UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL, WASHINGTON, D.C. and UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES BORDER PATROL, EL PASO, TEXAS Respondents and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, NATIONAL BORDER PATROL COUNCIL Charging Party	Case No. 6-CA-00527

Scott David Cooper, Esq.
For Respondents

Joseph Swerdzewski, Esq.
Julie Garnett Griffin, Esq.
For the General Counsel

Robert J. Marren
For the Charging Party

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION

Statement of the Case

Respondents OIG and INS are charged with violations of Section 7116(a)(1), (5) and (8) by reason of their failure to provide the Union with certain information. Respondents

deny the allegations and assert that the complaint against OIG is barred by Section 7118(a)(4)(A), i.e. that the amendment of the Complaint to embrace OIG had occurred too late.

The hearing was held in El Paso, Texas. The Respondents, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Based on the entire record, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

Respondent OIG having interposed the defense that Section 7118(a)(4)(A) precludes prosecution of it for these alleged violations, it is necessary to set forth the procedural history with some care.

Robert J. Marren, Field Services Coordinator for the National Border Patrol Council, wrote the Associate Regional Commissioner, Management, Immigration and Naturalization Service (INS) on December 18, 1989. He requested, pursuant to Section 7114(b)(4) that he be furnished with:

> (1) a copy of the investigative file "compiled by the agency" in response to his allegations that he had been assaulted by fellow Border Patrol Agent Lucero;
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> (2) copies of all other investigative files "on incidences of agency employees assaulting other agency employees during the last two years;
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> (3) copies of investigative files covering allegations he had made against "Messrs. Martinez, Roberson and Williams."

Marren supplemented this request with another, dated January 8, 1990, requesting a copy of the investigative file in a case flowing from allegations against Mr. Williams made by the Regional Vice President of the INS Service Council, and concerning the former's investigation of another Union official. In essence, Marren indicated that management officials and investigators had made misstatements in connection with official investigations, and that a different standard was being applied to Union officials than was the case with others. He sought such information, he said, "to determine whether or not sufficient evidence exists to serve

as the foundation for filing a grievance over this perception."

At the hearing Marren elaborated upon his need for the requested Lucero incident information. He needed, he said, to know who the witnesses were and what questions were asked of them and thus to determine whether the investigator asked the right questions. As to his request for "all other investigative files" concerning assaults, he indicated it was intended, as to scope, to be confined to the Southern Region of INS. Likewise, names would be required in connection with this request in order to check the adequacy of the investigations by "going to the people and finding out what happened if it wasn't clear from the report." Finally, it is to be noted that the last request concerns another bargaining unit within INS.

Associate Regional Commissioner Nelson of INS responded to Marren in an undated letter bearing the stamp "received 1/12/90", stating that his "request for data pursuant to 5 USC 7114(b)(4) concerning matters investigated by the Office of Inspector General" had been forwarded to that Office, the "custodian" of such records. On January 31, Ms. Nelson again wrote Marren, responding to a letter of January 8 "wherein you state that you have not received a reply to your letter of December 18," and forwarding a copy of her initial response. There is no evidence concerning receipt of, or any response to, the letter of January 8 described.

On February 8, 1990, Laurie Dubin Leone, Attorney-Advisor, Office of the General Counsel, OIG, Washington, DC, wrote Marren. She noted receipt of his (undated) request for information under the Freedom of Information Act, noted the impact of the Privacy Act and advised him of the fee schedule as well as her intention to answer "as quickly as possible".

This reply, unclear as to which of Marren's letters it answered, was the only response from OIG.

An unfair labor practice charge was filed by Marren on March 19, 1990, alleging that INS violated this statute by refusing to provide the above-described information, needed "in connection with an investigation into management complicity in and countenance of misconduct committed against Union officials." Acting Regional Commissioner Nelson and Laurie Leone, Attorney-Advisor, Office of the General Counsel, OIG/DOJ ("as an agent of INS") were named in the

body of the charge as having unlawfully withheld the information but the concluding paragraph said that the conduct set forth above described violations of Section 7102 by INS. While the charge named, as the charged activity or agency DOJ, INS, it was served only on INS, i.e. on the Associate Commissioner, Management, INS at 425 Eye St., NW, Washington, DC and to the same title in Dallas, Texas.

