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BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

First-Year Activities Of The Merit Systems Protection Board And The Office Of The Special Counsel

The Merit Systems Protection Board and the Special Counsel were established to safeguard merit systems from political and other abuses and to protect the rights of Federal employees.

Transition and startup problems--funding, staffing, and office space--prevented the Board and the Special Counsel from establishing full operations during 1979, but they made good progress in establishing the capability to carry out their statutory functions. Some problems still exist which will require continued attention.



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FPCD-80-46
JUNE 9, 1980

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COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

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To the President of the Senate and the
Speaker of the House of Representatives

This report discusses the Merit Systems Protection Board's and the Office of the Special Counsel's first year of operations implementing title II of the Civil Service Reform Act of 1978. It discusses in detail the startup problems encountered, progress made during the year, and areas needing improvement.

This report complies with section 2304(b) of the Civil Service Reform Act of 1978 (Public Law 95-454, Oct. 13, 1978), which requires the General Accounting Office to prepare and submit an annual report to the President and the Congress on the activities of the Merit Systems Protection Board.

We are sending this report to the President. Copies are being sent to the Director, Office of Management and Budget; the Director, Office of Personnel Management; the Chairwoman, Merit Systems Protection Board; and the Acting Special Counsel, Office of the Special Counsel.

A handwritten signature in black ink, reading "James G. Stacks".

Comptroller General
of the United States



COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

FIRST-YEAR ACTIVITIES OF THE
MERIT SYSTEMS PROTECTION BOARD
AND THE OFFICE OF THE SPECIAL
COUNSEL

D I G E S T

The first-year operations of the Merit Systems Protection Board and the Office of the Special Counsel were affected by startup and transition problems which hindered them from being able to fully carry out their statutory functions.

The Board and the Special Counsel lacked the resources, under their original budget allocations, to effectively carry out the full range of their responsibilities. While additional funding was obtained in August 1979, it was too late to remedy the first-year problems. Their operations were also impaired by insufficient office space. Although some improvements have been made, this continues to be a serious problem.

Some of the startup problems could have been minimized if technical and advisory assistance had been available. GAO believes such assistance could have been provided by the Office of Management and Budget. In this regard, GAO recently recommended that the Office of Management and Budget enhance its capability to assist new agencies in setting up operations, especially from an administrative standpoint (FPCD-80-40, Apr. 2, 1980).

During the year, a number of questions have been raised concerning the relationship between the Board and the Special Counsel. Although both were given separate authorities and functions, there is uncertainty concerning their authority with respect to one another. The intended legal relationship is not clearly defined in the Civil

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Service Reform Act or the President's Reorganization Plan. Because of this uncertainty, the Board has submitted proposed legislation that would separate the Office of the Special Counsel from the Board and establish it as a totally independent agency.

The Board and the Special Counsel have key roles in implementing effective merit system reforms and protections established under the Reform Act. The Congress intended that the Board and the Special Counsel provide vigorous protection of Federal merit systems. While it is too early to evaluate their operation in this respect, GAO believes they have made progress in establishing the capability necessary to carry out their responsibilities.

OFFICE OF THE SPECIAL COUNSEL

The Office of the Special Counsel was established to investigate and prosecute violations of prohibited personnel practices within the Federal Government. In its first year of operation, however, the Special Counsel was restricted in carrying out its statutory mandate by a lack of staff and other resources.

In an April 20, 1979, report to the Chairman, Senate Committee on Governmental Affairs, GAO reported that the Special Counsel lacked the staff and resources to

- make timely reviews,
- investigate complaints and allegations of wrongdoing,
- initiate independent investigations of possible prohibited personnel practices, and
- perform necessary management functions.

The Special Counsel was assigned responsibility for investigating allegations of prohibited personnel practices including unlawful political activity and reprisals against whistleblowers. The Special Counsel may also receive, but does not investigate, information which alleges a violation of law, rule or regulation, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. In these cases, the Special Counsel is required to transmit the information to the agency involved and determine whether the agency's handling of the matter is reasonable.

In the first 10 months of operation, prohibited personnel practice complaints comprised the majority of cases received and processed. The Special Counsel's office opened 1,869 cases, of which 84 percent were classified as prohibited personnel practice complaints. About 50 percent of the cases received were closed as of October 31, 1979, and over half were processed in 2 months or less.

The Special Counsel's records showed that only 83 whistleblower complaints were received during the first 10 months and were referred to the agencies involved. Of these cases, 23 were closed. GAO's review of the Special Counsel's handling of these cases showed that most were not processed within the time frame required in the Reform Act. In addition, agency responses had not been timely, ranging from several days to over 2 months beyond the time frames specified by the Special Counsel's office.

A timely and adequate review of whistleblower allegations is vital if the intent of the Reform Act is to be met. Potential whistleblowers need to have confidence in the Special Counsel and assurance that their

complaints will be promptly investigated. The Special Counsel's handling of these complaints, to date, does not foster such confidence.

In an October 1979 report on the Special Counsel's progress in protecting employees against prohibited personnel practices, GAO concluded that (1) the Special Counsel did not provide active leadership in informing and encouraging Federal employees to report merit system abuses or other activities prohibited by the Reform Act, (2) did not issue needed guidance and instructions to Federal agency hotlines on referring prohibited personnel practice complaints, and (3) did not have an adequate case management system to track cases or to evaluate the significance of complaints received on a Government-wide basis.

THE MERIT SYSTEMS PROTECTION BOARD

The Merit Systems Protection Board was established to hear and decide employee appeals, conduct special studies of the merit systems, review final rules and regulations of the Office of Personnel Management, and act on requests and complaints filed by the the Special Counsel.

The Board, like the Special Counsel, experienced startup and transition problems which impaired its ability to fully implement all of its statutory functions and responsibilities. Although the Board received funding for the functions and positions transferred under the President's Reorganization Plan, certain costs were not anticipated. Additional funding was not available until August 1979 to support the new functions and responsibilities assigned under the Civil Service Reform Act.

Another major problem and concern of the Board throughout the year was the adequacy

of its headquarters office space. In October 1979, the General Services Administration completed a survey of the Board's office space needs, which showed that the available space was not adequate for the approved staffing levels. Although some improvements have been made, as of May 1980, the General Services Administration had made no firm plans to obtain the additional office space required.

During the year, the Board took a number of steps to improve the timeliness of the appeals process. About 98 percent of the appeals processed by the Board's field offices were decided within its 120-day processing goal.

The Board also made a significant reduction in the number of cases which were carried over from the former Civil Service Commission's appellate offices. While over 4,000 cases were transferred, only a little over a thousand were pending on January 26, 1980. Improvements are needed, however, in guidance and training given to field appeals officers on Reform Act changes and the policies and interpretations of the Board on appeal matters.

GAO contacted selected Federal agencies and employee organizations to obtain their views on the Board's first-year operations. The most prevalent comment received was that the new appeals procedures were too legalistic and formal. Many officials said that there had not been enough information given to employees on the organization and functions of the Board as well as the Special Counsel.

The Board has been slow in implementing its important merit system oversight functions. Although the Reform Act requires studies of merit systems and reviews of final Office of Personnel Management regulations, none

were initiated by the Board during 1979. According to the Board's preliminary plans, periodic reviews of Office of Personnel Management regulations will be conducted in the future. Because of the importance of these functions, GAO plans to closely monitor and evaluate the Board's efforts in these areas.

RECOMMENDATIONS

While the Board and the Special Counsel have been able to resolve many of their initial problems, others exist. Certain areas will require continued attention by the Board and the Special Counsel during the coming year. GAO recommends that:

- The Chairperson of the Board and the Special Counsel work more closely together where possible to insure effective and continuous oversight of Federal merit systems.
- The Chairperson of the Board monitor the effectiveness of field staffing and provide guidance and training to field personnel.
- The Special Counsel highlight the leadership role and inform and encourage Federal employees to report possible prohibited personnel practices and other abuses.
- The Special Counsel monitor and emphasize the timely processing of employee complaints and agency investigations and reports on whistleblower allegations.

AGENCY COMMENTS

The Board commented that the report provides an objective accounting of the problems faced by the Board during its first year of operation, its accomplishments and successes,

and the program areas in which additional work needs to be done. The Special Counsel's office concurred generally in the findings and recommendations in the report.



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ABBREVIATIONS

EEOC	Equal Employment Opportunity Commission
FEAA	Federal Employees Appeals Authority
GAO	General Accounting Office
GSA	General Services Administration
OMB	Office of Management and Budget
OPM	Office of Personnel Management

CHAPTER 1

INTRODUCTION

The Merit Systems Protection Board was established on January 1, 1979, by Reorganization Plan No. 2 of 1978. The plan abolished the Civil Service Commission and separated its personnel management functions from its adjudicatory, appellate, and merit system enforcement responsibilities, placing them in two new agencies--the Office of Personnel Management (OPM) and the Merit Systems Protection Board, respectively. An independent Office of the Special Counsel was also established to investigate and prosecute merit system abuses before the Board. The Board and the Office of the Special Counsel were given overall responsibility for safeguarding merit systems against partisan political and other abuse and protecting employee rights within those systems.

A major reason for the reorganization was to eliminate the conflicting roles of the Civil Service Commission being both rulemaker and adjudicator. The Commission functioned as chief personnel office and management agent and also as the final administrative review authority in employee appeals. Because of this, the appeals program was often viewed and criticized as lacking independence and objectivity. The President's Personnel Management Project, after an extensive study of Federal personnel management and the role of the Civil Service Commission, reached the following conclusion:

"Expected to be all things to all parties--Presidential counsellor, merit 'watchdog,' employee protector, and agency advisor--the Commission has become progressively less credible in all of its roles."

The functions and responsibilities transferred to the Board and the Special Counsel under the Reorganization Plan were subsequently expanded under the Civil Service Reform Act of 1978, which took effect on January 11, 1979. The stated policy of the Congress concerning these changes was that:

"Federal employees should receive appropriate protection through increasing the authority and powers of the Merit Systems Protection Board in processing hearings and appeals affecting Federal employees."

"The authority and power of the Special Counsel should be increased so that the Special Counsel may investigate allegations involving prohibited personnel practices and reprisals against Federal employees for the lawful disclosure of certain information and may file complaints against agency officials and employees who engage in such conduct."

The Reform Act included many changes to strengthen the Board and the Special Counsel. Some of the major changes are:

- Merit systems principles and prohibited personnel practices were clearly spelled out in the act.
- OPM rules and regulations may be reviewed by the Board and can be invalidated if they would require any employee to commit a prohibited personnel practice.
- The Board can impose disciplinary action on agency officials who commit prohibited personnel practices, order corrective action by agencies, and direct that pay be withheld from employees who willfully fail or refuse to carry out orders of the Board.
- The Board can stay personnel actions at the request of the Special Counsel.
- Employees have a right to a hearing on all appeals to the Board.
- Subpoenas can be issued to obtain evidence and testimony needed in an investigation or in an appeals case.
- Attorney fees may be awarded to employees in certain cases.
- Decisions and orders of the Board are subject to judicial review by an appropriate U.S. Court of Appeals or the U.S. Court of Claims.
- The Board is required to establish and publish time standards for deciding appeals.
- Specific protections are provided for employees who disclose information (whistleblowers) on violations

of law, rule or regulation or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

While the primary objective of the President's reorganization and the Reform Act was to improve Federal personnel management by providing agencies and managers more flexibility in managing the Federal work force, the Board and the Special Counsel were given the responsibility for insuring that personnel practices are consistent with merit systems principles. In this respect, they serve as the focal point in the Federal Government for protecting the integrity of merit systems and the rights of employees within those systems. The Senate Committee on Governmental Affairs' report ^{1/} on the Reform Act summarized clearly what the Congress intended and expected of the Board and Special Counsel:

"There is little doubt that a vigorous protector of the merit system is needed. The lack of adequate protection was painfully obvious during the civil service abuses only a few years ago. Establishment of a strong and independent Board and Special Counsel will discourage subversions of merit principles. Dwight Ink, Executive Director of the President's Personnel Management Study called the independent and strong Merit Board 'the cornerstone' of civil service reform."

