UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS PROTECTION BOARD

In the matter of: ROBERT J. FRAZIER, JR., CHARLES E. MORRIS, WILLIAM C. REILLY, TERRY E. LOVE, AND WILLIAM E. HALL, DIRECTOR, U.S. MARSHALS SERVICE, CHARLES F. C. RUFF, ACTING DEPUTY ATTORNEY GENERAL, U.S DEPARTMENT OF JUSTICE, AND BENJAMIN R. CIVILETTI,* ATTORNEY GENERAL OF THE UNITED STATES	Docket No. SC-79-3 Order No. SCC-80-1

OPINION

This case presents the Board with a request for an order requiring correction of personnel practices which it is alleged violate the Civil Service Reform Act of 1978.[1] The petition was presented by the Special Counsel of the Merit Systems Protection Board.[2] The

*When the Special Counsel first brought this matter before the Board, the Attorney General was Honorable Griffin B. Bell and the Deputy Attorney General was Benjamin R. Civiletti.

[1] Pub. L. No. 95-454, 92 Stat. 1111 (effective Jan. 11, 1979). Title I of the Reform Act (5 U.S.C. §§ 2301-2305) establishes the merit system principles that govern federal personnel management and prohibits specified personnel practices, including reprisals for employees' disclosures of agency wrongdoing (whistleblowing). The protection of whistleblowers is a primary purpose of the Act. At the same time, the restrictions on managerial abuses and protection of employees established by Title I must be construed in light of the Act's legislative history, which reveals a complementary, but somtimes countervailing, purpose to improve the efficiency of the civil service by facilitating removal of the employees who fail to perform their duties. Thus an employee's claim to be a whistleblower must be carefully scrutinized to insure that whistleblowing protection is not being misused in an attempt to thwart needed disciplinary action.

[2] Title II of the Reform Act, along with Reorganization Plan No. 2 of 1978, created three new executive agencies: the Office of Personnel Management to administer personnel matters; the Merit Systems Protection Board and its Office of Special Counsel to investigate and adjudicate claimed violations of merit system principles; and the Federal Labor Relations Authority to exercise jurisdiction over collective bargaining in the federal sector. See 5 U.S.C. §§ 1101, 1201, 1204 and 7104.

Special Counsel is authorized by 5 U.S.C. § 1206 to investigate and seek corrective action for personnel practices which are prohibited by the Act. The Special Counsel's petition and the Board's consideration of his request are authorized by 5 U.S.C. § 1206(c)(1)(B).[3]

The case arose when shortly after the Reform Act became effective, the Special Counsel undertook an investigation of personnel actions by officials of the United States Marshals Service. The investigation was prompted by allegations of prohibited personnel practices, which were submitted to the Special Counsel on February 26, 1979, by James R. Rosa, General Counsel, American Federation of Government Employees, AFL-CIO, on behalf of Deputy United States Marshals Robert J. Frazier, Jr., Charles E. Morris, William C. Reilly and Terry E. Love. The complaining deputies requested the Special Counsel to investigate charges that they were transfered from their office in Atlanta, Georgia to other offices of the Marshals Service throughout Texas and Florida because they had complained in the spring of 1978 to Senator Herman Talmadge and Congressman Wyche Fowler about certain problems in the Atlanta office.

Subsequent to the initiation of his investigation, the Special Counsel, on March 6, 1979, requested the Board to order a stay for a period of 15 days of any action taken or which might be taken by the Director of the marshals Service, or his designee, to transfer the four deputies.[4] This request was based on the Special Counsel's determination that there were reasonable grounds to believe that personnel actions had been or were about to be taken by the marshals Service against the deputies in reprisal for their "whistleblowing" to Members of Congress, a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(8).[5]

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[3] This section provides in pertinent part:

> If, after a reasonable period, the agency has not taken the corrective action recommended, the Special Counsel may request the Board to consider the matter . . . .

[4] As introduced H.R. 11280, 95th Cong., 2d Sess. (1978) and S. 2640, 95th Cong., 2d Sess. (1978) provided that the Special Counsel could issue stays of certain personnel actions. *See* § 202(a) of both bills. During the legislative debates, however, a clear delineation evolved between the prosecutorial role of the Special Counsel and the adjudicatory role of the Merit Systems Protection Board. All adjudicatory powers were removed from the Office of the Special Counsel and placed in the Merit Systems Protection Board. Thus, the Special Counsel does not make adjudicatory findings. *See* S. Conf. Rep. No. 1272, 95th Cong., 2d Sess. at 132–133 (1978).

[5] Under 5 U.S.C. § 1208(a), the Special Counsel must allege in his stay petition that there are "reasonable grounds to believe that a personnel action was taken, or is to be taken, as a result of a prohibited personnel practice." The Board member reviewing the case "shall order such stay" unless under the "facts and circumstances involved . . . a stay would not be appropriate." If no action is taken on the stay request within three days of its filing, a stay is automatically granted by operation of law. There is no right to a hearing. *See generally In re Frazier*, 1 MSPB 2 (1979).

Two days later, on March 8, 1979, the Chairwoman granted the stay.[6] On March 23, 1979, upon the request of the Special Counsel, the Chairwoman extended the stay under the provisions of 5 U.S.C § 1208(b) for an additional 30 days. During the pendency of these stays, the Special Counsel concluded his investigation and found reasonable grounds to believe that prohibited personnel action had been taken by the Marshals Service. From his investigation the Special Counsel determined that the transfers were ordered in reprisal for exercise of "appeal rights" protected under section 2302(b)(9), as well as for disclosures protected under section 2302(b)(8). Accordingly, on April 11, 1979, acting under section § 1206(c)(1)(A), he forwarded a report of his determination, together with his findings and recommendations for corrective action, to the Board, the Office of Personnel Management, and to the Department of Justice (of which the Marshals Service is a subunit).[7] The Special Counsel recommended to the Department of Justice that, among other things, it rescind the proposed reassignments of the four deputies and review the action of U.S. Marshal Ronald E. Angel and Marshals Service Director William E. Hall in initiating the reassignments. The Special Counsel requested the Attorney General to review the matter and report his conclusions to the Special Counsel.

The Department of Justice, under the signature of the Attorney General, responded to the Special Counsel's recommendations on May 21, 1979, by declining to comply with the recommended corrective action. The Department took the position that there had been no prohibited personnel actions on the part of the Marshals Service and, accordingly, no corrective action was required. Consequently, the Special Counsel, on May 19, 1979, filed the petition for corrective action now before the Board. The Special Counsel also requested the Board to extend its initial stay for a period of 90 days or such lesser period as might be necessary for the Board's decision on the petition for correction action.[8] The Board on June 15, 1979,

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[6] Though the legislative history of section 1208(a) requires that "great deference" or "great weight" be given the Special Counsel's determination, this does not totally preclude board review of his determination. Thus, the Special Counsel's stay petition will be denied *only* if—

> . . . the facts and circumstances reveal that the request is so intrinsically or inherently irrational as to be arbitrary or capricious.

In re Frazier, ibid.

[7] Such a report by the Special Counsel is required by section 1206(c)(1)(A).

[8] Section 1208(c), 5 U.S.C., authorizes the Board to extend its stay for an appropriate period when it concurs in the Special Counsel's determination after an opportunity for comment is provided to the agency involved and the Special Counsel. A subsection 1208(c) stay proceeding is not a determination on the merits. Rather—

> . . . the Board will give the benefit of the doubt to the Special Counsel's findings with respect to those disputed facts which tend to support a finding that there

entered an order which extended the stay of the reassignments until a final decision on the matter was reached. In extending the stay, the Board issued an opinion dated June 20, 1979, which concurred in the Special Counsel's determination that there were reasonable grounds to believe that the reassignments were undertaken in reprisal for the deputies' disclosures of mismanagement and violations of law and regulations.

On June 29, 1979, the Marshals Service responded to the Special Counsel's petition for corrective action, and the Office of Personnel Management provided its comments on the matter. On July 11, 1979, the American Federation of Government Employees (AFGE) moved to intervene in the proceeding and, on July 12, 1979, the Board permitted the AFGE's attorneys to appeal on behalf of the four deputies.

Thereafter, in its order of July 12, 1979, the Board scheduled a hearing on the merits of the petition and discovery ensued pursuant to the terms of a Board order. The Board held three days of hearings on August 8 through 10, 1979, and resumed for another day on August 23, 1979. In accordance with the Board's post-hearing briefing schedule, final briefs in the matter were filed on October 8, 1979.

FINDINGS OF FACT

After hearing the witnesses and reviewing the transcript from the hearing and the evidence contained in the record, the Board has made the following findings of fact.

A. Background

For a number of years, the U.S. Marshals Service (the Service) has been beset by problems resulting from efforts to make its law enforcement efforts more professional. The Director of the Service, William Hall, is a civil servant faced with the difficult task of supervising 94 United States Marshals Service offices, each headed by an independent Presidential appointee. Notwithstanding this ambiguous relationship with district marshals, Hall must insure that each carries out the policies of the Service and he must take final action on any significant personnel matters affecting any of the 1,400 deputy marshals, including removals and transfers.

> are reasonable grounds to believe that a prohibited personnel practice has occurred . . . . [S]hould the Board find that the allegations fall outside the range of rationality, the Board will not hesitate to deny a § 1208(c) stay application.

In re Frazier, supra (Opinion dated June 20, 1979 at 6).

Therefore because of the reduced standard of proof involved in a section 1208(c) stay application, the stay relief available is interim in nature, and thus ancillary to final relief under other statutory sections such as 5 U.S.C. §§ 1206(c)(1)(B) and 1206(h) (corrective action), 1205(e) (OPM regulation review) or 7701 (Board appeal).

Throughout the fall and early winter of 1978, Hall periodically received reports on the 94 districts of the Service, including the Northern District of Georgia (the Northern District), which has its headquarters in Atlanta. The Northern District has been numbered among the particularly troubled and poorly managed districts in the Service. Among other things, it was the source of an unusually large number of complaints charging equal employment opportunity (EEO) violations.

Between 1976 and 1978, the total workforce of the Northern District averaged about 30 persons, yet at least 12 employees of that district filed discrimination complaints. Both management and personnel problems pre-existed the administration of the present Marshal, Ronald Angel, but continued after his arrival in September 1977.

In the late spring of 1978, some Northern District deputies took their complaints to the Atlanta offices of Senator Herman Talmadge and Congressman Wyche Fowler. A staff member of Wyche Fowler's office contacted the Service to request that the matters complained of be investigated. During this period, Hall first became aware that the Northern District was split into factions, one composed of certain deputies and the other composed of supervisors and the remaining deputies. He was also aware that some deputies had contacted Congressman Fowler regarding the situation in that district. In July 1978, Hall received a written request from Marshal Angel that four disruptive deputies be transferred to other districts.[9] Hall did not act on the request on the grounds that the U.S. Marshal should deal with the problems in his district.

Over the next six months the situation in the Northern District became increasingly troublesome. Hall continued to receive periodic reports about the management problems being encountered by Angel and the increasingly frequent personnel problems arising in that district.

Finally, in late December, following a visit by Angel to Service headquarters, Hall was informed by his staff that the situation in Atlanta was deteriorating rather than improving. Hall became convinced that a fresh look should be taken at the entire Atlanta situation, and therefore appointed a six-man management team to go to Atlanta.

