

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General



Memorandum

To: Associate General Counsel William G. Stack **Date:** July 12, 1994
From: Inspector General Bernard Levine
Subject: Final Audit Report - "Review of the National Labor Relations Board's Program(s) for Responding to-Allegations Which could Result in Criminal or Administrative Action Against Agency Employees"

Enclosed is a copy of the Office of Inspector General (OIG) audit report in the above referenced matter. A copy of this report is being provided to both the Chairman and the General Counsel in case either of them should receive inquiries concerning the report. A draft of the report was submitted to you for your comment. The comments were considered in preparing this final report and are included in their entirety as an exhibit.

The report presents the results of an OIG audit which determined that the National Labor Relations Board needs to standardize its procedures for responding to allegations which could result in criminal or administrative action against Agency employees. Seven recommendations were made in the report.

You are hereby requested to provide an action plan which implements audit recommendations one through five. Management disagreed with recommendations six and seven. The action plan should set forth specific actions which implement each recommendation and a schedule for their implementation. Your action plan should be submitted to the Supervisory Auditor within 60 days of this report.

We appreciate the cooperation extended to the OIG, specifically to Auditors Joseph Young and Kathryn Glaser, during the conduct of this audit. Should you have any questions or comments concerning this report, please do not hesitate to call upon us.


B.L.

cc: Chairman William B. Gould, IV
General Counsel Frederick L. Feinstein

AUDIT REPORT

Office of Inspector General

**REVIEW OF THE NATIONAL LABOR RELATIONS BOARD'S
PROGRAM(S) FOR RESPONDING TO ALLEGATIONS WHICH
COULD RESULT IN CRIMINAL OR ADMINISTRATIVE ACTION
AGAINST AGENCY EMPLOYEES**



National Labor Relations Board

AUDIT OIG-AMR-12

Issued: JULY 12, 1994

I. RESULTS OF AUDIT

Introduction

The Office of Inspector General (OIG) recognizes that Agency heads, as part of the overall powers needed to administer their entity, may authorize their designees to conduct their own investigations into allegations of employee misconduct. This audit was initiated after the OIG examined an investigative file prepared by the General Counsel's Division of Operations-Management (DOM) and determined that qualitative standards were not followed. In addition, by conducting its own investigation, DOM was, in effect, investigating itself. Whether or not DOM was independent in fact, it still remains that DOM was not independent in appearance.

DOM, which oversees and includes the field operations of the NLRB, employs about 77 percent of the staff assigned to the General Counsel's side of the Agency. Attorneys and examiners assigned to field offices operate with some degree of autonomy in that they perform many of their official duties away from NLRB offices. Field personnel must travel frequently, at Government expense, and interact extensively with the public. Since the investigative practices of DOM were the basis for the audit, the OIG began audit fieldwork in this Division. After completing DOM the OIG went to the other offices under the General Counsel's side of the Agency. These other offices employ less than 400 people, all of whom are assigned to Headquarters. Some of these other offices had a few issues such as theft of personal or government property. These issues were adequately investigated by the Security Staff within the Division of Administration and, when appropriate, coordinated with officials from the General Services Administration's Office of Physical Security and Law Enforcement.

Conclusions

This audit determined that DOM did not utilize standardized procedures in responding to allegations which could lead to criminal or administrative action against employees under DOM supervision. The absence of standardized procedures heightens the risk that investigative actions will not be applied consistently. The determination whether to investigate or not should be predicated upon whether the investigating entity has jurisdiction over the subject matter of the allegation and whether the allegation itself warrants investigation. Once that determination is made, a balance must be struck, while investigating the case, between the need to collect evidence and whatever rights witnesses or the subject of the investigation may have.

Complaints and allegations received by DOM were not always recorded. Professional judgment by the official(s) who received the allegation was the determining factor as to whether the allegation was recorded. Consequently, a record was not routinely established when a DOM official believed that a complaint or allegation did not warrant investigation. A record should be established even when an allegation does not

warrant an investigation so that a repository of information is available, if needed, for future retrieval.

