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THE WHITE HOUSE

February 18, 1986

MEMORANDUM FOR HILDA SCHREIBER  
LEGISLATIVE ANALYST  
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS   
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Office of Special Counsel, MSPB on H.R. 4033,  
"The Whistleblower Protection Act of 1986"

Counsel's Office has reviewed the above-referenced statement and finds no objection to it from a legal perspective.

## WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

- 0 - OUTGOING
  - H - INTERNAL
  - 1 - INCOMING
- Date Correspondence Received (YY/MM/DD) 1 1 7

Name of Correspondent: Roami Sweeney

MI Mail Report      User Codes: (A) \_\_\_\_\_ (B) \_\_\_\_\_ (C) \_\_\_\_\_

Subject: OSC, MSPB on HR 4033, "The Whistleblower Protection Act of 1986"

ROUTE TO:		ACTION	DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response Code	Completion Date YY/MM/DD
<u>CUTROLL</u>		ORIGINATOR	<u>BL 01, 18</u>		<u>1 1</u>
		Referral Note:			
<u>CUAT 18</u>		R	<u>BL 02, 18</u>	<u>STL 10, 18</u>	
		Referral Note:			
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		Referral Note:			

- ACTION CODES:**
- A - Appropriate Action
  - C - Comment/Recommendation
  - D - Draft Response
  - F - Furnish Fact Sheet to be used as Enclosure

- H - Info Copy to be Action Necessary
- R - Direct Reply
- S - For Signature
- K - Interim Reply

- DISPOSITION CODES:**
- A - Answered
  - B - Non-Special Referral
  - D - Completed
  - S - Suspended

**FOR OUTGOING CORRESPONDENCE:**

Type of Response Code = "A"  
 Initials of Signer  
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Comments: \_\_\_\_\_

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EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503  
February 18, 1986

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer  
Department of Justice  
Office of Personnel Management  
Merit Systems Protection Board

SPECIAL

SUBJECT: Office of Special Counsel, MSPB on H.R. 4033, "The Whistleblower Protection Act of 1986" - for February 20, 1986.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than C.O.B. FEBRUARY 18, 1986. TELEPHONE COMMENTS ACCEPTABLE.

Questions should be referred to ( ) or to Hilda Schreiber (395-7362), the legislative analyst in this office.

Naomi R. Sweeney, for  
Assistant Director for  
Legislative Reference

Enclosures

cc: White House Counsel (Special Messenger)  
John Cooney  
Frank Seidl  
Naomi Sweeney

whistleblowing; that it was a factor at all, much less a "significant factor." In a substantial number of matters (12.3%), we found that the claimed disclosure was not protected by the law and there was no evidence of causation either. In the next largest categories:

- there was not even a personnel action to correct (6.8%);
- disclosure was not found to be a significant factor (6.8%);
- OSC had no jurisdiction over the agency or persons involved (5.9%);
- the complainant would not cooperate with the investigation (5.5%);
- no personnel action and no evidence of causation (4.5%);
- no protected disclosure was made at all (1.8%);
- further OSC action became moot (1.4%).

Before I go on, let me remind you that these are the closed cases; the best allegations of the 303 made during this time period are either among the 4 in which corrective action was obtained or the 83 that are still under investigation or legal review. That said, it is interesting to calculate the percentage of closed cases where there is an indisputably valid reason for closing the case; one not subject to any argument whether or not OSC should have risked losing in a prosecution. Adding all the categories where no protected disclosure was made, there was no personnel action to correct, action was moot, there was no jurisdiction or the complainant refused to cooperate, one discovers a total of 38.2 percent. That is the percentage of allegations that should have never been made. Expressed numerically, of 220 closed reprisal complaints where we found no violation, 74 of them were clearly improvident.

We are left then with quite different percentages even among the closed cases. Of at least facially valid complaints, removing the 74 from the 220, we find the universe of arguably valid cases to be 146. Of this 146, 58 (26.4% of all 220 or 39.7 percent of the 146) were closed on multiple grounds, including a belief that there was no evidence of causation. I think you will

agree that a case with multiple defects is the least likely to have any prosecution merit. Subtracting these 58 cases from the 146 leaves a total of 88 cases where there is any room for discussion among trial attorneys about whether or not there was any merit to the case.

OSC decisions to act or not act in cases are carefully documented. The files were and are there for examination. These cases were closed for the very good reason that there was no evidence of a violation, not because of timidity or any desire to protect anything but the integrity of the merit system. It is the integrity of the merit part of the civil service that I am sworn to protect as are all the attorneys and investigators who help me do it. Let me point out, however, that this analysis of our reasons for closing reprisal for whistleblowing cases is strong evidence that you are not going to produce more whistleblower "wins" in litigation with the changes in this bill. What you are going to produce is a more expensive and cumbersome process to arrive at the same result you have today.

d. What Disclosures are Being Made?

My belief and advice has been that federal employees ought to make disclosures to IG's, OSC or other agencies anonymously or under the protection of confidentiality where possible. I have said so many times. If no one in authority learns who the whistleblower is, there can never be a reprisal. These covert channels have proved effective over these past few years, both in uncovering waste and in preserving confidentiality.

Assuming that the goal of the supporters of this bill is to produce more whistleblowing by making it easier to prove reprisal, one ought carefully to consider what kind of whistleblowing is currently claimed to result in reprisal.

Looking at the claimed whistleblowing among the 220 closed cases discussed above does not create optimism that this bill is going to surface employees who know about truly serious fraud, waste or abuse of government programs. To be kind to the employees involved, most of the claimed disclosures are

simply trivial and only technically to be considered as disclosures at all. OSC, the IG's, and the law itself are absolutely worth keeping, in my view, so that those few employees each year who see something genuinely wrong can safely disclose it to the IG's or other proper authority. We must have these systems to keep the government honest and efficient. But any objective review of the supposed problems included in Appendix B to this statement, or the representative remarks included in the MPSB study on whistleblowing, is little more than generalized complaining or unspecific opinion about the inefficiency of government or its programs overall. A review of Appendix B suggests further, as the GAO found, that some who claim to be whistleblowers are in reality either sad and desperate employees seeking an excuse for poor performance or misconduct, or cynical opportunists. Some whistleblowers, of course, may have suffered reprisal, though OSC and no one will ever prove it. But I can assure you that OSC has vigorously done its duty to find evidence of reprisal against bona fide whistleblowers and put things right. Knowing the OSC employees and their dedication, I am confident they will continue to do their duty to the law long after I have gone.

## 2. The Misapprehended Study

Those who support this bill often cite as justification the findings of the Merit Systems Protection Board's 1983 study, Blowing the Whistle in the Federal Government. (Study) As recently as January 22, 1986, in a press release from this Subcommittee, one supporter of this bill was quoted as saying:

"With fear of reprisal doubling among federal workers over the past five years, it's very apparent our system of protection needs improvement."

This statement is not at all what the Board actually found. 1/

What the Board actually found, although it is not stated in the text of the report is that there was no meaningful change in the percentage of federal employees who expressed fear of reprisal compared to the number who claimed to have seen any wrongdoing or waste. In 1980, 6.3% of those who claimed to have seen wrongdoing said they did not report it out of fear of reprisal; in

1983, 5.3% made the same claim. This denotes, if anything, an actual decrease in employee fears of reprisal. 2/ This is greatly removed from the exaggerated and dire assertions mentioned above.

Moreover, comparing the number of employees who expressed fear of reprisal to the total number surveyed suggests that fear of reprisal, in fact, dropped over 100% among employees as a whole. 3/

The Board did, nevertheless, report that some employees expressed fear of reprisal in 1983: a total of roughly 120 in all. 4/ It is these 120 fearful employees who are transformed into the alarming and dire assertions that federal employees are increasingly concerned about reprisal. Thus, this infinitesimal sample taken in the context of other survey findings, does not support a worsening trend. This number of some two million federal employees is simply not enough evidence to justify the expensive and disruptive changes proposed.

The Board itself pointed out that any differences in employee willingness to engage in whistleblowing were "negligible" between 1980 and 1983. 5/ The Board's findings demonstrate that regardless of the perception

of those 120 employees, the overall percentages of employees who chose to engage or not engage in whistleblowing remained almost exactly the same in both years. 6/

One important difference, however, largely overlooked before today, is that the Board's study found that 44% fewer employees in 1983 claimed to have witnessed any impropriety at all in government in 1983; an apparent testament to improved management in the first two years of the Reagan administration. 7/ The assertion of a worsening problem in the face of this evidence seriously distorts the survey data.

A second significant difference between 1980 and 1983, according to the Board's study, was a sharp increase (29%) in the willingness of senior executives to engage in whistleblowing. 8/ In 1980, 39% of senior executives said they had engaged in whistleblowing; by 1983 the percentage had jumped to 68%. 9/ Although, the sample numbers here are also small there is potential importance in this shift in perception since senior executives are those most likely to detect serious corruption or waste and theoretically those most vulnerable to reprisal in the form of reassignments and low performance appraisals. Fear of reprisal, if indeed it exists at all as a

factor among these employees, did not affect their decisions to report wrongdoing.

In short, beyond the 120 respondents in the Board's study, no support is found for the belief that fear of reprisal is a growing problem, or even a problem at all. Close examination of the Board's study reveals, on the contrary, that fear of reprisal among federal employees is probably decreasing and certainly not interfering with good and efficient government.

Finally, if the Board's study did detect a growing fear of reprisal for whistleblowing, that observation would only be valid for 1983. In 1984, OSC began to win the first whistleblower reprisal cases. These cases were highly publicized. To the extent that media shapes perception, this alone would have a profound effect in employee perceptions were an appropriate survey taken today.

## D. The Effect of the Proposed Statute

### 1. Sectional Analysis

The proposed bill will have significant impacts throughout OSC operations and these effects in turn will require greatly increased staff and attendant costs. Specifically, the proposed bill will reduce OSC subpoena authority, require OSC to pursue fruitless stay and corrective action proceedings and prosecute trivial Hatch Act violations. The proposed bill attempts to reduce the burden of proving reprisal for protected disclosures, but even here does not accomplish an effective change. Finally, the proposed bill completely changes the focus of OSC as a law enforcement agency and creates a legal services office for federal employees who claim an array of wrongs on the job. The ramifications of this radical new approach to federal employment law will be discussed at length below.

#### a. Proposed Changes in OSC's Subpoena Authority

Current law, 5 U.S.C. § 1205(b)(2), permits the Special Counsel to issue subpoenas requiring the attendance and testimony of witnesses and the production of documents or other evidence. Section 1205(b)(2) imposes no restriction on who might be subject to OSC's subpoena

authority. So long as the witness or evidence is located in the United States, its territories or possessions, Puerto Rico or the District of Columbia, OSC may issue subpoenas and have them enforced.

Under the proposed section 1212(b)(2), the Special Counsel's authority to issue subpoenas requiring the attendance of witnesses would be restricted to "any employee, member of the uniform services or contract employee of the Government . . . ." Id. at p.15, lines 23-24. Similarly, OSC authority to subpoena documents or other information would be limited to these three classes of individuals.

This change, if enacted, would hamper OSC's investigation of cases involving witnesses who are not civilian, military or contract employees of the government. While most private citizens do cooperate voluntarily in OSC investigations, there are frequent occasions when they do not. The following cases illustrate instances where the lack of subpoena authority would have detrimentally affected the ability of OSC to discharge its statutory responsibilities:

1. In a whistleblower reprisal matter, OSC investigators enforced a subpoena in U.S. District Court to compel the attendance of a former government official who took the reprisal action.

2. In a standard of conduct matter, OSC investigators subpoenaed records of a Las Vegas hotel to prove that respondent had stayed at the hotel as a guest of a labor organization with whom his agency was doing business.

3. In a political discrimination matter, OSC uncovered a pattern of political preference in the hiring practices of an agency's regional office through the testimony of private citizens who were connected directly or indirectly with a state political party. Due to lack of cooperation by some of these witnesses, OSC had to use or threaten to use subpoenas.

4. In a Hatch Act matter, OSC investigators used subpoenas to compel respondents' attendance at interviews and their production of documents.

b. Proposed Changes Regarding Hatch Act Enforcement

Under current law the Special Counsel is required to investigate allegations of Hatch Act violations by federal employees. 5 U.S.C. § 1206(e). If the Special Counsel determines that disciplinary action should be taken for a Hatch Act violation, he is authorized to initiate prosecution before the Board. 5 U.S.C. § 1206(g).

The various Special Counsels over the years have exercised discretion not to prosecute minor or technical violations of the Act and have issued warning letters when investigation uncovers apparent minor or technical violations. This practice is not inconsistent with that followed by the Civil Service Commission in the years immediately prior to passage of the CSRA.

The proposed statute would remove the Special Counsel's discretion in federal Hatch Act cases, and require prosecution of all violations, no matter how minor or technical. Proposed section 1217(b)(1), p.31, lines 18-23. If this had been the law during the last two years OSC would have been required to prosecute, and thereby subject to a mandatory minimum 30-day suspension, the following:

1. seven medical doctors and a nurse in the Navajo Indian Health Service, New Mexico, for allowing their names to appear in two Mondale/Ferraro political advertisements;
2. a New Hampshire Forest Service employee for distributing handbills for a county sheriff;
3. a federal employee of the Department of Education, in the District of Columbia, for writing

notes on invitations to a fundraiser encouraging several persons to support a candidate;

4. a Navy employee in Indiana for stuffing envelopes with campaign literature while under the mistaken belief that there was no violation because the materials were provided by his union representative.

These are only examples of the kind of prosecutions OSC would have to pursue. OSC sent out 50 warning letters in 1985.

#### c. Proposed Changes in Stay Provisions

Current law permits the Special Counsel in his discretion to request from any member of the Board "a stay of any personnel action for 15 calendar days if the Special Counsel determines there are reasonable grounds to believe that [a] personnel action was taken, or is to be taken, as a result of a prohibited personnel practice." 5 U.S.C. § 1208(a)(1). Any member of the Board "shall" grant the request unless he finds that a stay would not be appropriate. 5 U.S.C. § 1208(a)(2). Under current law, the Special Counsel may request an extension of the stay for 30 days, 5 U.S.C. § 1208(b), or for any period of time. 5 U.S.C. § 1208(c). Only in

the case of the latter "c"-stay does the agency have an opportunity to comment on the appropriateness of the stay before the Board issues its stay order. Id.

Under the proposed law, the Special Counsel's decision to request a stay would no longer be discretionary at the point where he determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken. Proposed section 1214(b)(1), p.25, lines 3-10. At such point, the proposed law requires that the Special Counsel "promptly seek a stay." Id. The proposed law would eliminate the "a", "b" and "c" stages of a stay and substitute a 60-day stay. The proposed law is silent on whether the agency will have an opportunity to comment on OSC's request. However, the current standard for Board review is retained: a stay shall be ordered unless it is determined that, under the facts and circumstances involved, a stay would not be appropriate. Proposed section 1205(a)(2), p.10, lines 8-12.

Once a stay has been ordered, the agency would have 60 days in which to reverse or cancel the prohibited personnel practice. If it does not do so, the proposed law requires the Special Counsel to petition the Board for corrective action. Proposed section 1214(b)(2)(A), p.25, lines 11-14.

The proposed law is silent on whether the Special Counsel could informally request a stay or corrective action from the agency once he decides that reasonable grounds exist to believe a violation has occurred. Nor does the law provide for any procedure to request an extension of the stay. However, once a complaint for corrective action is filed, the stay would automatically remain in effect until the Board issues a final decision provided that the corrective action is directed at the action which has been stayed. Proposed section 1205(a)(4)(A), p.10, lines 18-24.

The most serious implications of these changes arise from the attorney-client relationship which OSC will have with the complainant. The implications of this relationship will be discussed at greater length supra. If the client supplies an affidavit to OSC which, if believed, would provide reasonable grounds to find a violation, then OSC is required to seek a stay and subsequent corrective action. If post-stay investigation shows that the affidavit is erroneous or untruthful, there does not appear to be discretion to stop the process. Perhaps OSC could move to dissolve the stay, although there is no provision for such action. However, such a motion would be pregnant with

ethical problems for an attorney because the motion would likely prejudice the client's interests.

d. Proposed Changes Governing Corrective Actions

Current law requires the Special Counsel to report his findings to the agency in any case where he determines there are reasonable grounds to believe a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action. 5 U.S.C. § 1206(c)(1)(A). If, after a reasonable period, the agency has not corrected the matter, the Special Counsel "may" request the Board to consider it for corrective action. 5 U.S.C. § 1206(c)(1)(B). Thus, the decision to file a corrective action complaint is, at present, a discretionary one.

The proposed section 1214(b) removes the requirement that the Special Counsel apprise the agency of his findings before commencing litigation. In its place, the bill would substitute the requirement that once the Special Counsel has reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, he must promptly seek a stay. Proposed section 1214(b)(1), p.25, lines 3-10. This mandatory provision would preclude the Special Counsel from ob-

taining corrective action through informal channels where it might otherwise be economically efficient and strategically advantageous to do so. Moreover, the mandatory requirement of the proposed law leaves no alternative but to become involved in costly and often protracted litigation in every case where the agency declines to take corrective action, even if the Special Counsel does not believe there is a likelihood of prevailing since the agencies may avail themselves of the Mt. Healthy test. Even if the Special Counsel believes that the agency has overwhelming evidence that it would have taken the personnel action in the absence of protected conduct, he must proceed with litigation and expend resources.

e. Proposed Changes Governing OSC Intervention

Current law provides that the Special Counsel may as a matter of right intervene or otherwise participate in any Board proceeding. 5 U.S.C. § 1206(i).

Proposed changes in the law would prohibit the Special Counsel from intervening in either employee appeals or individual rights of action unless the individual consented to such intervention. Proposed section 1212(d)(2), p.17, lines 4-8.

