The JOURNAL OF PUBLIC INQUIRY

A PUBLICATION OF THE INSPECTORS GENERAL OF THE UNITED STATES

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Invitation to Contribute Articles

The Journal of Public Inquiry is a publication of the Inspectors General of the United States. We are soliciting articles from participating professionals and scholars on topics important to the President's Council on Integrity and Efficiency and the Executive Council on Integrity and Efficiency. Articles should be approximately 3–5 pages, single-spaced, and should be submitted to Agapi Doulaveris, Office of the Inspector General, Social Security Administration, Altmeyer Building, Suite 300, 6401 Security Blvd., Baltimore, MD 21235.

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Table of Contents

HOTLINES:

Introductory Paragraph 1

FBI Hotlines: Vital Link to the Public
Authors: Thomas J. Pickard and Dana M. Gillis 1

Hotline: Voices of the Unknown—Anonymous Complaints
Author: Leonard Trahan, Jr 5

Inspector General Hotlines: Have They Been Good, at What Cost, What is Lost?
Authors: Maurice S. Moody and Beth Serepca 9

Wired: IG Hotline Going On Line
Author: Ralph E. McNamara 13

Procurement Primer: Contracting Out Office of the Inspector General Services
Author: Alexis M. Stowe 17

CAUGHT IN THE ACT

**The Inspector General Act: The Meaning of "General Supervision"
"Does the IG Act Authorize an Agency Head to Control an Inspector General's Response to Media Inquiries?"**
Author: James R. Naughton 21

Looming Budget Difficulties: Time for a Change in Direction?
Authors: Thomas R. Bloom and James E. Hyler 25

Union Representation at OIG Interviews
Author: by Howard L. Sribnick 27

Labor Relations Issues and OIG Investigations
Author: Scott Cooper, Esq 31

Why Isn't Law Enforcement Authority in The IG Act?
Author: Vicky L. Powell, Esq. 33

What Was Intended by "Communications" with Congress: More Than the Semiannual and Seven Day Letter
Author: E. Jeremy Hutton 37

"Reinvention and Ethics: Public Service at the Crossroads?"
Author: Stuart C. Gilman, Ph.D 39

Book Review: "Representing the Agency Before the Merit Systems Protection Board: A Handbook on MSPB Practice and Procedures"
Commentary Author: Renn C. Fowler 43

Customer Survey 45

In Memory of...

James F. Hoobler
1938 - 1997

Inspector General James F. Hoobler, a distinguished and innovative public official for over 35 years, died of acute respiratory failure on December 22, 1997, at Georgetown University Hospital. He was appointed Inspector General of the Small Business Administration in 1991. He was 59 years old.

Dr. Hoobler's public service career spanned 3 decades during which his leadership and management skills have been widely recognized. He personified the professional Government manager who was able to bring his expertise and intelligence to a diverse range of public policy arenas. He began his career at the Central Intelligence Agency and moved to a series of progressively senior positions at the Department of Justice, the Department of Energy, the Veterans Administration, the Office of Management and Budget, the Department of State, and the Small Business Administration.

Throughout his remarkable career, Dr. Hoobler was a consistent advocate for making public employees more professional and for making public institutions more accountable. As a recognized authority on strategic planning and resource management, Dr. Hoobler was a frequent writer and lecturer on public policy and performance management. His greatest contribution to public service is the legacy of his former employees and colleagues whom he mentored and continue in Dr. Hoobler's tradition of dedicated public service.

Dr. Hoobler was born in Rochester, New York, and received his B.S. degree from Kent State University and his M.A. and Ph.D. from the University of Maryland at College Park. He is survived by his wife, Mary; his parents, Frank and Jean; and his sister, Gail.

Hotlines:

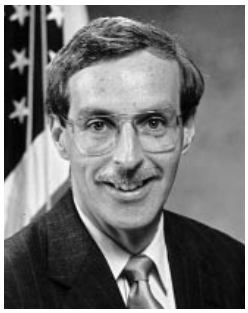
The idea of "hotlines" is closely associated in the public's mind with the Office of Inspector General. In fact, surveys around the world of citizen's attitudes toward anticorruption systems emphasize the importance of hotlines. Yet from their very inception the use and effectiveness of hotlines has been controversial.

The following articles explore the role of hotlines in the IG community from four different perspectives. Leonard Trahan examines the dilemma of anonymous complaints from his experience at the Department of Defense. Maurice Moody and Beth Serepca look critically at the role of hotlines in the IG community and their effectiveness. The role of technology and hotlines on the Internet is explored in Ralph McNamara's essay. And finally, the Federal Bureau of Investigation's article offers a perspective on hotlines in the criminal justice process.

These articles are not exhaustive of the topic but touch on some of the most difficult issues in administering hotline programs. The articles do not represent the perspective of the PCIE, much less the consensus of Inspectors General. In fact, this is an area of controversy upon which there is little agreement in the IG community. For that reason, I think these articles are important because they will contribute significantly to the quality of our discussions around this important issue.

FBI Hotlines: Vital Link to the Public

by Thomas J. Pickard and Dana M. Gillis



Thomas J. Pickard, Chairman, Integrity Committee, PCIE; Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation

Dana M. Gillis, PCIE Liaison; Supervisory Special Agent, Federal Bureau of Investigation

"Investigators have identified a vehicle that was used in connection with yesterday's attack on the Federal Building in Oklahoma City. Further investigation has determined that two white males were associated with that vehicle. Anyone with information about these two men should provide it immediately to the nearest FBI field office. They can also call phone banks we have specially established to receive their information. We urge people with information to call 1-(800). . . ." These chilling words are excerpts from an immediate Federal Bureau of Investigation (FBI) press release dated Thursday, April 20, 1995, in response to the single, most brazen act of domestic terrorism in American history. Overwhelming response to the Bureau's request for help from the public resulted in the arrest and convictions of Timothy McVeigh and Terry Nichols for this heinous crime.

Hotlines as Investigative Tool

The term "hotline" in connection with the FBI conjures up images of Andrew Cunanan, the UNABOMBER, and Mir Aimal Kasi, infamous alumni of the Bureau's "Ten Most Wanted Fugitives" list. The "top ten" list could be described as the FBI's best known investigative hotline. The list was established on March 14, 1950, by former Director J. Edgar Hoover, as a way to solicit public involvement in the Bureau's efforts to locate and arrest the Nation's

(continued on page 4)

most notorious felons. To date, more than 132 fugitives have been located because of appeals for public assistance based on publication of the list.

Unlike hotlines by agencies with narrowly defined investigative charters, the FBI has relied mainly upon telephone directory listings for its field offices as the initial intake point for complaints and allegations of criminal wrongdoing within the jurisdiction of the Bureau. Complaints fielded by individual offices generate cases and leads in much the same manner as hotlines provide similar information to offices of Inspectors General. The main difference is the breadth of complaints handled by FBI field offices which address nearly 300 violations.

As forms of communication have expanded throughout the years, the manner in which the Bureau has solicited assistance from the public has diversified. The impact of "reality based" television programs and the burgeoning explosion of the Internet has drastically altered the pace at which the Bureau can disseminate time critical investigative information and ask the public for assistance. A prime example of how the Bureau was able to harness the power of the mass media is the FBI's partnership with the Fox television network program, "America's Most Wanted: America Fights Back." This program is a vehicle whereby the FBI uses a toll-free telephone number to allow viewers to provide anonymous tips to law enforcement. The FBI's affiliation with "America's Most Wanted" and other reality-based programing has generated leads that have assisted in the location and arrest of more than 350 fugitives.

Use of Hotlines in Major Case Investigations

The hotline, as recognized by the general public, has been used mainly to locate fugitives. Hotlines have been extremely useful in major case investigations conducted by the FBI. A major case in Bureau parlance is an investigation of such magnitude that a massive commitment of resources from throughout FBI field divisions is required. The FBI has many cases that fall under the classification of major case investigations. Three recent investigations that have captured the public's attention are the Oklahoma City bombing, the Olympic Park bombing during the 1996 Summer Olympics in Atlanta and the crash of TWA Flight 800 off the coast of New York City.

Each of these major cases required the need to enlist the assistance of the public to generate leads that would be useful to investigators of these incidents. Hotlines, although indispensable investigative tools, are manpower intensive enterprises. In the Oklahoma City bombing and the TWA Flight 800 investigation, the Washington Field Office coordinated the operation of the hotlines.

During the initial days of the investigation into the explosion of TWA Flight 800, the 1-800- telephone number established for the investigation was managed and staffed by the FBI's Washington Field Office, Washington, D.C. Factors considered in designating the Washington Field Office to handle this task included, but were not limited to, space constraints, adequate staffing, and abundant telephone and technical support. One consideration in the establishment of an investigation specific hotline, is that it will take approximately 4 hours from the time the line is actually established for it to be published by the media.

Are Hotlines Effective?

The impact a hotline can have on an investigation is incalculable. Here's how a hotline enhanced the investigation of the Oklahoma City bombing. Witness interviews and descriptions of potential subjects were provided to the media along with a toll-free number to contact investigators. Within 8 days of the bombing, more than 10,000 telephone calls were received by the hotline. Similar hotlines were used by the FBI in the investigation into the murder of fashion designer Gianni Versace, and the UNABOMBER investigation.

The Dallas field office of the FBI utilized an investigative hotline to address the issue of program fraud directed against the U. S. Department of Housing and Urban Development. Unlike hotlines set up for major case investigations, the Dallas hotline was used in the local media to address a varying range of allegations concerning public corruption and fraud of federally funded programs. The Dallas hotline was published in the Dallas Morning News and has received more than 160 telephone calls. The hotline has been cited by the Dallas office as a reason for an increase in investigations of fraud directed against federally sponsored programs in the Dallas area.

Hotlines and the Cyber-Age: The FBI Web Page

Computers and the Internet have drastically expanded the manner and speed with which the public and law enforcement interact with each other. The FBI utilizes its Web Site, www.fbi.gov, to give the public information of interest regarding the agency. The site also serves as a means to allow private citizens to pass non-emergency information to the FBI via the growing number of offices that have individual Web Sites.

The Bureau's Internet site gives the public an on-line source of information on the Top Ten Fugitives list; press releases; and the Uniform Crime Reports. The interactive nature of the Bureau's Web Page expands the forums by which the public can provide information to the FBI. The Bureau has recently solicited the public's assistance in locating a key eyewitness to the recent bombing of an abortion clinic in Birmingham, Alabama. Individual FBI field offices are using their Internet sites for similar purposes. The use of the Internet, in instances like the abortion clinic bombing, will allow speedier dissemination of critical investigative information while utilizing investigative resources more efficiently.

Conclusion

The FBI has achieved a great deal of success during high profile investigations by using hotlines. Publicity of hotlines, whether through the media or other outlets such as the Internet, has given the FBI an effective means to obtain vital information from the public without delay. As a law enforcement agency with multifaceted investigative jurisdiction, the FBI has a continuing obligation to utilize innovative techniques in pursuit of today's felons. The FBI has taken bold steps to harness the power of the Internet to enhance the ability of the public to provide vital information to FBI field offices via individual office web pages. The challenge for the future is to continue to provide expertise the Bureau has obtained through experience with the operation of hotlines to State, local, and global investigative entities to foster the vision of former Director J. Edgar Hoover, who stated that, "The most effective weapon against crime is cooperation . . . [in the context of law enforcement, cooperation is defined as] the efforts of all law enforcement agencies with the support and understanding of the American people."❑

HOTLINE: Voices of the Unknown — Anonymous Complaints

by Leonard Trahan Jr.

Leonard Trahan Jr.,
Assistant Director, DOD Hotline,
Office of Inspector General,
Department of Defense

How many of you reading this can remember a sibling or neighborhood friend committing some minor misdeed such as trampling a neighbor's flowers in search of a ball, or accidentally toppling a garbage can over? Later, when you and "the culprit" were questioned about it, you spoke up -- only to receive an unexpected and undeserved "swat" for "telling on" your sister or your friend. Likewise, you may recall that older motion pictures frequently reinforced the idea that it's wrong to step forward to report wrongdoings by your neighbors, coworkers or employers. Such people were labeled by Edward G. Robinson and James Cagney as "you-dirty-rat," or as "snitches," and other unflattering names. Ironically, I cannot recall anyone from such movies invoking their right to remain anonymous.

We, in the Inspector General (IG) community, deal with these and similar ill-conceived notions and stereotypes on a daily basis. Very often, people who call the Department of Defense (DOD) Hotline are emotionally charged with feelings of guilt and disloyalty because they are calling "The Government" (Big Brother?) on an individual or employer to whom they feel close and loyal. After reassuring the individual(s) they are "doing the right thing," we elicit the information the caller wants to share. Despite our best efforts, however, there are still instances when the source does not want to disclose their identity -- they want to remain anonymous. The reasons individuals choose to remain anonymous are many and varied, but are nonetheless recognized as their right and must be honored by the Inspector General community[1].

[1] Section 7 of the Inspector General Act of 1978 (Public Law 95-452) (the Act) charges Inspectors General (created under the Act) to permit individuals reporting (suspected) instances of fraud, waste, abuse, and (today) mismanagement within Government programs, the ability to remain confidential. (Although not specifically mentioned in the Act, it is widely accepted within the Inspector General community that the Congress' use of the term "confidential" was intended to include sources who wish to remain anonymous as-well-as confidential.)

Within the Office of the Inspector General (OIG), DOD, our sources (both confidential and anonymous) are generally characterized as "good-citizen" sources. Most are folks like you and me, who have families, go to work, and pay taxes. Their primary concerns are clearly defined and identified — they have seen what they believe is an instance of fraud, waste, or mismanagement and they want it corrected. Ah, but they may also have a hidden agenda — a fear of possible reprisal resulting from the nature of their complaint. They are probably employed, and while their job may not be the "be-all" or "end-all" job, they are able to provide for their families needs. Their hidden agenda includes: keeping their jobs, remaining free from reprisal, and perhaps more importantly, to keep from being known as "a snitch." To this end, they too choose to remain anonymous. That's the "typical" profile of our clients at the Defense Hotline. We believe, as do others in the IG community, that most such individuals are well-intentioned and free from self-serving ulterior motives. However, it's up to the professional IG Hotline staffs to receive, evaluate and process the information the anonymous sources provide.

Probably the first exposure many of us had with the term Hotline dates back to the early 1960s with the direct telephone link between the White House in Washington, D.C., and the Kremlin in Moscow, created to avoid an inadvertent nuclear incident,.

Webster's University dictionary defines a Hotline as:

> ...a direct communications link, as a telephone line especially one between heads of state, for use in a crisis or emergency.

A second definition, and more applicable to our interests is:

> ... a telephone facility enabling a caller to talk confidentially with a sympathetic listener about a personal problem or crisis.

Over the past several years, it has become an all-too-common occurrence for an agency, public or private, to be faced with a situation where employees or senior managers are accused of inappropriate actions that need to be promptly investigated and resolved. Often, these agencies create

(continued on page 6)

temporary[2] Hotlines in an effort to quickly identify the individuals involved, those with information about the circumstances and, possibly, the systemic cause for the situation. More often than not, the person providing the information (the source) does not want to disclose their name or any other information that could tend to identify themselves — they want to remain anonymous!

For those in the Inspector General business and especially those who operate full-time Hotlines, such a request is not a problem. Professional Hotline investigators are trained to conduct probing, in-depth telephone interviews. More importantly, they know how to evaluate and recognize information that is specifically and intentionally aimed at damaging an individual's career.

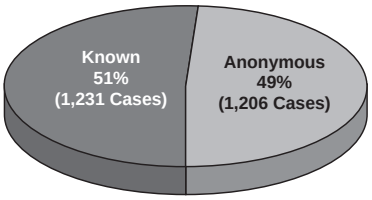
However, the mishandling of information received via temporary Hotlines from anonymous callers has recently caused the permanent Inspector General Hotline community to have to defend the role and value the anonymous source plays in any success we enjoy! These (malicious) anonymous sources do not identify a systemic problem. The caller wants you, through your agency, to "correct a hurt — with a hurt," by inflicting the wrath of the Federal Government on another individual. Don't look for a systemic problem or the common good that may result from the complaint. The results sought by this type of anonymous source are so narrowly focused, they're difficult to recognize — for all but the trained and experienced Hotline investigator. This scenario presents a real problem for agency managers. The fact is that Hotlines are an excellent resource to receive information from the public. The solution lies in having highly trained Hotline investigators who know how to receive AND evaluate the information received.