In those instances when investigative efforts were initiated, a record was not usually established as to what action(s) would be taken in response to the allegation(s). We were informed of seven investigations during interviews with DOM officials. Two other investigations were disclosed during our review of DOM files. Prior to conducting this audit, the OIG had no knowledge that six of these nine investigations (including two that were started prior to the selection of the Inspector General) had been conducted. The records relating to one of these nine investigations had been destroyed; therefore, no document review could be performed. This investigative file had been disposed of about 16 months after the final action had been taken by the Agency. The final action included financial restitution by an Agency employee. The remaining eight investigative files were reviewed. As a result of these nine investigations, two employees resigned, four employees were suspended and one employee was fired but subsequently reinstated based on an arbitrator's decision.

None of the files contained any record as to what action(s) would be initiated in response to the allegation. Specifically, we were looking for a dated record which would set forth the basis as to why responsible official(s) made a determination that an allegation or complaint warranted investigation. Seven of the eight files did not include an investigative work plan which is generally prepared at the outset of an investigation. The plan should set forth the issues, possible violations (statutes/regulations), and basic steps for accomplishing the investigation. For three of the eight files, the results of the investigation were not documented in a report or memorandum. Investigative reports usually contain the basis for and the details of an investigation.

The subject of the investigation was interviewed during the conduct of six (of eight) investigations. For five of these six investigations, there was no evidence that the subject was provided warnings and assurances before being interviewed. There was evidence in four of six files that the employee(s) either exercised or declined the right to be accompanied by a union representative during the interview. Warnings and assurances should be provided in writing and designed to ensure that employees are fully and consistently advised of their rights as well as their obligations during investigative interviews. Information obtained during investigative interviews is frequently the primary basis for subsequent criminal or administrative proceedings.

Recommendations

1. That DOM document the receipt of all allegations which potentially involve job related misconduct by an Agency employee.

Management Response: DOM agrees that all allegations reported to DOM personnel which potentially involve job related misconduct of a serious nature by an Agency employee will be documented.

2. That DOM record the basis for the determination that an allegation does not warrant investigation.

Management Response: Included in that documentation will be the basis for a determination that no investigation of the matter is required.

3. That DOM coordinate with the OIG prior to the commencement of any investigation to determine if:

- a. the matter should be investigated by DOM or the OIG;
- b. the OIG possesses any special skills which would dictate an OIG, rather than a DOM, investigation;
- c. the OIG possesses any special powers (e.g. subpoena) which would dictate an OIG, rather than a DOM, investigation; and
- d. appearance and public policy considerations dictate an independent investigation by the OIG, rather than one by DOM.

Management Response: If an allegation of employee misconduct potentially involves criminal violations, it will be referred to the OIG for investigation. If the allegation does not potentially involve criminal violations, but in the exercise of sound judgment, an OIG investigation may be warranted or assistance to a DOM investigation would be helpful, the OIG will be consulted.

OIG Response: As previously stated, this audit included a review of nine investigations performed by DOM. The OIG did not assess DOM investigations which dealt with issues such as employee tardiness, leave abuse, or insubordination. Some of the allegations pertaining to the nine investigations include:

- improper use of Agency property and personnel;
- unauthorized outside employment and/or the outside practice of law;
- falsification of jury duty documents;
- covertly providing information from Agency records to a party charged with an unfair labor practice; and
- falsely claiming to be on site conducting case work at a Union or Employer's workplace.

