

PROHIBITED PERSONNEL PRACTICES

WHISTLEBLOWER PROTECTION



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

U.S. OFFICE OF SPECIAL COUNSEL

TOPICS

5 U.S.C. CHPTRS. 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 ON BEHALF OF INDIVIDUALS WHO ARE THE VICTIMS OF PROHIBITED PERSONNEL PRACTICES
- SEEK DISCIPLINARY ACTION AGAINST AGENCY OFFICIALS WHO COMMIT PROHIBITED PERSONNEL PRACTICES

OFFICE OF SPECIAL COUNSEL (OSC)

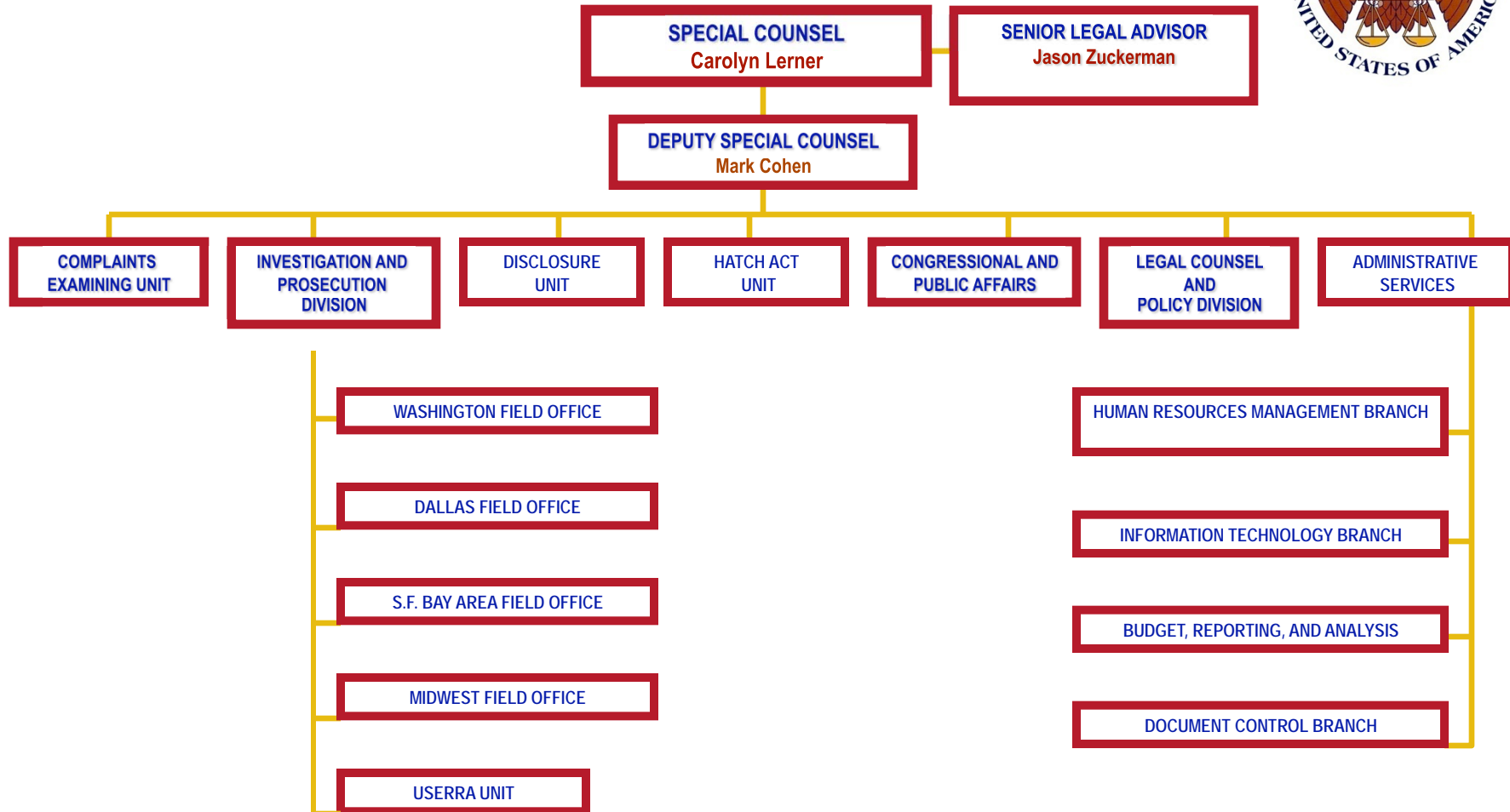
5 U.S.C. §§ 1211-19; 5 C.F.R. PART 1800



AUTHORIZED TO —

- PROVIDE A SAFE CHANNEL FOR WHISTLEBLOWER DISCLOSURES BY CURRENT AND FORMER FEDERAL EMPLOYEES, AND APPLICANTS FOR FEDERAL EMPLOYMENT
- ADVISE ON AND ENFORCE HATCH ACT PROVISIONS ON POLITICAL ACTIVITY APPLICABLE TO FEDERAL, STATE, AND LOCAL GOVERNMENT EMPLOYEES
- PROTECT THE 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
- COMPLYING WITH AND ENFORCING CIVIL SERVICE LAWS, RULES, AND REGULATIONS
- ENSURING THAT EMPLOYEES ARE INFORMED OF THEIR 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



12 PROHIBITED PERSONNEL PRACTICES — FALL UNDER ONE OF FOUR GENERAL CATEGORIES:

- **DISCRIMINATION**
- **HIRING PRACTICES THAT OFFEND MERIT SYSTEM**
- **RETALIATION FOR ENGAGING IN PROTECTED ACTIVITY (INCLUDING WHISTLEBLOWING)**
- **THE CATCH-ALL: VIOLATION OF LAWS, RULES OR REGULATIONS THAT IMPLEMENT MERIT SYSTEMS PRINCIPLES (INCLUDING VIOLATIONS OF CONSTITUTIONAL RIGHTS)**

DISCRIMINATION



