



U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

September 29, 2008

The Honorable Scott J. Bloch
U.S. Office of Special Counsel
1730 M Street, N.W. - Suite 300
Washington D.C. 20036-4505

Re: OSC File No. DI-08-0715

Dear Mr. Bloch:

Pursuant to your April 28, 2008 request to Attorney General Michael Mukasey, the United States Department of Justice has investigated various allegations of mismanagement and abuse of authority made by Tamarah Grimes against management officials in the United States Attorney's Office for the Middle District of Alabama (USAO). As required by 5 U.S.C. §1213(c), please find enclosed the Department's Report of Investigation (ROI). Attorney General Mukasey delegated his authority to me to review and sign the ROI.

The investigation was conducted by two experienced and senior Assistant United States Attorneys from two different United States Attorney's Offices. As set forth in detail in the ROI, the information obtained during the investigation of Ms. Grimes' allegations does not support a finding that USAO management officials violated any law, rule or regulation, or engaged in gross mismanagement, a gross waste of funds, or an abuse of authority. To the contrary, the evidence supports the factual assertions of the management officials in response to the allegations. Accordingly, the Department is unable to substantiate by preponderant evidence any of the allegations raised by Ms. Grimes, and we consider the matter closed.

If you have any questions concerning the investigation or the ROI, please contact Jay Macklin, EOUSA General Counsel at (202) 514-4024.

Sincerely,

David Margolis
Associate Deputy Attorney General

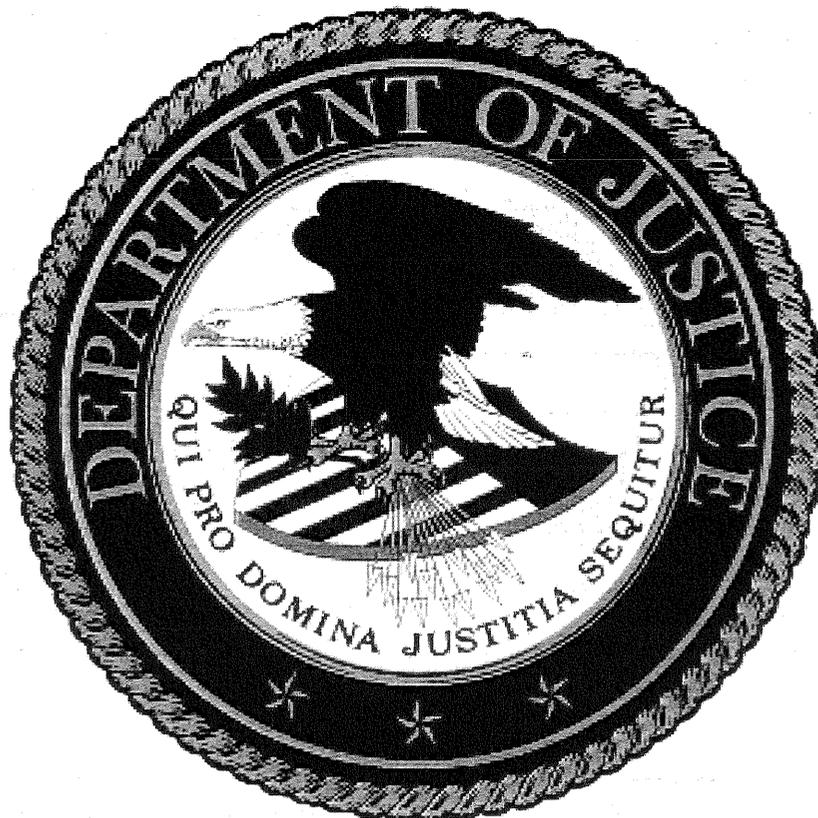
Enclosure

cc: Catherine McMullen, Chief, OSC Disclosure Unit
Jay Macklin, EOUSA General Counsel

REPORT OF INVESTIGATION
OSC File No. DI-08-0715

ALLEGATIONS REGARDING THE
UNITED STATES ATTORNEY'S OFFICE
FOR THE MIDDLE DISTRICT OF ALABAMA

Prepared by Assistant United States Attorneys Ronald R. Gallegos, Civil Chief,
District of Arizona and Steven K. Mullins, Civil Chief, Western District of
Oklahoma



September 2008

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I. Introduction¹

A. Background

Tamarah Grimes began her service with the United States Attorney's Office (USAO) for the Middle District of Alabama (MDAL) on April 20, 2003, when she was hired as a Paralegal Specialist in the Civil Division. Her primary duty was to serve as a civil paralegal with major emphasis on Affirmative Civil Enforcement (ACE) program litigation.

In September 2007, Ms. Grimes sent correspondence to the United States Department of Justice, Office of Inspector General (OIG), making various allegations regarding the conduct and operation of the United States Attorney's Office for the Middle District of Alabama. After reviewing this submission, the OIG Special Agent-in-Charge for Operations Investigation Division requested permission from Ms. Grimes to disclose her identity and refer her allegations for investigation to the United States Department of Justice, Office of Professional Responsibility (OPR) and the Executive Office for United States Attorneys (EOUSA). *See* Appendix F, p. F-1. On October 2, 2007, Ms. Grimes declined the request to disclose her identity or to refer the allegations for investigation to OPR or EOUSA. *See* Appendix F, p. F-2.

On October 2, 2007, the OIG's office acknowledged Ms. Grimes' declination to disclose her identity or agree to refer the allegations to the appropriate entities within the Department of Justice for investigation. However, the OIG informed Ms. Grimes that she might alternatively present her allegations to the Office of Special Counsel (OSC). *See* Appendix F, p. F-4.

On April 28, 2008, The Honorable Scott J. Bloch, The Special Counsel, Office of Special Counsel, requested that the Attorney General of the United States investigate certain disclosures of Tamarah Grimes regarding alleged improper conduct by management officials of the United States Attorney's Office for the Middle District of Alabama. This referral by the OSC was made pursuant to 5 U.S.C. § 1212(a)(3). *See* Appendix A, p. A-1.

¹This report is divided into six sections. The first section (I) is an introduction outlining the events that led to the request by the Office of Special Counsel for an investigation by the Attorney General. This section also briefly describes the Department of Justice components that are discussed in this report. Sections two (II) through six (VI) correspond to the five statutory required sections as outlined by 5 U.S.C. § 1213(d).

B. Description of Organizations Discussed in the Report

The **United States Attorney** serves as the chief law enforcement officer in each judicial district and is responsible for coordinating multiple agency investigations within that district. Although the Attorney General has supervision over all litigation to which the United States or any agency thereof is a party, and oversees all United States Attorneys, and their assistants, in the discharge of their respective duties (28 U.S.C. §§ 514, 515, 519), each United States Attorney, within his or her district, has the responsibility and authority to: (a) prosecute all offenses against the United States; (b) prosecute or defend, for the government, all civil actions, suits, or proceedings in which the United States is concerned; (c) appear on behalf of the defendants in all civil actions, suits, or proceedings pending in the district against collectors, other officers of the revenue or customs for any act done by them, or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury; (d) institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law unless satisfied upon investigation that justice does not require such proceedings; and (e) make such reports as the Attorney General shall direct. 28 U.S.C. § 547. By virtue of this grant of statutory authority and the practical realities of representing the United States throughout the country, United States Attorneys conduct most of the trial work in which the United States is a party. Ms. Leura Garrett Canary served as the United States Attorney for the Middle District of Alabama at all times relevant to this investigation.

The main office of the **United States Attorney's Office for the Middle District of Alabama (MDAL)** is located in Montgomery, Alabama. The office has fewer than 25 Assistant United States Attorneys. Since budget allocation and support staffing authorization for a United States Attorney's Office is generally based on the number of Assistant United States Attorneys, the MDAL has a small litigation budget and a limited number of support employees. Due to these limitations, the Department of Justice provides the District with many of its administrative needs directly from individuals employed by EOUSA in Washington, D.C. *See* 28 C.F.R. § 0.138.

The **Executive Office for United States Attorneys** serves as the liaison between the 94 United States Attorneys' Offices throughout the country, Department components in Washington, D.C., and other federal agencies. Among its other duties, EOUSA provides budget and fiscal assistance and guidance to USAOs.

The **Office of the Inspector General** conducts independent investigations, audits, inspections, and special reviews of United States Department of Justice personnel and programs to detect and deter waste, fraud, abuse, and misconduct as well as to promote integrity, economy, efficiency, and effectiveness in Department of Justice operations.

The **Office of Professional Responsibility (OPR)**, which reports directly to the Deputy Attorney General, is responsible for investigating allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice. The objective of OPR is to ensure that Department of Justice attorneys continue to perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. OPR reviews allegations of attorney misconduct involving violation of any standard imposed by law, applicable rules of professional conduct, or Departmental policy. When warranted, OPR conducts full investigations of such allegations, and reports its findings and conclusions to the Office of the Deputy Attorney General. OPR also reports findings of professional misconduct by Department attorneys to the appropriate state attorney disciplinary authority.

II. Initiation of Investigation

Following receipt of the April 28, 2008 OSC referral regarding alleged improper conduct by management officials of the United States Attorney's Office for the Middle District of Alabama, the Department assigned responsibility for this investigation to Assistant United States Attorneys (AUSA) Ronald R. Gallegos of the District of Arizona and Steven K. Mullins of the Western District of Oklahoma. Both Mr. Gallegos and Mr. Mullins are career federal attorneys who have held positions of responsibility in the Department of Justice during both Democratic and Republican administrations.

III. Description of the Scope of Investigation

A. Referred Issues

The April 28, 2008 OSC referral identified five areas for investigation by the Department of Justice.