To better illustrate the value we at the OIG, DOD, place on anonymous sources I have included several charts for FY97, comparing anonymous verses known sources, with a brief explanation for each.

The DOD Hotline received slightly less than 16,000 telephone calls and letters (contacts) in FY97. From that number we initiated some 2,437 cases. As Figure 1 illustrates, anonymous sources comprise a significant portion of our total case inventory. (Please note: the percentages depicted for FY97 are also representative, with a negligible percentage variation, of previous years inventory.)

[2] The term temporary is an important one in this scenario. Not only does it describe the intended life of this particular Hotline, but it also describes the status of the individuals manning the telephones and receiving and evaluating the information received. Individuals receiving information via a temporary Hotline will probably not be around to own responsibility for the impact the information had on the programs and individuals who were accused and involved, or worse, those (falsely) accused and not involved.

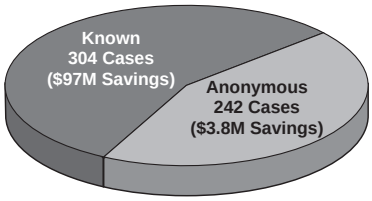
Figure 1
Defense Hotline
Total Open Cases FY 97



A Total of 2,437 Cases Were Opened in FY97
1,802 cases were referred for Action
635 cases were refered for Information

Figure 2 illustrates that 44 percent of the number of cases that were substantiated were also received from anonymous sources. Additionally, and although no trend-conclusions should be reached based on dollar savings, almost $4 million dollars in savings was realized as a result of these anonymous-source cases in FY97.

Figure 2
Defense Hotline FY 97
Anonymous – Substantiated vs. Known – Substantiated



A Total of 2,428 Cases Were Closed in FY97
546 cases were substantiated

Figure 3 demonstrates the consistency, over several years, between confidential (known) and anonymous sources as they relate to substantiated cases. (Please note: the disparity shown for FY96 is due to a significant number of personnel-type issues which required the source's identity to be known).

Figure 3
Defense Hotline
Total Cases Substantiated/Anonymous vs. Known

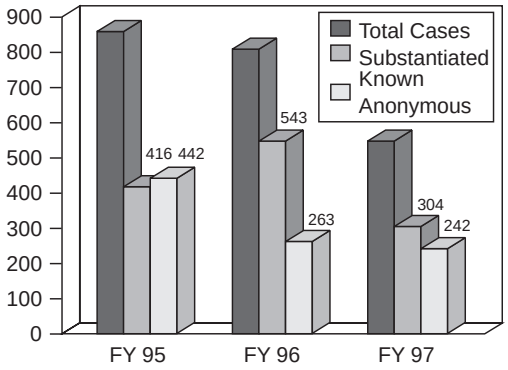


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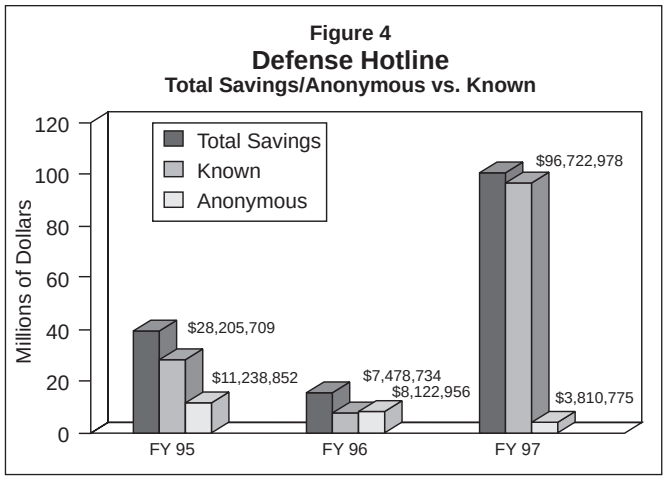
Figure 4 demonstrates the monetary value, over several years, that anonymous sources have provided. (Please note: the disparity in FY97 is due to one case that resulted in over $81 million dollars in savings).



In summary, we at the OIG, DOD, recognize that the (greater) value of the information received is in the analysis of such information and, ultimately in what is accomplished as a result of receiving such information. Obviously, we realize that the investigative process can often be facilitated when we are able to contact the source for needed additional information. However, as stated earlier, we recognize and respect an individuals right to remain anonymous. And, as demonstrated in figures 1-4, we cannot afford to discount the value that anonymous-source information provides.

Our organizational philosophy emphasizes and concentrates our collective energies, on resolving the problem reported - NOT on determining who reported the problem!❑

Inspector General Hotlines: Have They Been Good, at What Cost, What is Lost?

by Maurice S. Moody and Beth Serepca

Maurice S. Moody, Director of Finance, Debt and IRS Oversight, Office of Inspector General, U.S. Department of theTreasury

Beth Serepca, Senior Auditor, Finance, Debt and IRS Oversight, Office of Inspector General, U.S. Department of the Treasury

The U.S. Congress has typically viewed Inspector General Hotlines as essential in the fight against fraud, waste and abuse. However, the data in Semiannual Reports to the Congress clearly suggest that Hotlines are not a significant source of audit or investigative leads. In fact, the majority of Inspector General Hotline activities can be best described as public access points for program information and assistance. While these services assist the American public and help promote goodwill for parent agencies, they do not contribute directly to the Inspectors General primary mission of eliminating fraud, waste and abuse.

Few people would argue with the Government's need to be accessible to the American public. The challenge is to provide this access efficiently and effectively. In this regard, Inspectors General can make improvements in their hotline operations to reduce costs and improve services. Moreover, if Hotlines are to serve as a significant source of audit and investigative leads, the Inspector General community needs to work with the program offices to improve their public access operations.

We based the findings and conclusions in this article on a survey of Hotline operations at small, medium and large Offices of Inspector General. Our methodology included the use of a data collection instrument administered through structured interviews with Hotline managers and their staffs. In this regard, we focused on what was or was not working well. Additionally, we solicited opinions on innovations the Inspector General community could use to improve the Hotline operations. We further analyzed Hotline data in the Inspector General Semiannual Reports to the Congress to acquire a governmentwide perspective on trends and accomplishments.

Where Are We Now?

Most people think of a toll-free telephone line when someone mentions the word Hotline. But to the Inspector General community, the definition is more inclusive. Hotline operations also include intake by letters, memorandums, electronic mail and walk-ins. Even the use of toll-free numbers is not universal. Some Inspectors General have abandoned them in favor of local numbers only. Additionally, some Inspectors General favor live coverage of the Hotline operation, while others rely solely on answering machines.

Live Hotline coverage ranges from 2 hours to 10 hours a day. Currently, most operations provide 24 hour telephone access using a combination of live operators and answering machines. However, this is also changing. Some offices are eliminating the answering machines because of callers who overload the recording devices with political philosophies, general complaints about government, or veiled threats.

Most Inspectors General operate Hotlines in-house while a few rely on contractors. Hotline staffing is also varied. Some Offices of Inspector General employ full-time staffs composed of inspectors or investigators, and others use clerks who handle the Hotline as an ad hoc function.

What is the Cost?

The cost of Hotline operations varies as widely as the types of operations. One small agency, for example, uses a contractor at an annual cost of $400. On the other hand, a large cabinet-level agency staffs its Hotline operation with ten full-time employees at an estimated annual cost of more than $500,000. Grade levels and position classifications

(continued on page 10)

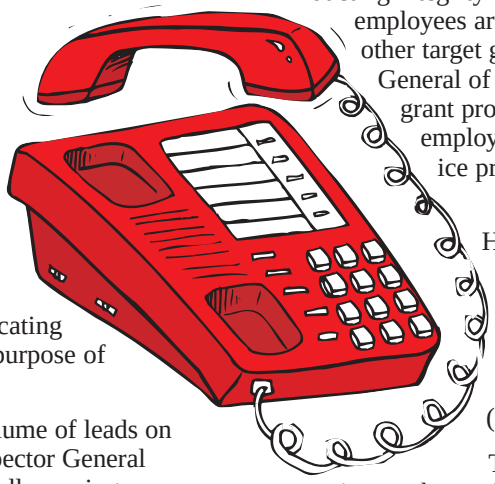
similarly range from GS-5 Investigative Technician to GS-14 Criminal Investigator.

The smaller agency generally receives only three referrals a year from its contractor; while the larger agency handles over 36,000 contacts yearly. Despite the volume, most of the Hotline intakes result in referrals to program offices, not to the Inspector General's offices of investigation and audit. The Department of Health and Human Services Hotline, for example, handles a large volume of inquiries about the proper use of Medicare benefits that it generally refers to the Medicare providers.

Further, support resources range from dedicated telephone lines only to a security room with multiple phones, answering machines and computer terminals. Hotline operating costs also include the resources used to handle the investigations and audits conducted on issues referred from the Hotline.

What is Lost?

While agency program offices are getting valuable assistance from the Hotline operations, they are not a comparatively large source of audit and investigative leads. Inspectors General refer three out of four Hotline intakes to program offices. As a result, Offices of Inspector General are dedicating their resources to the general goodwill and purpose of other agency program missions.



Even though Hotlines produce a low volume of leads on fraud, waste and abuse; some Offices of Inspector General have helped their agencies realize sizeable dollar savings through audits and investigations following these leads. One large agency reports annual savings of approximately $15 million due to Hotline operations. In contrast, several Offices of Inspector General report no monetary savings.

These data lead us to the conclusion that Inspector General Hotline operations are comparatively high-cost public access to agency program information. Too often, the Hotline contact is the source of last resort for people who, after making numerous telephone calls, are unsuccessful in obtaining information from agency program offices. Contacts such as these often come through the Inspector General Hotlines because there are no program office hotlines, or the ones in place are not widely publicized to the target populations.

What Changes are Necessary?

From the trend data generated by our survey, we identified five areas where improvements can be made. These areas are: restructuring, identifying the market, assuring ease of availability of resources, use of technology, human resources management, and training.

Program offices should generally handle three out of the four current Hotline contacts, not the Inspector General. Some agencies have helped reduce the calls to the Inspector General Hotline by establishing toll-free telephone numbers for program hotlines. One successful technique is the use of a caller driven telephone menu that routes calls to the appropriate office, including the Inspector General Hotline. This technique uses the caller as a screening device and saves hotline resources. Despite the approach taken, the Inspector General community could lessen its burden and improve service to the public by encouraging the use of program hotlines.

As with any product or service, success is linked to identifying the right market and successfully advertising within that market. In short, the Inspector General community needs to do a better job of advertising its Hotline operations to the right client groups. The common practices of displaying posters in Government office buildings and conducting integrity awareness briefings for Federal employees are very useful, but they fail to reach other target groups. For example, Inspectors General of agencies with large contracting and grant programs need to reach out to contractor employees, grant recipients and related service providers.

Promotional literature about Hotline operations is too often in English only, thus eliminating the large Spanish-speaking segment of the U.S. population. Similarly, many Hotline telephones do not have Telephone Devices for the Deaf (TDDs).

Time-consuming manual intake activities can be avoided with automated systems entries. Quite often, the Hotline operators record intake data on manual forms that they later enter into a computer system. This redundant process can be avoided with on-line entry using a personal computer.

Hotline employees often cite burn out and stress as major reasons for illness and career change. Hotline managers can reduce burn out by rotating employees into these jobs for set time periods or by using alternating shifts, such as 2 days on and 3 days off. Stress management counseling and seminars can help reduce employee turnover, particularly in situations where the intake clients are abusive or potential victims of serious misconduct.

Offices of Inspector General often provide Hotline employees with little training or the most common approach is to use on-the-job training. While this hands-on approach is useful in familiarizing employees with the unique operations of their agencies, it may overlook skill development in areas such as interviewing techniques, handling problem callers and using the Internet as an intake source.

The Federal Law Enforcement Training Center conducts training sessions for Hotline operators in Washington, DC and at its campus in Glynco, GA. Attendance at these sessions has been respectable, but not all Inspectors General are taking advantage of them.

Have They Been Good?

Besides serving as a source of intake for allegations of fraud, waste and abuse, Inspector General Hotlines have provided many useful services to the public. In one instance a Hotline operator even helped prevent a suicide. Several years ago, a man called the Department of Defense Inspector General Hotline and told the operator he was going to kill himself. The quick-thinking operator obtained enough information to notify the local law enforcement authority and kept the man on the phone until help arrived.

However, we must keep in mind that Inspectors General are using a considerable amount of resources to operate their Hotlines, often with little direct benefit to their primary mission. Accordingly, Inspectors General need to work with program officials to integrate their operations into targeted public access sources and to carry out operational changes for cutting costs and improving service.❑

Wired: IG Hotline Going Online

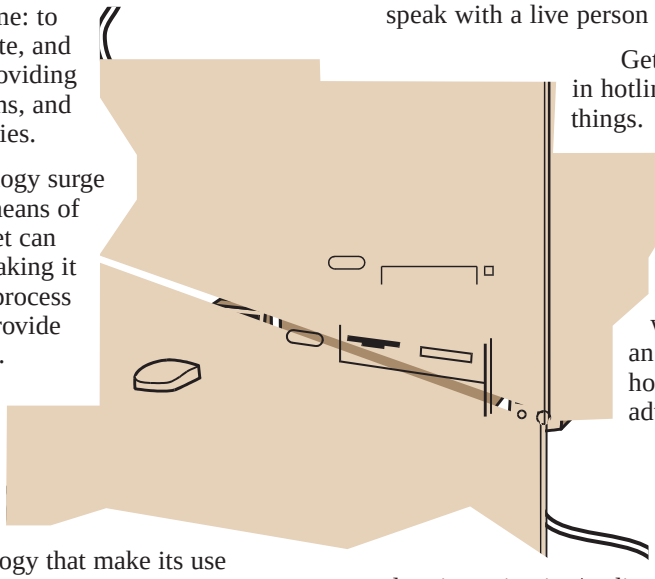
by Ralph McNamara

Ralph McNamara, Assistant Inspector General for Investigations, National Archives and Records Administration

Hotlines are nothing new to the Inspector General (IG) community. They have long been used to allow callers to report, complain, get information, and ask questions. Hotlines have progressed from a one person operation to multi-level auto-menu driven systems with all sorts of bells and whistles. Computers, telephone systems, and communication processing now allow a level of sophistication unimaginable a generation ago. But the basic theme remains the same: to get sources to report fraud, waste, and abuse. Along with that goes providing information, answering questions, and referring matters to other agencies.

The Internet and its technology surge now offer IG hotlines another means of progression or tool. The Internet can expand hotline operations by making it possible to reach more people, process contacts more efficiently, and provide useful information to customers. Hotline websites with Internet E-Mail may have some advantages over conventional hotlines. But is this new found medium right for all IG offices? Are there draw backs to this new and exciting technology that make its use risky? Let's explore some of the aspects of IG hotlines going on-line.

IG hotlines going on-line may be viewed as an important step in using computers and technology to do our job more efficiently and effectively. It brings home the saying "work smarter, not harder." Being able to reach/interact with more potential sources in an efficient manner benefits not only the IG, but the agency, Congress, and the public. With the hotlines wired to the Internet, customers can present their concerns, ask questions, get information, and report fraud, waste, and abuse any time, 24 hours a day, seven days a week. This seems to give the customer a sense of ready access to the agency. Because it can be very interactive, some say "it is the next best thing to getting a live body on the telephone." The customers know that when they interact with the IG hotline via the Internet, someone is receiving the message and will respond. This may also cause the customer to have a higher expectation level. The interaction may serve to reduce the frustration of getting into the seemingly endless loop of telephone menu systems that may or may not get a live person. When in this loop on a non-work day, the customer will be instructed to leave a message after a long series of number pushing. With the IG hotline's ability to be interactive, it seems that the customer is communicating with a live person, even though they are not! Of course, nothing will replace being able to speak with a live person in the customer's view.



Getting wired and using the Internet in hotline operations means different things. Getting Internet access (getting wired) is simply having the equipment, software, and an Internet provider to give you entry. Using the Internet in hotline operations means developing an IG hotline website/webpage and establishing an Internet presence. Once the IG hotline has a web page it can: 1) advertise the IG hotline in the form of an Internet Hotline Poster; 2) use E-Mail to answer questions and provide assistance; and 3) provide useful hotline information, receive complaints, and conduct investigative/audit research, thereby increasing effectiveness and efficiency. The type of hotline website mentioned in number 3 above, would be in an "Interactive Format." This is where the website would consist of several pages that contain options the customer can choose from that could display: complaint and request for information forms, links to other sites of interest or use, and statistical/general information about the hotline or OIG.

