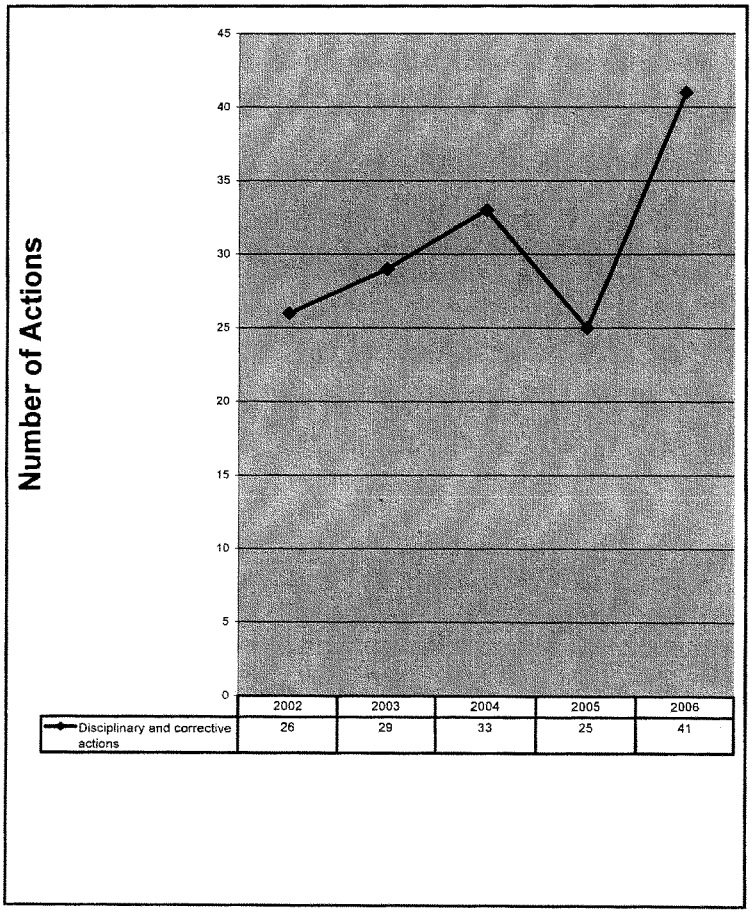
From FY 2003 through FY 2007, the average age of the open pending cases in OSC's Investigation and Prosecution Division has been dropping. The current average is 301 days, which is 39% lower than the average age back in FY 2003.

Hatch Act Unit - Average Processing Time per Complaint



OSC's Hatch Act Unit reduced its case processing time dramatically during the period from FY 2003 to FY 2006. The average number of days to process the case in FY 2006 is one third of what it was in FY 2003.

Hatch Act Unit - Disciplinary and Corrective Actions



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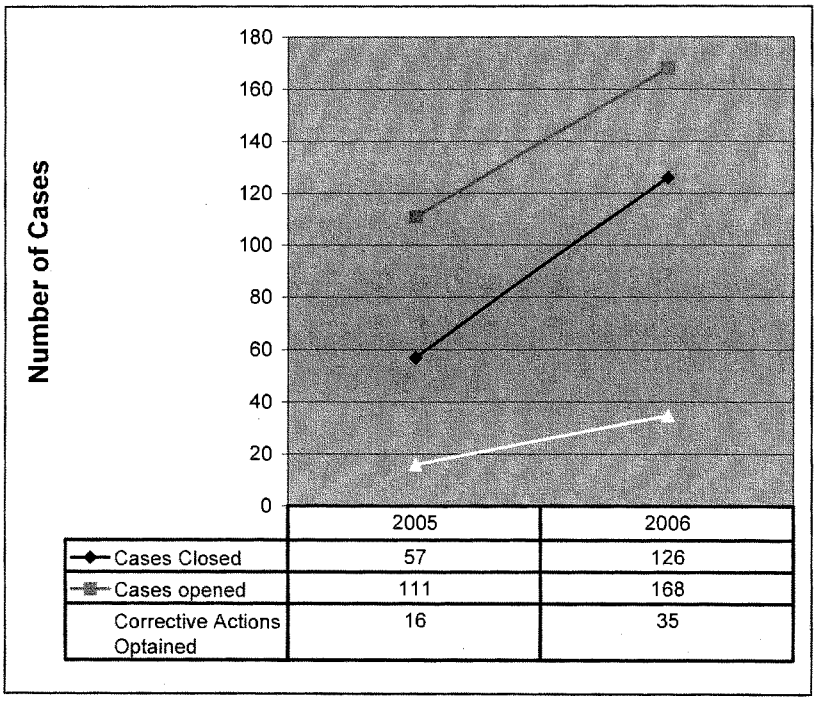
USERRA Demonstration Project



	2005	2006
Cases Closed	57	126
Cases opened	111	168
Corrective Actions Optained	16	35

The USERRA Demonstration Project began in February of FY 2005, and showed steady growth during FY 2006 in caseload, number of cases processed, and corrective actions obtained.

SAFEGUARDING THE MERIT SYSTEM PRINCIPLES:
A REVIEW OF THE MERIT SYSTEM PROTECTION BOARD AND
THE OFFICE OF SPECIAL COUNSEL
March 22, 2007

BACKGROUND

The Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB) were established in 1979 to safeguard the federal government's merit-based system of employment, principally by investigating complaints and hearing and deciding appeals from federal employees of removals and other major personnel actions, particularly those federal employees who step forward to disclose government waste, fraud, and abuse.

When the Civil Service Reform Act created the MSPB and the OSC in 1978, the MSPB, of which OSC was a part, was authorized indefinitely. With enactment of the Whistleblower Protection Act (WPA) in 1989, OSC was established as a separate independent entity in the executive branch and appropriations for the OSC and the MSPB were for the first time authorized for a limited time period. MSPB was authorized for the fiscal years 1989-1994, while the OSC was authorized for fiscal years 1989-1992.*1* According to the Senate Governmental Affairs Committee report, this was done to require Congress to take affirmative action to continue funding for the two agencies.*2* Legislative history on the Act suggests that the shorter authorization for OSC results from the negative perception many had with the agency.*3*

Congress last reauthorized OSC and MSPB on November 27, 2002, by P.L. 107-304 for five additional years, through the end of the 2007 fiscal year. OSC and MSPB both seek reauthorization through FY 2012 and additional legislative changes that are discussed later in the memorandum.

OFFICE OF SPECIAL COUNSEL

OSC is an independent federal investigative and prosecutorial agency. Created by the *Civil Service Reform Act* of 1978, OSC began operating on January 1, 1979. For ten years, OCS operated as an autonomous investigative and prosecutorial arm of the MSPB. In 1989, when Congress enacted the *Whistleblower Protection Act*, OSC became an independent agency within the Executive Branch. With approximately 108 employees, OSC's basic authorities are derived from three federal statutes (1) the *Civil Service Reform Act*; (2) the *Whistleblower Protection Act*; and (3) the *Hatch Act*. The agency was reauthorized for a five year period beginning on October 1, 2002, by P.L. 107-304.

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1 Pub. L. No. 101-12, 103 Stat. 16 (1989).
2 S. Rep. No. 100-413, at 36 (1988).
3 See *Whistleblower Protection Act of 1987: Hearing on S. 508 before the Subcomm. on Federal Services, Post Office and Civil Service of the Senate Comm. on Governmental Affairs*, 100th Cong., at 234-35, 260-64 (1987); *Hearings on Whistleblower Protection Act of 1986 Before the House Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service*, 99th Cong 151 (1986).

The mission of OSC is to protect current and former federal employees and applicants for federal employment from prohibited personnel practices; promote and enforce compliance by government employees with legal restrictions on political activity; and facilitate disclosures by federal whistleblowers about government wrongdoing. OSC carries out its mission by:

- Investigating complaints of prohibited personnel practices, especially reprisal for whistleblowing, and pursuing remedies for violations;
- Providing advisory opinions on, and enforcing Hatch Act restrictions on political activity;
- Operating an independent and secure channel for disclosures of wrongdoing in federal agencies;
- Protecting federal re-employment and anti-discrimination rights of veterans under the Uniformed Employment and Re-Employment Rights Act (USERRA);
- Promoting greater understanding of the rights and responsibilities of federal employees under the laws enforced by OSC through such avenues as mediation.

Prohibited Personnel Practices and Whistleblowing

OSC receives, investigates, and prosecutes allegations of prohibited personnel practices, with an emphasis on protecting federal government whistleblowers. OSC seeks corrective action remedies, including back pay and reinstatement, by negotiating with the employing agency or by petitioning the MSPB for injuries suffered by whistleblowers and other complainants. OSC is also authorized to file complaints at the MSPB to seek disciplinary action against individuals who commit prohibited personnel practices. Under current law, after receiving a prohibited personnel practice case, OSC has 240 days to determine whether there are reasonable grounds to believe that such a violation occurred, exists, or is likely to be taken.

Section 2302(b) of title 5 of the United States Code (USC) outlines the twelve prohibited personnel practices (PPPs), which are:

1. Discriminating against an employee or applicant based on race, color, religion, sex, national origin, age, handicap, marital status, or political affiliation;
2. Soliciting or considering employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics;
3. Coercing the political activity of any person;
4. Deceiving or willfully obstructing anyone from competing for employment;
5. Influencing anyone to withdraw from competition for any position so as to improve or injure the employment prospects of any other person;
6. Giving an unauthorized preference or advantage to anyone so as to improve or injure the employment prospects of any particular employee or applicant;
7. Engaging in nepotism (*i.e.*, hire, promote, or advocate the hiring or promotion of relatives);
8. Engaging in reprisal for whistleblowing;
9. Taking, failing to take, or threatening to take a personnel action against an employee or applicant for exercising an appeal, complaint, or grievance right; testifying for or assisting another in exercising such a right; cooperating with or disclosing information to

the Special Counsel or to an Inspector General; or refusing to obey an order that would require the individual to violate a law;

10. Discriminating based on personal conduct which is not adverse to the on-the-job performance of an employee, applicant, or others;
11. Taking or failing to take, recommend, or approve a personnel action if taking or failing to take such an action would violate a veterans' preference requirement; and
12. Taking or failing to take a personnel action, if taking or failing to take action would violate any law, rule or regulation implementing or directly concerning merit system principles.

If the prohibited personnel practice is a violation of veterans' preference, OSC only has disciplinary authority against the agency official and cannot take corrective action to help the veteran. The Department of Labor (DOL) is authorized to take corrective action on behalf of a veteran.

If OSC determines that a prohibited personnel practice case has merit, it will seek to remedy the situation with the employing agency. However, if meritorious prohibited personnel practice cases cannot be resolved through negotiation with the agency involved, OSC attorneys represent the Special Counsel and, in some cases, the affected employee in any litigation before the MSPB.

In addition to investigating and prosecuting prohibited personnel practices, OSC serves as a safe conduit for the receipt and evaluation of whistleblower disclosures from federal employees, former federal employees, and applicants for federal employment. In this capacity, OSC's Disclosure Unit (DU) receives and evaluates whistleblowing disclosures, which are separate and distinct from the prohibited personnel practice designation for complaints of reprisal for whistleblowing.

DU attorneys review five types of whistleblower disclosures (1) violations of law, rule or regulation; (2) gross mismanagement; (3) gross waste of funds; (4) abuse of authority; and (5) substantial and specific danger to public health and safety. The disclosures are evaluated to determine whether or not there is sufficient information to conclude with substantial likelihood that one of these conditions has occurred.

The OSC disclosure process differs from other governmental whistleblower channels in several ways including, (1) federal law guarantees the confidentiality to the whistleblower; and (2) the Special Counsel may order an agency head to investigate and report on the disclosure.

Outreach Program

The Outreach Program was established to assist agencies in meeting their statutory mandate under 5 U.S.C. § 2302(c), which Congress imposed in 1994. Under that provision, federal agencies are responsible "for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them" under chapters 12 and 23 of title 5. Under the program, OSC employees are available to speak at agency training sessions, conferences, meetings and other venues. OSC also established the

2302(c) Certification Program, which allows federal agencies to meet the statutory obligation to inform their workforces about the rights and remedies available to them under the Whistleblower Protection Act (WPA) and related civil service laws. Under the 2302(c) Certification Program, OSC will certify an agency's compliance with 5 U.S.C. §2302(c) if the agency meets the following five requirements:

1. Placing informational posters at agency facilities;
2. Providing information about PPPS and the WPA to new employees as part of the orientation process;
3. Providing information to current employees about PPPs and the WPA;
4. Training supervisors on PPPs and the WPA; and
5. Creating a computer link from the agency's website to OSC's website.

Achieving 2302(c) certification is one element considered in OPM's determination if the agency achieves "green" on the Human Capital Scorecard.

Hatch Act

OSC's Hatch Act Unit is responsible for enforcing Hatch Act restrictions on the political activities of federal and certain state and local government employees. Hatch Act Unit attorneys receive and review complaints alleging Hatch Act violations and, when warranted, prosecute violations before the MSPB. The unit also issues advisory opinions to individuals seeking information about the provisions of the Act. Recently, OSC has been reviewing how the Hatch Act applies to state and local government employees who receive federal homeland security grants. OSC is in the process of developing its policy at this time.

Uniformed Services Employment and Reemployment Rights Act

The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits discrimination against persons because of their service in the Armed Forces Reserve, the National Guard, or other uniformed services. USERRA prohibits an employer from denying any benefit of employment based on an individual's membership, application for membership, performance of service, application of service, or obligation for service in the uniformed services. USERRA also protects the rights of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment after being absent due to military service or training.

The Veterans Benefits Improvement Act of 2004 (PL 108-454) established a demonstration project providing OSC, rather than the Department of Labor, with the authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. Under the project, OSC will also receive and investigate all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction, regardless of the person's social security number. OSC is administering its part of the demonstration project, which began on February 8, 2005, and ends on September 30, 2007.

Recent Developments

A. Case Backlog

For years, the backlog of prohibited personnel practice, whistleblower disclosure, and Hatch Act cases has been a significant problem for OSC. For example, at the beginning of fiscal year 2004, OSC had over 1,200 whistleblower disclosure cases on hand; 690 of these cases were carried over from fiscal year 2003. During fiscal year 2004, OSC closed over 1,154 disclosure cases, and carried over 108 cases into fiscal year 2005. Just one year earlier, OSC had processed and closed only 401 disclosure cases. Stakeholders, such as the Government Accountability Project, the Project on Government Oversight, and the Public Employees for Environmental Responsibility, claim that OSC is not giving federal whistleblower cases their needed attention. They also cite the recent results of an internal OSC customer satisfaction survey, obtained through a Freedom of Information Act request, which shows that:

- Of 118 whistleblowers who filed complaints of retaliation only 4 obtained any relief, and then only because "You or OSC settled the matter";
- 7 whistleblowers obtained relief on their own after OSC had dismissed their complaints as obtained relief while their complaints were before OSC, with appeals still pending for another 14 employees; and
- Less than 6 percent of the respondents reported any degree of satisfaction with the results obtained by OSC while 89 percent were dissatisfied.

B. Sexual Orientation Policy

When Mr. Bloch was nominated, several Committee Members discussed the issue of protections for federal employees from discrimination based on sexual orientation with Mr. Bloch. Soon after he took office, Mr. Bloch began an examination of the policies under the jurisdiction of OSC, which included a review of the agency's handling of sexual orientation discrimination complaints. While this review was taking place, Mr. Bloch only removed sexual orientation information from OSC's website but not information on other matters. Section 2302 (b)(10) of Title 5 USC prohibits discrimination against a federal employee or applicant on the basis of off-duty conduct that does not affect job performance. This has been interpreted by the Office of Personnel Management, the Department of Justice's Office of Legal Counsel, the White House and the previous Special Counsel to include sexual orientation. However, OSC now interprets Title 5 as protecting employees from discrimination based on sexual conduct, but not discrimination based on one's status related to that conduct.

C. PCIE Investigation of Mr. Bloch

In January 2005, Mr. Bloch announced that he would restructure the agency and establish a new Midwest field office in Detroit, Michigan. The primary purpose for creating the Detroit field office was to provide the OSC with a Midwest regional presence. Under the reorganization,

each field office will investigate and prosecute cases involving prohibited personnel practices for a specific geographic location.

To open the new field office, Mr. Bloch proposed to transfer twelve employees from Washington, DC, to the Detroit, San Francisco, and Dallas field offices through a process known as a directed reassignment. Seven of the team members were to be transferred from Washington to Detroit.

Several employees affected by the reorganization joined with public interest groups and filed a complaint against Mr. Bloch with the President's Council on Integrity and Efficiency (PCIE). The complaint alleges that Mr. Bloch retaliated against OSC employees for disclosing wrongdoing at OSC to the press, discriminated against OSC employees based on their sexual orientation, failed to investigate whistleblower cases, and lied to Congress.

PCIE and the Executive Council on Integrity and Efficiency (ECIE) were established on May 11, 1992, through Executive Order 12805, to (1) address integrity, economy, and effectiveness issues that transcend individual Government agencies, and (2) increase the professionalism and effectiveness of IG personnel throughout the Government. The Special Council is a member of both PCIE and ECIE.

Deputy Director for Management at the Office of Management and Budget (OMB), Clay Johnson, who is the head of PCIE, asked the Inspector General (IG) of the Office of Personnel Management (OPM) to review the allegations. The investigation is ongoing.

Reauthorization Request

OSC is requesting to be reauthorized for a period of five years, through fiscal year 2012, and the following changes to law: require an employing agency, rather than OSC, to pay attorneys' fees in any failed plea for disciplinary action by OSC in a PPP case; permit MSPB to combine disciplinary penalties; permit OSC to file amicus briefs in cases before the Federal Circuit Court of Appeals; and transfer authority from DOL to OSC for seeking corrective action for violations of veteran's preference. Analysis of the provisions related to attorneys' fees and amicus briefs can be found in the Committee Report for S. 494, the Federal Employee Protection of Disclosures Act.*4* Although the House and Senate Committees on Veterans' Affairs have primary oversight over USERRA, OSC is also seeking disciplinary authority for USERRA cases and full jurisdiction over federal sector USERRA cases. OSC will pursue those changes with the Veterans' Affairs Committees.

OSC Data

Information from OSC's fiscal year 2006 Annual Report to Congress is included in this notebook.

MERIT SYSTEMS PROTECTION BOARD

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4 S. Rept. 109-72, Federal *Employee Protection of Disclosures Act, S. 494*, Committee on Homeland Security and Governmental Affairs, May 25, 2005.

The U. S. Merit Systems Protection Board (MSPB) is an independent, quasi-judicial agency in the Executive Branch that serves as the guardian of Federal merit systems. The Board was established by Reorganization Plan No. 2 of 1978, which was codified by the Civil Service Reform Act of 1978 (CSRA).5 The CSRA, which became effective January 11, 1979, replaced the Civil Service Commission with three new independent agencies: the Office of Personnel Management (OPM), which manages the federal workforce; the Federal Labor Relations Authority, which oversees Federal labor-management relations; and the MSPB, which assumed the employee appeals function of the Civil Service Commission and was given the new responsibilities to perform merit systems studies and to review the significant actions of OPM.

MSPB carries out its statutory mission principally by:

- Adjudicating employee appeals of personnel actions over which the Board has jurisdiction, such as removals, suspensions, furloughs, and demotions;
- Adjudicating employee complaints filed under the WPA, USERRA, and the Veterans Employment Opportunities Act;
- Adjudicating cases brought by the Special Counsel, principally complaints of prohibited personnel practices and Hatch Act violations;
- Adjudicating requests to review regulations of OPM that are alleged to require or result in the commission of a prohibited personnel practice or reviewing such regulations on the Board's own motion;
- Ordering compliance with final MSPB orders where appropriate; and
- Conducting studies of the federal civil service and other merit systems in the Executive Branch to determine whether they are free from PPPs.

The MSPB is composed of a Chairman, Vice Chairman, and Member6 who adjudicate the cases brought to the Board. The Chairman, by statute, is the chief executive and administrative officer of the Board. Office heads report to the Chairman through the Chief of Staff. The MSPB consists of the following offices:

- The Office of Regional Operations oversees the six MSPB regional offices and two field offices, which receive and process initial appeals and related cases. Administrative judges in the regional and field offices are responsible for adjudicating assigned cases and for issuing fair and well-reasoned initial decisions.

- The Office of the Administrative Law Judge adjudicates and issues initial decisions in Hatch Act cases, corrective and disciplinary action complaints brought by the Special Counsel, proposed agency actions against administrative law judges, MSPB employee appeals, and other cases assigned by the Board.

- The Office of Appeals Counsel conducts legal research and prepares proposed decisions for the Board in cases where a party petitions for review of a judge's initial decision and in all other cases decided by the three-member Board, except for those cases assigned to

5 Pub. L. No. 95-454, 92 Stat. 1111 (1978).
6 Currently Chairman Neil McPhie, Vice Chairman Mary Rose, and Member Barbara Sapin.

the Office of the General Counsel. The office also conducts the Board's petition for review settlement program, processes interlocutory appeals of rulings made by judges, makes recommendations on reopening cases on the Board's own motion, and provides research and policy memoranda to the Board on legal issues.

- The Office of the Clerk of the Board receives and processes cases filed at Board headquarters, rules on certain procedural matters, and issues the Board's Opinions and Orders. The office serves as the Board's public information center, coordinates media relations, produces public information publications, operates the Board's library and on-line information services, and administers the Freedom of Information Act and Privacy Act programs. The office also certifies official records to the courts and federal administrative agencies, and manages the Board's records and directives system, legal research programs, and the Government in the Sunshine Act program.

- The Office of the General Counsel, as legal counsel to the Board, provides advice to the Board and MSPB offices on matters of law arising in day-to-day operations. The office represents the Board in litigation, prepares proposed decisions for the Board on assigned cases, and coordinates the Board's legislative policy and congressional relations functions. The office also conducts the Board's ethics program and plans and directs audits and investigations.

- The Office of Policy and Evaluation carries out the Board's statutory responsibility to conduct special studies of the civil service and other merit systems. Reports of these studies are directed to the President and the Congress and are distributed to a national audience. The office also conducts an outreach program and responds to requests from federal agencies for information, advice, and assistance on issues that have been the subject of Board studies.

- The Office of Financial and Administrative Management administers the budget, procurement, property management, physical security, and general services functions of the Board. It develops and coordinates internal management programs and projects, including review of internal controls agency-wide. It also administers the agency's cross-servicing arrangements with the U.S. Department of Agriculture's National Finance Center (NFC) for accounting and payroll services and with ABS (APHIS Business Services) for human resources management services.

- The Office of Equal Employment Opportunity plans, implements, and evaluates the Board's equal employment opportunity (EEO) programs. It processes complaints of alleged discrimination and furnishes advice and assistance on affirmative action initiatives to the Board's managers and supervisors.

- The Office of Information Resources Management develops, implements, and maintains the Board's automated information systems in order to help the Board manage its caseload efficiently and carry out its administrative and research responsibilities.

Recent Developments

A. New Personnel Systems Impacting MSPB

In 2002, Congress passed the Homeland Security Act (HAS) (P.L. 107-296), which gave the Secretary of Homeland Security the ability to waive several provisions of Title 5 USC, including Chapter 77, which governs employee appeals. However, the Act required that Department of Homeland Security (DHS) employees be given fair treatment in any appeals system and due process. It further required that DHS consult with the MSPB in developing a new appeals process. On February 1, 2005, DHS issued final regulations for its new personnel system. With regard to the MSPB, DHS permits employees to appeal cases to the MSPB as usual and provides judicial review with the Federal Circuit Court of Appeals, but requires MSPB to shorten its time frame for reviewing DHS cases and increases the standard for MSPB to mitigate penalties imposed by DHS. The final regulations also establish and internal appeals board to review serious employee offenses. Appeals from the internal panel can be made to the MSPB, with limited review, with further appeal to federal courts.

Shortly after the final regulations were issued, the National Treasury Employees Union (NTEU), American Federation of Government Employees (AFGE), National Federation of Federal Employees, National Association of Agriculture Employees, and the Metal Trades Department, AFL-CIO, filed a lawsuit alleging that DHS exceeded the authority granted to them under the HSA. On August 12, 2005, a U.S. District Court for the District of Columbia enjoined in its entirety subpart E of the final regulations relating to labor-management relations and a regulation in subpart G, relating to appeals procedures, which limited the authority of the MSPB to mitigate penalties imposed by DHS on the ground that this limitation did not comply with a provision of the HSA which required that procedures must be fair. [*NTEU v. Chertoff,* 385 F. Supp. 2d 1 (D.D.C. 2005).] On June 27, 2006, the U.S. Court of Appeals for the District of Columbia Circuit upheld the District Court's decision related to collective bargaining, but found that the issues related to the MSPB were not ripe for consideration as no employee had been subject to the new appeals process. [452 F.3d 839] DHS is now moving forward to implement the new appeals system for DHS employees.

In 2004, Congress passed the National Defense Authorization Act for FY 2006 (P.L. 108-136), which established the National Security Personnel System (NSPS) at the Department of Defense (DoD). The Act gave DoD flexibility similar to that given to DHS and on November 1, 2005, DoD issued final regulations on NSPS. The final regulations retained MSPB appeal rights and judicial review, but called for shorter MSPB case processing times, increased the burden of proof for MSPB judges to mitigate penalties or award attorney fees. The regulations also provide DoD with discretion to review and reverse a MSPB administrative judge's initial findings of fact.

On November 7, 2005, a coalition of federal unions, including AFGE, the International Federation of Professional and Technical Engineers (IFPTE), and others, filed a lawsuit in federal district court challenging the regulations. On February 27, 2006, the U.S. District Court

for the District of Columbia enjoined the new regulations on the grounds that they failed to ensure collective bargaining rights, did not provide for the independent third-party review of labor relations decisions, and failed to provide a fair process for appealing adverse actions.7 DOD has appealed the decision. The court held that the process of appealing adverse actions in the final regulations would fail to provide employees with "fair treatment" and, therefore, were contrary to authority that had been granted in the statute.

B. E-Appeal

During fiscal 2003, MSPB implemented an electronic appeals process (e-Appeal) that allows appellants to file an initial appeal using the Internet. The Board also began implementation of e-Filing that allows the parties to file and serve subsequent pleadings and documents over the Internet. E-Appeal, phase I was a popular program with approximately 1000 electronic appeals filed in its first year. Phase II of E-Appeal was implemented in September of 2004. Phase II also gives appellants a system to upload filings as attachments and provides for same-day electronic distribution of filings, orders and decisions. The system also notifies the appropriate MSPB office and automatically files submitted filings in the Board's Document Management System (DMS). The MSPB believes e-Appeal programs will improve the Board's efficiency in handling appeals and make it easier for appellants to file appeals and communicate with the Board.

C. ADR Program

The Board's new alternative dispute resolution pilot program, called the Mediation Appeals Program (MAP), became fully functional in FY 2003 with the completion of mediation training by 15 Board employees. As part of the training, these employees completed 3 to 5 co-mediations with dispute resolution experts. Fifty percent of the completed co-mediations resulted in settlements of pending appeals.

Currently, 18 Board staff members have been trained and certified as mediators. In addition, the Board has expanded MAP to all regional and field offices; completed MAP training in all field and regional offices; and developed a mediation pamphlet to accompany the Acknowledgement Order in approximately half of the new appeals.

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7 American Federation of Government Employees, AFL-CIO v. Rumsfeld, No. CIV. 05-2183 EGS (D.D.C. Feb. 27, 2006).

MSPB Data

Cases Decided

Fiscal Year	Regional & Field Offices	HQ Appellate Jurisdiction	HQ Original Jurisdiction	Total
1997	8,314	1,740	100	10,154
1998	8,442	1,887	47	10,376
1999	7,670	2,037	106	9,813
2000	7,489	1,827	58	9,374
2001	7,174	1,357	28	8,559
2002	7,194	1,275	31	8,500
2003	7,227	1,152	37	8,416
2004	6,859	1,467	24	8,350
2005	6,824	1,584	23	8,431
2006	7,110	1,306	32	8,448

Selected Case Processing Statistics

Fiscal Year	Percent of Final Decisions Left Unchanged Upon Review	Average Processing Time for Initial Decisions	Average Processing Time for Petitions for Review	Average Processing Time for Enforcement Cases in the OGC
1997	96%	108	183	202
1998	92%	108	205	163
1999	92%	100	222	206
2000	96%	89	176	206
2001	96%	92	214	224
2002	93%	96	205	238
2003	94%	94	295	239
2004	95%	89	300	254
2005	94%	92	268	291

2006	93%	89	154	325

Budget and Staffing

Fiscal Year	Budget	FTE
1997	$23,923,000	259
1998	$27,720,000	238
1999	$25,780,000	237
2000	$27,481,000	226
2001	$29,372,000	222
2002	$33,075,000	228
2003	$34,276,000	223
2004	$35,503,000	228
2005	$37,005,000	228
2006	$37,618,000	225

MSPB Reauthorization Request

MSPB is requesting reauthorization for five years, through the end of fiscal year 2012; legislation to provide for a line of succession to the board's chairmanship; establish new delegation and budget authority for the chairman; allow the Board to grant summary judgment; and exempt MSPB from compliance with the Government in the Sunshine Act, at the discretion of the chairman. An analysis MSPB's request is provided by the Congressional Research Service, which is included in this notebook.

LEGISLATION

H.R. 985, the Whistleblower Protection Enhancement Act of 2007, introduced by Representative Henry Waxman (D-CA) on February 12, 2007, and passed the House on March 14, 2007.

S. 274, the Federal Employee Protection of Disclosures Act, introduced by Senator Daniel Akaka (D-HI) on January 11, 2007, and referred to the Senate Homeland Security and Governmental Affairs Committee.

H.R. 3128 (109th Congress), the Clarification of Federal Employment Protections Act, introduced by Representative Henry Waxman (D-CA) on June 30, 2005, and referred to the House Government Reform Committee. Reported favorably on November 18, 2005.

ADDITIONAL INFORMATION

Congressional Research Service Memorandum to Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia on the Reauthorization Request of the Merit Systems Protection Board, February 16, 2007.

Government Accountability Office, *U.S. Office of Special Counsel's Procedures for Assigning Incoming Cases to and within Organizational Units,* GAO-07-263R, January 12, 2007.

Government Accountability Office, *Office of Special Counsel Needs to Follow Structured Life Cycle Management Practices for Its Case Tracking System,* GAO-07-318R, February 16, 2007.

Government Accountability Office, *U.S. Office of Special Counsel: Selected Contracting and Human Capital Issues*, GAO-06-16, November 2005.

H. Hrg. 109-115 -- *Justice Delayed is Justice Denied: A Case for a Federal Employees Appeals Court*, House Committee on Government Reform, Subcommittee on Federal Workforce and Agency Organization, November 9, 2005.

S. Rept. 109-72, Federal *Employee Protection of Disclosures Act, S. 494*, Committee on Homeland Security and Governmental Affairs, May 25, 2005.

S. Hrg. 109-68 -- *Safeguarding the Merit System: A Review of the U.S. Office of Special Counsel*, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, May 24, 2005.

Government Accountability Office, *U.S. Office of Special Counsel's Role in Enforcing Law to Protect Reemployment Rights of Veterans and Reservists in Federal Employment,* GAO-05-74R, October 6, 2004

Government Accountability Office, *U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should Be Provided to Congress,* GAO-04-36, March 2004.

S. Rept. 107-349 for S. 3070, a bill to authorize appropriations for the Merit Systems Protection Board and the Office of Special Counsel, and for other purposes, Senate Committee on Governmental Affairs, November 19, 2002.

Public Employees for Environmental Responsibility (PEER), www.peer.org

Project On Government Oversight (POGO), www.pogo.gov

Government Accountability Project (GAP), www.whistleblower.org

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

MAR 2 3 2005

Leroy A. Smith
2708 5th Street
Atwater, CA 95301

Re: OSC File No. MA-05-1229

Dear Mr. Smith:

This letter is in response to the complaint you recently filed with the U.S. Office of Special Counsel (OSC). In your complaint, you allege that you were placed on AWOL status in retaliation for making several disclosures to the OSC. In a phone conversation on March 16, 2005, you also state that you suffered retaliation when you were threatened by management with removal. The Complaints Examining Unit has carefully considered the information you have provided. We have, however, based on our evaluation of the facts and law applicable to your circumstance, made a determination to close our inquiry into your allegations.

Your complaint was analyzed as a possible 5 U.S.C. 2302(b)(8) violation, retaliation for whistleblowing. As you also engaged in protected behavior by making a report to the OSC, we reviewed your complaint as a possible section 2302(b)(9) violation. Reprisal for engaging in protected behavior is a violation of section 2302(b)(9).

Under the Whistleblower Protection Act of 1989 (WPA), it is a violation of 5 U.S.C. § 2302(b)(8) to take or fail to take, or to threaten to take or fail to take, a personnel action with respect to any employee because of any disclosure of information by an employee or applicant which the employee reasonably believes evidences: (1) a violation of law, rule or regulation; (2) gross mismanagement; (3) a gross waste of funds; (4) an abuse of authority; or (5) a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law, or specifically required by Executive Order to be kept secret.

In order for OSC to establish a violation of 5 U.S.C. § 2302(b)(8), we must be able to show: (1) you made a "protected disclosure" of information, (2) a personnel action was taken, not taken, or threatened, (3) the official who took, failed to take, or threatened the personnel action knew about your "protected disclosure," and (4) the official took, failed to take, or threatened the personnel action because of your "protected disclosure."

Section 2302(b)(9) prohibits an official with personnel action authority from taking, failing to take, or threatening to take or fail to take a personnel action because an employee engaged in a protected activity, such as....(3) cooperating with or disclosing information to the Inspector General or the Special Counsel in accordance with applicable law.

The elements of proof necessary to establish a section 2302(b)(9) violation are: (1) an employee or applicant for employment participated in the protected activity defined in 5 U.S.C. § 2302(b)(9); (2) the agency officials exercising personnel action authority had knowledge of the employee's or applicant's participation in the protected activity; and (3) participation in the protected activity was a significant factor in the personnel action or threat of a personnel action.

As stated above, both statutes require a retaliatory personnel action. In your complaint, you state that you were denied sick leave and placed on AWOL (absent without leave) status. You also claim that your supervisor threatened you with removal if you did not attend a mandated doctor's examination. The merit of each personnel action will be discussed separately.

You first allege that the agency placed you on AWOL in retaliation for making protected disclosures. Although placement on AWOL is a personnel action identified at 5 U.S.C. § 2302(a)(2)(A), we are unable to further investigate this allegation of reprisal. As documented in your file, you were issued a letter on March 7, 2005, stating that you were approved for only 40 hours of sick leave. The letter also noted that without proper medical documentation, you would be carried AWOL starting March 6, 2005. However, you received a letter on March 11, 2005 stating that you had provided proper medical documentation before the March 7th letter could be rescinded and that your request for sick leave had, in fact, been approved. As the agency corrected itself and did not place you on AWOL status, we are left with no way to provide you relief for this alleged personnel action. Accordingly, because this allegation has no corrective action, we are closing our inquiry into these possible section 2302(b)(8) and (b)(9) violations.