PROHIBITED PERSONNEL PRACTICE TO DISCRIMINATE AGAINST AN EMPLOYEE:

- 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 DISCRIMINATION

POLITICAL ACTIVITY



PROHIBITED PERSONNEL PRACTICE TO:

- COERCE THE POLITICAL ACTIVITY OF ANY PERSON (INCLUDING PROVIDING OF ANY POLITICAL CONTRIBUTION OR SERVICE)
- TAKE ANY ACTION AGAINST AN EMPLOYEE OR APPLICANT FOR EMPLOYMENT AS A REPRISAL FOR THE REFUSAL OF ANY PERSON TO ENGAGE IN SUCH POLITICAL ACTIVITY

5 U.S.C. § 2302(b)(3)¹⁰

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 OR WILFULLY OBSTRUCTING RIGHT TO COMPETE FOR EMPLOYMENT — *5 U.S.C. § 2302(b)(4)***
- **INFLUENCING WITHDRAWAL FROM COMPETITION IN ORDER TO IMPROVE OR INJURE EMPLOYMENT PROSPECTS OF ANOTHER — *5 U.S.C. § 2302(b)(5)***
- **GIVING AN 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:

- IT IS NOT A PROHIBITED PERSONNEL PRACTICE TO ACT UPON ONE'S EXISTING EXPECTATION THAT ONE PERSON MAY BE THE BEST SELECTEE FOR A 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 PERSON IS DISADVANTAGED

HIRING OFFENSES



CAVEATS:

- WHILE HIRING OFFENSES USUALLY REQUIRE INTENT TO DECEIVE OR MANIPULATE THE SYSTEM, IF A LAW, RULE, OR REGULATION IMPLEMENTING A MERIT SYSTEM PRINCIPLE IS VIOLATED IN THE PROCESS, THAT WOULD ALSO BE A PROHIBITED PERSONNEL PRACTICE.
- NEGLIGENCE OR IMPRUDENT ACTIONS CAN CREATE THE APPEARANCE OF A HIRING OFFENSE AND RESULT IN COMPLAINTS AND INVESTIGATIONS — E.G., BROADCASTING ONE'S CHOICE BEFORE COMPETITION IS HELD.

