

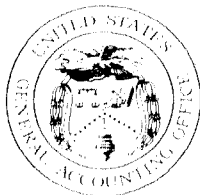
GAO

Report to the Chairman, Committee on  
the Judiciary, House of Representatives

May 1989

# IMMIGRATION SERVICE

## Allegation of Adverse Actions Taken Against INS Agents



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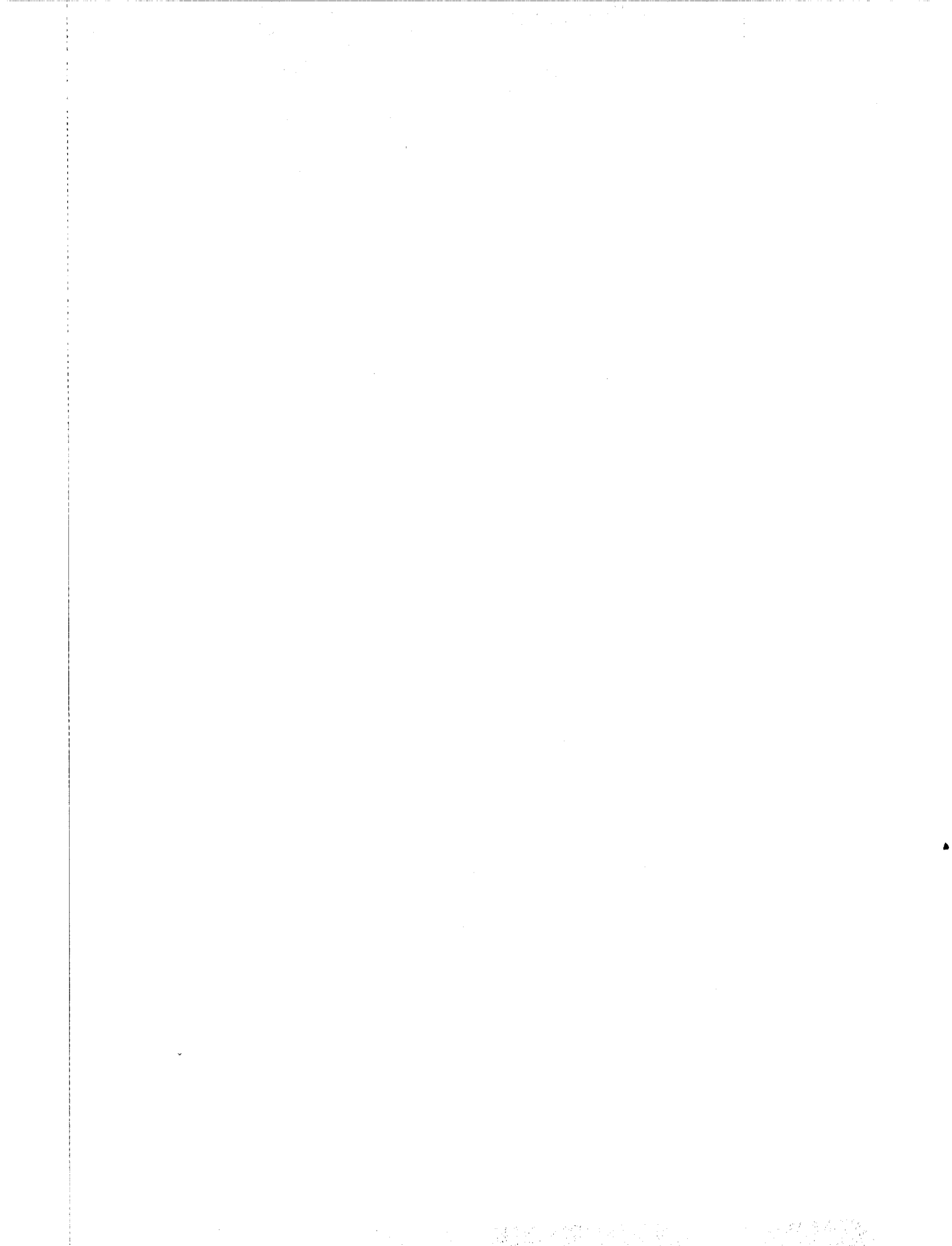
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May 1989

# IMMIGRATION SERVICE

## Allegation of Adverse Actions Taken Against INS Agents







United States  
General Accounting Office  
Washington, D.C. 20548

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**General Government Division**

B-125051

May 1, 1989

The Honorable Jack Brooks  
Chairman, Committee on  
the Judiciary  
House of Representatives

Dear Mr. Chairman:

This report responds to your April 13, 1988, request concerning alleged retaliation taken by Immigration and Naturalization Service management officials against eight anti-smuggling agents from the Houston District Office.

As arranged with the Committee, unless you announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies of the report to the Attorney General, the Commissioner of the Immigration and Naturalization Service, and other interested parties. Major contributors to this report are listed in the appendix.

Sincerely yours,

Arnold P. Jones  
Director, Administration of  
Justice Issues

# Executive Summary

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## Purpose

On September 12, 1987, eight Immigration and Naturalization Service (INS) Anti-Smuggling Unit (ASU) agents from the Houston District Office sent a letter to Members of the Texas Congressional delegation alleging that District management took improper actions regarding the management of ASU.

In a letter dated April 13, 1988, Congressman Jack Brooks expressed concern that Houston management may have retaliated against these agents and their immediate supervisors because of the agents' efforts to communicate with Members of Congress. He asked GAO to determine if retaliation had occurred. While not requesting a review of the agents' allegations, he also asked GAO to determine if (1) the INS investigation of the agents' allegations was done in an objective manner and (2) the agents properly recorded their work hours to the activity they were doing.

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## Background

INS enforces laws relating to admitting, excluding, detaining, deporting, and naturalizing aliens. As part of its enforcement activities, INS identifies and apprehends people who help smuggle aliens into the country. (See p. 8.)

On November 6, 1986, the Immigration Reform and Control Act of 1986 was enacted, which, among other things, provides sanctions, under certain circumstances, against employers who hire aliens not authorized to work in the United States. As part of its responsibilities under the act, INS implemented a program to educate employers about the hiring ban. In August 1987, the INS Houston District Office directed some ASU agents to begin making employer education contacts. To accomplish this, the District was reorganized.

Within INS, the Office of Professional Responsibility (OPR), among other duties, investigates allegations of criminal activity or other alleged misconduct by INS employees. Every INS employee is required to immediately report allegations of misconduct to the appropriate personnel within INS. (See p. 9.)

The Merit Systems Protection Board protects the integrity of federal merit systems and the rights of federal employees working in the systems. Within the Board but independent of it, the Office of Special Counsel (OSC) is responsible for investigating allegations of prohibited personnel practices, such as retaliation for whistle-blowing and for bringing actions before the Board for adjudication. (See p. 12.)

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## Results in Brief

GAO believes that INS management took unfavorable actions against the agents and their supervisors that might have resulted partly from the letter. However, GAO cannot make a legal determination that retaliation occurred because it is not clear (1) whether the letter was a significant motivating factor for the unfavorable actions or (2) whether the actions were based on concerns about performance. This essentially factual determination turns on questions of credibility and can be resolved through an adjudication by the Merit Systems Protection Board. Regardless of whether retaliation occurred, some of the management practices were inappropriate.

Although INS' investigation as a whole was not improper, GAO found that several steps were taken that could have been perceived as biased. The investigation's findings, however, were not affected by these actions.

The time agents spent doing employer education activities was incorrectly charged to anti-smuggling activities on one of two systems used to account for agents' time. However, because time charges were correctly made on the other system, productivity and workload statistics were not affected.

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## Principle Findings

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### Actions Taken Against Agents

At different times, after INS management learned of the ASU agents writing to Members of Congress, several unfavorable actions were taken against the agents. These actions included the following:

- Five agents received significantly different promotion/transfer assessments from first- and second-level supervisors. The assessments received from the second-level supervisor were lower than those prepared by the first-level supervisor, were significantly lower than the employees' previous assessments, and were inadequately documented.
- Three of the agents had their initial performance ratings lowered in the review process on the basis of reasons that were inadequately documented. In preparing the ratings, INS officials did not follow all requirements for preparing ratings.
- Two supervisors and one agent allegedly were pressured to take unwanted transfers. In the case of one of these supervisors, an unwanted transfer was ordered but later cancelled. (See pp. 16 to 30.)

