

**U.S. OFFICE OF SPECIAL COUNSEL**1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

September 17, 2004

Sandalio Gonzalez
Re: OSC File No. MA-04-2901

Dear Mr. Gonzalez:

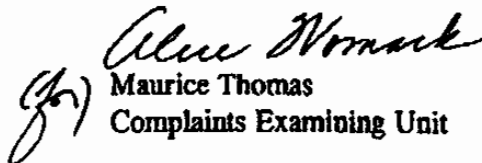
This will acknowledge receipt of the above-referenced complaint. In the near future, a member of our staff may contact you to discuss this matter if any additional information is needed to consider this case. Please provide the telephone number where you wish to be contacted, if you have not already done so. For overseas telephone numbers, please include country codes; we do not have access to Autovon.

If you wish to write to us again concerning this matter, please include the file number listed above. We can also be reached by telephone at 202-254-3600 or on our toll-free number at 1-800-872-9855. Your contact at the Office of Special Counsel is Colette Key. Enclosed is OSC's policy statement concerning the disclosure of information, which includes a disclosure consent form. If you do not sign and return one of the three consent statement options on the consent form to OSC within 20 days of the date of this letter, it will be assumed that you agree to Consent Statement I.

If this complaint alleges a violation of the prohibited personnel practice described in 5 U.S.C. § 2302(b)(8), commonly called reprisal for whistleblowing, a separate information sheet is included with this letter which includes answers to commonly asked questions and discusses the right to file a request for corrective action with the Merit Systems Protection Board. The Board's regulations concerning rights to file a corrective action case can be found at 5 C.F.R. Parts 1201-1205 and 1209.

Please bear in mind that each year OSC receives a large number of complaints concerning prohibited personnel practices. While we attempt to handle all cases as expeditiously as is possible, we generally process them in the order received.

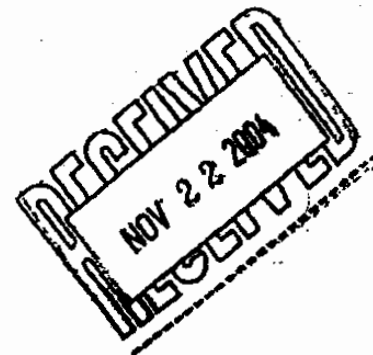
Sincerely,


Maurice Thomas
Complaints Examining Unit

**U.S. OFFICE OF SPECIAL COUNSEL**1730 M Street, N.W., Suite 309
Washington, D.C. 20036-4595

NOV 19 2004

Mr. Sandalio Gonzalez
c/o Peter H. Noone
Avery Dooley Post & Avery
90 Concord Avenue
Belmont, MA 02478



Re: *OSC File No. MA-04-2901*

Dear Mr. Gonzalez:

This letter is in response to your complaint to the U.S. Office of Special Counsel (OSC) against the Department of Justice (DOJ). You allege that the lowering of your performance rating from outstanding to excellent constitutes reprisal for whistleblowing.

The Office of Special Counsel is authorized to investigate allegations of activities prohibited by civil service law, rule, or regulation, and prohibited personnel practices. 5 U.S.C. §§ 1214(a)(1)(A), 1216(a) and 2302(b). We have carefully considered the information you provided as a possible violation of 5 U.S.C. § 2302(b)(8) and 5 U.S.C. § 2302(b)(12); however, for the reasons explained below, we have made a preliminary determination to close the investigation into this matter.

You state that on February 24, 2004, you sent a copy of the letter you wrote to Special Agent in Charge John Gaudio to the United States Attorney for the Western District of Texas. In this letter, you reported your frustration and outrage at the mishandling of the [REDACTED] investigation that resulted in the unnecessary loss of human life in the Republic of Mexico, and endangered the lives of Special Agents of the Drug Enforcement Administration (DEA) and their immediate families assigned to the DEA office in Mexico.

We do not believe that the Merit Systems Protection Board would find that your report is protected by the provisions of 5 U.S.C. § 2302(b)(8). In order for a disclosure to be protected, the employee must have a "reasonable belief" that the information being disclosed evidences one of the improprieties mentioned in the statute -- a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. It is not essential that the disclosure be true, or that the information actually establishes the impropriety. The standard for evaluating the "reasonableness" of a disclosure is an objective one: would a reasonable person in the discloser's position believe that the information evidences an impropriety defined in the statute.

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Sandalio Gonzalez

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We lack information that demonstrates how your report evidences one of the improprieties defined in the statute. Therefore, we would be unable to infer that you had a reasonable belief that you were making protected disclosures at the time of your report, as opposed to what appears to be your observations of, and dissatisfaction with, the Bureau of Immigration and Customs Enforcement management officials and their handling of a federal case. Accordingly, without a protected disclosure there is no 5 U.S.C. § 2302(b)(8) violation.