Complaint issued on July 20, 1990 against INS, United States Border Patrol, El Paso, Texas, and was served on an INS Labor Relations Specialist in Dallas. It was alleged and admitted that Laurie Leone of OIG Washington was a supervisor and management official. INS denied that the requested documents were maintained in the normal course of business, were reasonably available, or were necessary for a full and proper discussion, understanding and negotiation of subjects within the scope of bargaining. It asserted such information is protected by the Privacy Act, and is in any event not in the possession of INS. The Answer also affirmatively averred that OIG, a separate entity within DOJ would not release records to INS in response to Marren's request, nor would it have authorized release of such records by INS had they been in its possession. It followed, said the Answer, that any failure by INS to produce records unavailable to it could not be an unfair labor practice. It provided the name and address of OIG to which, it said, any future requests should be addressed.

On November 29, (six days before the hearing), the Complaint was amended to add OIG as a Respondent. On the day before Respondent INS had served a copy of its Amended Answer to the original Complaint. It denied that Laurie Leone of OIG was a supervisor or a management official and denied that she was at material times acting on behalf of Respondent INS. On December 5, the day of the hearing, OIG entered its Answer to the Amended Complaint. It denied that any charge had been filed against it, denied that Laurie Leone was at any material time acting on behalf of INS, denied that Leone was a supervisor/management official, denied, oddly, that either INS or OIG had refused to supply the requested information, and denied such information was normally maintained, reasonably available or necessary.

On November 20, 1990 subpoenas were issued to Ruth Anne Myers, Acting Regional Commissioner, INS, Dallas, Guilberto Lobato, Regional Inspector General, OIG/DOJ in El Paso, and Abel Salazar, Supervisory Border Patrol Agent, INS, El Paso. The first required production at the hearing

of the OIG Report and investigative file concerning the assault/misconduct allegation made by Marren against Lucero regarding the October 8 incident when the two had disputed possession of a letter posted on the bulletin board.1/ The other two subpoenas asked for the same material, plus the appointment letter issued to the investigating agent (Salazar), and all documents concerning that investigation, including all relevant regulations or other authority concerning the agent's role as an investigator for OIG and the requirements and procedures governing INS personnel in investigations conducted for OIG, as well as documents showing what "happened with the complaint/allegation" made by Marren to OIG after it was made. At hearing a subpoena was also served upon David Bobzien, Assistant Counsel, Office of Professional Responsibility, DOJ, for the investigative file concerning the Marren-Lucero incident.

None of the subpoenaed materials was produced. I rejected an offer to make them available for in camera inspection on the ground that the essential teaching of Weather Service, 30 FLRA 127, was that the better practice is to order their production subject to a protective order. I did so, refusing to quash, and Respondents' refused to produce for a variety of reasons to be explored later.

The investigation which is the subject of these subpoenas was conducted by Abel Salazar, a Supervisory Border Patrol Agent. He is an employee of INS, but is from time to time assigned to investigate matters either for OIG or OPR, depending upon the nature of the case, as a "collateral" agent. The 1988 amendments to the Inspector General Act (5 U.S.C. Appendix 3) created an IG for DOJ. In the original Act of 1978, (5 U.S.C. App. 3, § 3(a)), Congress provided that

> Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of

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1/ The letter, from INS Regional Commissioner Martin to Lucero, indicated that Marren's charges had not been substantiated by the investigation. It was apparently the first communication Marren had seen regarding disposition of his allegations.

such establishment. Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation. (Underscoring provided.)

The 1988 amendments specifically provide that the DOJ OIG "shall be under the authority, direction and control of the Attorney General with respect to . . . investigations . . . which require access to sensitive information. . .". Thus the Attorney General may prohibit or interfere with an IG investigation, but if he does so he must provide the IG with a written explanation of his reasons therefor, and the latter must promptly transmit same to the relevant Committees of the Senate and the House of Representatives. The IG is, in turn, instructed to refer to Counsel, Office of Professional Responsibility, for investigation, information or allegations relating to misconduct or violations of law, regulation or order by any DOJ employee in an attorney, criminal investigative, or law enforcement position. (See text of 5 U.S.C. App. 3 § 8D, attached as Appendix). Section 9(I) of 5 U.S.C. App. 3 transferred to OIG/DOJ the functions, inter alia, of OPR/INS.2/ That law provided for transfer of personnel, records, etc., to the OIG. It also provided that the IG shall not disclose nonconsensually the identity of an employee who makes a complaint or provides information, unless he "determines such disclosure is unavoidable during the course of the investigation." (5 U.S.C. App. 3, § 7).