(continued on page 14)

The following is a sample listing of what I call the hotline poster, hotline poster w/E-Mail and hotline Interactive websites:

Hotline Poster

DOT	http://www.dot.gov/oig/hotline.html
SBA	http://www.sbaonline.sba.gov/IG/hotline.html
LSC	http://www.oig.lsc.gov/lscpages/hotline.htm
USAID	http://www.sbaonline.sba.gov/ignet/internal/aid/hotline.html

Hotline Poster w/E-Mail

HUD	http://www.hud.gov/oig/oighot.html
Dept. of Ed	http://www.vais.net/~edoig/semiann/hotline.htm
DOC	http://www.osec.doc.gov/oig/main/offices/oi/hotline.htm
EPA	http://www.epa.gov/oigearth/hotline.htm
DOE	http://www.hr.doe.gov/ig/hotline.htm
HHS	http://www.os.dhhs.gov/progorg/oig/hhshot.html
CPB	http://www.cpb.org/about/oig.html

Hotline Interactive

NASA	http://www.hq.nasa.gov/office/oig/hq/hotline.html
VA	http://www.va.gov/oig/hotline/hotline.htm

Increasing effectiveness and efficiency is an important factor with any hotline. The private sector has already embraced the Internet as a tool of increasing effectiveness and efficiency. The following news report is one example:

"Deseret News: Online Commerce has a 4 percent higher profit margin September 12, 1997: According to a report by Forrester Research, companies doing business online are spending less time processing orders and more time delivering exactly what the customer wants. The Internet is two-thirds less expensive to process than a telephone transaction and this coupled with the fact that a computer taking orders 24 hours a day seven days a week costs less than employing human personnel, results in a 4 percent higher profit margin for online orders. Internet commerce is set to soar from a value of USD8 million at the moment to USD327 billion in five years time. The report predicts that this will happen as the Internet becomes ubiquitous and indispensible for conducting business to business commerce. 'Customers are in for a wild ride as suppliers, distributors and customers pile online,' according to a Forrester analyst."

With the growth of personal computers in the average household, it has become the "tool of choice" in everything from planning vacations, making reservations, to shopping. The Internet usage growth has been such that the industry now offers several types of "web television," making Internet use more user friendly. Many people who don't have a computer or who cannot operate a computer, now can "surf the Internet" using their television.

Mr. Richard C. Otto, Deputy Inspector General, Smithsonian Institution, comments that "Internet hotline availability enables individuals from around the country and the world (Smithsonian programs are national and international in scope) to provide information on fraud or waste in a timely, direct, convenient, and documentable manner. It obviates such basic problems of telephonic contract as cost, time difference, language barriers, and loss of detail."

Hotlines may not only use the Internet to conduct investigative/audit research but to post appropriate reports, briefing material, and other useful hotline material, thereby eliminating the need for a hotline operator to provide this material/service. Hotlines could receive allegations, refer matters for inquiry internally or externally, receive inquiry updates/final reports, and respond to the hotline customer all from a computer connected to the Internet. Think how much time, energy, and resources could be saved. In addition, all IG hotline files could be created, maintained and stored electronically. Hard copy hotline mail and documents could be scanned and added to the electronic files. If hard copy is needed the specific document of the entire file could be printed

Mr. James P. Grossman, Supervisor, Department of Health & Human Services Hotline, states that the advantages of using the Internet in hotline operations is the increased visibility/accessibility. He anticipates greater use by the next generation of medicare beneficiaries. Mr. Grossman said that the hotline web page has had 200 contacts since it began operation despite the fact that the page has not been advertised. In addition, Mr. Grossman suspects that the IG hotline website, when fully implemented (outreach programs and links to other organizations/agencies) will require a review of hotline staffing.

The responce to a survey of PCIE/ECIE members revealed that more PCIE members than ECIE members use the Internet in conjunction with hotline operations.

Those that do use the Internet are very pleased with the operation and recognize the potential. Many of PCIE/ECIE members had concerns about using the Internet. The main reasons cited for their concern were:

1. Inadequate Security
2. Do Not Have an Internet Connection
3. Protection of the identity of Sources
4. Following-up on Complaints Received
5. Lack of Technical Knowledge to Set-up System

Hotline Operations Survey			
	Do Use Internet	Do Not Use Internet	Plan To Use Internet
PCIE	10	7	1
ECIE	5	14	3
Total	15	21	4

6. Not Sure a Small Agency Would Benefit from Internet Hotline
7. Insufficient Number of Calls to Warrant Use of Internet

In an attempt to address some of those concerns the following information is provided:

1. Inadequate Security: Security is a major concern, however, agency hotlines currently accept complaints via fax and telephone (both land-line and cellular). Each of these modes of transmission have their own degree of risk associated with interception just as the Internet does. If you are encouraging complainants to communicate by telephone or fax, there is little point in not allowing the use of the Internet or E-Mail. Most of the concern over security can be solved by using public key encryption (PKE). PKE is an easy and affordable method to utilize. Without going into technical detail, PKE allows the sender (of E-Mail) to lock (make unreadable) the message so that only the party(ies) (sender and receiver) with the key can unlock and read the message. This is much more complicated, but hopefully you get the idea. PKEs are available commercially over the Internet and some new Internet browsers (such as Netscape 4) have PKE built-in to the E-Mail program.

2. Do Not Have an Internet Connection: If you do not have an Internet connection, it would be a wise investment to "get wired." More and more the Internet is proving to be a useful and cost-effective method of conducting investigative, audit, and legal research. In some cases, private sector offices have been able to significantly cut research time just by using the Internet. Private industry is making the largest gains in Internet research productability.

3. Protection of the Identity of Sources: Anonymous remailers offer confidentiality to Internet sources. Remailers are third parties that voluntarily serve as intermediaries for people who wish to keep their identity private. To use a remailer, you format your E-Mail as specified, and mail it to the remailer. The remailer's computer assigns a unique pseudonym to the sender, then strips the sender's E-Mail address from the message and forwards it to the intended recipient. The recipient knows that the message came through the anonymous remailer, but has no way of knowing the original sender.

4. Following up on Complaints Received: Following up with complainants who use E-Mail and desire anonymity can be superior to using telephones. Internet/E-Mail complainants may use anonymous remailers. Some anonymous remailers support replies. The hotline operator can send a reply back to the anonymous remailer, using the unique pseudonym. The remailer's computer forwards the reply to the complainant, who retains confidentiality. (See #3)

5. Lack of Technical Knowledge to Setup System: A basic Internet connection is fairly easy to set-up and maintain. Equipment costs vary, but some Internet system equipment (modems, etc.) can cost as little as $100. Of course if you have a complex computer security system in place, equipment costs will be more.

6. Not Sure a Small Agency Would Benefit from an Internet Hotline: The benefits of using an Internet hotline vary from agency to agency. Big agencies such as HHS, DoD, SSA, IRS, HUD, etc., are more likely to have a high number of hotline contacts. These agencies deal with large dollar/visibility programs. Agencies that do not deal with high dollar/visibility cases are likely to have a smaller number of contacts. In addition, agencies who do not appropriately advertise their Internet hotline services are also likely to have a smaller number of contacts. Small agencies fit into the same profile.

7. Insufficient Number of Calls to Warrant Use of Internet: A way of increasing the number of contacts to an agency hotline is to appropriately advertise, internally and externally, the use of the Internet as a way of contacting the OIG. We at NARA have used the Internet for some time, however, it was only after we advertised that the usage picked up. We advertised by displaying our Internet address on the agency's daily computer banner and added the information on the new method of contacting the hotline to all our OIG employee briefings. Before the advertising, we had zero contacts for the year. After the advertising, we had ten, which is a large number for an agency our size. Again, the number of contacts/calls depends on the agency's mission and the method of advertising. Another way is to publicize your site with the Internet search engines, such as YAHOO, LYCOS, INFOSEEK, HOT BOT, ALTAVISTA, WEBSEEK, AND THE LINKS.

In addition to the many positive aspects of establishing an IG hotline Internet presence, there are also the side affects or the dark side of getting wired.

(continued on page 16)

Ms. Shirley H. Murphy, Hotline Manager, DVA, reports "in a recent situation, we opened a hotline case that should have been limited to the health care of a single veteran and communication with that veteran. However, due to the involvement of a well-meaning friend who initiated an E-Mail campaign to 'make the VA do the right thing,' we received and responded to more than 50 E-Mails. We are also beginning to receive routine communications from veterans, who appear to have placed us on their global distribution list."

Another potential problem for IG Internet hotlines is "spam." This is unsolicited E-Mail from many different sources, the largest amount of spam is generated by advertisers. Sorting out good E-Mails from junk (spam) is a chore.

Mr. Frederick J. Zirkel, Inspector General, FTC, sounds another note of caution: "as only 5% of traditional hotline calls/complaints now result in the opening of an investigation, we really should be careful before we go mining for new ways to gather information that might be even less likely to result in action but will require resources to review and follow up."

In summary we have taken a quick look at the good and dark sides of using the Internet for hotline operations. Even though we all share a common mission we are all different and we must not take the "one shoe fits all" attitude. The important thing to remember is that the use of the Internet in hotline operations is not the total answer, it may be one way of improving operations and catching up with the computer age. The private sector is utilizing the Internet in everything from movie promotions to selling cars and it is paying off. The challenge is to make modern technology work to your advantage. All OIG hotlines have computers, therefore, getting "wired" to the Internet is a short step away. In some cases the agency has the connection, all that is needed is a tie into the OIG.

Deciding on whether or not to add an Internet website to your hotline requires that you know what the Internet can and cannot do, the pluses and the minuses, and what you want your hotline to do for you, your agency, and your customers. Even with the dark side, the Internet can be a very useful and productive tool which can enhance your hotline operations. So, if the decision is right for your agency, get wired!❑

ZDNet Ancho~esk: US Government has embraced the internet Sept. 12, 1997: According to a report by the General Accounting Office, there are over 4300 sites on the WWW maintained by US government offices at the moment. The US government spent a total of USD350 million between 1994 and 1998 on putting up websites and maintaining existing ones. Sites maintained by NASA are the most popular proving that space and the final frontier are of high interest. According to Bruce Maxwell, author of "How to Access The Federal Government on the Internet 1998," "some of the sites are very popular and get an enormous amount of traffic. Others are incredibly obscure."

Introduction

Contracting out Office of the Inspector General (OIG) services can make sense and save cents if you know the system and avoid the pitfalls. This article will help you decide whether or not to contract for a particular service, choose a contractor, and make sure you get what you pay for.

Decide Whether to Contract a Service

The first step in deciding whether or not to contract out a particular OIG service is to determine if it is on the list of government contracting prohibitions, or "inherently Governmental functions" that should only be performed by the Government. While you can contract out the performance of work to carry out government programs, you cannot contract out the policy making and management of the programs. The President's Council on Integrity and Efficiency (PCIE) guidance entitled, "PCIE Guidance on the IGs Use of Contractors", dated May 15, 1992, provides direction in accordance with the Office of Federal Procurement Policy directive concerning those functions which may not be contracted out.

The PCIE guidance provides an illustrative list of inherently governmental Inspector General (IG) functions that must be performed by OIG employees. These functions include policy and decision making, such as developing IG policy, providing guidance on IG budget formulation and

should not be overly rigid, which may result in the necessity for amendments, nor include unnecessary specifications, which will narrow the field of potential offerors and increase government cost. The SOW should also include a description of anything to be provided by the Government, such as office space, equipment, access to agency staff, use of agency e-mail and other network applications, extent of agency support, and a schedule for provision of specific documents and records. The OIG must also prepare a government estimate of the costs.

Choose a Contractor

Next the OIG must choose a contractor to perform the work. The OIG should first explore the possibility of using an existing Government contract within the OIG, in its agency, or in another OIG or agency. The OIG can save time and money if the procurement requirements fall within the scope of an existing contract. There are now several Government contracts available for use by OIGs that cover an array of potential services and that may meet the particular procurement requirements. Agencies that have contracts currently available for use by OIGs include the Department of Labor, the General Services Administration, and the General Accounting Office.

If the OIG determines that no existing contract will meet its needs, the next step is to write the Request for Proposal (RFP). The RFP should clearly set forth all terms, conditions, scope and evaluation criteria to provide bidders a common basis to prepare proposals. The RFP should specify the evaluation criteria for the technical proposal, including the weight or relative importance assigned to each evaluation factor. The RFP should ask offerors to submit their cost proposal separate from their technical proposal and should specify the relative weight of each.

To ensure independence and avoid conflicts-of-interest, the RFP should ask offerors to disclose all contracts ongoing and completed within the last 2 years for the specific program or office to be audited. The RFP should also contain a requirement that the successful offeror sign a "Declaration of Independence and Conflict-of-Interest Statement" which identifies the requirements with respect to conflicts of interest and specifies the penalties for noncompliance with these requirements. The "PCIE Guidance on the IGs Use of Contractors" provides an example of such a declaration. OIG determinations concerning conflict of interest status should be in writing and approved at the appropriate level.

The RFP must also specify the type of contract that will be awarded. If the OIG is able to clearly define its requirements in detail, a fixed-price contract should be used because it places most of the risk on the contractor and, therefore, requires the least amount of OIG monitoring. In a fixed-price contract, the contractor agrees to deliver all supplies or services at the times specified for an agreed upon price that cannot be changed unless the contract is modified. When the OIG is unable to clearly specify its requirements, it should award a labor hour contract under which it agrees to pay the contractor fixed rates for actual hours worked, plus overhead, general and administrative expenses and profit up to a specified ceiling amount. Obviously, a labor hour contract must be monitored far more closely than a fixed-price contract.

It is usually best to award an indefinite delivery and indefinite-quantity (IDIQ) contract, which allows the OIG to issue specific task orders for the performance of various segments of work. Task orders give the OIGs the flexibility to reassess their needs and the contractor's performance, especially when the contract is awarded for a number of years. IDIQ contracts are also advantageous when more than one offeror is selected because task orders are completed among the successful offerors.

For other than small purchases, full and open competition of potential contractors is generally required prior to award. To promote competition, the solicitation must be publicized, which should be done well before the RFP is issued. However, under emergency conditions, or if a particular vendor has unique qualifications, OIGs may be able to award sole source contracts without obtaining competition. IGs must be especially careful to fully justify the use of sole source contracts and must maintain written justifications. Another exception to full and open competition is the use of socioeconomic programs under which all or part of a procurement is set-aside for small businesses or reserved for the 8(a) program in which contracts are awarded through the Small Business Administration to eligible minority firms.

The primary method of Federal procurement for professional services is negotiation, and this method should normally be used by OIGs. A negotiated procurement allows the OIGs to conduct discussions with offerors regarding their proposals and provides an opportunity for offerors to revise their initial offer and submit a best and final offer (BAFO).

Technical proposals should be evaluated by each member of the selection panel. After that, the panel may meet and discuss their evaluations, and members may make changes to scores based on the discussions. Proposals are then given a composite score and ranked. Often, the ranking contains a natural cut-off point between those offerors that are in the competitive range and those which fall noticeably below the cluster of competitive offerors. Those offerors that fall below the cut-off point may be eliminated from further consideration. The cost proposals are then reviewed, and offerors are ranked on the basis of both technical and cost factors. At this point, discussions with offerors in the competitive range are held. OIGs may not discuss other offerors' proposals, but may freely discuss the offeror's technical weaknesses and any cost concerns. In this way the offerors are alerted to the areas which they need to strengthen in their BAFOs. If this process is done well, it reduces the differences among the offerors in the competitive range and allows the OIG to award the contract to the offeror with the lowest costs. Recall, that it is important not to include unnecessary specifications in the SOW because the OIG will have to give higher scores to offerors meeting the unnecessary specifications, and will then be prevented

from reducing the differences among offerors and achieving the lowest costs.

Make Sure You Get What You Pay For

Once the contract is awarded, the OIG must monitor contractor performance and accept or reject contract deliverables. Contractor performance must be monitored on an ongoing basis to ensure that both the type and quality of services specified in the contract are performed. Monitoring should include reviewing periodic progress reports or requesting periodic briefings, by contractors, in accordance with the contract.

The changes clause in Federal contracts allows the government to change the contract to meet its needs without the consent of the contractor. However, the downside is that Government representatives may unintentionally cause a constructive change by directing the contractor to go beyond the scope of work or demanding products that are beyond contract requirements, or a contractor may interpret the direction as a change order for additional work at additional cost. Consequently, the OIG must be vigilant in avoiding any directions that are beyond the scope of the contract.