Thus, under the proposed law if an agency requested approval from OSC under 5 U.S.C. § 1206(f), to institute a disciplinary action against a manager for taking reprisal for protected activity, the manager who took the reprisal action could prevent OSC from appearing in support of the agency's position in the manager's appeal of the disciplinary action. For example, in one recent case where OSC approved a request from an agency to remove a manager for sexual discrimination, the manager appealed his removal and OSC intervened to support the agency's position. Under the proposed law the charged manager could have successfully objected to OSC's intervention.

f. Effect of Proposed Change in Standard of Proof for Corrective Action in Whistleblower-Reprisal Cases

The present section 2302(b)(8) of title 5, United States Code, prohibits an official from taking or failing to take a personnel action, as defined by statute, as a reprisal for a disclosure of information which an employee reasonably believes evidences a violation of law, rule or regulation, mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

The Board has interpreted this to mean that a prima facie case of reprisal for protected disclosures

requires the Special Counsel to prove the following elements by preponderant evidence:

- (1) that an employee made a protected disclosure;
- (2) that an official took or failed to take a personnel action with respect to that employee;
- (3) that the official had actual or constructive knowledge of the employee's protected disclosure at the time of his decision;
- (4) that the protected disclosure was a significant factor in causing the official's decision to take or not to take the action. In re Frazier, 1 MSPB 163 (1979), aff'd on other grounds, 672 F.2d 150 (D.C. Cir. 1982).

For all disciplinary actions and for corrective actions where "dual motivation" is not present, the Board will find a violation of 5 U.S.C. § 2302(b)(8) and order appropriate action once these elements have been established by preponderant evidence. Special Counsel v. Brown, 28 MSPR 133 (1985); Frazier, supra.

In a corrective action case where "dual motivation" is present, the Board applies the "but for" test of Mt.

Healthy School District v. Doyle, 429 U.S. 274 (1977),  
in addition to the above-listed elements. In these  
cases, the Board will not order corrective action, even  
if the above elements are established, if the agency  
proves by preponderant evidence that it would have taken  
the same action had there been no protected disclosure.  
Special Counsel v. Department of State, 9 MSPB 14 (1982).

Under the proposed section 1214(b)(3)(B), p.26,  
lines 3-9, the standard of proof would be lowered from  
preponderance to substantial evidence for those elements  
to be proved by the Special Counsel. The Board would  
be required to order corrective action in a whistle-  
blower-reprisal case if it determines that the Special  
Counsel has demonstrated by "substantial evidence" that  
a prohibited personnel practice has occurred, exists,  
or is to be taken.\*/ However, in dual motivation cases  
this proposed change would not, on its face, affect the  
burden of proof which the agency must bear under the  
Mt. Healthy test. Since it is the agency's burden under  
Mt. Healthy to prove by preponderant evidence that it  
would have taken the same action regardless of the em-

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\*/ Under established Board law, the substantial  
evidence standard requires only evidence "of such quality  
and weight that reasonable and fair-minded persons in  
exercising impartial judgment might reach different con-  
clusions." Parker v. Defense Logistics Agency, 1 MSPB  
489, 509 (1980). It is a standard most commonly used in  
judicial review of administrative decisions. Id.

ployee's protected disclosure, the lowering of the Special Counsel's burden of proof to establish a prima facie case of reprisal would not affect the principal barrier to successful corrective action prosecutions.

Only if the proposed law is construed as doing away with the Mt. Healthy defense would the substantial evidence standard have any material effect on corrective action cases brought by this office. However, the proposed law does not, on its face, do this.

g. Effect of Proposed Change That OSC Establish An Attorney-Client Relationship With Complainants

The bill states, as one of its purposes, that the Office of the Special Counsel establish a lawyer-client relationship with employees who claim to have been subjected to prohibited personnel practices. Proposed statute, p.3, lines 5-8.

As mentioned above, under the CSRA, OSC is an investigative and prosecutorial agency which enforces civil service laws. Although established in 1978, OSC's function as the policer of the federal civil service derives substantially from the former Civil Service Commission's law enforcement responsibilities. By changing the office's purpose, the proposed bill, if passed, would fundamentally alter OSC's nature and function.

Section 1212 of the proposed bill states that the Office of the Special Counsel "shall (1) represent and act as legal counsel on behalf of employees alleging prohibited personnel practices before the Merit Systems Protection Board and Federal courts." Proposed statute, p.14, lines 10-14. This section and the implementing sections which follow transpose OSC from a law enforcement agency concerned with the efficiency and integrity of the merit system to a legal service agency whose ethical duty would be to represent, in a competent and zealous manner, aggrieved federal employees in pursuit of their own individual interests.

The establishment of an attorney-client relationship between OSC and any employee alleging a prohibited personnel practice not only substantially changes the role of OSC, but has substantial implications for other sections of the proposed legislation, implicitly invalidating them, or at least making them ineffective.

For example, section 1214(a) (1) of the proposed legislation states that "[t]he Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." Id. at p.24,

lines 7-11. This wording is the same as the present section 1206(a)(1). However, once OSC represents the complaining employee in an attorney-client relationship, the meaning of this provision becomes ambiguous. Under the statute as presently enforced, OSC makes the required "reasonable grounds" decision on the basis of information from the complainant, agency sources, and other witnesses. If OSC attorneys determine that the matter could not be proved before the MSPB, under the current law of that forum, OSC will close the matter.

Assuming, however, that the attorney-client relationship begins when the complainant files a complaint alleging a prohibited personnel practice, OSC must determine how far its attorneys must go in pursuing the complaint. Under one view OSC would be required to represent the complainant only as long as there are "reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." Proposed statute, p.24, lines 10-11. Under this view, OSC may be able to terminate the relationship once there is sufficient information or evidence to refute such a belief. However, under the ABA Code of Professional Responsibility (hereinafter referred to as Bar rules), an attorney is required to zealously prosecute the claims of his client; he is required to make all non-frivolous claims that the client wants pursued.

Thus, pursuant to ethical standards imposed by the various Bars, OSC attorneys may be required to pursue all matters that are non-frivolous and may withdraw from representation only when it becomes clear that the claim is frivolous. In this regard, it is not frivolous to assert a position without first substantiating all the facts; nor is it frivolous to assert a position even though the lawyer believes that the position will not ultimately prevail. Moreover, it is not frivolous to assert a position knowing that vital evidence can be uncovered only through extensive discovery proceedings.

Example: Complainant alleges that his removal for unacceptable performance is in fact a reprisal for filing a grievance against his supervisor. Complainant states that a witness has told him that he overheard his supervisor saying that he was going to fire complainant because of the grievance. During an OSC interview, the witness denies having made such a statement to complainant, and denies having overheard the supervisor make such a statement. OSC then confronts the complainant with the witness' denial; complainant persists in his statement that witness made such a statement to him, and must now be lying. The evidence shows that the complainant does in fact have a serious performance problem.

Under present procedures, this matter would probably be closed out by the OSC Complaints Examining Unit: (1) no witnesses and (2) serious documented performance problem undercutting a claim of reprisal.

Under the attorney-client relationship, however, OSC would likely have an obligation to pursue this mat-

ter. The OSC attorney would have to believe the client and act according to the client's best interests.

In other words, OSC would have insufficient "reasonable grounds" for pursuing the matter. However, since the complainant has raised a non-frivolous allegation, as his attorney, OSC would be obligated to pursue the matter to litigation.

Section 1214(b) (1), of the proposed legislation further provides that if the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, he shall promptly seek a stay of such prohibited activity. Id. at p.25, lines 3-10. Here too, although the proposed section uses the words "reasonable grounds to believe," the Bar rules would likely require OSC to interpret this in light most favorable to the client. Thus, if the client provides a statement which, without further investigation, sets forth the basic elements of a prohibited personnel practice, and he desires a stay, the OSC attorney would be bound by his ethical obligations to file such a request with the Merit Systems Protection Board.

A similar situation arises with respect to seeking corrective action. Proposed section 1214(b) (2) (A) states

that if during the pendency of a stay the agency has not taken action to reverse or cancel the prohibited personnel practice, the Special Counsel "shall" petition the Board for corrective action. Id. at p.25, lines 11-14. The Special Counsel is given no discretion in determining whether corrective action is appropriate or whether it is in the best interests of his client.

Although the proposed legislation is subject to divergent interpretations, it also appears to require the Special Counsel to represent, in an attorney-client relationship, those employees who file section 7701 appeals with the Merit Systems Protection Board and allege, as an affirmative defense to an adverse personnel action, that a prohibited personnel practice was committed. Proposed section 1212(d)(2), p. 17, lines 4-8 (allowing OSC intervention), and proposed section 1212(a)(1), p.14, lines 10-14, (providing that the Special Counsel shall represent the employee before the MSPB). It also appears that OSC would have the same representation obligation in any direct action brought before the Board or the courts by employees or former employees, as well as in any appeal filed by them after a final administrative order of the Board. Proposed section 1205(b)(1), p. 11, lines 8-14 (private right to seek a stay); proposed section 1212(d)(2), p.17, lines 4-8 (OSC intervention in appeals and section 1221 private actions); proposed

section 1212(d) (3), p.17, lines 9-13 (appeals to court from final board orders); proposed section 1221(a) (1), p.33, lines 17-19 (individual alleging prohibited personnel practice may bring an action before MSPB for corrective action); proposed section 1221(f) (1), p.35, lines 1-7 (individual may obtain judicial review).

An attorney must act with zeal on behalf of a client, and use whatever lawful and ethical measures are available to vindicate the client's cause. See ABA Model Rules of Professional Conduct, hereinafter Model Rules, and the Code of Professional Responsibility cited to canons, ethical considerations, and disciplinary rules. See Model Rule 1.3; Canon 7 and DR 7-101(A). While an attorney is foreclosed from making a frivolous argument, or taking a frivolous position on behalf of a client, all arguments that can be supported in good faith under existing law or are based on a good faith argument for changing the existing law are proper. In practice few arguments are truly "frivolous."

Another general matter involving the attorney-client relationship created by this proposed legislation concerns the confidentiality of certain government files and information. An attorney must keep the client reasonably informed and must respond promptly to the client's reasonable requests for information about the

matter. The attorney should furnish the client with all the information necessary to allow the client to participate intelligently in making decisions about the matter. Comment to Model Rule 1.2. Thus, if OSC had an attorney-client relationship with all those who alleged prohibited personnel practices, OSC may be required to provide to its clients all material received during an investigation or during discovery, including otherwise confidential material or material that would not be available to the employee under the Freedom of Information Act or the Privacy Act. This kind of information is now available to OSC, pursuant to Privacy Act exemption and protected from disclosure because of OSC's status as a law enforcement agency. 5 U.S.C. § 552a(b)(7).

The attorney-client relationship also poses additional problems for OSC attorneys as government employees. Absent the consent of the client, an attorney has an ethical obligation not to reveal information relating to the representation of his client. Model Rule 1.6; DR 4-101(B). The ethical duty of confidentiality is closely related to the attorney-client privilege, but differs in three important ways. First, the ethical duty is absolute, whereas the attorney-client privilege provides only an exclusionary rule of evidence. Thus, the ethical duty prohibits an attorney from voluntarily revealing information relating to the

representation; it applies in every context even where the attorney-client privilege may not apply. See comment to Model Rule 1.6. Furthermore, the ethical duty is comprehensive in scope. While the privilege covers only confidential communications, the ethical duty covers not only confidential communications, but also any other information that the attorney obtains relating to the representation of the client, no matter what the source of that information. Finally, the ethical duty concerns the use as well as the disclosure of information; the privilege concerns only the disclosure of information. An attorney can be disciplined for using a client's information to the disadvantage of the client.

Additionally, the proposed law would have its most problematic impact in the area of conflicts of interests. A lawyer's professional judgment must be exercised solely for the benefit of the client, free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of another client, nor the interests of a third person, or entity such as the government, should be allowed to interfere with the lawyer's loyalty to the client. EC 5-1.

The ABA rules provide that if an impermissible conflict of interest is apparent before the lawyer takes

on the client's matter, the lawyer must not take it on. DR 5-101(A) and DR 5-105(A); Model Rule 1.7. If an impermissible conflict becomes apparent after the lawyer has taken on the matter, the lawyer must withdraw. DR 5-105(B) and DR 2-110(B)(2); Model Rules 1.7 and 1.16(a)(1). Yet the bill, as proposed, does not give OSC attorneys these options.

It is difficult to fathom a situation where OSC could begin representation of a client before the MSPB or the courts on allegations of prohibited personnel practices, and then withdraw that representation without prejudicing the client. Such a move to withdraw would signal that OSC has found evidence that refutes the client's allegations, since OSC is required to represent the client if it has reasonable grounds to believe that a prohibited personnel practice has been or is to be committed. Thus, in reality, OSC could never withdraw, and would be forced to prosecute cases in which it had already determined that no prohibited personnel practice had been committed, or could be proved.

Disciplinary Rule 4-101 of the Code of Professional Responsibility prohibits a lawyer from revealing the

confidences or secrets of his client, except in certain circumstances, such as where the client consents, or where the disclosure is permitted under the Disciplinary Rules or required by law or court order.

The lawyer-client relationship established by the bill may prohibit the OSC from complying with the provisions of the Freedom of Information Act, unless the Freedom of Information Act is considered to be a law permitting disclosure of client confidences or secrets, or unless the client authorizes disclosure. Violation of the FOIA subjects the withholding official to disciplinary action, and subjects the agency to attorney fees and other litigation costs. Thus, substantial parts of OSC files which are now subject to the FOIA may be required to be withheld under the lawyer-client privilege, and may subject OSC to substantial litigation concerning the precedence of the privilege over the FOIA, or, if material is released by OSC, substantial litigation before the disciplinary board of the appropriate Bar of the attorney or his employee who divulged the confidences.

Further, the proposed bill, in sections 1218 and 1219 (pages 32-33) provides for transmittal of information to Congress and for an annual report of the Office of Special Counsel. A substantial amount of information

now transmitted to Congress and included in OSC's annual report may no longer be available to Congress or the public, because the Special Counsel would be prohibited by the Code of Professional Responsibility from releasing any client confidence or secret.

## 2. Cost Implications

My testimony so far has concentrated on the new requirements placed upon the Office of the Special Counsel by the proposed legislation. As you know, additional requirements always have attendant additional costs. The Office of the Special Counsel is currently authorized to operate in Fiscal Year 1986 with \$4,594,000. If this legislation is passed, in order to carry out the provisions, the Office of the Special Counsel estimates that its budget will have to be increased to \$18,000,000. I believe this estimate is conservative.

The approximately \$13,400,000 increase is primarily concentrated in the Prosecution and Investigation activity areas and is mainly precipitated by the requirements of the attorney/client relationship which is mandated by the proposed legislation. This alone accounts for \$4.7 million in the investigation area through a projected manpower increase of 80 positions and further need for funds to cover travel of \$1.7 million. Another \$0.4 million will be required to pay for transcripts and increased personnel benefits. The remaining \$2.6 million is accounted for in direct personnel costs.

With respect to litigation activities, the attorney/client relationship would require an estimated 83 attorneys and support staff. Approximately \$5.0 million will be needed to cover these personnel costs, additional travel, transcripts and so forth.

Further, projected requirements for legal staff of four positions and \$0.2 million will be necessitated by the requirement to prosecute all alleged federal Hatch Act violations. It is also expected that a staff increase of seven persons and about \$280,000 will be needed to meet the requirements of regulatory review.

The balance of the \$18.0 million is comprised of overhead and supervision in the amount of \$3.2 million. However, \$1.4 million of this overhead is a one-time expense to cover the establishment of four new field offices, moving expenses and equipment purchases.

The staffing of the Office of the Special Counsel will have to increase from 84 FTE positions to an estimated 270 FTE positions. In order to be effective and to respond adequately to the added responsibilities, many of which are mandated by the proposed statute, funding and staffing levels for this operation must be increased to this extent. This is a conservative estimate; to provide for less would virtually assure conflict of interest problems which would halt the functions of the office long before the proposed sunset date.

## E. Conclusion

The draft bill would destroy the present structure of agency employee relationships; would cripple and pervert the law enforcement function of OSC; would not reach the legal concepts which would require change if the stated objectives of the bill were to be pursued; and has an inevitable annual direct cost increase for OSC alone of at least triple the funds now appropriated.

The bill is flawed conceptually, as well, from inception, for it proceeds upon the false premise that proper law enforcement systems now in effect do not work to protect bona fide whistleblowers. The fact is that, now, the statutory protection works. I oppose the bill.

Notes to Section C-2

"The Misapprehended Study"

1/ An explanation for some of the distortion of the Board's findings may lie in the fact that a vociferous, self-described public interest group appears to deserve the honor of the first misuse. In hearings before this subcommittee on June 18, 1985, a representative of the Government Accountability Project declared in testimony that, "In 1980, 20 percent of whistleblowers did not report problems because of fear of reprisal. In 1983, that was 37 percent." Whistleblower Protection, U.S. House of Representatives, Committee on Post Office and Civil Service, Serial No. 99-19; 105. The error of this statement is manifest: one who chooses not to make a disclosure cannot be a whistleblower.

2/ These percentages are derived from the Board's report. In 1980, a total of 7271 employees claimed to have seen wrongdoing; 2419 of that number chose not to report it for any of several reasons; 19% of these, or 459, claimed fear of reprisal as a reason. In 1983, a total of 2243 employees claimed to have seen wrongdoing; 324 of that number chose not to report it for any of several reasons; 37% of these 324, or 119.8, claimed fear of reprisal as a reason for not reporting. Study, pp. 15, 34.

3/ These percentages are derived from comparison of the total number of employees who responded in each year with those who expressed fear of reprisal in each year. In 1980, 8592 employees responded compared to 459 who expressed fear or 5.3% of the whole. In 1983, 4897 employees responded compared to 119.8 who expressed fear of reprisal or 2.4% of the whole. Study, pp. 4, 15, 34.

4/ Study, p. 23

5/ Study, Id.

6/ Study, p. 24

7/ Study, p. 11, 13: a drop from 45% in 1980 to 25% in 1983 is a 44% change.

8/ Study, p. 26

9/ Study, Id.

