



United States Government Accountability Office
Washington, DC 20548

January 12, 2007

The Honorable John Conyers, Jr.
Chairman, Committee on the Judiciary
House of Representatives

The Honorable Barney Frank
House of Representatives

*Subject: U.S. Office of Special Counsel's Procedures for Assigning
Incoming Cases to and within Organizational Units*

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 for federal employment from prohibited personnel practices, especially reprisal from whistleblowing. Individuals who believe that a prohibited personnel practice, such as nepotism or obstruction of the right to compete for employment, has been committed may file complaints with OSC. In addition, the agency operates a secure channel for federal whistleblowing disclosures of violations of law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; and substantial and specific dangers to public health or safety. OSC also provides advisory opinions and enforces Hatch Act restrictions on political activities of individuals employed by the federal and District of Columbia governments as well as certain state and local government employees employed in connection with programs financed by federal funds. Additionally, the agency enforces the rights of federal employees and applicants for federal employment under the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994. A Special Counsel, appointed by the President and confirmed by the Senate, heads the agency; the current Special Counsel took office in January 2004.

OSC's handling of cases has been publicized in the media and you raised concerns about the assignment of two cases that involved alleged violations of the Hatch Act that OSC officials appeared to handle differently from other such cases. This report responds to your request to provide information on OSC's policies and procedures for assigning incoming cases to and within its organizational units. To meet this objective, we reviewed OSC's written policies and procedures for processing cases, which include procedures for assigning cases, and met

with OSC officials knowledgeable about these procedures. We describe the assignment procedures for the four major types of cases but, because of long-standing GAO precedent and policy, we do not highlight specific cases. We conducted our review in Washington, D.C., from December 2005 to November 2006 in accordance with generally accepted government auditing standards.

Results in Brief

Under OSC's procedures, the agency receives complaints, matters, disclosures, and requests for opinions through electronic media, by mail, or by fax. These generally come to the Document Control Branch before being sent to one of four units—Complaints Examining, Disclosure, Hatch Act, and USERRA—for further review and assignment. For complaints alleging prohibited personnel practices, the Document Control Branch typically screens the information to identify such information as type of complaint and complainant's name and opens a case file before forwarding the case to the Complaints Examining Unit. For disclosure matters that are filed electronically, the Document Control Branch is to open a case file in OSC's data tracking system but is to refer disclosure matters that are received via mail or fax to the Disclosure Unit before creating a case profile. For alleged violations of Hatch Act and requests for opinions on applicability of the act as well as USERRA complaints, OSC procedures call for the Document Control Branch to forward information directly to the respective unit chief who is responsible for reviewing the information, opening a case file, and assigning the case. The Special Counsel, as head of the agency, has authority and discretion to assign cases, but according to OSC, in most cases, the Special Counsel delegates this authority to unit chiefs, who are career staff. Within individual units, specific procedures for assigning cases to individuals vary. Generally, the unit chief makes an initial determination, among other things, as to whether OSC has jurisdiction over the complaint or disclosure and assigns those cases that fall within OSC's jurisdiction to a specific staff member or to a supporting division for review after considering such factors as the nature of the allegation and staff experience and workload. Cases that are outside of OSC's jurisdiction are to be closed with a letter of declination to the complainant.

Background

OSC derives its authority under the following federal statutes: the Civil Service Reform Act of 1978,¹ the Whistleblower Protection Act of 1989,² the Hatch Act,³ the Office of Special Counsel Reauthorization Act of 1994,⁴ the USERRA Act of 1994,⁵ and the Veterans Benefits Improvement Act of 2004 (VBIA).⁶ See enclosure I for a description of the applicable provisions of the statutes.

