

CHAPTER VII - OSC INVESTIGATIONS

I. FIELD INVESTIGATION

OSC's authority to investigate is found at 5 USC §§ 1212, 1214.

A. Assignment and Notification

Once the case is sent to OSC's Investigation Division, the complainant is notified as to what to he can expect when his complaint is being investigated. The complainant will be contacted by the investigator and given a rough estimate of when the active investigation may begin. The complainant will continue to receive 60-day status reports until the case is closed. 5 USC § 1214(a). At 240 days, the complainant will be asked specifically if he or she wants the investigation to continue. OSC is obligated to conclude its investigation by that time, unless complainant agrees to an extension. *Id.*

Cases are assigned to an investigator and a staff attorney from the Prosecution Division. The agency will be notified of the investigation and will receive a letter from the investigator requesting copies of documents and perhaps other assistance (e.g., locating witnesses). These notices cite OSC's authority to conduct investigations, and they are typically addressed to established liaison officials at agencies or to the General Counsel of an agency.

When appropriate, OSC may notify an agency that the investigation is concluded. It will do so in a short letter simply stating that the investigation has been terminated; OSC normally does this when an on-site investigation has taken place and the agency is aware of the investigation. OSC never provides an agency with details or a rationale for closing the investigation. If an agency makes a request to OSC for the status of an investigation, OSC will usually inform the agency whether the case is open or closed. Typically, both the investigator and the OSC attorney must agree that no evidence will support an element of a violation before a case is closed.

B. OSC's Investigatory Powers

Under 5 USC § 1212(b), OSC has specific investigatory authority:

- (b)(1) The Special Counsel and any employee of the Office of Special Counsel designated by the Special Counsel may minister oaths, examine witnesses, take depositions, and receive evidence.
- (2) The Special Counsel may—
 - (A) issue subpoenas; and
 - (B) order the taking of depositions and order responses to written interrogatories; in the

same manner as provided under section 1204.

- (3)(A) In the case of contumacy or failure to obey a subpoena issued under paragraph (2)(A), the Special Counsel may apply to the Merit Systems Protection Board to enforce the subpoena in court pursuant to section 1204(c).
- (B) A subpoena under paragraph (2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in the manner referred to in subsection (d) of section 1204, and the United States District Court for the District of Columbia may, with respect to any such individual, compel compliance in accordance with such subsection.

C. OSC Contacts with the Complainant

During the investigation, OSC will have a numerous contacts with the complainant. Complainant will be extensively interviewed as early as possible in the OSC investigation. The investigator will be interested in the complainant's theory of the violation and in the complainant's opinion concerning possible witnesses and other sources of evidence as to the violation. A complainant should expect emphasis on the basis of belief in the disclosure, details of the disclosure, the merits (or lack thereof) of the personnel action in dispute, the identities of witnesses and their expected testimony, and the location of key records.

As the investigation develops, the complainant should expect additional contacts, e.g., unforeseen evidence or testimony. OSC will not, however, give progress reports. Investigators are strictly instructed not to characterize the success (or lack thereof) of the investigation in proving a violation. Upon completion of the field investigation, the investigator may contact the complainant again to resolve inconsistencies in the evidence or to help resolve a side issue which arose. Formal rebuttal by the complainant takes place in response to a Preliminary Determination, if the case is to be closed without further action.

D. OSC's Investigation at the Agency

Investigations are conducted by the investigating agent and the assigned attorney. The OSC attorney's role is to provide legal guidance and support to the investigator. In practice, attorneys work closely with the investigator and may even conduct interviews. Outside the commuting areas of Washington, DC, Dallas, and San Francisco, OSC will conduct its interviews by telephone and on-site at the agency location. In those three commuting areas, OSC may conduct interviews at its local offices. If large amounts of records must be examined, OSC will do that on-site at the agency.

OSC will not make unannounced visits to agency locations to conduct investigations. The investigator will arrange with the agency for a local contact, suitable space for conducting interviews, access to security or restricted areas if necessary, the availability of witnesses, and access to needed records or the records themselves.

Although most interviews will take place during duty hours in offices, OSC will conduct discrete interviews in non-duty hours in other locations when appropriate. The agency will not be told of these interviews which are often confidential in nature.

Agency and witness cooperation with OSC is mandated by Civil Service Rule 5.4. Moreover, OSC has

broad subpoena power and it has often used it on recalcitrant agencies and individuals. But OSC is sensitive to the amount of disruption an investigation can cause and is amenable to reasonable agency requests to reduce the disruption.

