ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6699 SENATE STATE AFFAIRS 1103

SB 146, An Act allowing gaming devices on ferries

SB 146 would authorize the installation and use of video gaming devices on state ferries, with revenues from the games being appropriated to fund the operation of the ferry system. It is my intent to move this bill from committee on Friday.

SB 168, An Act authorizing gambling enterprises in municipalities

SB 168 would allow certain municipalities, by adoption of an ordinance, to operate a gambling enterprise. To be eligible, a municipality must have a substantial history of gambling and be substantially dependent on tourism. The bill would allow similar gambling operations on the state ferry system.

A draft committee substitute which makes the following changes is being prepared at the sponsor's request:

1) Eliminates the provisions regarding the ferry system.

2) Transfers the responsiblity for state oversight of the municipal operations from the Department of Revenue to the Department of Commerce. This is consistent with Executive Order 74, which transferred games of chance and contests of skill.

3) Provides for a share of the gambling proceeds to be used for prevention programs, as well as for treatment and counseling of compulsive gamblers.

It is my intent to move this bill out of committee today.

HB 91, An Act relating to protection for certain public employees and certain other persons who report or participate in a proceeding connected with a matter of public concern

HB 91, the "whistleblower bill", would prohibit public employers from discharging, threatening, or otherwise discriminating against employees simply because they disclose information of public concern before a public body.

A draft committee substitute which makes the following changes is being prepared:

1) Exempts the Alaska Railroad. Current statute provides that employees of the railroad are <u>not</u> employees of the state.

2) Exempts municipalities that, by ordinance, adopt substantially similar protections. This exemption is

consistent with the resolution passed by the Anchorage Municipal Assembly.

A zero fiscal note prepared by the Court System is attached. It is my intent to move this bill out of committee today.

HB 138, An Act establishing a state employee incentive award system

HB 138 would establish a monetary incentive program to encourage employees to improve state operations. A draft committee substitute that makes the following changes is attached:

1) Requires an annual report to the Legislature detailing who received awards, the basis for each award, and the amount of the award.

2) Prohibits commissioners, deputy commissioners, assistant commissioners, directors, and deputy directors from receiving awards.

It is my intent to move this bill out of committee today.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

Bill Version: HB 91 (Judiciary)
Publish Date: 3/15/89

FISCAL NOTE

REQUEST:

Revision Date:
Agency Affected: Alaska Court System
Title: An Act relating to protection for certain public employees ...
BRU: Trial Courts
Sponsor: Labor & Commerce
Components:
Requestor: Judiciary

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel
Phone: 264-8228
Division: Alaska Court System
Date: 04/20/89

Approved by: Arthur H. Snowden, II, Administrative Director
Date: 04/20/89
Agency: Alaska Court System

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)

1989 LEGISLATIVE SESSION

Bill Version: CSHB 91 (SA)
Publish Date: HOUSE 2/6/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: An Act relating to protection for public employees
Sponsor: House Labor and Commerce Committee
Requestor: House Labor and Commerce Committee

Agency Affected: Department of Administration
BRU: Personnel
Components: Centralized Administrative Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

This bill would not require an additional appropriation.

Prepared By: David K. F. Otto DKFO
Division: Personnel
Phone: 465-4430
Date: 1-31-89

Approved by Commissioner: John M. Andrews
Agency: Department of Administration
Date: 1-31-89

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

1/4K1/013007-9/1&2

Rev: 12/88

HB91POOP.TXT
4/19/89

HB 91, WHISTLEBLOWER ACT

TO TESTIFY

REP. DONLEY, SPONSOR (GINGER BAIM)

DAVE OTTO, DIV. PERSONNEL, DEPT. ADMINISTRATION

DUNCAN FOWLER, OMBUDSMAN

POSSIBLY BOB MANNERS, N.E.A.

OTHERS (SEE WITNESS LIST)

F.Y.I.

HB 91 IS ALSO SUPPORTED BY A.C.L.U., A.F.L./C.I.O., ANCHORAGE ASSEMBLY, AND THE FOSTER PARENTS ASSOCIATION.

SIMILAR LEGISLATION HAS BEEN INTRODUCED FOR 8 YEARS -- IT PASSED THE SENATE 3 TIMES AND THE HOUSE 4 TIMES BUT NEVER BOTH BODIES IN THE SAME YEAR.

ALASKA RAILROAD CALLED -- THEY'RE INCLUDED IN THE BILL (PAGE 3, LINE 28 AND PAGE 4, LINE 18), AND WANT TO BE EXEMPTED. THEY HAVE THEIR OWN PERSONNEL PROCEDURES -- WANT AS MUCH INDEPENDENCE FROM STATE OVERSIGHT AS THEY CAN GET. THEY DID NOT TESTIFY ON THE HOUSE SIDE. THEY'RE FAX-ING WRITTEN TESTIMONY.

SENATE COMMITTEE REPORT

FURTHER

JUD
FIN

3/23/89

DATE TURNED INTO OFFICE 4-22-89

Mr. President:

STATE AFFAIRS Committee considered CSHB 91 (JUD)

protection for certain public employees and certain other persons who report or participate in a proceeding connected with a matter of public concern

and recommended

[X] replace with ___ CS HB 91 (St Aff)) [X] same title
[ ] or adopt _____ CS _____) [ ] new title
[ ] technical title change (HB only)

[ ] attached amendment(s) and

[ ] _____ letter of intent adopted

[ ] do pass

[ ] do not pass

[ ] no recommendation

[X] individual recommendations

[ ] further referral to _____

FISCAL NOTE(S) [X] zero [ ] fiscal impact [ ] appropriation no FN
[ ] new [ ] updated [ ] previous
[ ] same as previous fiscal note(s) published _____

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

Jan Faris No Rec
Tim Kelly No Rec
Lee Cadenas No Rec

Ed Lamont do pass
Chairman signature and recommendation

[ ] Committee Backup attached

NEA-ALASKA

AFFILIATED WITH THE NATIONAL EDUCATION ASSOCIATION

ANCHORAGE REGIONAL OFFICE
1411 W. 33RD AVENUE
ANCHORAGE, ALASKA 99503
(907) 274-0536

JUNEAU OFFICE
105 MUNICIPAL WAY, SUITE 302
JUNEAU, ALASKA 99801
(907) 586-3090

FAIRBANKS REGIONAL OFFICE
2118 CUSHMAN STREET
FAIRBANKS, ALASKA 99701
(907) 456-4435

April 18, 1989

To: Senator Pat Pourchot, Chair
Members, Senate State Affairs Committee

Re: CS for House Bill No. 91; "An Act relating to protection for certain public employees and certain other persons who report or participate in a proceeding connected with a matter of public concern."

NEA-Alaska supports CS for HB 91 and encourages your favorable consideration. We feel that this legislation is a positive effort to improve the administration of government at all levels in Alaska.

School district employees have been subjected to reprisals for speaking out on matters of public concern and need this kind of protection if they are to be more secure in their work environment.

Passage of the CS for HB 91 will enable all public employees to be more productive employees and more confident in fulfilling their responsibilities as citizens as well.

Thank you for your consideration of our position.

Respectfully submitted,

Bob Manners
Executive Secretary

Judy Salo
President

HOUSE LABOR AND COMMERCE COMMITTEE
ALASKA STATE LEGISLATURE P.O. BOX Y, JUNEAU 99811
(907) 465-3892

February 6, 1989

M E M O R A N D U M

To: Members, House Judiciary Committee

From: Representative Dave Donley, Chair
House Labor and Commerce Committee

Re: HB 91 - "Whistleblower" protection

The House State Affairs CS for HB 91, relating to protection of public employees who disclose certain public information, is currently before the House Judiciary Committee.

Modeled after other states "whistleblower" laws, HB 91 was introduced by the House Labor and Commerce Committee to provide protection for public employees who disclose information of public concern before a public body. A similar measure has been before this Legislative body for each of the last six years. Unfortunately, none has yet passed into law.

The House State Affairs CS adopted three amendments (see attached) to the bill as filed that:

- Specifically include school districts and REAA's under the definition of "public employer"
- Broaden the definition of "public body"
- Provide that the protections under the act do not apply unless the employee has reasonable cause to believe the information reported is a matter of public concern and that they report the information in good faith.

HB 91 is a much needed bill that will assure that the Legislature and other public bodies receive critical public information. I urge your support.

MOA Resolution in support of HB 91.

APPROVED
Date: 4-11-89

Submitted by: Mayor

Prepared by: Municipal Manager

For reading: April 11, 1989

ANCHORAGE, ALASKA
AR NO. 89-92(S)

A RESOLUTION OF THE ANCHORAGE MUNICIPAL ASSEMBLY ENDORSING THE CONCEPT OF HOUSE BILL NO. 91 (HB 91) RELATING TO WHISTLE BLOWERS PROTECTION

WHEREAS, HB 91 has passed the House and is before the State Senate Affairs Committee; and

WHEREAS, the Act provides protection for certain public employees and certain other persons who report matters of public concern; and

WHEREAS, the Act includes protection for municipal employees who report on matters of municipal concern; and

WHEREAS, the Municipality of Anchorage wishes to encourage public employees to report violations of municipal law, regulation or ordinance; a danger to public health or safety; or gross mismanagement, a substantial waste of funds, or a clear abuse of authority; and

WHEREAS, the Municipality of Anchorage believes passage of this Act will improve the provision of municipal government to the benefit of the general public.

NOW, THEREFORE, the Anchorage Municipal Assembly resolves:

Section 1: That this body endorses the concept embodied in HB 91 and urges passage of such a concept by the Legislature. The final bill should contain a balance between the employers' need to manage the workforce and the public interest relative to the protection of individuals reporting matters of public concern. The final bill should also provide that local governments will establish their own whistle blowers protection ordinances.

admin. didn't want as broad as HB 91—

Section 2: That copies of this resolution be forwarded to the Governor and Legislature.

PASSED AND APPROVED by the Anchorage Assembly this 11th day of April, 1989.