FUNCTIONS OF THE BOARD AND THE SPECIAL COUNSEL ^{2/}

The Merit Systems Protection Board is a three-member bipartisan agency, appointed by the President, with the advice and consent of the Senate. Each member is appointed to a single 7-year term and can be removed only for inefficiency, neglect of duty, or malfeasance in office.

The Board is responsible for four basic functions:

--Hearing and deciding employee appeals.

^{1/}Senate Report No. 95-969, of the Committee on Governmental Affairs on S.2640, July 10, 1978.

^{2/}See apps. I and II for the organization and structure of the Special Counsel's office and the Board.

- Conducting studies and reviews of Federal merit systems to determine that they are free of prohibited personnel practices.
- Reviewing the issuance and implementation of regulations developed by OPM to determine whether they violate merit system principles on their face or as implemented by a Federal agency.
- Hearing and deciding requests and complaints brought by the Special Counsel.

The Special Counsel is appointed by the President for a 5-year term with the advice and consent of the Senate. The statute provides that the Special Counsel can be removed by the President only for inefficiency, neglect of duty, or malfeasance. The Special Counsel is authorized to appoint personnel and prescribe regulations relating to the receipt and investigation of matters under his jurisdiction.

The Special Counsel is required to receive and investigate allegations or initiate, in the absence of an allegation, investigations of

- prohibited personnel practices including reprisals against whistleblowers;
- activities prohibited by other civil service law, rule, or regulation;
- arbitrary or capricious withholding of information; and
- prohibited political activity by Federal employees and certain State and local employees.

The Special Counsel may also receive (but does not investigate) allegations of violations of law, rule, or regulation, mismanagement, gross waste of funds, and abuse of authority or substantial and specific danger to the public health or safety.

The Special Counsel may request the Board to order a stay of any personnel action if there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice. Disciplinary action may be sought against any employee who knowingly and willfully refuses or fails to comply with an order of the Board or any employee found to have engaged in a

prohibited personnel practice. Also, the Special Counsel may request the Board to order an agency to take appropriate corrective action whenever an agency fails to take action recommended by the Special Counsel.

SCOPE OF REVIEW

According to title I, section 2304, of the Civil Service Reform Act, we are required to prepare and submit an annual report to the President and the Congress on the activities of the Board. In carrying out this oversight function, we reviewed the progress of the Board's and the Special Counsel's implementation of functions under the act in their first year of operation. Our review was performed at the Board's headquarters in Washington, D.C., and at five field offices--Boston, Atlanta, Chicago, Dallas, and San Francisco. During the review we interviewed Board and Special Counsel officials, analyzed the legislative history of the act, and examined the budget, staffing, and operations including assessments of case management systems. We also obtained the views and comments of agency and union representatives with respect to their experiences and impressions of the operations of the Board and the Special Counsel.

CHAPTER 2

OFFICE OF THE SPECIAL COUNSEL--

FIRST-YEAR OPERATIONS HINDERED BY INADEQUATE RESOURCES

The Office of the Special Counsel was established in 1979 to investigate and prosecute violations of prohibited personnel practices within the Federal Government. The Special Counsel, along with the Board, is intended to vigorously protect merit systems and Federal employees from personnel practices prohibited by the Reform Act. In its first year of operation, however, the Special Counsel's office was restricted in carrying out its statutory mandate by a lack of staff and other resources; and as a result, the full intent of its role as envisioned by the Reform Act was not achieved.

Two factors which we believe also affected the Special Counsel's mission during the first year were (1) the Special Counsel did not take steps immediately to establish itself as the focal point for receiving and investigating complaints of prohibited practices and (2) it did not provide active leadership in encouraging Federal employees to report potential prohibited personnel practices and other merit system abuses. We believe this initial leadership is crucial if the Special Counsel is to function as intended under the Reform Act. Additional funding for the Special Counsel's operation was approved on July 25, 1979. With the increases in its budget, progress has been made in recruiting additional staff and establishing a much needed field office structure. Much of this progress, however, did not occur until late 1979.

On December 21, 1979, the Special Counsel resigned and until an Acting Special Counsel was designated on January 11, 1980, there were legal questions as to whether the Special Counsel's office had authority to carry out the Special Counsel's statutory functions. For example, it was questionable whether the office staff could request the Board to stay personnel actions. In one case in which the staff contemplated requesting a stay of a suspension of an employee, the agency involved agreed to delay the action pending the Special Counsel's investigation. According to the Acting Special Counsel, there were no significant work disruptions or other problems during this period.

STARTUP PROBLEMS

In an April 20, 1979, report to the Chairman, Senate Committee on Governmental Affairs, 1/ we reported that the Special Counsel lacked the staff and resources to timely review and investigate complaints and allegations of wrongdoing, initiate independent investigations of possible prohibited personnel practices, and perform necessary management functions. Operations were also affected by inadequate office space and other facilities, such as the lack of telephones needed to conduct investigations and receive complaints, and inadequate or lack of needed conference/interview rooms and staff offices. Although additional funding was later approved, the delay seriously hindered the early implementation of the functions assigned to the Special Counsel's office and its ability to promptly and adequately respond to employee complaints.

Under the original staff transfers, the Special Counsel's professional staff consisted of six attorneys and three investigators. The small staff size and limited funding made it virtually impossible to timely and adequately initiate investigations on allegations at locations outside the Washington, D.C., area. In its first few months of operations, approximately 80 percent of the complaints and allegations received were from outside the Washington, D.C., area. Many of those cases involved potentially serious allegations of reprisals and other prohibited personnel practices. The Special Counsel estimated that, with the original budget, only about 10 percent of the complaints and allegations being received could be investigated. Because it could create an appearance of conflict and dependence, the Special Counsel did not request outside assistance (for example, from the Board or OPM) in investigating complaints at departmental or agency field locations.

The Special Counsel also did not have staff to initiate independent investigations (in the absence of an allegation) into possible prohibited personnel practices. We were told that there were several such situations which should have been investigated but could not be, because of inadequate resources. Also, the development of proposed operating regulations was deferred because staff were assigned to process cases. Interim regulations were published in January 1979. Proposed final regulations were published on August 24, 1979, and final operating regulations were issued in December 1979.

1/See app. III for entire text of report.

The Special Counsel's requests for supplemental funding of \$842,000 for fiscal year 1979 and a revised fiscal year 1980 budget of \$4,516,000 were approved in July and September 1979, respectively. The revised budget included an increase in staff from the original 19 positions transferred to 140 positions by the end of fiscal year 1980. The revised budgets also provided for the establishment of field offices in Atlanta, Chicago, Dallas, New York, and San Francisco.

No field offices were set up, however, until October 1979. As of March 1980, field office operations had been established in San Francisco, Dallas, Philadelphia, and Atlanta, and plans were underway to set up an office in Chicago and branch offices in Seattle, St. Louis, Denver, Los Angeles, Boston, and New York. All of these offices are expected to be opened by June 1980, except for New York and Chicago. In most cases, office space for field offices was not offered by the General Services Administration (GSA) until 1980.

The additional staff approved in the Special Counsel's 1979 supplemental and 1980 budgets will enable the Special Counsel's office to establish a much needed field structure and to more timely respond to allegations and complaints and initiate its own investigations when warranted into possible patterns of prohibited personnel practices.

	Actual staffing levels		
	Mar. 1979	Oct. 1979	Planned FY 1980
Special Counsel	2	2	3
Deputy Special Counsel	-	-	2
Operations division	1	8	21
Prosecution and legal division	11	11	14
Investigative division	4	10	15
Field offices	-	4	85
Total	<u>18</u>	<u>35</u>	<u>140</u>

A total of 82 employees of the 140 positions authorized were either appointed or committed for employment by March 1980. However, the Special Counsel, as well as the Board, continues to lack adequate office space. The existing headquarters space is not adequate for its present staff and needs, and the problem will worsen as additional staff are hired. A survey of the office space requirements by GSA, completed in October 1979, concluded that the amount of

existing office space was not adequate for the approved staffing levels of the Board and the Special Counsel. Although some improvements have been made, as of the end of May 1980, no firm plans have been arranged to obtain the additional space required.

A number of questions have been raised concerning the relationship between the Board and the Special Counsel. Although both were given separate authorities and functions under the Reform Act and the Reorganization Plan, there is uncertainty concerning their authority with respect to one another. The intended legal relationship is not clearly defined in the President's Reorganization Plan nor in the Reform Act.

Great independence between the Board and the Special Counsel is indicated, but is not specifically granted. The legislative history of the Reform Act does not define the relationship between them. It cannot be stated that the Board and the Special Counsel are legally dependent or independent for all purposes. The relationship will become defined as specific issues arise and are resolved. For example, at the request of the Special Counsel, the Comptroller General ruled that the Special Counsel may recommend to the Board, but has no authority to grant, that attorneys' fees be awarded in certain cases. The Special Counsel has also requested a formal opinion of the Comptroller General on whether he has authority to take over selected contracting and procurement matters without clearance or approval from the Board. Because of the uncertainty, the Board has submitted proposed legislation that would separate the Special Counsel from the Board and establish it as a totally independent agency.

FIRST-YEAR ACTIVITY--COMPLAINTS
RECEIVED AND PROCESSED

The Office of the Special Counsel was assigned important functions and responsibilities under the Reform Act for investigating allegations of prohibited personnel practices and unlawful political activity and for protecting whistleblowers from reprisals. The Special Counsel is authorized to bring before the Board disciplinary charges against employees on the basis of its investigations or any knowing and willful refusal or failure of an employee to comply with an order of the Board. The Special Counsel may also request the Board to order corrective action when an agency refuses or fails to take remedial action recommended by the Special Counsel.

Allegations and complaints of prohibited personnel practices comprised the majority of the cases received and processed during the Special Counsel's first 10 months of operations. As of October 31, 1979, the Special Counsel opened 1,869 cases, of which 1,570, or 84 percent, were classified as prohibited personnel practice complaints. During this period, the Special Counsel closed 955 cases, or about 50 percent of the cases received, and over half of these cases were processed in 2 months or less. The following is a breakdown of the cases closed and pending as of October 31, 1979.

<u>Type of case</u>	<u>Total received</u>	<u>Number pending</u>	<u>Percent pending</u>	<u>Number closed</u>
Prohibited personnel practice	1,570	694	44	876
Whistleblower allegations				
--full investigation and report required	21	18	86	3
--response (but no investigation required)	62	42	68	20
Other (could not determine)	134	130	97	4
Hatch Act	<u>82</u>	<u>30</u>	36	<u>52</u>
Total received	<u>1,869</u>	<u>914</u>	49	<u>955</u>

The Special Counsel had no method, however, for systematically reporting or tracking its workload, that is, the number and types of cases received and processed. Because of this, we reviewed the Special Counsel's case filing system and obtained overall case information by manually reviewing each file card in the system from January 1 through October 31, 1979. Our analysis of the cases processed was restricted because of the limitations of the case filing system. Information on cases received, actions taken, and case dispositions is contained in a manual index card filing system. In many cases, detailed information on individual cases was not available.

The following is a general discussion of the Special Counsel's processing of prohibited personnel practice complaints and whistleblower allegations received through October 31, 1979.

Prohibited personnel practices

The Reform Act requires the Special Counsel to investigate all allegations of prohibited personnel practices to the extent necessary to determine, if reasonable grounds exist, whether a prohibited practice has occurred or will occur. Prohibited personnel practices are defined in the act and include

- reprisals against whistleblowers;
- prohibited political activity;
- discrimination;
- reprisals for exercising an appeal right; and
- personnel action that violates any law, rule, or regulation implementing or directly concerning merit system principles.

Allegations and complaints of prohibited personnel practices comprised the majority of the cases received by the Special Counsel in its first 10 months of operation. Approximately 1,570, or 84 percent, were classified as prohibited personnel practice or related complaints. The following is a breakdown as of October 31, 1979, of the 876 cases closed and the nature of the complaints.