That team presented Hall with a management report in mid-January and, among other things, recommended the transfers of four deputy marshals involved in this case, along with the chief deputy marshal. On January 29, 1978, Director Hall acted on the

[9] The four were deputies Frazier, Morris and Reilly, along with Deputy Theodore Jordan. Deputy Love was not included.

recommendation of the management report and ordered the transfers of the five individuals.

After the director ordered the reassignment, the Special Counsel conducted the investigation which eventually resulted in this petition for correction of the alleged prohibited personnel practices. The hearing in this case was conducted to obtain the factual information necessary to determine whether the transfers of the four deputy marshals are prohibited by 5 U.S.C. § 2302.

B. Whistleblowing Activities of the Deputies

In the late spring and early summer of 1978, a small group of deputies decided to visit the Atlanta offices of two Members of Congress to complain about the way the Northern District office was being run. At various times this group included the four deputies involved in this case—Robert Frazier, Charles Morris, William Reilly, and Terry Love—all of whom had become extremely alienated from the management of the office.[10]

At the time the various deputies visited the offices of Senator Talmadge and Congressman Fowler, Deputies Frazier and Morris were aware that disciplinary charges might be brought against them. Frazier knew of an investigation pending with regard to his involvement in an off-duty autmobile accident a year earlier. Northern District management already had warned Morris a number of times that he was in violation of the Service's personal grooming regulations and that disciplinary action might result. Service headquarters in fact authorized formal disciplinary action against Frazier and Morris on these grounds subsequent to Marshal Angel's July 19, 1978 recommendation of the reassignment of Deputies Frazier, Morris, Reilly and Jordan.

The event which apparently triggered the visits of the group of deputies to the two congressional offices was a training session and barbecue at the Cobb County Pistol Range on April 25, 1978. Marshal Angel had planned the day of training and fellowship hoping to improve morale among the deputies; outings of a similar nature were widely held throughout the districts of the Service.

Marshal Angel had purchased ribs and soft drinks at his own expense. Following the firearms training in the morning, all of the deputies stayed for a barbecue lunch. At the lunch, Marshal Angel, as well as some of the deputies, including William Reilly, Reginald Boyd, and Theodore Jordan, consumed beer. Some of the deputies used government vehicles to carry alcoholic beverages to the pistol range. There is conflicting and inconclusive evidence regarding

[10] The group included Robert J. Frazier, Lee Edward Mott, Theodore Jordan, William C. Reilly, Larry Sapp, and Charles Morris; Terry Love appears not to have attended the meetings, but to have delivered documents to Fowler's office and talked briefly with his aide.

weapon firing on the pistol range after drinking. After the lunch, some of the participants, including Marshal Angel, played poker for small stakes until around 5:00 p.m.

About a month later, Deputies Frazier, Lee Mott, and Theodore Jordan went to the Atlanta office of Senator Herman Talmadge to voice complaints about the management of the Northern District office. They spoke with Lowell Connor, an aide to the Senator, who told them he was a long-time friend of Marshal Angel and offered to discuss their complaints with the Marshal. The deputies left the office shortly thereafter. Connor and Angel both testified that Connor did not contact Angel or anyone else about the visit until sometime after the reassignment of four deputies had been ordered.

Around June 3, 1978, a small group of deputies made visits to the Atlanta office of Congressman Wyche Fowler. On these visits, the various deputies met with Charles Jackson, an aide to Congressman Fowler, and on one occasion, Congressman Fowler himself.

While there is some confusion as to the exact documents delivered to the Congressman's office, and when they were delivered, it was clear that, various deputies complained, however inarticulately, about harassment and racial discrimination against blacks; incompetent supervisors; problems in the transportation of prisoners; and the Cobb County Pistol Range incident.

While Jackson acknowledges that he did not undertand clearly the nature of the complaints made by the various deputies, he and Congressman Fowler were impressed with the seriousness of their allegations and phoned the congressional liaison office of the Department of Justice.

Eventually Jackson was referred to Frank Vandergrift, Chief of the General Operations at the Service. At no time during these contacts did Jackson identify the complaining deputies.

At the direction of Twomey, Deputy Director of the Service, Vandergrift went to Atlanta on July 6, 1978, and visited with Jackson. Vandergrift had difficulty understanding the particular allegations made to Jackson. Jackson gave Vandergrift papers which appear to have been some of those which the various deputies had earlier given to Jackson.

After examining the papers overnight, Vandergrift was still unable to identify particular problems. The next morning, before returning to see Jackson, Vandergrift phoned Ray Lora, then Acting Special Assistant for EEO Affairs to Service Director William Hall,[11] and asked him to handle the inquiry from Fowler's

[11] Lora had recently been appointed acting special assistant to Director Hall specifically for the purpose of handling EEO matters. He had no formal access to Hall and saw him only at staff meetings or by appointment.

office.[12] When Vandergrift returned to see Jackson, he told Jackson that Lora would follow up on the Congressman's inquiry.

When he returned to headquarters, Vandergrift spoke briefly with Twomey about his visit to Atlanta, telling him that he could not determine what the problem was, and that he had referred the matter to Lora. Lora confirmed that he would follow up with Congressman Fowler and did not report to Vandergrift further about the matter. Vandergrift did not discuss his trip to Atlanta with Director Hall.

When Lora arrived in Atlanta on July 16, 1978 to follow up on Fowler's inquiry and investigate an EEO complaint by Deputy Morris, Marshal Angel called an impromptu meeting to introduce him to the deputies. At that meeting, Angel stated that he knew some deputies had complained to a congressman about the pistol range incident.[13]

Lora interviewed Marshal Angel, Supervisory Deputies Warren and Brookhart, Chief Deputy Bowler and several deputies, including Frazier, Jordan, Reilly, Morris, Boyd, Mott, Navarro, Hood, Cutler, and Connors.

Lora and Angel visited Congressman Fowler's aide, Jackson, to assure him that the deputies' complaints were being handled by the Service. Fowler's office made no further inquiries about the matter until June of 1979, nearly one year later. By that time, the management team review team had completed its study and recommended the transfer of the four deputies involved in this case. Moreover, the Special Counsel had completed his investigation and petitioned for corrective action.

Shortly after returning from Atlanta, Lora met briefly with Director Hall and discussed his trip to Atlanta in terms of management problems in the Northern District and the polarization of staff there. He told Hall that he agreed with Angel's recommendation that some deputies be transferred. Lora apparently did not tell him about visits by the deputies to Fowler's or Talmadge's office or give him names of particular deputies.

The record is devoid of any subsequent references to "whistleblowing" prior to the visit of the headquarters management team to the Northern District in January 1979. There is conflict in the testimony, however, as to whether any of the deputies interviewed by the team told team members that they had complained to Fowler's or Talmadge's office.[14]

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[12] There is a confict in the testimony regarding whether Vandergrift read to Lora any of the names of signatories to the documents given him by Jackson. Vandergrift testified that he could not make out most of the names.

[13] Angel testified that he did not know the identities of the deputies.

[14] The team members were William Russell, Marshals Service director of administration; Gary Mead, chief of the personnel division; Benjamin Butler, special

All team members denied that any of the four deputies they subsequently recommended for reassignment mentioned any visit to a Member of Congress. While some of the deputies and a union official present at the interviews stated that they did tell members of the team about visits to Members of Congress, their testimony is internally inconsistent.[15]

C. Exercise of Appeal Rights by the Deputies

1. Deputy Robert J. Frazier

Deputy Robert J. Frazier has been assigned to the Northern District since 1971 and became involved in EEO activities in that district beginning in 1973. There is no evidence that he experienced any disciplinary problems until after he became a counselor for the Marshals Service EEO program. Thereafter, Chief Deputy William Bowler, Supervisory Deputies Lewis Warren and William Brookhart repeatedly harassed Frazier personally by threatening disciplinary actions against him.[16]

In August 1977 Frazier attended an EEO training session despite his supervisor's objections. Shortly thereafter, on September 9, 1977, he was accused of leaving his Service-issued weapon unattended in a vehicle.

In February of 1977, shortly after he counseled Tennyson Thompson, a black deputy, in connection with a race discrimina-

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assistant to the director for EEO matters; William Zamora, chief deputy for the New Mexico district; Anthony Furkah, chief deputy for the Washington, D.C. district; and Simon Barr of the headquarters audit staff.

[15] Deputy Frazier testified that he asked the team members who interviewed him, Gary Mead and Anthony Furkah, whether their visit was in response to some deputies having gone to see Congressman Fowler. He did not, however, tell them that he had seen Senator Talmadge or Congressman Fowler, or that he had provided documents to either of them. Further, Frazier's statements were contradicted by George Kelley, a union official present at Frazier's interview by Mead and Furkah; Kelley testified that Frazier told Mead he had been to "the congressmen."

Deputy Morris testified that he told team members that he discussed problems with a congressman. However, Morris did not testify that he told team member Butler he had been to Congressman Fowler.

Deputy Reilly testified that he offered Russell documents and told Russell that they were copies of the ones given to Congressman Fowler; Russell admits that Reilly offered and later delivered documents to him, but denies being told they had been given to Fowler. Union representative Kelley stated that Reilly told Russell and Zamora, the other team member interviewing him, that some of the deputies had complained to Fowler's office.

Deputy Love testified on direct examination that he told team members Mead and Furkah that several deputies had visited Congressman Fowler and that he had provided information to Fowler. On cross-examination, however, Love stated merely that he thought he told Mead that he attended a meeting at Fowler's office, and then stated that he did not remember what he told Mead.

[16] Neither Bowler, Brookhart nor Warren was called by the Marshals Service to testify at the hearing in this case.

tion complaint, Frazier again was threatened by then Marshal Henson with a letter of reprimand related to his having left his weapon unattended some five months earlier.

On February 25, 1977, Frazier filed a complaint of reprisal[17] against the Marshals Service in connection with his activities as EEO counselor. Approximately one week later, Chief Deputy Bowler informed him that he proposed to issue a letter reprimanding Frazier for alleged violations of the grooming regulations. On March 9, 1977, Bowler sent Frazier another notice of proposed reprimand regarding his failure to safeguard his weapon.

A few days later, on March 21, 1977, Supervisory Deputy Bowler advised Frazier that his problems were related to being in too many "activities." Frazier alleges that during that March 21st conversation, Bowler offered to drop the proposed letter of reprimand concerning the unattended weapon incident in return for Frazier's EEO counselor resignation. Bowler suggested to Frazier that he could expect to encounter less difficulty in his work if he dropped his union and EEO responsibilities. Later that same day, Frazier, who had begun to experience psychological problems, submitted to Bowler a letter of resignation as EEO counselor, citing "job pressures" as his reason. Strikingly, the record reflects that immediately after Frazier's resignation, Bowler advised Frazier that the proposed reprimand would be dropped. About a week later, Bowler informed Frazier by a memorandum that the proposed letter of reprimand was rescinded.

On April 17, 1977 Frazier was in an automobile accident involving his off-duty use of a government vehicle. A few weeks later he was admitted to a hospital for psychiatric treatment. While Frazier was in the hospital, he was ordered to return to work or be deemed absent without leave.