Furthermore, you state that you have been threatened with removal in retaliation for whistleblowing and for engaging in protected behavior. Specifically, you claim that in a letter issued March 11, 2005, you were instructed that if you failed to report for a medical examination on the date and time scheduled, you may be subjected to discipline up to removal. First, the personnel action for which you specify has no corrective action. As they have not issued you any disciplinary action or a proposed suspension, we have no relief for which to offer you. Second, we are unable to find a casual connection between this apparent threat of a personnel action and your protected disclosures and/or protected activity. It is common practice to subject certain federal employees to medical exams if the position has medical standards. Consequently, without some indication that you were issued a personnel action in retaliation for your protected disclosures and protected activity, we are unable to take further action into these allegations of section 2302 (b)(8) and (b)(9) violations.

As previously stated, we have made a preliminary determination to close our inquiry into your complaint. You have, however, an opportunity to submit comments concerning our determination. Your response must be ***in writing*** and should address the reasons we cited in reaching our preliminary determination to close your complaint. You have ***sixteen days from the date of this letter*** to submit your written response. If we do not receive any written

comments by the end of the sixteen-day period, we anticipate closing the file. We will then send you a letter terminating the investigation and advising you of any additional rights you may have.

Sincerely,

Maria Garabis
Attorney
Complaints Examining Unit

March 11, 2005 OSC File No: MA-05-1229

MEMORANDUM FOR Melissa Ehlinger, care of Catherine McMullen
Complaints Examining Unit
U.S. Office of Special Counsel
1730 M Street N.W., Suite 218
Washington D.C. 20036-4505

SUBJECT: Request for a Stay

Dear Ms. Catherine McMullen

I filed reprisal personnel action electronically on March 11, 2005, which Matthew Glover, Attorney assisted with my processing of this personnel action. I have not been provided a OSC File Number yet. On the form there was not an area to request for a stay through MSPB. I am formally requesting that the Office of Special Counsel request for a stay on my behalf, currently the Agency put me of AWOL status for no apparent reason. I was never called by my supervisor to request an updated medical report, before I received a certified letter in the mail telling me that my sick-leave and annual-leave had been denied and that I have been placed on AWOL status as of March 6, 2005. My Doctor had already completed an eight point letter at the agencies request and informed them that I would be off work for 3-6 months or longer. My supervisor over the last three month accepted my medical slips extending my time off from work without an updated medical report. I believe this directly related to the MSPB complaint, EEO complaint, and the disclosure with the Office of Special Counsel.

If there are any questions, please do not hesitate to let know.

Sincerely,

Leroy A. Smith Jr.

Home Phone: (209) 358-6582
Cell Phone: (209) 617-1319

Government Accountability Project
National Office
1612 K Street, N.W. • Suite 1100
Washington, D.C. 20006
(202)408-0034 • Fax: (202)408-9855
Email: info@whistleblower.org • Website: www.whistleblower.org

March 29, 2006

The Honorable Daniel Akaka, Chair
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
605 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Akaka:

Thank you for inviting written testimony from the Government Accountability Project (GAP) on the Office of Special Counsel's (OSC) and Special Counsel Scott Bloch's performance since the subcommittee's May 2005 hearings. GAP is a non-profit, non-partisan public interest organization whose mission is to support whistleblowers, those employees who exercise free speech rights to challenge abuses of power hat betray the public trust. We have led the outside campaigns for passage of the Whistleblower Protection Act of 1989 and subsequent amendments. Oversight of the Office of Special Counsel has been a cornerstone of our mission to whistleblowers, because that agency's track record has determined the need for stronger due process channels to enforce free speech rights. Unfortunately, since your last hearing the Office has not honored Mr. Bloch's commitments for better service to the merit system. In fact, although his term is two thirds complete, the OSC's performance has steadily deteriorated since 2005. This belies his prior testimony holding former Special Counsel Elaine Kaplan responsible for his failure to accomplish anything significant during his first 18 months, beyond forcing out the career staff who had been most effective helping whistleblowers prior to his arrival.

Regardless of responsibility, however, the bottom line has remained constant. Before Mr. Bloch's arrival, whistleblower support organizations regularly viewed the OSC as the first choice to help retaliation victims. While no panacea, OSC staff could be counted on to -- 1) make an honest effort reviewing employees' evidence and discussing it with them, 2) conduct intensive, no stones unturned investigations, 3) pressure steadily and aggressively for informal corrective action throughout the investigation to make a difference without litigation, 4) sustain the civil service's most effective Alternative Dispute Resolution mediation program, and 5) when dissatisfied, appeal directly to Special Counsel Kaplan or Deputy Special Counsel and informal Ombudsman Tim Hannapel, both of whom were accessible and available when needed. This was an organization that made a difference. None of those premises are true anymore. This is not an editorial comment, but simply the facts of life. Currently, whistleblower support groups regularly advise reprisal victims to steer clear of the Special Counsel, unless

unavoidable to preserve their rights. For all but a token few, at best the Office of Special Counsel is a waste of time, energy and money. Reprisal victims' decisions to avoid the agency altogether may explain in part Mr. Bloch's lament at the hearing last week that he does not have the results to illustrate his boasts of better service, because the quality of cases is not as good as it used to be.

This testimony will concentrate on two areas where GAP has developed in-depth knowledge of OSC operations: 1) the Customer Service Unit created by Mr. Bloch to implement his 2005 commitments, and 2) the Disclosure Unit for whistleblowers to challenge fraud, waste and abuse.

THE CUSTOMER SERVICE UNIT

This February GAP agreed to represent Ms. Natresha Dawson, who from June 2005 until October 2006 was one of two paralegals originally hired to staff the CSU, and is now a whistleblower about the grossest mismanagement possible of that office. She also attests to an intensifying pattern of retaliation and racism within the OSC. Her stated duties were to receive initial calls and work with intakes to understand their cases, review associated documents and prepare introductory analyses of whether and how the OSC could be of assistance. Her last day of active service was March 28, 2006, after which she had to take medical leave on doctor's orders due to migraine headaches and emergency room treatments for stress due to harassment. To her knowledge, at least through last October, there has not been a CSU, as her only partner already had left the unit and had not been replaced. Although all leave had been documented and approved, the Special Counsel fired her for being Absent Without Leave (AWOL).

Ms. Dawson accepted the initial Customer Service Unit job offer for two reasons: 1) She had reached a career ceiling as a GS-9 Legal Secretary for the Chief Administrative Law Judges at the U.S. Department of Agriculture, and the OSC offered her a GS 9-11 Paralegal Specialist position. 2) It was an opportunity to make a difference helping to enforce employee rights. During the course of her employment, Ms. Dawson spoke with hundreds of employees seeking help against prohibited personnel practices or attempting to blow the whistle.

Based on her experience at the CSU, Ms. Dawson drew two conclusions. 1) As an overwhelming rule the OSC did not respect or help victims of illegal retaliation. She knew of no one who contacted the CSU and received assistance. Eventually she stopped making any statements offering hope to those who sought help from the Special Counsel, because she believed it would be dishonest. 2) In terms of its own personnel practices, the OSC was the lowest common denominator in the Executive in terms of respect for and compliance with the merit system.

Prior to working for the OSC, Ms. Dawson had a spotless record during 17 years of federal service. For example, she had just received an Outstanding rating in her mid term review from USDA's Chief Administrative Law Judge. She had never asserted legal rights against an employer. Based on less than a year of active service working under

Special Counsel Bloch, she filed three EEO complaints, two Whistleblower Protection Act claims, an Office of Workman's Compensation claim, and a Federal Tort Claims Act lawsuit. Currently she is appealing her dismissal in a mixed WPA-EEO proceeding.

Ms. Dawson's allegations are summarized below.

I. CSU performance

* Initially Ms. Dawson and the other new CSU staffer worked with the Complaints Examining Unit (CEU). Although other staffers helped her on evaluating intakes and filling out CEU disposition forms, there was no formal training beyond general reading material.

* In September the CSU inexplicably was moved to become part of the Human Resources branch run by Mr. Robert Wise. He instructed Ms. Dawson to limit herself to receiving phone calls and summarizing what was on the OSC website.

* OSC personnel never questioned or discussed with her any specific calls from alleged reprisal victims seeking assistance. Their calls were nothing more than an opportunity to make noise. There was a 100 percent disconnect with the rest of the agency, and she could not point to any indications that her discussions with those referred to the CSU had any relevance for handling of their cases, other than that other OSC staff would not have to talk with them when they first contacted the Office.

* Intakes were dismissed arbitrarily, even if their alleged facts appeared to correspond directly to the elements of prohibited personnel practices summarized on the OSC website. OSC supervisors and other staff regularly referred to whistleblowers as "crazy." Ms. Dawson empathized deeply with many of the callers and wanted to help change that attitude. She protested that intakes seemed that way because they were under attack, bewildered and in danger of losing their professional lives. There was no empathy or commitment to help, as evidenced by a CEU Team Leader throwing an emergency stay request on a stack of other papers and refusing to discuss it with her. She felt like she was talking to walls. Other than CEU chief Audrey Williams, no OSC manager ever discussed with her the agency's mission to help whistleblowers.

* By February 2006 the other CSU Paralegal had left the unit, taking a lateral reassignment. After Ms. Dawson's last day of active duty on March 28, there was no CSU at least through October 13, 2006 when she was terminated.

II. Whistleblowing disclosures and response.

* Ms. Dawson was not passive about the disillusioning practices she observed. She made both verbal and written internal whistleblowing disclosures ranging from supervisors to Mr. Bloch on the following issues:

- Structurally and functionally isolating CSU staff from the Complaints Examining Unit when they should have been working in partnership to assess whether and how the Special Counsel most effectively could help prohibited personnel practice victims.
- Refusing to permit call intake sheets, so that Mr. Wise would know what issues the complainants had raised, and assess whether and how the OSC could help.
- Failing to make an honest effort to respect or help whistleblowers and other reprisal victims who sought relief.
- Hiring three CEU staffers without vacancy announcements.
- Hiring a Freedom of Information Act (FOIA) specialist who had no prior expertise of federal experience, and without a vacancy announcement despite Ms. Dawson's request to be kept informed because she wanted the job and had FOIA training.
- Monopolizing agency power at the top, illustrated by the practice of supervisors so disenfranchised that they did not meet their newly-hired staff until after hiring decisions in which they played no role.
- Reducing efficiency and exacerbating backlogs, due to Mr. Wise's orders that he would have to be the intermediary for all communications with other OSC staff, supervisors and employees assigning work.
- Absence of performance standards for her position.

* Ms. Dawson did not have any employment history of being a critic, and did not initially raise her concerns in that context. She was responding to Mr. Wise's request at the introductory meeting that he wanted the new CSU staff's help to get the unit off the ground. In her conversations she persisted in presenting her concerns as constructive suggestions to solve problems. But Mr. Wise appeared threatened, refused to discuss her ideas and summarily rejected them.

* In September 2005 Ms. Dawson made her first appeal to Mr. Bloch to provide leadership against threats to the merit system from within the OSC. It was in an email also copied to Deputy Special Counsel McVay. Mr. Bloch never responded, but a few days later Mr. McVay told her, "We're sticking with management." Other employees described that phrase as a mantra at the agency. The day after Mr. McVay's response, Mr. Wise told her that she had placed him and his supervisor in a bad light by going to the Special Counsel, so he was going to give her a letter of counseling. It ended with a threat of termination if she kept communicating with Mr. Bloch. Mr. Wise said that Mr. Bloch personally directed that she stop communicating with him, and that it was his decision to issue the letter of counseling. The action and threat directly contradicted the Special Counsel's anti-harassment policy.

* On July 22, 2006 Ms. Dawson alerted Mr. Anderson that she intended to disclose the CSU breakdown to Congress, as well as the atmosphere of internal repression. The next month he proposed her termination.

III. Racism.

* There was a system of de facto segregation in office placement for OSC staff. Seasoned employees referred from one side of Mr. Bloch's office to the end as "Mahogany Row," because no black staff could occupy an office and work there. When Ms. Dawson asked why she or other minority employees couldn't be located in vacant offices on the other side, she was told that they were reserved for storage of old furnishings and files and potential new hires. Later she was told the rooms were reserved for future SES hires who did not arrive before her departure.

* Initially Ms. Dawson had been assigned to another office on Mahogany Row, but Mr. Wise removed her with the explanation that "Associate Special Counsel Lenny Dribinsky complained that he couldn't walk by her door without his stomach turning." Mr. Wise confirmed that there was nothing else which could have caused Mr. Dribinsky's distress besides Ms. Dawson, the only employee in the office. He also said it was reserved for SES employees, but ultimately it was used by white interns, contractors, and for office files.

IV. Hostility to the merit system.

* The OSC leadership was rigidly intolerant of agency employees asserting their rights, which created an atmosphere of fear. Numerous employees warned her that anyone who filed a complaint about working conditions would be ruined and go down. One veteran employee was so upset about internal harassment that s/he cried in telling Ms. Dawson about it, but the employee was afraid to file a legal challenge due to certainty that it would lead to termination.

* The reaction to correcting an administrative mistake illustrates the hostility to employees asserting themselves. Shortly after being hired, Ms. Dawson learned that due to an error she would not receive a paycheck for her first pay period. When she could not obtain cooperation within OSC, she directly contacted the National Finance Center and easily straightened the matter out. She notified Mr. Wise. To her surprise, he and his Assistant Human Resource Specialist angrily accused her of a "security breach." A few days later Mr. Wise passed along the comment to Ms. Dawson that the sight of her made Mr. Dribinsky sick. A few weeks later he moved her workstation next to the men's room, where she was distracted by regular flushing and felt sick from the smell of disinfectant-masked urine.

* On August 8, 2005 Ms. Dawson complained to her second line supervisor about the seating arrangement. Mr. Wise then moved her to new locations five times over the next two months. The last was a storage room with excess furniture unstably stacked six feet high. In late August she decided to complain again about her safety, when a chair fell and came close to striking her head. Mr. Wise responded by canceling her flexible schedule. Mr. Anderson smiled while telling her that if he had complained about his seating arrangement he would have been fired.

* Ms. Dawson returned to work from sick leave the day after the Office of Personnel Management (OPM) Office of Inspector General (OIG) opened an investigation of Mr. Bloch. Without warning on her second day back, Federal Protective Service officers and an OSC security guard escorted her from her desk to the library, where they questioned her. This all took place in front of other employees, and appeared to be intended to make an example of her. The FPS staff explained the OSC had called them in, because she was dangerous and had been threatening to bring a machine gun in to work and shoot the place up. The FPS dropped the charges, because there was no prior contemporaneous record of the threat and the employee who supposedly had heard the threat refused to testify. After being released, she called Mr. Bloch's name and attempted to get his attention and find out what had happened, since he was observing by an elevator. But he quickly turned away. The FPS agreed with Ms. Dawson's request to investigate the basis, but the OSC then refused to cooperate – dismissing the incident as an EEO personnel matter. However, the OSC is still repeating the allegation about Ms. Dawson in litigation testimony answering her harassment charges.

* On October 2, 2005 Ms. Dawson filed an EEO complaint challenging hostile working conditions, and her threatened termination for communicating with Mr. Bloch. A little less than three weeks later, he downgraded her from a GS-9/11 to a GS-9 with no possibility for future advancement to GS-11.

* On October 10, 2006 Ms. Dawson communicated to Mr. Bloch a protest that the OSC was violating an EEO judge's settlement order. On October 13 he finalized her termination.

* The physical effects of the harassment were severe. Although she did not have a history of medical problems, Ms. Dawson developed insomnia and migraine headaches, to the point where on one occasion she had to be taken to the emergency room. Her doctor ordered her not to work, she submitted all required medical documentation, and sick leave was approved. While out, however, it was arbitrarily removed without notifying her. The OSC changed her status to AWOL, and then terminated her for the "offense" she did not know she was committing.

We believe a GAO review of the CSU's record is appropriate for two reasons: First, its brief life is a microcosm of the alleged mismanagement and retaliation at the agency whose mission is to police the rest of the federal government on both issues. Second, it is an ideal weathervane to assess Mr. Bloch's credibility for the rest of his assertions to Congress.

DISCLOSURE UNIT

Surveys of federal employees repeatedly have confirmed that the primary reason would-be whistleblowers remain silent when they witness misconduct is not fear of retaliation. It is that they will not be able to make a difference in correcting the problems they identify. If functioning as Congress intended, the OSC Disclosure Unit should give whistleblowers an opportunity to address, seek and obtain meaningful corrective action

for the problems they witness in the workplace. Despite the best efforts of the unit's dedicated career staff, by most accounts the DU under Mr. Bloch's tenure as Special Counsel has steadily sharply disintegrated, retreating from this vital good government function.

Statistics suggest that Mr. Bloch's decision to prioritize "efficiency" resulted in a sacrifice in the quality of its DU intake process. In FY2004, the percentage of whistleblower disclosures referred to agencies for investigations plummeted to 1.56% of 1154 processed. That percentage had been four times higher only two years before, even as the agency dealt with a significant increase in the number of post-9/11 whistleblowing disclosures.

At your last hearing, Mr. Bloch explained that the number had fallen as a result of OSC's efforts to reduce the Disclosure Unit's backlog. Yet, the Special Counsel does not appear to have used the resources allocated to him to help reduce the backlog through means other than mass closure of potentially valid cases. The President's budget for FY2004 requested that five additional positions be provided to OSC's Disclosure Unit to work on backlog reduction. This would have doubled the size of the Disclosure Unit's staff from 5 to 10, and would have allowed the unit to address the backlog without sacrificing the quality of its intake reviews and potential referrals. Although Congress granted the President's request for these additional positions, Mr. Bloch did not use them. Instead, during Mr. Bloch's first year he doubled the number of schedule C political appointments at OSC from 4 to 8. This is inexcusable, both as mismanagement, abuse of authority and illegal spending. A recent Democracy Corps poll found that likely voters' top priority for Congress was to stop illegal federal spending, in which bureaucrats spend money on what they want instead of its lawfully-approved purpose. Mr. Bloch's diversion of funds may be a microcosm of this concern. GAO should be assigned to investigate whether he diverted funds to political cronies, instead of spending it as Congress had approved for the unit that most directly challenges fraud, waste and abuse. .

Despite statistical evidence of the unit's decline, a number of important disclosures have been referred to agencies for investigation. However, even in these cases, Mr. Bloch consistently has refused to make the politically challenging and necessary decisions to refuse to accept agency reports that do not adequately resolve the whistleblower's complaint.

Consider the case of FAA manager Gabe Bruno, one of the "success" stories cited by Special Counsel Scott Bloch following the last hearing. In a June 14, 2005, OSC press release claiming victory on Mr. Bruno's disclosure of air safety threats, Mr. Bloch stated, "Nothing could be more central to the nation's overall security and the well-being of our citizenry than aviation safety...Thanks to the efforts of the whistleblowers, a problem was identified and is being corrected." However, a reality-based examination of Mr. Bruno's experience with OSC reveals Mr. Bloch's decreed a "good-government" stamp of approval on the fourth successive FAA whitewash of serious air safety concerns. The bureaucracy just waited until a leader would rubber stamp the same bad faith approach that had been flunked twice previously.

Mr. Bruno blew the whistle after FAA Southern Region managers abruptly canceled a mechanic reexamination program he had designed and implemented to assure that properly qualified mechanics were working on commercial and cargo aircraft. The reexamination program was necessary because of the activity of Anthony St. George, an FAA-contracted "Designated Mechanic Examiner," who was convicted on federal criminal charges and sent to prison for fraudulently certifying over 2,000 airline mechanics. Individuals from around the country -- and the world -- sought out St. George to pay a negotiated rate and receive an Airframe and Power plant Certificate without proper testing. After the conviction, Mr. Bruno's follow-up re-exam program, which required a hands-on demonstration of competence, resulted in 75% of St. George-certified mechanics failing when subjected to honest tests. The FAA then arbitrarily cancelled the program in the middle, leaving over 1,000 mechanics with fraudulently obtained credentials throughout the aviation system, including at major commercial airlines.

In June 2002, Mr. Bruno filed a whistleblower disclosure with OSC. Special Counsel Elaine Kaplan backed Mr. Bruno's disclosures in May 2003, finding a "substantial likelihood" that the disclosure constituted a danger to public safety.

OSC's "substantial likelihood" finding resulted in a Department of Transportation (DOT) Office of Inspector General (OIG) investigation of Mr. Bruno's disclosures. At first, there was reason for faith in the system. The DOT OIG submitted three reports that were not good faith resolutions. OSC flunked each report after receiving Mr. Bruno's rebuttal comments and ordered DOT back to the drawing board. Throughout this initial process, Mr. Bruno worked closely with an OSC attorney who monitored the investigation and reports closely.

However, in June 2005, OSC accepted a fourth DOT OIG report that confirmed mistakes had been made, but absolved the FAA of any intentional wrongdoing and did not require the agency to change its practices. In "correcting" the whistleblower's complaint, Special Counsel Bloch endorsed a disingenuous re-testing program that skips the hands-on, practical tests necessary to determine competence. The FAA's nearly completed reexamination program consists now of an oral and written test only. In effect, this decriminalizes the same scenario – incomplete testing – that previously had led to prison time for Anthony St. George. The bottom line is that the Special Counsel endorsed the status quo – the same system that had proven itself vulnerable to criminal fraud that endangers the flying public.

In his transmittal letter to the President after accepting the fourth DOT report, Mr. Bloch provided rhetorical understanding of the safety issues disclosed by Mr. Bruno. He stated, "It is crucial to the safety of the flying public that A&P mechanics receive proper training and master the skills necessary to perform their jobs, as evidenced by their ability to pass certification exams." Yet, Mr. Bloch refused to meet personally with Mr. Bruno to gain a better understanding of the inadequacies in the FAA's resolution. Also, despite acknowledging "concern" that the retesting program had again been halted due to a court

injunction, Special Counsel Bloch has done nothing to follow-up on his recommendation to immediately restart the retesting program, or to monitor the program's progress or results.

In 2002, Department of Energy Security Specialist Richard Levernier blew the whistle on the Department's systemic failure to adequately protect the nuclear weapons facilities under its control. Special Counsel Kaplan found a "substantial likelihood" that the allegations constituted a substantial and specific threat to public safety and ordered DOE to investigate. In 2003, DOE issued a report denying all of Mr. Levernier's allegations. Mr. Levernier submitted numerous, detailed comments, including authoritative internal studies confirming his concerns of ongoing terrorist vulnerability at nuclear weapons facilities, and flatly contradicting the official public resolution.

Nevertheless, after two years of delays, with no additional information requested from OSC, Special Counsel Bloch closed out the case and forwarded the Department of Energy's report to the President and Congress with the following explanation: "I have concluded that I am unable to determine whether or not the agency report contains all the information required by statute or whether its findings appear to be reasonable." This defied the Special Counsel's clear, statutory duty to make findings whether the report satisfies the minimum legal requirements of the Whistleblower Protection Act.[1]

In addition, for over 25 years, GAP's experience with the OSC has been that the Special Counsel sends reports back and tells agencies to keep working on them until they either pass statutory muster, or it is clear that the agency is refusing to comply with section 1213's requirements for responsible resolution of whistleblower charges. In that case, the Special Counsel flunks the agency's resolution as failing to meet legal standards. There does not seem to have been any public policy basis for abandoning that longstanding practice in this particular case. The stakes are unusually high, because Mr. Levernier was the Department of Energy's (DOE) top expert on quality assurance for safeguards and security. He documented numerous vulnerabilities to terrorism throughout the U.S. nuclear weapons complex. Yet, the Special Counsel let DOE off the hook without securing commitments from the agency to adopt corrective measures after he openly doubted conclusions in the agency report about "its ability to protect the nuclear assets entrusted to its care."

In a January 18, 2006 letter to Mr. Levernier, Mr. Bloch noted, "[T]here is much more work to be done to safeguard the nuclear facilities of this great country. Your tireless efforts to this end have been laudatory." Yet, he refused to meet personally with Mr. Levernier to gain a better understanding of the issues, and then passed the buck on holding DOE accountable.

[1] As provided by 5 USC 1213(e)(2) -- (2) Upon receipt of any report of the head of an agency required under subsection (c) of this section, the Special Counsel shall review the report and determine whether— (A) the findings of the head of the agency appear reasonable; and (B) the report of the agency under subsection (c)(1) of this section contains the information required under subsection (d) of this section.

RECOMMENDATIONS

The overwhelming consensus among whistleblowers, with a few vocal exceptions, is that this agency should be abolished. Through example and record it has weakened the merit system under Mr. Bloch. Indeed, Ms. Kaplan's administration is the only time since 1980 that conclusion has not reflected reality. If Congress is determined to give the Office still another chance, certain basic reforms are necessary:

I. Service to retaliation victims.

1. The OSC's mandatory duty to investigate in 5 USC § 1212 should be defined by statute, to include mandatory communications asking and answering questions about the initial submission, and providing guidance about any additional evidence or support needed to justify an OSC field investigation. Whether or not a field investigation is opened, the duty to investigate should not be complete unless and until an attorney has reviewed any preliminary disposition; prepared a menu of alternative sources for relief if there is no prohibited personnel practice jurisdiction; and concluded with a second call to explain any decision to close the case as well as the other available options, and to answer questions.

2. Provide complainants with copies of their case files, as are available from the EEOC on discrimination cases. In 1994 Congress accepted an OSC suggestion that this step would be unnecessary, if the OSC were required by statute to include an informal Findings of Fact and Conclusions of Law section in its closeout letters. Those summaries, however, have been virtually useless as explanatory devices or substitutes for direct human communication, and have served to mask the routine lack of effort by the Special Counsel to consider evidence submitted by reprisal victims.

3. Restore an Alternative Dispute Resolution unit to the Washington, D.C. headquarters, where most of the cases occur.

4. Provide independent, external mutual strike consensus selection, shared cost arbitration for OSC staff who allege prohibited personnel practices. The history of a currently-languishing, two year investigation into Mr. Bloch's alleged Whistleblower Protection Act violations against six staff members illustrates the structural vacuum for accountability. The case could not be investigated by the OSC due to conflict of interest, but a President's Council on Integrity and Efficiency (PCIE) investigation conducted by the Office of Personnel Management (OPM) Office of Inspector General (OIG) has been stalled for two years due to lack of OSC cooperation. Since the OSC sets an example for the rest of the merit system, retaliation disputes should be resolved without delay, and without any credibility questions on accountability.

5. Specifically amend 5 USC § 1212 so that the Special Counsel shall be removed if there is a pattern of prohibited personnel practices within the Office.

II. Whistleblowing disclosures

1. Provide that whistleblowers are entitled to see how the OSC frames issues in their disclosures and consult with the Office, before any referrals under 5 USC § 1213. Currently the OSC does not permit whistleblowers to know how their issues have been framed for investigation. This has maximized mistakes such as investigations into charges the employee did not make or, more frequently, avoiding the point of the whistleblowing disclosure through strategic edits. At a minimum, the OSC should demonstrate to the whistleblower that it understands the full scope of their allegations by providing documentation that specifies which allegations have and have not been referred. OSC should provide the language used in referring the allegation to the agency for the whistleblower to review. OSC communications with the agency should be available to the whistleblower for greater transparency and accountability during the process.

2. As an alternative to agency investigations, permit the employee to elect nonbinding, mutual strike consensus selection, shared cost arbitration for fact-finding and recommendations on disclosures referred under 5 USC 1213(c). All too often, the inherent conflict of interest in agency self-investigations has meant that OSC backing under this section facilitates institutional cover-ups.

3. After making a "substantial likelihood" finding under section 1213, OSC should provide the whistleblower with bimonthly status updates after, as is most often the case, the agency fails to meet the 60-day deadline for submitting the report of investigation to the Special Counsel. Likewise, after the agency submits its report and the whistleblower offer's comments, OSC should provide the whistleblower with bimonthly status reports as the OSC reviews the information.

4. Guarantee the whistleblower's right to have all comments included in the final report for the public record under section 1213, as well as in all associated communications to the President or Congress.

5. Enhance transparency by requiring the Special Counsel in its public records and annual reports to break down which disclosures are referred to agencies under 5 USC 1213(c) for full investigations, and which under section 1213(g) for limited review. Similarly, require the OSC to include the Disclosure Unit's work in its Customer Satisfaction Surveys.[2]

6. Explicitly eliminate the Special Counsel's discretion to close out a whistleblowing case under section 1213 without first taking a stand whether the agency's proposed resolution meets statutory requirements for completeness and reasonableness.

[2] At the recent oversight hearing, Mr. Bloch's only excuse for avoiding this feedback was that one of his lawyers told him he didn't have to.

Respectfully submitted,

Tom Devine
Legal Director

Adam Miles
Legislative Director

Statement of Colleen M. Kelley
National President
National Treasury Employees Union

to the

Committee on Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management and
the Federal Workforce
United States Senate

March 22, 2007

Chairman Akaka, Ranking Member Voinovich and Members of the Subcommittee, I appreciate this opportunity to present the views of the National Treasury Employees Union (NTEU) on the important matter of safeguarding merit system principles in the civil service. NTEU represents over 150,000 federal employees who work hard serving our nation. In return for their service, they expect and deserve fair treatment. The Office of the Special Counsel (OSC) and the Merit Systems Protection Board (MSPB) both play key roles in maintaining merit system principles. I commend this committee for performing the proper and needed oversight to make sure both of these agencies are fulfilling their important duties. Authorization for the MSBP and the OSC expires this year and the Senate needs to make a through review of the ability of these bodies to serve their public mission. To help the committee in its work, I would like to raise several matters of concern.

MSPB and the new DHS Personnel System

The Department of Homeland Security (DHS) recently announced its intention to go forward with regulations implementing a new employee appeals process. In April of 2005, MSPB Chairman McPhie testified before the House Committee on Government

Reform, Subcommittee on the Federal Workforce and Agency Operations, raising concerns about the impact these regulations would have on the Board's operations.

NTEU strong agrees with Chairman McPhie on the matter of allowing mitigation of penalties by MSBP. The Chairman testified that he believes that limiting the Board's ability to mitigate penalties "is based on a perception that the Board's practice is to second guess the reasonableness of an agency's penalty decision without giving deference to the agency's mission or the manager's discretion. " But "in fact, the Board considers a number of relevant factors in determining whether a penalty should be sustained, including whether it is in the range of penalties allowed for the offense in the agency's table of penalties." As the Chairman has also stated, MSPB only mitigates a penalty if it finds that the penalty clearly exceeded the maximum reasonable penalty.

NTEU opposes any such limitation and believes that when MSBP uses this authority it has done so in a proper way and gives due regard to the agency's mission and managerial discretion.

MSPB Reauthorization

As for the proposed reauthorization legislation, NTEU finds much of it non-controversial. However, I do have a few reservations. The bill proposes to amend 5 USC 1204(b)(3) to permit any member of the Board, any administrative law judge appointed by the Board under section 3105, and any employee of the Board designated by the Board, to grant a motion for summary judgment. I am concerned as to extending this to employees of the Board. It is unusual for employees to be given this authority. The committee needs to look closely at what expertise the employees have and how the Board justifies the delegation of this decision-making authority to subordinate employees before it approves this aspect.

The bill also proposes to permit the granting of motions for summary judgment when it has been determined that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. NTEU is concerned with this rush to judgment, especially in the case of pro se parties who may not be able to clearly state the facts or identify genuine issues of material fact in advance of a hearing. Pro se parties are also ill-equipped to explain, at a preliminary stage and on the pleadings only, why the moving party is not entitled to judgment as a matter of law.

Office of the Special Counsel

NTEU has many concerns as to the way the Office of the Special Counsel has functioned under it current leadership. We believe on many fronts the agency has not only failed in its mission but that its actions have led many federal workers to lose confidence in it. I will raise one matter that I hope this committee will take quick action to correct. The current head of the OSC has reversed the position OSC has taken in the past and that other federal agencies such as OPM continue to hold concerning discrimination in federal hiring based on sexual orientation. Mr. Bloch's claims is that 2302(b)(10) does not make it illegal for the federal government to deny an applicant a job solely on the basis of his sexual orientation, but only homosexual conduct. We find this distinction not only without merit but rather silly. Unfortunately, it has sent signals, indented or not, to the federal workforce that employees can not have confidence that the federal workplace is free of discrimination based on sexual orientation. While NTEU disagrees with Mr. Bloch's legal analysis, we believe it would be best for Congress to quickly clarify by legislation that such discrimination has no place in the federal workforce so that the unease among employees can be corrected without any delay.

I thank you, Chairman Akaka, for this opportunity to present NTEU views. NTEU remains ready to work with you and the committee to do all we can to promote and defend merit system principles.

Public Employees for Environmental Responsibility

2000 P Street, NW • Suite 240 • Washington, D.C. 20036 • 202-265-PEER(7337) • fax: 202-265-4192
email: info@peer.org • website: www.peer.org

Abolish the U.S. Office of Special Counsel

Testimony Submitted to

U.S. Senate Committee on Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia

Hearing on **Safeguarding the Merit System Principles:**
A Review of the Merit Systems Protection Board and the Office of Special Counsel

Jeff Ruch, Executive Director, PEER

March 22, 2007

Public Employees for Environmental Responsibility (PEER) urges the Committee on Homeland Security and Governmental Affairs to refrain from recommending the re-authorization of the U.S. Office of Special Counsel (OSC). Our argument is rooted in the fact that OSC helps extremely few whistleblowers, harms the causes of hundreds more whistleblowers than it helps and acts as a beacon of false hope for thousands more unsuspecting civil servants.

In short, the $15.3 million annual budget for OSC is very possibly the least cost-effective expenditure of federal resources made in the name of assisting whistleblowers.

PEER is a service organization for public employees working on environmental issues. PEER provides legal assistance and guidance to hundreds of public servants each year. Much of our work is with federal employees, ranging from the Chief of the U.S. Park Police to chemical weapons inspectors. As such, PEER often has direct dealings with OSC on behalf of our clients. Moreover, we also work directly with the whistleblower programs administered by the U.S. Department of Labor, various federal offices of inspector generals as well as whistleblower protection programs in more than 20 states.

Our experience leads to one incontrovertible conclusion: OSC has become nothing short of a disaster area for whistleblowers. In recent years, OSC has become so profoundly dysfunctional and defensive that PEER concludes the agency is beyond rehabilitation. Instead, Congress should use this opportunity to abolish OSC and distribute its functions among other agencies.

In this testimony, PEER provides 1) an overview of the paltry results now produced by OSC; 2) an examination of some of the very few "success" stories to which OSC can point; and 3) suggestions for transferring OSC's functions and for re-constituting the Merit Systems Protection Board (MSPB) in the context of reforms of the Whistleblower Protection Act (WPA) that are now being considered in both houses of Congress.

I. OSC's Dismal Track Record

A. Whistleblower Retaliation

A principal function of OSC is to protect federal employees from retaliation for reporting waste, fraud and abuse. It appears, however, that OSC protection of employee whistleblowers has become far more the exception than the rule.

This past November, OSC finally released its long-overdue FY 2005 annual report to Congress. (Although the 2007 Fiscal Year is nearly half over, OSC has yet to produce its FY 2006 report.) The 2005 report, however, reflects an abysmal track record for protecting federal servants from retaliation:

- In no case did OSC seek relief for a whistleblower where the agency had not already voluntarily agreed to the action.

- The only relief for employees comes throughout settlements, but fewer than ever cases are settling. Settlements for whistleblowers claiming retaliation declined 25% from the previous year and have declined by more than half since the current Special Counsel took office three years ago; and

- Following the forced resignation of the head of its mediation unit, no OSC cases were settled through alternative dispute resolution.

In other words, out of the hundreds of complaints of retaliation filed each year, only a tiny handful come to any resolution (other than dismissal) under the aegis of the OSC.