## SUMMARY DATA CONCERNING COMPLAINTS

During the period October 1984 through January 1986, OSC received 1884 complaints of various types. A substantial number of complaints involved more than one kind of allegation. However, these complaints were classified on initial review as involving the following types of allegations as the primary complaint:

<u>Nature of Primary Allegation</u>	<u>Number of Matters</u>
Prohibited Personnel Practices (Total)	<u>1251</u> (66.4%)
Discrimination on the basis of race, color, religion, sex, national origin, age, or handicapping condition	355 (18.8%)
Reprisal for whistleblowing	303 (16.1%)
Reprisal for exercising an appeal right	152 ( 8.1%)
Unauthorized preference or advantage	133 ( 7.1%)
Personnel action taken in violation of law, rule or regulation relating to a merit system principle	108 ( 5.7%)
Obstruction of the right to compete for employment	76 ( 4.0%)
Discrimination on the basis of non-job related conduct	59 ( 3.1%)
Nepotism	36 ( 1.9%)
Discrimination on the basis of marital status or political affiliation	15 ( 0.8%)
Solicitation or consideration of unauthorized recommendation	9 ( 0.5%)
Influencing withdrawal from competition	3 ( 0.2%)
Coercion of political activity	2 ( 0.1%)
No prohibited personnel practice or other prohibited activity apparently involved	<u>245</u> (13.0%)
Other Prohibited Activity	<u>151</u> ( 8.0%)
Hatch Act (Federal, State and local)	<u>121</u> ( 6.4%)
Disclosure of information possibly referable to the agency head concerned for a report of action taken thereon	<u>90</u> ( 4.8%)
Withholding of Information under FOIA	<u>17</u> ( 0.9%)
Standards of Conduct violation	<u>5</u> ( 0.3%)
Discrimination found by a court or administrative body	<u>1</u> ( 0.0%)
Pending determination	<u>3</u> ( 0.2%)
<u>Total Complaints</u>	<u>1884</u> (100%)

Allegations of Reprisal for Disclosures of Information

Of the 303 matters involving alleged reprisal, 220 were closed during the period and 83 were still pending completion of inquiry and investigation. Review of the 220 closed matters discloses certain common characteristics, which are tabulated below.

Kinds of Disclosures Involved. Although the disclosures claimed to have been made by complainants concern a wide range of matters, many of which do not fall clearly within the statutory definition of "whistleblowing", and often more than one type of allegation was involved, the following summarizes the general nature of the disclosures claimed to have been made.

<u>Kind of "Disclosure"</u>	<u>Number of Matters</u>
Information believed to evidence a violation of law, rule or regulation, or mismanagement, waste of funds, an abuse of authority or a danger to public health or safety.	110 (50.0%)
A general allegation of violation of law, mismanagement, waste of funds, abuse of authority, or danger to the public.	61 (27.7%)
Personal disagreement with the conduct or actions of others.	15 ( 6.8%)
Gave information to an investigator during the course of an OIG or other investigation.	11 ( 5.0%)
A disagreement with agency policy, directive or decision.	5 ( 2.3%)
A personal grievance or dispute with management or coworkers.	6 ( 2.7%)
A disagreement with supervisory review or direction.	2 ( 0.9%)
Other miscellaneous not within statutory definition.	10 ( 4.5%)
Total	220 (99.9%)

To Whom Disclosures Were Reportedly Made. Although disclosures were reportedly made to more than one recipient in a number of the matters, the following tabulation gives some indication as to whom employees tended to turn to in providing information or to seek assistance.

<u>Disclosed to:</u>	<u>Number of Matters</u>
Agency OIG or other investigative or oversight office	95
Higher management	61
Member of Congress	24
Supervisor	22
Other investigative or law enforcement office or agency	19
Other interest group	18
OSC	9
The President	5
News Media	5
No one	2

Kinds of Personnel Action Allegedly Involved in Reprisal\*

	<u>Number of Matters</u>
Disciplinary action (Including admonishment, reprimand, suspension, demotion, removal)	80 (36.4%)
Detail, reassignment, change of duties	31 (14.1%)
Performance based adverse action (Reassignment, demotion, removal)	27 (12.3%)
Performance appraisal	27 (12.3%)
Promotion (i.e. non-promotion)	17 ( 7.7%)
Other miscellaneous	10 ( 4.5%)
Decision re pay, benefits, awards of training	7 ( 3.2%)
No personnel action	7 ( 3.2%)
Adverse action <u>not</u> for cause (RIF separation or demotion, reclassification, MSPB ordered)	6 ( 2.7%)
Voluntary actions (Resignation, retirement, transfer)	6 ( 2.7%)
Appointment or reemployment	2 ( 0.9%)
<b>Total</b>	<b><u>220</u> (100%)</b>

\*In 62 matters, complainant cited more than one personnel action not included within this tabulation.

Basis for Closing Reprisal Matters

The 220 reprisal matters were usually closed for more than one valid reason. The following summarizes the primary basis for closing each of the 220 matters.

<u>Basis for Closing</u>	<u>Number of Matters</u>
No evidence of nexus	59 (26.8%)
No evidence of nexus and other factors <sup>1</sup>	58 (26.4%)
Claimed disclosure not protected and nexus not evidenced in any event	27 (12.3%)
No personnel action taken	15 ( 6.8%)
Disclosure not a significant factor	15 ( 6.8%)
Jurisdiction lacking <sup>2</sup>	13 ( 5.9%)
Complainant failed to cooperate <sup>3</sup>	12 ( 5.5%)
No personnel action and no nexus between disputed action and claimed disclosure	10 ( 4.5%)
No protected disclosure made <sup>4</sup>	4 ( 1.8%)
<u>Reprisal found and agency took recommended corrective action</u>	4 ( 1.8%)
Further action moot	3 ( 1.4%)
Total	<u>220</u> (100.0%)

<sup>1</sup>Other factors include such matters as agency justification for the contested action and the circumstances surrounding the particular dispute.

<sup>2</sup>Statute does not apply to the agency, employee or position involved or the alleged offending official.

<sup>3</sup>In the absence of information evidencing any prohibited personnel practice or other civil service violation, complainant failed to respond to requests for information needed to perfect the allegation or on which to base further inquiry.

<sup>4</sup>Although it was frequently not clear whether any protected disclosure was involved in the matters pursued, it was clear in these instances that no protected disclosure was involved.

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DESCRIPTION OF ALLEGED REPRISAL MATTERS

During the period October 1, 1984 to January 30, 1986, a total of 304 matters involving allegations of reprisal for disclosures of information (i.e. whistleblowing) were received by OSC. Of these, 220 matters were closed on the basis of OSC's inquiry into the matter. The following summarizes the nature of the alleged whistleblowing and reprisal in each of the closed matters and the reason each matter was closed.

In order to place this information in proper context, it should be noted that the prohibition against reprisal for bona fide whistleblowing is stated as follows in section 2302(b) of title 5, United States Code:

"Any employee who has authority<sup>1</sup> to take, direct others to take, recommend or approve any personnel action<sup>1</sup>, shall not, with respect to such authority --

(8) take or fail to take a personnel action<sup>1</sup> with respect to any employee or applicant for employment as a reprisal for -

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences -

(i) a violation of any law, rule, or regulation, or  
(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety<sup>2</sup>,

if such disclosure is not specifically prohibited by law and if such information is not specifically required to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of the agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences -

(i) a violation of law, rule, or regulation, or  
(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety..." (Emphasis added.)

Under current law, a prima facie case of reprisal requires: (a) a protected disclosure; (b) the offending employee's actual or constructive knowledge (or belief) of the alleged disclosure and alleged identity of the discloser; (c) taking or failing to take a personnel action; (d) a causal connection between the disclosure and the action taken. Stromfield v. Department of Justice, 21 MSPR 428, 431 (1984). The Special Counsel must also prove that retaliatory motivation was a "significant factor" in the action

<sup>1</sup>The "personnel actions" to which this section applies are prescribed in paragraph 2302(a)(2)(A) of the same section.

<sup>2</sup>The terms and phrases in this clause are not further defined in the statute.

Description of Alleged Reprisal Matters

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taken. Special Counsel v. Harvey, slip op. at 14 n. 16 and 17; In re Robert J. Frazier, Jr. 1 MSPB 159, 179 (1979). Moreover, in a corrective action proceeding, the agency may successfully defend by proving that it would have taken the same action regardless of the protected disclosure. Special Counsel v. Department of State (Rohrmann), 9 MSPB 14, 20 (1982); cf Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977).

Listing of Matters Closed

(10/1/84 - 1/30/86)

1. In February 1985, agency proposed 14 day suspension for misconduct in September 1984 and subsequently reduced penalty to an oral reprimand. Employee alleged that the disciplinary action was in reprisal for his giving testimony as a witness in an OSC investigation (October 1984 - January 1985) and in two discrimination complaint investigations by agency in June 1984. OSC found no evidence of retaliatory intent or nexus.
2. Employee was suspended for insubordination in June 1983, performance was rated unsatisfactory in August 1983 and marginal in October 1984. Employee claimed these actions were in reprisal for his having reported to his commander in 1982 that an agency official was conducting personal business from his office. OSC found no evidence of a causal connection. Moreover, employee's performance problems were well documented.
3. Employee's duties were changed to comport with job description. Employee alleged such change was in reprisal for his having submitted allegations to OSC in October 1984 concerning an alleged misuse of funds, waste through duplication of functions, and "material weaknesses" in agency's financial management procedures. OSC found reprisal not provable since no statutory personnel action was involved. Moreover, no evidence of nexus.
4. Employee's removal was proposed in March 1985. Employee alleged proposed removal was in reprisal for his having reported irregularities in contract negotiations in October 1984. OSC closed for lack of jurisdiction, i.e. nonappropriated fund employee. Moreover, no evidence of nexus.
5. Employee was reassigned from Virginia to New York. Employee alleged reassignment was in reprisal for his having expressed to his views to second line supervisor concerning the location and basis for stress and morale problems with employees. OSC found no protected disclosure was made and no evidence of nexus in any event. Moreover, reassignment was based on legitimate management reasons.

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6. Employee was reassigned from Hartford to Boston in January 1982, his performance appraisal in January 1984 showed he needed to improve his "adaptability" and "cooperativeness", and was given a letter of admonishment for insubordination and absence without leave. Employee alleged these agency actions were in reprisal for his having told the regional administrator in September or October 1981 that the administrator's assistant was a political opportunist who wasn't performing the job he was supposed to do. This aspect of matter was closed since it could not be established that employee had made any protected disclosure, and, in any event, the claimed disclosure was not a "significant factor" and there was no evidence of nexus.

7. Employee was discharged in June 1985 from a position requiring access to Top Secret information during probation for poor performance and as a possible security risk. Employee alleged his discharge was in reprisal for his having turned over a journal or magazine article which he claimed suggested that the Soviet's knew of his specialized mathematical work and for giving a lecture concerning government waste of funds in the statistical analyses performed by contractors. OSC found no evidence of retaliatory intent or nexus. Also, agency determination concerning employee's security clearance is not within OSC purview.

8. Employee complained about being placed on leave restriction and nonselection for promotion in February 1984. He alleged that these actions resulted from his having filed a complaint with the IG in October 1983 concerning alleged violations of the standards of conduct. OSC found no evidence of nexus.

9. Agency proposed a 10 suspension for negligent and careless work performance in August 1985. Employee claimed this was in reprisal for his having reported to the regional security office alleged improper use of agency rental aircraft and improper use of funds in March 1982. OSC found no nexus and that agency's action was supported.

10. Employee received a "low satisfactory" performance appraisal in December 1984. He claimed this low rating was in reprisal for his having informed a GAO review team in July 1984 that: (1) facial fractures were being treated improperly; (2) improper oral biopsy procedures were being used; and (3) patients scheduled for radiation therapy were not provided with adequate safeguards against infections. (Report of GAO investigation cited no evidence of mismanagement.) OSC found no evidence of retaliatory intent or nexus, whereas the record disclosed pre-existing performance problems.

Description of Alleged Reprisal Matters

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11. Employee complained of lowered performance ratings and lack of promotion (no dates.) He claimed these resulted from his having made disclosures of "mismanagement" to the DOD Hotline. Matter was closed when complainant failed to respond to requests for additional information needed to perfect his complaint.

12. Employee complained of a low performance rating in June 1984, a proposed removal in May 1985, and demotion in August 1985. He alleged that these actions were in reprisal for his having disclosed, in August 1983, "mismanagement" by his two supervisors in the maintenance of case files. OSC found that the claimed disclosure was not provable as a "significant factor". Moreover, agency actions were supported.

13. Employee complained of her reassignment to a position without promotion potential and the downgrading of her former position, both in May 1985. She claimed these actions were in reprisal for her having told her immediate supervisor and union president in February 1985 that her second level supervisor had allegedly thrown away or destroyed correspondence. OSC found that the employee had been on notice of performance deficiencies before her claimed disclosures and that the alleged disclosures were not provable as a "significant factor".

14. Employee complained of a reassignment in August 1982, harrasment in the form of reprimands late in 1983 and in 1984, and denial of a reassignment he requested. He claimed these actions were in reprisal for his complaint to his supervisors in early 1981 about an alleged waste of government property ("items of minor value"), an unspecified disclosure over the "waste, fraud and abuse hotline" to the comptroller's office in March 1981, and some unspecified disclosures to the general foreman. OSC found no evidence of retaliatory intent or nexus.

15. In December 1983, agency proposed employee's suspension for 5 days, then reduced penalty to a reprimand; proposed his removal for cause in June 1984, then issued a letter of caution in lieu thereof; and finally reassigned him from Columbus to Cleveland effective March 1985. (Disciplinary actions were based on employee's alleged infractions of the agency code of conduct and other misconduct.) Employee resigned in June 1985. Employee claims these actions were in reprisal for his having reported to the regional administrator alleged violations of law and abuse of authority by the field office manager in December 1983. OSC found that claimed disclosures were not provable as a significant factor in the agency actions at issue.

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Description of Alleged Reprisal Matters

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16. Temporary employee was not given a career conditional (permanent) appointment she desired. Employee alleged that her not receiving the appointment was in reprisal because agency management believed she had made disclosures to OSC concerning fraudulent claims of overtime and compensatory time and the practice of employees punching time cards of other employees, which she had not. OSC found that the alleged perpetrators of the alleged reprisal lacked actual or constructive knowledge of the disclosure and there was otherwise no evidence of nexus. Moreover, the employee was not eligible (under civil service rules) for the appointment she desired.

17. In December 1984, one employee was given a notice of reprimand for "misuse of official time", and another a reprimand for "refusal to comply with a proper order." The co-complainant~~s~~ claimed the reprimands were in reprisal for their having expressed their concerns, in September 1984 and subsequently, about what they thought was a violation of dual compensation [prohibitions] (civilian employee leaving during duty hours to perform military reserve duties) and a conflict of interest involving the same employee (i.e. auditing the reserve unit in which he served.) OSC found no evidence of nexus and that the claimed disclosure was not provable as a significant factor. ✓

18. Employee was demoted from a GS-17 position to a newly established GS-16 position (not for cause.) Employee claimed that the agency action was in reprisal for his having released records to a Senate Committee at its request. The records subsequently disclosed that the person they concerned (the nominee to be the head of the agency) may have given certain false information concerning his previous salary on his Form SF-171. OSC investigation disclosed that the disclosure was not provable as a "significant factor" and otherwise no evidence of nexus. Moreover, this matter did not involve a disclosure contemplated by the statute in that he was not even aware that the records he released contained information which evidenced any possible wrongdoing. (It should be noted that possible violations of subsections 2302(b)(10) and 2302(b)(11) were also considered in this matter. However, prosecution was declined for lack of prosecutive merit on all possible counts.)

19. Employee alleged reprisal for having reported fellow employees' actions of "theft or pilferage" to their supervisor. However, no personnel action was taken or proposed. The matter was closed since there was no~~t~~ personnel action involved and otherwise no basis for further action.

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20. Employee was separated during probation on April 9, 1985 for unacceptable performance. Employee claimed her separation was in reprisal for her having, on or about April 1 or 2, 1985, reported certain "improprieties and omissions" and incomplete documentation in the files to support certifications submitted to the regional flight surgeon. File was closed when it could not be established that the employee had made any protected disclosure, whereas the employee had been on notice of performance deficiencies prior to her separation and there was substantial evidence of unacceptable performance.

21. Complainant was reassigned to an isolated work station and, a year later, removed for committing a criminal misdemeanor. Co-complainant alleged he was harrassed and coerced into retirement. Both claimed these actions or events were in reprisal for their having reported through the AAFES hotline in August 1980 that substantial amounts of money were being stolen. Matter was closed for lack of jurisdiction since the complainants were former nonappropriated fund employees.

22. Complainant received a low performance rating in May 1984 and was charged with being absent without leave in October 1984. He claimed that these actions were in reprisal for his having used the agency OIG's hotline to give information concerning "mismanagement" and "abuse of authority" in May 1983. The matter was closed for absence of evidence of any retaliatory intent or nexus.

23. Complainant received a notice of unacceptable performance in December 1984, a notice of proposed reduction in grade in May 1985, and was demoted one grade in September 1985 for performance deficiencies. He claimed that these actions were in reprisal for his having been the source of information to the former district director, who told the press in April 1983 that the Reagan Administration purposely neglected filing EEOC lawsuits against employers. The matter was closed since it could not be established that complainant had made any protected disclosure of information, and even if the claimed disclosure could be construed as protected, such "disclosure" was not provable as a "significant factor" and there was otherwise no evidence of any retaliatory intent or nexus.

24. Removal of complainant was proposed when it was believed she had made false statements during an EEO proceeding, but the proposed removal was rescinded when she clarified her statement. She claimed her proposed removal was in reprisal for her reporting to her supervisor that another employee had worked during her lunch period in

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Description of Alleged Reprisal Matters

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violation of the Fair Labor Standards Act and giving a statement to an EEO counsellor about the same matter. File was closed since no personnel action was taken.

25. Complainant was charged initially with absence without leave, but the charge was dropped and he was given a written reprimand. The reprimand was then withdrawn when agreement was reached between the employee and his supervisor concerning leave restrictions. Complainant claimed these actions were in reprisal for his having complained to his union about his supervisor's preferential treatment of another employee. File was closed since there was no evidence of retaliatory intent or nexus and agency's actions were supported by an apparent need to deal with his leave problems.

26. Complainant's 1983 performance appraisal was lowered, but was not signed by the supervisor until February 1984. In March 1984, complainant wrote to the DOD Hotline office that his supervisor had a book typed on government time. File was closed for lack of jurisdiction since the complainant is a nonappropriated fund employee. Moreover, the disclosure allegedly the reason for reprisal was made after the personnel action at issue.