On April 14, 1989 OPR and OIG entered into a Memorandum of Agreement Regarding Conduct of Investigations. Recognizing that the IG was directed to refer all allegations of misconduct involving attorneys, criminal investigators and law enforcement personnel to OPR, "for timely investigation in accordance with the Attorney General's expressed intent", the Agreement provided, in lieu of contemplated transfers or details, that the OIG "will provide appropriate personnel . . . to the former internal investigative offices of the

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2/ Some considerable confusion in this case, as to who is working for whom, derives from the fact that there existed, apparently until April 14, 1989 an organization known as OPR within INS, whose operatives were subject locally to the Regional Commissioner. Forms reflecting that fact were used in an investigation in 1990.

components to perform those investigations falling within the purview" of OPR. Such investigations "now utilizing the staff of (OIG) will be conducted under the direction and control of the Counsel, (OPR)". Any conflicts between the organizations were to be resolved by the Attorney General.

OPR/DOJ is described in 28 CFR § 0.39 (April 24, 1980). It is headed by a Counsel appointed by the Attorney General, and subject to the latter's "general supervision and direction," as well as, whenever appropriate, that of the Deputy Attorney General, the Associate Attorney General or the Solicitor General. Its right to investigate any information or complaint concerning misconduct, including mismanagement, gross waste of funds, abuse of authority or a substantial danger to public health and safety, is specifically said not to "preempt the primary responsibility of internal inspection units of the Department to receive such information and to conduct investigations." It has the same obligations respecting the confidentiality of complainants or informants as those of OIG.

Robert Bobzien, an Assistant Counsel of OPR, testified that OPR supervises and controls agents of OIG investigating work within its jurisdiction, and that it can and has taken investigations from OIG agents. He said OPR directly conducts all investigations involving attorneys. He further said OPR is a creature of departmental regulations and an office directly under the Attorney General which is not "governed" by the IG statute. It maintains its own files, notwithstanding that they are often "stored" by OIG,3/ and it does not - never has - released its investigative files, not even to OIG. He said he cannot imagine the circumstances in which he would ever release a file. He distinguished such a release from providing "reports" to client agencies within DOJ such as INS, Bureau of Prisons or the Marshall's Service, for use in supporting disciplinary actions. Such reports, he said (which sometimes contain attachments), are created in such a way that agency management can review them in order to make a determination

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3/ OPR files in headquarters are maintained and stored by it. Those located elsewhere are, he said, kept by OIG because the small OPR office in Washington does not have the capacity to deal with them all. It is, he said, a "housekeeping thing". Theoretically, they could all be kept in Washington, but it serves OPR's purposes to have them segregated for storage by IG offices around the country.

concerning any action or discipline, or for use in defending the discipline imposed in MSPB or other proceedings. Those attachments relevant for purposes of imposing discipline are released to others, if in OPR's judgment the individual under investigation is entitled to them under MSPB or other law, including labor laws. Nevertheless, the entire file is never released, out of concern for the confidentiality of both witnesses and investigative practices and techniques, and "executive privilege", or the right to keep the deliberative process secret so as to avoid chilling the candor of those who, ultimately, advise the Attorney General about such matters. Impacting also, of course, is the Privacy Act.

As noted, Marren's allegations against Lucero were investigated by Supervisory Border Patrol Agent Salazar, operating as a collateral agent, assigned to such duty, he says, by OIG, although the assignment originated with OPR. The forms he receives assigning an investigation are stamped "OPR Coordinator". He turns the completed file over to the OPR Sector Coordinator in El Paso. In his investigations Salazar informs interviewees that he is conducting an OPR investigation under the authority of the Regional Commissioner. He further testified that the INS form used to require such testimony (GC Exh. 11(b)), which contains at the bottom, boxes to be checked opposite the words Office of Professional Responsibility and Office of the Regional Commissioner, indicate in the latter case the Regional Commissioner of OIG.4/ The form thus clearly suggests, since it was addressed to Marren, a law enforcement officer, that the investigation was being conducted for INS rather than OPR. The suggestion is strongly reinforced by the fact that, until the year before the form was used, there existed within INS an Office of Professional Responsibility. Thus is the impression conveyed that OPR remains a part of INS, and that records sought would be in the hands of INS. Salazar said that, while serving as a collateral, INS cannot interfere with his investigation and cannot get his file materials. He further stated that he assures witnesses that their statements will be released to OIG only.

