

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE**

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SANDALIO GONZALEZ
Appellant,

DOCKET NUMBER
DA-1221-05-0229-W-1

v.

DEPARTMENT OF JUSTICE
Agency.

DATE: July 5, 2005

STATEMENT OF FACTS AND ISSUES

I. STATEMENT OF ISSUES

- A. Whether the Appellant made protected disclosures under 5 USC 2302.
- B. Whether the Appellant's protected disclosures were contributing factors to the action taken against the Appellant
- C. Whether the Agency can prove by clear and convincing evidence that it would have taken the same personnel actions in the absence of such disclosures.

II. STATEMENT OF FACTS

The Appellant is a [REDACTED] year veteran of the law enforcement profession, and he spent [REDACTED] of those years with the Drug Enforcement Administration (DEA) in various domestic and foreign assignments. He was promoted to the Senior Executive Service of the United States in September [REDACTED] and retired from the DEA on January 8, 2005 as the Special Agent in Charge (SAC) of the [REDACTED] Texas Field Division. During his tenure as the SAC in [REDACTED] (April 2001 to January 2005) and prior to the issue

which is the subject of this appeal, the Appellant received "Outstanding" performance ratings for the two preceding rating periods (October 2001-June 2002, and July 2002-June 2003).

On February 24, 2004, the Appellant, during the course of his official duties, in an attempt to protect his agency and employees under his command, as well as DEA personnel that had been evacuated to [REDACTED] from the DEA [REDACTED] Mexico Resident Office, transmitted a letter to his counterpart, the Special Agent in Charge (SAC) of the Bureau of Immigration and Customs Enforcement (ICE) office in [REDACTED], holding him responsible for the actions of his subordinates and one of their informants in connection with the murder of several human beings in [REDACTED].

Following a meeting and a lengthy telephone conversation with his ICE counterpart, the Appellant felt it was necessary to get on the record with the facts of the case, when it became obvious to the Appellant that the ICE SAC and personnel under his command were being critical of DEA personnel assigned to [REDACTED] while attempting to mitigate and downplay both the seriousness of the situation as well as the role of ICE personnel and the informant in the case.

This action on the part of the Appellant was the result of his having received information reflecting that fourteen individuals were killed in [REDACTED], and that twelve of them were buried in the backyard of a residence in Juarez, as well as details about the subsequent obstruction of justice in the investigation of a threat against the lives of a DEA agent and his family resulting from that same case, all during the course of an ICE narcotics investigation.

Since the ICE investigation involving the murders was being conducted under the guidance or oversight of a U.S. federal prosecutor (Assistant United States Attorney) in ██████████ and it appeared to the Appellant from information received by him from DEA agents that the murders could have been prevented through the timely intervention of U.S. personnel, the Appellant forwarded a copy of the letter to the Office of the U.S. Attorney for the Western District of Texas, in order to report the situation to him. The letter in question has been previously submitted to the Board and is part of the record in this appeal. A timeline of events regarding this matter is at Tab 1.

The Appellant reported in said letter that on/about August 5, 2003, while working under the supervision of ICE agents, the previously mentioned informant, identified as SA-913-EP, participated in a murder in ██████████. When ICE officials learned of the murder, they took no immediate action to notify Mexican federal authorities of what had actually taken place, and on August 15, 2003, the actions of the informant were knowingly misrepresented to Mexican federal authorities that were told via official correspondence that the informant had merely "witnessed" a murder in the state of Chihuahua, and that he would later be made available to them to provide information regarding the event. It is the Appellant's position that the informant was in fact a participant in the torture/murder of a human being, as reflected in his debriefing report, dated August 25, 2003, which clearly states that the informant supervised the murder. The Appellant also pointed out that ICE personnel had thrown obstacles in DEA's way and concealed vital information that could have saved lives.

The murder of a human being in the Republic of Mexico, knowingly misrepresenting facts to Mexican federal law enforcement officials with jurisdiction over

the crime of murder in Mexico, and obstructing the investigation of a threat against the lives of a DEA agent and his family are clear violations of human rights, laws, rules or regulations, and constitute gross mismanagement of resources and criminal investigative procedures. The letter to the Mexican authorities is at Tab 2, and the report of the informant's debriefing is at Tab 3. The letter was written in Spanish, and an unofficial translation into English, prepared by the Appellant who is fluent in the Spanish language, is attached to it.