OSC carries out its mission pursuant to these statutes by conducting investigations of alleged prohibited personnel practices, attempting informal resolution through discussion with the agency (or by offering mediation), and when necessary, taking corrective or disciplinary action, or both, before the Merit Systems Protection Board (MSPB).⁷ OSC also handles whistleblower disclosures, investigates and prosecutes alleged Hatch Act violations and renders advisory opinions, and handles alleged USERRA violations including representing claimants before the MSPB. In fiscal year 2005, OSC reported receiving 1,771 prohibited personnel practice complaints, 485 whistleblower disclosures, 245 Hatch Act complaints, 30 USERRA referrals from the Department of Labor, and 111 USERRA complaints under the VBIA demonstration project.

OSC's current organizational structure includes the Immediate Office of the Special Counsel, five operating units/division—the Complaints Examining Unit, Hatch Act Unit, Disclosure Unit, USERRA/Special Projects Unit, and the Investigation and Prosecution Division—and four supporting offices—Alternative Dispute Resolution Program, Legal Counsel and Policy Division, Management and Budget Division, and Training Office. OSC maintains its headquarters office in Washington, D.C., and has four field offices located in Dallas, Oakland (the San Francisco

¹Pub. L. No. 95-454.

²Pub. L. No. 101-12.

³The provisions commonly referred to as the Hatch Act are found under chapter 15 and subchapter III of chapter 73 of title 5.

⁴Pub. L. No. 103-424.

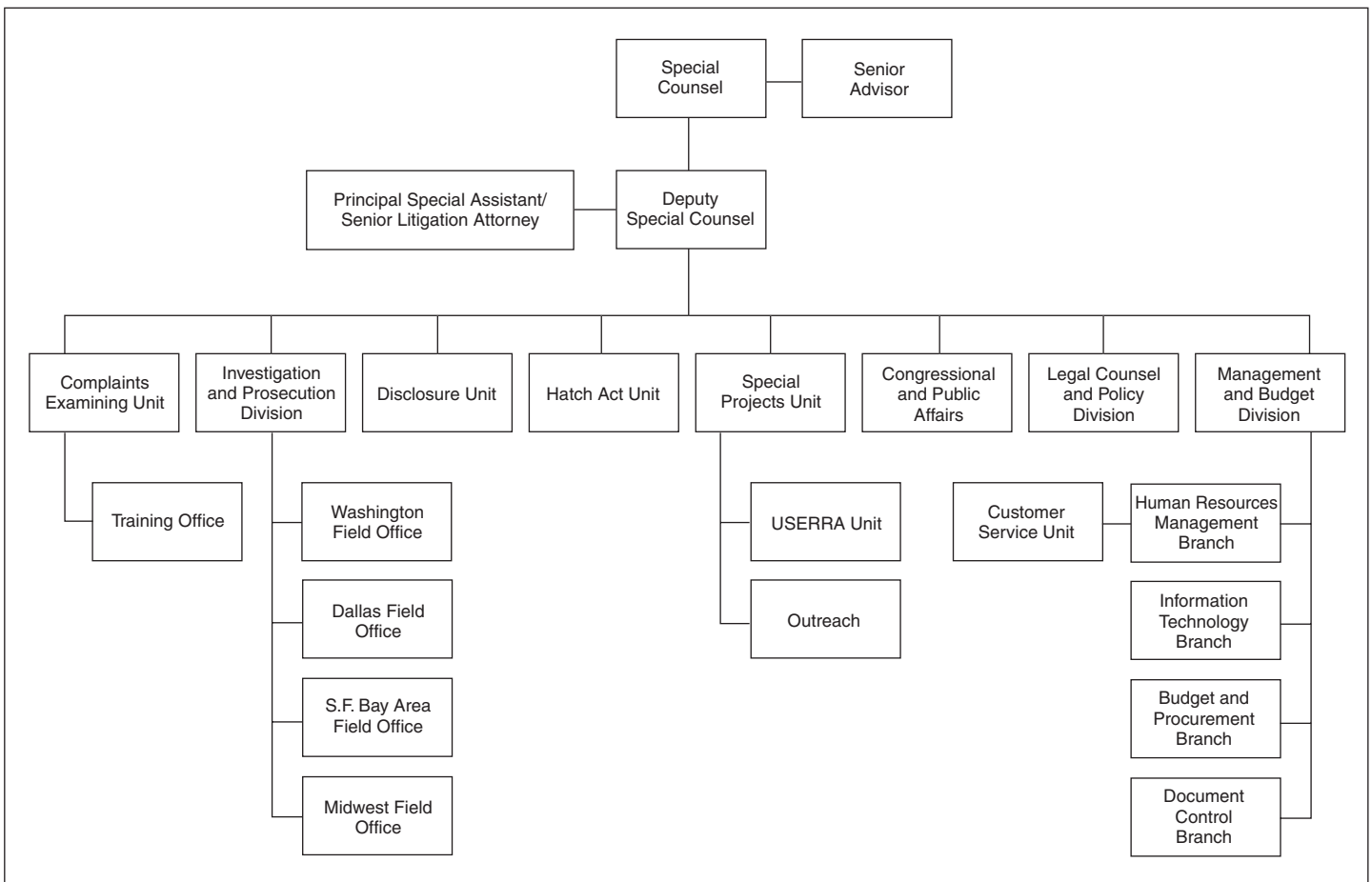
⁵Pub. L. No. 103-353.