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OSC is investigating the agents' and their supervisors' allegation of retaliation.

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### Analysis of INS' Internal Investigation

During the investigation, the Regional Office Investigator informed the agents and their immediate supervisors that they were both witnesses in and subjects of the investigation. While not improper, treating the people who raise the allegations externally as subjects of an investigation can be intimidating.

Further, the investigator incorrectly told the agents that he was investigating all parties involved, including the INS Commissioner and the Regional Commissioner. This implied that he was investigating his supervisor, which gave the appearance of a conflict of interest.

After completing his investigation, the investigator provided a copy of the investigative report to INS OPR and to INS officials in the Southern Regional Office. The Southern Regional Commissioner instructed him to provide a copy—including the statements of the agents and their immediate supervisors—to the Houston District Director. INS and Justice OPR policy is that copies of investigations are not to be released.

The investigator's comments and the release of the report, however, did not affect the investigation. (See pp. 30 to 32.)

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### Agents' Time Charges Incorrectly Recorded

The Houston ASU agents were instructed by District officials to charge all time spent on educational activities to anti-smuggling on their time and attendance reports. As a result of these instructions, the time agents and their supervisors spent on educational activities was being understated and the anti-smuggling activities were being overstated on these reports. Because time charges were made correctly on the Daily Workload Record, however, INS' accounting of the time spent on both programs was not affected. (See p. 32.)

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### Recommendations

GAO is making no recommendations.

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### Agency Comments

As requested, GAO did not obtain official agency comments on this report.





# Contents

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<b>Executive Summary</b>		2
<b>Chapter 1</b>		8
<b>Introduction</b>	Background	8
	Standards of Conduct	9
	Employee Rating Process	10
	Responsibility of the Office of Special Counsel	12
	Objectives, Scope, and Methodology	12
<b>Chapter 2</b>		16
<b>INS Actions</b>	Actions Affecting Anti-Smuggling Personnel	16
<b>Concerning ASU</b>	INS Investigation	30
<b>Agents</b>	Agents' Time Charges Incorrectly Recorded	32
	Conclusions	33
<b>Appendix</b>	Major Contributors to This Report	36
<b>Table</b>	Table 1.1: Personnel Involved	14

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## Abbreviations

ASU	Anti-Smuggling Unit
ELR	Employer Labor Relations
INS	Immigration and Naturalization Service
IRCA	Immigration Reform and Control Act of 1986
OPR	Office of Professional Responsibility
OSC	Office of Special Counsel



# Introduction

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The Chairman of the House Committee on the Judiciary requested information concerning the alleged retaliation Immigration and Naturalization Service (INS) management took against eight anti-smuggling agents from the Houston District Office. The agents had sent a letter to Members of the Texas Congressional Delegation alleging that District management took improper actions regarding the operations of the Anti-Smuggling Unit (ASU).

INS enforces laws relating to admitting, excluding, detaining, deporting, and naturalizing aliens. INS enforcement activities include (1) inspecting all persons seeking admission to the United States for the purpose of enforcing and administering the immigration and nationality laws; (2) deterring or preventing illegal entry at or near the border; (3) detecting criminal law violations involving aliens; and (4) locating, apprehending, and prosecuting aliens. Another aspect of its enforcement is to identify and apprehend people who participate in smuggling aliens into the country. INS' ASU agents carry out this activity. INS has a Washington, D.C., headquarters office, 4 regional offices, 33 domestic district offices, 20 Border Patrol Sectors, and 162 staffed ports-of-entry.<sup>1</sup>

The Immigration Reform and Control Act of 1986 (IRCA), which was enacted on November 6, 1986, increased INS' responsibilities and gave it primary responsibility for enforcing the act. The act prohibits employers from knowingly hiring persons who are not authorized to work in the United States and requires employers to verify the employment authorization and identity of each new person hired. The act requires that employers be educated about their new responsibilities. INS' Employer Labor Relations Division (ELR) has primary responsibility for carrying out the education effort.

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## Background

In order to carry out the education effort of IRCA, the Commissioner of INS, in June 1987, directed that INS initially dedicate 50 percent of its productive investigative time toward making educational employer contacts. This strategy began in June 1987, with a goal of contacting 1 million employers by June 1988. In August 1987, the INS Houston District Office directed some of the ASU agents to begin making educational employer contacts.

To accomplish the educational requirement, District management initially reorganized ASU in order to divide the agents' time between anti-

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<sup>1</sup>Other ports-of-entry are not permanently staffed.

smuggling and ELR activities. Later, District management consolidated ASU personnel with another District enforcement organization to jointly carry out INS' enforcement activities, including anti-smuggling and ELR activities.

The ASU agents and their two immediate supervisors believed that these reorganizations adversely affected their ability to do anti-smuggling activities. They raised these concerns to District management. However, District management felt that the agents' views about ELR participation demonstrated a lack of support for organizational goals (e.g., carrying out ELR activities).

The agents' concerns over the "best" means of carrying out INS' mission, including the recently required ELR activities and the anti-smuggling duties, culminated in their writing a letter to Members of Congress. On September 12, 1987, the eight Houston ASU agents sent a letter to 12 Members of the Texas Congressional Delegation. In their letter, the agents made allegations against Houston District Director Ronald Parra, Deputy District Director Michael McMahon, and Assistant District Director for Investigations Carey Murphy, concerning the recently assigned ELR duties. These allegations concerned, among other things, the use of anti-smuggling agents to do ELR activities without proper authority.

A Member of Congress sent a copy of their letter to the Southern Regional Commissioner. Consequently, INS did an internal investigation of the allegations' merits through the Southern Regional Commissioner's office in Dallas, Texas. At different times after the letter was received, events occurred that six of the eight agents and their two immediate supervisors believed INS took to retaliate for the agents' September letter to Members of Congress.

In December 1987, five of the eight ASU agents and their immediate supervisors requested that the Merit Systems Protection Board's Office of Special Counsel (OSC)—an independent agency responsible for investigating prohibited personnel practices, such as retaliation for whistleblowing—review their allegation that retaliatory actions were taken against them by INS officials because the agents wrote to Members of Congress. As of April 21, 1989, the investigation was in process.

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## Standards of Conduct

INS' operating instructions state that each employee shall adhere to Department of Justice and INS standards of conduct. Within INS, the

Office of Professional Responsibility (OPR)<sup>2</sup> was established to (1) receive allegations or other information regarding criminal activity or other alleged misconduct by INS employees; (2) plan and manage INS' program to resolve allegations of misconduct; (3) maintain an integrity awareness program; and (4) coordinate this program with other applicable INS offices and functions and with Justice.

The Director of INS OPR has dual reporting responsibility—to the Commissioner of INS and to Justice's OPR. The Justice OPR is responsible for overseeing (1) all investigations within Justice, (2) investigations of allegations against presidential appointees, and (3) other allegations of a sensitive nature. The Regional Commissioner of each INS Region has designated one employee as a regional OPR coordinator.

Every INS employee is required to immediately report allegations of misconduct to the appropriate personnel within INS, which includes OPR. Failure to report or delay in reporting allegations may result in disciplinary action against employees.

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## Employee Rating Process

INS employees may receive two ratings each year—an optional officer corps rating and a mandatory performance rating. INS uses the officer corps rating in filling competitive positions and the performance rating in taking various personnel actions, such as awards. The two ratings each cover a period of up to 1 year. The ending date for the officer corps appraisal varies from year to year, while the end of the performance rating period varies according to employee grade level.

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## Officer Corps Rating

INS officer corps employees are given the opportunity, on an annual basis, to request an officer corps rating score.<sup>3</sup> The officer corps rating score is used to prepare selection lists for competitively filling vacant officer corps positions.