27. Complainant claimed that the denial of a cash award and a low performance appraisal were in reprisal for his having given testimony during an IG investigation of allegations of mismanagement, waste of funds, and an abuse of authority. The file was closed for lack of prosecutive merit since one the management officials involved had already been removed by the agency, another had retired in lieu of reassignment, and the performance appraisal was under review under the agency's grievance procedures.

28. Complainant was suspended for five days in April 1985 for misconduct and disruption of the workforce. He claimed this action was in reprisal for his having written a letter to the editor of a local newspaper in January 1984 about alleged agency mismanagement and inefficiency resulting from incompetent management and personnel. File was closed for lack of evidence of retaliatory intent or nexus to the claimed disclosure. Letter to editor was sent over a year before the disciplinary action and complainant had a prior disciplinary record.

29. Complainant claimed her non-selection for promotion was in reprisal for reporting "fraud, waste and abuse" in contract irregularities to the agency's office of special investigations. File was closed in the absence of any evidence of retaliatory intent or nexus.

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30. Complainant was suspended in August 1983 for refusal to comply with his supervisor's orders. Shortly thereafter, a change was made in his duties. He claimed these actions were in reprisal for his having disclosed mismanagement and a waste of funds during a weapons test and "fraud in the granting of overtime in May and July. File was closed for lack of any evidence of retaliatory intent or nexus.

31. Complainant was given notice in May 1985 that his performance was unsatisfactory. He claimed this notice was in reprisal for his having, in March 1984, reported to the personnel office, alleged supervisory abuses - drinking and gambling on base, false labor reporting, falsification of documents, and providing information during the ensuing investigation. File was closed since the employee was on notice of his performance deficiencies before his disclosure, there was no evidence of retaliatory intent or of nexus, and he had not as yet been given the final performance rating.

32. Complainant was reassigned to a position in another state effective April 1985 and his removal for failure to accept the reassignment was proposed in May 1985. He alleged that the reassignment was in reprisal for his presentation of a research paper and writing a letter to the editor. Moreover, he claimed that his reassignment was a "gross waste of funds." File was closed since it could not be established that complainant had made any protected disclosure of information. Moreover, there was no evidence of any retaliatory intent or of nexus to any protected activity (including exercise of 1st Amendment rights.)

33. Complainant was placed on enforced leave in October 1983. He alleged that this action was in reprisal for his having reported to the Office of Professional Responsibility that two officials had engaged in mismanagement, cover-up of and investigation, abuse of authority, and fraud. Investigation was terminated as it was determined that the disclosure was not provable as a significant factor.

34. Complainant claimed that the denial of training he desired was in reprisal for his telling his supervisor that another employee had performed excessive temporary duty (TDY) involving travel status. File was closed in the absence of any evidence of retaliatory intent or of nexus. Moreover, no personnel action as such was involved.

35. Complainant claimed that his non-promotion (to a position for which he was not qualified), alleged failure to accommodate a handicapping condition (hernia), and assignment

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to full duties from light duty status (as a result of a fitness for duty examination through which the examining physician found no physical limitations) were in reprisal for his having written to a Member of Congress (more than a year before these actions) about allegedly improper use of government equipment, employee tardiness, employee nonproductivity, and record keeping inadequacies. File was closed since there was no evidence of retaliatory intent or of nexus to the claimed protected disclosure.

36. Complainant alleged that the agency not rehiring him following his resignation from a Veterans Readjustment Appointment was in reprisal for his having reported inconsistencies in the records concerning stocks of combat meals. (Complainant claimed he resigned after he reported the matter because he feared possible criminal prosecution.) File was closed in the absence of any evidence of reprisal or of any other prohibited personnel practice.

37. Complainant alleged that his "highly successful" performance rating (rather than an "exceptional" rating) in September 1985 and his detail to headquarters in October were in reprisal for his reporting to OIG in July 1985 that his supervisor was operating a private law practice during working hours and for his charging his supervisor with abusing restrictions on manpower ceiling and use of travel funds. File was closed in the absence of any evidence of reprisal, including knowledge by the supervisor of the claimed disclosures.

38. Complainant was given a reprimand in November 1985 for making false and malicious statements to the base inspector and another employee that her second level supervisor was "exchanging promotions in expectation of sexual favors". She claimed the reprimand was in reprisal for her meeting with the base inspector in August 1985 to discuss allegedly illegal contracts and forced contributions for parties, during which meeting she also allegedly accused her supervisor of dating and promoting employees in exchange for sexual favors. File was closed since any protected disclosure was not provable as a "significant factor" in the disciplinary action. The agencies pre-action investigation disclosed that the employee had a history of making unfounded allegations about her fellow employees.

39. Complainant was separated in July 1983 in a reduction in force. He had declined reassignment to another position in lieu of separation during the RIF. He claimed that his separation was in reprisal for his allegations to OSC of management abuse of overtime, disparate application of seniority policies, racial discrimination, neglect of the

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[employee beneficial] suggestions system, and safety practices in July 1979, and his telling OMB in August 1982 that it was wasteful to RIF nonsupervisory employees while retaining supervisory employees. File was closed in the absence of any evidence of retaliatory intent or nexus.

40. Complainant alleged that his change of duty station (within the same commuting area) and scope of duties in February 1984 was in reprisal for his allegations of mismanagement and gross waste of funds with respect to electrical work contracted in 1982 - 1983 which allegedly resulted in cost overruns on a project increasing costs from \$200,000 to \$750,000. File was closed since no personnel action was taken and there was no evidence of any retaliatory intent or of nexus. While employee claimed change in duty station was "inconsistent with his grade or pay", the change in assignment was effected to make his duties and responsibilities more consistent with grade and pay.

41. Complainant alleged reprisal for issuance of a tribal resolution accusing the superintendent of mismanagement, nepotism, conflict of interest, improper hiring procedures, illegal administration of housing programs, illegal budget transfer and misuse of funds. However, complainant failed to specify what actions, particularly any personnel action, had been taken against anyone. File was closed in the absence of any apparent personnel action being involved and the complainant's failure to respond to requests for further information to perfect the complaint.

42. Complainant complained about not being promoted between February 1981 and November 1984. He alleged that his nonpromotion resulted from his supervisor's mistaken belief that he had cooperated with the Naval Intelligence Service in October 1981, i.e. he had been interviewed, but did not make any disclosure. File was closed since there was no disclosure, no evidence of any retaliatory intent or of nexus.

43. Complainant alleged that the agency's failure to reemploy him in October 1984 (following his separation in a RIF in 1982) was in reprisal for his having testified in March 1979 during an internal agency investigation. File was closed in the absence of any evidence of retaliatory intent or of nexus. (Complainant appealed to the MSPB in April 1985, and his non-reemployment by the agency was sustained by the presiding official in August 1985.)

44. Complainant was charged in June 1983 with drinking on duty and discharged during probation in September 1983. He

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alleged that his discharge was in reprisal for his reporting, in July 1983, that some contract employees did not have proper security clearances and that some other employees had been found in restricted areas without proper clearance. He also allegedly reported the theft of unspecified government property. Disclosures purportedly made anonymously over the DOD Hotline and to the base commander and chief of security. File was closed since the disciplinary charge was issued before the alleged disclosures, the charges against the employee were substantiated by an IG investigation, he had a history of disciplinary problems, and there was no evidence of retaliatory intent or of nexus.

45. Complainant's performance was rated as unacceptable in July 1984. He alleged that the rating was in reprisal for his having submitted a memorandum to his supervisors in October 1983 criticizing them for not publishing his work and changing his work products, for sending a memorandum in March 1984 to the IG criticizing a research and development approach, and complaining to the IG in November 1984 that his supervisors were changing his reports. File was closed since the employee was on notice of his performance deficiencies before he made his alleged "disclosures", the claimed disclosures did not involve matters covered by section 2302(b)(8), and there was no evidence of nexus in any event.

46. Complainant was suspended for 30 days for insubordination in August 1983 and removed in May 1984 for falsifying time and attendance records. Employee alleged that these agency actions were in reprisal for his having reported alleged waste, abuse of authority in selecting tax returns for audit and problems which would result from a special collection project during 1974 - 1982 to the inspection service. Investigation was terminated when it was determined that there was no evidence of retaliatory intent or of nexus, that the alleged disclosures were not provable as significant factors in the agency decisions, and the agency had reasonable grounds for taking the actions complained of.

48. Employee alleged that agency officials tried to coerce him into accepting a voluntary demotion or to seek a disability retirement because he had testified against the agency in 1984 on two unspecified matters and had reported to OSC in September and October 1984 an alleged waste of water. The file was closed when it was established that no personnel action had been taken or proposed.

49. Employee alleged that changes in his duties and responsibilities "over a number of years" were in reprisal for his having made unspecified disclosures to OSC [in 1984]. The file was closed when it was determined that the

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actions complained of preceded his alleged disclosure and there was no evidence on any retaliatory intent or of nexus.

50. Complainant was issued a letter of caution in April 1985, was detailed to other duties from April to June 1985, was given a marginal performance appraisal and had his within-grade pay increase denied in May 1985, and was removed in August 1985 for use of abusive language, refusal to work, uncooperative and discourteous conduct, threatening bodily injury to another, and disruptive conduct. He alleged that the agency's actions against him were in reprisal for his having reported to the OIG in March 1985 that his supervisor had allegedly committed time and attendance fraud, violated standards of conduct, including conflict of interest and had committed a security violation, reported to his second level supervisor in March 1985 that his supervisor had allegedly committed a security violation, and reported the same matters to the investigative service in April 1985. Investigation was terminated when it was determined that any protected disclosure was not provable as a significant factor in the agency decisions, there was no evidence of any retaliatory intent or of nexus, and the agency otherwise had sufficient grounds for taking the actions complained of.

51. On May 13, 1985, complainant was apprised of her unsatisfactory performance during a work performance review. She alleged that this action was taken as a result of her having written to a Member of Congress and the agency OIG requesting assistance on her EEO complaint. The file was closed in the absence of any evidence of nexus. Moreover, the employee's performance problems had been documented before she wrote to the MOC. (Matter was deferred to the discrimination complaint procedures.)

52. Complainant alleged his removal in July 1979 for unsatisfactory performance was in reprisal for his having published an article and a cartoon concerning alleged travel fraud by agency officials in a union newsletter in January 1979. The file was closed in the absence of any evidence of retaliatory intent or of nexus. Moreover, on appeal, the agency's action was sustained by the MSPB and the Federal Circuit Court.

53. Complainant was given oral and written counselling in May 1985 concerning the use of inappropriate language on misrouted mail, which he claimed was in reprisal for reporting misrouting of mail to the internal security office. File was closed in the absence of any evidence of nexus or of retaliatory intent.

54. Complainant alleged that the withholding of a within-grade pay increase in March 1985 and his subsequent removal in September were in reprisal for his having alleged

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to fellow workers in January 1985 that his supervisor had given improper favoritism to a female employee. (Complainant had been suspended for 10 days in March 1985 for sexual harrasment or a female employee.) File was closed in the absence of any evidence of nexus or retaliatory intent.

55. Complainant was reassigned from Washington, D.C. to Vermont as a result of a reduction in force action and was notified, in September 1985, of his separation effective in October as a result of another RIF. He alleged that these actions were in reprisal for his having contacted the agency administrator in March 1984 to protest the assignment of seven employees to a facility which allegedly constituted a severe health hazard. File was closed in the absence of any evidence of nexus, of retaliatory intent, or irregularity in the RIFs.

56. In his performance appraisal for the period December 1984 - March 1985, it was recommended that the complainant lose his "ready for GS-14" rating (i.e. consideration for promotion.) Complainant alleged that this recommendation resulted from his writing a memorandum in September 1983 to the regional attorney saying that his assigned case lacked merit and another memorandum in September 1984 claiming that his case was no longer winnable. The file was closed since there was no evidence that any protected disclosure had been made and otherwise no basis for further action.

57. Removal of complainant for falsification of his Form SF 171 was proposed in December 1984. He resigned in lieu of being removed. He claimed that his proposed removal resulted from his having made a comment to the captain that certain lieutenants had embarrassed the complainant in public. The file was closed since there was no evidence of any nexus or of retaliatory intent. Moreover, the comment made to the captain did not constitute a protected disclosure.

58. Complainant was suspended in March 1985 for insubordination. He also complained of not being promoted, and claimed that these actions resulted from his having given information to OIG in January 1984 concerning his knowledge of water pollution problems and interference by his supervisors in the land appraisal process. He also claimed to have made unspecified disclosures to the OIG in January 1985. File was closed since there was no evidence of causal connection between the claimed disclosures and the actions complained of. OIG investigated his complaint also and found no reprisal.

59. Complainant had his within-grade pay increase denied in 1983, was given a notice of proposed removal for unsatisfactory performance in November 1984 and was removed

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in January 1985. He claimed these actions were in reprisal for his having disclosed information concerning waste of funds and mismanagement to the IG between 1980 and 1982. The file was closed in the absence of any evidence of nexus or of retaliatory intent. Moreover, the issue of reprisal was considered by the MSPB in the complainant's appeal of the removal and no reprisal was found. The removal was, however, reversed by the MSPB in May 1985 because the agency failed to prove the complainant's failure to meet performance standards.

60. Complainant was reassigned in 1979; reprimanded in March 1982 for making a false statement, insubordination, disrespectful conduct during the conduct of an investigation; reassigned in June 1982 and admonished for obstructing an investigation; reassigned again in February and May 1983; suspended in March 1984 for obstructing an investigation and wrongfully removing government property; and separated in April 1985 in a RIF. He then retired on the basis of discontinued service. He claimed these actions were in reprisal for his having reported in 1979 that a contract for security services violated the law. File was closed since there was no evidence of nexus or of retaliatory intent and any disclosure was not provable as a significant factor.

61. Complainant accepted a demotion voluntarily in November 1984 and resigned on January 15, 1985. He claimed he disclosed an abuse of authority and a waste of funds by the agency head to the agency head and a Congressman on January 15, 1985. The file was closed without further action since the contested actions, though voluntary, preceded the claimed disclosure; there was no evidence that the persons effecting the requested actions had knowledge of any disclosure; and there was evidence that the employee had been on notice of performance deficiencies were the alleged disclosures. Moreover, on appeal, the MSPB found that the resignation was voluntary and declined jurisdiction.

62. The agency declined to accept complainant's suggestions in December 1984 and April 1985. ~~He claimed nonfavorable consideration resulted from his having disclosed to Congress and higher management a waste of funds in August 1984. The file was closed since no personnel action was involved.~~

End Diskette WB  
(Narrative)

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62. Complainant claimed that non-acceptance of his suggestion in December 1984 and April 1985, was in reprisal for his August 1984 disclosure to Congress and management regarding waste of government funds, workers doing warranty work for contractors and working on a renovation that was ultimately torn down. The file was closed because no personnel action was taken or involved.

63. Complainant was separated during his probationary period in December 21, 1984 for violating agency travel regulations and unsatisfactory performance. He alleged it was because of a June memorandum he had written to his supervisor complaining about the agency's travel policy and his own eligibility for promotion. The matter was closed because the purported disclosure involved matters concerning the Complainant's personal situation only, not matters covered by § 2302(b)(8).

64. Complainant alleged that an agency delay in approving a \$2,500 Special Act Award based on outstanding performance [she was upset by the delay since she had borrowed \$1,000 in anticipation of receiving the cash award] was because she participated in an April 1985 IG investigation into the Office Director's management practices and alleged sexual harassment by him. The matter was closed because of no evidence of retaliatory intent; the Director approved the award.

65. Complainant was detailed to another staff (and later reassigned) five days after a meeting with the IG. In evaluating pre-award procedures; the IG used a contract the Complainant had "monitored" in the course of performing her duties. Her supervisors believed she might make a disclosure regarding monitoring procedures. She told OSC she made no disclosures to the IG. The matter was closed because consideration to reassign the Complainant began in March, before the IG meeting, and there was no evidence of retaliatory intent.

66. Complainant was terminated from a temporary appointment in September 1985 for unacceptable conduct (making derogatory comments about military personnel to an officer) which became a disruptive force within the unit. In about May or June 1985, Complainant disclosed, in an agency suggestion box, theft of food. She alleged to a U.S. senator and to OSC that the removal was in reprisal for her disclosure. The matter was closed because the protected disclosure was not provable as a significant factor in the removal decision.

67. Complainant received a 30-day suspension in March 1985 for willfully withholding sensitive investigative information from superiors and failing to comply with agency

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policy. He claimed reprisal motivation because in June 1983 he disclosed to agency officials that the Deputy Director used a government vehicle for private use. The matter was closed because the evidence showed that management would have taken the action even though they had knowledge of the earlier protected disclosure, and because of no evidence to support the retaliation claim.

68. Former employee complained that her removal for performance reasons in October 1985 was an act of reprisal for having made disclosures in December 1983 concerning agency policies, including the use of short form letters and the "subtle coercion" of employees to cause them to make decisions favorable to the agency program. After inquiry, the matter was closed, as the purported disclosures did not involve matters identified in 5 U.S.C. § 2302(b)(8), and the significant performance deficiencies were substantiated.

69. An employee of a private contractor in Panama, Central America, complained that she was being reprised against for disclosures she had made to U.S. Army authorities concerning the sale of puppy dogs by military personnel. The matter was closed for lack of jurisdiction as the individual was not a covered employee. See 5 U.S.C. § 2302(a)(2)(B).

70. An employee complained that his 100-day detail, beginning in September 1984, was an act of reprisal for having disclosed information to the agency IG about co-worker improprieties, e.g., abuse of sick leave, excessive overtime, and long lunch breaks. After inquiry, the matter was closed when it was determined that the protected disclosure was not a significant factor in the decision to detail him (the disclosure to the IG was made anonymously) and there was no evidence of retaliatory intent.

71. The employee complained that his reassignment in July 1985 was an act of reprisal for his disclosure of construction cost overruns in a new agency facility. The disclosures were made as part of a grievance from the employee protesting what he considered to be a "wasteful" temporary duty assignment for him. The matter was closed after inquiry due to the lack of evidence of an retaliatory intent in the decision to reassign the employee. [This employee has filed suit in the Supreme Court questioning judgments of the lower courts to deny him judicial access for various reasons.]