Guilberto Lobato is the RIG, or Regional Inspector General for the Southern Region of OIG/DOJ. Before that, he

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4/ There is in fact a RIG, or Regional Inspector General, rather than a Regional Commissioner, OIG. The only Regional Commissioner clearly existing on this record is an official of INS.

served as the Regional Director, OPR/INS. He gave the same description of the relationship between INS, OIG and OPR. Thus, under the MOU, OIG does a great deal of the work for OPR (i.e. investigations of law enforcement officers). When non-criminal allegations are received by him, he classifies them as Category 1 (serious administrative misconduct) or Category II, less serious in nature. He also determines whether they are OIG or OPR responsibilities. A Category I case is then sent to the Southern Regional Commissioner in Dallas who forwards it to the Coordinator "located in" the Southern Region, INS, Dallas, with Lobato's covering letter requesting assignment of a specially trained INS person as a collateral officer to conduct the investigation as his agent, i.e. as an agent of OPR or OIG. INS has no control over the assignment. When the investigation is completed it is sent back to Lobato through the Coordinator for review. If it is deemed completed, Lobato determines whether the allegations are substantiated or unsubstantiated and whether the cases should be closed or remain open. No INS agent, including the Regional Commissioner can interfere, or see the file. If Lobato determines the allegations were unsubstantiated the case is closed and the file stored in a safe. If it is an OPR matter the file is the "property" of OPR. If the allegations are substantiated the case is forwarded to OIG headquarters in Washington which routes a "Report" to the Commissioner of INS, who in turn forwards it to the Regional Commissioner, INS, Dallas, who in turn sends it to the deciding official, the INS supervisor or manager who must decide whether to propose disciplinary action against the employee. Neither OIG nor OPR is involved in the process of determining whether to impose discipline.

When Lobato determines that a case should be closed for lack of substantiation, nobody except the collateral, the Coordinator and he will have seen it or be allowed to see it. The Report which is forwarded to the relevant agency in a substantiated case contains exhibits. What governs their number or identity is not terribly clear; apparently it is relevance to any discipline to be considered. Those agency officials charged with administration of discipline and any proceedings in the aftermath of its proposal cannot get the file from him. Should he receive a request for a file, Lobato forwards it to the General Counsel of OIG in Washington for a decision, or in the case of an OPR file, for referral to OPR. He, like Salazar of INS, handles OPR investigations, although he is an OIG employee, and "stores" OPR's records separate from those of OIG and under the supervision of OPR. He does not, it is claimed, "maintain in the normal course" the records of OPR. Rather he is a "custodian" of those not forwarded to headquarters.

Lobato did not produce the Lucero files under subpoena because, he said, he submitted them to Washington on January 17, 1990, after receiving what he considered a FOIA request for them.

Laurie Leone, an Attorney-Advisor in the Office of the General Counsel, OIG, handled at least one, if not both, of Marren's information requests, responding to him on the assumption it was a FOIA request. She testified that Section 7 of the IG Act prohibits disclosure of the identities of complainants and witnesses, unless it is unavoidable for purposes of an effective investigation. She further said Section 5 contains a provision incorporating the Privacy Act, construed by OIG not only to prohibit release of such files, but even confirming or denying their existence. OIG cannot, she said, release OPR files in its possession, nor would it release one of its own files to a client agency. If a client had a demonstrated need (i.e. use in connection with discipline) it would get a Report plus "related exhibits"; in no other circumstances would such information be released. Thus a file closed as concerning unsubstantiated allegations, as in the instant case, would not be released.

Discussion and Conclusions

The Procedural Issue: There is the question whether OIG can be found to have independently violated Section 7116(A)(1) and (8) by interfering with the collective bargaining relationship between INS and NBPC, given that INS was the only agency charged and served with either the charge or original complaint, although both documents refer to OIG Attorney-Advisor Leone as having acted on behalf of INS.

Although couched as a Section 7118(a)(4)(A) defense, i.e. that the Complaint amendment is barred "because there was no underlying, timely, ULP charge filed by the Union in which it alleged that OIG . . . refused to supply. . . .", the defense appears in analysis to be that the charge, which was timely as respects the alleged violation, will not support a complaint against the unnamed OIG[5/] As no amended

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5/ Section 7118(a)(4)(A) says that "(No) complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority." Were this case one properly viewed as (Footnote continued on next page.)

charge was ever filed, the question of timeliness does not arise. The question is instead the scope of the charge: may it be said to properly encompass OIG, solely on the ground an OIG employee was therein named as being an agent of INS?

