



U.S. OFFICE OF SPECIAL COUNSEL
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The Special Counsel

December 6, 2001

The President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-00-2246

Dear Mr. President:

In accordance with 5 U.S.C. § 1213(e)(3), I am transmitting a report and supplemental report from the Honorable John Ashcroft, Attorney General, and the Honorable Kevin D. Rooney, former Acting Commissioner, U.S. Department of Justice, Immigration and Naturalization Service (INS), sent to me pursuant to 5 U.S.C. §§ 1213(c) and (d). I transmitted the disclosure to the Honorable Janet Reno, former Attorney General. The reports set forth the findings and conclusions of the agency's review of disclosures of information allegedly evidencing violations of law, rule, or regulation by officials of the Department of Justice, INS, San Juan, Puerto Rico.

The whistleblower, Mr. Johnnie W. Dorsey, provided comments on the agency reports to this office pursuant to 5 U.S.C. § 1213(e)(1), which I am also transmitting.

We have carefully re-examined Mr. Dorsey's original disclosures and reviewed the agency's response and Mr. Dorsey's comments. As described below, I have determined that the agency's report, as supplemented, contains all of the information required under section 1213(d). In addition, I have determined that the agency's findings appear reasonable within the meaning of section 1213(e)(2).

The Whistleblower's Disclosures

Mr. Dorsey, who consented to the release of his name, alleged that the San Juan District Director, Myrna Pere, permitted employees to use administrative leave without charging it on a time and attendance report if they contributed \$500.00 or more to the Combined Federal Campaign (CFC), and that time and attendance records were falsified in connection with this administrative leave. I found a substantial likelihood that this information disclosed a violation of CFC regulations set forth at 5 CFR 950, *et seq.*, and of federal laws and regulations governing time and attendance reporting. The specific CFC regulations alleged to have been violated were 5 CFR 950.108(b) and (d), prohibiting the disclosure to supervisors

of anything more than summary information about employees who participate in the CFC, and the setting of personal dollar goals or quotas.

Section 1213(c) provides that in response to the transmittal of such allegations, the agency head shall conduct an investigation and submit a written report "setting forth the findings of the agency head." 5 U.S.C. § 1213(c)(1)(B). The specific items required to be addressed in the written report are set forth in section 1213(d), and include, *inter alia*, "a listing of any violation or apparent violation of any law, rule, or regulation;" and "a description of any action taken or planned as a result of the investigation..." 5 U.S.C. § 1313(d)(4) and (5). Upon receipt of the report, the Special Counsel must determine whether the report contains the information required under section 1213(d), and whether the findings of the agency head appear reasonable. 5 U.S.C. § 1213(e).

Agency's Report

The report substantiated the essence of Mr. Dorsey's disclosure – that officials at the San Juan District Office operated a program rewarding employees who contributed to the CFC at a certain dollar level by granting administrative leave, and that time and attendance records did not accurately reflect the leave status of certain employees.

Specifically, the investigation substantiated the allegation that the "Super Giver" program did exist and was a long-standing part of the San Juan Office's annual CFC campaign. According to the report, in 1999, eight employees gave \$500 or more to the CFC program, and five took leave. Of those five, one employee's time was misreported. In 2000, 20 employees gave \$500 or more to the CFC program, and seven took leave. Of the seven, three employee's timesheets were improperly prepared. As a part of the program, the names of the participants were reported to the District Director in both years.

The report concluded that the program violated 5 CFR 950.108, in that improper incentives were awarded and inappropriate goals were established. The report also stated that the misreporting of administrative leave violated 5 CFR 610 and DOJ Order 1630.1(b), Chapter 14. Notwithstanding the findings of violations of law, rule, or regulation, the report states that there was no evidence developed that would indicate a knowing and willful violation of these regulations.

The agency has taken appropriate corrective action with respect to these identified violations of law. The Eastern Regional Director, INS, has issued a counseling letter to the District Director regarding her management of the CFC program. In addition, the agency has corrected errors in the payroll records.

Whistleblower's Comments on Report

Mr. Dorsey's comments raise exactly the concern, regarding the ability of whistleblowers to report government abuses free from the fear of reprisal, that the Whistleblower Protection Act was enacted to address. Mr. Dorsey, a 28-year career federal employee, motivated by a strong sense of duty and responsibility, spoke out for the first time in his career, about what he felt to be a questionable practice. Despite the fact that the report substantiated his concerns, Mr. Dorsey expressed regret over having made the difficult decision to speak out. He feels that he has, since the disclosure, become the victim of work place harassment by the very supervisor he reported. He cites a recent letter of reprimand he received, within days of the issuance of the report, for an alleged indiscretion that occurred in October 1999. He stated that he believes that the disclosure has left him without hope of career advancement, or protection from further harassment.

Mr. Dorsey suggests that employees making disclosures be forewarned of the adverse political career consequences they may face. Second, he suggests that employees and their supervisors be given documentation regarding the law protecting whistleblowers against reprisal for making protected disclosures. Finally, Mr. Dorsey believes that the whistleblower should be given a "fast track avenue" to immediately counteract an action, or obtain protection from reprisal that may occur during an investigation.

Special Counsel's Comments on Agency's Report and Recommendations

As is to be expected, I am especially concerned when a whistleblower's comments suggest a fear of retaliation. Although the provisions of section 1213 do not empower the Office of Special Counsel (OSC) to take action on such claims, this office can and will address such claims of reprisal for whistleblowing through the authority granted to OSC in the Whistleblower Protection Act. Such an effort is already underway in Mr. Dorsey's case.¹

Conclusion

I have determined, pursuant to section 1213(e)(2), that the agency's report contains all of the information required under section 1213(d), and that the findings of the agency head appear reasonable, for the reasons stated above.

¹ Mr. Dorsey filed a prohibited personnel practice complaint that is currently being investigated by OSC's Investigation and Prosecution Division. See OSC File No. MA-01-1913.

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As required by section 1213(e)(3), I have sent a copy of the report to the Chairmen of the Senate and House Committees on the Judiciary. We have also filed copies of the report and Mr. Dorsey's comments in our public file and closed the matter.

Respectfully,

A handwritten signature in black ink, appearing to read "Elaine Kaplan". The signature is written in a cursive style with a large initial "E" and a long, sweeping tail.

Elaine Kaplan

Enclosure