Chairman

Mayor concerned whistle-blowers would get him in trouble! MOA decided not to take him any so accepted his version.

ATTEST:

Municipal Clerk

Deputy

Joe Griffith 4-20-89

LDC:mr
m2/ar1

On grounds wrongs mun.'s panel didn't give Onlaidsman chance to respond.

AM 357-89

04. 19. 89 09:18AM *MOA PURCHASING P03

From ..... *Michael Mills*

4/5/89

Duncan —

This Resolution on the Whistleblowers Act was passed but later reconsidered by Wood and Campbell to allow the Administration to offer some changes to the resolution at next weeks meeting (4-11-89). I will keep you posted.

Michael

Municipality of Anchorage
Office of the Ombudsman
Michael Mills, Ombudsman
343-4461

Submitted by: Asssemblymen Wood and Kubitz
Prepared by: Office of the Ombudsman
For reading: April 4, 1989

ANCHORAGE, ALASKA
AR NO. 89-92

A RESOLUTION OF THE ANCHORAGE MUNICIPAL ASSEMBLY SUPPORTING HOUSE BILL NO. 91 (HB 91) RELATING TO WHISTLE BLOWERS PROTECTION

WHEREAS, HB 91 has passed the House and is before the State Senate Affairs Committee; and

WHEREAS, the Act provides protection for certain public employees and certain other persons who report matters of public concern; and

WHEREAS, the Act includes protection for municipal employees who report on matters of municipal concern; and

WHEREAS, the Municipality of Anchorage wishes to encourage public employees to report violations of municipal law, regulation or ordinance; a danger to public health or safety; or gross mismanagement, a substantial waste of funds, or a clear abuse of authority; and

WHEREAS, the Municipality of Anchorage believes passage of this Act will improve the provision of municipal government to the benefit of the general public.

NOW, THEREFORE, the Anchorage Municipal Assembly resolves:

Section 1: That this body endorses HB 91 and urges its passage by the Legislature.

Section 2: That copies of this resolution be forwarded to the Governor and Legislature.

PASSED AND APPROVED by the Anchorage Assembly this _____ day of _____, 1989.

_____
Chairman

ATTEST:

_____
Municipal Clerk

MM:eg
DOCA/AR33

ALASKA RAILROAD CORPORATION

P.O. Box 7-2111 • Anchorage, Alaska 99510-7069

VIA TELECOPY

April 18, 1989

The Honorable Pat Pourchot, Chairman
Senate State Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: CSHB 91, An Act Relating to Protection for Certain Other Persons Who Report or Participate in a Proceeding Connected With a Matter of Public Concern.

Dear Chairman Pourchot:

We understand that the Senate State Affairs Committee will be considering CSHB 91 during the course of a hearing on April 19, 1989. Trusting that they will be useful and beneficial, I would like to offer the following comments regarding this legislation on behalf of the Alaska Railroad Corporation ("ARRC").

I. Introduction

As you know, CSHB 91 is the proposed "Alaska Whistleblower Act." Evidently mirroring federal laws, the bill proposes additional protection for public employees who speak out against their employers' gross mismanagement of agency affairs. I use "additional protection" because the courts have already decided that federal and state constitutional guarantees apply to public employment relationships.

Most public employees are protected from significant disciplinary actions in the absence of just cause and appropriate due process procedures such as reasonable notice, hearing, right to cross-examine and call witnesses, etc. Importantly, public employees' free speech rights are also safeguarded. In addition, the courts have developed an "implied covenant of good faith and fair dealing" to insure that employers act reasonably and in good faith when it comes to matters of discipline. However, your committee will decide whether this bill is truly needed to supplement the already substantial protections afforded public employees by our constitutions and the courts. Our point is simply to request that ARRC be exempted from the new law, if it is passed.

II. Discussion

When ARRC's charter was developed, the new corporation was set on a course to create economic viability for the Alaska Railroad, and to steer clear of reliance on annual state appropriations for its operating funds and capital improvements. Community and business leaders were appointed to its board to oversee operations and to insure that the railroad's operations were conducted prudently and in a business-like fashion. In order to facilitate its later sale or transfer to the private sector, ARRC's enabling legislation also directed that the corporation set up its own operational and management plans and policies. For example, it was exempted from the state personnel system. ARRC put into place its own salary administration program, collective bargaining agreements, employee discipline rules, health, dental, and life insurance plans, retirement program, tax deferred savings plan, worker's compensation program, and ethics code.

Despite the philosophy which supports and requires ARRC's operational autonomy, employee protections were set out in the Alaska Railroad Corporation Act to prevent abuses, or perceived abuses, which occurred when the railroad company was owned by the federal government. In our opinion, those protections are already broad enough to fulfill the purposes of the Alaska Whistleblower Act.

For example, AS 42.40.885 directs that the corporation may not directly or indirectly "require or coerce an employee to participate in any way in any activity or undertaking unless the activity or undertaking is related to the performance of official duties." Hence, employees may not be compelled to violate state, federal, or municipal laws or regulations. Should such violations occur, or if an employee notes some troublesome mismanagement, waste of funds, or public health or safety issue, and desires to discuss it publicly, ARRC is also prohibited from any attempt to "restrict after-working-hour statements, pronouncements or other activities, not otherwise prohibited by law or personnel rule, of an employee, if the employee does not purport to speak or act in an official capacity." AS 42.40.885(a)(5). An employee who has spoken out under the terms of this statute may claim its protections if direct or indirect reprisals are suspected.

Unlike a state agency where internal and external controls are aimed at the conservation of appropriated funds, ARRC's management plans implement the more difficult task of maximizing bottom line returns on financial statements while simultaneously providing safe, economical, and efficient transportation. Unjustified state regulation of its activities can frustrate and even destroy the operational flexibility which has assured ARRC's success in the marketplace.

III. Conclusion

Including ARRC within the Alaska Whistleblowers Act is inconsistent with the legislature's original direction that the railroad corporation operate with a high degree of operational and managerial autonomy. This philosophy has proved effective and has assured the railroad's economic vitality and self-sufficiency. Combined with state and federal constitutional guarantees which already constrain public employers' inappropriate actions, the employee protections set forth in ARRC's enabling legislation would indicate that, at least with respect to ARRC, the Act is duplicative and unnecessary.

Accordingly, we respectfully request that ARRC be specifically exempted from CSHB 91 by deleting "the Alaska Railroad Corporation," in section 39.90.130(2), and inserting ", but not including the Alaska Railroad Corporation" after "rural educational attendance area." "But not" should also be inserted before "including the Alaska Railroad Corporation" in section 39.90.130(3)(D).

Please let me know whether we can provide further information which supports these concerns and comments.

Sincerely yours,

Larry D. Wood

Larry D. Wood
General Counsel

cc: ARRC Board of Directors
F. G. Turpin, President & CEO

8185L

State of Alaska
Ombudsman
Duncan C. Fowler

Reply to:

- P.O. Box 102636
  Anchorage, AK 99510-2636
  (907) 563-3673
  (800) 478-2624
- P.O. Box WO
  Juneau, AK 99811-3000
  (907) 465-4970
  (800) 478-4970
- P.O. Box 74358
  Fairbanks, AK 99707
  (907) 452-4001
  (800) 478-3257

February 17, 1989

Representative Max Gruenberg
Representative Peter Goll
Co-Chair, House Judiciary Committee
Post Office Box V
Juneau, Alaska 99811-3100

Dear Representative:

Enclosed is a position paper on HB 91, the Whistle Blowers legislation. I will be in my Anchorage office the week of February 20th and not available to testify in support of this legislation. Please note the suggested improvements for the bill mentioned in my position paper.

For the record, you and the committee should know that this legislation is needed, but only for isolated instances of abuse. I have found over the years that, by far, the large majority of public employees and their supervisors are good public servants. They accept disagreements on issues as part of their jobs and few would ever consider retaliation as a response.

Please give me a call in Anchorage if you have any questions about my suggestions. I have asked Kim Elton of my staff to attend your hearing in case he could be of help. I believe this legislation will be important in helping to improve Alaska's government. It promises to protect the little guy or gal who might have courage to speak out against instances of waste, fraud or mismanagement.

Sincerely,

Duncan C. Fowler
Ombudsman

DCF:pjc
cc: Rep. Mike Davis, Vice Chair
Rep. Cliff Davidson
Rep. Johnny Ellis
Rep. Terry Martin
Rep. Mike Miller

HOUSE LABOR AND COMMERCE COMMITTEE

ALASKA STATE LEGISLATURE

P.O. BOX Y, JUNEAU 99811

(907) 465-3892

January 16, 1989

M E M O R A N D U M

To: Members, House Labor and Commerce Committee

From: Representative Dave Donley, Chair
House Labor and Commerce Committee

Re: Proposed Committee Legislation - "Whistleblowers"

The attached bill draft (Work Order #6-0327A - Cramer) is similar to legislation that has been before this body every year since 1984. Last year's version, HB 168, was introduced by the House Labor and Commerce Committee. It passed the House 38 to one and died on adjournment in the Senate Labor and Commerce Committee.

The draft bill applies only to public employees and prohibits employers from discharging, threatening, or otherwise discriminating against an employee in terms of compensation, terms, conditions, location or privileges of employment because the employee reports or is about to report to a public body a matter of public concern or because the employee is requested to testify or participate in a court action or an official inquiry by a public body.

The bill further prohibits employers from disqualifying a public employee or other person who reports a matter of public concern from eligibility to bid on public contracts, receive land under a law of the state or municipal ordinance or any other right, benefit or privilege they are entitled to.

The bill includes restrictions on this protection under certain circumstances, listed in AS 39.90.100(c). Violation of this law is punishable by a civil fine of not more than $10,000. In addition, a person who alleges a violation of this law may bring a civil action.