Last fall through the Freedom of Information Act, PEER obtained the latest annual survey conducted by OSC (under a statutory mandate) of whistleblowers and other employees who filed retaliation complaints. Perhaps not surprisingly, the survey did not reflect well upon OSC. Nearly 90% of federal employees who dealt with the OSC registered dissatisfaction with the experience in the survey. Survey results included:

- OSC did not find for a single whistleblower. Of 118 whistleblowers who filed complaints of retaliation only 4 obtained any relief, and then only because "You or OSC settled the matter";

- Nearly twice as many whistleblowers (7) obtained relief on their own after OSC had dismissed their complaints as obtained relief while their complaints were before OSC, with appeals still pending for another 14 employees; and

- Less than 6% of the respondents reported any degree of satisfaction with the results obtained by OSC while 89% were dissatisfied.

It is hard to imagine how any business with such negative "customer satisfaction" ratings could keep its doors open.

This latest survey evidences a dramatic decline in both relief obtained for whistleblowers and in their regard for OSC. For example, in the FY 1997 survey, ten times more employees (45) obtained settlements while their complaints were before OSC than in FY 2005. More than a quarter of that survey's respondents said they were satisfied with how their cases were handled. Similarly, in the FY 2001 survey, 46 employees reported full or partial resolution of their cases at OSC.

B. **Whistleblower Disclosures**

The OSC is also supposed to serve as a place where federal employees can report waste, fraud, abuse or other wrongdoing and oversee investigation of those reports. These employee whistleblower reports are called "disclosures." The OSC is supposed to review each such disclosure and make a determination within 15 days as to whether the disclosure carries a substantial likelihood of validity. If so, OSC then orders the cabinet agency from which the disclosure emanated to provide a response back to OSC within 60 days. Once the agency response has been submitted, OSC provides the whistleblower a chance to respond.

After the whistleblower has responded to the agency review, the Special Counsel makes an independent determination as to whether the agency response was reasonable in addressing the problems raised by the whistleblower. If the Special Counsel finds the agency response to be wanting, he or she can order the agency head to provide additional information. Alternatively, the Special Counsel can find that the agency has not addressed the problems raised by the employee whistleblower and make that finding known to the president and the leadership of both houses of Congress.

While the OSC disclosure process has no teeth, in the sense that it cannot mandate that an agency take any particular action, when it is conducted properly it is a powerful tool for vindicating often embattled whistleblowers. Moreover, the OSC oversight of the agency response provides a measure of transparency lacking in agency inspector general investigations.

Unfortunately, this powerful tool for transparency is seldom used. In FY 2005, of the nearly 500 disclosures by federal employees of wrongdoing in their agencies, OSC deemed only 4% (19 cases) worthy of investigation. The rest of the whistleblower disclosures were dismissed without any follow-up or further review.

This means that fewer than one in 20 federal employees who discloses violations of law, threats to public safety or other misconduct to the OSC succeed in having the disclosure examined in any meaningful fashion. It is almost as if the OSC disclosure function is designed to stifle the disclosures rather than promote investigations.

C. **The Best Measure**

Finally, perhaps the most telling indication as to how OSC implements the WPA is the experience of OSC's own staff. On March 3, 2005, OSC staff members and a coalition

of whistleblower protection and civil rights organizations (including PEER) filed a complaint against Special Counsel Scott Bloch for violating the very laws he is supposed to enforce. The complaint specified instances of illegal gag orders, cronyism, invidious discrimination, and retaliation in forcing the resignations of one-fifth of OSC headquarters' legal and investigative staff.

The complaint was filed with the President's Council on Integrity and Efficiency, an umbrella group of inspector general and other government oversight agencies, that has the power to review such complaints when referred by a member agency. The PCIE took no action on the complaint for more than seven months, until October 2005 when the chair of PCIE tasked the Office of Personnel Management Office of Inspector General (OPM-IG) with conducting an investigation into the charges.

This investigation by OPM-IG is ongoing, more than 17 months later. One factor slowing this probe was Special Counsel Bloch's insistence that outside investigators make appointments with OSC staff members through his office, rather than contacting them directly to set up interviews. As late as January 30, 2007, Rebecca McGinley, one of Bloch's political deputies, sent an email to all OSC employees directing she be notified if OPM-IG contacted any of them for an interview. She also asserted that OPM-IG must conduct all interviews at OSC headquarters, unless the employee affirmatively declared his or her discomfort with speaking to investigators at the worksite.

Ms. McGinley claimed that this is consistent with the procedure OSC itself follows when conducting retaliation investigations. In fact, OSC does not follow such a policy. Its website confirms that "OSC reserves the right to contact witnesses directly when appropriate" rather than scheduling interviews through the agency which is the subject of the investigation.

Not surprisingly, OSC staff members report that they are afraid to speak with OPM-IG investigators for fear they will be reported back to Bloch.

Last month, in the face of a formal protest from the attorney for the current and former OSC employees who filed the retaliation complaint and an impending *Washington Post* story, Bloch's office abruptly reversed course and withdrew the directives.

It is beyond ironic that the attorneys and investigators within OSC who are supposed to be protecting others from retaliation are themselves facing the same issues. If the Whistleblower Protection Act does not work for OSC's own staff, why would we expect it to work for anyone else?

II. Three Cases in Profile

Statistics often do not communicate the frustration that public servants feel as they see their careers imploding due to their pursuit of what they believed was the morally correct course of action. These three recent cases from the PEER case files are especially

illustrative because they all represent OSC "success" stories yet capture the Kafkaesque experience of seeking help from OSC:

A. Dr. Adam Finkel (OSHA)

Dr. Adam Finkel was the Administrator for the six-state Rocky Mountain Region for the U.S. Occupational Safety and Health Administration (OSHA). In 2002, he discovered an agency database indicating that as many as 500 current and former compliance officers had taken air samples containing the toxic metal beryllium without wearing any personal protective equipment, such as respirators. Rather than act on the findings, in 2003 OSHA overrode the recommendations of its own medical and scientific staff and refused to notify or order blood tests for hundreds of its active and retired inspectors who may have been exposed to the beryllium.

Beryllium is an extremely toxic metal that carries a high risk of disease following even very low exposure. Hundreds have already died of chronic beryllium disease (CBD); a fast-progressing and potentially fatal lung disease, the only known cause of which is exposure to beryllium. A blood test used by industry and the U.S. Department of Energy can detect whether a person has been sensitized to beryllium, a necessary condition for the onset of CBD. The test costs approximately $150 per application.

Dr. Finkel internally protested the action and also disclosed what had occurred to a publication called *Inside OSHA*. Shortly after *Inside OSHA* published an article on the topic, Dr. Finkel was abruptly involuntarily transferred from his position as Regional Administrator and ordered to report to heretofore non-existent job with negligible duties in Washington, D.C.

He filed a complaint with OSC contending that his directed reassignment was in retaliation for making protected whistleblower disclosures. Initially, OSC appeared to agree with Dr. Finkel, moving to obtain four separate "stays" or postponements of his transfer before the MSPB. Ultimately, however, OSC dismissed Dr. Finkel's complaint, conceding that although he had made protected disclosures OSC claimed that it could find no connection between those disclosures and his abrupt removal.

With PEER, Dr. Finkel took his case directly to the MSPB. After several "smoking gun" emails connecting Dr. Finkel's transfer with Headquarters' displeasure at his advocacy for the inspectors were produced by OSHA in discovery leading up to the MSPB hearing, the agency asked for a settlement. A settlement was quickly reached. Today, Dr. Finkel has faculty positions in environmental and occupational health at Princeton University and the New Jersey University of Medicine and Dentistry. This past November, he received the prestigious David P. Rall Award for Advocacy in Public Health presented by the American Public Health Association.

Dr. Finkel is a success story in that he obtained a measure of relief from retaliation through the OSC-MSPB system. However, he was troubled that the beryllium exposure – the issue for which he risked his career – remained unaddressed.

In 2004, he filed a disclosure on the matter with OSC asking that OSC oversee a review by the U.S. Department of Labor, the parent agency of OSHA. After several months of inaction, OSC dismissed Dr. Finkel's disclosure on the grounds that he was not disclosing a threat to public health and safety as no inspector had reported an illness.

Dr. Finkel's disclosure was one of more than 700 disclosures pending when Scott Bloch became Special Counsel. Bloch created a special unit that dismissed more than 600 of those disclosures (it remains unclear if any of the remaining 100 were ever forwarded for investigation). That same unit also dismissed 470 of 500 pending retaliation complaints. Thus, Dr. Finkel's disclosure was part of a mass dismissal of more than one thousand whistleblower matters at the advent of Mr. Bloch's tenure.

Publicity about Dr. Finkel's case finally prompted OSHA to take some action. More than 18 months after Dr. Finkel blew the whistle, OSHA began a medical monitoring program but only for a portion of exposed compliance officers. According to an internal email sent to OSHA staff on March 24, 2005 by Acting Assistant Secretary of Labor for OSHA Jonathan Snare, ten OSHA employees out of 271 have tested positive for beryllium sensitization.

Although a number of factors suggest that the latest test results may well understate the extent of the problem, Secretary of Labor Elaine Chao never responded to a January 2005 letter by PEER, on behalf of Dr. Finkel, urging six steps to improve the beryllium testing program, including that OSHA disclose the location of facilities visited by inspectors who became sensitized so that state inspectors, EPA inspectors and the workers inside those facilities could make informed decisions about whether to seek medical testing. Instead, Mr. Snare sent PEER a letter dated March 24, 2005 that avoided any of the suggestions but assured that "We value the health of all OSHA employees."

To date, there has been no external review of OSHA's actions on this matter.

B. Kent Wilkinson and Bill Buge (BLM)

Kent Wilkinson was a land appraiser and Bill Buge is a minerals appraiser with the U.S. Bureau of Land Management (BLM). Through a disclosure filed via PEER in 2002 with OSC, Mr. Wilkinson exposed a pending land exchange that was supposed to be equivalent but, in fact, would have cost the U.S. Treasury more than $100 million.

At that time, OSC accepted the disclosure and requested that then-Interior Secretary Gale Norton undertake a review. Secretary Norton tasked the Department of Interior (DOI) Inspector General to investigate. The resultant report confirmed the whistleblower's disclosures, found several breakdowns in the system and recommended disciplinary action against named officials.

To our surprise, DOI embraced the report and in response DOI created a new agency called the Office of Appraisal Services, into which appraisers from all DOI agencies were

moved. The idea was to insulate appraisers from political pressures by placing them in a separate unit that does not answer to the managers who act as sponsors for exchanges.

While the disclosure aspects of their experience were remarkably successful, Wilkinson and Buge were ostracized by their supervisors, denied training and promotional opportunities, and Mr. Buge was even denied a requested transfer into the Office of Appraisal Services which his efforts had helped create.

Wilkinson and Buge filed whistleblower retaliation complaints with OSC. After a more than two-year investigation, OSC found that their complaints had merit but refused to share a copy of its investigative findings with the two complainants.

After concluding its investigation, OSC approached DOI seeking a settlement. When PEER asked what OSC would do if DOI refused the settlement, OSC informed us that it would dismiss the case, as it had no intention of directly advocating for Wilkinson or Buge before the MSPB.

In other words, in those very few cases where OSC fully investigates and actually finds for the whistleblower, it will seek only the relief consented to by the violating agency. Mr. Wilkinson compared it to scaling a high mountain only to reach the crest and find a deep crater.

What followed were several months of negotiation between OSC and DOI that finally reached a minimally acceptable settlement buttressed by repeated threats from OSC that it would dismiss the case because it was taking longer than the case deadlines handed down by Mr. Bloch.

C. Leroy Smith (Federal Bureau of Prisons)

In September 2006, Leroy Smith, a federal prison safety manager, received the "Public Servant of the Year" award from the OSC. He was honored for coming forward with documents showing that computer terminal disassembly plants were showering particles of heavy metals, such as lead, cadmium, barium and beryllium, over both inmates and civilian prison staff at Atwater Federal Prison, a maximum-security institution located just outside of Merced, California.

Smith's allegations were reviewed and upheld by the OSC which found the explanations offered by the Bureau of Prisons to be "unreasonable," "inconsistent with documentary evidence," and relying on "strained interpretations" of safety requirements.

Ironically, Smith was being honored even though OSC had dismissed Smith's complaint that he faced retaliation for his warnings. Smith then proceeded on his own, represented by San Francisco attorney Mary Dryovage and PEER, to force a resolution following a hearing before an MSPB judge. Smith now works as the safety manager at the Federal Correctional Institution at Tucson, Arizona.

Moreover, OSC has also rejected similar complaints and disclosures from his colleagues at other prisons.

In mid-September, OSC flew Smith and his wife Theresa out to Washington, D.C. for the "Public Servant of the Year" awards ceremony. One hour before the ceremony was to begin, Special Counsel Bloch learned that Smith was holding a post-award press conference at PEER to discuss the fact that dangerous conditions inside prison industries persist despite his disclosure. Bloch then abruptly cancelled the event (using as a pretext a death in the family of an OSC staff member the week before) and dispatched security guards to prevent Smith from entering the OSC office building. Smith was told that he could not come to OSC to pick up his plaque which would instead be mailed to him. As the caterers had already delivered the food for the post-award reception, Bloch sent an email to OSC staff offering them a free lunch.

It is absurd yet telling that Special Counsel Bloch scotched a ceremony to honor a whistleblower for fear that the person would use the occasion to blow the whistle.

At the press conference later that day, Smith released a statement reporting that nearly two years after his original disclosure conditions have not changed at Atwater or the six other federal prisons with similar computer recycling plants:

- "The dangers that I identified go un-remedied to the continuing detriment of my colleagues who work in the Federal Bureau of Prisons and the inmates working in those prison industry factories."
- "Daily, I receive calls from my colleagues working in computer recycling operations at other correctional institutions who describe coming home coated in dust. They had been assured that there was no danger. Now, many have health problems and others are scared about what lies in store for them."

Shortly after the award fiasco, a promised Justice Department Office of Inspector General investigation into Smith's disclosures began.

III. Next Steps

A post-OSC world is not that hard to imagine. In fact, this Congress is already taking strides to transform the whistleblower protection system that will make institutional changes unavoidable. Conversely, the reforms that Congress is considering will be undermined or obviated unless the problems at OSC are effectively addressed:

1. Expanding the Scope of the Whistleblower Protection Act (WPA).
Congress is considering several proposals to expand WPA coverage to federal scientists, national security agency employees and to government contract employees. If these new classes of employees are channeled into an ineffectual, non-responsive OSC, these new protections will be compromised and employee whistleblowers will be frustrated.

2. Extending the Right of Jury Trial.
Last session, Congress took the first step in providing the right to jury trials for all whistleblowers, including federal civil servants, for disclosures protected under the Energy Reorganization Act. If Congress expands the right to jury trial for whistleblowers, in major cases whistleblowers will opt for a jury trial, making the OSC-MSPB process a time-consuming, superfluous step.

3. Empowering Whistleblowers.
The thrust of Congressional actions are to provide whistleblowers with more options and allowing them to choose the appropriate course. There is little about the current OSC process that is empowering – the OSC posture is that it is an OSC process and the whistleblowers have no rights. Instead, the whistleblower is to passively wait to see if OSC will deign to assist them.

Looking forward, the OSC-MSPB process should be consolidated into one step in which the employee and the agency have the opportunity to seek mediation or other alternative dispute resolution prior to heading to trial.

To the extent that any federal administrative hearing is required, Congress should strongly consider transferring that function away from the inconsistent MSPB over to the cadre of administrative law judges at the U.S. Department of Labor who now adjudicate whistleblower complaints filed under federal environmental statutes.

Congress should also seriously consider extending the whistleblower coverage in the eight environmental statutes to all statutes and thereby create one unitary system for federal administration of whistleblower protection for federal employees.

Similarly, the OSC jurisdiction under a 2004 demonstration project to enforce the Uniformed Services Employment and Reemployment Rights Act, or USERRA, passed by Congress in 1994 to protect service members' jobs when they return from active duty, should be transferred to the U.S. Department of Labor, which already has similar jurisdiction in an array of employment discrimination statutes.

The OSC disclosure function should be transferred, along with the budget and FTEs, to the Government Accountability Office (GAO). The only major departure for GAO would be taking over a process driven by employee disclosures rather than by congressional requests. GAO is more than equipped to apply the current WPA disclosure standards, oversee agency responses and evaluate whether the agency responses reasonably address the concerns raised by the whistleblower.

Moreover, the disclosure process results only in a report back to the President and the congressional leadership. This reporting function is not an inherently executive role and should not infringe on separation of powers if transferred to a legislative agency.

Most important of all, GAO has a track record that justifies confidence that it could provide a strong avenue of transparency into executive branch operations. By contrast, the record at OSC does not inspire comparable confidence.

Finally, the only significant OSC responsibility remaining would be prosecutions under the Hatch Act. Based on the far greater number of press releases it issues on Hatch Act prosecutions, OSC seems to institutionally favor prosecuting employees rather than defending them. It can be argued that combining the prosecution and defense roles in on agency creates an institutional conflict.

Nonetheless, the Hatch Act role does not justify the continuing existence of OSC. This function could easily be transferred to the Public Integrity Section of the U.S. Department of Justice. In addition, the Congress should examine the growing number of prosecutions by OSC of state and local government officials under the Hatch Act. Under OSC's view, these state and local officials are covered by the Hatch Act if they administer federally-funded programs. These local and state officials, however, are often unaware that this connection prevents them from activities such as running for school board or their city council.

In conclusion, the currently constituted OSC is so bad as to be worse than nothing at all. PEER believes that this agency is now so dysfunctional that it is beyond repair. Finally, the continued existence of OSC threatens to undo the important reforms to the Whistleblower Protection Act now proceeding through this Congress.

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Additional Questions for the Record
For Mr. Neil McPhie
Chairman, Merit Systems Protection Board
Committee on Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
"Safeguarding the Merit Principles: A Review of the Merit Systems Protection Board and the Office of Special Counsel"
March 22, 2007

QUESTIONS FROM CHAIRMAN AKAKA

SUMMARY JUDGMENT

1. The Merit Systems Protection Board's (MSPB) legislative proposal states that MSPB may "grant a motion for summary judgment when it has been determined that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." The Board's justification for the proposal states that in *Crispin v. Department of Commerce*, 732 F. 2d 919 (Fed. Circ. 1984), the Federal Circuit Court of Appeals held that the MSPB does not have summary judgment authority because the conference managers to the Civil Service Reform Act of 1978 rejected the Senate's proposal to provide summary judgment.

   As you know, the Senate's proposal at that time provided that where there is no dispute about the facts, the presiding officer may avoid holding an evidentiary hearing since in these cases a full hearing is unnecessary. The Senate bill also specified the procedure either party must follow if it requests summary judgment and assured employees a full opportunity to fully develop their case before a decision to issue summary judgment is made. For example, the Senate language said that if the response of the adverse party shows that he cannot present facts essential to justify his opposition, the motion may be denied or a continuance may be ordered to permit affidavits to be obtained or depositions to be taken or discovery to be had. Section 205 of S. 2640, 95th Congress, 2nd Session, the Civil Service Reform Bill of 1978. The Senate report accompanying the legislation said that "the presiding officer may authorize the conduct of discovery procedures so that the employee has a chance to assemble his case before a decision on the summary judgment is rendered. This is especially important because often the agency alone will possess the records the employee needs to successfully argue his case." S. Rept. 95-969 at 53-54.

   A. Why did the Board not include safeguards similar to those provided in the 1978 Senate bill in its legislative request?

Response: At the time that the Senate drafted the 1978 proposal, the terms of the section on "Appellate Procedures," 5 U.S.C. § 7701, had not been finalized, and of course, the Board's regulations had not yet been written. The language that was used in the current proposal, however, takes into account both of those authorities. Pursuant to 5 U.S.C. § 7701(b)(1), a decision of the Board is to be issued "after receipt of the written representations of the parties to the appeal." Under Board regulations, 5 C.F.R. § 1201.44, MSPB administrative judges have the responsibility and the broad authorities necessary to assure the fair adjudication of all appeals. They do not in any instance issue decisions on substantive matters *ex parte*. Further, the Board's regulations specific to motions require that except for those made during a hearing or prehearing conference, all motions must be in writing and served on the other party, who then has ten days to respond unless the administrative judge sets a different response time. 5 C.F.R. § 1201.55(a), (b). Thus, the provisions of § 1201.55 will apply, so that no decision on a motion for summary judgment will be made without allowing the other party the opportunity to respond. The language in our draft proposal was certainly not intended to imply otherwise, and the Board would be happy to consider adding safeguards similar to those which appeared in the 1978 Senate bill and that also appear in Rule 56 of the Federal Rules of Civil Procedure either to the Board's implementing regulation or to the proposed bill if that would reassure the Chairman.

B. What standard would an adjudicating official use to grant or deny summary judgment?

Response: The proposed language itself sets the standard – a motion may be granted "when it has been determined that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In applying and interpreting that standard, the Board will look to relevant statutory and case law as it does in developing any new area of law. Although the Board is not bound by the Federal Rules of Civil Procedure, they are instructive in Board adjudications. Because the courts have construed summary judgment issues over the years pursuant to Rule 56 of the Federal Rules, we believe that those decisions will provide a solid foundation on which to build Board precedent on such matters. In addition, the Board will publish a regulation to implement any authority granted by Congress, and to provide procedural and/or substantive guidance in doing so.

C. At what stage of the employee's appeal could a summary judgment decision be made?

Response: As noted immediately above, the standard that we have proposed is that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, and consistent with your earlier concern, the parties must be afforded the opportunity to develop the record sufficiently so that the administrative judge can determine whether those prerequisites are met in each case. On the other hand, the matter must be decided early enough to allow sufficient time to have a

hearing when the motion is denied. Balancing these considerations, it may well be that the filing time would be set by reference to the end of the discovery period. We would therefore anticipate that a motion for summary judgment should generally be filed no later than shortly after the time limit for the completion of discovery set in the Board's acknowledgment order, perhaps five days, or a similar time limit set by the administrative judge.

D. What safeguards would be in place to ensure that Administrative Judges would not feel pressured to use summary judgment in order to meet timeliness standards or performance goals imposed by the Board?

Response: The Board's administrative judges are highly professional, well-trained staff who take seriously their obligation to provide justice to the parties. Just as they do not abuse their current authorities in order to decide cases quickly or easily, we anticipate no rush to judgment if summary judgment authority is granted. Initial decisions of the administrative judges have always been upheld by the Board on review at very high rates, and all Board and administrative judge decisions are affirmed by the U.S. Court of Appeals for the Federal Circuit in equally high proportions. Both Board case law and regulations, 5 C.F.R. § 1201.111(b), require that initial decisions identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and legal reasoning, as well as the authorities on which that reasoning rests. In ruling on summary judgment motions, those requirements will remain, to the extent they are applicable, and the petition for review process will be available to any party who believes that an administrative judge erred in granting summary judgment.

2. In response to my question about how the Board would apply summary judgment in cases with pro se appellants, you said that the Board has a long history of deciding cases brought by pro se individuals. Please describe the training and guidance MSPB currently provides to pro se appellants and what additional training and guidance MSPB will provide in cases involving summary judgment.

Response: The Board's Regional Directors and administrative judges consistently conduct a substantial amount of outreach to inform employees, union representatives, attorneys and paraprofessionals, as well as agency representatives, about the Board's procedures and authorities. In individual cases, administrative judges issue explanatory Orders and Notices to the parties and conduct lengthy conferences with them to apprise them of their rights, responsibilities, and burdens of proof. Pro se appellants are not expected to comply with the pleading requirements applicable to attorneys. The Board's administrative judges have become very skilled at winning the parties' trust and providing appropriate assistance, recognizing that they owe a special obligation to pro se appellants to assure that they are made aware of their rights and responsibilities. Yet, they may not act as the advocate of one party and the adversary of the other. We point out, too, that within the Board's budgetary means, administrative judges attend continuing education courses on a variety of subjects that expand their judicial knowledge and skills, offered by such prestigious institutions as the National Judicial

College. In sum, we believe that the same expertise administrative judges bring to bear on all aspects of their current case work and interactions with the parties will be applied to cases if they are given the authority to rule on summary judgment motions.

3. The Board's justification for seeking summary judgment authority notes that the Equal Employment Opportunity Commission (EEOC) has this authority. However, in those cases, the employee has the burden of proof, not the agency. In disciplinary or removal cases before the MSPB, the agency has the burden of proof.

    A. Would summary judgment be used in those cases where the agency is the moving party, having the burden of proof, and where the employee may not initially have access to all relevant information?

Response: Under this proposed legislation, any party may move for summary judgment. However, summary judgment would only be granted when it has been determined that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Should it appear from the party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the administrative judge may deny the motion for summary judgment or allow additional time to permit sufficient discovery to be had as is just. We would also point out that there are several types of appeals that come within the Board's jurisdiction in which the appellant either has the burden of proof or has at least a substantial burden to prove jurisdiction and the merits of his claim. For example, in most instances, it is the appellant who bears the burden on some or all issues in retirement appeals; and he or she bears the burden to establish that the agency violated his or her veterans preference rights under the Veterans Employment Opportunities Act of 1998. The same holds true under the Uniformed Services Employment and Reemployment Rights Act of 1994 where the appellant must show that the agency discriminated against him or her because of military service. In addition, the appellant bears a substantial burden of proof in individual right of action appeals and a significant burden to prove jurisdiction in constructive adverse action appeals. These types of cases comprise a significant portion of the Board's workload. Because such appeals may turn largely on the showing that a law was violated, it may well be appropriate to decide them on the basis that "the moving party is entitled to judgment as a matter of law," which is the standard for issuance of a summary judgment.

    B. What safeguards would you recommend to ensure that the employee has access to all relevant information before the decision to issue summary judgment is made?

Response: First, we would point out that agencies are obligated to comply with 5 C.F.R. § 1201.25 in responding to an appeal. That section requires the submission of, among other things, a "statement identifying the agency action taken against the appellant and stating the reasons for taking the action"; "all documents contained in the agency record of the action"; and "any other documents or responses requested by the Board."

When a regional or field office acknowledges an appeal, it directs the agency to provide to the Board and to the appellant information specific to the type of appeal filed. Board regulations further provide for several types of discovery, *see* 5 C.F.R. §§ 1201.71-1201.75, 1201.81-1201.85, including written interrogatories, depositions, requests for production of documents or things for inspection or copying, and requests for admission. An administrative judge may issue an order compelling discovery, and a subpoena may be issued and enforced on behalf of a party. Combined with the administrative judges' authorities and responsibilities as discussed above, and without imposition of an artificially short deadline for the submission of summary judgment motions, also noted above, we believe that the process will assure that both sides are equipped with the information necessary to file and respond to a motion for summary judgment before the issuance of any decision on such motion.

C. Please list all agencies that have summary judgment authority and how that authority is used.

Response: In a non-exhaustive search, we were able to locate numerous agencies or agency components with provisions for summary judgment in their regulations. They include: Government Accountability Office, 4 C.F.R. § 28.21; Office of Personnel Management, 5 C.F.R. § 185.119; Federal Labor Relations Authority, 5 C.F.R. § 2423.27; Railroad Retirement Board, 20 C.F.R. § 355.18; Department of Health & Human Services (DHHS), Social Security Administration, 20 C.F.R. § 498.204; DHHS, Centers For Medicare & Medicaid Services, 42 C.F.R. § 426.205, 42 C.F.R. § 426.405, 42 C.F.R. § 426.505; DHHS, Office of the Inspector General, 42 C.F.R. § 1005.4; DHHS, Public Health Service, 42 C.F.R. § 8.27, 42 C.F.R. § 93.506; Department of Labor (DOL), Employment and Training Administration, 20 C.F.R. § 636.10; DOL Employment and Standards Administration, 20 C.F.R. § 725.452; DOL Office of the Secretary, 29 C.F.R. § 18.40 and 29 C.F.R. § 22.18; DOL, Office Of Federal Contract Compliance Programs, 41 C.F.R. § 60-30.23; National Labor Relations Board, 29 C.F.R. § 102.24, 29 C.F.R. § 102.35, 29 C.F.R. § 102.114; Equal Employment Opportunity Commission, 29 C.F.R. § 1614.109(g); Occupational Safety And Health Review Commission, 29 C.F.R. § 2200.62; Department of Veterans Affairs, 38 C.F.R. § 42.18; General Services Administration, 41 C.F.R. § 105-70.018; Department of Homeland Security, 5 C.F.R. § 9701.706; and Department of Defense (DoD), 5 C.F.R. § 9901.807. We note that while neither the Equal Employment Opportunity Commission nor the DoD refers specifically to "summary judgment," the standards they impose are those applied in a summary judgment determination.

We do not have sufficient information regarding the internal operations of these agencies and organizations to determine how they are using their respective summary judgment authorities. However, it is our understanding that the EEOC uses its authority to grant total or partial summary judgment on a regular basis. Summary judgment motions (known as motions for a decision without hearing) can be filed either early in the litigation or after the parties have had an opportunity to engage in discovery. Pursuant to 29 C.F.R. § 1614.109(g), a party which believes that some or all of the material facts are not in genuine dispute may, at least 15 days prior to the scheduled hearing, or earlier if the administrative judge so orders, file a statement of material facts not in genuine

dispute. The opposing party may file an opposition within 15 days of receipt of the moving party's statement in which to rebut statements that material facts are not in dispute or to file an affidavit stating that the party cannot present facts to oppose the request. In addition, the administrative judge on his or her own initiative can, after giving the parties notice and an opportunity to respond, issue an order limiting the scope of the hearing or issue a decision without holding a hearing.

In the regulations governing their personnel management systems, the Department of Homeland Security (DHS) and the Department of Defense (DoD) provide for summary judgment. Under the DHS regulations, when there are no material facts in dispute, the adjudicating official must render summary judgment on the law without a hearing. Under the DoD regulations, if the presiding administrative judge of the MSPB determines upon his or her own initiative or upon request by either party that some or all material facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing, issue an order limiting the scope of the hearing or issue a decision without holding a hearing.

D. Please compare the situations in which those agencies have used summary judgment and the possible situations where this authority would be used by MSPB.

Response: As explained above, the Board does not have detailed knowledge of how other agencies use summary judgment. If the Board were given summary judgment authority, it would issue a regulation providing for appropriate safeguards such that a case would not be disposed of prematurely or in an unfair manner. The Board already has extensive procedures that allow the parties to develop the record, and a Board administrative judge would not decide a case by summary judgment until the parties had had an opportunity to use those procedures. An administrative judge could not appropriately decide a case by summary judgment if there was a genuine dispute of material fact.

SUCCESSION

4. The MSPB legislative proposal seeks to change the succession in leadership for the Board and the justification for the proposal cites the situation in 2004 when the Board faced the possibility of not having any Board Members as the need for the change. In that scenario, if Congress had not acted to confirm the nominees, what would have happened?

Response: I do not know what would have happened had the Board been without any Board members in 2004. I would like to clarify that our proposal does not seek to change the succession in leadership for the Board but to, instead, provide for a clear order of succession to avoid uncertainty in the event that the office of the Chairman becomes vacant, or in the event that the offices of the Chairman and Vice Chairman become vacant. Should the Chairman's office become vacant, an order of succession would make

it clear which remaining member, or in the absence of remaining members, which executive staff member, becomes the acting Chairman and assumes the statutory role of chief executive and administrative officer of the Board. With respect to adjudication, the Board's regulations provide that a Board decision may not be issued when there are fewer than two Board members. 5 C.F.R. § 1200.3.

5. The Board's legislative proposal would amend current law to permit the MSPB General Counsel to perform the chief executive and administrative officer duties and functions of the Chairman in the event all three Board positions are vacant.

A. Please describe the functions that would be performed by the General Counsel if this legislative proposal was accepted.

Response: If this legislative proposal is accepted, the General Counsel would temporarily assume responsibility for those executive and administrative matters typically performed by the head of an executive Branch agency, to the extent that the assumption of such duties is not prohibited by statute, regulation or executive order. It is not possible to enumerate all such functions, since the specific functions to be performed by the GC would be determined by the functions that need to be performed on behalf of the agency at the time that the total absence of any Board members exists. The General Counsel would not assume any of the adjudicatory functions of the Board beyond those currently delegated by the Board.

B. Section 1204(g) of Title 5, United States Code, permits the Board to delegate to any employee of the Board the performance of any of its administrative functions.

i. Please list the authorities and functions currently delegated to the General Counsel.

Response: The authorities and functions currently delegated to the General Counsel are listed in Appendix A-5 of the *U.S. Merit Systems Protection Board Delegations of Authority Manual (1991)*. A copy of this internal document is attached to these responses as Appendix I.

ii. Please list the authorities and functions that the Board is currently unable to delegate due to statutory constraints and would be delegated to the General Counsel if the legislative proposal is adopted. Also list the statutory language that prevents the delegation of this additional authority.

Response: Generally, the Board would not have the authority to delegate any of those authorities and functions that are normally within the sole purview of the chief executive or administrative officer of the Board. Examples of such authorities and functions include approving personnel actions or approving contracts and other Board expenditures.

The statutory language that prevents the delegation of this additional authority is found at 5 USC §§ 1203(a) and 1204(j). Section 1203(a) provides that the "Chairman [of the Merit Systems Protection Board] is the chief executive and administrative officer of the Board." Pursuant to section 1204(j), the Chairman of the Board is authorized to appoint such personnel as may be necessary to perform the functions of the Board.

C. How long would the General Counsel be able to exercise the authorities in the absence of Board Members?

Response: Section 3(g) of the MSPB legislative proposal provides that the General Counsel would exercise the authorities in the absence of Board Members until the President appointed or designated a Chairman (through the nomination process or by recess appointment).

D. Is the General Counsel a political appointee or a career employee? How would passage of this proposal affect the status (referring to career or political) of the General Counsel position?

Response: The current General Counsel is a political appointee. However, the General Counsel's position is one of two staff positions within the Board that can be designated as one to be filled by either a career employee or a political appointee. (The other position is that of the Director of the Office of Appeals Counsel.) During the course of the Board's history both career and political employees have occupied the position of General Counsel. I do not expect that the passage of the proposed plan of succession will affect the future status of the General Counsel position. However, the status of the next occupant of the position will be the decision of my successor.

AUTHORITY OF MSPB CHAIRMAN AND BOARD

6. Congress laid out specific functions for the Board and the Chairman of the MSPB in the Civil Service Reform Act (CSRA) of 1978. Many of these responsibilities mirror the authorities assigned to Members and the Chairman of the Civil Service Commission (CSC), the predecessor to the MSPB. For example, the chair of the CSC was charged with directing the preparation of requests for appropriations, but the CSC as a whole was to submit requests for appropriations. According to section 1204(k) of Title 5, United States Code, the Board shall prepare and submit to the President and Congress an annual budget. Part of MSPB's reauthorization request seeks to change the authority of the Chairman regarding budget submissions and claim that this is a technical change to reflect agency practice. Please explain how the budget preparation and submission process under current agency practice compares to that of the CSC.

Response: Pursuant to 5 USC § 1104(a)(4) (1976), the Chairman of the United States Civil Service Commission was responsible for directing the preparation of requests for appropriations and the use and expenditure of funds. Subsection (7) specifically reserved the authority for the submission of requests for appropriations to the full Commission. There is no specific reservation of authority under the statute that governs the operations of the MSPB.