<u>Nature of complaint</u>	<u>Cases closed</u>	<u>Percent</u>
Hiring/promotion procedures	158	18
Reassignment/termination/ retirement	72	8
Other discrimination	56	6
Reprisal for using an appeal procedure	43	5
Reprisal--other	34	4
Reprisal for whistleblowing	35	4
Race discrimination	28	3
Mismanagement	22	3
Harassment	20	2
Violation of merit principles	13	1
Nepotism	6	1
Sex discrimination	5	1
Other	153	18
Not indicated in case file system	<u>231</u>	<u>26</u>
Total	<u>876</u>	<u>100</u>

In 256, or 29 percent, of the closed cases, a determination was made that no prohibited personnel practice had occurred. Also, in a large number of the cases closed, 382, or 44 percent, no action was considered necessary. The majority of these cases involved matters either within the jurisdiction of another agency (92) or matters which could more appropriately be handled under an existing appeal or grievance procedure (117). According to the Special Counsel's records, in only nine cases was it reported that the agency involved took corrective action on the complaint. However, the Acting Special Counsel stated that, in at least three times that many cases, office staff members negotiated informal resolutions of employee problems with agency officials.

Whistleblower allegations

Under the Reform Act, the Special Counsel may receive, but does not investigate, information which alleges a violation of law, rule or regulation, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. Within 15 days after the receipt of such information, the Special Counsel must determine whether the information shows a substantial likelihood that a violation has occurred. In all cases, the Special Counsel is required to promptly transmit the information to the head of the agency involved.

According to the Special Counsel's records, 83 whistleblower complaints were received during the first 10 months of operation, which were referred to the agency involved. Of these cases, 23 were closed. Our review of the handling of closed cases showed that most were not processed within the time frames required in the Reform Act. In addition, agency responses had not been timely.

The information contained in the Special Counsel's case filing system also indicates that it did not meet the time frames required by the act for promptly transmitting information to the agency involved and for determining, within 15 days after receipt, whether the information shows a substantial likelihood that a violation had occurred. According to the Special Counsel's records, this time frame was met in only 1 of the 23 cases that were closed as of October 31, 1979. Officials in the office explained that delays were caused by a lack of staff to promptly review the complaints being received.

If the Special Counsel determines there is substantial likelihood that a violation has occurred, he may require the

head of the agency involved to conduct an investigation. Within 60 days, the agency head must prepare and submit a written report of the investigation to the Congress, the President, and to the Special Counsel for transmittal to the complainant. Reports required by the Special Counsel must include the following information.

- A summary of the information.
- A description of the conduct of the investigation.
- A summary of any evidence obtained.
- A listing of any violation or apparent violation of any law, rule, or regulation.
- A description of any corrective action taken or planned as a result of the investigation.

Upon receipt of agency reports, the Special Counsel is required to review them to determine whether the findings appear reasonable and contain the information required by the act. The Special Counsel has no explicit authority to follow up on agency reports but may, whenever an agency fails to submit a report within the required time, transmit a copy of the whistleblower information to the President and to the Congress, noting the agency's failure to file the required report.

As of October 31, 1979, the Special Counsel had required 21 formal agency investigations with 18 of these cases still with the agency under investigation. One investigation was deferred pending a criminal investigation by the Department of Justice. The two reports that were submitted to the Special Counsel both exceeded the 60 day time frame, required by the Reform Act, by more than 30 days. According to a Special Counsel office official, time extensions are granted if reasonable justification is made by the agency.

Whenever the Special Counsel does not require a formal investigation and report, the head of the agency involved, under section 1206(b)(7) of the Reform Act, is required, within a reasonable time, but no later than 60 days, to inform the Special Counsel in writing of what action has been or is to be taken and when such action will be completed. According to the records of closed cases, only 20 whistleblower complaints had been transmitted to the agency involved for this type of review and response. Sixteen of these responses, however, were not timely submitted, ranging

from several days to over 2 months beyond the time frame specified. Upon receipt of the agency's response, the Special Counsel is required to inform the complainant but, according to the Special Counsel's office, is not required under the act to review the agency's response for reasonableness. The Special Counsel, however, reviews these responses to determine whether the agency has satisfactorily dealt with the complaint and also relies on the complainant's review of agencies' responses by asking for their comments on the accuracy and reasonableness of reports or written responses.

The Special Counsel's early experience with respect to the timeliness of agency responses and reports on whistleblower allegations has not been good. However, the number of cases completed has been too small to make any conclusive statements on the processing of whistleblower complaints. In a September 27, 1979, memo to Federal executive agencies, the Director, Office of Management and Budget (OMB), emphasized that agencies must extend their full cooperation to the Special Counsel in investigating whistleblower allegations sent to them. The Director said such cooperation is essential to the Special Counsel's success.

We will continue to monitor the activities of the Special Counsel's office and provide assessments on its progress and problems in carrying out its responsibilities. This will include the timeliness and adequacy of agency reports and responses and the Special Counsel's review and processing of these cases. We feel, however, that timely and adequate review of whistleblower allegations is vital if the intent of the Reform Act is to be met. Even more important, potential whistleblowers need to have confidence in the operations of the Special Counsel's office for its services to be used. We believe its performance to date has not fostered such confidence.

ACTIONS NEEDED BY THE SPECIAL COUNSEL TO IMPROVE OPERATIONS

As part of our oversight activities, we evaluated the actions taken by the Special Counsel in carrying out responsibilities for protecting Federal employees from prohibited personnel practices. In a report to the Special Counsel on October 22, 1979, we reported that the Special Counsel had not

--adequately communicated the Special Counsel's role and responsibilities to Federal employees;

- established the Special Counsel's office as the focal point within the Federal service for receiving and investigating allegations of prohibited personnel practices;
- issued guidance and instructions to hotline officials about the criteria for referring allegations of prohibited personnel practices; and
- established an efficient and effective system for recording, categorizing, and tracking incoming complaints through the organization.

The Special Counsel had not adequately communicated its role as protector of Federal merit systems

The Special Counsel should be the focal point within the Federal service for receiving and responding to allegations of prohibited personnel practices as intended by the Reform Act. The Special Counsel did not, however, take sufficient steps to inform and encourage Federal employees to report possible prohibited personnel practices and potential merit system abuses.

In a February 9, 1979, letter to the Special Counsel, the National Federation of Federal Employees recommended that the Special Counsel prepare a notice to all employees which would explain in nonlegalistic terms his role, the procedure for filing a complaint to him, and where to send such a complaint. The Federation believed that if such a notice was posted in every Federal facility, employees would become familiar with the role of the Special Counsel and would have an opportunity to follow the intent of the legislation. The Special Counsel did not, however, disseminate such information.

During oversight hearings before the Senate Committee on Governmental Affairs on May 8, 1979, the Special Counsel stated that his office had not disseminated any informational materials concerning the role and responsibilities of his office other than the official notices in the Federal Register. He added that such information would probably be helpful, but he did not want to mislead Federal employees and create expectations that cannot be fulfilled because of a lack of resources and other limitations.

The Special Counsel had also not given adequate guidance and information to agency hotline officials on handling allegations involving possible prohibited personnel practices.

Agency hotline personnel we contacted did not understand the Special Counsel's responsibilities and role in protecting employees against prohibited personnel practices. In addition, most officials we contacted had not received any guidance concerning the criteria or procedures for referring complaints and did not know what matters should be referred or how serious the information should be before referring a complaint.

Appropriate guidance to the agency hotline officials from the Special Counsel is needed so that potential merit system and personnel abuses can be brought to the Special Counsel's attention and acted on as intended by the Reform Act. Without such guidance, there can be no assurance that merit system abuses will be pursued with the vigor intended by the Reform Act.

The eventual success of the Special Counsel and the Reform Act protections may be directly attributed to how the office is perceived and accepted by Federal employees. Because of this, we felt that the Special Counsel should take immediate steps to inform and explain to Federal employees and agencies (including agency hotline officials) his role and responsibilities as protector of Federal merit systems.

We recommended that the Special Counsel take immediate action to inform all Federal employees in nonlegal or non-technical terms of his function and role. The employee notification should include the following:

- Summary of the Special Counsel's responsibilities.
- Protection afforded Federal employees.
- Description and examples of the types of prohibited personnel practice allegations under the Special Counsel's investigative jurisdiction.
- Information needed by the Special Counsel from the complainant to perform a preliminary review of the allegation.

We also recommended that the Special Counsel give the following guidance to Federal hotline officials:

- Criteria for the types of personnel allegations to refer (this should include an example for each type).

--Suggestions about what questions to ask the complainant and facts to obtain about the alleged prohibited personnel practice.

--Method for referring such allegations to the Office of the Special Counsel.

The Special Counsel agreed that additional outreach was needed and considered a number of actions to inform and educate Federal employees on the functions and operations of the Special Counsel. They include the following:

--Hire a consultant to help develop an approach to inform Federal employees of the function, role, and activity of the Special Counsel. One current proposal is to develop an informational poster for display in Federal offices.

--Develop an informational booklet for distribution to Federal employees.

--Develop an informational letter and ask agencies to distribute to employees.

--Prepare briefing presentations targeted for employee unions and groups, agency managers, etc.

In January 1980 the Special Counsel's office commented on our report and said that the office had sent a package of general informational materials with guidance on the functions of the Special Counsel to agency hotline officials. According to the Acting Special Counsel, hotline officials were instructed to refer allegations in any form and no limitations have been imposed on the method of such referrals.

The Special Counsel also issued final regulations in December 1979 which included a nonlegalistic description of the role and functions of the Special Counsel and what steps an employee should take in filing a complaint to the Special Counsel's office. In addition, the office is developing an employee handbook on the functions of the Special Counsel with guidance concerning the submission of complaints and allegations. According to the Acting Special Counsel, the handbook will be given wide distribution.

Available data could improve monitoring of merit systems

The Special Counsel does not have an effective case control and monitoring system. As a result, the Special Counsel

can not (1) readily determine the types of complaints received or the agency involved or (2) monitor and evaluate the significance of the complaints received on a Government-wide basis. A manual system is used, consisting of index cards which include the name of the complainant(s), agency involved, location, and a brief description of the complaint and action taken. We believe this system is inadequate for monitoring and tracking cases, managing workloads, or performing basic analysis of complaints to determine possible patterns of prohibited practices or other merit system violations.

In our October 1979 report to the Special Counsel, we recommended that the Special Counsel develop and coordinate with the Board an information/tracking system which would allow control of cases received and provide data on the types of prohibited personnel practice cases by agency and by type (Government-wide). This would provide the Special Counsel with a valuable source in determining patterns of prohibited personnel practices. The data base of cases could also assist the Board's Merit Systems Review and Studies Office in planning and conducting studies of Federal merit systems. It could also be a valuable source of information in determining potential problem areas that affect the status of merit principles in the Federal service.

The Special Counsel, in commenting on our report, agreed that an automated complaint tracking and monitoring system is needed. In this respect, the Special Counsel contracted, in November 1979, to purchase a minicomputer system and a complaint tracking and monitoring computer program. The Special Counsel stated that once the system is operational, information on patterns of prohibited personnel practices and other systemic problems will be shared with the Board's Office of Merit Systems Review and Studies Office. The Special Counsel said the system may be operational by June 1980.

The Board is also developing an information and case tracking system for its operations and has stated that the system has potential for involving the Special Counsel should he choose to participate. The Special Counsel does not want to participate because the Board's proposal was viewed as too long range and tentative and also because there may be a security problem associated with the Board's planned use of a computer time-sharing system. While we have no opinion on separate information/case tracking systems by the Board and the Special Counsel, we believe there

needs to be close coordination and communication during the development of these systems to insure that the systems can provide the maximum benefits possible to both organizations.

CHAPTER 3

MERIT SYSTEMS PROTECTION BOARD

The Merit Systems Protection Board was established to hear and decide employee appeals, conduct special studies of merit systems, review final rules and regulations of OPM, and act on requests and complaints filed by the Special Counsel. The Board was given broad authority to carry out its functions and responsibilities in enforcing merit system principles and protecting employee rights.

Although the Board received funding for the functions and positions transferred under the President's Reorganization Plan, certain startup costs were not anticipated and, until August 1979, additional funding was not available to support the new functions and responsibilities assigned under the Reform Act.