When Frazier returned to work in mid-May, he was relieved of his weapon and told that he would be assigned administrative duties. Instead he was assigned, unarmed, to transport prisoners and serve process in high crime areas. Thereafter, in May and June of 1977, he was denied sick leave despite his physician's request. During this same time period, Frazier was subjected to a lengthy interrogation regarding the April 17, 1977 automobile accident involving his off-duty use of a government vehicle. A 30-day suspension of Frazier was proposed by Angel on July 20, 1978 on the grounds of: (1) willful unauthorized use of government property and (2)

[17] This was the first of two complaints filed by Frazier which are contained in the record. The second complaint was filed over a year later, in May 1978. The record reflects that at the time of the Board's hearing in this case, the Service still had not completed its processing of either of these complaints despite Frazier's diligence in pursuing his requests that the complaint be processed.

falsification, misstatement, exaggeration or concealment of a material fact in connection with an investigation.[18]

On July 28, 1977, Frazier returned to the office to provide an affidavit in an EEO investigation of the discrimination complaint of Tennyson Thompson, a deputy whom Frazier had counseled during the informal complaint stage. Frazier returned to duty in September 1977, and apparently was again assigned to transport prisoners without a weapon, despite his physician's request that he be placed on limited duty.

All the foregoing events occurred during the tenure of James Henson as Marshal of the Northern District. On September 28, 1977, Marshal Angel arrived. In October 1977, Angel was instructed by Marshals Service headquarters to place Frazier on limited duty status. However, Angel retained Frazier on full duty status. On October 24, 1977, Frazier submitted his resignation, effective January 2, 1978, explaining that his mental condition required his resignation.

A few days later, Marshal Angel placed Frazier on administrative leave on the grounds that Frazier's mental condition required that he be relieved of all duties. Frazier withdrew his resignation in December 1977, and asked to return to work. He was retained in leave without pay (LWOP) status until July 1978, seven months later. Although Frazier was on LWOP status, an EEO counselor, Art Worthy, was assigned to counsel Frazier for several days regarding the EEO complaint he had filed a year earlier. On May 8, 1978, Frazier filed a second formal complaint of discrimination based on interference and harassment related to his EEO activities. A month later on July 12, 1978, Marshal Angel informed Frazier that headquarters had ordered him to reinstate Frazier, and told him to report to work the following day.

Within days of his return to work, Frazier was interviewed by Joseph Tolson, an EEO invesitigator in connection with the investigation of a complaint filed by Deputy Morris. Moreover, he was interviewed by Ray Lora from headquarters. The record reflects that Lora asked Frazier what he required in exchange for withdrawing all of his complaints. Lora also inquired how Frazier would react to being transferred. After his visit to Atlanta, Lora told Director Hall he concurred in Marshal Angel's recommendation regarding the transfer of four deputies.

[18] While this matter is still unresolved, Marshal Angel later sent a memorandum to Floyd Wheeler of Marshals Service headquarters personnel which stated that the proposed 30-day suspension could not be sustained because, "I find office practices and procedures that existed in the Northern District of Georgia in April 1977, to be such that would render it technically impossible to adjudge the use of the government vehicle in the instant case to be unauthorized." Angel recommended a 15-day suspension on the second ground, to run concurrently with the period Frazier had been on leave without pay.

In late October 1978, Frazier provided a lengthy affidavit recounting the history of his own EEO case to Stanford Gorrin, another EEO investigator dispatched by headquarters to investigate his complaints.

In view of the protracted nature of Frazier's EEO activities, of Angel's contacts with headquarters regarding his case, and of the management team's knowledge of his EEO involvement, we find Director Hall had actual or constructive knowledge of Frazier's EEO activities.

2. *Deputy Charles E. Morris*

Deputy Charles E. Morris was assigned to the Northern District in 1976. From the outset of Marshal Angel's tenure in the district, Morris challenged his authority by refusing to comply with the Service's hair grooming policy, by objecting to courtroom duty and excessive close supervision, and by complaining continually about relatively petty matters such as the office leave policy.

Morris resisted courtroom duty because he felt that performing personal services for judges was beneath his dignity. He was openly contemptuous of his supervisors, and his constant agitation disrupted the office and caused dissension among the deputies. Morris often asked to be excused from particular work assignments for his personal convenience. On some occasions when Morris took issue with his superiors, he was ordered to get a haircut or was reported for grooming policy violations.

On May 17, 1978, Morris presented an oral grievance[19] to Marshal Angel concerning the office work rotation roster and bid system. After Morris finished his grievance, Angel rejected his suggestions and informed Morris that he was in violation of the Service hair grooming policy, and that he would be suspended for the maximum time for which Angel could obtain approval from headquarters. Following that interview, Angel sent Morris a memorandum advising him of the requirements for formalizing his oral grievance, but there is no evidence that Morris ever followed through.

Morris testified that he felt Angel instituted the grooming policy charges in retaliation for his having given affidavits supporting EEO complaints of Frazier and Thompson. Morris contacted Ray Lora, who advised him not to file an EEO complaint in regard to the proposed suspension. On June 5, 1978, however, Morris did file an EEO complaint charging Angel with retaliation. Ultimately Morris was suspended on the hair grooming charge for two days in August of 1978.

On July 17, 1978, Lora arrived in Atlanta to investigate Morris' EEO complaint and the disclosures to Congressman Fowler. After

[19] See p. 189, *infra*.

interviews with Morris and other deputies, Lora became convinced that Morris was the "eye of the storm" in Atlanta and told Morris in a second interview that he would try to have him transferred.

On September 5, 1978, Morris filed an EEO complaint against Lora for reprisal. On October 30, 1978, Lora received a copy of Morris' complaint against him and sent it to Director Hall with a note stating that Morris was one of the deputies whose transfer Angel had recommended. Hall received Lora's note.

Benjamin Butler, who interviewed Deputy Morris during the management review team's visit to Atlanta, testified that Morris said during the interview that he was aware he could file an EEO complaint. Butler said he knew that Morris had filed an EEO complaint. Simon Barr, another member of the team, was present during the interview. It is not clear from the testimony whether Barr knew Morris had filed a complaint. There is no evidence warranting an inference that any other member of the team knew of Morris' EEO complaints or that any member of the team considered Morris' EEO activities in recommending his transfer. Nor is there any basis for an inference that Hall considered Morris' EEO complaint against Lora in ordering the transfer.

3. *Deputy William C. Reilly*

Deputy William C. Reilly was assigned to the Northern District in January of 1976. At the outset, he began openly criticizing the supervisory staff for poor management and lack of effective communications with the deputies. Reilly complained about unfair performance rating procedures and in March of 1978 was partially successful in challenging one of his own ratings.

Reilly constantly complained about his duties and particularly objected to courtroom duty. On occasion he complained openly and bitterly about performing such "demeaning" duties as pouring water for witnesses and assisting an infirm judge in donning his judicial garb.[20]

[20] The highly speculative and irresponsible nature of a charge made by Deputy Reilly to Russell during a management team interview seriously undercuts the credibility of his other complaints. According to Russell, Deputy Reilly told him that he suspected that the Marshal and other Northern District personnel, including William Brookhart, may have been taking "kickbacks" from an airline. Russell stated that Reilly based his suspicion on the fact that the front office did all the scheduling for travel—a practice which Reilly believed was unusual. Russell added that Reilly mentioned that Brookhart's wife was a stewardess for the airline in question. Russell believed that Reilly was serious about his allegation.

Russell stated that management scheduling of all travel is not unusual, since that practice can prevent the need for paying excessive overtime on travel. Marshal Angel, in fact, stated that he had centralized travel arrangements in the front office as a direct result of the need to keep overtime costs within new budget allocations. He further states that the institution of this management practice seemed to have resulted in a reduction of overtime hours.

Reilly never filed an EEO complaint and no disciplinary action was ever proposed against him. On May 24, 1978, Reilly joined eight other deputies in sending a letter to Ray Lora asking that an EEO counselor be sent to Atlanta. On July 13, 1978, he gave an EEO investigator from Marshals Service headquarters an affidavit in support of the EEO complaint of Henry Buckner, a black deputy, against Marshal Angel. However, the record is devoid of any further evidence of EEO activity on his part. There is no proof that either Hall or the management review team had any knowledge of these activities.

4. *Deputy Terry E. Love*

Deputy Terry Love was assigned to the Northern District in March of 1974. At first he apparently did not complain, but later complained to the Marshal about factionalism among the deputies, harrassment of black deputies and their white friends, and bias against the better educated deputies. Although his complaints appear to have been more personal than systemic, he did once object to Supervisor Brookhart's physical and verbal abuse of prisoners and to the inability of Chief Deputy Bowler and Supervisor Warren to communicate with the deputies. Love never filed an EEO complaint, although he provided assistance to Deputies Frazier and Morris and information to Deputy Thompson for use in their EEO complaints. During his interviews with the review team, Love was vociferous in expressing his complaints. He was described by team members as the most hostile and disenchanted of the deputies, and was said to have used extremely crude language in describing management personnel of the team. He was especially upset about alleged bias against better educated deputies, and persisted in asserting that Marshal Angel was hostile toward the educational process. He admitted, however, that Angel had relieved him from overtime duty to accommodate his night school master's program.

Deputy Reilly's description of his conversation with Russell on this subject indicated the highly speculative nature of his apparent allegations regarding "kickbacks." On cross-examination, Reilly appeared almost to withdraw his charge, stating that he had no direct knowledge of kickbacks, denying mention of specific persons to Russell, and characterizing his suspicions as jocular:

> And in jest, I speculated that it would possibly lead me to believe, being a trained investigator, as are other people in the office, that if one were to be suspicious, and one were to speculate, that we were no longer permitted to make our own reservations on any airline that might be going to that particular destination, that the disproportionate number of airline flights on Eastern would lead a suspicious person to believe that someone in the office either had a friend at Eastern, or may receive some gratuity, but no names were mentioned at all, and it was speculation on my part. But I in no way mentioned the name or position of any individual that I may have suspected. (Tr. II, 97-98)

D. Management Team Report

In the spring of 1978, Director Hall became aware that the Northern District was beset by management and personnel problems and was split into factions, one composed of certain deputies and the other composed of the remaining deputies and management. He also knew that a large number of EEO complaints had been filed by employees in that district, and that some Northern District deputies had contacted Congressman Fowler, although he did not know their identities.

When Hall received Marshal Angel's request for reassignment of Deputies Robert J. Frazier, Charles E. Morris, William C. Reilly and Theodore Jordan in July of 1978, he did not act on it because he felt that it was Angel's responsibility to take care of the problems in his office. He stated:

> [The request] allude[d] to situations which are strictly within the District [of Marshal Angel], and I felt that Marshal Angel, as the Manager of that District, and was paid a good salary, and the compensation which we paid for included his handling of situations such as this.

Hall did, however, ask William Russell, Director of Administration, to counsel Angel in solving the managerial and personnel problems of the office.[21]

Throughout the fall and winter of 1978, Hall received reports on the Northern District along with reports on the other 93 districts of the Marshals Service.

