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**Analysis of Disclosures, Agency Investigation and Report,
Whistleblower Comments, and Findings of the Office of Special Counsel**

OSC File No. DI-08-3066

Summary

Jose Castillo, former Auditor, Department of Labor (DOL), Employee Benefits Security Administration (EBSA), New York, New York, alleged that he was prevented from investigating allegations of prohibited transactions under the Employee Retirement Income Security Act (ERISA) in a timely manner. The Office of Special Counsel (OSC) referred Mr. Castillo's allegations to the Honorable Elaine L. Chao, former Secretary of Labor, on January 9, 2009.

On September 9, 2009, OSC received the agency's report from Mary Ann Wyrsh, Associate Deputy Secretary for Management, DOL. Assistant Deputy Secretary Wyrsh was delegated the authority to respond to the disclosures by the Honorable Hilda Solis, Secretary of Labor. The investigation was conducted by the DOL Office of Inspector General (OIG). The DOL OIG investigation substantiated two of Mr. Castillo's allegations. However, the report noted that neither substantiated allegation constituted an abuse of authority. Rather, delays in the investigation of potential ERISA violations were caused by managerial inexperience. OSC finds that the agency's report contains all of the information required by statute and that its findings appear to be reasonable.

The Whistleblower's Disclosures

Mr. Castillo disclosed that he received a letter in November 2005 from [REDACTED], a participant in the Local 12 Asbestos Workers Annuity Funds (Local 12 Funds). [REDACTED] claimed that the Local 12 Funds' participants were defrauded of their earnings from the year 2000. These earnings were later determined to be \$1.8 million. Mr. Castillo attempted to discuss this issue with Group Manager Robert Goldberg, his temporary acting supervisor. Mr. Castillo alleged that Mr. Goldberg refused to review any of the information Mr. Castillo provided. When Group Manager Nichelle Langone became Mr. Castillo's supervisor in February 2006, Mr. Goldberg remained Mr. Castillo's "special supervisor" for issues related to the Local 12 Funds case. In his ten year career at the EBSA, Mr. Castillo alleged that he had never seen a "special supervisor" appointed in any other cases.

Mr. Castillo further alleged that Deputy Director Jeffrey Gaynor refused to review his Local 12 Funds case after it sat on Mr. Gaynor's desk for a week and a half in April 2006. Additionally, Mr. Castillo disclosed that he was instructed by Regional Director Jonathan Kay in November 2006 not to discuss the Local 12 Funds case with anyone other than Mr. Goldberg or Mr. Kay. Similarly, Mr. Kay instructed Mr. Castillo not to contact the trustees' counsels, third party administrators, or the Local 12 Funds' participants without either Mr. Gaynor's or

Mr. Goldberg's approval. Mr. Castillo alleged that he had never been restricted from contacting such parties in other cases.

In November 2006, Mr. Castillo discovered that \$381,000 of the Local 12 Funds' year 2000 earnings was used as an employer contribution. Mr. Castillo alleged that such use was a prohibited transaction in violation of ERISA §§ 404 and 406. Mr. Castillo discussed the Local 12 Funds case with Michael Briglia, who was Mr. Castillo's acting supervisor for a two week period in 2007 when Mr. Goldberg and Ms. Langone were out of town. After hearing the details of the use of \$1.8 million of the Local 12 Funds' year 2000 earnings, including the \$381,000 employer contribution, Mr. Castillo alleged that Mr. Briglia told him that it appeared to be a criminal violation and that he (Mr. Briglia) would speak with Ms. Langone about the issue. The next day, Mr. Briglia told Mr. Castillo never to speak with him again about the Local 12 Funds case.

Mr. Castillo also alleged that Mr. Kay and Mr. Goldberg impeded his discovery of the misuse of the Local 12 Funds' year 2000 earnings as an employer contribution before the expiration of the 5 year criminal statute of limitations by refusing to examine Mr. Castillo's documented evidence. But for their impediments, Mr. Castillo believed a parallel criminal investigation could have been performed with the civil investigation. However, no criminal investigation was conducted in this matter.