Because of this, the Board, like the Special Counsel, did not have the personnel or resources to effectively carry out the full range of its statutory functions and responsibilities. As a result, the development and implementation of the merit systems review function was delayed, other new functions were understaffed, and the Board was dependent on OPM for certain administrative services.

MAJOR RESPONSIBILITIES

One of the principal reasons for the establishment of the Board was to provide an independent body to hear employee appeals from management actions. The Reform Act introduced many changes in the way employee appeals are processed. The Board has authority to examine witnesses, take depositions, administer oaths, and issue subpoenas. Perhaps the most notable difference between the Board and the former appeals system is the enforcement authority vested in the Board by the Reform Act. This includes the authority to take disciplinary actions such as demotion, suspension, removal, debarment from Federal employment for up to 5 years, and fines of up to \$1,000. Also, employees who fail to comply with a Board order (except Presidential appointees confirmed by the Senate) may be barred from receiving payment for services during any period the employee does not comply with the order.

In all appeals before the Board, appellants are now entitled to a hearing for which a transcript must be made, to have a representative present, and to a written decision

on the appeal. The burden of proof in appellate cases is on the agency which took the appealed action. Agencies must show that decisions are supported by "a preponderance of evidence," except for actions based on unacceptable performance where the burden is the lesser standard of "substantial evidence." There had been criticisms that adverse personnel actions, which may have been fully warranted, could be overruled by the Civil Service Commission for minor procedural errors. Agency decisions, which meet the appropriate evidentiary standard under the Reform Act, will not be reversed unless an appellant can show harmful procedural error, or that the decision was based on a prohibited personnel practice or was otherwise not according to law. The Board also has authority to award reasonable attorney fees to employees who win their appeals when it determines that payment is warranted in the interests of justice.

Except for appeals which include allegations of discrimination, decisions of the Board or its presiding officials are final administrative determinations unless the Board reconsiders the matter at the request of one of the parties, OPM, or on its own motion. Decisions of the Board are, however, subject to judicial review in a Court of Claims or a U.S. Court of Appeals.

The Reform Act also established separate procedures for actions appealable to the Board which the appellants allege were based, in part, on prohibited discrimination. Under the new procedures, the Board will issue a decision on the discrimination charge and the action under appeal. If the decision on discrimination is adverse, the employee may further appeal to the Equal Employment Opportunity Commission. If the Board and the Commission differ on the issue, the matter may be referred for final administrative disposition to a special panel composed of one member of the Board, one member of the Commission, and a Chairman appointed by the President with the advice and consent of the Senate. Under the Reform Act, the Board is required, within 120 days of the filing of the appeal, to decide both the issue of discrimination and the appealable action.

The Board also has the authority and responsibility to conduct studies of merit systems and to report to the President and the Congress as to whether the merit system is free from prohibited personnel practices and to review the final rules and regulations issued by OPM. The Reform Act provides that the Board may, on its own motion or on petition from an interested party or the Special Counsel, review any rule or regulation promulgated by OPM to determine whether

the rule or regulation requires an employee to commit a prohibited personnel practice. The Board shall then require an agency to cease compliance with any invalid rule or regulation or to correct any invalid implementation of a rule or regulation.

TRANSITION AND STARTUP PROBLEMS

Under the President's Reorganization Plan of 1978, the Board assumed the appellate and certain enforcement responsibilities previously performed by the Civil Service Commission. The Reform Act expanded and strengthened these functions and responsibilities. A total of 289 positions were initially transferred to the Board to perform the functions assigned under the President's Reorganization Plan. However, no additional resources were authorized under the Reform Act. As a result, the Board did not initially have adequate resources to establish full operations and implement its statutory functions.

One of the Board's major functions is the conduct of special studies to insure the integrity of merit systems in the Federal Government. While this function was assigned to the Board under the President's Reorganization Plan No. 2 of 1978, no personnel or funds were allocated in the original resource transfers from the former Civil Service Commission. Because of this and the staffing priorities set by the Board, no staff were assigned until June 1979 when the Board anticipated approval of its supplemental funding request for fiscal year 1979. An initial staffing requirement of 10 positions for the Merit Systems Review and Studies Office was included in the Board's supplemental request and a revised 1980 budget request for 5 additional positions. At the end of 1979, the Merit Systems Review and Studies Office had a staff of eight (including administrative staff) and additional staff were being recruited.

Additionally, in the Board's analysis of the adequacy of its resources in relation to its statutory responsibilities, several other areas were understaffed. The Board, in its 1979 supplemental and 1980 budget requests submitted on March 16, 1979, said additional positions were needed for its Office of General Counsel and Office of Special Decisions to adequately carry out trial and appellate functions and provide advice and prepare formal opinions for the Board.

In May 1979, the Board's initial request for supplemental funding was denied, causing the Board to take a number of steps in restricting expenditures to avoid a deficit

situation. On May 18, 1979, the Board announced a freeze on hiring, procurement, and travel. The major effect of these actions involved the Board's appeals operations and also caused further delay in hiring staff for its new functions. Employees with pending appeals, and witnesses for both the appellant and the agency, were required to attend hearings at the Board's field offices. Previously, the Board generally conducted hearings at the agencies involved. These restrictions were relaxed in August 1979 after approval of the Board's supplemental funding request.

The Board also undertook an analysis of the original budget allocations to determine whether it had received adequate resources for the functional transfers. On the basis of this review, the Board, in a July 1979 letter to the Director, OMB, requested a revised determination order and reapportionment to transfer an additional \$639,728, which the Board believed should have been transferred initially from the former Civil Service Commission. The Board stated that this amount was the absolute minimum required to support the basic program transferred and that all aspects of operating an organization (including startup and miscellaneous expenses) were not taken into consideration in the original budget allocation. In the Board's analysis, the revised amount did not reflect the funds necessary to support the new functions assigned by the Reform Act but reflected only those that were transferred from the Civil Service Commission.

An additional amount of \$115,800 was transferred to the Board from OPM. According to the Board's Managing Director, there was no explanation for the transfer, but he believed it resulted from the Board's request to OMB for a revised determination order.

At the request of the Subcommittee on Manpower and Housing, House Committee on Government Operations, we reviewed the resource allocations made under the determination order to the Board. We confirmed that a serious fund shortage had existed for the Board, which resulted in the Board's freezing travel and procurement and delaying personnel hiring. However, this was not due to the original resource allocations. Under these allocations, the Board received full funding for all positions transferred, plus an additional amount for overhead-type expenses.

The fund shortages that occurred were related to the following factors.

--There was no money in the Civil Service Commission's 1979 appropriation to cover the transition and start-up costs of the new organizations.

--By dissolving one organization and creating three smaller organizations, certain diseconomies of scale were automatically created.

--When the Board was established many of the vacant positions transferred from the Civil Service Commission were filled at a higher level. The average salary of the Board positions transferred from the Civil Service Commission rose from about \$19,000 to \$24,000.

In its initial months of operation, the Board also did not have the capability to provide full administrative support to its headquarters and field operations and therefore had to rely on OPM for payroll, personnel, accounting, and certain other support services. Resources to perform these functions were not transferred from the former Civil Service Commission. The Board, by the end of fiscal year 1979, had established an administrative capability to perform all support functions except for the payroll and accounting services. The Board hopes to take on these services as soon as possible, but OPM will probably continue to provide them through fiscal year 1980.

The authorized staffing for the Board has increased by 93 positions, or 32 percent, over its original budget allocations. The following table lists the staffing levels assigned by the Board for its headquarters and field offices under the original budget transfer and at June 30 and September 30, 1979. Also listed are the approved positions in the Board's fiscal year 1979 supplemental and revised 1980 budgets.

Office	Positions allocated under original transfer	Actual		Position increase approved	
		June 30, 1979	September 30, 1979	1979	1980
Chair	16	15	14	16	16
Opinions (special decisions)	-	-	1	2	8
Merit review	-	2	4	10	15
Secretary General	15	13	15	15	15
Counsel	14	25	32	31	39
Administrative Law Judge	3	3	2	3	6
Information Field	5	3	2	5	5
offices	154	150	144	184	192
Appeals	47	41	36	47	47
Administration	<u>35</u>	<u>30</u>	<u>33</u>	<u>35</u>	<u>39</u>
Total	<u>289</u>	<u>282</u>	<u>283</u>	<u>348</u>	<u>382</u>

The largest increase in staffing during the year was in the Office of the General Counsel, which, according to the Board's Managing Director, was given a high priority by the Board. The reduction in the field office staffing was primarily the result of regular and early retirements. With the additional funding approved under its 1979 supplemental and revised 1980 budget, the Board has initiated recruiting for additional positions in its headquarters and field offices. During our review, we identified staffing imbalances at certain Board field offices. However, the Board was aware of this problem and was taking action to correct the imbalances by transferring personnel among the field offices involved. The Board should continue to monitor its field staffing needs to help insure the most efficient use of its staff resources in processing appeals cases.

Problems with office space

One of the major problems and concerns of the Board throughout the year was the adequacy of its headquarters office facilities, part of which were formerly the central offices of the Federal Employee Appeals Authority (FEAA). In a March 23, 1979, letter to GSA, the Board listed numerous problems and complaints it had with the existing facility

and requested assistance in obtaining alternative office space. The Board commented that the problems were of such magnitude as to seriously inhibit the initial operations of the Board and the Special Counsel. These problems included

- lack of hearing room facilities, conference rooms, and library space;
- lack of security necessary for the Board and the Special Counsel to hear sensitive cases and conduct investigations; and
- inadequate electrical wiring, heating, and cooling systems.

GSA did not approve the Board's request for alternate office space, but did consider rehabilitating the existing facilities. However, the Board questioned the soundness of expending hundreds of thousands of dollars to renovate space which it believes is inherently deficient.

The Board continued discussions with GSA with little or no results and at the Board's request, GSA surveyed the space requirements for existing and approved staffing levels of the Board and the Special Counsel. The survey, completed in October 1979, showed that the available office space was not adequate for the approved staffing levels. Although some improvements have been made, as of February 1980, GSA had made no firm plans to obtain the additional office space required by the Board and the Special Counsel. As a result, office space and facilities continue to be a serious problem.

Some of the startup problems the Board had could have been minimized if technical and advisory assistance had been available. Such assistance, we believe, could have been provided by OMB.

In this regard, we recently recommended that OMB enhance its capability to assist new agencies in setting up operations, especially from an administrative standpoint (space, budgets, equipment, organizational structure, and staff). 1/

1/"The Federal Labor Relations Authority: Its First Year in Operation." (FPCD-80-40, Apr. 2, 1980.)

PROGRESS AND STATUS OF
IMPLEMENTATION--THE FIRST YEAR

The Board took a number of steps during 1979 which should improve the timeliness of the appeals process. About 98 percent of the appeals processed during this period were decided within the 120-day processing goal established by the Board. The Board also made a significant reduction in the number of remaining cases carried over from the former Civil Service Commission's appellate offices. Of the over 4,000 cases transferred, only a little over a thousand were pending on January 26, 1980. However, improvements are needed in the guidance and training given to field appeals officers on Reform Act changes and the policies and interpretations of the Board on appeals matters. While required by the Reform Act, no studies of merit systems or reviews of final OPM regulations were initiated by the Board during 1979.

We interviewed agency and employee representatives to obtain their comments. The most common complaint was that the Board's appeal procedures were overly formal and legalistic.

Many aspects of the Reform Act will be interpreted and clarified through regulations and decisions issued by the agencies responsible for its implementation--OPM, the Board, and the Federal Labor Relations Authority. Some decisions thus far have caused controversy.

The Board, for example, ruled as invalid the OPM implementing regulations for removing or demoting employees for unacceptable performance. These procedures were provided in the act to make it easier to remove employees for poor performance. As a result of the Board's decision, these procedures cannot be used until performance appraisal systems are approved by OPM. OPM disagreed but has not appealed the Board's decision.

In a case brought by the Special Counsel requesting a stay of the reassignment of two Veterans Administration employees, the Board granted the request but raised questions which have significant implications on the application of whistleblower protections under the Reform Act. Among other things, the Board questioned whether whistleblowing protected by the act can occur when the alleged whistleblower has made disclosures solely within the "chain of command" of his or her agency.

