

**U. S. Office of  
Special Counsel  
Assessment**



### *SUMMARY OF MAJOR RECOMMENDATIONS*

1. Establish a single IPD Headquarters organization.
2. Decentralize and simplify the HAU and DU policies, procedures and processes.
3. Provide management, sensitivity, and interpersonal relations training for all supervisors.
4. Institutionalize the SFBAFO model for investigating and analyzing PPP cases.
5. Develop a tailored and flexible approach to conducting investigations and legal analysis based upon attorney and investigator experience, knowledge, expertise and case complexity.
6. Adopt the recommended interpretation of substantial likelihood.
7. Better integrate Dallas and San Francisco field offices with OSC headquarters.
8. Review and revise HR performance plans to include a critical element describing customer service.
9. Move personnel within the agency to rectify deficiencies and apparently consistent misclassification issues.
10. Audit the five non-supervisory GS-905-15 attorney positions in OSC. Arrange for the audits with another federal Human Resources Office, a contract auditor, or with the Office of Personnel Management.
11. If the audit justifies a GS-905-15, then all of the GS-905-15 non-supervisory attorney jobs should be marked as "incumbency allocations". They should be classified as rating the GS-15 grade designation due to the unique impact of the incumbent on the position, and once the position is vacated, it should revert to the GS-905-14 level, the standard career ladder target for the occupation.
12. Establish a senior investigator position (GS-14) to train, advise, and mentor other investigators, advise attorneys and to investigate complex PPP cases.
13. Audit the GS-15-201 personnel officer position, the GS-201-13 personnel specialist positions, and the GS-203-9 personnel assistant position in HARMB. Arrange for the audits with another federal Human Resources Office, a contract auditor, or with the Office of Personnel Management.
14. After the audits, re-write the GS-201-15 supervisory human resources specialist position description, the personnel specialist GS-201-13 positions, and the personnel assistant GS-203-9 position in HARMB to accurately describe the duties and responsibilities assigned.
15. Expand and upgrade the mailroom and retain enhanced separate document-processing administrative staff for individual functions.
16. Establish a Customer Service Center for telephone calls and information requests.
17. Retain the in-house information management function.
18. Establish a Training and Outreach Office.
19. Establish a Budget and Procurement Office.

### WRITTEN GUIDANCE

The DU's only known written guidance for processing whistleblower disclosures is an undated "Training Protocol". At one time, there was a Manual setting out policies and procedures for the DU, but it has not been updated or used for many years. The Chief, DU, also maintained a binder containing all relevant past memos relating to DU policy and procedures, but that disappeared when offices were temporarily vacated for repainting some time ago and has not been reconstituted.

The Training Protocol is at least several years old but has been updated from time to time, most recently in May 2004. This Protocol mentions the "substantial likelihood" test but provides little guidance for interpreting it. The "strong probability" interpretation in the Biggs memo is not mentioned. Neither does the Protocol even mention the 15-day time limit. As mentioned above, the Training Protocol describes the DU priority system, but without really identifying the factors<sup>89</sup> that determine priorities.

## RECOMMENDATIONS

### The Special Counsel

#### RESPONSIBILITY FOR REVIEWING RULES, REGULATIONS AND OTHER ACTIONS

Various statutes give OSC a broad protective role in ensuring that various federal rules, regulations, and other actions are consistent with maintaining the competitive service. The Special Counsel should assign responsibility within OSC for conducting these reviews.

#### CODE OF FEDERAL REGULATIONS

Several OSC functions are not mentioned in the Code of Federal Regulations, nor is OSC's organization described there. The Special Counsel should direct a review to ensure compliance with 5 U.S.C. 552(a)(1).

#### RECUSAL POLICY

The Special Counsel should promulgate a written office-wide policy establishing procedures for identification and recusal of OSC personnel with a real or apparent conflict of interest regarding their official duties.

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<sup>89</sup> Merit and seriousness.

### Disclosure Unit (DU)

#### 15-DAY TIME LIMIT

Since, in disclosures involving serious matters, other reforms are unlikely to enable the DU to comply with the 15-day time limit for making a substantial likelihood determination, OSC should seek an amendment to 5 U.S.C. 1213(b) either to expand or remove that time limit.

#### MEANING OF SUBSTANTIAL LIKELIHOOD

A less demanding interpretation of substantial likelihood should be adopted to reduce the risk of closing allegations that probably would be substantiated by an agency investigation, as well as to improve processing time. The following interpretation is recommended:

Substantial likelihood is a determination that the agency is more likely than not to find the allegation substantiated at the conclusion of its investigation.

#### ACKNOWLEDGING SERIOUSNESS AS A FACTOR

Although the seriousness of the wrongdoing alleged is already the key factor in how a disclosure is processed, it is not even mentioned in the DU's guidance (except for *de minimis* cases). New guidance should be issued explicitly recognizing the role that seriousness plays in –

- Assigning case priorities,
- Referring cases to the agency head,
- Referring cases to the agency IG, and
- Using abbreviated processing (priority 3).

#### REVIEW OF AGENCY INVESTIGATIONS

**Impartiality.** To preserve the appearance of impartiality, the 5 U.S.C. 1213(e)(2) review of an agency report of investigation should be conducted by an attorney other than one who recommended referral of the disclosure to the agency head.