However, even if your report was determined to constitute a protected disclosure, we still would be unable to establish a connection between it and the personnel action. We lack information of any adverse impact against the management official responsible for the personnel action, any evidence of statements of animus, or any other evidence that you believe establishes a connection between your report and the personnel action. Further, we note that because DOJ officials were conducting a fact-finding review of this situation prior to your report, they were already aware of the matter you reported.

Thus, while you may believe that agency officials took a reprisal action for your report, we cannot infer that this action was taken for reasons other than those given in your appraisal concerning your extremely poor judgment, and that your actions made already tense relationships worse. Accordingly, we would be unable to show the agency's actions were unsupported.

Finally, with regard to your allegation that you engaged in protected speech which was in turn the motivating, substantial and exclusive factor for the agency official's retaliation, we analyzed this matter as a possible violation of 5 U.S.C. § 2302(b)(12). It is a prohibited personnel practice to take or fail to take, any personnel action if taking or failing to take, such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles defined in 5 U.S.C. § 2301. In addition to the civil service law, rules, and regulations, section 2302(b)(12) was also intended to protect against the infringement of constitutional rights, including the right to free speech.

The Court in Pickering v. Board of Education, 391 U.S. 563, 570-573 (1968), established a balancing test to determine whether an employee's speech addressed a matter of public concern and whether the interest of the agency in promoting the efficiency of the public service it performs outweighed the employee's interest, as a citizen, in free speech. Speech involves a matter of public concern if it addresses items of political, social, or other concern to the community. However, federal employees enjoy a more limited right to free speech than other citizens when the federal government is acting as an employer.

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Sandalio Gonzalez

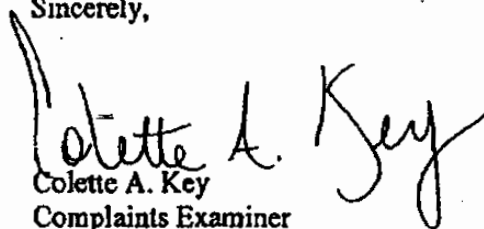
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Based upon our reading of Pickering, we believe that your comments did not amount to public speech protected by the First Amendment. Rather, as stated above, simply expressed your observations of, and dissatisfaction with, the Bureau of Immigration and Customs Enforcement management officials and their handling of a federal case.

Further, even if we assumed that the letter touched upon a matter of public concern, it appears that management's right to restrict an employee's on-duty speech that has the potential to disrupt the work environment would outweigh your rights in this situation. Thus, we have no basis for further inquiry into the lowered performance rating as a possible violation of section 2302(b)(12).

As indicated above, we have made a preliminary determination to close our inquiry into your complaint based on the reasons we cited for each of the allegations you made. Before we actually close the file, we will give you an opportunity to submit any comments you may wish to make concerning our determination. Your response must be in writing and should address each of the reasons we cited in reaching our preliminary determination to close your complaint. You have 16 days from the date of this letter to submit your written response. If we do not receive any comments by the end of the 16 day period, we anticipate closing this file and will send you a letter terminating the investigation and advising you of any additional rights you may have.

Sincerely,



Colette A. Key
Complaints Examiner
Complaints Examining Unit



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

DEC 07 2004

Mr. Sandalio Gonzalez
c/o Peter H. Noone
Avery Dooley Post & Avery
90 Concord Avenue
Belmont, MA 02478

Re: *OSC File No. MA-04-2901*

Dear Mr. Gonzalez:

The purpose of this letter is to notify you that you have a right to seek corrective action from the Merit Systems Protection Board (MSPB). As we informed you in our closure letter of this date, we have terminated our inquiry into your allegations. Because you alleged that you were the victim of the prohibited personnel practice described in 5 U.S.C. § 2302(b)(8), commonly called reprisal for whistleblowing, you may have the following rights.

You may seek corrective action from the MSPB under the provisions of 5 U.S.C. §§1214(a)(3) and 1221 (individual right of action) for any personnel action taken or proposed to be taken against you because of a protected disclosure that was the subject of your complaint to this office. You may file a request for corrective action with the MSPB within 65 days after the date of this letter. —

The Merit Systems Protection Board regulations concerning rights to file an individual right of action with the Board can be found at 5 C.F.R., parts 1201-1206 and 1209. If you choose to file such an appeal you should submit this letter to the Board as part of your appeal.

Sincerely,

A handwritten signature in black ink that reads "Colette A. Key". The signature is written in a cursive style with a long, sweeping line extending from the end of the name.

Colette A. Key
Complaints Examiner
Complaints Examining Unit