This opinion was criticized as discouraging employees from whistleblowing by questioning its protection under the Reform Act. Subsequently, the Special Counsel issued final regulations specifically providing that a protected disclosure (whistleblowing) may be oral or written and to any person within or outside the agency. The Special Counsel's interpretation may, however, be either affirmed or rejected by the Board if these questions are addressed in a specific case.

Appeals program

The Board's 11 field offices, which were formerly the field offices of FEAA, are responsible for hearing and issuing initial decisions on employee appeals. 1/ The Board has appellate jurisdiction over cases where there has been prior action by an agency and encompasses those actions specified in title 5 as amended by the Reform Act and those for which the jurisdiction may be granted by regulation of OPM. Actions appealable to the Board include

- removals, suspensions for more than 14 days, reduction in grade or pay, and furloughs of 30 days or less for reasons other than unacceptable performance;
- removals or reductions in grade for unacceptable performance;
- reduction in force;
- denials of within-grade salary increases;
- employment practice appeals;
- disability retirements and OPM determinations affecting the rights and interests of individuals with respect to retirement, insurance, and health benefits;
- certain actions relating to the Senior Executive Service;
- actions appealable to the Board which also involve an allegation of discrimination; and
- actions involving reinstatement of preference eligibles.

1/See app. IV for statistics on appeals processed by the Board, FEAA, and the Appeals Review Board.

Certain types of appeals formerly decided by the Civil Service Commission do not fall within the jurisdiction of the Board. These include position classification appeals and Fair Labor Standards Act complaints which can be taken to OPM.

Expediting appeals

A major objective of the President's Reorganization Plan and the Reform Act was to improve the appeals process and provide for expeditious but fair consideration of employee appeals. The processing of appeals by the former Civil Service Commission's appellate offices--FEAA and Appeals Review Board--was often criticized for being overly time consuming. The Reform Act addressed this problem by requiring the Board to

- decide, within 120 days, cases involving an appellate action which the appellant alleges was taken because of unlawful discrimination and
- establish and publicly announce time frames for other cases assuring the expeditious but fair consideration of appeals.

In February 1979 the Board announced a processing standard of 120 calendar days for processing all appeals within its jurisdiction. Although the former FEAA established an internal processing goal of 90 days, this standard was not achieved in a significant number of cases. More than half of the cases transferred to the Board were in process for more than 90 days. Below are the average processing times for appeals decided by FEAA in fiscal years 1977 and 1978.

<u>Type of appeal</u>	<u>Average processing time (calendar days)</u>
Adverse action:	
1977	169
1978	179
Reduction in force:	
1977	199
1978	190
Overall time for all appeals including discrimination complainants:	
1977	164
1978	157

Because of the concerns over the timeliness of the appeals process, the Board reviewed cases handled by the former FEAA to identify where delays occurred in processing appeals. The most frequent single cause of delay found was the time it took agencies to submit the written records of the actions under appeal. In some cases, this had taken as long as 6 months. Another major cause for delay was the frequent granting of continuances or postponements in hearing schedules and submission of requested documents.

To minimize these delays the Board adopted the following policies and processing procedures.

- Agencies must furnish the record supporting the personnel action within 15 days after notification of an appeal by a field office of the Board.
- No more than one continuance should be granted related to a hearing or the submission of documents except in extraordinary circumstances.

These requirements and the Board's emphasis on expeditious case processing improved the timeliness of appeals decisions. During 1979 new cases were processed on the average within 90 days, according to a sample taken by the Board. Through December 31, 1979, the Board received 3,672 Reform Act appeals. Of these appeals, 954 cases were pending before the Board, but only 23 cases, or about 2 percent, exceeded the 120-day processing standard. In these cases the Board must announce the reasons why an appeal was not decided within the time frame and set a new date for completing action on an appeal if the delay is expected to exceed 30 days.

According to field officials of the Board, the improved timeliness was primarily attributable to the Board's new requirements. Other factors cited by field officials include:

- Procedural reviews are no longer made in appeals cases unless the appellant raises the issue. This conforms with the harmful error standard in the Reform Act.
- The Board no longer assigns appeals officers to hold hearings and issue reports of findings and recommendations on discrimination complaints. This function had been performed by FEAA and is now the responsibility of the Equal Employment Opportunity Commission. Discrimination complaints accounted for approximately 25 to 30 percent of the FEAA workload in the past 3 years.
- The receipt of new Reform Act cases was not significant in the early months of the Board's operations.

The Board also has responsibility for deciding appeals cases which were pending as of January 1, 1979, before the Civil Service Commission's appellate offices. Over 4,000 of these cases were pending when the Board was established, and they must be processed in accordance with the laws and regulations existing before the Reform Act.

Although the Board gave lowest priority to the processing of these cases, the number of cases pending has been significantly reduced. As of January 26, 1980, 1,105--601 FEAA cases and 504 Appeals Review Board cases--old system cases remained. Because there were no specific time limitations for requests by appellants to reopen a decided case or for reconsideration by the Civil Service Commissioners, the Board will continue to receive some additional cases for processing as well as other appeals in which agency actions were initiated before the effective date of the Reform Act.

According to field office officials, the disposition of the large number of the pending old system cases was primarily attributable to a decline in case receipts during the early months of the Board's operations. This was also caused, in part, by the lag in receiving new cases under the Reform Act and because discrimination complaints are now handled by the Equal Employment Opportunity Commission.

Guidance to field offices

Under the Reform Act, new procedures were established for adjudicating employee appeals. However, field office

appeals officers said that guidance from headquarters on these changes need to be improved and training instruction are needed on the act's requirements and the Board's policies and interpretations.

A common complaint of the appeals officers was that guidance from headquarters was often vague and confusing in the early period of the Board's operations. These officials attributed this primarily to the startup problems the Board experienced in establishing its organizational structure and in operating under interim regulations issued on January 19, 1979.

Our review of guidance provided to the field offices confirmed that the information was at times disorganized, incomplete, and lacked clarity. Appeals officers said it was difficult for them to keep current on the Board's policies, interpretations, and appeals issues. Except for the chief appeals officers, the field staff were not given any specific training or instruction on the appellate provisions of the act and the policies and interpretations of the Board. In early March 1979, the chief appeals officers participated in a 3-day conference on the Board's interim organization and operating regulations and the act's provisions on appeals.

In late August the Board did begin, however, a process of providing feedback to appeals officers. The objective was to provide appeals officers with constructive criticism and guidance on format, content, and legal sufficiency expected in appellate decisions. In September, the Managing Director's and General Counsel's offices, initiated staff field office visits to discuss and provide guidance to appeals officers. According to an official of the Board's General Counsel, these initial efforts have been successful in improving appellate decisions. The Board's Managing Director agreed that the complaints were justified and that additional efforts will be made to improve communications and also provide for field input in management decisions.

Appeals officer qualifications

Emphasis on the qualifications of appeals officers and the more formal, judicial appeals process established by the Board led to the adoption of a requirement in September 1979 that all appeals officers be fully qualified attorneys. Approximately 80 percent of the Board's field appeals officers have a law degree or were working toward a degree and over 60 percent have been admitted to the bar. While some field office officials and agency and union representatives do not

feel this requirement is necessary, others stated that the decision is a good one in the light of the legal requirements of the act. They believe that, with the Board's more formal procedures, having qualified attorneys will provide more credibility to the appellate system.

The Board has initiated a placement program for those employees who are not eligible to convert to the attorney classification or who do not elect to convert. These employees, where possible, will be placed either in other positions with the Board or with other Federal agencies or provided the opportunity for retraining. To date, of the 27 employees with no legal training (19 in the field offices and 8 in the headquarters), 17 have been placed in Board offices or other Federal agencies, and 2 have availed themselves of retraining opportunities. Eight employees remain to be placed.

In addition, two employees, who were members of the bar but elected not to convert to the excepted service, were placed in positions with other agencies.

Agency and union views on appeals program

We contacted selected agencies and employee organizations within the Board field office regions of San Francisco, Dallas, Chicago, Atlanta, and Boston to obtain their views on the first-year operations of the Board. The most prevalent comment received was that the Board's implementation of the new appeals procedures was too legalistic and formal.

Under the Reform Act, the Board provides final administrative decisions on matters within its jurisdiction. In carrying out its functions, the Board has adopted more formal, judicial procedures than had existed under the Civil Service Commission. The Board, in replying to similar comments received on its proposed regulations, has stated that the Congress intended it to function as a quasi-judicial agency and therefore it is essential that formalized case processing procedures be implemented. Given the congressional mandate, the Board has stated that employees must receive full due process rights in adjudicating their appeals and that many of the legal concepts incorporated into the proposed regulations arose not out of Board policy but from legislative mandate.

Agency and employee organization concerns on the legal nature of the appeals procedures are summarized as follows.

Agency management

- The Board has created unnecessary legal obstacles for both the agencies and appellants.
- The parties involved generally do not have the background to adequately develop and present cases based on legal procedures.
- The more formal, legal approach has created an increased workload on the agencies' limited legal staff. Appeals require more legal counsel to adequately process a case and have increased the cost of case preparation.

Employee organizations

- The Board's procedures are complicated and require a lawyer to interpret them.
- Existing precedents for such a system do not exist.
- Arbitration is preferred because it is less legal and structured to involve less paperwork and red tape for the parties.

Some agency and employee organization officials, however, approved of the Board's more formal regulations and implementing procedures. Many officials commented that there had not been enough information provided to employees on the organization and functions of the Board and Special Counsel.

MERIT SYSTEMS STUDIES

As part of its overall responsibility for protecting the integrity of merit systems and the rights of employees, the Board was given a broad mandate to review the systems and policies governing personnel management in the Federal Government. The Reform Act requires that the Board:

"Conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and to report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected."

During 1979 the Board did not conduct or initiate any studies of Federal merit systems. The Merit Systems Review and Studies Office was established to perform this function, but the development and implementation of the merit systems studies function was delayed because of inadequate funding and other staffing priorities of the Board, such as the Office of the General Counsel. Preliminary plans for organizing work and conducting studies of merit systems has been developed. The Studies Office envisions that it will undertake three basic types of studies:

- Quantitative studies using existing data sources (e.g., information on Board appeals, Special Counsel complaints, agency fraud hot lines, etc.) to identify possible problem areas that should be further explored.
- Topical studies in major areas of merit systems operations. Initial areas of study include the Senior Executive Service, merit pay, performance evaluation, and evaluation of whistleblowing patterns.
- Onsite evaluations in selected agencies on possible problem areas that may be identified.

At the request of a congressional committee, the Studies Office has undertaken a comprehensive survey of sexual harassment in the Federal Government. This survey is expected to be completed in 4 to 6 months.

REVIEW OF OPM REGULATIONS

The Merit Systems Review and Studies Office also has responsibility for jointly reviewing, with the Office of General Counsel, the final rules and regulations of OPM. The Reform Act requires and authorizes the Board, on its own or at the request of another party, to review final regulations of OPM to determine whether the regulations would cause the commission of a prohibited personnel practice and whether the regulations have been validly implemented by Federal agencies. Although the Studies Office did not undertake, on its own motion, any regulatory reviews during 1979, it plans to conduct periodic reviews to insure that regulations conform with merit system principles. The Studies Office also plans to monitor the implementation of OPM rules and regulations by Federal agencies.

While the Board is authorized to review, at any time, final OPM regulations, it may also initiate a review at the

request of any interested person. On May 17, 1979, the American Federation of Government Employees petitioned the Board to review interim regulations issued by OPM on removals or demotions for unacceptable performance and the implementation of those regulations by the Social Security Administration. The American Federation of Government Employees contended that OPM's regulations and the Social Security Administration's implementing of them were legally invalid. The Board granted this petition and subsequently expanded its review to include consideration of OPM's final regulations issued on August 3, 1979. The Board, through analysis of the legislative history pertaining to these provisions and consideration of oral and written comments by interested parties, issued its opinion and order on December 17, 1979. The Board concluded that the OPM regulations relating to removal or demotions for unacceptable performance and the implementing of the regulations by the Social Security Administration were invalid and ordered that:

- Agencies cease taking actions under the final and interim OPM regulations.
- The Social Security Administration, within 20 days from the date of the order, provide a complete status report with respect to each personnel action taken under the regulations since January 11, 1979.
- The Social Security Administration, OPM, the American Federation of Government Employees, and the Special Counsel, within 40 days from the date of the order, submit a proposed order for appropriate corrective action.