Pursuant to 5 U.S.C. § 1203(a), "[t]he Chairman is the chief executive and administrative officer of the Board." See also 5 C.F.R. § 1200.2(b) (the Chairman serves as chief executive officer of the Board). In fact, most chairmen are essentially the agencies' chief executive and administrative officers. See Marshall J. Breger and Gary J. Edles, Established by Practice: The Theory and Operation of Independent Federal Agencies, 52 Admin. L. Rev. 1111, 1247 (2000). This means that they "appoint and supervise the staff, distribute business among the agency's personnel and administrative units, and **control the preparation of the agency's budget and the expenditure of funds.**" Id. (emphasis added). As chief executive and administrative officer of the [Merit Systems Protection] Board, the Chairman "has the authority to appoint senior staff and prepare the Board's budget without the approval of the Board." *Id.* at 1270.

However, section 1204(k) provides that:

> The **Board** shall prepare and submit to the President, and, at the same time, to the appropriate committees of Congress, an annual budget of the expenses and other items relating to the Board which shall, as revised, be included as a separate item in the budget required to be transmitted to the Congress under section 1105 of title 31 (emphasis added).

As drafted now, section 1204(k) appears inconsistent with the Chairman's statutory authority under section 1203(a). To correct this apparent inconsistency, we are asking for a technical amendment to section 1204(k) to change "[t]he Board shall prepare and submit" to "[t]he Chairman shall prepare and submit." The MSPB's current practice is reflected in its delegations manual. Listed in the manual as one of the items "specifically reserved for the approval of the Chairman are: a. the Board's budget request to OMB and the Congress. . . ." *See* MSPB Delegations of Authority Manual, Transmittal No. 1110.14, Appendix B-1 – Delegation of Authority to the Executive Director from the Chairman, 2.a.(February 27, 1991). This has been the practice of the Board since its inception.

7. You stated that the Board historically has followed a practice of leaving budget and administrative responsibilities to the Chairman pursuant to 5 U.S.C. § 1203. Yet you also concede that amendments to section 1204 would be necessary to ratify this practice. As you know, section 1204 states that the Board shall prepare and submit to the President and Congress an annual budget. What has led the Board to hand over its statutory responsibilities in these areas? Please provide documentation of this practice and the legal basis for it.

Response: Two clarifications are in order in responding to this question. First, the Chairman is not conceding that an amendment is necessary in order for him to continue to carry out the responsibilities of "chief executive and administrative officer of the Board." Second, the Chairman is not seeking ratification (that is, approval, sanctioning, or an endorsement) of the statutory authorities granted to the incumbent of that position. Rather, the legislative proposal during this reauthorization period seeks to clarify an ambiguity in the relative roles and responsibilities of the 3-Member Board and the Chairman of the Board.

The question assumes that the statute clearly vests budgetary authority for the agency in the 3-Member Board, rather than in the Chairman. The rationale for the legislative proposal that seeks to clarify these roles is the lack of clarity on these issues.

The powers and functions of the Board are set out by statute are found in 5 U.S.C. § 1204, to wit:

a) the adjudication of cases within its jurisdiction;
b) the enforcement of its orders;
c) the conduct of studies of the civil service; and
d) reports on the integrity of the merit system to the President and Congress.

Any other power or function of the 3-Member Board flows from these four responsibilities.

8. Current law states that the Chairman is the chief executive and administrative officer of the Board. (5 USC 1203). The Board cites this as a reason that the changes to the budget authority of the MSPB are merely technical changes. However, the Department of Justice Office of Legal Counsel decisions have held that even when such language is present, it does not encompass the substantive and policymaking functions of the Board as prescribed by law. (See "Division of Power and Responsibilities Between the Chairperson of the Chemical Safety Board and the Board as a Whole," Memorandum Opinion for the General Counsel of the Chemical Safety and Hazard Investigation Board from Randolph B. Moss, Acting Assistant Attorney General, Office of Legal Counsel, DOJ (June 26, 2000)). Since budget submissions can include policymaking, why is it agency practice for the Chairman to submit budget requests instead of the full Board?

Response: The legal opinion referenced above is not applicable to all agencies that feature boards or commissions. The legislative history of the Chemical Safety and Hazard Investigation Board (CSHIB) regarding governance differs significantly from that of the Merit Systems Protection Board. As cited in the above-referenced opinion, the legislative history of the statute establishing the CSHIB states that "the chair's conduct of the executive function is subject to oversight by the Board as a whole." (citation omitted). By contrast, the legislative history of the MSPB's authorizing statute strongly suggests that Congress intended for the chairman of the MSPB to exercise considerable authorities that are independent of the 3-Member Board. There is no suggestion in the statute or its

legislative history that the Chair of the Merit Systems Protection Board is to exercise the duties and responsibilities of the chief executive and administrative officer of the agency "subject to the oversight of the Board as a whole." The legislative history of the Civil Service Reform Act in pertinent part provides that "a sitting member of the Board who is nominated for the chairmanship must be confirmed by the Senate for that position. If the President appoints a person who is not serving on the Board to the chairmanship, that person could be confirmed simultaneously as both Chairman and a member of the Board." (See Joint Explanatory Statement of the Committee on Conference in the *Legislative History of the Civil Service Reform Act of 1978, Committee on Post Office and Civil Service, House of Representatives, Volume No. 1, pg. 1974, March 27, 1979*)

The heightened scrutiny to which the Chairman is subjected prior to assuming office clearly contemplates that the person selected for that position will occupy a position of responsibility that is superior, and not co-equal, to that of the other 2 Board members.

9. Current law permits the Board to delegate to any employee of the MSPB the performance of any of its administrative functions.

    a. As Board Members change, are these delegations reviewed?

Response: These delegations may be reviewed as the composition of the Board changes, but to my knowledge there has not routinely been a substantial or immediate change in these delegations whenever a Board member departs or a new Board member arrives. The delegations of authority allow for continuity of, and predictability in, operations as Board members come and go.

    b. Under what circumstances would an authority delegated to MSPB employees be resumed by the Board?

Response: Generally, the Board would take such action as the operational requirements of the Board dictate.

    c. Please define the term "administrative function."

Response: The term "administrative function" as used by Congress, is not defined in the legislative history of the statute. Generally, the word "administrative" is used to refer to functions or acts that are distinguishable from those that are judicial. See, *Black's Law Dictionary*, pg. 66 (4th ed. 1968).

10. Please describe the role of the Board, the Chairman, and that of individual Members as currently carried out in practice at the MSPB in the following areas:

    a. Developing and submitting legislative recommendations to Congress and the President as well as submitting comments on legislation and regulations

Response: Pursuant to his authority under 5 U.S.C. § 1203(a) as chief executive and administrative officer of the Board, the Chairman develops and submits legislative recommendations with input from individual Board members and other program managers. With respect to the development and submission of comments on pending legislation and regulations, the Chairman seeks input from individual Board members as he deems appropriate.

b. Preparing and submitting budget requests to Congress and the President

Response: Pursuant to his authority under 5 U.S.C. § 1203(a) as chief executive and administrative officer of the Board, the Chairman develops and submits budget requests after consultation with and input from individual Board members and other program managers.

c. Appointing personnel, including determining the size and nature of the MSPB workforce and individual Members' staff

Response: Pursuant to his authority under 5 U.S.C. § 1204(j), the Chairman, after consultation with office heads, makes all final hiring decisions concerning career staff outside of the Board members' offices. With regard to Board members' staffs, the Chairman considers the needs and preferences of the other Board members while retaining the final approval authority for hiring. Because the Chairman is ultimately responsible for ensuring that the Board stays within its budget, the other Board members do not have unlimited discretion in how their offices are staffed.

d. Conducting studies of the merit system

Response: The Board's research agenda is developed by its Office of Policy and Evaluation (OPE), after extensive input from stakeholders and senior executive staff. All of the Board members have an opportunity to review and comment on the research agenda. The Board members also approve OPE studies before they are released to the public.

e. Calling meetings under the Sunshine Act.

Response: The Chairman works with the Board members in determining whether to convene a meeting under the Sunshine Act.

f. Prescribing regulations

Response: The Chairman works with the Board members to prescribe or amend agency regulations that govern its adjudicatory function. These regulations are submitted to each Board member for review and approval. The Chairman consults with Board members and other program managers, as appropriate in developing and prescribing regulations that govern the general operation and management of the agency.

g. Designating attorneys to represent the Board in litigation before courts and determining litigation strategy

Response: Consistent with longstanding practice, and pursuant to his authority under 5 U.S.C. § 1204(i), the Chairman makes all final decisions designating those attorneys who will represent the Board before courts. Pursuant to his authority as head of the agency, the Chairman may work with the attorney and appropriate manager (usually the General Counsel or the Deputy General Counsel) to determine the litigation strategy that will be implemented for a court action involving MSPB.

h. Preparation and submission of the Annual Report

Response: The Chairman develops and submits the annual report on behalf of the Board after consultation with and input from individual Board members and other program managers.

i. Delegation of performance of the Board's administrative functions to MSPB employees

Response: Pursuant to his authority under 5 U.S.C. § 1204(g), the Chairman delegates, as warranted and appropriate, those administrative functions relating to general agency operations to MSPB employees. Individual Board members may delegate administrative functions relating to the general operations of their respective offices to those employees who are assigned to their respective offices.

SUNSHINE ACT

11. According to information provided to the Congressional Research Service, the MSPB held six meetings that were subject to the requirements of the Sunshine Act. I know that you were not at the MSPB when these meetings took place, but can you check MSPB's records and state whether those meetings were closed or open?

Response: Five of the six meetings held in 2001 were closed. One meeting, held on October 18, 2001, was partially closed. The last meeting was held on November 26, 2001.

12. Other collegial bodies with similar functions carry out their business through meetings under the Sunshine Act. What can MSPB learn from these organizations that would allow them to hold Board meetings in compliance with the Sunshine Act?

Response: Some agencies subject to the Sunshine Act have expressed concerns about how the open meeting requirements of the Sunshine Act chill collegial deliberations. See Federal Practice and Procedure – Judicial Review of Administrative Action, by Charles Alan Wright and Charles H. Koch, Jr., 33 Fed. Prac. & Proc. Judicial

Review § 8456; Report and Recommendation by the Special Committee to Review the Government in the Sunshine Act, Special Committee, Administrative Conference of the United States (1995), 49 Admin. L. Rev. No. 2, p. 421 ("ACUS Report"). During the ACUS Special Committee meeting, agency officials explained that the open meeting requirements inhibited collegial deliberations because of concerns about making members' deliberations public even when those deliberations are made before the member has all the information and has finished thinking about the issue, concerns about a member's statements being used against the agency in subsequent litigation, and concerns about a member's statements being misunderstood as expressing his or her true position when he or she is, instead, playing devil's advocate. ACUS Report at 422. As a result of these concerns, agencies feel compelled to engage in inefficient practices which, themselves, can contribute to the erosion of collegial decision making. *Id.* at 423.

The agencies subject to the Sunshine Act with missions and functions most similar to those of the MSPB are the Equal Employment Opportunity Commission, Federal Labor Relations Authority, and National Labor Relations Board. Our search via Westlaw of Federal Register notices issued by these three agencies over the past ten years revealed that they held very few Sunshine Act meetings on their adjudications. Over the past ten years, the EEOC announced two closed Sunshine Act meetings on agency adjudications, the FLRA announced no such meetings, and the NLRB announced one such meeting.

OTHER ISSUES

13. The Department of Homeland Security (DHS) recently announced the intention to begin implementing the DHS regulations establishing a new employee appeals process. As you know, your March 5, 2005, hearing statement before the House Federal Workforce Subcommittee raised concerns about the impact these regulations would have on the Board's operations — including the need for training on the DHS system and additional administrative judges, attorneys, and staff — and the impact on non-DHS employees with cases before the Board. Given these concerns in 2005, is MSPB ready to implement the DHS appeals system?

Response: The Board has substantially completed the revision of regulations that will reconcile its adjudicatory procedures to conform to the requirements of the DHS appeals system and expects to be fully ready when DHS begins its implementation of the DHS regulations.

During its 2005 Legal Conference, the Board provided training to its administrative judges, staff attorneys and paralegals regarding the DHS and DoD appeals systems. The training program included a panel discussion featuring representatives from both agencies.

Moreover, we are in the process of hiring to fill the newly authorized positions that we requested as part of our FY 2006 appropriations. These positions include 6

administrative judge and staff attorney positions as well as 2 staff persons to assist with the Board's merit studies function.

14. According to MSPB's strategic plan, among the external factors that could impact the Board's ability to achieve its goals include agency-specific and government-wide changes in the laws and regulations governing the federal civil service. What are the implications of the various personnel systems, such as those being developed at DHS and the Department of Defense, on MSPB operations?

Response: As stated above, the Board has substantially completed revisions to its regulations to accommodate the employee appeals system developed by the Department of Homeland Security. We have begun to develop similar regulations to accommodate the Department of Defense appeals system. However, as of this date the Board has yet to see single case under either of these new systems. It is difficult to predict how the new systems will impact the Board.

15. Current law allows the Board to review rules and regulations of the Office of Personnel Management (OPM) on its own motion and determine if it is in violation of 2302(b). How often has the MSPB conducted such a review on its own motion?

Response: Since the inception of OPM and the Board under the CSRA, the Board has always attempted to work in a collaborative manner with OPM. When early indications of programmatic problems came to our attention, we have worked with OPM to correct perceived or potential violations of merit principles or prohibited personnel practices. There are several instances where this has resulted in OPM promptly revising guidance to agencies on implementation practices.

When, in furtherance of its studies mission, the Board examines any OPM program or regulation, such as the Outstanding Scholar program, the Federal Career Intern Program (FCIP) or any other government-wide authority or guidance by OPM, it is undertaking a determination as to whether the implementation of such programs results in prohibited personnel practices. When we conduct a study we look at the OPM regulations and at agency implementation in practice, as well as agency implementing regulations for the same program. We do this "on our own motion" in that our specific research projects are not mandated by Congress as in the case of GAO, nor is it for the purposes of benefiting any specific agency or group of agencies in a coalition such as when National Academy of Public Administration looks at issues. Finally, MSPB studies are not conducted by virtue of any requirement of the Administration such as when OPM conducts "studies" to evaluate or enhance their own programs. The sole purpose of an MSPB study is to conduct an impartial review to determine whether the program or practices we are examining further the public's interest in a merit based civil service.

16. MSPB's fiscal year 2006 performance plan states that MSPB obtains feedback from customer surveys regarding the adjudicatory process. What are the results of the latest survey and how does this feedback inform MSPB policies and procedures?

Response: The most recent customer satisfaction survey was conducted in 2004 and included agency representatives. In general, these customers had very positive perceptions of their interactions with MSPB employees who are involved with the adjudication process, the quality and timeliness of decisions, MSPB settlement programs, MSPB guidance including the website, and due process procedures such as those related to discovery, case suspension and use of electronic hearings. Additional comments provided by the respondents indicated concern about the timeliness of processing petitions for review at headquarters and a perception that, in some cases, the parties may be subjected to excess encouragement to reach a settlement.

In FY 2005, MSPB reviewed its procedures for processing PFRs and discovered that a number of factors contributed to a considerable increase in the number of pending PFRs in the inventory. Additionally, although processing timeliness was improving, additional improvement was needed. In FY 2006, the Board established new performance targets for PFR timeliness and inventory management. As a result, the current inventory of PFRs has reached a more manageable level, and the time to process PFRs is less than half of what it was previously.

MSPB will continue to periodically collect feedback from its customers using a variety of formal and informal mechanisms. This information will be used in conjunction with other data to improve its adjudication programs within the statutory authority and resources provided by Congress.

17. Both the MSPB and OPM conduct surveys of the federal workforce through the Merit Principles Survey and the Human Capital Survey. In addition, OPM regulations now require individual agencies to conduct their own surveys.

    a. What do you see as the major similarities and differences between these surveys, and have MSPB and OPM explored the potential of conducting a unified survey?

Response: The Merit Principles Survey (MPS) and the Federal Human Capital Survey (FHCS) are similar in a number of ways. They are both administered to a Government-wide sample of supervisory and non supervisory employees. The results can be broken down by major agency components to identify trends at multiple levels. In addition, the surveys do have a number of overlapping questions.

There are several differences between the surveys, as well. For instance, the two surveys are completed in alternating years. This strategy helps avoid redundancy and survey fatigue. It also assists agencies in satisfying their obligations to conduct an annual survey. OPM has conducted the FHCS every other year since 2002 and is planning to continue its survey in even-numbered years. MSPB has periodically administered the MPS since 1983 and plans to administer this survey in odd-numbered years. Collectively, these two government-wide surveys may obviate the need for individual agencies to complete their own surveys.

However, the most significant difference between the two surveys is their respective purposes. The FHCS measures employees' perceptions of whether, and to what extent, conditions characterizing successful organizations are present in their agencies. In large part, the survey is a tool OPM uses to assess agencies' success in meeting the goals of the President's Management Agenda. It also provides general indicators of how well the Federal Government is operating its human resources management programs and how managers can use these programs to make their agencies work better.

The MPS is a tool that measures the "health" of Federal merit systems. This survey is designed to track specific merit system indicators over time and to evaluate how changes in personnel systems, often enacted by OPM, affect merit and fairness. In addition, we use the survey to collect data for more in-depth studies we are conducting of specific merit system issues. Ultimately, the MPS questions are driven by MSPB's mission to protect merit and our responsibility to study and report on the state of merit in Federal personnel systems.

b. To what extent should we be concerned about survey redundancy and fatigue and what are some options for avoiding such situations?

Response: The strength of a good survey is in how the information is used. If employees are expected to take the time to complete surveys, then they expect management will do something with the information. However, an annual requirement may not allow sufficient time to administer, analyze, and act on the results between surveys. In particular, any improvement strategies that agencies implement in response to survey results will likely take more than 1 year to manifest any measurable change.

As you mention, survey fatigue is another potential consequence of conducting agency surveys on an annual basis. Some Federal employees receive several surveys per year on a variety of topics. Recently, Federal survey response rates have been respectable. Both MSPB and OPM exceeded 50 percent on recent Government-wide surveys. However, with an annual survey requirement there is a risk that Federal employees will tire of completing them. This is particularly true for small agencies that will have to survey every employee each year to achieve samples large enough to be statistically significant.

Finally, many agencies are not equipped with the resources and expertise needed to carry out an annual survey. While MSPB and OPM can assist in administering the survey, the analysis of the responses and corresponding action has to be tailored to the needs of the individual agencies.

There are ways to minimize these potential negative consequences. The two most important steps are communication and action. First, agencies should continuously communicate with employees about the survey and what is being done to use the results. Even if progress is slow, employees will be aware that something is being done. This information-sharing should help keep them engaged in the survey process. Involving

employees in identifying and implementing change processes is another key strategy to raising engagement.

QUESTIONS FROM SENATOR ALEXANDER

1. When and how often since 1989 has MSPB complied with its statutory obligation, per 5 USC 1204(a)(3), to "report to the President and to the Congress as to whether the public interest in a civil service free of PPP's is being adequately protected"?

Response: This reporting requirement is performed primarily by the Board's Office of Policy and Evaluation. Since 1989, the Board has issued an average of 3 study reports each year. A list of the studies reports and produced by this office is available from the Board's website (www.mspb.gov/studies/mspbstudiespage.html).

2. Since the Office of Special Counsel (OSC) has primary responsibility to protect federal employees from PPP's, can MSPB make its required report without first using its authority, per 5 USC 1204(e)(3), to review OSC's compliance with statutory obligations to protect federal employees from PPP's?

Response: The MSPB has no oversight authority over the Office of Special Counsel. Since 1989, the OSC has been an agency independent of the MSPB. When the OSC finds prohibited personnel practices, it petitions to the MSPB for corrective action. With regard to prohibited personnel practices, the relationship between the OSC and the MSPB resembles that of prosecutor to court.

3. Does MSPB know, for each year since 1989, how many PPP's occurred, of which type, and in which agencies, based on its or OSC's determination? If not, why not and how can it make its statutory required reports about PPP's without such information?

Response: The MSPB does not have reliable statistical information on the number of PPPs that have occurred since 1989. For example, MSPB does not track PPP's that OSC finds and has agencies correct so that prosecution becomes unnecessary. PPP claims that come directly to MSPB as otherwise appealable actions as well as such claims that come to MSPB after OSC closes its investigation of the claims can be dismissed for reasons other than a finding that there was no PPP. For example, they can be dismissed for untimeliness, failure to exhaust administrative remedies with OSC, or they can be settled. Often, PPPs can be secondary claims attached to other claims and so may not be identified consistently by case trackers throughout the MSPB as PPP cases.

The specific language of 5 USC § 1204(a)(3) requires the Board to "report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected." This obligation is being met by the completion of the studies and resulting reports. For example, the Board has conducted several studies of employee perceptions regarding whether the workforce is

free of PPPs, such as The Federal Workforce for the 21st Century: Results of the Merit Principles Survey 2000, which was completed in 2003. Knowledge of employee perceptions is extremely important to federal agencies because negative perceptions are not conducive to workforce morale.

4. Does MSPB refer to OSC for investigation for possible disciplinary action all its determinations that (b)(2) to (b)(12) PPP's occurred, or only (b)(8) ones? If not, why not?

Response: Generally the MSPB refers matters to OSC for investigation only when it has determined that a current employee may have violated 5 U.S.C. § 2302(b)(8), which prohibits retaliation for whistleblowing. This referral procedure is based on 5 U.S.C. § 1221(f)(3), which states that the Board should make a referral to OSC when the Board determines that there has been a prohibited personnel practice "based on evidence presented to it under" section 1221, which by its own terms is limited to whistleblower retaliation cases.

5. Why is the evidentiary standard - "substantial likelihood" - found in MSPB regulations at 5 CFR 1209 for whistleblower stays greater than the statutory established evidentiary standard - "reasonable grounds to believe" - for OSC stay requests made per 5 USC 1214(b)(1)? Does the law allow MSPB to use "reasonable grounds to believe" as its evidentiary standard for whistleblower stays?

Response: The "substantial likelihood of prevailing" standard is one of the factors that the federal courts routinely consider in deciding whether to grant stays or other preliminary injunctive relief, along with potential harms to the respective parties. This is the standard routinely used by federal agencies in deciding on stay motions. It is possible that Congress extended special deference to OSC regarding its stay motions in prohibited personnel practice cases. Normally, stays are regarded as an extraordinary form of relief.

6. How many whistleblower stays have been sought and how many granted per 5 USC 1221 since 1989? In how many cases, after MSPB denied the stay, did the employee obtain relief as a result of his whistleblower appeal? In how many cases, after MSPB granted the stay, did the employee fail to obtain relief?

Response: The MSPB does not maintain statistics on the granting or denial of stays under section 1221.

7. Has MSPB conducted a special study, per 5 USC 1204(a)(3) and (e)(3), about its and OSC's implementation of the 1994 amendments to the WPA, to determine whether they are effective in strengthening the protection of federal employees from PPPs? If not, why not?

Response: The Board has issued earlier reports of its studies on whistleblowing, in 1981, 1984, and 1993, that studied employee perceptions and agency actions rather than appellate processes and outcomes. The 2003 study referred to above also focused on whistleblowing. The studies indicate that formal complaints are only a small part of the whistleblowing reality. Many employees who observe wrongdoing may choose not to report it; many employees may take no action in response to reprisal or a threat of reprisal; and many employees who seek corrective action may use avenues other than formal complaints or appeals.

APPENDIX 1

Additional Questions for the Record
For Mr. Neil McPhie
Chairman, Merit Systems Protection Board
Committee on Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
"Safeguarding the Merit Principles: A Review of the Merit Systems Protection Board and the Office of Special Counsel"
March 22, 2007

Appendix A-5 of the *U.S. Merit Systems Protection Board Delegations of Authority Manual (1991).*

MSPB DELEGATIONS OF AUTHORITY MANUAL
TRANSMITTAL NO. 1110.12

APPENDIX A-5

DELEGATIONS OF AUTHORITY TO THE GENERAL COUNSEL FROM THE BOARD

1. AUTHORITY DELEGATED.
a. Workload Categories. The General Counsel is delegated the authority to develop case records, draft decisions, and perform related legal research for the Board on the following types of adjudicatory or other matters:

(1)Actions Brought by the Special Counsel. The General Counsel reviews and drafts decisions on certain actions brought by the Special Counsel including, but not limited to, the following categories:

(a) complaints of unlawful political activity on the part of state or local government employees under 5 U.S.C. §§ 1504 and 1506;

(b) complaints of unlawful political activity on the part of Federal Government employees under 5 U.S.C. §§ 7325 and 1206 (g) (1);

(c) complaints filed by, and disciplinary action requested by, the Special Counsel under 5 U.S.C. § 1215;

(d) complaints filed by, and corrective action requested by, the Special Counsel under 5 U.S.C. § 1214; and

(e) requests for stays of personnel actions under 5 U.S.C. § 1214.

(2) Actions against Administrative Law Judges (5 U.S.C. § 7521);

(3) OPM Petitions for Reconsideration (5 U.S.C. § 7703(d))
;
(4) Enforcement Cases (5 U.S.C. § 1204(a)(2),(d)(2))and (e)(2)(B);

(5) Advisory opinions from OPM (5 U.S.C. § 1204 (e)(1)(A));

(6)Reviews of OPM Rules and Regulations (5 U.S.C. § 1204(f));

(7) Court Remands; and

(8) Petitions for Review of regional initial decisions that would normally be managed by the Appeals Counsel under § 7701(b) and § 7702(c),as assigned by the Board in special situations.

b. Procedural Authority. In the course of managing the above workload, the General Counsel is authorized either to take final action or recommend action to the Board, as appropriate, in performance of the following.

(1) Oaths and Affirmations -administer oaths and affirmations;

(2) Subpoenas -issue subpoenas after approval of a Board Member or an administrative law judge in accordance with § 1201.81 of the Board's regulations;

(3) Enforcement of Subpoenas -file in district court to enforce Board-issued subpoenas;

(4) Proof-rule upon offers of proof and receive relevant evidence;

(5) Discovery -rule upon the institution of discovery procedures under § 1201.73 of the Board's regulations;

(6) Conferences –

(a) hold conferences with counsel for the parties in compliance cases for the purpose of facilitating settlement or otherwise obtaining compliance; and

(b) order the parties to attend conferences, through their representatives, held by the General Counsel, at a time and place set by the General Counsel.

(7)Rulings -rule on motions, witness and exhibit lists, and proposed findings;

(8) Memoranda of Law and Oral Argument -require the filing of memoranda of law and the presentation of oral argument, as appropriate;

(9)Evidence and Witnesses -order the production of evidence and the appearance of witnesses, as appropriate;

(10) Sanctions -impose sanctions under § 1201.43 of the Board's regulations;

(11) Consolidation and Joinder -consolidate appeals filed by two or more appellants, or join two or more appeals filed by the same appellant (5 U.S.C. § 7701(f));

(12) Attorney Fees -require payment of attorney fees by an agency under 5 U.S.C. § 1221(g), or under 5 U.S.C. §§ 7701(g)l) and(2):

(13) GAO Opinions -request opinions from the Comptroller General; and

(14) Draft Decisions -draft decisions for the Board.

2. RESERVATIONS OF AUHORITY. The Board reserves the authority to make final decisions in all case/action categories listed in la above, and in taking final actions as presiding official in lb above.

Note: In regard to stays requested by the Special Counsel, any Board member may grant or deny a 45-day stay, but a majority of the Board members must approve stays for longer periods.

3. REDELEGATION RESTRICTIONS. The General Counsel may redelegate the authorities in paragraph 1 above, as appropriate,

Additional Questions for the Record
For Mr. Scott Bloch
Special Counsel, Office of Special Counsel
Committee on Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
"Safeguarding the Merit Principles: A Review of the Merit Systems Protection Board and the Office of Special Counsel"
March 22, 2007

Questions from Chairman Akaka:

1. According to the Office of Special Counsel's (OSC) FY 2005 Annual Report, the agency's 2302(c) Certification Program is designed to assist agencies in meeting the requirements of Title 5 for educating employees about their rights and protections.

    a. Once agencies are certified in the program, does OSC reassess an agency's compliance with the certification program requirements?

Answer: OSC's first priority under the program has been initial certification of executive branch agencies. In general, certification is renewable every three years.

    b. According to OSC's website, some agencies registered for the certification program as far back as 2002, but have not been certified. What steps is OSC taking to ensure that federal agencies obtain certification?

Answer: The burden is on each agency to show that they meet the five requirements listed on our website. We are glad to work with agencies who are seeking to be either certified or recertified to ensure that this process goes smoothly.

2. Following OSC's 2005 reorganization, there were widespread reports of low morale among OSC employees. What steps has OSC taken since that time to assess the level of morale among its employees and what actions were taken as a result of such assessments? Would you please provide for the record the fiscal year 2006 turnover rate for each of OSC's divisions by position?

Answer: These reports were false, and they were not widespread. A few interest groups and disreputable reporting created a false impression. Morale may have been low for disgruntled employees, but for the vast number it has been high at all times, as far as is known.

The Special Counsel has established an Employee Advisory Committee (EAC) made up of non-supervisory (GS-14 and below) representatives from each of the units within OSC that meets monthly. The EAC is comprised of attorneys, investigators, and administrative staff that bring concerns directly to the Special Counsel. These representatives are elected by their respective units and serve for a one year term. The goal of the EAC is to open up the channels of communication between the Special Counsel and the rest of the agency by discussing agency-wide issues.

OSC has also implemented telecommuting, additional training opportunities and an employee newsletter, as improvements to the work experience within the agency.

FY 2006 Turnover:

Investigation & Prosecution Division: General Attorney (2), Management Analyst (2), Investigator (1)
Disclosure Unit: General Attorney (1)
USERRA Unit: General Attorney (1)
Complaints Examining Unit: HR Specialist (1)
Legal Counsel and Policy: Investigator/FOIA Specialist (1)
Hatch Act Unit: Admin & Program Assistant (1)

3. What involvement have you or your political staff had with the investigation by the Office of Personnel Management (OPM) Inspector General (IG) regarding the structure and methodology of the investigation and how, when, where, and under what circumstances OSC employees may provide information to the OPM IG?

Answer: The coordination of the investigation was delegated by the Special Counsel to the Deputy Special Counsel, who has always handled the structure, methodology, how, when, where, why and other circumstances of the investigation. Leading up to the signing of the agreement, under which OPM OIG agreed to conduct an investigation of the Complaint and the Amendment to the Complaint of Prohibited Personnel Practices, there was discussion and interaction between the Special Counsel, the Deputy Special Counsel, OPM OIG, PCIE Chairman Clay Johnson, and the OMB general counsel's office to settle on the proper law and procedures to be followed in an OSC-type investigation as well as to address conflict of interest issues.

The matter is currently being handled by Deputy Special Counsel James Byrne, a career employee and the only top-level conduit between OSC and OPM OIG. His predecessor, James McVay, performed the same duties at the outset of the investigation, and Acting Deputy Special Counsel Rebecca McGinley bridged the several months between them.

4. OSC's 2005 Performance and Accountability Report (PAR) discussed OSC's goals and results.

    a. The PAR stated that the Office of Personnel Management (OPM) asks several questions regarding employee rights on the government-wide Federal Human Capital Survey. How does OSC use the responses from the survey?

Answer: Please see attachment.

    b. The PAR noted that OSC was changing its priority system for prohibited personnel practice (PPP) cases noting that the previous system began yielding counterproductive results. What changes has OSC made to the priority system for cases involving PPPs?

Answer: OSC retains a special focus on whistleblower reprisal cases under 5 USC 2302 (b)(8), but of course every complaint received by OSC is managed on its own merits. Many of the factors that went into the previous system are still used, but they are judgment factors, not mandatory factors, and the weighing is done by senior career supervisors.

5. Under a demonstration project, OSC shares the responsibility with the Department of Labor to receive and investigate claims from federal service members under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

    a. If OSC is granted authority to investigate all federal USERRA claims, what actions would the agency need to take to carry out this responsibility?

Answer: During the course of the demonstration project, OSC established and fine-tuned the means for receiving and investigating USERRA claims in a timely and efficient manner, namely: the USERRA Unit. Because the "USERRA infrastructure" is already in place, the only action necessary for OSC to be able to investigate the remaining 50% of federal sector USERRA claims currently being investigated by the U.S. Department of Labor, Veterans' Employment and Training Service, is increasing the number of employees assigned to the USERRA Unit and providing those employees the necessary resources to do the job (e.g., office space, computers, etc.).

b. How many employees at OSC work on the USERRA demonstration project and what is their position (investigator/attorney)? Do these employees only handle USERRA cases or other PPPs? If they handle other PPPs, what percentage of time is spent on USERRA cases and what percentage of time is spent on PPPs?

Answer: Currently, the USERRA Unit is permanently staffed with the following personnel:

Chief GS-905-15
Attorney GS-905-15
Attorney GS-905-14
Attorney GS-905-13
Attorney GS-905-13
Investigator GS-1810-13
Investigator GS-1810-13

Additionally, the following personnel are currently detailed to the unit:

Attorney GS-905-13
Attorney GS-905-13

The USERRA Unit is the only unit at OSC that receives, investigates, analyzes, resolves and prosecutes USERRA cases. Therefore, the foregoing employees are the only OSC employees handling USERRA claims. (Note: Through the Special Counsel's cross-training initiative, several experienced investigators in OSC's Investigation and Prosecution Division have recently received USERRA training and each will likely be assigned one or two USERRA cases in the near future as part of that training.)

The employees in the USERRA Unit have the experience and expertise to investigate, analyze, resolve, and prosecute prohibited personnel practice cases and, since the start of the demonstration project on February 8, 2005, the unit has received a handful of those cases. Specifically, eight of the approximate 350 cases assigned to the USERRA Unit during the demonstration project have been prohibited personnel practice cases (i.e., 2.3%). It is to be emphasized, however, that each of those eight cases directly concern service members' federal employment rights (e.g., prohibited personnel practices arising under 5 U.S.C. § 2302 (b)(11) or systemic violations of civil service law, rule, or regulation arising under 5 U.S.C. § 1216). The USERRA Unit is not assigned prohibited personnel practice cases that are unrelated to service members' employment rights.

c. Does the policy for contacting employees during an investigation of USERRA cases differ from that in whistleblower or other PPP cases, and if so how?

Answer: The question is confusing. Consequently, it has been assumed: 1) "contacting" means "arranging to interview or interviewing" and "employees" mean "witnesses" and 2) the question seeks information on how a USERRA investigation differs from a prohibited personnel practice investigation, if at all.

Generally speaking, all OSC investigations of matters within its jurisdiction (including prohibited personnel practice cases, Hatch Act cases, USERRA cases, and matters arising under 5 U.S.C. § 1216) are accomplished via a thorough examination of documents and witnesses. Witnesses are contacted directly, through their legal representative, or, at times, through the involved agency's OSC liaison. Witnesses are interviewed by various means — telephonically, video-telephonically, and in-person. In this regard, USERRA investigations are the same as prohibited personnel practice investigations.

Because USERRA investigations are conducted under title 38, not title 5, differences exist between USERRA investigations and prohibited personnel practice investigations. For example, OSC investigates employers that it would not typically investigate in a prohibited personnel practice case (e.g., the U.S. Postal Service). Accordingly, there has been a need to establish and foster new working relationships with those additional federal employers, including establishing new, minor variations in the manner in which USERRA investigations are conducted (e.g., identifying new agency liaisons and endeavoring to comply with their requests regarding the investigation, not always citing 5 C.F.R. § 5.4 as investigative authority, etc.). So, in this respect, USERRA investigations differ from prohibited personnel practice investigations.