It is not entirely clear to me why a charge filed against one component of an agency does not serve to bind others involved in the alleged infraction, especially those up a chain of command. There is, however, a dearth of precedent, presumably because appropriate amendments are made in time.

Scott Air Force Base, 44 FLRA No. 11, may provide the answer. There a timely charge was filed alleging that the Base violated the law by issuing a furlough letter without providing the union prior notice and an opportunity to bargain. Just three days short of six months after that event an amended charge was filed adding Headquarters, USAF as a charged party. The complaint alleged that Headquarters violated Section 7116(a)(1) and (5) when:

> [o]n or about September 14, 1990, HQ USAF directed Scott AFB to issue Notices of Proposed Furlough to employees no later than September 18, 1990.

September 14 was one day beyond the six-month reach of the amended charge. The Authority concluded that HQ USAF "may properly be charged with violating the Statute on September 18, 1990 when Respondent Scott AFB carried out Respondent HQ USAF's directive to issue the notices. Therefore . . . the March 15 . . . charge against . . . HQ USAF was timely filed under section 7118(a)(4)(A) . . .". Thus the Authority applied the limitation period to determine whether prosecution of HQ USAF was precluded, and its determination that the directive of September 14 caused a violation on September 18 brought HQ's conduct within reach of the amended charge. While this approach does not remove the possibility that the Authority might have found the original charge to suffice had there been no unlawful

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(Footnote continued from previous page.)

a contest over application of this "statute of limitations", such affirmative defense might well be viewed as waived by failure to assert it until briefs were filed. Cf. McKesson Drug Co., 257 NLRB 468. In my view it is a jurisdictional issue which could properly be raised after the hearing.

conduct within reach of the amended charge, it implies that the Authority will not find a charge against a subordinate to encompass a higher level's conduct, even where that conduct compels the subordinate to violate the law.

Here an even stronger case can be made for a finding that OIG is not reached by a charge against INS, as it is not located up the latter's chain of command. OIG is, in addition, a highly independent component of DOJ, and is in many respects as much a resident presence of the Congress as it is a part of DOJ. That is to say, while the Attorney General has somewhat more authority over his OIG, that office has enormous independence with respect to its investigations. Nor can it be argued, as might have been the case with an attempt to amend in OPR, that the real "culprit" was hidden from view, and its role never disclosed. Here the response to the request referred the Charging Party to OIG. It would appear, in such circumstances, that the validity of the charge, as one supporting a complaint allegation against OIG, hangs on the tenuous thread of the mention of that organization's employee as one who withheld information "as an agent" of INS. That might have been a beginning, but it was not served on OIG, and the appearance of the latter's noninvolvement was fortified by a highly similar formal complaint which again failed to name OIG as a "charged" party and was not served upon it. Even if OIG was aware of a real potential for its envelopment in such litigation, the Complaint issued four months after the charge and five months after the incident directly involving OIG, left it out, and the limitation period of 7118(a)(4)(A) for any amendment, should one be deemed necessary, expired a few weeks later. Thus a new or amended charge against OIG would have been time-barred by August 10, almost four months before the attempt to amend the complaint. In such circumstances I conclude that the charge is not a proper predicate or valid basis for the Amended Complaint.

The Merits

Without a viable charge against OIG or any at all against OPR, the apparent keeper of most of the records sought, we are faced with the question of what to do with INS. Neither of the Offices which compile and house such records as the Union here seeks can directly be ordered to do anything.

Nevertheless, Section 7114(b)(4) provides that an agency shall, upon request, furnish an exclusive representative, to the extent not prohibited by law, data which is normally

maintained in the regular course of business; which is reasonably available and necessary for full discussion, understanding and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel or training for management officials or supervisors relating to collective bargaining.

The documents sought of INS are, so far as we can tell from this record, in the custody of OIG and OPR. Those investigations involving law enforcement officers are, by regulation, within the province of OPR, although in the physical custody of OIG. The generalized request for all agency files concerning alleged assaults upon agency employees by agency employees would be in the custody of OIG where neither attorneys nor law enforcement authorities are involved. To the extent any such investigations found merit to allegations of misconduct, it is clear that the investigators' Report, sometimes with attachments, is furnished routinely to INS. Where allegations are determined to be unsubstantiated, the unrefuted (and, in the circumstances, unrefutable) testimony is that the files are simply closed, and no information is made available to INS or anybody else.