The officer corps rating process consists of three steps. First, the employees prepare a rating application that includes an inventory of their qualifications, skills, and past officer corps experiences. Second,

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<sup>2</sup>The Inspector General Act Amendments of 1988 (Public Law 100-504, Oct. 18, 1988) established an Office of Inspector General within Justice. As a result, INS' OPR unit will be transferred to that office.

<sup>3</sup>The following are considered officer corps positions within INS: Border Patrol Agent, Immigration Inspector, Immigration Examiner, Investigator, Deportation Officer, GS-10 Immigration Officer, and Airplane Pilot.

the applicants request a basic supervisory appraisal from their first- and second-line supervisors. A supervisory appraisal results in one of three possible recommendations to promote employees—Highly Recommended, Recommended, or Not Recommended—and is subjectively based on their supervisors' first-hand knowledge of their performance during the past year. The first- and second-line supervisors prepare these appraisals independently and both appraisals are included in the employees' officer corps rating application. Finally, the employees' rating applications are forwarded to a five-member rating panel at the INS central office that reviews the application and determines the applicants' final rating score. The final rating scores are used to prepare best-qualified lists of applicants for servicewide officer corps positions. This rating score is based on four criteria, one of which is the first- and second-line supervisory appraisals.<sup>4</sup> The supervisory appraisals account for almost 50 percent of the total rating score.

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## Performance Rating

INS employees are also rated annually on their specific job performance through the use of the performance rating. Among other things, this rating is used as a basis for personnel actions, such as rewarding, reassigning, demoting, retaining, or removing employees.

INS has established five performance levels to be used in rating employees on individual job elements and on overall performance—"Unacceptable," "Minimally Satisfactory," "Fully Successful," "Excellent," and "Outstanding." The performance rating process begins at the onset of the rating period with the preparation of a performance work plan. The rating official, normally the employee's immediate supervisor, after discussion with the employee, prepares a written performance work plan that identifies the job elements of the employee's position. INS requires that the work plan include written performance standards in each job element for the "Minimally Satisfactory," "Fully Successful," and "Excellent" performance levels. The supervisor (or rating official) and the employee are required to formally meet at least once to discuss the performance work plan.

Midway through the rating period, INS requires a formal progress review that is to be documented as part of the performance work plan. During the progress review, the rating official must inform the employee of his/her performance by comparison with the job elements and performance

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<sup>4</sup>The other three criteria upon which the officer corps rating score is based are experience, training and self-development, and quality of total qualifications.

standards in the performance work plan. At this time, the rating official and the employee can discuss and record, if necessary, modifications to the performance work plan—for example, to reflect changing work responsibilities.

At the end of the rating period, the rating official is to prepare a final rating of the employee for each individual job element according to the previously agreed upon performance standards. On the basis of the individual rating elements, the rating official assigns an overall performance rating to the employee. After review and approval by a second-line supervisor, the employee's rating becomes final.

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## Responsibility of the Office of Special Counsel

The Merit Systems Protection Board protects the integrity of federal merit systems and the rights of federal employees working in the systems. In overseeing the personnel practices of the federal government, the Board (1) does special studies of the merit system, (2) hears and decides charges of wrongdoing and employee appeals of adverse agency actions, and (3) orders corrective actions against an executive agency or disciplinary action against an employee when appropriate.

Within the Board but independent of it, OSC was formed to provide a secure channel through which allegations of waste, fraud, mismanagement, abuse of authority, or danger to public health or safety could be disclosed without fear of retaliation. OSC also investigates allegations of prohibited personnel practices and allegations of activities prohibited by other civil service laws, rules, and regulations. In hearings before the Merit Systems Protection Board, OSC prosecutes officials who violate civil service rules and regulations.

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## Objectives, Scope, and Methodology

In his April 13, 1988, letter, the then-Chairman of the House Government Operations Committee expressed concern that INS had retaliated against the ASU agents and their immediate supervisors because of the agents' efforts to communicate with Members of Congress. He further stated a strong interest in ensuring that the rights of federal employees to disclose allegations to Congress, as protected by the Lloyd-LaFollette Act of 1912, not be denied or infringed upon. In later discussions with the Committee, we agreed to determine if INS retaliated against the agents and their immediate supervisors as a result of the agents writing to Members of Congress. We did not determine the merits of all of the agents' allegations, but we agreed to review the following two other related issues as to whether



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- INS' OPR investigated the agents' allegations in an objective manner, consistent with its operating instructions, and
  - the agents properly recorded their work hours to the mission they were doing.

To carry out our review, we

- discussed the allegations and issues raised by the Chairman with (1) the eight Houston agents and their two immediate supervisors, (2) involved INS staff in the Southern Region and the Houston District Office, (3) involved INS OPR staff in Washington, D.C., and in the El Paso Regional Office, and (4) involved Justice OPR staff;
- discussed with OSC officials in Washington, D.C., and in the Dallas Field Office, matters related to the agents' allegations;
- reviewed INS' and Justice's OPR reports regarding the issues resulting from the agents' allegations;
- reviewed the time and attendance records and the Daily Workload Records of the agents and their supervisors from August 1987 to July 1988;
- reviewed the agents' and their supervisors' ratings for the period 1986 to 1988; and
- reviewed INS and Justice policies, procedures, operational instructions and guidance, including those governing employee conduct, OPR investigations, ratings and appraisals, and accounting for time.

Because of the sensitivity of the information discussed and the need to ensure accuracy of the statements, we asked that the ASU agents, their supervisors, and Houston District management review and sign off on their individual statements to us, which they did. All of the personnel listed in table 1.1 were involved to some extent in the circumstances surrounding the agents' letter to Members of Congress and later INS actions.

**Table 1.1: Personnel Involved**

<b>Name</b>	<b>Title</b>
<b>OPR Central Office, Washington, D.C.</b>	
Louis DeMartinis	Director
Henry Torres	Deputy Director
<b>Southern Regional Office, Dallas, Texas</b>	
Stephen Martin	Regional Commissioner
Dwayne Peterson	Associate Regional Commissioner for Operations
Bruce Plasket	Assistant Regional Commissioner for Anti-Smuggling (former Assistant Regional Commissioner for Investigations/Anti-Smuggling)
Charles Williams	Regional OPR Coordinator/Investigator
Daniel Vara	Assistant Regional Counsel
<b>Houston District Office</b>	
Ronald Parra	District Director
Michael McMahon	Deputy District Director
Carey Murphy	Assistant District Director for Investigations
Charles Griggs	ASU Supervisor
Jamar Hayes	Deputy Assistant Regional Commissioner for Investigations, Western Regional Office (former ASU Supervisor)
Harry Helmke II	Investigations Agent (former ASU Agent)
Rexford Burns	Investigations Agent (former ASU Agent)
Larry Nave	ASU Agent (transferred to Boise, Idaho)
Fredrick Capio	ASU Agent
Billy Burkland	ASU Agent
Edward Schepf	ASU Agent
Robert Moore	ASU Agent
Gustavo DeLeon	ASU Agent

In order to review the ASU agents' and supervisors' productivity over time, we attempted to verify the number of anti-smuggling cases and ELR educational contacts completed during the period the ASU was assigned this duty. We were unable, however, to obtain an accurate and verifiable account of each agent's work productivity. For example, the Houston District does not have an automated data base for ELR contacts nor do they have complete records to allow for a manual determination. As of October 1988, the District office was in the process of transcribing all of the ELR contacts into a computer data base; however, that process was not finished by February 1989. We also obtained the Houston ASU workload statistics for fiscal years 1985 through 1988 from INS' central, Southern Regional, and Houston District offices. However, each source reported a different number of anti-smuggling cases completed during the periods in question. For example, in fiscal years 1987 and 1988, the

central office and Southern Region reported a higher number of cases completed than did Houston. Because of these problems, we could not accurately determine either ELR or ASU productivity for the agents and their immediate supervisors. Therefore, we could not verify the data Houston officials gave us regarding the agents and their immediate supervisors.