Prior to conducting this audit, the OIG had no knowledge that six of these nine investigations had been conducted. In regards to the remaining three investigations, the

OIG was alerted after substantive investigative work had been completed. We were informed of one DOM investigation after the OIG initiated its own investigation in response to a complaint. Another investigation by DOM involved the improper use or disclosure of official information. DOM referred the matter to the OIG only after making a determination that an employee may have accepted moneys in exchange for the information. DOM did not believe that investigating an allegation of improperly using or disclosing official information in itself was a matter which should be coordinated with the OIG. The OIG was actually alerted to the third investigation by a party outside the Agency who filed allegations against a field attorney. The Regional Director, where the field attorney was assigned, was instructed to investigate the allegations. DOM considered the matter sensitive enough to request that the Regional Director not discuss his investigation with anyone in or outside of his Region.

A determination as to whether a criminal act may have occurred frequently necessitates extensive investigative efforts. This, in part, is the basis for which we recommended that DOM coordinate with the OIG prior to the commencement of an investigation.

4. That, at the outset of an investigation by DOM, DOM personnel develop work plans which set forth the issues, possible violations of statutes/regulations, and basic steps to be performed.

Management Response: Where warranted, an appropriate investigative plan will be prepared prior to the conduct of a DOM investigation of employee misconduct.

5. That DOM personnel prepare a report or memorandum which documents the details of the investigation.

Management Response: Division of Operations-Management personnel will prepare a report or memorandum of an investigation conducted of allegations of employee misconduct when the volume or complexity of evidence in the file would make review of the documents difficult without the report or in the exercise of managerial discretion a report or memorandum is otherwise advisable.

6. That warnings and assurances be provided by DOM personnel prior to conducting investigative interviews with Agency employees, and that they then be documented in the file.

Management Response: DOM personnel will not be conducting investigative interviews of Agency employees regarding matters that may potentially involve criminal violations. Accordingly, Constitutional warnings and assurances will not be required. The subject of warning or assuring Agency employees in interview situations not involving allegations that would not be potentially criminal, is currently under discussion by Agency management and the National Labor Relations Board Union. Accordingly, a response to the recommendation of the proposed Audit report would be premature at this time.

OIG Response: We reaffirm recommendation 6.

7. That DOM maintain files relating to investigations for 10 years after the end of the fiscal year in which the case is closed and maintain records relating to allegations where no action is taken for 5 years. (See Appendix I, Page 200 of the NLRB Files Management and Records Disposition Handbook which sets forth this requirement for investigative case files.)

Management Response: Investigative materials and documentation of allegations will be retained for 1 year.

OIG Response: A one year retention period for investigative files is insufficient. We reaffirm recommendation 7.

II. BASIS FOR AUDIT

The National Labor Relations Board (NLRB) is an independent Agency established in 1935 to administer the principle labor relations law of the United States, the National Labor Relations Act. The NLRB implements national labor policy to protect the public interest by helping to maintain peaceful relations among employers, labor organizations and employees; by encouraging collective bargaining; and by providing a forum for all parties to peacefully resolve representation and unfair labor practice issues. The Agency is headquartered in Washington, DC and has 33 Regional Offices, several of which have Subregional and/or Resident Offices. The Agency employs almost 2,100 people and for Fiscal Year 1994 has an appropriation of over \$171,000,000.

The Office of Inspector General (OIG) received an anonymous allegation of potentially criminal wrongdoing in a Resident Office (a sub-office of a Regional Office) and, not wishing to travel a substantial distance only to find that key witnesses were on leave or otherwise unavailable, asked the Regional Director (RD) if anyone would be absent from the office during the time of the proposed investigation. When the RD supplied the information and asked the purpose of the investigation, he was told the information would not be provided. A number of reasons existed for withholding that information, including:

(1) the OIG never apprises the head of an office of an impending investigation and only reports investigative results to the "heads" of the Agency if there has been a referral to prosecutive authority or, in the absence of a prosecution, the Agency heads should consider taking some administrative action as a result of the investigation;

(2) the Inspector General (IG) has a statutory obligation to protect the identity of employees and, despite the fact that this informant was anonymous, the IG did not want to risk someone identifying the informant based on the nature of the allegations made and then taking action against the informant, even for a legitimate reason, because there is enough concern in the IG community at large about the treatment accorded informants;