The conclusion is inescapable that INS can get reports of investigations, with what may be deemed "relevant" attachments, in all investigations which gave rise to the possibility of discipline. As INS could effectively request OPR or OIG, each a component of the same parent agency, DOJ, to furnish the documents covered by the request, it follows that they are within the control of the agency and are normally maintained within the meaning of Section 7114(b)(4). U.S. Department of Commerce, NOAA, NWS, 38 FLRA 120, 128-129. It cannot be seriously contended that such information is not reasonably available as, again, it is readily available upon request.

Such information is necessary to a union which professes it has reason to grieve, or invoke other forms of redress, concerning the application of a double standard as between union officials and others in misconduct investigations/ discipline. U.S. Department of Labor, 39 FLRA 531, 537. Such information would enable the union to compare those cases involving union officers with those that do not.

There is no evidence that the information sought constitutes guidance, advice or counsel relating to collective bargaining (NLRB, 38 FLRA 506), nor is there any indication that the Privacy Act is a barrier, as the material can be sanitized so as to protect the identity of complainants and witnesses.

The same analysis would appear to apply to the files, although with several caveats. It is assumed that OPR and OIG are entitled to protect investigative techniques, as well as sources or other matters which may have no relevancy to Marren's purposes. Lacking the files at issue, one is at a loss with respect to what may be withheld. Cf. 5 U.S.C. § 552(b)(7). Similar considerations apply to cases closed for lack of substantiation. While the testimony is that they are never made available under any circumstances, no law or regulation is proffered as the reason for such a stance. Presumably they are simply of no value to client agencies where no misconduct has occurred. Yet they have the same usefulness to the Union.

One cannot escape concern about the real possibility that the request here is a gigantic and very burdensome fishing expedition. Marren believes his complaints got short shrift, but even two swallows do not necessarily make a Spring. Nevertheless, there appears to be no impediment to his (or the Union's) entitlement to such materials. Only Respondent is in a position, at this juncture, to have any idea how much disclosure would meet his needs.

Having failed to make the files subpoenaed available, Respondent has foreclosed any examination of their contents, or any informed effort to determine what it might be privileged to withhold. Thus any determination whether a given file has been oversanitized must be resolved in compliance proceedings.

INS failed to comply with Section 7114(b)(4), and thereby violated Section 7116(a)(1), (5) and (8) on January 12, 1990, by failing and refusing to request that the appropriate DOJ components, i.e. OIG and OPR make available to the Union the data it requested.6/

Based on the foregoing, I recommend that the Authority issue the following Order:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118

6/ I have ignored Respondent's Motion to Strike as well as General Counsel's Response, feeling capable to sift the evidence without such help.

of the Statute, it is hereby ordered that the United States Immigration and Naturalization Service, United States Border Patrol, El Paso, Texas, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, AFL-CIO, National Border Patrol Council the data it requested, pursuant to 5 U.S.C. 7114(b)(4), on December 18, 1989 and January 8, 1990, consisting of the appropriately sanitized files of investigations into misconduct allegations made by the Office of Inspector General and/or Office of Professional Responsibility.

(b) In any like or related manner, failing or refusing to furnish to the Union, upon request, data which is normally maintained in the regular course of business, which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining, and which is not prohibited by law from release.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Furnish the Union with the data it requested, pursuant to Section 7114(b)(4), on December 18, 1989 and January 8, 1990, consisting of the appropriately sanitized files of investigations into misconduct allegations made by the Office of Inspector General and/or Office of Professional Responsibility.

(b) Otherwise furnish to the Union, upon request, data which is normally maintained in the regular course of business, which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, which does not constitute guidance, advice, counsel, or training

provided for management officials or supervisors relating to collective bargaining, and which is not prohibited by law from release.

(c) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner, Southern Regional Office, INS and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Dallas Regional Office, Federal Labor Relations Authority, Dallas Regional Office, 525 Griffin Street, Suite 926, LB-107, Dallas TX 75202, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

All of the allegations against the United States Department of Justice, Office of Inspector General, Washington, DC are dismissed.

