



# governmentattic.org

*"Rummaging in the government's attic"*

Description of document: Office of Special Counsel (OSC) Congressional Budget Justifications, 2007-2009

Requested date: 24-January-2017

Released date: 26-February-2017

Posted date: 26-June-2017

Source of document: FOIA Request  
FOIA Analyst  
Office of Legal Affairs  
Legal Services Corporation  
3333 K St NW  
Washington, DC 20007  
Fax: (202) 337-6519  
Email: [FOIA@lsc.gov](mailto:FOIA@lsc.gov)  
[FOIA Request Electronic Submission Form](#)

The governmentattic.org web site ("the site") is noncommercial and free to the public. The site and materials made available on the site, such as this file, are for reference only. The governmentattic.org web site and its principals have made every effort to make this information as complete and as accurate as possible, however, there may be mistakes and omissions, both typographical and in content. The governmentattic.org web site and its principals shall have neither liability nor responsibility to any person or entity with respect to any loss or damage caused, or alleged to have been caused, directly or indirectly, by the information provided on the governmentattic.org web site or in this file. The public records published on the site were obtained from government agencies using proper legal channels. Each document is identified as to the source. Any concerns about the contents of the site should be directed to the agency originating the document in question. GovernmentAttic.org is not responsible for the contents of documents published on the website.



**U.S. OFFICE OF SPECIAL COUNSEL**  
1730 M Street, N.W., Suite 218  
Washington, DC 20036-4505  
(202) 254-3600

February 26, 2017

Via Email

Re: Freedom of Information Act Request (#FO-17-0051)

I am writing in response to your request dated January 24, 2017, in which you asked the U.S. Office of Special Counsel (OSC) to provide you with select records regarding Congressional Budget Justifications. Your request has been processed under Freedom of Information Act (FOIA), 5 U.S.C. § 552.

In reviewing your request under the FOIA, OSC identified 250 pages of responsive records. We are releasing all 250 pages to you in full without redaction.

You have the right to appeal this determination under the FOIA. Any such appeal must be made in writing and sent to OSC's General Counsel at the address shown at the top of this letter or by e-mail to [FOIAappeal@osc.gov](mailto:FOIAappeal@osc.gov). The appeal must be received by the Office of General Counsel within 90 days of the date of this letter.

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows:

Office of Governmental Information Services  
National Archives and Records Administration  
8601 Adelphi Road, Room 2510  
College Park, MD 20740-6001  
[ogis@nara.gov](mailto:ogis@nara.gov)  
202-741-5770 (Office)  
1-877-684-6448 (Toll Free)  
202-741-5769 (Fax)

If you have any questions regarding this request, please feel free to contact Dawn Kral, FOIA Public Liaison, at 202-254-3636 or via email at [dkral@osc.gov](mailto:dkral@osc.gov). Please reference the above tracking number when you call or write.

With kind regards,  
/s/  
Tarik D. Ndongo

FOIA Team  
Office of Special Counsel

FISCAL YEAR 2007  
CONGRESSIONAL BUDGET JUSTIFICATION  
AND PERFORMANCE BUDGET GOALS



**U.S. OFFICE OF SPECIAL COUNSEL**

1730 M Street, N.W. (Suite 218)  
Washington, DC 20036-4505  
[www.osc.gov](http://www.osc.gov)

# Contents

|  |           |
|--|-----------|
| <b>Executive Summary .....</b>                                       | <b>3</b>  |
| <b>I. THE OFFICE OF SPECIAL COUNSEL .....</b>                        | <b>11</b> |
| A. Statutory Background .....  | 11        |
| B. OSC's Mission .....   | 12        |
| C. OSC's Internal Organization .....                                 | 12        |
| D. Organization Chart .....  | 15        |
| <b>II. SUMMARY OF FY2005 PROGRAM CASELOAD AND ACTIVITY .....</b>     | <b>16</b> |
| A. Prohibited Personnel Practices .....                              | 16        |
| B. Alternative Dispute Resolution Program .....                      | 20        |
| C. Case Processing: Hatch Act Violations .....                       | 21        |
| D. Hatch Act Disciplinary Actions.....                               | 22        |
| E. Disclosure Unit.....  | 24        |
| F. USERRA Referrals .....  | 31        |
| G. Outreach Program .....  | 34        |
| <b>III. FY2007 BUDGET REQUEST .....</b>                              | <b>35</b> |
| <b>IV. PERFORMANCE UNDER THE PRESIDENT'S MANAGEMENT AGENDA .....</b> | <b>42</b> |
| A. Strategic Management of Human Capital .....                       | 42        |
| B. Competitive Sourcing .....  | 43        |
| C. Improved Financial Performance .....                              | 43        |
| D. Expanded Electronic Government .....                              | 44        |
| E. Budget and Performance Integration .....                          | 44        |
| <b>V. TABLES.....</b>  | <b>46</b> |
| <b>VI. ENDNOTES .....</b>  | <b>58</b> |
| <b>VII APPENDICES.....</b>   | <b>59</b> |
| A. OSC Strategic Plan (FY2005-2010).....                             | 60        |
| B. OSC Annual Performance Budget Goals (FY2007).....                 | 75        |

## **U.S. Office of Special Counsel Fiscal Year 2007 Budget Justification, And Performance Budget Goals**

### **Executive Summary**

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Its primary mission is to safeguard the merit system in federal employment, by protecting employees and applicants from prohibited personnel practices (PPPs). In addition, the agency operates as a secure channel for federal whistleblower disclosures of violations of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; and substantial and specific danger to public health and safety. OSC also has jurisdiction under the Hatch Act to enforce restrictions on political activity by government employees. Finally, OSC enforces federal employment rights secured by the Uniformed Services Employment and Reemployment Rights Act (USERRA).

OSC historically has had an incessant problem of large backlogs of cases in its various operating units. Through tremendous effort by the entire agency, OSC has succeeded in eliminating the backlogs from its Hatch Act unit, Disclosure unit, Complaints Examining unit, and most recently from its Investigation and Prosecution Division. The agency has been successful in hiring, and is now operating at a staff level as close to its request level as possible. OSC implemented a significant reorganization which is bearing fruit in the way the streamlined divisions and empowered individual employees accomplish the business of the agency. OSC now stands ready to meet all of its goals of efficiency and expeditious justice.

In the past several years, the agency has experienced an increase in caseload level. There are a number of factors which have contributed to this level of complaint filings with OSC:

- There has been a heightened awareness of the Hatch Act due to the 2004 elections, and increased filing of disciplinary action cases by OSC. Several of these cases have involved high-profile employees and significant national press coverage. The Hatch Act Unit processed more cases (310) during FY 2005 than any other year, with the exception of election year FY 2004.
- Congress passed a statute intended to decrease the processing time for USERRA complainants from members of our armed forces. Under the three year pilot program created by Congress, which began in February of 2005, OSC recently began processing half of the USERRA cases involving Federal employees that would typically be processed by the Department of Labor. OSC is confident that this pilot program will provide speedier justice to the members of our military who are being denied rights under USERRA.

- In recent years, OSC has had a large number of high-profile whistleblower cases, leading to increased national press coverage of OSC. FY 2005 continued this trend. Section II Part E shows examples of these cases.
- OSC continues to investigate whistleblower retaliation complaints from Transportation Security Agency (TSA) security screeners under OSC's Memorandum of Understanding (MOU) with TSA. This MOU remains viable despite the Merit System Protection Board's decision that the Board does not have jurisdiction to adjudicate these matters.
- During FY 2005, OSC continued to certify more agencies through its outreach program. Moreover, new agencies continue to sign up for the certification program. As agencies implement the certification process, agency employees who might previously have been unaware of their rights and remedies through OSC are becoming informed.
- In addition to OSC's certification program, OSC continues to provide outreach programs to agencies requesting them, or as part of OSC settlements in particular matters.

In the last year and a half, each of OSC's units has worked intensively to reduce the backlog of cases while giving full and fair resolution to claims. The agency reorganization was accomplished, and is now contributing to the prevention of the recurrence of backlogs.

During the backlog reduction, to ensure each claim received a full and fair resolution, the Special Counsel insisted that the Complaints Examining Unit's referrals for further action to OSC's Investigation and Prosecution Division (IPD) remain at a high level and even be increased. During the backlog reduction effort on PPPs, the referral rate increased 100% over historic levels.

While OSC received much credit for resolving the cases in the backlog with full and fair resolution, the agency became subject to some criticism that Disclosure Unit (DU) cases were closed without adequate review. The DU cases resolved were primarily cases that had been identified as likely closures during the last two to three years, but had not been closed due to the focus on and volume of the several types of higher priority DU cases. These older DU cases received fresh review and the backlog was reduced through a tremendous effort. Nevertheless, to dissolve this criticism entirely, OSC invited a bipartisan group of Congressional staffers to visit OSC and review the case files and the processes used in resolving these cases, as well as PPP cases. The conclusion of the bipartisan investigation was that not a single case closed for lack of merit was found to have merit.

After this investigation, OSC's successes in reducing the DU backlog and reducing the PPP backlog while increasing the internal rate of referral were commended in a congratulatory letter from the U.S. House Of Representatives Committee on Government Reform (see letter below).

TOM DAVIS, VIRGINIA  
CHAIRMAN

CHRISTOPHER SHAYS, CONNECTICUT  
DAN BURTON, INDIANA  
JLEANA ROS-LEHTINEN, FLORIDA  
JOHN M. MC HUGH, NEW YORK  
JOHN L. MICA, FLORIDA  
GIL GUTKNECHT, MINNESOTA  
MARK E. SOUDER, INDIANA  
STEVEN C. LATOURETTE, OHIO  
TODD RUSSELL PLATTS, PENNSYLVANIA  
CHRIS CANNON, UTAH  
JOHN J. DUNCAN, JR., TENNESSEE  
CANDICE MILLER, MICHIGAN  
MICHAEL R. TURNER, OHIO  
DARRELL ISSA, CALIFORNIA  
VIRGINIA BROWN-WAITE, FLORIDA  
JON C. PORTER, NEVADA  
KENNY MARCHANT, TEXAS  
LYNN A. WESTMORELAND, GEORGIA  
PATRICK T. MC HENRY, NORTH CAROLINA  
CHARLES W. DENT, PENNSYLVANIA  
VIRGINIA FOXX, NORTH CAROLINA

ONE HUNDRED NINTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-6074  
FACSIMILE (202) 225-6874  
MINORITY (202) 225-6061  
TTY (202) 225-6852

<http://reform.house.gov>

HENRY A. WAXMAN, CALIFORNIA,  
RANKING MINORITY MEMBER

TOM LANTOS, CALIFORNIA  
MAJOR R. OWENS, NEW YORK  
EDOLPHUS TOWNS, NEW YORK  
PAUL E. KANJORSKI, PENNSYLVANIA  
CAROLYN B. MALONEY, NEW YORK  
ELIJAH E. CUMMINGS, MARYLAND  
DENNIS J. KUCINICH, OHIO  
DANNY K. DAVIS, ILLINOIS  
WM. LACY CLAY, MISSOURI  
DIANE E. WATSON, CALIFORNIA  
STEPHEN F. LYNCH, MASSACHUSETTS  
CHRIS VAN HOLLEN, MARYLAND  
LINDA T. SANCHEZ, CALIFORNIA  
C.A. DUTCH RUPPERSBERGER,  
MARYLAND  
BRIAN HIGGINS, NEW YORK  
ELEANOR HOLMES MORTON,  
DISTRICT OF COLUMBIA

BERNARD SANDERS, VERMONT,  
INDEPENDENT

May 17, 2005

VIA FACSIMILE

Mr. Scott Bloch  
U.S. Office of Special Counsel  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

Dear Mr. Bloch,

The Committee on Government Reform and has recently reviewed your efforts to respond to the findings of Government Accountability Office (GAO) 04-36. In that report, the GAO noted that the Office of Special Counsel (OSC) demonstrated a chronic inability to process cases in a timely manner which inevitably led to case backlogs. The report called for the OSC to develop a comprehensive strategy to address these recurrent failures.

We appreciate the professional seriousness with which you approached these recommendations and reduced the existing backlogs in the year following this report. Unfortunately, this activity, while beneficial to whistleblowers, was regarded with suspicion by activists who claim to work on behalf of whistleblowers.

At your invitation, a bipartisan group of congressional staff visited your offices on three occasions to review closed cases. The staff reviewed any closed case they requested, and you provided access to decision makers for questions and policy discussions. At the end of this period of review, one previously critical Senate staffer informed us "we have satisfied ourselves that they did not throw any folders into the Potomac." We are also satisfied that your hard work – and smart work – has resulted in a more responsive Office of Special Counsel.



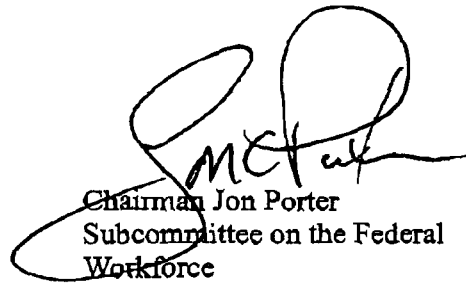
Mr. Scott Bloch  
May 17, 2005  
Page 2

We want to congratulate you on your efforts to improve the services you provide to whistleblowers. We continue to be impressed with the sincerity and pragmatism with which you and all your staff approach your jobs. You are providing a great service to the American people and the Federal government by protecting whistleblowers from illegal reprisals.

Sincerely,



Chairman Tom Davis  
Committee on Government Reform



Chairman Jon Porter  
Subcommittee on the Federal  
Workforce

cc. Rep. Henry Waxman, Ranking Member

It should be noted that the increased number of internal referral cases carried with it the necessary placement of a heavy burden on the IPD. However, the IPD has been successful in working through the majority of those cases.

OSC stands in a vastly improved position entering FY 2006 – with virtually no case backlogs. The agency has been successful in hiring, and will operate during FY2006 with a staff of 108 - 110 employees, which is as close to its FY 2006 request level as possible. For OSC to continue to operate at its current staffing level during FY 2007, the agency needs \$15,937,000, which is a small increase in funding (\$612,000) over its FY 2006 funding amount. This will enable the agency to maintain its current staff, thereby having enough employees to meet the challenges of the high volumes of cases and the agency's expanded responsibilities for USERRA investigation and enforcement. Maintaining current staffing levels will also aid in prevention of future case backlogs and allow OSC to improve in meeting its statutory time requirements.

### **OSC'S SUCCESSES IN FY 2005**

1. OSC negotiated and implemented a memorandum of understanding (MOU) at the request of the U.S. Postal Service Office of Inspector General (USPS OIG) to investigate Section 2302(b)(8) whistleblower complaints from USPS OIG employees. OSC does not otherwise have jurisdiction to investigate these complaints.
2. The newly created Customer Service Unit is now up and running. This unit handles hotline calls from employees seeking advice regarding possible statutory violations under OSC's jurisdiction. This Unit replaces the former practice of having one CEU employee designated Officer of the Week (OW) each week, requiring that employee to answer all of the above inquiries for the week. It was determined that the OW function was having a significant impact on the case processing efficiency of CEU employees. The Customer Service Unit ensures that attorneys who can be processing cases are not tied up on the telephone answering questions for several weeks each year. As a result, each of these CEU attorneys can handle approximately 10 extra cases per year.
3. OSC changed the manner in which USERRA claims were internally processed by assigning them only to experienced attorneys. The change resulted in quicker processing times. Most significant, however, was the Special Counsel's willingness to prosecute federal agencies for violations of the law. Prior Special Counsels had never filed any USERRA enforcement actions with the U.S. Merit Systems Protection Board (since USERRA was passed in 1994). In 2005, OSC set a precedent by filing three USERRA cases in one year. Full corrective action was received in all three cases.
4. During FY 2005, the Special Counsel has again focused on raising the profile of the Uniform Services Employment and Re-employment Rights Act (USERRA), so that returning reservists and veterans are aware of their rights and of the existence of OSC. In early 2005, OSC's role in enforcing USERRA again expanded. Pursuant to a demonstration project

established by the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, signed by President Bush on December 10, 2004, OSC, rather than the Department of Labor's Veterans Employment and Training Service (DOL VETS), has 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 also receives and investigates 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 received 111 cases by the end of FY2005, and is on track to receive 150 cases during FY 2006.

5. The Special Counsel appeared on the worldwide Pentagon Channel to explain to the members of our military their rights under USERRA and procedures for filing complaints.
6. Referrals for full investigations of both PPP and DU cases significantly increased by lowering the hurdles employees need to get through to show that a PPP has been committed against them, or that there is a substantial likelihood that a federal employee is reporting agency waste, fraud, illegality or abuse. This helps both the merit system and federal employees.
7. The Special Counsel followed through on his promise to litigate more cases before the Merit Systems Protection Board (Board) to protect the merit system and federal employees. In FY 2005, OSC filed thirteen cases before the Board, three more than in FY 2004. Three of these cases were filed under USERRA, when prior to FY 2004, OSC had never filed a USERRA case before the Board.
8. The Special Counsel was the recipient of a ceremony at the Pentagon praising him for his support of the Guard and Reserve. All Services were represented.
9. OSC's Outreach Program efforts have succeeded in educating federal agency managers and employees concerning their responsibilities and rights. OSC also assisted federal agencies to fulfill their statutory obligation to consult with OSC concerning informing federal employees of their rights under the laws that OSC enforces.<sup>1</sup> OSC formally launched its government-wide 2302(c) Certification Program in October 2002. Since that time, 47 agencies (including Cabinet-level agencies such as the Departments of Labor, Energy, State, Transportation, Education, Health and Human Services and Veterans Affairs) have registered for the program.
10. OSC is now participating in the federal GoLearn Project, which could increase outreach by up to 50,000 federal employees per year.
11. OSC's Alternative Dispute Resolution (ADR) Program continued to achieve a very high (100%) resolution rate. Among those cases resolved were several high profile whistleblower reprisal cases (discussed in Section II.B.) OSC has enhanced its resources for conducting mediations. Instead of having one full time mediator, seven people from different parts of the agency have received training in conducting mediations. OSC now has a cadre of professionals with varied skills and legal expertise in multiple areas from which to draw.

12. The Employee Advisory Committee is comprised of eight staff members, elected by their colleagues, who meet monthly to provide recommendations and feedback to the Special Counsel and the agency. The Special Counsel conceived of this idea and implemented it; the Employee Advisory Committee has been highly successful. The Student Loan Repayment / Employee Retention Program is one example of the agency responding directly to suggestions made to the Special Counsel in this forum.
13. A Government Accountability Office (GAO) March 2004 Report (GAO 04-36) was critical of OSC's chronic backlog problem. We provided a detailed response back to the GAO on May 17, 2005 and it is available on the OSC website. The response includes several strategies to reduce the backlogs in PPP and other cases that have already yielded results.
14. OSC continued to handle high-profile cases that received media attention, most of which resulted in corrective action.
15. In October, OSC announced its selection of Anne Whiteman, an 18-year air traffic controller at Dallas Fort Worth International Airport (DFW), as a recipient of the Special Counsel's Public Servant Award. Ms. Whiteman disclosed to OSC that air traffic controllers and management at DFW routinely covered up serious operational errors, in violation of an FAA order. Due to her courageous efforts, the FAA was able to address these serious problems. She is the fifth recipient of the Public Servant Award. The program was established in 2001 to recognize contributions by federal employees to the public interest when – often at great personal risk – they make significant disclosures of violations of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or, as was the case with DFW, a substantial and specific danger to public health and safety. The Public Servant Award is a non-monetary and merit-based award. Its purpose is to publicly recognize the most significant contributions made by federal whistleblowers who have either filed disclosures with OSC or who have sought relief from OSC on the grounds that they have suffered retaliation.

It is clear that although the reduction of backlogged cases has helped OSC meet its strategic goals of protecting federal employees from PPPs, protecting the merit system, and guarding the public interest through its Disclosure Unit, there are other ways of measuring success. We must now improve the timeliness of OSC's review of PPP cases and whistleblower disclosures.

**Highlights of the FY 2007 budget request include:**

- The U.S. Office of Special Counsel requests \$15,937,000 for FY 2007, which is an increase of \$612,000 over the FY 2006 appropriation. This increase is necessary due to the increased costs for salaries and benefits. 86% of OSC's budget is salary and benefits. Therefore, the pay raise of FY06 and the planned pay raise in FY07 have a dramatic impact on the amount of funding OSC needs to pay its mostly professional staff.
- OSC has revised its Strategic Plan FY 2006 – FY 2011 (Appendix A), and FY 2007 Annual Performance Budget Plan (Appendix B). Analysis of these revised plans reveal outcome oriented, concrete goals that are measurable. These goals provide measures of timeliness and quality related to each of the four central missions entrusted to OSC.
- In this request, OSC also describes its performance and plans under the President's Management Agenda for: (1) Strategic Management of Human Capital; (2) Competitive Sourcing; (3) Improved Financial Performance; (4) Expanded Electronic Government; and (5) Budget and Performance Integration. This request describes OSC's achievements in each of these areas, as well as planned future efforts.

## **I. The Office of Special Counsel**

### **A. Statutory Background**

OSC was first established on January 1, 1979.<sup>2</sup> From then until 1989, it operated as an autonomous investigative and prosecutorial arm of the Merit Systems Protection Board (“the Board”). By law, OSC received and investigated complaints from current and former federal employees, and applicants for federal employment, alleging prohibited personnel practices by federal agencies; provided advice on restrictions imposed by the Hatch Act on political activity by covered federal, state, and local government employees; and received disclosures from federal whistleblowers (current and former employees, and applicants for employment) about wrongdoing in government agencies. The office also enforced restrictions against prohibited personnel practices and political activity by filing, where appropriate, petitions for corrective and/or disciplinary action with the Board.

In 1989, Congress enacted the Whistleblower Protection Act. The law made OSC an independent agency within the Executive Branch, with continued responsibility for the functions described above. It also enhanced protections against reprisal for employees who disclose wrongdoing in the federal government, and strengthened OSC’s ability to enforce those protections.<sup>3</sup>

The Congress passed legislation in 1993 that significantly amended Hatch Act provisions applicable to federal and District of Columbia (D.C.) government employees, and enforced by OSC.<sup>4</sup> Provisions of the act enforced by OSC with respect to certain state and local government employees were unaffected by the 1993 amendments.

In 1994, the Uniformed Services Employment and Reemployment Rights Act became law. It defined employment-related rights of persons in connection with military service, prohibited discrimination against them because of that service, and gave OSC new authority to pursue remedies for violations by federal agencies.<sup>5</sup>

OSC’s 1994 reauthorization act expanded protections for federal employees, and defined new responsibilities for OSC and other federal agencies. It provided that within 240 days after receiving a prohibited personnel practice complaint, OSC should determine whether there are reasonable grounds to believe that such a violation occurred, exists, or is to be taken. The act extended the protections of certain legal provisions enforced by OSC to approximately 60,000 employees of what was then known as the Veterans Administration (now the Department of Veterans Affairs), and to employees of certain government corporations. It also broadened the scope of personnel actions covered under these provisions. Finally, the act made federal agencies responsible for informing their employees of available rights and remedies under the Whistleblower Protection Act, and directed agencies to consult with OSC in that process.<sup>6</sup>

In November of 2001, Congress enacted the Aviation and Transportation Security Act,<sup>7</sup> which created the Transportation Security Administration (TSA). Under the act, non-security screener employees of TSA could file allegations of reprisal for whistleblowing with OSC and the MSPB. The approximately 45,000 security screeners in TSA, however, could not pursue such complaints at OSC or the MSPB.

OSC efforts led to the signing of a memorandum of understanding (MOU) with TSA in May 2002, under which OSC would review whistleblower retaliation complaints from security screeners, and recommend corrective or disciplinary action to TSA when warranted. The MOU did not (and could not), however, provide for OSC enforcement action before the MSPB, or for individual right of action (IRA) appeals by security screeners to the MSPB.

## **B. OSC's Mission**

OSC's mission is to protect current and former federal employees, and applicants for federal employment, especially whistleblowers, from prohibited employment 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 this 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 reemployment and antidiscrimination rights of veterans under the USERRA; and
- promoting greater understanding of the rights and responsibilities of federal employees under the laws enforced by OSC.

## **C. OSC's Internal Organization and Functions**

OSC maintains its headquarters office in Washington, D.C. Four field offices are located in Dallas, Oakland (known as the San Francisco Bay Area Field Office), Detroit (Midwest Field Office), and Washington, D.C.

Agency components during FY2005 include the Immediate Office of the Special Counsel (IOSC), five operating units/divisions and five supporting offices explained in detail below. (See Organizational Chart on page 15.)

***Immediate Office of the Special Counsel.*** The Special Counsel and staff in IOSC are responsible for policymaking and overall management of OSC. They also manage the agency's congressional liaison and public affairs activities, and its outreach program, which includes



promotion of compliance by other federal agencies with the employee information requirement at 5 U.S.C. § 2302(c).

**Complaints Examining Unit.** This is the intake point for all complaints alleging prohibited personnel practices and other violations of civil service law, rule, or regulation within OSC's jurisdiction.<sup>8</sup> This Unit is responsible for screening approximately 1,800 prohibited personnel practice cases per year. Attorneys and personnel management specialists conduct an initial review of complaints to determine if they are within OSC's jurisdiction, and if so, whether further investigation is warranted. The unit refers all matters stating a potentially valid claim to the Investigation and Prosecution Division for further investigation.<sup>9</sup>

**Disclosure Unit.** This unit is responsible for receiving and reviewing disclosures received from federal whistleblowers. It advises the Special Counsel on the appropriate disposition of the information disclosed (including possible referral to the head of the agency involved for an investigation and report to OSC; referral to an agency Inspector General; or closure). The unit also reviews agency reports of investigation, to determine whether they appear to be reasonable and in compliance with statutory requirements before the Special Counsel sends them to the President and appropriate congressional oversight committees.

**Investigation and Prosecution Division.** Formerly three parallel units, staffed primarily by investigators and attorneys, the reorganization includes one IPD comprising four field offices, which conducts field investigations of matters referred after preliminary inquiry by the Complaints Examining Unit. Division attorneys conduct a legal analysis after investigations are completed to determine whether the evidence is sufficient to establish that a prohibited personnel practice (or other violation within OSC's jurisdiction) has occurred. Investigators work with attorneys in evaluating whether a matter warrants corrective action, disciplinary action, or both.

If meritorious cases cannot be resolved through negotiation with the agency involved, division attorneys represent the Special Counsel in any litigation before the Merit Systems Protection Board. They also represent the Special Counsel when OSC intervenes, or otherwise participates, in other proceedings before the Board. Finally, on an as-needed basis, division investigators and attorneys may also investigate alleged violations of the Hatch Act and the Uniformed Services Employment and Reemployment Rights Act. However, under the new pilot program, most USERRA functions are handled by the new USERRA unit in the Special Projects Unit to assure uniformity of policy.

**Hatch Act Unit.** The unit issues advisory opinions to individuals seeking information about Hatch Act restrictions on political activity by federal, and certain state and local, government employees. The unit is also responsible for enforcing the act. It reviews complaints alleging a Hatch Act violation and, when warranted, investigates and prosecutes the matter (or refers the matter to the Investigation and Prosecution Division for further action). It also oversees Hatch Act matters delegated to the IPD.



**USERRA/Special Projects Unit.** The Special Projects Unit uses senior trial lawyers to work cases of high priority and has also been used by the Special Counsel to conduct internal research on the processes and procedures of the operational units at OSC. In addition, a subdivision of the SPU called the USERRA Unit handles the new special project assigned by P.L. 108-454 that requires OSC to investigate the re-employment rights of military service members under USERRA, which involves new functions, increased caseload, and realigned personnel.

#### **SUPPORTING UNITS:**

**Alternative Dispute Resolution Program** In selected cases referred by the Complaints Examining Unit for further investigation, the agency contacts the complainant and the agency involved, and invites them to participate in OSC's voluntary mediation program. If mediation resolves the complaint, the parties execute a written and binding settlement agreement; if not, the complaint is referred for further investigation. The mediation program for Alternative Dispute Resolution has been reorganized. Rather than have a single ADR specialist under the leadership of an SES employee, the agency has expanded the program through cross-training multiple individuals from each of OSC's operating units. As a result the agency now has a broad pool of trained mediators with different legal areas of expertise.

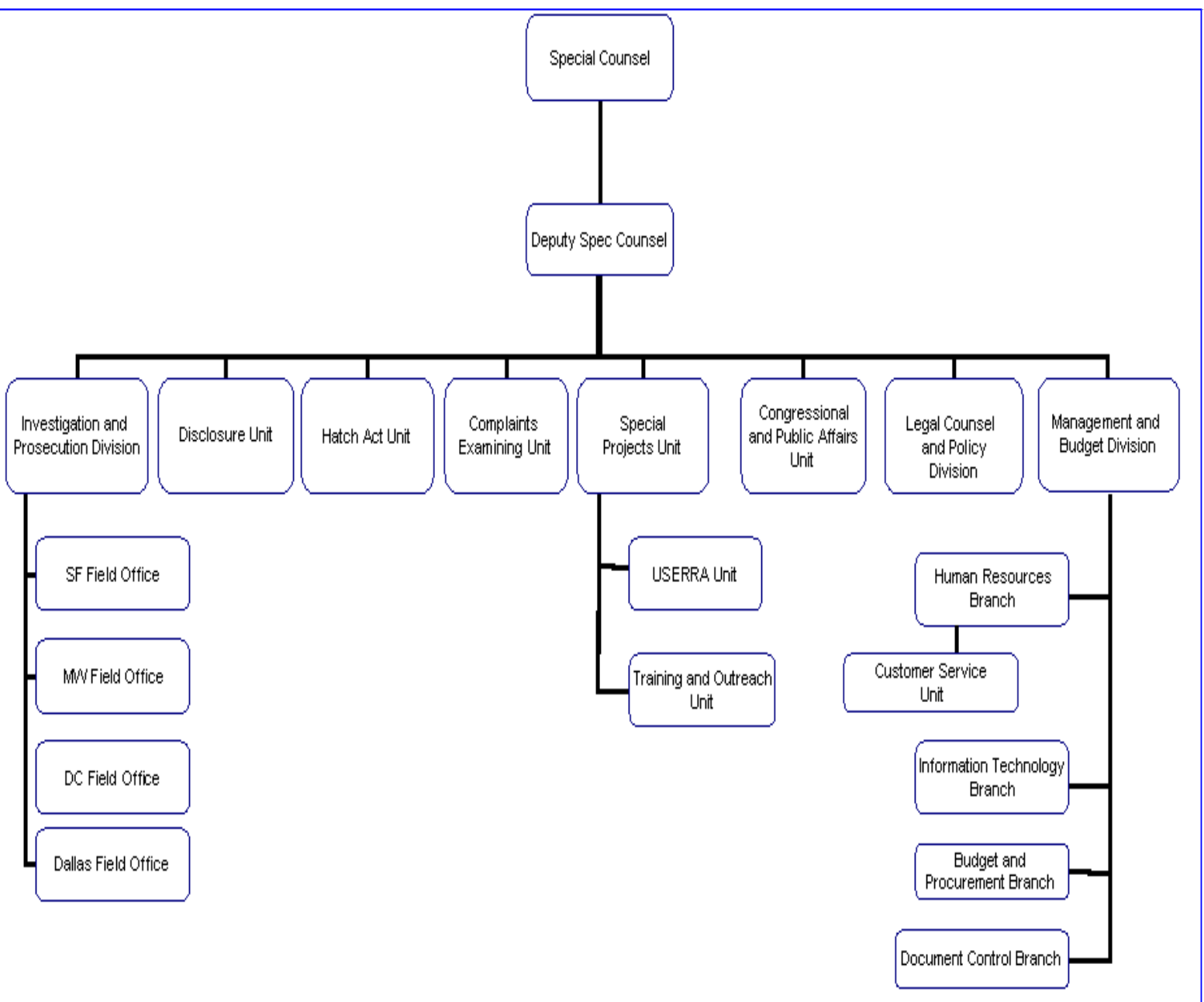
**Legal Counsel and Policy Division.** This division provides general counsel and policy services to OSC, including legal advice and support on management and administrative matters; legal defense of OSC in litigation filed against the agency; policy planning and development; and management of the agency ethics program.

**Management and Budget Division.** This division provides administrative and management support services to OSC, in furtherance of program, human capital, and budget decisions. This division also includes the Information Technology Branch, the Human Resources Branch, the Document Control Branch, and the Budget and Procurement branch. The purpose of this division is to put the administrative support functions under one authority.

**Training Office.** A training office has been created to train all new employees, cross train existing employees, and develop specialized training in areas such as litigation skills. Specifically, the Training Office will cross train attorneys and investigators to enable them to traverse organizational boundaries within the agency. They will develop sufficient expertise in several areas of the law, giving management the ability to detail employees to address any potential backlogs that could form in the various units.

**Customer Service Unit.** In the past, this function has been handled by rotating OSC staff to answer inquiries from the public or help with filing complaints and/or filling out forms. This unit will provide enhanced assistance to the public and federal employees, while streamlining operations by removing the 'Officer of the Week' duty from the attorneys in CEU.

## D. Organization Chart



## **II. SUMMARY OF FY2005 PROGRAM CASELOAD AND ACTIVITY**

### **A. Prohibited Personnel Practices**

Unlike many other investigative entities or agencies, OSC must, as a general rule, conduct an inquiry after receipt of complaints alleging the commission of a prohibited personnel practice.<sup>10</sup> Compare, for example, 5 U.S.C. § 1214(a)(1)(A) (“The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.”) with 5 U.S.C. app. 3, § 6(a) (“[E]ach Inspector General ... is authorized— ... (2) to make such investigations and reports relating to the administration of the programs and operations of the [agency] as are, in the judgment of the Inspector General, necessary or desirable[.]”) and § 7(a) (“The Inspector General may receive and investigate complaints or information from an employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.”).

The nature of the inquiry ranges from the CEU screening process to the IPD field investigations, but one must be conducted after a complaint is filed. Complaints received by OSC can and often do involve multiple allegations, some of which can involve different prohibited personnel practices. In all such matters, an OSC inquiry requires the review of, and a legal determination about, each allegation and prohibited personnel practice.

After a complaint is received by OSC, CEU attorneys and personnel management specialists conduct an initial review to determine whether it is within OSC’s jurisdiction, and whether further investigation is warranted. CEU refers all matters stating a potentially valid claim to the IPD for further investigation. All such matters are reviewed first by the ADR Unit.<sup>11</sup>

In selected cases that have been referred for further investigation, a trained OSC ADR specialist contacts the complainant and the employing agency to invite them to participate in the agency’s voluntary ADR Program. If both parties agree, OSC conducts a mediation session, led by OSC trained mediators who have experience in federal personnel law. When mediation resolves the complaint, the parties execute a binding written settlement agreement. If mediation does not resolve the complaint, it is referred for further investigation, as it would have been had the parties not attempted mediation.

The IPD conducts investigations to review pertinent records and to interview complainants and witnesses with knowledge of the matters alleged. Matters undergo legal review and analysis to determine whether the matter warrants corrective action, disciplinary action, or both.

If OSC believes a prohibited personnel practice has been committed and initiates discussions with an agency, the matter is often resolved through negotiation. Before OSC may initiate an enforcement proceeding seeking corrective action (relief intended to make an aggrieved employee

whole) at the MSPB, the Special Counsel must make a formal request to the agency involved, reporting on its findings and recommendations. Only when the agency has had a reasonable period of time to take corrective action and fails to do so, may OSC proceed to petition the MSPB for corrective action.<sup>12</sup> When an agency refuses to grant appropriate corrective action, OSC generally proceeds immediately to file a complaint with the MSPB.

If OSC determines that disciplinary action (the imposition of discipline on an employee who has committed a violation) is warranted, it can file a complaint directly with the MSPB.<sup>13</sup> Should the agency agree to take appropriate disciplinary action on its own initiative, then the matter can be settled without resort to an MSPB proceeding.

In addition to rectifying the matter at issue, OSC litigation before the MSPB – whether by enforcement actions seeking to obtain corrective and/or disciplinary action, or by intervention or other participation in matters filed by others – often has the additional benefit of clarifying and expanding existing law. It also brings greater public attention to OSC’s mission and work, a factor likely to increase the deterrent effect of its efforts.

OSC’s Complaints Examining Unit (CEU), as discussed above, is the intake unit for all prohibited personnel practice complaints.

For FY2005 OSC received 2,684 new matters, including PPP, Hatch Act, and Disclosure matters (**See Table 3**). The great majority of OSC’s staff resources were devoted to the processing of PPP complaints. Of the total 2,684 new matters OSC received during FY2005, 1,771 or 65% were new PPP complaints. (**See Table 4**).

**Procedures for Remediating PPPs.** Working together with investigators, IPD staff attorneys determine whether OSC’s investigation has established any violation of law, rule or regulation, and whether the matter warrants corrective or disciplinary action, or both.<sup>14</sup> If a violation is found, OSC generally first attempts to obtain resolution of complainants’ issues informally, through negotiated settlements. (**See Table 5** for figures concerning favorable actions). If a violation of law is found and informal resolution is not possible, the Special Counsel may refer the matter in writing to the agency head under 5 U.S.C. § 1214(b)(2)(B) with a recommendation for corrective and disciplinary action, or both. If an agency declines to take corrective action, the Special Counsel may file a petition for corrective action with the MSPB under § 1214(b)(2)(C). If the Special Counsel determines that an apparent violation warrants disciplinary action, the OSC files charges against the offending employee under § 1215(a) and prosecutes the case before the MSPB.

At any time during its processing of a case, the OSC may seek a stay of any personnel action if the available evidence provides reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a PPP. The OSC may obtain a stay upon direct request to the agency concerned, or by filing a request for a stay with the MSPB under § 1214(b)(1). Also, pursuant to § 1212(c), the Special Counsel may intervene as a matter of right or otherwise participate in any proceeding before the MSPB, except that the Special Counsel may not intervene in a proceeding

brought under § 1221 or 5 U.S.C. § 7701 without the consent of the individual initiating the proceeding.

**PPP Corrective & Disciplinary Action:**

Nepotism. OSC secured disciplinary and corrective action in a case in which agency management officials violated nepotism laws and granted an unauthorized preference or advantage to certain applicants for vacant positions in an installation during the fall of 1999. Our investigation revealed that the selecting official completed job applications and advanced the candidacy of several relatives of agency officials and advocated for her own daughter's employment. Our investigation also revealed that the selecting official's supervisor and another Division Chief advocated for their respective daughters' employment for one of the vacant positions. At OSC request, the agency suspended the selecting official for five days and her supervisor for three days, and gave the Division Chief an oral admonishment that will remain in his supervisory file for two years. The agency also agreed to provide Outreach training about prohibited personnel practices to relevant management officials.

Unauthorized Preference. OSC secured disciplinary and corrective action in a case in which we believe a former Chief Administrative Law Judge (ALJ) of a federal agency granted an unauthorized preference to an employee. The ALJ selected the employee in 1998 as an Attorney Adviser and 18 months later, made inquiries with the agency's personnel about raising her grade. In April 2000, the servicing personnel office acted on the ALJ's request, retroactively converting the employee to a higher grade as of November 1998, 90 days after her original appointment and awarding her back pay. Four months later, the ALJ selected the employee for a management position for which she would not have been qualified without the retroactive upgrade.

While our case was pending, the ALJ was removed by the Board for alleged sexual harassment in a separate case against him. Pursuant to the settlement, if the ALJ is successful in any appeal of his removal, the agency will consider OSC's recommended discipline of 30 days' suspension for the ALJ. OSC also secured a reprimand for the personnel specialist who assisted the ALJ in retroactively promoting the employee at issue. In terms of corrective action, the agency corrected all of the employee's SF-50's; initiated collection proceedings against her for the difference in when she would have received her promotions absent the unauthorized preference; and offered priority consideration for future similar positions to the other candidates for the management position.

Reprisal for Protected Activity. OSC settled a case in which a former Security Specialist at a federal agency alleged that he was suspended for 14 days because he provided testimony in an IG investigation and released a draft IG report to the media. Additionally, the employee alleged that his security clearance was suspended and he was reassigned to a non-security clearance position at the agency because of his disclosure. This case presented novel questions, among them, whether OSC could argue that the full draft IG report released by employee is a protected disclosure when a summary version was already arguably "publicly known" and whether the draft report was Privacy

Act protected. In addition, we investigated whether the agency violated the so-called Anti-gag statute, which prohibits expending agency appropriated funds to enforce nondisclosure policies. As a result of our investigation and conclusion that the agency violated the whistleblower statute when it suspended the employee, in part, because of his protected disclosure of the unclassified draft IG report, the agency agreed to (1) rescind the 14-day suspension; (2) compensate the employee for lost pay plus interest; (3) restore all related benefits from the rescission of the 14-day suspension; (4) pay the employee \$2,000 in attorney's fees; and (5) expunge all records related to the employee's 14-day suspension from his employment files, with the exception of his Personnel Security file. The agency also agreed to provide WPA training to persons involved in the employee's suspension and acknowledge the requirements of the Anti-gag statute in the settlement agreement. In return, employee agreed to accept a one-day suspension based on "falsely listing a co-worker as the sender of an agency facsimile transmitted to the media."

Conflict of Interest. OSC settled a case in which an employee alleged that the former Director of a federal agency committed a prohibited personnel practice when she non-competitively hired another individual who was jointly and severally liable with the former Director on a \$261,600 promissory note secured by their personal residence – a \$2,885 monthly mortgage obligation. The former Director appointed this individual to a Supervisory Business Manager position. OSC investigated this matter as a possible violation of 5 U.S.C. 2302 § (b)(12), focusing on whether the former Director violated federal financial conflict of interest regulations by this hiring. These regulations prohibit an employee from participating substantially in an official capacity in any matter in which, to her knowledge, she has a financial interest, if the matter will have a direct and predictable effect on that interest. 5 C.F.R. §§ 2635.402(a) and (c). OSC filed a disciplinary action complaint against the former Director, and she signed a settlement agreement in which she accepted a five-day suspension without pay.

Reprisal for Protected Activity. In February of 2003, a supervisory systems accountant at a federal agency in Alabama, alleged that she was given a letter of reprimand in part because she disclosed to the Office of Inspector General (OIG) in May of 2002 that her two supervisors violated the Federal Acquisition Regulation and abused their authority. The OIG investigation substantiated five of complainant's thirteen allegations. Investigation revealed that her disclosures were a contributing factor in the decision by her first-line supervisor to reprimand her. The agency agreed to pull the letter of reprimand from the employee's Official Personnel File.

Retaliation for Protected Activity. OSC secured corrective action in a case in which a federal employee alleged that he was given a directed reassignment from his duty station in Virginia, to California, in retaliation for having joined in a class action lawsuit against the agency. Prior to investigating the matter, OSC secured an agreement with the agency allowing the employee to remain in Virginia, which stayed in effect until he was ready to retire.

Due Process Violation. OSC also settled a case in which a GS-13 attorney-advisor with a federal agency presently stationed overseas alleged that the agency violated his due process rights under federal law and agency regulations by initiating garnishment of wages for an alleged



\$29,962.82 debt to the agency. The Complainant (Cp) alleged that the agency did not provide him the required opportunity to provide proof that he did not owe this debt.

According to our investigation, the agency initiated the garnishment without affording him due process rights as established in the federal regulations. Thus, we found reasonable grounds to believe that the wage garnishment violated 5 U.S.C. § 2302(b)(12) because the law and regulations violated implement merit principle § 2301(b)(2) (“fair and equitable treatment in personnel management...with proper regard for constitutional rights,” i.e. due process rights under 5th Amendment to the Constitution).

We advised the agency of our finding and requested they take corrective action. As a result, they voluntarily agreed to stop Cp’s wage garnishment (approximately \$350 biweekly) and refunded Cp a total of \$14,542.57 and \$772.44 in interest.

At OSC’s request, the agency identified approximately 45 other employees who were also subjected to collection without required due process rights. The preliminary total amount of collected wages is approximately \$153,357. We are in the process of investigating these cases to determine whether the agency should provide corrective action in those cases as well.

Protected Disclosure. OSC also settled a case in which the Complainant (Cp), a nurse in a federal agency, alleged that the agency removed her because she made a protected disclosure concerning the privacy of patient information. We found that the protected disclosure was a contributing factor in her termination. OSC brokered a settlement agreement by which the agency agreed to pay Cp approximately \$32,000 in back pay, benefits and attorney’s fees, permit Cp to voluntarily resign, and provide WPA training to managers.

## **B. Alternative Dispute Resolution Program**

Among the factors that determine “mediation-appropriate” cases are the complexity of the issues, the nature of the personnel action, and the relief sought by the Complainant. Once a case has been identified as mediation-appropriate, the OSC ADR Program Manager contacts the parties to discuss the ADR Program. “Pre-mediation” discussions are designed to help the parties form realistic expectations and well-defined objectives regarding the mediation process. Pre-mediation discussions also provide the ADR Program Manager an opportunity to assess whether a case is best handled on-site or by telephone.

The ADR Program generated a case resolution rate of 100% during FY2005 (See **Table 6**).

That rate reflects cases resolved in OSC mediation, as well as a handful of cases in which, after pre-mediation discussions with the ADR Program Manager, the complainant either withdrew the OSC complaint or settled the dispute through another mediation program.

Mediation settlement outcomes in OSC’s ADR Program vary, depending on the interests of the parties. Monetary recovery includes retroactive promotions, attorney fees, and lump sum

payments. In addition to monetary recovery, the benefits received by complainants in ADR include revised performance appraisals, transfers, and letters of recommendation.

The ADR Program resolved several significant complaints during FY2005.

Wrongful termination for Whistleblowing. The complainant alleged wrongful termination in violation of 5 U.S.C. § 2302(b)(8) and (b)(9) for whistleblowing and filing a union grievance. He had been forced to work overtime with no compensation and without proper approval. When he refused to drop the grievance, his supervisor threatened him with termination. Both parties agreed to OSC mediation and all issues were resolved in a timely manner.

Disclosure led to resignation. The complainant alleged that the Agency proposed her termination in violation of 5 U.S.C. § 2302(b)(8) and (b)(9), causing her to resign during her probationary period. She had previously disclosed travel fraud and claim reimbursement irregularities. Among those implicated in her disclosures were various high-level officials with responsibility for overseeing financial matters in the Agency. Some of the disclosures resulted in investigations by the Office of the Inspector General (OIG). She cooperated with the OIG during these investigations. The parties agreed to OSC mediation and all issues were resolved.

In order to provide a dispute resolution process that best meets the needs of the parties, the ADR Program engages in ongoing self-evaluation. Feedback from participants has been overwhelmingly positive.

### **C. Case Processing: Hatch Act Violations**

OSC is also responsible for enforcing the Hatch Act, including investigating and prosecuting complaints alleging violations of the Act, and providing advisory opinions on the Act's requirements.

The Hatch Act Unit, staffed by a Chief and four staff attorneys, is responsible for a nationwide program that provides federal, state and local employees, as well as the public at large, with legal advice on the Hatch Act. Specifically, the Hatch Act Unit has the unique responsibility of providing Hatch Act information and legal advice to White House staff, Congressional staff, the national press, senior management officials throughout the federal government, and state and local government officials. The Hatch Act Unit provides all of OSC's advisory opinions, which enable individuals to determine whether they are covered by the Act, and whether their contemplated activities are permitted under the Act.

The Hatch Act Unit also enforces compliance with the Act by receiving complaints alleging Hatch Act violations, conducting preliminary inquiries into complaint allegations and, where warranted, further investigating allegations or referring the complaints to OSC's IPDs for further investigation. Depending on the severity of the violation, the Hatch Act Unit will either issue a warning letter to the employee, attempt to informally resolve the violation, prosecute the case before the MSPB or send it to the IPD to prosecute before the MSPB.



There was an 8% increase in new advisory requests received, an increase of 75% of Disciplinary Actions obtained, and a 20% increase in Resignation from covered employment. There was also a 26% decrease in the end of fiscal year complaints that were pending. (**See Table 7**).

To further its advisory role, the Hatch Act Unit is very active in OSC's outreach program and conducted 17 outreach presentations in FY2004 to various federal agencies and employee groups concerning federal employees' rights and responsibilities under the Act. Many of these programs involved high-level agency officials. Also, the Unit attempts to informally resolve as many ongoing Hatch Act violations as possible without resorting to litigation.

OSC continued to issue advisory opinions on a broad range of issues in fiscal year 2005. For example, OSC issued guidance to the U.S. Department of Homeland Security regarding whether the prohibition against engaging in political activity while on duty or in the workplace applies to activity directed at the success or failure of political parties unique to Puerto Rico. OSC also issued guidance to the U.S. Department of Defense concerning the Hatch Act's application to federal employees in light of a Nebraska statute requiring registered voters to serve as election officials. In addition, OSC issued guidance about permissible and prohibited activity under the Hatch Act for federal employees interested in forming a political action committee.

#### **D. Hatch Act Disciplinary Actions**

Disciplinary action against state or local employees who were candidates in partisan elections. In one complaint a Transportation Engineer with a state agency was charged with running in the 2001 election for Southington Town Council, in violation of the Hatch Act. In another complaint a Home Care Supervisor with a New York City's agency was charged with violating the Hatch Act when he was a candidate in the 2004 election for New York State Assembly. In yet another case, a Child Support Enforcement Specialist with an agency in Hawaii was charged with being a candidate in the 2002 election for Hawaii State Representative, 35<sup>th</sup> District. Lastly, the Executive Director of a Lorain County agency was charged with violating the Hatch Act when he was a candidate in the 2004 primary election for Lorain County Commissioner.

Federal employees sending politically partisan electronic mail messages while on duty. One complaint was against a federal employee who sent an e-mail message to about 22 coworkers. The message contained a letter purporting to be written by John Eisenhower, son of former President Eisenhower that states, among other things: "... I intend to vote for the Democratic Presidential candidate, Sen. John Kerry"; "... the word 'Republican' has always been synonymous with the word 'responsibility' ... [t]oday's whopping deficit of some \$440 billion does not meet that criterion."; "Sen. Kerry, in whom I am willing to place my trust, has demonstrated that he is courageous, sober, competent ... I will vote for him enthusiastically ...." Prior to forwarding the above-referenced e-mail, she added the following statement: **"Some things to ponder....."**

The other complaint also concerned a federal agency employee who sent an e-mail message titled, "Your Vote," to 27 people. The e-mail states, among other things: "... our votes should be for

the party that stands firm on morally and ethically correct issues as written in the [B]ible”; “Kerry claims he has morals and ethics ... American society under Kerry’s command is frightening to even think about.” The e-mail then states “Pass along the ‘**I VOTE THE BIBLE**’ button” and includes a small picture of the button. In addition, there is a picture of President Bush in front of an American flag with the statement “**I VOTE THE BIBLE**” superimposed on the picture.

Engaging in political activity on behalf of a political party. OSC also filed a complaint for disciplinary action against a federal attorney with a federal agency, charging that he violated the Hatch Act when engaged in political activity on behalf of a political party while on duty in his government office (e.g., using his government office equipment to receive and send more than 100 e-mails, draft documents and have telephone conversations in support of a political party and its candidates).

Soliciting, accepting, receiving political contributions. OSC also filed a complaint for disciplinary action against a federal employee, charging that he violated the Hatch Act’s prohibition against soliciting, accepting or receiving political contributions. The employee was identified as the sender of a letter that was sent to approximately 144 people seeking political contributions for a local candidate, either by attending a reception or sending a check in an enclosed envelope. The candidate’s campaign committee sent the letter, but the federal employee was aware of and agreed to the contents of the letter before it was sent.

Engaging in political activity on behalf of a Congressional candidate. OSC also filed a complaint for disciplinary action against an employee with a federal agency, charging that he violated the Hatch Act by engaging in political activity on behalf of a Congressional candidate while on duty and in the federal workplace. The employee sent an e-mail to over 300 agency employees inviting them to attend a “meet the candidate” event for Congressional candidate Tim Holden.

### **Disciplinary Actions Obtained in FY2005:**

For example, in December 2004, OSC reached a settlement agreement with a state employee with a New York agency, who was charged with being a candidate in the partisan elections for Rochester City Council and New York State Senate, 56<sup>th</sup> District, in 2001 and 2002, respectively. As part of the agreement, the state employee admitted that she was covered by the Hatch Act and that she violated the Act in 2001 and 2002 by her candidacies in partisan elections. As a penalty for her violations of the Act, the employee agreed that she would resign from FLDDS effective January 7, 2005, and would not seek or accept employment with the State of New York for 18 months.

Also, in December 2004, the Merit Systems Protection Board found that a New Jersey state employee’s candidacies, in 2003 and 2004, for Member of the Board of the Chosen Freeholders in Cumberland County, New Jersey, violated the Hatch Act and that her removal was warranted.

Similarly, in February 2005, the Merit System Protection Board found that a civilian employee of a federal agency violated the Hatch Act, which warranted his removal, when he was candi-

date in the 2002 partisan election for the Maryland House of Delegates.

In March 2005, OSC reached a settlement agreement with the former Chief of Staff of a District of Columbia agency. The official was charged with violating the Hatch Act during a campaign rally on August 8, 2002, by specifically asking D.C. employees, many of whom were his subordinates, to volunteer to work on a reelection campaign. Additionally OSC's petition charged that, in or about May 2002, the official personally and/or through subordinates, solicited political contributions by asking individuals to purchase tickets to the Kennedy-King dinner, a political fundraiser for the District of Columbia Democratic State Committee. OSC filed its petition seeking his removal from the District of Columbia on July 9, 2004. He voluntarily resigned as Chief of Staff effective August 1, 2004. Under the terms of the settlement agreement, he agreed not to seek or accept employment with the District of Columbia for a period of two years, beginning August 1, 2004.

## **E. Disclosure Unit**

In addition to its investigative and prosecutorial mission, the OSC provides a safe channel through which federal employees, former federal employees, or applicants for federal employment may, under 5 U.S.C. § 1213(a), disclose information they reasonably believe evidences a violation of law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. At present, the Disclosure Unit staff is comprised of a Chief and five attorneys.

The Disclosure Unit is responsible for reviewing the information submitted by whistleblowers, and advising the Special Counsel whether it shows that there is a substantial likelihood that the type of wrongdoing described in § 1213(a) has occurred or is occurring. Where a substantial likelihood determination is made, the Special Counsel must transmit the disclosure to the head of the relevant agency for further action. The agency is required to conduct an investigation and submit a report to OSC describing the results of the investigation and the steps taken in response to the investigative findings. Under § 1213(e), the whistleblower is also provided with a copy of the report for comment. The Special Counsel is then required to review the report in order to determine whether it meets the requirements of the statute and its findings appear reasonable. Finally, the report is forwarded to the President and appropriate Congressional oversight committees.

In the Disclosure Unit, there was a 38% increase in the number of disclosures processed in less than 15 days, compared to the previous fiscal year. There was also a 6% decrease in the number of cases pending at the end of the fiscal year. (**See Table 8**).

The Disclosure Unit has handled several high profile cases that have received widespread national press attention. In addition, after the terrorist attacks of September 11, 2001, more federal whistleblowers came to OSC with national security allegations and concerns. Many cases handled by the Disclosure Unit involve complex issues; some involve classified material and must be handled according to federal requirements.

The Disclosure Unit's more complex cases are very labor-intensive and often require the attention of more than one attorney. These cases can take more than a year to complete for a number of reasons—agencies routinely request additional time to conduct the investigation and write the report, whistleblowers request additional time to prepare their comments, and Disclosure Unit attorneys and the Special Counsel must review the report to determine whether it contains the information required by statute, its findings appear reasonable, and to prepare any comments the Special Counsel may have on the report.

The following is a representative sample of cases that have been referred by the Special Counsel to the heads of the agencies pursuant to 5 U.S.C. § 1213(c) and closed after receipt and review of the agency report. Also included are summaries of cases that are presently under investigation by agency heads. In many cases, OSC's efforts have resulted in significant media coverage and reform efforts.

#### **Disclosures of Substantial and Specific Danger to Public Health and or Safety**

Airport Security Compromised. OSC referred to a federal agency allegations that the whistleblower observed numerous violations of Checked Baggage Standard Operating Procedures while working in the checked baggage area on a temporary assignment. Among other deficiencies, the whistleblower alleged baggage screeners were not performing thorough explosives detection inspections on checked luggage and contended that these violations compromise airport security and pose a substantial and specific danger to public safety.

The Transportation Security Administration's Office of Internal Affairs and Program Review investigated. The investigation did not substantiate the whistleblower's allegations. However, the investigators did substantiate additional allegations raised by the whistleblower during the course of the investigation. Specifically, they found that several of the baggage screeners assigned to the checked baggage area do not wear latex gloves when performing physical inspections of checked bags and many screeners neglect to wipe down ETD tables with isopropyl alcohol whenever a checked bag triggers an ETD alarm. *Referred March 2004; closed November 2004.*

Prisoners Provided Inadequate Medical Care. OSC referred allegations to the Attorney General that an agency in Tennessee, improperly reduced the number of hours worked by a contract psychiatrist and a contract laboratory technician. The whistleblower reported that, as a result of the decrease in psychiatric care, two psychiatric patients decompensated and attacked other inmates. The whistleblower also stated that the reduction in the lab technician's hours caused lengthy delays in the processing of laboratory results, which hindered his ability to provide his patients with adequate medical care.

The Attorney General delegated responsibility for the report to the director of the federal agency. The Director submitted a report to OSC on March 10, 2004, which OSC found deficient. OSC asked the Director to submit additional information, which he did on August 10, 2004. The additional investigation substantiated the allegations in part confirming that the changes the

whistleblower reported had taken place, but concluding that the inmates did not suffer harm as a result. The agency further found that, during the course of the investigation, an employee (or employees) provided misleading information to the investigators.

In his letter to the President and Congressional oversight committees, the Special Counsel stated that he was unable to conclude that the agency's findings regarding certain actions taken by the agency were reasonable. Whereas the agency report found that she offered acceptable justification for decreasing the laboratory technician's hours at a time when there was a backlog of lab tests, the Special Counsel found that this action unnecessarily jeopardized the health of the inmates. Therefore, the Special Counsel recommended that the agency take disciplinary action against her. *Referred December 2003; closed January 2005.*

Uncertified Tradesmen Performing Work on ships. As a follow-up to allegations referred in November 2001, OSC referred allegations to a federal agency that tradesmen in a number of different trades were not properly certified and performing noncompliant work at a federal agency in California. The whistleblower also alleged that unqualified welders at the agency improperly welded catapult hydraulic piping systems on the aircraft carrier USS Kitty Hawk.

The agency's Office of Inspector General investigated and substantiated the allegations of welding defects on the catapult hydraulic piping systems on the USS Kitty Hawk. In addition, the investigation partially substantiated the whistleblower's allegations regarding unqualified artisans. The investigation revealed that one employee, an Integrated Electronics Systems Mechanic, continued to solder after his certification had expired. The investigators found that the mechanic's supervisor was aware that he continued to work even though his certification had lapsed. However, the investigators did not find evidence that other artisans were working without the proper qualifications. The report noted that investigators found significant deficiencies in the electronic system the agency uses for tracking employees' certification status.

The report noted the corrective and disciplinary actions taken: (1) the agency completed repairs to the USS Kitty Hawk's catapults during the week of November 22, 2004; (2) agency management took disciplinary action against the mechanic and plans to pursue disciplinary action against his supervisor; and (3) the agency plans to implement several improvements to its training and recertification programs. The Special Counsel determined that the agency report contained the information required by statute and the findings appear reasonable. *Referred December 2003; closed May 2005.*

Aviation Mechanics Working with Suspect Certificates—Federal Agency Improperly Halted Reexamination. OSC referred allegations to the agency that: (1) in the Spring of 2001, management officials of the agency wrongfully cancelled a program to reexamine individuals who received A & P mechanic certificates from St. George Aviation under fraudulent conditions; and (2) from 1998 to 2001, agency management failed to adequately staff the AirTran Certificate Management Unit (CMU), which monitors air carriers to ensure compliance with aviation safety regulations and procedures.



The Agency's Office of Inspector General (OIG) investigated the allegations and substantiated them in part. First, the OIG substantiated the allegation that the agency should not have cancelled the reexamination program, and recommended that steps be taken to reexamine the remaining 1,228 mechanics who received certificates from St. George under suspect conditions. Subsequently, some of the suspect certificate holders challenged the legality of the reexamination program. The U.S. District Court for the Middle District of Florida issued a preliminary injunction stopping the reexaminations. The program has been suspended pending reconsideration of the injunction by the Eleventh Circuit Court of Appeals.

