

PROHIBITED PERSONNEL PRACTICES

WHISTLEBLOWER PROTECTION

*RIGHTS AND REMEDIES
OF FEDERAL EMPLOYEES
UNDER 5 U.S.C., CHAPTERS 12 & 23*

March 27, 2013

U.S. OFFICE OF SPECIAL COUNSEL



Topics

5 U.S.C. Chapters 12, 23, 73

U.S. Office of Special Counsel (OSC)



Prohibited Personnel Practices



Whistleblower Protection



Office Of Special Counsel (OSC)

5 U.S.C. §§ 1211-19; 5 C.F.R. PART 1800

Authorized to —

- ❑ Investigate prohibited personnel practices and other activities prohibited by civil service law, rule, or regulation
- ❑ Seek corrective action for victims of prohibited personnel practices
- ❑ Seek disciplinary action against officials who commit prohibited personnel practices



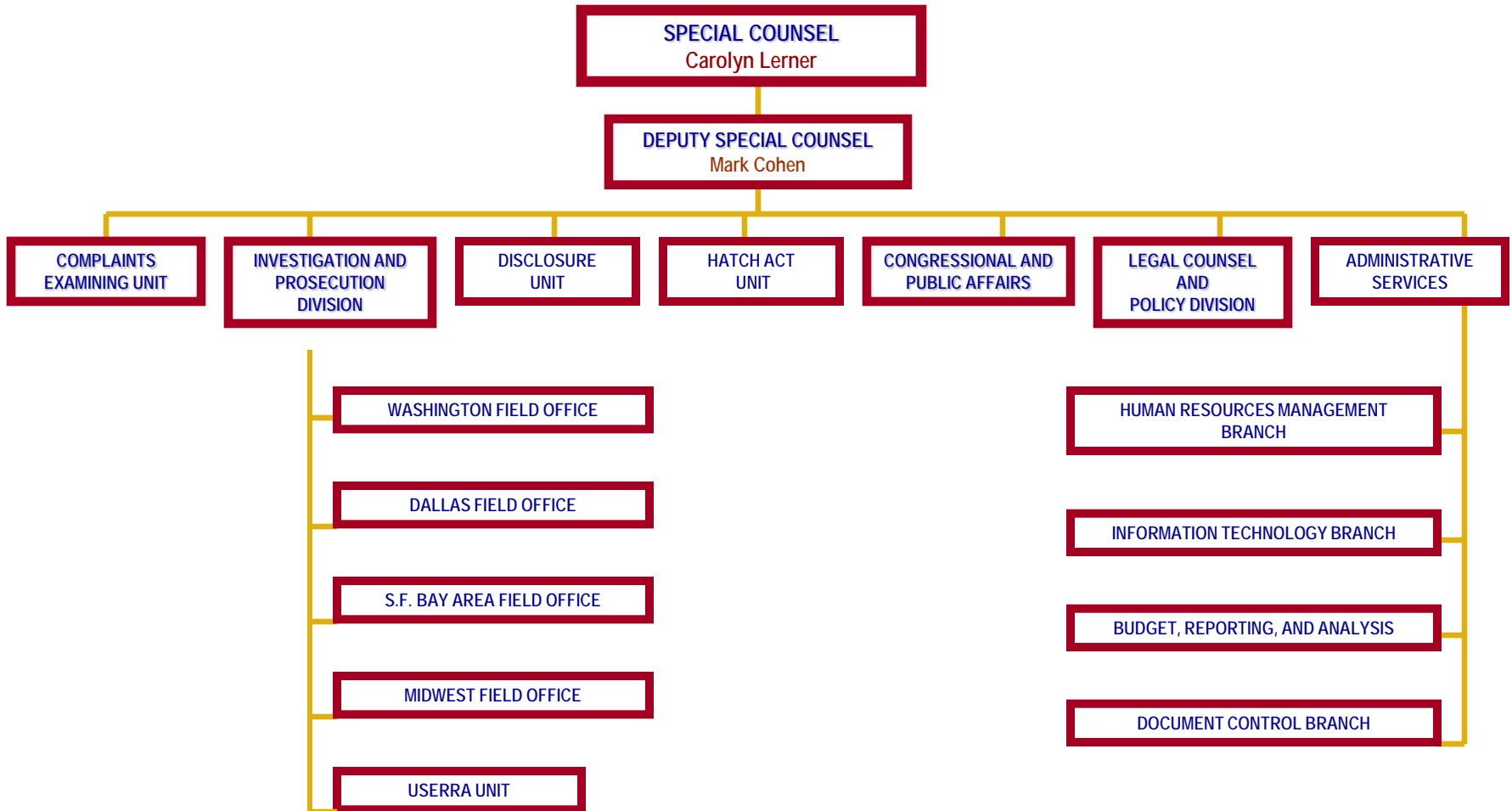
Office Of Special Counsel (OSC)