⁶Pub. L. No. 108-454.

⁷MSPB is an independent, quasi-judicial agency in the executive branch that serves as the guardian of federal merit systems.

Bay Area Field Office), Detroit (the Midwest Field Office), and Washington, D.C. Figure 1 outlines OSC's current organizational structure.

Figure 1: OSC Organizational Chart



Source: OSC.

OSC tracks its workload across different case types through its computerized system, known as “OSC 2000.” This system is designed to capture and record data on all case types from the initial filing of the complaint, disclosure, or request for advisory opinion, until closure and archiving of the file.

The current Special Counsel took office in January 2004 and announced a reorganization on January 6, 2005, which implemented recommendations

from internal and external evaluations related to the agency's operations. The Special Counsel noted that the reorganization was intended to address the backlog of cases in all units and the cumbersome structure of three separate Investigative and Prosecution Divisions.⁸ Under the reorganization, the Special Counsel directed the heads of most units to draft standard operating procedures, which according to OSC officials are expected to be incorporated into the agency's formal directive system by the end of January 2007.

OSC Units Have Procedures for Assigning Cases

OSC units have procedures for processing cases, which includes assigning complaints alleging violations of laws or disclosures of wrongdoing for review or investigation or both. These procedures cover matters received through the mail, by fax, and by electronic media and outline steps for preliminary screening, creating a case file in OSC 2000, and initial review of cases. The Special Counsel, as head of the agency, has authority and discretion to assign cases, but according to OSC, in most cases, the Special Counsel delegates this authority to unit chiefs, who are career staff. In line with the reorganization as directed by the Special Counsel in January 2005, the Disclosure Unit, the Hatch Act Unit, and the Investigation and Prosecution Division developed new standard operating procedures that included steps on assigning cases. According to OSC officials, these new procedures are intended to provide guidance to staff on case processing procedures based on recommendations from internal and external evaluations of the agency's organization and operations.

Prohibited Personnel Practice Cases: The Complaints Examining Unit (CEU) receives and conducts preliminary inquiries into allegations of prohibited personnel practices. Complainants alleging prohibited personnel practices are required to complete and submit either an electronic or paper copy of OSC Form 11, "Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity." Procedures call for the Document Control Branch to receive electronic and paper filings of OSC Form 11 and to review the information to ensure that it is not a duplicate of a previously received complaint (i.e., electronic and paper copy of the same complaint). For new complaints, information is entered into OSC 2000 and assigned a case number, and the file containing

⁸For a discussion of OSC case backlog, see GAO, *U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should Be Provided to Congress*, [GAO-04-36](#) (Washington, D.C.: Mar. 8, 2004).

the original documentation submitted by the complainant and an OSC-generated case profile is forwarded to the Chief, CEU, for review and further processing. OSC procedures for handling duplicate complaints require the Document Control Branch to update OSC 2000 using the “additional information” code, prepare an updated profile, attach it to the complaint, and send the file to the CEU.