In regard to the staffing issue, the OIG found that "there were considerable staffing issues in the Orlando FSDO" from 1998 to 2001. However, the OIG did not find evidence that the staffing shortage in the AirTran CMU could be attributed to any deliberate act or omission by the Southern Region FSD managers, nor did it find that the shortage created a substantial and specific danger to public safety. Information provided by the whistleblowers and the OIG established that the shortage which existed from 1998 to 2001 has since been rectified, and the AirTran CMU, now classified as a Certificate Management Office, is currently adequately staffed.

The Special Counsel determined that the agency reports contain all the information required by statute and the agency's findings appear reasonable. However, the Special Counsel noted that he remained concerned that the reexaminations had not yet been completed, and recommended follow-up with the agency to determine the status of the litigation and the steps the agency is taking to complete the reexaminations. *Referred March 2003; closed June 2005.*

Cover-up of Operational Errors by Air Traffic Controllers and Managers. OSC referred to the agency allegations, disclosed by an air traffic controller, that managers and air traffic controllers at a Texas airport, routinely covered up and failed to investigate operational errors contrary to agency policy and directive. The Secretary tasked the Office of the Inspector General (OIG) with conducting the investigation.

The OIG substantiated the allegations finding for the past seven years agency management had failed to investigate operational errors resulting in the underreporting of errors. Management's practice was to ask controllers whether they had committed an error. If the controller responded in the negative, the inquiry ended. This reliance on self-reporting was at odds with agency's national policy which called for electronic playback of radar and voice communication recording to investigate suspected errors. The report stated that this local practice began in 1996; the manager responsible has since retired. The report noted that the failure to detect this improper practice for seven years called into question the management oversight of agency's Southwest Region and some elements in headquarters. The report further noted that during the first six months of 2004, prior to the OIG investigation, two operational errors were noted. In contrast, after OIG's investigation and the subsequent implementation of the playback review, the agency reported 36 confirmed operational errors 2004 to December 2004, with 28 classified as moderately severe.

The agency took corrective actions which the Secretary stated represent progress toward preventing future underreporting. The agency 1) directed that the Texas airport follow the national

policy for the reporting and investigating operational errors; 2) took remedial personnel actions against all personnel, air traffic controllers as well as management officials, involved in the cover up of operational errors; and 3) placed the facility on “no-notice” review status for two years so it will be subject to close oversight by headquarters quality assurance officials. Finally, the whistleblower received the Special Counsel’s Public Servant Award for the considerable efforts and contribution to air traffic safety. *Referred May 2004; closed June 2005.*

Mistreatment of Agency Psychiatric Patients. The whistleblowers, two agency psychiatrists, alleged that their colleague, an agency psychiatrist, intentionally misdiagnosed numerous agency mental health patients and overprescribed certain medications, thereby creating a substantial and specific danger to public health. They alleged that the psychiatrist diagnosed a disproportionate number of patients with bipolar disorder and subsequently subjected these patients to an inappropriate treatment protocol consisting of risky antipsychotic and anticonvulsant medications and, often, the discontinuation of much-needed antidepressant medications.

The agency’s Office of Inspector General (OIG), with the assistance of another federal agency, investigated the whistleblowers’ allegations and found them to be unsubstantiated. The report stated that there was no evidence that the subject psychiatrist was prescribing inappropriately or endangering patients; however, the investigators did find significant interpersonal conflicts among the psychiatric staff. OSC reviewed the report and informed the OIG that it contained several deficiencies. The OIG submitted a supplemental report, which OSC also found to be deficient. In OSC’s transmittal letter to the President and Congress, the Special Counsel found the agency reports deficient on the grounds that the agency did not allow the whistleblowers an adequate opportunity to present their allegations to the investigators, the agency reports did not adequately address several of the issues OSC referred for investigation, and the agency failed to take appropriate corrective and/or disciplinary action in response to the investigation’s findings. *Referred March 2004; closed July 2005.*

Inadequate Food Inspections. OSC referred allegations to a federal agency that two agency food inspectors at a plant in North Carolina, performed their job duties in a negligent manner, creating a danger to public health. The whistleblower alleged that one inspector frequently fell asleep on the job and that the other regularly listened to music on headphones, danced, and conversed with other employees. The whistleblower maintained that, as a result, both inspectors allowed several chickens to pass their station every day without adequate inspection. The whistleblower informed the supervisor, Supervisory Veterinary Medical Officer and Inspector-In-Charge, but stated that he did not take any steps to correct the problem.

The agency investigated the whistleblower’s allegations and substantiated them in part. The investigation substantiated the whistleblower’s allegation that one inspector falls asleep at work, but it did not substantiate the remaining allegations concerning the other inspector or the supervisor. *Referred March 2004; closed August 2005.*

Inadequate Safety Systems on the Space Shuttle. OSC referred to the Administrator of a Federal agency allegations that the system the agency planned to use to inspect the Space Shuttle

Discovery's Thermal Protection System (TPS) while in orbit relied on inadequate, low-resolution cameras. The whistleblower contended that these cameras were incapable of detecting small breaches in the TPS that could prove catastrophic upon space shuttle's reentry into the Earth's atmosphere. In a series of three reports, the agency maintained that imaging systems upon which it planned to rely were superior to the high-resolution imaging system previously recommended by an agency working group because, unlike those high-resolution systems, they could measure the depth of suspected damage to the TPS. The whistleblower disputed the agency's findings and provided technical documentation to support his critique of the agency's TPS inspection systems. According to the whistleblower, "agency managers [were] aware of the issues [he identified], but . . . elected to ignore these concerns and fly the Space Shuttle with systems that are known to be faulty and inadequate." Despite the compelling critique presented by the whistleblower, however, OSC was unable to conclude that the agency's findings were unreasonable because the agency's selection of inspection systems appeared to have been based on a legitimate selection criterion, *i.e.*, the need to measure the depth of damage to the TPS. *Referred February 2005; closed September 2005.*

#### **Disclosures of Violations of Law, Rule or Regulation and Gross Mismanagement**

Violation of Security Regulations at Agency Facility. OSC referred allegations to the Secretary of the agency that a lead dispatcher violated security procedures and regulations by admitting individuals to highly sensitive areas of the agency solely on voice recognition. The whistleblower alleged that the dispatcher instructed other employees to admit individuals on voice recognition and that he frequently turned off the National Crime Information Center (NCIC) printer in the agency's Communication Center preventing the agency from receiving contemporaneous information on security threats and criminal activity from law enforcement agencies and the Department of Homeland Security. Finally, the whistleblower alleged that the dispatcher made violent and threatening statements to the whistleblower and other employees.

The agency's investigation partially substantiated the whistleblower's allegations finding that the dispatcher failed to follow the regulations for admitting individuals in violation of agency regulations. The investigation found that there were other employees who did not follow the proper procedures, but did not substantiate the allegation regarding the printer. Finally, the report stated that there were significant concerns with the dispatcher's behavior prior to OSC's referral. The agency was in the process of suspending him for incidents which occurred in 2003; due to additional information discovered in this investigation his suspension was expedited.

In response to the investigation, the agency ordered refresher training on access procedures for protected areas and on the proper operation of the NCIC printer. Due to the severity of his conduct, the subject dispatcher was suspended for 30 days without pay, ordered to attend counseling, and was reassigned to a different squad. The title and duties of lead dispatcher were revoked from personnel to eliminate the perception that lead dispatchers exercised special authority. All employees were required to attend training on the consideration of others and the prevention of sexual harassment.



The agency also made significant management changes undertaking a comprehensive reorganization which included converting the position of Chief, Agency Operations Division, from a military to a civilian position and hiring a civilian supervisor. The supervisor and Agency Operating Division Chief in place during this investigation were stripped of their responsibilities and under the reorganization will not hold supervisory positions. *Referred May 2003; closed May 2005.*

Management Involvement in Kickback Scheme Excused by Agency. The whistleblowers disclosed to OSC that numerous employees of a federal agency, including some management personnel, were engaged in extensive kickback and fraudulent reimbursement schemes in violation of federal law. The whistleblowers initially made a disclosure to the agency's Office of Inspection General (OIG), and the OIG published a report substantiating many of their allegations. The OIG recommended that the agency take "strong and immediate action" against the employees involved in the wrongdoing. Nearly a year after the OIG made its recommendation, however, OSC discovered that the agency decided to forego disciplinary action. Given the OIG's recommendation, the evident seriousness of the wrongdoing identified in the OIG report, and agency's refusal to take disciplinary action, OSC referred the whistleblowers' allegations to the Secretary of the agency for formal investigation by the agency.

The agency filed two reports with OSC detailing its investigation into the whistleblowers allegations. These reports uncritically accepted the assertions of management personnel that they were unaware of any wrongdoing. The agency's reports reflected a failure to take any disciplinary action against upper-level managers involved in wrongdoing and flouted OSC's request that the whistleblowers be interviewed regarding their allegations. OSC found unreasonable the agency's contention that forty-five employees at a single agency station were engaged in a pattern of conduct sufficiently egregious to warrant severe discipline without the knowledge of management. In addition, OSC observed that the agency did not avail itself of all reasonably available information in the course of its investigation. OSC's analysis of the agency's reports concluded, therefore, that the agency's investigation of management appeared pretextual, at best, and that the agencies involved "failed to conduct a *thorough* investigation." In response to the press coverage generated by this analysis, the agency publicly committed to thoroughly reinvestigate the whistleblowers' allegations. *Referred November 2003; closed May 2005.*

Contract Fraud. The whistleblower, a Public Utility Specialist at a federal agency, alleged that contracts between the agency and a contractor did not comply with agency guidance, were not reasonable, and that the contractor was paid for projects not performed. OSC referred the allegations to the agency for investigation; the agency tasked the Internal Audit Division with conducting the investigation and writing the report. The agency partially substantiated the whistleblower's allegations finding that while no laws, rules, or regulations were violated, there were several deviations from agency policy and procedure by the Contracting Officer (CO) and the Contracting Officer's Technical Representative (COTR), including, among other things, the failure to document the decision for the initial contract, maintain contract files and properly document contract modifications, and negotiating contract modifications without the knowledge or consent of the CO.

The agency took several actions to assure better compliance with agency procurement policies and procedures, including developing a COTR training and certification program. In investigating these allegations, the agency found deviations on other contracts. OSC found that the agency's report contained all of the information required by statute and that its findings appeared to be reasonable. *Referred October 2004; closed September 8, 2006.*

## **F. USERRA Referrals**

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301 et seq., as amended, protects the employment and reemployment rights of persons who perform uniformed services. USERRA prohibits discrimination against any person because of his or her service in the uniformed services and sets forth the employment and reemployment rights of persons who are absent from their federal employment due to the military service.

Under USERRA, an aggrieved person ("claimant") may choose to file a USERRA complaint with Department of Labor (DOL), Veterans' Employment and Training Service (VETS). VETS investigates the complaint and tries to resolve meritorious complaints.

OSC is the prosecutor of federal sector USERRA claims. Thus, if VETS is unsuccessful in resolving a claim involving a federal employer, the claimant may request that VETS refer the complaint to OSC. If the Special Counsel believes there is merit to the complaint, OSC may initiate an action before the U.S. Merit Systems Protection Board and appear on behalf of the claimant.

At the start of FY2005, the OSC had 12 pending USERRA cases. In FY2005, the OSC received 30 referrals from the Department of Labor. Six USERRA referrals were pending at the end of FY2005. (**See Table 9**).

On December 10, 2004, President Bush signed into law the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, which changes the manner in which certain federal sector USERRA claims are investigated. Starting on February 8, 2005, pursuant to a demonstration project established by section 204 of the VBIA, OSC rather than VETS will investigate USERRA claims filed by federal employees (and applicants for federal employment) whose social security number ends in an odd-numbered digit. In addition to those claims, OSC will receive and investigate all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction.

Under the demonstration project, VETS will continue to investigate even numbered claims that do not include a related prohibited personnel practice allegation. VBIA does not change the manner in which non-federal sector USERRA claims (*i.e.*, those involving state and local governments and private employers) are received and investigated by VETS. Likewise, OSC will continue to perform its prosecutorial function under the demonstration project.

Given OSC's new investigative responsibility, the Special Counsel established a USERRA Unit within OSC. The USERRA Unit serves as the intake, investigative, and prosecutorial unit for all matters received by OSC that directly concern or relate to federal employment issues affecting veterans and service members specifically including the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301, et seq.

The USERRA Unit's primary function is to review allegations of violations of USERRA occurring in the federal sector and determine if further investigation is warranted. If warranted, the USERRA Unit conducts the investigation, makes legal determinations as to whether corrective and disciplinary action is warranted, and resolves meritorious cases through settlement or, if necessary, prosecution before the MSPB. The USERRA Unit also provides technical assistance and information about USERRA to employees and employers in the federal and non-federal sectors via a telephonic and web-based hotline.

The USERRA Unit is composed of three investigators, two attorneys, and one administrative assistant. It is headed by a supervisory attorney, who reports to the Specials Project Unit Chief. A clerk is also assigned to the USERRA Unit. It is anticipated that the USERRA Unit will receive approximately 150 USERRA cases per year.

Under the demonstration project, in FY2005, of the total referrals received, 51% were closed; corrective action was received for 28% of these closed cases (see **Table 10**).

It is the sense of Congress that the Federal government is to be a model employer when carrying out its responsibilities under USERRA. The Special Counsel agrees with that goal and intends for the USERRA Unit to enforce USERRA zealously.

#### *Synopsis of Corrective Actions Obtained by OSC in FY2005*

Claimant, a commissary store worker alleged that the agency violated USERRA by failing to extend her term appointment, which had expired while she was on military duty and for which she reasonably expected to receive an extension. OSC successfully obtained full corrective action for claimant, namely: eight weeks of back pay.

Claimant, a full-time staff nurse serving under a temporary appointment, alleged that the agency violated USERRA by terminating her employment because she was excessively absent from the work place due to her military service obligations. The agency had taken the position that claimant's position was not covered under USERRA. USERRA's antidiscrimination provisions, however, cover all types of appointments. OSC filed an action before the MSPB and successfully obtained full corrective action for claimant, namely: back pay (approximately \$53,000 ); the expunging of all negative documentation relating to her termination; and issuance of an SF-50 reflecting that claimant resigned from the agency. Additionally, the agency agreed to undergo USERRA training.

Claimant, a GS-10 Electronics Technician, alleged that his employer, a federal agency, failed to grant him a career ladder promotion while he was absent for 12 months due to military service. The evidence indicated that the agency routinely promoted technicians to the GS-11 level after approximately 12 months of service at the GS-10 level. Because the agency's practice was, in essence to promote automatically to the GS-11 level simply after satisfaction of 12 months time-in-grade at the GS-10 level (i.e., much like a within grade increase of salary) and because there was no issue concerning the claimant's performance, OSC successfully persuaded the agency that a failure to promote complainant effective the date he would have been in the position for 12 months but for his military service was a violation of USERRA. The agency agreed and promoted complainant retroactively, granted back pay, and made up TSP contributions.

Claimant alleged that he was offered and accepted a law enforcement position with a federal agency. When the agency gave claimant an entry on duty (EOD) date, claimant informed the agency that he could not start on such date because of military service. In response, the agency said it would delay his employment until he returned from military service. When he returned from military service, claimant told the agency about an incident of alleged misconduct that occurred while he was on military service. The incident was one that required the agency to conduct a background check before the agency would allow the claimant to start his employment. The agency investigated the matter, cleared claimant, and hired him to the position it had offered initially. OSC determined that the agency violated USERRA by failing to place claimant on the rolls at the initial EOD date and placing him in an LWOP status. Had the agency done so, there would not have been a delay in hiring claimant while it investigated the alleged misconduct. Under the terms of the settlement, the agency adjusted claimant's EOD date to when he would have started at his new, higher graded position but for his military service and paid a lump sum amount reflecting the difference in salary he would have earned upon return from military service given the new EOD date.

Claimant had been accepted into a federal agency's 16-week Associate Supervisory training program (ASP). Enrollees who successfully complete the ASP are noncompetitively promoted to supervisory positions. Over the first eight weeks of the ASP, claimant earned excellent performance evaluations and attained a grade point average of 3.65 on a 4.0 scale. While enrolled in the ASP, however, claimant performed reservist duties and was absent from employment and unable to attend the ASP on Saturdays. The agency expressed concern over the fact that claimant's military duties caused him to miss the ASP every Saturday. Moreover, the agency believed there would be an undesirable adverse affect on agency morale when claimant, after completing the program, would be assigned to a junior supervisory position but would be unavailable to work on Saturdays—as is expected of new supervisors—because of his reservist duty. Thus, it decided to dismiss claimant from the ASP. Because the evidence established that claimant's military service obligations were a substantial and motivating factor in his dismissal from the ASP, OSC determined that the agency violated USERRA. OSC filed a USERRA action before the MSPB and successfully resolved the case with claimant accepting a large cash settlement.

Claimant was appointed by a federal agency to a 90-day term. In part, claimant's job entailed the lifting of heavy packages. Soon after starting his temporary employment, claimant notified the

agency that he would be absent from work to perform military service. While performing military duty, Claimant suffered a shoulder injury. Although he returned to work and attempted to perform the duties of his civilian job, he was unable to do so. Claimant informed the agency and, in response, the agency informed him that he was being fired because of his non-agency injury. OSC determined that the agency violated USERRA by prematurely terminating his term appointment rather than finding him suitable alternative employment. OSC filed suit and the case settled with the agency awarding full back pay to claimant and issuing agency documentation reflecting that claimant completed his 90-day term appointment. The agency also agreed to undergo USERRA training.

## **G. Outreach Program**

The Outreach Program assists agencies in meeting the statutory mandate of 5 U.S.C. § 2302(c). This provision requires that federal agencies inform their workforces about the rights and remedies available to them under the whistleblower protection and prohibited personnel practice provisions of the Whistleblower Protection Act, in consultation with the OSC.

In an effort to assist agencies in meeting the statutory requirement, OSC designed and created a five step educational program, the 2302(c) Certification Program. This program gives guidance to agencies and provides easy-to-use methods and training resources to assist agencies in fulfilling their statutory obligation. Agencies that complete the program receive a certificate of compliance from OSC.

Finally, OSC has continued its policy of issuing press releases when OSC files a significant litigation petition, or achieves significant corrective or disciplinary action through settlement. Most of these generate considerable press coverage, sometimes nationally, and often in trade and local press on individual cases, which contributes greatly to employee and manager awareness of the merit system protections enforced by OSC.

OSC personnel presented 42 outreach programs during FY 2005. OSC performed more outreaches in FY 2004, partly because FY 2004 was an election year. In addition, some agencies are using the improved educational materials on OSC's website and doing their own internal education programs. In FY 2005, OSC signed an agreement with the federal GoLearn project, which makes outreach style training available online for the federal workforce.

Also during FY 2005, OSC's USERRA unit created a full stand-alone USERRA presentation for use in outreach. USERRA used to be mentioned as a subsection of the Prohibited Personnel Practice presentation.

Significant outreach events this past year were the Federal Dispute Resolution (FDR) conference in August and the Office of Government Ethics (OGE) national conference in September. At FDR, OSC presented on Prohibited Personnel Practice law, Disclosure law, and USERRA. At OGE, we presented on the Hatch Act and Prohibited Personnel Practices.



### **III. Fiscal Year 2007 Budget Request**

OSC is requesting \$15,937,000 – an increase of \$612,000 over its FY2006 appropriation of \$15,325,000. The increase for FY 2007 is not for any increased FTE or additional programs. The increase is simply to pay the salaries and benefits of the current employees of the agency during FY 2007, given the large salary increases of FY 2005 and FY 2006, and the projected salary increase of 2.2% in FY 2007.

OSC has been successful in hiring excellent staff and the agency will operate with 110 employees during most of FY 2006. The agency needs to continue with 110 employees during FY 2007 to manage and process the agency's elevated workload (since FY2000) of prohibited personnel practice complaints, whistleblower disclosures, Hatch Act complaints, Hatch Act cases, Hatch Act advisory opinions, and USERRA referral cases in a manner that precludes the formation of case backlogs, and to investigate all USERRA cases referred to OSC by the Department of Labor under the Demonstration Project set forth under the Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, § 204, 118 Stat. 3606 (VBIA). Continuing with 110 employees will also enable OSC to continue reducing case processing times. Below are explanations of FTE usage in OSC's case processing units.

Other notable increased expenses for OSC include the higher cost of OSC's existing headquarters rented space and field office rented spaces (average increase is 3%), higher cost of accounting and procurement activities outsourced to BPD (71% increase over FY 2006 projection), the higher cost of legal information services (11% increase), and an additional \$19,000 required for mandatory security charges payable to DHS. An additional \$31,000 will also be needed for Microsoft Enterprise Software Licenses. As the agency operates with more employees than it has in the past, a marginal increase in expenditures for supplies, travel, equipment, and other services can be expected.

#### **Disclosure Unit:**

High numbers of disclosures continue to be filed with the Disclosure Unit. The Unit's caseload numbers have been high in the last few years due to the nation's understandably acute focus on national security and defense during this time of military action. But the more definitive driver of the recently increasing caseload seems to be the high profile national press coverage received for a large number of Disclosure Unit cases. Part E of Section II shows examples of these cases. OSC's Disclosure Unit currently has 6 attorneys and a portion of a clerical position. OSC will continue to monitor the incoming disclosure levels and processing times, and may transfer an additional employee into the unit to improve compliance with statutory time requirements for determinations of substantial likelihood.

#### **USERRA Unit:**

As the Army Reserve, Marine Corp Reserve, Naval Reserve, Air Force Reserve, and the National Guard are mobilized and demobilized in vast numbers, OSC's vigorous enforcement of the Uniformed Services Employment and Reemployment Act becomes a very important aspect of

supporting the country's armed forces (see Special Counsel Bloch's testimony to the VA Committee).<sup>15</sup> During FY 2005, OSC for the first time filed a USERRA case before the Merit Systems Protection Board. But the vast majority of times the offending agency will settle rather than risk losing to OSC before the Board. It has become evident that the vigor of OSC's forceful focus in protecting the rights of members of our armed forces under USERRA is itself increasing the numbers of such complaints being filed with OSC. One example of a high profile USERRA case is that of Kaplan.<sup>16</sup>

Congress has recognized OSC's commitment to dynamic USERRA enforcement by passing the Veteran's Benefit Improvement Act (VBIA) of 2004, Pub. L. No. 108-454, § 204, 118 Stat. 3606, which creates a Demonstration Project which gives OSC responsibility to investigate half of the Federal sector USERRA claims over three years (those in which the claimant has an odd-numbered social security number). These claims would normally have been investigated by the Department of Labor.

#### **Hatch Act Unit:**

During FY 2005, OSC's Hatch Act Unit increased filings of disciplinary action cases with the Merit Systems Protection Board. Several of these cases involve high-profile federal employees, and generated significant press coverage which further contributes to awareness of the Hatch Act among the Federal workforce. The 11 disciplinary action complaints filed during FY 2005 was a 57% increase from FY 2004. The eight disciplinary actions obtained (through negotiation or ordered by the board) was 300% higher than FY 2004. There has also been an increase in the number of alleged violations receiving field investigations, either from the Hatch Act Unit, or with assistance from OSC's field offices. OSC recently detailed an additional experienced attorney to its Hatch Act Unit for one year, to work on the caseload. Besides adding case processing firepower, this furthers the cross-training goals of the agency. The unit has five full time attorneys and a clerk.

#### **Investigation and Prosecution Division:**

When analyzing the number of Prohibited Personnel Practices processed in the last few years, FY 2004 should be isolated as an outlier year, due to the effects of the intense backlog reduction effort. OSC processed 1,774 complaints during FY 2005, which was 2.4% above the 1,732 complaints processed during FY 2003. In the outlier year FY 2004, OSC processed 2,093 PPP complaints, which was approximately 20% higher than the amounts processed during each of the Fiscal Years 2003 and 2005.

Also due to the 18-month backlog reduction and the Special Counsel's lowered bar for referral during this time, FY 2004 and FY 2005 both saw an increase in the number of complaints referred for field investigations by the agency's Investigation and Prosecution Division. PPP referrals in FY 2004 were 244 (an increase of 51% over FY 2003) and PPP referrals in FY 2005 were 198 (an increase of 22% over FY 2003).

The third effect of the backlog reduction on FY 2005 statistics was in the percent of complaints processed in less than 240 days. Due to the elevated number of cases that were referred to OSC's Investigation and Prosecution Division for full investigations during both FY 2005 and the latter half of FY 2004, it took the IPD longer to investigate, settle, or prosecute these cases. The effect of this increase in complex internal referrals is seen in the FY 2005 statistics, which show the overall percentage of PPP claims processed in under 240 days to be 67.5%, down from 86% in the previous year.

OSC expects this percentage to go up during FY 2006, provided the agency maintains current staffing levels.

### **Budget Factors:**

The agency is experiencing increased salary and benefit costs, transit subsidy increases, more expensive financial audits, increased costs under an interagency agreement for receipt of administrative services, increased security charges from DHS, increased software license agreement fees, and increased rent payments to GSA. Salaries and benefits make up approximately 86% of OSC's operating expenses for FY2005, so the agency has little ability to reprogram funds to salaries and benefits from other object classes.

The agency requests 110 FTE during FY 2007 to properly manage OSC's statutory responsibilities in the face of elevated volumes of complaints, cases, and advisory opinions, and to continue reducing process delays.

### **Fiscal Responsibility:**

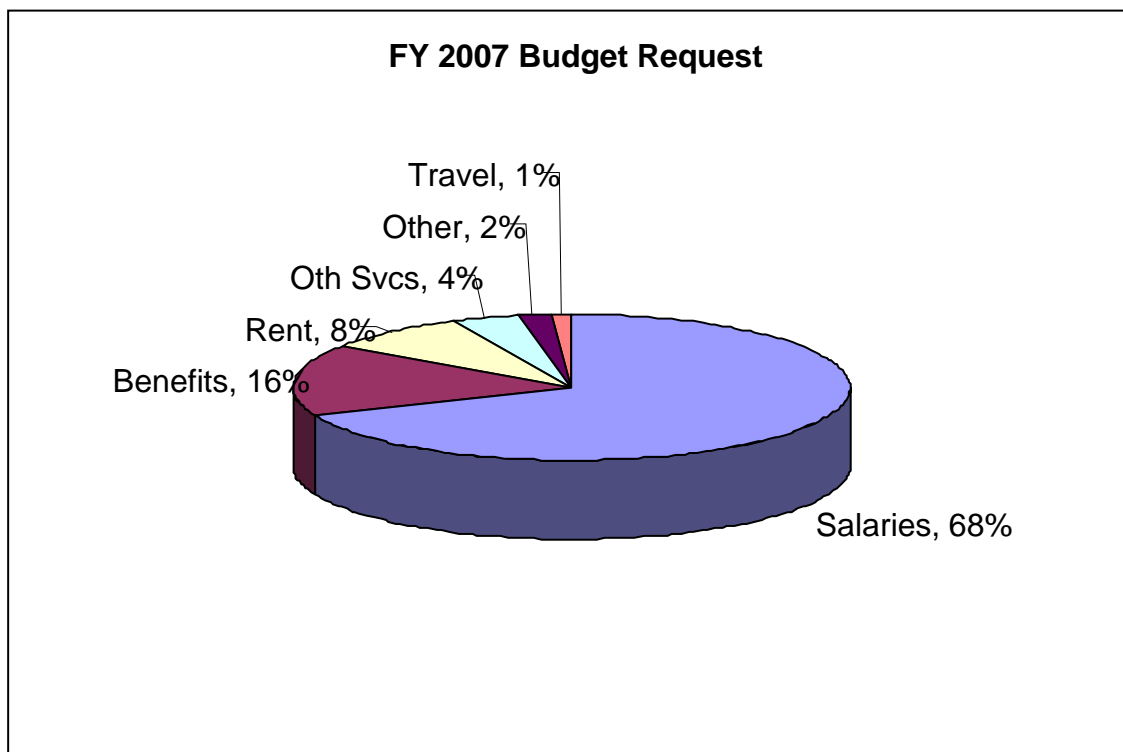
In order to operate during FY2007 within the requested funding levels, OSC has made the following adjustments in order to fund the salary and benefits for 110 FTE.

1. Based on changing needs, OSC revised its IT implementation plan. The FY 2007 request reflects the following adjustments: 1) planned expenditures on the document management system have been adjusted downward, and 2) hardware and software life cycle replacements and case tracking web application development have been rescheduled. Funding has been reallocated to support salaries and benefits of the 110 FTE needed by the agency.
2. The OMB-mandated conversion of the agency's infrastructure (network backbone) to Internet Protocol Version 6 (IPv6) will receive partial funding. All agency networks must interface with this infrastructure by June 2008. Funding has been reallocated to support salaries and benefits of the 110 FTE needed by the agency.



**Components of Budget Request:**

The following chart shows how the FY2007 request will be distributed on a percentage basis:



**Estimated Field Office Expenditures in FY 2007:**

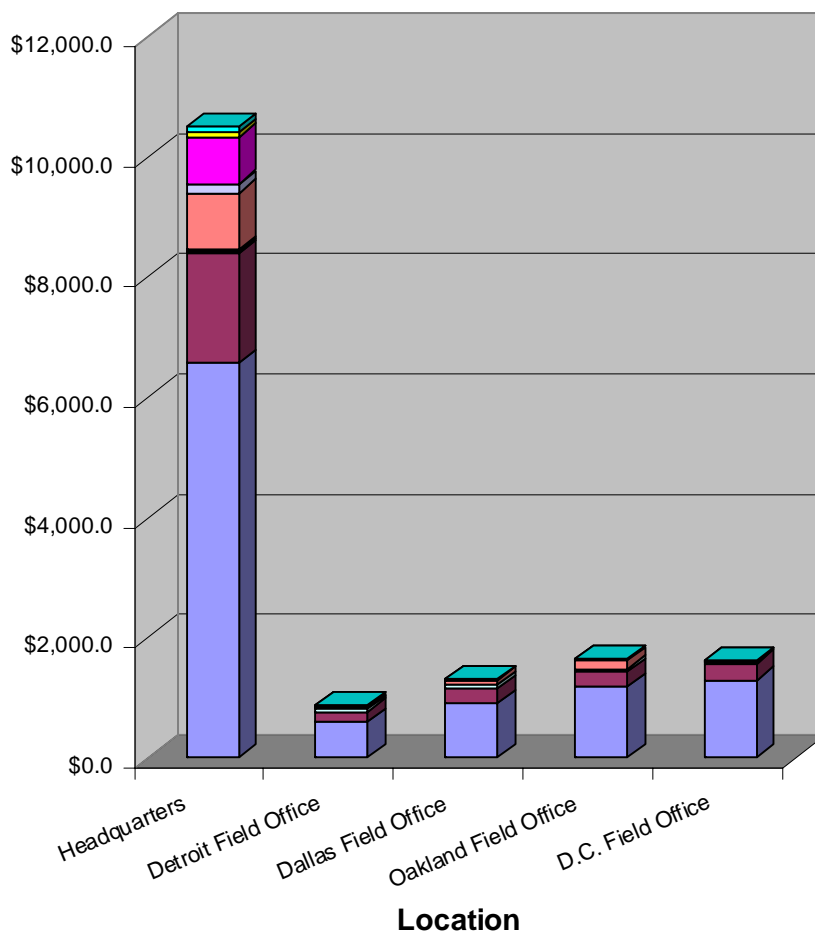
OSC has made estimates of the expenditures that its field offices will be making during FY 2007. These estimates will certainly be refined as FY 2007 approaches, but they are a place to start to see the approximate costs of maintaining OSC's headquarters and field offices.

The field office expenditure estimates are based on the following assumptions for the number of FTE at OSC's headquarters and field offices. It is important to note that these FTE estimates for each office are subject to change slightly up or down as operating plans are tactically adjusted during the year in order to properly meet the management needs of the agency.

|                                     |               |
|-------------------------------------|---------------|
| Headquarters                        | 71 FTE        |
| Midwest Field Office                | 7 FTE         |
| Dallas Field office                 | 10 FTE        |
| San Francisco Bay Area Field Office | 10 FTE        |
| Washington DC Field Office          | <u>12 FTE</u> |
|                                     | 110 FTE       |

|   |  |                                     |                                    |                                     |                                  |                  |                   |
|---|--|-------------------------------------|------------------------------------|-------------------------------------|----------------------------------|------------------|-------------------|
|   |  |                                     |                                    |                                     |                                  |                  |                   |
| <b>FY 2007 Projected Operating Plan</b>           |  |                                     |                                    |                                     |                                  |                  |                   |
| <b>by Budget Object Classification and Office</b> |  |                                     |                                    |                                     |                                  |                  |                   |
| <b>(projections as of January 2006)</b>           |  |                                     |                                    |                                     |                                  |                  |                   |
| <i>(in thousands of dollars)</i>                  |  |                                     |                                    |                                     |                                  |                  |                   |
|   |  |                                     |                                    |                                     |                                  |                  |                   |
| <b>Budget Object Classification</b>               | <b>Headquarters</b>  | <b>Detroit<br/>Field<br/>Office</b> | <b>Dallas<br/>Field<br/>Office</b> | <b>Oakland<br/>Field<br/>Office</b> | <b>D.C.<br/>Field<br/>Office</b> | <b>Total</b>     |                   |
| 11.0  | Personnel compensation                                       | \$6,576.0                           | \$589.0                            | \$918.0                             | \$1,185.0                        | \$1,294.0        | \$10,562.0        |
| 12.0  | Civilian personnel benefits                                  | 1,832.5                             | 178.5                              | 243.0                               | 241.0                            | 280.0            | 2,775.0           |
| 13.0  | Benefits to former personnel                                 | 15.0                                | 0.0                                | 0.0                                 | 0.0                              | 0.0              | 15.0              |
| 21.0  | Travel and transportation of persons                         | 27.0                                | 38.0                               | 45.0                                | 56.0                             | 27.0             | 193.0             |
| 22.0  | Transportation of things                                     | 14.0                                | 0.0                                | 0.0                                 | 0.0                              | 0.0              | 14.0              |
| 23.1  | Rental payments to GSA                                       | 941.0                               | 48.0                               | 89.0                                | 139.0                            | 0.0              | 1,217.0           |
| 23.2  | Rental payments to others                                    | 0.0                                 | 0.0                                | 0.0                                 | 0.0                              | 0.0              | 0.0               |
| 23.3  | Communications, utilities and misc. charges                  | 142.8                               | 0.4                                | 0.4                                 | 0.4                              | 0.0              | 144.0             |
| 24.0  | Printing and reproduction                                    | 15.0                                | 0.0                                | 0.0                                 | 0.0                              | 0.0              | 15.0              |
| 25.0  | Other services   | 769.0                               | 8.0                                | 9.0                                 | 7.0                              | 7.0              | 800.0             |
| 26.0  | Supplies and materials                                       | 75.5                                | 3.5                                | 5.0                                 | 5.0                              | 0.0              | 89.0              |
| 31.0  | Equipment  | 91.0                                | 6.0                                | 6.0                                 | 6.0                              | 4.0              | 113.0             |
| <b>99.9</b>                                       | <b>Total</b>   | <b>\$10,498.8</b>                   | <b>\$871.4</b>                     | <b>\$1,315.4</b>                    | <b>\$1,639.4</b>                 | <b>\$1,612.0</b> | <b>\$15,937.0</b> |
|   | Approximate full-time equivalent employment (FTE) work years | 71                                  | 7                                  | 10                                  | 10                               | 12               | 110               |

### FY 2007 Projected Operating Plan by Budget Object Classification and Office *(in thousands of dollars)*



- Equipment
- Supplies and materials
- Other services
- Printing and reproduction
- Communications, utilities and misc. charges
- Rental payments to others
- Rental payments to GSA
- Transportation of things
- Travel and transportation of persons
- Benefits to former personnel
- Civilian personnel benefits
- Personnel compensation

In the FY 2006 appropriation HR 3058, in the committee report language for the U.S. Office of Special Counsel, there was a committee recommendation for OSC to track budget object class expenditures by field office and headquarters in addition to its normal accounting by overall budget object class. OSC will adhere to this suggestion and will institute accounting procedures to track budget object class expenditures by field office in FY 2006. Further, OSC will communicate with the House and Senate when the agency's required expenditures will differ materially from the baseline amounts for each field office.

One of the effects of this added requirement of geographic accounting is more accounting labor required by OSC and by the outsource partner that performs much of OSC's accounting. OSC requests that detailed geographical allocations of this type be omitted from the FY 2007 budget for OSC.

#### **IV. Performance under the President's Management Agenda**

OSC has developed a results-oriented, cost-effective management agenda that includes many of the core criteria in the President's Management Agenda. These initiatives are also consistent with OSC's Government Performance and Results Act planning and assessment efforts.

##### **A. Strategic Management of Human Capital**

OSC's human capital strategy is integrated into the budgetary planning and the strategic planning of the agency. OSC has revised its performance goals and associated performance measures in order to be more outcome oriented and more measurable. Success in the aggressive targets set for these new goals can only be brought about with effective management of human capital. Further, OSC has internal accountability systems to ensure effective merit-based human resource management as described below.

OSC uses existing personnel flexibilities and tools, including leave flexibilities, alternative work schedules, and a telework pilot program. The agency's new Student Loan Repayments / Retention Program was successfully implemented in the summer of 2005. The agency is addressing gaps in competence and talent through such programs as: upward mobility positions, legal internships, in-house mission-specific training, and the hiring of additional personnel.

OSC has developed extensive documentation of agency procedures in division operating manuals, memos, statements of agency policy and strategic plan. The majority of the agency's manuals and directives have been updated or completely revised in the last year. OSC also captures valuable information and ideas of departing employees through extensive exit interviews. This information is used by senior managers to refine and improve work processes.

OSC's performance management systems allow managers to differentiate between high and low performers through the use of appropriate incentives and consequences. Performance plans are in place for SES members and managers that link to agency mission, goals and outcomes.

In FY 2005, OSC furthered its strategic management goals by reorganizing, creating a Midwest field office, creating a USERRA Unit, a Training Unit, a Customer Service Unit, and a Document Control Branch. OSC also set agency and division goals for continued control of backlogged cases and the age of cases. OSC also measured the performance of each individual, and is working on creating individual case processing targets for attorneys and investigators.

***B.                    Competitive Sourcing***

OSC is a small agency, with a highly specialized inherently government mission with 84% of its FTE perform inherently governmental work, and 16% of its FTE are considered commercial in nature. According to OMB Circular A-76 and supplemental guidance issued by OMB, government performance of commercial functions is permitted when, as is the case at OSC, the position activity total is 10 FTE or less.

However, while OSC is small enough that this guidance may exempt a large proportion of OSC's administrative functions that are commercial, OSC is dedicated to the intent of the principles of

cost-effective performance of all commercial functions, and OSC's plans for strategic management of human capital require that OSC senior staff and managers continually monitor and evaluate the productivity and cost of all functions performed, with the goal of focusing resources on OSC's mission operations. Thus, personnel resources used to perform any functions considered commercial at OSC are regularly assessed to determine whether they might be more effectively performed by a contractor. OSC has looked at this in particular in connection with a management assessment it commissioned in FY 2004.

OSC has an interagency agreement with Treasury Department's Bureau of the Public Debt (BPD) to perform certain accounting and procurement services. OSC reviews the BPD interagency agreement semi-annually to confirm the agreement is meeting OSC's needs. OSC also has an interagency agreement with the National Finance Center of the Department of Agriculture to perform payroll/personnel processing functions.

***C.                    Improved Financial Performance***

OSC contracts out certain work (financial accounting, reporting accounting, budget accounting, travel management, and certain aspects of procurement and payment operations) under an interagency agreement with the Bureau of Public Debt (BPD). OSC receives accurate and timely financial information concerning these functions from BPD. Contracting these functions out to BPD has provided OSC with more specialized expertise at a lower cost. But that is being reassessed in light of BPD's announcement of significant cost increases in 2006 and again in 2007. BPD provides OSC with a report on status of funds every pay period, and a detailed financial review every quarter. BPD also provides up-to-date financial information on day-to-day operations for payroll, procurement and travel, as needed by OSC.

As a small agency without an Inspector General, OSC generally submits a combined Inspector General (IG) Act and Federal Manager's Financial Integrity Act report each October. OSC's last report, submitted in October 2005, reported that OSC relies on audits and other reviews of BPD operations by the OIG and Office of the Chief Financial Officer (OCFO) in the Treasury Department, as well as information received directly from BPD, for information about any significant issues relating to the services provided to OSC. Information provided by the Treasury



Department OIG, the OCFO office, and BPD indicated that no material weaknesses were identified during FY 2005 in BPD systems involved in the processing of OSC transactions. That information led OSC to conclude that the objectives of its management control program for agency activities handled by those systems were met during FY 2005.

Historically, OSC received a waiver from OMB for the requirement to have an audit of the agency's financial statements. Since FY 2004, however, OSC has not received an audit waiver. An audit firm selected by BPD evaluated OSC's financial statements and processes, spending time at OSC headquarters and with the Bureau of Public Debt personnel who currently perform the accounting functions for OSC. The audit was completed in December of 2005. The auditors gave an unqualified audit opinion on OSC's financial statements, finding no material weaknesses or reportable conditions.

#### ***D. Expanded Electronic Government***

OSC provides one-stop service for those who wish to file a complaint or disclosure, or request a Hatch Act advisory opinion. A person can file a Prohibited Personnel Practices complaint online. Most of our PPP complaints come into the agency via this channel. A person can also make a complete Whistleblower Disclosure online and a Hatch Act advisory opinion may be solicited through the web site.

Those who wish to communicate with a knowledgeable OSC staffer through one of the agency's telephone hot lines will find the relevant information on the web site. OSC's web site is linked to FirstGov, as well as other agency web sites, such as those for the Office of Personnel Management, the Equal Employment Opportunity Commission, and the Office of Government Ethics, among many others. OSC's Information Technology Branch (ITB) staff are continually improving OSC's web site. User sessions on OSC's web site have continued to grow: FY 2005 total number of user sessions was 607,838. This represents a 16.7% increase over the FY 2004 total number of user sessions (520,698).

OSC's ISB is constantly working to improve OSC's IT efficiencies by continually re-engineering processes for productivity improvements. For example, an ongoing effort during FY 2006 and FY 2007 will be the design, development, and implementation of an integrated electronic document management system. Once completed, this system will be a powerful tool for OSC's staff to search its existing case files, manage current caseload documents, and to process Freedom of Information Act (FOIA) requests. Searches of case files and FOIA requests are currently handled manually.

#### ***E. Budget and Performance Integration***

OSC's senior staff meets regularly to discuss the current status of programs, current initiatives, general policy, and budget, and thus integrate OSC's GPRA planning, program evaluation

and budget. Each operating unit of OSC participated in the revision of OSC's Performance Budget Goals and the setting of aggressive targets for FY 2006 and FY 2007. Though they didn't used to be so, after this revision the goals and associated performance measures are now clear, outcome oriented, and measurable. The new goals demonstrate how well OSC is performing in its core statutory missions. The narrative associated with the goals explains in detail the impact of budgetary and resource issues on performance.

## **V. TABLES**

|  |    |
|--|----|
| 1. <u>Budget Object Classification of Obligations: FY2004-FY2006</u>                               | 47 |
| 2. <u>Analysis of Resources: FY2004-FY2006</u>   | 49 |
| 3. <u>Breakdown of Matters Pending and Completed FY2003 to FY2004</u>                              | 50 |
| 4. <u>FY2004 Allegations Contained in Matters Received</u>   | 51 |
| 5. <u>Summary of Prohibited Personnel Practice Complaints Activity – Receipts &amp; Processing</u> | 52 |
| 6. <u>Summary of Prohibited Personnel Practice Complaints Activity – Favorable Actions</u>         | 53 |
| 7. <u>Summary of Prohibited Personnel Practice Complaints Activity – Mediation Program</u>         | 54 |
| 8. <u>Summary of Hatch Act Advisory Opinion and Complaint Activity</u>                             | 55 |
| 9. <u>Summary of Whistleblower Disclosure Activity – Receipts and Dispositions</u>                 | 56 |
| 10. <u>Summary of USERRA Referral Activity</u>   | 57 |

**Table 1**

| <b>Budget Object Classification of Obligations: FY2005-FY2007</b> |                            |                               |                               |
|---|----------------------------|-------------------------------|-------------------------------|
| <i>(in thousands of dollars)</i>                                  |                            |                               |                               |
| <b>Budget Object Classification of Obligations</b>                | <b>FY2005<br/>(actual)</b> | <b>FY2006<br/>(projected)</b> | <b>FY2007<br/>(projected)</b> |
| 11.0 Personnel compensation                                       | 8,942                      | 9,882                         | 10,562                        |
| 12.0 Civilian personnel benefits                                  | 2,369                      | 2,769                         | 2,775                         |
| 13.0 Benefits to former personnel                                 | 107                        | 24                            | 15                            |
| 21.0 Travel and transportation of persons                         | 264                        | 185                           | 193                           |
| 22.0 Transportation of things                                     | 20                         | 12                            | 14                            |
| 23.1 Rental payments to GSA                                       | 1,167                      | 1,183                         | 1,217                         |
| 23.2 Rental payments to others                                    | 2                          | 1                             | 0                             |
| 23.3 Communications, utilities and misc. charges                  | 128                        | 152                           | 144                           |
| 24.0 Printing and reproduction                                    | 15                         | 10                            | 15                            |
| 25.0 Other services   | 904                        | 734                           | 800                           |
| 26.0 Supplies and materials                                       | 108                        | 80                            | 89                            |
| 31.0 Equipment  | 701                        | 140                           | 113                           |
| 32.0 Land and structures  | 366                        | 0                             | 0                             |
| <b>99.9 Total</b>   | <b>15,093</b>              | <b>15,172</b>                 | <b>15,937</b>                 |

Detailed notes concerning object classes in **Table 1**:

Object Class 11.0: No additional FTE are requested for FY2007. The increase is to pay the salaries for the 110FTE of the agency, given the pay raises of FY 2005 and FY 2006, and the projected pay raise of FY 2007.

Object Class 12.0: The increase is to pay the benefits for the 110FTE of the agency, given the pay raises of FY 2005 and FY 2006, the projected pay raise of FY 2007, and the associated increases in the costs of providing benefits, such as increased amounts for transit subsidies and payments for the agency's student loan repayment / employee retention program.

Object Class 21.0: In FY 2007, OSC will curtail travel to 27% below the actual amount expended in FY 2005. Travel will be closely controlled, in order to be able to realize these reductions. The existence of a Midwest Field Office will aid in this, providing a presence for the agency in that region of the country.

Object Class 22.0: In FY 2007, OSC will endeavor to cut expenditures for transportation of things by 30%.

Object Class 23.1: Rental Payments to GSA in FY 2007 include approximately \$917K for DC, \$24K for DC real estate taxes, \$89K for Dallas, \$139K for Oakland, and \$48K for Detroit.

Object Class 25.0: In the Other Services category, OSC will reduce expenses by 12% from actual FY 2005 expenditures. 43.6% of the requested amount is required to cover OSC's Interagency Agreement with the Bureau of Public Debt for accounting, travel, and procurement services. Also included here are the following items: approximately \$56,000 for Westlaw fees, \$40,000 for training, \$40,000 in DHS reimbursement charges for facility security related services, \$35,000 for software maintenance and support, \$31,000 for enterprise software licenses, \$31,000 for the FY2007 financial audit, \$25,000 (a reduced amount) for program support for a document management system, \$20,000 for program support for the OMB mandated HSPD-12 program, \$11,000 for NFC payroll services, and various amounts for Cyberfeds, court reporters, depositions, transcripts, copy machine maintenance contracts, air conditioning maintenance for the computer room, checkpoint firewall maintenance, and telephone system maintenance.

Object Class 26.0: OSC will attempt to cut its supplies expenditures to \$89,000, which is 18% below FY 2005 actuals. This object class represents office supplies, subscriptions, and other items for the headquarters and all field offices.

Object Class 31.0: In order to operate at its overall agency wide FY 2007 Budget Request funding level, OSC plans to reduce expenditures dramatically in this category. The projected FY 2007 expenditures are \$113,000, which is only 12% of actual expenditures in this object class during FY 2005. OSC's reductions of expenditures in this category are brought about by reducing the annual investment in the agency's hardware life cycle replacement plan, and by rescheduling several other technology investments, such as the case tracking web applications project. This object class includes \$30,000 for law books for OSC's legal library, and \$25,000 for life cycle replacement software. This reduction of expenditures in Object Class 31.0 enables OSC to realign funds to support salaries and benefits for the 110 FTE of the agency.

**Table 2**

| <b>Analysis of Resources: FY2005-FY2007</b><br><i>(in thousands of dollars)</i> |                           |                              |                              |
|---|---------------------------|------------------------------|------------------------------|
| Description   | FY2005<br><i>(actual)</i> | FY2006<br><i>(projected)</i> | FY2007<br><i>(projected)</i> |
| Budget authority  | 15,325                    | 15,172                       | 15,937                       |
| Outlays   | 13,851                    | 13,786                       | 14,481                       |
| Approximate full-time equivalent employment<br>FTE) work years                  | 97                        | 110                          | 110                          |



**Table 3**

| Breakdown of Matters <sup>1</sup> Pending and Completed FY2004 to FY2005 |        |                     |
|--|--------|---------------------|
|  | FY2004 | FY2005 <sup>2</sup> |
| Matters pending at beginning of fiscal year                              | 1,921  | 995                 |
| New matters received   | 2,754  | 2,684               |
| Matters closed   | 3,680  | 2,685               |
| Matters pending at end of fiscal year                                    | 995    | 994                 |

---

<sup>1</sup> The term “matters in this table includes prohibited personnel practice complaints (including Transportation Security Administration matters); Hatch Act complaints, whistleblower disclosures (DU matters); USERRA referrals from the MSPB pursuant to 5 U.S.C. x 1221(f)(3).

<sup>2</sup> Includes USERRA Documentation Project matters.

**Table 4**

| <b>Summary of Prohibited Personnel Practice (PPP) Complaints Activity – Receipts and Processing <sup>1</sup></b> |                           |               |                    |               |
|--|---------------------------|---------------|--------------------|---------------|
|  |                           | <b>FY2003</b> | <b>FY2004</b>      | <b>FY2005</b> |
| Pending complaints carried over from previous fiscal year  |                           | 594           | 653                | 524           |
| New complaints received (Intake Unit)  |                           | 1,791         | 1,964 <sup>2</sup> | 1,771         |
| <i>Total complaints:</i>   |                           | 2,385         | 2,617              | 2,295         |
| Complaints referred for field investigation  |                           | 162           | 244                | 198           |
| Complaints processed and closed  |                           | 1,732         | 2,093              | 1,774         |
| Processing times   | <i>Less than 240 days</i> | 1,471         | 1,799              | 1,198         |
|  | <i>More than 240 days</i> | 261           | 294                | 576           |
| Percentage processed in under 240 days   |                           | 85 %          | 86 %               | 67.5 %        |

<sup>1</sup> The numbers in this table, as well as in other tables in this report, may vary somewhat from those in previous years' reports. This is due to the fact that in response to an audit by the General Accounting Office, OSC enhanced its case tracking software system to more accurately track prohibited personnel practice and whistleblower disclosure matters. Use of the improved system has led to recalibration of some statistics from previous years.

<sup>2</sup> This figure is higher than reported in the President's FY 2006 Budget because it includes several closed cases that were reopened.

**Table 5**

| <b>Summary of Prohibited Personnel Practice Matters Activity – Favorable Actions</b>  |                     |               |               |               |
|---|---------------------|---------------|---------------|---------------|
|   |                     | <b>FY2003</b> | <b>FY2004</b> | <b>FY2005</b> |
| Total favorable actions obtained <sup>1</sup><br>(all prohibited personnel practices) | <i># of actions</i> | 115           | 80            | 45            |
|   | <i># of matters</i> | 83            | 65            | 45            |
| Favorable actions obtained<br>(reprisal for whistleblowing)                           | <i># of actions</i> | 75            | 57            | 37            |
|   | <i># of matters</i> | 75            | 49            | 37            |
| Stays negotiated with agencies <sup>2</sup>   |                     | 6             | 11            | 3             |
| Stays obtained from Merit Systems Protection Board                                    |                     | 1             | 1             | 1             |
| Disciplinary actions negotiated with agencies   |                     | 12            | 11            | 3             |
| Corrective action complaints filed with the Board                                     |                     | 0             | 1             | 1             |
| Disciplinary actions obtained from the Board  |                     | 1             | 0             | 1             |

---

1 The purpose of this breakout is to show the number of favorable actions obtained, and the number of matters involved. A matter (case) can have more than one action (favorable outcome).

2 Stays and disciplinary actions listed in this table (except for disciplinary actions obtained by OSC from the Board) are included in the totals shown in the two rows above, but are broken out here for further information.

**Table 6**

| <b>Summary of Prohibited Personnel Practice Complaints Activity – Mediation Program</b> |                     |               |               |               |
|---|---------------------|---------------|---------------|---------------|
|   |                     | <b>FY2003</b> | <b>FY2004</b> | <b>FY2005</b> |
| Matters identified before investigation as mediation-appropriate                        |                     | 43            | 82            | 22            |
| Initial acceptance rates by parties   | <i>Complainants</i> | 82 %          | 68 %          | 27 %          |
|   | <i>Agencies</i>     | 69 %          | 64 %          | 22 %          |
| Mediated and other resolutions <sup>1</sup>   |                     | 23            | 18            | 5             |
| Resolution rate – OSC mediation program   |                     | 92 %          | 86 %          | 100 %         |

<sup>1</sup> This category includes complaints settled through mediation by OSC (including “reverse-referrals” - i.e., cases referred back to the Alternative Dispute Resolution Unit by an Investigation and Prosecution Division due to the apparent potential for a mediated resolution). Also included in this category are complaints that entered the initial OSC mediation process, and were then resolved through withdrawal of the complaint, or through mediation by an agency other than OSC.

**Table 7**

| <b>Summary of Hatch Act Advisory Opinion and Complaint Activity</b>          |                                     |               |                    |               |
|--|-------------------------------------|---------------|--------------------|---------------|
|  |                                     | <b>FY2003</b> | <b>FY2004</b>      | <b>FY2005</b> |
| Advisory opinions issued   |                                     | 3,284         | 3,913 <sup>1</sup> | 2,558         |
| New advisory requests received (written)                                     |                                     | 159           | 176                | 191           |
| New complaints received  |                                     | 197           | 248                | 245           |
| Warning letters issued   |                                     | 43            | 93                 | 87            |
| Complaints processed and closed in fiscal year                               |                                     | 201           | 357                | 310           |
| Corrective actions taken by recipients of cure letters:                      | Withdrawal from partisan races      | 18            | 17                 | 4             |
|  | Resignation from covered employment | 7             | 8                  | 10            |
|  | Other                               | 0             | 6                  | 3             |
|  | Total:                              | 25            | 31                 | 17            |
| Disciplinary action complaints filed with the Merit Systems Protection Board |                                     | 4             | 7 <sup>2</sup>     | 11            |
| Disciplinary actions obtained (through negotiation or ordered by the Board)  |                                     | 4             | 2                  | 8             |
| Complaints pending at end of FY  |                                     | 254           | 146                | 79            |

---

1 This number is lower than reported in the President's FY2006 Budget (Other Independent Agencies, Appendix, p. 1209) because of a duplication error.

2 This number is higher than reported in the President's FY2006 Budget because of system entries made after that publication.

**Table 8**

| <b>Summary of Whistleblower Disclosure Activity – Receipts and Dispositions<sup>1</sup></b> |  |                    |                    |
|---|--|--------------------|--------------------|
|   | <b>FY2003</b>  | <b>FY2004</b>      | <b>FY2005</b>      |
| Pending disclosures carried over from previous fiscal year                                  | 556  | 690                | 98                 |
| New disclosures received  | 535  | 572                | 485                |
| <i>Total disclosures on hand at start of the fiscal year:</i>                               | 1,091  | 1,262              | 583                |
| Disclosures referred to agency heads for investigation and report                           | 11   | 18                 | 19                 |
| Agency head reports sent to President and Congress  | 23 <sup>2</sup>                                      | 8                  | 16                 |
| Results of agency investigations and reports  | <i>Disclosures substantiated in whole or in part</i> | 13                 | 8                  |
|   | <i>Disclosures unsubstantiated</i>                   | 10                 | 0                  |
| Disclosures processed   | <i>In more than 15 days</i>                          | 290                | 1,019 <sup>3</sup> |
|   | <i>In less than 15 days</i>                          | 111                | 135                |
| Percentage of disclosures processed in less than 15 days                                    | 28%  | 12%                | 50%                |
| Disclosure matters processed and closed   | 401  | 1,154 <sup>4</sup> | 473                |

<sup>1</sup> It should be noted that many disclosures contain more than one type of allegation. This table, however, records all allegations received in a whistleblower disclosure as a single matter.

<sup>2</sup> This number includes reports on disclosures referred to agency heads by OSC before FY2003.

<sup>3</sup> This number is large due to the backlog reduction effort.

<sup>4</sup> This number is large due to the backlog reduction effort.



**Table 9**

| <b>Summary of USERRA Referral Activity</b>  |               |               |               |
|---|---------------|---------------|---------------|
|   | <b>FY2003</b> | <b>FY2004</b> | <b>FY2005</b> |
| Pending referrals carried over from previous fiscal year  | 8             | 4             | 12            |
| Referrals received from DOL during fiscal year  | 7             | 14            | 30            |
| <i>Pending Referrals closed</i>   | 11            | 6             | 36            |
| Pending referrals at the end of the fiscal year   | 4             | 12            | 6             |
| Closed cases where corrective action was obtained<br>(including corrective actions obtained in matters referred<br>to litigation) | 3             | 1             | 6             |
| Closed cases where no corrective action was obtained  | 8             | 5             | 25            |
| Closed cases referred for litigation  | 0             | 0             | 5             |
| Litigation closed; no corrective action obtained  | n/a           | n/a           | n/a           |
| Litigation closed; corrective action obtained   | n/a           | n/a           | 3             |
| Litigation pending  | n/a           | n/a           | 2             |

**Table 10**

| Summary of USERRA Referral Activity <sup>1</sup>         |        |
|--|--------|
|  | FY2005 |
| Pending referrals carried over from previous fiscal year | 0      |
| Cases opened   | 111    |
| Cases closed   | 57     |
| Cases pending at the end of the fiscal year              | 54     |
| Closed cases where corrective action was obtained        | 16     |
| Closed cases where no corrective action was obtained     | 38     |
| Closed cases referred for litigation                     | 0      |

---

<sup>1</sup> Under VIBA, P.L. 108-454; OSC started receiving cases in Feb. 05.

## ENDNOTES

<sup>1</sup> Reorganization Plan Number 2 of 1978. See 5 U.S.C.A. App.1, § 204. The Civil Service Reform Act of 1978 (Public Law No. 95-454, 92 Stat. 1111) enlarged OSC's functions and powers.

<sup>2</sup> Public Law No. 101-12 (1989). Provisions setting forth OSC authorities and responsibilities were codified at 5 U.S.C. § 1211, *et seq.*

<sup>3</sup> Public Law No. 103-94 (1993), codified in scattered sections of 5 U.S.C. and 12 U.S.C.

<sup>4</sup> Public Law No. 103-353 (1994), codified at 38 U.S.C. § 4301, *et seq.*

The Veterans' Employment Opportunities Act of 1998 (Public Law No. 103-424) also expanded OSC's role in protecting veterans. The act made it a prohibited personnel practice to knowingly take, recommend, or approve (or fail to take, recommend, or approve) any personnel action, if taking (or failing to take) such action would violate a veterans' preference requirement. See 5 U.S.C. § 2302(b)(11). (The former § 2302(b)(11) was re-designated as § 2302(b)(12).).

<sup>5</sup> Public Law No. 103-424 (1994), codified in various sections of title 5 of the U.S. Code. The provision making federal agencies responsible, in consultation with OSC, for informing their employees of rights and remedies under the Whistleblower Protection Act appears at 5 U.S.C. § 2302(c).

<sup>6</sup> Public Law 107-71 (2001).

<sup>7</sup> Unless noted otherwise, all references after this to prohibited personnel practice complaints include complaints alleging other violations of civil service law, rule, or regulation listed at 5 U.S.C. § 1216, except for alleged violations of the Hatch Act.

<sup>8</sup> When the Complaints Examining Unit makes a preliminary determination to close a complaint without further investigation, it must by law provide complainants with a written statement of reasons, to which they may respond. On the basis of the response, if any, the unit decides whether to close the matter, or refer it to the Investigation and Prosecution Division.