EXAMPLES OF HIRING OFFENSES



- **MANAGER DELIBERATELY FAILS TO HAVE VACANCY ANNOUNCEMENT POSTED, TO PREVENT A PARTICULAR CANDIDATE FROM APPLYING FOR A VACANCY**
- **APPLICATION RECEIVED IS DELIBERATELY MISPLACED OR DESTROYED**
- **SUPERVISOR GIVES AN EMPLOYEE A DISHONEST RECOMMENDATION OR APPRAISAL TO KEEP VALUABLE EMPLOYEE OR TO HELP ANOTHER CANDIDATE**

EXAMPLES OF HIRING OFFENSES



- SUPERVISOR ENCOURAGES A SUBORDINATE NOT TO COMPETE, OR TO WITHDRAW HIS OR HER APPLICATION, BY MAKING PROMISES OF FUTURE BENEFITS THAT SUPERVISOR DOES NOT INTEND TO KEEP
- CLOSED VACANCY ANNOUNCEMENT IS RE-OPENED TO PERMIT A FAVORED CANDIDATE TO APPLY

EXAMPLES OF HIRING OFFENSES



- **JOB QUALIFICATIONS ARE MANIPULATED TO FAVOR A PARTICULAR APPLICANT**
- **A SUPERVISOR ADVISES A QUALIFIED EMPLOYEE NOT TO APPLY FOR A JOB IN ORDER TO IMPROVE ANOTHER EMPLOYEE'S CHANCES TO BE SELECTED**

CATCH ALL 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)

MERIT SYSTEM PRINCIPLES

5 U.S.C. § 2301(b)



1. RECRUIT, SELECT, AND ADVANCE ON THE BASIS OF MERIT AFTER FAIR AND OPEN COMPETITION
2. TREAT EMPLOYEES AND APPLICANTS FAIRLY AND EQUITABLY
3. PROVIDE EQUAL PAY FOR EQUAL WORK AND REWARD EXCELLENT PERFORMANCE
4. MAINTAIN HIGH STANDARDS OF INTEGRITY, CONDUCT, AND CONCERN FOR THE PUBLIC INTEREST

MERIT SYSTEM PRINCIPLES

5 U.S.C. § 2301(b)



5. **MANAGE EMPLOYEES EFFECTIVELY AND EFFICIENTLY**
6. **RETAIN OR SEPARATE EMPLOYEES ON THE BASIS OF THEIR PERFORMANCE**
7. **PROVIDE EMPLOYEES WITH EFFECTIVE TRAINING AND EDUCATION**
8. **PROTECT EMPLOYEES FROM IMPROPER POLITICAL INFLUENCE**
9. **PROTECT EMPLOYEES FROM REPRISAL FOR LAWFUL DISCLOSURES**

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 THE SPECIAL COUNSEL OR AN 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 THE PROTECTED DISCLOSURE
- PROTECTED DISCLOSURE WAS A CONTRIBUTING FACTOR IN THE PERSONNEL ACTION

PROTECTED WHISTLEBLOWER DISCLOSURES

5 U.S.C. §§ 2302(b)(8), 1213



CATEGORIES OF DISCLOSURES

- A VIOLATION OF ANY LAW, RULE OR REGULATION
- GROSS MISMANAGEMENT
 MORE THAN *DE MINIMIS*
- GROSS WASTE OF FUNDS
 MORE THAN A DEBATABLE EXPENDITURE
- ABUSE OF AUTHORITY
- SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH AND/
OR SAFETY

PROTECTED WHISTLEBLOWER DISCLOSURES *(cont'd)*

5 U.S.C. §§ 2302(b)(8), 1213



- GENERALLY PROTECTED WHEN MADE TO ANY PERSON (EXCEPT THE WRONGDOER)
- NEED NOT BE ACCURATE TO BE PROTECTED
- PROTECTED IF EMPLOYEE HAS A REASONABLE BELIEF 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 THAT EMPLOYEE GO THROUGH CHAIN OF COMMAND
- WHISTLEBLOWER'S PERSONAL MOTIVATION DOES NOT AFFECT REASONABLENESS OF A DISCLOSURE
- EMPLOYEE OR APPLICANT IS 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 NOT PROTECTED (UNLESS MADE TO THE
SPECIAL COUNSEL OR INSPECTORS GENERAL), WHERE
DISCLOSURE IS —