72. Employee complained that a letter of reprimand received in August 1985 (for improper use of funds, falsifying a time card, not issuing travel orders, and falsifying certified invoices) was an act of reprisal for disclosures made to the agency IG between March and June 1985 concerning a waste of

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funds and abuses of authority. The matter was closed after inquiry. The agency investigation had revealed that the disclosures by the employee had contained information of wrongdoing by the employee himself. The minimal disciplinary action was taken by the agency to correct his past misconduct.

73. Employee complained that her proposed removal was an act of reprisal for having assisted OSC in its investigation of an agency manager. She later requested to withdraw the complaint when the alleged offending official left the agency, and the action was still being pursued by her agency. After inquiry, the matter was closed as the protected disclosure (as a witness to OSC) was not a significant factor in the decision to propose her removal.

74. Employee complained that a letter of reprimand received in February 1985 was an act of reprisal for disclosures. However, despite requests for additional information, OSC was unable to substantiate that the employee had made any disclosure. The matter was closed for that reason.

75. Employee complained that his poor mid-year performance review in December 1984 and his failure to be selected for promotion in January 1985, were acts of reprisal for having disclosed in July 1984 that a co-worker had smoked in a non-smoking area in violation of agency regulations. After inquiry, the matter was closed as there was no evidence of retaliatory intent nor was there any evidence that the protected disclosure was a significant factor in the designated personnel actions.

76. Employee complained that four personnel actions (fitness for duty exam and an AWOL decision in November 1984; a detail to another job in December 1984; a second detail in May 1985), were acts of reprisal for disclosures made in 1978 and April 1985. After inquiry, the matter was closed due to the lack of evidence of any retaliatory intent and due to the legitimacy of agency concerns based on the employee's conduct, i.e., he had threatened to blow up the facility.

77. Employee complained that he was the victim of reprisal for having disclosed safety violations in his agency to OSHA in July 1985. However, the matter was closed after inquiry, when the employee was unable to identify any personnel action as having been taken or proposed.

78. Former employee complained that his removal in August 1985 (for excessive unauthorized absence) was an act of reprisal for having disclosed information to the agency IG, and to congressional members. However, the Complainant failed to respond to all requests for details concerning his

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alleged disclosures. The matter was subsequently closed on the basis of inadequate information and the lack of cooperation by the Complainant.

79. Former employee (a library technician) complained that her separation in March 1985 (under RIF procedures) from her overseas position at a U.S. medical installation was an act of reprisal for having complained in June 1984 to an agency executive about the poor quality of patient care provided to her relative by the installation. After inquiry, the matter was closed because the disclosure could not be substantiated; there was no evidence that the disclosure was a factor in the separation decision; and the agency would have taken the same personnel action for legitimate reasons.

80. Employee complained that her failure to be promoted on two occasions (December 1984 and March 1985), and her detail in March 1985, were acts of reprisal for having previously disclosed to the senior agency official at the installation her criticisms about a new function to be established soon at the installations. After inquiry, the matter was closed as the information revealed that management would have taken the personnel actions despite any knowledge of the disclosure. Further, there was no evidence that the disclosure action was any factor in the personnel decisions affecting the Complainant.

81. Employee complained that several element ratings in his performance appraisal of September 1984 were lowered (to satisfactory) in reprisal for having cooperated with the agency IG during a regulatory investigation over a three-year period (1981-84). The IG investigation resulted in the establishment of controls to correct the violations. After inquiry, the matter was closed because the persons involved in appraising the Complainant's performance lacked knowledge of any disclosure acts.

82. Former employee complained that his proposed removal (for cause--insubordination) in September 1985 was an act of reprisal for having disclosed allegations of waste and abuse to his supervisor in 1982 and for disclosing contractor inadequacies in reports he prepared in the course of his duties. During inquiry, the Complainant informed OSC that his agency had initiated his disability retirement with OPM on the basis of paranoia, and that a decision was expected soon, i.e., in 1985. The matter was closed as there was no evidence of nexus and the agency would have taken the same personnel action, in any event, for reasons unrelated to any disclosure activity.

83. Employee complained that his failure to be selected for promotion in January 1985 was an act of reprisal for having disclosed to investigative officials in (January 1983) that

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his military supervisor had stolen a compressor hose. After inquiry, the matter was closed due to the lack of evidence of nexus, or that the act of disclosure was a factor in the nonselection decision.

84. Complainant wrote OSC because he was fearful that some adverse action would be taken against him. He had earlier contacted the IG in February 1984 alleging harassment in reprisal for his disclosure to the IG in 1983 of fraud, waste and abuse regarding underutilization of equipment and manpower. The IG investigated, and thanked the Complainant for helping and improving the program. OSC closed the matter because no personnel action was taken or involved.

85. Complainant's removal was proposed on May 24, 1985 and effected on July 5, 1985. On May 22, 1985, he disclosed to the IG possible misuse of authority for personnel travel and other matters by his supervisor. The initial OSC inquiry revealed that the Complainant had a lengthy record of misconduct before he made the disclosure against his supervisor, and that the Complainant's action (two days before formerly receiving the removal proposal) may have been self-serving. The file was closed because the protected disclosure was not provable, a significant factor in the agency action.

86. Complainant was removed on April 18, 1985 during her probationary period for conduct, abusive and unreliable interpersonal relationships. She claimed reprisal for an April 11-12, 1985 disclosure to a Central Office Service Chief about alleged waste and mismanagement in a field office operation. The matter was closed when the Complainant exhibited an abrasive and uncooperative attitude in the OSC inquiry. Evidence revealed that she may have known about the forthcoming action when she made the "disclosure." There was no evidence of any retaliatory intent.

87. Complainant was suspended on March 13, 1984 for spending more than prescribed official time with an agent from FLRA. He claimed the action was in reprisal for his December 1983 disclosure to OSC alleging abuse of authority and specific danger to health and safety (OSC disclosure file closed April 1984 with no action because of Complainant's failure to provide additional information). The matter was closed because the persons involved in the alleged reprisal action had no knowledge of Complainant's whistleblowing to OSC.

88. Complainant requested promotion based on accretion of duties. The agency and OPM both denied reclassification request, agreeing that it was not warranted. He alleged his denial of promotion was in reprisal for his earlier

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disclosure to the IG hotline regarding safety problems and censorship of recommendations to contractors in Complainant's reports. The matter was closed because of no evidence of retaliatory intent, and because the dispute over the Complainant's grade level had been ongoing long before the hotline disclosure.

89. Employee complained that his proposed suspension in July 1985, was in reprisal for two disclosure acts in mid-1984 and in November 1984. The first disclosure to management officials and to the agency IG involved allegations of mismanagement and excessive leave use. The second disclosure, made to a senior agency official, was that his supervisor was guilty of mismanagement. After inquiry, the matter was closed as the protected disclosures were not significant factors and the basis for the suspension was employee misconduct, i.e., falsification of a worker compensation form.

90. Employee complained that his proposed removal for performance reasons (later reduced to a reassignment) in July 1984, and loss of leave hours, was in reprisal for having made disclosures to President Reagan. Under inquiry, it was revealed that he did not write to the President until October 1984, when he complained about his loss of leave hours and his proposed reassignment. The matter was closed at the employee's request and because there was no evidence of any nexus as the reassignment was proposed prior to the "disclosure."

91. Former employee complained that his removal in June 1984 was an act of reprisal for a disclosure made in April 1984 to the review unit concerning alleged waste of funds to accommodate a management official. After inquiry, the matter was closed when it was learned that the removal was based on employee misconduct. The employee was found to have submitted fraudulent travel vouchers based on an investigation that had begun in the spring of 1983.

92. Employee complained that his low performance rating in August 1984, while in a field office, and his subsequent detail (later reassignment) to Washington, D.C., were acts of reprisal for disclosing information at various times between October 1983 and August 1984, about sexual harassment of agency employees by his immediate supervisor; the DWI arrest of another employee; and a conflict of interest situation involving a State committee representative. The matter was investigated and it was learned that the employee's performance deficiencies had existed for a long period, even prior to any protected disclosures.

93. Employee complained that his low performance rating in March 1983, and a letter of warning in September 1984, were

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acts of reprisal for having disclosed allegations of policy violations and abuse of authority by his supervisor. The disclosures were made in a grievance concerning his performance appraisal filed by the employee. After inquiry, the matter was closed because there was no evidence of any retaliatory intent or nexus.

94. Employee complained that his removal in November 1982 (later reinstated), an incomplete internal appraisal in October 1984, and a reassignment in December 1985, were acts of reprisal for having made a disclosure to the IG. However, upon inquiry, it was revealed that the "disclosure" consisted of a request for the agency to reconsider an October 1982 suggestion to revamp an agency program. The matter was closed because the action officials in the personnel actions lacked knowledge of the disclosure.

95. A U.S. postal employee complained that his removal in December 1984 was an act of reprisal for disclosures made in July 1984 to Postal Inspection Service officials. After inquiry, the matter was closed because of lack of OSC jurisdiction over the Postal Service. See 5 U.S.C. § 2302(a)(2)(C). [The MSPB later ruled in employee's favor and required his reinstatement.]

96. Individual complained that he had been denied appropriate consideration for employment at an overseas location because of previous disclosures made to agency investigators. However, despite OSC efforts, the individual did not furnish details concerning either the alleged reprisal or the disclosures. Finally, the matter was closed because of the insufficient information and lack of cooperation.

97. A former employee of the Texas National Guard alleged that his discharge from his military position and separation of NG membership in May 1985 was in reprisal for disclosing a violation of the Hatch Act in October 1982. The matter was closed as OSC has no jurisdiction over NG employees, based on a recent MSPB decision.

98. Employee complained that a marginal performance rating in August 1984, and the reclassification of her position as non-supervisory (also in August 1984), were acts of reprisal for disclosures to the agency comptroller in July 1984 concerning supervisor's falsification of time cards. The matter was investigated and it was learned that the employee had been advised of the performance rating based on deficiencies and of the position change prior to any act of whistleblowing. The matter was closed without further action.

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99. Employee complained that her resignation in July 1985 was coerced in reprisal for having previously reported to the agency OIG that a member of the Army reserve force was a homosexual; that he was prone to violent behavior; and that he was a suspect in a murder case. After inquiry, the matter was closed due to the lack of a personnel action identified in 5 U.S.C. § 2302(a)(2)(A) and also to the lack of evidence of retaliatory intent.

100. Employee complained that his removal for cause (specifics acts of unprofessional, insolent, threatening and disruptive conduct) in January 1985, was in reprisal for a disclosure made in June 1983 to the agency OIG concerning mismanagement, appointment of an unqualified chairperson, favoritism and nepotism. After inquiry, the matter was closed due to the lack of any evidence of retaliatory intent.

101. Employee complained that his performance appraisal in October 1984 and his detail in January 1985 to lower graded duties were acts of reprisal for having disclosed to the OIG allegations of time and attendance fraud by his supervisors. An investigation by OSC substantiated the allegation of reprisal by one agency official. The agency was allowed to take appropriate disciplinary action without prosecution before the MSPB. The specific acts of reprisal against the employee were corrected by agency officials. Meanwhile, the agency IG had investigated and substantiated the T&A allegations from the employee.

102. Employee complained that his placement on involuntary sick leave (in November 29, 1984), his reprimand (in March 1985), and the denial of his next within-grade increase (in April 1985), were acts of reprisal for having written to President Reagan on November 10, 1984. In his letter to the President, he recited problems concerning his employment and he alleged that agency co-workers were participating in a deliberate attempt to poison him and his family. After inquiry, the matter was closed as the agency's actions were based on inappropriate conduct by the employee, appeared proper and were unrelated to the earlier act of disclosure.

103. Employee complained that her failure to receive an award in November 1983 or the denial of her attendance at a training opportunity, was an act of reprisal for having assisted the agency IG on an investigation of potential violators in late 1983. The matter was investigated and subsequently closed. The disclosure was not found to be a significant factor in the decisions of concern to the employee, nor was there any evidence of retaliatory intent.

104. Former employee complained that a series of personnel actions (performance appraisal in September 1983; detail out

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of supervisory position in April 1985); denial of his with-in-grade increase in June 1985; and his removal for performance in August 1985), were in reprisal for four acts of disclosure concerning the overtime policy and other abuses. The first disclosure was made to the agency comptroller in March 1983; the second to the senior base official in December 1984; the third to the agency IG in February 1985, and last, to President Reagan and higher management officials. After inquiry, the matter was closed due to the lack of any evidence of retaliatory intent or of any evidence of nexus between his disclosure acts and the personnel actions taken against him.

105. Spouse of deceased employee complained that he had been harassed by military supervisors because of an act of disclosure in November 1984 by a subordinate of the deceased employee, and that the harassment was a factor in the spouse's demise in February 1985. After inquiry, the matter was closed as the alleged offender (military) is not subject to disciplinary complaint action by OSC because there was no personnel action as defined in 5 U.S.C. § 2302(a)(2)(A).

106. Employee complained that his internal change of assignment (with no change in work schedule or loss of pay and benefits) in November 1984, was an act of reprisal for having disclosed agency safety violations to OSHA in June 1984, e.g., slippery floors. The matter was closed as there was no personnel action taken or involved [as defined in 5 U.S.C. § 2302(a)(2)(A)]. Also, although management had knowledge of the disclosure, it would have taken the contested action in any event.

107. Employee complained that two suspensions effected in August 1984 were acts of reprisal for disclosures made to agency investigative officials in July and August 1984 concerning mistreatment, marijuana and alcohol use, and theft of government property. (The allegations were investigated by agency officials but were not substantiated.) Upon inquiry, it was learned that the suspensions were for acts of misconduct by the employee, i.e., AWOL, insubordination, leaving worksite without permission, and refusing to obey an order. The matter was closed on the basis of no evidence of any retaliating intent, and the lack of any "reasonable belief" on his part concerning the disclosures made to agency officials.

108. Employee complained that her directed reassignment in November 1984, was in reprisal for three acts of disclosure. The first disclosure made in September 1980 to an agency official concerned a possible violation of state law. The second disclosure in 1981 to the same agency official concerned a similar violation of law. The third official was in May 1983 to the state legislature concerning her

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agency's program operations in that state. After investigation, the matter was closed as the disclosures concerned only state officials not subject to OSC jurisdiction.

109. Former employee alleged that his removal in 1982 was an act of reprisal for disclosures made in early 1982 to the agency IG and to a congressional member concerning abuses of authority by agency officials in program matters. After investigation, the matter was closed as the protected disclosure was not a significant factor and the employee's conduct, i.e., AWOL, was the basis for agency action.

110. Complainant resigned allegedly as a result of reprisal and harassment for making disclosures of information to the Army Inspector General regarding fiscal irregularities. The OSC file was closed due to the lack of a personnel action and because the resignation occurred prior to the effective date of the Civil Service Reform Act, vitiating OSC jurisdiction.

111. Complainant alleged that he was removed in reprisal for making disclosures to his acting supervisor regarding an unsafe truck. He was removed for cause for making false statements to a court and in a Workers Compensation claim. The OSC file was closed due to the lack of evidence of retaliatory intent.

112. Complainant was separated during her probationary period for cause, and for poor performance. She claimed reprisal for a disclosure of an alleged gross waste of funds to her supervisor and to the Inspector General regarding the EPA Superfund contract laboratory program. The OSC file was closed due to the finding that legitimate reasons existed for the adverse personnel action, and management would have taken the action anyway, even assuming arguendo the existence of some reprisal motivation.

113. Complainant received a notice of proposed removal for disruptive, insubordinate and grossly offensive conduct, including attempting bodily injury of another employee, using offensive and racially derogatory language, and disregarding an agency directive. The employee claimed reprisal for statements made to the GSA OIG regarding alleged fraudulent expenditures. The OSC file was closed due to the lack of evidence of retaliatory intent or nexus. OSC also received a letter from the employee admitting that his claims to us were invalid, and asking for a withdrawal of his complaint.

114. Complainant was suspended for 14 days and then geographically reassigned. He claimed reprisal for participation in a class action Federal court lawsuit

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against the NLRB which challenged promotion practices. The OSC file was closed due to lack of evidence of any retaliatory intent. It was also determined that the employee was properly disciplined for misconduct, and reassigned for the good of the service.

115. Complainant was reassigned to a nonsupervisory position, allegedly in reprisal for a letter to a U.S. senator regarding mismanagement in the Defense Department. The OSC file was closed because no personal action was actually taken here, only proposed. In addition, reprisal was not found to be a significant factor in the proposal.

116. Complainant was separated during his probationary period due to unacceptable conduct and performance. He claimed that he was the victim of reprisal for reporting a safety hazard to the agency chain of command, i.e., cars parked illegally in fire lanes. The OSC file was closed because there was no evidence of retaliatory intent or nexus. It was also not clear the employee had made a protected disclosure because the agency was already aware of the problem reported, and was taking action to remedy the situation.

117. Complainant was demoted from a supervisory to a nonsupervisory position and reduced one grade, allegedly in reprisal for complaints to a U.S. congressman about alleged misconduct of the agency promotion panel. The OSC file was closed because the protected disclosure was not a significant factor in the adverse personnel actions. In addition, the possible target officials were military officers, and were thus not within OSC jurisdiction for disciplinary action.

118. Complainant was denied a WGI and given notice of unacceptable performance allegedly in reprisal for disclosures to the OIG regarding alleged fraud and mismanagement by a co-worker. The OSC file was closed due to the lack of evidence of any retaliatory intent or nexus. In addition, it was determined by OSC that the employee was on notice of poor performance prior to the IG disclosures. Finally, the persons involved in the alleged disclosure lacked actual constructive knowledge of the disclosure involved.

119. Complainant was removed in March 1985 for poor performance. He claimed reprisal for disclosures regarding alleged misuse of non-appropriated funds in a country music jamboree. The OSC file was closed because the employee failed to cooperate in the OSC investigation and because the disclosure was not provable as a significant factor in the removal.

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120. Complainant was allegedly harassed and received a letter of caution for taking documents off of his supervisor's desk. He claimed reprisal for reporting to upper management that his supervisor was not giving him work, and that his supervisor was conducting personal business on government time. The OSC file was closed due to the absence of any personnel action as defined by the CSRA. In addition, there was a lack of evidence of retaliatory intent; the person who issued the letter of caution was not the same person about whom the disclosures were made in any event.