The Appellant also reported that following the murder in August 2003, ICE agents requested several country clearances for the informant to travel to ██████████, and ICE agents continued monitoring the informant's activities in ██████████, while failing to report his unlawful conduct to DEA in Mexico City as required by mutually (DEA & ICE) agreed upon international rules and protocol. In addition, the Appellant reported that ICE agents failed to provide DEA agents in ██████████ with the exact location where the body of the first victim was buried, intentionally and incorrectly stating that the information given by the informant was vague, thereby obstructing and delaying a murder investigation in Mexico, and as a consequence later placing in grave danger the lives of a DEA agent and his family in ██████████. Obstructing and delaying a murder investigation are violations of laws, rules or regulations, a threat to public health and safety, and gross mismanagement of law enforcement resources.

During his debriefing on August 6, 2003 by ICE agents in ██████████, the informant admitted to his participation in the killing of the victim, known at that time only as ██████████ as well as to knowing the exact location where the murder victim had been buried. An official ICE report indicates that the informant may have known ahead of time

that [REDACTED] would be killed on August 5, 2003, because in a memorandum to the informant's file authored by the ICE SAC, it was reported that before going to the house where the victim would be killed, the informant "went to purchase duct tape and lime (a powder used to conceal odor)." Following his meeting with ICE officials on August 5, 2003, the informant was allowed to return to the house in [REDACTED] to check the grave site and pay \$2,000 to other co-conspirators for their role in the murder of [REDACTED]. This information is reflected in the ICE debriefing report dated August 25, 2003, as well as in the aforementioned memorandum to the file dated August 6, 2003 (Tab 4).

On August 11, 2003, a DEA agent in [REDACTED] was asked by an ICE official to convene a meeting with FBI, DEA and ICE personnel to discuss the informant/murder issue. The meeting was scheduled to take place in the DEA office on August 15, 2003 at 2 PM, however, ICE personnel did not show up as scheduled, and ICE notified DEA that the meeting had been cancelled. The meeting was not rescheduled.

The Appellant also reported that following the August 2003 murder, ICE personnel and the prosecutor assigned to the case ignored, with no good reason, well founded recommendations made by DEA agents to arrest the principal suspect [REDACTED] and "take down" the case, thereby allowing at least thirteen other murders to take place in [REDACTED], in what can only be described as a display of total disregard for human life, and disrespect for the rule of law in Mexico. This was reportedly done to protect, what in comparison to the crime of murder, were relatively minor cases/prosecutions regarding drugs and a cigarette smuggling case in which the informant was a witness.

On/about December 19, 2003, the ICE office in [REDACTED] submitted a request to

lure the principal suspect into the U.S. without the requisite protocol coordination with DEA in ██████████ or with DEA in Mexico City. This was a clear violation of mutually agreed upon and well established rules between ICE and DEA. The informant and the subjects under investigation by ICE were allowed to continue their illicit activities in Mexico following the August 2003 murder, and on January 14, 2004, DEA agents and their families stationed in ██████████ were evacuated from their residences because hired killers that could and should have been taken into custody after the first murder in August 2003, tried to identify, through the informant, two DEA agents under the ruse of a traffic stop. The informant reportedly had told his co-conspirators that he knew corrupt U.S. officials that could provide this information. This attempt at identifying the DEA agents occurred as a result of information received by traffickers during the torture and killing of three individuals that took place in Juarez earlier that same day.

As a result of malfeasance on the part of U.S. government officials, the principal suspect (██████████) and others, with the assistance and participation of the ICE informant, committed a series of murders in ██████████ that shocked the conscience of decent, law-abiding citizens on both sides of the border. Following the emergency evacuation of DEA personnel in ██████████ the night of January 14, 2004, ICE agents refused to immediately make the informant available to Mexican federal authorities so that his statements could be used as the probable cause necessary to search the house where the bodies of twelve victims were buried, as well as probable cause to arrest several corrupt police officials in ██████████. The failure to make the informant available to Mexican federal officials resulted as a consequence in a one-week delay before probable cause could be established to search for the dead bodies. These officials informed the Appellant and

other DEA personnel in Mexico that they would not have had to wait to discover the bodies prior to arresting the corrupt officers. As a result, several dangerous killers were allowed to flee and presently remain at large.

To make matters worse, ICE officials would not allow the informant to call one of the suspects and arrange a meeting so that Mexican federal authorities could arrest him for his participation in the murders. Furthermore, the U.S. prosecutor refused the repeated requests by DEA for direct access to the informant so that at least attempts could be made to resolve the alleged threat against the DEA personnel and their families stationed in [REDACTED]. In fact the U.S. prosecutor stated that she had ordered ICE personnel to refuse DEA access to tape recorded conversations of the informant, while expressing concern that DEA personnel would share information with Mexican federal authorities. The ICE SAC inexplicably allowed a prosecutor to make an operational decision that clearly interfered with the investigation of a threat against the lives of fellow U.S. federal agents and their families.