In attempting to determine if the Houston management did retaliate, we used criteria established through case law and by OSC in prosecuting retaliation cases. These criteria consist of a four-part reprisal test. The following conditions must be proven to make a case of reprisal:

- a protected disclosure (e.g., reporting certain information to Congress),
- the offending official's knowledge of the complainant's identity and nature of the allegations,
- an adverse action taken that could under the circumstances be construed as retaliatory, and
- a causal connection between the motive for the adverse action and the protected disclosure.

The causal connection can be established through inference from circumstantial evidence, such as the proximity in time of the adverse action, the employer's reaction to the disclosure, and the employee's conduct versus the severity of the adverse action. It is not necessary to show that the employee's protected disclosure was the sole cause for the agency's adverse action. However, it must be proven that the retaliation motive was a "significant" factor for the action.

These are the legal criteria used by OSC in determining if retaliation occurred. While using these criteria, we did not make a legal determination of retaliation. Such a determination is the responsibility of the Merit Systems Protection Board. Further, OSC is in the process of reviewing the five agents' and their immediate supervisors' allegation of retaliation.

As requested by the Committee, we did not obtain official agency comments on a draft of this report. We discussed the facts with various agency officials, however, who generally agreed, and included their comments in the report where appropriate. We did our work between May 1988 and February 1989 and in accordance with generally accepted government auditing standards.

# INS Actions Concerning ASU Agents

After INS management learned that several agents had written a letter to Members of Congress that was critical of the agency, a series of events occurred from September 1987 to March 1989 that affected the agents and their supervisors. We cannot determine whether or not the actions taken by INS management meet the legal definition of retaliation. Many of these actions, however were inconsistent with INS policies or were not adequately documented by INS. Moreover, the timing of the actions and the lack of adequate documentation as to why they were taken, lead us to believe that they could be the result, at least in part, of the agents' letter.

## Actions Affecting Anti-Smuggling Personnel

After INS management received a copy of the ASU agents' letter sent to Members of the Texas Congressional Delegation, a series of actions took place that affected six of the eight agents and their two immediate supervisors. These actions, occurring between September 1987 and March 1989, included the following:

- Within a few days of knowing about the agents' letter, District officials made comments regarding possible actions that could be taken as a result of personnel problems in the District.
- With respect to officer corps ratings, five agents and one of their immediate supervisors received low supervisory appraisals that were inadequately documented.
- With respect to ASU agents' performance ratings, three of the agents' ratings were lowered when reviewed by District officials without adequate documentation.
- With respect to one ASU supervisor's performance rating, not all INS procedures were followed. For example, counseling sessions were not held and a work plan was not prepared.
- With respect to reassignments, three ASU personnel were allegedly pressured to take unwanted reassignments.

INS management officials explained that their actions were the result of ASU personnel's poor work performance. However, they were unable to provide verifiable documentation to support their position.

## Criteria Used to Establish Retaliation

As discussed in chapter 1, in order to establish a case of retaliation, OSC criteria identify four conditions to be met.

- First, a protected disclosure must have occurred. The agents sent a letter to Members of Congress expressing concern about possible violations of law and/or regulations. This was a protected disclosure under specific provisions of the Civil Service Reform Act of 1978 [5 U.S.C. 7211, 5 U.S.C. 2302(b)(8)].<sup>1</sup>
- Second, the identity of the complainants and the nature of the allegations must be known by management. All eight ASU agents signed the letter, a copy of which was sent to the Southern Regional Office and later given to the Houston District Office. The two supervisors did not sign the letter, however, Regional and District management officials appeared to believe that the supervisors assisted the agents in writing the letter.
- Third, an adverse personnel action must have occurred that could, under the circumstances, be construed as retaliatory. Some of the agents and their immediate supervisors received unfavorable officer corps appraisals and performance ratings, both supervisors and one agent were allegedly pressured to accept unwanted transfers, and one supervisor was relieved of his supervisory duties for almost 1 year.
- Fourth, a causal connection must exist between the protected disclosure and the motive for the adverse action. osc's Prosecution Manual states that "Proof of either the official's hostile or unreasonable reaction or the closeness of an adverse action to the protected conduct may establish in the appropriate case sufficient inference of a causal connection." In the INS case, on the basis of the circumstantial evidence, retaliation may have occurred. However, it is not clear from the information available to us whether the letter was a significant factor motivating the negative actions.

Therefore, using the retaliation criteria in evaluating the circumstances affecting the agents and their supervisors, GAO cannot make a legal determination regarding retaliation. The Board has that responsibility.

## Initial Management Actions in Response to Congressional Letter

On September 30, 1987, the Southern Regional Office received a copy of the ASU agents' letter to Members of Congress. On that date, a conference call was arranged among Dwayne Peterson, Associate Regional Commissioner for Operations; Bruce Plasket, Assistant Regional Commissioner for Investigations/Anti-Smuggling; Ronald Parra, Houston District Director; and Michael McMahan, Deputy District Director. They

<sup>1</sup>Before 1978, a citizen's right to petition Congress was permitted under a provision of the Lloyd-LaFollette Act (5 U.S.C. 7102). That statute was then recodified as part of the Civil Service Reform Act of 1978 (5 U.S.C. 7211).

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discussed the letter, personnel problems in the District, and a proposed management response. A transcript of the conversation was included in the INS OPR investigative report.

In discussing a proposed management response to the agents' letter and the personnel problems in the District, Mr. Parra said that he would like to see this situation resolved by removing ASU Supervisor Charles Griggs from the Houston District. Mr. Parra further asked Mr. Peterson "... how are we going to ... justify it [Griggs' transfer]?" Mr. Peterson replied that he was going to rely on Mr. Parra and Mr. McMahon to come up with the justification to remove Mr. Griggs from the Houston District. Mr. Parra added the same general comment concerning ASU Supervisor Jamar Hayes, noting that he [Hayes] would be "... a little bit easier to deal with internally in the sense that he is a probation supervisor . . . ." In closing the conversation, Mr. Parra said that "... the four of us [can] turn out to look like heroes for taking such decisive and positive management alternatives. So, we don't want to come down with a heavy hand on them. We can take care of this in a much more subtle and executive fashion."

On October 2, 1987, Southern Regional Office investigator Charles Williams arrived in Houston to investigate the allegations. As previously noted, the Southern Regional Office investigator made the agents and their immediate supervisors subjects of this investigation for failing to report their allegations internally. Six of the eight agents and their immediate supervisors told us that they felt intimidated by being named subjects of an investigation based on the agents' letter to Members of Congress.

At the end of his interview, but before the investigation was completed, Mr. McMahon asked Mr. Williams if he could "... utilize information contained in these statements for subsequent personnel actions against officers in this District." Mr. Williams replied that he was sure that the Southern Regional Commissioner would make the entire investigative report available to Mr. Parra. Further, Mr. Parra was one of the subjects of the issues discussed in the agents' letter.

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## ASU Officer Corps Appraisals

During November 1987, slightly over 1 month after Southern Regional Office and Houston District management became aware of the agents' letter, the eight ASU agents and one supervisor<sup>2</sup> received first- and

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<sup>2</sup>Mr. Griggs did not request officer corps supervisory appraisals.

second-line supervisory appraisals as part of their applications for an officer corps rating for fiscal year 1988. The agents' first-line supervisors, Charles Griggs and Jamar Hayes, rated all eight agents "Highly Recommended" (the highest possible rating). However, Assistant District Director for Investigations Carey Murphy, the agents' second-line supervisor, rated four of the agents (Messrs. Burkland, Capiro, DeLeon, and Moore) "Not Recommended" (the lowest possible rating), one agent (Mr. Nave) "Recommended" (the middle rating), and three agents (Messrs. Burns, Helmke, and Schepf) "Highly Recommended." Supervisor Hayes was rated "Not Recommended" by both his first-line supervisor, Mr. Murphy, and his second-line supervisor, Deputy District Director McMahon.

