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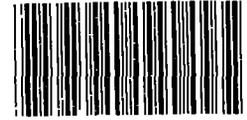
UNITED STATES GENERAL ACCOUNTING OFFICE  
WASHINGTON, D C 20548

FEDERAL PERSONNEL AND  
COMPENSATION DIVISION

B-203869

DECEMBER 2, 1981

The Honorable Alex Kozinski  
The Special Counsel  
Office of the Special Counsel



116959

Dear Mr. Kozinski:

Subject: Observations on the Office of the Special  
Counsel's Operations (FPCD-82-10)

We have completed our review of the Office of the  
Special Counsel's (OSC's) handling of prohibited personnel  
practice complaints. In conducting our work, we observed  
that OSC had

- certain administrative problems, including inadequate records of OSC's investigations;
- no criteria or guidelines for performing investigations which may cause similar cases to be treated differently; and
- unclear working relationships with the other central personnel agencies that hamper full cooperation and sharing of information.

In meetings with you and your staff, you agreed with our observations and indicated that certain actions were being taken to address the problems we identified. In view of this, we are not making any recommendations to you at this time. However, early in 1982, we will follow up on these matters as part of our annual report to the Congress on the activities of the Merit Systems Protection Board (MSPB) and OSC.

OBJECTIVES, SCOPE, AND METHODOLOGY

Our work included an examination of OSC case files; discussions with OSC officials in the headquarters and Philadelphia, Atlanta, Dallas, and San Francisco Regional Offices; and contacts with the other central personnel

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agencies--Equal Employment Opportunity Commission (EEOC), Federal Labor Relations Authority, MSPB, and the Office of Personnel Management.

We selected a random sample of 283 cases out of 948 cases closed between October 1, 1980, and March 31, 1981. The sample size allowed us to project our observations to all OSC cases closed during the 6-month period and be 95 percent sure that our figures were within plus or minus 3 percent of all cases. Most of the case files were stored at the office that performed the investigation. OSC headquarters in Washington, D.C., had 183 cases, or 65 percent of the sample, and the remaining 100 cases, or 35 percent of the sample, were scattered among OSC's field and branch offices.

After reviewing the 283 cases, we developed a profile, including

- types of complaints,
- agencies affected,
- whether the complainants acted alone or with an attorney or union representative, and
- OSC's disposition of the case.

We could not locate case files for 33 of the cases in our sample. These were all Washington, D.C., cases and could not be accounted for by OSC staff.

MOST OF OSC'S CASES CONCERN PROHIBITED  
PERSONNEL PRACTICE ALLEGATIONS

Of the 250 cases we were able to review, 226 (90%) involved prohibited personnel practice allegations; 15 (6%) were whistleblower allegations; and 9 (4%) involved Hatch Act, Freedom of Information Act, or other miscellaneous inquiries. Those agencies with 10 or more cases in our sample were the military departments and the largest of the civilian agencies.

<u>Agency</u>	<u>Number of complaints</u>	<u>Percentage of cases reviewed</u>
Army	32	13
Navy	26	10
Veterans Administration	21	8
Air Force	19	8
Health and Human Services	19	8
Agriculture	16	6
Interior	14	6
Defense	<u>10</u>	<u>4</u>
Total	<u>157</u>	<u>63</u>

Individuals or groups of individuals without independent representation filed 148 (59%) complaints. Individuals with an attorney filed 23 (9%) complaints, and individuals with a union representative filed 36 (14%) complaints. Members of the Congress referred or sent letters of interest in 17 (7%) cases. The remaining 26 cases (10%) were referred by various agencies, including MSPB, the Office of Personnel Management, and GAO.

Of the 250 cases we reviewed, OSC substantiated only 1 complaint. Seven others were resolved between the agency and complainant before OSC completed its investigation. OSC closed 100 cases (40%) because of insufficient evidence of any violation. Another 58 complaints (23%) were deferred to the agency grievance system. OSC closed 23 cases (9%) because they had no recent correspondence with the complainant or the complainant had failed to respond to requests for additional information. Thirty-six case files (14%) were because OSC determined they were not within its jurisdiction, and the remaining 25 case files (10%) were closed for miscellaneous reasons. We determined, on the basis of our sample, that OSC averaged more than 170 calendar days to process a case. This time frame may have been extended by OSC's budget problems and its efforts to close some longstanding cases in March 1981.