When the ICE SAC finally allowed DEA agents direct access to the informant, he placed unnecessary restrictions on that access that are inconsistent with both the spirit of cooperation that should exist between federal law enforcement agencies, and with well established law enforcement practices and procedures. His reasoning for doing this was that, in his view, DEA agents were targeting the ICE informant for investigation and he could not allow that to occur. The fact that ICE would go to such extreme lengths to protect this informant, and the procedures employed in the handling of this informant, including the fact that ICE agents continued working with him after he tried to smuggle a [REDACTED] pound load of marijuana behind their back in June 2003, and his incredible story

after he tape recorded the murder of [REDACTED], would lead a reasonable person to conclude that the informant may have been inappropriately controlling the agents. The fact is that ICE agents allowed the informant to continue on an unabated crime spree while under their so-called control, actions that clearly constitute gross mismanagement of an investigation and in the handling of a government informant. The AUSA and ICE officials finally allowed the informant to meet with Mexican authorities on February 12, 2004, almost a month later. The statement given by the informant to Mexican federal authorities on February 12, 2004, and its English translation, is being submitted to the Board at Tab 5.

The restrictions placed by ICE on the DEA interview of the informant had the effect of obstructing the investigation of the threat against a DEA agent and his family, a threat that should have never taken place, and that came about as a result of cold killers who went to the agent's residence, and later caused local police to make a traffic stop on the agent and his family for purposes of identification and, in the Appellant's opinion, their abduction and murder.

As a result of these wrongful actions, several murder suspects are now fugitives. There was no logical reason to prevent the informant from calling one of the main suspects, a Mexican state of Chihuahua police supervisor, and arranging a meeting with him so Mexican federal authorities, who were at the time present in large numbers for that very purpose, could arrest him

Under these circumstances, the subsequent indictment in the U.S. for murders that occurred after August 5, 2003, that could have been prevented, is questionable and most disturbing.

Information received by the Appellant indicates the informant knew on the morning of January 14, 2004, that [REDACTED] was planning to torture and kill someone that same day, and nothing was ever done about it until the informant received a call from [REDACTED] on the night of the 14th to check the names of DEA agents that had been stopped by local police in [REDACTED]. By that time, three more human beings had been tortured and killed. The Appellant submits that by all standards of law, common sense, good judgment, decency, and professional ethics U S government personnel could and should have taken steps to stop these assassins following the first murder in August 2003.

Instead, the U.S. Attorney for the Western District of Texas, [REDACTED], chose to retaliate against the Appellant for making protected disclosures by complaining to the Department of Justice (DOJ), which in turn caused DEA to include negative comments in the Appellant's performance evaluation, specifically attacking the disclosures, and lower the Appellant's last performance rating, in direct retaliation for the protected disclosures contained in the February 24, 2004 letter. These actions were retaliatory in nature, and designed to irreparably tarnish the Appellant's career and post governmental service and future employment opportunities. As a result of this unfair political pressure, the Appellant's performance evaluation was lowered and injected with negative information only because of his protected disclosures.

The Appellant learned of this when shortly after his letter was transmitted, he received a telephone call from the then DEA Chief of Operations, [REDACTED], who informed the Appellant that [REDACTED] had complained about the Appellant's letter directly to DOJ officials who in turn relayed [REDACTED] complaint to DEA Administrator [REDACTED]. [REDACTED] further stated that he had been directed to call

the Appellant to verbally admonish him. [REDACTED] further stated that [REDACTED] was very upset because the Appellant's letter had created discoverable material for the criminal case against [REDACTED]. The letter in question, however, being an internal administrative document, would probably not have created any discovery issues in the case. In any event, the information in the letter is the truth.

The Appellant was first threatened with the personnel action at issue during the so-called settlement discussions in another Individual Right of Action appeal filed by the Appellant on November 3, 2003 (MSPB Washington Regional Office, Docket Number DA-1221-04-0079-W-1). In a letter dated May 4, 2004, forwarded to the Appellant's representative in that case, the agency attorney suggested that a "serious lapse of judgment" on the part of the Appellant "will necessarily be reflected in his mid-year performance appraisal, which will issue after June 30, 2004." The letter also states that if the Appellant "retires before June 30, 2004, DEA will provide a positive letter of recommendation to future employers based on his final appraisal of record, that is, the "Outstanding" rating for calendar year 2003, without any reference to matters in 2004 concerning which SAC Gonzalez had not been formally rated at the time of his retirement." This letter was previously submitted to the Board and is part of the record in this appeal.

The Appellant's February 24, 2004 letter to his ICE counterpart was, at the time of its writing, protected internal government correspondence between officials in Senior Executive Service level positions that also went to the U.S. Attorney as the chief federal law enforcement official in the district because of the possible criminal implications of what had taken place. As a senior federal law enforcement official in charge of a DEA

previously submitted to the Board and is part of the record in this appeal.