The CEU is to screen prohibited personnel practice complaints to determine first that jurisdictional requirements are met. For example, among other requirements, the complaint must concern a personnel action involving a covered agency and must involve a covered position. The unit chief determines the priority of the case, generally based on the seriousness of the allegation, and assigns the case to a team leader for further review. As a result of this review, those cases that are determined to have merit are then referred to the Investigation and Prosecution Division, which investigates and analyzes such cases to determine whether they warrant seeking corrective and disciplinary action. (See enc. II for a description of the priority system and enc. III on the procedures for assigning prohibited personnel practice complaints.) The unit chief indicated that the procedures for assigning cases have not changed substantially over the years. Moreover, OSC officials indicated that the unit was already implementing new procedures prior to the reorganization; therefore, major changes in operating procedures were not necessary as a result of the January 2005 reorganization.

Whistleblower Disclosure Cases: OSC’s Disclosure Unit (DU) receives whistleblower disclosure claims. As described by law, these consist of (1) violations of law, rule, or regulation; (2) gross mismanagement; (3) gross waste of funds; (4) an abuse of authority; or (5) a substantial and specific danger to public health or safety. OSC reviews the information within 15 days and determines whether there is a substantial likelihood that the information discloses one or more of the above categories of wrongdoing.⁹ According to DU’s standard operating procedures, disclosures may be filed electronically, by mail, or by fax using either correspondence or an OSC Form 12, “Disclosure of Information.” Electronic versions of OSC Form 12 would go directly to the Document Control Branch where a case profile is to be prepared. Disclosures received by mail or by fax are to be referred by the Document Control

⁹OSC defines substantial likelihood as the determination that the agency is more likely than not to find the allegation substantiated at the conclusion of its investigation.

Branch to the DU before any action is taken, such as creating a case profile in OSC 2000.

Files received by the DU are reviewed by the unit chief to determine whether the allegations constitute disclosures under the applicable statutes and whether OSC has jurisdiction over the whistleblower, the agency, or both. The unit chief prepares a worksheet, including such case information as type of allegation, file number, and agency; this worksheet is updated as the case moves through the process. The unit chief also prepares a brief synopsis of the allegation and assigns a priority to the case; this information is entered into OSC 2000. The case priority depends on the nature of the allegation. For example, cases that appear to meet the definition of substantial likelihood that a violation has occurred and disclose substantial and specific dangers to public health or safety would be identified as Priority 1A. Others appearing to meet the substantial likelihood definition but not involving allegations of public health or safety dangers would be identified as Priority 1B. Both types of cases would be reviewed before other disclosure cases. After assigning a priority, the chief assigns the case to an attorney within the DU for further review, to contact the whistleblower, and make a recommendation regarding the substantial likelihood determination for the Special Counsel's consideration. (See enc. II for a description of the priority system for disclosure cases.)

Hatch Act Cases: The Hatch Act Unit handles requests for advisory opinions about applicability of the Hatch Act as well as complaints alleging violation of the act using OSC Form 13, "Complaint of Possible Prohibited Political Activity," although the use of the OSC Form 13 is not required to file a written complaint. Under the Hatch Act Unit's draft standard operating procedures, the unit chief assigns Hatch Act advisories to Hatch Act unit attorneys and law clerks. All Hatch Act complaints, according to these procedures, will be reviewed by the unit chief and he/she will assign a priority to cases before assigning them to unit attorneys and law clerks for a preliminary inquiry and recommendation. After the preliminary inquiry, several options are available, including closure, referral for investigation, or prosecution. If staffing within the Hatch Act Unit becomes an issue, the unit chief can refer complaints to the Investigation and Prosecution Division for preliminary inquiry, investigation, and prosecution. (See enc. II for a description of the priority system.)