121. Complainant was removed for cause and claimed reprisal for making non-specific disclosures to the agency IG about alleged criminal and administrative wrongdoing. The OSC file was closed because the contested personnel action preceded the alleged disclosure. There was also no evidence of retaliatory intent. Finally, the removal was supported by legitimate management reasons, i.e., misconduct including AWOL, neglect of duty, and violations of the standard of conduct.

122. Complainant resigned because she feared retaliation for statements made to the GAO during the course of its investigation of overtime fraud at her agency. The OSC file was closed due to the absence of any personnel action as defined by the CSRA. Under the pertinent MSPB test, the resignation was voluntary.

123. Complainant took disability retirement in 1975 allegedly due to harassment as reprisal for his disclosures to upper management regarding the sterilization of American Indians, allegedly without their consent or knowledge. The OSC file was closed due to the absence of any personnel action as defined by the CSRA, and because the employee failed to cooperate with the OSC investigation. OSC also had no jurisdiction to investigate this matter because it arose in 1975, prior to the effective date of the CSRA.

124. Complainant was given a low performance rating, and detailed to a lower grade was proposed, all allegedly in reprisal for statements to the agency OIG about alleged time and attendance fraud, and Privacy Act violations by her supervisor. OSC investigated the matter and found a violation of § 2302(b)(8). The agency was permitted to take disciplinary and corrective action in the matter to avoid OSC prosecution before the MSPB.

125. Complainant was denied a promotion and removed in reprisal for complaints to a U.S. congressman about mismanagement and waste, i.e., faulty equipment received from vendors. The OSC file was closed due to the lack of any evidence or retaliatory intent or nexus.

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126. Complainant was geographically reassigned from Denver to Seattle allegedly in reprisal for disclosures a year earlier to the OIG regarding mismanagement and abuse of government property. The OSC file closed due to lack of evidence of retaliatory intent or nexus.

127. Complainant was reprimanded allegedly in reprisal for disclosures to a U.S. senator regarding alleged over-drugging of patients at a VA Medical Center. The OSC file was closed because it was determined that the employee did not have a reasonable belief that his disclosures were based upon fact or were evidence of patient abuse; rather, the disclosures were based on hearsay, gossip and speculation. Further, the employee's main concern was non-promotion over a six-year period, not patient abuse.

128. Complainant was given notice of a proposed 3-day suspension for misconduct, i.e., office disruption. The employee claimed reprisal for reporting to the OIG that he heard loud grunting noises coming from his supervisor's office similar to noises made during sexual activity. The IG investigated and found no wrongdoing. The OSC file was closed because the employee did not have a "reasonable belief" that his information was evidence of wrongdoing. Thus, there was no protected disclosure. In addition, the employee was found to have had a running feud with his supervisor over poor performance ratings.

129. Complainant was removed for cause and alleged reprisal for a letter to a U.S. senator asserting bad immigration policy. The OSC file was closed because the employee failed to cooperate with the OSC investigation, and because of lack of evidence of retaliatory intent. The MSPB also sustained the removal, which was taken for abusive language, threatening an agency official, and non-compliance with agency regulations.

130. Complaint concerned a fitness-for-duty examination, which was initiated by an agency physician who was concerned about Complainant's physical condition. The Complainant wrote OSC saying he thought he might be laid off. He had earlier written to a congressman and to OSHA about alleged health violations at the agency, improper respirators and failure to check fume levels. The file was closed for lack of personnel action.

131. Complainant was denied a promotion in March 1985. He alleged it was in reprisal for his going to the IG in May 1984 and disclosing improper communication between a former agency official and the present Regional Administrator. The OSC investigation found evidence to support a reprisal allegation and violation of the IG Act. A disciplinary complaint has been filed with MSPB; trial set for March

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1986. As a result of OSC investigation, agency took corrective action by promoting complainant.

132. Complainant received a 30-day suspension November 1984 (upheld by MSPB a presiding official on appeal) for refusal to answer questions and cooperate in the investigation of the charges which were brought about by Complainant's disclosures. Complainant authored a June 1984 union letter charging project supervisor with mismanagement, and unethical conduct, and stated he was responsible for project delays and cost overruns. Matter was closed due to lack of evidence of any retaliatory intent or nexus between the disclosure and the disciplinary action taken.

133. In July 1985, Complainant was geographically reassigned from Minneapolis, Minnesota to Chicago, Illinois (lateral reassignment with no loss of grade or pay). In December 1982, Complainant told IG of alleged improprieties of another employee. He claimed his reassignment was in reprisal because his disclosure embarrassed a Member of Congress which brought political pressure to bear on the agency. The file was closed because the protected disclosure was not provable as a significant factor in the action and no evidence of any retaliatory intent.

134. In October 1985, Complainant's supervisor disapproved a request for annual leave, and later in same month gave Complainant a "fully successful" performance rating. Complainant believed she deserved a higher rating. Complainant alleged reprisal because she complained to Congress in 1983 about a RIF, and also complained that the agency applied former [out-dated] performance standards for current appraisals (agency corrected this). File was closed because of no evidence of a nexus and complainant request to OSC to withdraw complaint.

135. Complainant received a minimally satisfactory performance appraisal in May 1984, and a denial of a with-in-grade increase in November 1984. In addition, he received a suspension in October 1984 for breach of security and insubordination. He claimed reprisal for an April 1984 disclosure to the OIG that his supervisor "behaved improperly" with female inmates. The investigation was terminated because of no evidence of retaliatory intent, because the persons involved in the alleged reprisal actions were unaware of the alleged whistleblowing.

136. Complainant's military officer fitness performance appraisal was lowered in June 1984, and was honorably discharged in April 1985. In August 1983, Complainant wrote congressman and IG alleging his supervisor was not qualified for military assignment. File was closed because agency (National Guard) is not a covered agency.

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137. Complainant was reassigned in April 1985 following abolishment of his position. He alleged reprisal because in 1984, he refused to authorize a management expenditure and elevated the issue to a higher authority which backed the Complainant's position, and also denied the authorization. The file was closed because of no evidence of retaliatory intent or of nexus.

138. Complainant was denied promotion in August 1984 and January 1985, received a poor appraisal in January 1985 and claimed workman's compensation claim was delayed in March 1985. She also complained about being assigned to a new work area in October 1984. In April and September 1984, Complainant submitted written complaints to higher management about poor management practices, abuse of authority, and endangerment to patients. The file was closed because of no evidence of retaliatory intent in the personnel actions.

139. Complainant alleged a reduction in duties beginning about March 1984. In June 1984, he received a lowered performance appraisal and in August 1984, the agency proposed his removal. He obtained employment at another agency prior to a decision on the proposed removal. Complainant's protected activity included disclosing (in March 1984) to his supervisor the alleged sexual harassment of the supervisor's typist, which he reported to an EEO counselor in April; and, a May 1984 letter to the Administrator of the agency questioning the supervisor's hiring practices. He also wrote OSC in May 1984 about the supervisor's racist and prohibited employment practices. The Complainant denied making a February 1984 anonymous IG hotline call alleging misconduct between the supervisor and the typist. The OSC investigation was terminated after it was determined there was no evidence to prove the disclosures were a significant factor in the actions.

140. In March 1985, a time restriction was placed on Complainant's movements in the office. She alleged reprisal stemming from her October 1984 disclosures to GAO that a Project Officer awarded \$25,000 purchase order to a former business partner, improper use of franked envelopes, improper use of and solicitation of funds, conflict of interest in use of a condominium, and that a full time employee only worked two or three days a week. GAO determined the allegations were unfounded. The file was closed because no personnel action was taken or involved, and there was no evidence of retaliatory intent.

141. Complainant received reprimands in October 1984 and January 1985, and allegedly a proposed removal in February 1985. She disclosed to IG in July 1984 irregularities in medical practices by the supervisor. The matter was closed

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after initial inquiry when evidence showed that the supervisor had no knowledge that the Complainant was the whistleblower.

142. In June 1985, Complainant's performance standards were revised (she alleged to facilitate her removal), and in August 1985, she was issued a 60-day warning of unsatisfactory performance and her with-in-grade was withheld. In early 1985, Complainant disclosed to the OIG that officials were systematically stealing government property from the labs and were falsifying their own leave records. The matter was closed after inquiry revealed that all employees in the position received revised performance standards, that the Complainant had chronic performance problems, and lack of evidence of any retaliatory intent.

143. In December 1984, the order of succession in the office was changed as to who would act in the director's absence (Complainant's position had been downgraded from GS-11 to GS-9 earlier). He alleged reprisal because he informed a Headquarters' review team in October 1984 about a private parking lot owner allegedly using government employees to collect parking fees and keep parking records; also alleged local newspaper used government employees to distribute newspapers. The file was closed for lack of a personnel action.

144. Complainant was removed February 1985 for AWOL, conflict of interest, and criminal charge of false certification of consultant's time cards. Two years before, he made disclosures to the agency Central Office about patient abuse and drug and alcohol abuse by employees. The inquiry disclosed the protected disclosures were not provable as any significant factor in the removal action.

145. Complaint concerned non-promotion in December 1984. From October 1982 to early 1984, Complainant made disclosures to IG of numerous instances of employees falsifying travel vouchers, and disclosed that his supervisor violated the Hatch Act. Matter closed because RIF effected July 1985; Complainant and all target officials separated and no longer Federal employees.

146. Employee complained that his removal for theft of 20 cartons of cigarettes in June 1982, was actually in reprisal for a series of disclosures made to the FBI concerning: the Kennedy assassination; the suicides of Lyndon Johnson and Franklin Delano Roosevelt; U.S. government involvement with organized crime; subversive activities of Jane Fonda; President Reagan's mental condition; murders in New Jersey; and revelations from conversations with a "saint." The matter was closed because the disclosures could not be substantiated and because the employee could not have

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"reasonably believed" that the disclosures evidenced any impropriety. In summary, the voluminous complaint contained material not easily believed.

147. Employee complained that a reprimand in December 1984, for wasting time and insubordination, was in reprisal for having filed complaints earlier concerning inadequate ventilation in the Welding Shop with OSHA and with his supervisors. [OSHA investigated the complaint in August 1984, but did not substantiate the allegation.] The matter was closed due to the lack of evidence of any retaliatory intent or of the disclosure having been a significant factor in the reprimand.

148. An employee of the FBI complained that his detail to another job was in reprisal for sending a copy of his EEO complaint to the FBI Director's office. The matter was closed for lack of jurisdiction. See 5 U.S.C. § 2302(a)(2)(C)(ii).

149. Employee was docked on hour for leaving work without permission, and for not signing out. He alleged that the charge of AWOL for one hour was in reprisal for having reported to the union that supervisors directed employees to alter production reports, and to falsify credited production of employees to support cash awards. The matter was closed when the inquiry revealed that the persons involved in the alleged reprisal lacked knowledge of the alleged whistleblowing.

150. Former employee alleged that his removal in September 1984, was in reprisal for having previously made two disclosures. In 1981, he informally alleged to the personnel officer that the supervisor was allowing contractors to use a copy machine. In late 1983, he disclosed, through the IG hotline, that there was a conflict of interest situation involving his supervisor, i.e., that the supervisor's son worked for a contractor. The inquiry revealed that the removal was for stealing and selling government property; that the deciding official was not the supervisor referenced in his disclosures; and that there was no evidence of any nexus between his removal and the disclosures.

151. Employee complained that his geographical reassignment in April 1984, was in reprisal for oral disclosures made to his supervisor and to an agency investigative unit in January 1983 concerning unsafe tires. [The disclosure was investigated, and 4 of 1500 tires were found unsafe.] The matter was closed after our inquiry revealed that the employee had a prior history of significant conduct problems (5 suspensions); that there was no evidence of any retaliation or nexus; and that the employee had been

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reassigned similarly before any disclosures had been made to anyone.

152. Employee alleged that a denial of training and a performance appraisal rating received in April 1985, were acts of reprisal for a disclosure made in September 1984 concerning theft, waste and abuse. [The disclosure allegations were investigated by appropriate agency investigative officials but were not substantiated.] The matter was closed on the basis of no evidence of retaliatory intent when the employee failed to respond to a request for specific information concerning the alleged reprisal actions by his agency.

153. Employee complained that his change of tour (from night to day shift) and his 14-day suspension in August 1985, were in reprisal for having made a hotline disclosure to the OIG in September 1984. He alleged to the IG that drugs were being stolen from the inpatient pharmacy. To prove his contention to the IG, he acted without authorization and removed some drugs from the pharmacy in December 1984, and subsequently turned them over to state officials. After inquiry, the theft of drugs was without authorization from proper agency officials and thus did not constitute a protected activity.

154. Employee complained that his five-day suspension in September 1984, his temporary loss of certification in October 1984 to handle nuclear materials, and his ten-day suspension (also in October 1984), were in reprisal for a telephone complaint in September 1984 to higher agency officials about unsafe crane procedures and practices at the worksite. In October, he personally visited the agency officials to reiterate the same complaint. After inquiry, the matter was closed because the two suspensions were based on acts of insubordinate conduct by the employee and there was no evidence of any retaliatory intent.

155. Employee complained that his supervisor was retaining records of a January 1985 counseling session, and of a March 1985 infraction in retaliation for 1983 disclosures of mismanagement and abuse of authority by his former supervisor which "angered" higher officials. After inquiry, the matter was closed as the alleged reprisal acts were not personnel actions under 5 U.S.C. § 2302(a)(2)(A), and there was no evidence of retaliatory intent or nexus.

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156. Complainant was demoted from a supervisory to a nonsupervisory position during his supervisory probation period, and alleged reprisal for complaining to his supervisor that a planned project was a waste of funds. The OSC file was closed because the employee was on notice of performance problems three times prior to his "disclosure." There was also no evidence of retaliatory intent.

157. Complainant was demoted one grade allegedly in reprisal for assisting the OIG during 1984 and 1985. No specifics were given regarding the "assistance" given. The OSC file was closed due to the lack of evidence of any retaliatory intent. It was also determined that the employee had been downgraded as a result of an MSPB order that directed the agency to offer his position to another employee who had higher retention RIF rights.

158. Complainant was denied a merit pay increase and an award, and later given a reprimand for acquiring certain PC's (micro-computers) without authority. He claimed that he was the victim of reprisal for reporting to the Deputy Commander that his supervisor was using a computer and printer to produce tax letters for a private consulting business. The OSC file was closed because the agency had legitimate reasons for the actions taken. It appeared that there was an ongoing feud between the employee and the supervisor.

159. Complainant's position was not upgraded (thus denying a promotion opportunity) and the position under him was downgraded, all allegedly in reprisal for MSPB testimony by him that questioned the upgrading of the position of CPO and Principal Classifier. The OSC file was closed due to lack of evidence of retaliatory intent.

160. Complainant received a "highly successful" performance appraisal (which he claimed hampered his chances for promotion) allegedly in reprisal for a disclosure to the OIG that a bill submitted by an employee was fraudulent and excessive. The OSC file was closed because of lack of evidence of retaliatory intent. In addition, complainant provided no information to OSC that the rating given hampered him in anyway in seeking promotions.

161. Complainant was removed for cause in April of 1985 for unauthorized removal and copying of his supervisor's personal and confidential documents, for discourtesy in dealing with the public, and with loud and abusive behavior in dealing with co-workers. Reprisal for making disclosures to a Federal court judge was alleged; it was asserted that the supervisor's papers in question revealed discriminatory intent were directly related to the pending civil action. The OSC file was closed because it was determined that the

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disclosure was not provable as a "significant factor" in the removal action, especially in view of the manner in which the complainant obtained the information concerned.

162. The Complainant was not selected for promotion in June of 1984 allegedly in reprisal for disclosures in July of 1983 to the fire chief about alleged unsafe air conditioning equipment and electrical panels. The OSC file was closed due to a lack of evidence of retaliatory intent or causal connection.

163. The Complainant was laterally reassigned at the same grade level in January of 1985 allegedly in reprisal for disclosures to agency officials during the same month regarding alleged mismanagement and improper personnel practices. The OSC file was closed because the contested personnel action preceded the alleged disclosure, and because the employee actually requested the reassignment. Thus, no retaliatory intent was evident.

164. Complainant was given a 14-day suspension allegedly in reprisal for disclosing unethical conduct and mismanagement to a Congressman and to upper management. The OSC file was closed because the employee involved was a NAF employee and thus was not a "covered person" under the CSRA, vitiating OSC jurisdiction. The employee was also on notice of misconduct prior to the disclosure.

165. Complainant was removed for being AWOL and for throwing a pair of scissors at her supervisor. She asserted reprisal for complaining to upper management about gas leaking into corridors near her work space. The OSC file was closed due to lack of evidence of retaliatory intent, and because management had a legitimate reason for the adverse action taken.

166. Complainant was removed from a temporary, seasonal appointment, and alleged reprisal for making disclosures to a Congressman about alleged improper hiring practices. The OSC file was closed because of no evidence of any retaliatory intent. It was also determined that the employee admitted violations of the standards of conduct, and was terminated for this reason.

167. Complainant was removed for cause, and alleged that he was the victim of reprisal for informing the OIG that his former supervisor was involved in alleged "internal corruption." The OSC file was closed because the employee had a tarnished prior disciplinary record, and the adverse action appeared to be supported by legitimate management reasons. The employee also refused to cooperate with the OSC inquiry. Finally, the MSPB ruled (in deciding an appeal of the removal) that the employee's supervisors had no

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knowledge of his disclosure, and that even if they did, there was no evidence of nexus.

168. Complainant received a notice of proposed removal for referring export licensing business to his estranged wife in violation of agency regulations and standards of conduct. The employee alleged reprisal for disclosures to the agency OIG relating to alleged improper use of funds, conflicts of interests, and favoritism. The OSC file was closed because the persons allegedly involved in the reprisal lacked actual or constructive knowledge of the disclosures. In addition, it appeared that the adverse action was fully justified by the employee's misconduct.

169. Complainant was separated for poor performance during the probationary period for failure to properly account for government funds and abuse of leave. The employee claimed reprisal for reporting misuse of a government vehicle by her supervisor. The OSC file was closed because there was no evidence of retaliatory intent and because the charges against the employee were supported by the evidence.