BOARD ACTION ON THE SPECIAL COUNSEL'S REQUESTS

The Board also has jurisdiction over certain matters brought before it by the Special Counsel. Specifically, the Board

- makes final administrative determinations on complaints brought by the Special Counsel that disciplinary action should be taken against an employee;
- orders appropriate corrective action as requested by the Special Counsel when an agency fails to take action it has recommended; and

--orders stays of personnel actions requested by the Special Counsel where 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.

During the year, the number of actions brought before the Board by the Special Counsel were limited primarily to requests for stays of personnel actions. As of October 15, 1979, the Special Counsel had requested 16 stays. All but two stays were granted by the Board. Five additional stays were requested but withdrawn because the agencies involved agreed to take corrective action.

The Special Counsel did not file any complaints with the Board asking that disciplinary action be taken against an employee, and it petitioned the Board in only one case to order an agency to take corrective action.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

The Merit Systems Protection Board and the Special Counsel have key roles in the effective implementation of merit system reforms and protections established under the Reform Act. The eventual success of the Reform Act will depend mainly on how well the Board and the Special Counsel carry out their responsibilities. Although it is too early to evaluate the effectiveness of operations, we believe that the Board and the Special Counsel have made progress in establishing the capability necessary to carry out the full range of their responsibilities.

In April 1979 we reported to the Senate Committee on Governmental Affairs that the Board and particularly the Special Counsel could not effectively perform the duties and functions assigned under the Reform Act primarily because of a lack of adequate funds and staff. In late July and October 1979, budget increases were approved to provide for the additional staff and other resources the Board and the Special Counsel believed were needed to establish full operations. The Board and the Special Counsel also faced serious office space problems. Although some improvements have been made, as of the end of May 1980, GSA had not developed any firm plans to obtain all the additional office space required.

Although the Board and the Special Counsel were given separate authorities and functions, there is uncertainty concerning their authority with respect to one another. The intended legal relationship is not clearly defined in the Reform Act or the President's Reorganization Plan, but will become defined as specific issues arise and are resolved. In this respect, they should work together to avoid possible conflict and misunderstanding.

During most of the Special Counsel's first year of operations, its ability to promptly investigate and take action on employee complaints was restricted. Many complaints could not be promptly investigated because of limited funds and because it had no field office structure.

In October 1979, we reported on the Special Counsel's progress in protecting employees from prohibited personnel practices. We believe that the Special Counsel (1) was not providing active leadership in informing and encouraging

Federal employees to report merit system abuses or other activity prohibited by the Reform Act, (2) was not issuing needed guidance and instruction to Federal agency hotline programs on criteria for referring allegations of prohibited personnel practices, and (3) did not have an adequate case management system to track its caseload or evaluate the significance of complaints received on a Government-wide basis.

The Special Counsel's office agreed with our assessment and recommendations made and has taken or planned a number of steps to increase the Special Counsel's visibility and improve management of its workload. Guidance has been issued to agency hotlines, and an information handbook explaining the functions of the Special Counsel is being prepared for wide distribution. In November 1979 a computer system was contracted for, but, at the end of April 1980, it was not yet in place. According to the Special Counsel's office, this system may be operational by June 1980. The implementation of this system should greatly improve the Special Counsel's capability to manage its workload and will provide valuable data needed for monitoring merit systems and identifying possible trends of prohibited personnel practices. This information will also be useful to the Board's Merit System Review and Studies Office in planning and conducting its studies of Federal merit systems.

Although records from the Special Counsel indicate that only a small number of whistleblower complaints were received, these cases did not receive prompt attention. Our analysis of the closed whistleblower cases showed that agencies were not generally submitting timely reports and responses. Whistleblower allegations were not promptly transmitted to the agencies involved, and, in some cases, the Special Counsel did not review and determine, within the 15 days required by the Reform Act, whether there was substantial likelihood that a violation occurred. The Special Counsel needs to carefully monitor and emphasize the timeliness of agency investigations and reports on whistleblower allegations. This is very important in order for Federal employees to have confidence in the system and to encourage them to report instances of possible wrongdoing.

During 1979 the Board took a number of actions to improve the timeliness in processing appeals. A 120-day processing goal for all appeals to the Board was adopted, and specific time requirements were set for the submissions of records and other documents. Our review showed that about 98 percent of the appeals, decided under the Reform Act provisions, were being processed within the 120-day time frame. The Board, however, had not provided adequate guidance and

instruction to field offices on appeals policies and interpretations of the Reform Act. Also, a continued monitoring of field office caseloads is needed to help insure the most efficient use of staff resources in handling appeals.

No studies of merit systems or reviews of final OPM regulations were initiated by the Board during 1979. The implementation of the merit studies function was delayed because of a lack of funding and other staffing priorities. The Merit Systems Review and Studies Office has been partially staffed and has developed a preliminary plan for organizing its work and conducting studies of merit systems. According to this plan, the Studies Office will conduct periodic reviews of OPM regulations and how agencies implement them.

RECOMMENDATIONS

Transition and startup problems--funding, staffing, and office space--prevented the Board and the Special Counsel from establishing full operations during this first year. While they have been able to resolve many of their initial problems, others exist. We have identified certain areas which will require continued attention by the Board and the Special Counsel during the coming year, and we recommend that:

- The Chairperson of the Board and the Special Counsel cooperate and work more closely together, where possible, to insure that effective and continuous oversight of Federal merit systems is provided.
- The Chairperson of the Board monitor the effectiveness of field office staffing and provide guidance and training to field personnel.
- The Special Counsel highlight the leadership role and inform and encourage Federal employees to report possible prohibited practices and other abuses.
- The Special Counsel monitor and emphasize the timely processing of employee complaints and agency investigations, and reports on whistleblower allegations.

AGENCY COMMENTS

The Board commented that the report provides an objective accounting of the problems faced by the Board during its first year of operation, its accomplishments and successes, and the program areas in which additional work needs to be done. The Special Counsel's office generally concurred in the findings and recommendations in the report.

OFFICE OF THE SPECIAL COUNSELORGANIZATION AND FUNCTIONS

The Special Counsel, an independent officer of the Board, is responsible for investigating allegations and other information of prohibited political activities by Federal and certain State and local employees, arbitrary or capricious withholding of information in violation of the Freedom of Information Act, prohibited discrimination when found by appropriate authority, and other activities prohibited by any civil service law, rule, or regulation. The Special Counsel initiates disciplinary and corrective actions before the Board when warranted. This Office also receives and refers to the appropriate agency information which evidences a violation of any law, rule, or regulation, mismanagement, a gross waste of funds, or abuse of authority, or a substantial and specific danger to public health or safety. This Office has three primary divisions

- prosecution and legal,
- investigation, and
- operations.

Prosecution and legal division

This division

- establishes policies and procedures for acting on the results of Special Counsel investigations;
- develops guidelines for determining investigative findings and evidence to support charges against employees under the Special Counsel's jurisdiction or for referring matters to the Board, agency involved, and OPM for correction;
- provides guidance to investigative and field office staff of sufficiency of evidence for prosecuting cases and disposing of or closing cases;
- provides legal advice;
- issues complaints in cases reserved or retained under the direct jurisdiction of the Special Counsel and prosecutes such cases before the Board or a designated administrative law judge;

- prepares reports to the President concerning Presidential appointees against whom disciplinary action may be appropriate;
- prepares legal briefs as directed by the Special Counsel; and
- implements guidelines for referral to the Attorney General or appropriate U.S. attorney of possible criminal violations received by the field or headquarters offices of the Special Counsel.

Investigation division

This division

- establishes criteria and procedures for receiving, processing, and acting on complaints and allegations of violations and prohibited practices under Special Counsel jurisdiction (including "whistleblower" allegations);
- makes recommendations on matters and subject areas within the Special Counsel's investigative jurisdiction;
- processes complaints and allegations received by the Office of the Special Counsel;
- develops methods and procedures for planning, coordinating, and conducting investigations and reporting the results;
- provides guidance, training, and technical assistance to investigative staff of field offices;
- directs and coordinates investigations involving two or more field offices and cases retained under the direct control of the Special Counsel;
- maintains central case control records;
- refers completed division investigative report and case files to the Prosecution and Legal Division for appropriate action and other disposition; and
- establishes and maintains coordination and cooperation with investigative offices of other agencies.

Operations division

This division

- receives, processes, and distributes communications;
- maintains records and documents and central files;
- administers the activities of the Office under the Freedom of Information and Privacy Act including requests under this act;
- responds to inquiries concerning the functions and activities of the Office;
- provides administrative and staffing support to the Office; and
- directs the activities of the field offices.

The field offices

- receive and process complaints and allegations of violations of civil service rules and regulations, allegations of mismanagement, gross waste of funds, abuse of authority or specific danger to public health or safety, and of other prohibited personnel practices and activities;
- initiate appropriate and necessary inquiries and investigations to resolve complaints and allegations within the Special Counsel's and field offices' investigative jurisdiction;
- prepare and issue letters of charges against individuals who are found responsible for violations or prohibited activities and prosecutes such individuals before an administrative law judge designated by the Board;
- refer matters reserved for direct action by the Office of the Special Counsel or found not to be within the jurisdiction of the field office to the Deputy Special Counsel; and
- refer allegations and other information relating to possible criminal violations as received or uncovered directly to the appropriate U.S. attorney or Attorney General through the Associate Special Counsel for Prosecution.

MERIT SYSTEMS PROTECTION BOARD ORGANIZATION

On September 11, 1979, the Merit Systems Protection Board announced a reorganization of its management structure. The Board had been operating under an interim organization since February 1979. The organizational structure provides for central management of the Board's functions and consists of the offices of the Managing Director, General Counsel, Merit Systems Review and Studies, Special Decisions, Administrative Law Judge, Appeals, Information, the Secretary, Administration, and 11 field offices in major U.S. cities.

Office of Managing Director

The Managing Director is responsible for management of all operations and programs supporting the work of the Board. He/she is responsible for the operations of the other eight Board offices mentioned above. The Deputy Managing Director is responsible for the overall operations of the 11 field offices in Atlanta, Boston, Chicago, Dallas, District of Columbia area, New York, Denver, Philadelphia, San Francisco, Seattle, and St. Louis.

These offices are responsible for receiving, processing, hearing, and issuing initial decisions on Federal employee appeals within the appellate jurisdiction of the Board.

Office of General Counsel

This office provides legal advice and assistance to the Board through three organizational units: the Office of Legislative Counsel, the Office of Deputy General Counsel--Appellate, and the Office of Deputy General Counsel--Trial. Some major functions of the Office of General Counsel are to

- maintain liaison with congressional offices,
- prepare congressional testimony,
- respond to congressional and Presidential inquiries,
- conduct special research projects and prepare legal opinions for the Board,
- represent the Board in the U.S. Courts of Appeals and U.S. District Courts,
- review Office of Personnel Management regulations,

- prepare original jurisdiction cases from the Office of the Special Counsel,
- provide legal assistance to the field offices, and
- review Board opinions for consistent application of the law.

Merit Systems Review and Studies

This office is responsible for conducting studies of the civil service and merit systems, monitoring the manner in which Federal agencies implement OPM's rules and regulations, and insuring that agencies are free of prohibited personnel practices. In conjunction with the Office of the General Counsel, this office reviews the rules, regulations, and significant actions of OPM.

Special Decisions

The Office of Special Decisions prepares opinions and orders for the Board or an individual member. These opinions and orders are on original jurisdiction matters under the Reform Act and appeals procedures requiring the special attention of the Board.