USERRA Cases: According to the USERRA Unit's standard operating procedures, the unit is responsible for receiving, investigating, resolving, and prosecuting all matters that directly concern or relate to federal

employment issues affecting veterans and members of the Reserve and National Guard components of the Armed Forces. Under the directive implementing the January 2005 reorganization, the Special Counsel directed the head of the Special Projects Unit to establish a USERRA Unit, stating that OSC had in essence been assigned a special project under a demonstration project authorized by the VBIA where OSC would be handling a much larger number of cases under USERRA.¹⁰ Complainants may file OSC Form 14, "Complaint of Possible Violation of USERRA," but the form is not required to file a complaint. According to the unit's procedures, the unit chief receives and reviews each claim and enters information into a case file in OSC 2000. The unit chief assigns the file to an investigator or attorney, depending on factors such as work load, the type of allegation, and the complexity of the case.

Agency Comments

We provided a draft of this report to the Special Counsel for his review and comment. In responding, the Special Counsel noted and thanked GAO for taking the time to fully understand how OSC assigns and processes incoming cases within its organizational units. OSC's written response is included in enclosure IV. In addition, OSC provided technical comments which we have incorporated where appropriate.

We will send copies of this report to the Special Counsel, Office of Special Counsel; interested congressional committees; and other interested parties. Copies will be made available to others upon request. This report will also be available at no charge on GAO's Web site at <http://www.gao.gov>.

¹⁰Under USERRA, OSC is not authorized to receive claims directly from federal sector claimants. Instead, claimants file with the Department of Labor's Veterans' Employment and Training Service (VETS), which attempts to resolve the claim. If VETS efforts do not resolve the claim, the individual can have the case referred to OSC for possible prosecution before MSPB. However, under the VBIA demonstration project, OSC shares the responsibility with VETS to receive and resolve federal sector USERRA claims. The demonstration project began on February 8, 2005, and ends on September 30, 2007.

If you or your staff have questions about this report, please contact me on (202) 512-9490 or by e-mail at stalcupg@gao.gov. Contact points for our Office of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report were Belva Martin, Assistant Director; Sharon Hogan; Karin Fangman; David Fox; and Greg Wilmoth.

A handwritten signature in black ink that reads "George H. Stalcup". The signature is written in a cursive style with a large initial "G" and "S".

George H. Stalcup
Director, Strategic Issues

Enclosures

Enclosure I: Statutes That Govern Office of Special Counsel (OSC) Authority

Statute	Applicable provisions
Civil Service Reform Act of 1978	OSC was created under the Reauthorization Plan Number 2 of 1978. The Reform Act established OSC as a part of the Merit Systems Protection Board (MSPB) and introduced statutory protection for whistleblowers.
Whistleblower Protection Act of 1989	The act strengthens protection for whistleblowers and, thus, encourages whistleblowing. It also separated OSC from MSPB, establishing OSC as an independent federal investigative and prosecuting agency.
Office of Special Counsel Reauthorization Act of 1994	The act gives OSC 240 days from the time it receives a complaint involving a prohibited personnel practice to determine whether there are reasonable grounds for believing that such a practice has been committed. If OSC is unable to process cases within this time, the agency is required to receive the complainant's consent to keep the case open. The act also makes federal agencies explicitly responsible for informing their employees of available rights and remedies under the Whistleblower Protection Act and related laws and directs that OSC play a consultant role in the process.
Hatch Act	The act limits the political activities of federal employees, employees of the District of Columbia government, and certain employees of state and local governments who work in connection with programs, such as public health, housing, urban renewal, and area redevelopment programs, financed in whole or in part by federal loans or grants. The Hatch Act Reform Amendments of 1993 (Pub. L. No. 103-94) allow most employees of the federal government and District of Columbia government to take a more active part in political management or in political campaigns outside of the workplace, but their activities are still restricted.
Uniformed Services Employment and Reemployment Rights Act of 1994	The act prohibits discrimination against persons because of their service in the Armed Forces Reserve, the National Guard, or other uniformed services. The act also protects the reemployment rights and benefits of persons who were absent due to military service or training. OSC is not authorized to handle a Uniformed Services Employment and Reemployment Rights Act (USERRA) claim before a claimant obtains assistance from Department of Labor's Veterans' Employment and Training Service (VETS). Upon the claimant's request, VETS refers the matter to OSC, which is authorized to initiate an action on behalf of a federal employee before the MSPB to enforce the act's provisions. OSC may appeal an MSPB decision on behalf of the employee before the U.S. Court of Appeals for the Federal Circuit.
Veterans Benefits Improvement Act of 2004	Pursuant to a demonstration project established by the act, OSC has the authority to receive and investigate federal sector USERRA claims brought by persons whose social security numbers end in an odd-numbered digit. Such claims would not go through VETS. Under the demonstration project, OSC will also receive and investigate all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person's social security number. OSC is administering the demonstration project, which began on February 8, 2005, and ends on September 30, 2007.