#### Lack of Documentation

In discussing the officer corps appraisals, Mr. Murphy said the agents' appraisals were based on the agents' poor performance in doing ASU work and making ELR contacts. We attempted to verify the ASU's actual work productivity during the officer corps appraisal period but were unable to do so. For example, in attempting to substantiate Mr. Murphy's claim that the agents' appraisals were partly due to poor ASU work performance, we obtained fiscal year 1987 and 1988 ASU workload statistics from the INS central office in Washington, D.C.; the Southern Regional Office in Dallas; the Houston District Office; and the Houston ASU. Each source reported a different number of anti-smuggling cases completed for those 2 years.

With respect to the ELR work productivity, the District had insufficient documentation of the work accomplished. The District began participating in the ELR program in June 1987, and ASU was to begin its ELR work in late August 1987. In mid-October 1987, Mr. Murphy required each supervisor to submit weekly ELR productivity reports to him. Therefore, at the time Mr. Murphy prepared the officer corps appraisals, he would have had at most only 5 weeks of ELR productivity reports. However, Mr. Murphy was unable to provide all 5 weeks of these statistics at the time of our review. Mr. Murphy said that he also used his personal records of ELR productivity, dating from June 1987, but that these records also were no longer in his files and thus unavailable for our review. In February 1988, Mr. McMahon made an agent-by-agent accounting of all the District's ELR contacts through January 1988; however, this was about 3 months after completion of the officer corps appraisals in November 1987.

Similar Language

The narrative comments included in the appraisals of the four agents rated "Not Recommended" and the one agent rated "Recommended" were nearly identical—including typographical errors on three of the ratings that were later corrected ("loyalty" corrected to "loyalty"). Mr. Murphy also used similar comments, including the same typographical error for "loyalty," in his "Not Recommended" rating of Mr. Hayes.<sup>3</sup> For example, in rating Mr. Moore as "Not Recommended" for promotion, Mr. Murphy characterized him as

"... an experienced officer who knows and understands the requirements of his position; he also knows how to perform his duties effectively. However, he has recently demonstrated a lack of loyalty to the Service in meeting the Commissioner's priorities and goals, has resisted changes in assignments, appears to be no longer interested in doing a good job, and can not [sic] be depended on to complete his assigned tasks in the time ordinarily required for their accomplishment."

With only minor changes, Mr. Murphy used this same language in his ratings of the other three agents rated "Not Recommended" and the one agent rated "Recommended."

Regarding the agents' "lack of loyalty to the Service," Mr. Murphy told us he was referring to the agents' poor performance in the ASU and ELR areas rather than the agents' letter to Members of Congress. Mr. Murphy stated that the agents resisted participation in the ELR program and belittled the program before they were directed to participate. Mr. Murphy added, however, that he had not counseled the ASU agents or their supervisors about their individual performance prior to the appraisals. Mr. Murphy said that, in retrospect, it was probably not wise to have used similar narrative in the above appraisals.

While it is possible that similar language can accurately describe the performances of different people, it is not likely. This became apparent when agents received different ratings with similar justifications.

Inconsistencies

With respect to the three agents who received a "Highly Recommended" rating on their officer corps appraisals, Mr. Murphy said that two of these agents, Mr. Burns and Mr. Helmke, had been productive in their ASU and ELR duties and had done collateral duties as well. Therefore, he rated them "Highly Recommended." Mr. Murphy told us that, shortly after the ASU agents wrote their letter to Members of Congress, these

<sup>3</sup>Mr. Hayes had been promoted to ASU supervisor in June 1987. At the time of the officer corps appraisals, he was still in his probationary period as a supervisor.



two agents approached him to express regret that they had been involved in writing the letter and said that they did not agree with the allegations contained therein.<sup>4</sup>

In the case of the third agent, Mr. Schepf, our review of the District's statistics indicates that he was one of the least productive ASU members during the time period covered by this officer corps appraisal. Mr. Schepf said to us that his performance had not been as good as others rated "Not Recommended." Mr. Murphy also said that Mr. Schepf did not really deserve a "Highly Recommended" rating but had somehow convinced him that he (Mr. Schepf) was performing his duties as assigned. Mr. Murphy later realized that on the basis of the District's productivity statistics that had not been previously available, Mr. Schepf's performance was not deserving of such a high rating.

We also reviewed the ASU agents' and their supervisors' officer corps appraisals for fiscal year 1987 (appraisals previous to fiscal year 1987 had already been destroyed at the time of our review). Six of the eight agents and Jamar Hayes, who at that time had not yet been promoted to ASU supervisor, requested and received officer corps appraisals from their first- and second-line supervisors for fiscal year 1987.<sup>5</sup> All seven were rated "Highly Recommended" by their first- and second-line supervisors for that appraisal period. At that time, Mr. Griggs was first-line supervisor, and former Assistant District Director for Investigations Vincent Henderson was second-line supervisor for Messrs. Hayes, Burkland, Burns, DeLeon, Helmke, and Moore. Mr. Nave was not with ASU at that time, and Investigations Supervisor David Berkowitz was his first-line supervisor, and then-Deputy Assistant District Director for Investigations Murphy was his second-line supervisor.

## ASU Agents' Performance Ratings

In May 1988, approximately 2 months after the end of the rating period, the seven agents who were assigned to ASU<sup>6</sup> received their annual performance ratings for the 1987-1988 rating period. ASU Supervisor Griggs prepared four of the seven ratings for agents Capio, Helmke, Nave, and Schepf and rated all four agents "Excellent," with narrative comments

<sup>4</sup>Both agents have since transferred from ASU into other units in the District—one through promotion and one through lateral reassignment.

<sup>5</sup>Supervisor Griggs and agents Capio and Schepf did not request fiscal year 1987 officer corps appraisals.

<sup>6</sup>On December 20, 1987, ASU agent Rexford Burns was promoted into the Organized Crime and Drug Enforcement Task Force.

basically tailored to the individual agents. Assistant District Director for Investigations Murphy prepared the remaining three ratings<sup>7</sup> for agents Burkland, DeLeon, and Moore and rated all three "Fully Successful." Mr. Murphy reviewed the ratings Mr. Griggs had prepared and revised all except Mr. Helmke's to "Fully Successful." Thus, six of the seven ASU agents received a final rating of "Fully Successful" for the rating period.

### Lack of Documentation and Performance Standards

As previously discussed, we were unable to assess the ASU personnel's work productivity during the rating period, either in their primary ASU duties or in their ELR duties. As also discussed previously, the Houston Deputy District Director counted all ELR contacts made by each agent through January 1988. However, he did not have data available for us to verify the accuracy of this accounting.

Also, none of the agents received a performance work plan against which to measure their performance until April 1988, after the 1987-1988 rating period had ended. Consequently, none of the agents received a performance progress review, which is intended to provide feedback regarding employee performance and an opportunity to identify necessary improvements. The agents were, however, held to the performance standards contained in the late work plan. Mr. Murphy explained that although the ASU agents had no written work plan during the rating period, they were well aware through other written and verbal instructions of expected standards of performance. However, INS' Administrative Manual requires that each employee have specific performance standards for their individual work plan. The written instructions, to which Mr. Murphy referred, were addressed to supervisory personnel and restated the requirements to spend 50 percent of staff time on ELR activities and the remaining time on other enforcement activities (e.g., anti-smuggling). The Administrative Manual requires using objective and measurable performance standards.

### Inconsistencies

In five of the agents' ratings, Mr. Murphy cited a lack of ASU work being accomplished during the rating period. On the basis of data that Mr. Murphy provided, during the rating period Mr. Moore completed three cases, the highest number of ASU cases; Messrs. DeLeon and Helmke each completed two cases. Mr. Moore and Mr. DeLeon were both cited for a lack of ASU work, while Mr. Helmke was not. Moreover, Mr. Helmke was

<sup>7</sup>Since Mr. Hayes had transferred to the Western Region at this time, Mr. Murphy prepared these ratings.

rated "Excellent" in this job element while Mr. Moore and Mr. DeLeon were rated "Fully Successful."