170. Complainant received a letter of proposed removal for cause for attempting to cover up an auto accident, failure to report the accident, and lying during its investigation. The employee claimed reprisal for reporting to the NIS that his supervisor was stripping stored vehicles and stealing evidence confiscated during police investigations. The OSC file was closed because of the lack of evidence of retaliatory intent and because the reasons for the adverse action appeared to be fully supported by the evidence.

171. Complainant (a management official) was reassigned in August of 1985 allegedly in reprisal for having made disclosures to an OIG investigative team during the course of its investigation of his supervisor. Complainant's allegations neither prompted the investigation, nor did his name appear in the final report. File was closed due to the lack of any evidence of retaliatory intent; the reassignment was taken in order to put a new management team in place after the investigation which resulted in one manager being terminated and another manager retiring in lieu of reassignment.

172. Complainant was reassigned after writing to the General Counsel of a union to arrange a meeting between himself, the union, and the employee who had filed a complaint against him. Complainant did not claim (b)(8) reprisal, but OSC made inquiry to see if such a violation was possible. The file was closed because of the absence of any protected disclosure, and the lack of evidence of retaliatory intent.

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173. Complainant was removed for unsatisfactory performance, but claimed that the removal was due to reprisal for disclosures he made to the personnel office about another employee taking long lunch hours. The file was closed due to lack of evidence of causal connection, and because complainant had also previously received a warning notice for unacceptable performance. The complainant also settled his case with the agency, and withdrew his claim with OSC.

174. Complainant was separated during his probationary period for failure to comply with time and attendance rules, and for unprofessional conduct toward her supervisor. She alleged that her separation was due to reporting to the OIG alleged sexual harassment of her by her supervisor while they were conducting an on-site investigation. The file was closed because the disclosure was not found to be a significant factor in the separation. Even assuming it was, arguendo, it was determined that the agency would have taken the adverse action anyway for legitimate reasons.

175. Complainant asserted that he was not rated as qualified for promotion in 1984 because he had disclosed time card fraud and disparate treatment by his supervisor. The file was closed because there was no evidence of retaliatory intent or of nexus between the disclosure and not being rated as qualified.

176. Complainant was not selected for promotion in May 1985, allegedly in reprisal for disclosures of sexual harassment by two agency officials in February of 1985. The disclosure was made to an OSC investigator. The file was closed because the persons involved in the alleged reprisal lacked actual or constructive knowledge of the disclosures. There was also no evidence of retaliatory intent or of "nexus" between the disclosure and the nonselection.

177. Employee was admonished in March 1977, suspended in 1981 in lieu of removal, suspended in March 1982, and reprimanded in reprisal for disclosures to the agency and to Congress in 1975. It was claimed that this "harassment" of the employee was about an alleged gross waste of funds in the contracting out of laboratory tests that could be done by agency personnel. The file was closed since there was no evidence of nexus or of retaliatory intent. Moreover, investigation was not practically feasible since the alleged victim was deceased.

178. Complainant was reassigned in August 1984, allegedly due to disclosures made to the OIG regarding abuse of sick leave and inadequate supervision. The file was closed because the persons involved in the alleged reprisal lacked actual or constructive knowledge of the disclosure. Even assuming such knowledge arguendo, it was determined that

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there was no evidence of retaliatory intent or causal connection between the disclosures and the reassignment, which was directed for legitimate reasons stemming from the employee's disruptive tendencies and conflicts with her supervisor.

179. Complainant was not selected for promotion allegedly in reprisal for disclosures to the OIG that his Branch Chief had disapproved travel, filming on location, and overtime, and had taken wasteful trips and claimed compensatory time falsely. The file was closed because there was no evidence of retaliatory intent or causal connection between the disclosures and the nonselection for promotion.

180. Complainant was given notice of a proposed geographic reassignment in August of 1985, and he resigned instead. He asserted to OSC that his proposed reassignment was in reprisal for comments he made to his supervisor in February of 1985 that a speech his supervisor had given to employees was not appropriate. The file was closed by OSC because it was determined that no protected disclosure of information had been made. The reassignment also appeared to be based upon complainant's failure to properly supervise his own subordinate employees.

181. Complainant was given a notice of proposed removal in April of 1985 allegedly in reprisal for making disclosures in April of 1984 to the agency OIG regarding alleged falsification of vehicle maintenance records. The file was closed by OSC due to lack of any evidence of retaliatory intent or causal connection between the OIG contact which occurred an entire year prior to the proposed adverse action.

182. Complainant was given an "unqualified" supervisory potential rating and claimed that it resulted from actions he took some nine months earlier. The actions included a criticism of other supervisors' comments on an NLRB case agenda addendum, and a letter to the General Counsel requesting a RIF rather than a furlough in order to protect Veterans' entitlement to preferential status. The file was closed because the actions of the complainant did not rise to the level of a protected (b)(8) disclosure, and because there was no evidence of retaliatory intent.

183. Complainant was suspended for one day for throwing a chair and leaving his job one half an hour early without helping another employee as directed. He claimed that the suspension was in reprisal for filing a complaint with the FLRA alleging mismanagement in the handling of his grievance. The file was closed by OSC because the complaint to the FLRA did not rise to the level of a protected disclosure, and due to lack of evidence of any retaliatory intent.

Description of Alleged Reprisal Matters

184. Complainant was separated during his probationary period for cause allegedly in reprisal for disclosures of alleged contract fraud during a meeting with supervisors. The file was closed because the separation was canceled (because of a procedural error in the removal) by his agency, and because there was no evidence of retaliatory intent.

185. Complainant was given a notice of separation for unacceptable conduct during her probationary period. She alleged that this was in reprisal for disclosures to the IG and others claiming mismanagement and danger to patient care, an alleged "unfair" order, and possible privacy violations. The file was closed because one disclosure postdated the separation notice, and hence could not have played a role in the adverse action involved. Further, no evidence or retaliatory intent, or causal connection between the other disclosures and the separation was found.

186. Complainant's access clearance was suspended for compromising an undercover CID investigation, and his temporary appointment was then terminated due to the loss of the clearance. Complainant asserted that these personnel actions were taken in reprisal for disclosing alleged mismanagement (possible misuse of funds) to the DOD Hotline. The OSC file was closed because of the lack of MSPB jurisdiction over security clearance revocations, and because the agency would have taken adverse action against this employee anyway for legitimate reasons.

187. Complainant was demoted one grade allegedly in reprisal for making disclosures to his supervisor, to the OIG and to Congress that a fellow employee was using false data to justify sonar systems analysis. The OSC file was closed because of the lack of evidence of retaliatory intent and causal connection between the disclosures and the subsequent agency action. The complainant apparently retired in order to avoid removal due to two unsatisfactory performance appraisals.

188. Complainant was separated for repeated tardiness, AWOL, and unsatisfactory performance during her probationary period. She alleged the separation was due to disclosures to the hospital executive officer regarding alleged misappropriation of government property. The OSC file was closed because the persons involved in the alleged reprisal lacked actual or constructive knowledge of the disclosures, and due to the lack of evidence of retaliatory intent.

189. Complainant claimed that he was denied a promotion due to disclosures he made to Defense Department police officers that four chill water pumps seemed to have disappeared. The OSC file was closed because there was no evidence or

Description of Alleged Reprisal Matters

retaliatory intent, and because the "non-promotion" actually was a failure to upgrade his position, and that this occurred prior to his disclosure.

190. Complainant was reprimanded for insubordination, and given a notice of proposed removal. He claimed reprisal for making disclosures to his union's safety coordinator about alleged unsafe practices including the locking of all building doors before all employees had left for the evening. The OSC file was closed because the employee involved had a long history of filing grievances on top of grievances, as well as progressive discipline. There was also no evidence of retaliatory intent or causal connection.

191. Complainant was denied an extension of his temporary appointment, allegedly in reprisal for disclosures to the FBI and CID regarding the alleged improper use of funds by his supervisor. The OSC file was closed because there was no evidence of retaliatory intent, and no evidence of causal connection. The agency action was also justified by deficiencies in the employee's performance.

192. Complainant was removed for cause, i.e., administering the wrong drugs to inmate-patients. He alleged to OSC that he was removed in reprisal for disclosing to the Associate Warden that an inmate was preparing a performance evaluation during a labor-management meeting. The OSC file was closed due to lack of evidence of retaliatory intent and nexus. There were also substantial reasons for removal, including breach of security and endangering the life of an inmate.

193. Complainant was given a 12-day suspension for failure to transcribe medical records as assigned and a poor performance appraisal. He asserted that his suspension and performance rating were in reprisal for disclosures to a Congressman that his office had a high turnover due to low pay and heavy workload. The OSC file was closed due to lack of evidence of retaliatory intent or causal connection.

194. Complainant was reassigned geographically, and given a lowered performance appraisal allegedly in reprisal for MSPB testimony and certain unspecified disclosures to Congress and to the agency OIG. The OSC file was closed because it could not be substantiated that the employee made any disclosures of information. In addition, the complainant refused to cooperate in the OSC inquiry, and withdrew his complaint. There was also no evidence of any retaliatory intent.

195. Complainant was reassigned allegedly in reprisal for disclosures made to the agency General Counsel regarding conflict of interest and standard of conduct violations. The OSC file was closed due to the lack of any evidence of

## Description of Alleged Reprisal Matters

retaliatory intent. The OSC investigation also found that two other co-employees of the complainant also made the identical disclosure and suffered no reprisal.

196. Complainant was removed March 8, 1985 for improper sexually-oriented conduct; offensive comments toward female subordinates; making false and malicious statements; conducting personal work on government time; failure to work an eight-hour day; and improper approval and certification of subordinate's time and attendance. Matter was referred to OSC by MSPB because appellant raised a (b)(8) reprisal affirmative defense. File was closed after complainant failed to provide documentation requested about what disclosures he made to the OIG about fraud, waste, abuse and mismanagement and when he made them. Complainant withdrew complaint and appealed to MSPB when he reached a settlement with the agency.

197. Complainant, a U.S. Postal Service employee, alleged harassment including threats of removal and denial of seniority rights. Alleged reprisal after submitting written complaint to supervisor about inaccurate count of mail boxes on mail route, and resident complaints about not receiving local circulars. File was closed because USPS not a covered agency.

198. Employee complained about not being selected for promotion in September 1984, which followed a denial of an incentive award on June 22, 1984 and an initial denial of a with-in-grade increase in 1984. In June 1982, Complainant disclosed sexual harassment by an agency supervisor to agency officials and to OSC, and filed a reprisal (EEO) complaint in January 1983. Notwithstanding that reprisal was not proved with respect to the non-promotion claim, OSC found reasonable grounds to believe the denial of the achievement award was in reprisal for the allegations made against the supervisor. As a result of OSC request, agency took corrective action and granted the award to the complainant.

199. Complainant was involuntarily reassigned from Physical Scientist, GS-12 to Writer/Editor, GS-12 on May 4, 1984. Claimed the action was in reprisal for negative comments made on an agency questionnaire regarding management of the local office. The file was closed because of no evidence that persons involved in alleged reprisal action had actual or constructive knowledge of the alleged whistleblowing (completed questionnaires were transmitted in sealed envelope and contents not seen by local management). Further, there was no evidence of any retaliatory intent or of "nexus," and the purported disclosure did not involve matters covered by § 2302(b)(8) as they concerned the complainant's personal situation.

## Description of Alleged Reprisal Matters

200. Complainant was reassigned from GS-3 to WG-3 on December 9, 1984, and also claimed performance appraisal was adversely affected, because he had been contacted in an IG investigation concerning the activities of another employee. File was closed because agency had legitimate grounds for effecting the position change, and because complaint had not provided any substantive information to the IG and the persons involved in the reassignment decision were not aware of the IG contact with the Complainant.

201. Complainant was removed from his U.S. Postal Service position; arbitrator's decision on October 9, 1984 restored him to his job. He claimed the action was in reprisal for his disclosing information on dishonesty and corruption within the local Postal Service system. The file was closed because USPS is not a covered agency.

202. In an August 23, 1984 letter, Complainant was charged with a violation of agency standards of conduct. This stemmed from a May 6, 1984 newspaper article published by the complainant in which he criticized the agency's inspection procedures. The file was closed after OSC requested and the agency agreed to a rescission of the letter.

203. Complainant claimed he was denied cash awards in July 1984 and four previous years because of reprisal. In February 1983, Complainant made disclosures to the JAG office (which referred them to OIG) alleging management official improperly permitted a private contractor to use a government crane and subsequently authorized an illegal payment to the contractor. The file was closed because inquiry showed no evidence of any knowledge of the disclosures or any retaliatory intent by people involved in the cash awards; also, because cash awards had been denied to the Complainant several years preceding his protected disclosures.

204. Complainant alleged that he was denied requested leave in reprisal for his July 22, 1985 complaint to the District Fire Chief about his assignment to a particular fire station. On that date, he also disclosed that there was not a firefighter "officer" assigned to his station. The file was closed after the Complainant failed to cooperate with OSC in the inquiry.

205. Complainant's removal was proposed October 28, 1985 and effected December 23, 1985. In September 1979, the Complainant discovered that another employee (an attorney) was improperly practicing law [in the private sector]. He disclosed this to agency audit officials on December 27, 1985. The file was closed because the removal action preceded his protected disclosure action by three days and thus could not have been a factor significant to it.

Description of Alleged Reprisal Matters

206. Complainant's removal was proposed June 1, 1985 for unacceptable performance and the action was effective August 2, 1985. Complainant was president of the local union at the time. On May 15, 1985, the agency Assistant Secretary received a letter from the union regarding time and attendance abuse by the Regional Administrator; objectionable conduct during the union election (unilaterally relocating employees) was also discussed in the letter. The file was closed because of lack of evidence of any retaliatory intent or of any "nexus" between the union letter (which was signed by another union official) and the removal decision.

207. Complainant was removed for misconduct on October 31, 1984 and MSPB sustained the removal on appeal. On July 25, 1984, the complainant disclosed to higher management, mismanagement, misappropriations of funds and improprieties at a government project. During the course of the agency investigation into the allegations, the Complainant's misconduct (unrelated to allegations being investigated), was uncovered. The file was closed because of no evidence of any retaliatory intent or of "nexus" in the removal action and the projected disclosure.

208. Complainant alleged being subjected to harassment in 1982, 1983 and 1984, such as spraying the work site for insects, moving desk location, and annotation by supervisor relating to complainant's excessive use of sick leave. Complainant attributed this treatment to reprisal for 1978-79 disclosure to Member of Congress that Federal employees were being asked to perform work a contractor was being paid to do. The file was closed because no personnel action was involved in this matter, and because of no evidence of any retaliatory intent.

209. In November 1984, Complainant received a marginal performance rating; in April 1985 a warning of unsatisfactory performance and a 90-day notice to improve. Complainant alleged reprisal stemming from an October 1982 disclosure made to the agency Employee Relations Chief alleging that his supervisor and another supervisor were conducting private business in the office. The file was closed due to lack of evidence of any retaliatory intent; that even though management was aware of the 1982 disclosure, it would have taken the action in any event; the Complainant had a history of poor performance since 1980.

210. Complainant was terminated during probationary period in May 1985. He had been reassigned from night shift to day shift on November 26, 1984, and received a letter of counseling for inattention to duty on February 28, 1985. On

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Description of Alleged Reprisal Matters

July 12, 1984, complainant signed a statement (along with co-workers) reporting their supervisor was observed asleep on the job. A November 20, 1984 group meeting was held regarding the employee complaint. The file was closed because the evidence showed the agency had sufficient reason to support the probationary termination and the complainant's involvement in the protected disclosure was not provable as any significant factor in the decision.

211. On February 12, 1985, the Complainant was separated during probationary period for poor performance. The Complainant alleged the action was because on February 6, 1985, she told her third level supervisor about alleged violations of laboratory procedures, mislabeling of samples, falsification of data, and tracking of samples. The file was closed because evidence showed that the protected disclosures were not provable as a significant factor and that management would have taken the action in any event because the complainant's performance problems were documented prior to the disclosure.

212. Complainant received a "satisfactory" performance rating on October 17, 1985. He alleged he should have received a higher rating but did not because of reprisal and alleged violation of his right to free speech. Complainant's "disclosures" related to his November 8, 1984 complaint to U.S. District Court about an agency action on a grievance over an earlier performance appraisal. He sought an injunction requiring the agency to conduct a hearing on his grievance. The file was closed because it could not be substantiated that he made any disclosure of information protected by § 2302(b)(8), and because of no evidence of retaliatory intent, that the rating would not have been higher even if management had not been aware of the court claim and previous dispute.

213. Complainant received a warning on April 6, 1983 for not following leave policies; was reprimanded on November 4, 1983 for personal long distance telephone call; received a letter of warning on December 10, 1983 for disruptive behavior; was suspended September 13-14, 1984 for conduct (false and misleading statements); and suspended again on December 12-13, 1984. The Complainant reported the supervisor's alleged fraudulent leave reporting after supervisor had been critical of leave abuse of employees in the unit (including Complainant). File was closed because the supervisor had no knowledge of the disclosure, the employee was on notice of deficiencies prior to disclosure, and no evidence of any retaliatory intent.

214. On April 30, 1984, the Complainant received a proposed removal, for the efficiency of the service. Between 1981 and late 1982, the Complainant made general allegations of

## Description of Alleged Reprisal Matters

waste, mismanagement and corruption among various civil service functionaries to five U.S. senators, two congressmen and to the Director of OPM. The file was closed due to lack of evidence of any retaliatory intent and lack of knowledge of the alleged whistleblowing. In addition, the Complainant failed to follow-up with OSC in providing additional information during the inquiry.

215. Complainant received a suspension in 1984. He also alleged agency failed to reassign him to another duty station more sympathetic to his idea(s). Complainant sent a report to GAO in 1984 in which he advocated an idea related to economic analysis. He stated that the agency's failure to follow his theory was mismanagement and a gross waste of funds. The file was closed because it could not be sustained that there was any disclosure of information, and because of no evidence of any retaliatory intent.

216. Complainant was advised on February 22, 1985 that his position was to be abolished and he would be separated through RIF procedures, effective March 30, 1985. In lieu of separation, Complainant accepted reassignment effective March 31, 1985. Complainant had contacted IG on December 13 and 19, 1984, regarding violations in the program being administered by his agency. The OSC investigation was terminated in this matter because of lack of evidence of any significant relationship between the agency action, which had been contemplated before December 1984, and the Complainant's protected activity.