Report of the U.S. Department of Labor

The agency's September 9, 2009, report addressed seven allegations contained in the OSC referral and an additional seven raised by Mr. Castillo during the course of the investigation. The report first addressed Mr. Castillo's allegation that Mr. Goldberg refused to review any of the information provided by Mr. Castillo related to the Local 12 Funds investigation. The investigators did not substantiate this allegation. The investigators interviewed Mr. Goldberg on February 12, 2009, and he subsequently provided a sworn statement. Mr. Goldberg claimed that Mr. Castillo misrepresented that the Local 12 Funds' trustees and their attorneys agreed to settle all the issues that Mr. Castillo identified. Mr. Goldberg recalled that then-Deputy Director Jeffrey Gaynor was unclear whether violations existed for some of the issues identified by Mr. Castillo. As a result, Mr. Goldberg, Mr. Gaynor, Investigator Robert Trejillo, and Mr. Castillo met to discuss the allegations before the meeting with the trustees and their attorneys. Mr. Goldberg recollected that Mr. Castillo became upset at this meeting, because Mr. Castillo believed that Mr. Gaynor and he did not understand the issues due to Mr. Castillo's accent.

At the first settlement meeting, Mr. Goldberg was surprised to learn that the trustees and their attorneys were not in agreement with Mr. Castillo's findings. Mr. Goldberg acknowledged being unprepared for the first settlement meeting, because Mr. Castillo provided him only limited information about the case. Based on interviews with Mr. Goldberg and Mr. Kay, the investigators concluded that Mr. Goldberg asked Mr. Castillo on multiple occasions to provide him documentation related to the Local 12 Funds investigation. However, Mr. Castillo provided only the documentation that supported his investigative findings.

Second, the report substantiated Mr. Castillo's allegation that the appointment of a "special supervisor" was unique to the Local 12 Funds investigation. The investigators did not locate any other cases in which a special supervisor was appointed. However, the investigators opined that the appointment of Mr. Goldberg as Mr. Castillo's special supervisor in this case did not constitute an abuse of authority. The decision to appoint Ms. Langone as Mr. Castillo's acting supervisor and Mr. Goldberg as his special supervisor for the Local 12 Funds investigation was made by Mr. Kay pursuant to a rotational acting group supervisor position after the retirement of Group Supervisor Jonathan Brown. Mr. Kay believed that Mr. Goldberg's accounting background, his familiarity with the case, Ms. Langone's background as an attorney, and her lack of accounting experience justified this decision.

Third, the report did not substantiate Mr. Castillo's allegation that Mr. Gaynor refused to review his investigative findings from the Local 12 Funds investigation while they sat on Mr. Gaynor's desk for a week and a half. The investigators conducted a telephone interview with Mr. Gaynor on May 5, 2009. Mr. Gaynor recalled Mr. Castillo's name but had no recollection of him in regards to the Local 12 Funds investigation.

Fourth, the report substantiated Mr. Castillo's allegation that Mr. Kay instructed him not to discuss the Local 12 Funds investigation with anyone other than Mr. Goldberg or Mr. Gaynor. The report also substantiated that Mr. Kay directed Mr. Castillo not to contact the union's attorneys, third party administrators, or fund participants without the approval of Mr. Goldberg or Mr. Gaynor. Mr. Kay gave these instructions due to a fear that Mr. Castillo would disclose confidential investigative material with fund participants or discuss settlement issues with the trustees beyond the scope of his authority. Mr. Goldberg and Virginia Smith, Director of Enforcement, Office of Enforcement, EBSA, recalled that Mr. Castillo did in fact communicate confidential details of the investigation with the complainants in violation of EBSA policy. Consequently, the investigators determined that these instructions did not constitute an abuse of authority.