Date: April 19, 1989
To: State Affairs Committee, Alaska State Senate,(Pat Pourchot)
From: Jamie Bollenbach, Executive Director, AkCLU
Re: HB 91
Attn: Sandra Schubert

The Alaska Civil Libertiss Union, a private membership organization acting to promote and protect the Bill of Rights, strongly supports House Bill 91. The ability of a public employee to report to a public body a matter of public concern without fear of retribution is a policy that promotes the responsibility of state agencies. HB 91 also extends the spirit of the First Amendment's protection of free speech to employees acting in the public interest.

Of particular concern to the AkCLU is the possibility under current law that an employee <u>required</u> to report to a public body may be terminated or reprimanded for compelled testimony. A public employee in this situation is forced to either comply with the law and face the loss of a job or other sanctions from employers, or to violate the law and withold relevant information from the courts, the legislature, or other public bodies. The protection of these employees is critical for fairness in the workplace and for the accuracy of testimony.

The AkCLU would oppose amendments to the bill that weaken the protections for employees, place undue restrictions on the availability of these protections, or add language confusing to employees or employers affected by the law.

At least nineteen states have some form of statutory protection in this area. As currently drafted, HB 91 would facilitate the honest and responsible operation of state government by encourging reports of questionable activity, and would contribute to fair dealing and free speech for public employees.

The AkCLU would like to thank the Labor and Commerce Committee for their consideration in this matter. We would be happy to answer questions or provide further information on this topic.

The C
United

Contents

- Discriminate based on race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation;
- Solicit or consider employment recommendations based on factors other than personal knowledge or records of job related abilities or characteristics;
- Coerce the political activity of any person;
- Deceive or willfully obstruct any person from competing for employment;
- Influence any person to withdraw from competition for any position to improve or injure the employment prospects of any other person;
- Give unauthorized preference or advantage to any person to improve or injure the employment prospects of any particular employee or applicant;
- Engage in nepotism (hire or promote or advocate the hiring or promotion of relatives within the same agency component);
- Take reprisal against an employee for whistleblowing;
- Take reprisal against an employee for the exercise of an appeal right;
- Discriminate based on personal conduct which is not adverse to on-the-job performance of the employee, applicant or others;
- Violate any law, rule or regulation which implements or directly concerns the merit system principles.

It should be noted that while the Special Counsel is statutorily authorized to investigate allegations of age, race or sex discrimination, procedures and facilities for investigating such complaints have already been established in the agencies and the Equal Employment Opportunity Commission. To avoid duplicating those procedures, the Special Counsel will normally defer a complaint involving discrimination to those agencies' procedures rather than initiate an independent investigation. (5 C.F.R. 1251.3.)

An employee may request the Special Counsel to seek to postpone or "stay" an adverse personnel action pending investigation by the Office of the Special Counsel. If the Special Counsel has reasonable grounds to believe that the proposed action is the result of a prohibited personnel practice he may ask the MSPB to postpone the action until an investigation can be completed. The Special Counsel is not authorized to order a stay, rather, he petitions the MSPB to order such relief.

Hatch Act

The Hatch Act prohibits federal employees from participating in certain political activities. Specifically, it prohibits the use of official authority or influence to interfere with or affect the result of an election. It also prohibits taking an active part in political management of partisan campaigns. The law does not restrict an employee's right to vote in any election, or to publicly or privately express opinions, participate in non-partisan activities, or petition Congress. Some state and local government employees are also subject to less servere political activity restrictions.

Informational materials pertaining to the Hatch Act may be obtained free of cost by contacting the OSC. (See "Where to File".)

If you believe that a violation of the Hatch Act has occurred, you may file a complaint with the Special Counsel who will investigate and, if necessary, prosecute the individual breaking the law. OSC will also give advisory opinions as to whether or not any specific political activity an employee wishes to undertake violates the law. (See "Where to File".)

Who Is Covered

Anyone may disclose whistleblowing information to the Special Counsel for referra to the head of an agency. However, the Special Counsel may order an investigation and require a report from the agency head only if the information is received from current or former federal employees, or applicants for positions with the agency.

With few exceptions prohibited personnel practices apply to federal job applicants or current or former federal employees in any agency of the Executive branch, the Administrative Office of the U.S. Courts or the Government Printing Office, but not to employees in:

- A government corporation;
- The Central Intelligence Agency, Defense Intelligence Agency, National Security Agency or certain other intelligence agencies excluded by the President;
- The General Accounting Office;
- The U.S. Postal Service or Postal Rate Commission; or
- The Federal Bureau of Investigation.

The Special Counsel also investigates and advises on alleged violations of the Hatch Act governing political activity of employees in any agency in the Executive branch, the U.S. Postal Service, Postal Rate Commission and District of Columbia Government.

After the Investigation

Following investigation, the Special Counsel may recommend that an agency take corrective action if there is reason to believe a prohibited personnel practice has occurred, exists or is to be taken.

If the agency does not take the recommended action after a reasonable period, the Special Counsel may request the MSPB to order corrective action. The Special Counsel may also request MSPB to order disciplinary action against an employee who violates civil service laws, rules and regulations. The charged employee's rights in such cases are set forth in the MSPB regulations. A complaint may be filed against an employee for knowing and willful refusal or failure to comply with an MSPB order.

The Special Counsel may request an order withholding federal funds from a state or local agency if:

- The agency has failed to remove an employee found by MSPB to have engaged in prohibited political activity; or
- Such employee is reemployed within 18 months in a state or local agency of the same state.

The Special Counsel may intervene in any case before MSPB and may file complaints before the Board requesting review of the validity of any rule or regulation issued by the Office of Personnel Management.

Evidence of a criminal violation which arises during an investigation will be referred to the Department of Justice.

How To File A Complaint

Most employees' problems involving labor relation are resolved within the agency either through informal discussion with a supervisor or through established grievance procedures. Certain matters, such as adverse personnel actions, may also be resolved under an appeals procedure where an ap-

peal right is granted by law or regulation. Employees are encouraged to use these channels whether or not they also complain to the Special Counsel. Labor relations problems do not fall within the limited jurisdiction of the OSC, unless prohibited personnel practices are involved.

Any employee may report an alleged prohibited activity to the Office of the Special Counsel without being represented by an attorney. There is no time limit on filing a complaint. However, violations that occurred prior to January 1979, when OSC was created, do not fall within the purview of OSC jurisdiction. Although the OSC cannot give advisory opinions except in matters involving the Hatch Act, it will clarify its jurisdictional authority and advise the employee of information needed for OSC to take action on a problem. Employees filing complaints with the OSC are encouraged to respond promptly to requests for additional information in order to expedite investigations.

Information submitted to the Office of the Special Counsel should be in writing. The OSC will provide standardized complaint forms to employees upon request. (See "Where to File".) At a minimum, the following should be included in the submission:

- Full name, address and phone number at which the complainant may be reached for more information, or for notification of action taken. The identity of the individual will not be revealed without prior consent except in those instances when immediate action is required to carry out the responsibilities of the Special Counsel. The office will attempt to contact the complainant first in such instances.
- The name and address or location of the federal agency involved, including the specific office or activity that is the subject of the complaint.
- The job title, pay grade and employment status of the employee or employees affected by the allegedly prohibited actions.
- An indication whether the information submitted shows:
  - a prohibited personnel practice or other activity prohibited by civil service law, rule or regulation; or
  - a violation of other law, rule or regulation; or
  - mismanagement, a gross waste of funds, abuse or authority or substantial and specific danger to public health or safety.
- A brief and accurate statement of those facts believed to provide evidence of prohibited activity or wrongdoing, and a concise description of the actions and events being reported. If the information concerns a prohibited personnel practice, indicate the specific personnel action taken or proposed.

Always indicate:

- the specific actions that show wrongdoing;
- who was involved in the action;
- when the action was taken, or when the proposed action is to occur;
- any pertinent documentary evidence or information currently in possession of the complainant; and
- whether or not consent is given to disclose the identity of the employee filing the complaint, if this is necessary to take legal action.

The OSC depends upon complete and accurate information to provide the basis for its actions; therefore, additional information may be requested from the complainant if the OSC cannot determine what action is appropriate or whether the matter falls within its jurisdiction.

Where To File A Complaint

The complaints Examining Unit (CEU) in the OSC headquarters office receives, reviews and evaluates all incoming complaints and refers matters determined to warrant further investigation to the appropriate investigative office.

All complaints, reports and requests for information should be sent to:

Office of the Special Counsel
Merit Systems Protection Board
Complaints Examining Unit
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

OSC Telephone Numbers to Note

Complaints Examining Unit.	(202) or (FTS) 653-7188
Whistleblower Hotline	(202) or (FTS) 653-9125
Hatch Act Unit	(202) or (FTS) 653-7143
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☆ U.S. GOVERNMENT PRINTING OFFICE: 1984—464-855

NOTE

State Law Protection of At-Will Employees Who "Blow the Whistle"

I. INTRODUCTION

In recent years there has been a tremendous increase in litigation concerning the common-law "at-will employment" rule, which provides that, absent a contract for employment for a definite period of time, an employer has the right to discharge any employee at any time, for any reason. It is estimated that as many as seventy percent of all private sector workers are considered at-will employees, and thus, arguably not entitled to protection against unjust dismissal.[1] For most of this country's history, the at-will rule went unchallenged, or at least seldom successfully challenged. However, in a trend that developed slowly, but accelerated in the late 1970s, courts in many jurisdictions came to view the doctrine as manifestly unfair and, hence, created exceptions to it.[2]

These judicially created exceptions can be placed into three distinct categories: (1) actions for breach of an express or implied contract; (2) actions in tort for abusive or wrongful discharge under a theory of intentional infliction of emotional harm or interference with employment relations; and (3) actions, essentially in tort, arguing that a discharge has violated the public policy of the state in which it arose.[3] This Note will focus upon the last of these theo-

1. *See Committee on Labor and Employment Law, At-Will Employment and the Problem of Unjust Dismissal*, 36 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 170 (1981). *See also* 9A Indiv. Empl. Rts. Man. (BNA) § 505:2 (Jan. 1, 1987) (estimates of the actual number of workers range from 50 million to almost 76 million).