<sup>9</sup> Compare, for example, 5 U.S.C. § 1214(a)(1)(A) ("The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.") with 5 U.S.C. app. 3, § 6(a) ("[E]ach Inspector General ... is authorized— ... (2) to make such investigations and reports relating to the administration of the programs and operations of the [agency] as are, in the judgment of the Inspector General, necessary or desirable[.]") and § 7(a) ("The Inspector General may receive and investigate complaints or information from an employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety."). OSC cannot, however, investigate complaints over which it has no jurisdiction, with the result that some complaints are closed without further action after receipt and review. During FY2004, for example, OSC lacked jurisdiction in 617 (or 31.4%) of the complaints received, leaving 1,347 complaints (69%) in which OSC was required by statute to conduct an inquiry. In addition, discrimination based on race, color, religion, sex, or national origin, age, or handicapping condition is illegal under laws enforced by the Equal Employment Opportunity Commission (EEOC), and is also a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). However, since procedures for 10 investigating discrimination complaints have already been established in the agencies and the EEOC, the Special Counsel will normally avoid duplicating those procedures and will defer to those procedures rather than initiate an independent investigation. 5 C.F.R. § 1810.1. When a matter is not referred for further investigation, CEU must by law provide complainants with a written statement of reasons, to which they may respond. 5 U.S.C. § 1214(a)(1)(D). On the basis of the response, if any, CEU decides whether to finalize its preliminary determination to close the matter, or to refer the matter to an Investigation and Prosecution Division. 11 5 U.S.C. § 1214(b)(2)(C).

<sup>13</sup> Corrective action seeks a remedy for any injury to the individual complaining employee, such as back pay or reinstatement, while disciplinary action seeks to impose discipline on the perpetrator of the PPP.

<sup>14</sup> Several factors are believed to account for or contribute to this workload increase. They include: publicity about an increased number of high-profile cases handled by OSC, including whistleblower disclosures, and four Public Servant Awards issued to whistleblowers by OSC; increased public interest in elections since the 2000 presidential election, the public interest generated by the 2004 campaigns; OSC's 2302(c) Certification Program; significant improvements in OSC's web site, increasing awareness by government employees and others of OSC and its functions.

<sup>15</sup> [http://www.osc.gov/documents/osc\\_lst3.pdf](http://www.osc.gov/documents/osc_lst3.pdf)

<sup>16</sup> [http://www.osc.gov/documents/press/2005/pr05\\_15.htm](http://www.osc.gov/documents/press/2005/pr05_15.htm)

## VII APPENDICES

## **OSC's Revised Strategic Plan (FY 2006-2010)**

### **The Five Year Strategic Plan – Introduction**

Beginning in 2000, OSC saw an increased interest in Whistleblower Disclosure cases, and in particular following 9-11, there was a sizeable increase in filings, greater awareness of security and health and safety issues, improved outreach by OSC, and widespread publicity about high-profile cases. During this time of dynamic growth and change, the agency focused on establishing standards for prioritizing cases but did not systematically address the growing backlog or the process-driven system that contributed to the backlog. The system in place permitted paperwork and multiple layers of review that did not, in many cases, contribute to any tangible benefit or result to the agency or the merit system or our constituency, the federal executive employees. While there were some advantages gained through the establishment of standards for prioritization, it proved to be very ineffectual in reducing the backlog. In fact the backlog grew worse. In the past several years, the agency experienced an increase in caseload level across all units. This increase, coupled with a top-heavy and process-driven organizational structure and byzantine processes, caused the backlog to escalate even more in 2002, 2003 and early 2004. This was the situation facing the new Special Counsel, as he entered the agency in January of 2004. All of this was reflected in a GAO report that came out early in 2004, shortly after the new Special Counsel's arrival. It called for a radical solution to these problems that would not only solve existing backlogs but assure the structure and processes of the agency would be permanently changed to solve this 10-year backlog trend once and for all.

In the spring of 2004, an outside assessment team was hired to evaluate and assess the workforce, strategic alignment, agency efficiency, training needs, and strategic human capital management of the agency. Concurrently, a Special Projects Unit (SPU) was formed to go into one OSC operating unit at a time and work side by side for months with the unit's personnel in a long and intense backlog reduction effort. At the same time the SPU was analyzing the processes of the agency, many of which were convoluted. The SPU made recommendations to the Special Counsel, and the final report from the assessment team with specific recommendations was released in September 2004. Soon after, in early 2005, the agency was significantly reorganized, both structurally and procedurally. This reorganization is now bearing fruit in the way the streamlined divisions and empowered individual employees accomplish the business of the agency. The last phases of the reorganization, updates on the standard operating procedures to be used on a day-to-day basis by individual investigators and attorneys, are being implemented currently.

With the backlog fully controlled in all units for the first time in recent history, OSC is now focusing on the concept of expeditious justice. Since his first days in office, the Special Counsel has been summarizing his views on slow case processing with the phrase "Justice delayed is justice denied." Achievements have been realized in case processing times. Now OSC stands ready to set aggressive goals in case processing times, and to find innovative ways to meet those goals.

During the last five years, the agency organizational structure and case processing procedures were not the only significant challenges facing the agency. The Annual Performance Goals were opaque and close to being meaningless. They were unquantifiable, and seemed to be designed to obscure rather than to provide illumination into the effectiveness of the agency's various operating units.

With a reorganized agency now hitting on all cylinders, it is clear the revision of the Annual Performance Goals is the next step to take. Therefore, the U.S. Office of Special Counsel presents the following very revised Five Year Strategic Plan, and associated FY 2007 Annual Performance Budget Plan.

These goals serve three purposes. They focus the agency on the reasons for its existence. They set aggressive goals that can bring out the best in individuals, units, and management. And they provide an additional way for the public and Congress to see and appreciate what is happening at OSC.

### **The Five Year Strategic Plan – Where Does OSC want to be in 2010?**

- **Timeliness.** The U.S. Office of Special Counsel currently has a reputation for quality. By the year 2010, OSC wants to have firmly established its reputation for speed as well.

This means meeting and exceeding statutory time limits associated with two of OSC's missions (PPPs and Disclosures). In the case of the agency's responsibility to examine incoming disclosures, part of the solution may include a change to the statute itself.

For the other two missions of the agency (Hatch and USERRA), in the absence of statutory requirements, OSC will set aggressive goals for timeliness for each mission. A detailed description of the timeliness goal for each mission is included below, in the Revised Goals section.

- **Quality.** OSC's Complaints Examining Unit has long had the motto "We have to be right" when performing legal examinations of incoming claims which allege Prohibited Personnel Practices. And it is true. If CEU ever erroneously closed a case for lack of merit, besides closing an avenue of possible remedy to the Federal employee who made the claim, OSC would soon know about it. If OSC were to make a mistake in the legal analysis, others (outside attorneys, Congress, interest groups, etc.) would soon be pointing out what specific legal mistake was made. This is why such care goes into every incoming CEU case. All cases are discussed with management, and in complex cases, the back and forth discussion includes the Senior Associate Special Counsel, a career SES employee that has been with the agency for many years.

The reality is that CEU is practically never wrong in its legal analysis. Perhaps once every several years (with an average of 1800 cases per year being filed with CEU).



Other units within OSC have their own robust sense of quality. The aggregate result is that the agency already has a strong reputation. Every year between now and 2010, we want to build on this existing strength, and raise the level of quality wherever possible. With the help of the measurable quality goals outlined below for each mission of the agency, we look forward to achieving continued progress.

- **Outreach.** Aggressive investigations and enforcement are one good way of slowly educating the management in executive branch agencies, in terms of what types of actions are legal, and what types of actions are violations of the Civil Service Reform Act, the Hatch Act, or the Uniformed Services Employment and Reemployment Rights Act. But the other side of the prevention coin is for OSC to help prevent wrongdoing from occurring in the first place, through outreach and education concerning the laws. OSC takes its outreach responsibilities very seriously, realizing that the overall goal is a Federal workplace free from illegal activity. This is the reason that measurable outreach goals are included in the revised performance plan for several of the missions of OSC.
- **Great place to work.** While the Office of Special Counsel is already a good place to work, another goal is to continue making progress in the creation of an excellent work environment. We see this as a combination of providing meaningful work, having good management at all levels of the organization, and making use of as wide a variety of innovative benefits as possible, as an aid in attracting and retaining top talent.

Part of having good management for the agency is in the development of managers in-house and creating and implementing a thoughtful succession plan for the management that will be the future of the agency. This is in progress at OSC.

As for innovative benefits, besides the flexible schedules and alternate work schedule benefits, OSC has a successful Student Loan Repayment / Employee Retention Plan that is highly valued by the attorneys at OSC. Various units of OSC have been using a Telecommuting Pilot Plan, and in the future this plan will be expanded to more units of the agency.

- **Emphasis on USERRA.** It is becoming well known that the Special Counsel is doing everything possible to raise the profile of the Uniform Services Employment and Re-employment Rights Act, in order to put an end to discrimination against service members in the Federal workforce.

Under his leadership, OSC aggressively enforces the Uniform Services Employment and Re-employment Rights Act. In fact, OSC set a precedent in FY 2005 by filing three USERRA cases in one year. Full corrective action was received in all three cases.

In addition, the USERRA Unit does outreach so that returning reservists and veterans are aware of their rights and of the existence of OSC. The Special Counsel himself does outreach for

USERRA (on the Pentagon channel and at other high profile venues).

With the signing of the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, OSC's role in protecting service members again expanded. Under a demonstration project created by the VBIA, OSC now has the authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit (instead of the Department of Labor's Veterans Employment and Training Service). Under the project, OSC also receives and investigates 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.

Through 2010, OSC will continue to look for ways to provide superb assistance to service members under USERRA. The agency is committed to continue finding the resources to enable this legislation to protect service members at the level at which it was intended to do.

## **The Five Year Strategic Plan – the Revised Goals**

OSC's revised performance goals are organized by the four statutory missions of the agency: (1) to safeguard the merit system in federal employment by protecting federal employees and applicants from prohibited personnel practices (PPPs), especially reprisal for whistleblowing; (2) to enforce restrictions on political activity by government employees covered by the Hatch Act; (3) to facilitate disclosures of wrongdoing in federal government by operating a secure channel for whistleblowers; and (4) to enforce military personnel rights against re-employment discrimination for military service.

The performance goals of the agency are divided into four sections corresponding to the above statutory missions. There is some redundancy between the explanations of the performance goals in this section of the Five Year Strategic Plan, and the explanation of the goals in Appendix B (OSC Annual Performance Budget Goals.) This is intentionally done, since some readers may read only the Strategic Plan and others may read only the Annual Performance Budget Goals.

|  |
|--|
| <b>OSC'S Prohibited Personnel Practice Enforcement Mission</b> |
|--|

**Performance Goal 1:**

***TO PROTECT THE MERIT SYSTEM THROUGH TIMELY CASE PROCESSING***

The indicator selected is the percentage of PPP cases processed in less than the statutory requirement of 240 days.

This timeliness indicator measures the combined effectiveness of both OSC's Complaints Examining Unit (CEU) and OSC's Investigation and Prosecution Division (IPD).

OSC receives complaints of Prohibited Personnel Practices into the CEU. If, after initial screening, investigation, and legal analysis, a complaint meets the requirements for merit, it is internally referred to the IPD for further investigation. If the IPD investigates and determines the case does indeed have merit, the IPD either seeks relief for the claimant through mediation, settlement, or prosecution.

The target for FY 2006 is 85% and the target for FY 2007 is 95%. The reason the target is less than 100% is because in some cases the settlement process can take a considerable amount of time. In cases involving litigation, the timeframe for events is no longer driven by the speed of work of OSC attorneys and investigators. To strive for 100% would carry the implicit assumption that OSC would not litigate any cases.

Success in achieving the targets set for FY 2006 and FY 2007 would be a huge step in providing expeditious justice for PPP claims from employees in the Federal workforce.

**Performance Goal 2:**

***TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS***

The important performance indicator for quality is the percent of favorable outcomes in meritorious cases.

The numerator for the equation to determine the percent of favorable outcomes is the number of favorable outcomes. The number of favorable outcomes is defined as the number of successful mediations plus the number of settlements achieved plus the number of successful litigations. The denominator for the equation is the number of meritorious cases.

A meritorious case is one in which the Office of Special Counsel is satisfied that claimant is entitled to relief. In certain meritorious cases, OSC may endeavor to use mediation to secure relief for the claimant. If mediation was not appropriate or did not succeed, OSC may exercise

its prosecutorial authority and file for corrective or disciplinary action before the MSPB. As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to prosecute successfully cases warranting corrective action.

**Performance Goal 3:**  
***TO ENHANCE OUTREACH TO FEDERAL AGENCIES TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES (PPPs)***

The indicator is defined as the number of new Federal agencies certified in the 2302 (c) Program by OSC.

OSC has statutory authority to administer the 2302(c) Program, which recognizes the federal sector's need for awareness of Prohibited Personnel Practices and training in avoidance of committing them. However, OSC cannot force any agency to apply for certification. There are no statutory penalties for not being certified. This annual numeric target is not overly aggressive because 1) OSC cannot force compliance, and 2) the number of Federal agencies that may seek certification is limited by the number of agencies in existence. OSC already has 47 certified agencies, including most of the major ones. Nevertheless, OSC has set targets to add participating agencies to the 2302(c) certification program.

**Other outreach activities:**

- Additionally, members of the Investigation and Prosecution Division and the Complaints Examining Unit regularly accept invitations to provide outreach services designed to educate Federal personnel on these issues so that agencies comply with the law.
- OSC's Customer Service Unit maintains a telephonic hotline for answering PPP-related questions from members of the Federal workforce. Employees from OSC were able to educate employees of many agencies during a presentation at the Federal Dispute Resolution Conference (FDR)."
- OSC's website provides a wealth of information regarding PPPs and is a valuable and constantly improving resource for educating the Federal workforce on this subject. Every year the website statistics for user sessions increase, with an average increase in activity of 15% each previous year.
- The GoLearn project is a new initiative that will bring OSC expertise to thousands of Federal workers. OSC does not have responsibility for this project, other than providing expert content.

|                                |
|--------------------------------|
| <b>OSC's Hatch Act Mission</b> |
|--------------------------------|

**Performance Goal 1:**

***TO DEFEND THE MERIT SYSTEM BY ENFORCING THE HATCH ACT -  
THROUGH TIMELY CASE PROCESSING***

Performance Indicator A is the percentage of formal written advisory opinions issued in less than 120 days. The target is set at 75% for FY 2006 and 80% for FY 2007.

Written advisory requests are the requests for an advisory opinion that come in to OSC's Hatch Act Unit that are very complex and require significant analysis before answering.

Performance Indicator B is the percentage of oral and e-mail advisory opinions issued in less than five days. If an oral or e-mail advisory opinion were to take longer than five days, generally it would be treated as a formal written advisory request and be captured by Indicator A. Therefore the goal for processing these oral and e-mail advisories is set at 99% within the five days. With a constant focus on meeting this target, there should be very few times that a requested oral or e-mail advisory opinion is not handled by the Hatch Act Unit within the five days.

Performance Indicator C is the percentage of Hatch Act complaints resolved in less than 365 days. The target is set at 60% for FY 2006 and 70% for FY 2007. A number of these involve litigation, and the timeframe for events to transpire during litigation is out of OSC's control. Even for those that do not actually end in litigation, sometimes there are timeframes outside of OSC's control. For example, OSC may not know that the subject of a complaint ignored an OSC warning to pull out of an election or resign employment until the election actually occurs and it can be verified that neither action has occurred.

**Performance Goal 2:**

***TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS  
AND ENFORCEMENTS***

The performance indicator for quality in Hatch Act investigations and enforcements is the percent of favorable outcomes achieved by OSC in meritorious cases.

A meritorious Hatch Act case is a case in which OSC finds a violation of the Hatch Act. A favorable outcome in a Hatch Act case is either (1) successful litigation of the case; (2) successful settlement of the case; (3) successful corrective action (individual corrected his violation after receiving notice from OSC, for example, by withdrawing his candidacy or resigning from his employment); or (4) a written warning, in lieu of prosecution, which cures the violation.

The target is set at 90% for FY 2006 and 90% for FY 2007.

**Performance Goal 3:**  
***TO ENHANCE OUTREACH TO FEDERAL AGENCIES TO PROMOTE  
COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES (HATCH ACT)***

This goal denotes the importance of going out to do outreach programs at agencies that make a request of OSC. Performance Indicator A is specifically defined as the percent of Hatch Act trainings and outreaches given, over the number of invitations received. OSC has set a target for the Hatch Act Unit to fulfill 90% of these requests each year, recognizing that there will be times when a staff member can not be spared, due to the caseload at the time and/or trial schedules.

Performance Indicator B deals with the written advisory section of the Hatch Act portion of OSC's website. The Hatch Act Unit commits to adding one complex advisory opinion to the website every month. There are already many written opinions displayed on the website. Strengthening the content provides more ability for federal, state, and local employees subject to the Hatch Act to research their questions online and gain an informed idea of what the law means in their particular situation.

**Other outreach activities:**

- In addition to the performance of outreach visits and the website enhancement described above, OSC is producing both a Federal Hatch Act DVD and a State & Local Hatch Act DVD that explains the basics of the Hatch Act laws for each of these audiences. When it is finished, OSC should be able to mail the appropriate DVD to certain requestors who require a basic tutorial overview of the Hatch Act.
- OSC continues to provide free Hatch Act posters to requesting agencies, if the quantity requested is less than ten. If the quantity requested exceeds ten, the interested agency can use OSC's rider at the Government Printing Office to order the required number of Hatch Act posters.

## **OSC's USERRA Mission**

### **Performance Goal 1:**

### ***TO ENFORCE THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT THROUGH TIMELY CASE PROCESSING***

OSC receives four types of USERRA cases—RE, DP-OD, DP-MX, and DP-TSA:

**RE cases** - USERRA cases referred to OSC for prosecution after investigation by the Dept. of Labor.

**DP-OD cases** - demonstration project USERRA cases where the claimant has an odd-numbered SS #.

**DP-MX cases** - demonstration project USERRA cases where the claimant has an odd-numbered SS# and alleges a PPP in addition to the alleged USERRA violation.

**DP-TSA cases** - Transportation Security Administration USERRA cases.

Given the different nature of each of these types of cases, different performance indicators apply. Therefore, under Goal 1 (timely case processing) there is a Performance Indicator A and a Performance Indicator B for each of these four types of cases.

#### **RE Cases:**

Definition: Under USERRA, certain federal sector claims are investigated by U.S. Department of Labor, Veterans' Employment and Training Service (VETS). Pursuant to 38 U.S.C. § 4324, in the event that VETS is unable to resolve such a claim, a claimant has a right to have his or her claim referred to OSC for a determination on whether OSC will represent the claimant before the U.S. Merit Systems Protection Board (MSPB). Such cases are identified by OSC as "RE cases."

RE cases have already been investigated by VETS and reviewed by a DOL Office of Regional Solicitor (RSOL). The USERRA Unit receives the VETS investigative file and a legal memorandum from RSOL indicating whether RSOL recommends that OSC represent the claimant. USERRA Unit reviews the information and make as "de novo" determination.

Where the USERRA Unit disagrees with an RSOL determination that OSC should represent the claimant, the unit sends the RSOL a report setting forth the factual and legal basis of the unit's preliminary determination not to represent the claim and invites the RSOL to respond. The unit considers any response received from the RSOL in making a final representation determination. The RSOL is typically given two weeks to respond to the report.

It is to be noted that while RE cases have already been investigated by VETS, OSC has found that further investigation is often warranted (e.g., key witnesses need interviewing; important documents need to be obtained; too much time lapsed between alleged initial violations and their referral to OSC). In such cases, the USERRA Unit will always contact the agency and relevant witnesses to



obtain the information necessary to allow it to make a well-reasoned determination regarding the prosecutorial merit of a given claim.

The need and extent of any supplemental investigation affects the processing time of RE cases and is reflected in the performance indicator.

Performance Indicator A for the referral cases is defined as the percentage of cases where the representation decision is made in 75 days or less. The targets for this performance indicator are set at 90% for FY 2006 and 90% for FY 2007.

**DP-OD cases:**

Definition: In late 2004, Congress expanded OSC's role in enforcing USERRA and protecting the employment rights of federal employees and applicants. Pursuant to a demonstration project established by section 204 of the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, OSC was given the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. Under the demonstration project, OSC also investigates 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 (so-called "mixed claims"). VETS' investigative authority was limited to federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit and who do not allege a prohibited personnel practice. Pursuant to section 204(d)(1) of VBIA, OSC shall administer the demonstration project and DOL shall cooperate with OSC in carrying out the demonstration project. The demonstration project began on February 8, 2005, and ends on September 30, 2007.

Given the new, additional investigative responsibilities Congress assigned to OSC with the passing of the demonstration project and the Special Counsel's desire to revitalize OSC's enforcement of USERRA during his term, Special Counsel Bloch established the USERRA Unit as part of the January 6, 2005, directive reorganizing the agency. The USERRA Unit is the in-take, investigative, and prosecutorial unit for all matters pertaining to USERRA and veteran-related employment issues. The Unit is responsible for investigating USERRA claims to determine whether prosecution is warranted.

DP-OD cases are federal sector USERRA claims filed by persons having an odd-numbered social security number. DP-OD cases typically come from two sources: 1) from VETS, where a claimant files a USERRA Form 1010 (i.e., a USERRA complaint form) with VETS and 2) directly from the claimant, where the claimant files with OSC the OMB approved form OSC-14 "Complaint of Possible violation of USERRA."

The USERRA Unit conducts an investigation of DP-OD cases and determines whether OSC will represent the claimant in an USERRA action before the MSPB. The performance indicator reflects the time reasonably expected to investigate such cases.

Performance Indicator A for the odd-numbered social security number demonstration project cases is defined as the percentage of cases where the representation decision is made in 120 days or less. The targets for this performance indicator are set at 80% for FY 2006 and 80% for FY 2007.

**DP-MX cases:**

Definition: As stated above, OSC is responsible for investigating all federal sector USERRA claims where the claimant, regardless of his or her social security number, alleges a prohibited personnel practice over which OSC has jurisdiction.

The USERRA Unit conducts an investigation of DP-MX cases and determines whether OSC will represent the claimant in an USERRA or prohibited personnel practice action before the MSPB.

The processing time of DP-MX cases is affected by 1) additional complexity of such cases and 2) the USERRA Unit's adoption of OSC's practice in prohibited personnel practice cases of granting a claimant 13 days to respond to OSC's preliminary determination regarding prohibited personnel practice allegations. The performance indicators incorporate those factors.

Performance Indicator A for the demonstration project cases in which a PPP is also alleged (mixed case) is defined as the percentage of cases where the representation decision is made in 160 days or less. The targets for this performance indicator are set at 80% for FY 2006 and 80% for FY 2007.

**DP-TSA cases:**

On June 9, 2005, the MSPB held in Spain v. Department of Homeland Security (MSPB Docket # PH-0353-04-0361-I-1) that USERRA does not apply to Transportation Security Administration (TSA) Security Screeners or TSA Supervisory Security Screeners and, therefore, the MSPB does not recognize jurisdiction over such cases. Consequently, OSC is unable to prosecute USERRA actions involving TSA Security Screeners or TSA Supervisory Security Screeners.

Notwithstanding the Spain decision, TSA voluntarily permits OSC to investigate USERRA claims and reports its findings and recommendations for corrective action to TSA management officials (akin to the manner in which OSC is permitted to investigate and report on allegations of whistleblower reprisal).

The performance indicator for these types of cases reflects the MSPB's decision in the Spain case.

Performance Indicator A for the TSA cases is defined as the percentage of cases where a "no merit" determination is made or a request for voluntary corrective action is sent to TSA in 160 days or less. The targets for this performance indicator are set at 80% for FY 2006 and 80% for FY 2007.

**Performance Goal 2:**  
***TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS  
AND ENFORCEMENTS***

Where the Office of Special Counsel is satisfied that claimant is entitled to relief, then it may exercise its prosecutorial authority and represent the claimant before the MSPB and, in certain circumstances, the U.S. Court of Appeals for the Federal Circuit. See 38 U.S.C. §§ 4324(a)(2)(A) and (d)(2). As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to prosecute successfully cases warranting corrective action. “Meritorious cases” under this performance indicator are to be distinguished from the “test cases” found under Performance Indicator B.

Performance Indicator A is defined as the percent of favorable outcomes in cases determined by OSC to be meritorious. Total favorable outcomes are the sum of the number of successful mediations and the number of settlements achieved and the number of successful litigations.

It is foreseeable that OSC will desire to file cases where the law is not clear (e.g., novel legal issues requiring “test cases” to define the bounds of the law) but will establish legal precedent benefiting all service members, if the litigation is successful. The outcomes of these types of cases do not depend on OSC’s skill in weighing of the evidence, applying of law, and trying the case. Instead, the cases involve questions of law.

It is difficult to define a performance goal that accurately reflects “success” or “failure” of OSC’s identification of cases that are fertile for expanding the law. The mere fact of filing test litigation with an eye toward expanding the law, however, seems appropriate. Performance Indicator B captures this concept.

Performance Indicator B is defined as the number of test cases filed. While not appropriate to set a specific target for this indicator, since there may be years when no viable test case presents itself, the number of such test cases that OSC files is still an important indicator to track, as OSC assists in safeguarding the rights of service members in the parts of the law that are still vague or undefined.

**Performance Goal 3:**  
***TO ENHANCE OUTREACH TO FEDERAL AGENCIES TO PROMOTE  
COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES (USERRA)***

OSC recognizes the federal sector’s need for USERRA training although it has no statutory obligation to provide it. Thus, the USERRA Unit regularly accepts invitations to provide outreach services designed to educate federal personnel on USERRA issues so that agencies comply with the

law. For example, such outreach efforts include USERRA seminars presented by OSC staff to the D.C. Bar in May 2005, at the annual Federal Dispute Resolution Conference in August 2005 in New York, and at an upcoming presentation at the Army's Advanced Labor and Employment Law Course on October 18, 2005, at the Judge Advocate General's Legal Center and School in Charlottesville, Virginia. Additionally, the unit maintains a telephonic and web-based "hotlines" for answering USERRA-related questions from the public and private sectors.

The performance indicators reflects the practical budgetary constraints of providing OSC-sponsored USERRA training to all requesters and OSC ability and desire to provide such training.

Performance Indicator A is specifically defined as the percent of USERRA outreaches given, over the number of invitations received. The USERRA Unit has set a target to fulfill 90% of these requests each year (where the requesting agency is paying for travel), recognizing that there will be times when a staff member can not be spared, due to the caseload at the time and/or trial schedules.

The USERRA Unit will also endeavor to assist those agencies who need outreach or training but are unable to offer reimbursement for expenses. Thus, the target for this Performance Indicator B is 50%. It is estimated that half of the requesting agencies of this sort will be local and therefore the costs would be minimal for OSC to meet their needs.

|   |
|---|
| <b>OSC's Whistleblower Disclosure Mission</b> |
|---|

**Performance Goal 1:**  
***TO RECEIVE AND RESOLVE WHISTLEBLOWER DISCLOSURES WITH  
TIMELY PROCESSING***

Pursuant to § 1213(b), when the Special Counsel receives any disclosure of information by an [employee] which the [employee] reasonably believes 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, the Special Counsel must review the information within 15 days and determine whether there is a *substantial likelihood* that the information discloses one or more of the above categories of wrongdoing.

OSC handles these whistleblower disclosures under 5 U.S.C. § 1213 in one of several ways. If the Special Counsel makes a positive determination, he must transmit the information to the appropriate agency head, and require the agency head to conduct an investigation and submit a written report on the findings of the investigation. These referrals under § 1213 represent a small percentage (approximately 7% for FY 2005) of the total number of cases resolved by OSC in any fiscal year.

If the Special Counsel does not make a positive determination, the matter is closed. These closures make up the vast majority (93% for FY 2005) of the total number of cases resolved by OSC in any fiscal year.

If the Special Counsel is unable to make the substantial likelihood determination on the basis of the information supplied by the whistleblower, the matter may be informally referred to the Inspector General (IG) for the agency involved, with a request that the IG assist OSC in making the determination.

Because of the time involved in preparing cases for referral under § 1213 and in cases referred to the IG, the statutory 15-day time frame is rarely, if ever, met in these cases. As a result the Indicator for Goal #1, “[p]ercentage of disclosures processed within the statutory 15 day timeframe,” is intended to capture only those cases in which the substantial likelihood determination has not been met. Even in those cases, the actual percentage of cases resolved in less than 15 days is relatively low. It should also be noted that the Special Counsel is considering proposing a legislative change in the statutory language to enlarge the time frame from 15 days to 45 days, a number which would more accurately reflect the average amount of time required to resolve a whistleblower disclosure. The performance indicator for this goal is the percentage of disclosures resolved within the statutory 15 day time frame. The target is 50% in FY 2006 and 50% in FY 2007.

## **Performance Goal 2:**

### ***TO PROMOTE JUSTICE AND PROTECT THE MERIT SYSTEM THROUGH THE QUALITY OF DETERMINATIONS AND REFERRALS***

The U.S. Office of Special Counsel does not have investigative or enforcement authority under 5 U.S.C. § 1213. As such, the Indicator for Goal #2 reflects a quality measure based on the number of cases referred under §1213, regardless of the outcome of the referral. The percentage of cases referred out of the total number of cases received in a fiscal year is a relatively low number historically, and as such, the FY 2006 and FY 2007 targets are low. Since OSC's Disclosure Unit processes nearly 500 disclosures annually, this percentage can be seen as an indicator of the average relative height of the "substantial likelihood" bar in a given year.

The Indicator for Goal #2 reflects only one way of measuring quality as defined in Goal #2, to "promote justice and protect the merit system." **Because the statutory mandate of § 1213 contemplates that OSC make a determination whether there is a *substantial likelihood* that the information discloses wrongdoing, a negative determination under the statute, resulting in a closure, is as quality driven as a positive determination resulting in a referral.** OSC's analysis of a whistleblower disclosure may result in a determination not to burden an agency with an inappropriate referral, thus promoting justice and protecting the merit system. Notwithstanding this difficulty in identifying a measure of quality, the individual whistleblower who initiates the disclosure, thus accessing the statutory protections, is more inclined to measure quality by whether or not his or her disclosure is referred. As such, the Indicator for Goal #2 for now reflects this single measurement.

The performance indicator for this goal is specifically defined as the percentage of disclosures referred to agency heads, pursuant to 5 U.S.C. § 1213, or under the informal IG referral process. The target for FY 2006 is set at 7% and the target for FY 2007 is set at 7%.

## **Performance Goal 3:**

### ***TO ENHANCE OUTREACH TO FEDERAL AGENCIES TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES (DISCLOSURE)***

OSC's Disclosure Unit does not have a statutorily defined mandate to perform compliance outreach, and as such does not regularly provide training or outreach to other government entities, with the exception of informational presentations to foreign delegations and annually at the Federal Dispute Resolution Conferences.

OSC continues to provide free Whistleblower Disclosure Act posters to requesting agencies, if the quantity requested is less than ten. If the quantity requested exceeds ten, the interested agency can use OSC's rider at the Government Printing Office to order the required number of Whistleblower Disclosure Act posters.

## **APPENDIX B:**

### **OSC ANNUAL PERFORMANCE BUDGET GOALS (FY2007)**



**OSC Statutory Missions:  
PPP ENFORCEMENT MISSION**

| <b>Goal 1: <i>TO PROTECT THE MERIT SYSTEM THROUGH TIMELY CASE PROCESSING</i></b> |   |                       |                        |                       |                        |
|--|---|-----------------------|------------------------|-----------------------|------------------------|
| <b>PPP Enforcement Mission</b>   | <b>PERFORMANCE INDICATORS</b>   | <b>FY 2006 TARGET</b> | <b>FY 2006 RESULTS</b> | <b>FY 2007 TARGET</b> | <b>FY 2007 RESULTS</b> |
| <b>Prohibited Personnel Practices Cases</b>                                      | Indicator A:<br><b>Percentage of cases processed in less than 240 days.</b> | 85 %                  |                        | 95 %                  |                        |

Comments for Goal #1:

1. Indicator A: PPP Cases.

This timeliness indicator measures the combined effectiveness of both OSC's Complaints Examining Unit (CEU) and OSC's Investigation and Prosecution Division (IPD).

OSC receives complaints of Prohibited Personnel Practices into the CEU. If, after initial screening, investigation, and legal analysis, a complaint meets the requirements for merit, it is internally referred to the IPD for further investigation. If the IPD investigates and determines the case does indeed have merit, the IPD either seeks relief for the claimant through mediation, settlement, or prosecution.

The reason the target is less than 100% is because in some cases the settlement process can take a considerable amount of time. In cases involving litigation, the timeframe for events is no longer driven by the speed of work of OSC attorneys and investigators. To strive for 100% would carry the implicit assumption that OSC would not litigate any cases.

| <b>Goal 2: <i>TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS</i></b> |  |                           |                            |                           |                            |
|---|--|---------------------------|----------------------------|---------------------------|----------------------------|
| <b>PPP<br/>Enforcement<br/>Mission</b>  | <b>PERFORMANCE<br/>INDICATORS</b>  | <b>FY 2006<br/>TARGET</b> | <b>FY 2006<br/>RESULTS</b> | <b>FY 2007<br/>TARGET</b> | <b>FY 2007<br/>RESULTS</b> |
| <b>Prohibited<br/>Personnel<br/>Practices<br/>Cases</b>   | <u>Indicator A:</u><br>% favorable outcomes in cases determined by OSC to be meritorious = (# successful mediations + # of settlements achieved + # of successful litigations) / (# meritorious cases) | 99%                       |                            | 99%                       |                            |

#### Comments to Goal #2

##### 1. Performance Indicator A

A meritorious case is one in which the Office of Special Counsel is satisfied that claimant is entitled to relief. In certain meritorious cases, OSC may endeavor to use mediation to secure relief for the claimant. If mediation was not appropriate or did not succeed, OSC may exercise its prosecutorial authority and file for corrective or disciplinary action before the MSPB. As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to prosecute successfully cases warranting corrective action.

| <b>Goal 3: TO ENHANCE OUTREACH TO FEDERAL AGENCIES TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES</b> |   |                       |                        |                       |                        |
|--|---|-----------------------|------------------------|-----------------------|------------------------|
| <b>PPP Enforcement Mission</b>   | <b>PERFORMANCE INDICATORS</b>   | <b>FY 2006 TARGET</b> | <b>FY 2006 RESULTS</b> | <b>FY 2007 TARGET</b> | <b>FY 2007 RESULTS</b> |
| <b>Prohibited Personnel Practices Outreach</b>   | Indicator A:<br># of new Federal agencies certified in the 2302 (c) Program by OSC. | 5                     |                        | 5                     |                        |

#### Comments to Goal #3

OSC has statutory authority to administer the 2302(c) Program, which recognizes the federal sector's need for awareness of Prohibited Personnel Practices and training in avoidance of committing them. However, OSC cannot force any agency to apply for certification. There are no statutory penalties for not being certified. This annual numeric target is not overly aggressive because 1) OSC cannot force compliance, and 2) the number of Federal agencies that may seek certification is limited by the number of agencies in existence. OSC already has 47 certified agencies, including most of the major ones.

#### Other outreach activities:

- Additionally, members of the Investigation and Prosecution Division and the Complaints Examining Unit regularly accept invitations to provide outreach services designed to educate Federal personnel on these issues so that agencies comply with the law. Employees from OSC were able to educate employees of many agencies during a presentation at the Federal Dispute Resolution Conference (FDR)."

- OSC's Customer Service Unit maintains a telephonic hotline for answering PPP-related questions from members of the Federal workforce.
- OSC's website provides a wealth of information regarding PPPs and is a valuable and constantly improving resource for educating the Federal workforce on this subject. Every year the website statistics for user sessions increase, with an average increase in activity of 15% each previous year.
- The GoLearn project is a new initiative that will bring OSC expertise to thousands of Federal workers. OSC does not have responsibility for this project, other than providing expert content.

**OSC Statutory Missions:  
HATCH ACT MISSION**

| <b>Goal 1: <i>TO DEFEND THE MERIT SYSTEM BY ENFORCING THE HATCH ACT - THROUGH TIMELY CASE PROCESSING</i></b> |   |                       |                        |                       |                        |
|--|---|-----------------------|------------------------|-----------------------|------------------------|
| <b>HATCH ACT MISSION</b>   | <b>PERFORMANCE INDICATORS</b>   | <b>FY 2006 TARGET</b> | <b>FY 2006 RESULTS</b> | <b>FY 2007 TARGET</b> | <b>FY 2007 RESULTS</b> |
| HATCH ACT WRITTEN ADVISORY OPINIONS<br><br>See comment 1.  | Indicator A:<br><b>Percentage of formal written advisory opinions issued in less than 120 days.</b>   | 75%                   |                        | 80%                   |                        |
| HATCH ACT ORAL & EMAIL ADVISORY OPINIONS<br><br>See comment 2.   | Indicator B:<br><b>Percentage of oral and e-mail advisory opinions issued in less than five days.</b> | 99%                   |                        | 99%                   |                        |
| HATCH ACT COMPLAINTS   | Indicator C:<br><b>Percentage of matters resolved in less than 365 days.</b>                          | 60%                   |                        | 70%                   |                        |

Comments for Goal #1:

1. Performance Indicator A: written advisory opinions

These are the requests for an advisory opinion that come in to OSC's Hatch Act Unit that are very complex and require significant analysis before answering.

2. Performance Indicator B: oral or e-mail advisory opinions

If an oral or e-mail advisory opinion were to take longer than five days, generally it would be treated as a formal written advisory request and be captured by Indicator A.

| <b>Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS</b> |   |                       |                        |                       |                        |
|--|---|-----------------------|------------------------|-----------------------|------------------------|
| <b>HATCH ACT MISSION</b>   | <b>PERFORMANCE INDICATORS</b>                             | <b>FY 2006 TARGET</b> | <b>FY 2006 RESULTS</b> | <b>FY 2007 TARGET</b> | <b>FY 2007 RESULTS</b> |
| HATCH ACT CASES<br><br>See comment 1.  | Indicator A:<br>% favorable outcomes in meritorious cases | 90%                   |                        | 90%                   |                        |

Comments to Goal #2

1. Meritorious cases

A meritorious Hatch Act case is a case in which OSC finds a violation of the Hatch Act. A favorable outcome in a Hatch Act case is either (1) successful litigation of the case; (2) successful settlement of the case; (3) successful corrective action (individual corrected his violation after receiving notice from OSC, for example, by withdrawing his candidacy or resigning from his employment); or (4) a written warning, in lieu of prosecution, which cures the violation.



| <b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b> |   |                       |                        |                       |                        |
|--|---|-----------------------|------------------------|-----------------------|------------------------|
| <b>HATCH ACT MISSION</b>   | <b>PERFORMANCE INDICATORS</b>   | <b>FY 2006 TARGET</b> | <b>FY 2006 RESULTS</b> | <b>FY 2007 TARGET</b> | <b>FY 2007 RESULTS</b> |
| HATCH ACT OUTREACH VISITS  | Indicator A:<br>(# of HA trainings and outreaches given) / ( # of invitations to provide HA training or outreach, where the inviter sponsors OSC) | 90%                   |                        | 90%                   |                        |
| HATCH ACT SECTION OF OSC WEBSITE   | Indicator B:<br>Number of new advisory complex opinions added every month to the website.   | One                   |                        | One                   |                        |

Comments to Goal #3

1. Outreach DVD

In addition to the performance of outreach visits and the website enhancement described above, OSC is producing both a Federal Hatch Act DVD and a State & Local Hatch Act DVD that explains the basics of the Hatch Act. When it is finished, OSC should be able to mail the appropriate DVD to certain requestors who require a basic tutorial overview of the Hatch Act.

2. Hatch Act poster

OSC continues to provide free Hatch Act posters to requesting agencies, if the quantity requested is less than ten. If the quantity requested exceeds ten, the interested agency can use OSC's rider at the Government Printing Office to order the required number of Hatch Act posters.

**OSC Statutory Missions:  
USERRA MISSION**

- A. **RE cases** – USERRA cases referred to OSC for prosecution after investigation by the Dept. of Labor.  
B. **DP-OD cases** - demonstration project USERRA cases where the claimant has an odd-numbered SS #.  
C. **DP-MX cases** - demonstration project USERRA cases where the claimant has an odd-numbered SS# and alleges a PPP in addition to the alleged USERRA violation.  
D. **DP-TSA cases** -Transportation Security Administration USERRA cases.

See Comment 1.

| <b>Goal 1: <i>TO ENFORCE THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT THROUGH TIMELY CASE PROCESSING</i></b> |  |                       |                        |                       |                        |
|---|--|-----------------------|------------------------|-----------------------|------------------------|
| <b>USERRA MISSION</b>   | <b>PERFORMANCE INDICATORS</b>  | <b>FY 2006 TARGET</b> | <b>FY 2006 RESULTS</b> | <b>FY 2007 TARGET</b> | <b>FY 2007 RESULTS</b> |
| <b>USERRA A: RE Cases</b><br><br>Cases received from DOL pursuant to 38 U.S.C. § 4324.<br><br>See Comment 2.                  | Indicator A:<br>Percentage of cases where the representation decision is made in 75 days or less.  | 90%                   |                        | 90%                   |                        |
| <b>USERRA B: DP-OD Cases</b><br><br>Cases received by OSC pursuant to the VBIA.<br><br>See Comment 3.                         | Indicator A:<br>Percentage of cases where the representation decision is made in 120 days or less. | 80%                   |                        | 80%                   |                        |

|   |  |      |  |      |  |
|---|--|------|--|------|--|
| <b>USERRA<br/>C: DP-MX<br/>Cases</b><br><br>Cases received by<br>OSC pursuant to<br>the VBIA.<br><br>See Comment 4. | Indicator A:<br><b>Percentage of<br/>cases where the<br/>representation<br/>decision is made<br/>in 160 days or less</b>   | 80 % |  | 80 % |  |
| <b>USERRA<br/>D: DP-TSA<br/>Cases</b><br><br>TSA Cases<br>received by OSC.<br><br>See Comment 5.                    | Indicator A:<br><b>Percentage of<br/>cases where a<br/>“no merit”<br/>determination is<br/>made or a request<br/>for voluntary<br/>corrective action<br/>is sent to TSA in<br/>120 days or less.</b> | 80 % |  | 80 % |  |

Comments for Goal #1:

1. USERRA Cases

OSC receives four types of USERRA cases—RE, DP-OD, DP-MX, and DP-TSA—each of which are explained in detail below. Given the different nature of such cases, different performance indicators apply.

2. RE Cases

Under USERRA, certain federal sector claims are investigated by U.S. Department of Labor, Veterans’ Employment and Training Service (VETS). Pursuant to 38 U.S.C. § 4324, in the event that VETS is unable to resolve such a claim, a claimant has a right to have his or her claim referred to OSC for a determination on whether OSC will represent the claimant before the U.S. Merit Systems Protection Board (MSPB). Such cases are identified by OSC as “RE cases.”

RE cases have already been investigated by VETS and reviewed by a DOL Office of Regional Solicitor (RSOL). The USERRA Unit receives the VETS investigative file and a legal memorandum from RSOL indicating whether RSOL recommends that OSC represent the claimant. USERRA Unit reviews the information and make as “de novo” determination.

Where the USERRA Unit disagrees with an RSOL determination that OSC should represent the claimant, the unit sends the RSOL a report setting forth the factual and legal basis of the unit's preliminary determination not to represent the claim and invites the RSOL to respond. The unit considers any response received from the RSOL in making a final representation determination. The RSOL is typically given two weeks to respond to the report.

It is to be noted that while RE cases have already been investigated by VETS, OSC has found that: further investigation is often warranted, e.g., key witnesses need interviewing; important documents need to be obtained; too much time lapsed between alleged initial violations and their referral to OSC. In such cases, the USERRA Unit will always contact the agency and relevant witnesses to obtain the information necessary to allow it to make a well-reasoned determination regarding the prosecutorial merit of a given claim.

The need and extent of any supplemental investigation affects the processing time of RE cases and is reflected in the performance indicator.

### 3. DP-OD cases

In late 2004, Congress expanded OSC's role in enforcing USERRA and protecting the employment rights of federal employees and applicants. Pursuant to a demonstration project established by section 204 of the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, OSC was given the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. Under the demonstration project, OSC also investigates 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 (so-called "mixed claims"). VETS' investigative authority was limited to federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit and who do not allege a prohibited personnel practice. Pursuant to section 204(d)(1) of VBIA, OSC shall administer the demonstration project and DOL shall cooperate with OSC in carrying out the demonstration project. The demonstration project began on February 8, 2005, and ends on September 30, 2007.

Given the new, additional investigative responsibilities Congress assigned to OSC with the passing of the demonstration project and the Special Counsel's desire to revitalize OSC's enforcement of USERRA during his term, Special Counsel Bloch established the USERRA Unit as part of the January 6, 2005, directive reorganizing the agency. The USERRA Unit is the in-take, investigative, and prosecutorial unit for all matters pertaining to USERRA and veteran-related employment issues. The Unit is responsible for investigating USERRA claims to determine whether prosecution is warranted.

DP-OD cases are federal sector USERRA claims filed by persons having an odd-numbered social security number. DP-OD cases typically come from two sources: 1) from VETS, where a claimant files a USERRA Form 1010 (i.e., a USERRA complaint form) with VETS and 2) directly from the claimant, where the claimant files with OSC the OMB approved form OSC-14 "Complaint of Possible violation of USERRA."

The USERRA Unit conducts an investigation of DP-OD cases and determines whether OSC will represent the claimant in an USERRA action before the MSPB. The performance indicator reflects the time reasonably expected to investigate such cases.

#### 4. DP-MX cases

As stated above, OSC is responsible for investigating all federal sector USERRA claims where the claimant, regardless of his or her social security number, alleges a prohibited personnel practice over which OSC has jurisdiction.

The USERRA Unit conducts an investigation of DP-MX cases and determines whether OSC will represent the claimant in an USERRA or prohibited personnel practice action before the MSPB.

The processing time of DP-MX cases is affected by 1) additional complexity of such cases and 2) the USERRA Unit's adoption of OSC's practice in prohibited personnel practice cases of granting a claimant 13 days to respond to OSC's preliminary determination regarding prohibited personnel practice allegations. The performance indicator incorporates those factors.

#### 5. DP-TSA cases

On June 9, 2005, the MSPB held in *Spain v. Department of Homeland Security* (MSPB Docket # PH-0353-04-0361-I-1) that USERRA does not apply to Transportation Security Administration (TSA) Security Screeners or TSA Supervisory Security Screeners and, therefore, the MSPB does not recognize jurisdiction over such cases. Consequently, OSC is unable to prosecute USERRA actions involving TSA Security Screeners or TSA Supervisory Security Screeners.

Notwithstanding the *Spain* decision, TSA voluntarily permits OSC to investigate USERRA claims and reports its findings and recommendations for corrective action to TSA management officials (akin to the manner in which OSC is permitted to investigate and report on allegations of whistleblower reprisal).

The performance indicator for these types of cases reflects the MSPB's decision in the *Spain* case.

| <b>Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS</b> |   |  |                        |  |                        |
|--|---|--|------------------------|--|------------------------|
| <b>USERRA MISSION</b>  | <b>PERFORMANCE INDICATORS</b>   | <b>FY 2006 TARGET</b>                  | <b>FY 2006 RESULTS</b> | <b>FY 2007 TARGET</b>                  | <b>FY 2007 RESULTS</b> |
| <b>USERRA Cases</b>  | Indicator A:<br>% favorable outcomes in cases determined by OSC to be meritorious =<br>(# successful mediations + # of settlements achieved + # of successful litigations) /<br>(# meritorious cases) | 90%                                    |                        | 90%                                    |                        |
|  | Indicator B:<br># of "test cases" filed   | Inappropriate to set a specific target |                        | Inappropriate to set a specific target |                        |

#### Comments to Goal #2

##### 1. Performance Indicator A

Where the Office of Special Counsel is satisfied that claimant is entitled to relief, then it may exercise its prosecutorial authority and represent the claimant before the MSPB and, in certain circumstances, the U.S. Court of Appeals for the Federal Circuit. See 38 U.S.C. §§ 4324(a)(2)(A) and (d)(2). As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to prosecute successfully cases

warranting corrective action. “Meritorious cases” under this performance indicator are to be distinguished from the “test cases” found under Performance Indicator B.

## 2. Performance Indicator B

It is foreseeable that OSC will desire to file cases where the law is not clear (e.g., novel legal issues requiring “test cases” to define the bounds of the law) but will establish legal precedent benefiting all service members, if the litigation is successful. The outcomes of these types of cases do not depend on OSC’s skill in weighing of the evidence, applying of law, and trying the case. Instead, the cases involve questions of law.

It is difficult to define a performance goal that accurately reflects “success” or “failure” of OSC’s identification of cases that are fertile for expanding the law. The mere fact of filing test litigation with an eye toward expanding the law, however, seems appropriate. Performance Indicator B captures this concept. OSC will track how often it files this type of case. However, a target can not be identified because OSC cannot determine how often appropriate “test cases” will come into the agency from claimants.



| <b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b> |  |                       |                        |                       |                        |
|--|--|-----------------------|------------------------|-----------------------|------------------------|
| <b>USERRA MISSION</b>  | <b>PERFORMANCE INDICATORS</b>  | <b>FY 2006 TARGET</b> | <b>FY 2006 RESULTS</b> | <b>FY 2007 TARGET</b> | <b>FY 2007 RESULTS</b> |
| <b>USERRA Outreach</b>   | Indicator A:<br>(# of USERRA trainings and outreaches given) / (# of invitations to provide USERRA training or outreach visits {where inviting agency sponsors OSC}) | 90%                   |                        | 90%                   |                        |
|  | Indicator B:<br>( # of USERRA trainings and outreaches given) / (# of invitations to provide USERRA training or outreach visits {where OSC pays expenses})           | 50%                   |                        | 50%                   |                        |

#### Comments to Goal #3

OSC recognizes the federal sector's need for USERRA training although it has no statutory obligation to provide it. Thus, the USERRA Unit regularly accepts invitations to provide outreach services designed to educate federal personnel on USERRA issues so that agencies comply with the law. For example, such outreach efforts include USERRA seminars presented by OSC staff to the D.C. Bar in May 2005, at the annual Federal Dispute Resolution Conference in August 2005 in New York, and at an upcoming presentation at the Army's Advanced Labor and Employment Law Course on October 18, 2005, at the Judge Advocate General's Legal Center and School in Charlottesville,

Virginia. Additionally, the unit maintains a telephonic and web-based "hotlines" for answering USERRA-related questions from the public and private sectors.

The performance indicators reflects the practical budgetary constraints of providing OSC-sponsored USERRA training to all requesters and OSC ability and desire to provide such training.

**OSC Statutory Missions:  
WHISTLEBLOWER DISCLOSURE MISSION**

| <b>Goal 1: <i>TO RECEIVE AND RESOLVE WHISTLEBLOWER DISCLOSURES WITH TIMELY PROCESSING</i></b> |   |                       |                        |                       |                        |
|---|---|-----------------------|------------------------|-----------------------|------------------------|
| <b>WHISTLE-BLOWER DISCLOSURE MISSION</b>  | <b>PERFORMANCE INDICATORS</b>   | <b>FY 2006 TARGET</b> | <b>FY 2006 RESULTS</b> | <b>FY 2007 TARGET</b> | <b>FY 2007 RESULTS</b> |
| DISCLOSURES<br>See comment 1.   | Indicator A:<br><b>Percentage of disclosures resolved within the statutory 15 day time frame.</b> | 50%                   |                        | 50%                   |                        |

Comments for Goal #1:

1. Performance Indicator A: Timely Disclosure Processing

Pursuant to § 1213(b), when the Special Counsel receives any disclosure of information by an [employee] which the [employee] reasonably believes 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, the Special Counsel must review the information within 15 days and determine whether there is a *substantial likelihood* that the information discloses one or more of the above categories of wrongdoing.

OSC handles these whistleblower disclosures under 5 U.S.C. § 1213 in one of several ways. If the Special Counsel makes a positive determination, he must transmit the information to the appropriate agency head, and require the agency head to conduct an investigation and submit a written report on the findings of the investigation. These referrals under § 1213 represent a small percentage (approximately 7% for FY 2005) of the total number of cases resolved by OSC in any fiscal year.

If the Special Counsel does not make a positive determination, the matter is closed. These closures make up the vast majority (93% for FY 2005) of the total number of cases resolved by OSC in any fiscal year.

If the Special Counsel is unable to make the substantial likelihood determination on the basis of the information supplied by the whistleblower, the matter may be informally referred to the Inspector General (IG) for the agency involved, with a request that the IG assist OSC in making the determination.

Because of the time involved in preparing cases for referral under § 1213 and in cases referred to the IG, the statutory 15-day time frame is rarely, if ever, met in these cases. As a result the Indicator for Goal #1, “[p]ercentage of disclosures processed within the statutory 15 day timeframe,” is intended to capture only those cases in which the substantial likelihood determination has not been met. Even in those cases, the actual percentage of cases resolved in less than 15 days is relatively low. It should also be noted that the Special Counsel is considering proposing a legislative change in the statutory language to enlarge the time frame from 15 days to 45 days, a number which would more accurately reflect the average amount of time required to resolve a whistleblower disclosure.

| <b>Goal 2: TO PROMOTE JUSTICE AND PROTECT THE MERIT SYSTEM THROUGH THE QUALITY OF DETERMINATIONS AND REFERRALS</b> |   |                       |                        |                       |                        |
|--|---|-----------------------|------------------------|-----------------------|------------------------|
| <b>WHISTLE-BLOWER DISCLOSURE MISSION</b>   | <b>PERFORMANCE INDICATORS</b>   | <b>FY 2006 TARGET</b> | <b>FY 2006 RESULTS</b> | <b>FY 2007 TARGET</b> | <b>FY 2007 RESULTS</b> |
| DISCLOSURES<br><br>See comment 1.  | Indicator A:<br>% of disclosures referred to agency head, pursuant to 5 U.S.C. § 1213, or under the informal IG referral process. | 7%                    |                        | 7%                    |                        |

#### Comments to Goal #2

##### 1. Indicator A: Whistleblower referrals:

The U.S. Office of Special Counsel does not have investigative or enforcement authority under 5 U.S.C. § 1213. As such, the Indicator for Goal #2 reflects a quality measure based on the number of cases referred under §1213, regardless of the outcome of the referral. The percentage of cases referred out of the total number of cases received in a fiscal year is a relatively low number historically, and as such, the FY 2006 and FY 2007 targets are low. Since OSC's Disclosure Unit processes nearly 500 disclosures annually, this percentage can be seen as an indicator of the average relative height of the "substantial likelihood" bar in a given year.

The Indicator for Goal #2 reflects only one way of measuring quality as defined in Goal #2, to "promote justice and protect the merit system." Because the statutory mandate of § 1213 contemplates that OSC make a determination whether there is a substantial likelihood that the information discloses wrongdoing, a negative determination under the statute, resulting in a closure, is as quality driven as a positive determination resulting in a referral. OSC's analysis of a whistleblower disclosure may result in a determination not to burden an agency with an inappropriate referral, thus promoting justice and protecting the merit system. Notwithstanding this difficulty in identifying a measure of quality, the individual whistleblower who initiates the disclosure, thus accessing the statutory protections, is more inclined to measure quality by whether or not his or her disclosure is referred. As such, the Indicator for Goal #2 for now reflects this single measurement.

| <b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b> |                               |                       |                        |                       |                        |
|--|-------------------------------|-----------------------|------------------------|-----------------------|------------------------|
| <b>WHISTLE-BLOWER DISCLOSURE MISSION</b>   | <b>PERFORMANCE INDICATORS</b> | <b>FY 2006 TARGET</b> | <b>FY 2006 RESULTS</b> | <b>FY 2007 TARGET</b> | <b>FY 2007 RESULTS</b> |
| NA   | NA                            | NA                    |                        | NA                    |                        |

Comments to Goal #3

1. Disclosure outreach

OSC's Disclosure Unit does not have a statutorily defined mandate to perform compliance outreach, and as such does not regularly provide training or outreach to other government entities, with the exception of informational presentations to foreign delegations and annually at the Federal Dispute Resolution Conferences.

OSC continues to provide free Whistleblower Disclosure Act posters to requesting agencies, if the quantity requested is less than ten. If the quantity requested exceeds ten, the interested agency can use OSC's rider at the Government Printing Office to order the required number of Whistleblower Disclosure Act posters.

FISCAL YEAR 2008  
CONGRESSIONAL BUDGET JUSTIFICATION  
AND PERFORMANCE BUDGET GOALS



**U.S. OFFICE OF SPECIAL COUNSEL**

1730 M Street, N.W. (Suite 218)

Washington, DC 20036-4505

[www.osc.gov](http://www.osc.gov)

## **Contents**

|   |           |
|---|-----------|
| <b>Graphical Highlights of Our Agency's Successes.....</b>          | <b>3</b>  |
| <b>Executive Summary .....</b>                                      | <b>11</b> |
| <b>I. THE OFFICE OF SPECIAL COUNSEL .....</b>                       | <b>17</b> |
| <b>A. Statutory Background .....</b>                                | <b>17</b> |
| <b>B. OSC's Mission .....</b>                                       | <b>18</b> |
| <b>C. OSC'S Internal Organization .....</b>                         | <b>18</b> |
| <b>D. Organization Chart .....</b>                                  | <b>21</b> |
| <b>II. SUMMARY OF FY 2006 PROGRAM CASELOAD AND ACTIVITY.....</b>    | <b>22</b> |
| <b>A. Prohibited Personnel Practices .....</b>                      | <b>22</b> |
| <b>B. Alternative Dispute Resolution Program .....</b>              | <b>27</b> |
| <b>C. Case Processing: Hatch Act Violations .....</b>               | <b>28</b> |
| <b>D. Disclosure Unit .....</b>                                     | <b>31</b> |
| <b>E. USERRA Referrals .....</b>                                    | <b>41</b> |
| <b>F. Outreach Program .....</b>                                    | <b>45</b> |
| <b>5</b>  |           |
| <b>III. FY 2008 BUDGET REQUEST .....</b>                            | <b>46</b> |
| <b>IV. OSC and the Future of USERRA .....</b>                       | <b>47</b> |
| <b>V. PERFORMANCE UNDER THE PRESIDENT'S MANAGEMENT AGENDA .....</b> | <b>49</b> |
| <b>1. Strategic Management of Human Capital .....</b>               | <b>49</b> |
| <b>2. Competitive Sourcing .....</b>                                | <b>49</b> |
| <b>3. Improved Financial Performance .....</b>                      | <b>50</b> |
| <b>4. Expanded Electronic Government .....</b>                      | <b>51</b> |
| <b>5. Budget and Performance Integration .....</b>                  | <b>51</b> |
| <b>VI. TABLES .....</b>   | <b>52</b> |
| <b>VII. Appendices .....</b>  | <b>64</b> |
| <b>A. OSC Strategic Plan (FY 2006-2010)</b>                         |           |
| <b>B. OSC Annual Performance Budget Goals (FY 2008)</b>             |           |
| <b>C. ENDNOTES</b>  |           |



## **GRAPHICAL HIGHLIGHTS OF OUR AGENCY'S SUCCESSES**

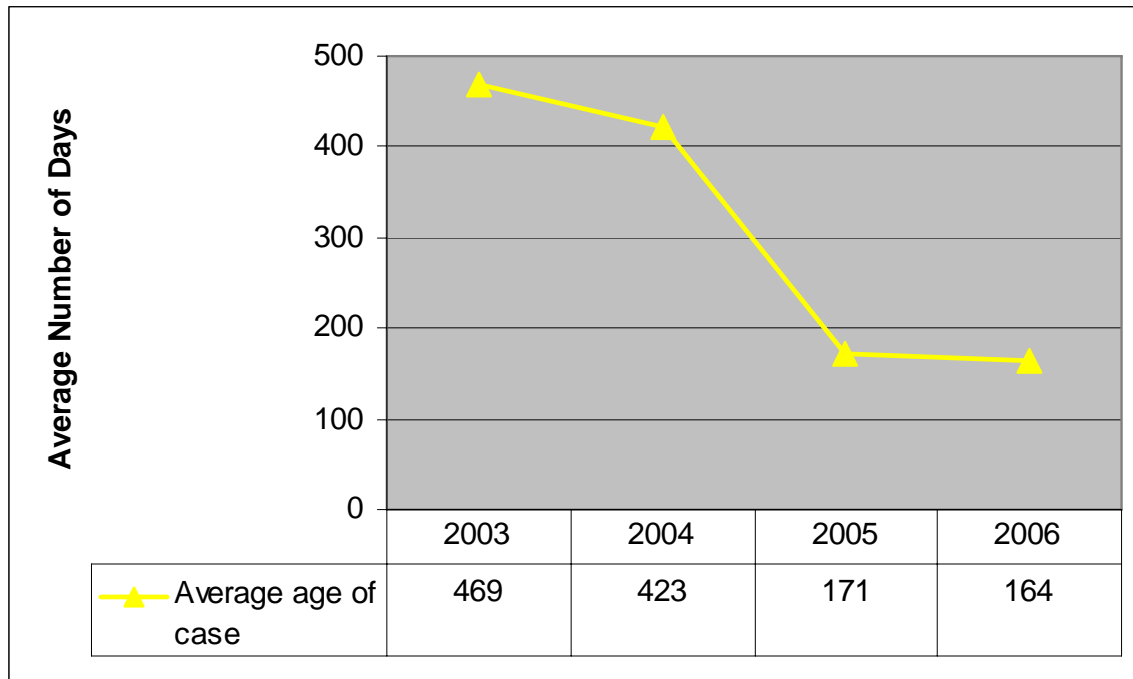
When the new Special Counsel took office in January 2004, two major problems confronted OSC: a serious backlog of cases in all of the units and a cumbersome structure of three separate Investigation and Prosecution Divisions (IPDs). The Government Accountability Office (GAO) issued a report in March 2004 (GAO 04-36) that was critical of OSC's chronic backlog problem in the Complaints Examining Unit and Disclosure Unit. That same month, Special Counsel Bloch created a Special Projects Unit (SPU) to begin immediately investigating the problem of the backlog of cases and to find solutions.