#### PROBLEMS STILL HAMPER OSC'S OPERATIONS

OSC's operations are still hampered by the effects of a budget recision and limited staffing. Also, between

December 1979 and June 1981, OSC did not have a confirmed Special Counsel. We have reported on these problems in the past. 1/

In July 1980, the Congress recinded 46 percent (\$2 million) of OSC's fiscal year 1980 budget. The recision adversely affected all areas of operations, including near total curtailment of OSC's mandated responsibilities. In August 1980, OSC stopped all traveling and most other outlays and detailed about 60 percent of its staff to MSPB for about 5 weeks. Travel for investigations was not authorized until after January 1981. OSC continued to receive complaints during this time. As a result, we were told the case backlog increased, and OSC has not been able to fully recover.

The inability to hire staff during two Presidential hiring freezes added to OSC's problems. Although OSC projected it would need approximately 140 staff-years for fiscal year 1981, the Office of Management and Budget imposed a ceiling of 124, with 120 staff-years proposed for fiscal year 1982. To comply with recently proposed budget cuts, OSC may have to absorb a 12-percent cut. As of June 19, 1981, OSC had 102 permanent staff on board.

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1/"Merit Systems and Employee Protection" (FPCD-80-15, Oct. 22, 1979), "First-Year Activities of the Merit Systems Protection Board and the Office of the Special Counsel" (FPCD-80-46, June 9, 1980), "The Office of the Special Counsel Can Improve its Management of Whistleblower Cases" (FPCD-81-10, Dec. 30, 1980), and "Civil Service Reform After Two Years: Some Initial Problems Resolved But Serious Concerns Remain" (FPCD-82-1, Nov. 10, 1981).

<u>Grade</u>	<u>Headquarters</u>			<u>Field</u>			<u>Total</u>
	<u>Attor- neys</u>	<u>Investi- gators</u>	<u>Other</u>	<u>Attor- neys</u>	<u>Investi- gators</u>	<u>Other</u>	
Executive level	1						1
SES	1	1	1				3
GS-15	3	1	1	2			7
GS-14	4	1	1	1			7
GS-13	1	11	2	5	15		34
GS-11 and GS-12	4	1	4	4	5		18
GS-7 thru GS-10			4				4
GS-1 thru GS-6			13			14	27
WG	—	—	<u>1</u>	—	—	—	<u>1</u>
<b>Total</b>	<u>14</u>	<u>15</u>	<u>27</u>	<u>12</u>	<u>20</u>	<u>14</u>	<u>102</u>

OSC HEADQUARTERS' CASE  
FILES ARE IN DISARRAY

Our review of OSC's Washington case files revealed numerous problems. In general, the case files were in disarray. Information in the files was not inventoried and was usually randomly organized. Records of phone calls or coordination with other OSC investigators, as well as with individuals outside of OSC, were often on scraps of paper. File documents submitted by the complainant and records of investigators' research were not secured or anchored to the file folders and could easily be lost, misfiled, or destroyed without anyone knowing such items were missing.

The case files were located in lockable file cabinets. However, OSC did not keep records or logs that the cabinets were locked and checked each night. Precautions taken to safeguard the material appeared minimal. Case files removed from their file cabinet were supposed to be signed for by the investigator or attorney using the files; however, we were told and we also observed that this "rule" was not always followed. For example, we were initially unable to locate 44 of the 183 Washington case files in our random sample. After several months, 11 turned up on investigators' desks or in other cabinets, but OSC staff could not locate the other 33 case files. This means about 12 percent of the case files are missing. If OSC fails to find these files, it will not be able to comply with requests to reconstruct these investigations.

In contrast, the case files at the OSC field and branch offices were generally complete and organized with documents filed in chronological order and anchored to the folder. In many of these case files, the investigator prepared a summary of the allegations, the investigator's action, and the reasons for closing the case.

OSC HAS NOT DEVELOPED CRITERIA  
FOR INVESTIGATIONS

OSC is required to investigate Federal employee complaints and allegations involving prohibited personnel practices and may recommend corrective actions if the allegations are substantiated. However, OSC has not developed specific criteria for its staff members to follow while investigating complaints. Similar complaints may be treated differently depending on the investigator and the OSC office. The decision to close or continue an investigation appears to rely almost entirely on the investigator's subjective judgment. Further, training for OSC investigators has been virtually nonexistent.

In practice, OSC does not investigate prohibited personnel practice allegations (the large majority of complaints received) or take any action (such as requesting a stay) unless the complainant or his/her representative convinces the OSC investigator that both (1) a personnel action did or did not occur and (2) the action (or inaction) was based on a prohibited practice. In nearly all the cases we reviewed, the OSC investigators determined that one of these elements for a prohibited personnel practice was not present. Often they determined this without any evidence in the case file of followup with the complainant except the closeout letter.