5 U.S.C. §§ 1211-19; 5 C.F.R. Part 1800

Authorized to —

- ❑ Provide safe channel for whistleblower disclosures
- ❑ Advise & enforce Hatch Act provisions on political activity by federal, state, and local government employees
- ❑ Protect reemployment rights of federal employee military veterans and reservists under USERRA

OSC Organization



Responsibilities of Agency Officials

5 U.S.C. § 2302(c)

Agency heads, and officials with delegated personnel management authority, are responsible for —

- | Preventing prohibited personnel practices
- | Following and enforcing civil service laws, rules, and regulations
- | Ensuring that employees are informed of rights and remedies (in consultation with OSC)

Key Concepts

- Merit System Principles
The framework and foundation for making all personnel decisions in the civil service
- Prohibited Personnel Practices
Admonitions against specific practices that conflict with merit systems principles
- Whistleblower Disclosures
OSC provides a safe channel for disclosures by current and former federal employees and applicants for federal employment

Prohibited Personnel Practices: Overview

13 Prohibited Personnel Practices — four general categories:

- Discrimination
- Hiring practices that offend merit system
- Retaliation for protected activity
(including whistleblowing)
- Catch-all: violation of law, rule or
regulation that implement merit systems
principles (including constitutional rights)

Discrimination

Prohibited Personnel Practice to discriminate:

- Based on race, color, nationality, religion, gender, handicapping condition, age, marital status, or political affiliation
- Based on “conduct which does not adversely affect the performance of the employee or applicant, or the performance of others,” including sexual orientation

Political Activity

Prohibited Personnel Practice to:

- Coerce political activity of any person (including providing any political contribution or service)
- Reprising against an employee or applicant for employment for the refusal of any person to engage in political activity

5 U.S.C. § 2302(b)(3)

Hiring Offenses

- Obstructing the right to compete
- Influencing withdrawal from competition
- Unauthorized preferences
- Nepotism
- Considering improper job references
- Knowingly violating veterans' preference

5 U.S.C. § 2302(b)(2); (b)(4); (b)(5); (b)(6);(b)(7); (b)(11)

Hiring Offenses

Most common violations:

- Deceiving/willfully obstructing right to compete for employment — *5 U.S.C. § 2302(b)(4)*
- Influencing withdrawal from competition to improve or injure employment prospects of another — *5 U.S.C. § 2302(b)(5)*
- Granting unauthorized preference or advantage to improve or injure the prospects of any particular person for employment — *5 U.S.C. § 2302(b)(6)*



Hiring Offenses

Common misconception:

- Not prohibited to act upon preconceived idea that one person may be best selectee for particular position ("*preselection*")
- To violate the law there must be —
 - ✓ The grant of some illegal advantage
 - ✓ An intentional and purposeful manipulation of the system to insure that one person is favored and another is disadvantaged

Hiring Offenses

Caveats:

- While most hiring offenses require intent to deceive or manipulate, hiring in violation of a law, rule, or regulation implementing a merit system principle is also a PPP
- Negligent or imprudent actions can create appearance of violation leading to complaints and investigations — E.g., Broadcasting one's choice before competition

Examples of Hiring Offenses

- **Manager deliberately fails to post vacancy to stop particular candidate from applying**
- **Application received is deliberately misplaced or destroyed**
- **Supervisor gives employee**