On December 28, 1978, Marshal Angel travelled to headquarters to discuss problems in his district with senior management officials in the Marshals Service. Angel met with Russell, Mead and Butler, among others. At that meeting, Marshal Angel vented his frustrations over a wide range of administrative matters as well as certain personnel problems in his district. Angel discussed equipment requests and budget procedures as well as the disruptive nature of some employees in the district and his inability to obtain answers from headquarters on pending personnel actions. In discussing how the headquarters had handled personnel actions improperly, Marshal Angel brought up the "Frazier case," specifically, his suspension, and demanded answers before he left the meeting. Director Hall and other senior staff were unwilling to reach any conclusions at that time since they felt that Angel had made a one-sided presentation. There was no evidence that the names of the other three deputies (Morris, Reilly, and Love) were mentioned during that meeting.

[21] Russell denied having been asked to do so.

Following Angel's visit, Hall was informed by members of his senior staff that the problems in the Northern District had not improved, but were intensifying. Hall then became convinced that it would be appropriate to appoint a management review team, a problem-solving approach which the Service had used in several other districts. William Russell was appointed to head a six-man team which included Gary Mead, Chief of the Marshal Service Personnel Management Division; Benjamin F. Butler, Special Assistant to Hall for EEO matters;[22] Simon Barr, a member of the headquarters audit staff; Anthony J. Furkah, Chief Deputy for the Washington D.C. District; and William N. Zamora, Chief Deputy in the New Mexico District. The team was chartered to investigate all facets of the Atlanta office's operation and to make any recommendation that would rectify the problems in that office. They were to consult with all the deputies, the supervisory deputies, the Marshal and the administrative staff, as well as members of the judiciary and employees of the U.S. Attorney's office.

Beginning on January 15, 1979, the six-man team conducted a three and one-half day investigation of the Atlanta office. They interviewed all members of that office, using two questionnaires developed by team member Mead to gather information from those interviewed. Those questionnaires were based on standard management evaluation forms used by OPM and the Department of Justice.[23]

Following the investigation, the team made a written report to Hall which incuded some ten findings and 54 recommendations. The report found that the morale of the deputies in the district was very low because of the lack of an effective chain of command, perceptive performance evaluations, training opportunities, fair rotation of assignments and opportunities for deputies to gain supervisory experience. It stated that discipline was used to control employees rather than to encourage acceptable performance, and there was no meaningful employee counseling. A wide range of recommendations dealing with improvements in the structure and management of the Atlanta office were made to correct each of these deficiencies.[24]

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[22] Butler was appointed in November 1978 to succeed Ray Lora as Special Assistant to the Director for EEO matters. He was responsible for managing the Service's affirmative action program.

[23] While the Board has serious concerns about the adequacy of the specific questions that allegedly were designed to ferret out problems with the EEO procedures, this issue was not explored in any depth with Service witnesses during cross-examination by the Special Counsel or by the intervenors. Unfortunately, the record is insufficient on this important line of inquiry to warrant negative inferences regarding why the Service failed to include more probing questions regarding the adequacy of EEO procedures in the Atlanta office.

[24] The report contained no meaningful analysis, evaluation or recommendations relating to the EEO program in the Northern District, and, in fact, confuses such

In terms of personnel, the report found that a majority of employees and management felt that a small group of employees was disruptive to the office and that inter-personal conflicts had resulted in lower productivity and poor morale. The team determined that four deputies, Frazier, Morris, Reilly and Love, were totally alienated and distrustful of district management and had become so embittered that they could no longer present rational arguments to support their concerns. Moreover, in their testimony before the Board, the team members reiterated some of their findings and the bases upon which they were reached. Gary Mead testified that Deputy Frazier was "paranoid" with respect to district management, and was unable to support his general complaints. Mead testified that Love was extremely contemptuous of the district management staff to whom he referred in extremely crude terms. Russell testified that Deputy Reilly was "totally polarized" and made unfounded allegations that district management took kickbacks from airlines used to transport prisoners.

The report was also critical of the manner in which the Atlanta office was managed. The report states that the mangement staff (Marshal Angel, Chief Deputy Bowler and Supervisor Brookhart) has "assumed a totally defensive and inflexible posture." Lines of communication had been damaged and personnel policies were not being followed. In addition, it was found that the performance and personalities of the Chief Deputy and one of the supervisory deputies had contributed to the escalation of the situation and would interfere with any attempts at positive change. The team recommended the transfer of Chief Deputy Bowler. It further recommended intensive training in inter-personal relations for Supervisory Deputy Brookhart, suggesting that a demotion action be initiated if he did not improve within 120 days.

LEGAL ANALYSIS

A. The Proceeding and the Burden of Proof

The Special Counsel and counsel for the deputy marshals in this case have objected to the Board's determination to conduct a hearing in response to Special Counsel's petition. Broadly stated their contention is that Special Counsel has authority to make dispositive fact findings and that the Board therefore exceeded its statutory authority in holding an evidentiary hearing. This question can best be resolved by looking to the statutory provision that articulates the powers of the Board as an adjudicatory body, and at the statutory scheme providing actions under section 1206(c)(1). Section 1205(a) confers upon the Board the plenary power to:

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managerial deficiencies as lack of supervision and lack of rotation with the reasons why employees filed EEO complaints.

(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, . . . or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter, . . .

This language, read together with that which follows in subsections (2), (3), and (4), indicates clearly that Congress constituted the Board to be a quasi-judicial body whose functions are to adjudicate (section 1205(a)(1), (2) and (4)) and to study and report to Congress and the President (section 1205(a)(3)).

In light of subsections 1205(a)(1) and (2), it is clear that the adjudicatory roles described therein are involved in the corrective action proceeding set out in section 1206(c)(1)(B), which provides:

(B) If, after a reasonable period, the agency has not taken the corrective action recommended, the Special Counsel may request the Board to consider the matter. The Board may order such corrective action as the Board considers appropriate, after opportunity for comment by the agency concerned and the Office of Personnel Management.

The lack of specificity of the statutory language under which the corrective action proceeding is conducted permits the Board to exercise broad discretion in determining what kind of hearing is appropriate to the almost endless variety of circumstances that may be involved in corrective action requests. As the Board noted in its June 20, 1979 opinion issued in conjunction with granting the section 1208(c) stay in this case, the Congress intended the Board to make an independent determination whether "reasonable grounds to believe" exist for purposes of granting a section 1208(c) stay. That stay provides only for interim relief. It follows, *a fortiori,* that the Board must make a determination that the weight of the evidence supports the contention of the Special Counsel that corrective action is needed.[25]

A close analysis of the operation of the subsection serves to buttress this conclusion. Under the provisions of section 1206(c)(1)(A), the Special Counsel is empowered to report to the Board, the President, OPM, and the agency involved any determination, findings or recommendations arising out of any investigation where he concludes that there are "reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken

[25] The conclusion that the Special Counsel, in his initial determination, and the Board, in its final determination, perform sequential fact finding roles is reflected in the legislative history which provides that "[w]hether the disciplinary action is a result of . . . reprisal . . . is a matter for judgment to be determined in the first instance by the agency, and ultimately by the Special Counsel and the Merit Systems Protection Board." S. Rep. No. 969, 95th Cong., 2d Sess. 22 (1978).

which requires corrective action." This initial presentation of the findings and recommendations is made for the purpose of affording the agency knowledge that prohibited practices appear to be occurring or are about to occur in its operations. The agency head, upon receipt of such information, logically would be expected to look into the matter and undertake to correct it, and that is the apparent purpose of the subsection 1206(c)(1)(A) procedure. Subsection 1206(c)(1)(B) comes into play only in cases where, as here, the agency declines to take the corrective action recommended. Whenever that occurs, two governmental entities—the Special Counsel and the agency—are in conflict regarding the manner in which each interprets a factual situation. There is no ready way to resolve the conflict between the two, since each is entitled to the classic presumption that it, as a governmental instrumentality, is acting in good faith and according to the law. *See, e.g., Mazaleski* v. *Truesdell,* 562 F.2d 701, 717 (D.C. cir. 1977). It is in that dichotomous posture that the matter comes to the Board. Thus, although the statute itself is silent regarding the nature of the proceeding before the Board, it is manifest that the Board must employ some appropriate method of inquiring into the relative validity of the positions taken by the Special Counsel and the agency. The Board is obliged to makes its factual determinations and cannot be bound by those made by the Special Counsel.[26]

This is especially so in view of the purpose and operation of the statutory scheme and the absolute discretion conferred upon the Board under section 1206(c)(1)(B). That discretion permits the Special Counsel only to "request" the Board to consider the matter, whereupon the Board "*may* order such corrective action as the Board *considers appropriate.*" (Emphasis supplied.) The use of this precatory language indicates that the Board can refuse altogether to entertain the request. Certainly, it cannot be bound by the fact findings that underlie it.[27]

In making its fact findings, the Board has concluded that it is appropriate to place the burden of proof on the Special Counsel and to apply a preponderance of the evidence standard. This conclusion

[26] Indeed, in instances where issues of credibility or motivation are at issue, the presentation of live witness testimony before the Board is particularly appropriate. *See Nasem* v. *Brown,* 595 F.2d 801, 807 (D.C. Cir. 1979).

[27] This reading of the statute was adopted by the Comptroller General of the United States in his decision dated November 27, 1979 (No. B-196680), where he stated (p. 3):

> . . . since the Special Counsel can only determine that there are reasonable grounds to believe, not find, that an improper action has occurred and since he can only recommend, not order, corrective action, we believe that the Civil Service Reform Act did not confer "appropriate authority" status [with power to award attorney fees] under 5 U.S.C. § 5596 upon the Special Counsel.

comports with existing case law in analogous areas of administrative adjudication. The burden of proof question has arisen in various circumstances, and the generally accepted rule is that the proponent bears the burden of persuasion. *See, e.g,* McCormick, *Evidence* § 355 (2d ed. 1972); 4 Mezines, Stein, Gruff, *Administrative Law,* § 24.03 (1979). The Special Counsel, as the entity asserting the need for corrective action, certainly is the proponent in the proceeding now before the Board, and properly must bear the burden of proof.

This leaves unanswered, however, the issue of the standard of proof. Of the standards applicable in court proceedings, that of preponderance of the evidence is most applicable to the situation here. That is the standard most commonly invoked in agency proceedings (*see, e.g., Polcover* v. *Secretary of Treasury* 477 F.2d 1223 (D.C. Cir. 1973) *cert. denied,* 414 U.S. 1001 (1973)) and it is the one that seems to be required to be applied under the Administrative Procedure Act (5 U.S.C. § 556(a)).[28] Although some courts have fashioned a standard that is intermediate between "preponderance" and "clear and convincing," that higher standard has been applied primarily in cases involving civil fraud[29] and seems peculiarly inapplicable here.[30] Accordingly, the Board has adopted the preponderance standard as the standard most suited to the type of case (corrective action) and the sanction to be imposed (rectifying internal agency personnel procedures).

B. Whistleblowing by the Deputies

Special Counsel and the deputies contend that the disclosures to Congressman Fowler and Senator Talmadge's aide were protected by 5 U.S.C. § 2302(b)(8)(A). That section provides in material part that—

[28] The language used in 5 U.S.C. § 556(d), however, confuses the issue. That subsection provides that no rule or order may be issued "except on consideration of the whole record or those parts therof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." This type of language has been interpreted as being the standard for review. *See Woodby* v. *Immigration Service,* 38 U.S. 276 (1966).

[29] *Collins Sec. Corp.* v. *Sec. & Exchg. Com'n,* 562 F.2d 820 (D.C. Cir. 1977); *Fairfax Hospital Ass'n, Inc.* v. *Califano,* 585 F.2d 602, 612 (4th Cir. 1978).