Some OSC staff members expressed concern that investigators have been pressured to act quickly on complaints and only spend time on those that appear to have the strongest case. This sense of pressure was apparently caused by OSC's large caseload resulting from the fiscal year 1980 budget recision and OSC's inability to hire enough investigators because of the two Presidential hiring freezes. If OSC had decided to investigate each case more fully, such as interviewing each complainant, OSC's backlog would certainly have increased, but each complainant would have had the opportunity to explain his/her case, answer questions, and supply additional information if needed. The investigator also would have had the opportunity to determine that a complaint was indeed unsubstantiated rather than just poorly presented to OSC.

OSC does not have any formal training for its investigators. As a stated policy, OSC hires personnel specialists and trains them to be investigators. Nearly all training thus far has been on the job. This practice, combined with the pressure to close cases, may cause problems if inexperienced investigators overlook relevant information or don't properly document or even recognize cases that should be referred for corrective action.

From the case files, we could not determine how much time was actually spent investigating a case. While some case files were more voluminous than others, the time spent researching, reviewing, investigating, etc., was not recorded. However, we noted that OSC took almost 200 calendar days to close cases in our sample when the individual was represented by a lawyer or union official or when a congressional representative had intervened, as compared to the overall average of 170 days for the sample cases.

OSC HAS UNCLEAR WORKING RELATIONSHIPS  
WITH OTHER CENTRAL PERSONNEL AGENCIES

While OSC is the focal point for investigating and prosecuting prohibited personnel practice complaints, title I of the Civil Service Reform Act also gave other central personnel agencies--EEOC, Federal Labor Relations Authority, MSPB, and the Office of Personnel Management--and executive departments and agencies responsibility to insure that merit system principles are protected and that prohibited personnel practices are prevented. But the responsibilities and interrelationships among these agencies in investigating, reporting, and correcting prohibited personnel practices are not clear.

OSC has not established effective working relationships with central agencies, and communication has been minimal. For example, we believe greater communication between EEOC and OSC would benefit both agencies, especially in the area of case referrals. OSC and EEOC have met with the intent of developing a memorandum of understanding to distinguish their roles and responsibilities in cases involving discrimination. However, nothing has been formalized. If EEOC identifies a possible prohibited personnel practice during a discrimination investigation, it does not report it to OSC. EEOC's explanation was that if the complaint got as far as EEOC, the individual had probably already contacted OSC. This may be true, but OSC routinely defers most complaints involving discrimination to the agency complaint system and conducts

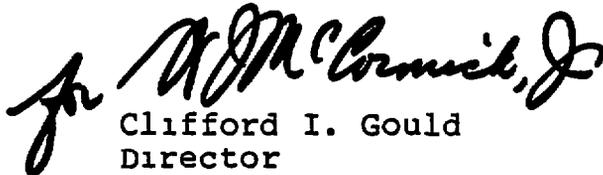
no investigation of its own. Also, OSC does not tell EEOC of complaints it has deferred in this manner. Sharing such information and analyzing it could solve problems. Furthermore, OSC is authorized to enforce corrective actions against agency officials who have committed a prohibited personnel practice involving discrimination, whereas EEOC can only recommend action to make the complainant "whole."

OSC operates independently of MSPB; however, OSC is organizationally part of MSPB for administrative purposes. This relationship is not clearly defined in the Civil Service Reform Act of 1978. In August 1980, the Chairwoman of MSPB issued directives concerning OSC's personnel authority, budget, and communications with the Congress and the news media. The Acting Special Counsel believed that adhering to these directives would be contrary to the Civil Service Reform Act. OSC requested a legal opinion from the Department of Justice on OSC's relationship with MSPB. However, the issues were not resolved. In November 1980, MSPB filed a lawsuit against the Acting Special Counsel seeking to compel OSC to comply with the August 1980 directives. The suit was dismissed as moot, but the Special Counsel and MSPB must work out a more satisfactory relationship.

Of the 31 case files we reviewed in the OSC Dallas field office, 13 of them were petitions for appeal referred by the MSPB field office as possibly involving a prohibited personnel practice or whistleblower allegation. Although this referral of cases does not seem to be time consuming or expensive, MSPB referred none of the case files reviewed in the Washington, D.C., office or the other OSC field offices for this reason. If all MSPB offices adopted the procedure of referring such cases to OSC, cooperation between the two organizations could be improved significantly.

We thank you for the complete cooperation we received during our review. If you would like to discuss our work or other matters affecting OSC, please feel free to contact us.

Sincerely yours,

  
Clifford I. Gould  
Director