The OIG must accept or reject contract deliverables on a timely basis because after a period of time silence is construed as acceptance. Also, invoice approval, which is acceptance of services provided, or documentation of deficiencies in the services, must be prompt. The OIG should ensure that deliverables meet contract requirements. It is not unusual to ask for changes in products, but the OIG should not be overly stringent in rejecting products that meet contract requirements or the OIG will be at risk of a constructive change order that could cost more money. In other words, make sure you get what you pay for, no more and no less.

For most OIG contracts, ensuring adherence to contract specifications is fairly straight forward. However, in those instances in which the contract calls for providing services to customers, for example, OIG staff receiving computer services or citizens calling a hotline, the OIG should take additional steps to monitor performance. This additional monitoring should include reviewing and measuring the delivery of service, customer satisfaction, and achievement of program objectives in accordance with the contract.

Conclusion

For other than inherently governmental functions, OIGs should carefully consider the benefits of contracting out services. For some services, contracting out saves money and frees OIG employees for other priority work. When contracting out, OIGs should take steps to hire the best contractor for the least cost and to make sure services received meet contract requirements.❑

The Inspector General Act: The Meaning of "General Supervision"

Does the IG Act Authorize an Agency Head to Control an Inspector General's Response to Media Inquiries"

by James R. Naughton

Mr. Naughton is an Attorney and Certified Public Accountant with extensive experience relating to Federal legislation, programs and operations, including work as a consultant for numerous Federal departments and agencies. Mr. Naughton was Counsel, Intergovernmental Relations and Human Resources Subcommittee, U.S. House of Representatives from 1955 to 1983. In this capacity, he personally drafted much of the legislation (Inspector General Act) that established statutory Offices of Inspector General (OIGs) in Federal departments and agencies. In addition to his role in the establishment of IG offices, Mr. Naughton directed several investigative reviews and reviews of government-related programs and activities.

James R. Naughton

Although a major purpose of the Inspector General Act of 1978 was to create independent units within Federal departments and agencies, the Act also provides that Inspectors General shall be "under the general supervision" of agency heads. The meaning of this phrase-and whether or not it authorizes an agency head to control an Inspector General's communications with the media-was at the center of a highly unusual series of events at the Department of Housing and Urban Development (HUD) during the summer of 1997.

Events at HUD

On June 17, 1997, the HUD Deputy Secretary ordered the HUD Inspector General (IG) not to issue press releases or respond to media inquiries without permission of the HUD Office of Public Affairs. The order was presented in a June 16 memorandum to the IG; a second June 16 memorandum from HUD's Office of General Counsel (OGC) claimed that the order was authorized by the "general supervision" language of the Inspector General Act.

In his memorandum, the Deputy Secretary referred to "...the aggressive stance taken by Secretary Cuomo in exposing and eliminating waste, fraud and abuse, and restoring the public's trust in the Department and its programs," and emphasized that it was "especially important" that the Department and the Office of Inspector General (OIG) craft "a consistent public message on these subjects."

The HUD Inspector General refused to comply with the Deputy Secretary's order. In doing so, she called attention to the OIG's statutory obligation for independent and objective reporting, stating that "...it is inconceivable that the OIG and HUD will always have the same view on matters of fraud, waste, and abuse; and it is equally inconceivable that the OIG would hide its independent views from the public in order to promote a consistent HUD message."

On July 1, 1997, HUD asked the President's Council on Integrity and Efficiency (PCIE) to investigate the IG's refusal, alleging that it was "a violation of the Inspector General Act of 1978 by the Inspector General."

It is interesting to note that the July 1 complaint was not signed by the Secretary or the Deputy Secretary nor was it signed by HUD's Acting General Counsel, who had participated in the June 17 meeting with the Inspector General. Instead, it was signed by a career employee who ranks no higher than third in the HUD Office of General Counsel.

The attempt by HUD officials to restrict OIG contacts with the media was abandoned before the end of summer. On September 12, the Deputy Secretary signed a memorandum which stated that the complaint to the PCIE would be withdrawn and acknowledged that:

"The Office of Inspector General (OIG) will communicate directly with the media concerning any and all matters relating to the responsibilities and functions of the OIG under the Inspector General Act..."

The Inspector General Act

HUD officials backed away from their attempt to control public release of information by the OIG. However,

(continued on page 22)

since they contended that their aborted actions were authorized under the "general supervision" language of the IG Act, the nature and validity of their claim of authority should be examined.

A brief review of the legislative history of the Inspector General Act of 1978 is a logical starting point.

Rep. L. H. Fountain became the chief sponsor of legislation to create statutory Inspectors General after the work of his House Government Operations subcommittee disclosed fundamental weaknesses in Federal audit and investigative activities.

The subcommittee found there were as many as 116 separate audit and investigative units in a single department or agency, with no central direction or coordination. Such units not only lacked independent authority, but typically reported to and were under the direct supervision of officials responsible for managing the programs being audited or investigated.

Because they lacked independence, auditors and investigators were vulnerable to control by or interference from agency officials. In some instances, investigations could not be opened without specific permission from the agency head; in others, investigators were not allowed to refer criminal cases to the Department of Justice or had been ordered to terminate ongoing inquiries.

There was little assurance that agency heads or Congress would be alerted to significant problems and deficiencies. Auditors and investigators who worked for program managers had to be concerned that objective reports disclosing mismanagement or incompetence might antagonize their supervisors and endanger their own career prospects without ever reaching agency heads or Congress.

Drastic changes were sorely needed. To bring them about, the IG Act created independent units in 12 departments and agencies, to be headed by presidentially-appointed Inspectors General. Existing audit and investigative units were transferred to the newly established OIGs, which were given broad responsibility for audits and investigations and for other activities designed to promote economy and efficiency and to prevent and detect fraud and abuse relating to agency programs and operations.

The Act included a number of specific provisions designed to ensure that Inspectors General were independent and would have adequate authority to carry out their responsibilities.

Public Disclosure of Information

OGC argues that, because Semiannual Reports to Congress are transmitted through the agency head, the IG Act "reserves to the agency head the responsibility to inform the public of Inspector General findings." This contention is not only baseless, but is clearly contrary to the intent of the Act. Semiannual IG reports to Congress are transmitted through agency heads to give them an opportunity to comment on the reports. Agency heads may not change or withhold the Semiannual Report; instead, they are required to transmit the report to Congress with an accompanying report of their own and to make both reports available to the public.

IGs have full authority to make Semiannual and other Reports directly available to the public; in fact, the Freedom of Information Act requires OIGs (and other Federal entities) to provide requested reports and information to the media and the public unless there is a specific statutory exemption permitting non-disclosure.

The "General Supervision" Clause

The "general supervision" clause provides for the IG to "report to" the agency head. However, such reporting is clearly not for the purpose of receiving orders or assignments; under the IG Act, the Inspector General has sole authority to determine which audits or investigations are necessary or desirable.

Other provisions of the Act make it clear that the reporting requirement is intended to ensure that agency heads receive needed information about serious problems, abuses and deficiencies; before 1978, such information had often been directed only to program managers or not provided at all. To provide further assurance that such information reaches agency heads, the Act also includes statutory authority for an IG to have "direct and prompt access" to the agency head when necessary.

Although Inspectors General are clearly not subordinate employees, use of the term "general supervision" in the IG Act might seem to give the agency head at least some degree of authority over the IG. Other provisions of the Act make it clear, however, that the clause does not authorize agency heads to order Inspectors General to do-or not do-anything that might interfere with the performance of their duties.

Congress took extraordinary precautions to ensure the independence of IGs. If it had intended to authorize agency heads to control any activities of Inspectors General, Congress could and would have done so in clear and unequivocal language.

In fact, Congress did use such language in the 1988 amendments to the Act when it authorized heads of the State, Justice, Treasury and Defense departments-but not HUD-to exercise "authority, direction and control" over their Inspectors General in very limited circumstances involving national security or sensitive criminal investigations. If such authority is invoked, the reasons for doing so must be reported to Congress.

While Inspectors General are not subject to control by agency heads, they obviously must comply with the IG Act and other applicable laws and court orders.

Although agency heads may not control an Inspector General's actions, they may review and criticize an Inspector General's performance, ask for an investigation of an IG's activities or even request the President to remove the Inspector General. It should be noted, of course, that they could take such unilateral actions even if there were no "general supervision" clause.

Importance of Cooperation

Even though the "general supervision" clause does not give the agency head any meaningful authority, there was an important reason for Congress to include it in the IG Act.

The Inspector General Act provided IGs with both independence and independent authority so that they could, if necessary, carry out their responsibilities with little or no support from agency heads. However, it was obvious to sponsors of the legislation that a cooperative working relationship between an Inspector General and the agency head would be more effective in combating fraud, waste and abuse than an adversarial situation. Consequently, the "general supervision" clause was included to promote such cooperation by emphasizing that the OIG-though independent-was still part of the agency.

In its report on the l978 IG Act (Senate Report 95-1071), the Senate Committee on Government Operations stressed that Inspectors General, while maintaining their independence, should work cooperatively with agency heads. To illustrate the kind of relationship it intended, the committee said that "if the agency head asked the Inspector General to perform an audit or investigation or to look at certain areas of agency operations during a certain year, the Inspector General should do so, assuming staff resources were adequate."

The committee emphasized that the IG's authority to initiate whatever audits and investigations he deems necessary or appropriate "cannot be compromised"; it further stated that an IG who believed that an agency head was inundating him with requests in some areas in order to divert him from looking at others should share his concern with Congress.

In carrying out their duties, IGs are required to report on problems and deficiencies relating to programs and

(continued on page 24)

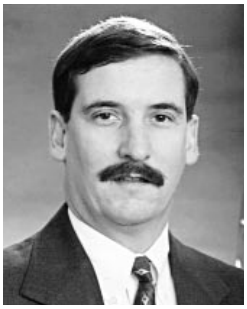
activities for which their agency head has overall responsibility. Despite the built-in potential for conflict, many Inspectors General have had- and continue to have-excellent working relationships with agency heads. In other cases, obviously, the relationship has been less harmonious.

In September 1997, when HUD abandoned its attempt to restrict OIG contacts with the media, the Deputy Secretary acknowledged that "cooperation between the Office of Inspector General and the Department as a whole is critical to the Department's enforcement efforts, and of paramount importance in serving the interests of the American taxpayer."

Congress could hardly have foreseen that the "general supervision" clause would be taken out of context and misused as it was at HUD. If it had anticipated such an unlikely possibility, Congress might well have imposed a mandatory requirement that agency heads read the entire IG Act.❑

Looming Budget Difficulties: Time for a Change In Direction?

by Thomas R. Bloom and James E. Hyler



Thomas R. Bloom,
Inspector General,
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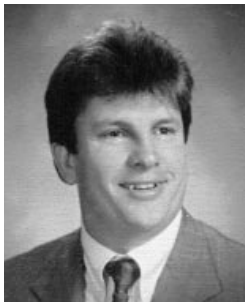

James E. Hyler,
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Perhaps one of the greatest challenges that Inspectors General (IGs) will face in the next few years will be obtaining the financial resources we need to perform our duties. While functioning in an era of fiscal constraint is nothing new, the recent passage of the Balanced Budget Act and the continued growth of entitlements seem destined to make it more difficult for everyone in Government to obtain resources. Further, any reduction in the strong economic growth and rising level of tax revenues we have recently enjoyed would only increase this difficulty. Consequently, the process by which we receive our funding—including the entity to which we submit our budget request—becomes ever more critical.

Current IG Budget Processes

Currently IGs submit their budget request to their agencies, which, after negotiation, either accept or adjust the request, and then submit it to the Office of Management and Budget (OMB) as a separate line item (a practice that began in the 1980s). The IG budget request, however, remains part of the overall agency budget request that must fit under the OMB "mark." OMB can accept or change both figures; again, usually after some negotiation. And while Congress can, in the end, appropriate more or less than was initially requested, this process has caused many to argue that IGs cannot truly be independent if our agencies exert some influence over the size of our budgets. Additionally, inasmuch as our budgets are part of an overall amount limited to the size of the OMB mark, at least some competition for resources between the other agency components and the IG is inherently present.

Despite this inherent competition for resources, the budget process has historically served most IGs well, particularly during the 1980s. And although the fiscal austerity of the 1990s has certainly made it more difficult for everyone to obtain resources, it has been our understanding that the current process has continued to serve most IGs relatively well, and here we stress relative to the agencies' ability to achieve their overall budget requests.

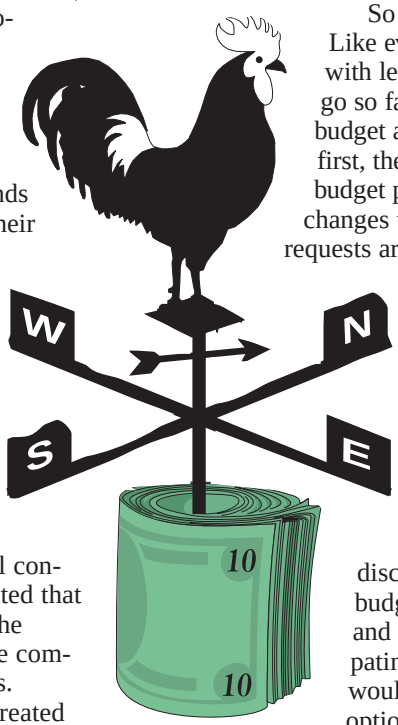
In an effort to determine the validity of this supposition, we informally surveyed IG budget personnel at 10 of the 27 PCIE member agencies. We asked how well the budget process had worked in the recent past, if resources being received were sufficient to accomplish their missions, and if additional Chief Financial Officers Act (CFO) and Government Management and Reform Act (GMRA) audit responsibilities—to audit their agency's financial statements—were hampering them in this regard. We also asked if these additional audit responsibilities had created any conflict-of-interest between the IG and the CFO, real or otherwise, as many agency budget offices are directly answerable to the CFO who is responsible for the preparation of agency financial statements. Consequently, the CFO is the auditee for the CFO and GMRA audits. This is not an issue at the Department of Education, as our Budget Service is not in the CFO's chain-of-command, but it struck us that the potential for conflict is inherently present.

Practically everyone we interviewed reported enjoying favorable working relationships with both their agency's budget officers and OMB officials. Only one interviewee described the working relationship as something other than

(continued on page 26)

"good," "very good," or "excellent." This respondent used the adjective "professional."

Regarding the adequacy of the level of resources received, most gave the impression that they had fared "relatively" well, although several reported that they were experiencing some difficulty in receiving sufficient resources to accomplish their mission. Most of these respondents stated that one primary reason for this difficulty was an overall decline in available resources. Additionally, almost everyone noted that the additional CFO and GMRA audit responsibilities had forced them to reduce or alter the amount of work they would have done otherwise. For instance, some found it necessary to pull staff away from program or performance audits to do the CFO audit, meaning that the original audits were delayed. In many agencies, it was unclear what funds were available to perform the CFO audit; one of the larger agencies convinced their individual bureaus to provide funds to help cover contract costs associated with their financial statement audits. Several respondents characterized the additional CFO and GMRA audit responsibilities as "unfunded mandates."



No one reported that any real conflict-of-interest had developed with regard to their agency CFO and his or her budget oversight responsibilities, although most felt that the appearance was clearly present. Several respondents, however, did state that the IG budget process creates a real conflict-of-interest with their agencies. They noted that the separate line-item appropriation, due to the presence of the OMB mark, did not eliminate competition for resources with other agency units. While most stressed that their agencies had treated them fairly, several stated that because negotiation—both with the agency and OMB—was an important part of the budget process, the personalities of players involved, rather than actual need, can often substantially affect final results. Others noted that agencies often let OMB do the "dirty work" of cutting, and raised the issue of whether agency personnel were as likely to be inclined to protect IG resources as they would other agency resources. Finally, several raised the fundamental question—is it appropriate for agencies over which IGs have monitoring responsibilities to have any say over the size of the IG budget?

Future Budget Requests

While many have long questioned the appropriateness of having our agencies review our budget requests, our concern is with the practical effects of that review in a fiscal environment increasingly likely to limit significantly the availability of Government resources. As the size of the available budget pie decreases, competition for resources will become more intense, and agencies would seem more likely to favor program activities. Meanwhile, increased responsibility makes it more difficult for us as IGs to accomplish our missions.