At the end of FY 2004, we had eliminated the backlogged prohibited personnel practice (PPP) cases in the Complaints Examining Unit from 447 to 119 cases and reduced the number of whistleblower disclosure cases in backlog from 674 to 82. Therefore, the overall cases backlog reduction in FY 2004 was 82% and this work continued into the FY 2005 when OSC processed 1,774 prohibited personnel practice cases, including 576 "old" cases, some of which had been in the Investigation and Prosecution Division for two, three and four years.

The next step in solving the difficulties was a reorganization of the agency in January 2005. We eliminated the system of three co-equal investigation and prosecution units doing the same work and consolidated them into one Investigation and Prosecution Division. We also added a new Midwest field office. More importantly, we "flattened" the agency management review structure by reducing the number of supervisors and managers that had to review and approve the staffs' work. The Special Counsel further directed that each operating unit establish standard operating procedures that would establish consistency in case processing, and with that consistency, faster processing times. These improvements have lead to further reductions in backlogs and enabled the agency to reach the meritorious cases faster, enabling OSC to seek settlements or initiate prosecutions before evidence became stale and witnesses' memories faded. Decisions are now reached faster, bringing swifter justice to those Federal employees served by the Office of Special Counsel. The Special Counsel expects that swifter and more consistent and reliable decision-making by experienced employees and first-line managers will help prevent resurgent backlogs at OSC. At the same time, OSC has kept at the forefront the paramount goal of maintaining and increasing positive enforcement and results.

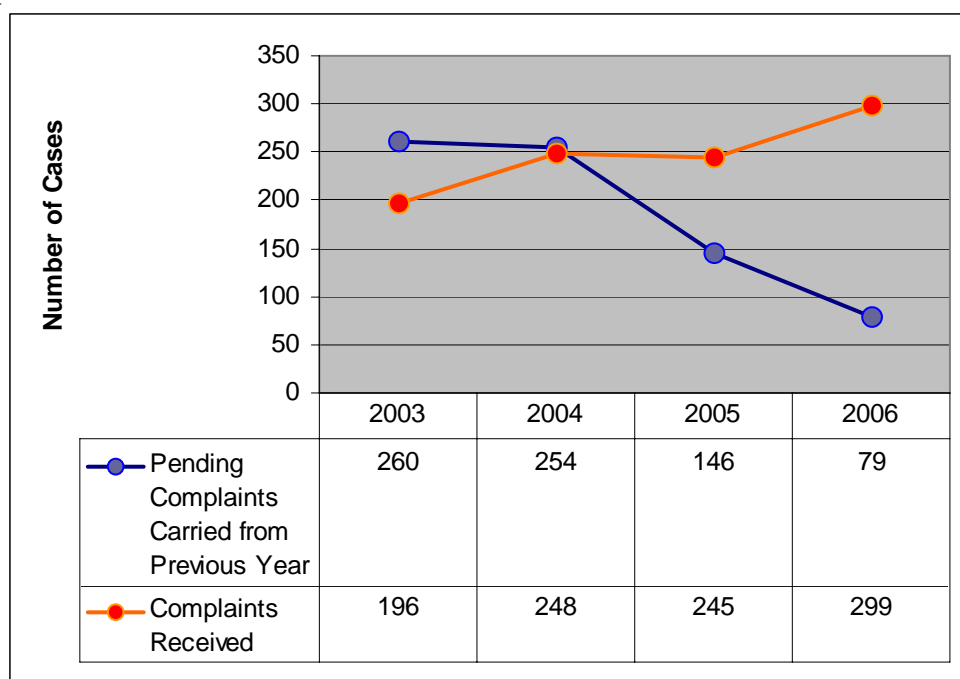
The next seven pages graphically tell the story of the successes of the last three years at OSC, especially the decreased case processing times and the elimination of the backlogs, including those backlogs mentioned by GAO in 2004. These successes were achieved despite increasing caseloads in several units and newly added responsibilities for the agency.

### Hatch Act Unit - Average Processing Time per Complaint



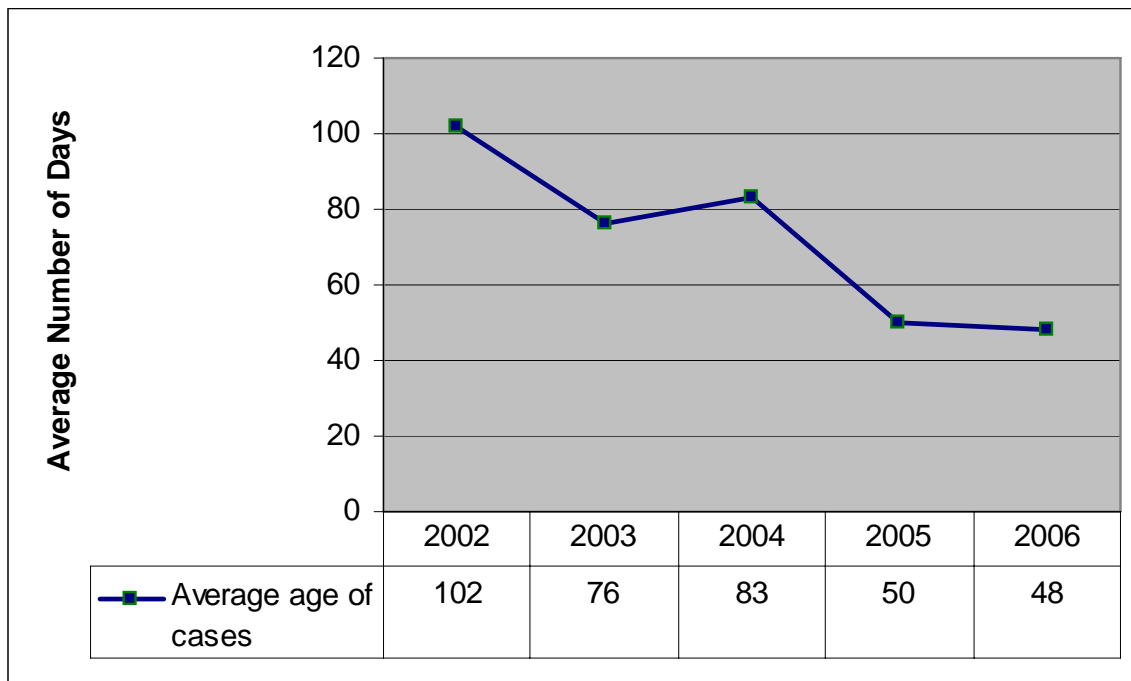
OSC's Hatch Act Unit reduced its case processing time dramatically during the period from FY 2003 to FY 2006. The average number of days to process the case in FY 2006 is one third of what it was in FY 2003.

### Hatch Act Complaints



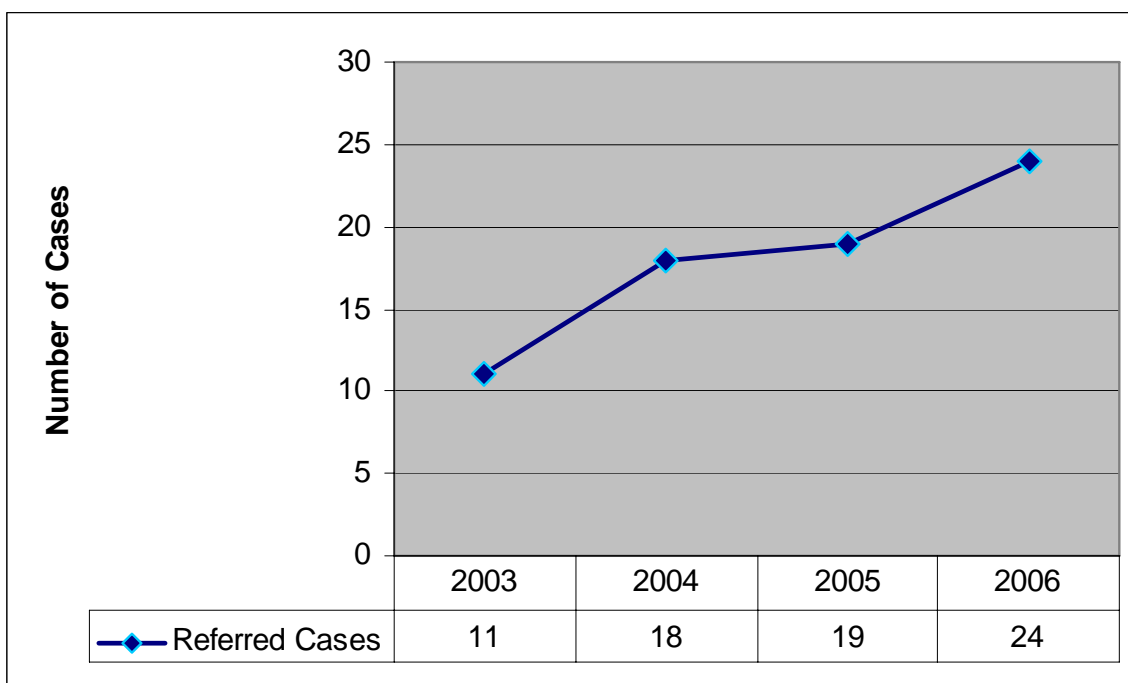
Starting in FY 2005, as OSC reduced its processing time for Hatch Act complaints, the number of pending complaints carried forward from the previous fiscal year sharply declined. From FY 2003 to FY 2006, the overall decline was 70%. During the same period, the number of complaints received increased by 53%. In just three years, the Hatch Act Unit has become much more efficient.

**Complaints Examining Unit - Average Processing of PPP Cases in the Unit**



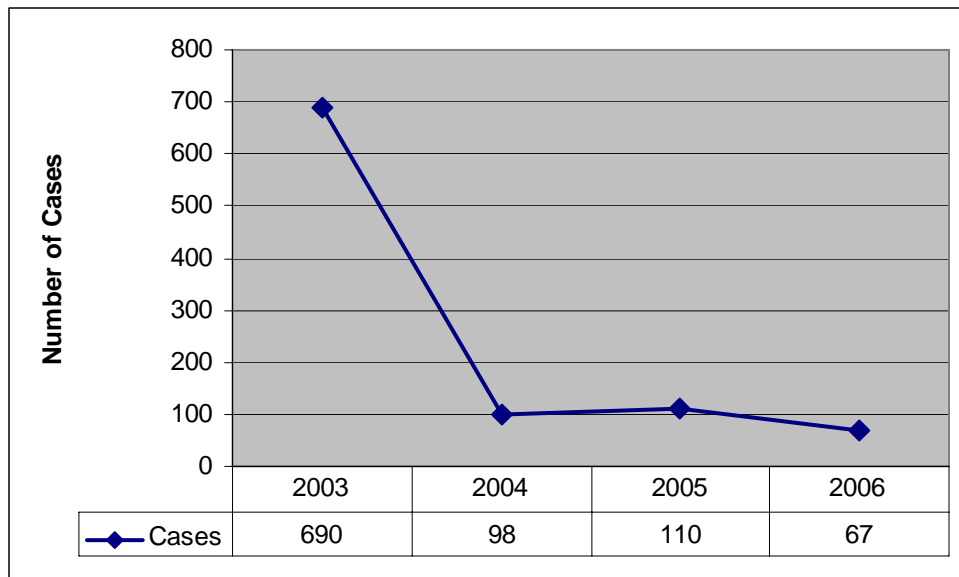
This chart shows the average number of days that a Prohibited Personnel Practice case remained in OSC's Complaints Examining Unit, before the case was either closed or referred to OSC's Investigation and Prosecution Division for further investigation.

### Disclosure Referrals to Agency Heads



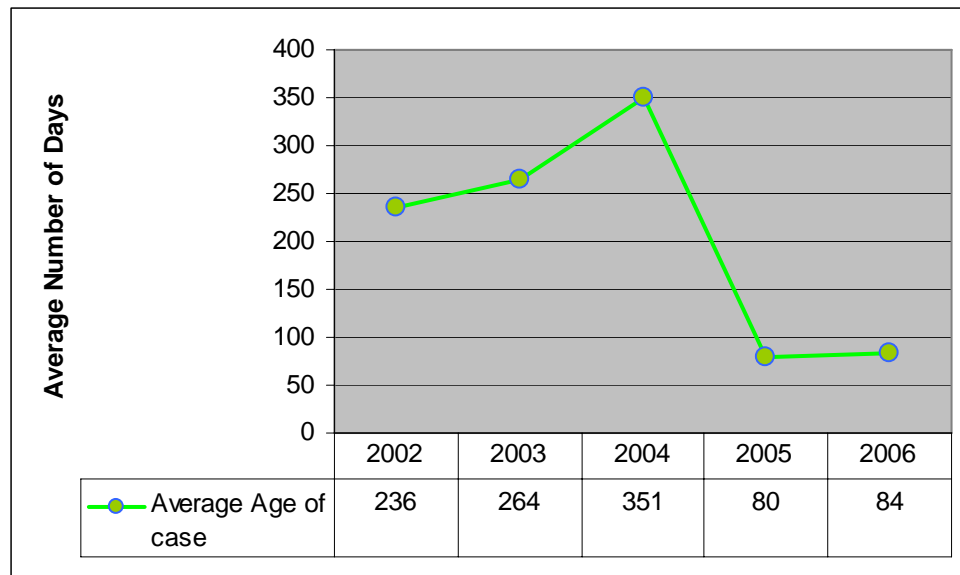
When the Special Counsel analyzes a whistleblower disclosure and determines there is substantial likelihood of wrongdoing, he refers the matter to the head of the appropriate agency, who is then required to internally investigate the matter and report the results to OSC, the Congress, and the President.

### 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.

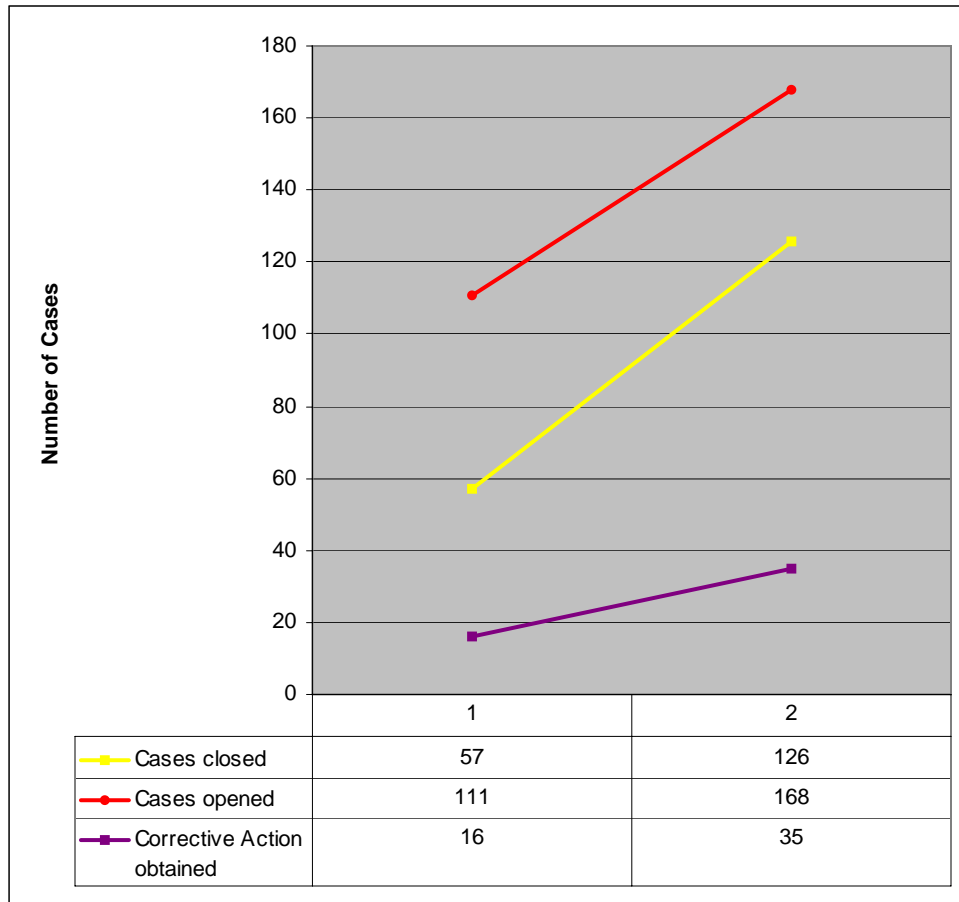
### Disclosure Unit - Average Processing Time per Disclosure



This chart shows the improvement in processing time in OSC's Disclosure Unit. The average processing time for disclosures in FY 2006 was 84 days. This was a 76% reduction from the high of FY 2004 (an average of 351 days).



### USERRA Demonstration Project



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.

## **Executive Summary**

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Its primary mission is to safeguard the merit system in federal employment by protecting employees and applicants from prohibited personnel practices (PPPs), especially reprisal for whistleblowing. In addition, the agency operates as a secure channel for federal whistleblower disclosures of violations of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; and substantial and specific danger to public health and safety. OSC also has jurisdiction under the Hatch Act to enforce restrictions on political activity by government employees. Finally, OSC enforces federal employment rights secured by the Uniformed Services Employment and Reemployment Rights Act (USERRA).

In last year's budget request, OSC reported how the chronic problem of backlogged Prohibited Personnel Practice (PPP) cases, Hatch Act cases and Disclosure Unit cases had been reduced through focused and sustained effort by the entire agency over an 18-month period. The good news to report in this year's request is that the agency, through hard work and diligence, has been successful in avoiding a recurrence of any of the three types of backlog. The streamlined processes and logical organizational structure put into place with the agency reorganization during FY 2005 contributed to the agency's ability to avoid resurgent backlogs. The goal of providing timely justice to all federal complainants is the ongoing objective of OSC, along with the active achievement of benchmarks of more corrective actions and finding opportunities for greater litigation to generate public awareness of significant cases.

When Special Counsel Bloch arrived in January, 2004, USERRA cases were a low priority at OSC. The Special Counsel drastically changed the situation by creating a USERRA Unit at OSC, and staffing it with attorneys and investigators dedicated full-time to USERRA enforcement. This unit now handles all of the cases referred from the Department of Labor for litigation, as well as all of the cases that come to OSC as part of the Demonstration Project created by the Veterans Benefits Improvement Act of 2004 (VBIA).

OSC continues to experience a high caseload level. There are a number of factors which contribute to this level of complaint filings with OSC:

- A string of Hatch Act cases involving high-profile employees over the last three years has resulted in significant national press coverage. There is now a heightened awareness of the Hatch Act among Federal employees. The number of Hatch Act complaints received in FY 2006 exceeded the number in FY 2005 by 22%. In fact, the FY 2006 number exceeded the numbers received previously in any year. Hatch Act complaints in FY 2008 are projected to be the highest number yet, due to the upcoming presidential election.
- Due to OSC's more vigorous focus on USERRA complaints from members of our armed forces, increased numbers of such complaints are being filed with OSC.

- Congress passed the VBIA in order to decrease the processing time for USERRA complainants from members of our armed forces. Under the pilot program created by Congress, which began in February, 2005, OSC began processing half of the USERRA cases that would typically be processed by the Department of Labor. OSC has slashed processing times to approximately one third of previous average times. OSC is confident that this pilot program will provide speedier justice to the members of our military who are being denied rights under USERRA.
- In recent years, OSC has had a large number of high-profile whistleblower cases, leading to increased national press coverage of OSC. FY 2006 continued this trend.
- OSC continues to investigate whistleblower retaliation complaints from Transportation Security Agency (TSA) security screeners under OSC's Memorandum of Understanding (MOU) with TSA. This MOU remains viable despite the Merit System Protection Board's decision that the Board does not have jurisdiction to adjudicate these matters.
- During FY 2006, OSC continued to certify more agencies through its outreach program. As agencies implement the certification process, agency employees who might previously have been unaware of their rights and remedies through OSC are becoming informed.
- In addition to OSC's certification program, OSC continues to provide outreach programs to agencies requesting them, or as part of OSC settlements in particular matters.

OSC stands in a vastly improved position entering FY 2007 – with virtually no case backlogs and processing times that are significantly less than before 2004 (decreased as much as 75%, depending upon which unit of OSC is involved). Even the high number of PPP cases in the Investigation and Prosecution Division (internal referrals) has been handled. The agency has been successful in hiring, and is now operating at a staff level (109 FTE) as close to its approved levels (113 FTE) as possible, given the funding of the agency for FY 2007 and the impact of the pay raises of FY 2006, FY 2007 and the projected pay raise of FY 2008. For OSC to continue operating at approximately 110 FTE, a slight funding increase over FY 2007 levels is necessary for FY 2008.

### **OSC'S SUCCESSES IN FY 2006**

1. The Special Counsel's willingness to prosecute federal agencies for violations of the law again achieved strong results. Prior Special Counsels had never filed any USERRA enforcement actions with the U.S. Merit Systems Protection Board (since USERRA was passed in 1994). In FY 2005, OSC set a precedent by filing three USERRA cases in one year, receiving full corrective action in all three cases. In FY 2006, OSC filed and successfully prosecuted one USERRA appeal and obtained full corrective action on behalf of the claimant - who had been informed by the U.S. Department of Labor that his case had no merit. This willingness to prosecute USERRA violations also causes more corrective action settlements prior

to litigation. OSC achieved a record 38 USERRA corrective actions during FY 2006.

2. During FY 2006, the Special Counsel again focused on raising the profile of the Uniform Services Employment and Re-employment Rights Act (USERRA), so that returning reservists and veterans are aware of their rights and of the existence of OSC. In early 2005, OSC's role in enforcing USERRA again expanded. Pursuant to a demonstration project established by the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, signed by President Bush on December 10, 2004, OSC, rather than the Department of Labor's Veterans Employment and Training Service (DOL VETS), has 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 also receives and investigates 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. During FY 2006, the second year of the demonstration project, OSC received 168 cases including approximately 60 cases that come directly to OSC from veterans. OSC's corrective action rate was an unheard of 28% on these cases. This pilot project has already shortened the processing times for members of our armed forces who are discriminated against in employment.

3. OSC's Outreach Program efforts have succeeded in educating federal agency managers and employees concerning their responsibilities and rights. OSC also assisted federal agencies to fulfill their statutory obligation to consult with OSC concerning informing federal employees of their rights under the laws that OSC enforces.<sup>1</sup> OSC formally launched its government-wide 2302(c) Certification Program in October 2002. Since that time, 51 agencies (including Cabinet-level agencies such as the Departments of Labor, Energy, State, Transportation, Education, Health and Human Services and Veterans Affairs) have registered for the program.

4. OSC continues to enhance its resources for conducting mediations. Instead of having one full time mediator, seven people from different parts of the agency have received training in conducting mediations. OSC now has a cadre of professionals with varied skills and legal expertise in multiple areas from which to draw.

5. Army Reservist James Harris, a letter carrier from Alabama, suffered serious back and neck injuries in a truck accident in Iraq. The injuries prevented him from returning to his letter carrier position, and he found himself out of work, even though the USERRA laws required his agency to find him a different position. OSC investigated, and within three months of picking up the case, Harris was re-employed by the post office as a permanent window clerk. The September 5, 2006 edition of Federal Times summarized, "Harris' case illustrates a vast improvement over how many such cases are resolved. Traditionally, complaints of wrongful job loss or demotions under the Uniformed Services Employment and Re-employment Rights Act (USERRA) are handled by the Labor Department and can take years to resolve."

6. Army Reservist Steven Walker suffered a severe back injury in Kuwait in June 2003. The injury prevented him from returning to his civilian federal job as a policeman for the Navy. He inquired about placement in a less physically demanding job at his base in Kings Bay, Georgia. But after a few

weeks on a temporary light duty detail, he was let go. Because his agency was in the process of downsizing, management didn't believe they were obligated to find him a job. But the USERRA law requires agencies to involve the U.S. Office of Personnel Management to assist in locating a position for a reservist if the agency cannot. Walker filed a complaint with DOL VETS, but the Labor staff didn't realize the firing was illegal. Walker complained to the Naval Chief of Legislative Affairs, with no results. Then Walker went to OSC. In August 2006 — two years after his initial complaint — he won his case. OSC had persuaded the Navy to modify its practices, follow the USERRA law for Mr. Walker, and to retrain the human resources employees and management employees at the naval base.

7. The agency hired two extraordinarily qualified employees through the Federal Career Intern program and one highly qualified employee through the Veterans Recruitment Appointment (VRA) program.

8. During FY 2006, OSC's Strategic Plan was rewritten and the agency's Performance Goals were thoroughly redesigned. They are now measurable, finite, and tied directly to the four statutory missions of the agency. They deal with timeliness, quality, and outreach (where applicable) for each enforcement mission. The Senate Appropriations Committee expressed their satisfaction with the changes in the budget hearing in March of 2006.

9. In November, OSC won removal of an agency attorney in California who used his office to effect fund-raising and organizing activities for his political party through his office computer during office hours. The Merit Systems Protection Board upheld this decision in August, 2006.

10. In March, Special Counsel Scott Bloch presented Chairman Neil McPhie with a certificate showing that MSPB has taken the required steps to ensure its employees are informed about their rights under OSC's 2302(c) Certification Program. Increased outreach to inform federal workers of their rights has been cited as a major factor in ensuring that workers are aware of their rights and feel secure in exercising them.

11. In March, OSC won admission of guilt on Hatch Act violations from the former Mayor of Atlantic City, Lorenzo Langford. Langford is temporarily barred from government service. His position as mayor included administration of federal grants, rendering him covered by the Act. Langford had committed multiple violations, including ordering his subordinates to engage in political activities and abusing his office.

12. In April, Special Counsel Scott Bloch sat on a panel at the National Press Club with the MSPB Chairman, moderated by Bill Bransford of the Senior Executives Association. They discussed misconceptions among federal employees and managers that hamper the proper application of employee rights under the law. They also discussed potential changes to the law that would aid employees.

13. In June, OSC achieved corrective action (reinstatement, promotion, back pay) for serviceman Russell Jones from the Army Corps of Engineers. Jones had been told that his case was worthless by the Department of Labor, but OSC was able to obtain full corrective action on his behalf.

14. In June, the Special Counsel presented 2302(c) certification to the General Counsel for the Department of Homeland Security, Phil Perry. OSC is certifying that DHS has taken the required steps to ensure its employees are informed about their rights under the law.

15. In July, the Special Counsel testified before the House Government Reform Committee's subcommittee on the federal workforce. The hearing was regarding a bill to create a commission, on which the Special Counsel would sit, that would study ways to improve the federal employee appeals process. The Special Counsel offered OSC's own efforts at backlog resolution, including vigorous management and a well-regulated screening unit. He expressed an eager willingness to cooperate with the other agencies and the committee to find ways to improve the process.

16. In August, the Special Counsel spoke before nearly 1,000 people from management and rank and file federal workers at the annual Federal Dispute Resolution (FDR) Conference held in San Antonio, TX concerning the "ordinary heroes" of the workforce as well as OSC's achievements in championing their cause.

17. In September, the Public Servant of the Year award was presented to Leroy Smith. As in past years, this award was presented to a public servant who performed an outstanding service to the public through OSC. Smith blew the whistle on unsafe and potentially deadly activities at the Bureau of Prisons, where not only inmates but also staff were at risk due to dangerous chemical recycling operations. Currently, the Justice Department is investigating OSC's allegations that BOP and Federal Prison Industries have failed to take corrective action.

In spite of these successes, OSC faces serious challenges. For fiscal reasons OSC has not hired up to its approved level of 113 FTE during FY 2006. Several positions have been filled with part time employees, in order to further reduce salary and benefit expenditures.

Although the elimination of backlogged cases has helped OSC achieve its strategic goals of protecting federal employees from PPPs, protecting the merit system, and guarding the public interest through its Disclosure Unit, there are other important ways in which the agency must gauge its success. OSC made progress on improving the timeliness to review PPP cases (88% processed in less than 240 days so far in FY 2006, a 22% improvement). OSC's percentage of whistleblower disclosures handled in less than 15 days dropped slightly to 42% in FY 2006 (down from 50% in FY 2005). A major focus of OSC during the next two years will be the measurable realization of more progress in this area.



**Highlights of the FY 2008 budget request include:**

- OSC requests \$16,368,000 for FY 2008, an increase of \$368,000 over the FY 2007 appropriation. This amount is necessary due to the increased costs for salaries, benefits, and rent. 92% of OSC's budget goes toward salary, benefits, and office space rent. Therefore, the pay raise of FY 2007 and the planned pay raise in FY 2008 have a dramatic impact on the amount of funding OSC needs to pay its mostly professional staff. OSC is not requesting new FTE in FY 2008. Rather, OSC is requesting enough funding to continue paying salaries and benefits to the 110 FTE the agency will have in FY 2007, which is the minimum number of employees needed for OSC to accomplish its statutory missions.
- **The Future of USERRA.** The three-year Demonstration Project created by the Veterans Benefits Improvement Act of 2004 will terminate at the end of FY 2007. Congress will likely make a decision regarding which agency (OSC or DOL VETS) will handle Federal Sector USERRA cases. Section IV of this budget justification discusses the future of USERRA at OSC.
- This budget justification contains for the first time the completely revised Performance Goals of the agency. The old performance goals were cumbersome and very few were actually concretely measurable. The new ones are measurable, and directly tie to the four statutory missions of the agency. The new goals deal with timeliness in terms of investigating and processing cases, quality in investigations and prosecutions, and outreach (for those units that have statutory outreach responsibilities). The new performance goals can be found in Appendix B.
- This budget justification contains for the first time the rewritten Strategic Plan (FY 2006 – FY 2010), which lines up with the agency's new performance goals. The plan can be found in the Appendix A.
- In this request, OSC also describes its performance and plans under the President's Management Agenda for: (1) Strategic Management of Human Capital; (2) Competitive Sourcing; (3) Improved Financial Performance; (4) Expanded Electronic Government; and (5) Budget and Performance Integration. This request describes OSC's achievements in each of these areas, as well as planned future efforts.



## **1. The Office of Special Counsel**

### **A. Statutory Background**

OSC was first established on January 1, 1979. From then until 1989, it operated as an autonomous investigative and prosecutorial arm of the Merit Systems Protection Board (“the Board”). By law, OSC received and investigated complaints from current and former federal employees, and applicants for federal employment, alleging prohibited personnel practices by federal agencies; provided advice on restrictions imposed by the Hatch Act on political activity by covered federal, state, and local government employees; and received disclosures from federal whistleblowers (current and former employees, and applicants for employment) about wrongdoing in government agencies. The office also enforced restrictions against prohibited personnel practices and political activity by filing, where appropriate, petitions for corrective and/or disciplinary action with the Board.

In 1989, Congress enacted the Whistleblower Protection Act. The law made OSC an independent agency within the Executive Branch, with continued responsibility for the functions described above. It also enhanced protections against reprisal for employees who disclose wrongdoing in the federal government, and strengthened OSC’s ability to enforce those protections.<sup>1</sup>

The Congress passed legislation in 1993 that significantly amended Hatch Act provisions applicable to federal and District of Columbia (D.C.) government employees, and enforced by OSC.<sup>2</sup> Provisions of the act enforced by OSC with respect to certain state and local government employees were unaffected by the 1993 amendments.

In 1994, the Uniformed Services Employment and Reemployment Rights Act became law. It defined employment-related rights of persons in connection with military service, prohibited discrimination against them because of that service, and gave OSC new authority to pursue remedies for violations by federal agencies.<sup>3</sup>

OSC’s 1994 reauthorization act expanded protections for federal employees, and defined new responsibilities for OSC and other federal agencies. It provided that within 240 days after receiving a prohibited personnel practice complaint, OSC should determine whether there are reasonable grounds to believe that such a violation occurred, exists, or is to be taken. The act extended the protections of certain legal provisions enforced by OSC to approximately 60,000 employees of what was then known as the Veterans Administration (now the Department of Veterans Affairs), and to employees of certain government corporations. It also broadened the scope of personnel actions covered under these provisions. Finally, the act made federal agencies responsible for informing their employees of available rights and remedies under the Whistleblower Protection Act, and directed agencies to consult with OSC in that process.<sup>4</sup>

In November of 2001, Congress enacted the Aviation and Transportation Security Act,<sup>5</sup> which created the Transportation Security Administration (TSA). Under the act, non-security screener employees of TSA could file allegations of reprisal for whistleblowing with OSC and the MSPB. The approximately 45,000 security screeners in TSA, however, could not pursue such complaints at OSC or the MSPB.

OSC efforts led to the signing of a memorandum of understanding (MOU) with TSA in May 2002, under which OSC would review whistleblower retaliation complaints from security screeners, and recommend corrective or disciplinary action to TSA when warranted. The MOU did not (and could not), however, provide for OSC enforcement action before the MSPB, or for individual right of action (IRA) appeals by security screeners to the MSPB.

## **B. OSC's Mission**

OSC's mission is to protect current and former federal employees, and applicants for federal employment, especially whistleblowers, from prohibited employment 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 this 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 reemployment and antidiscrimination rights of veterans under the USERRA; &
- promoting greater understanding of the rights and responsibilities of federal employees under the laws enforced by OSC.

## **C. OSC's Internal Organization and Functions**

OSC maintains its headquarters office in Washington, D.C. Four field offices are located in Dallas, Oakland, Detroit, and Washington, D.C.

Agency components during FY 2006 include the Immediate Office of the Special Counsel (IOSC), five operating units/divisions and five supporting offices explained in detail below. (See Organizational Chart on p. 21.)

**Immediate Office of the Special Counsel.** The Special Counsel and staff in IOSC are responsible for policymaking and overall management of OSC. They also manage the agency's congressional liaison and public affairs activities, and its outreach program, which includes promotion of compliance by other federal agencies with the employee information requirement at 5 U.S.C. § 2302(c).

**Complaints Examining Unit.** This is the intake point for all complaints alleging prohibited personnel practices and other violations of civil service law, rule, or regulation within OSC's jurisdiction.<sup>6</sup> This Unit is responsible for screening up to 1,700 prohibited personnel practice cases per year. Attorneys and personnel management specialists conduct an initial review of complaints to determine if they are within OSC's jurisdiction, and if so, whether further investigation is warranted. The unit refers all matters stating a potentially valid claim to the Investigation and Prosecution Division for further investigation.<sup>7</sup>

**Disclosure Unit.** This unit is responsible for receiving and reviewing disclosures received from federal whistleblowers. It advises the Special Counsel on the appropriate disposition of the information disclosed (including possible referral to the head of the agency involved for an investigation and report to OSC; referral to an agency Inspector General; or closure). The unit also reviews agency reports of investigation, to determine whether they appear to be reasonable and in compliance with statutory requirements before the Special Counsel sends them to the President and appropriate congressional oversight committees.

**Investigation and Prosecution Division.** The Investigation and Prosecution Division (IPD) is comprised of four field offices. The IPD conducts field investigations of matters referred after preliminary inquiry by the Complaints Examining Unit. Division attorneys conduct a legal analysis after investigations are completed to determine whether the evidence is sufficient to establish that a prohibited personnel practice (or other violation within OSC's jurisdiction) has occurred. Investigators work with attorneys in evaluating whether a matter warrants corrective action, disciplinary action, or both.

If meritorious cases cannot be resolved through negotiation with the agency involved, division attorneys represent the Special Counsel in litigation before the Merit Systems Protection Board. They also represent the Special Counsel when OSC intervenes, or otherwise participates, in other proceedings before the Board. Finally, division investigators and attorneys also investigate alleged violations of the Hatch Act and the Uniformed Services Employment and Reemployment Rights Act. However, under a new pilot program, most USERRA functions will be housed in a new USERRA unit in the Special Projects Unit to assure uniformity of policy regarding the new pilot.

**Hatch Act Unit.** The unit issues advisory opinions to individuals seeking information about Hatch Act restrictions on political activity by federal, and certain state and local, government employees. The unit is also responsible for enforcing the act. It reviews complaints alleging a Hatch Act violation and, when warranted, investigates and prosecutes the matter (or refers the matter to the Investigation and Prosecution Division for further action). It will also oversee Hatch Act matters delegated out to the IPD.

**USERRA Unit.** Special Counsel Scott Bloch has made OSC's enforcement of USERRA a top priority. Thus, given the new, additional investigative responsibilities Congress assigned to OSC with the passing of the demonstration project, Mr. Bloch established OSC's USERRA Unit. The USERRA Unit is centrally located at OSC's headquarters in Washington, D.C. It is the specialized unit designated to receive, investigate, analyze, and resolve (via voluntary agreement or prosecution before the U.S. Merit Systems Protection Board) all USERRA and related veteran-employment claims. As part of OSC's outreach program, the USERRA Unit also educates federal agencies on their USERRA obligations.

## **SUPPORTING UNITS:**

**Alternative Dispute Resolution Program.** In selected cases referred by the Complaints Examining Unit for further investigation, the agency contacts the complainant and the agency involved, and invites them to participate in OSC's voluntary Mediation Program. If mediation resolves the complaint, the parties execute a written and binding settlement agreement; if not, the complaint is referred for further investigation. The mediation program for Alternative Dispute Resolution has been reorganized. Rather than have a single ADR specialist under the leadership of an SES employee, the agency has expanded the program through cross-training multiple individuals from each of OSC's operating units. As a result the agency now has a broad pool of trained mediators with different legal areas of expertise.

**Legal Counsel and Policy Division.** This division provides general counsel and policy services to OSC, including legal advice and support on management and administrative matters; legal defense of OSC in litigation filed against the agency; policy planning and development; and management of the agency ethics program.

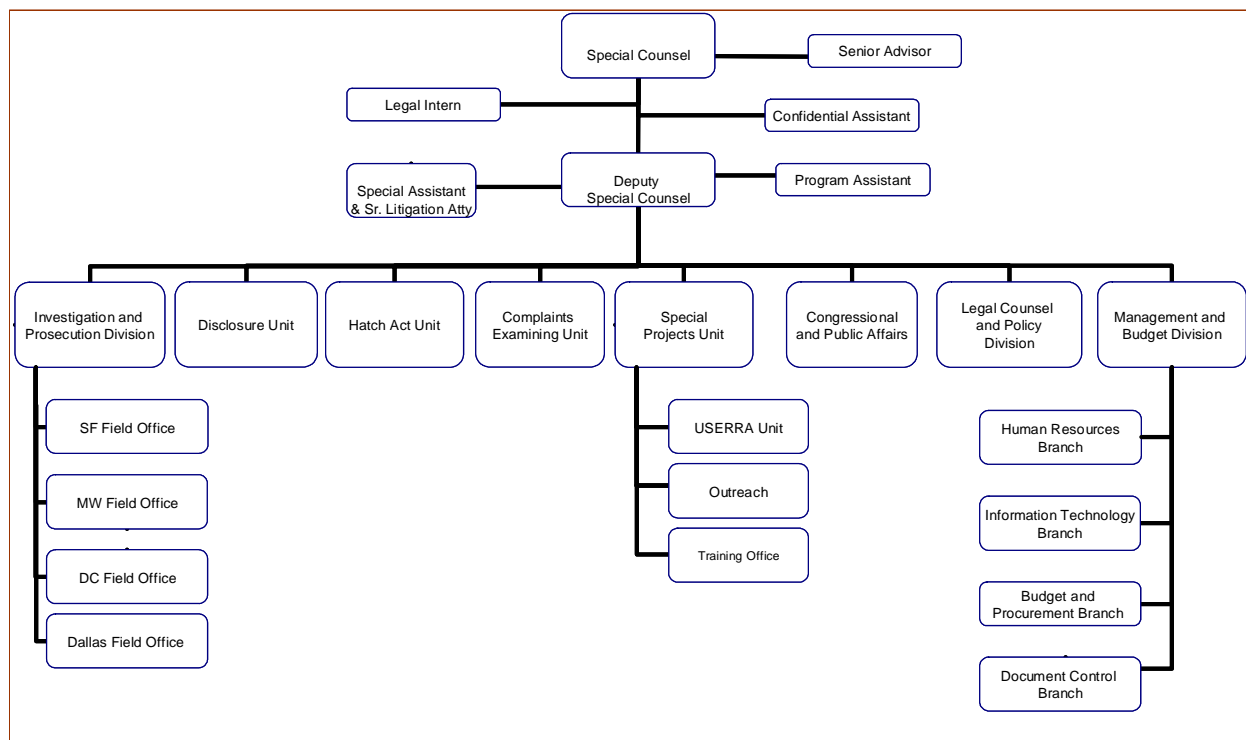
**Management and Budget Division.** This division provides administrative and management support services to OSC, in furtherance of program, human capital, and budget decisions. Division also includes the Information Technology Branch, Human Resources Branch, Document Control Branch, Customer Service Unit, and the Budget and Procurement Branch. The purpose of this division is to put the administrative support functions under one authority.

**Training Office.** A training office has been created to train all new employees, cross train existing employees, and develop specialized training in areas such as litigation skills. Specifically, the Training Office will cross train attorneys and investigators to enable them to traverse organizational boundaries within the agency. They will develop sufficient expertise in several areas of the law, giving management the ability to detail employees to address any potential backlogs that could form in the various units.

**Special Projects Unit.** This unit uses senior trial lawyers to work cases of high priority and has also been used by the Special Counsel to conduct internal research on the processes and procedures of the operational units at OSC. In addition, this unit handles the new special project assigned by P.L. 108-454 that requires OSC to investigate the re-employment rights of military service members under USERRA, which involves new functions, increased caseload, and new personnel.

## D. Organization Chart

### U.S. Office of Special Counsel – Organization Chart



## **II. SUMMARY OF FY 2006 PROGRAM CASELOAD AND ACTIVITY**

### **A. Prohibited Personnel Practices**

Unlike many other investigative entities or agencies, OSC must, as a general rule, conduct an inquiry after receipt of complaints alleging the commission of a prohibited personnel practice.<sup>8</sup> Compare, for example, 5 U.S.C. § 1214(a)(1)(A) (“The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.”) with 5 U.S.C. app. 3, § 6(a) (“[E]ach Inspector General ... is authorized— ... (2) to make such investigations and reports relating to the administration of the programs and operations of the [agency] as are, in the judgment of the Inspector General, necessary or desirable[.]”) and § 7(a) (“The Inspector General may receive and investigate complaints or information from an employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.”). The nature of the inquiry ranges from the CEU screening process to the IPD field investigations, but one must be conducted after a complaint is filed. Complaints received by OSC can and often do involve multiple allegations, some of which can involve different prohibited personnel practices. In all such matters, an OSC inquiry requires the review of, and a legal determination about, each allegation and prohibited personnel practice.

After a complaint is received by OSC, CEU attorneys and personnel management specialists conduct an initial review to determine whether it is within OSC’s jurisdiction, and whether further investigation is warranted. CEU refers all matters stating a potentially valid claim to the IPD for further investigation. All such matters are reviewed first by the ADR Unit.<sup>9</sup>

In selected cases that have been referred for further investigation, a trained OSC ADR specialist contacts the complainant and the employing agency to invite them to participate in the agency’s voluntary ADR Program. If both parties agree, OSC conducts a mediation session, led by OSC trained mediators who have experience in federal personnel law. When mediation resolves the complaint, the parties execute a binding written settlement agreement. If mediation does not resolve the complaint, it is referred for further investigation, as it would have been had the parties not attempted mediation.

The IPD conducts investigations to review pertinent records and to interview complainants and witnesses with knowledge of the matters alleged. Matters undergo legal review and analysis to determine whether the matter warrants corrective action, disciplinary action, or both.

If OSC believes a prohibited personnel practice has been committed and initiates discussions with an agency, the matter is often resolved through negotiation. Before OSC may



initiate an enforcement proceeding seeking corrective action (relief intended to make an aggrieved employee whole) at the MSPB, the Special Counsel must make a formal request to the agency involved, reporting on its findings and recommendations. Only when the agency has had a reasonable period of time to take corrective action and fails to do so, may OSC proceed to petition the MSPB for corrective action.<sup>10</sup> When an agency refuses to grant appropriate corrective action, OSC generally proceeds immediately to file a complaint with the MSPB.

If OSC determines that disciplinary action (the imposition of discipline on an employee who has committed a violation) is warranted, it can file a complaint directly with the MSPB.<sup>10</sup> Should the agency agree to take appropriate disciplinary action on its own initiative, then the matter can be settled without resort to an MSPB proceeding.

In addition to rectifying the matter at issue, OSC litigation before the MSPB – whether by enforcement actions seeking to obtain corrective and/or disciplinary action, or by intervention or other participation in matters filed by others – often has the additional benefit of clarifying and expanding existing law. It also brings greater public attention to OSC’s mission and work, a factor likely to increase the deterrent effect of its efforts. OSC’s Complaints Examining Unit (CEU), as discussed above, is the intake unit for all prohibited personnel practice complaints.

For FY 2006 OSC received 2,718 new matters, including PPP, Hatch Act, and Disclosure matters (**See Table 3**). The great majority of OSC’s staff resources were devoted to the processing of PPP complaints. Of the total 2,718 new matters OSC received during FY 2006, 1,805 or 66% were new PPP complaints. (**See Table 4**).

### ***Protecting the Federal Workforce from Reprisal for Whistleblowing***

Rescinded termination. A GS-12 Facility and Strategic Planner at a federal agency alleged that his termination was proposed because he disclosed to his agency’s Office of Inspector General irregularities in the operations of that area’s local Combined Federal Campaign. Investigation revealed that the disclosures were a factor in the decision to propose his termination. As a result of OSC’s investigation, the VA rescinded the proposed termination.

Rescinded suspension. OSC secured corrective action in a case in which a federal employee alleged that he was suspended for five days because of his whistleblowing. The employee disclosed that senior officials had violated housing assistance regulations. As a result of OSC’s investigation, the agency agreed to rescind the suspension, remove all negative documentation from the employee’s Official Personnel File, and pay the employee’s salary for the five days he was suspended.

Rescinded appraisals and reprimand. OSC secured corrective action in a case in which a former Electronics Engineer at a federal agency alleged that she received two successive marginal annual performance ratings and a reprimand because of her whistleblowing. Her whistleblowing included reports that her first and second-level supervisors had failed to remedy a hostile workplace in her predominantly male work environment. She also reported that her supervisors had supported her

principal harasser. Our investigation verified many of the employee's factual allegations and concluded that she had been retaliated against for her whistleblowing. As a result, the agency ultimately agreed to rescind the employee's performance appraisals, substitute ratings consistent with those received in the past, rescind her reprimand, provide a clean employment record, and forbid her former supervisors from participating in any future employment references.

Employee reinstated with back pay. A Mental Health Specialist assigned to an agency in New Mexico, 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 he 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 the Mental Health Specialist and provided him with full back-pay. The agency, at OSC's request, also agreed to remove the AWOL and charge the time to his regular pay and to remove all references to the AWOL and his termination from his Official Personnel Folder.

Corrective action for blacklisted employee. A former border patrol agent alleged that he was not selected for over 200 agent positions nationwide because of his whistleblowing. His disclosures included reports of a widespread pattern and practice of travel fraud by border patrol agents who were serving details along the U.S.–Mexican border. Under this fraudulent scheme, agents received rental kickbacks from hotels and private landlords during their details. Because of the employee's disclosures, the government was able to discipline and prosecute many of these agents. Our investigation found a clear pattern of circumstantial evidence indicating that the employee's supervisor informally blacklisted him in retaliation for his whistleblowing so he could not find another position. OSC settled this matter in a confidential settlement agreement, whereby the agency agreed to provide the employee with appropriate corrective action.

Three retroactive promotions, plus back pay and attorney's fees. OSC secured corrective action in a case in which an appraiser at a federal agency alleged that his agency failed to promote him, significantly changed his working conditions, and took other personnel actions against him because he blew the whistle on the agency's improper appraisal practices. He asserted that these improper practices grossly inflated property values to the detriment of federal taxpayers. The appraiser's whistleblowing led to Office of Inspector General and Government Accounting Office investigations, as well as an Appraisal Foundation review, all of which confirmed his allegations. As a result of our investigation, the agency agreed to give the appraiser three retroactive promotions, to pay \$7,000 in performance awards, to restore 10 days of leave, to pay \$2,000 for career training, to pay attorneys' fees up to \$17,500, and to purge the appraiser's personnel records of all negative references related to his whistleblower status.

### ***Protecting the Federal Workforce from Reprisal for Protected Activity***

Reassignment for employee. Resignation of director. OSC secured corrective action in a case in which a secretary at a federal agency alleged that she was detailed for over two years to a lower-graded position because she failed to obey an illegal order. Specifically, she told her director that she would no longer perform secretarial duties connected to his nongovernmental work. Our investigation confirmed that the director had misused his office for personal work and had retaliated against the secretary after she



refused to assist him. In response to a formal corrective action letter from OSC, the agency agreed to reassign the secretary to a new position, pay her reasonable attorney fees, and give her a clean employment record. The director resigned from federal service after OSC gave the results of its investigation to the agency.

***Protecting the Merit System through Enforcement of the Other PPPs (non-reprisal)***

Due process violation. OSC secured corrective action in a case in which a Port Director alleged he was reassigned to another position without being notified that the position was lower graded. Our investigation found circumstantial evidence indicating that the employee was effectively demoted without being given his Chapter 75 due process rights. As a result of OSC's investigation, the agency paid the employee approximately \$83,000 (equivalent to the amount of pay he lost after the downgrade).

Denial of veterans' preference. OSC secured corrective action in a case in which a disabled veteran alleged that he was improperly denied consideration for an entry-level budget analyst position by a federal agency. Our investigation verified the veteran's allegations. We found that instead of granting the veteran the 10-point preference he was entitled to, the agency selected a non-veteran through the Outstanding Scholar Program. As the Merit Systems Protection Board found in Dean v. Department of Agriculture, using this program to circumvent veterans' preference is illegal. In response to a formal corrective action letter from OSC sent to the Secretary of the agency, the veteran was offered a job, which he accepted.

Recruitment and leave/pay violation. A federal agency installation police officer alleged that following his retirement from a non-appropriated fund position, the agency failed to properly compute his leave and pay in violation of the Portability of Benefits for Non-Appropriated Fund Employee Act of 1990. Investigation substantiated the police officer's claim. At OSC's request, the agency changed his hiring date from the day before he retired to the day after he retired. The agency also retroactively corrected the police officer's time cards, gave him the opportunity to use accrued leave, and agreed to pay him for the leave if he was forced into a use or lose situation.

Obstruction of right to compete. OSC secured disciplinary action in a case in which a district manager with a federal agency told contract representatives that he was only going to be considering external applicants for an upcoming vacancy (the position had not yet been announced). The agency, at OSC's request, suspended the district manager for one day for attempting to influence these contract representatives from competing.

Unauthorized employment preference. OSC secured corrective action in a case in which a Special Agent at a federal agency alleged that an unqualified employee was promoted. As a result of OSC's investigation, the agency re-announced the position to allow qualified individuals to compete.

Influenced to withdraw from competition. A House Keeping Aid with an agency alleged that management officials had attempted to influence him to withdraw from competition for a position so as to improve or injure the employment prospects of another person in violation of 5 U.S.C. § 2302(b)(5). OSC found that management officials at the agency did attempt to influence the complainant to

withdraw from competition for a position, based on their belief that they were looking out for his best interests in attempting to dissuade him from giving up a career appointment for a temporary position. The agency was informed of our findings and agreed to informal disciplinary action. The agency issued memoranda to supervisors at the facility where the complainant is employed, specifically including the managers who attempted to influence him to withdraw from competition for a position. The memoranda reviewed prohibited personnel practices and merit system principles.

Recruitment and unauthorized preference. On May 11, 2006, the OSC entered into a settlement agreement with DHS in which the agency admitted that the border patrol agent had performed IT duties outside of his official position description and that he should not have been recruited and retained in a supervisory border patrol agent capacity from the time he was promoted to a GS-11 supervisory border patrol agent position to the present. DHS agreed to take the following corrective action: 1) document an approximate 9-year detail to IT duties in the border patrol agent's Official Personnel File; 2) reassign the border patrol agent to a properly classified non-supervisory position; 3) update its policies and procedures regarding administration of AUO premium pay; 4) work with OSC to train all border patrol supervisory employees on preventing future prohibited personnel practices; and 5) issue letters of counseling to appropriate border patrol managers admonishing them for assigning/promoting employees to work outside of their official position descriptions.

### **Procedures for Remediating PPPs.**

Working together with investigators, IPD staff attorneys determine whether OSC's investigation has established any violation of law, rule or regulation, and whether the matter warrants corrective or disciplinary action, or both.<sup>14</sup> If a violation is found, OSC generally first attempts to obtain resolution of complainants' issues informally, through negotiated settlements. (See **Table 5** for figures concerning favorable actions). If a violation of law is found and informal resolution is not possible, the Special Counsel may refer the matter in writing to the agency head under 5 U.S.C. § 1214(b)(2)(B) with a recommendation for corrective and disciplinary action, or both. If an agency declines to take corrective action, the Special Counsel may file a petition for corrective action with the MSPB under § 1214(b)(2)(C). If the Special Counsel determines that an apparent violation warrants disciplinary action, the OSC files charges against the offending employee under § 1215(a) and prosecutes the case before the MSPB.

At any time during its processing of a case, the OSC may seek a stay of any personnel action if the available evidence provides reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a PPP. The OSC may obtain a stay upon direct request to the agency concerned, or by filing a request for a stay with the MSPB under § 1214(b)(1). Also, pursuant to § 1212(c), the Special Counsel may intervene as a matter of right or otherwise participate in any proceeding before the MSPB, except that the Special Counsel may not intervene in a proceeding brought under § 1221 or 5 U.S.C. § 7701 without the consent of the individual initiating the proceeding.

**B. Case Processing: The Mediation Program for Alternative Dispute Resolution**

Among the factors that determine “mediation-appropriate” cases are the complexity of the issues, the nature of the personnel action, and the relief sought by the Complainant. Once a case has been identified as mediation-appropriate, the OSC ADR Specialist contacts the parties to discuss the ADR Program. “Pre-mediation” discussions are designed to help the parties form realistic expectations and well-defined objectives regarding the mediation process.

During fiscal year 2006, the number of resolutions increased from 5 to 11; the number of complaints identified as mediation appropriate went from 22 to 52. (**See Table 6**).

Mediation settlement outcomes in OSC’s Mediation Program vary, depending on the interests of the parties. Monetary recovery includes retroactive promotions, attorney fees, and lump sum payments. In addition to monetary recovery, the benefits received by complainants in ADR include revised performance appraisals, transfers, and letters of recommendation.

The ADR Unit resolved several significant complaints during FY 2006:

1. The complainant alleged that her supervisor lowered her performance appraisal rating, denied her an award and significantly changed their working relationship, all in reprisal for her whistle blowing to the Inspector General. The parties agreed to engage in mediation, and after meeting with two OSC mediators they reached an agreement to resolve all outstanding issues. Because of this no OSC investigation was needed and we closed the matter.
2. In another case the employee complained to his Congressman about the agency’s revocation of his “hardship” status as a single parent on unreasonably short notice, which led to a charge by the agency that he was AWOL. The agency fired the employee soon thereafter during his probationary period. The parties agreed to mediation and then settled the case. The agency rehired the employee in another office and he agreed to begin a new probationary period. This again obviated the need for an OSC investigation.

In order to provide a dispute resolution process that best meets the needs of the parties, the ADR Unit engages in ongoing self-evaluation. Feedback from participants has been overwhelmingly positive.

### **C. Case Processing: Hatch Act Violations**

OSC is also responsible for enforcing the Hatch Act, including investigating and prosecuting complaints alleging violations of the Act, and providing advisory opinions on the Act's requirements. The Hatch Act Unit, staffed by a Chief and five staff attorneys, is responsible for a nationwide program that provides legal advice on the Hatch Act to federal, state and local employees and the public at large. Specifically, the Hatch Act Unit has the unique responsibility of providing Hatch Act information and legal advice to White House staff, Congressional staff, the national press, senior management officials throughout the federal government, and state and local government officials. The Hatch Act Unit provides all of OSC's advisory opinions. When provided to individuals, the advisory opinions enable them to determine whether they are covered or not by the Act, and whether their contemplated activities are permitted under the Act or not.

The Hatch Act Unit also enforces compliance with the Act by receiving complaints alleging Hatch Act violations, conducting preliminary inquiries into complaint allegations and, (where warranted) further investigating allegations or referring the complaints to OSC's IPD (for further investigation). Depending on the severity of the violation, the Hatch Act Unit will either issue a warning letter to the employee, attempt to informally resolve the violation, prosecute the case before the MSPB or send it to the IPD to prosecute before the MSPB.

In FY 2006, OSC received 299 complaints, a 22% increase over FY 2005 (245 complaints were received in FY 2005). OSC has processed and closed 266 complaints during this period. Also, the Unit attempted to informally resolve as many ongoing Hatch Act violations as possible without resorting to litigation. Thus, corrective actions obtained in FY 2006 significantly increased. For example, employees who agreed to come into compliance with the law by withdrawing from partisan races or by resigning from their employment increased 125% and 120%, respectively. (See Table 7).

To further its advisory role, the Hatch Act Unit is very active in OSC's outreach program; the unit conducted 13 outreach presentations in FY 2006 to various federal agencies and employee groups concerning federal employees' rights and responsibilities under the Act. Many of these programs involved high-level agency officials. Advisories concerning partisan activity surrounding upcoming state and local elections have accounted for much of the unit's work this fiscal year. In FY 2006, the Hatch Act Unit received 237 written requests. This represents a 24% increase in intake compared to FY 2005 (191 written requests were received in FY 2005). This year, the unit issued 230 written formal opinions, 919 email advisories and responded to 1,855 oral advisory requests. (See Table 7).

#### **Hatch Act Disciplinary Actions Filed:**

**State/Local Employee Violations.** OSC filed two complaints for disciplinary action against state or local employees or officers for using their official authority and influence for the purpose of interfering with or affecting the result of an election and/or coercing subordinates to make political contributions. In one complaint, OSC sought disciplinary action against a Sheriff of a local county Sheriff's Department for asking his subordinate employees to appear in a political campaign commercial on behalf of a gubernatorial candidate. The Sheriff asked his employees to appear in this campaign ad while they were on duty and

asked them to appear in the commercial wearing their official Sheriff County uniforms and standing next to Sheriff Department official vehicles. The complaint also contained a separate count that alleged the Sheriff invited his subordinate employees to political fund-raisers that the Sheriff held on behalf of his own re-election campaign. In the other case, the former mayor of Atlantic City was charged with holding several meetings during which he asked subordinate employees, mainly city department directors, to collect absentee ballots for a candidate in a then-upcoming primary for City Council. It was further charged that the former mayor held subsequent meetings where he requested his directors to inform him of the number of ballots they had collected. In a separate count the former mayor was also charged with using his official position in an endorsement letter on behalf of the same candidate, in violation of the Hatch Act's restrictions on use of official authority.

**Federal Employee Violations.** During FY 2006, OSC filed three complaints for disciplinary action against federal employees. For example, in one complaint an Assistant United States Trustee (AUST) was charged with using her official authority or influence to affect the result of an election and for soliciting a political contribution from a subordinate. Specifically, the AUST handed an invitation to a political fund-raiser to a subordinate employee while the AUST admitted to the employee that she knew "it was a little outside the rules." The AUST had received training on the Hatch Act a mere two weeks prior to this incident.