Examples Of Hiring Offenses

- Supervisor encourages subordinate not to compete, or to withdraw application, by promising future benefits that supervisor does not intend to grant
- Closed vacancy announcement is re-opened to permit favored

Examples Of Hiring Offenses

- Job qualifications are manipulated to favor particular applicant
- Supervisor tells qualified employee not to apply for job in order to improve another employee's chances of selection



Catchall Prohibited Personnel Practice

Taking or failing to take personnel action,
in violation of a law, rule, or regulation
that implements or directly concerns a
merit system principle

5 U.S.C. § 2302(b)(12)



Retaliation

5 U.S.C. § 2302(b)(8), (b)(9)

Taking, failing to take, or threatening to take or fail to take personnel action for —

- Protected whistleblowing
- Exercise of appeal, complaint, or grievance rights
- Testimony or other assistance to person exercising such rights
- Cooperation with or disclosures to Special Counsel or Inspector General
- Refusal to obey an order that would require violation of law



Elements of Proof: Reprisal for Whistleblowing

5 U.S.C. §§ 1214(b)(4)(a)-(b), 1221(e)

Must show —

- Protected disclosure of information under 5 U.S.C. § 2302(b)(8)
- Personnel action taken, not taken, or threatened
- Actual or constructive knowledge of protected disclosure
- Protected disclosure was contributing factor in personnel action



Protected Whistleblower Disclosures

5 U.S.C. §§ 2302(b)(8), 1213

Disclosure Categories

- Violation of any law, rule, or regulation
- Gross mismanagement: substantial risk of significant impact on mission
- Gross waste of funds: more than debatable expenditure
- Abuse of authority
- Substantial & specific danger to public health & safety
- Censorship related to scientific research or analysis (scientific integrity)



Protected Whistleblower

Disclosures *(cont'd)*

5 U.S.C. §§ 2302(b)(8), 1213

- Generally protected when made to any person
- Need not be accurate to be protected
- Protected if employee reasonably believes that it is true — test is both objective and subjective



Protected Whistleblower Disclosures *(cont'd)*

5 U.S.C. §§ 2302(b)(8), 1213

- No requirement to go through chain of command
- Whistleblower's personal motivation does not negate reasonable belief
- Employee or applicant protected if employer mistakenly believes he or she is a whistleblower

Protected Whistleblower Disclosures *(cont'd)* 5 U.S.C. §§ 2302(b)(8), 1213

- **Disclosure does not lose protection because:**
 - disclosure made to person who participated in the wrongdoing;
 - disclosure revealed information that had previously been disclosed;
 - disclosure made while off duty; or
 - disclosure made during the employee's normal course of duties.



Protected Whistleblower

Disclosures (*cont'd*)

5 U.S.C. §§ 2302(b)(8), 1213

Disclosure not protected (unless made to OSC or IG), where —

- | Prohibited by law (and certain regulations), or
- | Required by Executive Order to be secret for national security or foreign affairs

Non-Disclosure Agreements

- Non-disclosure agreements, policies or forms must include a statement clarifying that agency restrictions on disclosures are superseded by statutory whistleblower rights.
- Implementing or enforcing a nondisclosure agreement that fails to provide this required notification of whistleblower rights is a PPP.



Contributing Factor

Any factor which alone or in connection with others tends to affect in any way the outcome of the personnel action at issue

- | Can be established by knowledge / timing alone
- | Often established by circumstantial evidence



Clear and Convincing Evidence

(Agency Defense)

- Agency must show — by clear and convincing evidence — that it would have taken same action without disclosure
- Factors:
 - Strength of evidence in support of personnel action
 - Existence & strength of motive to retaliate
 - Treatment of similar employees who are not whistleblowers

OSC's management advice

- Be measured in your speech and actions
- Keep the merit systems concepts on your radar screen
- Foster an open work environment in which employees are not reluctant to disclose wrongdoing
- Set the right tone at the top
- Be consistent in managing employees
- Seek expert advice when you are unsure