- PROHIBITED BY LAW, OR
- REQUIRED BY EXECUTIVE ORDER TO BE SECRET FOR NATIONAL SECURITY OR FOREIGN AFFAIRS REASONS

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 DEFENDS PERSONNEL ACTION BY SHOWING — BY *CLEAR AND CONVINCING EVIDENCE* — THAT IT WOULD HAVE TAKEN THE SAME ACTION WITHOUT THE DISCLOSURE.
- FACTORS:
 - STRENGTH OF THE EVIDENCE IN SUPPORT OF THE PERSONNEL ACTION
 - EXISTENCE AND STRENGTH OF MOTIVE TO RETALIATE
 - TREATMENT OF SIMILAR EMPLOYEES WHO ARE NOT WHISTLEBLOWERS

CORRECTIVE ACTION:

5 U.S.C. § 1214



IF OSC FINDS THAT A PROHIBITED PERSONNEL PRACTICE HAS OCCURRED, A LETTER WILL BE SENT TO THE HEAD OF THE AGENCY INVOLVED TO REQUEST CORRECTIVE ACTION

EXAMPLE —

IF THE CASE INVOLVES A 30-DAY SUSPENSION, OSC MIGHT REQUEST THAT THE SUSPENSION BE RESCINDED, AND THAT THE EMPLOYEE RECEIVE BACK PAY

IN MOST CASES, AGENCIES AGREE TO TAKE THE CORRECTIVE ACTION REQUESTED AND A SETTLEMENT AGREEMENT RESOLVES THE MATTER

CORRECTIVE ACTION *(cont'd)*

5 U.S.C. § 1214



**IF THE AGENCY DOES NOT TAKE THE
CORRECTIVE ACTION REQUESTED WITHIN
A REASONABLE PERIOD OF TIME, OSC MAY
FILE A PETITION FOR CORRECTIVE ACTION
WITH THE MERIT SYSTEMS PROTECTION BOARD**

CORRECTIVE ACTION *(cont'd)*

5 U.S.C. § 1214



IF, AFTER A REASONABLE PERIOD OF TIME, THE AGENCY DOES NOT ACT TO CORRECT THE PROHIBITED PERSONNEL PRACTICE, THE SPECIAL COUNSEL MAY PETITION THE BOARD FOR CORRECTIVE ACTION

- THE BOARD SHALL PROVIDE AN OPPORTUNITY FOR ORAL OR WRITTEN COMMENTS BY OSC, OPM, THE AGENCY INVOLVED, AND BY ANY INDIVIDUAL WHO ALLEGES TO BE THE SUBJECT OF THE PROHIBITED PERSONNEL PRACTICE
- IF THE BOARD DETERMINES THAT OSC HAS DEMONSTRATED THAT A PROHIBITED PERSONNEL PRACTICE OCCURRED, EXISTS, OR IS TO BE TAKEN, THE BOARD SHALL ORDER SUCH CORRECTIVE ACTION AS THE BOARD CONSIDERS APPROPRIATE

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 A MERIT SYSTEMS PROTECTION BOARD ADMINISTRATIVE LAW JUDGE
- WRITTEN DECISION

OSC'S MANAGEMENT ADVICE



- **BE MEASURED IN YOUR SPEECH AND ACTIONS**
- **KEEP THE MERIT SYSTEMS CONCEPTS ON YOUR RADAR SCREEN**
- **SEEK EXPERT ADVICE WHEN YOU ARE UNSURE**
- **DEAL WITH PROBLEMS AS THEY OCCUR TO AVOID THE APPEARANCE OF BAD MOTIVE**
- **BE CONSISTENT IN YOUR MANAGEMENT OF YOUR EMPLOYEES**
- **DO YOUR BEST NOT TO BE SOMEONE ABOUT WHOM THE WHISTLE IS BLOWN**

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

A DISCLOSURE MUST BE RELATED TO AN EVENT THAT OCCURRED IN CONNECTION WITH THE PERFORMANCE OF AN EMPLOYEE'S DUTIES AND RESPONSIBILITIES