OSC also filed a complaint for disciplinary action against a federal employee for sending politically partisan electronic mail messages while on duty in violation of the Hatch Act. Specifically, the complaint was against an agency employee who sent an e-mail message to over 30 coworkers while on duty and in his federal office. The e-mail contained a letter from then-Chairman of the Democratic National Committee Terry McAuliffe, which urged its recipients to take immediate action after the Presidential Debates "to help Kerry win on November 2."

Lastly, OSC filed a complaint for disciplinary action against an employee of the Department of Veterans Affairs for distributing campaign materials while on duty in his government work place and obtained a favorable settlement in this matter.

### **Hatch Act Disciplinary Actions Obtained:**

**Federal Employee Cases.** In this fiscal year, OSC obtained eight disciplinary actions (through negotiated settlements or from the Merit Systems Protection Board). For example, OSC obtained disciplinary action against a federal employee for sending a partisan political e-mail, which advanced the re-election campaign of a Congressional candidate, while on duty and in the federal workplace. The e-mail was titled "Halloween Party for Tim Holden" and contained an attached invitation that encouraged people to attend the party and "meet Tim Holden," a U.S. Representative seeking re-election to the 17th Congressional District, Pennsylvania. The federal employee sent the e-mail and invitation to over 300 recipients. In February 2006, an Administrative Law Judge (ALJ) recommended that the employee be suspended for 60 days for violating the Hatch Act. The ALJ noted that the e-mail described the candidate in highly favorable terms and strongly encouraged attendance at the event, and the ALJ concluded that the text and the attachment of the e-mail "obviously were directed toward the success of Mr. Holden's reelection campaign." In June 2006, the Merit Systems Protection Board upheld the ALJ's decision and ordered that the employee be suspended for 60 days.

Also in FY 2006, OSC obtained disciplinary action against an attorney with the Small Business Administration, who OSC had charged with knowingly and willfully violating the Hatch Act by engaging in political activity over a three year period on behalf of a political party while on duty in his government office (e.g., using his government office equipment to send and receive more than 100 e-mails, to draft documents and to have telephone conversations in support of a political party and its candidates). The Merit Systems Protection Board upheld the initial decision finding that the employee's activities as charged warranted removal from his employment.

In April 2006, the Merit Systems Protection Board upheld an initial decision suspending a federal employee for 30 days for violating the Hatch Act's solicitation prohibitions. OSC had charged the employee with soliciting political contributions when he permitted a campaign committee to send a letter identifying him as the sender to 144 people requesting political contributions for a candidate for partisan public office.

In yet two other cases, OSC reached settlement agreements with two federal employees who e-mailed invitations to a political fund-raiser while they were on duty and in their federal workplace. One of the employees sent the invitation to subordinates. Their actions violated the Hatch Act's prohibitions on soliciting political contributions, using official authority or influence to interfere with the result of an election, and engaging in political activity while on duty and/or in a federal building. Under the terms of the settlement agreements one employee served a ten day suspension, while the other employee served a twelve day suspension.

**State and Local Employee Cases.** In March 2006, OSC reached a settlement agreement with the former Mayor of Atlantic City. OSC filed its petition seeking disciplinary action on November 9, 2005. He left office on December 31, 2005, after being defeated in his re-election bid. As described in greater detail in the preceding section, OSC had charged this official with violating the Hatch Act by asking several subordinates employees to collect absentee ballots for a candidate in a partisan election and by using his official position in an endorsement letter on behalf of the same candidate. Under the terms of the settlement agreement, the former mayor admitted violating the Hatch Act and he agreed not to seek or accept employment with the State of New Jersey for a period of eighteen months.

In yet another example, in November 2005, the Merit Systems Protection Board upheld an initial decision finding that an executive director of a New Jersey county agency had violated the Hatch Act when he ran for partisan public office. The Board found that the executive director's violation was willful and ordered his county agency to remove him from his position.

#### **D. Case Processing: Disclosure Unit**

In addition to its investigative and prosecutorial mission, the OSC provides a safe channel through which federal employees, former federal employees, or applicants for federal employment may, under 5



U.S.C. § 1213(a), disclose information they reasonably believe evidences a violation of law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. At present, the Disclosure Unit staff is comprised of the Chief, six attorneys, one paralegal and one student intern.

The Disclosure Unit is responsible for reviewing the information submitted by whistleblowers, and advising the Special Counsel whether it shows that there is a substantial likelihood that the type of wrongdoing described in § 1213(a) has occurred or is occurring. Where a substantial likelihood determination is made, the Special Counsel must transmit the disclosure to the head of the relevant agency for further action. The agency is required to conduct an investigation and submit a report to OSC describing the results of the investigation and the steps taken in response to the investigative findings. Under § 1213(e), the whistleblower is also provided with a copy of the report for comment. The Special Counsel is then required to review the report in order to determine whether it meets the requirements of the statute and its findings appear reasonable. Finally, the report is forwarded to the President and appropriate Congressional oversight committees.

In the Disclosure Unit, 435 new matters were received in FY 2006. During FY 2005, the Unit referred 19 matters for investigation under § 1213(c), and closed 473 matters due to lack of sufficient basis for further action. In FY 2006, the unit referred 24 matters for investigation under § 1213(c), a 26% increase over FY 2005, and closed 478 matters due to lack of sufficient basis for further action. (See Table 8).

The Disclosure Unit's caseload remains high due to growing public awareness of the Unit's work. In recent years, it has handled several high profile cases that have received widespread national press attention. In addition, after the terrorist attacks of September 11, 2001, more federal whistleblowers came to OSC with national security allegations and concerns. Many cases handled by the Disclosure Unit involve complex issues; some involve classified material and must be handled according to federal requirements.

The Disclosure Unit's more complex cases are very labor-intensive and often require the attention of more than one attorney. These cases can take more than a year to complete for a number of reasons—agencies routinely request additional time to conduct the investigation and write the report, whistleblowers request additional time to prepare their comments, and Disclosure Unit attorneys and the Special Counsel must review the report to determine whether it contains the information required by statute, its findings appear reasonable, and to prepare any comments the Special Counsel may have on the report.

The following is a representative sample of cases that have been referred by the Special Counsel to the heads of the agencies pursuant to 5 U.S.C. § 1213(c) and closed after receipt and review of the agency report. Also included are summaries of cases that are presently under investigation by agency heads. In many cases, OSC's efforts have resulted in significant media coverage and reform efforts.

## **CLOSED CASES**

### **Disclosures of Substantial and Specific Danger to Public Health and Safety**

Substandard Mental Health Care at Indian Hospital. OSC referred to the Secretary of Health and Human Services allegations that the mental health staff at Pine Ridge Indian Hospital was not properly licensed or qualified and that the staff was subject to the clinical supervision of an unlicensed administrator. According to the whistleblower, the quality of mental health care at the hospital routinely fell below Indian Health Service and Medicaid standards. The whistleblower further alleged that the hospital was engaged in ongoing Medicaid fraud insofar as it billed South Dakota Medicaid for mental health services that were not covered by the program. An agency investigation confirmed that improperly qualified staff members had provided mental health services for which Pine Ridge Indian Hospital sought and received Medicaid reimbursements. The agency reported that administrative recovery proceedings were underway and that additional quality assurance procedures were adopted to ensure proper care. In addition, the agency referred this matter for possible criminal prosecution. *Referred February 2005; OSC's Analysis of Disclosure submitted to the President and Congressional oversight committees October 26, 2005.*

Mishandling and Improper Storage of Expensive Military Equipment. The whistleblower disclosed to OSC violations of regulation in connection with the storage of military equipment at the Department of Defense (DOD) Defense Logistics Agency, Defense Distribution Depot, Anniston, Alabama, (DDAA). Specifically, he alleged that 1) expensive military equipment stored at DDAA is often packaged and stored improperly, 2) DDAA employees are not conducting required inspections of incoming supply containers nor are they conducting timely inspections of inventory already in storage, and 3) DDAA employees fail to seek reimbursement from other agencies for packaging materials.

An investigation by the DOD Office of the Inspector General (OIG) substantiated the whistleblower's allegations. As a result of the investigative findings, the OIG recommended several corrective actions, including 1) inspection of all items stored in location P127 for proper packaging and preservation, 2) refresher training on receiving/packing/inspection procedures for relevant personnel, 3) and development and implementation of a method to provide accountability for night vision devices. *Referred August 2004; OSC's Analysis of Disclosure submitted to the President and Congressional oversight committees January 2006.*

Deficiencies in Security at Nuclear Research Laboratories and Facilities. OSC referred to the Secretary of the Department of Energy allegations of security deficiencies and violations of law, rule or regulation in DOE's Safeguards and Securities Program. The whistleblower alleged that the nation's class "A" nuclear research facilities and laboratories were vulnerable to terrorist attack, theft, and sabotage. DOE's class "A" facilities are charged with several different functions including research, disassembly of nuclear weapons stockpiles, storage of nuclear components and raw materials including Special Nuclear Material used for the production of nuclear weapons, and the replacement and refurbishment of nuclear weapons components presently in use by the U.S. military.



DOE did not substantiate the allegations. The report stated that because the referral was based on information dating from August 2002, the allegations did not accurately reflect the agency's present safeguards and security posture. Significant changes had been made to the security apparatus since August 2000 after the National Nuclear Security Administration was established. Congress created the NNSA, in part, in response to previous concerns about security in the nuclear weapons complex. The report states that the changes to security and protection have been reviewed and evaluated by independent organizations even more so after the terrorist attacks of September 11, 2001. The Special Counsel commented that it appeared DOE had taken action to address security issues but that given recent concerns identified by GAO, continued Congressional oversight of DOE's security program was needed.

The whistleblower also raised security and vulnerability concerns about the Office of Transportation Safeguards, the DOE division responsible for transporting DOE assets, including nuclear weapons and materials, throughout the United States. This disclosure was classified. OSC determined that the classified disclosure involved counterintelligence information. Thus, in accordance with 5 U.S.C. § 1213(j), the information was transmitted to the National Security Advisor, the Senate Select Committee on Intelligence and the House Select Committee on Intelligence on June 7, 2002. *Referred October 2002; OSC's Analysis of Disclosure submitted to the President and Congressional oversight committees February 2006.*

Improper Denial of Medical Services. OSC referred allegations to the Secretary of the Department of Health and Human Services (HHS), that, from July 2004 until October 2004, Dr. Stephen Ryter, then-Clinical Director, HHS, Indian Health Service, Acoma-Canoncito-Laguna (ACL) Service Unit, Albuquerque, New Mexico, routinely denied all requests for contract medical services. The ACL Service Unit relies upon contracts with other hospitals as a means of providing advanced medical services to its patients. The whistleblower alleged that Dr. Ryter's practice of denying all requests for contract services created a substantial and specific danger to the health of the hospital's patients because patients were not receiving proper medical care.

The HHS OIG Dallas Regional Office, Albuquerque Field Office, investigated the allegations and found them to be unsubstantiated. The investigators found that Dr. Ryter implemented the case priority system properly. They also reviewed the medical records of the eight patients specifically mentioned in the disclosure and, in each case, found that there was a satisfactory explanation for the ACL Service Unit's decision not to pay for further treatment. *Referred April 2005; OSC's Analysis of Disclosure submitted to the President and Congressional oversight committees March 2006.*

Mistreatment of VA Psychiatric Patients. OSC referred to the Secretary of Veterans Affairs allegations that the Greater Los Angeles Healthcare System, West Los Angeles Medical Center (Medical Center) has allocated psychiatric resources in a manner that endangers patients, staff, and the public. In particular, the whistleblowers alleged that the Medical Center created a fictitious ward, Ward 1 East, into which suicidal, homicidal, and other psychiatric patients are admitted when there are no other beds available. According to the whistleblowers, patients admitted to Ward 1 East may be left on gurneys in the emergency room for as many as three days, thereby aggravating their psychiatric conditions. Other patients presented for emergency psychiatric care, the whistleblowers maintained, are denied immediate treatment and referred to an outpatient facility. In addition, the whistleblowers alleged that the Medical Center reduced the

number of psychiatric beds available to its patients and closed its Psychiatric Emergency Service in violation of 38 U.S.C. § 1706. Finally, the whistleblowers alleged that management is engaging in an ongoing waste of funds in connection with the long-term care contracts for mental health patients.

After investigation the agency reported, that it had experienced some difficulties when reorganizing the Medical Center but the problems had been resolved through the use of working groups that involved frontline practitioners. The agency further explained that the designation “Ward 1 East” represented an administrative mechanism for tracking patient treatment which actually improved the quality of care for patients who were awaiting admission to an inpatient ward. *Referred July 2005; OSC’s Analysis of Disclosure submitted to the President and Congressional oversight committees March 2006.*

Dangers to Public Safety at Prison Factories. OSC referred to the Attorney General allegations that inmates working in computer recycling facilities operated by Federal Prison Industries (FPI) at United States Penitentiary (USP) Atwater, California, and other Bureau of Prisons (BOP) facilities were being exposed to hazardous materials, including lead, cadmium, barium and beryllium, released when computer monitors were intentionally broken as part of the recycling process. The whistleblower further alleged that prison officials abused their authority by ordering the reactivation of operations in the computer recycling facility after they were suspended on the grounds that they presented imminent danger to the health of factory workers. Finally, the whistleblower alleged that a food service area in the computer recycling facility at USP Atwater was exposed to the factory floor and toxic contaminants in violation of Occupational Health and Safety Administration regulations.

In response to OSC’s referral, the agency reported that “BOP[,] FPI and Safety Staff appear[ed] to have adequately addressed” the safety concerns raised in the disclosure. The whistleblower vigorously disputed these findings and provided OSC with documentary evidence to support his account of events. Upon review of the agency’s submissions and the whistleblower’s comments, the Special Counsel determined that the agency’s findings were unreasonable and recommended an independent and impartial investigation into BOP’s recycling activities. It is our understanding that such an investigation is currently being conducted by the Office of Inspector General for the U.S. Department of Justice and that this investigation comprises all computer recycling facilities located in BOP institutions. *Referred November 2004; OSC’s Analysis of Disclosure submitted to the President and Congressional oversight committees April 2006.*

Over-Exposure of Human Subjects without Informed Consent. OSC referred to the Administrator of the Environmental Protection Agency (EPA) allegations that researchers at EPA’s National Health and Environmental Effects Research Laboratory (NHEERL), Research Triangle Park, North Carolina, were violating regulations governing the conduct of human research studies. The whistleblower, a senior research scientist, alleged that research scientists at NHEERL experimented on human subjects without obtaining their informed consent and that EPA officials covered up this wrongdoing when it was brought to their attention.

In particular, the whistleblower alleged that Chong Kim, a research scientist in the Human Studies Division (HSD) of NHEERL, led a research team which exposed human subjects to doses of di-2-ethylhexyl sebacate (sebacate) and other potentially dangerous compounds as much as one hundred times greater than the doses to which the subjects consented. The whistleblower further alleged that EPA officials repeatedly mischaracterized the wrongdoing identified as merely technical violations of EPA protocol. EPA's Office of the Inspector General (OIG) investigated the allegations and found that although test subjects were exposed to sebacate in amounts greater than that to which they consented, the overexposure was not proved to be intentional. Rather, the overexposure resulted from a mistake in the researcher's mathematical calculations. The investigation also found that the overexposure posed no health risk to the subjects, as sebacate is not a hazardous substance; there was no evidence of intentional or willful misconduct on the part of Dr. Kim, and that EPA timely addressed the issues raised by the overexposure. In response to the investigation, EPA took actions to assure better compliance with human subject experiments including disciplining and indefinitely banning Dr. Kim from human subject testing. Subjects were notified of the overexposure, and there was no evidence that any subjects suffered any adverse health consequences as a result of the overexposure. Human subject testing was not resumed until additional controls were put in place agency-wide according to the recommendations of the Human Subject Review Panel. *Referred November 2004; OSC's Analysis of Disclosure submitted to the President and Congressional oversight committees April 2006.*

Nebulizer Treatments Improperly Administered to Respiratory Patients. The whistleblower alleged that medical personnel at the Department of Veterans Affairs (VA), Miami VA Medical Center (VAMC), Miami, Florida, are endangering the health of respiratory patients by administering the medications albuterol sulfate and ipratropium bromide in diluted doses and at incorrect intervals of time in order to cut costs. He also alleged that management at the VAMC instructs medical personnel to falsify medical records in order to conceal this wrongdoing.

The VA Office of the Medical Inspector (OMI) investigated the allegations and found them to be unsubstantiated. However, the investigation did uncover other problems in the VAMC's Respiratory Care Unit, including a shortage of staff and poor documentation of medical treatments. To correct these deficiencies, the OMI recommended that the VAMC: 1) document respiratory treatments with greater consistency, 2) increase staffing levels in the Respiratory Care Unit, 3) improve recruitment and retention strategies for respiratory therapists, and 4) clarify the policy on the administration of medications via aerosol delivery devices. *Referred November 2005; OSC's Analysis of Disclosure submitted to the President and Congressional oversight committees May 2006.*

## **Disclosures of Gross Mismanagement**

Physician Misconduct at Veterans Affairs Medical Center. OSC referred to the Secretary of Veterans Affairs allegations from four health care professionals, including a physician, employed at the U.S. Department of Veterans Affairs (VA), VA Canandaigua Medical Center, Canandaigua, New York, that Dr. Susan Sharza, a VA physician, repeatedly refused to see patients, falsified medical records, repeatedly failed to respond to her pager in emergency situations, and failed to communicate important medical information regarding patients to specialists at the facility. In addition, they alleged that VA Medical Center management officials, in particular Chief of Staff, Dr. Robert Babcock, failed to address her conduct and impeded the efforts of one of the

whistleblowers to correct the problems. The whistleblowers alleged that this gross mismanagement and abuse of authority resulted in neglect and mistreatment of veterans.

At the request of the Secretary, the VA Veterans Health Administration investigated. The allegations were partially substantiated with the investigation confirming two instances of substandard care involving Dr. Sharza and two instances when she refused to see patients. The investigation concluded that she did not falsify medical records and was unable to determine whether or not she intentionally failed to respond to her pager. Even though the investigation uncovered instances of substandard care and poor conduct, the agency ultimately concluded that these incidents were insufficient evidence to support a finding of gross mismanagement. The agency also found no evidence that Dr. Babcock abused his authority. *Referred June 2004; OSC's Analysis of Disclosure submitted to the President and Congressional oversight committees November 2005.*

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

Violation of Procurement Laws and Regulations. OSC referred to the Secretary of the Army that contracting personnel at the U.S. Army Corps of Engineers (USACE), Great Lakes and Ohio River Division, Louisville District, routinely disregarded applicable federal contracting laws, rules, and regulations, including the Federal Acquisition Regulation (FAR), Engineering FAR Supplement, Department of Defense FAR Supplement, the Chief Financial Officers Act of 1990 (31 U.S.C. § 901 *et seq.*), the Competition in Contracting Act (10 U.S.C. § 2304), and the Brooks Act (40 U.S.C. § 541 *et seq.*).

The USACE Office of Chief Counsel investigated and substantiated the allegations in part. The investigators found that Administrative Contracting Officer authority had been improperly delegated on service contract, DACA27-98-D-0001. In response, Internal Review recommended that the agency reissue guidance from the Office of the Chief of Contracting to contracting personnel regarding the proper authority for modifications on service contracts. Internal Review also recommended that contracting officers review contract records every 12 months to ensure compliance with the terms of the contract. A follow-up investigation in April 2004 confirmed that the Contracting Division was implementing the recommendations. The Office of Chief Counsel found that several of the other allegations had been previously investigated by Internal Review or the Department of Defense Office of Inspector General, and, when warranted, USACE had already taken appropriate corrective action. *Referred February 2005; OSC's Analysis of Disclosure submitted to the President and Congressional oversight committees December 2005.*

## **AGENCY REPORTS UNDER REVIEW**

### **Disclosures of Substantial and Specific Dangers to Public Health and Safety**

Incompetence of the Chief of Cardiology at VA Medical Center. OSC referred to the Secretary of the Veterans Affairs (VA) allegations that the Chief, Cardiology Division at the St. Louis VA Medical Center did not accurately interpret 12-lead electrocardiogram and Holter monitor rhythms, and mismanaged the Cardiology Division. According to the whistleblower, the Cardiology Chief made significant errors in interpreting ECG and Holter monitor recordings, which could lead to serious injury or death for patients. The whistleblower also alleged that the Cardiology Chief publicly misrepresented his standing as a Fellow of the American College of Cardiology, failed to report for his regularly scheduled duties in the Cardiology Division, failed to review echocardiograms on days he scheduled himself to be responsible for such reviews, and failed to manage attending physician and call schedules in a timely and equitable manner. All of these actions, according to the whistleblower, constituted gross mismanagement and significantly compromised patient care and the safety of veteran patients. *Referred October 2005; agency report under review.*

Ineffective Border Security Tactics Mandated by Sector Management. OSC referred to the Secretary of Homeland Security allegations that Blaine Sector management ordered agents to discontinue their successful low-visibility tactics and adopt high-visibility tactics that stand no reasonable chance of deterring smuggling activities along a particular section of the U.S. Canada border. According to the whistleblowers, management allocated 3 agents to patrol a 75-mile stretch of border and adopted policies which left the border unprotected for at least 16 hours per day. These policies also impede cooperation with other federal and local law enforcement agencies. Given the recognized risk that terrorists may target the unprotected border area as a point of entry into the United States, the whistleblowers alleged that management's new policies amount to a substantial and specific danger to public safety as well as gross mismanagement. In addition, the whistleblowers also alleged that the now retired Patrol Agent-in-Charge for the station in question engaged in violations of law, rule or regulation, gross mismanagement, and a gross waste of funds. *Referred November 2005; agency report under review.*

Misallocation of Funds Earmarked by Congress for Wireless Initiatives at the Southwest Border. OSC referred to the Secretary of the Department of Homeland Security (DHS) allegations that in 2004, and 2005, DHS failed to allocate sufficient funds to support the acquisition of wireless telecommunications equipment and technologies as intended by Congress, and instead used the monies for non-wireless procurements. According to the whistleblower, the failure to support wireless communications at the southwestern U.S. border has rendered the border unsafe for agents and vulnerable to terrorist infiltration. *Referred September 2005; agency report under review.*

Collection of Human DNA Cell Lines Without Informed Consent. OSC referred to the Secretary of Health and Human Services allegations that a contract researcher conducting human research studies with the National Institutes of Health collected genetic material from infant subjects, for the creation of immortalized cell lines for future research, without proper informed consent of the study participants. The collection occurred incident to a comprehensive study examining the use of the drug hydroxyurea in infants with Sickle Cell Disease, the Pediatric Hydroxyurea Phase III Clinical Trial, a project known as BABY HUG. According to the whistleblower, neither the trial protocol nor the consent forms provided to subjects contemplated the creation of



living DNA cell lines. The whistleblower alleged the collection of this genetic material without informed consent constituted a violation of law, rule, or regulation, gross mismanagement, an abuse of authority, and a substantial and specific danger to public health and safety. *Referred March 2006.*

Mistreatment of Mental Health Patients by the Navajo Area Indian Health Service. OSC referred to the Secretary of the Interior allegations of systematic and willful mistreatment of patients in need of mental health intervention by physicians employed at the Crownpoint Health Care Facility (Crownpoint), an Indian Health Service (IHS) facility located in within the Navajo Area. The whistleblower alleged that physicians at Crownpoint repeatedly participated in the involuntarily commitment of patients to secured psychiatric hospitals without due process and in violation of applicable law. The whistleblower further alleged that physicians at Crownpoint were prescribing psychotropic drugs to patients in need of mental health intervention without adequate regard for the viability of non-pharmacological treatment alternatives or proper safety precautions. According to the whistleblower, many of these drugs have serious side effects such as depression and can even lead to suicidal ideations in some patients. The whistleblower asserted that the prescription practices he disclosed constituted a substantial and specific danger to public health and violated both New Mexico Medicaid regulations and IHS policy. *Referred June 2006.*

Falsification of Secure Database at Airport. OSC referred to the Secretary of the Department of Homeland Security allegations that management officials directed the entry of false records of customs inspections to inflate statistics at the Sanford International Airport (Sanford), Sanford, Florida. According to the six whistleblowers, Customs and Border Patrol (CBP) Agents, during the summer and fall, 2005, they were detailed to work at Sanford. During their shifts in the secondary agricultural inspections area, they were instructed by Sanford CBP Supervisors to take stacks of passenger and crewmember customs declarations, and enter the names into the enforcement database as reports of enforcement screens, or IO25s. They were told to guess at the information that would otherwise be obtained during direct interview and inspection of the passenger or crewmember, such as race, length of stay, and number of bags. They also alleged that they were instructed to enter an "ENF" code, rather than the code for an agricultural secondary inspection, "PPQ." This would falsely reflect that the passenger or crewmember had been stopped, interviewed, and bags inspected in connection with a suspicion of possessing contraband or engaging in unlawful activity. *Referred April 2006.*

Federal Air Marshal Policies Endanger Marshals and the Public. OSC referred to the Secretary of Homeland Security allegations that Federal Air Marshals are required to wear dress clothing inconsistent with most passenger attire on many flights, that Marshals are required to pre-board flights in plain view of passengers, and that they must identify themselves as Federal Air Marshals at hotels. The whistleblower, a Federal Air Marshal, also disclosed that the agency has released to the media highly sensitive tactical information about training and in-flight procedures used by Marshals, which has further jeopardized the safety of both Federal Air Marshals and the flying public. The whistleblower alleged that these practices violate the Intelligence Reform and Terrorism Prevention Act of 2004 and thereby constitute a serious breach of established law enforcement practice and procedure, and constitute gross mismanagement and a substantial and specific danger to public safety. *Referred August 10, 2006.*

Lack of Audible Fire Alarm System at Training Center. OSC referred to the Secretary of the Department of Navy allegations that the fire alarm system was inaudible in the classrooms at the Safety and Environmental Training Center, Naval Air Depot North Island, San Diego, California. The whistleblower

alleged that the inability to hear the fire alarm places instructors and students in substantial danger in the event of a fire. According to the whistleblower, the fire detection system has not functioned properly since a contractor accidentally damaged the system, rendering it inoperable. *Referred September 2006.*

Overpayment of Air National Guardsmen. OSC referred to the Secretary of the Department of Defense (DoD) allegations of systematic abuse of time and attendance regulations which cost DoD hundreds of thousands of dollars in man-hours and paid leave at the North Carolina Air National Guard (NCANG), Charlotte, North Carolina. According to the whistleblower, civilian and military personnel at the NCANG routinely claim compensatory time for hours that were not spent on standby status or performing mission-related work. Instead, civilian and military personnel claim hours spent at the beach, golfing and relaxing by the hotel pool as overtime hours eligible for compensatory time or leave passes. In particular, the whistleblower alleged that support personnel for the Modular Airborne Firefighting System (MAFFS) claimed an unjustifiable amount of compensatory time (up to 59 hours per work week) for missions that required little, if any, overtime work. *Referred September 2006.*

#### **Disclosures of Violations of Law, Rule or Regulation, Gross Mismanagement and Gross Waste of Funds and Abuse of Authority**

Misrepresentation of Air Marshal Flight Statistics. OSC referred to the Secretary of the Department of Homeland Security allegations that a computer generated report summarizing the activity of Air Marshals in December 2004, misrepresented the number of flights covered by Federal Air Marshals. This report, the whistleblower alleged, showed that Air Marshals flew on a different number of flights as actually covered by the agency. According to the whistleblower, current staffing levels and existing operating procedures would make it impossible for Air Marshals to cover the number of flights represented in the report he reviewed. As a result, the report overstated the number of flights covered. The whistleblower also alleged that the inflated statistics factored in the bonuses awarded to FAMS Special Agents in Charge and were provided to Congress in order to demonstrate compliance with staffing requirements. *Referred April 2005.*

Faulty Repairs of F/A-18 Fighter Jets. OSC referred to the Secretary of the Navy allegations that mechanics in Shop 93503, Naval Air Depot, North Island, California, attached generator conversion units (GCUs) onto F/A-18 fighter jets incorrectly. Specifically, he alleged that, from March 2005 until July 2005, the mechanics did not have the necessary torque tools required to properly torque the screws used to attach the GCUs to the wings of the aircraft. Although Shop 93503 mechanics finally received torque tools in July 2005, the whistleblower stated that the GCU screws on hundreds of F/A-18s currently deployed by the U.S. military and several foreign militaries still have not been properly torqued. The whistleblower also alleged that Shop 93503 does not perform mandatory quality assurance inspections on all GCU components. *Referred February 2006.*

Dangerous Airflow in Biohazard Laboratory. OSC referred to the Secretary of the Department of Health and Human Services allegations that an airflow problem at a Biohazard Level 3 laboratory at the National Institutes of Health, National Institute of Neurological Disorders and Stroke, Rocky Mountain Laboratory, Hamilton, Montana, poses a danger to public health. He advised that scientists in this laboratory

are conducting research on several contagious, dangerous diseases, including tuberculosis and mad cow disease. According to the whistleblower, the doors to this laboratory do not close properly due to an airflow problem, thereby posing a risk that employees working elsewhere in the building could become infected. *Referred March 2006.*

Unlicensed Practice of Pharmacy at VA Facility. OSC referred to the Secretary of Veterans' Affairs an allegation that prescriptions filled on the super-tote line at the Department of Veterans Affairs, Mid-South Consolidated Mail Outpatient Pharmacy (Mid-South CMOP) in Murfreesboro, Tennessee, were not being verified by pharmacists before they were sent to patients. According to the whistleblower, this failure to properly verify prescriptions violated general principles of pharmacy law, the applicable Veterans Health Administration Manual, and the instructions of both the National CMOP Director and the Chief Consultant for the Pharmacy Benefits Management Strategic Healthcare Group. OSC previously referred this matter to the Honorable Richard J. Griffin, VA Inspector General, on December 14, 2004, requesting information related to the whistleblower's allegation. OIG declined to provide the information requested, resulting in OSC's referral for formal investigation under 5 U.S.C. § 1213. *Referred April 2006.*

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

Unethical Post-Employment Activities. OSC referred to the Secretary of the Air Force allegations that Col. Ron Oholendt, former Commander, U.S. Department of the Air Force, Space Battlelab, Schriever Air Force Base, Colorado Springs, Colorado, and Lt.Col. Allan Cassidy, former Space Battlelab Chief of Concept Evaluation, violated 18 U.S.C. § 207 by engaging in illegal post-employment communications with government employees in an attempt to influence the Space Battlelab to fund a project in which they had previously participated personally and substantially as government employees. She also alleged that Col. Patrick Rhodes, Space Battlelab Commander, and other government employees were aware of the illegal nature of these communications, yet allowed them to continue. We transmitted her allegations to the Secretary of the Air Force on November 10, 2005. *Referred November 2005.*

Purchasing Personal Items with Government Funds. OSC referred to the Secretary of the Department of Veterans Affairs allegations that, on November 2, 2004, Anita Johnson, Purchasing Agent, Prosthetic and Sensory Aids Service, Veterans Affairs Medical Center (VAMC), Alexandria, Louisiana, used VAMC funds to purchase seven pairs of shoes for personal use. OSC initially referred the allegations to the VA Office of the Inspector General (OIG) on January 3, 2006. The OIG did not investigate the allegations nor respond to OSC's request for assistance in this matter. The allegations were then referred to the Secretary for a formal investigation. The agency has referred the matter for criminal review. *Referred April 2006.*



## **E. Case Processing: USERRA Violations**

### **OSC's Enforcement Role under USERRA: Background**

With the passage of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301, *et seq.*, Congress expanded OSC's role as protector of the federal merit system. USERRA is the law that protects the reemployment rights of persons who are absent from their respective civilian employment due to the performance of military duties. USERRA also makes it illegal for an employer to deny any benefit of employment on the basis of past, current, or future performance of military service.

Pursuant to 38 U.S.C. § 4324, OSC is authorized to act as the attorney for an aggrieved person ("claimant") and initiate legal action against the involved federal employer. Under title 38, OSC serves the federal sector's special prosecutor of meritorious USERRA cases. As special prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or litigation before the U.S. Merit Systems Protection Board (MSPB).

As special prosecutor, OSC objectively reviews the facts and laws applicable to each complaint. Where the Special Counsel is satisfied that claimant is entitled to relief, then it may exercise its prosecutorial authority and represent the claimant before the MSPB and, if required, the U.S. Court of Appeals for the Federal Circuit. *See* 38 U.S.C. §§ 4324(a)(2)(A) and (d)(2).

In early 2005, OSC's role in enforcing USERRA again expanded. Pursuant to a demonstration project established by the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, signed by President Bush on December 10, 2004, OSC, rather than the Department of Labor's Veterans Employment and Training Service (VETS), has the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. Under the project, OSC also receives and investigates 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.

Effective February 8, 2005, OSC began investigating federal sector USERRA claims under the demonstration project. The demonstration project ends on September 30, 2007, and Congress will determine whether OSC will continue to have investigative responsibility over federal sector USERRA claims.

### **USERRA Unit**

Special Counsel Scott Bloch created the USERRA Unit on January 6, 2005, in response to the passage of the VBIA, which gave exclusive responsibility for investigating certain federal sector claims arising under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) to OSC. It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of USERRA. *See* 38 U.S.C. § 4301(b). The Special Counsel concurs with that goal and intends for the USERRA Unit to enforce USERRA zealously.

OSC's USERRA Unit has attained exemplary results through its aggressive and objective enforcement of service members' employment and reemployment rights. A small sample of the wide variety of relief obtained by OSC is set forth below:

***Protecting Reemployment Rights***

- The service member alleged that the agency police failed to reemploy him promptly and did not reemploy him to the appropriate "status" upon being honorably discharged. The service member had served as a police officer in the agency's San Francisco, California, office. The agency reemployed the service member but assigned him to its Washington, D.C., office. OSC's investigation uncovered sufficient evidence to establish that the agency should have reemployed the service member to his former San Francisco duty station and should have reemployed him sooner. OSC successfully persuaded the agency to pay the service member an amount equaling the lost wages he suffered as a result of the delay in reemploying him and as a result of being reemployed to the agency's Washington, D.C., office instead of its San Francisco office (i.e., the difference in locality pay).
- The service member alleged that a U.S. Federal agency denied her a career ladder promotion to the GS-12 level because she was absent from employment due to military service. During its investigation, OSC obtained evidence indicating that, but for the service member's departure for military service, the service member would have attained her promotion. Thus, upon her return from military service, the agency granted OSC's request that it provide the service member appropriate training and, upon successful completion of such training, promote her retroactively and award her back pay.

***Correcting Denial of Benefits of Employment***

- The service member alleged that the Federal agency prepared its monthly schedule in such a way that discriminated against him because of his reservist duties. The service member and his co-workers are required to work on weekends. The agency, however, gives its employees weekends off on a rotating basis. OSC's investigation confirmed that the agency always scheduled the service member to be off on the weekend he had reservist duties. Although the agency had a business reason for not scheduling the service member to work on weekends that it knew he would be unable to come to work (i.e., his reservist weekend), the agency's scheduling practice violated one of the purposes of USERRA, namely: minimize the inconveniences to civilian careers that arise from military service. Accordingly, at OSC's request, the agency changed the manner in which it prepared its monthly schedule such that it would not automatically schedule the service member to be off the weekends he had military duty.

***Preventing Denial of Initial Employment***

- The service member alleged that he was offered and accepted a position with the U.S. Military agency. When the agency gave the service member an entry on duty (EOD) date, the service member informed the agency that he could not start on such date because of military service. In response, the agency withdrew the offer of employment. OSC contacted the agency and explained that it is illegal under USERRA to deny initial employment because of military service. In response, the agency re-offered the position, which the service member again accepted, and the parties agreed to a new EOD date.

***Securing Competitive Promotions, Career Ladder Promotions, and Step Increases***

- Two service members alleged that the U.S. Federal Agency did not consider them for competitive promotions to GS-8 Senior Officer Specialist positions while they were away due to military service obligations. OSC's investigation confirmed that the agency violated federal USERRA regulations requiring that a federal agency's promotion plan provide a mechanism for considering absent service members for promotion. Thus, OSC persuaded the agency to consider the service members for promotion. Subsequently, the warden selected the service members for promotions to GS-8 Senior Officer Specialist positions. OSC also obtained evidence establishing that the service members would have been selected for promotion had the agency considered them earlier. Consequently, OSC requested that the agency provide full corrective action to the service members, and agency officials also agreed to promote the service members retroactively and to award them back pay and other applicable seniority-based employment benefits.
- The service member alleged that a U.S. Federal agency denied her a career ladder promotion to the GS-12 level because she was absent from employment due to military service. During its investigation, OSC obtained evidence indicating that, but for the service member's departure for military service, the service member would have attained her promotion. Thus, upon her return from military service, the agency granted OSC's request that it provide the service member appropriate training and, upon successful completion of such training, promote her retroactively and award her back pay.
- The service member alleged that the U.S. agency did not grant the service member his step increase in salary upon being reemployed after completing 17 months of military service with a different Federal agency. OSC contacted the agency and educated it about its USERRA obligations. In response, the agency made the step increase retroactive and will award back pay to the service member.

- The service member alleged that the Federal agency violated USERRA by not awarding her a “goal sharing” bonus that all the members of her team had received for participating in fulfilling team goals. The agency did not award the service member the bonus because she did not fully participate in the team’s work because of her absence from employment due to military service. Prior to the service member’s deployment, she had participated in the goals for which the other employees were being rewarded. The evidence showed that the service member would have been given a bonus but for her absence due to military service. Under OSC’s interpretation of the statute, which is to be liberally construed in favor of the service member, such team bonuses constitute a benefit of employment different from salary or wages. Thus, OSC contacted agency officials, and they agreed to award the service member the same goal-sharing bonus.

### ***Educating the Federal Sector and Preventing Future Violations***

In addition to the individualized corrective action that OSC secured on behalf of many service members, OSC endeavors to improve the federal merit system by obtaining systemic corrective action wherever appropriate. Systemic corrective action (i.e., a change in an agency’s practice or policy) is warranted wherever a federal employer’s practice or policy deviates from USERRA’s requirements. In Fiscal Year 2006, OSC identified two common USERRA violations. The first involved the manner in which federal employers reemployed injured service members. For example, many federal employers are unaware of their obligation to seek placement assistance from U.S. Office of Personnel Management upon determining that they are unable to reemploy an injured service member. The second concerned the kinds of documentation that federal employers demanded where a service member requested a leave of absence due to military service. In response to those common violations, OSC prepared training documents that clearly identify and fully explain federal employers’ obligations. Now, whenever either of those issues are identified during the course of an OSC USERRA investigation (regardless if the issue was one that the service member raised), the training document is sent to the involved agency with the request that the agency disseminate it to managers and human resources staff. In those cases where such documents were sent, the agencies were receptive OSC’s guidance.

### ***Summary of Results***

OSC received 11 referrals from the DOL in FY 2006, with 6 referrals carried over from the previous fiscal year; 82% of these referrals were closed during FY 2006. (**See Table 9**).

OSC received 168 Demonstration Project Cases during FY 2006, up from 111 cases in FY 2005 (**See Table 10**). The USERRA Unit obtained corrective action in 35 demonstration project cases in FY 2006, an increase of 119% over FY 2005. Moreover, the Unit anticipates filing three additional cases with the MSPB in the near future should the involved agencies not agree to resolve them voluntarily.

## **F. Outreach Program**

The Outreach Program assists agencies in meeting the statutory mandate of 5 U.S.C. § 2302(c). This provision requires that federal agencies inform their workforces about the rights and remedies available to them under the whistleblower protection and prohibited personnel practice provisions of the Whistleblower Protection Act, in consultation with the OSC.

In an effort to assist agencies in meeting the statutory requirement, in FY 2002, OSC designed and created a five step educational program, the 2302(c) Certification Program. This program gives guidance to agencies and provides easy-to-use methods and training resources to assist agencies in fulfilling their statutory obligation. Agencies that complete the program receive a certificate of compliance from OSC.

The 2302(c) Certification Program was piloted by the Office of Personnel Management (OPM) in the spring of 2002 and OPM received the first-ever certificate of compliance in May of that year. Shortly thereafter, OSC began working with ten large agencies on participation in the program and offered the program government-wide in October of 2002. As of 2006, 51 agencies have been registered in the program and are working towards certification, and 29 agencies have been certified.

In an effort to promote OSC's mission and programs, OSC provides formal and informal outreach sessions, including making materials available on the agency web site. In FY 2006, OSC employees spoke at 50 events, including agency training sessions, conferences and meetings nationwide. Additionally, the Special Counsel has been a keynote speaker at largely attended events such as the Federal Dispute Resolution Conference in August of 2006.

Finally, OSC has continued its policy of issuing press releases when OSC files a significant litigation petition, or achieves significant corrective or disciplinary action through settlement. Most of these generate considerable press coverage. This contributes greatly to employee and manager awareness of the merit system protections enforced by OSC.

### **III. Fiscal Year 2008 Request**

OSC is requesting \$16,368,000 – an increase of \$368,000 over its FY 2007 appropriation of \$16,000,000. The increase for FY 2008 is not for any increased FTE or additional programs. The increase is simply to pay the salaries and benefits of the current employees of the agency during FY 2008, given the salary increases of FY 2006 and FY 2007, and the projected salary increase of 3.0% in FY 2008. Salary, benefits, and rent historically make up approximately 92-93% of OSC's budget, so there is little opportunity to reprogram funds for salaries from other object classes.

OSC has been successful in hiring excellent staff and the agency will operate with 110 employees during most of FY 2007. The agency needs to continue with 110 employees during FY 2008 to manage and process the agency's elevated workload (since FY 2000) of prohibited personnel practice complaints, whistleblower disclosures, Hatch Act complaints, Hatch Act cases, Hatch Act advisory opinions, and USERRA referral cases in a manner that precludes the formation of case backlogs, and to investigate all USERRA cases referred to OSC by the Department of Labor under the Demonstration Project set forth under the Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, § 204, 118 Stat. 3606 (VBIA). Continuing with 110 employees will also enable OSC to continue reducing case processing times.

### **OTHER BUDGETARY FACTORS**

#### **Increased Expenses:**

Notable increased expenses for OSC include the higher cost of OSC's existing headquarters rented space and field office rented spaces (average increase is 3.5%), the cost of accounting activities outsourced to NBC (which has increased 114% since FY 2005), the higher cost of legal information services (12% increase), and the higher cost of mandatory security charges payable to DHS (35% increase). An additional \$32,000 will also be needed for Microsoft Enterprise Software Licenses. OSC's transit subsidy costs are also increasing by 14%. As the agency operates with more employees than it has in the past, a marginal increase in expenditures for supplies, travel, equipment, and other services can be expected. The agency's E-travel contract with BPD has also increased. OSC will likely be paying to convert to a more compatible e-travel system managed by NBC.

#### **Fiscal Responsibility:**

In order to operate during FY 2008 within the requested funding levels, OSC has made the following adjustments in order to fund the salary and benefits for 110 FTE. Based on changing needs, OSC revised its IT implementation plan. The FY 2008 request reflects the following adjustments:



1. Hardware and software life cycle replacements and case tracking web application development have been rescheduled. Funding has been reallocated to support salaries and benefits of the 110 FTE needed by the agency.
2. The OMB-mandated conversion of the agency's infrastructure (network backbone) to Internet Protocol Version 6 (IPv6) will receive partial funding. All agency networks are supposed to interface with this infrastructure by June 2008. Funding has been reallocated to support salaries and benefits of the 110 FTE needed by the agency.

#### **IV. OSC and the Future of USERRA**

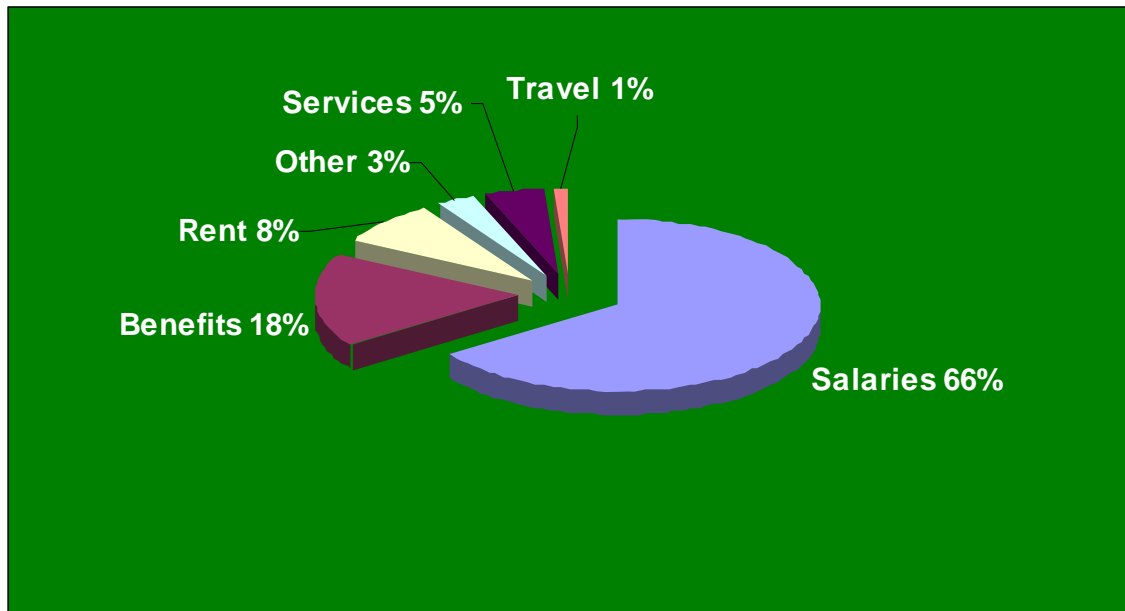
The 32-month Demonstration Project created by the Veterans Benefits Improvement Act of 2004 will terminate at the end of FY 2007. Congress will likely make a decision regarding which agency (OSC or DOL VETS) will handle Federal Sector USERRA cases. There are several different scenarios in which OSC could be called upon to perform investigatory USERRA responsibilities on a permanent basis for the benefit of the members of the United States armed forces. Each of the scenarios would have a different cost structure for OSC. Rather than present various scenarios and their associated costs here, we will simply make four points:

1. **Technical Expertise.** The agency currently has substantial technical USERRA expertise, and has a training unit in place to train new employees. This expertise has already resulted in significant reductions in processing times for those members of the military for which OSC has responsibility under the Demonstration Project. For example, during FY 2006, the average time to investigate and process a standard USERRA case at OSC was only 115 days. The OSC Investigation and Prosecution Division also has expert investigative and prosecutorial firepower that could be brought to bear on any expanded USERRA responsibility.
2. **Management expertise.** No matter what the requirements would be of an expanded USERRA role for the U.S. Office of Special Counsel, the agency has the experienced management in place to develop a plan, implement it, and achieve highly efficient results for the veterans and members of the military that have rights under USERRA. The current USERRA Unit Chief - an attorney with 20 years of investigation, analysis, and litigation experience – is an expert in USERRA federal sector law and regulations.
3. **Priority.** Protecting the nation's veterans, guardsmen, and reservists has always been one of the highest of all priorities for Special Counsel Bloch at OSC. Taking on an expanded role in providing expeditious enforcement for these brave Americans through USERRA would be an honor for the agency.
4. **Cost models.** OSC is able to provide further information regarding current cost structure or any other USERRA related information.



**Components of Budget Request:**

The following chart shows how the FY 2008 request will be distributed on a percentage basis:



**Field Offices:**

Field office expenditures are almost entirely driven by the number of FTE in the field offices. Below is a list of FTE ranges by field office. Staffing levels may be slightly adjusted during the year within these ranges in order to properly meet the management needs of the agency, and its individual units.

|                            |           |
|----------------------------|-----------|
| Headquarters               | 70-75 FTE |
| Midwest Field Office       | 6-8 FTE   |
| Dallas Field office        | 9-11 FTE  |
| Oakland Field Office       | 8-10 FTE  |
| Washington DC Field Office | 8-12 FTE  |

## **V. Performance under the President's Management Agenda**

OSC has developed a results-oriented management agenda that includes many of the core criteria in the President's Management Agenda.

### **A. Strategic Management of Human Capital**

OSC's human capital strategy is aligned with its mission, goals, and organizational objectives: 1) it is integrated into Budget and Strategic Plans; 2) it is consistent with OPM's human capital balanced scorecard and OMB's plan for strategic management of human capital; and 3) it provides for effective merit-based human resource management as described below.

OSC uses existing personnel flexibilities and tools, including leave flexibilities, alternative work schedules, and a telework program. In FY 2006, OSC also drafted and implemented a successful student loan repayment / employee retention program in which 14 employees have participated. And OSC introduced a fitness program for its employees. OSC's performance management systems allow managers to differentiate between high and low performers through the use of appropriate incentives and consequences.

The agency is addressing gaps in human resources competencies talent in its program areas through internal development, upward mobility positions, legal internships, in-house mission-specific training, and hiring additional personnel. OSC also has a highly developed cross training program that enables employees to learn new skills and participate in the work of several units. OSC also captures valuable information and ideas of departing employees through extensive exit interviews. This information is used by senior managers to refine and improve work processes.

In 2006, OSC continued its strategic management initiatives by further refining the reorganization of 2005, in which a Midwest field office, USERRA Unit, Training Unit, Customer Service Unit, and a Document Control Branch were created. OSC now has set agency and division goals for the age of cases under review by the agency. Performance plans are in place for SES members and managers that link to the agency's mission and to strategic goals for that are in place for the individual divisions. OSC also now has measurable finite performance goals in place for each individual employee.

### **B. Competitive Sourcing**

OSC is a small agency, with a highly specialized inherently government mission. 84% of its FTE perform inherently governmental work, and 16% of its FTE are considered commercial in nature. According to OMB Circular A-76 and supplemental guidance issued by OMB, government performance of commercial functions is permitted when, as is the case at OSC, the position activity total is 10 FTE or less.

However, while OSC is small enough that this guidance may exempt a large proportion of OSC's administrative functions that are commercial, OSC is dedicated to the intent of the principles of outsourcing cost-effective performance of all commercial functions. Therefore, personnel resources used to perform any functions considered commercial at OSC are regularly assessed to determine whether they might be more effectively performed by a contractor. OSC looked in depth at this issue in a management assessment it commissioned in the summer of 2004.

OSC now has an interagency agreement with the Department of Interior's National Business Center (NBC) to perform the following services: budget accounting, accounting services and procurement system hosting. OSC has an interagency agreement with BPD for travel services. OSC will review the BPD and NBC interagency agreements semiannually to confirm that they are meeting OSC's needs. OSC also has an interagency agreement with the National Finance Center of the Department of Agriculture to perform payroll and personnel processing functions.

**C. Improved Financial Performance**

As mentioned above, OSC contracts out certain accounting work under an interagency agreement. The FY 2007 agreement is with the National Business Center (NBC) instead of the Bureau of Public Debt (BPD). This gives OSC a unique opportunity to participate in the design of the processes used for its accounting, and to design specific customized reports that reflect exactly the information most helpful to OSC in managing its funds. Contracting these functions out has provided OSC with more specialized expertise at a lower cost than could be accomplished internally. NBC provides OSC with detailed financial review every quarter. NBC will also provide up-to-date financial information on day-to-day operations for payroll, procurement and travel, as needed by OSC.

As a small agency without an Inspector General, OSC generally submits a combined Inspector General (IG) Act and Federal Manager's Financial Integrity Act report each October. OSC normally reports that it relies on audits and other reviews of BPD operations by the OIG and Office of the Chief Financial Officer (OCFO) in the Treasury Department, as well as information received directly from BPD, for information about any significant issues relating to the services provided to OSC. Now, however, OSC has turned its attention to monitoring reports and reviews concerning NBC.

Historically, OSC received a waiver from OMB for the requirement to have an audit of the agency's financial statements. Since FY 2004, however, OSC has not received an audit waiver. An audit firm selected by BPD evaluated OSC's financial statements and processes, spending time at OSC headquarters and with the Bureau of Public Debt personnel who currently perform the accounting functions for OSC. This audit was completed in November of 2006. The auditors gave an unqualified audit opinion on OSC's financial statements, finding no material weaknesses. The results were similar to those of the FY 2004 and FY 2005 audits.

**D. Expanded Electronic Government**

OSC provides one-stop service for those who wish to file a complaint or disclosure, or request a Hatch Act advisory opinion. A person can file a Prohibited Personnel Practices complaint on-line. Most of our PPP complaints come into the agency via this channel. A person can also make a complete Whistleblower Disclosure on-line and a Hatch Act advisory opinion may be solicited through the web site.

Those who wish to communicate with a knowledgeable OSC staffer through one of the agency's telephone hot lines will find the relevant information on the web site. OSC's web site is linked to FirstGov, as well as other agency web sites, such as those for the Office of Personnel Management, the Equal Employment Opportunity Commission, and the Office of Government Ethics, among many others. OSC's Information Technology Branch (ITB) staff are continually improving OSC's web site. User sessions on OSC's web site have continued to grow: FY 2006 total number of user sessions was 840,226. This is a 38% increase over the FY 2005 total number of user sessions.

OSC's Information Technology Branch is constantly working to improve OSC's IT efficiencies by continually re-engineering processes for productivity improvements. For example, during FY 2007 and FY 2008 OSC will implement the integrated electronic document management system that was designed and planned during FY 2006. Once completed, this system will be a powerful tool for OSCs staff to search its existing case files, manage current caseload documents, and to process Freedom of Information Act (FOIA) requests. Searches of case files and FOIA requests are currently handled manually. Additionally, OSC will seek to institute computerized tutorials for all electronic filers in order to assure improved understanding of our laws as well as better complaints and improved results.

**E. Budget and Performance Integration**

OSC's senior staff meet regularly to discuss the current status of programs and initiatives, general policy, and budget, in light of OSC's annual performance goals. Now that OSC has completely revised its performance goals to be concise, measurable, and strictly aligned with the four statutory authorities of the agency, the agency is more effective than ever before in making budgetary decisions in pursuit of realizing its performance goals.

## **V. TABLES**

|  |    |
|--|----|
| 1. <u>Budget Object Classification of Obligations: FY 2006 - FY 2008</u>                           | 53 |
| 2. <u>Analysis of Resources: FY 2006- FY 2008</u>  | 55 |
| 3. <u>Breakdown of Matters Pending and Completed FY 2005 to FY 2006</u>                            | 56 |
| 4. <u>Summary of Prohibited Personnel Practice Complaints Activity – Receipts &amp; Processing</u> | 57 |
| 5. <u>Summary of Prohibited Personnel Practice Complaints Activity – Favorable Actions</u>         | 58 |
| 6. <u>Summary of Prohibited Personnel Practice Complaints Activity – Mediation Program</u>         | 59 |
| 7. <u>Summary of Hatch Act Advisory Opinion and Complaint Activity</u>                             | 60 |
| 8. <u>Summary of Whistleblower Disclosure Activity – Receipts and Dispositions</u>                 | 61 |
| 9. <u>Summary of USERRA Referral Activity</u>  | 62 |
| 10. <u>Summary of USERRA Demonstration Project</u>   | 63 |

**TABLE 1**

| <b>Budget Object Classification of Obligations: FY2006-FY2008</b> |   |                            |                               |                               |
|---|---|----------------------------|-------------------------------|-------------------------------|
| <i>(in thousands of dollars)</i>                                  |   |                            |                               |                               |
| <b>Budget Object Classification of Obligations</b>                |   | <b>FY2006<br/>(actual)</b> | <b>FY2007<br/>(projected)</b> | <b>FY2008<br/>(projected)</b> |
| 11.0  | Personnel compensation                      | 9,655                      | 10,632                        | 10,775                        |
| 12.0  | Civilian personnel benefits                 | 3,093                      | 2,695                         | 2,857                         |
| 13.0  | Benefits to former personnel                | 23                         | 15                            | 15                            |
| 21.0  | Travel and transportation of persons        | 132                        | 212                           | 222                           |
| 22.0  | Transportation of things                    | 17                         | 14                            | 15                            |
| 23.1  | Rental payments to GSA                      | 1135                       | 1,217                         | 1,260                         |
| 23.3  | Communications, utilities and misc. charges | 114                        | 160                           | 151                           |
| 24.0  | Printing and reproduction                   | 8                          | 15                            | 16                            |
| 25.0  | Other services                              | 962                        | 798                           | 816                           |
| 26.0  | Supplies and materials                      | 103                        | 92                            | 93                            |
| 31.0  | Equipment                                   | 258                        | 150                           | 148                           |
| 32.0  | Land & Structures                           | 9                          | 0                             | 0                             |
| 42.0  | Tort Claims                                 | 0                          | 0                             | 0                             |
| <b>99.9</b>   | <b>Total</b>                                | <b>15,509</b>              | <b>16,000</b>                 | <b>16,368</b>                 |

Detailed notes concerning object classes in **Table 1**:

Object Class 21.0: In FY 2008, OSC's projected requirements are \$222,000. In FY 2005, OSC spent \$297,000 on travel. Fortunately, the agency's video conferencing system now provides the ability to conduct certain investigations without travel.

Object Class 23.1: Rental Payments to GSA in FY 2008 will rise 3.5% over FY 2007 levels.

Object Class 25.0: In the Other Services category, 44% of this amount (\$360,000) is required to cover OSC's Interagency Agreement with the National Business Center for accounting and procurement services. Also included here are the following items: approximately \$58,000 for Westlaw fees, (an 8% increase), \$40,000 for training (including \$4,000 for training of OSC's acquisition workforce), \$32,000 for the FY 2008 financial auditors, \$25,000 (a reduced amount) for program support for a document management system, \$54,000 in DHS reimbursement charges for facility security related services, 32,000 for Microsoft Enterprise Licenses, \$47,000 for annual maintenance contracts, \$35,000 for travel management, \$34,000 for Oracle upgrades, \$20,000 for the agency's HSPD-12 program and fees.

Object Class 26.0: The \$93,000 projected for this object class represents office supplies, subscriptions, and other items for the headquarters and all field offices.

Object Class 31.0: In order to operate at its overall agency wide FY 2008 Budget Request funding level, OSC plans to keep expenditures low in this category. This includes reductions in hardware life cycle replacements, and rescheduling of several other technology investments. These funds are realigned to Object Class 11.0 and 12.0, in order to support the salaries and benefits of the approximately 110 FTE of the agency.



**Table 2**

| <b>Analysis of Resources: FY2006-FY2008</b>                    |                           |                              |                              |
|--|---------------------------|------------------------------|------------------------------|
| <i>(in thousands of dollars)</i>                               |                           |                              |                              |
| Description  | FY2006<br><i>(actual)</i> | FY2007<br><i>(projected)</i> | FY2008<br><i>(projected)</i> |
| Budget authority   | 15,172                    | 16,000                       | 16,368                       |
| Outlays  | 13,476                    | 14211                        | 14538                        |
| Approximate full-time equivalent employment<br>FTE) work years | 103                       | 110                          | 110                          |

**TABLE 3**

| <b>Breakdown of Matters<sup>a</sup> Pending and Completed FY2002 to FY2006</b> |               |               |               |                           |               |
|--|---------------|---------------|---------------|---------------------------|---------------|
|  | <b>FY2002</b> | <b>FY2003</b> | <b>FY2004</b> | <b>FY2005<sup>b</sup></b> | <b>FY2006</b> |
| <b>Matters pending at beginning of fiscal year</b>                             | 1,200         | 1,415         | 1,605         | 778                       | 777           |
| <b>New matters received</b>  | 2,345         | 2,530         | 2,798         | 2,684                     | 2,718         |
| <b>Matters closed</b>  | 2,118         | 2,344         | 3,612         | 2,685                     | 2,814         |
| <b>Matters pending at end of fiscal year</b>                                   | 1,423         | 1,601         | 791           | 777                       | 681           |

<sup>a</sup> The term “matters in this table includes prohibited personnel practice complaints (including Transportation Security Administration matters); Hatch Act complaints, whistleblower disclosures (DU matters); USERRA referrals from the MSPB pursuant to 5 U.S.C. x 1221(f)(3).

<sup>b</sup> Includes USERRA Documentation project matters.