- (1) Whether prosecutors in *U.S. v. Siegelman* committed a violation of law, rule, or regulation when they allegedly failed to disclose to the trial court improper contacts with jurors in the criminal trial;
- (2) Whether management officials in the MDAL committed gross mismanagement, or a gross waste of funds, by allegedly causing the government to incur unnecessarily the salary, per diem, and travel expenses for a contract employee that was hired to assist in the trial of *U.S. v. Siegelman*;

(3) Whether management officials in the MDAL committed a violation of law, rule, or regulation when they allegedly improperly used victim impact funds to pay for a federal contractor's transportation and per diem expenses to attend the sentencing of defendants in *U.S. v. Siegelman*;

(4) Whether management officials in the MDAL committed an abuse of authority when they allegedly obstructed an investigation by the Department of Justice's Office of Professional Responsibility; and

(5) Whether management officials in the MDAL committed a violation of law, rule, or regulation, or an abuse of authority, when they allegedly improperly initiated a criminal investigation of paralegal Tamarah Grimes in retaliation for participation in protected activity.

B. Collateral Issues

Ms. Grimes has filed multiple discrimination complaints with the Equal Employment Opportunity Staff of the Department of Justice. She also has filed a federal workers compensation claim and raised other whistleblower protection issues with the OSC. While some of these complaints and claims are tangentially related to this report since they involve some of the same facts as those giving rise to this investigation, the specific allegations and claims raised in those forums are collateral to the inquiry conducted by AUSAs Gallegos and Mullins. The investigators writing this report limited the scope of their investigation to the five specific areas of inquiry identified in the April 28, 2008 OSC referral to the Attorney General.

IV. Summary of Investigation

On May 9, 2008, AUSAs Gallegos and Mullins conducted a video conference meeting with EOUSA officials regarding logistic and procedural matters for the conduct of the investigation of referred matters.

On May 20, 2008, AUSA Mullins met with individuals from the General Counsel's Office (GCO) for EOUSA to get copies of documents related to the referred OPR matter.

On June 11 and 12, 2008, AUSAs Gallegos and Mullins visited the office of the United States Attorney in Montgomery, Alabama. They reviewed relevant contract, personnel, and litigation files.

They also conducted initial interviews with the following individuals:

- A. United States Attorney Leura G. Canary;
- B. First Assistant United States Attorney (FAUSA) Patricia Watson;
- C. AUSA Steve Feaga, Prosecutor in *U.S. v. Siegelman*;
- D. AUSA Louis V. Franklin, Criminal Chief, Acting U.S. Attorney and Prosecutor in *U.S. v. Siegelman*;
- E. AUSA J.B. Perrine, Prosecutor in *U.S. v. Siegelman*;
- F. AUSA R. Randolph Neeley, Civil Attorney and subject of the OPR investigation;
- G. Debbie L. Shaw, Criminal Legal Assistant and member of the trial team in *U.S. v. Siegelman*;
- H. Retta Goss, Administrative Officer;
- I. Tamarah Grimes, Civil Paralegal and OSC Complainant. This interview was transcribed. *See* Appendix T.

On July 15, 2008, AUSA Mullins and Law Clerk Aashish Bhargava interviewed Federal Bureau of Investigation (FBI) Special Agent Keith Baker. Agent Baker was a member of the trial team in *U.S. v. Siegelman*. This interview was transcribed. *See* Appendix R.

On July 28, 2008, AUSAs Gallegos and Mullins and Law Clerk Aashish Bhargava conducted a formal interview with Ms. Debbie Shaw. This interview was transcribed. *See* Appendix U.

On July 28, 2008, AUSAs Gallegos and Mullins and Law Clerk Aashish Bhargava interviewed Mr. Vallie Byrdsong. Mr. Byrdsong is an independent contractor hired by the United States to assist in the *U.S. v. Siegelman* investigation and trial. His contract was the subject of the allegations of misuse of funds. This interview was transcribed. *See* Appendix S.

On August 26, 2008, AUSA Gallegos interviewed OPR Assistant Counsel Frederick C. Leiner and OPR Associate Counsel William J. Birney. *See* Appendix P.

On August 31, 2008, the MDAL provided its official response to the allegations referred by the OSC for investigation. *See* Appendix K.

On September 5, 2008, FAUSA Patricia Watson provided a Declaration regarding the allegations of Ms. Grimes. *See* Appendix V.

Throughout the period of the investigation, various documents were provided to the investigators by EOUSA, the MDAL, and Ms. Grimes. Documents which are considered to be relevant to the findings of the investigation are attached to this report.

V. Findings

A. Standards of Review

(1) Violation of law, rule, or regulation.

In order to constitute a violation of law, rule, or regulation, an employee's statements and the circumstances surrounding the making of those statements must clearly implicate an identifiable violation of law, rule, or regulation. *Langer v. Department of Treasury*, 265 F.3d 1259 (Fed. Cir. 2001). A mere policy disagreement can serve as the basis for a violation of law, rule, or regulation only if the legitimacy of a particular policy choice "is not debatable among reasonable people." *White v. Department of the Air Force*, 391 F.3d 1377, 1882 (Fed. Cir. 2004). As noted in *Herman v. Department of Justice*, 193 F.3d 1375, 1381 (Fed. Cir. 1999), "[T]he WPA (Whistleblowers Protection Act) was enacted to protect employees who report genuine violations of law, not to encourage employees to report minor or inadvertent miscues occurring in the conscientious carrying out of a federal official or employee's assigned duties."

(2) Gross mismanagement.

"Gross mismanagement" has been defined as a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. *White v. Department of the Air Force*, 63 M.S.P.R. 90, 95 (1994). *See also, Nafus v. Department of Army*, 57 M.S.P.R. 386 (1993). The Office of Special Counsel defined the term "mismanagement" in past versions of its regulations. "Mismanagement means wrongdoing or arbitrary and capricious actions that may have an adverse effect on the efficient accomplishment of the agency mission." *See* 5 C.F.R. § 1250.3(e) (1989). In addition, West's Legal Thesaurus/Dictionary 496 (1985 ed.) equates "mismanagement" to "maladministration, malpractice, misconduct, misfeasance, misdirection, neglect and negligence."

The legislative history of the WPA shows that Congress also intended the term "gross mismanagement" to reflect something blatant or out of the ordinary. The legislative history explains as follows:

S. 508 would also change the definition of protected disclosures from “mismanagement” to “gross mismanagement.” While the Committee is concerned about improving the protection of whistleblowers, it is also concerned about the exhaustive administrative and judicial remedies provided under S. 508 that could be used by employees who have made disclosures of trivial matters. CSRA specifically established a *de minimis* standard for disclosures affecting the waste of funds by defining such disclosures as protected only if they involved “a gross waste of funds.” Under S. 508, the Committee establishes a similar *de minimis* standard for disclosures of mismanagement by protecting them only if they involve “gross mismanagement.”

S. Rep. No. 413, 100th Cong. 2d Sess. 13.

(3) Gross waste of funds.

The MSPB defines gross waste of funds as a “more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.” See *Nafus v. Department of the Army*, 57 M.S.P.R. 386, 393 (1993); see also, *Van Ee v. EPA*, 64 M.S.P.R. 693, 698 (1994) (quoting *Nafus v. Department of the Army*, 57 M.S.P.R. 386, 393 (1993)). For example, in *McCorcle v. Department of Agriculture*, 98 M.S.P.R. 363, 375 (2005), the Court held that appellant’s alleged disclosure that the agency wasted “three years of taxpayers[’] money,” when it allegedly assigned him clerical and other duties, did not constitute a non-frivolous allegation of a “gross waste of funds.” The Court further held that the appellant’s alleged disclosure constitutes, at most, an expression of disagreement with the agency’s assignment of duties and his opinion that he was being underutilized.

(4) Abuse of authority.

In *Doyle v. Department of Veterans Affairs*, 2008 WL 1712316 (Fed. Cir. 2008), the MSPB defined an “abuse of authority” as “an arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.” See also, *Embree v. Department of the Treasury*, 70 M.S.P.R. 79, 85 (1996). As courts have noted, “[d]iscussion and even disagreement with supervisors over job-related activities is a normal part of most occupations,” and not an abuse of authority. *Willis v. Department of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998). Harassment or intimidation of employees may constitute abuse of authority. *Special Counsel v. Costello*, 75 M.S.P.R. 562, 580-581 (1997).

B. Discussion of Allegations

Issue One: Whether prosecutors in *U.S. v. Siegelman* committed a violation of law, rule, or regulation when they allegedly failed to disclose to the trial court improper contacts with jurors in the criminal trial.

a. Investigative Findings

The underlying factual allegations which were referred for investigation by the OSC are described in its April 28, 2008 letter. The letter stated that it was alleged that “during the prosecution of a political corruption case against former Alabama Governor Don Siegelman and former HealthSouth CEO Richard Scrushy, the prosecutors were aware of improper behavior on the part of jurors yet did not disclose it to the judge.”² The specific improper behavior alleged was that a female juror (and perhaps others) was “**passing notes to the U.S. Marshals in the courtroom**” who thereafter passed the notes to the prosecutors. It was alleged that the passing of these written notes was not disclosed to the trial court.

If those allegations of **external contacts** are true, such conduct is improper and would constitute a violation of law. The recent case of *Oliver v. Quarterman*, ___ F.3d ___, 2008 WL 3522425, at *3-*4 (5th Cir. 2008), clearly outlines the law regarding **external contacts** with members of the jury.

Oliver rests his argument on Supreme Court precedent that, under the Sixth Amendment, forbids a jury from being exposed to **external influences** during its deliberations. *See Parker v. Gladden*, 385 U.S. 363, 364-65, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966) (stating that “the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel” (internal quotation marks omitted)); *Turner v. Louisiana*, 379 U.S. 466,

²*U.S. v. Siegelman* refers to a federal prosecution of former Alabama Governor Don Siegelman and former HealthSouth CEO Richard Scrushy. Following a two-month trial, jurors on June 29, 2006, found Siegelman and Scrushy guilty of bribery, conspiracy, and mail fraud in a scheme in which Siegelman was accused of appointing Scrushy to an important hospital regulatory board in exchange for Scrushy arranging \$500,000 in contributions to Siegelman's campaign for a statewide lottery. Siegelman also was convicted of obstruction of justice for trying to cover up \$9,200 given to him by a lobbyist to help him purchase a motorcycle.