217. Complainant received reprimand in June 1985 for making unfounded statements in January and March 1985. Complainant wrote three memos in January 1985, and one in March 1985 to higher management alleging that her supervisor failed to prepare performance standards, re-routed mail to bypass Complainant, did not have procedures established to scrap (dental) gold, and was not signing agency form for approval of treatment prescribed. The file was initially closed due to lack of evidence that alleged disclosures were in fact protected disclosures and that they were not provable as a significant factor in the action taken.

218. Complainant alleged that from 1977 to 1985, he had been threatened with denial of with-in-grade and removal. Complainant telephoned the IG hotline about his supervisor's threats to take action against him; to silence him from disclosing mismanagement, abuse of authority and misconduct. The file was closed because no personnel action was taken; it could not be substantiated that any disclosure of information was made, and because the Complainant requested the complaint be withdrawn as the agency took corrective action by reassigning him.

Description of Alleged Reprisal Matters

219. Complainant received a change in duty station in July 1984. Prior to the action, he had written to a state assemblyman and interest groups about mismanagement of agency programs. The OSC investigation was terminated because of no evidence of retaliatory intent or nexus to show protected disclosure was provable as a significant factor in the agency action.

220. Complainant was placed on administrative leave pending completion of internal investigation on June 18, 1984, after three separate incidents on the same day, threatening to shoot individuals he confronted. Agency proposed his removal for cause in August 1984, but later decided to suspend him for 60 days in lieu of removal. Complainant claimed the action was in reprisal for an official report he filed in April 1984, alleging misuse of a government vehicle. The file was closed because of no evidence of retaliatory intent and because even though management had knowledge of the April disclosure, it would have taken the action in any event.

## APPENDIX C

### I. Disciplinary Actions Filed By OSC From October 1982 Through January 1986

<i>Respondents Charged</i>	<i>Disciplinary Action</i>	<i>Corrective Action</i>
1. Starrett (Reprisal for whistleblowing)	Removed + \$1000 fine	Victim's reassignment cancelled twice.
2. Brown (Reprisal for Appeal)	Exonerated	
3. Evans (Reprisal for whistleblowing)	Demoted + \$500 fine	
4. Tueller (Reprisal for whistleblowing)	Demoted + \$500 fine	
5. Lynn (Reprisal for speech)	30-day suspension	Victim received back pay and priority consideration for a job.
6. Chiarella (Reprisal for speech)	14-day suspension	
7. Hamilton (Illegal preference)	30-day suspension	No corrective action desired by victim.
8. Everett (Reprisal for appeal)	MSPB without jurisdiction	MSPB without jurisdiction.
9. Falt (Reprisal for whistleblowing)	Letter of reprimand + \$1000 fine	Victim received back pay and expungement of records. Military officer received letter of reprimand.
10. Leduc (Reprisal for whistleblowing)		
11. Filiberti (Illegal preference)	60-day suspension	Victim offered job.
12. Dysthe (Illegal preference)	60-day suspension	
13. Harvey (Reprisal for appeal)	Removal from SES + demotion	No corrective action desired by victim.
14. Hoban (Reprisal for whistleblowing)	Demotion of 4 grades	Reconstructed competition for victims.
15. Lavrar (Nepotism)	20-day suspension	Beneficiary of nepotism removed.
16. Mackin (Reprisal for whistleblowing)	Letter of reprimand	Victim received attorney fees and expungement + agency Secretary notified all managers of free access by employees to Inspector General

<i>Respondents Charged</i>	<i>Disciplinary Action</i>	<i>Corrective Action</i>
17. Zimmerman (Religious discrimination)	ALJ recommended removal	District Court had ordered corrective action for victim.
18. Pouy (Religious discrimination)	ALJ recommended demotion of 3 grades + \$1000 fine	"
19. Russell (Sexual discrimination)	Pending	No corrective action desired by victims.
20. Verrot (Illegal preference)	\$1000 fine	No corrective action appropriate.
21. Williams (Accepting illegal gifts)	Removal from SES, Demotion + \$1000 fine.	No corrective action appropriate.
22. Woods (Sexual discrimination)	Resigned	Woods removed from supervisory position over victims pending outcome.
23. Parker (Illegal preference)	\$1000 fine + Letter of reprimand	No corrective action desired by victim.
24. Ponce (Nepotism)	14 day suspension	No corrective action appropriate.
25. Ross (Illegal preference)	Pending	Beneficiary of illegal actions removed.
26. Catledge (Illegal preference)	Pending	
27. Mongan (Reprisal for whistleblowing)	Pending	Victim promoted.
28. Coffield (Violation of Rule)	Pending	No corrective action appropriate.
29. Loney (Violation of Rule)	"	"
30. DeFord (Illegal preference)	\$750 fine	No corrective action appropriate.
31. Julian (Illegal preference)	90-day suspension	

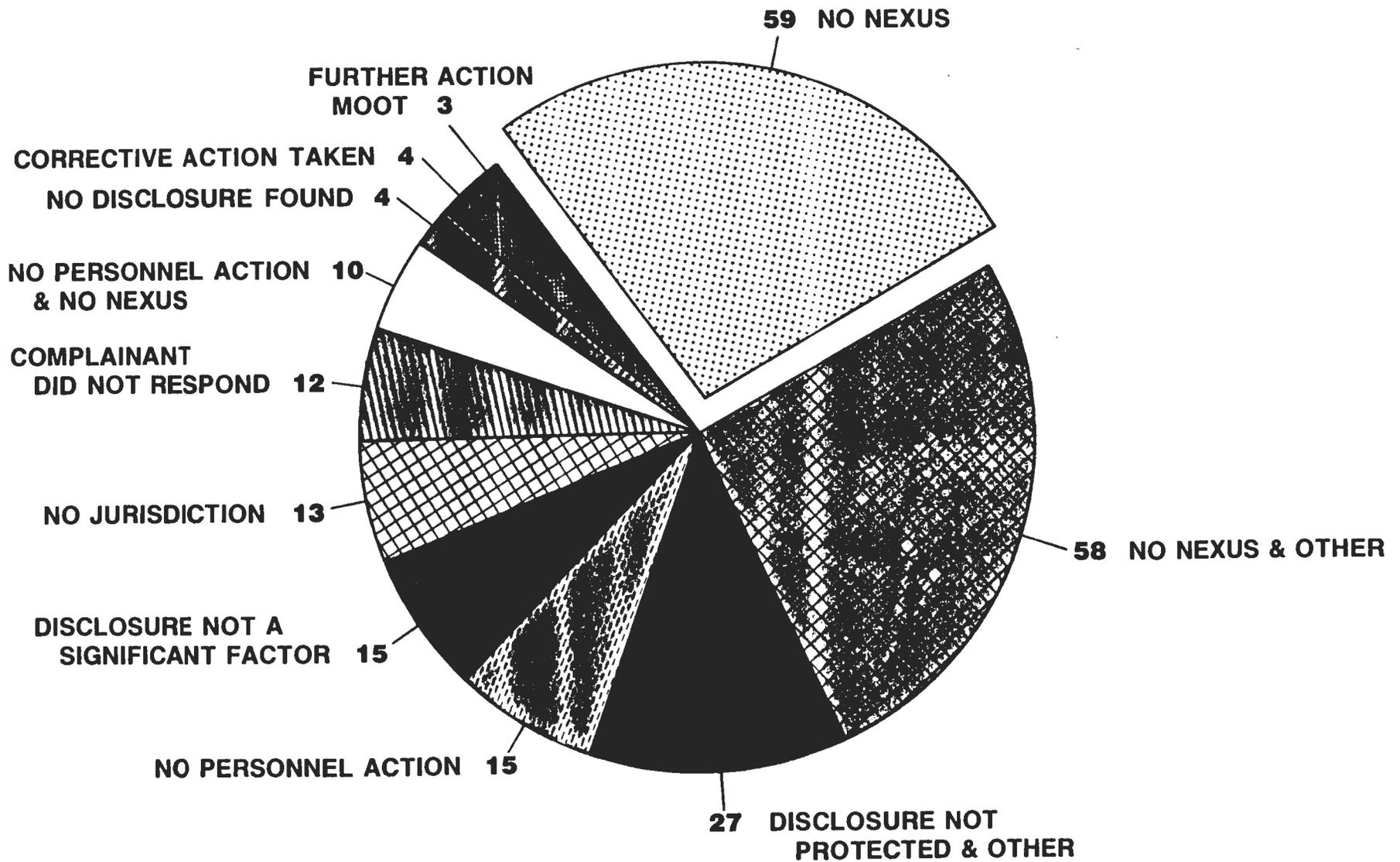
## II. Other Corrective Actions Obtained by OSC From October 1982 through January 1986

<i>Victim</i>	<i>Corrective Action</i>
1. Kaiser (Reprisal for whistleblowing)	Cancellation of reassignment and return to job.
2. Lesht (Reprisal for appeal)	Cancellation of proposed reassignment.

<i>Victim</i>	<i>Corrective Action</i>
3. Telleen (Reprisal for speech)	Expungement of disciplinary letter.
4. Lockerby (Reprisal for whistleblowing)	Corrected performance appraisal.
5. Kirkman (Reprisal for whistleblowing)	Corrected performance appraisal.
6. Dickens (Reprisal for whistleblowing)	Corrected performance appraisal.
7. Sikes (Reprisal for appeal)	Restoration of performance award.
8. Chiechi (Illegal preference)	Management disciplined several officials and reiterated agency policy that all recruitment actions be based on merit.
9. Crandall (Reprisal for speech)	Management posted notice re employee First Amendment rights.
10. Sh'ade (Due process violation)	Victim restored to duty.
11. McCrary (Reprisal for whistleblowing)	Victim reassigned to requested position.
12. King (Reprisal for whistleblowing)	Victim reassigned to requested position.
13. Pierce (1st Amendment & Right to Petition Congress)	(Agency clarified directive limiting contacts with Congress to refer only to employees acting in official capacity)
14. Yonke (Non-compliance with MSPB order)	(Agency agreed to promote employee to higher grade)

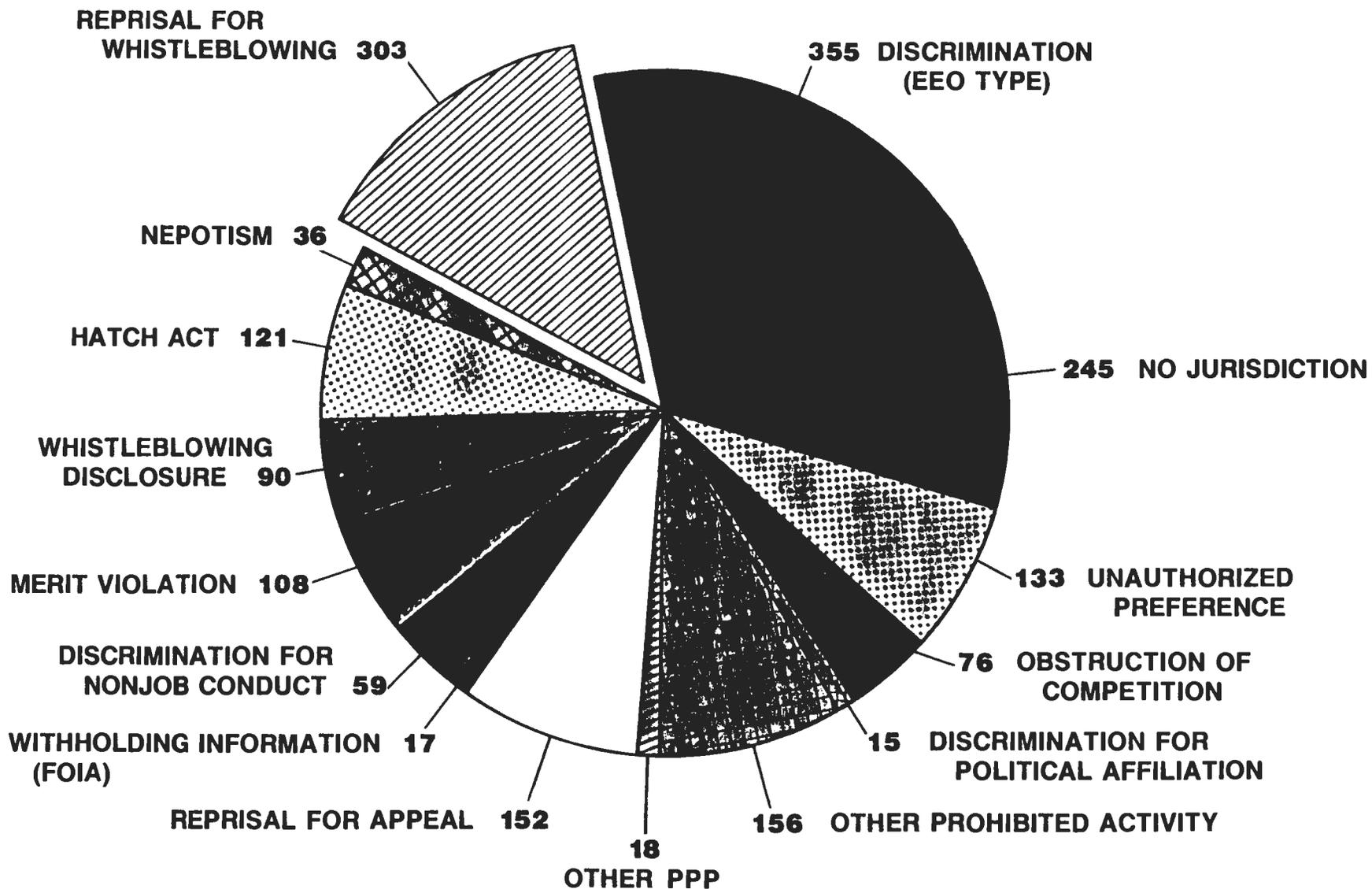
# CLASSIFICATION OF 220 CLOSED COMPLAINTS ALLEGING REPRISAL FOR WHISTLEBLOWING

(10/84 - 1/86)



# ANALYSIS OF INTAKE (10/84 - 1/86)

## 1884 MATTERS



# COST OF PROPOSED LEGISLATION (IN \$ MILLIONS)

ADMINI-  
STRATION



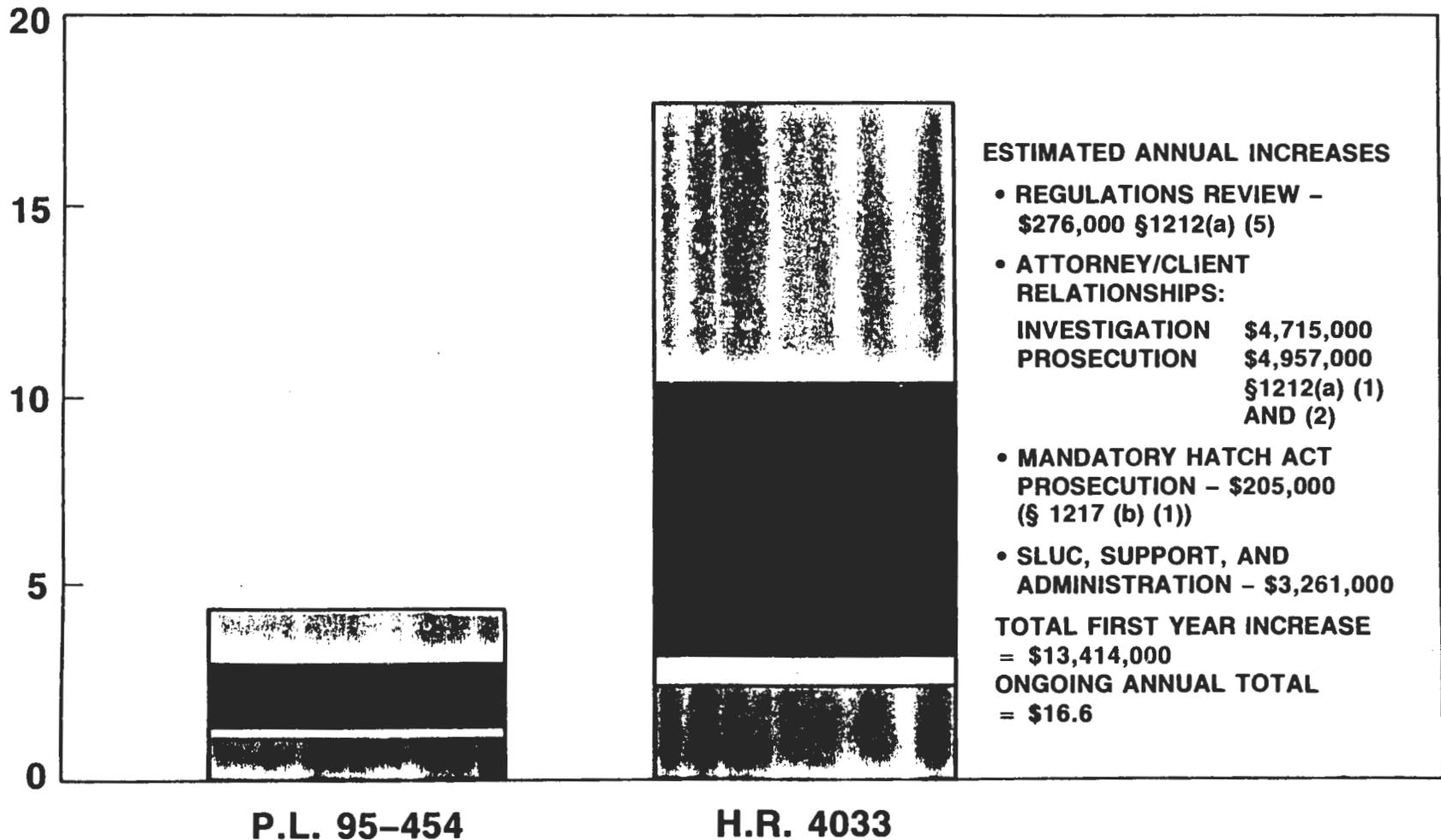
PLANNING &  
OVERSIGHT



INVESTI-  
GATION



PROSECUTION



# DISCIPLINARY CASES FILED (OTHER THAN HATCH ACT)