So where will these circumstances leave us? Like everyone else, clearly we will have to do more with less. Doing more with less, however, will only go so far. Assuming that agencies will adapt their budget arguments to protect their program resources first, the time may be ripe to seek changes in the IG budget process that others have previously proposed—changes that would ensure that our initial budget requests are given the same consideration as our parent agencies' overall budget requests. One such change would require us to notify Congress of any budget cuts imposed by either our agencies or OMB that we feel would interfere with the "adequate working" of our offices. Another option would be to allow IGs to submit our budget requests simultaneously to Congress and our agency heads. Still another solution, and one that has not been, to our knowledge, very thoroughly discussed, would allow us to submit our initial budget requests to OMB only, with both the "M" and "B"—management and budget—sides participating in developing the passback. This solution would be less extreme than either of the first two options, and would seem likely to eliminate much of the inherent conflict-of-interest discussed previously.

The list of options presented here is surely not a complete one. Our objective is to stimulate conversation in the President's Council on Integrity and Efficiency (PCIE) community regarding how we can best ensure that OMB and Congress are fully aware of our budget needs, given that fiscal and economic circumstances in the near future seem likely to limit severely the amount of available dollars that all federal entities must share. If this view is correct, then now is the time for that conversation to begin.❑

Union Representation at OIG Interviews

by Howard L. Sribnick

Howard L. Sribnick, General Counsel to the Inspector General, Department of Justice

The Eleventh and Second Circuit Courts of Appeal have recently rendered decisions on the issue of whether an employee covered by a union collective bargaining agreement is entitled to have a union representative participate in an interview conducted by the Office of the Inspector General (OIG). The Eleventh Circuit ruled that the National Aeronautics and Space Administration (NASA) OIG had committed an unfair labor practice by placing limitations on a union representative during an OIG interview. The Second Circuit ruled that the Department of Justice (DOJ) OIG had not committed an unfair labor practice when one of its agents refused to allow a union representative to be present during an interview. This article summarizes these and other federal circuit court opinions addressing this issue and sets forth guidelines for conducting interviews of bargaining unit employees.

Background

The Federal Labor-Management Relations Act (5 U.S.C. §§ 7101 - 7135) (FLMRA) affords Government employees certain rights to union representation. Section 7114(a)(2)(B) codifies the rights recognized by the Supreme Court in NLRB v. Weingarten, Inc., 420 U.S. 251 (1975) as follows:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at . . . (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation.

It is the position of the Department of Justice that the FLMRA does not apply to an interview conducted by an OIG Special Agent because the agent is not a representative of the agency. This position is based on the statutory independence of the OIG. Specifically, the OIG is an independent entity vested by statute with authority to investigate waste, fraud, and abuse in the agency's programs and operations, and allegations of misconduct and criminal wrongdoing on the part of agency employees. The Inspector General (IG) is appointed by the President with the consent of the Senate. The IG is subject to the general supervision of the agency head. However, neither the agency head nor anyone else in the agency may direct the activities of the IG. Only the President, not the agency head, may request the resignation of the IG. In order to maintain the IG's independence, the Inspector General Act bars the IG from engaging in the management functions of the agency. Accordingly, by law and practice, the Inspector General is not part of management of the agency or its components.

In addition, the FLMRA exempts OIGs from all collective bargaining obligations, (5 U.S.C. 7112(b)(7)). Therefore, a union should not be able to negotiate the parameters of an OIG investigation either with the OIG or with the agency acting as a de facto surrogate for the OIG. This proposition is particularly important because the FLRA views the OIG's obligations to the union to extend beyond representation during an interview. These include the obligation to provide advance notice of an examination and the general subject of that examination[1] ; the right to halt an interview and consult with the employee outside the hearing of the investigator in order to discuss responses to particular questions[2] ; and the right to negotiate the procedures and arrangements that will apply to OIG investigations[3]. Such "interference" with the OIG's ability to investigate criminal and administrative employee misconduct is contrary to the OIG's responsibilities under the IG Act and clearly undermines the OIG's independence, especially if the agency is allowed to negotiate with the union regarding how the OIG will carry out
its responsibilities.

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[1] FAA, New England Region, Burlington, MA, 35 FLRA 645, 652-654 (1990) and U.S. DOJ, INS, 40 FLRA 521, 549 (1991), rev'd on other grounds, 975 F.2d 128, 224-226 (5th Cir. 1992).

[2] U.S. DOJ, INS, 46 FLRA 1526, 1553-1555, 1565-1569 (1993), rev'd on other grounds, 39 F.3d 361, infra.

[3] U.S. NRC, 47 FLRA 1, 9 (1993), rev'd, 25 F.3d 229, infra.

(continued on page 28)

Circuit Court Rulings

The five judicial decisions that have addressed union rights relative to OIG investigations have focused on two issues (1) what is the "agency" under the FLMRA; and (2) whether the OIG investigator is a representative of the "agency" while conducting an interview of a collective bargaining unit employee. The Third Circuit Court of Appeals held that OIG investigators are representatives of the agency under § 7114(a)(2)(B) of the FLMRA in all circumstances. The Fourth and the District of Columbia Circuits held that the OIG and its agents are outside the scope of the FLMRA. The Eleventh Circuit held that OIG investigators are representatives of the agency and must afford covered employees the right to union representation during an administrative interrogation (the Court expressly did not decide the issue as it applies to criminal inquiries). Finally, the Second Circuit held that the determination of whether FLMRA rights apply during an OIG interview of a collective bargaining unit employee depends on whether the issues being inquired about are covered by the collective bargaining agreement. A review of each of these decisions follows:

A. Defense Criminal Investigative Service v. F.L.R.A., 855 F.2d 93 (3rd Cir. 1988) involved a criminal investigation by an investigator of the Defense Criminal Investigative Service (DCIS), the investigative arm of the Department of Defense (DOD) OIG. The Court held that the "agency" for purposes of the FLMRA was DOD and that DCIS investigators were representatives of the agency. Accordingly, DCIS agents were required to afford to bargaining unit employees rights under the FLMRA. The Court explained its reasoning as follows:

> DCIS investigators are employees of the DOD and their purposes when conducting interviews like the ones here involved is to solicit information concerning possible misconduct of DOD employees in connection with their work. Concededly, the information secured may be disseminated to supervisors in affected subdivisions of the DOD to be utilized by those supervisors for DOD purposes. Under these circumstances, we are confident that Congress would regard a DCIS investigator as a "representative" of the DOD. (855 F.2d at 100)

B. U.S. Nuclear Regulatory Commission v. F.L.R.A., 25 F.3d 229 (4th Cir. 1994). This case involved the issue of whether the Nuclear Regulatory Commission (NRC) was required, under its collective bargaining agreement, to negotiate employees' rights and investigative procedures relating to OIG interviews. The Fourth Circuit ruled that the OIG was statutorily independent of agency management, was not subject to the agency's obligation to collectively bargain with the union, and that inclusion of OIG investigative issues in the collective bargaining process would undermine the independence of the OIG. The Court stated:

> Congress intended that the Inspector General's investigatory authority include the power to determine when and how to investigate. To allow the NRC and the Union, which represents the NRC's employees, to bargain over restrictions that would apply in the course of the Inspector General's investigatory interviews in the agency would impinge on the statutory independence of the Inspector General. (25 F.3d at 234)

C. United States Department of Justice v. F.L.R.A., 39 F.3d 361 (D.C. Cir. 1995). This case involved a DOJ OIG interview of an Immigration and Naturalization Service (INS) employee that took place after criminal prosecution had been declined. The OIG investigator limited the participation of the union representative during the interview and questioned a union official regarding the official's conversation with the subject of the investigation. The union alleged, and the Federal Labor Relations Authority (FLRA) found, that these actions violated the rights of the employee under the FLMRA.

The District of Columbia (D.C.) Circuit Court of Appeals disagreed. The Court expressly recognized the statutory independence of OIGs and their need to be free of the constraints of union contracts in order to carry out their mandate to effectively undertake criminal and administrative investigations, stating:

> [T]here cannot be the slightest doubt that Congress gave the Inspector General the independent authority to decide "when and how" to investigate; that the Inspector General's authority encompasses determining how to conduct interviews under oath; and that the Inspector General's independence and authority would necessarily be compromised if another agency of government - the Federal Labor Relations Authority - influenced the Inspector General's performance of his duties on the basis of its view of what constitutes an unfair labor practice. (39 F.3d at 367) (citation omitted)

D. F.L.R.A. v. NASA, 120 F.3d 1208 (11th Cir. 1997) involved three issues on appeal from the FLRA: whether a NASA OIG investigative agent was an agency representative when conducting a non-criminal interview[4] of a bargaining unit employee; whether the agent had committed an unfair labor practice by setting ground rules for the participation of the union representative during the interview; and whether NASA headquarters had committed an unfair labor practice by not instructing the OIG to abide by the FLMRA.

On the first two issues, the Court affirmed the FLRA's rulings that the OIG agent was a representative of the agency and that an unfair labor practice had been committed. The Court stated:

> The Authority determined that NASA-OIG performs an investigatory role for NASA-Headquarters (HQ) and its components . . . [and] that information obtained during the course of NASA-OIG investigations may be used by NASA components to support

[4] The Court noted that it was not determining the availability or scope of § 7114(a)(2)(B) protection in the context of criminal investigatory examinations. See 120 F.3d 1208 at fn. 6.

> administrative or disciplinary actions taken against bargaining unit employees. Under these circumstances, we conclude that the Authority's determination that the NASA-OIG investigator was a "representative of the agency" within the meaning of § 7114(a)(2)(B) is a permissible construction of the Statute
>
> * * *
>
> We find nothing in the text or legislative history of the IG Act . . . to justify exempting OIG investigators from compliance with the federal Weingarten provision. No provision of the IG Act suggests that Congress intended to excuse OIG investigators from honoring otherwise applicable federal statutes. (120 F.3d at 1213)

The Court also affirmed the FLRA's finding that NASA headquarters had committed an unfair labor practice by not directing the OIG to comply with the FLMRA, stating:

> [W]e conclude that the Authority's order directing NASA-HQ to order NASA-OIG to comply with the terms of this section does not intrude on the independence of NASA-OIG. As discussed earlier, the OIG need only have enough independence from agency management so that it can effectively discover and cure abuses and inefficiency within the agency. Requiring agency management to order the OIG to comply with a congressional directive does not in our view intrude on the statutory independence of the OIG. (Id. at 1217)

E. F.L.R.A. v. U.S. Dept. of Justice, 125 F.3d 106 (2d Cir. 1997). This case involved both criminal and administrative interviews, conducted by DOJ OIG Special Agents, of INS employees who were part of a collective bargaining unit. The investigation addressed allegations of bribery and failure to follow a directive on the carrying of firearms. The Second Circuit Court of Appeals ruled that the determination of whether OIG Special Agents were representatives of the agency for purposes of the FLMRA while conducting these interviews turned on the nature of the questions being asked.

> In our view, whether an OIG agent is a "representative" of the DOJ for purposes of section 7114(a)(2)(B) depends on the context in which the interrogation arises. (125 F.3d at 113)

The Court opined that if the questions went to areas covered by the collective bargaining agreement, then the OIG agent was acting as a representative of the agency and must afford FLMRA rights to the employee.

> We would think that Congress wanted the Weingarten provision to apply whenever any person was requested by the DOJ (or any other covered "agency") to interrogate employees of a collective bargaining unit about any matters within the scope of collective bargaining. It is not likely that Congress would tolerate avoidance of the Weingarten requirement whenever an agency, such as the DOJ, shifted the task of interrogating employees about such matters away from personnel with supervisory authority over such employees and assigned it to agents of the OIG. Thus, for example, if OIG agents were called in to question the INS-New York (NY) employees about excessive use of sick leave, section 7114(a)(2)(B) would apply to require attendance of a union representative. (Id.)

If, however, the questions addressed areas outside the purview of the collective bargaining agreement, the Court ruled that the OIG investigator would not be a representative of the agency, and FLMRA rights did not apply.

> The rights and obligations imposed by section 7114 have no application to matters beyond the scope of collective bargaining. For example, if an Federal Bureau of Investgation (FBI) agent was questioning a DOJ employee concerning the employee's alleged criminal conduct, we do not believe that the Weingarten provision would apply to assure the presence of a union representative at the examination. The interrogating agent would be a "representative" of the DOJ for some purposes, but not for the purposes of section 7114(a)(2)(B). Thus, we do not agree with the Third and Eleventh Circuits that section 7114(a)(2)(B) applies to questioning by an OIG agent simply because the inquiry concerns "possible misconduct" of employees "in connection with their work," . . . or because the information obtained might be used "to support administrative or disciplinary actions." (Id.) (citation omitted)

Because the Court deemed the areas inquired about during the interviews in this case (allegations of bribery and failure to follow a firearms directive) to be outside the scope of the collective bargaining agreement.

> We conclude that the FLRA lacks authority to require an Inspector General to permit federal employees to have a union representative present during questioning concerning criminal offenses and other matters not within the scope of collective bargaining. . .(Id. at 113 - 114)

Conclusion

Parties to a collective bargaining dispute under the FLMRA may seek review in either the D.C. Circuit or in the judicial Circuit governing the geographic area in which the dispute arose. The D.C. Circuit is, thus, a court of national jurisdiction in these matters. Unless a particular Circuit, other than the D.C. Circuit, has rendered an opinion on an FLMRA issue, the decisions of the D.C. Circuit are controlling. Accordingly, OIG Special Agents should comply with the following guidelines when interviewing an employee who is a member of a collective bargaining unit.

Bargaining unit employees within the jurisdiction of the Third Circuit (Pennsylvania, New Jersey, Delaware and the

(continued on page 30)

Virgin Islands) who reasonably believe that an OIG examination may result in disciplinary action and who request union representation during an interview must be allowed such representation, even during a criminal interview. Defense Criminal Investigative Service v. F.L.R.A., 855 F.2d 93 (3rd Cir. 1988).

Bargaining unit employees within the jurisdiction of the Eleventh Circuit (Florida, Georgia and Alabama) who reasonably believe that a non-criminal OIG interview may result in disciplinary action and who request that a union representative be present must be afforded union representation. F.L.R.A. v. NASA, 120 F.3d 1208 (11th Cir. 1997).

Bargaining unit employees within the jurisdiction of the Second Circuit (New York, Connecticut and Vermont) who reasonably believe that an OIG interview regarding matters within the collective bargaining agreement may result in disciplinary action and who request union representation must be allowed such representation. For purposes of applying this rule, Special Agents may assume that, at a minimum, interviews involving allegations of criminal wrongdoing are outside the scope of the collective bargaining agreement. F.L.R.A. v. U.S. Dept. of Justice, 125 F.3d 106 (2d Cir. 1997).

Elsewhere, OIG Special Agents continue to be governed by the D.C. Circuit opinion in United States Department of Justice v. F.L.R.A., 39 F.3d 361 (D.C. Cir. 1995), and are not required to afford an employee the right to union representation during an investigative interview.❑

Labor Relations Issues In OIG Investigations

by Scott Cooper, Esq.

Scott Cooper, Esq., Department of Justice

I. The *"Weingarten Right"* and Inspector General Investigations

5 U.S.C. § 7114 was enacted in 1978 as part of the Federal Service Labor-Management Relations Statute (FSLMRS). The section, as its title indicates, address "representation rights and duties." The section, specifically 5 U.S.C. § 7114(a)(2)(B), vests Federal employees with a certain right during investigatory interviews, generally referred to as the "Weingarten right."

The *Weingarten* right has its origins in case law developed in private sector labor relations. The private sector right was judicially created in the Supreme Court case, *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S., 251 (1975). That right was carried over to the Federal sector and written into law by Congress. The FSLMRS provides that a bargaining unit employee will be allowed to have a union representative present at any examination of an employee in the unit by a representative of the agency in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action against the employee and the employee requests representation.

5 U.S.C. § 7114(a)(2)(B)

Thus, the right to union representation is only activated when an employee requests such representation. There is no duty to inform employees of any right to representation.

The employee making the request must also reasonably believe discipline could result from the interview. According to the Federal Labor Relations Authority (FLRA) and the United States Court of Appeals for the District of Columbia Circuit, it is "[t]he possibility, rather than the inevitability, of future discipline that determines the employee's right to representation." American Federation of Government Employees, Local 2544 v. Federal Labor Relations Authority, 779 F.2d 719 (D.C. Cir. 1985), 85 FLRR 1-8034. The FLRA has held that an employee has no reasonable fear of discipline where the employee has been granted "use immunity." U.S. Department of Justice, Office of Inspector General, Washington, D.C. and United States Immigration and Naturalization Service, El Paso and AFGE, 47 FLRA 1254 (1993), 93 FLRR 1-1169. For practical purposes, the FLRA finds that any employee who has not been granted use immunity and claims he or she fears discipline, has a reasonable fear of discipline.

