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Analysis of Disclosures, Agency Investigation and Reports, Whistleblower Comments, and Comments of the Special Counsel

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The Whistleblowers' Disclosures

In February 2001, the whistleblowers, Larry E. Davenport, a former Senior Patrol Agent with approximately fifteen years of experience in U.S. Border Patrol (Border Patrol), and Willie A. Forester, a former Supervisory Border Patrol Agent (SBPA) with approximately twenty years of experience, disclosed to the Office of Inspector General (OIG) for the Department of Justice[1] that SBPAs and Border Patrol Agents (BPAs) detailed to the Douglas, Arizona Border Patrol Station (Douglas Station) were engaging in kickbacks and fraudulent reimbursement claims in relation to their lodging expenses. At the time, Douglas Station was one of the locations for Border Patrol's "Operation Safeguard 99," which brought a heavy influx of BPAs on details to the area. The whistleblowers alleged that employees of Border Patrol were renting rooms to detailed agents, charging rent at rates lower than the per diem rates or refunding a portion of the rent charged, and providing agents with false receipts reflecting payment of the full per diem amount. In addition, the whistleblowers alleged that many detailed agents were accepting cash rebates, credits, and other kickbacks from local lodging facilities while claiming the full per diem amount for reimbursement. Finally, the whistleblowers alleged that management of Border Patrol was aware of these improper activities but refused to take any action to address the problem.

On January 8, 2003, after significant delays[2], OIG published a Report of Investigation (OIG Report), which is attached hereto as Exhibit 1. The OIG Report substantiated the whistleblowers' allegations that SBPAs and BPAs were conducting kickback and fraudulent reimbursement schemes in violation of the Federal Travel Regulation pertaining to temporary duty travel allowances, 41 C.F.R. § 301 *et seq.*, in some instances, 18 U.S.C. § 287 (False, Fictitious or Fraudulent Claims) and, potentially, statutory and/or regulatory conflict-of-interest provisions. OIG also faulted management of the Immigration and Naturalization Service (INS) for failing to adequately prepare for and oversee the lodging needs of the extensive number of agents detailed for Operation Safeguard. In light of the "troubling practices on the part of the INS and many of its agents," OIG concluded that "strong and immediate action" was required and forwarded its findings to INS for corrective and/or disciplinary action.

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[1] Prior to March 1, 2003, Border Patrol was a component of the Immigration and Naturalization Service within the Department of Justice. As a result, the whistleblowers initial disclosures was made to DOJ. On March 1, 2003, Border Patrol merged into the Department of Homeland Security as a component of U.S. Customs and Border Protection.

[2] OIG initiated an investigation in September 2001, only after the whistleblowers reported their allegations to United States Representative Jim Kolbe, in whose Congressional district the Douglas Station is situated.

In February 2003, the Office of Special Counsel (OSC) contacted OIG and the Office of Internal Affairs (OIA) for INS to determine the status of corrective and/or disciplinary action. We were advised by OIA that it would provide recommendations to Border Patrol upon the receipt of a more detailed report from OIG. On the basis of OIA's representations, OSC delayed referring the whistleblowers' allegations to the agency for formal investigation. Not until November 20, 2003, nearly a year after first being contacted by OSC, did U.S. Customs and Border Protection (CBP) advise OSC that it had decided to forego disciplinary action against employees found to have been engaged in wrongdoing.

Even more troubling, CBP informed OSC that the Chief of DHS, Bureau of Immigration and Customs Enforcement, Headquarters Human Resources, Employee Relations Section had issued a memorandum to Border Patrol in July 2003 recommending that no disciplinary action be taken against any of the wrongdoers identified by OIG. CBP provided to OSC a copy of that July 29, 2003, memorandum, which is attached hereto as Exhibit 2. The memorandum states, in part:

> Our office is primarily responsible for determining whether appropriate disciplinary and/or adverse action is indicated. An analysis of all the facts and circumstances surrounding these investigations concludes that we neither support nor recommend discipline.

The memorandum further states that "[w]e cannot afford to channel off our energies with an administrative burden that disciplining 75 individuals would entail. For example, even a one-day suspension must be proposed by the employee's first-line supervisor and decided by the employee's second-line supervisor." Thus, Border Patrol decided not to discipline federal law enforcement employees who broke the law because it would be administratively burdensome.

Given OIG's recommendation of "strong and immediate action," the evident seriousness of the wrongdoing identified in the OIG Report, and CBP's refusal to take disciplinary action against any of the employees involved in that wrongdoing, OSC referred the whistleblowers' allegations to the Secretary of DHS for formal investigation by the agency pursuant to 5 U.S.C. § 1213(c) and (d).