In short, because USERRA claims are, in essence, prohibited personnel practice claims, the "nuts and bolts" of USERRA investigations do not differ in any meaningful way from OSC's prohibited personnel practice investigations.

6. It seems crucial that there be a cooperative working relationship between Disclosure Unit staff and the whistleblower throughout the process so that the whistleblower's expertise of relevant subject matter is utilized and complaints properly identified.

    a. Please describe in general the level of communication between the Disclosure Unit and the whistleblower after a substantial likelihood finding on a whistleblower disclosure has been made by OSC.

Answer: After the substantial likelihood requirement is met, the OSC-assigned case attorney or the Chief of the Disclosure Unit has as much contact with the whistleblower (or the whistleblower's attorney) as desired by the whistleblower, or as necessary in the interests of the case. Typically, the OSC attorney will make contact with the whistleblower by telephone or e-mail during the course of the

agency investigation to ensure that the whistleblower has been contacted and plans are in place for the whistleblower's interview. Thereafter, the attorney will contact the whistleblower in writing upon receipt of the agency's report to request comments, and again, any time there is a question about the agency's response. The assigned case attorney and/or the Chief of the Disclosure Unit are available to answer questions or discuss the case status. In many cases, the whistleblower maintains much more significant contact with the assigned case attorney, and more frequent communication occurs during the course of the agency investigation and reporting.

b. The prior Special Counsel met personally with whistleblowers on several occasions in cases that involved significant public safety issues. How many whistleblowers, if any, have you met with personally to receive briefings on issues important to public safety before informing the President and Congress of your findings on their disclosures?

Answer: Generally, the Special Counsel does not meet personally with whistleblowers who file disclosures with OSC. However, he has spoken with a number of whistleblowers either in person or via telephone. This includes Anne Whiteman and Leroy Smith, OSC's most recent Public Servant Award recipients. The Special Counsel, in all cases, including those involving significant public safety issues, reviews the whistleblower's personal comments on agency reports, where the whistleblower has elected to provide them. In addition, he has taken calls over the years from prospective whistleblowers to discuss whether they might have a case.

c. When it is clear from a whistleblower's comments and communications with the OSC that he or she does not believe an agency's report, pursuant to 5 U.S.C. 1213, has adequately resolved the whistleblower's complaint, what steps does OSC take to address these concerns?

Answer: In many cases, where the whistleblower has provided comments reflecting that the disclosure has not been resolved, the Disclosure Unit has returned to the agency to outline the whistleblower's continuing concerns, and to seek a supplemental response or responses. Pursuant to 5 U.S.C. Section 1213, the Special Counsel is required to make a determination as to whether or not the agency has satisfied the statutory requirements for reporting, and whether or not the findings of the agency head appear reasonable. In many cases, the Special Counsel has found the agency report deficient, and has included comments, as authorized by 5 U.S.C. 1213 (e)(3) in his final transmittal of the report to the President and Congressional oversight committees. For example, in at least one case, the Special Counsel sought clarification based on the whistleblower's continuing concerns, and met with agency officials to discuss these concerns. In other cases, in response to the

Special Counsel's request for clarification, the agency has re-investigated the matter, or provided supplemental or amended reports to address the deficiencies.

d. Especially in technically challenging disclosures, what guarantee does a whistleblower have that his/her complaint has been accurately relayed to the agency and that the full scope of their allegations is being investigated?

Answer: In technically challenging disclosures, the Disclosure Unit has, where necessary, provided the whistleblower with an opportunity to review and correct that portion of the referral letter which describes the technical aspects of the referral. In cases of referral, the whistleblower is notified by letter of the allegations that have been referred for investigation. In cases where some of the whistleblower's allegations do not meet the substantial likelihood requirement and are not referred for investigation, the whistleblower is notified of the reasons the allegations were closed and referred to the appropriate Inspector General's Office.

e. After making a substantial likelihood finding, and receiving the report of investigation, for FY 2002 through FY2006 in how many cases has OSC failed to then make a determination as to whether an agency's ensuing report appears reasonable?

Answer: In several cases, the Special Counsel has been unable to make a determination as to whether or not the agency's report appears reasonable.

7. In your Annual Report, I've noticed that in addition to no longer including Disclosure Unit survey results, OSC no longer gives a breakdown of PPP intakes by type (i.e. whistleblowing reprisal, nepotism, etc); no longer gives this breakdown for allegations referred by OSC for investigation by the Investigation and Prosecution Division (IPD); and no longer provides a clear indication of whether Disclosure Unit referrals to agency heads were made under section 1213(c) or 1213(g) of Title 5, United States Code.

   a. For the fiscal years 2002-2006, Please provide the number of PPP complaints by type, the number of PPP cases referred to IPD for investigation by type, the number of whistleblower disclosures referred to agency heads under 1213 (c) and the number of disclosures referred to agency heads under 1213(g).

Answer: Please see attachment.

b. Although you believe that the law does not require you to survey employees who make disclosures, I believe that such a survey would provide helpful information to OSC in how it is addressing allegations of waste, fraud, and abuse in the federal government. Will you survey employees who make disclosures and include the survey results in future Annual Reports?

Answer: As the Special Counsel said in his March 28th letter to Sen. Akaka, the OSC general counsel advised that Disclosure Unit matters do not fall under the statutory framework laid out for the annual surveys. Naturally, if Congress passes a revision to the law, OSC will uphold it.

8. I have also noticed some discrepancy in your reporting of Disclosure Unit referrals to agency Inspector Generals in recent years. For example, the FY2006 Annual Report states that the DU referred 10 cases to agency Inspectors General in FY2002. However, the FY2002 Annual Report says the number of disclosures referred to IGs was 125 that year (FY2002 annual report, page 18). Also, the number of DU referrals to IGs in FY2000-FY2002 was 106, 119, and 125 respectively, according to the FY2002 Annual Report. These totals seem to have fallen off significantly in recent years, with IG referrals between 8 and 24 the last three fiscal years.

   a. Are you using a different method for counting referrals to IGs than in previous years? If not, please explain the discrepancy between the statistics reported for IG referrals in the FY2002 annual report and those reported in FY2006.

Answer: Referrals to the Inspectors General are now reported differently. In FY2002, any anonymous complaint received was closed by OSC and sent to the Inspector General of the involved agency, for any action deemed necessary, because OSC could not make a substantial likelihood determination in those cases. Closure of these anonymous cases is in accordance with an opinion of the Office of Legal Counsel, Department of Justice. See Memorandum for the Special Counsel from the Deputy Attorney General, Office of Legal Counsel, July 1, 1981. When a whistleblower is anonymous to OSC, the Disclosure Unit cannot make any determination as to the employee's status as a federal employee, former federal employee, or applicant for federal employment, and therefore cannot assert jurisdiction.

In FY2006, OSC changed its reporting practice in the annual report. Only those cases in which the whistleblower is identified and OSC has requested additional information, are now included in the total number of cases referred to the Inspector General. This more accurately reflects the substantive matters under OSC's review.

However, anonymous cases are still referred to the Inspector General. In FY2003, 116 anonymous complaints were closed by OSC and sent to the Inspector General for any action deemed necessary; 108 in FY2004; 65 in FY2005; and 86 in FY2006.

b. Please also explain the circumstances in which the Disclosure Unit decides to refer a case to an agency Inspector General. Please explain why this process has fallen off in recent years.

Answer: It has not fallen off; see Answer 8a above. If the *substantial likelihood* determination cannot be made based on the information provided by the whistleblower, the matter may be informally referred to the Office of the Inspector General (IG) for the involved agency, with a request that the IG assist OSC in its determination. In many cases, the whistleblower has already reported the matter to the IG, and the IG may be able to provide to OSC a written report on the matter. When a case is referred to the IG, a letter to the IG is prepared, for signature by the Chief of the Disclosure Unit, identifying the disclosures and specifically requesting that the IG respond to OSC within 60 days. A letter to the whistleblower is also prepared and signed by the attorney advising that the matter has been referred to the IG.

In cases in which the informal referral does not resolve the matter, and a substantial likelihood determination can be made as a result of additional information obtained from the IG, the matter is formally referred to the agency head under 5 U.S.C. 1213.

To the extent that informal referrals have decreased, this is due to the fact that some agencies have elected not to respond to these informal requests for information, preferring to operate within the more formal statutory structure of 5 U.S.C. 1213. OSC has established very good working relationships with several Offices of Inspectors General, to facilitate the informal referral and investigation of a whistleblower's allegations, and has not changed its policy in this regard.

9. In response to my question on sexual orientation discrimination and determining if a manager took a prohibited personnel action against an employee because he/she was gay, you said that "if you peel back the layers very far, you may indeed find conduct....[b]ut it may also not be that." Please describe the fact based questions and answers that are needed to show that the discrimination is not based on conduct.

Answer: Mr. Bloch has been criticized by this committee for reversing in 2004 what he determined was the illegal and improper interpretation of a statute to grant class

status for "sexual orientation," a phrase totally foreign to the Civil Service Reform Act and its legislative history, and a status protection that was explicitly rejected by the Merit Systems Protection Board in Morales v. Department of Justice 77 M.S.P.R. 482, 484 (1998).

More recently, the Board affirmed Morales and declined to address the question of whether a status protection could be inferred from 5 U.S.C. 2302(b)(10), the apparent basis of Mr. Bloch's predecessor for her decision to extend status protection for "sexual orientation" when it had never been enforced in that way for twenty years preceding her tenure. In Mahaffey v. Dept. of Agriculture, 2007 MSPB 93 (March 30, 2007) (pp. 14-16) the Board considered the claimant's argument that he had been discriminated against on the basis of his sexual orientation. The court reiterated what it found in Morales and then addressed the additional argument that the claimant made that, even if 5 U.S.C. 2302(b)(1) does not cover sexual orientation as a status protection, section (b)(10) does. The complainant quoted from Mr. Bloch's April 2004 policy determination by saying there was "imputed conduct" in any discrimination that would be based on sexual orientation. The Board declined to accept that argument.

In addition, the House of Representatives recently introduced HR 2015, the Employment Nondiscrimination Act (ENDA), to provide for employment protections against discrimination on the basis of sexual orientation. This has been accompanied by S1345 and HR 2232, the Clarification of Federal Employment Protections Act. These two developments make it clear that those protections did not and do not exist, or they would be enforceable in federal court, and Congress' own action shows that new legislation is necessary to give OSC the power to investigate and prosecute for such allegations. Therefore, Mr. Bloch's actions in defending his agency against misuse of power and improper prosecutions for this form of discrimination based on class status rather than conduct was both correct and necessary. The facts necessary to establish conduct or the lack of conduct in a (b)(10) claim are as varied as factual patterns in human experience, and it is impossible to explain this in a hypothetical situation. Suffice it to say, if a complainant presents facts that show discrimination on the basis of conduct, OSC would proceed to fully investigate and prosecute the case.

10. In 2005, you created a new Customer Service Unit (CSU) to better serve the public and federal employees and OSC operational units. According to OSC's press release, having specific personnel assigned for this purpose will help OSC gain a reputation of better customer service within the federal workforce.

    a. How many employees work in the CSU today?

Answer: On August 15, 2005, the new CSU began operations with two Paralegal Specialists. These two individuals were hired to handle "hotline calls" as part of the Officer of the Week duties, which were formerly performed by Attorneys and HR Specialists in the Complaints Examining Unit (CEU). Initially, both Paralegal

Specialists received training by the Complaints Examining Unit (CEU) regarding prohibited personnel practices and performed analysis on some of the easier cases. The concept seemed promising because the Paralegal Specialists were assigned to alternate weeks on the hotline and could perform CEU or other paralegal casework when not answering calls. However, it was difficult getting other paralegal work and within 6 months, one of the Paralegal Specialists accepted another position within OSC, and the other ceased employment with OSC. Consequently, the duties were transferred back to the CEU to continue to serve the public and meet the needs of OSC. Since this time, there has been some discussion about creating a separate position in the CEU as an HR Specialist to primarily function as the Officer of the Week on a daily basis. The primary function of this position would be the hotline with a relatively small CEU caseload. Due to budget constraints, no action has yet been taken on this proposal.

b. Please describe their role, the performance standards they are required to meet, the training they received, and how those employees interact with IPD and CEU employees.

Answer: See answer 10a.

11. OSC's fiscal year 2005 Annual Report shows that the number of favorable PPP actions decreased from 126 in fiscal year 2002 to 45 in 2005. According to the report, fiscal year 2005 was the year its Investigation and Prosecutions Division (IPD), which processes PPP cases, reduced its backlog, that many of the backlog cases had been in the IPD for two or more years, and the majority of these older cases were not strong cases. OSC added that fiscal year 2006 would be the first year the IPD would be able to focus primarily on cases received during fiscal year 2006 and expected a higher number of favorable actions. However, in the 2006 Annual Report shows only 52 favorable PPP actions. When asked why there wasn't a greater improvement in PPP favorable actions, you responded that "you can't determine how many favorable actions you have at a given snapshot of time" and that the Complaints Examining Unit reported to you that "the quality of cases that they were seeing in the last two years had decreased or dropped off." You also said that there has been a "slight shift in philosophy within the directorate" of the IPD and the CEU in which OSC is "going after stronger, bigger things and more litigation when possible rather then perhaps something that might be a little more insubstantial."

a. If you believe that you can't determine how many favorable actions you have at a given time, then why did the FY05 Annual Report make such a claim?

Answer: OSC made no guarantees, and still makes none, but hopes for increasing quality of claims and evidence.

b. You said that the quality of cases has declined.

A. Please elaborate as to why you believe the quality of cases has declined. Are the cases not meeting the "reasonable belief" standard? Do the cases not fall into one of the categories of whistleblowing disclosure, such as violation of law, rule, or regulation? Do the allegations not meet the preponderance of the evidence standard? Do the whistleblowers not provide enough information to OSC upon their initial contact with the agency?

Answer: This question is very much on point about the deficiencies noted in recent complaints received by OSC. Each of the reasons you cite has been evident, as well as others such as failure to cite a personnel action covered by section 2302(b), failure to inform OSC that the employee had already appealed and lost a case before MSPB, or filed a grievance (filing a grievance under a negotiated grievance procedure precluded filing a ppp over the same alleged ppp). We have found that many employees have turned to OSC as another grievance system and many of their grievances do not fit into the prohibited personnel practices Congress established for OSC to investigate.

B. What assistance does OSC provide to whistleblowers to help them provide all necessary information related to their disclosure?

Answer: The question is confusing as to whether it refers to whistleblowers with pending retaliation claims or with pending disclosures, as the relevant units having different operating principles and are chartered under different sections of the law. However, in either case, career employees are available by email or telephone to discuss pending matters with the whistleblowers that have filed them. In the course of this communication the OSC employees try to draw out all necessary information for the case at hand. Other assistance comes in the form of OSC's general outreach efforts, which have been important in communicating OSC's statutes to the public at large. Another tool is the OSC website, which contains a wealth of information about how to file and what falls under our statutes. OSC does believe that the cumulative effect of improved education and outreach has produced fewer complaints.

c. Do you agree with the shift in philosophy by the directorate of the IPD and the CEU?

Answer: I agree with the operating principles currently employed by the IPD and CEU. I have requested these units to find better and more cases, while acknowledging that we cannot invent the cases.

d. If OSC is to protect federal employees from prohibited personnel practices, especially reprisal for whistleblowing, why then is OSC only going after stronger and bigger cases?

Answer: "Stronger, bigger things" in my testimony refers to more aggressive actions with regard to litigation and investigation. OSC reviews every case that comes before it equally. However, such review bears out that some cases are more suitable for litigation than others, just as some cases are more meritorious than others.

Crucially, even in cases where litigation might not be appropriate, we can occasionally obtain a favorable settlement for the claimant. With this understood, OSC is pursuing maximum value for the federal workers, and not "only" going after "stronger and bigger" cases. The power to educate through highlighting important actions of the agency has proved useful as a deterrent to agencies committing PPPs or violations under USERRA or the Hatch Act.

e. What assistance is provided to whistleblowers who are subject to retaliation and whose disclosure does not meet the "stronger and bigger" test applied by the IPD and CEU?

Answer: The question proceeds from a faulty premise. All whistleblowers receive the same level of assistance as OSC reviews retaliation claims. Any such claim OSC finds valid will be pursued, whether the complaint is ultimately settled or proceeds to prosecution. The faulty premise is that pursuing stronger and bigger cases in any way detracts from pursuing smaller or possibly weaker cases, so long as they meet a minimum level of proof. Indeed, the increase in enforcement and corrective action rates in DU, USERRA and Hatch Act cases bears out that OSC has taken down walls to cases getting through.

12. In response to my question on the low number of PPP favorable actions you said, "We have tried to encourage the CEU examiners to speak with the complainants and try to find the good that is within their case. It might not be 100 percent good, but maybe there's a PPP in there. I have even sat in on the sort of round robin sessions of the CEU where they brainstorm and try to figure out where is the PPP. I've kidded with them that it's kind of like "Where is Waldo?" Where's the hidden PPP, because sometimes when a federal executive employee comes to you, they have a problem, and it's a bundle of things." Does this mean that employees are not being turned away from OSC, or their cases dismissed, because they filled out the OSC Form 11 improperly, but there is evidence that a

prohibited personnel practice had occurred? Please provide all relevant policies and communications to staff on this specific issue, as well as on communicating with complainants generally about "finding the right PPP."

Answer: In no case will such an employee be turned away. OSC conducts supervisor/colleague review committees where several career members of the Complaints Examining Unit go over cases to determine if a ppp seems to have been committed, to backstop the work conducted by the individual examiner.

13. In further response to the question mentioned above, you said in part, "We need to make better case law." Please explain in detail what you mean by this response.

Answer: To make better case law, in this context, means for OSC to push cases that will flesh out gray areas in the law where the extent of worker protections are less understood. This is very important for those protections, to make it clear what is protected and what isn't. Clear bright lines make for better, safer law.

Since OSC and MSPB were created in 1978 and began operating in 1979, there have been very few cases analyzing the elements of the various prohibited personnel practices. Thus, for most PPPs, we do not have a body of case law telling us how to interpret whether certain personnel actions constitute a PPP. I would like to bring more test cases in order to establish such.

Such test cases are especially valuable because a successful result benefits not just the respective complainant, but future complainants as well. For example, in the arena of (b)(6) unauthorized preference cases, OSC has taken an aggressive approach and filed litigation with the board. In that case, the matter settled satisfactorily with DHS and the case law was not advanced per se, but the point was made and a kind of precedent was set. We have also filed a number of USERRA and Hatch cases that have made important law.

14. In the case of Leroy Smith, you said that OSC stopped the investigation because it was asked to do so by Mr. Smith.

    a. On November 11, 2004, and on March 23, 2006, OSC wrote letters to Mr. Smith, which have been included in the record, advising him that OSC had made a determination to close its investigation into his allegations. How did OSC make a determination to close its investigation into Mr. Smith's case and yet still recognize him for his work as a whistleblower?

Answer: OSC was required by statute to close its investigation into Leroy Smith's whistleblower reprisal complaint after Mr. Smith withdrew the complaint. As a matter of contract, Mr. Smith and his attorneys agreed that he had to "immediately" withdraw his PPP complaint from OSC. This was a separate legal

matter from the pursuit of Mr. Smith's whistleblower disclosure of hazardous environmental conditions, which he did not withdraw. His disclosure was pursued by OSC up to and including the April 3rd, 2006 letter from Special Counsel Scott Bloch to President Bush criticizing the deficient report and calling for a fuller investigation. That investigation is still proceeding into multiple facilities by the Inspector General of the U.S. Department of Justice to correct toxic emissions wherever they may be occurring.

b. Why did Mr. Smith decide to get his own attorney to address his reprisal claim and if OSC was still reviewing the matter?

Answer: Mr. Smith had claims pending with other agencies prior to his whistleblower reprisal claim at OSC, and his negotiation for a global settlement was underway before OSC had an opportunity to investigate his claim. Mr. Jeffrey Ruch of Public Employees for Environmental Responsibility was one of his attorneys, and he put out an inaccurate statement about his client as well as OSC's role in not pursuing Mr. Smith's PPP to completion. Information about that is included in the attachment to this question. This appears to be the source of this line of questioning by the committee.

Telling the truth about his case handling is also important, and Mr. Smith's handlers have explained the case inaccurately. It is not true that the attorneys working at OSC retaliated against Mr. Smith by dismissing his complaint.

OSC had no choice in the matter; Mr. Smith and his attorneys withdrew his complaint. Mr. Smith and his attorneys entered into an agreement with the Department of Justice to resolve his employment claims, including his retaliation claims, and agreed to withdraw his complaint from OSC, and from MSPB, and any other claims he had or might have had against DOJ or BOP.

The statement that OSC refused to take the claims of the other people at BOP Atwater facility is incomplete. OSC had no jurisdiction over them because they were not federal executive employees, but we took Leroy Smith's complaint and substantiated it which had the same effect of taking care of the other employees' identical claims.

The case we had took as long as it took to get BOP's initial investigation, which was inadequate, we gave them feedback and they did further investigation, and we then had a statutory obligation to send those reports to Mr. Smith, and only then could we send the letter to the President and Congress. We took action as swiftly as possible given the complex facts, and the process required by statute. We never heard any complaints from Mr. Smith, and in fact in the summer of 2006 he called the Special Counsel, the case attorney, and the head of the disclosure unit to express his extreme satisfaction at how his case was handled, and then was told the Special Counsel was considering him for the Public Servant of the Year award,

which he was subsequently granted. He never complained to us either personally or through his attorneys about how OSC handled his whistleblower disclosure or retaliation case.

Mr. Smith's attorney at PEER put out a press release when OSC put out its press release sending its letter to the President and Congress that said nothing negative about any improper treatment or any other negative statement about the handling of Mr. Smith's case by OSC.

c. Why did OSC decide to cancel the award ceremony for Mr. Smith when it sought to recognize him for his whistleblower efforts? Did you pay for Mr. Smith to travel to DC to participate in the ceremony? Did you allow him to come by and pick up his award? Was the ceremony rescheduled and if not, why?

Answer: OSC continues to honor Leroy Smith for his courageous whistleblowing, and the Special Counsel has spoken on numerous occasions about his admiration for Mr. Smith's actions. Mr. Smith is and remains the 2006 recipient of the Public Servant Award, and agency staff confirmed that he received a trophy and framed certificate as a show of thanks for his efforts. Unfortunately, the event itself was canceled due to staffing concerns after the death in the family of a key employee. Agency funds were used to bring Mr. Smith to Washington.

15. According to various stakeholders, OSC has changed the way it calculates and determines the number of favorable actions. Please provide a description, with relevant case number, of all 45 favorable actions obtained by OSC on behalf of employees during FY2005. Please provide a description, with relevant case number, of all 52 favorable actions obtained by OSC on behalf of employees in FY2006.

Answer: Please see attachment.

16. Did OSC include a settlement brokered in early FY2003 by OSC on behalf of a Department of Energy nuclear security specialist in its reported favorable action statistics for FY2004 or FY2005? If not, why was a narrative summary of this settlement action included in the FY2004 annual report (page 9) and again in the FY2005 annual report (page 12)?

Answer: The corrective action achieved in this case was counted in the FY 2004 statistics. The brief narrative description of this case was inadvertently retained in the narrative section of the FY 2005 annual report. However, it was not counted in the FY 2005 corrective action statistics.

17. Under the prior Special Counsel, complaints examiners were required to provide complainants alleging retaliation and other prohibited personnel practices an opportunity to speak with the examiner reviewing their case before it was closed. OSC's pretermination letters advised the complainants of this right. According to whistleblower advocates, the former Special Counsel's policy is no longer in effect. Please explain why this policy has been abandoned. If true, please provide all relevant policies and communications to staff on this specific issue, as well as on communicating with complainants generally.

Answer: Examiners are still available to speak with complainants and spend a significant portion of their time doing so. In addition, examiners frequently communicate by email with complainants. Staff expressed that inordinate amounts of time were required to perform tasks that provided no due process but were designed to appease outside special interests. They recommended that the elimination of these needless and unhelpful requirements not contained in law would help provide better and more efficient and expeditious service to all federal employees.

18. For many years, OSC has given complainants 16 days to respond to OSC's predetermination letters to allow them the opportunity to provide information for OSC to consider before closing their cases. OSC also had a policy of giving complainants reasonable extensions of time when they were unable to meet the 16 day deadline. According to whistleblower advocates, during your tenure the 16 day period has been reduced to 13 days and extensions of time to respond are not routinely granted. Please verify if this is true and explain your basis for reducing the amount of time for complainants to respond to OSC's preliminary findings, particularly given that the vast majority of the complainants are not represented by counsel.

Answer: The statute requires only 10 days be granted to complainants. In past years, it was felt that mail transmission concerns (both internal and external) made 16 days a more appropriate timeframe. With recent improvements and the rising availability of instant communication, the extra time has proven unnecessary. Three additional days for mailing is the model contained within the federal rules of civil procedure.

19. In response to questions I submitted following the May 2005 hearing on OSC, you wrote, "The [Disclosure Unit] staff has consistently rejected Federal agency reports that were deemed unacceptable, based upon whistleblower comments submitted pursuant to 5 U.S.C. 1213(e)(1). The capable DU staff decides if and when the agency report is acceptable. If the agency report is unacceptable, DU sends the agency report back to the agency for revision. Some agency reports have been revised two or more times before the DU accepts them as resolving the whistleblower's complaint."

a. Since May 2005, has OSC changed this policy, and/or stopped requiring agencies to submit additional information or reports if their initial effort does not meet the statutory requirements of 5 U.S.C. 1213, or reasonably resolve a whistleblower's complaint, as specified in 5 U.S.C. § 1213?

Answer: There has been no change in the Disclosure Unit procedure for reviewing agency reports submitted pursuant to 5 U.S.C. 1213 since May 2005. In all cases where, in the judgment of the assigned case attorney, with the concurrence of the Chief of the Disclosure Unit, the initial agency report does not meet the statutory requirements of 5 U.S.C. 1213, or if the findings of the agency head do not appear reasonable, OSC will request clarification from the agency, usually in the form of a supplemental report or reports. In all cases, the Special Counsel makes the final determination, after review of the case, whether or not the agency report is statutorily sufficient and/or reasonable. Further, the Special Counsel and Deputy Special Counsel receive weekly briefings and monthly status reports from the Chief of the Disclosure Unit regarding pending matters; particularly those in which an agency report is being evaluated.

b. Further, in your answer you indicate that the career staff in the DU are making decisions about whether a report is or is not acceptable. Prior Special Counsels have personally reviewed this determination by the career staff. Do you?

Answer: Yes. Please see answer to Question 19a above.

20. Section 1213(e)(2) of Title 5, United States Code, does not specifically define the term "reasonable," referring to the standard to which OSC shall measure the report submitted by an agency in response to a referral of a whistleblower disclosure.
    a. Please provide a general description of the requirements that must be met for OSC to determine that an agency's report is reasonable.

Answer: 5 U.S.C. 1213(e)(2) states that, "[u]pon receipt of any report of the head of an agency required under subsection (c) of this section, the Special Counsel shall review the report and determine whether – (A) the findings of the head of the agency appear reasonable; and (B) the report of the agency under subsection (c)(1) of this section contains the information required under subsection (d) of this section. "Reasonable" is not defined in the statute; therefore, the Special Counsel has adopted a generally accepted definition of reasonable, i.e., whether the report is governed by or in accordance with reason or sound thinking under the totality of circumstances.

b. Is it necessary for the agency during the course of its investigation to address each allegation referred by OSC in order for OSC to determine that a report is reasonable and meets statutory requirements?

Answer: Generally, yes. In assessing the reasonableness of an agency report, the Special Counsel considers the totality of the evidence and findings of the agency head. As such, the agency's response to each allegation referred is an important consideration.

c. Would assurances in an agency report that past wrongdoing had been corrected without an explanation of the changes in agency rules, regulations, or practices that led to correction or disciplinary action against any employee that was involved in the wrongdoing satisfy an agency's statutory requirements and meet reasonableness standards?

Answer: 5 U.S.C. 1213(d)(5) mandates that an agency report include, "a description of any action taken or planned as a result of the investigation, such as – (A) changes in agency rules, regulations, or practices..." and "disciplinary action against any employee." As such, in evaluating whether or not an agency report has met statutory requirements, OSC would consider whether or not the agency report contains this information, particularly where the report reflects that wrongdoing has occurred. Generally, where the report substantiates wrongdoing that results in disciplinary action against an employee, the Special Counsel expects that the report will contain sufficient detail regarding the nature and extent of disciplinary action. Decisions regarding reasonableness are based upon the totality of the information reported by the agency, i.e. whether the "findings of the head of the agency appear reasonable."

d. What steps, if any, does OSC take to make sure that its recommendations have been adopted or acted on, especially when those recommendations were necessary for the OSC to find that an agency had adequately resolved a whistleblower's complaint?

Answer: 5 U.S.C. 1213(e)(3) requires that the Special Counsel "transmit any agency report received...and any appropriate comments or recommendations by the Special Counsel to the President..." and the congressional committees with jurisdiction over the agency involved. The Special Counsel does not make recommendations in all cases. The agency head receives a letter from the Special Counsel incorporating his recommendations and/or comments. The Special Counsel, however, is not authorized by statute to enforce any such recommendations, and any agency action on those recommendations is left to the discretion of the agency head. However, I do ask for reports or follow-ups on cases where recommendations have been made for further action.

e. What are the deadlines for OSC, the agency, and whistleblowers to respond to the referred disclosure, the agency report, and/or a request for more information and how often are these deadlines met by OSC, federal agencies, and the whistleblower?

Answer: 5 U.S.C. 1213(c)(1)(B) requires that the agency head "submit a written report... within 60 days after the date on which the information is transmitted to the agency head or within any longer period of time agreed to in writing by the Special Counsel." Generally, the agency is granted an extension of time in 60-day increments as necessary to complete the investigation and report. If an agency requests more than two 60-day extensions of time, the Special Counsel will generally review and approve or deny such extensions. When the Special Counsel requests additional information following receipt of a report, the agency head is typically granted between 30 and 60 days to respond, with extensions as necessary, depending on the nature and extent of the information requested. Pursuant to 5 U.S.C. 1213 (e)(1), the whistleblower is given 15 days after receipt of a copy of the agency report to submit comments. OSC grants extensions of time to the whistleblower as necessary.

Questions from Senator Alexander:

1. How many specific Prohibited Personnel Practices (PPP) allegations were contained in the 5529 PPP complaints OSC dispositioned in FY 2002 - 2004?

Answer: Once we subtract out the complaints that came to OSC without citing any prohibited personnel practice or prohibited activity, it appears there were approximately 6,203 specific PPP allegations made in those 5,529 complaints from FY 2002 to FY 2004.

2. Of these, in how many did OSC make a positive PPP determination - "there are reasonable grounds to believe a PPP has occurred, exists, or is to be taken"?

Answer: Questions 2, 3, 4, 9 and 10 deal with terminology currently under litigation. Therefore, OSC will not comment in detail.

However, it is important to understand that most meritorious cases are resolved by staff attorneys and investigators prior to reaching the stage where a formal corrective action letter is sent by the Special Counsel to an agency head pursuant to 5 U.S.C. 1214(b)(2)(B). The numbers of formal corrective action letters from the

Special Counsel during the period specified in the question are reported in the agency's annual reports.

3. Of these, in how many were negative PPP determinations made?

Answer: See Answer to Question 2.

4. If the numbers do not add up, what is the explanation for the discrepancy, given OSC's statutory obligation to make and appropriately report this positive or negative PPP determination?

Answer: See Answer to Question 2.

5. OSC claims to have obtained 321 "favorable actions" in 255 cases in FY 2002-2004. How many positive PPP determination reports did it make to the Merit Systems Protection Board (MSPB) during this time, per 5 USC 1214(b)(2)(B), as required by a 2000 court decision in Weber v. Department of Army, 209 F.3d 756, 758 (D.C. Cir. 2000)?

Answer: Weber described subsection (b)(2)(B) - it did not require any action by OSC. See, however, answer to Question 2.

6. Do OSC PPP investigation termination letters contain the required "termination notice" of 5 USC 1214 (appendix)? If not, why not?

Answer: OSC letters terminating PPP investigations contain the information described in 5 U.S.C. 1214 for such letters.

7. Does OSC provide the information described in the "termination statement," by phone, when requested by the complainant? If not, why not?

Answer: Yes.

8. Do OSC's PPP termination letters report OSC's statutory required PPP determination or only OSC's discretionary determination about seeking corrective action on behalf of the complainant at MSPB?

Answer: See Answer to Question 6.

9. How can the heads of agencies comply with their statutory obligations to "prevent PPP's" in their agencies (see 5 USC 2302(c)), if OSC does not formally report all its positive PPP determinations?

Answer: See Answer to Question 2.

10. How can the information required by the No FEAR act (see 5 USC 2301 appendix) be compiled if OSC does not formally report all its positive PPP determinations?

Answer: See Answer to Question 2.

Attachment to Sen. Akaka's Question 4a

4. OSC's 2005 Performance and Accountability Report (PAR) discussed OSC's goals and results.

a. The PAR stated that the Office of Personnel Management (OPM) asks several questions regarding employee rights on the government-wide Federal Human Capital Survey. How does OSC use the responses from the survey?

(45) Prohibited Personnel Practices (for example, illegally discriminating for or against any employee/applicant, obstructing a person's right to compete for employment, knowingly violating veterans' preference requirements) are not tolerated.						
Strongly Agree	**Agree**	**Neither Agree nor Disagree**	**Disagree**	**Strongly Disagree**	**Do Not Know**	**# of Respondents**
22.6%	39.6%	17.9%	5.0%	5.4%	9.6%	221,426

(46) I can disclose a suspected violation of any law, rule or regulation without fear of reprisal.						
Strongly Agree	**Agree**	**Neither Agree nor Disagree**	**Disagree**	**Strongly Disagree**	**Do Not Know**	**# of Respondents**
15.5%	33.6%	23.2%	9.9%	8.8%	9.1%	221,392

These statistics seem to indicate that a minority of Federal employees **think that Prohibited Personnel Practices and retaliation against whistleblowing are tolerated in agencies** (for Question #45, 10.4% of the respondents either Disagree or Strongly Disagree, and for Question #46 that percentage is 18.7%). This minority group is likely made up of a combination of employees that have experienced or heard of such things happening currently in their agencies, employees that have a memory of such things happening in the past in their agencies, and employees that prefer to answer in the negative regardless of what is happening in their agencies.

Statistics such as this validate OSC's Outreach Program. OSC recognizes that there are agencies in which infractions continue to occur. OSC vigorously pursues the investigations of such actions when OSC knows about them. OSC's Outreach program has two very important effects:

- When managers and supervisors in an agency are trained in understanding Prohibited Personnel Practices, they commit less of them.
- When rank and file employees become aware of the laws and legal protections they have, complaints are filed with OSC. When OSC sifts through the complaints, finds the ones with merit, and obtains corrective or disciplinary action, it has the effect of reducing the number of infractions that occur in the long term.

The occurrence of both of these effects over time boosts the confidence of Federal employees concerning the facts that the laws against Prohibited Personnel Practices and retaliation for whistleblowing are strongly enforced.

OSC uses the statistics to know what is happening concerning overall government-wide perceptions of enforcement in the Federal workforce. But OSC does not receive agency specific

information showing the perceptions at individual agencies. OSC performs dozens of outreach events every year, and offers its 2302(c) certification program to all agencies.