An employer may refuse an employee's request for a union representative, but the interview may not continue without the employee's consent. Of course, "the employer is free to carry on [its] inquiry without interviewing the employee..." If an employee is given the option of being interviewed or remaining silent and waiving any benefit of an interview (i.e. a *Miranda* situation) the *Weingarten* right does not apply.

The Supreme Court described the functions and limitations of a union representative during an investigative interview, and the obligation of the employer in Weingarten as follows:

> The employer has no duty to bargain with the union representative at an investigatory interview. "The representative may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested in hearing the employee's own account of te matter under investigation... Certainly his presence need not transform the interview into an adversary contest."

Weingarten, 420 U.S. at 264. The Supreme Court went on to emphasize that "exercise of the [Weingarten] right may not interfere with legitimate employer prerogatives." *Id.*

The Courts of Appeals are split on the issue of whether *Weingarten* rights apply to employees that are questioned by agency Inspector General Offices (OIG). The issues in these cases have been: (a) whether OIG employees conducting interviews should be considered to be "representatives of the Agency" as that term is defined by the Statute, and; (b) whether the granting of *Weingarten* rights would impermissibly interfere with the administration of the Inspector General Act (IG), 5 U.S.C. Appendix 3. Three Courts of Appeals decisions have specifically addressed these issues.

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In *Defense Criminal Investigative Service, Department of Defense v. FLRA*, 855 F.2d 93 (3rd Cir. 1988), 88 FLRR 1-8042 (DCIS), and *Federal Labor Relations Authority v. National Aeronautical and Space Administration*, 120 F.3d 1208 (11th Cir. 1997), the Courts ruled that IG agents are representatives of the Agency and the granting of *Weingarten* rights does not impermissibly interfere with the IG Act. The FLRA has adopted these cases. However, in *United States Department of Justice; INS, Northern Region, Twin Cities, Minnesota; Office of Inspector General, Washington, D.C.; and Office of Professional Responsibility, Washington, D.C. v. FLRA*, 39 F.3d 361 (D.C. Cir. 1994), 94 FLRR 1-8011, the D.C. Circuit reached the opposite conclusion. This is especially important since all cases may be appealed to the D.C. Circuit. Given this split, it is likely that this issue will soon reach the Supreme Court. Until then, IGs would be wise to grant Weingarten rights unless they can show that to do so would cause actual harm to their investigation.

II. Employee Entitlement to Counsel During IG Interviews

While the D.C. Circuit decided that an employee has no right to a Weingarten representative during an IG interview, the judges indicated that

> [o]f course, representation might assist union members. But that is not because of anything having to do with labor-management relations or collective bargaining. Anyone — whether a union member, a management official or an individual not employed by the federal government — would be prudent to secure legal representation if they are to be questioned under oath.

Twin Cities, 39 F.3d at 368. The Court based this conclusion on the Administrative Procedure Act (APA), 5 U.S.C. § 555(b) which states:

> [a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented and advised by counsel or, if permitted by the agency, by other qualified representative.

It has not held whether the APA requires legal representation at OIG interviews. This issue has not been expressly addressed by any court. The above-quoted statement in *Twin Cities* was dicta, in that the issue was not one put before or resolved by the Court.

The right under the APA, if any right exists, allows representation by a lawyer. While the agency may allow representation by non-lawyers, it need not do so.

III. Discussions Between a Union Member and His or Her Representative and Questions of Privilege

In *U.S. Department of the Treasury, Customs Service, Washington, D.C. and National Treasury Employees Union*, 38 FLRA 1300(1991), 91 FLRR 1-1003 (Customs Service), the FLRA held that union representatives may be "privileged" to refuse to answer certain investigators' questions relating to the employee they are representing. The issue in *Customs Service* was:

> whether the designated union representative in an actual or potential disciplinary action can be examined by management concerning statements made by the employee to his, or her, representative. It is, indeed, whether the relationship between the union representative and an employee is analogous to the attorney client privilege.

Id., at 1319. The FLRA, in holding that such discussions were privileged, based its decision on the holding of the D.C. Circuit in *Cook Paint & Varnish Co. V. NLRB*, 648 F.2d 712 (D.C. Cir. 1981) (*Cook Pain*t). Cook Paint involved the review of a private sector decision of the National Labor Relations Board. The Court held the coercive interviews of union stewards regarding representational activities after discipline had been issued and arbitration had been involved may be an unfair practice. The Court stated.

> we do not mean to suggest that a 'blanket rule' concerning [coercive interviews of] union stewards is any more appropriate than a 'blanket rule' concerning [coercive interviews] of employees. For example, a union steward who has no representation responsibilities in a particular case, or one who be directly involved in alleged acts of misconduct, may not be entitled to any special protection.

Id., at 725. The FLRA, in issuing Customs Service, held that all representationally related conversations between a bargaining unit member and the unit member's representative are "privileged". The holding in Customs Service was first challenged in Twin Cities. The Court held that any privilege that exists between union members and their representatives does not apply to OIG interviews.

IV. OIGs and Provisions of Collective Bargaining Agreements

Subjects of interviews often claim that OIG investigators are bound by provisions of a collective bargaining agreement. However, both Courts that have addressed this issue have found that an IG may not be bound by the provisions of a collective bargaining agreement. In *United States Nuclear Regulatory Commission, Washington, D.C. V. FLRA*, 25 F.3d 229 (4th Cir. 1994), 94 FLRR 1-8005, The Court of Appeals for the Fourth Circuit held that agencies and unions could not bargain over any proposal that purported to bind or effect an OIG. The Fourth Circuit's reasoning was adopted by the D.C. Circuit in *Twin Cities*. Thus, while this issue is not yet resolved, under the current state of the law, Inspectors General cannot be bound by provisions of collective bargaining agreements.❑

Why Isn't Law Enforcement Authority in the Inspector General Act?

by Vicky L. Powell, Esq.

Vicky L. Powell, Esq., Associate Counsel, Office of the Counsel to the Inspector General, Department of Health and Human Services

Introduction

In Fiscal Year 1997 the Department of Health and Human Services' Office of Inspector General (OIG), the first statutorily created OIG[1], reported 215 successful criminal prosecutions; 2719 program exclusions; 1255 civil recoveries; 287 indictments/information; 1047 criminal presentations; and 1558 civil presentations. This resulted in over $1.2 billion in judgments, settlements, fines and other receivables. Notwithstanding, the effectiveness of the Department of Health and Human Services' OIG, like most OIGs, is hampered by the lack of full statutory law enforcement authority.

Full statutory law enforcement authority permits investigative agents in OIGs to execute warrants, to make arrests and to carry firearms. These are necessary, every day aspects of an investigator's job. The lack of full statutory law enforcement authority means that OIGs investigators must routinely seek assistance from other Federal agencies with the relevant authority to carry out these duties. The availability and timeliness of such assistance fluctuates widely depending on the current needs of the agency providing the assistance.

Full statutory law enforcement authority also provides additional protections to ensure the security of investigators in potentially unsafe situations. The possible consequences of not having these additional protections are poignantly illustrated by OIGs investigators' participation in Task Forces. In order to coordinate efforts, Task Forces are created that partner OIG investigators with agents from other federal law enforcement agencies. Experience has shown that during the course of a Task Force investigation, the investigator from an agency with statutory law enforcement authority will be called upon to engage in crime fighting activity while in the company of a partner whose authority is limited. The investigator with restricted authority is placed in the precarious position of having to weigh whether to back up a partner or face possible adverse administrative or legal action, even though the investigator has the appropriate training, to do so.

Finally, full statutory law enforcement authority improves crime control efforts. The nature of an investigator's job requires him or her to deal with individuals who engage in criminal activity. The behavior or conduct of such an individual is unpredictable and not limited to a particular type of offense. Yet, an investigator who comes into contact with an individual that he or she helped to prosecute may be in a compromising position because of limits on law enforcement authority. Similarly, an investigator with limited authority is impeded from acting even when a felony or misdemeanor falls outside the scope of his or her authority, takes place in the investigator's presence.

Historically, the inability to gain statutory law enforcement authority by OIGs has been primarily due to concerns regarding the proliferation of Federal law enforcement authority. Fragmentation, duplication of effort, an absence of consolidated command and control, failures in coordination, interagency rivalries and turf battles have been cited as the consequences of proliferation of federal law enforcement.[2]

Given the reluctance to extend formal law enforcement authority, the Federal Government has sought remedial measures to compensate OIGs for the lack of full statutory law enforcement authority. Shortly after passage of the Inspector General Act of 1978, the Department of Justice officially designated Inspector General Offices of Investigations as "criminal justice agencies" so investigators could obtain criminal records and information on suspects. Further, OIG investigators were included in the list of Federal officers protected by Federal assault and murder statutes. OIG's investigative agents were also given the same position classification[3] as agents of the Federal Bureau of Investigation, Drug Enforcement Administration, Secret Service and the Bureau of Alcohol, Tobacco and Firearms.

(continued on page 34)

[1] Public Law 94-505, 90 Stat. 2429, 42 U.S.C. §3521 (1976).

[2] 5 U.S.C. Appendix Sec. 9.

[3] The Offices of Inspector General investigators are generally in the GS-1811 series which has a special pay and retirement benefits and which is the traditional criminal investigator classification. All Offices of Inspector General investigators receive training at the Federal Law Enforcement Training Center in Glynco, Georgia.

The Department of Justice further expanded OIG's investigative abilities by opining that OIG agents are investigative officers and as such may be authorized by appropriate officials at the Department of Justice to apply for and conduct court authorized electronic surveillance with regard to matters within the Inspector General's investigative jurisdiction. Additionally, the Attorney General designated many OIG investigators as "Federal law enforcement officers" authorized to request the issuance of warrants. Finally, Congress granted the OIG at the Department of Labor a more active role in conducting investigations of organized crime and racketeering.

However, as a result of the above approach, law enforcement authorities are scattered among the OIGs in a somewhat haphazard manner. For example, some OIGs gained statutory law enforcement authority through a transfer of functions that they held prior to the enactment of the 1978 Act. Other OIG investigators acquired relevant authorities through specific statutory assignment. Still, other OIGs receive law enforcement authority through special deputations.

This article discusses the procedural obstacles faced by most investigative OIGs due to the lack of full statutory law enforcement authority. Part I details the Office of Management and Budget's (OMB) draft Circular and the Department of Justice's guidelines for OIG proposed legislation regarding law enforcement authority and the objections to the guidelines. Part II discusses in detail the deputation process-the alternative to seeking full statutory law enforcement authority that most OIGs utilize. It also discusses the administrative burdens associated with this process.

I. OMB Draft Circular and the Department of Justice's Administration Policy Statement Guidelines for Use in Proposing and Reviewing Legislation Involving Criminal Law Enforcement Authorities

On January 27, 1984, the Office for Legislative Reference at the OMB issued a draft Circular that proposed guidelines that were to be used by OIGs when proposing and reviewing legislation involving criminal law enforcement authorities. The draft Circular required that OMB-established criteria be met prior to proposing legislation or reporting favorably, including testifying before congressional Committees, on pending bills that would grant expanded criminal law enforcement authorities to Federal agencies. Further, the draft Circular required each OIG to submit to the OMB for clearance any written expression of its views, including notes and reports prepared for testimony on a pending bill, as well as any proposal for or endorsement of legislation concerning law enforcement authorities.

Fifteen Inspectors General submitted their views on the draft Circular through the Chairman of the Legislative Committee on the President's Council on Integrity and Efficiency (PCIE) to the Deputy Director of OMB. The primary objection expressed by Inspectors General to the draft Circular was that the guidelines and OMB clearance procedures directly conflicted with the statutory responsibilities and authorities of the Inspectors General. The OIGs were established, in part, as vehicles for keeping Congress "fully and currently informed" about problems and deficiencies in their respective agencies and the need for corrective action. As part of this effort, OIGs review proposed legislation and regulations and report on such matters directly to Congress, generally without prior clearance or approval. The OIGs argued that the statutory provisions, as well as the legislative history accompanying each, manifest a clear congressional desire to have OIGs routinely express their opinions on legislative matters directly to Congress, generally without clearance or censorship. In addition to the Inspector General community, various cabinet members and agency officials as well as the Chairman of the House Committee on Government Operations, objected to the draft Circular on similar grounds. Subsequently, the Department of Justice issued a revised version of the guidelines, in the form of an Administration Policy Statement. Like the draft OMB Circular, the Administration Policy Statement set forth guidelines for use by agencies in the development and review of proposed legislation and bills that would extend criminal law enforcement authority to OIGs. Additionally, the Administration Policy Statement required both the Department of Justice and the Department of Treasury to evaluate proposals for law enforcement authority.

The Policy Statement declared that, in general, criminal law enforcement authority should not be extended to an executive agency involved in a federal law enforcement mission unless the following criteria are present:

a. The agency's ability to perform an essential function within its jurisdiction is significantly hampered by its lack of criminal law enforcement authority;

b. The agency's need for such law enforcement authority cannot be met effectively by assistance from law enforcement agencies with such authority;

c. Adequate internal safeguards and management procedures exist to ensure proper exercise of the authority by the agency; and

d. The advantages attributable to the agency's possession of the authority can reasonably be expected to exceed the disadvantages that are likely to be involved in its exercise of the authority.

Compliance with these guidelines have proved quite difficult and a number of OIGs who attempted to request clearance for full statutory law enforcement authority under these guidelines were turned down.

More than 13 years after the guidelines were issued, in response to concerns raised by Inspectors General, the Department of Justice in the fall of 1996 reissued

amendments to the guidelines. However, these amendments did not lessen the burdens imposed on OIGs by the Administration Policy Statement. The only alternative for most OIGs for obtaining needed law enforcement authorities to carry out their mandated investigative functions is the deputation process. This process too has proven less than satisfactory.

II. Special Deputation as U.S. Marshals

The U.S. Marshals Service is authorized to deputize selected officers or employees of the United States who are designated by the Associate Attorney General to perform the functions of the Deputy U.S. Marshal.[4] Special deputations of investigators in OIGs were historically handled on a case-by-case basis. Deputations are used to authorize investigative personnel of OIGs to exercise additional law enforcement powers in the context of a case that is within the jurisdiction of the requesting Inspector General. The law enforcement powers granted under a deputation include the authority to seek and execute arrest or search warrants, to make warrantless arrests in certain circumstances and to carry a firearm.

However, powers bestowed upon OIG investigators under a special deputation are more limited in scope, duration, eligible staff, operational autonomy and investigative techniques than full statutory law enforcement authority. Specifically, OIG investigators' use of a special deputation is typically restricted by the terms of the deputation to a particular case or project. OIGs soliciting special deputations are required to evaluate and nominate only those persons who have held positions and have shown expertise in the law enforcement field and who have qualified with the use of firearms within the last 12 months. Also, all such deputations are for a limited time; each deputation expires on a date certain that is stated on the face of the deputation. Ordinarily, these special appointments will not be authorized for longer than one year, and will automatically expire on June 30th of each year unless a requesting Inspector General and the Federal prosecutor assisting in the matter agree that the appointment may include an alternate termination date.

The investigative procedures for which deputation is granted are restricted to the following:

(1) hazardous to the life or physical safety of the criminal investigator or a cooperating witness;

(2) necessary for the successful completion of the Federal investigation; and

(3) can not reasonably be performed by another law enforcement agency with firearms and arrest powers.

Each Inspector General's request for deputation is directed to the Deputy Assistant Attorney General in the Criminal Division of the U.S. Department of Justice. The request for a special deputation must include:

(1) information demonstrating that the request is for an authorized purpose;

(2) an endorsement letter from the prosecutor that must include:

  (a) brief summary of the investigation;

  (b) the expected duration of the investigation, and where it is anticipated that the deputation will necessarily last beyond the following June 30th date, a recommended termination date for deputation (not to exceed 1 year from the request) and a justification for the extended duration; and

  (c) a statement whether the prosecutor or any Federal law enforcement agency also involved in the investigation knows or has worked with the agent(s) for whom a deputation is requested; and provides an explanation of how the activities to be conducted by the agents are hazardous and why they require a special deputation.

(3) a statement of the agency's authority to conduct the subject investigation; and

(4) the agent's qualifications.