472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965) (“The requirement that a jury’s verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.”); *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954) (stating that “private communication, contact, or tampering” with the jury is presumptively prejudicial); *Mattox v. United States*, 146 U.S. 140, 149, 13 S.Ct. 50, 36 L.Ed. 917 (1892) (stating that “in capital cases [] the jury should pass upon the case free from external causes tending to disturb the exercise of deliberated and unbiased judgment”).

Remmer provides our starting point for determining the Supreme Court’s clearly established law regarding **external influences** on a jury. See 347 U.S. at 229, 74 S.Ct. 450. *Remmer* involved a third party who attempted to bribe a juror. *Id.* at 228, 74 S.Ct. 450. The juror notified the judge, who then informed the prosecutors. *Id.* The judge asked the FBI to investigate the incident, and the FBI concluded that the third party had made the statement to the juror in jest. *Id.* As a result, neither the judge nor the prosecutor told the defendant about the incident. *Id.* The jury found the defendant guilty, and he appealed after learning of the alleged bribery attempt. *Id.* The Supreme Court vacated the lower court’s judgment that the defendant had not shown any prejudice and held that in a criminal case,

any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Id. at 229. *Remmer* thus prohibits jurors from being subjected to “private communication, contact, or tampering” and considers any such **external influences presumptively prejudicial**.

(emphasis added).

In contrast, *Oliver*, 2008 WL 3522435, at *5 also outlines the law regarding **internal influences**. Internal influences are not presumptively prejudicial. If prosecutors played no

part in the generation of internal influences, they would not have committed a violation of law. *Oliver* stated:

Finally, the Court fleshed out the difference between an “external” and an “internal” influence on a jury in *Tanner*. *Id.* at 117, 107 S.Ct. 2739. There, the Court considered allegations that a juror was intoxicated during the trial. *Id.* at 110, 107 S.Ct. 2739. The Court held that the Sixth Amendment did not require the district court to hold an evidentiary hearing, because juror intoxication is not an “external influence.” *Id.* at 127, 107 S.Ct. 2739. In so holding, the Court noted that lower courts **have distinguished between external influences, which a defendant can use to impeach a jury’s verdict, and internal influences, which are not presumptively prejudicial.** *Id.* at 117-18, 107 S.Ct. 2739. A juror is exposed to an external influence when the juror reads information not admitted into evidence, such as a newspaper article about the case, or hears prejudicial statements from others, as in *Parker* and *Remmer*. *Id.* at 117, 107 S.Ct. 2739. In contrast, internal influences, which provide no basis for relief, include allegations of physical or mental incompetence of a juror, such as claims that a juror was insane, could not sufficiently understand English, or had a severe hearing impairment. *Id.* at 119, 107 S.Ct. 2739. . . . Internal influences thus stand in stark contrast to their external counterparts, which come from without and carry the potential to bias the juror against the defendant.

(emphasis added).

Prior to the initiation of trial proceedings in the *U.S. v. Siegelman* case, the United States District Court took great care to protect the integrity of the jury and maintain its security. On March 22, 2006, the Honorable Mark E. Fuller, Chief United States District Judge for the Middle District of Alabama, entered an *Order For Partial Sequestration*. See Appendix L. The *Order for Partial Sequestration* specifically charged the United States Marshals Service to make certain that no member of the jury “has any unauthorized contact with any outside person.” In implementing the Court’s *Order for Partial Sequestration*, the United States Marshals Service chose to limit further possible impermissible contact with the jury by assigning United States Deputy Marshals from areas outside of Alabama (on a rotating schedule) to escort, protect, and sequester the jury. See Appendix R, Interview of Baker, pp. 10-11; Appendix U, Interview of Shaw, pp. 7-9. As stated by Ms. Shaw in her interview:

Q. Was the jury sequestered during this time, during the trial of the Siegelman case?

A. They were partially sequestered.

Q. Can you explain to me what that means?

A. Sure. And I think there was even an order done on it by the judge.

They met, picked a different place everyday during the trial, don't know where it was. They would meet, leave their cars, the marshals picked them up in vans, they brought them to the back of the courthouse. They didn't come in and out through the front doors of the courthouse. They went in and out through the clerk's office. They ate breakfast together every day, they ate lunch together everyday, and they either ordered in, or sometimes the marshals would make special arrangements to take them somewhere in town. They had their breaks together. Like here, during regular trials, the jury is using the public restrooms during breaks and all that. That didn't happen with this trial.

And there were always marshals with them. There was one marshal who was in charge of the jury. And he was in there everyday. And then they had visiting marshals who came from other districts. I think the first two came and stayed for two or three weeks, then they had some others that came and stayed for two or three weeks. They had visiting marshals. Then at the end of the day, they were taken out through the back and taken back to their cars.

Q. So would it have been very difficult for the prosecution team to have had any kind of communication with the jurors?

A. I don't see how they could have. . . . So, there's no way. You would have to have had the marshals in—you would have had to have the visiting marshals who didn't know us from Adam passing notes to a jury in an extremely high profile case.

See Appendix U, Interview of Shaw, pp.7-8.

The genesis for Ms. Grimes' charge of possible prosecutorial misconduct in the trial of *U.S. v. Siegelman* is not based on first-hand information or personal observation. In fact, Ms. Grimes stated that she never attended the *U.S. v. Siegelman* trial. *See Appendix T, Interview of Grimes, p. 12, lines 12-13.* Ms. Grimes stated that she learned that messages had been

passed from the jury to the prosecution team during conversations with Patricia Watson and Vallie Byrdsong. See Appendix T, Interview of Grimes, pp. 11-12.³

As evidence that such conversations occurred, Ms. Grimes provided a copy of an email exchange between herself and Ms. Watson. Ms. Watson was the First Assistant United States Attorney in the MDAL and a friend of Ms. Grimes at the time of the email exchange. The email exchange took place on June 15, 2006, the date the *U.S. v. Siegelman* case was submitted to the jury for deliberation. In the email exchange Ms. Watson made the following comment, "I just saw Keith in the hall. The jurors kept sending out messages through the marshals. A couple of them wanted to know if he was married." Ms. Grimes responded, "Yeah, that's what Vallie said. He said one girl was a gymnast and they called her 'Flipper' because she apparently did back flips to entertain the jurors. 'Flipper' was very interested in Keith." See Appendix H.

Ms. Watson was interviewed and stated that she did, in fact, write the emails provided by Ms. Grimes dated June 15, 2006. She stated that she did not speak with Special Agent Keith Baker on June 15, 2006. However, when she saw Agent Baker in the hall following the closing arguments in the *U.S. v. Siegelman* case, she was reminded of the rumor she had heard regarding the jurors thinking Special Agent Baker was good-looking. When she received the email from Ms. Grimes, Ms. Watson said she repeated the story. Ms. Watson said she had no actual information regarding the truth of the rumor and had never attended the *U.S. v. Siegelman* trial. She also said that, although her former husband was a U.S. Marshal, she had not spoken to him, or any other Marshals Service employee, about the *U.S. v. Siegelman* trial.

U.S. v. Siegelman prosecutors AUSA Louis V. Franklin, AUSA Steve Feaga, and AUSA J.B. Perrine were interviewed regarding the allegation that messages were passed between the jury and the government during the trial of the criminal case. Each prosecutor stated that no such communications occurred during the trial. Each stated that they never received, nor initiated, any such communication at any time during the trial of the *U.S. v. Siegelman* matter.

During the investigation of this matter, portions of the *U.S. v. Siegelman* trial transcript were reviewed. Although the specific charge of jury communication with the government

³Ms. Grimes stated that she was told by Patricia Watson that the messages were only verbally communicated by the U.S. Marshals. See Appendix T, Interview of Grimes, p. 18, lines 10-17. Ms. Grimes stated that she was told by Vallie Byrdsong that the messages were written and delivered by the U.S. Marshals or court security officers. See Appendix T, Interview of Grimes, p. 15, line 4; p. 18, lines 18-21.

was never raised by any party in the *U.S. v. Siegelman* case, jury misconduct was an allegation raised by the defendants following their convictions. On November 17, 2006, Judge Fuller conducted an examination of each juror regarding their conduct during the trial and deliberations in *U.S. v. Siegelman*.⁴ In addition to other inquiries, Judge Fuller asked each juror the following questions:

- Did anyone other than another juror try to influence your thinking about this case or your vote on the substantive counts against any Defendant?
- Do you have any reason to believe that any juror was subjected to attempts to influence his or her thinking about the case during the time you were a juror in this case?
- Did anyone other than another juror attempt to discuss the case with you during the time you were a juror in this case?
- During the time that you were serving as a juror did you overhear any conversations between persons not on the jury or between non-jurors as to any member of the jury relating to this case?
- During the time that you were serving as a juror did you view or hear any extraneous information about either the law applicable to this case or any factual material relating to this case?

See Appendix M. No juror gave any response which indicated that any improper communication had occurred between any member of the jury and any member of the government prosecution team.

Special Agent Keith Baker was interviewed regarding the allegations that improper communications with the jurors had occurred during the trial of *U.S. v. Siegelman*. Agent Baker denied that any written or verbal communications had occurred between the jurors and the government trial team. He volunteered that this rumor may have started when a member of the court clerk's office joked during a break in the trial that "the jurors want to know if you're married." He stated that this one comment was all that ever occurred. He did not know the source of the comment and no communication was ever sent back to the jury. He stated that it was a joke and may have had no factual basis in any actual statement by a juror. Agent Baker stated:

⁴The Supreme Court has held that a trial court can rely upon its own evaluation of alleged biased jurors in determining actual juror bias. *Smith v. Phillips*, 455 U.S. 209, 217 n. 7 (1982).