2. *See generally* Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201 (1985); Murg & Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329 (1982); Olsen, *Wrongful Discharge Claims Raised by At-Will Employees: A New Legal Concern for Employers*, 32 LAB. L.J. 265 (1982); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983); Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Note, *Employment At Will—Limitations on Employers' Freedom to Terminate*, 35 LA. L. REV. 710 (1975); Annotation, *Modern Status of Rule that Employer May Discharge At-Will Employee For Any Reason*, 12 A.L.R.4th 544 (1982).

3. The three categories are "natural" ones. The first, the implied (or express) contract theory, relies upon proof that the employer made a promise of continued employment absent just cause for termination. Courts have held that such a promise may be established by oral representations, a course of dealing, employment

ries—the so-called "public policy exception" to the at-will rule. More specifically, this Note will address one particular type of claim that is recognized as a public policy exception: actions by an employee who reports or exposes illegal or unsafe conduct on the part of his employer and is subsequently discharged in retaliation—the "whistleblower" exception.[4] The scope of this article is further limited to a discussion of the protection of private sector, at-will employees; thus, it will not address the protection of public sector employees or those covered by collective bargaining agreements.[5]

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handbooks, or personnel manuals. *See* Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 170 (1984); Pugh v. See Candies, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880 (1980). Related to this basic theory is the situation in which a discharged employee attempts to show a breach by the employer of an "implied convenant of good faith and fair dealing," which exists in every contract, and which in this case would protect an employee from termination for bad cause. *See* Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

The second category develops the tort theory of abusive discharge. The employee seeks to prove intentional infliction of emotional harm by the employer, or interference by the employer with the employment relation (for example, with the right to file for workers' compensation or to file a sex discrimination charge), causing damages to the employee. Successful litigation in this area is rare and narrowly construed. *See* Alcorn v. Anbro Eng'g Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970); Howard Univ. v. Best, 484 A.2d 958 (D.C. 1984); Gates v. Life of Mont. Ins. Co., 668 P.2d 213 (Mont. 1983). *See also* Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

The third category, and the one that this Note addresses, is the public policy exception. Although essentially an action in tort, this exception leads the courts who have adopted it to concentrate on the harm incurred by an unjustly discharged employee and by the public. Proponents of this theory assert that an employee should not be discharged for asserting basic rights that society has an interest in protecting. *See* Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983); Peterman v. Local 396, International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Kelsay v. Motorola Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Nees v. Hocks, 282 Or. 210, 536 P.2d 512 (1975).

4. *See generally* R. NADAR, P. PETKAS & K. BLACKWELL, WHISTLEBLOWING (1972); A. WESTIN, WHISTLEBLOWING! LOYALTY AND DISSENT IN THE CORPORATION (1981); Kohn & Kohn, *An Overview of Federal and State Whistleblower Protections*, 4 ANTIOCH L.J. 99 (1986); Malin, *Protecting the Whistleblower From Retaliatory Discharge*, 16 U. MICH. J.L. REF. 277 (1985); Rogine, *Toward a Coherent Legal Response to the Public Policy Dilemma Posed by Whistleblowing*, 23 AMER. BUS. L.J. 281 (1985); Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Comment, *Protecting the Private Sector At-Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WIS. L. REV. 777.

5. Both state and federal laws guarantee the public sector employee some protection against arbitrary or unjust dismissal. The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified in scattered sections of 5 U.S.C. (1982)), protects federal employees. Among its several sections are provi-

Until very recently, principled or conscientious employees who were brave enough to call attention to their employer's wrongdoings did not fare particularly well in actions for wrongful or abusive discharge.[6] Even today, a successful challenge to dismissal from employment under this theory is no minor feat because the law in this area can be described as inconsistent or, at best, perhaps more aptly as in a severe state of disarray.[7] It is clear that no general rule is accepted as a framework for analyzing a whistleblower claim, as

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sions for whistleblower protection and disclosure investigation. 5 U.S.C. § 2302(b)(8) (1982). However, these sections have thus far proven to be ineffective. *See Special Focus: Whistleblower and the Public Interest*, 4 ANTIOCH L.J. 1 (1986) (Introduction by Patricia Schrieder: D-Colorado: Chairwoman of the Subcommittee on Civil Service: U.S. House of Representatives) (ineffective or unconcerned special counsel in charge of enforcing the whistleblower protection provisions have "crippled" the protection provided by that legislation). The specific employee protection provisions for whistleblowing that are written into individual federal laws are far more effective. Examples include the whistleblower provisions in the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 660(c) (1982); the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215 (1975); the Federal Mine Health and Safety Act (FMHSA), 30 U.S.C. § 815(c) (1979); and the various environmental protection laws, such as the Solid Waste Disposal Act, 42 U.S.C. § 6971 (1982).

Most states provide protection against arbitrary and unjust dismissal for their public sector employees as well, either through laws allowing collective bargaining between employee unions and the state or local municipalities, or through specific protective legislation. One author estimates that over 50% of all state and local government employees have bargained for some sort of "just cause" protection. Peck, *Unjust Discharge From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8-9 (1979). Several states have passed legislation designed to protect public sector whistleblowers only. At this writing they are: DEL. CODE ANN. tit. 29, § 5115 (1983); IND. CODE ANN. § 4-15-10-4 (Burns 1987); KAN. STAT. ANN. § 75-2973 (1984); KY. REV. STAT. ANN. § 61.990 (Michie/Bobbs-Merrill 1986); MD. ANN. CODE art. 64A, § 12G (1983); OR. REV. STAT. § 240.740 (1985); TEX. REV. CIV. STAT. ANN. art. 6252-16a (Vernon 1987); UTAH CODE ANN. § 67-21-3 (1986); WASH. REV. CODE ANN. § 42.40.010 (1987); WIS. STAT. § 230.81-88 (1987). A few states have enacted legislation to protect private sector whistleblowers as well. *See infra* note 76 and accompanying text.

6. As noted, there was little litigation concerning the at-will rule until recently. Professor Summers comments:

> Ten years ago a symposium on the subject of employment at will would have been unthinkable. There would have been few commentators willing to write on the subject, and few others interested in reading about it. The misbegotten legal doctrine was mechanically, and at times brutally, applied by the courts but was seldom examined or questioned. It was one of our inherited legal curses which we mindlessly accepted.

Summers, *Introduction: Individual Rights in the Workplace*, 16 U. MICH. J.L. REF. 201 (1983). The early leading case in whistleblower litigation is Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974), discussed *infra* in text accompanying notes 19-30.

7. One author describes the recent judicial attempts to deal with the subject as "patchwork, ad hoc, and inconsistent." He calls for the enactment of uniform legislation as the only way to remedy a situation that at present is "neither rational or humane." Rongine, *Toward a Coherent Response to the Public Policy Dilemma Posed by Whistleblowing*, 23 AMER. BUS. L.J. 281, 297 (1985).

the traditional rule denying protection once was. This Note will provide an overview of the laws created by the few courts and legislatures that have examined and acted upon the issue. It will begin with an examination of decisions in those states that decline to accept the idea of a public policy exception to the traditional rule and then analyze the varying degrees to which other states provide protection for employees who presume to report the illicit activities of their employers.

II. The Public Policy Exception for Whistleblowers

A. *No Exception Recognized*

Several jurisdictions decline to deviate from the traditional at-will rule under any theory.[8] In a state that does not recognize any public policy exception, the outcome of the discharged whistleblower's action, though harsh, is easily determined: there can be no recovery for abusive or retaliatory discharge because there is no theory under which to recover.

The Texas Court of Appeals' decision in *Maus v. National Living Centers, Inc.*[9] demonstrates the harshness of such a rule. In *Maus* a nurse's aide was discharged for complaining to her supervisors about patient neglect. The court affirmed the trial court's grant of summary judgment for the employer and declined to "recognize a new cause of action for retaliatory discharge" absent a determination by either the state legislature or supreme court.[10] Although it recognized the importance of policing the operation of nursing homes, the court would admit only that it stood "at the crossroads

8. At this writing, at least nine state courts refuse to recognize a public policy exception to the traditional rule in the absence of legislation. *See* Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977); Lampe v. Presbyterian Medical Center, 41 Colo. App. 465, 590 P.2d 513 (1978); Haney v. Laub, 312 A.2d 330 (Del. Super. Ct. 1973); DeMarco v. Public Supermarkets, Inc., 384 So. 2d 1253 (Fla. 1980); Goodroe v. Georgia Power Co., 148 Ga. App. 193, 251 S.E.2d 51 (1978); Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978); Gil v. Metal Serv. Corp., 412 So. 2d 706 (La. App. 1982), *cert. denied*, 414 So. 2d 379 (La. 1982); Green v. Amereda-Hess Corp., 612 F.2d 212 (5th Cir. 1980); Phung v. Waste Management, Inc., 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986).

9. 633 S.W.2d 674 (Tex. Ct. App. 1982).

10. *Id.* at 677. In its analysis of plaintiff's public policy argument, the court recognized that "[t]here is a trend toward limiting the employer's right to discharge his employees." *Id.* at 676 n.1. However, the court held that such a trend, without specific guidance, was not reason enough to exceed its "proper authority within the legal framework." *Id.* at 676. The harshness of the rule in this case is further exemplified by the fact that, while the Texas court refused to recognize an exception for employees who report the wrongdoing of their employers, a state statute existed that required nursing home employees to report cases of neglect to the state licensing agency or to law enforcement officials. Failure to report is a misdemeanor. *Id.* at 675. *See* Tex. Rev. Civ. Stat. Ann. art. 4442C § 16 (Supp. 1982). Thus, the employee in *Maus* was caught between the threat of legal sanctions and discharge.

of *two* important public policies:"[11] the proper and safe functioning of the state's health care facilities, and the traditional doctrine of judicial restraint and deference to the legislative function of promulgating state laws and creating public policy. The court held that the latter policy was overriding.[12]

A more recent application of this reasoning is found in the Ohio Supreme Court's opinion in *Phung v. Waste Management, Inc.*[13] in which the court held that an employee discharged for reporting violations of certain environmental regulations to his supervisor did not state a cause of action.[14] The court reasoned that because the legislature had not yet created an exception for abusive discharge, one did not exist.[15]

Similarly, the Georgia Court of Appeals in *Goodroe v. Georgia Power Co.*[16] held that a security officer who claimed he was discharged because he was about to uncover evidence of criminal activities by a superintendent of his employer did not have a cause of action. The court in *Goodroe* likewise deferred to the legislature's failure to provide such an exception to the at-will rule.[17]

B. *Limited Exception Recognized*

Several states, however, do recognize a general public policy

11. *Id.* at 676 (emphasis added). The court posed its determinative question as "whether the time has come for the nursing home policy [requiring employees to report neglect] to override the employment at-will doctrine." *Id.* It found it could not answer affirmatively without more guidance.