**TABLE 4**

| <b>Summary of Prohibited Personnel Practice (PPP) Complaints Activity – Receipts and Processing<sup>a</sup></b> |            |                |                |                    |                |               |
|---|------------|----------------|----------------|--------------------|----------------|---------------|
|   |            | <b>FY 2002</b> | <b>FY 2003</b> | <b>FY2004</b>      | <b>FY 2005</b> | <b>FY2006</b> |
| Pending complaints carried over from previous fiscal year   |            | 740            | 594            | 653                | 524            | 521           |
| New complaints received (Intake Unit)   |            | 1,558          | 1,791          | 1,964 <sup>b</sup> | 1,771          | 1,805         |
| <i>Total complaints:</i>  |            | 2,298          | 2,385          | 2,617              | 2,295          | 2,326         |
| Complaints referred for field investigation   |            | 191            | 162            | 244                | 198            | 143           |
| Complaints processed and closed   |            | 1,704          | 1,732          | 2,093              | 1,774          | 1,930         |
| Processing times  | < 240 days | 1,284          | 1,471          | 1,799              | 1,198          | 1,693         |
|   | >240 days  | 420            | 261            | 294                | 576            | 237           |
| Percentage processed in under 240 days  |            | 75%            | 85%            | 86%                | 67.5%          | 88%           |

<sup>a</sup> The numbers in this table, as well as in other tables in this report, may vary somewhat from those in previous years' reports. This is due to the fact that in response to an audit by the General Accounting Office, OSC enhanced its case tracking software system to more accurately track prohibited personnel practice and whistleblower disclosure matters. Use of the improved system has led to recalibration of some statistics from previous years.

<sup>b</sup> This figure is higher than reported in the President's FY 2006 Budget because it includes several closed cases that were reopened.

**TABLE 5**

| <b>Summary of Prohibited Practice Complaints Activity – Favorable Actions</b>         |                     |                |                |                |                |                |
|---|---------------------|----------------|----------------|----------------|----------------|----------------|
|   |                     | <b>FY 2002</b> | <b>FY 2003</b> | <b>FY 2004</b> | <b>FY 2005</b> | <b>FY 2006</b> |
| Total favorable actions obtained <sup>a</sup><br>(all prohibited personnel practices) | <i># of actions</i> | 126            | 115            | 80             | 45             | 52             |
|   | <i># of matters</i> | 107            | 83             | 65             | 45             | 48             |
| Favorable actions obtained (reprisal for whistleblowing)                              | <i># of actions</i> | 98             | 75             | 57             | 37             | 40             |
|   | <i># of matters</i> | 83             | 75             | 49             | 37             | 37             |
| Stays negotiated with agencies <sup>a</sup>   |                     | 7              | 6              | 11             | 3              | 8              |
| Stays obtained from Merit Systems Protection Board                                    |                     | 1              | 1              | 1              | 1              | 1              |
| Disciplinary actions negotiated with agencies   |                     | 13             | 12             | 11             | 3              | 4              |
| Corrective action complaints filed with the Board                                     |                     | 0              | 0              | 1              | 1              | 1              |
| Disciplinary actions obtained from the Board  |                     | 0              | 1              | 0              | 1              | 0              |

<sup>a</sup>The purpose of this breakout is to show the number of favorable actions obtained, and the number of matters involved. A matter (case) can have more than one action (favorable outcome).

<sup>b</sup> Stays and disciplinary actions listed in this table (except for disciplinary actions obtained by OSC from the Board) are included in the totals shown in the first two rows above, but are broken out here for further information.

**TABLE 6**

| <b>Summary of Prohibited Personnel Practice Complaints Activity – Mediation Program</b> |                     |               |               |               |               |               |
|---|---------------------|---------------|---------------|---------------|---------------|---------------|
|   |                     | <b>FY2002</b> | <b>FY2003</b> | <b>FY2004</b> | <b>FY2005</b> | <b>FY2006</b> |
| Matters identified before investigation as mediation-appropriate                        |                     | 39            | 43            | 82            | 22            | 52            |
| Initial acceptance rates by parties   | <i>Complainants</i> | 80%           | 82%           | 68%           | 27%           | 83%           |
|   | <i>Agencies</i>     | 68%           | 69%           | 64%           | 22%           | 59%           |
| Mediated and other resolutions <sup>a</sup>   |                     | 14            | 23            | 18            | 5             | 11            |
| Resolution rate – OSC mediation program   |                     | 82%           | 92%           | 86%           | 100%          | 55%           |

<sup>a</sup> This category includes complaints settled through mediation by OSC (including “reverse-referrals”- i.e., cases referred back to the Alternative Dispute Resolution Unit by an Investigation and Prosecution Division due to the apparent potential for a mediated resolution). Also included in this category are complaints that entered the initial OSC mediation process, and were then resolved through withdrawal of the complaint, or through mediation by an agency other than OSC.

**TABLE 7**

| <b>Summary of Hatch Act Advisory Opinion and Complaint Activity</b>          |                                     |               |               |                    |               |               |
|--|-------------------------------------|---------------|---------------|--------------------|---------------|---------------|
|  |                                     | <b>FY2002</b> | <b>FY2003</b> | <b>FY2004</b>      | <b>FY2005</b> | <b>FY2006</b> |
| Advisory opinions issued   |                                     | 3,245         | 3,284         | 3,913 <sup>a</sup> | 2,558         | 3,004         |
| New advisory requests received (written)                                     |                                     | n/a           | 159           | 176                | 191           | 237           |
| New complaints received  |                                     | 213           | 196           | 248                | 245           | 299           |
| Warning letters issued   |                                     | 49            | 43            | 93                 | 87            | 76            |
| Complaints processed and closed in fiscal year                               |                                     | 107           | 201           | 357                | 310           | 266           |
| Corrective actions taken by recipients of cure letters:                      | Withdrawal from partisan races      | 12            | 18            | 17                 | 4             | 9             |
|  | Resignation from covered employment | 5             | 7             | 8                  | 10            | 22            |
|  | Other                               | 1             | 0             | 6                  | 3             | 2             |
|  | Total:                              | 18            | 25            | 31                 | 17            | 33            |
| Disciplinary action complaints filed with the Merit Systems Protection Board |                                     | 4             | 4             | 7 <sup>b</sup>     | 11            | 6             |
| Disciplinary actions obtained (through negotiation or ordered by the Board)  |                                     | 4             | 4             | 2                  | 8             | 8             |
| Complaints pending at end of FY  |                                     | 260           | 254           | 146                | 79            | 112           |

<sup>a</sup>This number is lower than reported in the President's FY 2006 Budget (Other Independent Agencies, Appendix, p. 1209) because of a duplication error.

<sup>b</sup>This number is higher than reported in the President's FY 2006 Budget because of system entries made after that publication.

**TABLE 8**

| <b>Summary of Whistleblower Disclosure Activity – Receipts and Dispositions <sup>a</sup></b> |  |               |               |                    |               |               |
|--|--|---------------|---------------|--------------------|---------------|---------------|
|  |  | <b>FY2002</b> | <b>FY2003</b> | <b>FY2004</b>      | <b>FY2005</b> | <b>FY2006</b> |
| Pending disclosures carried over from previous fiscal year                                   |  | 287           | 556           | 690                | 98            | 110           |
| New disclosures received   |  | 555           | 535           | 572                | 485           | 435           |
| Total disclosures  |  | 842           | 1,091         | 1,262              | 583           | 545           |
| Disclosures referred to agency heads for investigation and report                            |  | 18            | 11            | 18                 | 19            | 24            |
| Referrals to Agency IGs  |  | 6             | 3             | 8                  | 14            | 10            |
| Agency head reports sent to President and Congress   |  | 10            | 23            | 8                  | 16            | 24            |
| Results of agency investigations and reports   | <i>Disclosures substantiated in whole or in part</i> | 7             | 13            | 8                  | 16            | 21            |
|  | <i>Disclosures unsubstantiated</i>                   | 3             | 10            | 0                  | 0             | 3             |
| Disclosures processed  | <i>In more than 15 days</i>                          | 192           | 290           | 1,019 <sup>b</sup> | 237           | 275           |
|  | <i>In less than 15 days</i>                          | 94            | 111           | 135                | 236           | 203           |
| Percentage of disclosures processed in less than 15 days                                     |  | 33%           | 28%           | 12%                | 50%           | 42%           |
| Disclosure matters processed and closed  |  | 286           | 401           | 1,154 <sup>c</sup> | 473           | 478           |

<sup>a</sup> It should be noted that many disclosures contain more than one type of allegation. This table, however, records all allegations received in a whistleblower disclosure as a single matter.

<sup>b</sup> This number is large due to the backlog reduction effort.

<sup>c</sup> This number is large due to the backlog reduction effort, and includes approximately 500 cases that had been reviewed in prior years and determined to be low priority and probable closures



**TABLE 9**

| <b>Summary of USERRA Referral Activity</b>  |               |               |               |               |               |
|---|---------------|---------------|---------------|---------------|---------------|
|   | <b>FY2002</b> | <b>FY2003</b> | <b>FY2004</b> | <b>FY2005</b> | <b>FY2006</b> |
| Pending referrals carried over from previous fiscal year  | 10            | 8             | 4             | 12            | 6             |
| Referrals received from DOL during fiscal year  | 19            | 7             | 14            | 30            | 11            |
| Pending Referrals closed  | 21            | 11            | 6             | 36            | 14            |
| Pending referrals at the end of the fiscal year   | 8             | 4             | 12            | 6             | 3             |
| Closed cases where corrective action was obtained (including corrective actions obtained in matters referred to litigation) | n/a           | 3             | 1             | 6             | 3             |
| Closed cases where no corrective action was obtained  | n/a           | 8             | 5             | 25            | 11            |

|   |     |     |     |     |     |
|---|-----|-----|-----|-----|-----|
| Litigation closed; no corrective action obtained      | n/a | n/a | n/a | n/a | n/a |
| Litigation closed; corrective action obtained         | n/a | n/a | n/a | 3   | 1   |
| Matters referred for litigation pending               | n/a | n/a | n/a | 2   | 1   |
| Pending litigation matters carried over from prior FY | n/a | n/a | n/a | n/a | 2   |

**TABLE 10**

| <b>Summary of USERRA Demonstration Project Activity<sup>a</sup></b> |               |               |               |
|---|---------------|---------------|---------------|
|   | <b>FY2004</b> | <b>FY2005</b> | <b>FY2006</b> |
| Pending referrals carried over from previous fiscal year            |               | 0             | 54            |
| Cases opened  |               | 111           | 168           |
| Cases closed  |               | 57            | 126           |
| Cases pending at the end of the fiscal year                         |               | 54            | 96            |
| Closed cases where corrective action was obtained                   |               | 16            | 35            |
| Closed cases where no corrective action was obtained                |               | 38            | 91            |
| Closed cases referred for litigation                                |               | 0             | n/a           |

<sup>a</sup> Under VIBA, P.L. 108-454; OSC started receiving cases in Feb. 05

## **VII. APPENDICES**

## **OSC's Revised Strategic Plan (FY 2006-2010)**

### **The Five Year Strategic Plan – Introduction**

Beginning in 2000, OSC saw an increased interest in Whistleblower Disclosure cases, and in particular following September 11, 2001 there was a sizeable increase in filings, greater awareness of security and health and safety issues, improved outreach by OSC, and widespread publicity about high-profile cases. During this time of dynamic growth and change, the agency focused on establishing standards for prioritizing cases but did not systematically address the growing backlog or the process-driven system that contributed to the backlog. The system in place permitted paperwork and multiple layers of review that did not, in many cases, contribute to any tangible benefit or result to the agency or the merit system or our constituency, the federal executive employees. While there were some advantages gained through the establishment of standards for prioritization, it proved to be very ineffectual in reducing the backlog. In fact the backlog grew worse. In the past several years, the agency experienced an increase in caseload level across all units. This increase, coupled with a top-heavy and process-driven organizational structure and byzantine processes, caused the backlog to escalate even more in 2002, 2003 and early 2004. This was the situation facing the new Special Counsel, as he entered the agency in January of 2004. All of this was reflected in a GAO report that came out early in 2004, shortly after the new Special Counsel's arrival. It called for a radical solution to these problems that would not only solve existing backlogs but assure the structure and processes of the agency would be permanently changed to solve this 10-year backlog trend once and for all.

In the spring of 2004, an outside assessment team was hired to evaluate and assess the workforce, strategic alignment, agency efficiency, training needs, and strategic human capital management of the agency. Concurrently, a Special Projects Unit (SPU) was formed to go into one OSC operating unit at a time and work side by side for months with the unit's personnel in a long and intense backlog reduction effort. At the same time, the SPU was analyzing the processes of the agency, many of which were convoluted. The SPU made recommendations to the Special Counsel, and the final report from the assessment team with specific recommendations was released in September 2004. Soon after, in early 2005, the agency was significantly reorganized, both structurally and procedurally. This reorganization is now bearing fruit in the way the streamlined divisions and empowered individual employees accomplish the business of the agency. The last phases of the reorganization, updates on the standard operating procedures to be used on a day-today basis by individual investigators and attorneys, are being implemented currently.

With the backlog fully controlled in all units for the first time in recent history, OSC is now focusing on the concept of expeditious justice. Since his first days in office, the Special Counsel has been summarizing his views on slow case processing with the phrase "Justice delayed is justice denied." Achievements have been realized in case processing times. Now OSC stands ready to set aggressive goals in case processing times, and to find innovative ways to meet those goals.

During the last five years, the agency organizational structure and case processing procedures were not the only significant challenges facing the agency. The Annual Performance Goals were opaque and close to being meaningless. They were unquantifiable, and seemed to be designed to obscure rather than to provide illumination into the effectiveness of the agency's various operating units.

With a reorganized agency now hitting on all cylinders, it is clear the revision of the Annual Performance Goals is the next step to take. Therefore, the U.S. Office of Special Counsel presents the following very revised Five Year Strategic Plan, and associated FY 2007 Annual Performance Budget Plan.

These goals serve three purposes. They focus the agency on the reasons for its existence. They set aggressive goals that can bring out the best in individuals, units, and management. And they provide an additional way for the public and Congress to see and appreciate what is happening at OSC.

#### **The Five Year Strategic Plan – Where Does OSC want to be in 2010?**

- **Timeliness.** The U.S. Office of Special Counsel currently has a reputation for quality. By the year 2010, OSC wants to have firmly established its reputation for speed as well. This means meeting and exceeding statutory time limits associated with two of OSC's missions (PPPs and Disclosures). In the case of the agency's responsibility to examine incoming disclosures, part of the solution may include a change to the statute itself.

For the other two missions of the agency (Hatch and USERRA), in the absence of statutory requirements, OSC will set aggressive goals for timeliness for each mission. A detailed description of the timeliness goal for each mission is included below, in the Revised Goals section.

- **Quality.** OSC's Complaints Examining Unit has long had the motto "We have to be right" when performing legal examinations of incoming claims which allege Prohibited Personnel Practices. And it is true. If CEU ever erroneously closed a case for lack of merit, besides closing an avenue of possible remedy to the Federal employee who made the claim, OSC would soon know about it. If OSC were to make a mistake in the legal analysis, others (outside attorneys, Congress, interest groups, etc.) would soon be pointing out what specific legal mistake was made. This is why such care goes into every incoming CEU case. All cases are discussed with management, and in complex cases, the back and forth discussion includes the Senior Associate Special Counsel, a career SES employee that has been with the agency for many years. The reality is that CEU is practically never wrong in its legal analysis. Perhaps once every several years (with an average of 1800 cases per year being filed with CEU).

Other units within OSC have their own robust sense of quality. The aggregate result is that the agency already has a strong reputation. Every year between now and 2010, we want to build on this existing strength, and raise the level of quality wherever possible. With the help of the measurable quality goals outlined below for each mission of the agency, we look forward to achieving continued progress.

- **Outreach.** Aggressive investigations and enforcement are one good way of slowly educating the management in executive branch agencies, in terms of what types of actions are legal, and what types of actions are violations of the Civil Service Reform Act, the Hatch Act, or the Uniformed Services Employment and Reemployment Rights Act. But the other side of the prevention coin is for OSC to help prevent wrongdoing from occurring in the first place, through outreach and education concerning the laws. OSC takes its outreach responsibilities very seriously, realizing that the overall goal is a Federal workplace free from illegal activity. This is the reason that measurable outreach goals are included in the revised performance plan for several of the missions of OSC.
- **Great place to work.** While the Office of Special Counsel is already a good place to work, another goal is to continue making progress in the creation of an excellent work environment. We see this as a combination of providing meaningful work, having good management at all levels of the organization, and making use of as wide a

variety of innovative benefits as possible, as an aid in attracting and retaining top talent. Part of having good management for the agency is in the development of managers in-house and creating and implementing a thoughtful succession plan for the management that will be the future of the agency. This is in progress at OSC.

As for innovative benefits, besides the flexible schedules and alternate work schedule benefits, OSC has a successful Student Loan Repayment / Employee Retention Plan that is highly valued by the attorneys at OSC. Various units of OSC have been using a Telecommuting Pilot Plan, and in the future this plan will be expanded to more units of the agency.

- **Emphasis on USERRA.** It is becoming well known that the Special Counsel is doing everything possible to raise the profile of the Uniform Services Employment and Re-employment Rights Act, in order to put an end to discrimination against service members in the Federal workforce. Under his leadership, OSC aggressively enforces the Uniform Services Employment and Reemployment Rights Act. In fact, OSC set a precedent in FY 2005 by filing three USERRA cases in one year. Full corrective action was received in all three cases.

In addition, the USERRA Unit does outreach so that returning reservists and veterans are aware of their rights and of the existence of OSC. The Special Counsel himself does outreach for USERRA (on the Pentagon channel and at other high profile venues).

With the signing of the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, OSC's role in protecting service members again expanded. Under a demonstration project created by the VBIA, OSC now has the authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit (instead of the Department of Labor's Veterans Employment and Training Service). Under the project, OSC also receives and investigates 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.

Through 2010, OSC will continue to look for ways to provide superb assistance to service members under USERRA. The agency is committed to continue finding the resources to enable this legislation to protect service members at the level at which it was intended to do.

### **The Five Year Strategic Plan – the Revised Goals**

OSC's revised performance goals are organized by the four statutory missions of the agency: (1) to safeguard the merit system in federal employment by protecting federal employees and applicants from prohibited personnel practices (PPPs), especially reprisal for whistleblowing; (2) to enforce restrictions on political activity by government employees covered by the Hatch Act; (3) to facilitate disclosures of wrongdoing in federal government by operating a secure channel for whistleblowers; and (4) to enforce military personnel rights against re-employment discrimination for military service.

The performance goals of the agency are divided into four sections corresponding to the above statutory missions. There is some redundancy between the explanations of the performance goals in this section of the Five Year Strategic Plan, and the explanation of the goals in Appendix B (OSC Annual Performance Budget Goals.) This is intentionally done, since some readers may read only the Strategic Plan and others may read only the Annual Performance Budget Goals.

## OSC's Revised Strategic Plan

### OSC's Prohibited Personnel Practice Enforcement Mission

#### Performance Goal 1:

##### ***TO PROTECT THE MERIT SYSTEM THROUGH TIMELY CASE PROCESSING***

The indicator selected is the percentage of PPP cases processed in less than the statutory requirement of 240 days.

This timeliness indicator measures the combined effectiveness of both OSC's Complaints Examining Unit (CEU) and OSC's Investigation and Prosecution Division (IPD).

OSC receives complaints of Prohibited Personnel Practices into the CEU. If, after initial screening, investigation, and legal analysis, a complaint meets the requirements for merit, it is internally referred to the IPD for further investigation. If the IPD investigates and determines the case does indeed have merit, the IPD either seeks relief for the claimant through mediation, settlement, or prosecution.

The target for FY 2006 is 85% and the targets for FY 2007 and FY 2008 are 92%. The reason the target is less than 100% is because in some cases the settlement process can take a considerable amount of time. In cases involving litigation, the timeframe for events is no longer driven by the speed of work of OSC attorneys and investigators. To strive for 100% would carry the implicit assumption that OSC would not litigate any cases.

Success in achieving the targets set for FY 2006, FY 2007, and FY 2008 would be important steps in providing expeditious justice for PPP claims from employees in the Federal workforce.

#### Performance Goal 2:

##### **TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS**

The important performance indicator for quality is the percent of favorable outcomes in meritorious cases.

The numerator for the equation to determine the percent of favorable outcomes is the number of favorable outcomes. The number of favorable outcomes is defined as the number of successful mediations plus the number of settlements achieved plus the number of successful litigations. The denominator for the equation is the number of meritorious cases.



A meritorious case is one in which the Office of Special Counsel is satisfied that claimant is entitled to relief. In certain meritorious cases, OSC may endeavor to use mediation to secure relief for the claimant. If mediation was not appropriate or did not succeed, OSC may exercise its prosecutorial authority and file for corrective or disciplinary action before the MSPB. As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to prosecute successfully cases warranting corrective action.

### **Performance Goal 3:**

#### **TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES**

The indicator is defined as the number of new Federal agencies certified in the 2302 (c) Program by OSC.

OSC has statutory authority to administer the 2302(c) Program, which recognizes the federal sector's need for awareness of Prohibited Personnel Practices and training in avoidance of committing them. However, OSC cannot force any agency to apply for certification. There are no statutory penalties for not being certified. This annual numeric target is not overly aggressive because 1) OSC cannot force compliance, and 2) the number of Federal agencies that may seek certification is limited by the number of agencies in existence. OSC already has 51 certified agencies, including most of the major ones. Nevertheless, OSC has set targets to add participating agencies to the 2302(c) certification program.

#### **Other outreach activities:**

- Additionally, members of the Investigation and Prosecution Division and the Complaints Examining Unit regularly accept invitations to provide outreach services designed to educate Federal personnel on these issues so that agencies comply with the law.
- OSC's Customer Service Unit maintains a telephonic hotline for answering PPP-related questions from members of the Federal workforce. Employees from OSC were able to educate employees of many agencies during a presentation at the Federal Dispute Resolution Conference (FDR).
- OSC's website provides a wealth of information regarding PPPs and is a valuable and constantly improving resource for educating the Federal workforce on this subject. Every year the website statistics for user sessions increase, with an average increase in activity of 20% above the previous year.
- The GoLearn project is a new initiative that will bring OSC expertise to thousands of Federal workers. OSC does not have responsibility for this project, other than providing expert content.

## **OSC's Hatch Act Mission**

### **Performance Goal 1:**

#### **TO DEFEND THE MERIT SYSTEM BY ENFORCING THE HATCH ACT THROUGH TIMELY CASE PROCESSING**

Performance Indicator A is the percentage of formal written advisory opinions issued in less than 120 days. The target is set at 75% for FY 2006 and 80% for FY 2007 and FY 2008.

Written advisory requests are the requests for an advisory opinion that come in to OSC's Hatch Act Unit that are very complex and require significant analyses before answering.

Performance Indicator B is the percentage of oral and e-mail advisory opinions issued in less than five days. If an oral or e-mail advisory opinion were to take longer than five days, generally it would be treated as a formal written advisory request and be captured by Indicator A. Therefore the goal for processing these oral and e-mail advisories is set at 99% within the five days. With a constant focus on meeting this target, there should be very few times that a requested oral or e-mail advisory opinion is not handled by the Hatch Act Unit within the five days.

Performance Indicator C is the percentage of Hatch Act complaints resolved in less than 365 days. The target is set at 60% for FY 2006 and 70% for FY 2007 and FY 2008. A number of these involve litigation, and the timeframe for events to transpire during litigation is out of OSC's control. Even for those that do not actually end in litigation, sometimes there are timeframes outside of OSC's control. For example, OSC may not know that the subject of a complaint ignored an OSC warning to pull out of an election or resign employment until the election actually transpires and it can be verified that neither action has occurred.

### **Performance Goal 2:**

#### **TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS**

The performance indicator for quality in Hatch Act investigations and enforcements is the percent of favorable outcomes achieved by OSC in meritorious cases.

A meritorious Hatch Act case is a case in which OSC finds a violation of the Hatch Act. A favorable outcome in a Hatch Act case is either (1) successful litigation of the case; (2) successful settlement of the case; or (3) successful corrective action (individual corrected his violation after receiving notice from OSC, for example, by withdrawing his candidacy or resigning from his employment).

The target is set at 90% for FY 2006 and 90% for FY 2007 and FY 2008.

**Performance Goal 3:**

**TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES**

This goal denotes the importance of going out to do outreach programs at agencies that make a request of OSC. Performance Indicator A is specifically defined as the percent of Hatch Act trainings and outreaches given, over the number of invitations received. OSC has set a target for the Hatch Act Unit to fulfill 90% of these requests each year, recognizing that there will be times when a staff member can not be spared, due to the caseload at the time and/or trial schedules.

Performance Indicator B deals with the written advisory section of the Hatch Act portion of OSC's website. The Hatch Act Unit commits to adding one complex advisory opinion to the website every month. There are already many written opinions displayed on the website. Strengthening the content provides more ability for federal, state, and local employees subject to the Hatch Act to research their questions online and gain an informed idea of what the law means in their particular situation.

**Other outreach activities:**

- In addition to the performance of outreach visits and the website enhancement described above, OSC has produced both a Federal Hatch Act DVD and a State & Local Hatch Act DVD that explains the basics of the Hatch Act laws for each of these audiences. OSC is now able to mail the appropriate DVD to certain requestors who require a basic tutorial overview of the Hatch Act.
- OSC continues to provide free Hatch Act posters to requesting agencies, if the quantity requested is less than ten. If the quantity requested exceeds ten, the interested agency can use OSC's rider at the Government Printing Office to order the required number of Hatch Act posters.

## OSC's USERRA Mission

### Performance Goal 1:

### **TO ENFORCE THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT THROUGH TIMELY CASE PROCESSING**

OSC receives four types of USERRA cases—RE, DP-OD, DP-MX, and DP-TSA:

**RE cases** - USERRA cases referred to OSC for prosecution after investigation by the Dept. of Labor.

**DP-OD cases** - demonstration project USERRA cases where the claimant has an odd-numbered SS #.

**DP-MX cases** - demonstration project USERRA cases where the claimant has an odd-numbered SS# and alleges a PPP in addition to the alleged USERRA violation.

**DP-TSA cases** - Transportation Security Administration USERRA cases.

Given the different nature of each of these types of cases, different performance indicators apply. Therefore, under Goal 1 (timely case processing) there is a Performance Indicator A and a unique set of targets for each of these four types of cases.

#### **RE Cases:**

Definition: Under USERRA, certain federal sector claims are investigated by U.S. Department of Labor, Veterans' Employment and Training Service (VETS). Pursuant to 38 U.S.C. § 4324, in the event that VETS is unable to resolve such a claim, a claimant has a right to have his or her claim referred to OSC for a determination on whether OSC will represent the claimant before the U.S. Merit Systems Protection Board (MSPB). Such cases are identified by OSC as "RE cases."

RE cases have already been investigated by VETS and reviewed by a DOL Office of Regional Solicitor (RSOL). The USERRA Unit receives the VETS investigative file and a legal memorandum from RSOL indicating whether RSOL recommends that OSC represent the claimant. USERRA Unit reviews the information and make as "de novo" determination.

Where the USERRA Unit disagrees with an RSOL determination that OSC should represent the claimant, the unit sends the RSOL a report setting forth the factual and legal basis of the unit's preliminary determination not to represent the claim and invites the RSOL to respond. The unit considers any response received from the RSOL in making a final representation determination. The RSOL is typically given two weeks to respond to the report.

It is to be noted that while RE cases have already been investigated by VETS, OSC has found that further investigation is often warranted (e.g., key witnesses need interviewing; important documents need to be obtained; too much time lapsed between alleged initial violations and their referral to OSC). In such cases, the USERRA Unit will always contact the agency and relevant witnesses to obtain the information necessary to allow it to make a well-reasoned determination regarding the prosecutorial merit of a given claim.

The need and extent of any supplemental investigation affects the processing time of RE cases and is reflected in the performance indicator.

Performance Indicator A for the referral cases is defined as the average number of days in which the representation decision is made. The target for this performance indicator is set at 75 days for FY 2007 and FY 2008.

**DP-OD cases:**

Definition: In late 2004, Congress expanded OSC's role in enforcing USERRA and protecting the employment rights of federal employees and applicants. Pursuant to a demonstration project established by section 204 of the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, OSC was given the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. Under the demonstration project, OSC also investigates 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 (so-called "mixed claims"). VETS' investigative authority was limited to federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit and who do not allege a prohibited personnel practice. Pursuant to section 204(d)(1) of VBIA, OSC shall administer the demonstration project and DOL shall cooperate with OSC in carrying out the demonstration project. The demonstration project began on February 8, 2005, and ends on September 30, 2007.

Given the new, additional investigative responsibilities Congress assigned to OSC with the passing of the demonstration project and the Special Counsel's desire to revitalize OSC's enforcement of USERRA during his term, Special Counsel Bloch established the USERRA Unit as part of the January 6, 2005, directive reorganizing the agency. The USERRA Unit is the in-take, investigative, and prosecutorial unit for all matters pertaining to USERRA and veteran-related employment issues. The Unit is responsible for investigating USERRA claims to determine whether prosecution is warranted.

DP-OD cases are federal sector USERRA claims filed by persons having an odd-numbered social security number. DP-OD cases typically come from two sources: 1) from VETS, where a claimant files a USERRA Form 1010 (i.e., a USERRA complaint form) with VETS and 2) directly from the claimant, where the claimant files with OSC the OMB approved form OSC-14 "Complaint of Possible violation of USERRA."

The USERRA Unit conducts an investigation of DP-OD cases and determines whether OSC will represent the claimant in a USERRA action before the MSPB. The performance indicator reflects the time reasonably expected to investigate such cases.

Performance Indicator A for the odd-numbered social security number demonstration project cases is defined as the average number of days in which the representation decision is made. The target for this performance indicator is set at 160 days for FY 2007.

**DP-MX cases:**

Definition: As stated above, OSC is responsible for investigating all federal sector USERRA claims where the claimant, regardless of his or her social security number, alleges a prohibited personnel practice over which OSC has jurisdiction.

The USERRA Unit conducts an investigation of DP-MX cases and determines whether OSC will represent the claimant in an USERRA or prohibited personnel practice action before the MSPB.

The processing time of DP-MX cases is affected by 1) additional complexity of such cases and 2) the USERRA Unit's adoption of OSC's practice in prohibited personnel practice cases of granting a claimant 13 days to respond to OSC's preliminary determination regarding prohibited personnel practice allegations. The performance indicators incorporate those factors.

Performance Indicator A for the demonstration project cases in which a PPP is also alleged (mixed case) is defined as the average number of days in which the representation decision is made. The target for this performance indicator is set at 160 days for FY 2007.

**DP-TSA cases:**

On June 9, 2005, the MSPB held in Spain v. Department of Homeland Security (MSPB Docket # PH-0353-04-0361-I-1) that USERRA does not apply to Transportation Security Administration (TSA) Security Screeners or TSA Supervisory Security Screeners and, therefore, the MSPB does not recognize jurisdiction over such cases. Consequently, OSC is unable to prosecute USERRA actions involving TSA Security Screeners or TSA Supervisory Security Screeners.

Notwithstanding the Spain decision, TSA voluntarily permits OSC to investigate USERRA claims and reports its findings and recommendations for corrective action to TSA management officials (akin to the manner in which OSC is permitted to investigate and report on allegations of whistleblower reprisal).

The performance indicator for these types of cases reflects the MSPB's decision in the Spain case.

Performance Indicator A for the TSA cases is defined as the average number of days in which a "no merit" determination is made or a request for voluntary corrective action is sent to TSA. The target for this performance indicator is set at 160 days FY 2007.

**Performance Goal 2:**

**TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS**

Where the Office of Special Counsel is satisfied that claimant is entitled to relief, then it may exercise its prosecutorial authority and represent the claimant before the MSPB and, in certain circumstances, the U.S. Court of Appeals for the Federal Circuit. See 38 U.S.C. §§ 4324(a)(2)(A) and (d)(2). As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to prosecute successfully cases warranting corrective action. “Meritorious cases” under this performance indicator are to be distinguished from the “test cases” found under Performance Indicator B.

Performance Indicator A is defined as the percent of favorable outcomes in cases determined by OSC to be meritorious. Total favorable outcomes are the sum of the number of successful mediations and the number of settlements achieved and the number of successful litigations. The target for this indicator is set at 90% for FY 2007 and FY 2008.

It is foreseeable that OSC will desire to file cases where the law is not clear (e.g., novel legal issues requiring “test cases” to define the bounds of the law) but will establish legal precedent benefiting all service members, if the litigation is successful. The outcomes of these types of cases do not depend on OSC’s skill in weighing of the evidence, applying of law, and trying the case. Instead, the cases involve questions of law.

It is difficult to define a performance goal that accurately reflects “success” or “failure” of OSC’s identification of cases that are fertile for expanding the law. The mere fact of filing test litigation with an eye toward expanding the law, however, seems appropriate. Performance Indicator B captures this concept.

Performance Indicator B is defined as the number of test cases filed. While not appropriate to set a specific target for this indicator, since there may be years when no viable test case presents itself, the number of such test cases that OSC files is still an important indicator to track, as OSC assists in safeguarding the rights of service members in the parts of the law that are still vague or undefined.



**Performance Goal 3:**

**TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH  
ENHANCED OUTREACH TO FEDERAL AGENCIES**

OSC recognizes the federal sector's need for USERRA training although it has no statutory obligation to provide it. Thus, the USERRA Unit regularly accepts invitations to provide outreach services designed to educate federal personnel on USERRA issues so that agencies comply with the law. For example, such outreach efforts include USERRA seminars presented by OSC staff to the D.C. Bar in May 2005, at the annual Federal Dispute Resolution Conference in August 2005 in New York, and at an upcoming presentation at the Army's Advanced Labor and Employment Law Course on October 18, 2005, at the Judge Advocate General's Legal Center and School in Charlottesville, Virginia. Additionally, the unit maintains a telephonic and web-based "hotlines" for answering USERRA-related questions from the public and private sectors.

The performance indicator reflects the practical budgetary constraints of providing OSC-sponsored USERRA training to all requesters and OSC ability and desire to provide such training.

Performance Indicator A is specifically defined as the percent of USERRA outreaches given, over the number of invitations received. The USERRA Unit has set a target to fulfill 90% of these requests each year (where the requesting agency is paying for travel), recognizing that there will be times when a staff member can not be spared, due to the caseload at the time and/or trial schedules.

The USERRA Unit will also endeavor to assist those agencies who need outreach or training but are unable to offer reimbursement for expenses. Thus, the target for this Performance Indicator B is 50%. It is estimated that half of the requesting agencies of this sort will be local and therefore the costs would be minimal for OSC to meet their needs.

|   |
|---|
| <b>OSC's Whistleblower Disclosure Mission</b> |
|---|

**Performance Goal 1:**

**TO RECEIVE AND RESOLVE WHISTLEBLOWER DISCLOSURES WITH TIMELY PROCESSING**

Pursuant to § 1213(b), when the Special Counsel receives any disclosure of information by an [employee] which the [employee] reasonably believes 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, the Special Counsel must review the information within 15 days and determine whether there is a *substantial likelihood* that the information discloses one or more of the above categories of wrongdoing.

OSC handles these whistleblower disclosures under 5 U.S.C. § 1213 in one of several ways. If the Special Counsel makes a positive determination, he must transmit the information to the appropriate agency head, and require the agency head to conduct an investigation and submit a written report on the findings of the investigation. These referrals under § 1213 represent a small percentage (approximately 8% for FY 2006) of the total number of cases resolved by OSC in any fiscal year.

If the Special Counsel does not make a positive determination, the matter is closed. These closures make up the vast majority (92% for FY 2006) of the total number of disclosures resolved by OSC in any fiscal year.

If the Special Counsel is unable to make the substantial likelihood determination on the basis of the information supplied by the whistleblower, the matter may be informally referred to the Inspector General (IG) for the agency involved, with a request that the IG assist OSC in making the determination.

Because of the time involved in preparing cases for referral under § 1213 and in cases referred to the IG, the statutory 15-day time frame is difficult to meet in these cases. As a result the indicator for Goal #1, "percentage of disclosures processed within the statutory 15 day timeframe," is intended to capture only those cases in which the substantial likelihood determination has not been met. It should also be noted that the Special Counsel is considering proposing a legislative change in the statutory language to enlarge the time frame from 15 days to 45 days, a number which would more accurately reflect the average amount of time required to resolve a whistleblower disclosure. The performance indicator for this goal is the percentage of disclosures resolved within the statutory 15 day time frame. The target is 50% in FY 2007 and 50% in FY 2008.

**Performance Goal 2:**

**TO PROMOTE JUSTICE AND PROTECT THE MERIT SYSTEM THROUGH THE QUALITY OF DETERMINATIONS AND REFERRALS**

The U.S. Office of Special Counsel does not have investigative or enforcement authority under 5 U.S.C. § 1213. As such, the Indicator for Goal #2 reflects a quality measure based on the number of cases referred under §1213, regardless of the outcome of the referral. The percentage of cases referred out of the total number of cases received in a fiscal year is a relatively low number historically, and as such, the FY 2006 and FY 2007 targets are low. Since OSC's Disclosure Unit processes nearly 500 disclosures annually, this percentage can be seen as an indicator of the average relative height of the "substantial likelihood" bar in a given year.

The Indicator for Goal #2 reflects only one way of measuring quality as defined in Goal #2, to "promote justice and protect the merit system." **Because the statutory mandate of § 1213 contemplates that OSC make a determination whether there is a *substantial likelihood* that the information discloses wrongdoing, a negative determination under the statute, resulting in a closure, is as quality driven as a positive determination resulting in a referral.** OSC's analysis of a whistleblower disclosure may result in a determination not to burden an agency with an inappropriate referral, thus promoting justice and protecting the merit system. Notwithstanding this difficulty in identifying a measure of quality, the individual whistleblower who initiates the disclosure, thus accessing the statutory protections, is more inclined to measure quality by whether or not his or her disclosure is referred. As such, the Indicator for Goal #2 for now reflects this single measurement.

The performance indicator for this goal is specifically defined as the percentage of disclosures referred to agency heads, pursuant to 5 U.S.C. § 1213, or under the informal IG referral process. The target for FY 2007 and FY 2008 is set at 7%.

**Performance Goal 3:**

**TO ENHANCE OUTREACH TO FEDERAL AGENCIES TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES (DISCLOSURE)**

OSC's Disclosure Unit does not have a statutorily defined mandate to perform compliance outreach, and as such does not regularly provide training or outreach to other government entities, with the exception of informational presentations to foreign delegations and annually at the Federal Dispute Resolution Conferences.

OSC continues to provide free Whistleblower Disclosure Act posters to requesting agencies, if the quantity requested is less than ten. If the quantity requested exceeds ten, the interested agency can use OSC's rider at the Government Printing Office to order the required number of Whistleblower Disclosure Act posters.

APPENDIX B:

OSC ANNUAL PERFORMANCE BUDGET GOALS (FY 2008)

## OSC Statutory Missions: PPP ENFORCEMENT MISSION

| <b>Goal 1: TO PROTECT THE MERIT SYSTEM THROUGH TIMELY<br/>CASE PROCESSING</b> |  |
|---|--|
| <b>PPP Enforcement Mission</b>  | <b>PROHIBITED PERSONNEL<br/>PRACTICES CASES</b>  |
| <b>PERFORMANCE INDICATOR</b>  | <b>Indicator A: <span style="color: blue;">Percentage of cases<br/>processed in less than 240 days.</span></b> |
| <b>FY 2006 TARGET</b>   | 85%  |
| <b>FY 2006 RESULTS</b>  | 89%  |
| <b>FY 2007 TARGET</b>   | 92% <sup>a</sup>   |
| <b>FY 2007 RESULTS</b>  |  |
| <b>FY 2008 TARGET</b>   | 92%  |
| <b>FY 2008 RESULTS</b>  |  |

### Comments for Goal #1:

#### 1. Indicator A: PPP Cases.

This timeliness indicator measures the combined effectiveness of both OSC's Complaints Examining Unit (CEU) and OSC's Investigation and Prosecution Division (IPD).

OSC receives complaints of Prohibited Personnel Practices into the CEU. If, after initial screening, investigation, and legal analysis, a complaint meets the requirements for merit, it is internally referred to the IPD for further investigation. If the IPD investigates and determines the case does indeed have merit, the IPD either seeks relief for the claimant through mediation, settlement, or prosecution.

The reason the target is less than 100% is because in some cases the settlement process can take a considerable amount of time. In cases involving litigation, the timeframe for events is no longer driven by the speed of work of OSC attorneys and investigators. To strive for 100% would carry the implicit assumption that OSC would not litigate any cases.

<sup>1</sup> The FY 2007 target for PPPs processed in under 240 days has been lowered slightly from 95% to 92%. The reason is that OSC has several high priorities in FY 2007 that necessitate the reallocation of resources from both the units that handle PPPs (the Complaints Examining Unit and the

Investigation and Prosecution Division). Several IPD attorneys are on detail to the Hatch Act Unit, because of the high number of Hatch Act cases. The agency does not want to risk development of a Hatch Act backlog. Two CEU attorneys and one IPD attorney are on detail to the USERRA Unit, to assist with handling the high number of USERRA cases. In addition, an IPD investigator has taken a position in the USERRA unit on a permanent basis. In a small agency, reallocation of resources to assist with high priority initiatives has an effect. The effect in this case is that 92% is now an aggressive target for the agency to reach in terms of processing PPPs in less than 240 days.

| <b>Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS</b> |   |
|--|---|
| <b>PPP Enforcement Mission</b>   | <b>PROHIBITED PERSONNEL PRACTICES CASES</b>   |
| <b>PERFORMANCE INDICATOR</b>   | <b>Indicator A: % favorable outcomes in cases determined by OSC to be meritorious = (# successful mediations + # of settlements achieved + # of successful litigations) / (# meritorious cases)</b> |
| <b>FY 2006 TARGET</b>  | 99%   |
| <b>FY 2006 RESULTS</b>   | 100%  |
| <b>FY 2007 TARGET</b>  | 99%   |
| <b>FY 2007 RESULTS</b>   |   |
| <b>FY 2008 TARGET</b>  | 99%   |
| <b>FY 2008 RESULTS</b>   |   |

#### Comments to Goal #2

##### 1. Performance Indicator A

A meritorious case is one in which the Office of Special Counsel is satisfied that claimant is entitled to relief. In certain meritorious cases, OSC may endeavor to use mediation to secure relief for the claimant. If mediation was not appropriate or did not succeed, OSC may exercise its prosecutorial authority and file for corrective or disciplinary action before the MSPB. As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to successfully prosecute cases warranting corrective action.

In FY 2006, OSC processed 48 meritorious PPP cases. There was one more case in which a stay was in place at the end of the year. Even though the stay was favorable action, we are not counting that case in the 06 numbers, because we won't have completed its investigation of the case until FY 2007.

In 47 of the 48 meritorious cases, OSC successfully achieved corrective action during or after the investigation of the case. The case went to litigation, but was settled for corrective action, giving a percentage of 100% as the result in FY 2006. This percentage exceeded the previously established target.



| <b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b> |   |
|--|---|
| <b>PPP Enforcement Mission</b>   | <b>PROHIBITED PERSONNEL PRACTICES CASES</b>   |
| <b>PERFORMANCE INDICATOR</b>   | <b>Indicator A: # of new Federal agencies certified in the 2302 (c) Program by OSC.</b> |
| <b>FY 2006 TARGET</b>  | 5   |
| <b>FY 2006 RESULTS</b>   | 6   |
| <b>FY 2007 TARGET</b>  | 5   |
| <b>FY 2007 RESULTS</b>   |   |
| <b>FY 2008 TARGET</b>  | 5   |
| <b>FY 2008 RESULTS</b>   |   |

## Comments to Goal #3

OSC has statutory authority to administer the 2302(c) Program, which recognizes the federal sector's need for awareness of Prohibited Personnel Practices and training in avoidance of committing them. However, OSC cannot force any agency to apply for certification. There are no statutory penalties for not being certified. This annual numeric target is not overly aggressive because 1) OSC cannot force compliance, and 2) the number of Federal agencies that may seek certification is limited by the number of agencies in existence. OSC already has 29 certified agencies, including most of the major ones.

Other outreach activities:

Additionally, members of the Investigation and Prosecution Division and the Complaints Examining Unit regularly accept invitations to provide outreach services designed to educate Federal personnel on these issues so that agencies comply with the law. Employees from OSC were able to educate employees of many agencies during a presentation at the Federal Dispute Resolution Conference (FDR).

- OSC maintains a telephonic hotline for answering PPP-related questions from members of the Federal workforce.
- OSC's website provides a wealth of information regarding PPPs and is a valuable and constantly improving resource for educating the Federal workforce on this subject. Every year the website statistics for user sessions increase, with an average increase in activity of 15% over the previous year.
- The Go Learn project is a new initiative that will bring OSC expertise to thousands of Federal workers. OSC does not have responsibility for this project, other than providing expert content.

The results for the number of certifications exceeded the previously set target of five agencies to be certified during FY 2006.

### OSC Statutory Missions: HATCH ACT MISSION

| <b>Goal 1: TO DEFEND THE MERIT SYSTEM BY ENFORCING THE HATCH ACT – THROUGH TIMELY CASE PROCESSING</b> |  |   |   |
|---|--|---|---|
| <b>HATCH ACT MISSION</b>  | <b>HATCH ACT WRITTEN ADVISORY OPINIONS<br/>See comment 1.</b>                                    | <b>HATCH ACT ORAL &amp; EMAIL ADVISORY OPINIONS<br/>See comment 2</b>                             | <b>HATCH ACT COMPLAINTS</b>   |
| <b>PERFORMANCE INDICATORS</b>   | <b>Indicator A: Percentage of formal written advisory opinions issued in less than 120 days.</b> | <b>Indicator B: Percentage of oral and e-mail advisory opinions issued in less than five days</b> | <b>Indicator C: Percentage of matters resolved in less than 365 days.</b> |
| <b>FY 2006 TARGET</b>   | 75%  | 99%   | 60%   |
| <b>FY 2006 RESULTS</b>  | 93%  | 100%  | 84%   |
| <b>FY 2007 TARGET</b>   | 80%  | 99%   | 70%   |
| <b>FY 2007 RESULTS</b>  |  |   |   |
| <b>FY 2008 TARGET</b>   | 80%  | 99%   | 70%   |
| <b>FY 2008 RESULTS</b>  |  |   |   |

#### Comments for Goal #1:

##### 1. Performance Indicator A: written advisory opinions

These are the requests for an advisory opinion that come in to OSC's Hatch Act Unit that are very complex and require significant analysis before answering.

##### 2. Performance Indicator B: oral or e-mail advisory opinions

If an oral or e-mail advisory opinion were to take longer than five days, generally it would be treated as a formal written advisory request and be captured by Indicator A.

Several employees were detailed into the Hatch Act Unit to assist with the high volume of advisories, complaints, and cases. These employee details, and the extreme dedication of the employees of the Hatch Act Unit, made it possible to exceed all three timeliness targets for FY 2006.

| <b>Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS</b> |   |
|--|---|
| <b>HATCH ACT MISSION</b>   | <b>HATCH ACT CASES</b><br>See comment 1.                      |
| <b>PERFORMANCE INDICATOR</b>   | <b>Indicator A: % favorable outcomes in meritorious cases</b> |
| <b>FY 2006 TARGET</b>  | 90%   |
| <b>FY 2006 RESULTS</b>   | 97%   |
| <b>FY 2007 TARGET</b>  | 90%   |
| <b>FY 2007 RESULTS</b>   |   |
| <b>FY 2008 TARGET</b>  | 90%   |
| <b>FY 2008 RESULTS</b>   |   |

Comments to Goal #2

1. Meritorious cases

A meritorious Hatch Act case is a case in which OSC finds a violation of the Hatch Act. A favorable outcome in a Hatch Act case is either (1) successful litigation of the case; (2) successful settlement of the case; or (3) successful corrective action (individual corrected his violation after receiving notice from OSC, for example, by withdrawing his candidacy or resigning from his employment).

The results achieved by the Hatch Act Unit for Goal 2 exceeded the target by 7% for FY 2006.

| <b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b> |  |   |
|--|--|---|
| <b>HATCH ACT MISSION</b>   | <b>HATCH ACT OUTREACH VISITS</b>   | <b>HATCH ACT SECTION OF OSC WEBSITE</b>   |
| <b>PERFORMANCE INDICATORS</b>  | <b>Indicator A: (# of HA trainings and outreaches given) / (# of invitations to provide HA training or outreach, where the inviter sponsors OSC)</b> | <b>Indicator B: Number of new advisory complex opinions added every month to the website.</b> |
| <b>FY 2006 TARGET</b>  | 90%  | One   |
| <b>FY 2006 RESULTS</b>   | 96%  | One   |
| <b>FY 2007 TARGET</b>  | 90%  | One   |
| <b>FY 2007 RESULTS</b>   |  |   |
| <b>FY 2008 TARGET</b>  | 90%  | One   |
| <b>FY 2008 RESULTS</b>   |  |   |

Comments to Goal #3

1. Results:

Indicator A: The outreach results for FY 2006 exceed the set target by 6%.

Indicator B: Ten complex advisory opinions have been posted. This averages to one opinion per month since these goals were established in February 2006.

2. Outreach DVD

In addition to the performance of outreach visits and the website enhancement described above, OSC has produced both a Federal Hatch Act DVD and a State & Local Hatch Act DVD that explains the basics of the Hatch Act. OSC is now able to mail the appropriate DVD to certain requestors who require a basic tutorial overview of the Hatch Act.

## **OSC Statutory Missions: USERRA MISSION**

### **Explanatory Comments about the Four Types of USERRA Cases**

OSC receives four types of USERRA cases—RE, DP-OD, DP-MX, and DP-TSA—each of which are explained in detail below. Given the different nature of such cases, different performance indicators apply.

#### **1. RE Cases**

Under USERRA, certain federal sector claims are investigated by U.S. Department of Labor, Veterans' Employment and Training Service (VETS). Pursuant to 38 U.S.C. § 4324, in the event that VETS is unable to resolve such a claim, a claimant has a right to have his or her claim referred to OSC for a determination on whether OSC will represent the claimant before the U.S. Merit Systems Protection Board (MSPB). Such cases are identified by OSC as "RE cases."

RE cases have already been investigated by VETS and reviewed by a DOL Office of Regional Solicitor (RSOL). The USERRA Unit receives the VETS investigative file and a legal memorandum from RSOL indicating whether RSOL recommends that OSC represent the claimant. USERRA Unit reviews the information and make as "de novo" determination.

Where the USERRA Unit disagrees with an RSOL determination that OSC should represent the claimant, the unit sends the RSOL a report setting forth the factual and legal basis of the unit's preliminary determination not to represent the claim and invites the RSOL to respond. The unit considers any response received from the RSOL in making a final representation determination. The RSOL is typically given two weeks to respond to the report.

It is to be noted that while RE cases have already been investigated by VETS, OSC has found that: further investigation is often warranted, e.g., key witnesses need interviewing; important documents need to be obtained; too much time lapsed between alleged initial violations and their referral to OSC. In such cases, the USERRA Unit will always contact the agency and relevant witnesses to obtain the information necessary to allow it to make a well-reasoned determination regarding the prosecutorial merit of a given claim.

The need and extent of any supplemental investigation affects the processing time of RE cases and is reflected in the performance indicator.

#### **2. DP-OD cases**

In late 2004, Congress expanded OSC's role in enforcing USERRA and protecting the employment rights of federal employees and applicants. Pursuant to a demonstration project established by section 204 of the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, OSC was given the

exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. Under the demonstration project, OSC also investigates 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 (so-called "mixed claims"). VETS' investigative authority was limited to federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit and who do not allege a prohibited personnel practice. Pursuant to section 204(d)(1) of VBIA, OSC shall administer the demonstration project and DOL shall cooperate with OSC in carrying out the demonstration project. The demonstration project began on February 8, 2005, and ends on September 30, 2007.

Given the new, additional investigative responsibilities Congress assigned to OSC with the passing of the demonstration project and the Special Counsel's desire to revitalize OSC's enforcement of USERRA during his term, Special Counsel Bloch established the USERRA Unit as part of the January 6, 2005, directive reorganizing the agency. The USERRA Unit is the in-take, investigative, and prosecutorial unit for all matters pertaining to USERRA and veteran-related employment issues. The Unit is responsible for investigating USERRA claims to determine whether prosecution is warranted.

DP-OD cases are federal sector USERRA claims filed by persons having an odd-numbered social security number. DP-OD cases typically come from two sources: 1) from VETS, where a claimant files a USERRA Form 1010 (i.e., a USERRA complaint form) with VETS and 2) directly from the claimant, where the claimant files with OSC the OMB approved form OSC-14 "Complaint of Possible violation of USERRA."

The USERRA Unit conducts an investigation of DP-OD cases and determines whether OSC will represent the claimant in an USERRA action before the MSPB. The performance indicator reflects the time reasonably expected to investigate such cases.

### **3. DP-MX cases**

As stated above, OSC is responsible for investigating all federal sector USERRA claims where the claimant, regardless of his or her social security number, alleges a prohibited personnel practice over which OSC has jurisdiction.

The USERRA Unit conducts an investigation of DP-MX cases and determines whether OSC will represent the claimant in a USERRA or prohibited personnel practice action before the MSPB.

The processing time of DP-MX cases is affected by 1) additional complexity of such cases and 2) the USERRA Unit's adoption of OSC's practice in prohibited personnel practice cases of granting a claimant 13 days to respond to OSC's preliminary determination regarding prohibited personnel practice allegations. The performance indicator incorporates those factors.

#### **4. DP-TSA cases**

On June 9, 2005, the MSPB held in *Spain v. Department of Homeland Security* (MSPB Docket # PH-0353-04-0361-I-1) that USERRA does not apply to Transportation Security Administration (TSA) Security Screeners or TSA Supervisory Security Screeners and, therefore, the MSPB does not recognize jurisdiction over such cases. Consequently, OSC is unable to prosecute USERRA actions involving TSA Security Screeners or TSA Supervisory Security Screeners.

Notwithstanding the *Spain* decision, TSA voluntarily permits OSC to investigate USERRA claims and reports its findings and recommendations for corrective action to TSA management officials (akin to the manner in which OSC is permitted to investigate and report on allegations of whistleblower reprisal).

The performance indicator for these types of cases reflects the MSPB's decision in the *Spain* case.

| <b>Goal 1: TO ENFORCE THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT THROUGH TIMELY CASE PROCESSING</b> |  |   |   |  |
|--|--|---|---|--|
| <b>USERRA MISSION</b>  | <b>USERRA A: RE Cases</b>  | <b>USERRA B: DP-OD Cases</b>  | <b>USERRA C: DP-MX Cases</b>  | <b>USERRA D: DP-TSA Cases</b>  |
|  |  |   |   | See Comment 5.   |
| <b>PERFORMANCE INDICATORS</b>  | <b><u>Indicator A:</u><br/>Average number of days in which the representation decision is made</b> | <b><u>Indicator A:</u><br/>Average number of days in which the representation decision is made.</b> | <b><u>Indicator A:</u><br/>Average number of days in which the representation decision is made.</b> | <b><u>Indicator A:</u><br/>Average number of days in which a “no merit” determination is made or a request for voluntary corrective action is sent to TSA.</b> |
| <b>FY 2006 TARGET</b>  | 90%  | 80%   | 80%   | 80%  |
| <b>FY 2006 RESULTS</b>   | 50%  | 62%   | 74%   | 33%  |
| <b>FY 2007 TARGET<sup>a</sup></b>  | 75 days  | 160 days  | 160 days  | 160 days   |
| <b>FY 2007 RESULTS</b>   |  |   |   |  |
| <b>FY 2008 TARGET</b>  | 75 days  | NA <sup>b</sup>   | NA  | NA   |
| <b>FY 2008 RESULTS</b>   |  |   |   |  |

<sup>1</sup> OSC has refined its performance indicators for timeliness in USERRA case processing to be more descriptive. Since the main concern with timeliness in USERRA investigations is on the actual number of days it takes to investigate cases, we have simplified by making the indicator be exactly that – the average number of days. We have set the FY 2007 target for average number of days to be 160 days for DP-OD cases, DP-MX cases, and DP-TSA cases. This is a slight lowering of the target for DP-OD cases and DP-TSA cases. The initial target was set without baseline data available for this type of USERRA investigation case. After analyzing the baseline data that has become available, it is clear the initial targets were unrealistically high. The FY 2007 targets of 160 days are still quite aggressive. But



they are at the same time realistic in a way the initial targets were not, for a start-up unit with training requirements for a good portion of its employees.

<sup>2</sup> The Demonstration Project ends at the close of FY 2007. Once the size and scope of OSC's USERRA responsibilities for FY 2008 have been decided, OSC can formulate a relevant timeliness target for that fiscal year.

Comments for Goal #1:

a. For RE cases, in **50%** of them the representation decision was made within 75 days.

- 5 RE cases were resolved in <75 days.
- 5 RE cases were resolved in >75 days.
- Average processing time to resolve these 10 RE cases was **71 days**.

GOAL: 90%

ASSESSMENT: USERRA Unit did not meet this aggressive target.

b. For the DP-OD cases, in **62%** of them the representation decision was made within 120 days.

- 91 DP-OD cases were resolved in <120 days.
- 56 DP-OD cases were not resolved in < 120 days.
- Average processing time to close 147 DP-OD cases was **115 days**.

GOAL: 80%

ASSESSMENT: USERRA Unit did not meet this aggressive target.

c. For DP-MX cases, in **74%** of them the representation decision was made within 160 days.

- 26 DP-MX cases were resolved in <160 days.
- 9 DP-MX cases were not resolved in <160 days.
- Average processing time to close 35 DP-MX cases was **123 days**.

GOAL: 80%

ASSESSMENT: USERRA Unit came very close to meeting this aggressive target.

d. For DP-TSA cases, in **33%** of them a “no merit” determination was made or a “request for voluntary corrective action” was sent to TSA within 120 days.

- 2 TSA cases were resolved in <120 days.
- 4 TSA cases were not resolved in <120 days.
- Average processing time to close 6 TSA cases was **161** days.

GOAL: 80%

ASSESSMENT: USERRA Unit did not meet this aggressive target.

In general, the USERRA Unit did not meet the aggressive internal timeliness targets set forth last year because it is a start up unit. As with any “new business,” there are initial inefficiencies that adversely affect performance. As time goes by, those inefficiencies diminish, and the business becomes more efficient.

In the case of the USERRA Unit, the inefficiencies stemmed from the need to assemble (hire, reassign, or detail) and train a new staff of lawyers and investigators to handle the agency’s new mission of investigating USERRA cases. A lot of time has been spent training the staff on the substantive law. As the staff’s expertise in USERRA grows, so will its efficiency, and the goals should be attainable.

**Notwithstanding the failure to meet the aggressive timeliness targets for USERRA for FY 2006, it is important to note OSC’s average time to resolve a USERRA claim is exemplary and reflects the dedication of the USERRA Unit members.**

| <b>Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS</b> |  |   |
|--|--|---|
| <b>USERRA MISSION</b>  | <b>USERRA CASES</b>  |   |
| <b>PERFORMANCE INDICATORS</b>  | <b>Indicator A: % favorable outcomes in cases determined by OSC to be meritorious = (# successful meditations + # of settlements achieved + # of successful litigations) / (# meritorious cases)</b> | <b>Indicator B: # of “test cases” filed</b> |
| <b>FY 2006 TARGET</b>  | 90%  | Inappropriate to set a specific target      |
| <b>FY 2006 RESULTS</b>   | 100%   | NA  |
| <b>FY 2007 TARGET</b>  | 90%  | Inappropriate to set a specific target      |
| <b>FY 2007 RESULTS</b>   |  |   |
| <b>FY 2008 TARGET</b>  | 90%  | Inappropriate to set a specific target      |
| <b>FY 2008 RESULTS</b>   |  |   |

## Comments to Goal #2

## 1. Performance Indicator A

Where the Office of Special Counsel is satisfied that claimant is entitled to relief, then it may exercise its prosecutorial authority and represent the claimant before the MSPB and, in certain circumstances, the U.S. Court of Appeals for the Federal Circuit. See 38 U.S.C. §§ 4324(a)(2)(A) and (d)(2). As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to prosecute successfully cases warranting corrective action. “Meritorious cases” under this performance indicator are to be distinguished from the “test cases” found under Performance Indicator B.

Detail behind the percentage in the results for FY 2006 Indicator A:

- |                                |     |
|--------------------------------|-----|
| a. # of successful mediations  | n/a |
| b. # of settlements achieved   | 35  |
| c. # of successful litigations | 1   |
| d. # meritorious cases         | 36  |
| e. # test cases filed          | n/a |

GOAL = 90 %

RESULTS = 100%

ASSESSMENT: USERRA Unit exceeded the target for this indicator.