E. Checklist for Agency Representative

- At the first contact with an OSC representative, usually an investigator, find out if there is any basis on which the complainant might settle the complaint; often an early settlement will be on reasonable terms and much disruption will be avoided.
- If the investigator asks the agency representative to arrange interviews, that request should not be turned down. It will tell much about the case.
- Interview the personnel officer and supervisors about what they think the complaint is about; be careful, in that an interview of the subject official must not compromise the agency's objectivity.
- Do not attempt to interview the complainant or any of his corroborating witnesses; OSC will interpret those interviews as interference or intimidation and will closely question each witness about those interviews.
- Keep the door open: if OSC believes that the agency is sincere about wanting to correct any reprisal or serious irregularity, OSC will be more forthcoming about what it is discovering.
- Get management to decide if it wants to participate in the correction of a problem or if it wants to fight; the fight will be with OSC, e.g., the U.S. Government, and may result in distraction and publicity.
- Remember that OSC is objective but oriented toward finding evidence of a reprisal. OSC will not give up a case until it believes that it has no merit.

F. On-Site investigations

1. Witness Interviews

Witnesses in OSC investigations who are government employees are obliged to cooperate. See Civil Service Rule 5.4. OSC policy has been that witnesses may be represented by legal counsel but that they may not be represented by one who is not an attorney.

OSC has taken the position that it is not the "employing agency" and has no duty with respect to a bargaining unit (union) at the agency. Accordingly, OSC need not afford the complainant or the bargaining unit representation rights during OSC's witness interviews, as the agencies often must do.

Since OSC investigations are of alleged agency misconduct, and OSC is always in some sense in an adversarial position with the agency, this makes sense.

OSC will, however, be flexible about the presence of a labor union official in some interviews. For example, if the presence of a bargaining unit official might encourage the witness to cooperate more freely, OSC may permit it. Also, if the union had assisted the employee in making the complaint, OSC may permit a union representative to sit in on the interview of the complainant. OSC would not permit a union representative to sit in on interviews of any witness the union did not represent or who did not want the union present. In general, however, OSC will insist on interviewing the witness alone or with the witness's legal counsel.

OSC will not generally permit the agency to be present or to be represented during witness interviews. The reason for this policy is to protect the witness from intimidation and to encourage witness candor. The only exception to this policy by OSC arises when the witness has requested legal counsel from the agency at the OSC interview. OSC will not object if the representative is an attorney and if the attorney and the witness both express to OSC that the representative has a duty to render legal advice to the witness and that the witness understands that the agency lawyer also represents the agency. Agencies and agency lawyers should be cautious about such arrangements; there is considerable potential for conflicts of interest and ethical dilemmas.

The witness interview may be under oath and tape-recorded, or reduced later to a sworn statement. At times, the investigator may simply document the interview with a memorandum to the file (called a Memorandum of Interview). Documentation by memorandum alone is a signal that the investigator does not believe that the witness has relevant testimony to offer.

OSC policy is that any witness who wants a copy of his or her statement, whether in writing or tape-recorded, may have one on request. OSC will probably not give the witness a copy of his or her statement until the investigation is concluded. OSC will never give a witness a copy of one of its memoranda of interview, as that memorandum is in reality a statement by the investigator about what the witness said. Nevertheless, witnesses who give testimony against the agency or their supervisor may not want to possess a copy of their statements because, once the statement is in the witness's possession, it is not privileged and it becomes discoverable. OSC will refuse to disclose a witness statement pursuant to a request from an agency until it is in litigation before the MSPB, and perhaps not even then. Witnesses will not be permitted to tape-record interviews.

Witnesses in all government investigations, including OSC investigations, must be truthful, whether or not under oath. 5 USC § 1001. Lies are violations of the Federal False Statements Act.

2. Subject and Adverse Witness Interviews

A subject of an OSC investigation is an official who, if a violation exists, is the responsible official. Subjects are routinely advised by the investigator that OSC considers him a subject at the time an interview is scheduled. This permits the subject time to obtain legal counsel, if he or she wishes. (OSC investigations are carefully structured and designed so as not to require more than one site visit if possible).

Subjects of OSC investigations should be aware that they are ordinarily interviewed last, after all other witnesses have been interviewed and all documentation has been reviewed. OSC investigators are instructed that they should learn all that is possible about a case before undertaking the subject interviews. This is sound investigative practice; it makes it easier to know when the subject is not telling the truth. Also, OSC will conduct any needed investigation, after the subject interview, to verify or disprove any declarations of fact that the subject may make that have not already been investigated.