The Five Requirements of the 2302(c) Certification Program

1. POSTINGS: Agencies should post the laws regarding PPPs as well as information regarding the process for making confidential disclosures to OSC. Posters containing this information should be displayed in all personnel and EEO offices and in other prominent places throughout the agency.

   The following posters are required to be posted throughout your agency in order to obtain certification:

   1. "Whistleblowing": Defines a "whistleblower" as someone who discloses information he or she reasonably believes evidences a violation of any law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, substantial and specific danger to public heath, and substantial and specific danger to public safety.

   2. "Whistleblower Retaliation": Asks, "What is whistleblower retaliation?" A federal employee authorized to take, direct others to take, recommend or approve any personnel action may not take, fail to take, or threaten to take any personnel action against an employee because of protected whistleblowing. Cites an example. Defines "protected whistleblowing."

   3. "Prohibited Personnel Practices" (PPPs): Lists (in two columns) what federal employees are prohibited from doing under federal law.

   The following materials, though not required to obtain certification, are also highly recommended by the OSC:

   4. "The Hatch Act and Federal Employees" (poster): Lists (in two columns) Permitted and Prohibited Activities for Employees who may engage in Partisan Activity.

   5. "Political Activity and the Federal Employee" (booklet): 13 pages long, Explains the Hatch Act, Its Importance to Federal Employees, Who is covered under the Hatch Act, Permitted and Prohibited Activities for Employees Who May Engage in Partisan Activity, Questions and Answers, Permitted and Prohibited Activities for Employees Subject to Additional Restrictions, Questions and Answers, Designated Communities, Penalties, The Office of Special Counsel, Title 5, US Code Sections 7321 - 7326.

   6. "Political Activity and the State and Local Employee" (booklet): 11 pages long, Explains the Hatch Act, Its Importance to State and Local Employees, Who is Covered, Who is Not Covered, Permitted and Prohibited Activities for State and Local Employees, The Office of Special Counsel, Title 5, US Code Sections 1501 - 1508, Questions and Answers on General Provisions, Prohibited Activities, Permitted Activities, Penalties for Violation, and Special Considerations for Employee-of-Private, Nonprofit Agencies Receiving Federal Assistance.

   To order any of these posters, click on: "GPO Bookstore".

2. NEW EMPLOYEES: Written materials on PPPs, the WPA and OSC's role in enforcing these laws should be provided in new employee orientation packets. OSC has created informational materials, including an outline of PPP rights and remedies ("Your Rights as a Federal Employee") that can either be printed or sent via e-mail. In addition, examples of letters sent to agency employees by agency heads, outlining rights and remedies under the WPA, are also

available under the employee notification requirement below.

3. EMPLOYEE NOTIFICATION: Written materials on PPPs, the WPA and OSC's role in enforcing these laws should be provided to all employees on an annual basis. Agencies should also include this information on their web sites. As noted above, OSC has developed materials which can be e-mailed to help agencies fulfill this requirement ("Your Rights as a Federal Employee"). Examples of letters sent to agency employees by agency heads, outlining rights and remedies under the WPA, are also available below:
    - Example letter 1 (OPM Director Kay Coles James)
    - Example letter 2 (former VA Secretary Togo West)
    - Example letter 3 (former IRS Commissioner Charles Rossotti)

4. SUPERVISORY TRAINING: Each agency, in consultation with OSC, should provide training to managers and supervisors to ensure their understanding of their responsibilities under the PPP and whistleblower protection provisions of Title 5. OSC has developed several options to aid agencies in fulfilling this requirement of the program including: providing speakers for satellite training or to address large groups of employees and a Power Point presentation.

5. COMPUTER LINK: Each agency should provide a link from its own web site or intranet site to the OSC web site (www.osc.gov).

Attachment to Sen. Akaka's Question 7a

7. In your Annual Report, I've noticed that OSC no longer gives a breakdown of PPP intakes by type (i.e. whistleblowing reprisal, nepotism, etc); OSC no longer gives this breakdown for allegations referred by OSC for investigation by the Investigation and Prosecution Division (IPD); OSC no longer provides a clear indication of whether Disclosure Unit referrals to agency heads were made under section 1213(c) or 1213(g) of Title 5, United States Code.

a. For the fiscal years 2002-2006, Please provide:
- the number of PPP complaints by type,
- the number of PPP cases referred to IPD for investigation by type,
- the number of whistleblower disclosures referred to agency heads under 1213 (c)
- the number of disclosures referred to agency heads under 1213(g).

There are four parts to this question. To answer the first of the four parts, here is a table showing the number of PPP allegations by type, received by OSC from FY 2002 to FY 2006.

Breakdown of Allegations in PPPs Received in FY 2002 - 2006

Nature of Allegation	# of Allegations FY 2002	# of Allegations FY 2003	# of Allegations FY 2004	# of Allegations FY 2005	# of Allegations FY 2006
Reprisal for whistleblowing [2302(b)(8)]	694	768	690	748	736
Reprisal for exercise of a right of appeal [2302(b)(9)]	500	484	498	585	570
Violation of a law, rule or regulation implementing or concerning a merit system principle [2302(b)(12)]	447	447	459	454	560
Discrimination on the basis of race, color, religion, sex, national origin, age, or handicapping condition [2302(b)(1)(A)-(D)]	425	407	427	492	395
Granting of unauthorized preference or advantage [2302(b)(6)]	352	362	338	359	431

Breakdown of Allegations in PPPs Received in FY 2002 - 2006

Nature of Allegation	# of Allegations FY 2002	# of Allegations FY 2003	# of Allegations FY 2004	# of Allegations FY 2005	# of Allegations FY 2006
Deception or obstruction of the right to compete [2302(b)(4)]	268	231	216	272	246
Discrimination on the basis of non-job related conduct [2302(b)(10)]	96	108	106	103	104
Solicitation or consideration of unauthorized recommendations [2302(b)(2)]	77	95	73	84	76
Attempts to influence withdrawal from competition [2302(b)(5)]	63	50	43	58	62
Appointment, promotion, or advocating the appointment or promotion of a relative [2302(b)(7)]	62	68	99	70	90
Violation of a Veterans Preference Requirement [2302(b)(11)]	43	41	52	66	61
Discrimination on the basis of marital status or political affiliation [2302(b)(1)(E)]	41	35	31	46	17
Arbitrary or capricious withholding of information requested under the Freedom of Information Act [1216(a)(3)]	23	21	14	20	13
Coercion of political activity [2302(b)(3)]	5	2	4	1	2

Breakdown of Allegations in PPIs Received in FY 2002 - 2006

Nature of Allegation	# of Allegations FY 2002	# of Allegations FY 2003	# of Allegations FY 2004	# of Allegations FY 2005	# of Allegations FY 2006
Other activities allegedly prohibited by civil service law, rule or regulation	7	3	22	6	11
No allegation code assigned	1	0	0	3	1
Sexual Harassment (Allegation Code is 9)	7	9	5	11	11
Total	**2,103**	**2,150**	**1,950**	**2,087**	**2,305**

To answer the second of the four parts to this question, here is a table showing the number of PPP cases referred to OSC's Investigation and Prosecution Division for further investigation. It shows the allegation type.

Breakdown of Allegations in PPPs Referred to IPD in FY 2002 - 2006

Nature of Allegation	# of Allegations FY 2002	# of Allegations FY 2003	# of Allegations FY 2004	# of Allegations FY 2005	# of Allegations FY 2006
Reprisal for whistleblowing [2302(b)(8)]	130	123	177	138	95
Reprisal for exercise of a right of appeal [2302(b)(9)]	87	78	119	108	87
Violation of a law, rule or regulation implementing or concerning a merit system principle [2302(b)(12)]	52	59	52	47	43
Discrimination on the basis of race, color, religion, sex, national origin, age, or handicapping condition [2302(b)(1)(A)-(D)]	25	26	32	15	16
Granting of unauthorized preference or advantage [2302(b)(6)]	54	49	42	30	31
Deception or obstruction of the right to compete [2302(b)(4)]	34	21	31	26	19
Allegations which did not cite or suggest any prohibited personnel practice or prohibited activity	0	0	2	0	0
Discrimination on the basis of non-job related conduct	16	12	15	6	5

Breakdown of Allegations in PPPs Referred to IPO in FY 2002 - 2006

Nature of Allegation	# of Allegations FY 2002	# of Allegations FY 2003	# of Allegations FY 2004	# of Allegations FY 2005	# of Allegations FY 2006
[2302(b)(10)]					
Solicitation or consideration of unauthorized recommendations [2302(b)(2)]	8	7	7	5	4
Attempts to influence withdrawal from competition [2302(b)(5)]	11	14	9	12	4
Appointment, promotion, or advocating the appointment or promotion of a relative [2302(b)(7)]	19	12	21	12	7
Violation of a Veterans Preference Requirement [2302(b)(11)]	6	2	5	10	2
Discrimination on the basis of marital status or political affiliation [2302(b)(1)(E)]	6	3	6	6	0
Arbitrary or capricious withholding of information requested under the Freedom of Information Act [1216(a)(3)]	1	1	1	3	1
Other activities allegedly prohibited by civil service law, rule or regulation	8	3	11	5	2
No allegation code assigned	1	0	0	1	0
Total	**461**	**411**	**531**	**424**	**318**

To answer the third part of the four parts to this question, one can turn to TABLE 6 in OSC's FY 2006 Annual Report. It shows the number of whistleblower disclosure referrals to agency heads for investigation under 1213(c) from FY 2002 - FY 2006. The numbers referred to agency heads each year are 18, 11, 18, 19 and 24, respectively.

The answer to the fourth part of the question, regarding referrals under 1213(g), is that OSC no longer refers under that statute, and has not for many years. All referrals are under 1213(c). The language in the FY2002 Annual report that mentioned disclosures being received for possible referral under 1213(c) or 1213(g) was probably carried forward from a past annual report.

Attachment to Sen. Akaka's Question 14

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

www.osc.gov

The Special Counsel

March 28, 2007

Chairman Daniel K. Akaka
Subcommittee on Oversight of
Government Management, the Federal Workforce,
And the District of Columbia
442 Hart Senate Building
Washington, DC 20510

Dear Chairman Akaka:

Thank you again for the opportunity to testify last Thursday on protecting the merit system. It was a pleasure to see you and Sen. Voinovich again and to have the chance to expound on the work our agency is doing.

I have a few specific areas that I would like to follow up on in regards to the hearing, and for which purpose I have enclosed the relevant documents.

During the hearing, you asked about the Leroy Smith case. As I responded, we applaud Mr. Smith for his courageous whistleblowing. Multiple divisions of our agency worked hard for him. Even though his case has passed beyond our statutory reach, we continued to aid him by naming him the 2006 Public Servant of the Year, therefore keeping his case in the public eye and hopefully contributing to a positive resolution of the problems he brought to light.

I was disappointed, however, to hear a charge against me and my career staff that has been repeatedly discredited. Our agency was aggressively pursuing action regarding Mr. Smith's claim of whistleblower reprisal when he withdrew his complaint from our agency, leaving us statutorily unable to pursue that part of his case. Mr. Smith used private counsel to reach a settlement with his agency that required him to withdraw his complaint from OSC. His settlement agreement expressly required him to withdraw his whistleblower retaliation complaint from OSC. We complied with his withdrawal.

However, we continued to pursue action on his whistleblower disclosure regarding the environmental safety hazards at Bureau of Prisons facilities. Our record on that is, I am confident, quite strong.

Nevertheless, several months ago, a scurrilous rumor started circulating that OSC had "refused to investigate" or had "thrown out" the whistleblower reprisal complaint filed by Mr. Smith. As you will see in the attached documents – legal documents detailing Mr. Smith's withdrawal of his complaint – OSC did no such thing. I hope in the future that you and I, as well as our staffs, can communicate more closely regarding any questions you have regarding such serious charges.

Indeed, Mr. Smith called us in the last two weeks to refer more whistleblowers to our office in other federal prison facilities, and we are quite pleased that he has continued to show leadership in this important effort to prevent physical harm and to redress reprisals against employees doing the right thing. We again laud him for his efforts. It truly detracts from what he has accomplished for these unfounded rumors to be repeated. It can only serve to deter other whistleblowers from coming forward.

On the question of corrective actions achieved in Prohibited Personnel Practice cases, I would note that outreach is a major component of the execution of each of our statutory functions. In many cases, federal managers and employees do not know the laws in question or the details of OSC's enforcement powers. I have to credit my immediate predecessor with initiating OSC's outreach efforts, which we have since worked to redouble. The theory has been advanced that the past seven or eight years of outreach has had a significant effect on the understanding federal employees have of their rights. This has led to a corresponding reluctance to violate them, and therefore a reduction in the overall corrective action rate.

Another question that came up during the hearing related to our Disclosure Unit survey results. I was reminded after the hearing that our general counsel, a longtime career employee, has advised the statutory power to survey complainants did not extend to the whistleblower disclosure area. I have chosen to abide by that advice.

Finally, another unfounded and erroneous statement was made at the hearing that I never had the opportunity to directly confront and dispel. You mention that I had been accused in an article in the Washington Post of having interfered in or obstructed the OPM Inspector General investigation. The article did not mention anything about me other than to repeat false allegations contained in the complaints against me. I have been recused and uninvolved in the decisions made as to the investigation. I was unaware of the e mails giving instructions to the agency on who was to act as go between until I saw those e mails myself at the same time as the rest of the agency. The article in the Washington Post, while filled with inaccuracies, never claimed that I had anything to do with any "obstruction." I have fully cooperated in the investigation. The rumors spread in the hearing do not serve the process and are not worthy of the dignity of the United States Senate.

I am also enclosing a copy of our request for reauthorization, including certain legislative fixes we believe will better improve our ability to execute our statutory missions. Although we did not have the chance to discuss the details at the hearing, I look forward to answering any questions you may have, and my staff stands ready as well. As I did mention in my testimony, I am pleased to note that you have favored some of these fixes in legislation of your own.

U.S. OFFICE OF SPECIAL COUNSEL
1301 Clay Street, Suite 365S
Oakland, California 94612-5217

San Francisco Bay Area Field Office

January 10, 2006

Mr. Leroy A. Smith, Jr.
2708 5th Street
Atwater, CA 95301

Re: OSC File No. MA-05-1229

Dear Mr. Smith:

This letter is to inform you that your complaint to the Office of Special Counsel (OSC), docketed as MA-05-1229, has been closed. In your complaint, you stated that you had earlier reported to OSC's Disclosure Unit that officials at the U.S. Department of Justice (DOJ), Federal Bureau of Prisons, United States Penitentiary, in Atwater, California, were committing numerous safety violations. You stated that as a result of your report, BOP officials did not respond appropriately to an Office of Workers' Compensation Programs (OWCP) claim that you filed due to stress you experienced following your disclosures. OSC referred your case for investigation of a potential violation of 5 U.S.C. § 2302(b)(9).

On December 14, 2005, OSC received a copy of a settlement in the matter of Leroy Smith v. Alberto Gonzales, U.S. Attorney General, U.S. Department of Justice, Federal Bureau of Prisons. In this settlement, which you signed on November 22, 2005, you withdrew your complaint to OSC. Based on this agreement, OSC has closed your complaint, and will take no further action in your case. If you have any questions, please contact me at (510) 637-3460.

Sincerely,

Rachel Venier
Attorney
Investigation and Prosecution Division

Thank you once again. I look forward to working with you and the committee in improving the merit system.

Sincerely,

Scott J. Bloch
Special Counsel

Cc: Ranking Member George Voinovich

17. The Complainant/appellant agrees that his signature on this agreement is a request to immediately withdraw and dismiss any pending complaints or actions against the agency involving the Complainant/appellant.

LEROY A. SMITH, JR., Complainant/appellant. v. ALBERTO GONZALES, U.S. ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Agency.	EEOC Case No. 370-2005-00276X Agency Case No. P-2005-0021 MSPB Docket No. SF-1221-05-0341-W-1 OSC Case No. MA-05-1229

SETTLEMENT AND COMPROMISE AGREEMENT

1. By this Settlement and Compromise Agreement, it is stipulated and agreed by and between Leroy A. Smith, Jr., (Complainant /appellant), Mary Dryovage, Attorney at Law, Theresa Smith, and the U.S. Department of Justice / Federal Bureau of Prisons (the agency), that in exchange for valid consideration (the receipt and sufficiency of which is hereby acknowledged) Complainant/appellant and Theresa Smith agree to withdraw all pending complaints, including but not limited to: Equal Employment Opportunity Commission (EEOC) actions including Agency No. P-2005-0021, Merit System Protection Board (MSPB) appeals including Docket No. SF-1221-05-0341-W-1, Office of Special Counsel complaints, and any other pending complaints or actions filed or which could be filed in any forum which are based upon any of the facts described in any of Complainant/appellant's EEO, MSPB, OIG, and/or OSC cases or facts otherwise known to Complainant/appellant and Theresa Smith at the date of execution of this Settlement and Compromise Agreement.

[illegible] any other type of allegation.

Leroy A. Smith, Jr., Complainant/appellant — Date 11/22/05

Theresa Smith, Health Information Technician — Date 11/22/05

Mary Dryovage, Attorney for Complainant/appellant — Date 11/22/05

J. E. Gonja, Regional Director for the Western Region of the Federal Bureau of Prisons — Date 12/2/05

21. Complainant/appellant declares that he has read and reviewed this Settlement and Compromise Agreement with his attorney and that he fully understands the terms of such Settlement and Compromise Agreement. Complainant/appellant further declares that he voluntarily accepts this Settlement and Compromise Agreement for the purpose of making full and final compromise of all claims which were made or could have been made in connection with the causes of action and underlying facts now pending in the OSC, MSPB and EEOC cases, including but not limited to claims for compensatory damages, liquidated damages, personal injury, back pay, front pay, breach of contract, attorney's fees, interest and/or costs and that all agreements and understandings of the parties have been included and expressed herein.

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

www.osc.gov

The Special Counsel

March 21, 2007

Chairman Daniel K. Akaka
Subcommittee on Oversight of
Government Management, the Federal Workforce,
and the District of Columbia
442 Senate Hart Building
Washington, DC 20510

Dear Chairman Akaka:

I am pleased to forward for the consideration of Congress proposed legislation to extend the reauthorization of the U.S. Office of Special Counsel (OSC) for fiscal years 2008 through 2012. OSC's current authorization expires at the end of fiscal year 2007.

As you know, OSC is an independent federal agency with four major statutory responsibilities. The first is to investigate and prosecute employee allegations of prohibited personnel practices at federal agencies, including retaliation for whistleblowing. In cases where an OSC investigation reveals reasonable grounds to believe that a prohibited personnel practice has been committed, and an agency declines to voluntarily provide relief to a complainant, OSC will prosecute a petition for corrective action before the Merit Systems Protection Board.[1]

OSC's second major charge is the interpretation and enforcement of the Hatch Act provisions governing political activity by federal employees and certain state and local employees. OSC promotes compliance by government employees with legal restrictions on political activity by providing over a thousand advisory opinions every year on the Hatch Act, enabling individuals to determine whether their contemplated political activities are permitted under the Act. OSC also enforces compliance with the Act. When an OSC investigation reveals a violation, depending on its severity, OSC will either issue a warning letter to the employee or prosecute a violation before the MSPB.

The third statutory responsibility is to provide a secure channel for whistleblowers through its Disclosure Unit for federal workers. This allows them to disclose information about various workplace improprieties including a violation of law, rule or regulation, gross mismanagement, waste of funds, abuse of authority, or a substantial danger to public health or safety.

OSC's fourth major statutory focus is its role in enforcing the Uniformed Services Employment and Reemployment Act (USERRA), the federal law which proscribes workplace discrimination on the basis of past, preset or future uniformed service and sets forth the

[1] OSC's investigations frequently result in the favorable settlement of complaints without litigation.

reemployment rights of persons who are absent from their civilian employment due to uniformed service. OSC prosecutes violations of USERRA occurring in the federal sector.

In addition to reauthorization, I request several statutory changes to improve the functioning of OSC. I have attached a document covering them in greater depth, but in brief:

1) We request the Committee modify the provision regarding attorney fees for cases in which OSC seeks but does not win disciplinary action, to safeguard our prosecutorial discretion.

2) We request the Committee grant OSC the option of moving its headquarters anywhere within the local metropolitan area, or similar adjustment the Committee finds suitable.

3) We request the Committee grant the Merit Systems Protection Board discretion to combine disciplinary actions so that agencies cannot circumvent the effect of certain penalties.

4) We request the Committee change the law to allow OSC to file amicus briefs in cases that go beyond the Merit Systems Protection Board to the federal court system. Current law deprives Justice Department prosecutors of OSC's experience.

5) We request the Committee grant OSC the authority to process veterans preference claims under each relevant PPP provision.

6) We request the Committee modify the time requirements for whistleblower allegation review to more accurately reflect OSC's operations and capabilities.

Although the Committee on Veterans Affairs has primary oversight over USERRA, OSC would like to make this Committee aware that USERRA contains no disciplinary action provisions for federal sector cases. Because a violation of USERRA is not a prohibited personnel practice, OSC does not have jurisdiction to seek disciplinary action for USERRA claims. We would like to see this loophole closed, as well as request that Congress give OSC the authority to investigate all federal sector USERRA claims.

Thank you for considering these legislative requests. I appreciate your careful oversight of OSC and look forward to working with you in the future on all these issues.

Sincerely,

Scott J. Bloch
Special Counsel

Cc: Senator George Voinovich

OSC Reauthorization: Suggested Legislative Adjustments

1) Attorney fees. Current case law construes the "agency involved" under 5 U.S.C. § 1204(m)(1) as OSC, with the result that OSC is made liable for attorney's fees after an unsuccessful disciplinary action against an agency employee in a PPP case at the MSPB. Sec. 1204(m)(1) imported the attorney's fees provision applicable to adverse action appeals under 5 U.S.C. 7701(g) and applied it to enforcement actions by OSC under 5 U.S.C. 1215. The latter are fundamentally different from adverse action appeals involving current or former employees and applicants and an employing agency.

OSC disciplinary actions are initiated against employees believed by OSC, after independent investigation, to have violated the law. Such actions are taken to enforce the law. As such, they are more akin to prosecutions by DOJ, after which defendants are not permitted to seek attorneys fees after an unsuccessful prosecution. OSC believes that section 1204(m)(1)'s incorporation of fee provisions applicable to internal agency-employee employment-related disputes, and application of those provisions to fundamentally different enforcement proceedings filed by OSC under section 1215, are flawed approaches, and have a detrimental effect on legitimate OSC enforcement efforts. Potential solutions to

these problems range from deleting subsection (1) entirely (to conform to the approach followed in the criminal enforcement context), to amending sec. 1204(m)(1) by striking "agency involved" and inserting "agency where the prevailing party is or was employed." Other approaches could also be considered which would not penalize OSC for filing disciplinary action complaints when, for example, its position was substantially justified, or other factors make an award unwarranted.

2) Agency relocation. It has come to our attention that before OSC's next reauthorization (assuming the five-year window remains constant), our agency may be forced to move from the office building on M Street, NW we currently call home. OSC is bound by statute to maintain its headquarters within the District of Columbia, and while we agree that proximity to the seat of government is logical, we think it might be appropriate to adjust that language. We think it would serve the taxpayers and our mission to allow OSC the option of moving anywhere within the metropolitan area, or a similar adjustment that the Committee might find reasonable. We hereby request that the Committee consider such a change.

3) Disciplinary action. Current law does not allow MSPB to combine disciplinary penalties. In one case, a manager was fired in compliance with a Board order to remove the employee, and then rehired the next day to circumvent the ruling because she had not been debarred. OSC requests

the Committee allow MSPB the discretion to combine penalties.

Section 1215(a)(3) of title 5, United States Code, is amended to read as follows:

`(3)(A) A final order of the Board may impose--

`(i) disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand;

`(ii) an assessment of a civil penalty not to exceed $1,000; or

`(iii) any combination of disciplinary actions described under clause (i) and an assessment described under clause (ii).

`(B) In any case in which the Board finds that an employee has committed a prohibited personnel practice under paragraph (8) or (9) of section 2302(b), the Board shall impose disciplinary action if the Board finds that the activity protected under paragraph (8) or (9) of section 2302(b) was a significant motivating factor, even if other factors also motivated the decision, for the employee's decision to take, fail to take, or threaten to take or fail to take a personnel action, unless that employee demonstrates, by preponderance of evidence, that the employee would have taken, failed to take, or threatened to take or fail to take the same personnel action, in the absence of such protected activity.'.

4) Special Counsel Amicus Curiae appearance. Current law does not allow OSC to file amicus briefs in cases that go beyond MSPB to the federal court system. This deprives the Justice Department prosecutors who take over of the experience OSC has in enforcing its own statutes. OSC requests the power to file amicus briefs be included by the Committee.

Section 1212 of title 5, United States Code, is amended by adding at the end the following:

`(h)(1) The Special Counsel is authorized to appear as amicus curiae in any action brought in a court of the United States related to any civil action brought in connection with section 2302(b) (8) or (9), or subchapter III of chapter 73, or as otherwise authorized by law. In any such action, the Special Counsel is authorized to present the views of the Special Counsel with respect to compliance with section 2302(b) (8) or (9) or subchapter III of chapter 73 and the impact court decisions would have on the enforcement of such provisions of law.

`(2) A court of the United States shall grant the application of the Special Counsel to appear in any such action for the purposes described in subsection (a).'.

5) Disclipinary actions under USERRA. Although the Committee on Veterans Affairs has primary oversight over USERRA, OSC would like to make the Committee aware that USERRA contains no disciplinary action provisions for federal sector cases. Because a violation of USERRA is not a prohibited personnel practice, OSC does not have jurisdiction to seek disciplinary action for USERRA claims.

Accordingly, we have submitted a draft bill in hopes of closing this loophole. We also want Congress to amend USERRA and grant OSC the authority to investigate all federal sector USERRA claims. The Committee should be aware of those two potential changes. We ask the Committee to look favorably on these changes as natural extensions of our other statutes that will strengthen USERRA enforcement in the federal sector.

A BILL

To amend provisions of the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301, et seq., to authorize the U.S. Office of Special Counsel to seek disciplinary action against Federal employees for knowing violations of the Uniformed Services Employment and Reemployment Rights Act. Nothing herein is to be deemed or construed to alter the procedures pertaining to claims brought against state or local governmental agencies or private companies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

A. For the purpose of authorizing the U.S. Office of Special Counsel to seek disciplinary action against Federal employees who knowingly take, recommend, or approve (or fail to take, recommend or approve) any action that violates the Uniformed Services Employment and Reemployment Rights Act, the following amendments are made:

A. Section 4324 of title 38 is amended by creating a new subsection (a)(3), which reads as follows:

"(a)(3)

(A)

(1) Except as provided in subsection (B), if the Special Counsel is reasonably satisfied that disciplinary action should be taken against any employee of a Federal executive agency, as defined by 38 U.S.C. § 4303(5), who knowingly takes, recommends, or approves (or fails to take, recommend or approve) any action that violates any of the provisions of this chapter, the Special Counsel may prepare a separate written complaint against the person containing the Special Counsel's determination, together with a statement of supporting facts, and present the complaint and statement to the person and the U.S. Merit Systems Protection Board ("Board"), in accordance with this subsection.

(2) Any employee against whom a complaint has been presented to the Board under paragraph (1) is entitled to -

(a) a reasonable time to answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer;

(b) be represented by an attorney or other representative;

(c) a hearing before the Board or an administrative law judge appointed under section 3105 and designated by the Board;

(d) have a transcript kept of any hearing under subparagraph (c); and

(e) a written decision and reasons therefor at the earliest practicable date, including a copy of any final order imposing disciplinary action.

(3) A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $5,000.

(4) There may be no administrative appeal from an order of the Board. A person subject to a final order imposing disciplinary action under this subsection may obtain judicial review of the order by filing a petition therefor with such court, and within such time, as provided for under 5 U.S.C. § 7703(b).

(B)

In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the complaint and statement referred to in

subsection (A)(1), together with any response of the employee, shall be presented to the President for appropriate action in lieu of being presented under subsection (A).

(C)

(1) In the case of persons who are members of the uniformed services and individuals employed by any person under contract with an agency to provide goods or services, the Special Counsel may transmit recommendations for disciplinary or other appropriate action (including the evidence on which such recommendations are based) to the head of the agency concerned.

(2) In any case in which the Special Counsel transmits recommendations to an agency head under paragraph (1), the agency head shall, within 60 days after receiving such recommendations, transmit a report to the Special Counsel on each recommendation and the action taken, or proposed to be taken, with respect to each such recommendation."

B. Section 4324 of title 38 is further amended by creating a new section (c)(5), which reads as follows:

"(c)(5)

The Board shall adjudicate any disciplinary action complaint brought before it by the Special Counsel pursuant to section 4324(a)(3)(A)(1)."

C. So that the Special Counsel is not impeded in its effort to seek disciplinary action, section 4324 of title 38 is further amended by creating a new section (c)(6), which reads as follows:

"(c)(6)

Notwithstanding any other provision of law, the Board shall have no authority to award attorney fees pursuant to 5 U.S.C. § 1204 (m)(1) or any other law, rule, regulation, or stature, in disciplinary actions brought by the Special Counsel under section 4324(a)(3)."

6) Veterans preference claim processing authority equal to PPPs. As discussed in response to Question #3, veterans are not entitled to ask OSC to receive, investigate, or prosecute violations of their veterans' preference rights for corrective action purposes. Instead, there is an unnatural split in the avenues of redress between those who seek

corrective action for veterans' preference claims (i.e., by filing with DoL and then proceeding to the MSPB) and OSC seeking disciplinary action for violations of veterans' preference rights. By comparison, there is no division in the claims process of prohibited personnel practice cases: OSC investigates, analyzes, and (if warranted) prosecutes the federal agency for corrective action for the aggrieved person before the MSPB at the same time OSC seeks disciplinary action against the involved federal manager(s) from the MSPB. Indeed, under the current system for processing veterans' preference claims, a claimant with a meritorious case must prosecute his case before the MSPB without OSC's assistance.

As also referenced in Question #3, we are enclosing previous correspondence with Chairman Akaka where this issue was addressed.

Recognizing the inherent flaw in the existing claims process, OSC often seeks to identify obtain corrective action under a PPP theory based on the same set of facts giving rise to a veterans' preference violation in order to assist veteran preference eligibles. But, there are legal hurdles to prosecuting prohibited personnel practice cases that simply do not arise in the prosecution of veterans' preference claims. Therefore, proving a prohibited personnel practice is much more difficult than proving a veterans' preference violation.

Finally, most veteran preference eligibles do not know

that the facts underlying a veterans' preference claim might support a prohibited personnel practice claim, and the U.S. Department of Labor's Veterans' Employment and Training Service (VETS) does not endeavor to sift through a veterans' preference claim to determine if a prohibited personnel practice may have been committed. Thus, the existing system for processing veterans' preference/VEOA claims deprives claimants of OSC's expertise and experience. It also denies OSC, as federal prosecutor and protector of the federal merit system, the ability to zealously enforce this important aspect of service members' employment rights.

Therefore, OSC requests that the Committee return full veterans preference prosecutorial power to the agency responsible for PPP enforcement by allowing OSC to receive, investigate, analyze, and prosecute veterans' preference claims for corrective action purposes.

7) Realistic timeframe for processing whistleblower disclosures. In the Whistleblower Protection Act, Congress specified that OSC's primary function is to protect federal employees from reprisal for whistleblowing. Thus, the majority of the agency's resources are devoted to the investigation of reprisal for whistleblowing and other prohibited personnel practices within the federal government. DU provides a safe channel through which federal employees, former federal employees, and applicants for federal employment may disclose information they reasonably believe evidences a violation

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

In a recent development, Special Counsel Scott Bloch directed a policy change which lowered the standard for substantiating whistleblower allegations which led to a more-than-doubling of the referral rate. Previously, the artificially high standard made it more difficult for whistleblower allegations to be fully investigated.

OSC's Disclosure Unit does not have the authority to investigate the allegations. If the information presented by the whistleblower meets the statutory threshold—a substantial likelihood of wrongdoing—the Special Counsel refers the allegations to the head of the agency involved for an investigation and report. OSC is required to make this substantial likelihood determination within 15 days of receipt of the information. After the agency has investigated the allegations and written a report, OSC transmits the report to the President and appropriate Congressional oversight committees. Any further action taken as a result of the agency report is taken by the President or Congress, not OSC.

Since its inception, DU has found it very difficult to meet the 15-day time frame set forth in the statute, especially in complex cases and cases which involve referrals to the head of the agency for investigation. At the time the statute was written it appears that Congress did not anticipate the volume of cases that DU would be required

to handle, nor the time necessary to properly evaluate the cases. For this reason, we request that the statute be amended to allow the DU a 45-day time period to make the substantial likelihood determination.

Over the years, DU's caseload has steadily increased due to a number of factors. People became more aware of the office and its function through several agency initiatives which heightened OSC's visibility with federal employees. These initiatives include issuing press releases to publicize reports of investigations undertaken as a result of whistleblower disclosures, conducting outreach seminars at federal agencies, establishing a Public Servant Award designed to honor and recognize whistleblowers' contributions to the public interest, and enhancing OSC's website. The terrorist attacks of September 11, 2001, also triggered additional filings. The increased number of cases, the complexity of the cases and the small size of the staff resulted in a backlog.

As its caseload increased, OSC took steps to address the issues of DU understaffing and the increasing backlog. These efforts included pursuing funding for additional attorney positions. For instance, in FY 2000, DU staff included the Unit Chief, two attorneys, one paralegal and one student intern. During a period of fiscal austerity, OSC sought and received funding for two additional attorneys in 2001. Although recruitment for both positions was initially delayed due to budget concerns, they were both filled by mid-2001. Since then, DU has been staffed by four attorneys.

In addition, in response to the increasing DU caseload, a priority system was implemented in FY 2001. Under this system, cases are reviewed and assigned a priority status. Disclosures involving public health or safety issues and that appear to meet the substantial likelihood standard for referrals are the highest priority and are reviewed first. These cases are the most urgent and time-consuming, and often involve complex questions. Disclosures of violations of law, rule or regulation, gross mismanagement, gross waste of funds and abuse of authority that appear to meet the substantial likelihood standard for referral to the head of the agency are reviewed next. Disclosures that appear to lack a sufficient basis for a referral to the agency are reviewed last.

The purpose of the initial review is to determine which cases present the most urgent allegations. The DU Chief assigns the case to an attorney and the attorney attempts to contact the whistleblower within 2 to 10 days of receipt. However, the substantial likelihood determination is not made during the initial review. The determination is made by the Special Counsel after reviewing the recommendation of the DU attorneys. The recommendation is based upon the initial information submitted by the whistleblower as well as contacts with the whistleblower to elicit information to determine if the statutory threshold has been met.

Whistleblowers file disclosures on a wide range of topics. For instance, disclosures have involved analysis of government regulations on the disposal and interstate

transportation of hazardous substances; allegations of improper influence and manipulation of a cost-benefit analysis to obtain approval for a navigation improvement project on the Upper Mississippi River and Illinois Waterway; allegations that Federal Aviation Administration supervisors suppressed information about aviation security and manipulated testing data in order to protect the airline industry; and allegations that welders and inspectors performing shipboard welding and inspections on Navy aircraft carriers and destroyers were not certified. These disclosures usually require review and analysis as well as multiple contacts with the whistleblowers to obtain data and clarify issues in order to determine if there is a substantial likelihood of wrongdoing requiring an agency investigation.