## 2. Performance Indicator B

It is foreseeable that OSC will desire to file cases where the law is not clear (e.g., novel legal issues requiring “test cases” to define the bounds of the law) but will establish legal precedent benefiting all service members, if the litigation is successful. The outcomes of these types of cases do not depend on OSC’s skill in weighing of the evidence, applying of law, and trying the case. Instead, the cases involve questions of law.

It is difficult to define a performance goal that accurately reflects “success” or “failure” of OSC’s identification of cases that are fertile for expanding the law. The mere fact of filing test litigation with an eye toward expanding the law, however, seems appropriate. Performance Indicator B captures this concept. OSC will track how often it files this type of case. However, a target can not be identified because OSC cannot determine how often appropriate “test cases” will come into the agency from claimants.

OSC filed no USERRA test cases during FY 2006.

| <b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b> |  |   |
|--|--|---|
| <b>USERRA MISSION</b>  | <b>USERRA CASES</b>  |   |
| <b>PERFORMANCE INDICATORS</b>  | <b>Indicator A: (# of USERRA trainings and outreaches given) / (# of invitations to provide USERRA training or outreach visits {where inviting agency sponsors OSC})</b> | <b>Indicator B: (# of USERRA trainings and outreaches given) / (# of invitations to provide USERRA training or outreach visits {where OSC pays expenses})</b> |
| <b>FY 2006 TARGET</b>  | 90%  | 50%   |
| <b>FY 2006 RESULTS</b>   | NA   | 100%  |
| <b>FY 2007 TARGET</b>  | 90%  | 50%   |
| <b>FY 2007 RESULTS</b>   |  |   |
| <b>FY 2008 TARGET</b>  | 90%  | 50%   |
| <b>FY 2008 RESULTS</b>   |  |   |

## Comments to Goal #3

OSC recognizes the federal sector's need for USERRA training although it has no statutory obligation to provide it. Thus, the USERRA Unit regularly accepts invitations to provide outreach services designed to educate federal personnel on USERRA issues so that agencies comply with the law. Such outreach efforts include USERRA seminars presented by OSC staff to the D.C. Bar, at the annual Federal Dispute Resolution Conference, and presentations at the Army's Advanced Labor and Employment Law Course at the Judge Advocate General's Legal Center and School in Charlottesville, Virginia. Additionally, the unit maintains a telephonic and web-based "hotlines" for answering USERRA-related questions from the public and private sectors.

The performance indicators reflect the practical budgetary constraints of providing OSC-sponsored USERRA training to all requesters and OSC ability and desire to provide such training.

Detail behind the results for FY 2006 Indicator A:

- a. # of USERRA training & outreaches given, where inviter sponsors OSC = 0
- b. # of invitations for USERRA training/outreach visits, where the inviter sponsors = 0

GOAL = 90 %

ASSESSMENT: N/A (No one invited OSC and offered to sponsor the outreach.)

Detail behind the results for FY 2006 Indicator B:

- a. # of USERRA training & outreaches given, where OSC pays = 2
- b. # of invitations for USERRA training/outreach visits, where OSC pays = 2

GOAL = 50 %

RESULTS = 100% (2/2)

ASSESSMENT: The USERRA Unit exceeded the target for this indicator.

**OSC Statutory Missions:  
WHISTLEBLOWER DISCLOSURE MISSION**

| <b>Goal 1: TO RECEIVE AND RESOLVE WHISTLEBLOWER DISCLOSURES WITH TIMELY PROCESSING</b> |   |
|--|---|
| <b>WHISTLEBLOWER DISCLOSURE MISSION</b>  | <b>DISCLOSURES</b><br><br>See comment 1.  |
| <b>PERFORMANCE INDICATORS</b>  | <b>Indicator A: Percentage of disclosures resolved within the statutory 15 day time frame</b> |
| <b>FY 2006 TARGET</b>  | 50%   |
| <b>FY 2006 RESULTS</b>   | 42%   |
| <b>FY 2007 TARGET</b>  | 50%   |
| <b>FY 2007 RESULTS</b>   |   |
| <b>FY 2008 TARGET</b>  | 50%   |
| <b>FY 2008 RESULTS</b>   |   |

Comments for Goal #1:

1. Performance Indicator A: Timely Disclosure Processing

Pursuant to § 1213(b), when the Special Counsel receives any disclosure of information by a federal employee, former federal employee or applicant for federal employment which the [employee] reasonably believes 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, the Special Counsel must review the information within 15 days and determine whether there is a substantial likelihood that the information discloses one or more of the above categories of wrongdoing.

OSC handles these whistleblower disclosures under 5 U.S.C. § 1213 in one of three ways. If the Special Counsel makes a positive determination, he must transmit the information to the appropriate agency head, and require the agency head to conduct an investigation and submit a written report on the findings of the investigation. These referrals under § 1213 represent a small percentage (approximately 8% for FY 2006) of the total number of disclosures resolved by OSC in any fiscal year.

If the Special Counsel does not make a positive determination, the matter is closed. These closures make up the vast majority (92% for FY 2006) of the total number of cases resolved by OSC in any fiscal year.

If the Special Counsel is unable to make the substantial likelihood determination on the basis of the information supplied by the whistleblower, the matter may be informally referred to the Inspector General (IG) for the agency involved, with a request that the IG assist OSC in making a substantial likelihood determination.

Because of the time involved in preparing cases for referral under § 1213 and in cases referred to the IG, the statutory 15-day time frame is difficult to achieve. As a result the Indicator for Goal #1, “[p]ercentage of disclosures processed within the statutory 15 day timeframe,” is intended to capture only those cases in which the substantial likelihood determination has not been met. Even in those cases, the actual percentage of cases resolved in less than 15 days is relatively low. It should also be noted that the Special Counsel is considering proposing a legislative change in the statutory language to enlarge the time frame from 15 days to 45 days, a number which would more accurately reflect the average amount of time required to resolve a whistleblower disclosure.

Because of the issues identified above, the Disclosure Unit did not meet the target set for Goal 1 for FY 2006.



| <b>Goal 2: TO PROMOTE JUSTICE AND PROTECT THE MERIT SYSTEM THROUGH THE QUALITY OF DETERMINATIONS AND REFERRALS</b> |  |
|--|--|
| <b>WHISTLEBLOWER DISCLOSURE MISSION</b>  | <b>DISCLOSURES</b><br><br>See comment 1.   |
| <b>PERFORMANCE INDICATORS</b>  | <b>Indicator A: % Percentage of disclosures referred to agency head, pursuant to 5 U.S.C. § 1213, or under the informal IG referral process.</b> |
| <b>FY 2006 TARGET</b>  | 7%   |
| <b>FY 2006 RESULTS</b>   | 8%   |
| <b>FY 2007 TARGET</b>  | 7%   |
| <b>FY 2007 RESULTS</b>   |  |
| <b>FY 2008 TARGET</b>  | 7%   |
| <b>FY 2008 RESULTS</b>   |  |

#### Comments to Goal #2

##### 1. Indicator A: Whistleblower referrals:

The U.S. Office of Special Counsel does not have investigative or enforcement authority under 5U.S.C. § 1213. As such, the Indicator for Goal #2 reflects a quality measure based on the number of cases referred under §1213, regardless of the outcome of the referral. The percentage of cases referred out of the total number of cases received in a fiscal year is a relatively low number historically, and as such, the FY 2006 and FY 2007 targets are low. Because OSC's Disclosure Unit processes nearly 500 disclosures annually, this percentage can be seen as an indicator of the average relative height of the "substantial likelihood" bar in a given year.

The Indicator for Goal #2 reflects only one way of measuring quality as defined in Goal #2, to "promote justice and protect the merit system." **Because the statutory mandate of §1213 contemplates that OSC make a determination whether there is a substantial likelihood that the information discloses wrongdoing, a negative determination under the statute, resulting in a closure, is as quality driven as a positive determination resulting in a referral.** OSC's analysis of a whistleblower disclosure may result in a determination not to burden an agency with an inappropriate referral, thus promoting justice and protecting the merit system. Notwithstanding this difficulty in identifying a measure of quality, the individual whistleblower who initiates the disclosure, thus accessing the statutory protections, is more inclined to measure quality by whether or not his or her disclosure is referred. As such, the Indicator for Goal #2 for now reflects this single measurement.

The target for this goal was exceeded for FY 2006.

| <b>Goal 3: <i>TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</i></b> |    |
|---|----|
| <b>WHISTLEBLOWER DISCLOSURE MISSION</b>   | NA |
| <b>PERFORMANCE INDICATORS</b>   | NA |
| <b>FY 2006 TARGET</b>   | NA |
| <b>FY 2006 RESULTS</b>  | NA |
| <b>FY 2007 TARGET</b>   | NA |
| <b>FY 2007 RESULTS</b>  | NA |
| <b>FY 2008 TARGET</b>   | NA |
| <b>FY 2008 RESULTS</b>  | NA |

Comments to Goal #3

1. Disclosure outreach:

OSC's Disclosure Unit does not have a statutorily defined mandate to perform compliance outreach, and as such does not regularly provide training or outreach to other government entities, with the exception of informational presentations to foreign delegations.

OSC continues to provide free Whistleblower Disclosure Act posters to requesting agencies, if the quantity requested is less than ten. If the quantity requested exceeds ten, the interested agency can obtain extra copies from the Government Printing Office.

### Endnotes

<sup>1</sup> Public Law No. 103-94 (1993), codified in scattered sections of 5 U.S.C. and 12 U.S.C.

<sup>2</sup> Public Law No. 103-353 (1994), codified at 38 U.S.C. § 4301, *et seq.* The Veterans' Employment Opportunities Act of 1998 (Public Law No. 103-424) also expanded OSC's role in protecting veterans. The act made it a prohibited personnel practice to knowingly take, recommend, or approve (or fail to take, recommend, or approve) any personnel action, if taking (or failing to take) such action would violate a veterans' preference requirement. See 5 U.S.C. § 2302(b)(11). (The former § 2302(b)(11) was re-designated as § 2302(b)(12).).

<sup>3</sup> Public Law No. 103-424 (1994), codified in various sections of title 5 of the U.S. Code. The provision making federal agencies responsible, in consultation with OSC, for informing their employees of rights and remedies under the Whistleblower Protection Act appears at 5 U.S.C. § 2302(c).

<sup>4</sup> Public Law 107-71 (2001).

<sup>5</sup> Unless noted otherwise, all references after this to prohibited personnel practice complaints include complaints alleging other violations of civil service law, rule, or regulation listed at 5 U.S.C. § 1216, except for alleged violations of the Hatch Act.

<sup>6</sup> When the Complaints Examining Unit makes a preliminary determination to close a complaint without further investigation, it must by law provide complainants with a written statement of reasons, to which they may respond. On the basis of the response, if any, the unit decides whether to close the matter, or refer it to the Investigation and Prosecution Division.

<sup>7</sup> Compare, for example, 5 U.S.C. § 1214(a)(1)(A) ("The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.") with 5 U.S.C. app. 3, § 10(a) ("[E]ach Inspector General ... is authorized— ... (2) to make such investigations and reports relating to the administration of the programs and operations of the [agency] as are, in the judgment of the Inspector General, necessary or desirable[.]") and § 7(a) ("The Inspector General may receive and investigate complaints or information from an employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety."). OSC cannot, however, investigate complaints over which it has no jurisdiction, with the result that some complaints are closed without further action after receipt and review. During FY2004, for example, OSC lacked jurisdiction in 617 (or 31.4%) of the complaints received, leaving 1,347 complaints (69%) in which OSC was required by statute to conduct an inquiry. In addition, discrimination based on race, color, religion, sex, or national origin, age, or handicapping condition is illegal under laws enforced by the Equal Employment Opportunity Commission (EEOC), and is also a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). However, since procedures for 10 investigating discrimination complaints have already been established in the agencies and the EEOC, the Special Counsel will normally avoid duplicating those procedures and will defer to those procedures rather than initiate an independent investigation. 5 C.F.R. § 1810.1. When a matter is not referred for further investigation, CEU must by law provide complainants with a written statement of reasons, to which they may respond. 5 U.S.C. § 1214(a)(1)(D). On the basis of the response, if any, CEU decides whether to finalize its preliminary determination to close the matter, or to refer the matter to an Investigation and Prosecution Division. 11 5 U.S.C. § 1214(b)(2)(C). <sup>11</sup> Corrective action seeks a remedy for any injury to the individual complaining employee, such as back pay or reinstatement, while disciplinary action seeks to impose discipline on the perpetrator of the PPP.

<sup>8</sup> Corrective action seeks a remedy for any injury to the individual complaining employee, such as back pay or reinstatement, while disciplinary action seeks to impose discipline on the perpetrator of the PPP.

<sup>9</sup> Several factors are believed to account for or contribute to this workload increase. They include: publicity about an increased number of high-profile cases handled by OSC, including whistleblower disclosures, and four Public Servant Awards issued to whistleblowers by OSC; increased public interest in elections since the 2000 presidential election, the public interest generated by the 2004 campaigns; OSC's 2302(c) Certification Program; significant improvements in OSC's web site, increasing awareness by government employees and others of OSC and its functions.

<sup>10</sup> [http://www.osc.gov/documents/osc\\_lst3.pdf](http://www.osc.gov/documents/osc_lst3.pdf)

FISCAL YEAR 2009  
CONGRESSIONAL BUDGET JUSTIFICATION  
AND PERFORMANCE BUDGET GOALS



**U.S. OFFICE OF SPECIAL COUNSEL**

1730 M Street, N.W. (Suite 218)

Washington, DC 20036-4505

[www.osc.gov](http://www.osc.gov)

## Contents

|   |           |
|---|-----------|
| <b>Part 1 – Executive Summary</b>                                   | <b>3</b>  |
| Summary of Request  | 3         |
| OSC’s Mission   | 3         |
| Graphical Highlights of OSC’s Successes                             | 3         |
| Statutory background  | 12        |
| Strategic Objectives  | 13        |
| Internal Organization   | 14        |
| Budget by Program   | 16        |
| <b>Part 2 – Budget Programs and Performance Plan</b>                | <b>17</b> |
| Investigation and Prosecution of Prohibited Personnel Practices     | 17        |
| Alternative Dispute Resolution                                      | 21        |
| Goals and Results – Prohibited Personnel Practices                  | 22        |
| Hatch Act Enforcement Program                                       | 25        |
| Goals and Results – Hatch Act Program                               | 28        |
| Whistleblower Disclosure Unit Program                               | 31        |
| Goals and Results – Whistleblower Disclosure                        | 34        |
| USERRA Enforcement and Prosecution Program                          | 36        |
| Goals and Results – USERRA Enforcement Program                      | 39        |
| OSC and the Future of USERRA Enforcements                           | 46        |
| Outreach Program  | 47        |
| <b>Part 3 – FY2009 Budget Request – Additional Information</b>      | <b>48</b> |
| Budgetary factors   | 48        |
| Components of Budget Request  | 49        |
| Table - Budget Information by Object Class                          | 50        |
| Table - Analysis of Resources                                       | 51        |
| <b>Part 4 – Performance under the President’s Management Agenda</b> | <b>52</b> |
| Strategic Management of Human Capital                               | 52        |
| Competitive Sourcing  | 52        |
| Improved Financial Performance                                      | 53        |
| Expanded Electronic Government                                      | 53        |
| Endnotes  | 54        |

## **Part 1 - Executive Summary**

### **Summary of Request**

OSC is requesting \$17,468,000 in FY 2009, which is the same amount as the agency's FY 2008 appropriation of \$17,468,000, which included \$1,100,000 for computer forensics associated with the investigations of its Special Task Force. The \$17,468,000 includes funding for at least one additional FTE, as well as funding to cover the salary increase of January 2008 and the projected increase of January 2009.

### **OSC's Mission**

The U.S. Office of Special Counsel's primary mission is to safeguard the merit system in federal employment by protecting employees and applicants from prohibited personnel practices (PPPs), especially reprisal for whistleblowing. In addition, the agency operates as a secure channel for federal whistleblower disclosures of violations of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; and substantial and specific danger to public health and safety. OSC also has jurisdiction under the Hatch Act to enforce restrictions on political activity by government employees. Finally, OSC enforces federal employment rights secured by the Uniformed Services Employment and Reemployment Rights Act (USERRA).

On matters ranging from protecting passengers in the nation's air travel, protecting our borders, identifying waste in federal contracting and grants to save taxpayers money, assuring safety in customs inspections to provide safety to the public, creating greater efficiency in the military for safety, correcting discrimination against service members returning from duty so that our all-volunteer military continues to attract quality persons, to disciplining high level officials for whistleblower retaliation and use of official authority to affect elections -- the U.S. Office of Special Counsel has fulfilled its role as an independent prosecutorial and investigative agency charged with bringing greater integrity and efficiency to the merit system. New challenges have arisen at the Office of Special Counsel, including highly visible investigations into the nation's air traffic control system, investigations into the adequacy of the pumps installed in New Orleans to relieve the city from flooding during hurricanes, and an investigation into possible violations of the Hatch Act throughout the agencies of the federal executive branch of government. Granting this budget request will instill increased public trust in government by sending the message that independent agencies are discovering and counteracting fraud, waste and abuse of authority; that we honor, not punish, those individuals who bring these matters to light.

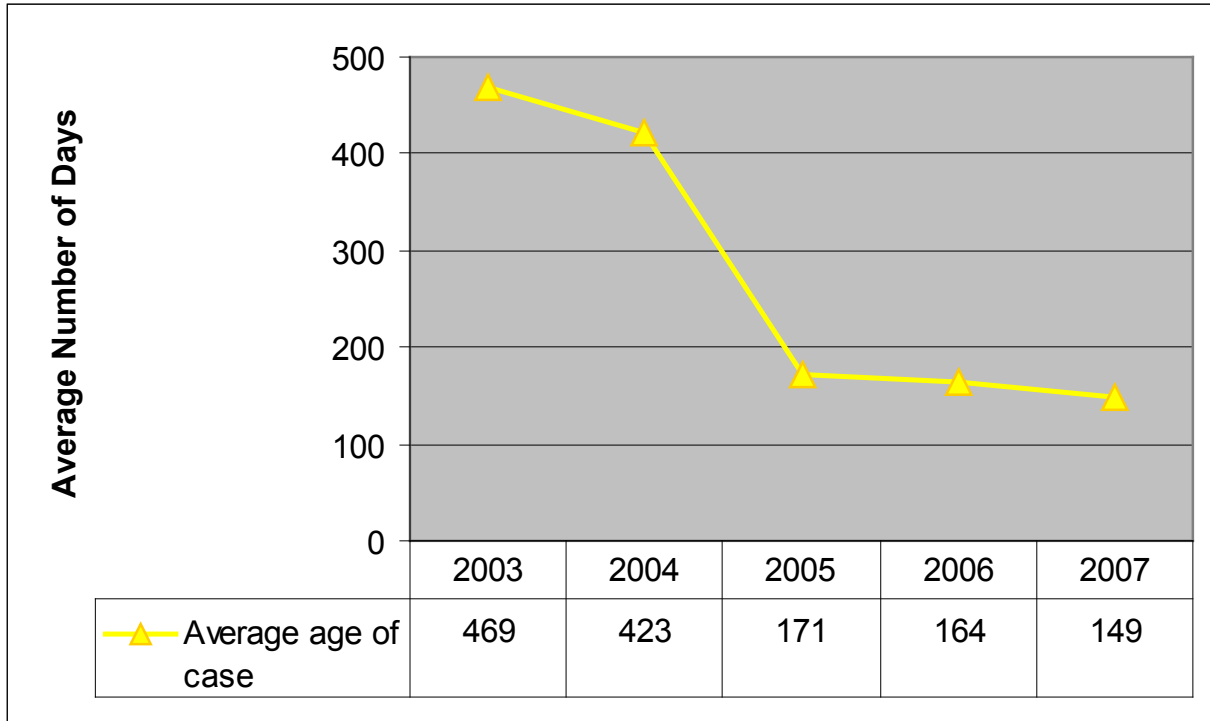
### **Graphical Highlights of OSC's Successes**

When the new Special Counsel took office in January 2004, two major problems confronted OSC: a serious backlog of cases in all of the units and a cumbersome structure of three separate Investigation and Prosecution Divisions (IPDs). The Government Accountability Office (GAO) issued a report in March 2004 (GAO 04-36) that was critical of OSC's chronic backlog problem in the Complaints Examining Unit and Disclosure Unit. That same month, Special Counsel Bloch created a Special Projects Unit (SPU) to begin immediately investigating the problem of the backlog of cases and to find solutions.

The next step in solving the difficulties was a reorganization of the agency in January 2005. The Special Counsel further directed that each operating unit establish standard operating procedures that would establish consistency in case processing, and with that consistency, faster processing times. These improvements have lead to further reductions in backlogs and enabled the agency to reach the meritorious cases faster, enabling OSC to seek settlements or initiate prosecutions before evidence became stale and witnesses' memories faded. Decisions are now reached faster, bringing swifter justice to those Federal employees served by the Office of Special Counsel.

The next seven pages graphically tell the story of the successes of the last four years at OSC, especially the decreased case processing times and the elimination of the backlogs, including those backlogs mentioned by GAO in 2004. These successes were achieved despite increasing caseloads in several units and newly added responsibilities for the agency.

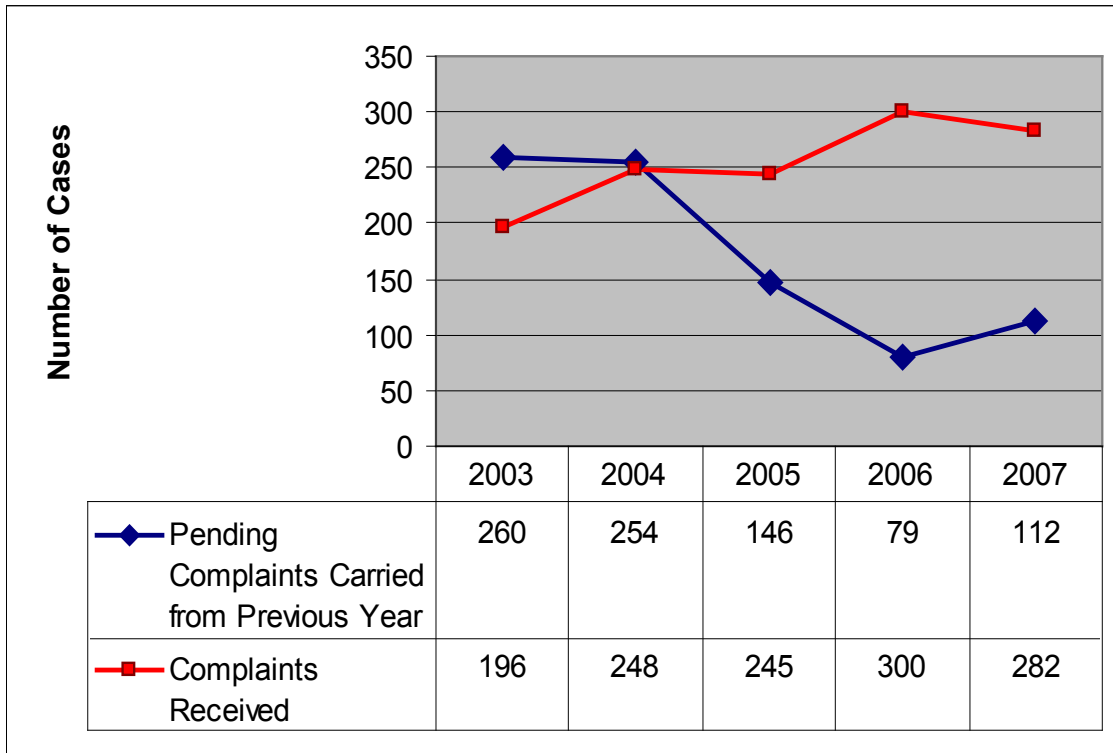
## Hatch Act Unit - Average Processing Time per Complaint



OSC's Hatch Act Unit reduced its case processing time dramatically during the period from FY 2003 to FY 2007. The average number of days to process the case in FY 2007 is less than one third of what it was in FY 2003.

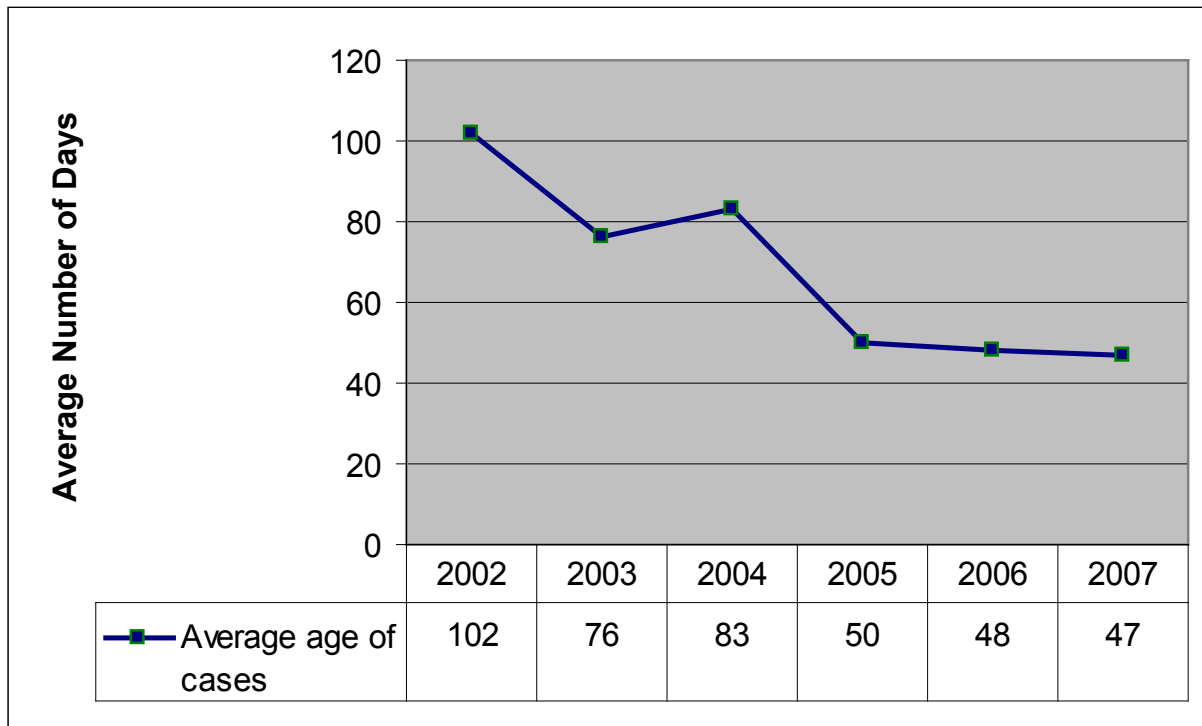


## Hatch Act Complaints



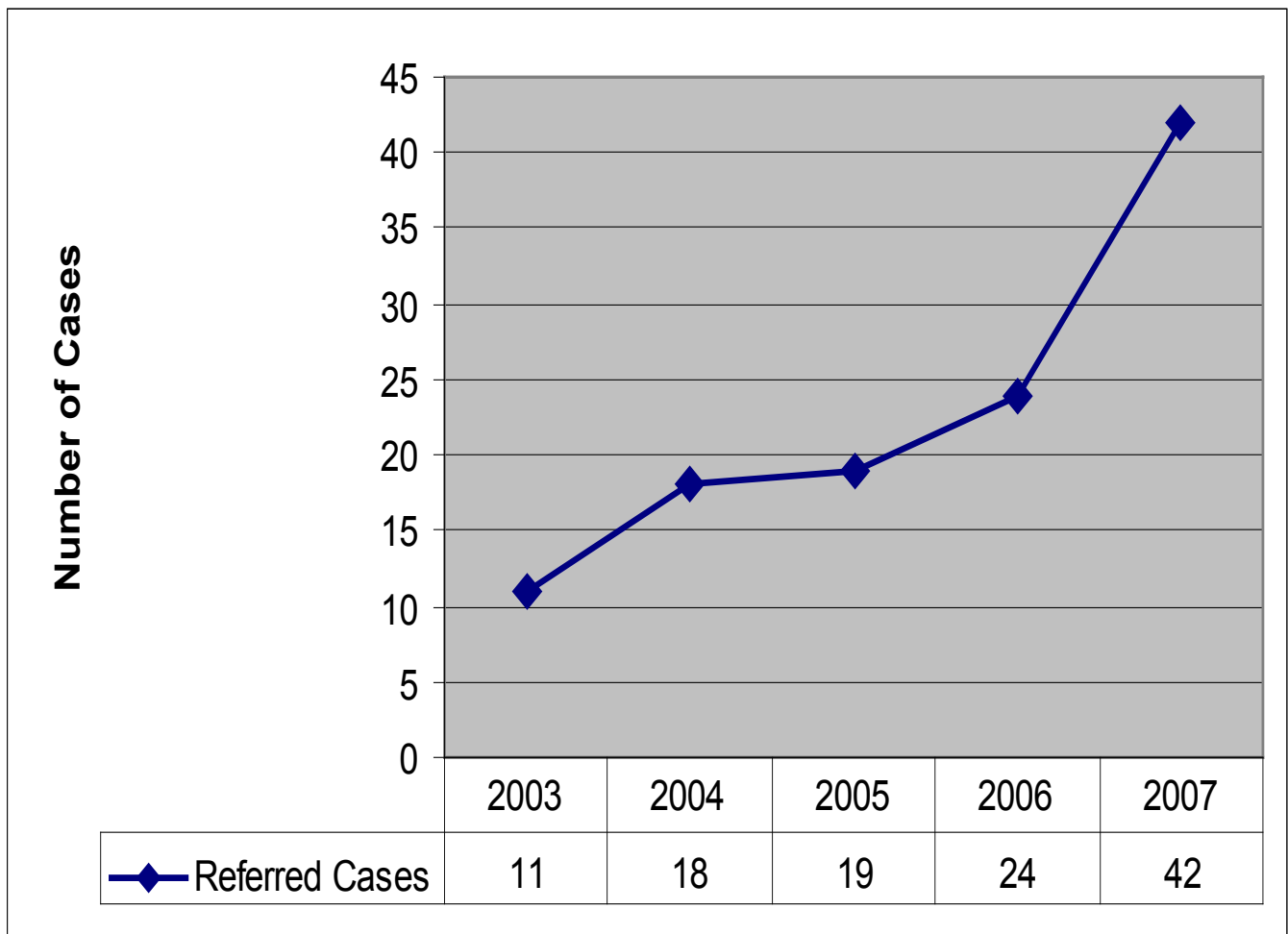
Starting in FY 2005, as OSC reduced its processing time for Hatch Act complaints, the number of pending complaints carried forward from the previous fiscal year sharply declined. From FY 2003 to FY 2007, the overall decline was 57%. During the same period, the number of complaints received increased by 44%. In just three years, the Hatch Act Unit has become much more efficient.

## Complaints Examining Unit - Average Processing of PPP Cases in the Unit



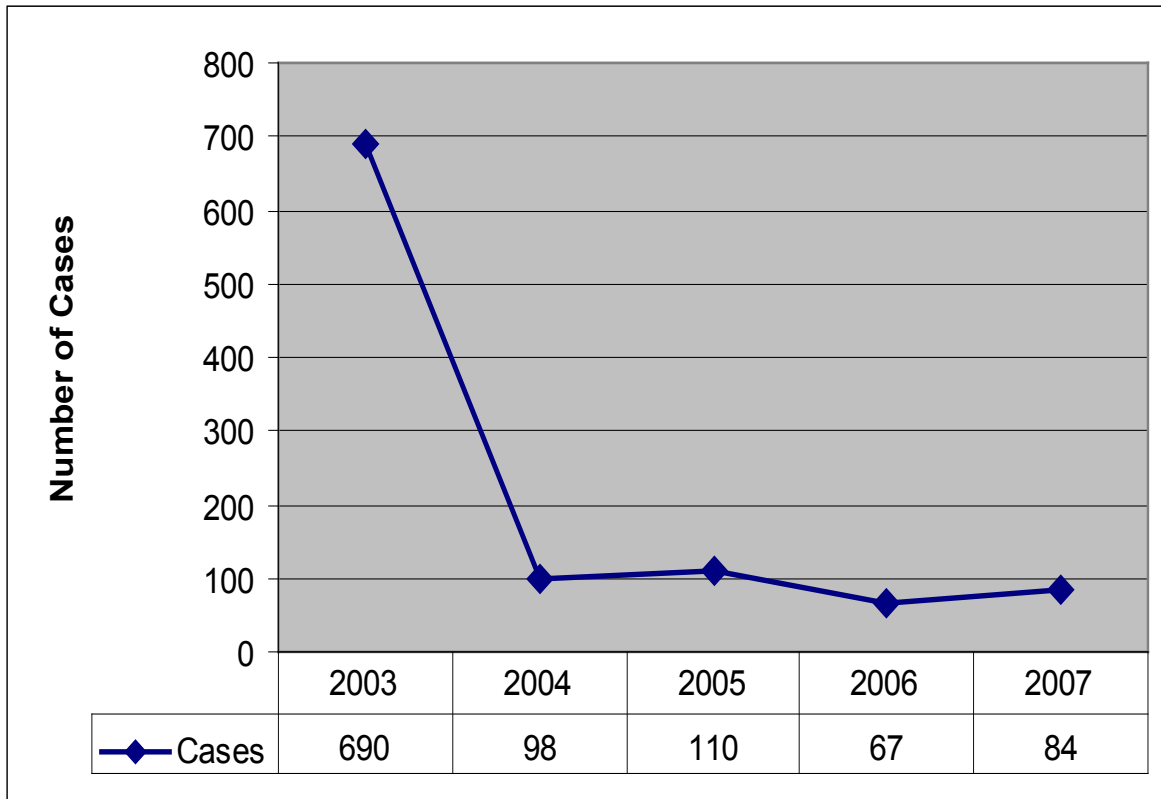
This chart shows the average number of days that a Prohibited Personnel Practice case remained in OSC's Complaints Examining Unit, before the case was either closed or referred to OSC's Investigation and Prosecution Division for further investigation.

## Disclosure Referrals to Agency Heads



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.

## Disclosure Unit Cases Pending at End of Year



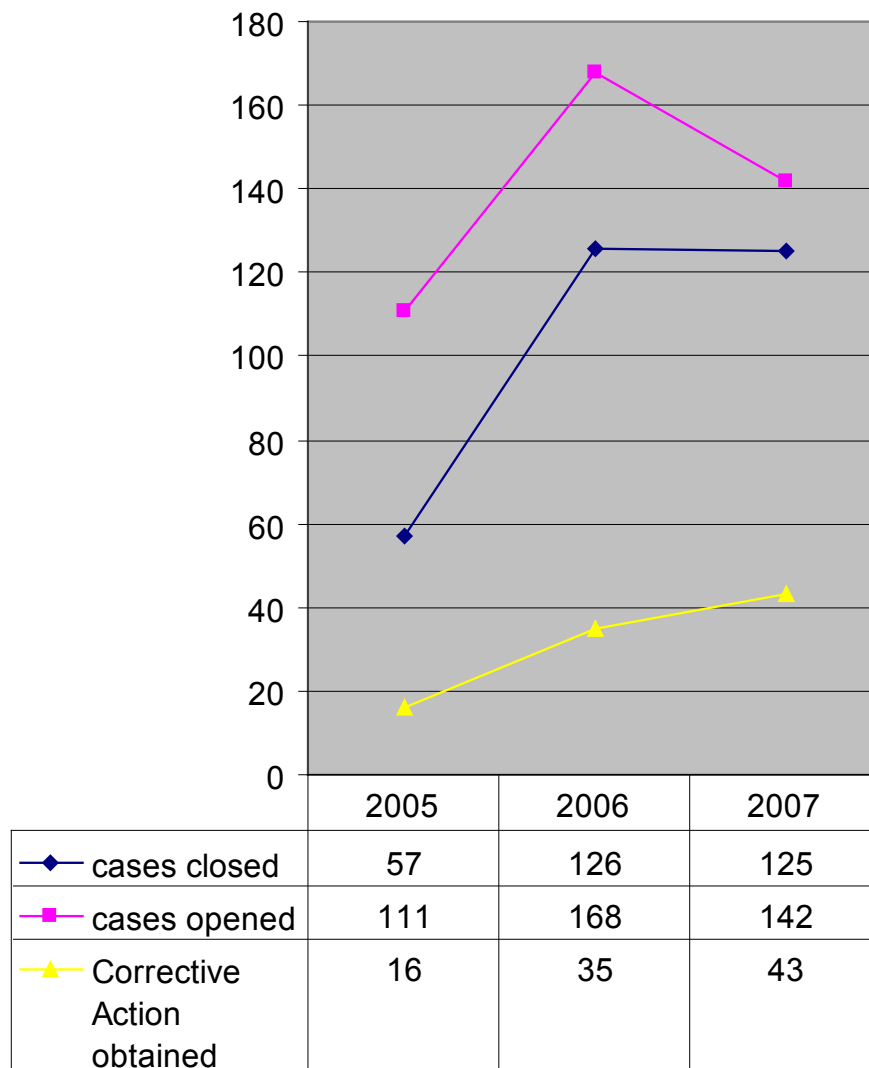
In FY 2003, the Disclosure Unit had a backlog of whistleblower disclosures. OSC reduced the backlog by FY 2004, and has prevented a backlog resurgence in FY 2005, FY 2006 and FY 2007.

## Disclosure Unit - Average Processing Time per Disclosure



This chart shows the improvement in processing time in OSC's Disclosure Unit. The average processing time for disclosures in FY 2007 was 54 days. This was an 85% reduction from the high of FY 2004 (an average of 351 days).

## USERRA Demonstration Project



The USERRA Demonstration Project began in February of FY 2005. OSC has achieved improvement every year in the number of corrective actions obtained on behalf of members of the armed forces.

## Statutory Background

OSC was first established on January 1, 1979.<sup>1</sup> From then until 1989, it operated as an autonomous investigative and prosecutorial arm of the Merit Systems Protection Board (“the Board”). By law, OSC received and investigated complaints from current and former federal employees, and applicants for federal employment, alleging prohibited personnel practices by federal agencies; provided advice on restrictions imposed by the Hatch Act on political activity by covered federal, state, and local government employees; and received disclosures from federal whistleblowers (current and former employees, and applicants for employment) about wrongdoing in government agencies. The office also enforced restrictions against prohibited personnel practices and political activity by filing, where appropriate, petitions for corrective and/or disciplinary action with the Board.

In 1989, Congress enacted the Whistleblower Protection Act. The law made OSC an independent agency within the Executive Branch, with continued responsibility for the functions described above. It also enhanced protections against reprisal for employees who disclose wrongdoing in the federal government, and strengthened OSC’s ability to enforce those protections.<sup>2</sup>

The Congress passed legislation in 1993 that significantly amended Hatch Act provisions applicable to federal and District of Columbia (D.C.) government employees, and enforced by OSC.<sup>3</sup> Provisions of the act enforced by OSC with respect to certain state and local government employees were unaffected by the 1993 amendments.

In 1994, the Uniformed Services Employment and Reemployment Rights Act became law. It defined employment-related rights of persons in connection with military service, prohibited discrimination against them because of that service, and gave OSC new authority to pursue remedies for violations by federal agencies.<sup>4</sup>

OSC’s 1994 reauthorization act expanded protections for federal employees, and defined new responsibilities for OSC and other federal agencies. It provided that within 240 days after receiving a prohibited personnel practice complaint, OSC should determine whether there are reasonable grounds to believe that such a violation occurred, exists, or is to be taken. The act extended the protections of certain legal provisions enforced by OSC to approximately 60,000 employees of what was then known as the Veterans Administration (now the Department of Veterans Affairs), and to employees of certain government corporations. It also broadened the scope of personnel actions covered under these provisions. Finally, the act made federal agencies responsible for informing their employees of available rights and remedies under the Whistleblower Protection Act, and directed agencies to consult with OSC in that process.<sup>5</sup>

In November of 2001, Congress enacted the Aviation and Transportation Security Act,<sup>6</sup> which created the Transportation Security Administration (TSA). Under the act, non-security screener employees of TSA could file allegations of reprisal for whistleblowing with OSC and the MSPB. The approximately 45,000 security screeners in TSA, however, could not pursue such complaints at OSC or the MSPB. OSC efforts led to the signing of a memorandum of understanding (MOU) with TSA in May 2002, under which OSC would review whistleblower retaliation complaints from security screeners, and recommend corrective or disciplinary action to TSA when warranted. The MOU did not (and could not), however, provide for OSC enforcement action before the MSPB, or for individual right of action (IRA) appeals by security screeners to the MSPB.

## Strategic Objectives

OSC has four strategic objectives (see table below), each of which is supported by a series of operational goals. These operational goals are described in Part 2, in the appropriate section for each budget program.

| Strategic Objectives of the Agency |   |
|------------------------------------|---|
| U.S. Office of Special Counsel     |   |
| Strategic Objective 1              | OSC will protect the Merit System and promote justice in the Federal workforce through investigation and prosecution of the Prohibited Personnel Practices. |
| Strategic Objective 2              | OSC will protect the Merit System and promote justice in the Federal workforce by enforcing the Hatch Act.  |
| Strategic Objective 3              | OSC will promote justice, public safety, and efficiency through acting as a channel for whistleblowers in the Federal workforce to disclose information.    |
| Strategic Objective 4              | OSC will protect veterans in the Federal workforce through enforcement of the Uniformed Services Employment and Reemployment Rights Act.                    |



## Internal Organization

OSC maintains its headquarters office in Washington, D.C. Four field offices are located in Dallas, Oakland, Detroit, and Washington, D.C. Agency components during FY2007 include the Immediate Office of the Special Counsel (IOSC), five operating units/divisions and several supporting offices explained in detail below.

**Immediate Office of the Special Counsel.** The Special Counsel and staff in IOSC are responsible for policymaking and overall management of OSC. They also manage the agency's congressional liaison and public affairs activities, and its outreach program, which includes promotion of compliance by other federal agencies with the employee information requirement at 5 U.S.C. § 2302(c).

**Complaints Examining Unit.** This unit is the intake point for all complaints alleging prohibited personnel practices and other violations of civil service law, rule, or regulation within OSC's jurisdiction.<sup>7</sup> This unit is responsible for screening approximately 1,700 prohibited personnel practice cases per year. Attorneys and personnel management specialists conduct an initial review of complaints to determine if they are within OSC's jurisdiction, and if so, whether further investigation is warranted. The unit refers all matters stating a potentially valid claim to the Investigation and Prosecution Division for further investigation.<sup>8</sup>

**Disclosure Unit.** This unit is responsible for receiving and reviewing disclosures received from federal whistleblowers. It advises the Special Counsel on the appropriate disposition of the information disclosed (including possible referral to the head of the agency involved for an investigation and report to OSC; referral to an agency Inspector General; or closure). The unit also reviews agency reports of investigation, to determine whether they appear to be reasonable and in compliance with statutory requirements before the Special Counsel sends them to the President and appropriate congressional oversight committees.

**Investigation and Prosecution Division.** The Investigation and Prosecution Division (IPD) is comprised of four field offices. The IPD conducts field investigations of matters referred after preliminary inquiry by the Complaints Examining Unit. Division attorneys conduct a legal analysis after investigations are completed to determine whether the evidence is sufficient to establish that a prohibited personnel practice (or other violation within OSC's jurisdiction) has occurred. Investigators work with attorneys in evaluating whether a matter warrants corrective action, disciplinary action, or both.

If meritorious cases cannot be resolved through negotiation with the agency involved, division attorneys represent the Special Counsel in litigation before the Merit Systems Protection Board. They also represent the Special Counsel when OSC intervenes, or otherwise participates, in other proceedings before the Board. Finally, division investigators and attorneys also sometimes investigate alleged violations of the Hatch Act and the Uniformed Services Employment and Reemployment Rights Act, though most Hatch Act and USERRA work is handled by the Hatch Act Unit and the USERRA Unit, respectively.

**Hatch Act Unit.** This unit issues advisory opinions to individuals seeking information about Hatch Act restrictions on political activity by federal, and certain state and local, government employees. The unit is also responsible for enforcing the act. It reviews complaints alleging a Hatch Act violation and, when warranted, investigates and prosecutes the matter (or refers the matter to the Investigation and Prosecution Division for further action). It also oversees Hatch Act matters delegated to the IPD.

**USERRA Unit.** This unit handles USERRA cases that are referred to OSC for prosecution by the Department of Labor. In addition, this unit handles the new special project assigned by P.L. 108-454 that requires OSC to investigate the re-employment rights of military service members under USERRA, which has involved new functions, increased case load, and new personnel.

### **SUPPORTING UNITS:**

**Alternative Dispute Resolution Program.** In selected cases referred by the Complaints Examining Unit for further investigation, the agency contacts the complainant and the agency involved, and invites them to participate in OSC's voluntary Mediation Program. If mediation resolves the complaint, the parties execute a written and binding settlement agreement; if not, the complaint is referred for further investigation.

The mediation program for Alternative Dispute Resolution has been reorganized. Rather than have a single ADR specialist under the leadership of an SES employee, the agency has expanded the program through cross-training multiple individuals from each of OSC's operating units. As a result the agency now has a broad pool of trained mediators with different legal areas of expertise.

**Legal Counsel and Policy Division.** This division provides general counsel and policy services to OSC, including legal advice and support on management and administrative matters; legal defense of OSC in litigation filed against the agency; policy planning and development; and management of the agency ethics program.

**Management and Budget Division.** This division provides administrative and management support services to OSC, in furtherance of program, human capital, and budget decisions. This division also includes the Information Technology Branch, Human Resources Branch, Document Control Branch and Budget and Procurement branch. The purpose of this division is to put the administrative support functions under one authority.

**Training Office.** A training office has been created to train all new employees, cross train existing employees, and develop specialized training in areas such as litigation skills. Specifically, the Training Office will cross train attorneys and investigators to enable them to traverse organizational boundaries within the agency. They will develop sufficient expertise in several areas of the law, giving management the ability to detail employees to address any potential backlogs that could form in the various units.

## Budget by Program

| FY 2009 Budget by Program  |                  |      |                  |      |                   |     |
|--|------------------|------|------------------|------|-------------------|-----|
| (in thousands of dollars)  |                  |      |                  |      |                   |     |
| Program  | FY 2008 Estimate |      | FY 2009 Estimate |      | Increase/Decrease |     |
|  | \$               | FTE  | \$               | FTE  | \$                | FTE |
| Investigation and Prosecution of Prohibited Personnel Practices  | \$7,480          | 52   | \$7,679          | 52   | \$199             | -   |
| Hatch Act Enforcement (including Special Task Force)   | \$1,712          | 11.5 | \$1,910          | 12.5 | \$198             | 1   |
| Whistleblower Disclosure Unit  | \$1,116          | 7.5  | \$1,146          | 7.5  | \$30              | -   |
| USERRA Enforcement and Prosecution   | \$1,185          | 8    | \$1,217          | 8    | \$32              | -   |
| Office of the Special Counsel  | \$1,197          | 7    | \$1,229          | 7    | \$32              | -   |
| Office of the Agency General Counsel   | \$897            | 5    | \$921            | 5    | \$24              | -   |
| Management / Information Technology / Budget / Human Resources / Procurement / Document Control / Planning / Outsourced Computing Svcs | \$3,881          | 19   | \$3,366          | 19   | -\$515            | -   |
| totals   | \$17,468         | 110  | \$17,468         | 111  | \$0               | 1   |

## **PART 2 - BUDGET PROGRAMS AND PERFORMANCE PLAN**

### **A. Investigation and Prosecution of Prohibited Personnel Practices**

Unlike many other investigative entities or agencies, OSC must, as a general rule, conduct an inquiry after receipt of complaints alleging the commission of a prohibited personnel practice.<sup>8</sup> The nature of the inquiry ranges from the CEU screening process to the IPD field investigations, but one must be conducted after a complaint is filed. Complaints received by OSC can and often do involve multiple allegations, some of which can involve different prohibited personnel practices. In all such matters, an OSC inquiry requires the review of, and a legal determination about, each allegation and prohibited personnel practice.

After a complaint is received by OSC, CEU attorneys and personnel management specialists conduct an initial review to determine whether it is within OSC's jurisdiction, and whether further investigation is warranted. CEU refers all matters stating a potentially valid claim to the IPD for further investigation. All such matters are reviewed first by the ADR Unit.<sup>9</sup>

In selected cases that have been referred for further investigation, a trained OSC ADR specialist contacts the complainant and the employing agency to invite them to participate in the agency's voluntary ADR Program. If both parties agree, OSC conducts a mediation session, led by OSC trained mediators who have experience in federal personnel law. When mediation resolves the complaint, the parties execute a binding written settlement agreement. If mediation does not resolve the complaint, it is referred for further investigation, as it would have been had the parties not attempted mediation.

The IPD conducts investigations to review pertinent records and to interview complainants and witnesses with knowledge of the matters alleged. Matters undergo legal review and analysis to determine whether the matter warrants corrective action, disciplinary action, or both.

If OSC believes a prohibited personnel practice has been committed and initiates discussions with an agency, the matter is often resolved through negotiation. Before OSC may initiate an enforcement proceeding seeking corrective action (relief intended to make an aggrieved employee whole) at the MSPB, the Special Counsel must make a formal request to the agency involved, reporting on its findings and recommendations. Only when the agency has had a reasonable period of time to take corrective action and fails to do so, may OSC proceed to petition the MSPB for corrective action.<sup>10</sup> When an agency refuses to grant appropriate corrective action, OSC generally proceeds immediately to file a complaint with the MSPB. If OSC determines that disciplinary action (the imposition of discipline on an employee who has committed a violation) is warranted, it can file a complaint directly with the MSPB.<sup>11</sup> Should the agency agree to take appropriate disciplinary action on its own initiative, then the matter can be settled without resort to an MSPB proceeding.

In addition to rectifying the matter at issue, OSC litigation before the MSPB – whether by enforcement actions seeking to obtain corrective and/or disciplinary action, or by intervention or other participation in matters filed by others – often has the additional benefit of clarifying and expanding existing law. It also brings greater public attention to OSC's mission and work, a factor likely to increase the deterrent effect of its efforts. OSC's Complaints Examining Unit (CEU), as discussed above, is the intake unit for all prohibited personnel practice complaints.

For FY 2007 OSC received 2,880 new matters, including PPP, Hatch Act, and Disclosure matters (See Table 1).

## Resource Estimates

During FY2008 the Investigation and Prosecution of Prohibited Personnel Practices will use approximately 52 FTE at a cost of approximately \$7,480,000. During FY 2009, we estimate the cost of the program will be at a cost of approximately \$7,679,000 with no increase in FTE.

**TABLE 1**

| <b>Breakdown of Matters<sup>a</sup> Pending and Completed FY2003 to FY2007</b> |               |               |                           |               |               |
|--|---------------|---------------|---------------------------|---------------|---------------|
|  | <b>FY2003</b> | <b>FY2004</b> | <b>FY2005<sup>b</sup></b> | <b>FY2006</b> | <b>FY2007</b> |
| <b>Matters pending at beginning of fiscal year</b>                             | 1,415         | 1,605         | 778                       | 777           | 667           |
| <b>New matters received</b>  | 2,530         | 2,798         | 2,684                     | 2,718         | 2,880         |
| <b>Matters closed</b>  | 2,344         | 3,612         | 2,685                     | 2,814         | 2,842         |
| <b>Matters pending at end of fiscal year</b>                                   | 1,601         | 791           | 777                       | 681           | 698           |

<sup>a</sup> The term “matters” in this table includes prohibited personnel practice complaints (including Transportation Security Administration matters); Hatch Act complaints, whistleblower disclosures (DU matters); USERRA referrals from the MSPB pursuant to 5 U.S.C. x 1221(f)(3).

<sup>b</sup> Includes USERRA Demonstration Project matters.

The majority of OSC's staff resources were devoted to the processing of PPP complaints. Of the total 2,880 new matters OSC received during FY 2007, 1,927 or 67% were new PPP complaints. (See Table 2).

**TABLE 2**

| <b>Summary of Prohibited Personnel Practice (PPP) Complaints Activity – Receipts and Processing<sup>a</sup></b> |            |                |               |                |               |               |
|---|------------|----------------|---------------|----------------|---------------|---------------|
|   |            | <b>FY 2003</b> | <b>FY2004</b> | <b>FY 2005</b> | <b>FY2006</b> | <b>FY2007</b> |
| Pending complaints carried over from previous fiscal year   |            | 594            | 653           | 524            | 521           | 387           |
| New complaints received (Intake Unit)   |            | 1,791          | 1,964         | 1,771          | 1,805         | 1,927         |
| <i>Total complaints:</i>  |            | 2,385          | 2,617         | 2,295          | 2,326         | 1,967         |
| Complaints referred for field investigation   |            | 162            | 244           | 198            | 143           | 125           |
| Complaints processed and closed   |            | 1,732          | 2,093         | 1,774          | 1,930         | 1,953         |
| Processing times  | < 240 days | 1,471          | 1,799         | 1,198          | 1,693         | 1,832         |
|   | > 240 days | 261            | 294           | 576            | 237           | 121           |
| Percentage processed in under 240 days  |            | 85%            | 86%           | 67.5%          | 88%           | 94%           |

<sup>a</sup>This figure is higher than reported in the President's FY 2006 Budget because it includes several closed cases that were reopened.

In FY 2007, there was an increase in stays obtained from the Merit Systems Protection Board and an increase in disciplinary actions negotiated with agencies. (see Table 3).

**TABLE 3**

| Summary of Prohibited Practice Complaints Activity – Favorable Actions                |              |         |         |         |         |         |
|---|--------------|---------|---------|---------|---------|---------|
|   |              | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
| Total favorable actions obtained <sup>a</sup><br>(all prohibited personnel practices) | # of actions | 115     | 80      | 45      | 52      | 29      |
|   | # of matters | 83      | 65      | 45      | 48      | 29      |
| Favorable actions obtained (reprisal for whistleblowing)                              | # of actions | 75      | 57      | 37      | 40      | 21      |
|   | # of matters | 75      | 49      | 37      | 37      | 21      |
| Stays negotiated with agencies <sup>b</sup>   |              | 6       | 11      | 3       | 8       | 4       |
| Stays obtained from Merit Systems Protection Board                                    |              | 1       | 1       | 1       | 1       | 3       |
| Disciplinary actions negotiated with agencies   |              | 12      | 11      | 3       | 4       | 5       |
| Corrective action complaints filed with the Board                                     |              | 0       | 1       | 1       | 1       | 1       |
| Disciplinary actions obtained from the Board  |              | 1       | 0       | 1       | 0       | 0       |

<sup>a</sup> The purpose of this breakout is to show the number of favorable actions obtained, and the number of matters involved. A matter (case) can have more than one action (favorable outcome).

<sup>b</sup> Stays and disciplinary actions listed in this table (except for disciplinary actions obtained by OSC from the Board) are included in the totals shown in the first two rows above, but are broken out here for further information.

## Alternative Dispute Resolution

Among the factors that determine “mediation-appropriate” cases are the complexity of the issues, the nature of the personnel action, and the relief sought by the Complainant. Once a case has been identified as mediation-appropriate, the OSC ADR Specialist contacts the parties to discuss the ADR Program. “Pre-mediation” discussions are designed to help the parties form realistic expectations and well-defined objectives regarding the mediation process.

During fiscal year 2007, the number of agencies which accepted initial mediation remained at 59% and there were ten successfully mediated resolutions. (See Table 4).

**TABLE 4**

| <b>Summary of Prohibited Personnel Practice Complaints Activity – Mediation Program</b> |                     |               |               |               |               |               |
|---|---------------------|---------------|---------------|---------------|---------------|---------------|
|   |                     | <b>FY2003</b> | <b>FY2004</b> | <b>FY2005</b> | <b>FY2006</b> | <b>FY2007</b> |
| Matters identified before investigation as mediation-appropriate                        |                     | 43            | 82            | 22            | 52            | 38            |
| Initial acceptance rates by parties   | <i>Complainants</i> | 82%           | 68%           | 27%           | 83%           | 71%           |
|   | <i>Agencies</i>     | 69%           | 64%           | 22%           | 59%           | 59%           |
| Mediated and other resolutions <sup>a</sup>   |                     | 23            | 18            | 5             | 11            | 10            |
| Resolution rate – OSC mediation program   |                     | 92%           | 86%           | 100%          | 55%           | 50%           |

<sup>a</sup> This category includes complaints settled through mediation by OSC (including “reverse-referrals” - i.e., cases referred back to the Alternative Dispute Resolution Unit by an Investigation and Prosecution Division due to the apparent potential for a mediated resolution). Also included in this category are complaints that entered the initial OSC mediation process, and were then resolved through withdrawal of the complaint, or through mediation by an agency other than OSC.

Mediation settlement outcomes in OSC’s Mediation Program vary, depending on the interests of the parties. Monetary recovery includes retroactive promotions, attorney fees, and lump sum payments. In addition to monetary recovery, the benefits received by complainants in ADR include revised performance appraisals, reinstatement of employment, and transfers to better working environments.



## Goals and Results - Prohibited Personnel Practices

OSC's Strategic Objective 1 is to protect the Merit System and promote justice in the Federal workforce through investigation and prosecution of the Prohibited Personnel Practices. The tables below describe the three operational goals supporting this strategic objective.

| <b>Goal 1: TO PROTECT THE MERIT SYSTEM THROUGH TIMELY CASE PROCESSING</b> |   |
|---|---|
| <b>PPP Enforcement Mission</b>  | <b>PROHIBITED PERSONNEL PRACTICES CASES</b>                                     |
| <b>PERFORMANCE INDICATOR</b>  | <b>Indicator A: <i>Percentage of cases processed in less than 240 days.</i></b> |
| <b>FY 2006 TARGET</b>   | 85%   |
| <b>FY 2006 RESULTS</b>  | 89%   |
| <b>FY 2007 TARGET</b>   | 92%   |
| <b>FY 2007 RESULTS</b>  | 94%   |
| <b>FY 2008 TARGET</b>   | 92%   |
| <b>FY 2008 RESULTS</b>  |   |
| <b>FY 2009 TARGET</b>   | 92%   |
| <b>FY 2009 RESULTS</b>  |   |

### Comments for Goal #1:

#### 1. Indicator A: PPP Cases.

This timeliness indicator measures the combined effectiveness of both OSC's Complaints Examining Unit (CEU) and OSC's Investigation and Prosecution Division (IPD).

OSC receives complaints of Prohibited Personnel Practices into the CEU. If, after initial screening, investigation, and legal analysis, a complaint meets the requirements for merit, it is internally referred to the IPD for further investigation. If the IPD investigates and determines the case does indeed have merit, the IPD either seeks relief for the claimant through mediation, settlement, or prosecution.

The reason the target is less than 100% is because in some cases the settlement process can take a considerable amount of time. In cases involving litigation, the timeframe for events is no longer driven by the speed of work of OSC attorneys and investigators. To strive for 100% would carry the implicit assumption that OSC would not litigate any cases. The 92% target reflects the reality that 8-10% of the PPP cases call for full investigations. To set a target higher than 92% would imply that the agency should artificially try to limit the number of cases receiving full investigations. The agency will never do that. Therefore the appropriate target is 92%.

| <b>Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS</b> |   |
|--|---|
| <b>PPP Enforcement Mission</b>   | <b>Prohibited Personnel Practices Cases</b>   |
| <b>PERFORMANCE INDICATOR</b>   | <b>Indicator A: % favorable outcomes in cases determined by OSC to be meritorious = (# successful mediations + # of settlements achieved + # of successful litigations) / (# meritorious cases)</b> |
| <b>FY 2006 TARGET</b>  | 99%   |
| <b>FY 2006 RESULTS</b>   | 100%  |
| <b>FY 2007 TARGET</b>  | 99%   |
| <b>FY 2007 RESULTS</b>   | 100%  |
| <b>FY 2008 TARGET</b>  | 100%  |
| <b>FY 2008 RESULTS</b>   |   |
| <b>FY 2009 TARGET</b>  | 100%  |
| <b>FY 2009 RESULTS</b>   |   |

### Comments for Goal #2

#### 1. Performance Indicator A

A meritorious case is one in which the Office of Special Counsel is satisfied that claimant is entitled to relief. In certain meritorious cases, OSC may endeavor to use mediation to secure relief for the claimant. If mediation was not appropriate or did not succeed, OSC may exercise its prosecutorial authority and file for corrective or disciplinary action before the MSPB. As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to successfully prosecute cases warranting corrective action.