I never had any conversation with any jurors, I never wrote any notes to any jurors, I never received any notes from any jurors, and I never had any contact with any jurors. Since the trial, to this date, I've never spoken to a juror. So . . . I don't know how to answer that one other than that.

See Appendix R, Interview of Baker, pp. 11-12.

Ms. Debbie Shaw was also interviewed regarding the allegations that improper communications with the jurors had taken place. Ms. Shaw is the criminal division supervisory legal assistant. She was a member of the *U.S. v. Siegelman* trial team and was present during the entire trial. She was asked if any written or verbal communications ever occurred during the trial between the jury and the government trial team. She denied that such communications ever occurred. However, she did recall a single instance when a member of the Court Clerk's office came from the trial gallery and "punched him [Agent Baker] in the arm and said, 'I heard some of the jurors talking, they think you're cute, they were wondering if you were married.'" See Appendix U, Interview of Shaw, p. 5.

Ms. Shaw stated that Agent Baker "turned beet red" and did not send any message back to the jury. In fact, she expressed that she was not confident that any juror actually made the comment. Ms. Shaw stated that the member of the Court Clerk's office did not identify the jury members who allegedly made the comment.

Ms. Shaw was asked if it was possible that the prosecutors were unaware of this joking exchange between the member of the Court Clerk's office and Agent Baker. She answered that it was possible they did not know about this incident. In fact, she stated that the conversation regarding the incident was short lived and likely unknown to the prosecutors. See Appendix U, Interview of Shaw, pp. 11-13.

On June 28, 2008, Vallie Byrdsong was interviewed about the allegations of jury misconduct and his role in communicating the story to Ms. Grimes. Mr. Byrdsong is an independent contractor who was employed by the government to provide both paralegal and technical services in the *U.S. v. Siegelman* trial. Mr. Byrdsong sat at the prosecution table during the trial. Mr. Byrdsong was asked if he was aware of a message being passed between the jury and the government trial team. He stated that he was unaware of any such communication and was of the opinion that no such exchange occurred.

Mr. Byrdsong stated that he was aware of a single instance when Agent Baker was teased by a member of the Court Clerk's office. He stated that he understood that the only trial team member who was present when this teasing of Agent Baker occurred was Debbie

Shaw. He was not present when the exchange occurred. However, Mr. Byrdsong made the following statements:

Q. Did you ever relate to Ms. Grimes this one occasion that you heard about, that some juror might have thought that Mr. Baker was cute, did you tell Ms. Grimes that story?

A. Yes, I'm sure I did at some point.

Q. What would you have said to her?

A. Honestly, I don't remember the information. But I would have played it up for great amusement; because she was friends with Baker, so she would have appreciated the story. I would have told her-- I probably would have played it up even more than it actually was, just for the amusement factor.

Q. Just to make sure it's clear, you never even heard this conversation occur - any kind of conversation between Baker and someone saying that the jurors thought he was cute?

A. No. Yes. I heard about it later in the context of teasing of Mr. Baker.

Q. And probably from Ms. Shaw?

A. I think that is correct.

.....

Q. You would have puffed it a little bit just for the amusement value of the story?

A. I would say that's right.

Q. Did you ever talk to Ms. Grimes, have a conversation with her, in which it was discussed whether the conduct of the jurors should be reported to the judge?

A. No.

Q. Do you believe that there was any conduct in the trial of any kind that was misconduct by any member of the prosecution team?

A. No.

See Appendix S, Interview of Byrdsong, pp. 23-27.

b. Summary of Findings

There is no evidence to support the allegation that prosecutors in *U.S. v. Siegelman* committed a violation of law, rule, or regulation. A review of the evidence demonstrates that there was no improper external contact between jurors and prosecutors, and the jury was not exposed to any external influence.

At most, the evidence could suggest that during jury sequestration, a comment was made by one juror to another juror regarding the personal attractiveness of an FBI Agent. Such a conversation, if it occurred, between members of the jury is an **internal contact** and as such is not presumptively prejudicial. Prejudice must be determined based upon the express content of such conversations. For example, in *State v. Cruz*, 122 P.3d 543 (Utah 2005), defense counsel overheard two jurors speculating as to why they had been selected to sit on the case. The reviewing courts stated that simple speculation as to why a juror had been selected for service does not suggest bias, nor does it suggest that the jurors were improperly discussing the case.

In this instance, the reported juror conversation was at most a prosaic *ex parte* or *de minimus* discussion between members of the jury, and even if it occurred, does not trigger a presumption of prejudice. The comment regarding the appearance of an FBI agent does not tend to demonstrate jury bias of any jury member or reveal an opinion of any juror regarding the guilt or innocence of any defendant. The comment, if it occurred, did not reflect the receipt of information by any jury member of evidence that was not presented in the courtroom.

Because a presumption of prejudice does not arise from such a set of circumstances, the law would not require mandatory disclosure of this reported jury discussion to the court. Simply stated, an evidentiary hearing is not mandated every time there is an allegation of prosaic *de minimus* discussions between members of the jury which occur prior to the case being submitted for deliberation. In summary, Ms. Grimes' allegations have little basis in fact but, as rumors frequently do, grew from humble factual beginnings into unrecognizable detailed and distorted factual form.

Issue Two: Whether management officials in the MDAL committed gross mismanagement, or a gross waste of funds, by allegedly causing the government to incur unnecessarily the salary, per diem, and travel expenses for a contract employee who was hired to assist in the trial of *U.S. v. Siegelman*.

a. Investigative Findings

The April 28, 2008 letter from the Special Counsel states that certain allegations of Ms. Grimes provide sufficient factual basis to determine that there is a substantial likelihood that management officials in the MDAL committed gross mismanagement, or a gross waste of funds, by allegedly causing the government to incur unnecessarily the salary, per diem, and travel expenses for a contract employee who was hired to assist in the trial of *U.S. v. Siegelman*. The specific factual allegations are that between October 2002 and June 2007, the government hired independent contractor Vallie Byrdsong to provide litigation services when “3-4 employees” could have provided similar services at no additional cost to the government.

The criminal investigation from which the *Siegelman* case arose began in 2001. In that year, the MDAL and the State of Alabama Attorney General’s Office began pursuing multiple federal public corruption matters. In 2002, the investigation team grew to include seven FBI agents, three IRS agents, three state investigators, three state prosecutors, and four federal prosecutors. The evidence consisted of nearly one million documents. Due to the massive scope of the investigation, the FBI contracted with Maxwell Air Force Base for a 4,000 square foot off-site facility to house the investigative team and provide for centralized storage of evidence. The MDAL found itself without sufficient computer equipment or support personnel to support an effort of such magnitude.

In March 2002, the MDAL requested \$295,000 from EOUSA for equipment and litigation support in the *Siegelman* criminal matter.⁵ In that initial request, the United States Attorney stated that the USAO’s office was “understaffed,” “unable to handle this type of full-time project,” and that the litigation budget of the office was insufficient to meet the equipment and litigation support needs. See Appendix N, p. N-01. EOUSA began a review of the request for additional funding.

⁵File names associated with this litigation included *U.S. v. Lanny Young*; *U.S. v. David Green*; and *U.S. v. Curtis*. For simplification, all associated cases will be referred to herein as *U.S. v. Siegelman*.

In May 2002, the USAO provided additional information to EOUSA regarding the need for additional funding and the need for additional litigation support staffing. *See* Appendix N, p. N-06.

By June 2002, the *Siegelman* matter had become a joint investigation of the Public Integrity Section of the Department of Justice and the MDAL. On June 11, 2002, the Public Integrity Section joined in the request to EOUSA for additional funding. In documents submitted to justify this additional funding request, it was again stated that the MDAL was “substantially understaffed and does not have the resources to handle this litigation.” The office also was expending significant amounts of its budget in overtime to handle the litigation needs of *Siegelman*. *See* Appendix N, p. N-12.

In August 2002, the USAO provided EOUSA a statement of work for contract personnel that would be hired to assist the *Siegelman* litigation. The stated need for contract support included both information technology services and legal analysis services. *See* Appendix N, p. N-15. After full review of the need for litigation support services, EOUSA approved \$99,990 for additional contract personnel. The approval for additional litigation support by contract personnel was approved only through March 15, 2003. *See* Appendix N, p. N-20.

In August 2002, Mr. Vallie Byrdsong was one of two contractors hired to perform support services for the *Siegelman* investigation. The April 28, 2008 letter from the OSC seems to imply that Mr. Byrdsong may not have been fully qualified to provide litigation support services.⁶ However, the investigation concluded that Mr. Byrdsong was very qualified to perform information technology and data management services. Prior to Mr. Byrdsong’s service to the United States, he earned a double undergraduate degree from the University of Maryland, College Park, Maryland. One degree is a Bachelor of Arts in Economics and one degree is a Bachelor of Arts in Government and Politics. His overall undergraduate GPA was 3.4. His collegiate training included 34 hours of math and computer science and 33 hours of accounting, business, and law. Prior to his service to the United States, Mr. Byrdsong became proficient in computer languages C/C++ and Visual Basic. He also is proficient in multiple business and law computer programs. *See* Appendix N, Resume

⁶The OSC letter states, “Mr. Byrdsong, who was not an attorney and was pursuing his college degree online, worked on the *Siegelman* case until its conclusion.” *See* Appendix A, p. A-2. Although the import of this statement is unclear, it may indicate that the OSC is under the impression that Mr. Byrdsong did not have sufficient education to provide support to the government during the *Siegelman* litigation.

of Byrdsong, pp. N-17-18. While employed to assist in the Siegelman case, Mr. Byrdsong also was working on his Masters Degree. See Appendix S, Interview of Byrdsong, p. 7.