In support of five of the agents' ratings, Mr. Murphy referred to their ELR performance as being "negligible" or "less than diligent." Although we were unable to verify the ELR statistics compiled by the District, its data did not support these statements. The District's statistics showed that the total ELR productivity per hour by the ASU personnel was virtually identical to that of the other personnel during the time period October 1987 through January 1988. Mr. Murphy did not refer to these ELR statistics in completing the ASU performance ratings. Mr. Murphy told us he did not believe that information had been made available to him at the time he prepared the ratings. According to Mr. McMahan, he provided the information to Mr. Murphy shortly after February 1988. Mr. McMahan added that he did not know if Mr. Murphy used the information in preparing the agents' ratings.

In lowering the rating of Mr. Capio, Mr. Murphy stated that he had "negligible" activity in the ELR program. In fact, by the District's own accounting of ELR activity, Mr. Capio reported over 350 ELR contacts between October and January, the period during which the District completed the bulk of its employer education visits. Mr. Capio's 350 contacts constituted the third highest total among the 23 Houston District personnel who made ELR contacts during that time period.

One agent, Mr. Nave, received the same performance work plan and was rated against the same performance standards as the other six agents, even though he was assigned duties different from those of the other agents during the rating period April 1987 through March 1988. During that 12-month rating period, Mr. Nave was assigned to four different duties: 3 months as a general investigator,<sup>8</sup> 4 months with the airport drug task force, 4 months at the federal training academy, and 1 month with ASU. Mr. Nave's rating included no mention of his performance while working as a general investigator or with the airport task force, and only a passing reference to his assignment at the training academy. Mr. Murphy could not explain why he had rated Mr. Nave in this manner but said he considered Mr. Nave's previous investigative work in preparing the rating.

<sup>8</sup>Mr. Nave was a general Investigations agent before his promotion to ASU on July 5, 1987.

Regarding Mr. Nave's enforcement responsibilities, Mr. Murphy commented in Mr. Nave's rating that "He has not demonstrated any exceptional qualities in this area. . . ." This comment is inconsistent with Mr. Murphy's previous comment in Mr. Nave's officer corps appraisal in which Mr. Murphy stated that Mr. Nave's performance before September 1987 had been exceptional. Mr. Murphy said that the officer corps rating should have stated that Mr. Nave's performance prior to July 1987—when Mr. Nave transferred into ASU—had been exceptional. In acknowledging that his statements were contradictory, Mr. Murphy said that he relied on some of Mr. Nave's prior work to justify the "Fully Successful" rating. However, according to Mr. Murphy, Mr. Nave was not counseled regarding his poor performance during the rating period.

#### Similar Language

As he had done with the officer corps appraisals, Mr. Murphy used almost identical narrative comments for the three ratings he prepared. For example, in the first job element—Compliance With Service Policies, Goals, And Objectives—he cited the three agents for "less than a diligent and conscientious effort to comply" with other than ASU tasks. He then noted that he would have rated the agents "Minimally Satisfactory" in this element, but because they had not received a performance work plan, he was going to give them the "benefit of the doubt." Narrative comments for the other job elements were also basically identical. Mr. Murphy said he was not aware that he had used similar language in these three ratings, and that it was probably just an oversight. He noted that because he was responsible for preparing around 20 ratings, it was not unlikely that he would use similar language in some of the ratings.

In these three ratings, Mr. Murphy also included comments in one job element—Report Writing—that matched almost verbatim a description of the "Excellent" performance standard for that job element. However, he gave all three agents ratings of "Fully Successful" in that element. Mr. Murphy could not recall why he rated the agents this way, although he added that the narrative comments were probably correct, and the rating for that job element should have been "Excellent."

We also reviewed the eight agents' previous year's performance ratings (1986-1987). During this period, Mr. Capio was rated "Outstanding;" Messrs. Burkland, Burns, DeLeon, Moore, and Nave were rated "Excellent;" and Mr. Helmke and Mr. Schepf were rated "Fully Successful." Since Mr. Nave was an Investigations agent at that time, Investigations Supervisor Berkowitz prepared Mr. Nave's rating and Mr. Murphy reviewed it. Mr. Griggs prepared and Mr. McMahon reviewed the seven

other ASU agents' ratings for that time period. Performance ratings prepared before this time had been destroyed.

## ASU Supervisors' Performance Ratings

ASU Supervisor Griggs received two performance ratings during the period of our review. Mr. McMahon prepared and Mr. Parra reviewed Mr. Griggs' 1986-1987 performance rating, while Mr. Murphy prepared and Mr. McMahon reviewed Mr. Griggs' 1987-1988 performance rating.

### 1986-1987 Performance Rating

Mr. Griggs received his 1986-1987 performance rating in October 1987, 4 months after the end of the rating period and 20 days after the ASU agents' letter to Members of Congress became public. Mr. McMahon rated Mr. Griggs "Fully Successful" overall, but "Minimally Satisfactory" in three individual job elements. Mr. McMahon later upgraded two of these individual elements to "Fully Successful" after receiving guidance from the Southern Region's Office of Human Resources. Mr. Griggs claimed that this rating was based on actions that occurred after the rating period (i.e., the letter to Members of Congress) and was retaliatory. He initially appealed the rating to District Director Parra, who affirmed the rating, and then to the Southern Regional Office Performance Rating Grievance Committee. The committee raised the third "Minimally Satisfactory" element to "Fully Successful," upheld the remaining elements, and affirmed the overall rating of record as "Fully Successful." Mr. Griggs made an appeal of this rating to the Southern Regional Commissioner, who told us that he will not make a decision on Mr. Griggs' appeal until we have completed our review.

We found insufficient evidence to either support or refute Mr. Griggs' rating during this period. First, as previously mentioned, we were unable to verify ASU's actual work performance. Second, Mr. Griggs received a progress review at approximately the mid-point of the rating period that stated that he did not have any performance problems overall. Third, according to Mr. Murphy and Mr. Griggs, there was no documentation to indicate Mr. Griggs had any performance problems or had received counseling at any other times during the rating period. Fourth, near the end of the rating period, Mr. Parra twice wrote memos to the Southern Regional Commissioner to "request the noncompetitive upgrade of Charles R. Griggs." In the second memo, after listing Mr. Griggs' then-current responsibilities, Mr. Parra said "These responsibilities and duties are more than sufficient to justify the upgrading of Mr. Griggs' position." Mr. Parra later told us that in recommending Mr. Griggs for promotion, he was primarily referring to an upgrade in the

position Mr. Griggs held as an ASU supervisor rather than specifically referring to the individual in that position. Mr. Parra did not believe that his two promotion recommendations and his later approval of Mr. Griggs' relatively low performance rating were inconsistent.

In one job element—Support Of Service Priorities—Mr. McMahon rated Mr. Griggs "Minimally Satisfactory," stating that Mr. Griggs was not supportive of all INS priorities, and in this area his "behavior both personally and professionally is close to unacceptable." When we asked Mr. McMahon to elaborate on this statement he explained that it was based on (1) conflict Mr. Griggs had with other District personnel at the District's Service Processing Center and (2) Mr. Griggs' disagreements over ELR work priorities. However, Mr. McMahon's account of the incident at the Service Processing Center had the incident occurring in September 1987. Because ASU personnel were not assigned the ELR activities until late August 1987, neither the conflict at the Service Processing Center nor the alleged lack of support for the ELR program fell within the rating period that ended June 30, 1987.

Mr. McMahon later told us that he had been mistaken when he initially said that the conflict at the Service Processing Center had been one of the reasons for his comment in Mr. Griggs' rating. With respect to his statement about Mr. Griggs' lack of support for the ELR program, Mr. McMahon said that this statement was not specifically referring to the ELR program but to other non-anti-smuggling programs in which Mr. Griggs did not want the ASU agents to participate.

#### 1987-1988 Performance Ratings

Mr. Griggs' 1987-1988 rating, due in July 1988, was not prepared until September 1988. Assistant District Director for Investigations Carey Murphy rated Mr. Griggs "Minimally Satisfactory" overall. Mr. Griggs appealed this rating to the Southern Regional Office in October 1988, and the results are pending.