The Agency's Investigation and Reports

Initial Report

Six months after OSC referred the whistleblowers' allegations to DHS for investigation, Secretary Thomas J. Ridge produced a report (Initial Report) "summarizing the actions taken [and recommended] by CBP" in response to the findings in the prior OIG investigation. The agency's Initial Report reflected the work of a special panel convened by CBP to "propose any adverse or disciplinary action warranted by the evidence" that OIG had collected. It recommended additional training for managers, supervisors and front line agents and the development of improved procedures for reviewing reimbursement claims. The Initial Report also attached policy memoranda issued by management of Border Patrol and CBP regarding travel and lodging reimbursement procedures. Finally, the Initial Report cited forty-five instances of corrective or

disciplinary action, including suspensions, removals, and a demotion, that the special panel proposed against employees implicated in the wrongdoing substantiated by OIG.

The Initial Report did not identify any corrective or disciplinary action taken against management personnel. Indeed, the special panel noted that it was "unable to address issues related to . . . management's involvement in the travel-related improprieties" because OIG's investigation did not provide sufficient evidence. To remedy this defect, the special panel recommended that "interviews be conducted with the Tucson Sector's entire chain-of-command." Nevertheless, no such investigation was conducted prior to the agency's submission of its Initial Report to OSC, and the whistleblowers' allegations that management personnel were involved in and/or tolerated the wrongdoing at issue went unaddressed.

OSC reviewed DHS's Initial Report and determined that it was deficient because the agency failed to address the involvement of management in the wrongdoing identified by the whistleblowers and neglected to interview the whistleblowers. On April 23, 2004, OSC advised DHS of its concerns, and the agency agreed to prepare a supplemental report addressing them.

Supplemental Report

On December 29, 2004, OSC received the final version of a supplemental report (Supplemental Report) prepared by the Office of Internal Affairs for CBP. This Supplemental Report detailed the findings of a more extensive investigation into the involvement of management personnel in kickback and fraudulent reimbursement schemes at Douglas Station. According to CBP, investigators interviewed over twenty-five management employees, and found little evidence of management involvement and/or acquiescence in the wrongdoing the whistleblowers identified.

Upper-level management uniformly provided statements to the Office Internal Affairs for CBP that minimized their knowledge of and involvement in travel-related wrongdoing at Douglas Station. Patrol Agent In Charge (PAIC) Norma King stated that she only "became aware of the travel voucher and kickback problem" when the whistleblowers informed her that they had made disclosures to OIG and that she "addressed the issue . . . within two weeks of the allegations being made." Associate Chief at Headquarters Rowdy Adams stated that he only "became aware of the voucher problem in May 2001." He added, however, that he had information regarding travel regulations added to briefing packets in October 2000, and suggested that the wrongdoing at issue can be traced to an influx of inexperienced agents at a border patrol station that had outgrown its "supervisory, command and control[] structure." Chief Patrol Agent David Aguilar stated that he first learned of the wrongdoing at issue through Associate Chief Adams and PAIC King.

In the course of its investigation, the Office of Internal Affairs for CBP found only one supervisor who would admit some contemporaneous knowledge of wrongdoing at Douglas Station. The Supplemental Report summarizes the statement of Bryant Brazley, a Supervisor at Chula Vista Station, as follows:

> He state[d] that things at Douglas were out of control. He state[d] he recalled talk about incentives and that these *were passed up the chain of command*, but he claim[ed] he never heard any answers. He also

> stated he was aware that several local supervisors had rooms to rent. . . . He also said he heard rumors about cash kickbacks on his second or third detail. (Emphasis added.)

The Supplemental Report makes no effort to resolve the apparent contradiction between this statement and the statements of upper-level management personnel. Instead, it notes that "the vast majority of people interviewed stated that they were not aware of the [whistleblowers'] allegations until the OIG investigation started." On the basis of such statements, the Supplemental Report purports to exonerate management personnel: "Corrective Action on their part would have been difficult since they did not know the improprieties were taking place."

The Supplemental Report also revisits the disciplinary action taken against employees of the Border Patrol in response to the OIG's investigation and OSC's original referral. In particular, it notes that of the forty-five instances of proposed disciplinary action cited in the Initial Report, four involved supervisory personnel. According to the Supplemental Report, three of the four actions proposed against supervisors were sustained, including one instance of removal.[3] Still, the Supplemental Report identifies no instances of disciplinary action taken against upper-level managers whom the whistleblowers identified as wrongdoers in their disclosures to OSC.

The Whistleblowers' Comments

The whistleblowers submitted comments concerning both the Initial Report and the Supplemental Report, consistently maintaining that the agency's investigation was inadequate and its reports contained inaccurate factual findings. Ultimately, the whistleblowers concluded that the agency "seems to be avoiding the full scope—as well as the ugly truth—of Rentgate."