Issued, Washington, DC, April 1, 1992

John H. Fenton

JOHN H. FENTON
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish the American Federation of Government Employees, AFL-CIO, National Border Patrol Council with data requested on December 18, 1989 and January 8, 1990, consisting of the appropriately sanitized files of investigations into allegations of misconduct which were conducted by the Office of Inspector General and/or Office of Professional Responsibility.

WE WILL NOT in any like or related manner, fail or refuse to furnish to the Union, upon request, data which is normally maintained in the regular course of business, which is reasonable available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining, and which is not prohibited by law from release.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL furnish the Union with the data requested on December 18, 1989 and January 8, 1990, consisting of the appropriately sanitized files of investigations into misconduct allegations made by the Office of Inspector General and/or Office of Professional Responsibility.

WE WILL otherwise furnish to the Union, upon request, data which is normally maintained in the regular course of business, which is reasonable available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to

collective bargaining, and which is not prohibited by law from release.

_____
(Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Dallas Regional Office, whose address is: 525 Griffin Street, Suite 926, LB-107, Dallas TX 75202, and whose telephone number is: (214) 767-4996.

Historical and Statutory Notes

Effective Date. Section effective 180 days after Oct. 18, 1988, see section 113 of Pub.L. 100–504, set out as a note under section 5 of this Act.

Legislative History. For legislative history and purpose of Pub.L. 100–504, see 1988 U.S.Code Cong. and Adm. News, p. 3154.

§ 8D. Special provisions concerning the Department of Justice

(a)(1) Notwithstanding the last two sentences of section 3(a), the Inspector General shall be under the authority, direction, and control of the Attorney General with respect to audits or investigations, or the issuance of subpenas, which require access to sensitive information concerning—

(A) ongoing civil or criminal investigations or proceedings;

(B) undercover operations;

(C) the identity of confidential sources, including protected witnesses;

(D) intelligence or counterintelligence matters; or

(E) other matters the disclosure of which would constitute a serious threat to national security.

(2) With respect to the information described under paragraph (1), the Attorney General may prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpena, after such Inspector General has decided to initiate, carry out, or complete such audit or investigation or to issue such subpena, if the Attorney General determines that such prohibition is necessary to prevent the disclosure of any information described under paragraph (1) or to prevent the significant impairment to the national interests of the United States.

(3) If the Attorney General exercises any power under paragraph (1) or (2), the Attorney General shall notify the Inspector General in writing stating the reasons for such exercise. Within 30 days after receipt of any such notice, the Inspector General shall transmit a copy of such notice to the Committees on Governmental Affairs and Judiciary of the Senate and the Committees on Government Operations and Judiciary of the House of Representatives, and to other appropriate committees or subcommittees of the Congress.

(b) In carrying out the duties and responsibilities specified in this Act, the Inspector General of the Department of Justice—

(1) may initiate, conduct and supervise such audits and investigations in the Department of Justice as the Inspector General considers appropriate;

(2) shall give particular regard to the activities of the Counsel, Office of Professional Responsibility of the Department and the audit, internal investigative, and inspection units outside the Office of Inspector General with a view toward avoiding duplication and insuring effective coordination and cooperation; and

(3) shall refer to the Counsel, Office of Professional Responsibility of the Department for investigation, information or allegations relating to the conduct of an officer or employee of the Department of Justice employed in an attorney, criminal investigative, or law enforcement position that is or may be a violation of law, regulation, or order of the Department or any other applicable standard of conduct, except that no such referral shall be made if the officer or employee is employed in the Office of Professional Responsibility of the Department.

(c) Any report required to be transmitted by the Attorney General to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified under such section, to the Committees on the Judiciary and Governmental Affairs of the Senate and the Committees on the Judiciary and Government Operations of the House of Representatives.

(Added Pub.L. 100–504, Title I, § 102(f), Oct. 18, 1988, 102 Stat. 2520.)

Historical and Statutory Notes

Effective Date. Section effective 180 days after Oct. 18, 1988, see section 113 of Pub.L. 100–504, set out as a note under section 5 of this Act.

Transfer of 20 Investigation Positions Within the Department of Justice. Section 102(h) of Pub.L. 100–504 provided that: "No later than 90 days after the date of appointment of the Inspector General of the Department of Justice, the Inspector General shall designate 20 full-time investigation positions which the Attorney General may transfer from the Office of Inspector General of the Department of Justice to the Office of Professional Responsibility of the Department of Justice for the performance of functions described