Ms. Grimes alleges that by October 2002, the MDAL had sufficient staff to do the *Siegelman* investigative support work when it hired legal assistant Janie Crooks. See Appendix T, Interview of Grimes, pp. 36-38. Ms. Crooks was hired to serve as the legal assistant to the Law Enforcement Coordinator and First Assistant United States Attorney. The *Official Written Reply* submitted by the MDAL described her duties as follows:

She was charged with assisting the Law Enforcement Coordinator in organizing and carrying out training and conferences, notifying and registering attendees, and maintaining records regarding conference attendance and other matters. She also served as a back up to the Victim Witness Coordinator and as a back up secretary to the U.S. Attorney, and provided administrative support to the Administrative Division. In addition, Ms. Crooks was the legal assistant for the First Assistant U.S. Attorney. Ms. Crooks, a legal assistant, did not possess the necessary skills to perform the functions assigned to the contract employee. Nonetheless, Ms. Crooks could never have performed the necessary functions of her job while at the offsite, and the USAO would have suffered as a consequence.

See Appendix K, p. K-09.

Ms. Grimes also alleges that the USAO had the available services of criminal division legal assistant Natalie Seagers in October 2002.⁷ The criminal division had 12 AUSAs, four support staff, and one paralegal. Each legal assistant was responsible for three AUSAs. If Ms. Seagers had been assigned to fill one of the two contract support positions, the remaining legal assistants would have had to support at least four AUSAs doing the regular criminal litigation of the office. To reduce criminal litigation support during this period would have been problematic. According to the published *U.S. Attorneys' Annual Statistical Reports*, case loads for the criminal division were growing during this period.⁸

⁷Ms. Grimes also alleges that she was available to do this support work for the office. However, Ms. Grimes did not join the USAO until April 2003 and her availability for service in the *Siegelman* case, if any, was actually much later in the contract period.

⁸Fiscal year 2000 - 220 matters opened; Fiscal year 2001 - 243 matters opened; Fiscal year 2002 - 273 matters opened; Fiscal year 2003 - 347 matters opened; Fiscal year 2004 - 363 matters opened.

The *Official Written Reply* submitted by the MDAL correctly states the facts as they apply to the contention that the United States Attorney's office had adequate staff to provide litigation support services to the *Siegelman* case. It stated:

The USAO was and remains a small office. It was understaffed and unable to handle the full-time project of scanning and digitizing the million or more pages of documents, particularly at an offsite location. It could not afford to reassign one of the four criminal legal assistants to the full-time project, as doing so would hinder the ability of the Criminal Division to adequately attend to the daily needs of the other criminal AUSAs and to insure that other pending cases of the district were appropriately staffed. Each member of the support staff was responsible for supporting three AUSAs and had other collateral duties associated with the day-to-day operations of the office. The investigation extended for more than three years. Even if support staff could have assisted on the project on a short term basis, they could not have been spared from the USAO for a period of several years, as would have been required. Also, the district's budget would not allow the district to hire and independently fund the litigation support needed to insure that the high profile, document intensive public corruption case was adequately staffed.

See Appendix K, p. K-06.

During the interview of Ms. Debbie Shaw, the criminal division supervisory legal assistant, she was asked her opinion of this allegation. She stated:

A. I've been here almost twenty-six years. I couldn't have come close to doing what Vallie did. There were nights he slept at that God-awful off-site. There was nobody else that could have done it. There's no way.

Q. So you don't think there's anyone else in your office that could have provided the service he provided?

A. Not in the way Vallie provided it, no.

Q. How would you describe the technical expertise of your support staff in your office?

A. . . . It was me, and we had, if I remember three other legal assistants. One has been here since 1989. And they all had three AUSAs that they worked for. None

of them had the kind of computer and technological knowledge Vallie did. We just have never used it in this district. There's nobody that could have done it.

Even if there were, and you had taken one of the legal assistants out there to try to do what Vallie did, then our office would have suffered, because at that time, we all had three AUSAs that we worked for, because the office kept right on going during the trial. Grand jury was still meeting, other cases were still being indicted, we were going to trial. There's no way we could have done it.

See Appendix U, Interview of Shaw, pp. 18-19.

On February 25, 2003, prior to the expiration of authorization for contractor litigation support, the USAO and DOJ Public Integrity Section requested an extension of the contract and sought an additional \$75,000. The request stated that the USAO was experiencing an increase in the criminal case load and a significant increase in civil litigation. See Appendix N, p. N-21. After review of the request and its supporting documentation, EOUSA granted additional funding in the amount of \$75,000.

In July 2003, the USAO requested an additional \$20,750 to cover the expense of contract litigation support through September 2003. The request stated that the circumstances of the criminal case had changed. Prior to this date, the case was expected to be resolved by September 2003. However, due to the successful prosecution of several lower level defendants, the case was expanding to higher level individuals and would require additional litigation support. See Appendix N, p. N-22.

On October 23, 2003, the USAO requested additional funding from EOUSA for the *Siegelman* case. The request stated, "the continued services of the two Aspen support staff, Vallie Birdsong⁹ and Lisa Copeland are indispensable, as they have written programs and organized and devised sophisticated management skills that are necessary to proceed with the investigation in this case. The investigation would be impossible without these valued individuals." See Appendix N, p. N-25. This request was approved and funded through September 2004.

By September 2004, the USAO reduced the supplemental contract litigation support requirement for assistance in the *Siegelman* litigation from two contractors (one IT contractor and one Paralegal contractor) to only one position (a combined IT/Document Management

⁹ Paperwork submitted by the District to EOUSA frequently referred to Vallie Byrdsong, as "Vallie Birdsong."

position). In its September 2004 request for additional funding from EOUSA for the *Siegelman* case, the MDAL stated:

To date, MDAL, with the assistance of the other named agencies and Aspen's contract support staff, has amassed an enormous amount of evidence. Although the attorneys handling this investigation and prosecution have changed, the Aspen contract support staff has remained the same. Therefore, the Aspen support staff, namely Vallie Birdsong has created over 80,000 computer files and he is the only member of the investigative/prosecution team who knows the location and contents of these files. It would not be prudent to try and replace Mr. Birdsong with someone who would have to spend an unthinkable amount of time becoming acquainted with the existing computer files and the programs created by Mr. Birdsong to access them. In light of Mr. Birdsong's experience with and knowledge of the instant case, MDAL believes it cannot go forward without the assistance of Mr. Birdsong.

MDAL is a small office. The criminal division has eleven AUSAs, a division chief, four support staff (legal assistants and/or paralegal assistant) and one paralegal specialist. Each support staff is responsible for three AUSAs and other collateral duties associated with the day-to-day operations of the office. Although we have assigned one support staff person to work on the investigation part-time, we do not have the resources to devote a support person to work on this case full time, i.e., learn the contents of the computer files and how to access the same.

See Appendix N, p. N-49.

The office requested \$256,000. EOUSA funded only \$53,200 and requested that the office resubmit a new request in January 2005. In January 2005, the USAO again submitted a request for additional funding. It was anticipated that the *Siegelman* matter would require an additional \$91,000. However, the entire litigation budget for the USAO for the entire year, for all cases, was only \$80,000. The office stated:

Mr. Birdsong is a very skilled professional whose services are greatly in demand. We have been told by EOUSA/Facilities Management and Aspen that if we lose funding for Mr. Birdsong at any time, he will be immediately placed on another project for Aspen. Mr. Birdsong's expertise in support of this case is critical to the continued investigation and potential indictment, trial preparation and trial of this case. . . . The AUSAs who are working this case have expressed grave concern about their ability to adequately prepare without having Mr. Birdsong available to manage and retrieve information from the extensive database of files

and documents that he has created. He is the only member of the investigative and prosecution team who has been involved since the beginning of the case. He alone possesses the knowledge of the information gathered from the inception of the investigation to the current time. He has created and maintained a very large and complex database which has over 80,000 computer files and is the only member of the team who knows the location and content of the files.

If the additional funds requested are not approved, this high-profile Public Corruption/RICO case will not be able to be brought to a successful completion.

See Appendix N, p. N-55.

Over the next several months, EOUSA approved short term requests for additional funding.

On April 6, 2005, Ms. Grimes was assigned to help on the *Siegelman* matter on a part-time basis. Although she was assigned to help with the case, she also was required to continue to maintain a civil support case load. *See* Appendix G.

Ms. Grimes alleges that she was available to replace some, if not all, of Mr. Byrdsong's duties in the *Siegelman* case for the last 15 months of the contract period.¹⁰ However, during this period her personnel record indicates that she was significantly engaged as a civil paralegal for the MDAL. For example, in September 2006, she received a Special Act Award for her efforts during the preceding months in government fraud and reverse discrimination cases. Her training file also indicates that during this 15 month period she attended, or participated as an instructor, in six weeks of DOJ training.

Perhaps the most compelling evidence of her significant engagement as a civil paralegal is her promotion from a GS-11 Paralegal Specialist to GS-12 Paralegal Specialist in June 2005. This promotion was based on her performance of additional and more complex civil paralegal duties than could be performed by a GS-11 paralegal. *See* Appendix E. Also, according to the published *U.S. Attorneys' Annual Statistical Reports*, case loads for the civil

¹⁰ Similarly, it was alleged that Ms. Glenna Ryals was available to assist in a litigation support role. However, Ms. Ryals was one of only two legal assistants assigned to the civil division. She resigned from the office in December 2004, and would not have been available for reassignment during the fifteen months of the litigation support contract.

division were growing during his period.¹¹ During this time period of growing civil caseloads, Ms. Grimes certified that she worked significant amounts of overtime. Her time sheets reflect that she worked more than 65 overtime hours in calendar year 2006.¹²

An additional consideration is the ability to transfer the litigation support duties from contract personnel to MDAL employees. To do so would require that the employee spend a substantial amount of time becoming fully familiar with the massive historical records and database which had been compiled over the previous two years. The database at this point in time already contained several million pages of documents.