In a six-page response dated June 30, 2004, the whistleblowers disputed the adequacy of the agency's investigation and remedial action as reported by DHS in its Initial Report. In particular, the whistleblowers maintained that the OIG investigation on which DHS relied was deficient insofar as OIG neglected to interview numerous Border Patrol employees, whom the whistleblowers identified as participants in the alleged wrongdoing. The whistleblowers further criticized the work of the special panel because the disciplinary action it proposed applied exclusively to "lower level agents," ignoring the involvement of management personnel in the wrongdoing. Finally, the whistleblowers objected that DHS neglected to interview them regarding their allegations, despite their long-standing contention that they have knowledge and evidence of extensive wrongdoing by at least sixteen management officials.

In their comments concerning the agency's Supplemental Report, the whistleblowers protest that the agency again neglected to interview them regarding their allegations. As a consequence, the whistleblowers maintain, CBP failed to question a number of the management officials involved in the pervasive kickbacks and fraudulent reimbursement claims at Douglas Station. Moreover, the

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[3] OSC has determined that of the six employees whom the Border Patrol proposed to remove as a consequence of their involvement in wrongdoing at Douglas Station, all but one were allowed to remain with the agency. In two instances the agency's deciding official did not sustain the proposed removal, and in three instances, the agency reached settlement agreements with the subject employees. Thus, the only employee removed as a result of the wrongdoing identified by the whistleblowers was a non-supervisory Border Patrol Agent.

whistleblowers assert that as a direct result of the agency's refusal to interview them, CBP failed to develop testimonial and documentary evidence that contradicts the statements of many of the officials they interviewed. For example, the whistleblowers identify the following inconsistencies between the statements of management personnel and evidence in their possession:

- Mr. Davenport maintains that he reported his concerns regarding kickbacks and fraudulent reimbursement claims to Associate Chief Adams, PAIC King, and Special Operations Supervisor (SOS) Monte Garland in a meeting that occurred before the whistleblowers reported their allegations to the OIG in February 2001 but was told to "mind his own business";

- The whistleblowers observe that "the volume of rental flyers posted ... in the muster room" makes it "hard to believe" that supervisory staff "had no prior knowledge of the kickback scheme" at Douglas Station;

- The whistleblowers allege that Mr. Brazley rented a house located at 1550 15th Street in Douglas, Arizona, to agents detailed from California and paid kickbacks to his tenants upon completion of their detail;

- According to the whistleblowers, Chief Patrol Agent Aguilar contacted Mountain Vista Apartments in Sierra Vista, Arizona, in June 2000 regarding their practice of paying kickbacks to detailed agents;

- The whistleblowers contend that BPA Russ Jensen, who was renting to a detailed agent, complained to Chief Patrol Agent Aguilar *via* memorandum that his tenant was demanding a kickback, but Chief Patrol Agent Aguilar refused to intervene;

- Mr. Davenport asserts that SBPA Adam Zeitz, SBPA Eric Moncayo, and SOS Monte Garland approached him to solicit tenants for SBPA Salvador Marquez in the presence of Associate Chief Adams and Associate Chief Patrol Agent (ACPA) Carlos Carrillo; and

- Mr. Davenport alleges that Associate Chief Adams and ACPA Carrillo told him that "if he wanted to move up in the Border Patrol ... he had to get along."

On the basis of this and other information, the whistleblowers contend that "[a]t a minimum, management condoned the fraud" at issue in their disclosures and that the agency has "failed to conduct a *thorough* investigation."

Conclusion

Based on the representations made in the agency's reports and as stated above, I have determined that the agency's reports contain all of the information required by statute, but I am unable to conclude that the agency's findings are reasonable. After extensive delays and two reports, the agency's response to the whistleblowers' disclosures remains inadequate. In particular,

the agency appears to have discounted without justification evidence implicating management and supervisory personnel in the wrongdoing identified by the whistleblowers. Disciplinary action taken by the agency focused on low-level BPAs and four SBPAs despite the whistleblowers' allegations of extensive management involvement in the wrongdoing at issue. When asked by OSC to address the whistleblowers' allegations regarding upper-level management, CBP did interview many of the management officials who oversaw Douglas Station, but it appears to have uncritically accepted their contentions that they were unaware of any wrongdoing. It is simply not credible that forty-five employees at a single Border Patrol station could engage in a pattern of conduct sufficiently egregious to warrant severe discipline without the knowledge of management.

The agency appears to have exerted little effort to follow up on evidence that would call into question the contentions of its management personnel. For example, Mr. Brazley's statement appears to contradict the statements given by upper-level managers, but it was dismissed as a single statement among many exonerating statements. More importantly, DHS and CBP flouted OSC's specific request that the whistleblowers be interviewed regarding their allegations. In short, CBP did not avail itself of all reasonably available information in the course of its investigation. The agency's investigation of management appears pretextual, and at best, I can conclude that DHS and CBP "failed to conduct a *thorough* investigation."