Administrative Law Judge

The Administrative Law Judge conducts formal adjudicative proceedings. These include actions against administrative law judges, violations of the Hatch Act, appeals in sensitive or complex disciplinary cases and disciplinary proceedings, and other actions initiated by the Office of the Special Counsel. He/she also acts on motions for discovery and the issuance of subpoenas.

Office of Appeals

The Office of Appeals receives appellant petitions for review of cases decided by field offices or cases reopened on the Board's own motion. Appeals officers prepare recommendations to the Board on whether a case should be reopened or denied. On those cases reopened by the Board, analyses, opinions, and orders are prepared for approval by the Board. In addition to appeals under the Reform Act, this Office is also responsible for considering reopening requests of cases decided under the previous appeals system.

Office of Information

The Office of Information is responsible for providing information on the Board activities and policies to the general public, the press, and Federal employees.

Office of the Secretary

This Office is responsible for the flow of communications to and from the Board to the appropriate recipients, e.g., the Congress, the President, appellants, labor organizations, Federal agencies, and others. To meet this responsibility the Office is divided into four sections:

- Mail and records management.
- Docket and control.
- Orders and meeting.
- Publication and information services.

The mails and records management section receives, logs, and delivers incoming mail and mails outgoing mail. It also establishes and maintains a system of records.

The docket and control section has responsibility for timely processing and accurately controlling employee appeals cases through each stage of the appeal process.

The orders and meeting section receives and processes Board orders, opinions, and decisions; maintains operating procedures and rules of practice for the Board; prepares minutes and records of Board meetings; certifies records to courts and others; assures that matters are properly published in the "Federal Register"; gives notices of Board meetings; and other duties.

The publications and information services branch assists in in-house research and makes information available to the public. It also responds to certain complaints and inquiries and to Freedom of Information and Privacy Act requests. It is responsible for publishing Board orders, decisions, and opinions.

Office of Administration

This Office is responsible for the coordination and accomplishment of the Board's central office and field office administrative management functions. These functions

include financial management, internal personnel management, and general administrative services. This Office consists of the Budget and Finance Branch, the Personnel Management and Equal Employment Opportunity Branch, and the Administrative Services Branch.



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

APRIL 20, 1979

B-115398

The Honorable Abraham Ribicoff
Chairman, Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

Your October 26, 1978, letter requested our assistance in providing oversight of the transition and establishment of the Merit Systems Protection Board, Office of Personnel Management, and the Federal Labor Relations Authority. As a result, we now have staff at these agencies to monitor their activities and implementation of the Civil Service Reform Act.

As part of our monitoring activities we reviewed the budget, current staffing and operations of the Board and the Office of Special Counsel. In our opinion, with their present staffing and funding, the Board and particularly the Special Counsel do not have adequate resources to establish full operations and effectively carry out the duties and responsibilities assigned to them under the Civil Service Reform Act. As a result, the intent of the legislation cannot be achieved. We believe the Board and Special Counsel should receive immediate attention and action on their budget requests. Your attention to this matter may help.

The Board and the Special Counsel were established on January 1, 1979, by Reorganization Plan number 2 of 1978. The plan transferred the adjudicatory, appellate and certain merit system enforcement functions previously performed by the Civil Service Commission. Also transferred were those personnel, funds and other resources related to the functional transfers under the reorganization plan. A total of 289 positions were initially transferred to the Board and 19 positions to the Special Counsel to perform these functions. Subsequently, the functions and responsibilities of the Board and Special Counsel were expanded and strengthened under the Civil Service Reform Act of 1978 which took effect on January 11, 1979. However, no personnel or additional funds were transferred. As a result, certain program responsibilities and functions of the Board and Special Counsel have not been implemented because of inadequate resources. Following are those functions and responsibilities which we feel do not

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have adequate resources. We have discussed these matters with the Special Counsel, his staff, and staff of the Board.

The Office of Special Counsel

The Special Counsel currently lacks the staff and resources to timely review and investigate complaints and allegations of wrongdoing, initiate independent investigations of possible prohibited personnel practices and perform necessary management and regulatory functions.

Currently the Special Counsel only has a total professional staff of six attorneys and three investigators (three additional investigators are being recruited). The Special Counsel has requested resources for an additional 43 positions which he feels is the minimum number needed to initially staff headquarters and 3 field offices.

Because of limited staffing, no field offices have yet been established. According to the Special Counsel, the small staff size and limited funds make it virtually impossible to timely and adequately initiate investigations on allegations at locations outside the Washington, D.C., area. Approximately 80 percent of the complaints and allegations being received are from outside the Washington, D.C., area. Many of these cases involve potentially serious violations of reprisals and other prohibited personnel practices. The Special Counsel has not requested Board or Office of Personnel Management assistance in investigating complaints at departmental or agency field locations because it could create an appearance of conflict and dependence. The Special Counsel estimates that with present resources it can process only about 10 percent of the complaints and allegations being received. As of March 16, 1979, 325 cases were pending before the Special Counsel.

The Special Counsel also does not have the staff or resources needed to initiate in the absence of an allegation independent investigations into possible prohibited personnel practices. The Special Counsel told us that there are several such situations which he is already aware of which should be investigated but which have not been due to inadequate resources. The Special Counsel has also delayed the development of proposed regulations because available professional staff have been assigned to process cases. In addition, several key management positions remain vacant. The Deputy

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Special Counsel, Associate Special Counsel for Prosecution and Associate Special Counsel for Operations have not yet been filled.

Without additional staff and resources, the Special Counsel cannot act timely and adequately on allegations of personnel system abuse and other violations. Most importantly, at this time, however, is the need for the Special Counsel to establish its credibility by quickly and effectively investigating and acting on matters brought to its attention. We believe that without adequate resources the current and future effectiveness of the Special Counsel is likely to be seriously impaired.

The Merit Systems Protection Board

The Board, like the Special Counsel, does not have the personnel or resources to effectively carry out the full range of its statutory functions and responsibilities. As a result, the Merit Systems Review function has not been staffed or implemented, other program functions are understaffed, and the Board continues to be dependent for certain administrative services on the Office of Personnel Management. Also, a large backlog of cases carried over from the former Federal Employee Appeals Authority and Appeals Review Board continues to place additional burdens on the Board's limited resources.

One of the most important functions for which the Board is responsible is the conduct of special studies relating to the adequacy and fairness of merit systems in the Federal service. Because of inadequate staff, the Board has not assigned or recruited staff to perform this function. In its budget statements, the Board explained that several program functions, including merit systems studies and review, were assigned under the Reorganization Plan and congressionally affirmed under the Reform Act, but no personnel were transferred to perform the functions. An initial minimum staffing requirement of 10 positions for the Merit Systems Review function was included in the Board's fiscal year 1979 supplemental budget request. However, according to the Board's Managing Director, the requested supplemental positions and funding are not expected for several months. Additionally, in the Board's analysis of the adequacy of its resources in light of its statutory responsibilities several offices, such as the Office of General Counsel and Office of Opinions are understaffed in terms of the Board's expanded responsibilities under the Civil Service Reform Act.

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The Board currently does not have the capability to provide full administrative support for its headquarters and field offices. Personnel to perform these functions were not transferred from the former Civil Service Commission. Payroll, personnel, accounting, and other support services are now provided by the Office of Personnel Management. Until staff and resources are available, the Board will continue to rely on the Office of Personnel Management for administrative support.

The Board is responsible for deciding appeal cases which were pending before the former Federal Employee Appeals Authority and Appeals Review Board. As of February 6, 1979, 1,933 Appeals Review Board cases and 2,452 Federal Employee Appeals Authority cases were pending before the Board. The number of Federal Employee Appeals Authority cases has been reduced to 1,650 as of March 24, 1979. Approximately 2,500 Appeals Review Board cases are now pending. Additional appeals from old cases may be made to the Board because there were no specific time limitations for them under the previous system.

The Board's ability to dispose of the old cases hinges on the number of new cases it receives. The Board has announced a 120-day goal for processing new appeal cases and also has a statutory 120-day time limit for processing appeals involving discrimination. Because of this, the Board has decided to place priority first on processing new appeals involving discrimination and second on other new cases under the Civil Service Reform Act. As a result, decisions on old cases are likely to be further delayed. At present, over 50 percent of the former Federal Employee Appeals Authority cases have been pending for more than 3 months.

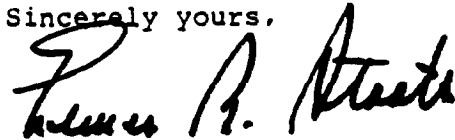
To address these operational deficiencies, the Board has asked for 102 additional positions for fiscal year 1979 and additional funding of \$1,426,000. Of the 102 positions, 43 positions are to be assigned to the Special Counsel. The Board views the additional resource requests as the minimum levels necessary for the Board and Special Counsel to initially staff their program functions.

In our opinion, the Board and particularly the Special Counsel presently lack the resources necessary to adequately implement the functions and responsibilities which they were assigned by the Civil Service Reform Act. We feel it is critical that the Board and Special Counsel establish their

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presence and credibility as soon as possible. Your concern and attention to the Board's and Special Counsel's additional funding and resource needs may be helpful in getting appropriation action on this matter. As arranged with your staff, we are also sending copies of this letter to the House and Senate Appropriations Committees and to Senator Percy.

Sincerely yours,

A handwritten signature in black ink, appearing to read "James A. Strick". The signature is written in a cursive style with a large initial "J".

Comptroller General
of the United States

THE BOARD'S FIELD OFFICES APPEALS WORKLOADFISCAL YEAR 1979CIVIL SERVICE REFORM ACT CASES

<u>Type of appeals</u>	<u>Received</u>	<u>Decisions issued</u>	<u>Canceled</u>	<u>Pending</u>
Adverse actions:				
Removal	988	529	126	333
Suspension for more than 14 days	82	44	12	26
Reduction in grade or pay	122	71	15	36
Furlough of 30 days or less	<u>12</u>	<u>6</u>	<u>5</u>	<u>1</u>
Total adverse actions	1,204	650	158	396
Reduction in force	265	144	71	50
Performance, unsatisfactory	77	28	6	43
Retirement, other	32	1	14	17
Retirement, disability	13	2	4	7
Retirement, overpayment	1	0	0	1
Discrimination, individual complaint (note a)	-	-	-	-
Discrimination, class complaint (note a)	-	-	-	-
Mixed appeals	205	104	30	71
Acceptable level of competency	107	43	24	40
Probationary	324	246	29	49
Reemployment rights and priority	4	4	0	0
Restoration to duty	17	4	5	8
Salary retention	4	3	1	0
Short suspension	61	56	0	5
Suitability	18	12	0	6
Performance rating	10	9	1	0
Employment practices	11	7	0	4
Senior executive service	32	14	0	18
Other appeals	<u>10</u>	<u>10</u>	<u>0</u>	<u>0</u>
Total	<u>2,395</u>	<u>1,337</u>	<u>343</u>	<u>715</u>

a/These are appeals before the Reform Act. The Reorganization Plan transferred these cases to the Equal Employment Opportunity Commission (EEOC).

THE BOARD'S FIELD OFFICES APPEALS WORKLOADFISCAL YEAR 1979APPEALS UNDER PROCEDURES BEFORE THE CIVIL SERVICE REFORM ACT

<u>Type of appeals</u>	<u>On hand 10/1/78</u>	<u>Received</u>	<u>Decisions issued</u>	<u>Canceled</u>	<u>Pending</u>
Adverse actions (note a):					
Removal	-	-	-	-	-
Suspension for more than 14 days	-	-	-	-	-
Reduction in grade or pay	-	-	-	-	-
Furlough of 30 days or less	-	-	-	-	-
Total adverse actions	1,011	1,730	2,063	521	157
Reduction in force	404	353	602	143	12
Performance, unsatis- factory (note b)	-	-	-	-	-
Retirement, other	0	435	18	2	415
Retirement, disability	124	402	351	78	97
Retirement, overpayment	0	1	0	0	1
Discrimination, individ- ual complaint (note c)	672	415	720	367	0
Discrimination, class complaint (note c)	47	22	41	28	0
Mixed appeals (note b)	-	-	-	-	-
Acceptable level of com- petency	58	173	166	49	16
Probationary	159	304	286	170	7
Reemployment rights and priority	5	17	17	5	0
Restoration to duty	14	18	24	7	1
Salary retention	6	29	32	3	0
Short suspension	121	277	321	71	6
Suitability	7	21	25	3	0
Performance rating	0	209	132	46	31
Employment practices	0	21	10	0	11
Senior executive service (note b)	-	-	-	-	-
Other appeals	0	12	11	1	0
Total	<u>2,628</u>	<u>4,439</u>	<u>4,819</u>	<u>1,494</u>	<u>754</u>

a/A breakdown for these adverse actions appeals was not available.

b/These are appeals under the Reform Act.

c/These appeals were transferred under the Civil Service Reform Act and Reorganization Plan to the EEOC except for those for which delegation of authority to complete was given by EEOC to the Board.