12. *Id.*

13. 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986).

14. *Id.* at 103, 491 N.E.2d at 1117. The court of appeals, in finding that such a cause of action existed, stated that "[p]ublic policy requires that there be an exception to the absolute right of an employer to discharge an employee at will when such employee is discharged for reporting to his employer or proper authorities that the employer is conducting its business in violation of the law." *Id.* at 101, 491 N.E.2d at 1115-16 (quoting from the court of appeals' unpublished opinion).

15. The court stated simply that "an at-will employee who is discharged for reporting to his employer that it is conducting its business in violation of the law does not have a cause of action against the employer for wrongful discharge." *Id.* at 103, 491 N.E.2d at 1117.

16. 148 Ga. App. 193, 251 S.E.2d 51 (1978).

17. *Id.* at 194, 251 S.E.2d at 52. *See* Perdue v. J.C. Penney Co., 470 F. Supp. 1254 (S.D.N.Y. 1982). In *Perdue*, plaintiffs, who had conducted an internal audit of the employer, uncovered an illegal bribery or kickback scheme. They claimed that they were discharged to cover up their conclusion. The court applied Texas law and held that the wrongful purpose on the part of the employer was irrelevant. *See also* Martin v. Platt, 386 N.E.2d 1026 (Ind. App. 1979) (employees claimed that they were discharged for reporting a supervisor who was receiving kickbacks; the court held that what constitutes public policy is a decision better left to the legislature); Pavolini v. Bard Air Corp., 451 N.Y.S.2d 288, 88 A.2d 714 (1982) (after noting the merits of the case and the harshness of the rule, the court refused to recognize a cause of action by a discharged at-will employee on public policy grounds).

exception to the at-will rule. These exceptions are varied in scope, and not all are broad enough to include whistleblowing activity.[18] Some state courts create a public policy exception so narrow that it is often impossible for the whistleblower to enlist its protection. For example, in *Geary v. United States Steel Corp.*,[19] the seminal case in whistleblower litigation, the Pennsylvania Supreme Court considered the discharge of a salesman who had repeatedly voiced to his superiors his concerns over the safety of a particular product he was selling. When his protestations were ignored, he took the matter to a company vice-president.[20] The product was reevaluated and taken off the market, but Geary was discharged shortly thereafter, allegedly in retaliation for disrupting and ignoring procedure.[21] The court rejected Geary's public policy argument, but did not, as the courts in *Maus* and *Phung* did,[22] completely decline the invitation to create *any* exception.[23] It merely found that in this case it was not convinced that "a clear mandate of public policy" had been violated by the employer.[24] The court noted the "praiseworthiness" of Geary's intentions, but found that a new cause of action was not the most appropriate method for employees to express their views on the quality of their employer's products.[25] The court also noted that Geary was not an expert[26] on the subject of product safety and that he had gone outside of the usual chain of command established for voicing opinions and concerns.[27] It concluded that the case did

18. For a state-by-state analysis of those jurisdictions that recognize an exception, however limited, to the traditional rule, see 9A Indiv. Empl. Rts. Man. (BNA) § 540-90 (1987). The degree of protection provided by these courts varies from state to state.

19. Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).

20. *Id.* at 173, 319 A.2d at 175.

21. *Id.* at 180, 319 A.2d at 178.

22. *See supra* text accompanying notes 9-15.

23. The court discussed Geary's claim that his actions were undertaken with good intent and were obviously of some merit given the subsequent change made in the product. Yet the court refused to credit the argument, concluding that:

> It may be granted that there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of those areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened. The notion that substantive due process elevated an employer's privilege of hiring and discharging his employees to an absolute constitutional right has long since been discredited.

Geary, 456 Pa. at 184, 319 A.2d at 180.

24. *Id.* at 184-85, 319 A.2d at 180. "We hold only that where the complaint itself discloses a plausible and legitimate reason for terminating an at-will employment relationship and no clear mandate of public policy is violated thereby, an employee at will has no right of action against his employer for wrongful discharge." *Id.*

25. *Id.* at 183, 319 A.2d at 180.

26. *Id.* at 181, 319 A.2d at 178-79.

27. *Id.* at 180, 319 A.2d at 178.

not clearly involve any significant danger or wrongdoing on the part of the employer, and therefore expressly refused to fashion a privilege based upon an employee's right to express his views.[28] The decision in *Geary* is significant, though, because the court at least implied a willingness to entertain an exception when a "clear mandate" of public policy warrants.[29]

Critics of *Geary's* strict standard fault the opinion for its apparent requirement that there be a "pronouncement" of policy by the legislature before the court takes action.[30] They argue that, as a practical matter, the discharged employee would then be required to allege that the employer violated a specific legislative prohibition or that he was discharged for exercising a specific statutory right or fulfilling a specific statutory duty.[31] Some courts indicate that a public policy exception will be recognized only under these circumstances. In *Campbell v. Eli Lilly & Co.*[32] the Indiana Court of Appeals rejected a wrongful discharge claim by a researcher at a drug manufacturing company. The researcher was fired for reporting his su-

28. *Id.* at 183, 319 A.2d at 180. The Michigan Supreme Court made a similar ruling in Suchdolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982). The court rejected an employee's claim that he was discharged for his complaints concerning the company's internal auditing practices and that the discharge was in violation of public policy. The employee based his complaint on two sources, the Code of Ethics of the Institute of Internal Auditors and the Regulations of the Public Service Commission. *Id.* at 696, 316 N.W.2d at 712. The court stated that for it to support an action for retaliatory discharge, the employee must establish a violation of a "clearly mandated public policy." *Id.* A dispute over internal auditing procedures, it argued, was at best a "corporate management dispute." *Id.*

29. *Geary*, 456 Pa. at 185, 319 A.2d at 180. *See also* Rossi v. Pennsylvania State Univ., 340 Pa. Super. 39, 489 A.2d 828 (1985) (plaintiff's claim that he was fired for attempting to prevent a "waste of taxpayer's money" through frequent criticism or complaints to management was denied as not establishing a sufficient violation of a clear mandate of public policy); Rachford v. Evergreen Int'l Airlines, Inc., 596 F. Supp. 384 (N.D. Ill. 1984) (plaintiff, fired for reporting aircraft defects to the FAA, had no viable claim since he could not show that the discharge violated a clear mandate of public policy); Percival v. General Motors Corp., 400 F. Supp. 1322, 1324 (E.D. Mo. 1975), *aff'd*, 539 F.2d 1126 (8th Cir. 1976) (plaintiff's claim that he was fired for trying to correct misinformation given by the company to the public and government was rejected since there existed no violation of a clear mandate of public policy in the absence of "contractual, statutory or public policy considerations").

30. *See, e.g.*, Note, *Protecting the Private Sector Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 Wis. L. Rev. 777, 802.

31. [The] use of such terms as "clear mandate" or "expressed" policy, if taken as those terms are conventionally used, refers to legislatively defined public policy. If this is how the *Geary* . . . [court] mean[s] to limit the exception, then [it has], by inference, rejected the application of the public policy exception to cases which present non-legislatively defined public policy issues.

Id. at 802.

32. *Campbell*, 413 N.E.2d 1054 (Ind. App. 1980).

pervisor's misconduct and questioning the safety of some of the drugs.[33] The court found that the plaintiff had not demonstrated a "statutory source for the alleged rights he claims to have exercised,"[34] nor a "statutory source for the duty he claims to have fulfilled."[35] The court, therefore, refused to "recognize the general public policy exception . . . to the venerable at will employment doctrine we reconfirm today."[36] Again, the case is significant because it implies a willingness to create *some* kind of exception so long as there is a statutory basis for the employee's actions.[37]

An even more restrictive interpretation of the statutory-based requirement is found in *Murphy v. American Home Products Corp.*[38] In *Murphy* the New York Court of Appeals considered the case of an at-will employee who reported the illegal manipulation of a company pension plan by high-ranking officers to his superiors.[39] Although the court found that the actions of the officers only amounted to unorthodox accounting procedures, it stated that in order to succeed Murphy needed to show that he was fired either for some "constitutionally impermissible purpose" or that a *statutory proscription* against firing for that particular reason existed.[40] Otherwise, the employer's right to fire him is unaffected.[41]

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33. *Id.* at 1057.

34. *Id.* at 1061.

35. *Id.* The court in *Campbell* relied on the decision in *Percival*, discussed *supra* at note 29, which used similar language to limit protection under the public policy exception to cases in which the discharge was "motivated by the fact that an employee did something that public policy encourages or refused to do something that public policy forbids or condemns." *Percival*, 539 F.2d at 1129-30.

36. *Cambell*, 413 N.E.2d at 1061.

37. The court indicated its reliance on its earlier decision in Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973), in which it established the "statutory right or statutory duty" test. It concluded only that under the facts before it, plaintiff had not satisfied the test, and refused to create the general exception urged by plaintiff. *Campbell*, 413 N.E.2d at 1061.

The court's decision in *Campbell* is reaffirmed by the recent decision of Romack v. Public Serv. Co. of Ind., 499 N.E.2d 768 (Ind. App. 1986), in which plaintiff alleged he was fired for reporting to his superiors several safety and security problems at the employer's nuclear power plant. The court of appeals dismissed his complaint and concluded that a "narrowly construed exception" to the at-will rule existed only "when the employee is discharged solely for exercising a statutorily conferred right." *Id.* at 773.