(3) The President's Council on Integrity and Efficiency, in a document entitled "Quality Standards for Investigations," noted at page 5 that the second general standard for investigative organizations is, "[i]n all matters relating to investigative work, the investigative organizations must be free, both in fact and appearance, from impairments to independence; must be organizationally independent; and must maintain an independent attitude;" and,

(4) it would be unwise to tell the RD or any other non-witness what the allegations were because, if the investigation ultimately produced no results, no valid assertion could then be made that the reason it produced no results was that the allegations had been shared in advance with the person or persons who had the responsibility

for supervision of the office in question and who might, therefore, have a motive to engage in a cover-up.

Accordingly, the RD was informed that he was being provided with complete deniability should such an assertion ever be made and he could always testify that "they (the OIG) would not tell me anything." The RD asked if there were any objections to his telling the Division of Operations-Management (DOM) about the investigation and he was informed that the OIG would never put him in a position of not being able to communicate with his superior.

Presumably, the RD communicated the fact that an investigation was about to commence to DOM because the OIG next received a phone call from the Associate General Counsel, DOM, and was asked the nature of the investigation. He was given the same response. The IG was next called into a meeting with the General Counsel, the Acting Deputy General Counsel and the Assistant General Counsel in the immediate Office of the General Counsel. When asked the same question, the same response was given.

On the day prior to the scheduled commencement of the investigative trip, the IG received a call from then Deputy Associate General Counsel, DOM (the Associate General Counsel had retired in the meantime), who asked if the OIG still intended going to the Resident Office the next day to investigate the case. When given an affirmative response, he responded that they (DOM) had been investigating a case in the same office for two weeks and they wanted the OIG to know that.

The IG asked to see their entire investigative file and learned from reading it that they had granted immunity from criminal prosecution to everyone in the Resident Office, including the alleged wrongdoer. In fact, a written memorandum to the target of the investigation noted, among other things, "[h]owever, neither your answers nor any information or evidence gained by reason of your answers can be used against you in any criminal proceeding." While another portion of the memorandum noted that administrative action might be taken for failing to reply fully and truthfully, the above-quoted language, arguably, may have granted immunity from a criminal prosecution even for perjury.¹ When asked on whose authority they had granted such immunity, the then Deputy Associate General Counsel said that one of the Special Counsels to the General Counsel had been instructed to contact the U.S. Attorney in the city of the Resident Office and had secured such permission.

¹The form used in the OIG for giving warnings and assurances to prospective witnesses who are required to provide answers, as was the target of the investigation, provides, in pertinent part, "[h]owever, neither your answers nor any information or evidence gained by reason of your answers can be used against you in any criminal proceedings, except that if you knowingly and willfully provide false statements or information in your answers, you may be criminally prosecuted for that action."

That Special Counsel, when interviewed by the OIG, stated that: (1) based on instructions received, an Assistant U.S. Attorney (AUSA) in the city of the Resident Office was contacted and asked if he "had any problems with them (DOM) investigating the case;" (2) the AUSA asked if the Agency had an IG; (3) he was told the Agency did have an IG but he (the IG) had "not been brought into the loop;" (4) the AUSA said he would check and call back; (5) when he did he said they could follow their usual operating procedures; and (6) the Special Counsel specifically apprised the Associate General Counsel that this is the kind of matter which should be discussed with the IG.

Contact with the AUSA established that, with the exception of the last numbered item to which he was not privy, there was complete agreement with the above recitation. Of greater significance is the fact that both the AUSA and the Special Counsel are also in agreement that the AUSA was not asked if he was declining to prosecute or if he was authorizing the Agency to grant immunity from criminal prosecution to anyone. Contact with the person at the Department of Justice (DOJ) who is responsible for granting such immunity established that: (1) only the DOJ can grant immunity; (2) even when "unofficial" immunity is granted, certain procedures must be followed, one of which is to secure a proffer of what the witness will testify to as the quid pro quo for the granting of immunity (this was not done in this case even if a grant of immunity had been authorized); and (3) an agency can only grant immunity from that which the agency has authority to mete out, that is, administrative action. Authorizing grants of immunity from criminal prosecution is generally reserved for the prosecutor.