DECISIONS BY FEAA BY FISCAL YEARS

	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>
Actions appealed to FEAA	<u>a/6,823</u>	<u>9,528</u>	<u>9,029</u>	<u>not available</u>
Decisions by FEAA:				
Adverse action	1,862	2,569	3,183	3,049
Reduction in force	799	813	1,688	1,223
Disability retirement	990	497	223	289
Suspension of 30 days or less	182	231	343	455
Termination of probation	364	447	439	475
Suitability decisions	173	157	79	29
Acceptable level of com- petence	63	154	205	250
Salary retention	13	27	14	29
Restoration to duty	26	33	31	59
Reemployment and reen- statement rights	5	7	13	11
Adverse actions by the Civil Service Commis- sion (note b)	<u>1</u>	<u>4</u>	<u>4</u>	<u>-</u>
Adverse actions-- total	<u>4,478</u>	<u>4,939</u>	<u>6,222</u>	<u>5,869</u>
Discrimination complaint-- recommendations	<u>926</u>	<u>1,677</u>	<u>2,066</u>	<u>2,663</u>
Total decisions	<u>5,404</u>	<u>6,616</u>	<u>8,288</u>	<u>8,532</u>

a/Does not include denial of within grade increases.

b/These actions result when the Director of the Civil Service Commission's Bureau of Personnel Investigations instructs an agency to remove or take other disciplinary action.

THE BOARD'S OFFICE OF APPEALS REVIEW WORKLOAD
FOR FISCAL YEAR 1979 (note a)

<u>Type of appeals</u>	<u>Received</u>	<u>Decisions issued</u>	<u>Canceled</u>	<u>Pending</u>
Requests for reopening and reopened appeals:				
Adverse actions	978	1,778	50	400
Reduction in force	118	299	22	62
Acceptable level of competency	55	88	1	30
Suitability	5	13	1	3
Disability retirement	76	97	1	23
Other appeals	165	296	11	51
Old system appeals (before 9/74)	12	24	3	12
Original jurisdiction appeals (note b)	458	230	497	6
Equal employment op- portunity (note d)	227	376	<u>c/2,621</u>	65
New system cases (Civil Service Re- form Act cases)	<u>257</u>	<u>1</u>	<u>-</u>	<u>256</u>
Total	<u><u>2,351</u></u>	<u><u>3,202</u></u>	<u><u>3,207</u></u>	<u><u>908</u></u>

a/This schedule includes cases transferred from the Appeals Review Board to the Merit Systems Protection Board by the Reorganization Plan and the Reform Act.

b/Original jurisdiction appeals include cases pertaining to administrative law judges, retirement (legal), examination rating, and examination practice.

c/The Board transferred 2,619 cases to EEOC.

d/Under the Reorganization Plan and Reform Act, these appeals were transferred to EEOC except for those which EEOC gave the Board delegation of authority to complete.

APPEALS REVIEW BOARD CASE WORKLOADS

<u>Type of appeals</u>	<u>FY 1976</u>		<u>FY 1977</u>		<u>FY 1978</u>	
	<u>Received</u>	<u>Decisions issued (note a)</u>	<u>Received</u>	<u>Decisions issued (note a)</u>	<u>Received</u>	<u>Decisions issued (note a)</u>
Requests for re-openings:						
Adverse actions	494	332	723	310	1,079	505
Reduction in force	114	101	150	60	191	82
Acceptable level of competency	26	28	27	12	55	17
Suitability	17	15	6	4	9	1
Disability retirement	35	32	20	14	51	24
Other appeals	55	41	83	50	171	49
Old system appeals (before 9/74)	302	573	139	157	53	59
Original jurisdiction appeals	312	247	299	282	456	379
Equal employment opportunity	<u>1,760</u>	<u>1,102</u>	<u>1,924</u>	<u>1,021</u>	<u>2,037</u>	<u>1,128</u>
Total	<u>3,115</u>	<u>2,471</u>	<u>3,371</u>	<u>1,910</u>	<u>4,102</u>	<u>2,244</u>

a/Decisions issued include canceled appeals.



In Reply Please Refer to:

Office of the Special Counsel1717 H St., N.W.
Washington, D.C. 20419

Mr. H. L. Krieger
Director, Federal Personnel and Compensation Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Krieger:

This is in response to your April 3, 1980 letter requesting our comments on the draft proposed report on the First Year Activities of the Merit Systems Protection Board and the Office of the Special Counsel. We have reviewed the draft report and insofar as it relates to the Office of the Special Counsel, we concur generally in the findings and recommendations.

The only change we suggest in the draft report is in the last paragraph of page 6, which states that the Office had no authority to carry out the Special Counsel's statutory functions during the period when there was no Special Counsel. There were legal questions, but it is not clear that the Office staff could not continue to carry out at least some of the statutory functions. We suggest that the paragraph be revised to read as follows:

On December 21, 1979, the Special Counsel resigned and until an Acting Special Counsel was designated on January 11, 1980, there were legal questions as to whether the Office had authority to carry out the Special Counsel's statutory functions. For example, it was questionable whether the Office could request the Board to stay personnel actions. In one case in which the Office staff contemplated requesting a stay of a suspension of an employee, the agency involved agreed to delay the action pending the Special Counsel Office's investigation. According to the Acting Special Counsel, there were no significant work disruptions or other problems during this period.

We appreciate the opportunity to review the draft report.

Sincerely,

Mary Eastwood
Acting Special Counsel



THE CHAIRWOMAN OF THE MERIT SYSTEMS PROTECTION BOARD

Washington, D.C. 20419

April 21, 1980

Mr. H. L. Krieger, Director
Federal Personnel and Compensation
Division
General Accounting Office
Washington, D.C. 20548

Dear Mr. Krieger:

This is in response to your letter of April 3, 1980, transmitting to the Board for its review copies of your proposed report to Congress, entitled, "First-Year Activities of the Merit Systems Protection Board and the Office of the Special Counsel." We appreciate the opportunity to comment on this report.

The report, in our view, accurately identifies and explains the major functions and responsibilities of the Board, and provides an objective accounting of the problems faced by the Board during its first year of operation, the Board's accomplishments and successes, and the program areas in which additional work will have to be done. Our recommendations consequently concern the addition or correction of certain statements or information that will, in our opinion, make the report more complete and accurate, but which will not significantly alter it. We do note that at several places in the report you refer to a number of unanswered questions that have been raised concerning the relationship between the Board and the Office of the Special Counsel. We share your concern over the existing uncertainty regarding the Board's and the Special Counsel's authority with respect to one another. As a result, on April 14, 1980, we submitted to Congress proposed legislation that would amend Title 5 of the United States Code to separate the Special Counsel from the Board and establish it as a totally independent agency. Because of this proposal, our feelings about the independence of the Special Counsel, and the statement in your letter that a copy of the report has been sent directly to the Special Counsel, our comments do not cover that portion of your report that discusses the activities and operations of that office.

Our specific comments and recommendations are as follows:

Page 21- last sentence in paragraph continuing from page 20. We recommend that this sentence be changed to state that, "The Board also has the authority to award reasonable attorney fees to employees who win their appeals when it determines that payment is warranted in the

interest of justice." The amended sentence reflects more accurately the governing provision of the Reform Act and the Board's authority.

Page 21- second sentence of the last paragraph. We recommend that the last portion of this sentence be changed to indicate that the Board's review in this situation is to determine whether the OPM rule or regulation requires an employee to commit a prohibited personnel practice in violation of 5 USC section 2302(b). As amended, the sentence presents a more accurate explanation of the Board's authority and responsibility in this area.

Page 22--third paragraph. Reference to the Office of Opinions should be changed to the Office of Special Decisions. Appendix II of the report contains the correct name of this office.

Page 27 - fourth paragraph. In the case described in this paragraph the Office of Personnel Management did not appeal the Board's decision to the Court of Appeals. It would be appropriate, we feel, to include a sentence to this effect in this paragraph.

Page 27 and page 28. The case discussed in these paragraphs has been dismissed before the Board as a result of a stipulation between the parties and a settlement that cancelled the proposed transfers. In our opinion, this information should be added to the report.

Page 30 - last paragraph. In measuring the Board's success in meeting its announced 120-day time limit for processing cases, the more significant statistics, in our minds, concern those cases which, as of December 31, 1979, could have been completed within the 120-day processing time limit. The number of over standard cases pending with the Board as of this same date, while important in evaluating the status of the Board's current workload, does not, we feel, accurately document the Board's record during the first year of its operation. In our 1979 calendar year report to Congress required by 5 U.S.C. section 7701(i)(2) we pointed out that 2,721 of the appeals received by the Board could have been completed within 120 days in 1979, and that only 65 of these cases, approximately two (2) percent, took longer than 120 days to process. These figures, we feel, present a more complete accounting of the Board's record and reflect the extent of the Board's success in expediting the processing of appeals. We, consequently, recommend that these additional figures be included in this portion of your report.

Page 31. In relating the comments of field officials on the reasons for the more timely processing of cases by the Board, the report, in this paragraph, indicates that the small number of Reform Act case receipts in the early months of the Board's operation was a significant factor. In our opinion this statement is a misleading indicator of the reasons for the Board's success in expediting the processing of appeals, and, as a result inappropriately detracts from the record that we were able to establish. As is disclosed in the succeeding paragraphs on this page and page 32 of the report, and in

Appendix IV (page 54), the Board was faced with a substantial workload of "old system" cases throughout the 1979 calendar year. While the relative mix of "old" and "new" cases changed dramatically between the beginning and the end of the year, there was at all times a constant workload that had to be processed. Under these circumstances we were able to keep up with the receipts of old system cases and reduce significantly the number of those cases pending with the Board, while at the same time processing 98 percent of our Reform Act cases within the 120-day time limit we had established. The reduction of our backlog and the more timely processing of cases were not the fortuitous occurrences that the report, to some degree, suggests they were. We are proud of our record during the past year and would consequently like to see it receive appropriate attention in your report.

Page 32 and page 33. Appeals Officer Qualifications. We recommend that the last three sentences of this paragraph be deleted and that the following be inserted in lieu thereof:

The Board has initiated a placement program for those employees who are not eligible to convert to the attorney classification or who do not elect to convert. These employees, where possible, either will be placed in other positions with the Board or with other Federal agencies, or provided the opportunity for retraining. To date, of the 27 employees with no legal training (19 in the field offices and 8 in the headquarters), 17 have been placed in Board offices or other Federal agencies, and two (2) have availed themselves of retraining opportunities. Eight (8) employees remain to be placed.

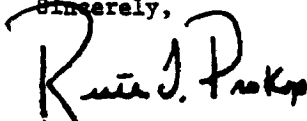
In addition, two (2) employees who were members of the bar but elected not to convert to the excepted service, were placed in positions with other agencies.

Page 35 and page 36. In the case discussed in this paragraph the Board considered written as well as oral comments of interested parties. Correction of this point is recommended.

Page 37. Records of the Office of the Secretary indicate that two (2) of the 16 stays requested by the Special Counsel as of October 15, 1979, were denied. The statement in the report that all 16 requests were granted therefore needs to be corrected.

If you have any questions about our comments or desire any additional information, please do not hesitate to contact me.

Sincerely,



Ruth T. Prokop

GAO note: Page references refer to pages in this report.

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