Notwithstanding the unrealistic time frame posed by the statute, OSC has regularly met the statutory requirement in some cases. A review of the DU's caseload shows the following statistics: in 2002, 34% of DU cases were resolved within the 15 days; in 2003, 29%; in 2004, 12%; and in 2005, 48%. These cases were not referrals for investigation, but rather, cases where OSC lacked jurisdiction, or where it was evident at the outset that the disclosure did not meet the substantial likelihood standard.

OSC takes its mission to provide a safe channel for federal whistleblowers very seriously. In the end, experience has shown that a large majority of disclosures do not contain sufficient information to meet the substantial likelihood requirement. Nevertheless, in a case of any

complexity, including cases which are closed, an appropriate review cannot adequately be accomplished in 15 days. As briefly summarized above, OSC has taken a number of steps to manage the DU caseload in an attempt to meet the 15-day deadline. While these actions have been helpful, they have also consistently highlighted the difficulties with meeting the statutory deadline. More time is needed to review and manage the cases and respond to whistleblowers in the manner that Congress intended. Therefore, we request that the statute be amended to allow DU 45 days to make its substantial likelihood determination. This time frame more accurately reflects the time needed to complete the work of the DU.

A BILL

To amend provisions of the Whistleblower Protection Act, 5 U.S.C. § 1213, et seq., to authorize the U.S. Office of Special Counsel a statutory time period of 45 days in which to make the substantial likelihood determination in whistleblower disclosure cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

PART ONE. Amending the Statutory Time Period for Making the Substantial Likelihood Determination

For the purpose of authorizing the U.S. Office of Special Counsel a forty-five (45) day time period to review disclosures of information received from federal employees, former federal employees and applicants for federal employment to determine whether there is a substantial likelihood that the information discloses a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety, the following amendment is made:

A. Section 1213(b) of title 5 is amended by deleting the "15 days" and inserting "45 days" such that the paragraph, as amended, reads as follows:

(b) Whenever the Special Counsel receives information of a type described in subsection (a) of this section, the Special Counsel shall review such information and, within 45 days after receiving the information, determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.

Public Employees for Environmental Responsibility News Release (www.peer.org)

For Immediate Release: September 7, 2006
Contact: Carol Goldberg (202) 265-7337

"PUBLIC SERVANT OF THE YEAR" SAYS HIS WARNINGS WERE IN VAIN — Dangers of Toxic Prison Computer Recycling Operations Continue Unabated

Washington, DC — The federal employee today named whistleblower of the year for 2006 finds his actions failed to change dangerous conditions inside prison industries, according to a statement released today by Public Employees for Environmental Responsibility (PEER). Instead, he charges that the federal Bureau of Prisons and its parent agency, the Department of Justice, continue to cover-up toxic exposure of both staff and inmates working in computer recycling operations.

Today, Leroy Smith, a federal prison safety manager, received the "Public Servant of the Year" award from the U.S. Office of Special Counsel (OSC), the federal agency charged with whistleblower protection. Mr. Smith was honored for coming forward with documents showing that computer terminal disassembly plants were showering particles of heavy metals, such as lead, cadmium, barium and beryllium, over both inmates and civilian prison staff at Atwater Federal Prison, a maximum-security institution located just outside of Merced, California.

The award comes nearly two years after his original disclosure but Smith says conditions have not changed at Atwater or the six other federal prisons with similar computer recycling plants. In his statement, Smith said:

- "The dangers that I identified go un-remedied to the continuing detriment of my colleagues who work in the Federal Bureau of Prisons and the inmates working in those prison industry factories."
- "Daily, I receive calls from my colleagues working in computer recycling operations at other correctional institutions who describe coming home coated in dust. They had been assured that there was no danger. Now, many have health problems and others are scared about what lies in store for them."

Smith's allegations were reviewed and upheld by the OSC which found the explanations offered by the Bureau of Prisons to be "unreasonable," "inconsistent with documentary evidence," and relying on "strained interpretations" of safety requirements. In May, the Justice Department Office of Inspector General promised to investigate but none of the witnesses named by Smith have yet been contacted.

"It is supremely frustrating for conscientious employees to risk their careers bringing dangers to light only to see business continue as usual," stated PEER Executive Director Jeff Ruch. "The accountability mechanisms in the federal government, while never strong, have now ceased to function altogether."

Ironically, Smith is being honored even though OSC has rejected similar complaints and disclosures from his colleagues at other prisons. Moreover, OSC also dismissed Smith's complaint that he faced retaliation for his warnings. Smith then proceeded on his own, represented by San Francisco attorney Mary Dryovage, to force a resolution: Smith now works as the safety manager at the Federal Correctional Institution at Tucson, Arizona.

"Things have gotten so pathetic at the Office of Special Counsel that they could only find one case in the whole year where the whistleblower did not have an utterly miserable experience," Ruch concluded, noting that, despite Smith's dissatisfaction, it is rare for a federal whistleblower to receive any positive

recognition.

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Read the statement of Leroy Smith

Find out more about Leroy Smith's disclosures

Look at concerns others have raised about prison computer recycling operations

See more concerns

Attachment to Sen. Akaka's Question 15

Corrective Actions for Fiscal Year 2005

Case Number	Correction Type	Subtype	Date Completed	Synopsis
MA-04-1650	Corrective Action	Informal	10/14/2004	CP, a GS 9 Biological Science Technician, alleged a violation of 2302(b)(8) when she failed to receive a promotion and had her duties changed after she disclosed that her supervisor failed to properly record time and attendance information for favored employees. The parties agreed to mediation and all issues have been resolved. The terms of the settlement agreement are confidential.
MA-04-2652	Corrective Action	Informal	12/07/2004	Complainant, a GS 11 Family Advocacy Specialist, alleged a violation of 2302 (b)(8) when she was terminated during her probationary period after she disclosed to the base Commanding Officer and the Director of Human Resources that her supervisor failed to follow personnel regulations, misused resources, and was verbally abusive to employees. The parties agreed to OSC mediation and all issues have been resolved. The terms of the settlement agreement are confidential.
MA-05-0196	Corrective Action	Informal	03/14/2005	CP, the Chief of Human Resources, alleged violations of 2303(b)(8) & (9) when the Agency proposed her demotion after she participated in several internal Administrative Investigation Boards regarding possible misconduct by her supervisor. The parties agreed to OSC mediation and all issues have been resolved. The terms of the settlement agreement are confidential.
MA-01-1103	Corrective Action	settlement agreement	01/27/2005	Cp`s complaint was referred for further investigation of possible (b)(4) and (b)(6) violations with regard to the agency`s offer, and then revocation of the offer, of an Adjudications Officer position. In settlement of the complaint, the agency has agreed to pay Cp a lump sum payment ($1489.20) for annual leave; and to pay Cp $496.40, minus applicable deductions, as compensation for the adjustment in her leave category that would have occurred but for alleged PPP. In exchange, Cp agreed to withdraw her complaint. The agency did not admit any wrongdoing in the settlement agreement.
MA-04-0610	Corrective Action	Informal	11/18/2004	Cp, a lead firefighter at the Army`s Picatinny Arsenal in New Jersey, alleged that he

				received a lowered performance appraisal in 2003 because he reported fire department safety hazards to OSHA and the Army IG. After OSC began investigating, the Army agreed to raise Cp`s appraisal to the highest possible rating in exchange for his withdrawal of his OSC complaint and his related EEO complaint.
MA-04-2707	Stay	Litigation	12/08/2004	Cp alleges that the Army`s Fort Monmouth Police Office terminated him from his police officer position because he made a disclosure to the Army IG that one of his lieutenants had been indicted for sexual assault. (Cp was terminated August 16, 2004.)  Fort Monmouth declined OSC`s offers for a settlement of the claim or, in the alternative, an informal stay. Last week, OSC obtained a stay from the Board, which order the agency to return Cp to his position as a police officer while OSC investigates.
MA-04-2707	Corrective Action	Informal	01/21/2005	Cp withdrew his complaint on 1.21.05 pursuant to a settlement agreement with the Army. In exchange for Cp not seeking future Army employment, the Army agreed to give Cp a neutral reference and a lump-sum payment of $5,862.17 (the equivalent of 9 weeks` salary, minus $150 in credit card debt).  Cp had alleged that the Army`s Fort Monmouth Police Office terminated him from his police officer position because he made a disclosure to the Army IG that one of his lieutenants had been indicted for sexual assault. (Cp was terminated August 16, 2004.) On December 8, 2004, the MSPB granted OSC`s request to stay Rigdon`s termination.
MA-03-1746	Systemic	Informal	01/07/2005	CP, a civilian Deployment Specialist, filed a complaint alleging that the U.S. Department of the Army violated 5 U.S.C. §§ 2302(b)(8) and (9) by returning him to the United States from Kuwait in reprisal for making a protected disclosure and filing complaints. The Army has agreed to provide training in prohibited personnel practices to employees at Ft. Campbell, Ky.
MA-03-1746	Corrective Action	settlement agreement	01/07/2005	Cp, a civilian Deployment Specialist, filed a complaint alleging that the U.S. Department of the Army violated 5 U.S.C. §§ 2302(b)(8) and (9) by returning him to the United States from Kuwait in reprisal for making a protected disclosure and filing complaints. In settlement of Cp`s OSC complaint, the Army agreed to pay Cp $7,196.93 ($6,475.43 in attorney fees and costs and $701.50 as reimbursement for training fees).

MA-04-0056	Corrective Action	Informal	10/26/2004	Cp, a former GS-7, alleged that the U.S. Army Corps of Engineers denied him sick leave and terminated him, because of disclosures he made about contractual performance problems with a road project at Hurlburt Air Force Base. Investigation did not substantiate a (b)(8) claim,, but revealed the agency mistakenly denied 32 hours of sick leave to care for a family member with a serious health condition. The agency granted the employee annual leave instead. We found that an agency official mistakenly believed that a probationary employee could not use sick leave to care for a family member because the FMLA, which provides for the use of sick leave for this purposes, only covers employees with one year of service. Nevertheless, 5 C.F.R. § 630.401 allows employees, including probationary employees, to use sick leave for this purpose. Therefore, we informed the agency that the denial of sick leave violated 2302(b)(12). As a result, the agency provided Cp with back pay with interest, and informed all its employees of the right to use sick leave to care for a family member with a serious condition.
MA-04-2441	Corrective Action	Informal	02/23/2005	Cp, a Division Administrator (GS-14) in Phoenix, AZ, for the Federal Motor Carrier Safety Administration (FMCSA), alleges that he was geographically reassigned to a position in Washington, D.C., because he spoke to a reporter about an agency investigation and because the agency perceived him to be a whistleblower regarding the investigation. Cp declined the reassignment and the agency proposed his removal. Cp requested a stay of the reassignment and proposed removal. At OSC`s request, the agency voluntary agreed to stay the proposed removal for 120 days to enable OSC and the agency`s Office of Inspector General to investigate Cp`s allegations. At the end of stay period, Cp settled his complaint with the agency. The agency agreed to pay Cp $6,000 in attorney`s fees, remove any reference of his detail or reassignment from his Official Personnel File, and place him back as Division Administrator in Phoenix, AZ. Cp, in turn, agreed to withdraw his OSC complaint. The parties agreed to keep the terms and conditions of the settlement confidential.
MA-04-2982	Corrective Action	Informal	08/10/2005	OSC received an anonymous complaint alleging nepotism that involved the Director of Investigations (DOI) for the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE) approving a promotion package of 53 individuals that included her sister being promoted to a GS-15 Assistant Special Agent in Charge with ICE`s New York field office. The promotional package was created when DHS formed ICE by merging the Customs Service with the Immigration and Naturalization Service. The siblings worked at the two different agencies prior to the merger.

				The agency agreed to rescind the promotion and resubmit a new referral list that was to be approved by the Director of Operations and outside the purview of the DOI. The agency also created an internal barrier by delegating authority for the New York field office to the Assistant DOI.
MA-04-2670	Corrective Action	settlement agreement	12/13/2004	OSC received a complaint from a Police Officer alleging the U.S. Department of the Navy violated 5 U.S.C. § 2302(b)(8) by proposing his removal in reprisal for making a protected disclosure concerning the placement of duct tape over the mouth of an intoxicated suspect in police custody. After OSC negotiated an informal stay of the proposed removal, the Navy and Cp entered into a settlement agreement, under which the Navy agreed to: (1) rescind the proposed removal; (2) restore sick leave that Cp used while awaiting a return to his original duties; (3) provide Cp $1,500.00 in attorney's fees; (4) return him to the duties, responsibilities, and work schedule he was assigned to prior to the proposed removal; and (5) insure that Cp is not subjected to retaliation concerning his OSC complaint.
MA-04-2789	Corrective Action	Informal	03/31/2005	
MA-05-0122	Corrective Action	Informal	04/06/2005	
MA-03-1051	Corrective Action	settlement agreement	02/08/2005	OSC received a complaint from an applicant for employment with the U.S. Fish and Wildlife Service (FWS), alleging a selecting official improperly orchestrated the hiring of a close personal friend. Specifically, the selecting official cancelled the vacancy announcement for a position at the GS-4 grade-level after Cp's veterans' status prevented the selecting official from selecting the friend. After confirming that her friend would qualify at the GS-7 grade-level, the selecting official had the position readvertised at that level and selected her friend from the readvertised announcement. Pursuant to the findings of our investigation, which found a violation of subsection (b)(6) and possible violations of (b)(4) and (b)(11), OSC sought back pay for Cp. Under the terms of a settlement agreement, FWS awarded Cp back pay for the period between the cancellation of the vacancy announcement and her eventual appointment by FWS.

MA-04-1634	Corrective Action	Informal	07/26/2005	Cp was a GS-5 seasonal firefighter at Mt. Zion National Park. He disclosed to management that his supervisor forcefully struck a co-worker in the face out of anger. His supervisor gave him a "not achieved" rating for the fire season and told him he would not be rehired for the following season. The investigation showed that management had knowledge of cp's disclosure at the time it gave him his rating and informed him he would not be rehired. The agency agreed to take corrective action, removing derogatory information from its files, giving cp an "achieved" rating, provided backpay ($23,681.56) for missed salary because he was not rehired, and issued a letter offering him a position for the 2005 fire season. Before he could return to duty, the agency changed its medical clearance procedure. Based on the new procedure, cp was unable to gain medical clearance. OSC intervened to secure an appointment as a dispatcher for the remainder of the fire season or until such time as cp could obtain medical clearance. The agency counseled the second and third-level supervisors for having failed to prevent the PPP.
MA-04-1931	Stay	Informal	07/29/2005	Cp, a GS-15 financial analyst with the Air Transportation Stabilization Board (ATSB), is on a term appointment. In May and June 2003, cp disclosed to the ATSB chairman's staff that the ATSB executive director had engaged in suspicious conduct that created the appearance of a violation of ethic rules. The alleged conduct included accepting gifts and benefits from ATSB loan applicants and contractors and soliciting employment from an applicant's investment banker. On August 11, 2003, cp sent a detailed letter to the Treasury ethics officer and the IG describing evidence of the director's ethical misconduct. Thereafter, cp alleges that ATSB management engaged in a pattern of retaliatory actions, which included significantly changing his duties and working conditions and directing his relocation from NYC to Washington, D.C. Cp was placed on LWOP when he failed to report for duty in D.C. The agency voluntarily agreed to place cp on 45 days administrative leave to permit the parties an opportunity to discuss settlement and to permit OSC to begin its investigation.
MA-02-0973	Corrective Action	Informal	09/13/2005	See MA-02-0516
MA-02-0516	Corrective Action	Informal	09/21/2005	Cp was a computer technician for the Department of Veterans Affairs. He alleged that he was placed on enforced annual leave and suspended for 14 days because he had posted critical comments about his agency on his personal web site. Cp's comments concerned DVA's intent to require IT personnel to undergo background investigations for security clearances. Cp's comments were of the "Big Brother" nature.

				Complainant retired from service under threat of removal. He appealed his retirement to the MSPB and Federal Circuit and did not prevail. The agency agreed to provide cp with a clean record and backpay for the enforced annual leave and suspension. Complainant withdrew his OSC complaint.
MA-05-0231	Corrective Action	Informal	04/05/2005	Cp, an employee at Travis AFB, CA, received a Cease & Desist Order for making protected disclosures. His supvr also placed an excerpt from the Air Force table of penalties in his 971 file. Cp wanted both removed from his files. At OSC`s request, agency settled and agreed to rescind both documents and trained the subject supervisors on whistleblower protection laws.
MA-05-0403	Stay	Informal	01/25/2005	Cp disclosed a violation of an Indian Health Service rule to her supvr and a higher level official. One month later, Cp`s supvr initiated an internal investigation of Cp for her disclosure. Though the investigation reportedly cleared Cp of wrongdoing, her supvr proposed a 3-day suspension, effected in November 2004. In December her supvr issued her a directed 120-day geographic detail to another office 170 miles away. OSC requested an informal stay of the detail. On January 25, 2005, IHS granted an informal indefinite stay for the OSC investigation.
MA-04-0061	Systemic	Informal	01/27/2005	Cp was formerly employed as an GS-9, at the Department of the Navy, Naval Support Activity (NSA) in Naples, Italy. He filed a complaint with the Office of Special Counsel (OSC) in October, 2003, alleging that he was terminated during his probationary period in violation of 5 U.S.C. § 2302(b)(8) for disclosing that his supervisors had ordered subordinates to make uncompensated repairs to their personal vehicles. OSC sought and received an informal stay of Cp`s termination, which placed Cp on administrative leave. OSC attempted to negotiate a settlement of the complaint. The Navy agreed to host an OSC training in Naples, Italy. However, the complainant refused all other corrective action offered. The complaint was thereafter forwarded to the Special Projects Unit, which further negotiated with the Navy to retain Cp on administrative leave through December 2004, at which point he would resign his position. Cp orally agreed to these terms, but refused to sign the written agreement. Thus, the complaint has been resolved with only the systemic corrective action.

MA-03-0796	Corrective Action	Informal	05/11/2005	Cp, a Welder, WG-10, with the Naval Air Depot (NADEP), disclosed welding irregularities on Navy ships to her superiors and to OSC. Cp made her disclosures repeatedly over a period of years, but her superiors ignored her protests. Cp brought her allegations to OSC's attention when she was reassigned from her position after complaining of a hostile work environment in her unit. Many of Cp's disclosures were validated through the IG investigation stemming from Cp's disclosure to OSC. OSC concluded that she had been reassigned and denied a temporary promotion because of her disclosures. OSC requested that the Navy provide individual and systemic corrective action. The Navy agreed, offering full status quo ante relief, including returning her to her previous welder position, back pay of approximately $60,000, a priority consideration for future temporary promotion, and attorney fees. NADEP held training for all of its managers and reached a global settlement to resolve all claims.
MA-03-2233	Amicus Petition	Informal	09/30/2005	The Office of Special Counsel (OSC) obtained informal corrective action where officials at the Veterans Administration Medical Center in Anchorage, Alaska, improperly granted a $10,000 relocation bonus to a GS-7 Human Resources Assistant in violation of 5 U.S.C. § 2302(b)(12). The laws, regulations, and VA rules governing relocation bonuses state that a relocation bonus may not exceed 25% of an employee`s base salary; that it may only be offered if the position is difficult to fill; that the bonus must be approved prior to the employee entering on duty; that the employee must sign a service agreement as a condition of receiving the bonus; and that officials should offer the maximum allowable bonus only when the VA is experiencing the greatest difficulty in filling a position. VA officials neglected to comply with any of these provisions when they offered the relocation bonus at issue in MA-03-2233. OSC concluded that VA officials had failed to comply with laws, rules, and regulations that implemented or directly concerned the merit system principle that the federal workforce be used efficiently and effectively, 5 U.S.C. § 2301(b)(5), and had thus violated 5 U.S.C. § 2302(b)(12). VA officials took all of the corrective action that OSC recommended, including initiating a bill of collection to recoup the improper bonus, training the approving official regarding the failures in the bonus, and writing Standard Operating Procedures to ensure proper administration of recruitment bonuses in the future.
MA-00-0747	Corrective Action	Informal	05/20/2005	HUD agreed to provide veterans` preference training to all classification and staffing specialists and managers by July 30, 2005; add veteran employment language to HUD`s website; send letter to various veterans organizations under the signature of the Deputy Assistant Secretary for Human Resources Management reaffirming HUD`s commitment to hiring qualified veterans; and sign and present a statement of support of veterans, guardsmen, and reservists to the National Committee for Employer Support of the Guard and Reserve.

MA-00-0910	Corrective Action	Informal	05/20/2005	HUD agreed to provide veterans' preference training to all classification and staffing specialists and managers by July 30, 2005; add veteran employment language to HUD's website; send letter to various veterans organizations under the signature of the Deputy Assistant Secretary for Human Resources Management reaffirming HUD's commitment to hiring qualified veterans; and sign and present a statement of support of veterans, guardsmen, and reservists to the National Committee for Employer Support of the Guard and Reserve.
MA-05-0597	Corrective Action	Informal	06/02/2005	In this 2302(b)(11) case, complainant alleged a willful violation of his veteran preference rights in connection with the agency's initial failure to hire him for a Maintenance Worker position. OSC successfully persuaded the agency to pay complainant for lost wages resulting from the delay in hiring complainant. There was insufficient evidence, however, to support disciplinary action.
MA-04-1625	Corrective Action	Informal	04/07/2005	CP alleged that she suffered various performance-related personnel actions (including denial of a WIGI, poor performance evaluations, and a proposed removal) in retaliation for filing grievances. After investigation of her allegations, OSC concluded that she had performance problems, but that these problems preceded any action by the agency. However, following her initiation of several grievances, the agency began to take action to correct her performance deficiencies. This case covered a fairly lengthy period of time. While the initial actions taken against CP were clearly retaliatory, as time went on, there was less evidence of a causal connection. Nevertheless, OSC sent a PPP Report and Corrective Action letter to the agency asking for corrective action. The agency initially declined to take any of the corrective actions OSC sought. In the end, however, the agency agreed to rescind the proposed removal. CP is under a new supervisor now and doing well. Therefore, OSC decided to close this file for the corrective action provided by the agency.
MA-04-0787	Disciplinary Action	Informal	04/06/2005	Cp, a TV Operator/News Gatherer for the Department of the Navy in Yokosuka, Japan, alleged that her first-line supervisor took several personnel actions against her because she filed an EEO complaint against him and made protected disclosures in her EEO complaint for which he was disciplined. In early 2002, Cp filed an EEO complaint alleging that her supervisor drove her to a

				remote location, twice tried to kiss her, and made inappropriate comments about her appearance. On March 14, 2003, the supervisor was suspended for 14 days in part because Cp had disclosed that he failed to follow Navy regulations on compensatory and overtime hours. As a result, Cp alleges that the supervisor: (1) denied her sick leave requests; (2) made negative comments in her performance appraisals; (3) proposed to suspend her for 14 days (ultimately mitigated to 10 days); (4) failed to extend her overseas tour of duty; and (5) proposed her removal. The Navy proposed to suspend the subject for 14 days "conduct unbecoming a Federal employee." OSC approved this disciplinary action pursuant to 5 U.S.C 1214.
MA-04-0787	Corrective Action	Informal	04/06/2005	Cp, a TV Operator/News Gatherer for the Department of the Navy in Yokosuka, Japan, alleged that her first-line supervisor took several personnel actions against her because she filed an EEO complaint against him and made protected disclosures in her EEO complaint for which he was disciplined. In early 2002, Cp filed an EEO complaint alleging that her supervisor drove her to a remote location, twice tried to kiss her, and made inappropriate comments about her appearance. On March 14, 2003, the supervisor was suspended for 14 days in part because Cp had disclosed that he failed to follow Navy regulations on compensatory and overtime hours. As a result, Cp alleges that the supervisor: (1) denied her sick leave requests; (2) made negative comments in her performance appraisals; (3) proposed to suspend her for 14 days (ultimately mitigated to 10 days); (4) failed to extend her overseas tour of duty; and (5) proposed her removal. OSC obtained extensions of Cp's tour of duty and obtained stays of her proposed removal while investigating her allegations. During OSC's investigation, Cp reached a global settlement of all her claims against the Navy. As part of the settlement, Cp received $150,000 in compensatory damages and attorney fees not to exceed $115,000. In addition, among other things, her annual and sick leave were restored, her ten day suspension cancelled, and she is to receive a GS-7/9 position in San Diego.
MA-05-0141	Stay	Informal	11/29/2004	On October 10, 2004, OSC received a complaint from a Nurse Practitioner with the Department of Veterans Affairs, Gulf Coast Veterans Health Care System. Cp alleges that the Medical Center Director terminated her during her probationary period because she made protected disclosures of information to various agency officials. Specifically, Cp voiced concerns that the new Women's Clinic would be sharing a hallway with the urology department in violation of various agency privacy

				regulations. Prior to her disclosures Cp was commended for her work performance, and on May 2, 2004, she was promoted from Registered Nurse Level II, step-12 to a Registered Nurse, Level III step-7. Following her disclosures regarding the Women's Clinic, in June 2004, the Director changed Cp's duties from 50% clinical and 50% administrative to 80% clinical and 20% administrative. Then, on August 20, 2004, Cp received a notice that she was to appear before the Professional Standards Board (PSB) on September 3, 2004, to determine her discharge during her probationary period. The letter stated that she was charged with divulging false and derogatory information and failure to follow the chain of command. Cp responded to the charges in writing and appeared before the PSB to defend against the claims. Following her appearance before the Board, Cp was issued a letter notifying her of the PSB's decision to terminate her because she was "not fully qualified and satisfactory." Her effective date of discharge is October 29, 2004. OSC contacted the agency in an effort to get an informal stay of Cp's termination. The agency agreed to a 45-day stay of the termination to allow OSC an opportunity to investigate the allegations made by Cp.
MA-04-0649	Corrective Action	Informal	01/06/2005	Cp, Chief Liaison in the Advisory Groups and Nationwide Tax Forum Branch of the Internal Revenue Service (IRS), alleged that she was detailed and issued a lowered performance appraisal in retaliation for disclosures she made to the Treasury Inspector General (IG) in violation of 5 U.S.C. § 2302(b)(8) & (b)(9). The Office of Special Counsel negotiated a settlement whereby Cp's performance appraisal was rescinded and replaced with a rating of "Exceeded." In addition, Cp was giving a $2000 performance award, the amount equivalent to the award issued in 2003 for an "Exceeded" performance rating. In exchange, Cp withdrew her OSC complaint.
MA-05-0141	Corrective Action	settlement agreement	02/07/2005	Cp alleged that Department of Veterans Affairs (VA) officials at the Gulf Coast Veterans Health Care System terminated her during her probationary period because she made protected disclosures of information to various agency officials in violation of 2302 § (b)(8). After the assigned attorney entered into negotiations with VA, Cp signed a settlement agreement under which VA agreed to rescind her termination and remove all documentation referencing the termination from her OPF or any other agency system of record. In exchange, Cp agreed to withdraw her OSC complaint.
MA-04-0321	Disciplinary Action	Informal	11/03/2004	Complainant (Cp), a screener at the Romulus, Michigan airport, alleged that she was suspended for three days because she disclosed to agency officials that her

				supervisors refused to pay employees for working beyond their assigned shifts, violated agency protocol by assigning her to work an international flight alone, and allowed untrained screeners to clear alarms caused by passenger bags. Our investigation revealed that there was insufficient supporting evidence to conclude that Cp was sleeping on the job, the reason given for her suspension. TSA, at our request, agreed to cancel the 3-day suspension, and remove any reference to it from Cp`s personnel files.
MA-04-2213	Corrective Action	Informal	12/06/2004	Complainant Stephanie Armel, a GS-5 secretary, at Sheppard Air Force Base, 365th Training Squadron, Wichita Falls, TX, alleged that she was subjected to retaliatory personnel actions by her then commander, Lt. Col Xavier Villareal, for initiating a 2004 Departure Unit Climate Assessment Survey (UCAS) in early 01/04, which she believed to be mandatory. After initiating the survey, Armel learned that the UCAS was optional. Armel alleged that Villareal gave her a Letter of Counseling (LOC) on 3//31/04, lowered her Annual Performance Review on 4/27/04, and detailed her on 5/14/04, because he thought the UCAS would yield unfavorable opinions of his leadership and supervisory skills. The Air Force Office of the Inspector General (OIG) investigated the matter and issued a report on 08/02/04 resulting in the rescission of the LOC, a raised performance rating for Armel and a cancellation of the detail. The OIG did not conclude that Armel was the victim of retaliation. Instead, it opined that this was the result of misunderstandings and miscommunications. Although all the personnel actions initially raised in Armel`s OSC complaint were corrected, Armel alleged that she received more retaliation from the new 365th Training Squadron commander, Lt Col E. Kent Wong. In addition to this OSC complaint, Armel also filed an Equal Employment Opportunity (EEO) complaint. In order to resolve and put final closure to this matter, the Air Force agreed to: 1) reassign Armel to a GS-5 secretary position with the 372nd Training Squadron at Sheppard AFB, 2) revise AF Form 860B dated 09/15/04, omitting any and all references to Armel`s consultations with the EEO and OIG offices; and 3) restore 24 hours of annual leave to Armel. In return, Armel agreed to withdraw her OSC and EEO complaints.
MA-03-2132	Disciplinary Action	Informal	03/21/2005	Keith Anderson (Cp), a WG-11 utility systems operator, 50th Civil Engineering Squadron (CES), Schriever AFB, CO, alleged that LtC Franklin W. Baugh, then 50th CES Commander, criticized him in a 3/15/04 memorandum for routinely circumventing the chain of command and elevating issues to the wing leadership and beyond before giving flight and squadron chain of command an opportunity to address his concerns. cp also alleged performance evaluation lowered and failure to receive an award in reprisal for disclosure

				On 3/21/05, at OSC request, COL Joseph Squatrito, Commander, 50th Space Wing, Schriever AFB, CO, issued LTC Baugh a Letter of Concern specifically addressing the language he used in his 03/15/04 memorandum to Cp. COL Squatrito noted that the 3/15/04 memorandum "was in error inasmuch as it ordered him (Cp) to adhere to the chain of command without making it clear that he was always free to make a complaint through other channels." Cp`s evaluation was raised and he was given the award.
MA-04-2633	Systemic	Informal	05/10/2005	
MA-04-2633	Corrective Action	Informal	05/10/2005	
MA-04-2953	Corrective Action	Settlement Agreement	02/15/2005	Cp, a Stakeholder Liaison, with the Transportation Security Administration (TSA), alleged that she was terminated because she was perceived to have reported that her supervisor brought his private assault rifle onto government premises. After the OSC attorney entered into negotiations with TSA, Cp and TSA signed a settlement agreement in which TSA agreed to pay Cp $5,000, and replace the termination with a resignation. In exchange, CP withdrew her OSC and EEOC complaints.
MA-04-2185	Corrective Action	Settlement Agreement	02/18/2005	Cp, an Acting Assistant Federal Security Director with Transportation Security Administration (TSA), alleged that she was terminated for reporting that her supervisor illegally brought his private assault rifle onto government premises in violation of 2303(b)(8). After the assigned attorney engaged in negotiations with TSA, CP and TSA signed a settlement agreement in which TSA agreed to rescind the termination; increase her base salary by 5%, pay 10,000 for attorney`s fees, and pay the majority of the Cp`s relocation costs. In exchange, CP agreed to withdraw her OSC and EEOC complaints.
LI-05-0524	Disciplinary Action	MSPB	07/31/2005	On June 24, 2005, ALJ issued initial decision ordering the Department of Interior to suspend Simonton for 45-days for violating (b)(4), (b)(6), and (b)(11). In addition, under a Settlement Agreement (entered into the record), Simonton admitted to unknowingly violating the above provisions, and agreed not to challenge the suspension. In exchange, OSC agreed to dismiss the case. The decision became final July 29, 2005.
MA-02-1574	Corrective Action	Informal	12/10/2004	Cp was an eight year veteran of the Air Force whose first federal employment after

				leaving the service was with the Department of Veterans Affairs (VA). On April 22, 2001, Cp was given a temporary appointment with the VA as a Staff Nurse II in the Primary Care Unit at the James A. Haley Veterans Hospital in Tampa Florida. Cp alleged that her appointment was not renewed on May 23, 2002, in reprisal for whistleblowing. In particular, Cp alleged that after she complained to Rosemary Ashby, Associate Chief of Nursing Service, that her immediate supervisor, Norma Figueroa, had violated the Privacy Act by accessing her medical record. Following an on site investigation, the VA offered to settle the matter. Under the settlement, Cp will be reinstated as a Clinical Staff Nurse II at the Outpatient Clinic in Newport Richey, Florida. On December 7, 2004,Cp accepted the settlement offer. The effective date of the reinstatement is to be determined.
MA-03-0859	Corrective Action	Settlement Agreement	08/30/2005	A former employee at the VA Hospital in Chicago, IL, claimed that she was suspended, demoted and eventually removed from her job because she reported to the VA OIG that her supervisor had been using his vehicle for personal use. The supervisor was eventually suspended for this infraction for 30 days. After an on-site investigation, a settlement was negotiated whereby, without admitting liability, the VA has agreed to rescind two ten-day suspensions, one two-day suspension, the demotion and removal, and support Cp in her disability retirement application. The agency has already submitted paperwork agreeing that Cp should receive a disability retirement. The disability retirement papers are under review at OPM.
MA-04-2291	Corrective Action	Informal	06/27/2005	Cp filed a July 2004 complaint with OSC, alleging that Transportation Security Administration (TSA) retaliated against her for disclosures she made to agency officials and the Office of Internal Affairs by revoking her detail and failing to promote her. Prior to OSC`s investigation, the assigned attorney engaged in settlement discussions with TSA. As a result, TSA agreed to: (1) promote Cp from an H-band to an I-band, (2) increase Cp`s base salary 13%, (3) remove the letter of counseling from TSA records and not use it in any future personnel decisions, and (4) document on SF-50s that Cp had previously worked 18 months in two I-band positions. The agreement constituted full corrective action, thus, the matter was closed.

Note: There were five cases in which two corrective actions were achieved. The FY 2005 annual report showed 45 corrective actions stemming from 45 matters. But it was actually 45 corrective actions stemming from 40 matters.