Requests for renewal of appointments as Special Deputy U.S. Marshals are made in writing from the Inspector General to the U.S. Attorney for the District in which the action is proceeding. These requests must include:

(1) a statement as to the current status of the investigation;

(2) any recent developments; and

(3) a certification that nominees have qualified with the use of firearms within the preceding 12 months.

These requests are submitted to and approved by the U.S. Attorney with the concurrence of the Department of Justice Headquarters Officer of Enforcement Operations. Once approved by the Office of Enforcement Operations, the authorization is forwarded from the U.S. Marshal's Service to effect the deputation.

In an emergency situation, deputation requests may be made by telephone. The U.S. Attorney or other prosecuting official may approve a deputation to the U.S. Marshal's Service to effect the deputation. Within 48 hours, the U.S. Attorney or other prosecuting official must submit appropriate written justification to the Department of Justice Headquarters Office of Enforcement Operations. The Office of Enforcement Operations may cancel the authorization prospectively.

[4]28 C.F.R. §§0.19(a)(3), 0.112.

(continued on page 36)

The procedures for a special deputation, as outlined above, are not only cumbersome but also can involve a significant delay. In response to a request from the Chairman of the Committee on Governmental Affairs for information relating to the deputation of special agents in the OIG, the PCIE noted in a report in March 1993 that the Department of Justice average turnaround time for deputation requests varies among PCIE agencies from 23-90 days with the turnaround time running as high as 120 days in individual cases. The PCIE found that they had an adverse impact on investigations.

In 1994 several Inspectors General and the PCIE requested an annual renewable blanket deputation from the Department of Justice. The argument in support of blanket deputation included the complexity of the documentation and the cost of obtaining case-by-case deputations; the time expended; and the training of OIG agents which often exceeded that of U.S. Deputy Marshals. It was also suspected that blanket deputations were consistent with the goal of streamlining Government.

In 1995 a blanket deputation pilot project was developed by the Federal Bureau of Investigation (FBI), Department of Justice and several OIGs. The Departments of Labor, Housing and Urban Development, Transportation, Veterans Affairs, State, Social Security Administration and the Small Business Administration were selected for the pilot program and entered into the Memoranda of Understanding (MOU) with the Department of Justice and the Federal Bureau of Investigation for so called "blanket deputations." The purpose of the MOU was to address issues related to coordination, notification and training. Under the MOU, for a period of 1 year all special agents in the 1811 series in an investigative OIG were deputized. This allowed the investigators to make arrests, seek and execute warrants and carry a firearm on all the cases within their jurisdiction, without having to go through the deputation process for each individual case. Other OIGs have sought and received more tailored blanket deputations, such as the Department of Health and Human Services, OIG's program deputation for health care matters.

Although the blanket deputation process is clearly more efficient than the case-by-case deputation procedures, there are still administrative burdens such as the tracking and reporting requirements and the annual renewal of the deputation. Specifically, the general MOU, now covering several OIGs, requires that the investigation of certain sensitive cases be confined to joint investigations with the FBI; prompt notification to the FBI of initiation of any investigation in which there is concurrent FBI jurisdiction; obtaining a prosecutor's opinion before investigations progress beyond initial stages; quarterly instead of semiannual firearms qualifications; and limitations on certain sensitive investigative techniques.

In spite of the administrative shortcomings, the deputation process has allowed many OIG investigators to functionally operate as empowered law enforcement officers. As a result, OIG investigators have gained invaluable experience, training and expertise in law enforcement activities. Moreover, under deputations, OIG investigators have demonstrated effectiveness and responsibility in exercising these authorities, which is evident by the success of the pilot program.

The success of the pilot program is illustrated by improved communications between OIG's investigative headquarters and field offices. There is noticeably improved liaison between the FBI field divisions and the regional OIG. There is also an increase in the reporting of new cases from the FBI field divisions. These are just a few examples of the initial pilot deputation program's accomplishments. The program was so successful that in 1996, the Department of Justice extended the program to other OIGs with more than 50 percent of their agents deputized. The MOU was expanded to the Departments of Commerce, Education, Energy, Interior, Treasury, Environmental Protection Agency (EPA), Federal Emergency Management Agency (FEMA), National Aeronautics & Space Administration (NASA), the Nuclear Regulatory Commission and the Office of Personnel Management (OPM).

Conclusion

Indisputably, the nature of OIG investigators work requires law enforcement authorities to carry out their functions. The exercise of these authorities under special and blanket deputations has resulted in significant monetary savings for taxpayers and thousands of convictions for criminal violations involving Federal programs and activities. The OIGs have a superb track record in responsibly administering law enforcement authorities.

The administrative burdens associated with the current process for case-by-case deputation, blanket deputation, and proposed legislation for statutory law enforcement authority are no longer warranted given the success of the deputation pilot project and the accomplishments of Investigative OIGs. Now it is time for lifting the restrictive approach to granting full statutory law enforcement authority to Presidential rank OIGs. Uniform full statutory law enforcement authority will make OIGs more effective by directing efforts toward fraud enforcement and away from complicated paperwork.❑

What Was Intended by "Communications" with Congress: More than the Semiannual Report and Seven Day Letter

by E. Jeremy Hutton

E. Jeremy Hutton, Special Counsel to the Inspector General, Office of Personnel Management

One of the most difficult and sensitive issues for Inspectors General (IGs) is the extent to which they communicate with Congress, i.e., how to share their knowledge of problems within their respective agencies without being seen as undercutting the agencie's policies and programs. Recent initiatives such as the National Performance Review have emphasized the need for IGs to gain the respect and trust of agency officials. However, success also depends on recognition of the special and unique relationship Congress expects to have with the Inspectors General. They are one of the few Federal officials required to report both to the President, through their respective agency heads, and to Congress. Because of the dual reporting responsibilities and the expectations of Congress embodied in the Inspector General Act of 1978, as amended (IG Act), Inspectors General are required to maintain a delicate balance between branches of Government that would be challenging to even a skilled diplomat.

My 25 years of service with the legislative branch (11 with the Congressional Research Service (CRS) and 14 with the General Accounting Office (GAO)), prior to joining the Office of Personnel Management's (OPM) Office of the Inspector General (OIG) in 1991, has made me sensitive to what are sometimes unrealistic expectations from members of Congress. Since Congress was CRS and GAO's primary client, we were keenly aware of its need for information to make decisions necessary to enact laws and oversee the executive branch.

While the IG Act specifically provides for two forms of communications between Inspectors General and Congress--the mandatory Semiannual Report for which the statute provides specific content requirements and the seldom-used seven day letter,[1] authorized by section 5(d) of the IG Act, Congress expects much more. Section 2(3) of the IG Act probably provides a more accurate gauge of what Congress originally intended and now expects. That section gives equal status to agency heads and Congress with regard to an Inspector General's responsibility:

> to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of . . . [agency] programs and operations and the necessity for and progress of corrective action.

Paul Light recognized that one of Congress' underlying objectives in enacting the IG Act was to create officials throughout the Government without program operating responsibilities who "were free to audit, investigate, review, assess, analyze, evaluate, oversee, and appraise every problem, abuse, deficiency, and weakness relating to the programs and operations of their establishment."[2] These officials would be where Congress wanted to be but could not get---inside the agencies---and could serve as useful partners to supply information. He believes this thirst for information lies beneath the "traditional explanation" of the IG Act as a quest for accountability or fraud busting politics.[3]

(continued on page 38)

[1] A 1988 congressional review of the IG Act concluded that IGs had decided that this report, which the head of the agency is required to submit to Congress within seven days, should be used only in "situations so egregious as to require congressional oversight" or "as a last resort to attempt to force appropriate action." A 1986 President's Council on Integrity and Efficiency (PCIE) survey showed only eight seven day letters had been used up to that time and few have been issued since reflecting the belief that the threat of sending this report is as effective in persuading agency management to act as sending it. However, the House Government Operations Committee expressed regrets that the instrument was not used more and felt that it should be used "to report serious or flagrant problems to the Congress. . . whether or not the agency agrees to take action" although in the latter case they could include reports of action taken. House Committee on Government Operations, The Inspector General Act of 1978: A 10-Year Review. (House Report No. 100-1027, 1986), pp. 22-23.

[2] Paul C. Light, Monitoring Government: Inspectors General and the Search for Accountability. (Washington, D.C., The Brookings Institution), p. 17.

[3] Ibid. at p. 39.

Is it any wonder that in its evaluation of the IG Act on its tenth anniversary, the House Government Operations Committee complained about the quality of IG reporting to Congress. In addition to requesting more effective use of the formal reporting mechanisms, including the seven day letter, the Committee stated:

Further, the Inspectors General should take care to assure that relationships have been established with all appropriate committees and subcommittees. While keeping the head of the establishment informed is in the Inspectors General's best interest, the public interest as well as the Inspector General's interest will be best served if the Inspectors General also keep the Congress adequately informed.[4]

In a recent Council of Counsels of the Inspectors General (CCIG) Legal Forum, Bill Greenwalt, Majority Professional Staff Member of the Senate Committee on Governmental Affairs stressed the need for IGs to establish informal lines of communication, particularly with respective authorizing and appropriations committees and the IG oversight committees, i.e., his committee and the House Committee on Government Reform and Oversight. In his informal remarks, he admitted the difficulty in establishing long-term relationships with Hill staffs in light of the high turnover but stressed:

There is a need for IGs to keep developing relationships and asking how we can improve. You need to work with your customers on the Hill. It is a difficult dilemma because we do not speak with one voice and represent different interests. This is what makes the congressional liaison function so important.[5]

In fact, Paul Light suggests that "informal channels of access to Congress, which are generally available to any executive official" may be necessary for an IG to attain visibility and that getting attention for IG reports from either end of Pennsylvania Avenue may be more of a problem than dual reporting requirements.[6] Mark Uncapher, Counsel to the House Committee on Government Reform and Oversight Subcommittee on Government Management, Information and Technology suggested to the CCIG Forum that the problem is not lack of interest in IG reports but the difficulty in trying "to figure out what's in them." He requested OIGs to "help us find the needle in the haystack to point out issues of importance or of interest to Congress."[7] Greenwalt called on the IG community to identify reports that are "indicative of systemic problems where we should maximize our limited oversight resources," particularly in light of the proliferation of audit reports received from Chief Financial Officers and the General Accounting Office as well as IGs.

To facilitate congressional contacts, many IGs have designated a staff member to serve as congressional liaison. At OPM, this person is the focal point for contacts with key staff members of our oversight committees. He works closely with the OPM's Office of Congressional Relations receiving guidance from it and keeping it informed on issues of mutual concern. He facilitates meetings between OIG officials and congressional staff to provide expertise or information to the committees as needed. In all of these endeavors, care is taken to recognize that congressional and agency interests may not be identical and, when appropriate, to operate in accord with agency and OMB policies. The usual restriction on release of investigatory material or other privileged information still applies. This function is informational and separated from the budgetary process conducted within the agency and under the direction of OMB. It is hoped these efforts will lead to a more satisfied congressional client and better understanding between all parties.

As we approach the twentieth anniversary of the IG Act in a period of increasing demands and diminished resources, the future success of Inspectors General may largely be determined by the extent to which they can more effectively deliver their messages to Congress. This will largely depend on how effectively informal channels of communication are established to enable congressional staffs to get to know and work with IG staffs. Upcoming oversight hearings likely to be held to commemorate the anniversary will also give the IG community and Congress an opportunity to look at methods to streamline the Semiannual Report and other formal reporting requirements to meet the needs of our clients more effectively.❑

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[4] H.Rept. no. 100-1027 at p.23.

[5] Informal comments by Bill Greenwalt at the CCIG Legal Forum, Washington, D.C., October 29, 1997.

[6] Light at p. 226.

[7] CCIG Forum, n. 5.

Reinvention and Ethics: Public Service at the Crossroads?

by Stuart C. Gilman, Ph.D.

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As public servants you must not only do the right thing, but do it in the right way. This is the essence of much of contemporary ethics discourse in public administration: the danger of confusing ends and means. In a recent PA TIMES essay, Raymond Olsen argued that there was a hidden risk in the Government re-alignment movement because it tends to focus primarily on performance and fails to understand that "how government conducts its responsibilities" is just as important. The essence of ethics systems for the public service is that they serve to focus on "the means" to assure the public that its Government is working only in the public interest. This article will focus on the impact of re-alignment and the new public administration on ethics systems in public service. It will highlight the fundamental tensions between the re-invention or realignment movement and anti-corruption systems; discussing the potential for creating government that is more "responsive and lean" while at the same time preserving public integrity.

Historical Background:

However, before entering into the main argument of this paper, it is important to set the historical context.

In August of 1838 Samuel Swartwout, the Federal Customs Collector for the Port of New York left for London with two black satchels. Within them he took more than five percent of the entire treasury of the United States. In the proceedings against him, at least four employees admitted knowing about the embezzlement from the beginning. About their conduct, Joshua Phillips, Assistant Cashier, explained "I was Mr. Swartwout's clerk, and would not betray the secret of my employer . . . we clerks of the custom-house consider ourselves as in the service of the collector, and not in the service of the United States."[2] There was no extradition treaty with England. Neither Mr. Swartwout or the money were ever recovered.

Coincident with this event and in reaction to the massive corruptions in his administration, President Andrew Jackson empowered his Post Master General, Amos Kendall, to fundamentally redesign the Post Office Department, and his successors followed Kendall's model in reorganizing governmental institutions. Instead of relying on men of character, as Presidents since Washington had done, Kendall designed a system of redundancy of signatures in order to spend money on behalf of the United States. Additionally, he developed the first "transparent" procurement and contracting systems, and even developed "Rules of Conduct" for public employees.

A young French nobleman, Alexis de Tocqueville, in comparing the French and American systems, needing a word to describe this new "system of government," coined the term *bureaucracy*. These new bureaucracies were designed to minimize corruption in governmental systems and were added to on a regular basis to account for every fresh scandal. It is certainly true that these systems were also viewed as mechanisms for greater efficiency -- something especially ironic today.

As the executive and legislative branches struggled to cope with newly arising forms of corruption, no one was ever made responsible to oversee what had come before -- much less how new laws and orders would integrate with what had been implemented previously. The result was that system was built upon system, often with no logical integration between them, and often with contradictory requirements. The layering of integrity systems became so pervasive that bureaucracies learned to operate independently of many legislative or executive controls, often through voluminous regulation, resulting in a "priesthood" of expertise in the Government department. The impact of this process was summed up by Michael Nelson as one of the ironies of American bureaucracy: "*agencies organized to avoid evil became that much less able to do good.*"[3]

(continued on page 40)

[1] The opinions expressed in this article are the authors and do not reflect the policy of the U.S. Office of Government Ethics or the United States Government.

[2] Quoted in Leonard White, *The Jacksonians: A Study in Administrative History*, NY: Macmillian, 1954, p. 427.

[3] Michael Nelson, "A Short, Ironic History of American National Bureaucracy," *The Journal of Politics*, Vol. 44, 1982, p. 763.

Ethics Systems: Compliance vs. Integrity

The literature in public administration often focuses on the distinction between compliance and integrity based systems. Even the recent OECD study, Ethics in Public Service, focused on this framework. In many ways this distinction is a straw man. Compliance based systems are supposed to be only rule or law based with little room for individual conscience or decision. Integrity based systems are designed to increase human autonomy through aspirational goals avoiding rule structures. Perhaps these concepts can be framed as ideal types. But, the empirical reality is that they are ends of a continuum. For that reason, a more informed discussion should look at the social psychological dynamic in this process.

Compliance based rule systems at their worst degrade into a system of casuistry governed by a priesthood, often of attorneys or personnel specialists. They exercise sole authority in providing authoritative interpretations of rules in more and more narrowly defined circumstances. Any system in which an elite simply hands down edicts becomes more and more isolated from the daily processes of government.

Integrity based systems at their worst become systems of wishful thinking. These become general, very abstract guides of performance with no enforcement and no method for receiving advice or education. Empowerment of public officials in such a setting can be a recipe for disaster. *Empowering ethically bankrupt people simply leads to corruption more quickly*. The question confronting the new public administration is how can we flatten, compete, reduce, and simplify government while making it more responsive, without creating the potential for a public service cesspool. In a recent book Professor George Fredrickson vividly highlights these problems.