The report concurrently addressed Mr. Castillo's fifth and sixth allegations. These allegations were that the Local 12 Funds' trustees improperly used \$381,000 of the year 2000 earnings as an employer contribution in violation of ERISA sections 404 and 406, and Mr. Kay and Mr. Goldberg impeded Mr. Castillo's discovery of this allegation, which allowed the criminal statute of limitations to expire. The investigators did not substantiate either of these allegations. They discovered numerous discrepancies in Mr. Castillo's statements. The EBSA Office of the Solicitor (SOL), New York Region, the DOL Office of Regulation and Interpretation (ORI), and the EBSA Office of the Chief Accountant (OCA) each concluded that criminal and civil violations did not exist. The delays in the investigation were due to the managerial inexperience of the EBSA New York Regional Office. However, these delays were not designed to purposely impede Mr. Castillo's investigation.

Seventh, the report did not substantiate Mr. Castillo's allegation that Mr. Briglia told him that the investigative findings of the Local 12 Funds case appeared to contain criminal violations. The report also did not substantiate Mr. Castillo's claim that Mr. Briglia contacted Mr. Castillo

the next day and told him never to speak to him again regarding the Local 12 Funds investigation. The investigators interviewed Mr. Briglia on March 11, 2009. He explained that he was Mr. Castillo's acting supervisor for a short period of time. He recalled that Mr. Castillo asked him to review documents related to the Local 12 Funds investigation. Mr. Briglia explained that he did not draw any conclusions from these documents. He thought that Mr. Castillo needed additional information to make his arguments more understandable. Mr. Briglia did not recall any further contact with Mr. Castillo regarding the Local 12 Funds investigation.

The report also addressed seven allegations made by Mr. Castillo during the course of his four interviews with the investigators. These allegations were not contained within the OSC referral letter. Only one of the seven allegations was substantiated. The substantiated allegation was that Regional Solicitor Patricia Rodenhausen, who is the wife of Mr. Kay, banned Mr. Castillo from attending meetings at the SOL pertaining to the Local 12 Funds investigation. Ms. Rodenhausen described e-mails from Mr. Castillo regarding the investigation as "ranting, containing scrambled English, and very poor arguments." Ms. Rodenhausen also received complaints from SOL attorney Jennifer Weekley that Mr. Castillo challenged her reputation in the e-mails. Ms. Rodenhausen chose to ban Mr. Castillo from the meetings, because she believed Mr. Castillo displayed poor judgment in sending these e-mails and normally EBSA supervisors, not investigators, attend these meetings.

The Whistleblower's Comments

Mr. Castillo provided comments on the agency's report. He dismissed the agency's report and believed that Mr. Kay with cooperation from Ms. Rodenhausen engaged in a "cover-up" with respect to the Local 12 Funds investigation. Additionally, he perceived the DOL OIG investigation to be a cover-up of a cover-up. He recalled that an investigator attempted to intimidate him and yelled at him during the interview. Mr. Castillo claimed that one of the investigators misconstrued his statements so that his answers would be inconsistent when he was questioned again about the same topics. Mr. Castillo noted that Mr. Trejillo, now a former DOL employee, was not interviewed. He believed that Mr. Trejillo's testimony would have contradicted the report's findings.

Mr. Castillo also responded to each of the seven allegations. With respect to the first allegation, he maintained that the Local 12 Funds' trustees were unable to document their claim that there was a shortfall. Regarding the second allegation, he believed the agency's justification for having a special supervisor was inconsistent. Mr. Castillo is an auditor and he audited accounting records in all of his cases to uncover ERISA violations. He questioned why Ms. Langone was able to supervise the accounting issues in his other cases but not the Local 12 Funds case. Mr. Castillo's only comment for the third allegation was to reference attachments to the agency's report, including a September 29, 2006, letter addressed to Mr. Gaynor.

Regarding the fourth allegation, Mr. Castillo challenged the claim that he provided confidential information to individuals outside of EBSA. Mr. Castillo responded to the fifth and

sixth allegations by again noting that his statements to the investigators were misconstrued. He believed the OCA, SOL, and ORI's findings were each based on an undocumented alibi. Mr. Castillo responded to the seventh allegation by stating that Mr. Briglia is under the influence of Mr. Kay.

The Office of Special Counsel's Findings

Based on our review of the original disclosure, the agency's report, and the whistleblower's comments, OSC has determined that the agency's report contains all of the information required by statute and the findings appear to be reasonable.