**Knowledge of standard for OSC review.** Attorneys who review agency reports of investigation should be made familiar with the meaning of a review for reasonableness, i.e., that the agency findings are to be approved unless the reviewer concludes that no reasonable person could have reached those findings on the basis of the evidence presented.

## Legal Analysis

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**Knowledge of agency's standard of proof.** Attorneys who review agency reports of investigation should be made familiar with the standard of proof used by the agency in reaching its conclusions (usually a preponderance of the evidence), and that this is to be considered in determining whether the agency's findings are reasonable.

### WRITTEN GUIDANCE

The DU should prepare a comprehensive guide setting out its policies and procedures.

## Process Evaluation of the Hatch Act Unit

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Disadvantages include:

- A major disruption of current Hatch Act duties and responsibilities,
- May cause inconsistent and incomplete investigations and legal analysis,
- Limits HAS attorneys professional development, and
- Hatch Act cases may be relegated to a lower priority.

### RECOMMENDATIONS

1. Revise HAU Directive No 1075-4 to decentralize and simplify the HAU policies, procedures, and processes.
2. Eliminate unnecessary levels of review in the Hatch Act complaint and advisory opinion process.
3. Power down the Hatch Act decision making and review process to the lowest level of competency.
4. Eliminate the practice of "pursuing even the grayest case to the limit" to determine knowledge and intent; simply issue warning letters.
5. Lower the bar for determining knowledge and intent especially for lower-ranking state and local employees.
6. Assign trained investigators to the HAU to allow attorneys to focus upon complex Hatch Act complaints and advisory opinions.

## Support Services Evaluation

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Training can also serve to assist employees in upward mobility. It is in the interest of the organization to develop employees to their full potential, sometimes beyond the confines of their occupation. Subject to funds availability, training to enhance career growth is a legitimate goal—so long as it is related to the organizations' mission.

The primary mission of training is to ensure that employees are competent and capable of performing their assigned tasks. Any training program should be linked not only to employee tasks, but also to the goals and mission of the agency. A training office needs to be established. This office would serve to coordinate OSC's training activities, facilitate the development of a training program, and ultimately to create a training cadre to teach and mentor OSC employees.

### Recommendations

- Establish a Training Office responsible for development an OSC training program. The combination of training and outreach functions into a single office will be discussed in the outreach section.
- Conduct a skills inventory of the major OSC occupations to identify the training needs.
- Provide management, sensitivity and interpersonal relations training for supervisors.
- Ensure a clear linkage exists between the agency goals and mission and employee training.

## OUTREACH

### Mission

"The Outreach program was established to assist in meeting their statutory mandate under 5 U.S.C §2302(c), which Congress imposed in 1994. Under that Provision, federal agencies are responsible for 'ensuring (in consultation with the Office of the Special Counsel) that agency employees are informed of the rights and remedies available to them' under chapters 12 and 23 of title 5. Because of this clear statutory mandate, OSC considers outreach to federal managers and employees to be an important part of its mission."<sup>1</sup>

### Overview

The OSC Strategic Plan and Annual Performance Budget Goals both set out to "promote greater understanding of the rights and responsibilities of government employees under the statutes enforced by OSC. In fact, OSC has established a Certification Program that "allows participating federal agencies to meet the statutory obligation to inform their workforces about the rights and remedies available to them

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<sup>1</sup> "OSC Outreach Program and 2303(c) Certification Program," Retrieved on July 8, 2004 from <http://www.osc.gov/outreach.htm>.

## Support Services Evaluation

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under the Whistleblower Protection Act (WPA) and related civil service law.<sup>2</sup> As outlined in OSC's guide, the agency must meet the following five requirements to be certified:

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

The Outreach Program includes training, public relations, agency liaison, and certification program functions. These activities are currently being accomplished by drawing resources from OSC components on an ad-hoc basis.

The Outreach Program is currently assigned as a collateral duty for the Principal Special Assistant to the Special Counsel. This program, with all the adjunct functions, is too complex and central to the organizational mission of OSC to be an ad-hoc assignment. The outreach function is broad enough in mission, scope and importance to warrant its own organizational structure. The Outreach Program should be expanded, and OSC should be more proactive in offering outreach. Instead of waiting for government agencies to contact them for training, OSC should initiate calls, market their outreach training to government agencies, and advertise in national publications.

### **Outreach and Training Office**

Outreach and in-house training are two separate functions, but they are both about information dissemination. Outreach focuses on training individuals external to the organization, while training focuses on the internal development of OSC employees. In order to cross-train employees at OSC, training on the Hatch Act, disclosure of information, and PPPs is required. Economies of scale would be realized by combining the outreach and training functions into one office.

### **Recommendations**

- Establish an Outreach and Training Office.
- Develop a more proactive marketing approach to disseminating information about the rights and remedies available to federal employees.
- Emphasize the importance of the Outreach Program to all OSC employees.

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<sup>2</sup> "Guide to OSC's Outreach Program," Retrieved on July 9, 2004 from \\fs\_data\Outreach\Intranet\guideoutreach.doc.