38. 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

39. *Id.* at 297-98, 448 N.E.2d at 87-88, 461 N.Y.S.2d at 233-34.

40. *Id.* at 305, 448 N.E.2d at 91, 461 N.Y.S.2d at 237. "In sum, under New York law as it now stands, absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired."

41. *Id.* The New York court was particularly careful about infringing upon the territory of the legislature in making policy decisions, acknowledging that body's "infinitely greater resources and procedural means to discern the public will." *Id.*

In some cases it is impossible to establish the existence of the plaintiff's right or duty. For example, in *Pierce v. Ortho Pharmaceutical Corp.*[42] the New Jersey Supreme Court held that a physician did not have a cause of action when she resigned after Ortho removed her from a team working on the development of a drug that she claimed might be harmful.[43] The court argued that the physician's Hippocratic Oath was not comparable to a statute and thus was an insufficient basis upon which to claim a public policy exception.[44]

Some courts, while still requiring a legislative basis for a finding of public policy violations, allow the whistleblowing plaintiff to satisfy his burden by establishing something less than an explicit statutory right or duty. In some jurisdictions, the mere existence of a statute specifically prohibiting the reported activity, even if the action is not brought under it, will provide a basis upon which to argue the existence of a policy favoring a remedy for discharge. These courts reason that the existence of a legislative prohibition is persuasive evidence of a public policy against such activity. In *Harless v. First National Bank*[45] the court examined violations of state and federal consumer credit and protection laws by a West Virginia bank. A bank employee brought the violations to the attention of several of his superiors and a bank auditor[46] and was discharged for reporting the violations.[47] The court accepted the plaintiff's argument that his discharge violated the state's public policy, concluding that the legislature's adoption of the consumer protection and credit laws created a "clear and unequivocal public policy that consumers

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at 302, 448 N.E.2d at 90, 461 N.Y.S.2d at 236. As such, it concluded: "If the rule of nonliability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants." *Id.* The court's position here is much like that of the courts in *Mau* and *Phung*. See *supra* text accompanying notes 9-14 for a discussion of these cases.

42. 84 N.J. 58, 417 A.2d 505 (1980).

43. *Id.* at 61, 76, 417 A.2d at 507, 514.

44. *Id.* at 76, 417 A.2d at 514. *Compare* Suchdolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982), discussed *supra* note 28. An even more difficult determination for the employee is found in Welch v. Brown's Nursing Home, 20 Ohio App. 3d 15, 484 N.E.2d 178 (1984). The *Welch* court found that since the statute, which provided that no nursing home or employee of a nursing home may retaliate against any person for reporting alleged violations to the Commission on Aging, was an *administrative*, not legislative, one, it did not create a cause of action for retaliatory discharge. *Id.* at 17, 484 N.E. 2d at 180. *See also* Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 897, 568 P.2d 764, 770 (1977) (no cause of action existed since plaintiff did not claim that he was discharged for "exercising a statutory right" or for "refus[ing] to engage in criminal activity").

45. 246 S.E.2d 270 (W. Va. 1978).

46. *Id.* at 272.

47. *Id.*

. . . [are] to be given protection."[48] Such "manifest public policy," it argued, should not be frustrated by allowing an employee to be fired for attempting to ensure consumer protection.[49]

Similarly, the Connecticut Supreme Court in *Sheets v. Teddy's Frosted Foods, Inc.*[50] held that an employee had stated a claim for wrongful discharge when he was dismissed after reporting to his employer several state law violations, including the mislabeling of food weight and the use of substandard raw materials.[51] The court noted that state law imposed a criminal penalty for such violations and concluded that an employee should not be forced to choose between the risk of criminal sanctions and the loss of employment.[52] More recently, the Illinois Supreme Court in *Wheeler v. Caterpiller Tractor Co.*[53] held that a cause of action existed for retaliatory discharge when a radiographer was fired for refusing to operate a unit that utilized live, radioactive cobalt in violation of Nuclear Regulatory Commission standards.

C. *Broad Exception Recognized*

Finally, some jurisdictions recognize a very broad public policy exception, affording substantial protection to the employee who reports an employer's wrongdoing, regardless of statutory authority. In carving out such an exception, courts generally determine that it is proper, if not often necessary, to look outside the legislative area for a definition of public policy. Particularly illustrative of this conclusion is *Wagner v. City of Globe*,[54] in which the Arizona Supreme Court endorsed plaintiff's argument that his discharge violated the state's public policy. Wagner, a newly-hired, probationary employee with the Globe police department, was fired after uncovering

48. *Id.* at 276.

49. *Id.*

50. 179 Conn. 471, 427 A.2d 385 (1980).

51. *Id.* at 473, 427 A.2d at 386.

52. The court found that the statute, which made the employer's actions criminal, was intended to "safeguard the public health and promote the public welfare by protecting the consuming public from injury by product use and the purchasing public from injury by merchandising deceit." *Id.* at 478, 427 A.2d at 388. The court concluded that because the statute was clearly relevant to plaintiff's claim, it could not "ignore the statement of public policy that it represents." *Id.* at 478, 427 A.2d at 389.

53. 108 Ill. 2d 502, 485 N.E.2d 372 (1982). *See also* Kalman v. Grand Union Co., 183 N.J. Super. 153, 443 A.2d 728 (1982). In *Kalman*, a pharmacist was fired for refusing to close his pharmacy within the employer's store. State statutes (as well as the pharmacy profession's code of ethics) required the pharmacy to keep the same hours of operation as the store. The New Jersey court found that these laws sufficiently expressed public policy, which would be violated if the employee had been fired for attempting to comply with them.

54. 150 Ariz. 82, 772 P.2d 250 (1986).

the illegal arrest and detention of a prisoner.[55] He brought the prisoner before a magistrate who, after some persuasion, reluctantly released the prisoner.[56] However, Wagner was terminated from his position shortly thereafter.[57]

Wagner argued that despite his at-will status, his discharge was wrongful. He advanced two theories in support of his contention: breach of contract by the employer for violation of the rules set out in its personnel manual (his "employment contract"),[58] and violation of the state's public policy in favor of reporting illegal and improper activities.[59] The trial court granted summary judgment in favor of the employer, and the court of appeals affirmed.[60] The supreme court, however, reversed.[61]

The supreme court was very receptive to plaintiff's public policy argument, stating at the outset that "employees should not have to choose between their jobs and the demands of important public policy interests; . . . thus courts have developed the public policy exception to the at-will doctrine."[62] The Arizona court, unlike other courts, was not inhibited by the lack of "explicit statutory expression" of such policy. Such explicit recognition, it argued, was "no longer required."[63]

The court initially examined several generally recognized policy exceptions to the rule, including that for the whistleblower. It concluded that whistleblowing employees had lately "gained a measure of judicial protection,"[64] that such activity serves a public purpose, and that it should enjoy equal status among the other perhaps better-established exceptions.[65] Protection for the at-will employee who blows the whistle on his employer would henceforth be granted, the court ruled, "[s]o long as employees' actions are not merely private or proprietary, but instead seek to further the public good. . . ."[66]

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55. *Id.* at 84, 772 P.2d at 252. The prisoner was given a ten-day sentence for vagrancy under a statute that had been amended or abolished over a year earlier. He was in jail for twenty-one days when Wagner discovered the "error." *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 85-86, 772 P.2d at 253-54.

59. *Id.* at 87-90, 722 P.2d at 255-58.

60. *Id.* at 82, 722 P.2d at 250.

61. *Id.*

62. *Id.* at 87-88, 722 P.2d at 255-56. "Whatever the nomenclature, our concern remains the same: employees should not be discharged because they performed an act that public policy would encourage, or refused to do that which public policy condemns." *Id.* at 88, 722 P.2d at 256.

63. *Id.* This language is particularly important because it shows that the court is aware that it is expanding the existing law to accommodate the new exception.

64. *Id.* at 88, 722 P.2d at 256.

65. *Id.* at 89, 722 P.2d at 257.

66. *Id.* Indeed, the court states that the decision on the part of an employee to

The *Wagner* court noted that the facts clearly established that the employer had violated the law, making it a particularly strong case in which to justify the creation of an exception to the at-will doctrine. Nevertheless, it explicitly acknowledged that its decision to afford protection to whistleblowing employees was not limited to such a case, but would extend to any instance in which "some 'important public policy interest in the law' has been furthered by the whistleblowing activity."[67] Thus, the court broadly held that "all employees who attempt to correct problems of public interest fall within the ambit of the public policy exception to the at-will doctrine."[68]

Wagner is not the only instance in which a court has provided maximum protection to an employee discharged for whistleblowing. The *Wagner* court, for example, relied heavily on the Illinois Supreme Court case of *Palmateer v. International Harvester Co.*[69] in which an employee was fired for supplying information to local law enforcement authorities regarding another employee and agreeing to assist in the investigation and trial.[70] The *Palmateer* court held that, while no particular constitutional or statutory provision "requires a citizen to take an active part in the ferreting out and prosecution of a crime," public policy must nonetheless protect the "citizen crime-fighters."[71]

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expose illegal or unsafe practices on the part of his employer should not only be protected, but *encouraged* as well. *Id.*

67. *Id.*

68. *Id.* at 90, 722 P.2d at 258. It is important to note the absence of any kind of "qualifying" language in the court's holding (for example, that the employee must report only to his superiors, or be correct).

69. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

70. *Id.* at 127, 421 N.E.2d at 877.