The contract for litigation support services was closed shortly after the conclusion of the *Siegelman* trial in July 2006. The litigation support funding for the investigation and trial during the entire four-year contract period was approximately \$532,000. This cost reflects the salaries and associated expenses of one individual for two years and another individual for the entire contract period.

b. Summary of Findings

The Special Counsel requested a review of the expenditures for contract litigation support in the *Siegelman* case to determine if there was evidence of gross mismanagement or a gross waste of funds. There is no evidence to support the allegation that MDAL officials committed gross mismanagement, or a gross waste of funds, by allegedly causing the government to incur unnecessarily the salary, per diem, and travel expenses for a contract employee who was hired to assist in the trial of *U.S. v. Siegelman*. The legal standard for such an inquiry is whether the expenditure created a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission or a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. A review of the contract file and other evidence in this case does not support such a finding. In fact, the record evidence supports a contrary finding.

In this instance, the litigation support contract was reviewed carefully by EOUSA at regular intervals. It is also apparent that the MDAL monitored the requirements during the contract period. For example, after two years of the development of document management

¹¹ Fiscal year 2004 - 381 civil matters opened; Fiscal year 2005 - 445 civil matters opened.

¹² The *Official Written Reply* submitted by the MDAL accurately reported that Ms. Grimes' overtime records reflected that 54 overtime hours were expended during the months immediately preceding the start of the criminal trial. See Appendix K, p. K-08.

systems, the contract requirements were reduced by fifty percent. There is also ample evidence that the litigation and personnel budget of the USAO was limited during the relevant time period. The use of contract personnel created no adverse impact on the mission of the USAO. Indeed, the use of contract personnel seemed to have allowed the more effective use of district assets which resulted in increased criminal and civil enforcement of mission priorities as reflected by the MDAL statistical reports. Thus, the evidence demonstrates that the USAO properly expended funds with regard to the hiring of the contract employee at issue.

Issue Three: Whether management officials in the MDAL committed a violation of law, rule, or regulation when they allegedly improperly used victim impact funds to pay for a federal contractor's transportation and per diem expenses to attend the sentencing of defendants in *U.S. v. Siegelman*.

a. Investigative Findings

Between September 2002 and July 2006, the United States contracted for the services of Mr. Vallie Byrdson in a litigation support role in the *U.S. v. Siegelman* case. Following the jury verdict finding Defendants Siegelman and Scrushy guilty of bribery, conspiracy, mail fraud, and obstruction of justice, Mr. Byrdson left Alabama.

About a year later, in June 2007, the week-long sentencing phase of the *U.S. v. Siegelman* case began. Mr. Byrdson was no longer serving in a litigation support role in the *Siegelman* case, and the contract with his employer had expired. However, federal prosecutors required the testimony of Mr. Byrdson during the sentencing phase and issued a subpoena compelling his attendance. Ms. Shaw described the need for his testimony as follows:

Q. Did Vallie Byrdson return for the sentencing?

A. He did.

Q. Why did he return for the sentencing? What occurred there?

A. This was a difficult case. A lot of things happened that never happened in other trials. We didn't have any idea what the defense would try to do. Vallie is the only one who knew a lot of the things. Vallie is the only one who knew those exhibits. And we are talking at least a million documents. . . . for all we know, the defense could have said: "I have never seen that. I have never seen it." Vallie would have been able to tell them exactly what they had, when they got it, when

we sent it to them. We had to have Vallie there. They could have called witnesses. We didn't know what they were going to do. We had to have Vallie there.

Q. Was he subpoenaed to attend the sentencing?

A. He was.

See Appendix U, Interview of Shaw, pp. 19-20.

Ms. Grimes alleges that the fees associated with the payment of this subpoenaed witness were improperly paid by the Victim Witness unit of the MDAL. It is important to note that Ms. Grimes has no direct knowledge of the purpose of Mr. Byrdsong's attendance at the sentencing. She stated during her interview:

Q. Did you have conversations with anyone else about-- about how he was brought to the sentencing, for the sentencing, how he was paid-- if he was paid, or anything like that?

A. No, I did not.

Q. Did you see any documentation related to that?

A. No I did not. Let me take that back. I did mention it to Retta Goss, the AO [Administrative Officer] here. I did mention to her that-- that I was upset that they would have this big party and invite Vallie and fly him in from DC and not even give me an invitation after I had worked so hard on the case. I did say that to her.

Q. Do you know if Vallie was ever paid or reimbursed - do you know whether Vallie was ever paid or whether his expenses were reimbursed for coming to the Siegelman sentencing?

A. I don't know.

See Appendix T, Interview of Grimes, pp. 50-51.

The Fees and Expenses of Witnesses (FEW) is a special appropriation by Congress and is the source of funding for witnesses appearing in court on behalf of the Department of Justice. Although the appropriation is to the Department of Justice, the United States

Marshals Service (USMS) provides accounting services and disburses payments of fact witness expenses and fees.

Appearance fees and travel expenses related to a fact witness' attendance at court are paid from the FEW appropriation and disbursements to the witness are established through statute. 28 U.S.C. § 1821 contains the basic fees and allowances for fact witnesses. 28 C.F.R. Part 21 contains the implementing regulations for § 1821. Frequently, fact witnesses incur expenses over and above the fees and allowances permitted by statute. These are referred to as "Unusual Expenses of Fact Witnesses." 28 U.S.C. § 524 and 530C contain the authority to incur and reimburse unusual expenses of witnesses. Such unusual expenses are frequently granted in instances where the case is complex, where there are voluminous documents, or where there are an unusually large number of witnesses. *See also* USAP 3-19.000.004.

Form OBD-3, "Fact Witness Voucher," is used to attest the attendance of the fact witness, compute the entitlement, and certify and disburse the fact witness fees and allowances. When the witness' attendance is no longer required, the appropriate expenses are recorded and the claim is verified. The OBD-3 is then submitted to the U.S. Marshal's office for payment.

In most United States Attorneys' Offices, the Victim-Witness staff is in charge of the OBD-3 process and is responsible for submission of the form to the Marshal's office. The Victim-Witness Coordinator/Specialist maintains a master file for OBD-3s submitted to the Marshal's office and these files are normally maintained for several years.

In this case, a search was made for the witness payment records. Ms. Debbie Shaw made the search for the records and reported:

Q. Do you know whether he was reimbursed for his expenses for coming to the sentencing?

A. He was not. It hit me, I don't know, a month or two after the sentencing was over, that Vallie never filled out the paperwork to get an OBD-3 done. I never saw a copy of his OBD-3 come back to the office. There were several times that I thought: "I need to stop and ask Vallie." I felt bad, did he have to pay for it out of his pocket. At some point, I talked to Vallie and said, "Vallie, did you ever do the paperwork to get reimbursed?" He said, "No. My company went on to pay me, so he didn't put in to get reimbursed for it."

. . . We have a victim witness coordinator and she does most of them [OBD-3s]. But on the night, when the sentencing was over, that Thursday night, I think it was about 8:00 or so by the time we got finished, and she was not here. In cases like that, where she is already gone and the legal assistant is here, we have just a little form that we made up in our office. And we fill it out and get the receipts and we give it to her to do the OBD-3. And Vallie never gave me all of his stuff and I never gave it to her to do the OBD-3. I even checked on the OBD-3s just to make sure and I called the Marshal's office to make sure he didn't get reimbursed.

Q. What did the Marshals tell you?

A. I think the last time they paid a Byrdsong was in 1992.

Q. Did you also check with your Victim Witness Coordinator to see if he turned in the voucher through them?

A. I did and he had not.

See Appendix U, Interview of Shaw, pp. 22 -23.

Mr. Byrdsong confirmed the fact that he never received funds from the United States for attending the sentencing in *Siegelman*. He stated:

Q. Following the sentencing, you know the procedure about how to be reimbursed as a federal witness?

A. Yes.

Q. . . . Knowing that procedure, how did you go about getting paid for your time as a witness when you were subpoenaed for the sentencing of the Siegelman trial?

A. Unfortunately, I am sort of known for being bad with reimbursement and getting receipts in. In this case, I didn't do it right off the bat at the time. I kind of waited awhile, let some weeks roll by. I eventually just decided that Alabama had been good to me, it was an important case for me, and I had a lot of respect and liked the people there and I just figured I would let it slide.

See Appendix S, Interview of Byrdsong, p. 31.

b. Summary of Findings

There is no evidence to support a finding that management officials in the MDAL committed a violation of law, rule, or regulation when they allegedly improperly used victim impact funds to pay for a federal contractor's transportation and per diem expenses to attend the sentencing of defendants in *U.S. v. Siegelman*. To the contrary, it is clear from review of the records that the procedure used by the MDAL to obtain the testimony of Mr. Byrdsong for the sentencing portion of the *Siegelman* case was proper. Moreover, although no government funds were used to pay for Mr. Byrdsong's expenses, it would have been proper to use the Fees and Expenses of Witnesses (FEW) special appropriation funds to pay for his transportation and per diem expenses to attend the sentencing of defendants in *U.S. v. Siegelman*.

Issue Four: Whether management officials in the MDAL committed an abuse of authority when they allegedly obstructed an investigation by the Department of Justice's Office of Professional Responsibility.

a. Investigative Findings

On May 24, 2004, Patricia A. Watson, acting Civil Chief MDAL,¹³ had a meeting with civil AUSA R. Randolph Neeley regarding certain performance issues. See Appendix O, p. O-01. The conduct included AUSA Neeley's alleged failure to file documents in two cases, and the withdrawal of a bill of costs without authorization in a third case. *Id.* During the meeting, AUSA Neeley was informed that the USAO was conducting an investigation into these matters so that "we may determine what action, if any, should be taken." *Id.*

United States Attorney Leura Canary (USA Canary) advised FAUSA Watson to work with EOUSA's General Counsel's Office regarding what action to take regarding AUSA Neeley. See Appendix K, pp. K-11-12. FAUSA Watson contacted the General Counsel's Office about the performance issues, and she was advised to inform the Office of Professional Responsibility about the conduct. *Id.* at p. K-12. In August 2004, pursuant to 28 C.F.R. § 45.12 and Section 1-4.100(A) of the United States Attorneys' Manual,

¹³Patricia Watson was the Civil Chief during the conduct at issue in the meeting. She became Civil Chief in January 2004. In April 2004, she also became the First Assistant United States Attorney. She held both titles until June 2004 when a new Civil Chief was appointed. In this report she is referred to by each of these titles depending on the role at the time of the factual event. Ms. Watson also married during the course of the various events referred by OSC. Her name in 2004 was Patricia Snyder. For purposes of this report she is consistently referred to as Patricia Watson.

management officials in the MDAL informed OPR of the three performance issues. *Id.*; see also Appendix O, pp. O-05-07.