The New Public Administration and the Destruction of Ethics Systems:

Fredrickson asserts that reinvention (one face of the new public administration) inherently leads to corruption. In an excerpt from his forthcoming book, *The Spirit of Public Administration*, he constructs a continuum with the governmental model at one end and the enterprise model at the other. He argues that the new public administration pushes government functions away from the governmental model and towards the enterprise model. This change, he says, inherently leads to corruption, as employees adopt practices that are common in business, but are considered unethical in government. In making this argument, he is right in the sense that the need for impartiality and the sense of public duty are de-emphasized in the new public administration. He is wrong, however, when he appears to claim that the new public administration inherently leads to corruption.

Rather, the new public administration demands the flattening and simplifying of Government, the introduction of competitiveness and flexibility into existing systems. Fredrickson rightly points out that among other things, "realigners" target existing compliance-based ethics structures. These structures, as I explained earlier, accreted over the years to form a rule-driven system that to some degree ensured the public's confidence in Government. Fredrickson laments the loss of these structures, expressing the fear that their loss will "increase the propensity for corruption and unethical behavior."[4] Aside from the questionable equation of private inclination with unethical practices, this argument makes too large a claim because it portrays realignment as necessitating the elimination of ethics systems. This extreme change need not, and probably would not, be the reality for the new public administration. In flattening the organization, the question will not be which parts of the system to eliminate, but which to keep, and some parts should definitely be kept. We should therefore take Fredrickson's claim seriously as a warning not to go too far in transforming government agencies into privately inclined organizations.

Realignment, Ethics and Autonomy:

Having considered Fredrickson's argument, however, I must also address those who would like to ignore the potential negative consequences of the new public administration. As one example, a single dominant theme is that realignment will empower the new public servant. Within the framework there is a dominant emphasis on autonomy of the individual civil servant. If we empower civil servants, they will be free—or at least this is the theme of the literature. The question is *free* to do what?

If reinvention is a good thing, then, can we have too much of it? The simple answer is yes. Some scholars argue that employees should be freed of any constraint, and when these chains fall away, a new ethic of public service will develop. A golden age of empowered "right" actors would emerge from the destruction of the rule-bound edifice of the compliance-based ethics program. Such a magical emergence of ethics seems unlikely, however. This notion of autonomy does not automatically elicit trust in Government, nor does it really "free" the civil servant.

This bias toward the maximum autonomy of the civil servant, as opposed to a maximum autonomy of the Government organization, builds upon some of the more naive concepts in contemporary social psychology. In their book *The Perversion of Autonomy*, Willard Gaylin and Bruce Jennings discuss the emphasis on personal autonomy in the U.S. In their view, the notion of the autonomous, rational individual ignores the reality of human life:

> We are not as free and self-determining as we would like to believe, and we are not as independent as we pretend to be. We must face the fact that we are not as rational as we would like to think we

[4] H. George Fredrickson, "Public Sector Model Strives to Avoid Corruption," *Public Administration Times*, 20(5): 12.

are. The rational roots of our conduct are pathetically overvalued. We must appreciate the power of emotions over human behavior in order to effectively institute changes in that behavior.[5]

Taking into account the inherently emotional, irrational side of human beings leads us to seek some safeguards against the potential for ethical anarchy that might result from complete autonomy. In a continuation of the previous quote, Gaylin and Jennings propose the need for some framework, some system to avoid this anarchy. "Despite a preference in the culture of autonomy for rational persuasion and a bias against manipulation and coercion, persuasion rarely works. It is coercion on which society must depend." We must, then, have some system that serves to coerce (perhaps *motivate* would be a better word) employees into ethical behavior.

A Foundation of Compliance, A Structure of Aspiration:

Critically, there must be some basic compliance system on which to build integrity. Often a code of conduct with vigorous enforcement will serve to create this foundation. As important, the code of conduct should be uniform, applying to everyone within the branch of Government. It should apply from the President of a country to the janitor who cleans his or her office. It should apply to military officers and cabinet officials. Additionally, enforcement should be uniform. And if there is any variance, the more senior officials should be treated the most harshly.

Upon this foundation of "minimally acceptable standards" must be built a structure of aspirational goals. Models for these goals can be found in integrity based regimes such as England or New Zealand - - both of which have a far longer history of reinvention than the U.S. Both countries have adopted leadership models whereby senior public officials ascribe to specific aspirational behaviors that they are in turn responsible for inculcating in their own organizations. For example, in New Zealand the categories of aspirational goals include: Representation, Leadership, Professional and Personal Ethics, Responsibility and Accountability, Statutory Independence, Collective Interest and Collegiality. In England, a Parliamentary system, the Nolan Commission, prescribed general standards, standard for members of Parliament, and standards for Ministers and civil servants.[6]

Essentially advocates of the new public must struggle with how a balance of compliance and integrity systems can work with the changes being made in the current alignments in the public sector. Without a thoughtful integration of these systems within the changes being brought by the new public administration there will be a significant structural misalignment. The result will be either an undercutting of reinvented systems by compliance based programs designed to focus only on narrow issues, or the destruction of all ethics/integrity systems creating a kleptocracy.

Conclusion:

The simplistic solution of "just doing away with the rules" should not be viewed as the essence of realignment or the new public administration. As I have attempted to argue, governments should carefully assess the structures necessary to maintain the new organizational paradigms that they are creating. They must focus on essential programs that provide integrity without overly restricting flexibility.

Ideally this will require neither a compliance based or integrity based regime. Rather, it will require a careful mixture of both. There must be enough compliance to ward off the most base corruptions of public office. However, there must also be an aspirational vision of integrity in public service, and means for rewarding that behavior. It is certainly true that this "ethic" is easier to capture in an environment where all who do public service are *public* employees, i.e. work directly for the Government. However, the realities of modern government dictate otherwise.

Most Governments have consciously decided to embrace the new public management by shrinking the size of the public work force, privatizing functions, contracting, and eliminating the myriad of controls placed on public workers. In this environment, there must be a recognition of the potential for abuse, as well as the appearance of abuse of public office. The question is what residual systems are left in place to protect the integrity of Government?

The answers to this question will constitute the "second wave" of the new public administration. The success of the movement will not only depend on its ability to measure outcomes as ends. It must also effectively monitor the means to those outcomes. A confusion between ends and *means*, or a lack of attention to either, will tar it with the inevitable corruption that will result. And, if this happens, the new public administration movement will be just one more arcane footnote in this history of public administration.❑

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[5] *The Perversion of Autonomy: The Proper Use of Coercion and Constraint in Liberal Society*, The Free Press, NY, 1996: p. 126.

[6] "Responsibility and Accountability: Standards Expected of Public Service Chief Executives," New Zealand State Services Commission (June, 1997) and "Standards in Public Life," First Report of the Committee on Standards in Public Life, Chairman Lord Nolan, May, 1995.

Book Review:

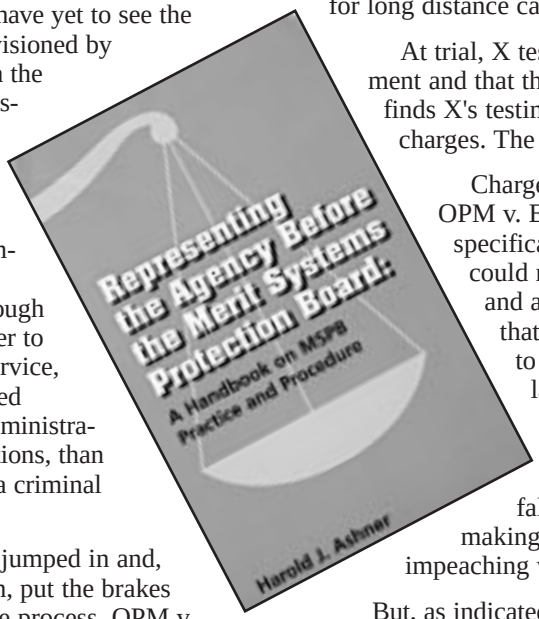
"Representing the Agency Before the Merit Systems Protection Board: A Handbook on MSPB Practice and Procedure, by Harold J. Ashner, Esq."

Commentary by Renn C. Fowler

Renn C. Fowler, Executive Director of the Government Training Institute

Two recent happenings, the revision of "Representing the Agency Before the Merit Systems Protection Board: A Handbook on MSPB Practice and Procedure," and the Supreme Court's January 21, 1998, decision in LaChance, Acting Director, Office of Personnel Management v. Erickson, No. 96-1985, bring much needed good news and guidance for a disciplinary appeal system much in need of good news and guidance.

It has been nearly 20 years since the Civil Service Reform Act of 1978 (CSRA), but we have yet to see the streamlined and simplified system envisioned by that legislation. Instead, we have seen the development of an over-judicalized system of Olympic complexity. The MSPB has managed to provide, over the years since its inception, far more process than was ever envisioned as due. One former Board member recently described the MSPB as being in the due process business. Though it is hyperbole to lament that it is easier to get one into jail than out of Federal service, some MSPB cases have indeed afforded greater protections to employees in administrative investigations and disciplinary actions, than the law has afforded to defendants in a criminal investigations and prosecutions.



Against that backdrop, the Court jumped in and, with the guidance in OPM v. Erickson, put the brakes on the expansion of administrative due process. OPM v. Erickson reversed a long line of MSPB and Federal Circuit decisions, known collectively as "Walsh-Key-Erickson." Those decisions had expanded the notion of due process to include, of all things, the right to lie in an administrative investigation into misconduct. Hopefully, the Court's guidance will serve to put back on the table more orthodox notions of administrative due process as well as the more simplified system envisioned by the CSRA.

The present system has become, quite frankly, so baroque that it has left behind most managers and personnelists; employees are equally intimidated, although they are, more often than not, the beneficiaries of the present system. Even investigators as well as others experienced in working on disciplinary matters find the current system a Byzantine maze.

The following scenario depicts our Byzantine system in all its splendor. Late one evening, X removes, without authorization, from the agency office, a computer and cellular phone. X's supervisor notices the equipment is missing. The building logs and the guard finger X. The FPOs go to X's residence, and after denying many times that he has the equipment, he turns over the missing equipment. The agency then removes X on three charges: (1) providing false statements; (2) stealing; and (3) misusing the cellular phone for long distance calls.

At trial, X testifies that he only borrowed the equipment and that the cellular calls were local. The MSPB finds X's testimony credible and rules for X on all charges. The bases for those rulings follows.

Charge 1, falsification, would be lost (pre-OPM v. Erickson) under Walsh et al. More specifically, the Walsh cases held that agencies could not charge an employee with misconduct and also with lying in an investigation into that misconduct. Such charging, according to the MSPB and the Federal Circuit, violated an employee's due process right to put the agency to its proof. To afford full due process, the MSPB extended that rationale to bar reliance on such false statements in setting the penalty, making credibility determinations, and impeaching witnesses.

But, as indicated, OPM v. Erickson brought good news: Walsh had it wrong. According to the Court, the CSRA has provided employees with four procedural rights: (1) 30 days advance written notice; (2) at least 7 days to answer; (3) representation; and (4) a written decision with specific reasons. "In these carefully delineated rights there is no hint of any right to 'put the government to its proof' by falsely denying the charged misconduct."

Likewise, the Court held that the Fifth Amendment does not include "a right to make false statements with respect to the charged conduct." Of course, if "answering

(continued on page 44)

an agency's investigatory questions could expose an employee to criminal prosecution, he may exercise his Fifth Amendment right to remain silent." To be sure, pre-Walsh law was that, absent a threat of criminal prosecution, an employee had to answer or risk removal, once given his "Kalkines rights." Kalkines v. U.S., 473 F.2d 1391 (Ct. Cl. 1973); Weston v. H.U.D., 724 F.2d 943 (1983). Lying is not an option, and the Court said that false testimony can be used to enhance a sentence.

Next, charge 2, stealing, would be lost for two reasons. First, since the MSPB accepted the employee's explanation that he was only borrowing the phone and computer, the agency failed to prove "intent to permanently deprive," an essential element of theft as defined by the MSPB. Second, because the MSPB does not recognize lesser-included offenses, charge 2 is lost in its entirety; in other words, no discipline could be imposed for unauthorized removal, unauthorized possession, or conversion, even though the record did prove those offenses.

Recapped, a lesser-included offense is a "sub-offense" of the greater offense, simply the greater offense minus an element or two (e.g., unauthorized possession being a lesser of theft, not requiring the element of intent to permanently deprive). The Board made its wrong turn away from lesser-included offenses in Major v. Department of the Navy, 31 M.S.P.R. 283 (1986), a highly questionable but over-read and over-applied case. See "Toward the Simplification of Civil Service Disciplinary Procedures," The Hon. Richard W. Vitaris, 149 Mil. L. R. 382. Ironically, criminal law, unlike MSPB law, recognizes lesser-included offenses. See Fed. R. Crim. P. 31(c).

The MSPB's rule against lesser-included offenses has had, unquestionably, more of an adverse impact on disciplinary actions than any other rule has. The adverse impact has been under-charging, under-disciplining: Because of the bar's draconian all or nothing effect, agencies base disciplinary actions, more often than not, on the safest possible charge. And, of course, the safest possible charge is generally something so "watered-down" that it will not support a penalty appropriate for the misconduct at issue. As a result, there are today in the Federal service many "under-disciplined" wrongdoers who simply do not belong there.

And finally, charge 3, misuse of cellular phone for long distance calls, would be lost because of MSPB's rather stringent pleading rules. A case almost identical to our hypothetical is Lanza v. Department of the Army, 67 M.S.P.R. 516 (1995); Lanza involved a charge of "improperly using a Government supplied cellular phone for unofficial long distance calls." Like X, Lanza won: His calls were local. "The agency specifically charged, however, that the calls were long distance. The agency bears the burden of proving each of the elements of its charge. ... Because it failed to do so, the charge cannot be sustained." Lanza, 67 M.S.P.R. at 522. Local or long, the short of it is misuse is misuse is misuse; the relevance, if any, of local versus long would run only to the penalty, not to the charge. That kind of result is "cute by half." See Milner v. Justice, MSPB No. SF075295082812 (October 10, 1998) (failure to cooperate with agency investigation not proven where employee refused to speak with agent but later on same day sent letter to IG).

Summed up: Prior to January 21, 1998, X would have won on all charges and returned to his old job with back pay and attorney fees. Even after the Court's January 21, 1998, decision, X would still have won on charges 2 and 3. Ironically, had X faced these charges in criminal court, he would have been convicted of some misconduct, and his false statements could have been considered in sentencing him.

As is obvious from this scenario, MSPB actions are highly complex and technical. It is often said that these actions are won or lost before the appeal is filed, but that is an understatement. The more accurate statement is that these actions are won or lost before the action is proposed and before notice is given to the employee. Thus, it is imperative that everyone involved in putting an action together - the investigator, the personnelists, the proposing official, etc. - appreciate the complexity and understand the process to which these actions will be subjected.

The good news is that Harold Ashner's new book has the answers. Although this 600 page reference tool was designed primarily for agency representatives, it is ideal for anyone working in this area. It is an invaluable nuts and bolts desk reference for anyone tasked with building a solid misconduct case or finding the facts behind the misconduct. It covers evidence, credibility, documentation, burdens, procedures and much more. Its appendices include a glossary, the statutes and regulations, sample forms, research tools, a historical synopsis, and a summary of the leading cases.

Simply put, Ashner's book unravels in a user-friendly, checklist style, all the puzzles. It is a clear-cut guide to the essentials, and it contains every good tip and solid bit of useful information needed for dueling with the complexities of the current system. Ashner is an authority on civil service law, who has served with MSPB, OPM, and other agencies, and he has culled these tips from his experience, from interviews with the experts, with MSPB's best practitioners, and set out those tips in an easy-to-get-to format. If ever a book distilled doing-it-right to a step-by-step, tangible approach, this is that book.

The predecessor to Mr. Ashner's book -same title, co-authored by Ashner 14 years ago- became a hallmark of administrative personnel law. With his new book, he has produced a sequel to eclipse the original. It is easily the most important book to appear in this area, since its predecessor and since Peter Broida's definitive treatise on MSPB law. Were I to pick one book on MSPB practice, this would be that book. No one working in this area can be without it. Get it. It is outstanding: If a movie, four stars; if a bond, triple A. Hats off!❑

Representing the Agency Before the Merit Systems Protection Board: a Handbook on MSPB Practice and Procedure, by Harold J. Ashner, Esq.; Dewey Publications Inc. (P.O. Box 663, Arlington, Va., 22216, (703) 524-1355, fax (703) 524-1463, dewpub@ix.net.com), 1997 600 pages, $95.00.

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