Source: GAO.

Enclosure II: Priority Procedures for Prohibited Personnel Practice Cases, Whistleblower Disclosures, and Hatch Act Cases

The U.S. Office of Special Counsel (OSC) has a priority system for processing prohibited personnel practice cases, whistleblower disclosures, and Hatch Act complaints to allow more important cases to be handled more expeditiously.

Priority System for Prohibited Personnel Practice Cases

In November 2001, OSC issued a policy directive that adopted a priority case processing system that classifies all its prohibited personnel practice cases into one of three categories. Under this approach, cases are investigated and analyzed for a determination of violation based on the category to which they have been assigned, while also taking into consideration the statutory time limits that apply to all cases. Category 1 prohibited personnel practice cases consist of the most serious personnel actions, involving employees who are removed, suspended for more than 14 days, geographically reassigned, or reduced in grade, or more than one of the above. Category 2 cases are less severe, including cases where suspensions are 14 days or fewer, performance appraisal ratings are below “fully successful,” and denials of within-pay grade increases are being challenged. Category 3 cases involve the least serious adverse personnel actions, such as lower performance ratings that are still “fully successful,” nongeographical reassignments or details, failure to promote, reprimands, and nonselections. For category 3 cases, investigators may use streamlined procedures that may require less time and staff resources to complete and may thus be investigated before some other cases. According to OSC officials, cases may be moved from one category to another as evidence is gathered supporting or refuting the allegation and a priority designation may be cancelled and the timing and level of resources to be dedicated to the case may be reevaluated on a case-by-case basis.

In addition, within each of these categories, prohibited personnel practice cases may be designated “priority”—meaning they will receive the most prompt attention—based on the following factors: (1) meet OSC’s criteria for seeking a stay of the personnel action or already have a stay in effect; (2) be a case in which OSC believes, on the basis of the evidence, that there is a substantial likelihood that the complaint is meritorious and in which OSC will seek corrective or disciplinary action; or (3) there is a public interest in prompt resolution of the case. Within each category, whistleblower reprisal complaints are given top priority.

Priority System for Whistleblower Disclosure Cases

We have reported that OSC has used a priority system for Disclosure Unit cases since 2002. These cases are classified into three major categories, including two subcategories:

- Priority 1 cases are those that appear to be referrals to the head of the agency. Within Priority 1, there are two subcategories: Priority 1A matters are disclosures of substantial and specific dangers to public health or safety that appear to be referrals and Priority 1B are disclosures of violations of the law, rule, or regulation; gross mismanagement; a gross waste of funds; and an abuse of authority that appear to be referrals. Upon receipt of Priority 1A and 1B matters, the attorney assigned must immediately review the file and contact the whistleblower within 2 business days of receipt.
- Priority 2 cases are those that appear to be referrals to the Office of Inspector General. These cases include all disclosures of violations of law, rule, or regulation; gross mismanagement; a gross waste of funds; and an abuse of authority that appear to be referrals to the Inspector General. Generally, OSC refers disclosures involving substantial and specific dangers to public health or safety directly to the head of the agency, and not the Inspector General. Therefore, there is no need for a separate subcategory for public health and safety allegations under this priority. Upon receipt of Priority 2 matters, the attorney assigned must immediately review the file and contact the whistleblower within 3 business days of receipt.
- Priority 3 cases are those that appear to be closures and are reviewed last. Within this priority, there are also two subcategories, 3A and 3B. Disclosures that are classified as 3A are of a substantial and specific danger to public health or safety that appear to be closures. The 3B disclosures are disclosures of violations of a law, rule, or regulation; gross mismanagement; a gross waste of funds; and an abuse of authority that appear to be closures. Upon receipt of Priority 3A and 3B matters, the attorney assigned must immediately review the file and contact the whistleblower within 4 business days of receipt.