Mr. Griggs did not have a performance work plan until 9 months after the start of the 1987-1988 rating period and did not receive a performance progress review until the last week of the rating period. Moreover, Mr. Griggs had his ASU responsibilities reduced in mid-January 1988 pending reassignment. (See following section.) Later, he was totally relieved of ASU supervisory duties and assigned to only ELR duty in early March 1988. However, in his rating, he was judged using supervisory performance standards even though he had previously been relieved of his supervisory duties.

Mr. Murphy told us that when he realized Mr. Griggs did not have a performance work plan, he immediately prepared one and gave it to Mr. Griggs in mid-March 1988. Because Mr. Murphy believed it was important that Mr. Griggs be rated against standards for the rating period, he extended the rating period 60 days to allow time for a performance progress review and the final rating. He also stated that at the time, he was uncertain whether to prepare a supervisory work plan for Mr. Griggs' 1987-1988 rating period. Mr. Murphy said, lacking another alternative, he prepared the work plan but wrote very general standards that could apply to almost any position. Mr. Murphy noted that although the standards did not address Mr. Griggs' responsibilities since he had been relieved of his supervisory duties, Mr. Griggs should have been well aware through other written and verbal guidance of specifically what was expected from him. As we noted in a previous section, this is inconsistent with INS' Administrative Manual, which requires measurable and objective standards relating to the employees' assigned duties. Mr. Griggs told us that as a result of this "Minimally Satisfactory" rating, he received only a 2-percent pay raise effective January 1, 1989, rather than the full 4-percent raise authorized by Congress.

ASU Supervisor Jamar Hayes did not receive a performance rating for the period 1987-1988, during which he was a supervisor in Houston. As previously stated, Mr. Hayes was promoted to ASU supervisor in June 1987, but he did not receive a performance work plan at that time. Also, he received no progress review during the rating period. According to Mr. Hayes, he told Deputy District Director McMahon about this oversight in December 1987; however, he was not given a work plan until April 1988, just before he transferred out of the Houston District Office. His 1986-1987 rating, during which time he was an ASU agent, was "Excellent."

## Transfers and Reassignment of ASU Personnel

During January 1988, INS management transferred or proposed the transfer of ASU Supervisors Charles Griggs and Jamar Hayes and agent Fred Capio out of the Houston District Office. Although only Mr. Hayes eventually transferred out of Houston, all three believed that INS management had been pressuring them to leave Houston because of their involvement or perceived involvement in reporting allegations of mismanagement to Members of Congress. In addition, Mr. Griggs, although he was not transferred, was later relieved of his ASU supervisory duties and assigned to ELR duties.

Supervisor Griggs Ordered to  
Transfer and Relieved of  
Supervisory Duty

In January 1988, Deputy District Director McMahon notified ASU Supervisor Griggs that according to Southern Regional Office instructions he was being transferred to the Border Patrol in McAllen, Texas. He was given no reason for this transfer. Mr. Griggs had not requested, nor did he want, a transfer out of the Houston District Office. He requested that the Southern Regional Office rescind the transfer because of physical, financial, and mental hardship, primarily due to the ill health of his wife. Associate Regional Commissioner for Operations Peterson denied Mr. Griggs' request to rescind the transfer.

However, 2 months later in early March 1988, the Southern Regional Office, without giving a reason to Mr. Griggs, cancelled his transfer. Southern Regional Commissioner Martin said that he had ordered Mr. Griggs' transfer to McAllen because (1) Mr. Griggs' poor performance could be helped by exposing him to the quality of supervision present at the proposed duty station; and (2) there was, at that time, a need for ASU supervisors at the border. Mr. Martin said that he eventually cancelled the transfer because of Mr. Griggs' wife's health and the desire to make no changes in Houston until we had reviewed the situation.

Less than 1 week after Mr. Griggs' transfer was cancelled, Mr. McMahon informed Mr. Griggs that he was to dedicate 100 percent of his time to ELR duty until such time as he demonstrated the ability to follow orders. This ELR duty consisted primarily of making 40 telephone calls per day to Houston employers to explain IRCA requirements and answer related questions. Shortly thereafter, Mr. Griggs was relieved of all ASU supervisory responsibilities and removed from his private office to a cubicle.

Mr. Griggs requested on three occasions to be returned to his ASU supervisory duties. District Director Parra denied all three requests. Mr. Parra claimed that the Southern Regional Office had ordered Mr. Griggs relieved of his ASU duty, and, therefore, they would have to order or approve any decision to return Mr. Griggs to ASU duty. Southern Regional Commissioner Martin, however, told us that he had nothing to do with assigning Mr. Griggs to ELR duty and that Mr. Parra was responsible for that decision. In early March 1989, Mr. Parra ordered Mr. Griggs returned to ASU duty.

We could not find evidence that Mr. Griggs had been insubordinate or failed to follow orders as Mr. McMahon indicated. At the time he was relieved of duty, Mr. Griggs had not received a substandard performance rating, nor had he been given a substandard progress review. Mr. McMahon and Mr. Murphy did provide verbal accounts of Mr. Griggs'



failure to perform his duties that they believed supported their view of Mr. Griggs' inadequate work performance. However, we found no evidence that any of these incidents had been formally documented.<sup>9</sup>

### Supervisor Hayes Transferred to Western Regional Office

ASU Supervisor Hayes told us that he decided, in late November 1987, because of the working environment in the Houston District Office, to begin looking for a position in another INS district. He applied for several positions throughout INS at his then-current grade level, GS-13. In January 1988, New Orleans District Director John Caplinger contacted Mr. Hayes to offer him a position at the GS-11 level. Mr. Hayes objected, saying that he had only applied for positions at his current grade level. According to Mr. Hayes, Mr. Caplinger said that he (Hayes) was "damaged goods" because of what had transpired in Houston and that he should take this transfer offer. Mr. Hayes objected and Mr. Caplinger agreed to increase the offer to a GS-12 position with the possibility of moving Mr. Hayes back to GS-13 if his performance warranted the promotion.

At this point, Mr. Hayes said he began to feel some pressure from District management to accept the transfer to New Orleans as punishment for his alleged involvement in the agents' letter to Members of Congress. According to Mr. Hayes, Deputy District Director McMahon stated a deadline by which Mr. Hayes had to accept or reject the transfer; if Mr. Hayes remained in Houston, Mr. McMahon would take steps to downgrade him. Mr. Hayes said he also feared being forcibly transferred to a remote INS location if he did not take the New Orleans transfer. As the deadline approached, Mr. Hayes decided to accept the transfer and downgrade to New Orleans.

While waiting for his orders to report for duty in New Orleans, Mr. Hayes interviewed with the INS Western Regional Office for a GS-13 position. Later, the Western Region offered Mr. Hayes a GS-13 position as the Deputy Assistant Regional Commissioner for Investigations. Mr. Hayes accepted the position and left Houston in mid-April 1988.

According to Mr. McMahon, there was no pressure on Mr. Hayes to accept the transfer to New Orleans. Mr. McMahon said he did tell Mr. Hayes that he might be downgraded to GS-12, but that comment was in

<sup>9</sup>Mr. Murphy did document one instance in which he had admonished Mr. Griggs for communicating outside the chain-of-command. In this case, however, Mr. Murphy did not mention Mr. Griggs' work performance.

reference to a December 1987 counseling session Mr. McMahon previously had with Mr. Hayes concerning his work performance. At that time, Mr. McMahon told Mr. Hayes he had 90 days to improve his performance or face the possibility of a downgrade to GS-12. According to Mr. McMahon, Mr. Hayes could do nonsupervisory duties adequately, but he had problems carrying out his assigned duties as a newly promoted supervisor.

#### Agent Capio Offered Transfer to New Orleans

In January 1988, Mr. McMahon told ASU agent Capio that there was a career opportunity for him through a transfer to the New Orleans District Office. According to Mr. Capio, Mr. McMahon recommended that Mr. Capio take the transfer or Houston management might have to take more forcible action against him on the basis of his poor work performance. Mr. Capio said he believed he was being pressured to accept the transfer; however, he eventually declined the offer and remained in Houston.