The OIG decided to abort its investigation based on the grant of immunity by the General Counsel's agents. Although there is some question about the legal efficacy of the grant of immunity, the IG thought it unconscionable for the OIG to investigate and then make a referral to prosecutive authority when the Agency had already granted immunity.

Having concluded that no OIG investigation should go forward, but being of the view that the matter had to be addressed in some fashion, the OIG decided to conduct an audit of the Agency's program(s) for responding to allegations it receives which could result in criminal or administrative action against employees. That fact was announced to the Chairman and General Counsel and an entrance interview was conducted with the two of them. At the entrance conference a discussion ensued about the propriety of the Agency's actions and, based upon a comment that it was unfortunate that the OIG had to spend its time in conducting such an audit, the IG proposed that, since it was too late to rectify the damage done in granting immunity from criminal prosecution and that what the OIG hoped to accomplish from the audit was a series of recommendations as to how the Agency's referral of investigative matters should be handled, the OIG would prepare a Memorandum of Understanding (MOU) outlining those proposed procedures, submit it to them for consideration and, if we were unable to reach agreement, we would go forward with the audit.

The IG submitted an MOU to the Chairman and the General Counsel on November 21, 1991. Despite numerous meetings and proposals since that time, no MOU has been entered into. Accordingly, the audit commenced.

III. OBJECTIVES, SCOPE, AND METHODOLOGY

This audit reviewed the system(s) for controlling the submission, receipt, processing, and disposition of allegations which could result in criminal or administrative action against Agency employees. We evaluated the methods and techniques utilized in investigating allegations; and the process by which the Agency coordinates with appropriate officials in the DOJ to obtain declinations of prosecution and grants of immunity from criminal prosecution.

Our audit scope was October 1, 1990 through September 30, 1993 and included any investigations conducted by the General Counsel's side of the Agency during this time even if the investigation was commenced prior to the beginning of our audit scope. About 85 percent of NLRB's employees are assigned to the General Counsel's side of the Agency. We interviewed employees and officials within the offices under the General Counsel's side of the Agency and examined documents such as field trip reports, correspondence files, and personnel and grievance records. In evaluating the Agency's investigative methods and techniques, we utilized: the Quality Standards for Investigations issued by the President's Council on Integrity and Efficiency, selected procedures set forth in the U.S. Attorney's Manual, and generally accepted policies and procedures prescribed by Inspectors General.

This audit was performed in accordance with generally accepted Government auditing standards at NLRB's Headquarters during the period October 1993 to April 1994.

UNITED STATES GOVERNMENT
National Labor Relations
Board

Date: June 27, 1994

MEMORANDUM

TO : Bernard Levine, Inspector General

FROM : William G. Stack, Associate General Counsel
Division of Operations-Management

SUBJECT: OIG-AMR-12

On May 20, 1994 a discussion draft of the audit report of your office in the subject matter was presented to my office. This memorandum will present comments to the draft report, the conclusions drawn and recommendations made.

As stated in the draft report, the subject of the audit was the "system(s) for controlling the submission, receipt, processing, and disposition of allegations which could result in criminal or administrative action against Agency employees". Initially, I wish to compliment your staff on the thorough, professional and courteous manner in which the audit was conducted.