OSC maintained the same high standard of achieving favorable outcomes in 100% of meritorious PPP cases.

| <b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b> |   |
|--|---|
| <b>PPP Enforcement Mission</b>   | <b>PROHIBITED PERSONNEL PRACTICES CASES</b>   |
| <b>PERFORMANCE INDICATOR</b>   | <b>Indicator A: # of new Federal agencies certified in the 2302 (c) Program by OSC.</b> |
| <b>FY 2006 TARGET</b>  | 5   |
| <b>FY 2006 RESULTS</b>   | 6   |
| <b>FY 2007 TARGET</b>  | 5   |
| <b>FY 2007 RESULTS</b>   | 3   |
| <b>FY 2008 TARGET</b>  | 5   |
| <b>FY 2008 RESULTS</b>   |   |
| <b>FY 2009 TARGET</b>  | 5   |
| <b>FY 2009 RESULTS</b>   |   |

#### Comments for Goal #3

OSC has statutory authority to administer the 2302(c) Program, which recognizes the federal sector's need for awareness of Prohibited Personnel Practices and training in avoidance of committing them. However, OSC cannot force any agency to apply for certification. There are no statutory penalties for not being certified. This annual numeric target is not overly aggressive because 1) OSC cannot force compliance, and 2) the number of Federal agencies that may seek certification is limited by the number of agencies in existence. OSC already has 32 certified agencies, including most of the major ones.

Other outreach activities:

Additionally, members of the Investigation and Prosecution Division and the Complaints Examining Unit regularly accept invitations to provide outreach services designed to educate Federal personnel on these issues so that agencies comply with the law. Employees from OSC were able to educate employees of many agencies during a presentation at the Federal Dispute Resolution Conference (FDR).

- OSC maintains a telephonic hotline for answering PPP-related questions from members of the Federal workforce.
- OSC's website provides a wealth of information regarding PPPs and is a valuable and constantly improving resource for educating the Federal workforce on this subject. Every year the website statistics for user sessions increase, with an average increase in activity of 15% over the previous year.

The results for the number of certifications fell below the target of five agencies to be certified during FY 2007, but we anticipate reaching our target for FY 2008.

## **Hatch Act Enforcement Program**

OSC is also responsible for enforcing the Hatch Act, including investigating and prosecuting complaints alleging violations of the Act, and providing advisory opinions on the Act's requirements. The Hatch Act Unit, staffed by a Chief and five staff attorneys, is responsible for a nationwide program that provides legal advice on the Hatch Act to federal, state and local employees and the public at large. Specifically, the Hatch Act Unit has the unique responsibility of providing Hatch Act information and legal advice to White House staff, Congressional staff, the national press, senior management officials throughout the federal government, and state and local government officials. The Hatch Act Unit provides all of OSC's advisory opinions. When provided to individuals, the advisory opinions enable them to determine whether they are covered or not by the Act, and whether their contemplated activities are permitted under the Act or not.

The Hatch Act Unit also enforces compliance with the Act by receiving complaints alleging Hatch Act violations, conducting preliminary inquiries into complaint allegations and, (where warranted) further investigating allegations or referring the complaints to OSC's IPD (for further investigation). Depending on the severity of the violation, the Hatch Act Unit will either issue a warning letter to the employee, attempt to informally resolve the violation, prosecute the case before the MSPB or send it to the IPD to prosecute before the MSPB.

A string of Hatch Act cases involving high-profile employees over the last three years has resulted in significant national press coverage. There is now a very heightened awareness of the Hatch Act among Federal employees. The number of Hatch Act complaints received in FY 2006 exceeded the number received previously in any year. Hatch Act complaints in FY 2008 are projected to be the highest number yet, due to the upcoming presidential election.

### **Resource estimates:**

During FY 2008, the Hatch Enforcement Program (including the Special Task Force) will use approximately 11.5 FTE at a cost of approximately \$1,712,000. This does not include an additional \$1,100,000 for forensic computing services. During FY 2009, we estimate the cost of this program to be \$1,910,000 for 12.5 FTE.

In FY 2007, OSC had double the number of withdrawals from partisan races as in FY 2006. (See Table 5).

**TABLE 5**

| <b>Summary of Hatch Act Advisory Opinion and Complaint Activity</b>          |                                     |               |                    |               |               |               |
|--|-------------------------------------|---------------|--------------------|---------------|---------------|---------------|
|  |                                     | <b>FY2003</b> | <b>FY2004</b>      | <b>FY2005</b> | <b>FY2006</b> | <b>FY2007</b> |
| Advisory opinions issued   |                                     | 3,284         | 3,913 <sup>a</sup> | 2,558         | 3,004         | 2,598         |
| New advisory requests received (written)                                     |                                     | 159           | 176                | 191           | 237           | 194           |
| New complaints received  |                                     | 196           | 248                | 245           | 299           | 282           |
| Warning letters issued   |                                     | 43            | 93                 | 87            | 76            | 68            |
| Complaints processed and closed in fiscal year                               |                                     | 201           | 357                | 310           | 266           | 252           |
| Corrective actions taken by recipients of cure letters:                      | Withdrawal from partisan races      | 18            | 17                 | 4             | 9             | 18            |
|  | Resignation from covered employment | 7             | 8                  | 10            | 22            | 6             |
|  | Other                               | 0             | 6                  | 3             | 2             | 1             |
|  | Total:                              | 25            | 31                 | 17            | 33            | 25            |
| Disciplinary action complaints filed with the Merit Systems Protection Board |                                     | 4             | 7 <sup>b</sup>     | 11            | 6             | 1             |
| Disciplinary actions obtained (through negotiation or ordered by the Board)  |                                     | 4             | 2                  | 8             | 8             | 0             |
| Complaints pending at end of FY  |                                     | 254           | 146                | 79            | 112           | 142           |

<sup>a</sup> This number is lower than reported in the President's FY 2006 Budget (Other Independent Agencies, Appendix, p. 1209) because of a duplication error.

<sup>b</sup> This number is higher than reported in the President's FY 2006 Budget because of system entries made after that publication.

To further its advisory role, the Hatch Act Unit is very active in OSC's outreach program; the unit conducted approximately 20 outreach presentations in FY2007 to various federal agencies and employee groups concerning federal employees rights and responsibilities under the Act. Many of these programs involved high-level agency officials. Also, the unit attempted to informally resolve as many ongoing Hatch Act violations as possible without resorting to litigation. Advisories concerning partisan activity surrounding upcoming state and local elections have accounted for a fair amount of OSC's work this fiscal year.

## **Task Force Investigations**

In the spring of 2007, the Special Counsel created a new task force to investigate numerous allegations that high level agency officials may have violated the Hatch Act or other civil service laws. Specifically, the task force is investigating numerous allegations that certain agency officials may have encouraged or allowed partisan political forces to improperly influence government decisions. Among those allegations that the task force is currently investigating is the circumstances surrounding the firing of the United States Attorneys and the legality of the political briefing given by the White House Office of Political Affairs to political appointees throughout the federal government. Due to the highly sensitive and potentially explosive nature of the task force's investigations, the Special Counsel is unable to publicly acknowledge the numerous other allegations that the task force is currently investigating.

## Goals and Results - Hatch Act Program

OSC's Strategic Objective 2 is to protect the Merit System and promote justice in the Federal workforce by enforcing the Hatch Act. The tables below describe the three operational goals supporting this strategic objective.

| <b>Goal 1: TO DEFEND THE MERIT SYSTEM BY ENFORCING THE HATCH ACT – THROUGH TIMELY CASE PROCESSING</b> |  |   |   |
|---|--|---|---|
| <b>HATCH ACT MISSION</b>  | <b>HATCH ACT WRITTEN ADVISORY OPINIONS</b> See comment 1.  | <b>HATCH ACT ORAL &amp; EMAIL ADVISORY OPINIONS</b> See comment 2                                 | <b>HATCH ACT COMPLAINTS</b>   |
| <b>PERFORMANCE INDICATORS</b>   | <b>Indicator A: Percentage of formal written advisory opinions issued in less than 120 days.</b> | <b>Indicator B: Percentage of oral and e-mail advisory opinions issued in less than five days</b> | <b>Indicator C: Percentage of matters resolved in less than 365 days.</b> |
| <b>FY 2006 TARGET</b>   | 75%  | 99%   | 60%   |
| <b>FY 2006 RESULTS</b>  | 93%  | 100%  | 84%   |
| <b>FY 2007 TARGET</b>   | 80%  | 99%   | 70%   |
| <b>FY 2007 RESULTS</b>  | 91%  | 99%   | 92%   |
| <b>FY 2008 TARGET</b>   | 85%  | 99%   | 80%   |
| <b>FY 2008 RESULTS</b>  |  |   |   |
| <b>FY 2009 TARGET</b>   | 90%  | 99%   | 85%   |
| <b>FY 2009 RESULTS</b>  |  |   |   |

### 1. Performance Indicator A: written advisory opinions

These are the requests for an advisory opinion that come in to OSC's Hatch Act Unit that are very complex and require significant analysis before answering.

### 2. Performance Indicator B: oral or e-mail advisory opinions

If an oral or e-mail advisory opinion were to take longer than five days, generally it would be treated as a formal written advisory request and be captured by Indicator A.

The Hatch Act Unit exceeded two of its three timeliness targets for FY 22007, and met its third timeliness target.

The FY 2008 timeliness targets for Indicator A and Indicator C have been revised upwards, in order to be more aggressive. However, these timeliness targets reflect the reality that each member of the unit will spend more time on the phone doing oral advisories during the presidential election year.

| <b>Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS</b> |   |
|--|---|
| <b>HATCH ACT MISSION</b>   | <b>HATCH ACT CASES</b><br>See comment 1.                      |
| <b>PERFORMANCE INDICATOR</b>   | <b>Indicator A: % favorable outcomes in meritorious cases</b> |
| <b>FY 2006 TARGET</b>  | 90%   |
| <b>FY 2006 RESULTS</b>   | 97%   |
| <b>FY 2007 TARGET</b>  | 90%   |
| <b>FY 2007 RESULTS</b>   | 97%   |
| <b>FY 2008 TARGET</b>  | 97%   |
| <b>FY 2008 RESULTS</b>   |   |
| <b>FY 2009 TARGET</b>  | 97%   |
| <b>FY 2009 RESULTS</b>   |   |

#### Comments for Goal #2

##### 1. Meritorious cases

A meritorious Hatch Act case is a case in which OSC finds a violation of the Hatch Act. A favorable outcome in a Hatch Act case is either (1) successful litigation of the case; (2) successful settlement of the case; or (3) successful corrective action (individual corrected his violation after receiving notice from OSC, for example, by withdrawing his candidacy or resigning from his employment).

The results achieved by the Hatch Act Unit for Goal 2 exceeded the target by 7% for FY 2007.

The targets for FY 2008 and FY 2009 have been substantially revised upwards from 90% to 97%.

The target is not set at 100% for several reasons:

- A client may decide not to settle for personal reasons.
- Despite judicious selecting of cases to be brought to trial and good preparation, a judge may disagree with OSC's position.
- Each year, OSC's Hatch Act Unit tackles a few cases which break new ground. For example, in new areas such as the use of blogs while on duty, there are Hatch Act implications. OSC will at times seek judicial clarification of the Hatch Act through litigation in areas such as this. By nature, OSC will not win every one of these.



| <b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b> |  |   |
|--|--|---|
| <b>HATCH ACT MISSION</b>   | <b>HATCH ACT OUTREACH VISITS</b>   | <b>HATCH ACT SECTION OF OSC WEBSITE</b>   |
| <b>PERFORMANCE INDICATORS</b>  | <b>Indicator A: (# of HA trainings and outreaches given) / (# of invitations to provide HA training or outreach, where the inviter sponsors OSC)</b> | <b>Indicator B: Number of new advisory complex opinions added every month to the website.</b> |
| <b>FY 2006 TARGET</b>  | 90%  | One   |
| <b>FY 2006 RESULTS</b>   | 96%  | One   |
| <b>FY 2007 TARGET</b>  | 90%  | One   |
| <b>FY 2007 RESULTS</b>   | 100%   | One   |
| <b>FY 2008 TARGET</b>  | 95%  | One   |
| <b>FY 2008 RESULTS</b>   |  |   |
| <b>FY 2009 TARGET</b>  | 95%  | One   |
| <b>FY 2009 RESULTS</b>   |  |   |

### Comments for Goal #3

#### 1. Results:

Indicator A: The outreach results for FY 2007 exceeded the set target by 10%. The FY 2008 and FY 2009 targets have been revised upwards to 95%. The targets are not set at 100% because OSC needs the flexibility to be able to decline one or two outreaches each year, due to trials, elections, investigations, and heavily booked outreach schedules.

Indicator B: One opinion per month has been posted. This averages to one opinion per month since these goals were established in February 2006. The target for FY 2008 and FY 2009 remains at one complex opinion per month. The opinions online are not a massive database to reflect every possible facet of each type of case. Rather, the Hatch Act Unit looks for unique issues that will be generally useful to many people because they address a new issue or explain a general principle of how the Hatch Act will be enforced.

#### 2. Outreach DVD

In addition to the performance of outreach visits and the website enhancement described above, OSC has produced both a Federal Hatch Act DVD and a State & Local Hatch Act DVD that explains the basics of the Hatch Act. OSC is now able to mail the appropriate DVD to certain requestors who require a basic tutorial overview of the Hatch Act.

## **Whistleblower Disclosure Unit Program**

In addition to its investigative and prosecutorial mission, the OSC provides a safe channel through which federal employees, former federal employees, or applicants for federal employment may, under 5 U.S.C. § 1213(a), disclose information they reasonably believe evidences a violation of law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. At present, the Disclosure Unit staff is comprised of the Chief, six attorneys, and one paralegal. The Disclosure Unit is responsible for reviewing the information submitted by whistleblowers, and advising the Special Counsel whether it shows that there is a substantial likelihood that the type of wrongdoing described in § 1213(a) has occurred or is occurring. Where a substantial likelihood determination is made, the Special Counsel must transmit the disclosure to the head of the relevant agency for further action. The agency is required to conduct an investigation and submit a report to OSC describing the results of the investigation and the steps taken in response to the investigative findings. Under § 1213(e), the whistleblower is also provided with a copy of the report for comment. The Special Counsel is then required to review the report in order to determine whether it meets the requirements of the statute and its findings appear reasonable. Finally, the report is forwarded to the President and appropriate Congressional oversight committees.

In recent years, OSC has had a large number of high-profile whistleblower cases, leading to increased national press coverage of OSC. FY 2007 accelerated this trend. OSC continues to investigate whistleblower retaliation complaints from Transportation Security Agency (TSA) security screeners under OSC's Memorandum of Understanding (MOU) with TSA. This MOU remains viable despite the Merit System Protection Board's decision that the Board does not have jurisdiction to adjudicate these matters.

### **Resource Estimates:**

During FY 2008, the Whistleblower Disclosure Unit will use approximately 7.5 FTE at a cost of \$1,116,400. During FY 2009, we estimate the cost of the program will be \$1,146,000 with no increase in FTE.

In the Disclosure Unit, 482 new matters were received in FY 2007, an 11% increase from the previous fiscal year. During FY 2007, the Unit referred 42 matters for investigation under § 1213(c), a 43% increase from the previous fiscal year. (See Table 6).

**TABLE 6**

| <b>Summary of Whistleblower Disclosure Activity – Receipts and Dispositions <sup>a</sup></b> |   |               |                    |               |               |               |
|--|---|---------------|--------------------|---------------|---------------|---------------|
|  |   | <b>FY2003</b> | <b>FY2004</b>      | <b>FY2005</b> | <b>FY2006</b> | <b>FY2007</b> |
| Pending disclosures carried over from previous fiscal year                                   |   | 556           | 690                | 98            | 110           | 69            |
| New disclosures received   |   | 535           | 572                | 485           | 435           | 482           |
| Total disclosures  |   | 1,091         | 1,262              | 583           | 545           | 551           |
| Disclosures referred to agency heads for investigation and report                            |   | 11            | 18                 | 19            | 24            | 42            |
| Referrals to Agency IGs  |   | 3             | 8                  | 14            | 10            | ?             |
| Agency head reports sent to President and Congress   |   | 23            | 8                  | 16            | 24            | 20            |
| Results of agency investigations and reports   | Disclosures substantiated in whole or in part | 13            | 8                  | 16            | 21            | 19            |
|  | <i>Disclosures unsubstantiated</i>            | 10            | 0                  | 0             | 3             | 1             |
| Disclosures processed  | <i>In more than 15 days</i>                   | 290           | 1,019 <sup>b</sup> | 237           | 275           | 130           |
|  | <i>In less than 15 days</i>                   | 111           | 135                | 236           | 203           | 285           |
| Percentage of disclosures processed in less than 15 days                                     |   | 28%           | 12%                | 50%           | 42%           | 61%           |
| Disclosure matters processed and closed  |   | 401           | 1,154 <sup>c</sup> | 473           | 478           | 467           |

<sup>a</sup> It should be noted that many disclosures contain more than one type of allegation. This table, however, records all allegation received in a whistleblower disclosure as a single matter.

<sup>b</sup> This number is large due to the backlog reduction effort.

<sup>c</sup> This number is large due to the backlog reduction effort, and includes approximately 500 cases that had been reviewed in prior years and determined to be low priority and probable closures.

The Disclosure Unit's caseload remains high due to growing public awareness of the Unit's work. In recent years, it has handled several high profile cases that have received widespread national press attention. In addition, after the terrorist attacks of September 11, 2001, more federal whistleblowers came to OSC with national security allegations and concerns. Many cases handled by the Disclosure Unit involve complex issues; some involve classified material and must be handled according to federal requirements.

The Disclosure Unit's more complex cases are very labor-intensive and often require the attention of more than one attorney. These cases can take more than a year to complete for a number of reasons—agencies routinely request additional time to conduct the investigation and write the report, whistleblowers request additional time to prepare their comments, and Disclosure Unit attorneys and the Special Counsel must review the report to determine whether it contains the information required by statute, its findings appear reasonable, and to prepare any comments the Special Counsel may have on the report.

This year, for the sake of brevity, we are not including a representative sample of cases that have been referred by the Special Counsel to the heads of the agencies pursuant to 5 U.S.C. § 1213(c) and closed after receipt and review of the agency report. We are also not including summaries of cases that are presently under investigation by agency heads, though all of these summaries are available. In many cases, OSC's efforts have resulted in significant media coverage and reform efforts.

## Goals and Results - Whistleblower Disclosure

OSC's strategic objective 3 is to promote justice, public safety, and efficiency through acting as a channel for whistleblowers in the Federal workforce to disclose information. The tables below describe the two operational goals supporting this strategic objective.

| <b>Goal 1: TO RECEIVE AND RESOLVE WHISTLEBLOWER DISCLOSURES WITH TIMELY PROCESSING</b> |   |
|--|---|
| <b>WHISTLEBLOWER DISCLOSURE MISSION</b>  | <b>DISCLOSURES</b>  |
|  | See comment 1.  |
| <b>PERFORMANCE INDICATORS</b>  | <b>Indicator A: Percentage of disclosures resolved within the statutory 15 day time frame</b> |
| <b>FY 2006 TARGET</b>  | 50%   |
| <b>FY 2006 RESULTS</b>   | 42%   |
| <b>FY 2007 TARGET</b>  | 50%   |
| <b>FY 2007 RESULTS</b>   | 61%   |
| <b>FY 2008 TARGET</b>  | 50%   |
| <b>FY 2008 RESULTS</b>   |   |
| <b>FY 2009 TARGET</b>  | 50%   |
| <b>FY 2009 RESULTS</b>   |   |

### Comments for Goal #1:

#### 1. Performance Indicator A: Timely Disclosure Processing

Pursuant to § 1213(b), when the Special Counsel receives any disclosure of information by a federal employee, former federal employee or applicant for federal employment which the [employee] reasonably believes 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, the Special Counsel must review the information within 15 days and determine whether there is a substantial likelihood that the information discloses one or more of the above categories of wrongdoing.

OSC handles these whistleblower disclosures under 5 U.S.C. § 1213 in one of three ways. If the Special Counsel makes a positive determination, he must transmit the information to the appropriate agency head, and require the agency head to conduct an investigation and submit a written report on the findings of the investigation. These referrals under § 1213 represent a small percentage (approximately 10% for FY 2007) of the total number of disclosures resolved by OSC in any fiscal year.

If the Special Counsel does not make a positive determination, the matter is closed. These closures make up the vast majority (90% for FY 2007) of the total number of cases resolved by OSC in any fiscal year.

If the Special Counsel is unable to make the substantial likelihood determination on the basis of the information supplied by the whistleblower, the matter may be informally referred to the Inspector

General (IG) for the agency involved, with a request that the IG assist OSC in making a substantial likelihood determination.

OSC's Disclosure Unit exceeded its timeliness target by 11% for FY 2007. The FY 2007 statistics were aided by the presence of a series of companion cases that were all similar in nature, and could all be handled relatively quickly. This is not normally the case. Therefore, the target will remain the same, at 50% for FY 2008 and FY 2009.

| <b>Goal 2: TO PROMOTE JUSTICE AND PROTECT THE MERIT SYSTEM THROUGH THE QUALITY OF DETERMINATIONS AND REFERRALS</b> |  |
|--|--|
| <b>WHISTLEBLOWER DISCLOSURE MISSION</b>  | <b>DISCLOSURES</b>   |
|  | See comment 1.   |
| <b>PERFORMANCE INDICATORS</b>  | <b>Indicator A: % Percentage of disclosures referred to agency head, pursuant to 5 U.S.C. § 1213, or under the informal IG referral process.</b> |
| <b>FY 2006 TARGET</b>  | 7%   |
| <b>FY 2006 RESULTS</b>   | 8%   |
| <b>FY 2007 TARGET</b>  | 7%   |
| <b>FY 2007 RESULTS</b>   | 10%  |
| <b>FY 2008 TARGET</b>  | 7%   |
| <b>FY 2008 RESULTS</b>   |  |
| <b>FY 2009 TARGET</b>  | 7%   |
| <b>FY 2009 RESULTS</b>   |  |

#### Comments to Goal #2

##### 1. Indicator A: Whistleblower referrals:

The U.S. Office of Special Counsel does not have investigative or enforcement authority under 5U.S.C. § 1213. As such, the Indicator for Goal #2 reflects a quality measure based on the number of cases referred under §1213, regardless of the outcome of the referral. The percentage of cases referred out of the total number of cases received in a fiscal year is a relatively low number historically, and as such, the FY 2006 and FY 2007 targets are low. Because OSC's Disclosure Unit processes nearly 500 disclosures annually, this percentage can be seen as an indicator of the average relative height of the "substantial likelihood" bar in a given year.

The Indicator for Goal #2 reflects only one way of measuring quality as defined in Goal #2, to "promote justice and protect the merit system." **Because the statutory mandate of §1213 contemplates that OSC make a determination whether there is a substantial likelihood that the information discloses wrongdoing, a negative determination under the statute, resulting in a closure, is as quality driven as a positive determination resulting in a referral.** OSC's analysis of a whistleblower disclosure may result in a determination not to burden an agency with an inappropriate referral, thus promoting justice and protecting the merit system. Notwithstanding this difficulty in identifying a measure of quality, the individual whistleblower who initiates the disclosure, thus accessing the statutory protections, is more inclined to measure quality by whether or not his or her disclosure is referred. As such, the Indicator for Goal #2 for now reflects this single measurement.

## **USERRA Enforcement and Prosecution Program**

### **Background:**

With the passage of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Congress expanded OSC's role as protector of the federal merit system. USERRA is the law that protects the reemployment rights of persons who are absent from their respective civilian employment due to the performance of military duties. USERRA also makes it illegal for an employer to deny any benefit of employment on the basis of past, current, or future performance of military service.

As special prosecutor, OSC objectively reviews the facts and laws applicable to each complaint. Where the Special Counsel is satisfied that claimant is entitled to relief, then it may exercise its prosecutorial authority and represent the claimant before the MSPB and, if required, the U.S. Court of Appeals for the Federal Circuit.

In early 2005, OSC's role in enforcing USERRA again expanded. The Veterans Benefits Improvement Act of 2004 (VBIA), set up a Demonstration Project giving OSC, rather than the Department of Labor's Veterans Employment and Training Service (VETS), the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. Under the project, OSC also receives and investigates 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. The original team of the three-year demonstration project ended on September 30, 2007, but Congress extended the program through the series of continuing resolutions. Eventually, Congress will determine whether OSC will continue to have investigative responsibility over federal sector USERRA claims.

OSC's USERRA Unit has attained exemplary results in the demonstration project cases through its aggressive and objective enforcement of service members' employment and reemployment rights. GAO was tasked with comparing the performance of OSC and DOL under the demonstration project, but focused on the two agencies' case tracking systems. OSC has an excellent case tracking system, but much more importantly for the veterans with claims, OSC achieved an outstanding rate of corrective action on behalf of veterans. If there were any doubts about the veracity of the corrective action totals, the number of corrective actions could have been verified with a few dozen calls by GAO to the veterans who received corrective action due to OSC's efforts.

### **Corrective Action Results:**

In FY 2007, OSC's USERRA Unit once again achieved impressive results on behalf of military service members, obtaining corrective action in a remarkable 35%, or over one-third, of the USERRA cases it closed during FY2007 (**see Table 8**). Moreover, the Unit anticipates filing several additional cases with the MSPB in the near future should the involved agencies not agree to resolve them voluntarily.

### **Resource Estimates:**

During FY 2008, the USERRA Unit will use approximately 8 FTE at a cost of \$1,185,000. Projecting the same number of FTE into FY 2009 would require approximately \$1,217,000.

### **Outreach:**

In addition to investigating and favorably resolving service members' USERRA claims, and litigating important cases, OSC has been very active in providing USERRA outreach and training. In FY 2007, the USERRA Unit

conducted eight trainings for federal agencies, two presentations for a federal employment sector professional association, and two federal personnel law briefings for its USERRA partner: the U.S. Department of Labor's Veterans' Employment and Training Service. Moreover, the Special Counsel was the keynote speaker at a USERRA conference sponsored by the Reserve Officers Association. The Unit's outreach even extended to the international level as its chief met with representatives of the Australian Defence Department's Office of Reserve Service Protection to discuss common issues and exchange ideas concerning service members' employment and reemployment rights.

**TABLE 7**

| <b>Summary of USERRA Referral Activity</b>  |               |               |               |               |               |
|---|---------------|---------------|---------------|---------------|---------------|
|   | <b>FY2003</b> | <b>FY2004</b> | <b>FY2005</b> | <b>FY2006</b> | <b>FY2007</b> |
| Pending referrals carried over from previous fiscal year  | 8             | 4             | 12            | 6             | 3             |
| Referrals received from DOL during fiscal year  | 7             | 14            | 30            | 11            | 4             |
| Pending Referrals closed  | 8             | 6             | 36            | 14            | 4             |
| Pending referrals at the end of the fiscal year   | 4             | 12            | 6             | 3             | 3             |
| Closed cases where corrective action was obtained (including corrective actions obtained in matters referred to litigation) | n/a           | n/a           | 5             | 3             | 0             |
| Closed cases where no corrective action was obtained  | n/a           | n/a           | 25            | 11            | 4             |

|   |     |     |     |     |   |
|---|-----|-----|-----|-----|---|
| Litigation closed; no corrective action obtained      | n/a | n/a | n/a | n/a | 4 |
| Litigation closed; corrective action obtained         | n/a | n/a | 3   | 1   | 0 |
| Matters referred for litigation pending               | n/a | n/a | 2   | 1   | 2 |
| Pending litigation matters carried over from prior FY | n/a | n/a | n/a | 2   | 1 |



**TABLE 8**

| <b>Summary of USERRA Demonstration Project Activity<sup>a</sup></b> |               |               |               |               |
|---|---------------|---------------|---------------|---------------|
|   | <b>FY2004</b> | <b>FY2005</b> | <b>FY2006</b> | <b>FY2007</b> |
| Pending referrals carried over from previous fiscal year            |               | 0             | 54            | 95            |
| Cases opened  |               | 111           | 168           | 142           |
| <i>Cases closed</i>   |               | 57            | 126           | 123           |
| Cases pending at the end of the fiscal year                         |               | 54            | 96            | 114           |
| Closed cases where corrective action was obtained                   |               | 16            | 35            | 43            |
| Closed cases where no corrective action was obtained                |               | 38            | 91            | 80            |
| Closed cases referred for litigation                                |               | 0             | n/a           | 0             |

<sup>a</sup>Under VIBA, P.L. 108-454; OSC started receiving cases in Feb. 05.

### **Educating the Federal Sector and Preventing Future Violations**

In addition to the individualized corrective action that OSC secured on behalf of many service members, OSC endeavors to improve the federal merit system by obtaining systemic corrective action wherever appropriate. Systemic corrective action (i.e., a change in an agency's practice or policy) is warranted wherever a federal employer's practice or policy deviates from USERRA's requirements. In Fiscal Year 2007, OSC identified two common USERRA violations. The first involved the manner in which federal employers reemployed injured service members. For example, many federal employers are unaware of their obligation to seek placement assistance from U.S. Office of Personnel Management upon determining that they are unable to reemploy an injured service member. The second concerned the kinds of documentation that federal employers demanded where a service member requested a leave of absence due to military service. In response to those common violations, OSC prepared training documents that clearly identify and fully explain federal employers' obligations. Now, whenever either of those issues are identified during the course of an OSC USERRA investigation (regardless if the issue was one that the service member raised), the training document is sent to the involved agency with the request that the agency disseminate it to managers and human resources staff. In those cases where such documents were sent, the agencies were receptive to OSC's guidance.

## Goals and Results – USERRA Enforcement and Prosecution Program

OSC's Strategic Objective 4 is to protect veterans in the Federal workforce through enforcement of the Uniformed Services Employment and Reemployment Rights Act. The tables below describe the three operational goals supporting this strategic objective. But first, a note of explanation follows on each of the four types of USERRA cases that OSC receives - RE, DP-OD, DP-MX, and DP-TSA:

**1. RE Cases:** Under USERRA, certain federal sector claims are investigated by U.S. Department of Labor, Veterans' Employment and Training Service (VETS). In the event that VETS is unable to resolve such a claim, a claimant has a right to have his or her claim referred to OSC for a determination on whether OSC will represent the claimant before the U.S. Merit Systems Protection Board (MSPB). Such cases are identified by OSC as "RE cases."

RE cases have already been investigated by VETS and reviewed by a DOL Office of Regional Solicitor (RSOL). The USERRA Unit receives the VETS investigative file and a legal memorandum from RSOL indicating whether RSOL recommends that OSC represent the claimant. OSC's USERRA Unit reviews the information and makes a "de novo" determination.

It is to be noted that while RE cases have already been investigated by VETS, OSC has found that: further investigation is often warranted, e.g., key witnesses need interviewing; important documents need to be obtained; too much time lapsed between alleged initial violations and their referral to OSC. In such cases, the USERRA Unit will always contact the agency and relevant witnesses to obtain the information necessary to allow it to make a well-reasoned determination regarding the prosecutorial merit of a given claim.

The need and extent of any supplemental investigation affects the processing time of RE cases and is reflected in the performance indicator.

**2. DP-OD cases:** Pursuant to the demonstration project established by the Veterans Benefits Improvement Act of 2004 (VBIA), OSC was given the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. DP-OD cases are federal sector USERRA claims filed by persons having an odd-numbered social security number. DP-OD cases come from two sources: 1) from VETS, and 2) directly from the claimant.

The USERRA Unit conducts an investigation of DP-OD cases and determines whether OSC will represent the claimant in an USERRA action before the MSPB. The performance indicator reflects the time reasonably expected to investigate such cases.

**3. DP-MX cases:** Under the demonstration project, OSC also investigates 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. These are also known as "mixed claims".

The USERRA Unit conducts an investigation of DP-MX cases and determines whether OSC will represent the claimant in a USERRA or prohibited personnel practice action before the MSPB.

The processing time of DP-MX cases is affected by 1) additional complexity of such cases and 2) the USERRA Unit's adoption of OSC's practice in prohibited personnel practice cases of granting a claimant 13 days to respond to OSC's preliminary determination regarding prohibited personnel practice allegations. The performance indicator incorporates those factors.

#### **4. DP-TSA cases:**

On June 9, 2005, the MSPB held in *Spain v. Department of Homeland Security* that USERRA does not apply to Transportation Security Administration (TSA) Security Screeners or TSA Supervisory Security Screeners and, therefore, the MSPB does not recognize jurisdiction over such cases. Consequently, OSC is unable to prosecute USERRA actions involving TSA Security Screeners or TSA Supervisory Security Screeners.

Notwithstanding the *Spain* decision, TSA voluntarily permits OSC to investigate USERRA claims and reports its findings and recommendations for corrective action to TSA management officials.

The performance indicator for these types of cases reflects the MSPB's decision in the *Spain* case.

| <b>Goal 1: TO ENFORCE THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT THROUGH TIMELY CASE PROCESSING</b> |  |  |  |   |
|--|--|--|--|---|
| <b>USERRA MISSION</b>  | <b>USERRA A: RE Cases</b>  | <b>USERRA B: DP-OD Cases</b>   | <b>USERRA C: DP-MX Cases</b>   | <b>USERRA D: DP-TSA Cases</b>   |
| <b>PERFORMANCE INDICATORS</b>  | <b>Indicator A:</b><br><b>Average number of days in which the case is settled, closed or a decision to litigate is made.</b> | <b>Indicator A:</b><br><b>Average number of days in which the case is settled, closed or a decision to litigate is made.</b> | <b>Indicator A:</b><br><b>Average number of days in which the case is settled, closed or a decision to litigate is made.</b> | <b>Indicator A:</b><br><b>Average number of days in which a “no merit” determination is made or a request for voluntary corrective action is sent to TSA.</b> |
| <b>FY 2006 TARGET</b>  | 90%  | 80%  | 80%  | 80%   |
| <b>FY 2006 RESULTS</b>   | 50%  | 62%  | 74%  | 33%   |
| <b>FY 2007 TARGET</b>  | 75 days  | 160 days   | 160 days   | 160 days  |
| <b>FY 2007 RESULTS</b>   | 33 days  | 107 days   | 171 days   | 90 days   |
| <b>FY 2008 TARGET</b>  | 75 days  | 140 days   | 160 days   | 140 days  |
| <b>FY 2008 RESULTS</b>   |  |  |  |   |
| <b>FY 2009 TARGET</b>  | 75 days  | NA   | NA   | NA  |
| <b>FY 2009 RESULTS</b>   |  |  |  |   |

Comments for Goal #1:

1. For RE cases in FY 2007, OSC achieved resolution in an average of 33 days, which was an improvement over the FY 2006 result. There are few RE cases each year, and they are often very complex. For these cases, OSC normally has to reinvestigate the case to determine the facts and the situation. 75 days is aggressive, because OSC never knows the complexity of these referred cases, nor whether any of the work performed by DOL is usable.

2. For the Demonstration Project cases, OSC has lowered the FY 2008 target from 160 days to 140 days for DP-OD cases, and from 160 days to 140 days for DP-TSA cases. Baseline data in FY 2006 was 115 days for DP-OD cases and 161 days for DP-TSA cases. The USERRA unit is down to 8 employees from its high of 10 employees and OSC will likely not staff it back up to 10 employees unless and until Congress definitely decides to entrust OSC with the investigations of all Federal Sector USERRA claims. Therefore the target of 140 days for these two types of Demonstration project cases is aggressive.

3. For DP-MX cases, the average number of days to resolve the cases was 171, so the USERRA Unit failed to meet the FY 2007 target. DP-MX cases contain both USERRA and Prohibited Personnel Practice (PPP) allegations (whereas DP-OD cases contain only USERRA allegations). Therefore, because DP-MX cases contain more allegations and are more complex, they generally take longer to investigate than DP-OD cases. Accordingly, in FY 2008, OSC will set the target for DP-MX cases at 160 days.

| <b>Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS</b> |  |   |
|--|--|---|
| <b>USERRA MISSION</b>  | <b>USERRA CASES</b>  |   |
| <b>PERFORMANCE INDICATORS</b>  | <b>Indicator A: % favorable outcomes in cases determined by OSC to be meritorious = (# successful meditations + # of settlements achieved + # of successful litigations) / (# meritorious cases)</b> | <b>Indicator B: # of “test cases” filed</b> |
| <b>FY 2006 TARGET</b>  | 90%  | Inappropriate to set a specific target      |
| <b>FY 2006 RESULTS</b>   | 100%   | 0   |
| <b>FY 2007 TARGET</b>  | 90%  | Inappropriate to set a specific target      |
| <b>FY 2007 RESULTS</b>   | 100%   | 1   |
| <b>FY 2008 TARGET</b>  | 95%  | Inappropriate to set a specific target      |
| <b>FY 2008 RESULTS</b>   |  |   |
| <b>FY 2009 TARGET</b>  | 99%  | Inappropriate to set a specific target      |
| <b>FY 2009 RESULTS</b>   |  |   |

#### Comments for Goal #2

##### 1. Performance Indicator A

Where the Office of Special Counsel is satisfied that claimant is entitled to relief, then it may exercise its prosecutorial authority and represent the claimant before the MSPB and, in certain circumstances, the U.S. Court of Appeals for the Federal Circuit. See 38 U.S.C. §§ 4324(a)(2)(A) and (d)(2). As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to prosecute successfully cases warranting corrective action. “Meritorious cases” under this performance indicator are to be distinguished from the “test cases” found under Performance Indicator B.

## 2. Performance Indicator B

It is foreseeable that OSC will desire to file cases where the law is not clear (e.g., novel legal issues requiring “test cases” to define the bounds of the law) but will establish legal precedent benefiting all service members, if the litigation is successful. The outcomes of these types of cases do not depend on OSC’s skill in weighing of the evidence, applying of law, and trying the case. Instead, the cases involve questions of law.

It is difficult to define a performance goal that accurately reflects “success” or “failure” of OSC’s identification of cases that are fertile for expanding the law. The mere fact of filing test litigation with an eye toward expanding the law, however, seems appropriate. Performance Indicator B captures this concept. OSC will track how often it files this type of case. However, a target can not be identified because OSC cannot determine how often appropriate “test cases” will come into the agency from claimants.

| <b>Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES</b> |  |   |
|--|--|---|
| <b>USERRA MISSION</b>  | <b>USERRA CASES</b>  |   |
| <b>PERFORMANCE INDICATORS</b>  | <b>Indicator A: (# of USERRA trainings and outreaches given) / (# of invitations to provide USERRA training or outreach visits {where inviting agency sponsors OSC})</b> | <b>Indicator B: (# of USERRA trainings and outreaches given) / (# of invitations to provide USERRA training or outreach visits {where OSC pays expenses})</b> |
| <b>FY 2006 TARGET</b>  | 90%  | 50%   |
| <b>FY 2006 RESULTS</b>   | NA   | 100%  |
| <b>FY 2007 TARGET</b>  | 90%  | 50%   |
| <b>FY 2007 RESULTS</b>   | 100%   | 100%  |
| <b>FY 2008 TARGET</b>  | 90%  | 75%   |
| <b>FY 2008 RESULTS</b>   |  |   |
| <b>FY 2009 TARGET</b>  | 90%  | 75%   |
| <b>FY 2009 RESULTS</b>   |  |   |

### Comments for Goal #3

OSC recognizes the federal sector’s need for USERRA training although it has no statutory obligation to provide it. Thus, the USERRA Unit regularly accepts invitations to provide outreach services designed to educate federal personnel on USERRA issues so that agencies comply with the law, including presentations conducted at national events such as the Federal Dispute Resolution conference. In individual USERRA cases where OSC believes an agency would benefit from such training, OSC requests that the agency sponsor OSC-conducted USERRA training at agency expense. Additionally, the USERRA unit maintains telephonic and e-mail "hot lines" for answering USERRA-related questions from the public and private sectors.

The target for Indicator A is not set at 100% because OSC needs the flexibility to decline one or two outreaches each year, due to trials, investigations and booked schedules.

Usually there are two to four outreaches each year that fall under Indicator B, for which OSC will bear the expense. The target will go up to 75% in FY 2008 and FY 2009, but OSC needs the flexibility to decline one unreimbursed outreach each year, due to trials, investigations, and booked schedules.



## OSC and the Future of USERRA Enforcements

The original term of the 32-month Demonstration Project created by the Veterans Benefits Improvement Act of 2004 ended at the close of FY 2007. Congress has extended the program during the four continuing resolutions of FY 2008 but has not yet decided to entrust the entire federal sector USERRA responsibility to OSC.

There are several different scenarios in which OSC could be called upon to perform investigatory USERRA responsibilities on a permanent basis for the benefit of the members of the United States armed forces. Each of the scenarios would have a different cost structure for OSC. Rather than present various scenarios and their associated costs here, we will simply make four points:

**1. Technical Expertise.** The agency currently has substantial technical USERRA expertise, and has a training unit in place to train new employees. This expertise has already resulted in increased correction action rates and quick processing times for those members of the military for which OSC has responsibility under the Demonstration Project. The OSC Investigation and Prosecution Division also has expert investigative and prosecutorial firepower that could be brought to bear on any expanded USERRA responsibility.

**2. Management expertise.** No matter what the requirements would be of an expanded USERRA role for the U.S. Office of Special Counsel, the agency has the experienced management in place to develop a plan, implement it, and achieve highly efficient results for the veterans and members of the military that have rights under USERRA. The current head of the USERRA investigations at OSC is an SES attorney with 27 years of investigation, analysis, and litigation experience. The unit has several experts in USERRA federal sector law and regulations.

**3. Priority.** Protecting the nation's veterans, guardsmen, and reservists has always been one of the highest of all priorities for Special Counsel Bloch at OSC. Taking on an expanded role in providing expeditious enforcement for these brave Americans through USERRA would be an honor for the agency.

**4. Cost models.** OSC is able to provide further information regarding current cost structure or any other USERRA related information.

## **Outreach Program**

The Outreach Program assists agencies in meeting the statutory mandate of 5 U.S.C. § 2302(c). This provision requires that federal agencies inform their workforces about the rights and remedies available to them under the whistleblower protection and prohibited personnel practice provisions of the Whistleblower Protection Act, in consultation with the OSC.

In an effort to assist agencies in meeting the statutory requirement, in FY 2002, OSC designed and created a five step educational program, the 2302(c) Certification Program. This program gives guidance to agencies and provides easy-to-use methods and training resources to assist agencies in fulfilling their statutory obligation. Agencies that complete the program receive a certificate of compliance from OSC.

The 2302(c) Certification Program was piloted by the Office of Personnel Management (OPM) in the spring of 2002 and OPM received the first-ever certificate of compliance in May of that year. Shortly thereafter, OSC began working with ten large agencies on participation in the program and offered the program government-wide in October of 2002. Through FY 2007, 57 agencies have been registered in the program and are working towards certification, and 32 agencies have been certified.

During FY 2007, OSC continued to certify more agencies through its outreach program. As agencies implement the certification process, agency employees who might previously have been unaware of their rights and remedies through OSC are becoming informed. In addition to OSC's certification program, OSC continues to provide outreach programs to agencies requesting them, or as part of OSC settlements in particular matters.

Finally, OSC has continued its policy of issuing press releases when OSC files a significant litigation petition, or achieves significant corrective or disciplinary action through settlement. Most of these generate considerable press coverage. This contributes to employee and manager awareness of the merit system protections enforced by OSC.

### **PART 3 - FY 2009 BUDGET REQUEST - ADDITIONAL INFORMATION**

OSC is requesting \$17,468,000. This is the same amount as the agency's FY 2008 appropriation, which included \$1,100,000 for computer forensics associated with the investigations of its Special Task Force. The \$17,468,000 includes funding for at least one additional FTE for Special Task Force work, as well as funding to cover the FY 2008 and projected FY 2009 salary increases.

This one additional FTE will bring the agency to 111 employees during FY 2009. This number of FTE is necessary to manage and process the agency's elevated workload (since FY 2000) of prohibited personnel practice complaints, whistleblower disclosures, Hatch Act complaints, Hatch Act cases, Hatch Act advisory opinions, special task force investigations, and USERRA cases in a manner that precludes the formation of case backlogs.

#### **BUDGETARY FACTORS**

##### **Increased Expenses:**

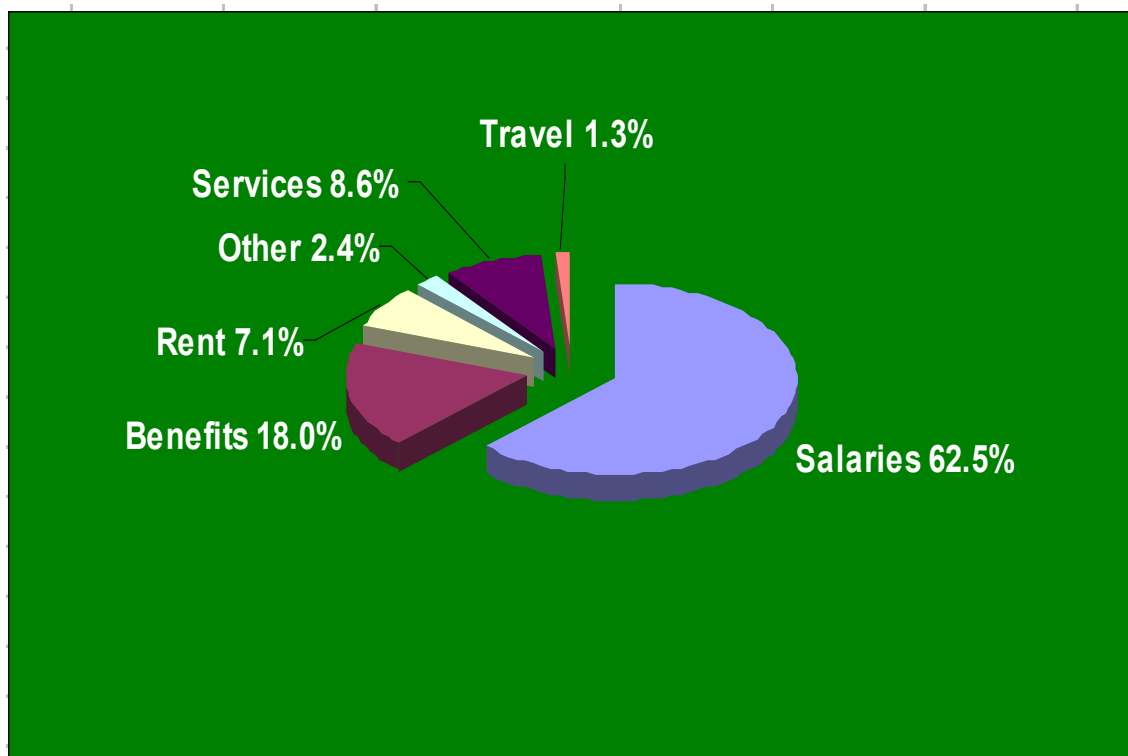
Notable increased expenses for OSC include the higher cost of OSC's existing headquarters rented space and field office rented spaces, the cost of accounting outsourced activities (which has increased 130% since FY 2005), the higher cost of legal information services (12% increase), and the higher cost of mandatory security charges payable to DHS (35% increase). An additional \$32,000 will also be needed for Microsoft Enterprise Software Licenses. OSC's transit subsidy costs are also increasing. As the agency operates with more employees than it has in the past, a marginal increase in expenditures for supplies, travel, equipment, and other services can be expected. The agency's outsourced E-travel expenses have also increased.

##### **Information Technology Necessities:**

1. OSC needs to update its outdated computers and convert its case tracking system to a web-based platform. OSC will accomplish as much as possible towards these information technology needs without jeopardizing its ability to pay the salary and benefits of 111 FTE during FY 2009.
2. The OMB-mandated conversion of the agency's infrastructure (network backbone) to Internet Protocol Version 6 (IPv6) will receive as much funding as possible in order to meet the deadline without sacrificing funding needed for salaries, benefits, or rent. All agency networks are supposed to interface with this infrastructure by June 2008.

## Components of Budget Request:

The following chart estimates how the FY 2009 request will be distributed on a percentage basis:



Field office expenditures are almost entirely driven by the number of employees in the field offices. Below is a list of ranges by field office. Staffing levels may be slightly adjusted during the year within these ranges in order to properly meet the management needs of the agency, and its individual units.

|                            |                 |
|----------------------------|-----------------|
| Headquarters               | 70-83 employees |
| Midwest Field Office       | 5-8 employees   |
| Dallas Field office        | 7-11 employees  |
| Oakland Field Office       | 7-10 employees  |
| Washington DC Field Office | 7-11 employees  |

**Table - Budget Object Classification of Obligations**

| <b>Budget Object Classification of Obligations: FY2008-FY2009</b> |   |                          |                               |                               |
|---|---|--------------------------|-------------------------------|-------------------------------|
| <i>(in thousands of dollars)</i>                                  |   |                          |                               |                               |
| <b>Budget Object Classification of Obligations</b>                |   | <b>FY2007<br/>Actual</b> | <b>FY2008<br/>(projected)</b> | <b>FY2009<br/>(projected)</b> |
| 11.0  | Personnel compensation                      | 9,747                    | 10,556                        | 10,926                        |
| 12.0  | Civilian personnel benefits                 | 2,811                    | 2,980                         | 3,135                         |
| 13.0  | Benefits to former personnel                | 0                        | 15                            | 15                            |
| 21.0  | Travel and transportation of persons        | 130                      | 230                           | 233                           |
| 22.0  | Transportation of things                    | 15                       | 20                            | 21                            |
| 23.1  | Rental payments to GSA                      | 1,189                    | 1,214                         | 1,238                         |
| 23.3  | Communications, utilities and misc. charges | 95                       | 100                           | 105                           |
| 24.0  | Printing and reproduction                   | 20                       | 21                            | 21                            |
| 25.0  | Other services                              | 932                      | 2,078                         | 1,508                         |
| 26.0  | Supplies and materials                      | 174                      | 104                           | 106                           |
| 31.0  | Equipment                                   | 140                      | 150                           | 160                           |
| 32.0  | Land & Structures                           | 0                        | 0                             | 0                             |
| 42.0  | Tort Claims                                 | 0                        | 0                             | 0                             |
| <b>99.9</b>   | <b>Total</b>                                | <b>15,252</b>            | <b>17,468</b>                 | <b>17,468</b>                 |

Detailed notes concerning the object classes in the table:

Object Class 21.0: Historically, the agency usually expends \$200,000 to \$300,000 for travel. The unique budget factors present in FY 2007 required the agency to restrict travel to a lower level. The agency's video teleconferencing system does now fortunately provide the ability to conduct certain investigations without travel. But face-to-face is extremely important for certain types of investigations. Considering these factors, in FY 2009, OSC projects requirements of \$233,000.

Object Class 23.1: Rental Payments to GSA in FY 2009 will rise approximately 2% over FY 2008 levels.

Object Class 25.0: In the Other Services category, over 40% of this amount is required to cover OSC's Interagency Agreement with the National Business Center for accounting services, travel services, and procurement system services. Also included here are the following items: approximately \$75,000 for Westlaw fees, (an 8% increase), \$50,000 for training, \$37,000 for the FY 2009 financial auditors, \$92,000 for the agency's conversion to a web-based case tracking system, \$40,000 for program support for the document management system, \$60,000 in DHS reimbursement charges for facility security related services (a 10% increase), \$33,000 for Microsoft Enterprise Licenses, \$47,000 for annual maintenance contracts, \$34,000 for Oracle upgrades, \$33,000 for the agency's HSPD-12 program and fees, \$44,000 for the required conversion to Internet Protocol v6, and \$13,000 for payroll services from the National Finance Center.

Object Class 26.0: The \$106,000 projected for this object class represents subscriptions, journals, materials and supplies of all types, including paper and toner for the headquarters and all field offices.

Object Class 31.0: In order to operate at its overall agency wide FY 2009 budget justification funding level, OSC plans to keep expenditures low in this category. However, the agency is behind in replacing certain aspects of its aging hardware, notably the laptops used by employees of the agency to do their day-to-day work, as well as several servers. Therefore, certain hardware and software purchases must be made during FY 2009 in this area.

## Table - Analysis of Resources

| <b>Analysis of Resources: FY2007-FY2009</b><br><i>(in thousands of dollars)</i> |                           |                              |                              |
|---|---------------------------|------------------------------|------------------------------|
| Description   | FY2007<br><i>(Actual)</i> | FY2008<br><i>(projected)</i> | FY2009<br><i>(projected)</i> |
| Budget authority  | 15,524                    | 17,468                       | 17,468                       |
| Outlays   | 14,147                    | 15,918                       | 15,918                       |
| Approximate full-time equivalent employment<br>(FTE) work years                 | 104                       | 110                          | 111                          |

## **PART 4 - PERFORMANCE UNDER THE PRESIDENT'S MANAGEMENT AGENDA**

OSC has developed a results-oriented management agenda that includes many of the core criteria in the President's Management Agenda.

### **Strategic Management of Human Capital**

OSC's human capital strategy is aligned with its mission, goals, and organizational objectives, as it is:

1) integrated into Budget and Strategic Plans; 2) consistent with OPM's human capital balanced scorecard and OMB's plan for strategic management of human capital; and 3) complies with standards for internal accountability systems to ensure effective merit-based human resource management as described below.

OSC uses existing personnel flexibilities and tools, including leave flexibilities, alternative work schedules, and a fairly extensive telework program. In FY 2006, OSC also drafted and implemented a successful student loan repayment / employee retention program in which approximately 20 employees have participated. In FY 2007, OSC finalized a fitness program for its employees. OSC's performance management systems allow managers to differentiate between high and low performers through the use of appropriate incentives and consequences.

The agency is addressing gaps in human resources competencies talent in its program areas through internal development, upward mobility positions, legal internships, in-house mission-specific training, and hiring additional personnel. OSC also has a highly developed cross training program that enables employees to learn new skills and participate in the work of several units. OSC also captures valuable information and ideas of departing employees through extensive exit interviews. This information is used by senior managers to refine and improve work processes.

In FY 2007, OSC continued its strategic management initiatives by further refining the reorganization of 2005, in which a Midwest field office, USERRA Unit, Training Unit, and a Document Control Branch were created. OSC now has set agency and division goals for the age of cases under review by the agency. Performance plans are in place for SES members and managers that link to the agency's mission and to strategic goals that are in place for the individual divisions. OSC also now has measurable finite performance goals in place for each individual employee.

### **Competitive Sourcing**

OSC is a small agency, with a highly specialized inherently government mission. 84% of its FTE perform inherently governmental work, and 16% of its FTE are considered commercial in nature. According to OMB Circular A-76 and supplemental guidance issued by OMB, government performance of commercial functions is permitted when, as is the case at OSC, the position activity total is 10 FTE or less.

However, while OSC is small enough that this guidance may exempt a large proportion of OSC's commercial administrative functions, OSC is dedicated to the intent of the principles of outsourcing cost-effective performance whenever appropriate. Therefore, personnel resources used to perform any functions considered commercial at OSC are regularly assessed to determine whether they might be more effectively performed by a contractor. OSC looked in depth at this issue in a management assessment it commissioned in the summer of 2004.

## **Improved Financial Performance**

OSC's switch to using NBC for outsourced accounting services has provided a unique opportunity to participate in the design of the processes used for its accounting, and to design specific reports that reflect the information most helpful to OSC in managing its funds. Contracting these functions out has provided OSC with more specialized expertise at a lower cost than could be accomplished internally. NBC provides OSC with a detailed financial review every quarter. NBC will also provide up-to-date financial information on day-to-day operations for payroll, procurement and travel, as needed by OSC.

As a small agency without an Inspector General, OSC generally submits a combined Inspector General (IG) Act and Federal Manager's Financial Integrity Act report each October. OSC normally reports that it relies on audits and other reviews of NBC's operations by the OIG and Office of the Chief Financial Officer (OCFO) at the Department in the Interior as well as information received directly from NBC, for information about any significant issues relating to the services provided to OSC.

Historically, OSC received a waiver from OMB for the requirement to have an audit of the agency's financial statements. Since FY 2004, however, OSC has not received an audit waiver. An audit firm spent time at OSC headquarters and with the National Business Center personnel who currently perform the accounting functions for OSC. This audit was completed in November of 2007. The auditor gave OSC an unqualified audit opinion on our annual financial statements, finding no material weaknesses. The results were similar to FY 2004, FY 2005 and FY 2006 audits.

## **Expanded Electronic Government**

OSC provides one-stop service for those who wish to file a complaint or disclosure, or request a Hatch Act advisory opinion. A person can file a Prohibited Personnel Practices complaint on-line. Most of our PPP complaints come into the agency via this channel. A person can also make a complete Whistleblower Disclosure on-line and a Hatch Act advisory opinion may be solicited through the web site.

Those who wish to communicate with a knowledgeable OSC staffer through one of the agency's telephone hot lines will find the relevant information on the web site. OSC's web site is linked to FirstGov, as well as other agency web sites, such as those for the Office of Personnel Management, the Equal Employment Opportunity Commission, and the Office of Government Ethics, among many others. OSC's Information Technology Branch (ITB) staff are continually improving OSC's web site. User sessions on OSC's web site have continued to grow: FY 2007 total number of user sessions was 951,725. This is a 13% increase over the FY 2006 total number of user sessions.



1 Public Law No. 103-94 (1993), codified in scattered sections of 5 U.S.C. and 12 U.S.C.

2 Public Law No. 103-353 (1994), codified at 38 U.S.C. § 4301, et seq. The Veterans' Employment Opportunities Act of 1998 (Public Law No. 103-424) also expanded OSC's role in protecting veterans. The act made it a prohibited personnel practice to knowingly take, recommend, or approve (or fail to take, recommend, or approve) any personnel action, if taking (or failing to take) such action would violate a veterans' preference requirement. See 5 U.S.C. § 2302(b)(11). (The former § 2302(b)(11) was re-designated as § 2302(b)(12).).

3 Public Law No. 103-424 (1994), codified in various sections of title 5 of the U.S. Code. The provision making federal agencies responsible, in consultation with OSC, for informing their employees of rights and remedies under the Whistleblower Protection Act appears at 5 U.S.C. § 2302(c).

4 Public Law 107-71 (2001).

5 Unless noted otherwise, all references after this to prohibited personnel practice complaints include complaints alleging other violations of civil service law, rule, or regulation listed at 5 U.S.C. § 1216, except for alleged violations of the Hatch Act.

6 When the Complaints Examining Unit makes a preliminary determination to close a complaint without further investigation, it must by law provide complainants with a written statement of reasons, to which they may respond. On the basis of the response, if any, the unit decides whether to close the matter, or refer it to the Investigation and Prosecution Division.

7 Compare, for example, 5 U.S.C. § 1214(a)(1)(A) ("The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.") with 5 U.S.C. app. 3, §10(a) ("[E]ach Inspector General ... is authorized— ... (2) to make such investigations and reports relating to the administration of the programs and operations of the [agency] as are, in the judgment of the Inspector General, necessary or desirable[.]") and § 7(a) ("The Inspector General may receive and investigate complaints or information from an employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety."). OSC cannot, however, investigate complaints over which it has no jurisdiction, with the result that some complaints are closed without further action after receipt and review. During FY2004, for example, OSC lacked jurisdiction in 617 (or 31.4%) of the complaints received, leaving 1,347 complaints (69%) in which OSC was required by statute to conduct an inquiry. In addition, discrimination based on race, color, religion, sex, or national origin, age, or handicapping condition is illegal under laws enforced by the Equal Employment Opportunity Commission (EEOC), and is also a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). However, since procedures for investigating discrimination complaints have already been established in the agencies and the EEOC, the Special Counsel will normally avoid duplicating those procedures and will defer to those procedures rather than initiate an independent investigation. 5 C.F.R. § 1810.1. When a matter is not referred for further investigation, CEU must by law provide complainants with a written statement of reasons, to which they may respond. 5 U.S.C. § 1214(a)(1)(D). On the basis of the response, if any, CEU decides whether to finalize its preliminary determination to close the matter, or to refer the matter to an Investigation and Prosecution Division. 11 5 U.S.C. § 1214(b)(2)(C). 11 Corrective action seeks a remedy for any injury to the individual complaining employee, such as back pay or reinstatement, while disciplinary action seeks to impose discipline on the perpetrator of the PPP.

8 Corrective action seeks a remedy for any injury to the individual complaining employee, such as back pay or reinstatement, while disciplinary action seeks to impose discipline on the perpetrator of the PPP.

9 Several factors are believed to account for or contribute to this workload increase. They include: publicity about an increased number of high-profile cases handled by OSC, including whistleblower disclosures, and four Public Servant Awards issued to whistleblowers by OSC; increased public interest in elections since the 2000 presidential election, the public interest generated by the 2004 campaigns; OSC's 2302(c) Certification Program; significant improvements in OSC's web site, increasing awareness by government employees and others of OSC and its functions.

10 [http://www.osc.gov/documents/osc\\_lst3.pdf](http://www.osc.gov/documents/osc_lst3.pdf)