[30] Other courts have applied a standard lower than preponderance, but these cases appear to be a clear minority. *See Strachan Shipping Co.* v. *Shea,* 276 F. Supp. 610 (S.D. Tex. 1967), *aff'd,* 406 F.2d 521 (5th Cir. 1969), *cert. denied,* 395 U.S. 921 (1969). It should be noted, moreover, that the petitioner in that case was attempting to qualify for workmen's compensation, and the court deliberately opted to apply a lesser standard, resolving all doubtful questions of fact in favor of the injured employee. 406 F.2d at 522, 523.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for—

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

The Marshals Service asserts that the disclosures were not protected "whistleblowing" because they were not made in the reasonable belief that the matters disclosed constituted mismanagement, gross waste, abuse of authority or threats to public safety within the meaning of section 2302(b)(8)(A). Rather, the Service contends that the deputies "blew the whistle" to prevent proposed disciplinary actions against them.

The parties essentially are in agreement that, in order to prove a case of "whistleblowing," the proponent must demonstrate that a protected disclosure was made and that retaliation resulted. It necessarily follows that, to establish retaliation, it must be shown that the official accused of taking the retaliatory action against the whistleblower had knowledge that the protected disclosure has been made and by whom.[31]

We turn first to the assertion of the Marshals Service that the deputies' disclosures were not protected by section 2302(b)(8)(B) because of pending disciplinary actions. This argument is without merit. It is true that two of the deputies, Frazier and Morris, had been threatened with disciplinary actions at the time of their

[31] S. Rep. No. 696, 95th Cong., 2d Sess. 23 (1978), enumerates the knowledge requirement for placing responsibility on any individual vis-a-vis prohibited personnel practices:

> Subsection (c) specifically designates the head of each Executive Agency as the individual responsible for preventing prohibited personnel practices, and for insuring that applicable civil service laws, rules, and regulations, including merit system principles, are complied with. The same duty and responsibility is placed on any individual within the agency who is given authority for personnel management. Thus, to the extent that managerial or superivisory authority is delegated, this section means that responsibility for insuring compliance with the merit system, and potential disciplinary liability for failing to ensure compliance, will follow such a delegation. The delegation will not, however, relieve the head of the executive agency or other top officials for ultimate responsibility for personnel actions and policies within the agency, to the extent that such officials have knowledge or should have knowledge of the actions taken or policies implemented.

disclosures.[32] That, however, does not dispose of the question whether the deputies reasonably believed that the matters which they disclosed to the Congressman and Senator constituted "mismanagement . . . and abuse of authority, or a substantial and specific danger to public health or safety" within the meaning of section 2302(b)(8). The report of the management review team itself establishes that there were serious management deficiencies in the Atlanta office. Moreover, the deputies' complaints were not limited to the Atlanta office, and Director Hall himself acknowledged that a number of management problems existed in the Marshals Service generally. In addition, as discussed elsewhere in this opinion, there was a reasonable basis to believe that the manner in which some EEO complaints and some disciplinary actions were handled in Atlanta constituted both mismanagement and an abuse of authority. It is true, as the Marshals Service has emphasized, that Congress expressed great concern that the whistleblower provisions not be abused by dissident employees who have no legitimate basis for disclosures, but rather are bent upon disruption or upon creating smoke screens to obscure their own wrongdoing.[33] This, however, does not mean that there can never be an element of self-interest in whistleblowing activities protected by section 2302(b)(8). Indeed, since the matters complained of by the deputies in this case directly affect the deputies themselves, their interest is quite consonant with the public interest in improving the management and operations of the Marshals Service.

Accordingly, since we have found that the deputies in this case made disclosures protected by section 2302(b)(8), we turn to the question whether, on the evidence before the Board, it can be found that Director Hall acted with retaliatory intent when he ordered their transfers. As we have noted, retaliation cannot be attributed to Hall unless the record shows that he had knowledge the deputies

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[32] No formal proposal of disciplinary actions had been made when the disclosures occurred.

[33] The Senate Committee was quite explicit in expressing this concern (*id.* at 22):

> Finally, it should be noted that this section is a prohibition against reprisals. The section should not be construed as protecting an employee who is otherwise engaged in misconduct, or who is incompetent, from appropriate disciplinary action. If, for example, an employee has had several years of inadequate performance, or unsatisfactory performance ratings, or if an employee has engaged in action which would constitute dismissal for cause, the fact that the employee "blows the whistle" on his agency after the agency has begun to initiate disciplinary action against the employee will not protect the employee against such disciplinary action. Whether the disciplinary action is a result of the individual's performance on the job, or whether it is a reprisal because the employee chose to criticize the agency, is a matter of judgment to be determined in the first instance by the agency, and ultimately by the Special Counsel and the Merit Systems Protection Board.

whose transfers he ordered had engaged in protected disclosures. It is upon this point that the case presented by the deputies and Special Counsel fails. We are compelled by the record here to conclude that Director Hall did not have actual or constructive knowledge that these deputies had engaged in protected activities. Rather, he acted in full reliance upon the recommendation of the management review team which, as discussed at some length elsewhere in this opinion, was for the most part based upon sound management considerations.

Special Counsel and the deputies dwell at great length in their briefs upon the facts that, some six months before Director Hall ordered the transfers in issue, Ray Lora, Franklin Vandergrift and arguably Marshal Angel, knew that disclosures had been made to Congressman Fowler and to Senator Talmadge's office and that the names of at least some of the deputies were known to them.[34] The essential fact that Special Counsel fails to grasp, however, is that nowhere in this regard is there any persuasive evidence to support the inference that Director Hall knew that four deputies in this case had made protected disclosures. Hall testified that he did indeed learn in the summer of 1978 that some deputies in the Northern District had made some congressional contacts. He also testified, however, that he did not know at the time he ordered the transfers who those deputies were, and that he did not consider the congressional contacts in reaching the decision. On the contrary, he testified that he relied exclusively on the recommendation of the review team. This testimony was not shaken on cross-examination and no contrary evidence was offered.

Special Counsel seems to suggest that the Board must infer that the names of the deputies necessarily were known to Hall because of the nature of the events involved in this case. The evidence, however, is to the contrary. So far as the record shows, Vandergrift, who was sent to Atlanta by John Twomey, Deputy Director of the Marshals Service, never discussed the inquiry from Fowler's office with Hall or any member of the Russell team.

The extent of Lora's communication to Hall regarding his trip to Atlanta was to tell Hall that he concurred in Marshal Angel's transfer recommendation. There is no persuasive evidence that Angel ever discussed the congressional contacts of the deputies with Hall. The Marshals Service, like most federal agencies, routinely receives congressional inquiries, and on this record, there

[34] Special Counsel suggests in his post-trial brief that Angel's and Lora's recommendations that Deputies Frazier, Morris, Reilly be transferred were prohibited personnel practices within the meaning of 5 U.S.C. §2302(b)(8). This argument is, of course, raised too late. Moreover, it is without any merit since those recommendations were made prior to the effective date of the Civil Service Reform Act, and, accordingly, would not be unlawful under its terms.

is no reason to believe that this one was so extraordinary as to command the personal attention of Hall, who had delegated responsibility for handling such inquiries to subordinates within the Marshals Service.

Special Counsel also places great reliance upon the deputies' testimony that they told members of the management review team about their disclosures to Congress. He argues that Director Hall must, therefore, be charged with actual or constructive knowledge of the disclosures. The difficulty with this argument is that it is *predicated upon the self-serving testimony of the four deputies* whose transfers were ordered. The testimony of Deputies Frazier and Love on this point was not consistent on cross-examination. Moreover, the testimony of George Kelley, a union representative who sat in on the interviews, was not consistent with the testimony of Frazier and Love. In contrast, the members of the management review team uniformly testified that they did not know that the four deputies whose transfers they recommended had made disclosures to the offices of Fowler or Talmadge. Indeed, Special Counsel and counsel for the deputies did not even cross-examine four of the six members of the team—Furkah, Butler, Bar and Zamora—on this point.

Of course, we cannot speculate as to what might or might not have been established had Special Counsel elected to use his broad investigatory authority to conduct a full exploration of the facts underlying this case. Suffice it to say that he chose instead to rely upon his view that the Board must infer from the unpersuasive, self-serving testimony of the deputies, who claimed to have told the management review team that they were whistleblowers, that Hall had actual knowledge of the whistleblowing. The result, quite simply, is a failure of proof on the question of retaliatory motive on the part of Hall.

Moreover, contrary to Special Counsel's contention, there is no basis in this case for reliance upon the "small plant" doctrine sometimes applied in certain labor cases. The doctrine recognizes that an inference of employer knowledge of an employee's protected union activity may arise where the employee "engaged in in-plant union activity and the plant is relatively small." *A. T. Krajewski Manufacturing Co.* v. *NLRB,* 413 F.2d 673, 676 (1st Cir. 1969). Director Hall, however, is not the supervisor of a small group of employees. Rather, he is responsible for some 1,400 deputies employed nation-wide in the 94 districts of the Marshals Service. Thus, he cannot reasonably be charged with the specific knowledge of the employees in any single one of those districts. This is especially so since there was no further expression of interest in the Atlanta office by Congressman Fowler following Lora's visit in July of 1978. Moreover, assuming that Marshal Angel had the

requisite knowledge and acted with retaliatory intent in recommending the transfers of Deputies Frazier, Reilly, Morris and Jordan, that recommendation was a nullity since Hall did not act on it. Instead, Hall ordered the transfers of Chief Deputy Bowler and Deputies Love, Reilly, Morris and Frazier, acting in reliance upon the recommendations of the management review team. For the most part that recommendation was based upon sound management considerations. The deputies were hostile, frustrated, disruptive and demonstrably unable to function effectively in Atlanta.

As the management review team readily recognized, the alienation of the four deputies was attributable in part to bad management in the district. That, however, does not indicate that the recommendations of the management review team were unsound, but instead favors a contrary conclusion. It must be remembered that the team also recommended the transfer of Chief Bowler, a member of the management staff responsible for much of the dissension because of his harassment of, and isolation from, these and other deputies, and his inability to establish workable rules and procedures in the office. Further, the team recommended steps to improve the management techniques of Marshal Angel and other members of the supervisory staff. The team acknowledged that the deputies whose transfer was proposed have excellent potential, and that their transfers can be expected to have a positive effect on their careers by providing them with an improved working environment. Thus it is apparent that the recommendations of the team were sound, in light of the circumstances in Atlanta, and that they were designed to accommodate the competing needs of the dissident deputies and those of the Atlanta office.

C. Deputies' Exercise of Appeal Rights

The Special Counsel further contends that the involuntary transfers of Deputies Frazier, Morris, Reilly and Love were ordered, at least in part, as a reprisal for their filing of EEO complaints and their involvement in the EEO activities of other deputies in the Northern District of Georgia and that such actions constituted a violation of 5 U.S.C. § 2302(b)(9).[35] Thus a threshold question is whether the filing of an EEO complaint or participation

[35] Section 2302(b)(9) provides:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—. . . take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation.

A personnel action for purposes of section 2302(b)(9) includes a transfer. 5 U.S.C. § 2302(a)(2)(iv).

in an agency's internal administrative EEO complaint process constitutes "the exercise of any appeal right granted by any law, rule, or regulation" for purpose of applying section 2302.