On October 12, 2004, OPR issued a letter to the United States Attorney informing the office that it was initiating an investigation into the circumstances of the performance of AUSA Neeley in these three civil cases. See Appendix O, pp. O-08-09. The letter outlined the procedures OPR used in the investigation and provided general information regarding OPR. *Id.* at pp. O-10-15.

The lead investigator for the OPR investigation was Assistant Counsel Frederick Leiner. See Appendix P, p. P-01. He contacted FAUSA Watson and asked for the names of potential witnesses. See Appendix K, p. K-13. FAUSA Watson provided Mr. Leiner with the names of all the individuals who worked with AUSA Neeley and who might have information regarding the three civil cases. *Id.* FAUSA Watson provided the Department's investigators in this matter a contemporaneous note from March 2005, listing the names of the individuals she orally provided to Mr. Leiner as possible witnesses. See Appendix O, p. O-17. The witnesses included the following individuals: Tami Grimes - paralegal, AUSA Neeley, Ann Williams - legal assistant, Glenna Ryals- legal assistant, former AUSA Kenneth Vines, Civil Chief Stephen Doyle, and herself. *Id.*¹⁴

Mr. Leiner does not specifically recall how he decided what witnesses to interview. See Appendix P, p. P-01. However, his practice, which he believes was followed in this case, was to derive the witnesses to be interviewed from the information and documents provided by the district. *Id.* Mr. Leiner stated that OPR alone determines who it will interview. *Id.* Any suggestion that officials of the MDAL "vetoed any witness from being interviewed is preposterous." *Id.* Once it was determined who OPR would interview, management officials in the MDAL were asked to arrange the interviews. *Id.* Mr. Leiner believes all the witnesses he wanted to interview were in fact interviewed. *Id.*

Ms. Grimes alleges that she originally was on the witness list for OPR to interview but management officials in the MDAL removed her name the day before OPR came to the USAO because if asked she would inform OPR of the following:

- AUSA Neeley was arrested for public intoxication while on government business in California; and

¹⁴ The individuals actually interviewed by OPR were AUSA Neeley, Former AUSA Vines, Civil Chief Doyle, Legal Assistant Williams and FAUSA Watson.

- AUSA Neeley “lunged” at Ms. Watson during a counseling session.

See Appendix T, Interview of Grimes, p. 54, lines 15-22.

Ms. Grimes alleges that USA Canary did not want OPR to know about these two incidents because she had a “soft spot” for AUSA Neeley.¹⁵ *Id.* at p.55, lines 15-18.

The evidence does not support Ms. Grimes’ allegations. According to both FAUSA Watson and Mr. Leiner, the individuals interviewed by OPR were chosen by OPR. The MDAL did not have the authority to remove an individual from the interview list but is required to schedule interviews as directed by OPR. OPR policies and procedures provide that the complainant, witnesses identified by the complainant, and witnesses identified by OPR are interviewed during an investigation. See Appendix O, pp. O-12-13.

Ms. Grimes was not chosen by OPR to be interviewed and was never a scheduled witness. She was not removed from the OPR witness list on the day before OPR conducted its on-site visit, or at any other time. This statement is supported by an April 29, 2005 email from Mr. Leiner to FAUSA Watson:

I received your phone message from last night confirming that you have been able to arrange the interviews on May 4 and 5. Along the lines of our discussion, I hope the interviews with you, Steve Doyle, and Annie Williams will be on the afternoon of the 4th, and Rand Neeley’s will be on the morning of the 5th.

For internal purposes here at OPR, and so that I can arrange for the court reporter, would you please let me know the times you scheduled for each interview, and where Neeley’s interview will be. Thanks.

Id. at O-21. Accordingly, there is no evidence to support the charge that Ms. Grimes’ name was ever on or removed from the OPR witness list.

¹⁵Ms. Grimes alleges that management officials in the MDAL removed her name from the witness list for the OPR investigation. Ms. Grimes, however, never saw a witness list related to the OPR investigation. See Appendix T, Interview of Grimes, p. 55, lines 22 -23. Ms. Grimes also states that to her knowledge OPR has never been informed of the intoxication and lunging incidents, but she is unaware of what information OPR collected during its investigation. *Id.* at p. 62, lines 13-18; p. 64, lines 2-4.

However, Ms. Grimes' allegation that information may have been intentionally hidden from OPR investigators is a serious one if such information was material to the investigation.¹⁶ It was not. According to Mr. Leiner and Associate Counsel William J. Birney, AUSA Neeley's arrest for public intoxication and the alleged "lunging" incident had no bearing on whether he committed professional misconduct by failing to file documents in two of his cases or waiving a bill of costs without authorization in a third case. *See* Appendix P, pp. P-01-02. Thus, assuming that the information Ms. Grimes would have provided was kept from OPR, this information was not material in determining whether AUSA Neeley committed professional misconduct in his litigation of the three cases. *Id.*

Ms. Grimes also alleges that management officials in the MDAL removed her from the witness list because USA Canary had a "soft spot" for AUSA Neeley. FAUSA Watson states, however, that her observations were that USA Canary has never shown favoritism or bias toward any employee of the MDAL. *See* Appendix K, p. K-14. FAUSA Watson's observations appear confirmed by an August 11, 2004 email from FAUSA Watson to Josh Eaton, GCO, regarding a proposed reprimand of AUSA Neeley. The email stated, "Ms. Canary had a question about this draft reprimand. If OPR does not discipline on something we send up to them, but we think that it warrants discipline, can we later revise the written reprimand to address that conduct as well?" *See* Appendix O, p. O-19.

The events leading up to the referral to OPR also indicate that management officials in the MDAL did not hesitate to take action regarding the conduct of AUSA Neeley. AUSA Neeley was confronted directly with the allegations and informed that the office was investigating his conduct. In August 2004, it was management officials in the MDAL that submitted the information which led to the OPR investigation.

Mr. Leiner's statement also indicates that AUSA Neeley was not shown favoritism. In fact, Mr. Leiner had the impression that the MDAL, including USA Canary, viewed AUSA Neeley's conduct as serious and felt that he should be strongly disciplined. *See* Appendix P, p. P-01. Although the contact person at the MDAL was FAUSA Watson, Mr. Leiner felt that FAUSA Watson was working hand-in-hand with USA Canary on the matter and that she supported FAUSA Watson regarding the investigation. *Id.* Mr. Leiner did not perceive that management officials of the MDAL were trying to protect AUSA Neeley. *Id.*

¹⁶"OPR has jurisdiction to investigate allegations of misconduct by Department of Justice attorneys, investigators, and law enforcement personnel that relate to the exercise of an attorney's authority to investigate, litigate, or provide legal advice." *Id.* at O-10.

According to Mr. Leiner, management officials of the MDAL were cooperative during the investigation. *Id.* The investigators were able to gather all the material information they needed to make a determination regarding AUSA Neeley's conduct. *Id.* at pp. P-01-02.

b. Summary of Findings

There is no evidence to support the allegation that management officials in the MDAL abused their authority. An abuse of authority by a federal official or employee is the "arbitrary or capricious exercise of power" that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons. *Doyle v. Department of Veterans Affairs*, 2008 WL 1712316 (Fed. Cir. 2008); *Embree v. Department of the Treasury*, 70 M.S.P.R. 79, 85 (1996). Here, the record reveals that OPR was not obstructed in any way from gathering all the material information it needed to determine whether AUSA Neeley had engaged in professional misconduct in the three cases. OPR received all the documentation related to the cases and alone decided whom to interview.

Issue Five: Whether management officials in the MDAL committed a violation of law, rule, or regulation, or an abuse of authority, when they allegedly improperly initiated a criminal investigation of paralegal Tamarah Grimes in retaliation for participation in protected activity.

a. Investigative Findings

In approximately July 2007, Ms. Grimes filed an Equal Employment Opportunity (EEO) complaint against officials in the MDAL. See Appendix Q, p. Q-005. The EEO complaint included allegations that Ms. Grimes had been subjected to demeaning remarks of a sexually offensive and discriminatory nature while working on the *Siegelman* case. *Id.*

In an attempt to resolve the complaint, the parties engaged in a mediation which took place from November 1-2, 2007. USA Canary and FAUSA Watson participated in the mediation on behalf of the MDAL. AUSA Frederick Menner represented the Executive Office for United States Attorneys and Sharon Stokes, Deputy Chief of the Civil Division in the U.S. Attorney's Office in the Northern District of Georgia, served as the mediator. *Id.*

The mediation began with the parties meeting together and making opening comments. *Id.* After this session, the parties met separately with Mediator Stokes. *Id.* At one point during the mediation, Mediator Stokes informed USA Canary, FAUSA Watson, and AUSA Menner that Ms. Grimes felt that they did not believe her claims that a hostile work environment existed at the off-site where work on the *Siegelman* case was being conducted. *Id.* at Exh. 2, affidavit of USA Canary, p. Q-022; Exh. 1, affidavit of FAUSA Watson, p.

Q-014; Exh. 4, affidavit of AUSA Menner, p. Q-034. USA Canary, FAUSA Watson, and AUSA Menner told Mediator Stokes that they did not believe Ms. Grimes. *Id.* AUSA Menner requested that Mediator Stokes ask Ms. Grimes who else “heard the alleged inappropriate remarks.” *Id.* at Exh. 4, affidavit of AUSA Menner, p. Q-034.