Corrective Action

5 U.S.C. § 1214

If OSC finds prohibited personnel practice committed, letter is sent to agency head requesting corrective action

Example --

Rescind suspension, issue back pay

In most cases, agencies agree to corrective action requested and settlement

Corrective Action *(cont'd)*

5 U.S.C. § 1214

Corrective Action includes:

- Placing individual in the position he or she would have been in had no wrongdoing occurred
- Reasonable and foreseeable consequential damages
 - Attorney fees, back pay and benefits, medical costs, travel expenses
 - Compensatory damages



Corrective Action *(cont'd)*

5 U.S.C. § 1214

If agency does not act in reasonable time to correct PPP, OSC may petition the Board for corrective action

- | Board allows for oral or written comments by OSC, OPM, the agency involved, and by alleged PPP victim
- | If Board determines that OSC has demonstrated that PPP occurred, exists, or is to be taken, Board shall order appropriate corrective action



Disciplinary Action

5 U.S.C. § 1215

May be sought by OSC for —

- | Prohibited personnel practices
- | Hatch Act violations
- | Other violations of civil service law, rule, or regulation



Disciplinary Action *(cont'd)*

5 U.S.C. § 1215

May be sought by OSC from —

- | The Merit Systems Protection Board
- | Agency heads
(For uniformed service members and contractors)
- | The President
(For most presidential appointees)



Disciplinary Action *(cont'd)*

5 U.S.C. § 1215

Possible penalties —

- | Removal, reduction in grade, suspension, or reprimand
- | Debarment from federal employment
(Up to five years)
- | Civil penalty
(Up to \$1,100)



Disciplinary Action *(cont'd)*

5 U.S.C. § 1215

Rights of charged employee include —

- | Opportunity to respond
- | Legal or other representation
- | Hearing before Merit Systems
Protection Board Administrative Law
Judge
- | Written decision



Whistleblower Disclosures

5 U.S.C. § 1213

The Office of Special Counsel provides a safe channel for whistleblower disclosures by federal employees, former federal employees, and applicants for federal employment



Whistleblower Disclosures

5 U.S.C. § 1213

Jurisdictional elements

- Covered agency

Most executive branch agencies

- Covered position

Disclosure must involve occurrence connected to performance of employee's duties & responsibilities



Whistleblower Disclosures

5 U.S.C. § 1213 (b)

OSC has no investigative authority

- OSC shall make substantial likelihood determination 15 days after receiving information from whistleblower
- Substantial likelihood: agency investigation more likely than not to substantiate allegations
- Follows MSPB definitions of gross waste of funds, gross mismanagement, & abuse of authority



Whistleblower Disclosures

5 U.S.C. § 1213 (c)

Referrals--

If Special Counsel determines there is substantial likelihood that information shows one or more categories of wrongdoing, Special Counsel must transmit information to agency head



Whistleblower Disclosures

- | Agency head required to investigate and submit written report of findings to the Special Counsel within 60 days—5 U.S.C. § 1213 (c)(1)
- | Special Counsel reviews report to determine if it contains information required by statute and if findings appear reasonable—5 U.S.C. § 1213 (d), (e)(2)



Whistleblower Disclosures

Whistleblower's Comments

Whistleblower has 15 days to
comment on agency report

5 U.S.C. § 1213 (e) (1)



Whistleblower Disclosures

Agency's report and any whistleblower comments are transmitted to President and congressional oversight committees with jurisdiction over the agency involved

5 U.S.C. § 1213 (e)(3)



Whistleblower Disclosures

- If Special Counsel determines that there is no substantial likelihood that the information shows one of the categories of wrongdoing, then Special Counsel informs whistleblower
 - Reasons why disclosure may not be further acted on, and
 - Directs individual to other offices available for receiving disclosures—5 U.S.C. § 1213 (g)(3)

OSC WEB SITE
(<http://www.osc.gov>)



OSC Phone / e-mail contacts

Complaints Examining Unit:

(202) 254-3670
(800) 872-9855

Disclosure Hotline:

(202) 254-3640
(800) 572-2249

Hatch Act Unit:

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USERRA Unit:

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