Priority System for Hatch Act Cases

Pursuant to the January 2005 draft standard operating procedures, the priority system for Hatch Act complaints primarily involves first processing those complaints that demonstrate that a serious and existing violation has occurred, which may require corrective or disciplinary action or is in the public's interest to quickly resolve. Hatch Act complaints are designated as Category I, II, or III. According to OSC, significant congressional, executive branch, or media interest may affect the level at

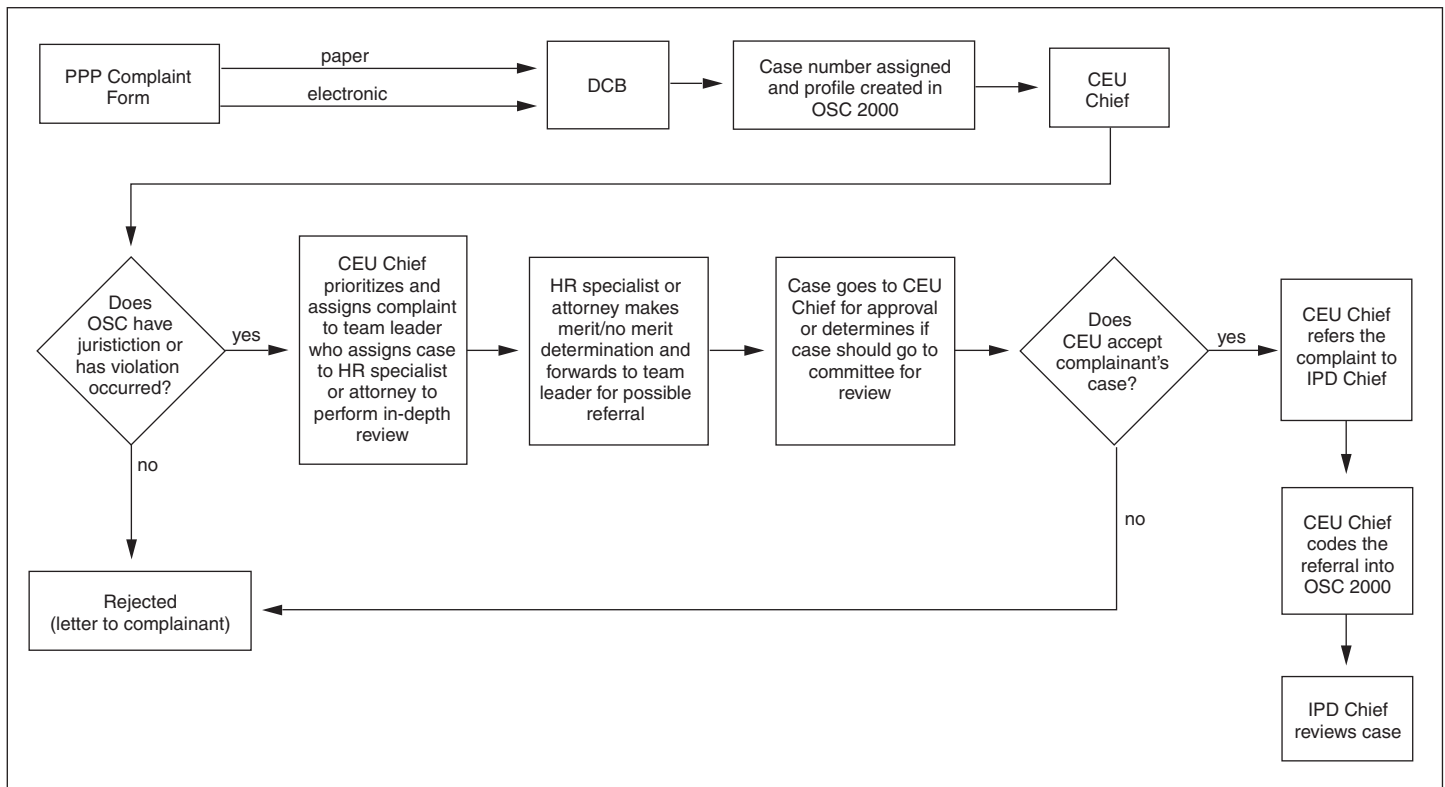
**Enclosure II: Priority Procedures for
Prohibited Personnel Practice Cases,
Whistleblower Disclosures, and Hatch Act
Cases**