Additionally, in accordance with applicable rules for SES employees, the Appellant responded to the Rating Official within seven days of the receipt of the tentative rating requesting a review of his performance rating in a memorandum dated August 27, 2004. This memorandum was previously submitted to the Board and is part of the record. The agency never responded to the Appellant's request for a higher level review of his performance rating as required by DEA regulations (Tab 6).

The Appellant again respectfully submits to the Board that he made protected disclosures under 5 USC 2302. The Whistleblower Protection Act protects employees who (reasonably) disclose, inter alia, "a substantial and specific danger to public health or safety." 5 USC 2302(b) (8) (A) (ii) The Appellant reported allegations of serious misconduct on the part of government agents and an informant acting under the direction of the agents, arguably with the knowledge of a federal prosecutor.

Under the Whistleblower Protection Act, "any" disclosure is protected so long as it is based upon a reasonable belief that the information evidenced either a violation of any law, rule, or regulation or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety, and it involved information which was not required to be kept confidential. 5 USC 2303(b) (8), 5 USC 2302(b) (8), Garst v. Dept. of the Army, 60 MSPR 514, 517-18 (1994), Geyer v. Dept. of Justice, 63 MSPR 13, 17 (1994).

The Appellant believes that the information contained in his letter of February 24, 2004, evidenced substantial and specific danger to public health and safety, abuse of authority, violations of laws, rules and regulations gross mismanagement, and violations

of agency rules and regulations. The disclosures attributed to the Appellant are not excluded from the protection of the Act because they were neither confidential nor prohibited by law.

In addition, it is clear that the Appellant's protected disclosures were a contributing factor to the actions taken against the Appellant because the notations in the performance evaluation directly relate to these disclosures, thus obviating the usual inquiry into the action-taking official's knowledge. A performance evaluation under Chapter 43 constitutes a "personnel action" as it is clearly within the ambit of 5 USC 2302(a) (2) (A) (viii). In direct retaliation for the protected disclosures attributed to the Appellant, the agency first threatened to, and then included negative information within the evaluation, specifically attacking the disclosures, an admission of its direct violation of the whistleblower statute. These notations irreparably tarnished the Appellant's career and post government service employment opportunities.

The Agency cannot prove by clear and convincing evidence that it would have taken the same action and included the language "extremely poor judgment" in the Appellant's performance rating in the absence of his disclosures because this language was placed in the evaluation precisely (and only) as a result of the Appellant's letter and protected disclosures. A more transparent violation of the Whistleblower Protection Act is difficult to imagine.

Evidence of this can be seen in documents obtained by the Appellant through discovery in a discrimination lawsuit he filed against the agency in Federal District Court in Florida. These documents show that U.S. Attorney ██████████ contacted a Department of Justice official to complain about the February 24, 2005 letter, and this

official in turn notified DEA Administrator [REDACTED]. In typical governmental hypocrisy, [REDACTED] described the Appellant's letter to the ICE SAC as "inflammatory", even though it was factual and concerned possible governmental misconduct in the death by torture of several human beings, which Sutton as the lead federal prosecutor in the area failed to address. [REDACTED] followed suit by referring to the letter as "inexcusable" stating that she had "apologized" to [REDACTED] for the Appellant's actions. She also wrote that the Appellant "will be brought in next week for performance discussions to further address this officially" (Tab 7).

The agency's insincerity in this matter knows no bounds, because during a visit to [REDACTED] shortly prior to February 24, 2004, [REDACTED] spoke with the Appellant at length about this issue, and she agreed that the actions of ICE and the prosecutor in this case were totally inappropriate, and she stated that she had discussed it with [REDACTED]. In addition, the Appellant was told by a DEA Headquarters official that when briefed on this issue, Attorney General John Ashcroft became very upset with the actions of both ICE and the federal prosecutor in this case.

The Appellant respectfully requests that the Board rescind the action taken by the agency in this case, and that all comments regarding the subject matter of this appeal be stricken from the Appellant's 2003-2004 performance rating.

Respectfully submitted,

[REDACTED]
Sandalio Gonzalez
Appellant

CERTIFICATE OF SERVICE

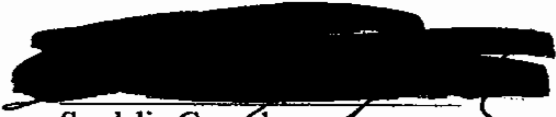
I certify that the attached document(s) was (were) sent as indicated this day to each of the following:

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Sandalio Gonzalez
Appellant