Turning to the draft report, a recommendation is included that the Division of Operations-Management document receipt of all allegations which potentially involve job related misconduct by an Agency employee. As was related to the auditors, information raising concerns with respect to employee conduct typically comes to the attention of Operations-Management personnel from Regional Office management, usually in conversation between the Regional Director of the Region in which the issue arises and the Assistant General Counsel or Deputy Assistant General Counsel having responsibility for that Region under the Division's District system. Regional Directors and other Regional managers repeatedly have been informed that the investigation of all criminal activity is the responsibility of the Office of the Inspector General. They have further been instructed to bring such matters directly to the attention of the IG or to inform the Division of Operations-Management which will refer to the OIG such matters as potentially involve criminal violations. These protocols have been observed, but the matters reported are usually minor instances of possible misconduct. None of the matters referred by the DOM to the OIG have resulted in a criminal prosecution or a decision by a U.S. Attorney to prosecute an individual.

If allegations of employee misconduct are not found to potentially involve criminal violations and are not referred to the OIG, or if the OIG declines to investigate, the matter may be investigated by management. If Division of Operations-Management personnel investigate or if Regional management personnel investigate and advise the Division of their findings, a decision is made as to what, if any, action to take. That decision is often made by Regional management and when reported to DOM, usually is documented in a memorandum or file note and retained in files maintained by the respective Assistant General Counsels.

When reports of possible employee misconduct come to the attention of Division of Operations-Management personnel and it is obvious that the conduct does not potentially involve criminal activity and does not even warrant an investigation, the incident and Division response is not recorded, except perhaps in the personal notes maintained by DOM personnel. These are typical management problems such as a pattern of tardiness by an employee.

When an investigation is conducted by DOM personnel or Regional Office management, it is not routine that an investigative plan is drafted. Such matters are generally factually simple and involve practices and procedures well known to long-tenured personnel of the Agency.

When the employee concerning whom the allegation pertains is questioned by DOM personnel or Regional Office management during the course of the investigation, appropriate rights and protections are offered. As it has been determined that no criminal violations potentially are involved (either because it is obviously so or because the OIG has declined to become involved), Miranda rights are not provided.

Our responses to the draft report's recommendations follow:

- 1 DOM agrees that all allegations reported to DOM personnel which potentially involve job related misconduct of a serious nature by an Agency employee will be documented.
- 2 Included in that documentation will be the basis for a determination that no investigation of the matter is required.
- 3 If an allegation of employee misconduct potentially involves criminal violations, it will be referred to the OIG for investigation. If the allegation does not potentially involve criminal violations, but in the exercise of sound judgment, an OIG investigation may be

warranted or assistance to a DOM investigation would be helpful, the OIG will be consulted.

- 4 Where warranted, an appropriate investigative plan will be prepared prior to the conduct of a DOM investigation of employee misconduct
- 5 Investigative materials and documentation of allegations will be retained for 1 year.


W. G. S

UNITED STATES GOVERNMENT
National Labor Relations Board

Date: July 11, 1994

MEMORANDUM

TO : Bernard Levine, Inspector General

FROM : William G. Stack, Associate General Counsel
Division of Operations-Management

SUBJECT: OIG-AMR-12

By memorandum dated June 27, 1994 I provided you with comments to the draft report of the audit conducted by your office of National Labor Relations Board programs for responding to allegations which could result in criminal or administrative action against Agency employees. On July 6, your office requested clarification of my comments respecting recommendations numbered 5 and 6 of the draft report.

In response to recommendation number 5 of the draft report, Division of Operations-Management personnel will prepare a report or memorandum of an investigation conducted of allegations of employee misconduct when the volume or complexity of evidence in the file would make review of the documents difficult without the report or in the exercise of managerial discretion a report or memorandum is otherwise advisable.

Recommendation number 6 proposes that "warnings and assurances be provided by DOM personnel prior to conducting investigative interviews with Agency employees, and that they be documented in the file." DOM personnel will not be conducting investigative interviews of Agency employees regarding matters that may potentially involve criminal violations. Accordingly, Constitutional warnings and assurances will not be required. The subject of warning or assuring Agency employees in interview situations not involving allegations that would not be potentially criminal, is currently under discussion by Agency management and the National Labor Relations Board Union. Accordingly, a response to the recommendation of the proposed Audit report would be premature at this time.


W G. S