According to Mr. McMahon, he did talk to New Orleans District Director John Caplinger about possibly transferring Mr. Capio to New Orleans. Mr. McMahon said the suggestion of a transfer was initiated by Mr. Caplinger, and there was never any pressure on Mr. Capio to accept or reject the offer.

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#### INS Investigation

On September 30, 1987, INS' Southern Regional Commissioner Stephen Martin received a copy of the Houston ASU agents' letter to Members of Congress. The agents' letter outlined allegations of misconduct regarding ASU operations against the Houston District Director, Deputy District Director, and Assistant District Director for Investigations. After receiving the letter, the Regional Commissioner instructed Charles Williams, the Regional OPR Coordinator, to inform OPR officials in Washington about the allegations.

In a telephone conversation, the INS OPR Deputy Director said that he informed Mr. Williams that in his opinion, the thrust of the allegations seemed to deal with management issues rather than fraud or criminal activities. The Deputy Director then said that he verbally instructed Mr. Williams to do a preliminary investigation of the allegations' merits and notify him should any fraud or criminal activities be identified. According to both the INS OPR Director and the Deputy Director, this is a normal operating procedure for an initial investigation.

In doing his investigation, Mr. Williams informed the agents and supervisors that they were both witnesses in the investigation (i.e., they would provide information regarding their allegations) and subjects of the investigation (i.e., they were being considered subjects of the investigation for having not reported the allegations internally). Mr. Williams told the agents that he was investigating all parties involved, including the INS Commissioner and the Regional Commissioner (Mr. Williams' immediate supervisor). After completing his investigation, Mr. Williams gave a copy of the investigative report—including statements from the agents and their immediate supervisors—to OPR and to INS officials in the Southern Regional Office. The Southern Regional Commissioner instructed Mr. Williams to give a copy to the Houston District Director. Copies were not given to the agents or their two immediate supervisors. These actions, while not correct, did not affect the investigation.

The agents said to us that they had not reported the allegations to OPR because of uncertainty over whether the allegations constituted OPR violations. Also, the agents said they believed they had reported internally by discussing their concerns with their supervisors and Houston management. Six of the agents and their two immediate supervisors added that being subjects of an investigation that the agents' letter initiated was intimidating. Mr. Williams said to us he believed that even if the allegations were uncertain, the agents still should have reported them to OPR. Because they did not, Mr. Williams made the agents and supervisors subjects of the investigation.

Justice OPR reviewed the INS OPR investigation in response to inquiries from the Houston ASU agents, Members of Congress, and OSC. On March 29, 1988, Justice OPR completed its inquiry and in its report concluded

“... that the investigation conducted by Mr. Williams was not improper. Appropriate steps were taken to ensure compliance with departmental reporting requirements, including those contained in the service's [sic] operating instruction. While the technique used by Mr. Williams of combining witness and subject interviews was unusual, he was able to articulate reasons, including efficiency and freshness of recollection, for his decision.”

In its review and later report of the propriety of the INS internal investigation, Justice OPR did not address (1) Mr. Williams' statement that he included the Commissioner and Regional Commissioner in his investigation and (2) Regional Commissioner Martin's release of the investigative report to the Houston District Director.

The Assistant Counsel of Justice OPR said that he had been aware that Mr. Williams said he was investigating the Regional Commissioner. At the time, that statement did not appear significant to him in Justice OPR's overall investigation. He did recognize, however, that such a statement could have led the agents to believe that Mr. Williams was not impartial in the investigation. According to Mr. Williams, he believed that the agents had implicated, in their allegations regarding ELR policy, all INS management above their local District's chain-of-command. Thus, he included both the Regional Commissioner and the INS Commissioner as targets of his investigation.

The Southern Regional Commissioner said he had released the report because, in his opinion, the allegations constituted an administrative matter best resolved at the District level. Therefore, he had sent the report to the District Director to obtain his suggestions on resolving the situation. However, the Assistant Counsel of Justice OPR and the Director of INS OPR agreed that OPR policy is that no part of an investigative report be disclosed outside OPR.

As part of a later investigation regarding the agents' letter, on April 12, 1989, Justice OPR recommended to the Commissioner of INS that letters be sent exonerating INS personnel included in Mr. Williams' investigation. Justice OPR also recommended that INS act quickly to remedy the very troublesome management problems in its Houston District Office.<sup>10</sup>

## Agents' Time Charges Incorrectly Recorded

INS agents have two means of recording time spent on different investigative functions. The time and attendance report is used to accumulate and measure financial data, such as salaries and other costs related to specific INS programs. A second system, the Daily Workload Record, also tracks employees' time spent on work-related activities but is used for developing and reporting workload and productivity statistics for a management information system.

In September 1987, District officials instructed the Houston ASU agents and their supervisors to charge all time spent on ELR activities to the anti-smuggling accounting code on the time and attendance report. As a result of these instructions, the agents' and supervisors' time spent on ELR activities was being understated, while their time spent on anti-smuggling activities was being overstated on the time and attendance

<sup>10</sup>On April 26, 1989, we requested a copy of the Justice OPR report on its later investigation and have not yet received a copy.

report. However, at approximately the same time, Regional management instructed agents to account for ELR activity on the Daily Workload Record. Therefore, this record reflected an accurate accounting of the agents' and supervisors' time.

INS officials said that in the absence of specific guidance on how ELR activity was to be accounted for on the time and attendance report, they did not consider the instructions to be a significant departure from INS policy. We noted, however, that these instructions were in direct conflict with guidance provided by the INS Administrative Manual. After we brought this matter to INS' attention, the Regional Commissioner said he would ensure that future ELR activities are correctly accounted for on the time and attendance report.

INS headquarters officials informed us, and we agree, that the inaccurate time charges on the time and attendance report did not have a material impact on the programs involved. Both the anti-smuggling and ELR programs are part of INS' enforcement program budget and are not treated as separate line items. Moreover, because the ELR time was properly recorded on the Daily Workload Records, INS was able to continue to monitor the workload and productivity output for both programs despite the errors in the time and attendance reports.

## Conclusions

The following circumstantial evidence suggests that INS officials may have taken actions against the agents and their immediate supervisors in retaliation for the letter to Members of Congress:

- Soon after receiving the letter, management officials made comments that one or more of the ASU supervisors should be transferred.
- Five of the agents and one supervisor received low officer corps supervisory appraisals about a month after the agents' letter became known to District management; management could not provide evidence of poor work performance in support of the low appraisals; and all six had been appraised "Highly Recommended" for promotion in the previous fiscal year.
- Six of the agents and one supervisor received low performance ratings that were insufficiently documented.
- One agent and two supervisors were allegedly pressured to accept unwanted assignment changes.

However, we cannot determine whether the letter was a significant motivating factor for the actions taken or whether the actions were

based on management concerns about the performance of the agents and the effectiveness of the supervisors in carrying out assigned tasks. This essentially factual determination turns on questions of credibility and can only be resolved through an adjudication by the Merit Systems Protection Board.

Regardless of whether retaliation as defined by the Civil Service Reform Act of 1978 occurred, some of the management practices employed were inappropriate. Accordingly, we concur with Justice OPR's recommendation to the Commissioner of INS to remedy the troublesome management problems in its Houston District.

We agree with the overall Justice OPR finding that INS' internal investigation of the agents' allegations was "not improper." We still believe, however, that actions taken during the investigation contributed to a perception by the agents and their supervisors that the investigation was biased and not objective. Although they did not affect the investigation's findings and conclusions, the actions involved giving misleading and inaccurate data to the agents and their supervisors and included questionable release of the report to one of the subjects of the agents' allegations.

The Houston District management was incorrect in directing anti-smuggling personnel to charge time spent performing ELR activities to anti-smuggling activities. However, because INS was able to monitor the time dedicated to ELR activities through another system, we do not believe the error affected INS' management of either program.



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First-Class Mail  
Postage & Fees Paid  
GAO  
Permit No. G100