The Marshals Service argues that because reprisals for job discrimination complaints are prohibited by 5 U.S.C. § 2302(b)(1)(A), which incorporates the prohibitions of employment discrimination found in Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), such reprisals are outside the scope of section 2302(b)(9).[36] We conclude that such a narrow reading of section 2302(b)(9) is neither required nor warranted.[37] The various provisions of section 2302(b) overlap to some extent in proscribing certain agency actions. For example, the prohibitions of section 2302(b)(10)[38] and (b)(11)[39] encompass a variety of personnel actions or requirements which would also be cognizable under other subsections. The Service's argument also ignores the statutory scheme, which in (b)(1) prohibits all discriminatory personnel actions proscribed by Title VII[40] and in (b)(9) prohibits reprisals for the exercise of Title VII and other remedial rights. We believe this

[36] The Marshals Service appears to concede that a claim of reprisal for EEO activities would constitute a cognizable claim of prohibited personnel practice under section 2302(b)(1)(A). We agree. The protections against employment discrimination on the basis of race, color, religion, sex or national origin enjoyed by private employees under Title VII have been extended to federal employees under section 717 of the Act (42 U.S.C. §2000e-16), enacted as part of the Equal Employment Opportunity Act of 1972. The same substantive and remedial rights provided private employees by Title VII were granted to federal employees by section 717. *Douglas v. Hampton,* 512 F.2d 976, 981 (D.C. Cir. 1975); *Parks v. Dunlop,* 517 F.2d 785, 787 (5th Cir. 1975). *See* S. Rep. No. 415, 92d Cong., 1st Sess. 16 (1972). *See Chandler v. Roudebush,* 425 U.S. 840 (1976). These protections include the right under section 704(a) (42 U.S.C. §2000e-3(a)) to be free from reprisals for opposition to employment practices made unlawful by Title VII or for participation in any manner in the remedial processes established by the statute. *Ayon v. Sampson,* 547 F.2d 446, 450 (9th Cir. 1976); *DeMedina v. Reinhardt,* 444 F. Supp. 573, 580 (D.D.C. 1978); *Hunter v. Stetson,* 444 F. Supp. 238, 240 (E.D.N.Y. 1977). The Reform Act states in subsection (d) of section 2302 that such section "shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through . . . any right or remedy available under . . . section 717."

[37] Nor can we accept the Service's narrow reading of "any appeal right" as including only rights to review of final agency actions. We believe the remedial aspects of the statute require a broader reading of the phrase.

[38] This subsection bars discrimination "on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others . . . "

[39] This subsection prohibits personnel actions which violate "any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301."

[40] This prohibition includes retaliation for "opposition" to unlawful employment practices as defined in section 704(a); such opposition does not need to be a part of a formalized process. *See Sias v. City Demonstration Agency,* 588 F.2d 692, 695 (9th Cir. 1978).

interpretation gives section 2302(b)(9) its plain meaning and accordingly conclude that an agency's internal administrative EEO process is both "granted by," and indeed required by and enacted pursuant to "law, rule, or regulation. *See* 29 C.F.R. Part 1613. This compels us to conclude that it is a prohibited personnel practice under *section 2302(b)(9) to transfer a federal employee for the exercise* of remedial or appeal rights provided by section 717 of Title VII and regulations implementing the statute.

Even if the Board were to accept the argument that the matters covered by subsections (b)(1) and (b)(9) are exclusive of each other, it is clear that the Service was on notice that the Special Counsel was seeking relief for actions he alleged were taken in part in reprisal for participation in the EEO remedial process. Administrative pleadings are liberally construed, and technical pleading rules will not be applied by the Board in a proceeding under section 1206(c)(1)(B) to preclude its ordering appropriate corrective action where the agency has had notice of the substance of the matter alleged and the opportunity for comment provided by that section. "So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue." *National Rlty. & C. Co.* v. *Occupational S. & H.R. Com'n,* 489 F.2d 1257, 1264 (D.C. Cir. 1973). The record in this case demonstrates that retaliation against the deputies for their EEO activites was an issue recognized by all parties from the outset.

Since we have concluded that reprisal or retaliation against an employee who exercises rights or participates in an administratively mandated EEO proceeding constitutes a violation of subsection (b)(9), we must turn to an analysis of what acts, and what evidence thereof, will constitute proof of such reprisal. In construing (b)(9) the Board will be guided, without being bound, by judicial interpretations of federal statutes containing similar prohibitions against reprisals.[41] Under all these statutes, the guarantee of freedom from reprisal extended to persons who invoke the aid of a remedial administrative process is designed to insure the integrity of the process. Protection against reprisal is necessary to prevent employer intimidation of prospective complainants and witnesses, which would dry up the channels of information and undermine the implementation of the statutory policy which the administrative process was established to serve.[42] Thus section

[41] Statutory provisions making it unlawful for an employer to discriminate against an employee for use of the remedial procedures established elsewhere in the statute include section 8(a)(4) of the National Labor Relations Act (29 U.S.C. §158(a)(4)), section 15(a)(3) of the Fair Labor Standards Act (29 U.S.C. §215(a)(3)), and section 704(a) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-3(a)).

[42] *NLRB v. Scrivener,* 405 U.S. 117, 122 (1972); *Mitchell v. Robert Demario Jewelry, Inc.,* 361 U.S. 288, 292 (1960).

704(a) of Title VII (42 U.S.C. § 2000e-3(a)) makes it unlawful for an employer to discriminate against an employee "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." A violation of section 704(a) is shown when an employee (or applicant for employment) establishes that he or she engaged in an activity protected by this section; that he or she subsequently was treated in an adverse fashion by the employer; and that there is a causal connection between the protected activity and the adverse action(s). *Hochstadt* v. *Worcester Foundation,* 425 F. Supp. 318, 324 (D. Mass. 1976), *aff'd,* 545 F.2d 222 (1st Cir. 1976).[43] The causal connection which the employee must show merely consists of an inference of retaliatory motive for the adverse employer action. *EEOC* v. *Locals 14 and 15, Intern. U. of Oper. Eng.,* 438 F. Supp. 876, 881 (S.D.N.Y. 1977), *rev'd in part on other grounds,* 553 F.2d 251 (2d Cir. 1977). We believe the reasoning of the Title VII cases is particularly instructive in defining the elements constituting employer reprisal for protected employee activities under section 2302(b)(9) in light of our conclusion that subsections (b)(1) and (b)(9) are complementary rather than mutually exclusive.[44]

Turning to the facts of the instant case, the Board has found that all deputy marshals in this case participated, to varying extents, in Marshals Service EEO procedures. However, the Board is unable to conclude from the record that the decision makers responsible for the transfer at issue considered the EEO activities of any deputy besides Robert Frazier in recommending or ordering the transfers. There is no persuasive evidence that the director or the management review team were even aware of protected EEO activities by Deputies Reilly and Love. Retaliatory motive, of course, presupposes knowledge of the activity which is sought to be discouraged.[45] Given such knowledge, however, motive must in almost all situations be inferred from circumstantial evidence. Courts have consistently permitted such inferences in employment discrimination cases. *Loeb* v. *Textron, Inc.,* 600 F.2d 1003, 1014 (1st Cir. 1979); *Rutherford* v. *American Bank of Commerce,* 565 F.2d 1162, 1164 (10th Cir. 1977); *Gates* v. *Georgia-Pacific Corp.,* 326 F. Supp. 397, 399 (D. Or. 1970), *aff'd,* 492 F.2d 292 (9th Cir. 1974)

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[43] A finding of reprisal for protected exercise of remedial rights does not, of course, decide the merits of the underlying claim. *See Pettway v. American Cast Iron Pipe Co.,* 411 F.2d 998, *reh. den.,* 415 F.2d 1376 (5th Cir. 1969).

[44] The elements of prohibited retaliation under section 8(a)(4) of the National Labor Relations Act (29 U.S.C. §158(a)(4)) are essentially the same. *See Dubin-Haskell Lining Corp. v. NLRB,* 386 F.2d 306, 309 (4th Cir. 1967), *cert. denied,* 393 U.S. 824 (1968).

[45] Although two of the team members and the director were also aware that Deputy Morris had filed an EEO complaint, there is no convincing evidence on the record that this fact was considered. See discussion, *infra,* at p. 189.

In the case of Deputy Frazier, it is manifest on the record, as summarized in our findings of fact, that he was subjected to systematic threats and harassment in retaliation for his EEO activities from the time he became an EEO counselor in 1974 through his transfer in January of 1979. Frazier's superiors repeatedly threatened him with long-unresolved disciplinary charges in a concerted effort to thwart his efforts to counsel other deputies regarding EEO complaints and to obtain redress for his own EEO complaints.[46] Defiance of statutory provisions conferring appeal rights is reprehensible. The personal harassment of Frazier, even when he attempted to obtain time off for psychiatric treatment, is even more shocking.

In contrast to the whistleblowing activities of the deputies, Frazier's EEO activities were known to and considered by the management review team in recommending his transfer. Gary Mead, Chief of Personnel, testified that the team members discussed Frazier's EEO complaints in determining that he should be transferred. Benjamin Butler was appointed Hall's special assistant for EEO affairs in November, 1978. He was a member of the review team and, because of his position, obviously knew the nature and extent of Frazier's EEO activities. In light of this, and since Marshals Service Director Hall specifically directed the team to investigate the large number of EEO and other complaints in the Northern District, Hall himself undoubtedly was aware of the extent of Frazier's EEO involvement. Not only were the director of the Marshals Service and his management review team aware of Frazier's unresolved complaints alleging improper interference with the retaliation for his activities as an EEO counselor, they also had specific knowledge of the unusually long history of Frazier's efforts to obtain relief from allegedly retaliatory actions;[47] the substantial nature of his allegations; and the fact that the inescapable effect of any involuntary transfer of Frazier would be to frustrate further his efforts to exercise his appeal rights.

With respect to intent, the evidence amply demonstrates that there were many instances in the Atlanta Office when personnel actions were taken against Frazier immediately after protected EEO activities. Because of the large number of these incidents and their similarity, the Board infers that the management of the Atlanta office was continuously retaliating against Frazier for his EEO activities. This retaliatory intent is attributable to Mr. Hall and the headquarters staff because of its widespread nature and because of the repeated direct involvement of headquarters in Frazier's EEO

[46] These charges, which were used in bad faith against Frazier by the Northern District management, are the same charges which the Marshals Service contends destroy Frazier's credibility as a whistleblower in this case.

[47] *We reiterate our findings, supra, that the Service did little, if anything, to* resolve Frazier's complaints in a timely fashion.

matters. From this, the Board infers that Mr. Hall was at least a silent participant in retaliation against Frazier.

The Board does not dispute the general proposition that reassignment of employees, based on interpersonal conflicts and resulting tensions which interfere with productivity, is a legitimate tool of management.[48] For this reason alone, resolution of the question of management motivation, based in large part on circumstantial evidence, is a difficult and close matter. When there is evidence of both legitimate and retaliatory motives for the same employer action, varying standards have been applied under both Title VII and the National Labor Relations Act in determining the degree to which the impermissible motive must influence the action so as to render it illegal. Some courts have found a prohibited reprisal for protected activity where the retaliatory motive played any part in the employer's decision.[49] Other courts require a showing that retaliation was the employer's primary or dominant motive.[50] We believe that the appropriate test for finding a violation of section 2302(b)(9) is whether retaliation for the exercise of appeal rights is a significant factor in the challenged personnel action. The Special Counsel has satisfied this standard with respect to the role played by retaliation in the decision to transfer Deputy Robert Frazier.