According to Mediator Stokes, Ms. Grimes told her that she had “recordings” or “tape recordings” supporting her allegations. *Id.* at Exh. 3, affidavit of Mediator Stokes, p. Q-028. Mediator Stokes believes the words “tapes” and/or “tape recordings” were used during her conversation with Ms. Grimes. *Id.* Mediator Stokes is unclear whether the use of the word “tapes” was a direct quote from Ms. Grimes or if that was Mediator Stokes’ understanding of what Ms. Grimes was telling her. *Id.* She is confident, however, that Ms. Grimes advised her that she had tape recordings and a written journal. *Id.* Mediator Stokes’ contemporaneous hand-written notes contain the word “tapes.” *Id.* at Exh. 3, p. Q-030.¹⁷

Mediator Stokes informed USA Canary, FAUSA Watson, and AUSA Menner of her understanding that Ms. Grimes had tape recordings of MDAL employees. *Id.* at Exh. 3, affidavit of Mediator Stokes, p. Q-028; Exh. 2, affidavit of USA Canary, p. Q-022; Exh. 1, affidavit of FAUSA Watson, p. Q-014; Exh. 4, affidavit of AUSA Menner, p. Q-034. They asked Mediator Stokes whether they could listen to them. *Id.* Mediator Stokes states that she relayed the request to Ms. Grimes, and that Ms. Grimes informed Ms. Stokes that she would have to discuss it with her attorney in Birmingham, Alabama, who had possession of the tapes. *Id.* at Exh. 3, affidavit of Mediator Stokes, p. Q-028. Ms. Stokes relayed this information to USA Canary, FAUSA Watson, and AUSA Menner. *Id.* at Exh. 2, affidavit of USA Canary, p. Q-023; Exh. 1, affidavit of FAUSA Watson, p. Q-014-015; Exh. 4, affidavit of AUSA Menner, p. Q-034. Scott Boudreaux, the attorney in Birmingham, Alabama who was representing Ms. Grimes, states that he never received any tapes, journal, or notes from Ms. Grimes in support of her EEO allegations. *Id.* at Exh. 5, Interview of Boudreaux, pp. Q-042-043.¹⁸

¹⁷Ms. Grimes states that she never tape recorded conversations of MDAL employees at the off-site or otherwise, and that Mediator Stokes misunderstood that Ms. Grimes was referring to written recordings of events and not tape recordings. *See* Appendix Q, Exh. 9, Sworn Statement of Grimes, pp. Q-091-097.

¹⁸Ms. Grimes denies that Ms. Stokes ever asked her whether the other party could listen to the tapes. *Id.* at pp. Q-101; Q-104-105. She also denies telling Mediator Stokes that her attorney had the tapes. *Id.* at p. Q-107. Ms. Grimes states she did discuss the issue of releasing evidence with Mediator Stokes, but not the release of any tape recordings. *Id.* at p. Q-111.

On the second day of the mediation, Mediator Stokes informed USA Canary, FAUSA Watson, and AUSA Menner, that Ms. Grimes would not turn over the tapes. *Id.* at Exh. 2, affidavit of USA Canary, p. Q-023; Exh. 1, affidavit of FAUSA Watson, p. Q-015; Exh. 4, affidavit of AUSA Menner, p. Q-034.¹⁹

During the mediation, USA Canary, FAUSA Watson, and AUSA Menner became concerned that Ms. Grimes may have tape recorded conversations related to the *Siegelman* case that could include grand jury, privileged, work product, or sensitive law enforcement information. *Id.* Pursuant to 28 C.F.R. § 45.11,²⁰ AUSA Menner contacted his supervisor, Andrew Niedrick, in the GCO regarding the “possibility that Ms. Grimes may have violated state or federal law as well as disclosed private, attorney work product in an on-going criminal investigation.” *Id.* at Exh. 4, affidavit of AUSA Menner, p. Q-035. On November 2, 2007, he also sent Mr. Niedrick an email with suggested language for a referral to OIG or OPR. *Id.* at Exh. 4, p. Q-036. The allegations were referred to the OIG by GCO. *Id.* at Q-004.

b. Summary of Findings

There is no evidence to support the allegation that management officials in the MDAL committed a violation of law, rule, or regulation, or an abuse of authority, when they allegedly improperly initiated a criminal investigation of paralegal Tamarah Grimes in retaliation for her participation in a protected activity. The evidence is clear that management officials in the MDAL did not make the referral to OIG resulting in the criminal investigation. Further, the evidence demonstrates that the Department officials who made the referral to OIG not only acted appropriately, but were required to do so under Department of Justice regulations.

It is alleged that management officials in the MDAL committed a violation of law by violating the *Whistleblower Protection Act*. Under the *Whistleblower Protection Act*,

¹⁹Ms. Grimes denies having told Mediator Stokes she had tape recordings or that she refused to turn them over. *Id.*

²⁰28 C.F.R. § 45.11 states that “Department of Justice employees have a duty to, and shall, report to the Department of Justice Office of the Inspector General, or to their supervisor. . . (b) Any allegation of criminal or serious administrative misconduct on the part of a Department employee (except those allegations of misconduct that are required to be reported to the Department of Justice Office of Professional Responsibility pursuant to § 45.12).

management officials are prohibited from retaliating against employees who make protected disclosures. 5 U.S.C. § 2302(b)(8). To establish a violation of Section 2302(b)(8), it must be shown that the official knew of the disclosure, and that retaliation was a significant factor in the official taking adverse action against the employee. *In the Matter of Frazier*, 1 MSPB 159 (1979); *Shockro v. F.C.C.*, 5 MSPB 181 (1981). The evidence does not support a finding that management officials in the MDAL initiated a criminal investigation of Ms. Grimes in retaliation for her submitting protected disclosures.

The evidence clearly establishes that management officials in the MDAL did not submit the allegations involving Ms. Grimes to the OIG. AUSA Menner provided the information to GCO, who in turn submitted the allegations to the OIG for investigation. In addition, although management officials of the MDAL knew of the disclosures by Ms. Grimes, there is no evidence that retaliation was a motivation in the initiation of the criminal investigation. Management officials in the MDAL did not falsify evidence or allegations to initiate a criminal investigation against Ms. Grimes. The information provided to the OIG and which led to the investigation was consistent with the understandings of all the individuals, except Ms. Grimes, who participated in the mediation. It was this same information that was the basis for the OIG opening its investigation. There is no evidence to support Ms. Grimes' claim that management officials in the MDAL retaliated against her in violation of 5 U.S.C. § 2302(b)(8).

The OSC also requested review of these alleged facts for possible abuse of authority by management officials in the MDAL. Federal officials commit an abuse of authority only when they exercise power in an arbitrary or capricious manner that adversely affects the rights of any person or that results in personal gain or advantage to themselves or to preferred other persons. *Doyle v. Department of Veterans Affairs*, 2008 WL 1712316 (Fed. Cir. 2008); *Embree v. Department of the Treasury*, 70 M.S.P.R. 79, 85 (1996). A review of the record demonstrates that management officials in the MDAL did not initiate a criminal investigation of Ms. Grimes, and that the criminal investigation was not a result of an abuse of authority.

Management officials in the MDAL, along with AUSA Menner, expressed concern about their understanding that Ms. Grimes claimed to have tape recorded conversations containing grand jury, privileged, or sensitive law enforcement information, and provided those tape recordings to a person outside the Department of Justice. It was AUSA Menner, who contacted GCO, to report the allegations. Further, it was GCO, not management officials in the MDAL, who referred the allegations to the OIG. There is simply no evidence that management officials were involved in the referral to OIG.

Even if management officials in the MDAL had initiated the criminal investigation of Ms. Grimes, doing so would not have been an abuse of authority. It is irrelevant for purposes

of this investigation whether Ms. Grimes did or did not tape record conversations related to the *Siegelman* case. It is also irrelevant whether there was a miscommunication between Ms. Grimes and Mediator Stokes regarding whether there were tape recordings or simply written recordings.²¹ The relevant inquiry is whether management officials in the MDAL had been told, and therefore believed, Ms. Grimes may have tape recorded and disclosed MDAL employee conversations, and if they did, whether they abused their authority by referring the allegations to the OIG. The statements of Mediator Stokes, AUSA Menner, USA Canary, and FAUSA Watson demonstrate a consistent understanding that Ms. Grimes claimed to have tape recordings of MDAL employees that were disclosed to someone outside the Department of Justice. These were the only allegations provided to the OIG regarding Ms. Grimes. Based on this information alone, the OIG opened its investigation. Thus, there is no evidence that management officials in the MDAL acted in an arbitrary or capricious manner and, therefore, they did not abuse their authority. Indeed, 28 C.F.R. § 45.11 establishes a clear obligation on the part of Department of Justice employees to report such allegations. Thus, it was not only appropriate, but required, that Department officials report possible violations of law.

VI. Planned Course of Action

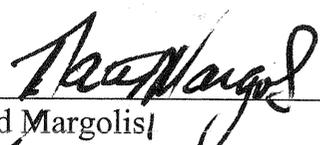
A. Conclusion

Based on the foregoing, the record does not support a finding that management officials in the MDAL violated any law, rule, or regulation, or engaged in gross mismanagement, a gross waste of funds, or an abuse of authority regarding the allegations. To the contrary, the evidence strongly supports the factual assertions and positions of the management officials in response to the allegations.

²¹In its investigation, the OIG found that Ms. Grimes did inform Mediator Stokes “during the mediation that she made audio recordings supporting her EEO complaint.” See Appendix Q, p. Q-003.

B. Recommendations

As stated in the conclusion, the record does not support a finding of a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, or abuse of authority by management officials in the MDAL. As a result, there is no need for recommendations related to the specific allegations at issue in this investigation.

 9-27-08

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