Corrective Actions for Fiscal Year 2006

Case Number	Correction Type	Subtype	Date Completed	Synopsis
MA-06-1369	Stay	Informal	06/28/2006	6/28/06: 45-day voluntary stay granted by agency (exp. 8/11/06).
MA-06-0522	Stay	Informal	12/12/2005	Cp, a GS-12 Facility and Strategic Planner, at the Veterans Affairs Medical Center in Dallas, Texas, alleged that he is being terminated during his 2-year trial period beacuse he disclosed to the U.S. Office of Personnel Management Inspector General concerns he had with the way the Metropolitan Dallas Combined Federal Campaign office was operating. At OSC request, the VA is staying its decision to terminate Cp for 60 days so that OSC can conduct an investigation.
MA-06-0522	Corrective Action	Informal	02/02/2006	Cp, a GS-12 Facility and Strategic Planner, at the Veterans Affairs Medical Center in Dallas, Texas (VA), alleged that his termination was proposed because he disclosed to the U.S. Office of Personnel Management Inspector General concerns he had with the way the Metropolitan Dallas Combined Federal Campaign office was operating. On January 19, 2006, in a letter signed by the Assistant Director, the VA rescinded the termination proposed on November 21, 2005. Investigation is continuing for possible disciplinary action.
MA-05-1353	Corrective Action	Informal	11/10/2005	Cp, an instructor at the U.S. Citizenship & Immigration Services Academy, Glynco, Georgia, alleged that his annual summary performance rating was lowered, and that he was denied training and threatened with disciplinary action because he made protected disclosures, filed a previous OSC complaint (MA-04-1932), or because he filed a

				grievance over his lowered performance rating. At OSC request, the agency agreed to give Cp an outstanding overall summary rating for the October 1, 2003 through September 30, 2004, performance year, and a 40-hour time off performance award. Both subjects, the former director and deputy director of the Academy, have retired from federal service.
MA-05-1004	Corrective Action	Informal	11/21/2005	Effective June 30, 2004, former Lexington, Kentucky Federal Medical Center (FMC) Warden reassigned Cp from her warden's secretarial position to a special investigative support technician position. Cp alleged that she was reassigned because she filed a workplace violence complaint against her first-line supervisor in May of 2004. At OSC request, the agency reassigned Cp back to her secretarial position effective November 21, 2005. Her reassignment was effected concurrent with the arrival of a new FMC warden.
MA-04-2142	Disciplinary Action	Informal	10/27/2005	An electrician alleged that he was suspended for 14 days and given a lowered annual performance rating because of his disclosures to the Office of Inspector General. While our investigation did not substantiate his claims, we did find that a WA-11 lockmaster and GS-13 Navigation Chief had instructed Cp that he should make complaints through the chain-of-command before filing a grievance. On 10/27/05, at OSC request, the lockmaster and navigation chief received a verbal counseling; whereby, they were instructed that supervisors should never define the nature of an employee's complaint and tell him how to seek redress.
MA-05-2584	Corrective Action	Informal	04/12/2006	Cp, a special agent with the U.S. Drug Enforcement Agency (DEA), alleged that his pending reassignment from his current post of duty in Beaufort, South Carolina, to the Atlanta Field Division, Atlanta, Georgia, was retaliation for a May 2002 disclosure. The OSC investigation revealed that for reasons unrelated to Cp's disclosure, the Assistant U.S. Attorney in South Carolina became upset with and refused to work with Cp expressing concerns that Cp is "Giglio" impaired, and, therefore, could no longer

				testify for the government in criminal trials. While the DEA disagreed with this assessment, it was obligated to reassign Cp to a location where the Cp would have the opportunity to perform the entire range of duties, including testifying in cases Cp investigated that result in criminal trials. Although there was no indication of a nexus between the DEA's decision to reassign Cp and his May 2002 disclosure, the agency proposed to settle the matter by agreeing to give Cp priority consideration for the next available vacancy in Wilmington, SC. Cp declined the proposed corrective action.
MA-05-2380	Corrective Action	Informal	04/13/2006	Complainant, a GS-101-07 mental health specialist, Shiprock Counseling Services, Indian Health Service, Department of Health and Human Services, Shiprock, NM, alleged that he was charged absent without leave (AWOL) and subsequently terminated during his probationary period because of complaints he made to the union about his supervisor. Prior to the OSC investigation, the agency realized that the complainant was not a probationary employee at the time of his termination and had not been given statutory appeal rights. As a result, the agency unilaterally reinstated complainant and provided him with full back-pay. The agency, at OSC's request, also agreed to remove the AWOL and charge the time to the complainant's regular pay and to remove all references to the AWOL and his termination from his Official Personnel Folder.
MA-06-0391	Corrective Action	Informal	06/12/2006	Complainant, currently a GS-5 police officer, U.S. Department of Army (ARMY), Fort Bliss, Texas, alleged that following his retirement from a Non-appropriated Fund position with the Army and Air Force Exchange Service on August 8, 2003, and entering on duty into a GS-3 police officer position on August 7, 2003, the agency failed to properly compute his leave and pay in violation of the Portability of Benefits for Non-appropriated Fund Employees Act of 1990 (ACT). On June 12, 2006, the agency, at OSC request, agreed to resolve this matter by: 1) changing Cp's date of hire from August 7 to August 9, 2003; 2) resubmitting all time cards which need to be changed as a result of the new hiring date; 3) making a good faith effort to afford the complainant the opportunity to use any accrued annual leave in a timely manner or receive pay for said leave if Cp is placed in a situation where he has to use or lose accrued annual leave.

MA-04-0911	Disciplinary Action	Informal	01/30/2006	OSC investigation revealed that on April 9, 2003, a supervisor verbally counseled Cp Wesley Ferguson, then a Mobile Mechanic at the Pine Bluff Arsenal (PBA), for not following the chain of command when making protected disclosures. The supervisor also referenced this oral admonishment in the record of Cp`s 2003 mid-year performance review.  On 1/30/06, Cp and PBA signed a settlement agreement in which PBA agreed to formally counsel the supervisor regarding his inappropriate response to Cp`s protected activity.
MA-04-0911	Corrective Action	Informal	01/30/2006	Cp alleged that Pine Bluff Arsenal (PBA) officials violated 5 U.S.C. § 2302(b)(8) when they terminated his 1-year appointment as a Heavy Equipment Mobile Mechanic one day before the expiration of his appointment. Cp had reported to his supervisors that PBA mechanics were mishandling motor pool vehicles and that a co-worker had tried to run him over with a vehicle. OSC`s investigation revealed that the decision to remove Cp was based, in part, on unsubstantiated claims that he had lied on his application for a security back ground investigation and was ineligible for a security clearance. OSC also found that Cp`s supervisor had inappropriately referenced an oral admonishment in the record of his 2003 mid-year performance review. PBA agreed to 1) cancel removal action, changing it to expiration of appointment; 2) remove reference to the termination fom his personnel file; 3) remove reference to the oral admonishment from his 2003 mid-year review; and 4) ensure that its response to any requests for his employment references/ history reflect the changed personnel action. Cp withdrew his complaint.
MA-04-0464	Corrective Action	Informal	02/09/2006	During the course of OSC`s investigation, we discovered policies and procedures utilized in the EPA Region 5 Human Resources Office that were inconsistent with nepotism laws and Merit System Principles. We raised these issues with EPA Region 5 and we were able to obtain informal corrective action. EPA Region 5 acknowledged that it will be reviewing its policies with respect to the processing of personnel actions. We understand this review will include, but is not limited to, ensuring that employees in the Human Resources department do not process any personnel actions involving any relative, as defined in 5 U.S.C. § 3110.

MA-04-2834	Disciplinary Action	Informal	04/18/2006	Cp alleged that management officials at the Veterans Affairs Medical Center (VAMC), in Ann Arbor, Michigan, attempted to influence him to withdraw from competition for a position he applied for at VAMC in violation of 5 U.S.C. § 2302(b)(5). OSC found that management officials at the Ann Arbor VAMC did attempt to influence Cp to withdraw from competition for a position, based on their belief that they were looking out for Cp`s best interests in attempting to dissuade him from giving up a career appointment for a temporary position. The Veterans Administration (VA) was informed of our findings and agreed to informal corrective/disciplinary action. The VA issued a memorandum to supervisors at the Ann Arbor VAMC; specifically including the managers who attempted to influence Cp to withdraw from competition for a position. This memorandum reviews prohibited personnel practices and merit system principles. Managers with questions were directed to contact OSC.
MA-03-1708	Corrective Action	Informal	12/12/2005	Complainant, a WS-10 electrician with the U.S. Department of Navy, Norfolk Naval Shipyard, alleged his work duties were changed because he engaged in protected activity. Specifically, he alleged that in reprisal for filing a complaint with OSC in January 1997, he suffered a significant change in duties and responsibilities which continued until OSC`s intervention in late 2005. Due to the complainant`s delay in reporting the change, nearly 4 years after the change in duties, it was not possible for OSC to show that management`s actions were a direct result of his protected activity. However, due to OSC`s investigation, the agency agreed to reassign the complainant to the type of duties normally performed by a WS-10 electrician and provide any necessary training to enable him to perform those duties.
MA-05-2058	Corrective Action	Informal	12/13/2005	Complainant, currently a GS-12 Special Agent, Bureau of Indian Affairs, alleged that the Southwest Human Resources Office illegally promoted another employee to the position of GS-9 Special Agent. The selectee did not meet time-in-grade requirements. After the HR office made the selection and moved the employee, they realized the selectee lacked the necessary time-in-grade. Instead of reannouncing the position, the agency attempted to correct the problem by placing the selectee in a GS-7 position to allow him time to meet the time-in-grade requirements for the GS-9 promotion. After discussion with OSC, the agency agreed to reannounce the GS-9 Special Agent

				position to allow qualified employees the opportunity to compete.
MA-04-1673	Corrective Action	Settlement Agreement	09/18/2006	A former manager for the Dept of the Army alleged that the Army knowingly made illegal temporary and permanent promotions to a Deputy Chief of Staff position at the Rock Island Arsenal. Title 10 requires that certain identified positions, designated as Critical Acquisition Positions (CAP) be filled by employees who meet the membership requirements of the Army Acquisition Corp (ACC). This position by the agency as a CAP position. Mgmnt at the Rock Island Arsenal detailed employees without the qualifications to the position. When the permanent position was announced, it lacked the language restricting it to ACC employees. The Agency selected a non-ACC employee to fill the open position. The complainant was the only applicant who possessed ACC qualifications. As a result of OSC's investigation, the Agency acknowledged the problem, agreed to promote him and provide back pay, to recalculate the amount of his leave payment, based on his higher salary at the time of his retirement; and to request an adjustment of his annuity, from OPM, based on a recalculation of his high three salary.
MA-04-2788	Corrective Action	Settlement Agreement	03/06/2006	The complainant alleged that the agency improperly processed his removal as a voluntary resignation as opposed to a removal action. OSC settled the complaint by having the parties agree that the agency would cancel the resignation action and re-process in accordance with the originally proposed action.
MA-04-2814	Corrective Action	Statutory - 5 U.S.C.	04/27/2006	Complainant alleged that management officials at the DECA in Fort Lee Virginia reassigned him in retaliation for having accused a former supervisor of improper or unethical activities. He chose to pursue his 5 USC § 2302(b)(8) claim through the MSPB. OSC closed his 5 USC § 2302(b)(6) allegation and investigated his 5 USC § 2302(b)(9) allegation. The agency approached OSC with a settlement offer which included the payment of attorney fees, restoration of four days of annual leave, cleansing of Cp's OPF, and providing Cp with a letter stating his importance to the agency.

				The complainant indicated that he did not want to be returned to his former position, and he was uninterested in resolving the matter through a settlement agreement even though DECA had expressed a willingness to take full corrective measures that OSC would have sought from the Merit Systems Protection Board if we were to determine that a prohibited personnel practice had been committed. Because of Cp's unwillingness to settle with the agency, OSC determined that no further corrective action was possible.
TS-05-0897	Corrective Action	Informal	02/16/2006	The complainant is a TSA Security Screener in Billings, Montana. She alleged that starting around 8/04, she made various disclosures about screening violations and possible screener misconduct. She claimed that she suffered reprisal for those disclosures. Reprisals supposedly included an unsatisfactory performance evaluation, negative comments on that evaluation, negative comments on a 12/22/04 letter from a superior, and a reprimand. Before our on-site investigation began, we informally approached the agency about resolving the complainant's case. As a result of our efforts, the agency removed the negative comments on her performance evaluation, corrected her performance rating, removed the negative comments in the 12/22/04 letter, and removed her letter of reprimand. Given these corrective actions and OSC's advisory role under the 5/28/02 MOU with TSA, we closed the case without further action.
MA-05-1687	Stay	Informal	10/27/2005	Agency granted informal stay to allow OSC to investigate Cp's b8 complaint.
MA-04-1754	Corrective Action	Settlement Agreement	11/10/2005	Cp, a GS-5 clerk, alleged that her right to compete for a promotion was obstructed and unauthorized preference was granted to another person by the 355th Medical Support Sqdm at Davis-Monthan AFB. Investigation found that the AF eliminated Cp's GS-5 position through a RIF, citing lack of funding. Yet, two months after the RIF, the AF created a new GS-7 position with duties nearly identical to those that Cp had performed as a GS-5. Additionally, the AF announced the GS-7 vacancy in such a way that Cp not apply. It selected another applicant for the position. OSC verified that Cp lacked time-in-grade (OSC, however, did not substantiate the agency's allegation that complainant lacked specialized experience for the new position. In fact, her former supervisor verified that Cp had performed almost all of the duties of the new PD, and thus should have satisifed the specialized experience requirements of the GS-7 position. In a compromise settlement, the agency agreed to give Cp credit for the specialized

				experience that OSC documented, and name request her for a newly created GS-6/7 position. Cp withdrew her OSC complaint.
MA-04-2954	Corrective Action	Informal	11/18/2005	Cp applied for a vacant district ranger position on the Bighorn National Forest. He was not selected. He alleged that this personnel decision was a prohibited personnel practice under (b)(4), (b)(6), (b)(8), (b)(9) and (b)(12). The OSC investigation found that a staffing specialist mistakenly disqualified the cp from consideration based on his failure to submit a recent SF-50 to document his current federal employment status. Although the agency's past practice had been to required the submission of a current SF-50, the vacancy announcement for this position specifically stated that the agency might request a current SF-50. In this case, there was no evidence that the agency had requested a current SF-50. Based on the honest mistake of the staffing specialist, the agency offered cp priority consideration to the next available district ranger position. The cp declined. The investigation did not find that the staffing specialist acted with any improper motivation, and thus did not sustain violations of (b)(6), (8) or (9).
MA-02-0556	Corrective Action	Informal	12/29/2005	Cp alleged that the Border Patrol failed to select him for over 200 border patrol vacancies because he and his supervisor had disclosed that other Border Patrol agents had engaged in voucher fraud through a kickback scheme involving various rental property owners in Douglas, Arizona. (The whistleblowing is the subject of a separate OSC Disclosure Unit file that has resulted in significant investigative work and disciplinary action.) Cp is currently a Federal Air Marshal and lost no pay. Cp and Border Patrol agreed to a no-fault settlement that will pay cp $40k in cash. In return, cp has withdrawn his OSC complaint and from a EEO lawsuit filed in district court alleging age discrimination. The parties further agreed to limit any public discussion about this settlement to the following information: that a no-fault agreement has been reached in this whistleblower complaint for nonselection; that the cp received appropriate corrective action; and that the parties agreed to keep the specific terms of the agreement confidential.

MA-06-0698	Corrective Action	Informal	05/05/2006	In this TSA screener complaint for reprisal for whistleblowing, the agency`s disciplinary board overturned complainant`s 2004 removal. Nonetheless, the agency failed to not take corrective action and after a long delay, erroneously documented that the complainant had resigned from service. OSC intervened and persuaded TSA to rescind the removal, rescind the erroneous 2005 resignation, and grant complainant full back pay. Complainant, in turn, decided he did not want to return to his former position and resigned on April 14, 2005, the day his reinstatement was effected. Complainant received back pay for the period 10/7/04-4/14/06 in the amount of $71, 811.18.
MA-04-2464	Corrective Action	Statutory - 5 U.S.C.	07/10/2006	Cp, a 30 percent disabled vet, applied for a GS-7 budget analyst position with the Bureau of Reclamation, DOI. He was not selected. Instead the agency selected a lower standing nonveteran under the Outstanding Scholar Program (OSP). Cp appealed his nonselection under USERRAand VEOA before the MSPB. The AJ, with the full Board affirming, denied his appeal. His OSC cp followed alleging that the selection of the nonveteran was a PPP. The investigation found reasonable grounds to believe that the selection of the nonvet under the OSP was improper. In response to a corrective action letter, the Department appointed complainant to a vacant GS-7 budget analyst position.
MA-04-0895	Corrective Action	Informal	07/14/2006	Cp was the secretary to the Alaska State Director, Rural Development, USDA. She alleged that the state director detailed her to a lower-graded position outside his immediate office because he suspected she had made IG hotline complaints and because she refused to perform nongovernment duties related to his appointment to a local borough assembly seat. Cp further alleged that the state director instituted a misconduct investigation against her for the same reasons. The investigation confirmed cp`s allegations. A formal PPP report was sent to the Secretary. Whereupon, the state director resigned and the agency granted full corrective action: (1) merit promotion appointment to a GS-7 loan technician position with a promise of noncompetitive promotion to GS-9 after one year; (2) 10k in attorney fees; (3) $10,311.68 in medical costs; and (4) a clean record.

MA-04-2464	Systemic	Statutory - 5 U.S.C.	07/25/2006	Cp, a 30 percent disabled vet, applied for a GS-7 budget analyst position with the Bureau of Reclamation, DOI. He was not selected. Instead the agency selected a lower standing nonveteran under the Outstanding Scholar Program (OSP). Cp appealed his nonselection under USERRAand VEOA before the MSPB. The AJ, with the full Board affirming, denied his appeal. His OSC cp followed alleging that the selection of the nonveteran was a PPP. The investigation found reasonable grounds to believe that the selection of the nonvet under the OSP was improper. In response to a corrective action letter, the Department appointed complainant to a vacant GS-7 budget analyst position and agreed to provide appropriate training to supervisors and human resources staff on PPPs, veterans preference, ICTAP and OSP.
MA-06-1405	Corrective Action	Settlement Agreement	08/02/2006	Cp alleged that his employer, DOD, suspended him for 14 days and separated him from service through a RIF because he reported to the OIG that his supervisor had violated agency regulations regarding computer security. The case was resolved through a global settlement, wherein cp received a cash settlement (amount is confidential) and withdrew his OSC complaint and his MSPB appeal.
MA-05-0780	Corrective Action	Informal	09/25/2006	Cp, a GS-5 contact representative for DVA and a union representative, filed a ULP on behalf of her unit challenging DVA's unilateral decision to relocate employees within her unit. The ULP was successful. Shortly after the ULP was corrected, management detailed cp to a different service unit. OSC found evidence to believe that the detail was because of cp's protected union activities. Based on a draft PPP report, the agency agreed to take corrective action and the matter was settled informally. The agency provided cp with a clean record, restored 19 hours of sick leave, 50 hours of annual leave, and 70 hours of travel compensatory time, and paid her $6,746.31 for consequential damages and $22,500 for attorney fees and related costs.

MA-04-1502	Corrective Action	Informal	09/26/2006	Cp, an electrical engineer, GS-12, at Tinker Air Force Base, complained to her Command that peers had been harassing her and that her supervisors failed to intervene. An internal agency investigation found no merit to her allegations. Subsequently, she received a reprimand for sending a personal email to two colleagues complaining about their behavior. She also received two successful low performance appraisals. Cp has retired on disability. Through informal communications, the agency has voluntarily agreed to take corrective action by providing cp with a clean employment record, rescinding her reprimand and two performance appraisals, substituting her last valid rating score as her presumptive ratings of record, and promising to handle any future requests for employment references through its HR office.
MA-05-2274	Corrective Action	Informal	03/29/2006	The complainant is the District Director for the Farm Service Agency in Provo, Utah. He alleged that on 10/8/04, he filed a hotline complaint with his Office of Inspector General. He believed that in reprisal for the hotline complaint, his immediate supervisor changed his duties and included negative comments in his annual performance appraisal. Before our on-site investigation began, we learned that the supervisor had retired from federal service. As a result of our efforts, the agency then removed from the complainant`s appraisal both the supervisor`s negative comments and the complainant`s reponse to those comments. Given those corrective actions and the subject official`s retirement, we closed the case without further action.
MA-00-1440	Corrective Action	Settlement Agreement	12/30/2005	An Appraiser with the Bureau of Land Mngmt (BLM), alleged that officials failed to select him for a promotion, significantly changed his working conditions, and took other personnel actions against him because he blew the whistle on improper appraisals. Cp asserted that BLM violated legal reqs and standards of appraisal practice with land exchanges that inflated values to the detriment of taxpayers. Cp`s protests led to investigations by the OIG and GAO and a review by the Appraisal Foundation, all of which validated Cp`s allegations. OSC investigated a reprisal for whistleblowing complaint and approached DOI

				regarding corrective action for actions taken in violation of 2302(b)(8), (9), and (12) (first amendment). DOI agreed to provide the following relief: a retroactive promotion to Acting State Chief appraiser, GS-13, for 120-days; a retroactive promotion to State Chief Aprser, GS-13; a retroactive promotion to a GS-13 position; $7000 for performance awards; to purge Cp`s personnel records of all negative references; to restore 10 days of leave; and to pay attorneys fees NTE $17,500.
MA-00-1754	Corrective Action	Informal	01/12/2006	With his coworker from MA-00-1440, Cp, A Real Estate Specialist with the BLM alleged that officials failed to select him for a promotion, significantly changed his working conditions, and took other personnel actions against him because he blew the whistle on BLM`s improper appraisal practices.  OSC investigated Cp`s complaint of reprisal for whistleblowing and approached DOI regarding corrective action for personnel actions taken in violation of 2302(b)(8), (9), and (12) (first amendment). DOI agreed to provide Cp the following relief: $7000 for performance awards; to treat his future requests for continuing education as it would treat any other individuals` request; to pay for him to maintain his status as a General Certified Appraiser; $2000 for career training; to purge his personnel records of all negative references related to his status as a whistleblower; to restore 7 days of annual or sick leave; and to pay attorneys fees not to exceed $11,500.
MA-04-0629	Corrective Action	Settlement Agreement	10/21/2005	Cp is a Deputy Assistant Regional Director for ICE. He and his spouse applied in late 2003 for reassignment to one of several Supervisory Detention and Deportation Officer positions advertised at FLETC. Even though both made the competitive list, neither Cp nor his spouse were offered positions. Cp alleged that he, nor his spouse, received offers because one of the recommending officials didn`t like his spouse, which was corroborated inthe investigation.  Subsequently Cp applied for and was selected for a lateral Criminal Investigations (CI) position at FLETC. Cp`s spouse then applied for spousal reassignment. Cp`s selection was cancelled, which resulted in his spouse's request for spousal reassignment being rescinded. Cp and his spouset filed Complaints with OSC in regard to both actions taken by the agency. In settlement, Cp received a CI position, and his spouse received a DRO position. The agency further agreed that the offending official will not be his spouse''s supervisor or within her chain of command. The parties (including OSC) also agreed to keep the terms of the agreements confidential.

MA-05-0324	Corrective Action	Settlement Agreement	10/21/2005	Cp is a Deputy Assistant Regional Director for ICE. He and his spouse applied in late 2003 for reassignment to one of several Supervisory Detention and Deportation Officer positions advertised at FLETC. Even though both made the competitive list, neither Cp nor his spouse were offered positions. Cp alleged that he, nor his spouse, received offers because one of the recommending officials didn`t like his spouse, which was corroborated inthe investigation.  Subsequently Cp applied for and was selected for a lateral Criminal Investigations (CI) position at FLETC. Cp`s spouse then applied for spousal reassignment. Cp`s selection was cancelled, which resulted in his spouse's request for spousal reassignment being rescinded. Cp and his spouset filed Complaints with OSC in regard to both actions taken by the agency. In settlement, Cp received a CI position, and his spouse received a DRO position. The agency further agreed that the offending official will not be his spouse"s supervisor or within her chain of command. The parties (including OSC) also agreed to keep the terms of the agreements confidential.
MA-05-0889	Corrective Action	Settlement Agreement	10/21/2005	Cp is a Deputy Assistant Regional Director for ICE. She and her spouse applied in late 2003 for reassignment to one of several Supervisory Detention and Deportation Officer positions advertised at FLETC. Even though both made the competitive list, neither Cp nor her spouse were offered positions. Cp alleged that she, nor her spouse, received offers because one of the recommending officials didn`t like her.  Subsequently Cp`s spouse applied for and was selected for a lateral Criminal Investigations (CI) position at FLETC. Past then applied for spousal reassignment. Shortly thereafter, her spouse`s selection was cancelled, which resulted in Cp`s request for spousal reassignment being rescinded. Cp and her spouse filed Complaints with OSC in regard to the actions taken by the agency. In settlement, Cp received a DRO position, and her spouse received a CI position. The agency further agreed that the offending official will not be Cp`s supervisor or within her chain of command as part of the lateral reassignment.

MA-06-2078	Stay	Informal	09/07/2006	Cp, a supervisory appraiser, with the Department of Veterans Affairs (VA) Regional Office in Houston, Texas, alleged that he was given a proposed 14-day suspension because of his disclosure that his second-level supervisor, Loan Guaranty Officer Ray Biagioli, and another VA employee played golf on government time. Cp was given the proposed suspension letter on 8/29/06. The VA agreed to stay its decision on the proposed suspension through November 8, 2006.
MA-99-0173	Corrective Action	Settlement Agreement	04/12/2006	CP was Port Director, GS-13, at Tampa International Airport. He admittedly was having difficulty in the position so when his supervisor suggested a reassignment to an Adjudication Officer position, CP accepted it. However, he was not notified that it was a GS-12 position and that by accepting it, he was going to be downgraded. Therefore, his downgrade was not voluntary and he was constructively demoted without being given Chapter 75 due process rights. OSC concluded, on these facts, that there were reasonable grounds to believe that (b)(12) had been violated. CP has since retired from the federal government. In resolution of his complaint, the agency offered and he accepted a lump sum payment of $82,732.96 (which is equivalent to the amount of pay that he lost between his GS-13 and GS-12 positions). In exchange, CP withdrew this complaint.
MA-06-1091	Stay	Informal	06/30/2006	CP received a proposed removal containing numerous charges, each with multiple specifications. Some reference activities that appear to be directly tied to CP's protected disclosures (which are currently under investigation by the National Institutes of Health as the result of a 1213 referral from the Disclosure Unit). Some of the charges, however, seem unrelated to CP's protected disclosures. But it appears that the agency may not have become aware of these activities but for an investigation initiated by officials implicated in her disclosures. The informal stay is set to expire on June 30th.
MA-06-0365	Stay	Informal	03/14/2006	Cp, a GS-13 area commander with the Federal Protective Service (FPS), St. Louis, Missouri, alleged that he was issued a proposed 14-day suspension because of disclosures he made to the FPS Director, Wendell Shingler, concerning abuse of authority and gross mismanagement by the FPS Region 6 Deputy Director, Michele

				Jekel, and the Region 6 Director, David Olson. At OSC request, the agency agreed to stay its decision on the proposed suspension until we complete our investigation and legal analysis.
MA-05-1171	Disciplinary Action	Informal	05/04/2006	Cp, a contract representative with the Social Security Administration alleged that her supervisor, a District Manager, willfully obstructed her from competing for a GS-5/7 social insurance specialist (claim representative) position with promotion potential to GS-11 and attempted to influence her to withdraw from competing for 1 of the 5 vacancies. OSC investigation revealed that the DM told Cp and other contract representatives, before the positions were announced, that he was only going to be considering external applicants for the claim representative vacancies so they need not apply. Cp applied anyway, but did not make the referral list. While the DM did not commit any PPP, he did violate Civil Service Regulation 330.1001 (Withdrawal from Competition), which prohibits a federal official from attempting to influence another person to withhold filing an application for the purpose of improving or injuring the employment prosepects of any one person. After requesting and receiving OSC approval, the agency suspended the DM for 1 day.
LI-06-2537	Stay	Litigation	08/09/2006	Cp, a GS-13 senior special agent with the Drug Enforcement Agency (DEA), alleged that he is being reassigned from the McAlester Resident Field Office in Oklahoma to the New York Division because he made an anonymous disclosure to the DEA Deputy Administrator on March 6, 2006. Cp reported that the McAlester Assistant Special Agent in Charge had violated the constitutional rights of a target in December of 2005. Cp alleged that on May 23, 2006, the McAlester Special Agent in Charge informed him that he was going to be geographically reassigned after Cp had admitted to DEA inspectors during an April 14, 2006, interview that he was the source of the anonymous disclosure. On August 8, 2006, the OSC filed a petition with the Merit Systems Protection Board (the Board) requesting a stay of Cp`s pending geographic reassignment pending an investigation and legal review. On August 9, 2006, the Board approved a 45-day stay of Cp`s reassignment, i.e., through September 25, 2006.
MA-06-0365	Corrective Action	Informal	09/08/2006	Cp, an area commander with ICE, Federal Protective Services (FPS), alleged that he: (1) was issued a letter of reprimand; (2) had his 90-day temporary promotion to Eastern

				District Commander (EDC) canceled prematurely; (3) was not selected for the permanent EDC position; and (4) received negative comments in his 2005 annual performance evaluation because of his disclosures to the FPS Director concerning his first and second line supervisors. Cp alleged in an EEO complaint that he was discriminated against because of his race, national origin (Spanish Indian) and reprised against for prior EEO activity. The FPS agreed to: (1) promote Cp to EDC, GS-14; (2) make a lump sum payment to Cp for back pay; (3) cancel and remove the LOR and the Suspension from his personnel file; (4) remove derogatory comments from Cp's 2005 evaluation; and (5) pay his attorney's fees. In return, the Cp agreed to withdraw his EEO and OSC complaints. FPS also agreed, at OSC request, to conduct prohibited personnel practice outreach training for FPS supervisors and managers.
MA-04-1140	Corrective Action	Settlement Agreement	01/20/2006	CP filed a complaint with OSC alleging that his supervisor retaliated against him for complaining to his chain of command and the IG about several workplace conditions CP considered unsafe or unhealthful, i.e., failure to use ergonomic chairs. At a meeting with members of his chain of command, CP made derogatory and/or disrespectful comments about his supervisor. As a result of this meeting, CP was given a two-day suspension without pay. The charge, however, was written up as making "knowingly" false statements about his supervisor's failure to rectify the purported workplace issues. Although OSC's investigation did not substantiate CP's retaliation claim, the assigned OSC attorney encouraged settlement discussions because the suspension, as written, did not appear supported. Given the nominal nature of the action, management agreed to reduce the suspension to one day with pay (with full reimbursement of CP's forfeited pay) and to amend the charged misconduct to discourtesy. Accordingly, CP has agreed to withdraw his OSC complaint.
MA-05-0903	Corrective Action	Informal	04/05/2006	CP alleged that management took a number of actions against her in retaliation for several protected disclosures and complaints she made to various agencies. Among the alleged retaliatory actions were two proposed suspensions and two adverse performance evaluations. While the evidence was insufficient to substantiate CP's allegations of retaliation, management agreed to withdraw the second performance evaluation at the request of the assigned OSC attorney. The evaluation was withdrawn due to questions regarding the basis for some elements of the evaluation.

MA-06-1426	Corrective Action	Informal	09/11/2006	Complainant (Cp), formerly a WG-5 equipment cleaner, Department of Army, Corpus Christi Army Depot (CCAD), Corpus Christi, Texas, who was terminated during his probationary period effective 10/28/05, alleged that his termination was retaliation for having made a protected disclosure, and discrimination based on race (white) and handicap. While the OSC investigation did not substantiate Cp`s retaliation claim, the CCAD did agree, as part of a global settlement, to allow him to resign in lieu of probationary termination. In return, Cp agreed to withdraw his OSC and Equal Employment Opportunity complaints.
MA-05-2681	Stay	Informal	01/17/2006	Cp alleged that he was terminated prematurely from his two-year term appointment because he disclosed to his supervisors and the Department of Defense (DOD) Hotline that officials at Fort Bliss had violated federal acquisition regulations and wasted government funds. At OSC`s request, the agency agreed to stay Cp`s termination and return him to duty as a GS-6 Computer Assistant effective February 6, 2006, while OSC investigates his allegations.
LI-06-0825	Corrective Action	Settlement Agreement	05/11/2006	OSC filed with the MSPB, charging the Border Patrol violated 2302(b)(6), when it granted an unauthorized preference during competition for promotions to a border patrol agent (BPA); and 2302(b)(12) by assigning him duties outside his position of record and authorizing administratively uncontrollable overtime pay (AUO). OSC alleged that the BPA has been assigned to work outside of his position of record since approximately 1990, when he was unofficially detailed from a GS-9 BPA position and assigned to work exclusively on setting up computers and other telecommunication equipment at the Laredo Sector Headquarters. The complaint charged that he continued to work in the tech field for the next fourteen years; however, his official BPA position description was never changed and he continued to receive law enforcement pay and benefits. DHS agreed to change BPA's Official Personnel File to reflect the 9-year detail, and agreed to reassign the BPA to a properly classified non-supervisory position. They also agreed to 1) update policies, 2) work with OSC to assure training to all Border Patrol supervisory employees.

MA-03-1650	Corrective Action	Settlement Agreement	11/29/2005	CP filed a complaint with OSC alleging that U.S. Department of the Interior (DOI) officials retaliated against him for disclosures he made to DOI officials conceming contracting irregularities permitted by his supervisor, who has since retired. CP claimed that his whistleblowing led to his then-supervisor's determination in September 2002 that CP had failed his GS-14 supervisory probationary period. Thus, CP was returned to his prior GS-13 position. After investigation of CP's allegations, OSC believed that CP's disclosures may have contributed to his removal from the GS-14 position. The assigned attorney engaged in settlement discussions with DOI. As a result, DOI agreed to: (1) retroactively place CP back into a GS-14 position from the date when he was first taken out of his supervisory position and provide all back pay to date; (2) provide all applicable step increases and retirement benefits and contributions to CP, and (3) pay $10,000 towards CP's attorney fees. In exchange, CP agreed to closure of his OSC complaint. Additionally, the parties agreed to keep the settlement confidential.
MA-03-1572	Corrective Action	Settlement Agreement	12/08/2005	CP filed a complaint with OSC alleging that U.S. Department of the Interior (DOI) officials retaliated against him for disclosures he made concerning contracting irregularities permitted by DOI officials. CP claimed that his whistleblowing led to several personnel actions against him, including two suspensions, a reprimand, and the denial of awards since 2002. After investigation of CP's allegations, OSC believed that CP's disclosures may have contributed to his first suspension and the length of his second suspension (because the length was based, in part, on the existence of the first suspension). The assigned attorney encouraged settlement discussions. DOI ultimately agreed to rescind both suspensions, pay CP a lump sum of $6,500, and pay $10,000 in attorney fees. In exchange, CP agreed to closure of his OSC complaint. CP and agency agreed to keep the settlement confidential.
MA-05-0031	Corrective Action	Settlement Agreement	07/19/2006	CP filed a complaint with OSC alleging that U.S. Department of Housing and Urban Development (HUD) officials retaliated against him for disclosures he made to HUD

				officials concerning violations of HUD housing assistance regulations. CP claimed that his whistleblowing led to a five day suspension. After an investigation of CP's allegations, OSC believed that there was sufficient evidence to assert that CP had made disclosures that may have contributed to his suspension. The assigned attorney engaged in settlement discussions with HUD. As a result, HUD agreed to rescind the suspension, remove it and the accompanying proposal from CP's official personnel folder, and pay CP for the five days when he served the suspension. In exchange, CP agreed to closure of his OSC complaint.
MA-04-2653	Corrective Action	Settlement Agreement	05/11/2006	Cp alleged that management in the Department of the Navy discriminated against him due to his marital status when he was transferred to England as a dependant on his wife's travel orders without his written consent and that Navy officials violated 5 U.S.C. § 2302(b)(12). We found insufficient evidence to establish a violation of 5 U.S.C. § 2302(b)(1). As to the section 2302(b)(12) allegation, we found some evidence suggesting that the agency violated its own travel regulation when it failed to "formally advise" Cp that he was not hired in the interest of the government and that he would not have his own travel orders. However, it is unclear what, if any, corrective action is available in this matter as Cp received appropriate payment for his travel expenses as a dependent, i.e., on his wife's travel orders. Nevertheless, based on the error noted above and at the request of the assigned OSC attorney, the agency and Cp agreed to settle the matter for a $2000 lump sum payment.