WHISTLEBLOWER DISCLOSURES

5 U.S.C. § 1213 (b)



OSC DOES NOT HAVE INVESTIGATIVE AUTHORITY

- BY STATUTE, OSC SHALL MAKE A SUBSTANTIAL LIKELIHOOD DETERMINATION WITHIN 15 DAYS AFTER RECEIVING INFORMATION FROM A WHISTLEBLOWER
- SUBSTANTIAL LIKELIHOOD IS DEFINED AS THE DETERMINATION THAT THE AGENCY IS MORE LIKELY THAN NOT TO FIND THE ALLEGATION SUBSTANTIATED AT THE CONCLUSION OF ITS INVESTIGATION
- IN MAKING THE SUBSTANTIAL LIKELIHOOD DETERMINATION, OSC FOLLOWS THE MERIT SYSTEM PROTECTION BOARD DEFINITIONS OF A GROSS WASTE OF FUNDS, GROSS MISMANAGEMENT, AND AN ABUSE OF AUTHORITY

WHISTLEBLOWER DISCLOSURES

5 U.S.C. § 1213 (c)



REFERRALS--

IF THE SPECIAL COUNSEL MAKES A POSITIVE DETERMINATION THAT THERE IS A SUBSTANTIAL LIKELIHOOD THAT THE INFORMATION DISCLOSES ONE OR MORE OF THE NOTED CATEGORIES OF WRONGDOING, THE SPECIAL COUNSEL MUST TRANSMIT THE INFORMATION TO THE AGENCY HEAD

WHISTLEBLOWER DISCLOSURES



- THE AGENCY HEAD IS REQUIRED TO CONDUCT AN INVESTIGATION AND SUBMIT A WRITTEN REPORT ON THE FINDINGS OF THE INVESTIGATION TO THE SPECIAL COUNSEL WITHIN 60 DAYS--5 U.S.C. § 1213 (c)(1)
- THE SPECIAL COUNSEL REVIEWS THE AGENCY REPORT AND DETERMINES WHETHER IT CONTAINS THE INFORMATION REQUIRED BY STATUTE AND WHETHER THE FINDINGS APPEAR REASONABLE—5 U.S.C. § 1213 (d) and (e)(2)

WHISTLEBLOWER DISCLOSURES



WHISTLEBLOWER'S COMMENTS

**WHISTLEBLOWER HAS 15 DAYS TO
COMMENT ON THE AGENCY REPORT**

5 U.S.C. § 1213 (e) (1)

WHISTLEBLOWER DISCLOSURES



THE AGENCY'S REPORT AND ANY COMMENTS PROVIDED BY THE WHISTLEBLOWER ARE TRANSMITTED TO THE PRESIDENT AND THE CONGRESSIONAL OVERSIGHT COMMITTEES WITH JURISDICTION OVER THE AGENCY THAT THE DISCLOSURE INVOLVES

5 U.S.C. § 1213 (e)(3)

WHISTLEBLOWER DISCLOSURES



- IF THE SPECIAL COUNSEL DOES NOT MAKE A POSITIVE DETERMINATION THAT THERE IS A SUBSTANTIAL LIKELIHOOD THAT THE INFORMATION DISCLOSES ONE OR MORE OF THE CATEGORIES OF WRONGDOING, THE SPECIAL COUNSEL INFORMS THE WHISTLEBLOWER
 - THE REASONS WHY THE DISCLOSURE MAY NOT BE FURTHER ACTED ON, AND
 - DIRECTS THE WHISTLEBLOWER TO OTHER OFFICES AVAILABLE FOR RECEIVING DISCLOSURES—5 U.S.C. § 1213 (g)(3)

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(<http://www.osc.gov>)



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Thursday, 25 May 2006 Thursday, 25 May 2006

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Whistleblower Disclosures



Prohibited Personnel Practices



Political Activity (Hatch Act)



Uniformed Services Employment and Reemployment Rights Act (USERRA)

HEADLINES

- **LATEST OSC PRESS RELEASE:** [OSC: Prisons Exposed Staff and Inmates to Hazardous Materials Federal Bureau of Prisons Has Failed to Address Concerns in Report](#)
- **FORMS UPDATED:** [Revised Complaint Form \(OSC-11\) and Disclosure Form \(OSC-12\) Now Available](#)
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