In the case of the other deputies, we cannot find from the evidence that they were transferred because of their EEO activities. The Special Counsel and the deputies have failed to show that the director of the Marshals Service and the review team had any knowledge that Deputies Reilly and Love had participated in

[48] The Special Counsel, contrary to his representations at the pretrial conference, argued in his post-trial brief that the proposed transfers violated Justice Department regulations and, as a result, 5 U.S.C. §2302(b)(11). This subsection prohibits personnel actions which violate a law, rule, or regulation implementing or directly concerning a merit system principle. Because of the Special Counsel's failure to raise this issue in his stay applications, report of investigation, petition for corrective action, or at the hearing, the Board considers it unfair at this date to decide an issue not pleaded, tried, or adequately addressed by any of the parties. Moreover, we view this question as immaterial in light of our determination that the transfers of Morris, Reilly and Love were based on sound management considerations and that Frazier's transfer violated section 2302(b)(9). A recent decision the Tenth Circuit Court of Appeals, *Hernandez v. Alexander,* (No. 78-1550, Oct. 18, 1979), specifically recognized that an employing federal agency may, as a "legitimate management decision," transfer an employee whose "intransigence and opposition to management decisions at all levels" created such "intense personal conflicts" as to constitute a "serious threat" to the agency's mission.

[49] *E.g., NLRB v. Retail Store Employees Union, Local 876,* 570 F.2d 586, 590 (6th Cir. 1978), *cert. denied,* 439 U.S. 819 (1978); *E.E.O.C. v. Kallir, Philips, Ross, Inc.,* 401 F. Supp. 66, 72 n. 17 (S.D.N.Y. 1975), *supplemented,* 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd,* 559 F.2d 1203 (2d Cir. 1977), *cert. denied,* 434 U.S. 920 (1977).

[50] *E.g., NLRB v. South Shore Hospital,* 571 F.2d 677, 684 (1st Cir. 1978); *Tidwell v. American Oil Co.,* 332 F. Supp. 424, 430 (D. Utah 1971).

EEO procedures.[51] The decision-makers knew that Deputy Morris was one of a considerable number of deputies in the Northern District who had filed EEO complaints. However, the record does not show, as it does in Frazier's case, that Morris' exercise of appeal rights was considered in arriving at the transfer decision. Morris' EEO activities were not remarkable because of their extent, the seriousness of the allegations made, or the time during which they were left unresolved. The director and the review team's mere knowledge of these activities does not support an inference of retaliation.[52]

The Special Counsel has alleged that grievances, including oral grievances, are also cognizable under section 2302(b)(9) as "the exercise of any appeal right granted by any law, rule, or regulation." We find that there is insufficient evidence in the record to ascerain whether the employees involved were covered by a master agreement providing for a negotiated grievance procedure. The Special Counsel has provided us with nothing to indicate whether, when, or what kind of master agreement might have existed, other than the reference in Marshal Angel's memorandum to Deputy Morris dated May 17, 1978, giving Morris notice of his right to reduce his oral grievance to writing. Marshal Angel referred to a "master agreement between the Marshals Service Locals AFGE, Article 24." Accordingly, we have no way of knowing whether the regulations under 5 C.F.R. § 771.101 *et seq.* apply, or whether these grievances fall under section 771.117, entitled *Negotiated Grievance System,* which provides:

> This subpart does not apply to a grievance system established through a negotiated agreement between an agency and a labor organization to which exclusive recognition has been granted.

Since the record is barren of evidence regarding the contents of a master agreement or the time it was in effect, we have no basis for

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[51] See our findings of fact, *supra,* at pp. 22-24.

[52] We need not decide whether the "but for" rule enunciated in *Mt. Healthy City School Dist. v. Doyle,* 429 U.S. 274 (1977) is applicable in appeal reprisal cases under section 2302(b)(9). In this case, the Supreme Court announced that the discharge of a public employee partially in retaliation for the exercise of First Amendment rights would not be set aside if the public employer could show by the weight of the evidence that the discharge would have occurred for other valid reasons regardless of the protected activity. Here, the Marshals Service has not established by the weight of the evidence that Mr. Frazier would have been transferred in spite of his EEO-appeal activities. Moreover, because of the strong inferences of reprisal which support a determination that the reasons advanced for Frazier's transfer by the Marshals Service were mere pretexts for the actual retaliatory reasons, we are not required to rule on whether the mere "articulation of a legitimate nonretaliatory reason" for Mr. Frazier's transfer would rebut the Special Counsel's prima facie case of retaliation. Compare, *Board of Trustees v. Sweeney,* 439 U.S. 24 (1978), with *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

ascertaining whether the grievances referred to by the Special Counsel are timely, in the proper format, were filed with the proper person, and so forth. Certainly we cannot therefore find that the grievances constitute an exercise of a "legitimate appeal right" under 5 U.S.C. § 2302(b)(9). See S. Rep. No. 969, 95th Cong., 2d Sess. 22 (1978).

CORRECTIVE ACTION

Our finding that a prohibited personnel practice was committed by the Marshals Service with respect to Robert Frazier requires us to address the issue of whether and to what extent corrective action is warranted. 5 U.S.C. § 1206(c)(1)(B) provides that the Board "may order such corrective action as the Board considers appropriate."[53] Words such as "may"[54] and "consider appropriate"[55] show a clear Congressional intent to provide the Board with broad discretion in the type and scope of the corrective action ordered, if any.[56]

The message is unmistakable: the Reform Act is aimed at protecting against and correcting merit system abuses, as the very name of this Board indicates. Therefore, upon its finding of a prohibited personnel practice, the Board, in ordering corrective action, must determine if the practice or practices were caused by underlying and systemic abuses. Thus in an appropriate case, corrective action may need to be of substantially broader scope than mere correction of a specific personnel action. Factors to be considered by the Board in determining the scope of corrective action include the

[53] The Civil Service Commission had no authority to order corrective action upon a finding of merit system abuse. *Vaughn v. Rosen,* 523 F.2d 1136, 1146 (D.C. Cir. 1975). The Civil Service Reform Act, as proposed by the President, did not empower the Board to order corrective action; rather, it left the taking of corrective action to the discretion of the agency involved. *See* S. 2640, 95th Cong., 2d Sess. (1978) and H.R. 11280, 95th Cong. 2d Sess. (1978), §202(a). As passed by the House, section 202(a) provided for corrective action in a manner similar to that provided by the present section 1206(c)(1)(B). The bill passed by the Senate provided for mandatory corrective action only if the Special Counsel found a pattern of prohibited practices. Both provisions ultimately were included in the Act respectively as sections 1206(c)(1)(B) and 1206(h).

[54] Ordinarily the word "may" is considered permissive. 2A Sands, *Sutherland Statutory Construction* §57.03 (4th ed.).

[55] Under 49 U.S.C. §1482(c) (1964), the Civil Aeronautics Board was in certain instances authorized to issue an "appropriate order." In interpreting this language the D.C. Circuit ruled:

> . . . absent a showing of abuse of discretion, it is the Board's *sole* responsibility to decide upon the *appropriate action* and remedy in individual cases. (Emphasis supplied.).

Capitol International Airways, Inc. v. CAB, 392 F.2d 511, 515 (1968).

[56] It is clear that, even upon a finding of a technical prohibited personnel practice, the Board is not automatically compelled to set aside the personnel action in question or order any corrective action at all.

nature of the prohibited personnel practice, its root causes, and the likelihood of future similar abuses.

The national policy with respect to equal employment opportunity is clear-cut and strongly stated. Nevertheless, in this case the Board has found considerable evidence that for a number of years the U.S. Marshals Service, particularly in its Atlanta office, retaliated against Robert Frazier because of his EEO-related activites. While the Board finds significant evidence of reprisal by the Marshals Service against only one of the four deputies, the evidence of other EEO-related abuses not arising to the level of a prohibited personnel practice is strong. The Board has found that the Atlanta office itself was divided along racial lines. Moreover, the Marshals Service itself admitted that it recognized that disproportionate number of EEO complaints arose in Atlanta. Many of the EEO complaints filed by the petitioners in this case were either ignored or improperly processed. In other cases, the investigation of EEO matters was careless. In sum, no regular EEO process within the spirit or letter of Title VII of the Civil Rights Act of 1964 was or is in place and being implemented in the Atlanta U.S. Marshals Service office.

The Board finds this state of affairs to be prima facie evidence of merit system abuse warranting specific and detailed corrective action with respect to all phases of equal employment opportunity. If immediate steps are not taken to correct this situation in the Atlanta office, it is the firm belief of the Board that the federal government's goal of equal employment opportunity for all will be seriously impaired. Moreover, in the absence of correction there will be a greater likelihood of further prohibited personnel practices of the kind in issue here. For these reasons, the Board has determined it appropriate to order broad-based remedial corrective action, in addition to particular actions to provide immediate relief to Deputy Frazier.

Inasmuch as the Board has found a prohibited personnel practice with respect to the involuntary transfer of Robert Frazier, that transfer is set aside.[57] Secondly, the Board orders the Marshals Service to cease immediately from retaliating against Deputy Frazier for his EEO activities. The Board's order is directed to the Marshals Service, including, in particular, all those in authority in the Atlanta office. In order specifically to correct the EEO problems in the Atlanta office, the Board believes it is essential that the content of this opinion and accompanying order be communicated to all Marshals Service employees and that they be reminded of the statutory responsibility of the Marshals Service to carry out EEO principles. Furthermore, to insure compliance with these prin-

[57] Of course, Mr. Frazier may be voluntarily transferred elsewhere, but only with his consent.

ciples, the Board will require both the immediate appointment of an EEO counselor from within the ranks of the Atlanta office and the appointment of a senior-level Equal Employment Opportunity Officer for the northern District of Georgia. The latter individual will guarantee compliance with the Board's order, conduct EEO training, and insure that prompt and fair resolution of EEO complaints is accomplished. This officer should have extensive EEO counseling and complaint management experience and should not previously have been involved with the Atlanta office.[58]

To insure that further retaliation and other EEO violations of the type found by the Board do not continue, the Board will require periodic reports from the Marshals Service on pending EEO cases. In this regard, the Board has decided to impose a 90-day deadline for the investigation of all unresolved EEO complaints.[59] This deadline is consistent with the recent Congressional mandate to render complete and final agency decisions on EEO complaints within 120 days. 5 U.S.C. § 7702.[60]

Because Director Hall reports to the Department of Justice, the Department of Justice has the responsibility to insure that he and Marshals Service officers and employees comply with all terms of this order.

In summary, it is the conclusion of the Board that detailed and specific steps must be taken immediately by the Marshals Service to forestall a recurrence of the present situation with respect to Deputy Frazier. The integrity of the merit system principles will continue to be undermined if the EEO problems in the Northern District are not corrected immediately.

For the Board:

RUTH T. PROKOP,
Chairwoman.

ERSA H. POSTON,
Vice Chair.