71. *Id.* at 132, 421 N.E.2d at 880. On remand the trial court granted summary judgment to the plaintiff. The employer appealed, and the court of appeals reversed, holding that an issue of fact existed regarding whether the plaintiff was in fact fired for his whistleblowing or for some other reason. The court did not contest the supreme court's ruling that a cause of action existed. Palmateer v. International Harvester Co., 140 Ill. App. 3d 857, 489 N.E.2d 474 (1986). The Illinois Supreme Court's ruling in *Palmateer* was recently affirmed in Johnson v. World Color Press, 147 Ill. App. 3d 746, 498 N.E.2d 575 (1986). In *Johnson* the plaintiff claimed that he was discharged for complaining to superiors about the use of certain accounting procedures, which he contended overstated income and net worth. The employer cited Petrik v. Monarch Printing Corp., 143 Ill. App. 3d 1, 493 N.E. 2d 616 (1986), in which the court had ruled that a discharge for similar activity did not create a cause of action, reasoning that the controversy concerned internal management disputes. *Compare* Suchdolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982), discussed *supra* note 28. The *Johnson* court distinguished *Petrik*, stating that it had involved a dispute over two acceptable practices while *Johnson* involved a procedure that was arguably fraudulent. In reaffirming *Palmateer*, the court stated: "We have found public policy favors, and certain statutes require, full disclosure, truthfulness, and accuracy in financial reports made by businesses to the government and to the public. Public policy favors employees

Another recent decision in which a court has recognized a broad, nonstatutory policy exception is *Boyle v. Vista Eyewear, Inc.*[72] The Missouri Court of Appeals in *Boyle* concluded that:

> where an employer has discharged an at-will employee . . . because the employee reported to his superiors or the public authorities serious misconduct that constitutes violations of the law and of such well established and clearly mandated public policy, the employee has a cause of action in tort for damages for wrongful discharge.[73]

Like the court in *Wagner*, the *Boyle* court noted that the public policies of the "state and nation" are found in the "constitutions, statutes, *judicial decisions, and administrative regulations*."[74]

D. *Legislative Recognition*

A handful of states have enacted legislation explicitly designed to protect the *private sector* at-will whistleblower. Such statutes, along with the liberal judicial interpretations (such as *Wagner*), are the "cutting edge" of developing at-will exceptions. Federal and state employees have long enjoyed such protection,[75] but at present only a few states afford this protection to private sector employees.[76]

Typical of such state legislation is the Michigan Whistleblower's

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attempting to ensure management's compliance with the requirements of the law and public policy." *Johnson*, 147 Ill. App. 3d at 752, 498 N.E.2d at 580. Illinois recently enacted a statute designed to protect both public- and private-sector employees. ILL. REV. STAT. ch. 127 ¶ 63b119e.1 (1981).

See also Garibaldi v. Lucky Food Stores, 726 F.2d 1367 (9th Cir. 1984). Plaintiff claimed he was fired for reporting to state health officials that his employer had forced him to deliver adulterated milk in violation of state laws specifically prohibiting such activity. The Ninth Circuit held that the action on the part of the employee to protect the health and safety of the citizens of California is exactly what that state's supreme court had in mind when it created its public policy exception to the at-will rule in Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

72. 700 S.W.2d 859 (Mo. App. 1985).

73. *Id.* at 871.

74. *Id.* at 877 (emphasis added).

75. *See supra* note 5 and accompanying text.

76. The number of states with statutes that protect private sector employees (or both public and private) is rapidly increasing. At this writing the list consists of: CAL. LAB. CODE § 1102.5 (West Supp. 1987) (public and private); CONN. GEN. STAT. ANN. § 31-51m(a) (private), § 4(b)-(d) (public) (West 1987); FLA. STAT. ANN. § 760.10 (West 1986) (public and private); ILL. ANN. STAT. ch. 63, ¶ 19 (Smith-Hurd 1979) (public and private); IOWA CODE ANN. § 19A.19 (private), § 20.10 (public) (West 1978); LA. REV. STAT. ANN. § 30:1074.1(A) (West Supp. 1987) (public and private); ME. REV. STAT. ANN. tit. 26, § 831 (1974) (public and private); MICH. STAT. ANN. § 17.428 (2) (Callaghan 1982) (public and private); N.J. REV. STAT. ANN. § 34.19 (West Supp. 1987) N.Y. CIV. SERV. LAW § 75-b(2)(a) (McKinney 1987) (public and private); R.I. GEN. LAWS § 36-15-3 (1987) (public and private).

"Whistle Blower

Protection Act of 1980,[77] which provides protection to both public and private employees. The Act, in rather broad language, purports to apply to any employee who "reports or is about to report" suspected violations of any law on the part of his employer, or who testifies in any enforcement proceedings.[78] If, however, the employee "knows" the report is false, he is not protected by the Act.[79] Generally, the employee must file suit within ninety days of the employer's action.[80] If found to be protected, the employee is entitled to injunctive relief and/or actual damages, which may include reinstatement, back pay, benefits, seniority, and attorney fees.[81]

Interestingly, there has not been a great deal of litigation under the Michigan Act. One major issue, the establishment of a prima facie case, has been addressed. In *Melchi v. Burns International Security Services, Inc.*,[82] a federal district court applied Michigan law in holding that a plaintiff must demonstrate that he was engaged in a protected activity, that he was subsequently discharged from employment, and that there was a causal connection between his activity and the discharge.[83] The burden of production then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the discharge.[84] If the defendant sustains this burden, the plaintiff must demonstrate that the legitimate reason was a mere pretext for the retaliatory action.[85] The overall burden of persuasion remains with the plaintiff who must show that, but for his protected activity, he would not have been discharged.[86]

Several states have enacted laws to protect the private sector whistleblower that are similar to Michigan's Act. The statutes generally provide a cause of action for the employee who reports an actual or suspected legal violation and protect the employee who is asked to testify before an investigating agency.[87] Some statutes provide a great deal of protection. For example, Connecticut's statute protects an employee who reports any suspected violation of any federal, state, or municipal law, regulation, or ordinance.[88] Others

77. MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 1981).
78. MICH. COMP. LAWS ANN. § 15.362 (West 1981).
79. *Id.*
80. MICH. COMP. LAWS ANN. § 15.363(1) (West 1981).
81. MICH. COMP. LAWS ANN. § 15.364 (West 1981).
82. 597 F. Supp. 575 (E.D. Mich. 1984).
83. *Id.* at 582.
84. *Id.* (citing Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980)).
85. *Id.*
86. The order and allocation of the burden of going forward in *Melchi* parallels that first established for Title VII actions in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), which was later elaborated upon by the Court in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).
87. MICH. COMP. LAWS ANN. § 15.364 (West 1981); CONN. GEN. STAT. ANN. § 31-51m(d) (West 1987).
88. CONN. GEN. STAT. ANN. § 31-51m(a) (West 1987).

enforce this section may be brought by any person. (§ 2 ch 153 SLA 1984)

Sec. 42.40.710. Corporation employees. Employees of the Alaska Railroad are employees of the corporation and not of the state. The provisions of AS 39 do not apply to employees of the corporation. However, no later than January 1, 1987, the corporation shall adopt a code of ethics for its directors and employees that is substantially equivalent to that adopted in AS 39. (§ 2 ch 153 SLA 1984; am § 4 ch 87 SLA 1986)

Effect of amendments. — The 1986 amendment added the last sentence.

Sec. 42.40.720. Collective bargaining rights. The provisions of AS 23.40.070 — 23.40.260 do not apply to the corporation or to its employees. However, employees who are not executive officers may organize and form, join, or assist an organization to engage in collective bargaining through representatives of their own choosing and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. (§ 2 ch 153 SLA 1984)

Sec. 42.40.730. Railroad labor relations agency. (a) There is established a railroad labor relations agency that consists of three members appointed by the governor. One member shall be a member of the state personnel board. Members serve at the pleasure of the governor.

(b) The railroad labor relations agency shall carry out the provisions of AS 42.40.710 — 42.40.890.

(c) Members of the railroad labor relations agency receive no compensation for their services, but are entitled to per diem and travel expenses authorized for boards and commissions. (§ 2 ch 153 SLA 1984)

Sec. 42.40.740. Collective bargaining unit. The railroad labor relations agency shall decide in each case, in order to ensure employees the fullest freedom in exercising the rights guaranteed by AS 42.40.710 — 42.40.890 the unit appropriate for the purposes of collective bargaining, based on such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees. Bargaining units shall be as large as is reasonable, and unnecessary fragmenting shall be avoided. (§ 2 ch 153 SLA 1984)

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Sec. 18.60.089. Prohibition against retribution. (a) A person may not discharge or discriminate against an employee because the employee has filed a complaint or instituted or caused to be instituted a proceeding related to the enforcement of occupational safety and health standards, or has testified or is expected to testify in a proceeding relating to occupational safety and health or because an employee has exercised personally or on behalf of others a right afforded under AS 18.60.010 — 18.60.105.

(b) An employee who has been discharged or discriminated against by a person in violation of this section may, within 30 days after the violation occurs, file a complaint with the commissioner alleging the discrimination. Upon receipt of the complaint, the commissioner shall investigate the matter as the commissioner considers appropriate. If, upon investigation, the commissioner determines that this section has been violated, the commissioner shall request the attorney general to bring an action in the superior court against the violator. The superior court has jurisdiction to restrain violations of (a) of this section and to order all appropriate relief including rehiring or reinstatement of the employee to the employee's former position with back pay.

(c) Within 90 days of the receipt of a complaint filed under this section, the commissioner shall notify the complainant of the determination under (b) of this section. (§ 7 ch 72 SLA 1973)

Sec. 18.60.090. Penalty for violations. [Repealed, § 9 ch 72 SLA 1973.]

Sec. 18.60.091. Citations. (a) If, upon inspection or investigation, the department believes that an employer has violated a provision of AS 18.60.010 — 18.60.105 that is applicable to the employer, the department shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and must describe with particularity the nature of the violation, including reference to the provisions of the chapter or any order or regulation alleged to have been violated, and must fix a reasonable time for abatement of the violation. The department may prescribe procedures for the issuance of a notice instead of a citation with respect to minor violations that have no direct or immediate relationship to safety or health, or violations that are not serious and that the employer agrees to correct within a reasonable time. If an employer does not, within a reasonable time set out in the notice, correct a violation that is not serious, the department shall issue a citation to the employer.