which a case is categorized. Moreover, within a category, cases receiving such interest would be assigned greater priority. Category I complaints are designated high priority and involve the most serious violations, where the subject is presently engaged in the prohibited activity or where there is evidence that the violation was knowing and willful. Examples of Category I complaints include misuse of official authority/coercion cases, candidacy cases, and solicitation cases.

Category II complaints are of a midlevel priority and involve past serious violations, less serious ongoing violations, and less serious violations where there is evidence that the violation is knowing and willful. Examples of less serious violations include (1) posting or displaying partisan posters and photographs, (2) use of official title while engaged in political activity, and (3) writing a speech for a candidate while on duty.

Category III or low-level priority complaints consist of complaints involving no apparent Hatch Act prohibited activity, or past violations which do not appear to be knowing and willful.

Enclosure III: Procedures for Assigning a Prohibited Personnel Practice Complaint



Source: GAO.

Note:

- CEU Complaints Examining Unit
- DCB Document Control Branch
- HR Human Resource
- IPD Investigation and Prosecution Division
- OSC Office of Special Counsel
- OSC 2000 OSC Data Tracking System
- PPP Prohibited Personnel Practice

Enclosure IV: Comments from the Office of Special Counsel



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The Special Counsel

December 11, 2006

The Honorable David M. Walker
Comptroller General of the United States
General Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Re: Response to GAO Draft Report #GAO-07-263R

Dear Mr. Walker:

Thank you for the opportunity to formally respond in writing to the Government Accountability Office (GAO) draft Report (#GAO-07-263R), dated December 7, 2006, on *U.S. Office of Special Counsel's Procedures for Assigning Incoming Cases to and Within Organizational Units*.

As your report notes, OSC has numerous statutory responsibilities. Our primary mission is to safeguard the merit system in federal employment by protecting employees and applicants for federal employment from prohibited personnel practices, especially reprisal from whistleblowing. In addition, the agency operates a secure channel for federal whistleblowing disclosures of violations of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; and substantial and specific dangers to public health or safety. OSC also provides advisory opinions and enforces Hatch Act restrictions on political activities of individuals employed by the federal and District of Columbia governments as well as certain state and local government employees employed in connection with programs financed by federal funds. Additionally, the agency enforces the rights of federal employees and applicants for federal employment under the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994.

Because of OSC's numerous responsibilities outlined above, OSC has various and varied policies and procedures on handling incoming cases within its organizational units. These policies and procedures ensure that cases are processed in the most efficient and timely manner, and enable me and my staff to be more responsive to our customers.

I commend your staff for taking the time necessary to fully understand how OSC assigns and processes incoming cases within its organizational units. GAO's understanding of how my authority has been delegated to my career staff regarding assigning and processing cases is important for our customers to understand.

Again, thank you for taking the time to fully understand our policies and procedures, and also for giving me the opportunity to respond to this draft Report.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott J. Bloch".

Scott J. Bloch

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