WASHINGTON, D.C., *December 17, 1979*

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[58] Since the activities of this designated senior-level equal employment officer cannot reasonably be viewed as requiring either the full-time services of any individual or the permanent or temporary assignment of that individual to the Northern District of Georgia, it would be particularly appropriate to assign this responsibility to a Justice Department employee who can perform these functions, including such visits to the Atlanta office as may be appropriate, on a part-time basis.

[59] Many of the EEO complaints in this case had been pending for more than one year without completion of an EEO investigation.

[60] Requiring the investigation to be completed within 90 days will provide the minimum allowable investigation period consistent with completion of the cases within 120 days. Thus, in addition to the time permitted for investigation, the Board will allow a minimum of 30 days for the Justice Department to complete its final hearing and render a decision on the case.

UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS PROTECTION BOARD

In the matter of: ROBERT J. FRAZIER, JR., CHARLES E. MORRIS, WILLIAM C. REILLY, TERRY E. LOVE, AND WILLIAM E. HALL, DIRECTOR U.S. MARSHALS SERVICE CHARLES F.C. RUFF, ACTING DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, AND BENJAMIN R. CIVILETTI,* ATTORNEY GENERAL OF THE UNITED STATES	Docket No. SC-79-3

ORDER OF CORRECTIVE ACTION

1. The involuntary transfer or reassignment of Deputy Marshal Frazier as effected on January 29 and May 22, 1979, is permanently enjoined.

2. It is hereby ordered that the United States Marshals Service cease retaliating against Deputy Frazier or any other employee of the United States Marshals Service Office for the northern District of Georgia who has filed, assisted in filing, or otherwise participated in the filing, investigation or adjudication of any charge of discrimination or discriminatory reprisal pursuant to 29 C.F.R. Part 1613 and Sections 272 and 274 of the U.S. Marshals Manual.

3. It is further ordered that Director William Hall shall:

A. Communicate within five days to all employees of the Northern District of Georgia the adherence of the United States Marshals Service to equal employment opportunity principles including those of non-reprisal.

B. Within five days, post a copy of this Order in a conspicuous place within each establishment of the Marshals Service in the Northern District of Georgia for a period of 60 days.

C. Within 60 days, compile and serve on the Board and all parties a list of unresolved complaints and charges of

* When the Special Counsel first brought this matter before the Board, the Attorney General was Honorable Griffin B. Bell and the Deputy Attorney General was Benjamin R. Civiletti.

discrimination and reprisal in the northern District of Georgia. Such list shall reflect: the date filed; the nature of the complaint; and what, if any, action has been taken in accordance with Marshals Service Manual Sections 272 and 274 or 29 C.F.R. Part 1613.

D. Appoint, within ten days of this Order, an EEO Counselor for the Northern District of Georgia as described in 29 C.F.R. § 1613.204(c) and take such steps as may be necessary to insure that the person appointed conducts those responsibilities described in 29 C.F.R. § 1613.213. If at any time during the period this Order is in effect such positions becomes vacant another appropriate individual shall be appointed within 10 days.

E. Within 20 days, designate an employee experienced in the handling of EEO matters, having the rank of GS-15 or above, to be the Special EEO Officer for the Northern District of Georgia for purposes of monitoring the implementation of all EEO complaint processing in the Northern District of Georgia, and guaranteeing compliance with this Order.

F. Insure that the Special EEO Office conducts training of all supervisors and management officials within the Northern District of Georgia on EEO procedures found at 29 C.F.R. Part 1613 and Section 272 and 274 of the Marshals Service Manual within 60 days.

G. No later than January 2 and July 1 of the years 1980 and 1981, and commencing July 1, 1980, serve upon the Board and all parties a written report containing the following information:

i) the number of unresolved and resolved EEO complaints in the Northern District of Georgia based on the following time periods: from the effective date of this Order to June 1, 1980; from June 2, 1980 to December 1, 1980; from December 2, 1980 to June 1, 1981; and from June 2, 1981 to December 1, 1981.

ii) the minimum, maximum and average processing time for EEO complaints (calculated from the filing date to the date of final agency action) in the Northern District of Georgia.

iii) the minimum, maximum, and average processing time for EEO complaints, similarly computed, for ten other district offices selected by random sample, and

iv) the disposition of each resolved EEO complaint in the Northern District of Georgia during the applicable time period (i.e., withdrawal, informal settlement, finding of no discrimination, finding of discrimination).

H. Insure that investigation (such as that provided for in 29 C.F.R. § 1613.216) of complaints or charges of discrimination of reprisal within the meaning of 42 U.S.C. § 2000(e)-16 or 29

C.F.R. part 1613 which are pending or subsequently arise in the Northern District of Georgia be completed within 90 days of the date of filing (as defined in 29 C.F.R. § 1613.214), or within 90 days of the date of this Order, whichever is later. If compliance with such time limitation cannot be accomplished with the exercise of due diligence, for reasons beyond the control of the Marshals Service, written documentation of the reasons for such non-compliance shall be made by the Director as part of the written report prescribed in Section 3G of this Order.

4. The United States Department of Justice shall directly supervise compliance by the Marshals Service and its Director with all apsects of this Order.

5. Nothing contained herein shall be interpreted to permit the Marshals Service to take any action of reprisal against Deputies Frazier, Morris, Reilly, or Love for their participation in the proceedings that led to this Order. Nor shall anything contained herein be interpreted to prevent the Marshals Service from taking any legal and appropriate action concerning events transpiring after the effective date of this Order.

For the Board:

RUTH T. PROKOP,
Chairwoman.

ERSA H. POSTON,
Vice Chair.

December 17, 1979.

UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS PROTECTION BOARD

In the matter of: ROBERT J. FRAZIER, JR., CHARLES E. MORRIS, WILLIAM C. REILLY, TERRY E. LOVE, AND WILLIAM E. HALL, DIRECTOR, U.S. MARSHALS SERVICE CHARLES F.C. RUFF, ACTING DEPUTY ATTORNEY GENERAL U.S. DEPARTMENT OF JUSTICE AND BENJAMIN R. CIVILETTI,* ATTORNEY GENERAL OF THE UNITED STATES	Docket No. SC-79-3

ORDER RELATING TO THE INTRODUCTION OF DOCUMENTS

On August 23, 1979, the Board, in a bench ruling, ordered the Special Counsel to submit within five work days an affidavit listing those exhibits not previously introduced which the Special Counsel received from the Department of Justice and which the Special Counsel proposed to introduce. The Board also afforded the Department of Justice five days to respond to the Special Counsel's affidavit.

On August 29, 1979, the Special Counsel moved the admission of 58 exhibits, identified in a supporting affidavit, which it has obtained from the Department of Justice in the course of its investigation. On September 10, 1979 the United States Marshals Service filed its objections to the motion of the Special Counsel.

The Marshals Service objected to post-hearing admission of all of the documents on the grounds that: (1) post-hearing admission of exhibits would be prejudicial inasmuch as it would deny the Marshals Service the right to confront and cross-examine with respect to each document; (2) the documents are cumulative and repetitive of the testimony presented at the hearing; and (3) post-hearing admission would constitute an unwarranted and unwise practice which could foster abuse of the administrative process.

* When the Special Counsel first brought this matter before the Board, the Attorney General was honorable Griffin B. Bell and the Deputy Attorney General was Benjamin R. Civiletti.

The Board agrees with the objection of the Marshals Service that post hearing admission of documents for the truth of the matters asserted therein would be both prejudicial to the Marshals Service and would set a dangerous precedent for future proceedings. Many of the Special Counsel's proposed documents raise issues of fact never addressed by the testimony of any live witness, nor ever addressed in the Special Counsel's petition for corrective action. Therefore, with respect to those documents below that the Board admits, admission is granted only for the limited specific purpose of proving either that the document existed in the files of the Marshals Service or that the respondents had notice of the matters asserted in the document, unless otherwise indicated.

Since this was the first evidentiary hearing conducted by the Board under its corrective action authority, the Board afforded the parties more latitude in proving their cases than it will allow in the future. In future evidentiary hearings conducted in conjunction with the Board's consideration of a petition for corrective action, the Board will require the parties to identify and introduce at the proper time all documents proposed to be admitted.

Within these limitations, the following specific rulings are made:

Exhibit No.	*Rulings*
7	Objection sustained. The document is irrelevant to any issue before the Board.
87	Objection overruled. The document will be considered in its entirety.
154	Objection overruled. Document admitted to show notice.
155	Objection overruled. Document admitted to show notice.
163	Objection sustained. From the single document presented, it is impossible to determine its relevance, materiality or weight.
164	Objection overruled. Document admitted to show notice.
168	Objection overruled. Document admitted to show notice of allegations raised and to show that the Deputies served as EEO witnesses.
169	Objection sustained. The issue raised in this document was not raised at the hearing and is irrelevant to this case.
174	Objective overruled. Document admitted to show notice.
178	Objection overruled. Document admitted to show notice.
181	Objection overruled. Document admitted to show notice
183	Objection sustained. Robert Frazier testified in this case but did not raise many of the matters set forth in this affidavit.
184	Objection sustained. It is impossible to tell from the face of this document its relevance to this case. Moreover, Christopher Reilly, the affiant, testified in this case, and his oral testimony on the stand will govern.
189	Objection overruled. This document was discussed by a number of witnesses and the Department of Justice had ample opportunity to cross-examine witnesses about it. Therefore, it is admitted generally.

Exhibit No.	*Rulings*
196	Objection sustained. The document is illegible.
199	Objection overruled. Document admitted to show notice.
202	Objection overruled. Document admitted to show notice.
203	Objection sustained. The issue raised in this document was not previously raised before the Board. This document is irrelevant.
206	Objection sustained. This document is irrelevant.
207	Objection overruled. This document is admitted to show notice.
209	Objection overruled. This document admitted to show notice.
5, 6, 85, 90, 160, 161, 162, 165, 167, 170, 171, 173, 175, 176, 177, 179, 182, 185, 186, 187, 188, 190, 191, 193, 194, 195, 197, 198, 200, 208, 210	Objection overruled. Admitted generally.
166, 180, 192, 201, 204, 205	Objection overruled. Admitted to show malice or knowledge.

During the hearings, rulings were reserved with respect to certain documents. With regard to these documents, the following specific ruling are made:

Exhibit No.	*Ruling*
9	Objection sustained. This document was not introduced or identified by any witness at the trial.
50, 55	Objection overruled. Both documents were shown to have been contemporaneously recorded. See Volume 1, pp. 144-145 and 149.
87	Objection overruled. Although this document appears to be incomplete, no lack of fairness in considering these partial notes has been shown. See, e.g., FRE 106. Moreover, witnesses Russell, at Volume 3, pp. 71-72, and Meade, at Volume 3, pp. 189-190, identified this document.
148	Objection sustained. This document was not introduced or identified by any witness at the trial.
Petitioner Exhibit 4	Objection overruled. This document was properly identified as Volume 1, page 89.

The Board also reserved ruling at Volume 4, page 40, on the admissibility of certain testimony by witness Boyd. The testimony appears to be generally within the offer of proof at Volume 4, pp. 36-37, and generally relevant. Therefore, the testimony is admitted.

For the Board:

RUTH T. PROKOP.
ERSA H. POSTON.

December 17, 1979.