(b) Upon receipt by the employer, each citation issued under this section, or a copy of the citation, shall be immediately and prominently posted, at or near each place the violation referred to in the citation occurred.

Sec. 44.21.234. Access to long term care facilities, older Alaskans, and records. (a) A person may not deny access to a long term care facility or to an older Alaskan by the ombudsman or an employee, volunteer, or other representative of the office.

(b) Notwithstanding the provisions of AS 44.21.232(c)(1), the ombudsman may obtain medical or other records of an older Alaskan who resides in a long term care facility in the state only with the consent of the older Alaskan or the older Alaskan's legal guardian or, if the older Alaskan is unable or incompetent to consent and does not have a legal guardian, only with a court order. (§ 2 ch 108 SLA 1988)

Sec. 44.21.235. Confidentiality. (a) Records obtained or maintained by the ombudsman are confidential, are not subject to inspection or copying under AS 09.25.110 — 09.25.120 and, except as provided in (b) of this section, may be disclosed only at the discretion of the ombudsman.

(b) The identity of a complainant or an older Alaskan on whose behalf a complaint is made may not be disclo[illegible]ithout the consent of the identified person or the person's legal g[illegible]ian, unless required by court order. (§ 2 ch 108 SLA 1988)

Sec. 44.21.236. Immunity from liability. (a) A person who, in good faith, makes a complaint described in AS 44.21.232 is immune from civil or criminal liability that might otherwise exist for making the complaint.

(b) The ombudsman, or an employee, volunteer, or other representative of the office, is immune from civil or criminal liability for the good faith performance of official duties. (§ 2 ch 108 SLA 1988)

Sec. 44.21.237. Interference with the long term care ombudsman and retaliation prohibited. (a) A person may not intentionally interfere with the ombudsman, or an employee, volunteer, or representative of the office, in the performance of official duties under AS 44.21.232.

(b) If a person makes a good faith complaint described in AS 44.21.232, an employer or supervisor of the person, or a public or private agency or entity that provides benefits, services, or housing to the person, may not discharge, demote, transfer, reduce the pay or benefits or work privileges of, prepare a negative work performance evaluation of, deny or withhold benefits or services, evict, or take other detrimental action against the person because of the complaint. The person making the complaint may bring a civil action for compensatory and punitive damages against an employer, supervisor, agency, or entity that violates this subsection. In the civil action there is a rebuttable presumption that the detrimental action was retaliatory if it was taken within 90 days after the complaint was made.

(c) A person who violates this section is guilty of a class B misdemeanor. (§ 2 ch 108 SLA 1988)

Sec. 44.21.238. Legal counsel for the long term care ombudsman. The attorney general shall provide legal advice and representation in connection with any matter relating to the powers, duties, and operation of the office, and in any legal action brought against the ombudsman or an employee, volunteer, or other representative of the office. If the attorney general cannot provide legal advice or representation because of a conflict of interest, the ombudsman may employ private legal counsel. (§ 2 ch 108 SLA 1988)

Sec. 44.21.239. Cooperative agreements. The commission shall enter into cooperative agreements concerning the operations of the office, including protocols for investigations, with state and local agencies that have jurisdiction over long term care facilities or over the abuse and neglect of older Alaskans. (§ 2 ch 108 SLA 1988)

Sec. 44.21.240. Definitions. In AS 44.21.200 — 44.21.240,

(1) "commission" means the Older Alaskans Commission;

(2) "long term care facility" means a foster home or other residential facility for dependent adults that is required to be licensed under AS 47.35 and a nursing home as defined in AS 08.70.180;

(3) "office" means the office of the long term care ombudsman;

(4) "older Alaskan" means a resident who is 60 years of age or older;

(5) "ombudsman" means the long term care ombudsman hired under AS 44.21.231;

(6) "senior citizen housing" has the meaning given in AS 44.47.620(e). (§ 2 ch 79 SLA 1981; am § 3 ch 108 SLA 1988)

Effect of amendments. — The 1988 amendment rewrote and restructured this section, which read "In AS 44.21.200 — 44.21.240, 'commission' means the Older Alaskans Commission."

Article 5. Alaska Council on Science and Technology.

Secs. 44.21.241 — 44.21.255. [Repealed, § 63 ch 21 SLA 1985.]

Article 6. Alaska Public Broadcasting Commission.

Section

REPORT BY THE

Comptroller General

OF THE UNITED STATES

Whistleblower Complainants Rarely Qualify For Office Of The Special Counsel Protection

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

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

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

GAO/GGD-85-53
MAY 10, 1985

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

B-217796

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

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

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

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

Charles A. Bowsher

Comptroller General
of the United States

COMPTROLLER GENERAL'S REPORT

WHISTLEBLOWER COMPLAINANTS RARELY QUALIFY FOR OFFICE OF THE SPECIAL COUNSEL PROTECTION

D I G E S T

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

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

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

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

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

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

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

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

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

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

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

representatives express an alternative view, for which support can also be found in the legislative history, that the Special Counsel's office was also established to offer support to individual whistleblowers and other complainants. (See pp. 4 to 6.)

THE OFFICE OF THE SPECIAL COUNSEL'S OPERATING POLICIES EMPHASIZE RESPONSIVENESS TO COMPLAINANTS

The Office of the Special Counsel's policies and procedures for processing and investigating complaints from federal employees emphasize timeliness and responsiveness. The office has also attempted to develop better internal complaint review guidance.

Most Complaints Closed in Initial Screening

The Civil Service Reform Act requires the Office of the Special Counsel to investigate incoming complaints to the extent necessary to determine if there are reasonable grounds to believe that a prohibited personnel practice is involved. In fiscal year 1984, the office received 1,383 complaints alleging prohibited personnel practices. About 8 percent of incoming allegations survive a centralized screening process and are given an in-depth investigation. This screening process is anticipated in the legislative history and GAO believes that the statutory investigation requirement is met by this procedure. Because whistleblower reprisal cases are more complicated than other cases, they are more likely to receive a thorough investigation. Even so, 99 percent of these cases are closed by the office without initiating disciplinary or corrective action. (See p. 9.)

Case Handling Policies Emphasize Responsiveness

The incumbent Special Counsel has established a policy that responsiveness to complainants, in the form of prompt acknowledgement and disposition of their complaints, is among the office's top priorities. In one of his first formal staff directives, the current Special Counsel instituted a set of standards for dealing with incoming complaints. For

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

The Office is Developing Better Complaint Review Guidance

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

WHISTLEBLOWER REPRISAL COMPLAINANTS RARELY QUALIFY FOR SPECIAL COUNSEL PROTECTION

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

Mutiplicity of Factors Are Involved in Decisions to Close Cases

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

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

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

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

GAO Did Not Disagree With The Special Counsel's Decisions

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

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

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

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

RECENT SUCCESS IN DISCIPLINARY LITIGATION IS A POTENTIALLY USEFUL PRECEDENT

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

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

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

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

AGENCY COMMENTS

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

Contents

ABBREVIATIONS

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

CHAPTER 1

INTRODUCTION

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

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

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

BACKGROUND

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

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

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

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

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

TYPES OF ALLEGATIONS RECEIVED BY OSC

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

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

PRIOR GAO REPORTS

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

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

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

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

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

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

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

--Inadequate communication between OSC and government whistleblowers.

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

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

--Missing case files and files in disarray.

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

--Lack of criteria for evaluating and investigating complaints.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OBJECTIVE, SCOPE AND METHODOLOGY

Objective

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

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

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

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

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

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

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

Scope

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

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

Methodology

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

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

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

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

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

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

AGENCY COMMENTS

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

CHAPTER 2

OSC'S OPERATING POLICIES EMPHASIZE RESPONSIVENESS TO COMPLAINANTS

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

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

MOST CASES ARE CLOSED IN INITIAL SCREENING

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE SPECIAL COUNSEL HAS EMPHASIZED TIMELINESS AND RESPONSIVENESS

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

Direct Contact with the Complainant

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

Closeout Letters are Required by Law

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

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

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

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

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

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

OSC PROCEDURES FOR HANDLING SENSITIVE MATTERS

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

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

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

OSC IS DEVELOPING BETTER GUIDANCE FOR SUBSTANTIVE REVIEW OF COMPLAINTS

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

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

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

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

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

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

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

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

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

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

OSC HAS TAKEN STEPS TO CLARIFY UNDERSTANDING OF ITS ROLE

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

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

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

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

AGENCY COMMENTS

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

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

CHAPTER 3

WHISTLEBLOWER REPRISAL COMPLAINANTS RARELY QUALIFY FOR SPECIAL COUNSEL PROTECTION

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

WHISTLEBLOWER REPRISAL CASES AT THE OSC--AN OVERVIEW

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

CSRA sought to protect role of whistleblowers

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

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

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

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

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

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

Exacting standards of proof are required to prosecute whistleblower cases successfully

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

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

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

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

OSC'S DECISIONS TO CLOSE WHISTLEBLOWER REPRISAL COMPLAINTS APPEAR REASONABLE

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

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

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

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

MULTIPLICITY OF FACTORS ARE INVOLVED IN OSC DECISIONS TO CLOSE CASES

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

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

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

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

Personnel action not taken within OSC's jurisdiction

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

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

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

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

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

Case Withdrawn, Mooted, or Abandoned by Complainant

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

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

Responsible Official Not Within OSC's Jurisdiction

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

Complainant's Disclosure Not Protected

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

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

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

Independent Grounds for Disciplinary Action

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

Documented Performance Problems

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

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

Legitimate Management Reasons for a Transfer or Reduction in Force

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

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

Timing of Disclosure Does Not Precede Personnel Action

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

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

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

Acting Officials Do Not Have Knowledge or Motive

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

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

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

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

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

CONCLUSION

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

AGENCY COMMENTS

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

CHAPTER 4

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AGENCY SETTLEMENTS VARY SIGNIFICANTLY IN NATURE AND SCOPE

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

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