

**STATEMENT OF NIKKI L. TINSLEY
INSPECTOR GENERAL
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE,
JUNE 25, 2002**

Good Morning Chairman Jeffords and Members of the Committee. My name is Nikki Tinsley and I am the Inspector General of the Environmental Protection Agency (EPA). I am pleased to speak to the Committee today about the Office of the Inspector General's implementation and operation of the Ombudsman function.

I'd like to begin my remarks with a brief history of the EPA Ombudsman. The Ombudsman function was established by Congress in the Resource Conservation and Recovery Act amendments of 1984. Although the statutory authority for the office expired in 1989, and Congress has not reauthorized it, EPA has continuously maintained the Ombudsman function in some form for more than 16 years. As originally authorized, the Ombudsman's mission was to provide information, and investigate complaints and grievances from the public related to EPA's administration of certain hazardous and solid waste programs.

In July 2001, the General Accounting Office (GAO) issued a report, EPA's National and Regional Ombudsmen Do Not Have Sufficient Independence, GAO-01-813. This report identified areas of weakness in the operation of the Ombudsman function regarding its independence from the program office that is subject to review, its impartiality and freedom from conflict of interest, and its accountability and reporting. Given that the Ombudsman's role of reviewing Agency actions is similar to the work we were created to perform, and because we report to both Congress and the Agency, I believe our office was well suited to assume the investigatory functions of the Ombudsman's office. In April of this year, the Ombudsman's Office was transferred to the OIG.

Congress established the Inspectors General through the Inspector General Act of 1978 (Act), to serve as an independent, impartial and accountable source for audits, evaluations and investigations of the activities of Federal Departments and Agencies in an effort to prevent and detect fraud, waste, and abuse, and enhance the economy, efficiency, and effectiveness of government programs and operations. We are sometimes known as "watchdogs" for our role in alerting the public and Congress to areas of concern within the Executive branch. Under the Act, Inspectors General have the authority to demand access to any Agency record; request information or assistance from Federal, State or local government agencies; and issue subpoenas. The IG Act also granted certain authorities unique to OIG's in order to insure our independence. We select, prioritize and carry out all of our work assignments independent of EPA oversight. We have separate budget authority, separate hiring and contracting authority, and independent reporting responsibilities to Congress. These are some of the key characteristics that enable us to effectively review Agency programs and ensures our structural independence.

We perform our work in accordance with established standards and procedures, including Generally Accepted Government Accounting Standards, otherwise known as the GAO “Yellow Book,” and report our findings independently and separately to the EPA Administrator and Congress. The IG Act also provides the OIG broad authorities to receive complaints and conduct investigations. Whatever capacity our staff may be serving in, the basic operating principles of the EPA OIG, and all Federal OIG’s for that matter, are to act with independence, impartiality and accountability. Congress and the public can be assured that all work done by the OIG, including that of the Ombudsman, will continue to meet those standards. For the record, I am submitting a copy of a brief prepared by the U.S. Department of Justice which outlines the legal authority for the OIG to perform the Ombudsman function.

Since the early 1980s, we have operated a Hotline to receive complaints and allegations from the public regarding EPA’s programs, operations, employees and contractors. We receive Hotline complaints through our toll-free number, correspondence and, beginning recently, the Internet. We have the sole discretion either to accept a request for assistance, or decline to act. Such decisions are made based on the information received, supporting evidence, and an internal evaluation process. This function is very similar to the function of an Ombudsman, and over time has provided us with audit, evaluation and investigative leads.

All complaints received by the OIG may not result in an investigation. In those instances where our preliminary work produces sufficient information to warrant a full review, we open a case. Oftentimes a complaint does not warrant an investigation but rather, resolution of an issue. If the first responsibility for handling the issue rests elsewhere in the Agency, we will make a referral. In many cases, elevation of an issue by the OIG is sufficient to get Agency action. This is our current operating procedure for all complaints. In some cases, the OIG will already have ongoing work in an area when a complaint is received by the Ombudsman; when this occurs the Ombudsman will consult with the lead staff member on the assignment to expand the scope of work to include new issues or information. As is the case with all our work, the highest priority assignments are provided the necessary financial and human resources to fulfill their objectives.

We operate as one OIG. This means that our work prioritization involves multiple OIG offices and no single staff member has the authority to select and prioritize their own caseload independent of all other needs. If an issue or investigation warrants further work, the necessary human and financial resources are devoted to the project until the matter has been brought to its appropriate conclusion.

As part of the transfer, we have expanded the services of the Ombudsman to include all EPA administered programs, rather than limiting it to only Superfund and hazardous waste issues. Within the OIG, the Ombudsman now has the opportunity to utilize the expert assistance of all OIG staff, which includes scientists, auditors, attorneys, engineers, and investigators. Ours is a matrix organization. We assign staff and other resources to projects on a priority basis, drawing from a large pool of OIG resources.

I'd like to now give you an update on what we have accomplished in the 10 weeks since we began doing the work of the Ombudsman. Our first order of business was to get an Acting Ombudsman in place, and to assess the transferred caseload. This involved the inventory and organizing of 130 boxes of documents that were transferred from the National Ombudsman's office in OSWER. This was a rather challenging undertaking due to the lack of any organized system of records or case file index. It took us until early June to organize and review the files and to assess the information and the work that had been done. To date, we have had eight OIG staff members assigned to the Ombudsman's caseload, which is more than double the staff that had been assigned in OSWER.

According to GAO's 2001 report, the prior National Ombudsman opened 34 cases between October 1992 and December 2002, closing 14 of those cases within five to 25 months, 13 months being average. We are assessing the remaining 20 cases. Ten of the 20 cases initially appear to be completed or closed, and we are working to confirm this. The remaining 10 cases range in age from more than 20 months to five years and appear to be unresolved. These cases include Marjol Battery, Shattuck Chemical, Bunker Hill/Coeur d'Alene. Further, we are determining the status of seven additional cases where we have found documents or read media accounts of the existence of cases. This includes the World Trade Center, which we have incorporated into an already ongoing OIG assignment.

We have developed a priority list of cases, and will be working to conclude these as quickly as possible. We have also begun outreach efforts in order to both explain how we plan to perform the Ombudsman function and to collect additional information. We have met with individual Members of Congress and Congressional Committee staff. We have made contact with citizen groups in several of the communities where there are open cases, and we have scheduled site visits and public meetings for Couer d'Alene, Idaho and Tarpon Springs, Florida in July.

Our primary focus at this point is to work to resolve the already existing cases. To do this, we are conducting our work using our audit, evaluation and investigative standards and procedures. At the same time we are working on developing policies and procedures for handling future incoming cases. This includes case selection criteria. We have also met with the Regional Ombudsmen and are working with them to develop a coordinated approach for addressing the incoming issues at all levels in a timely and appropriate manner.

I believe the public reporting of the caseload, activities, and accomplishments of the Ombudsman is a vital and important responsibility. As an Inspector General I firmly believe that professional standards of conduct, a transparent review process, and public accountability strengthens the credibility of the reviewer's findings. In order to provide accountability and communication with the public, and Congress, the work of our Ombudsman will meet the same high standards we have for all our other products. We will publish at least annually a report summarizing the work of the Ombudsman, including a status report on the cases opened by the National Ombudsman and recommendations or findings made to the Agency. We already provide similar reports semiannually for all our work, and annually for Superfund program work.

Members of the Committee, I am proud of the track record of the EPA OIG. I want to assure the public, EPA stakeholders, and Congress that we will conduct the Ombudsman work with independence and professionalism. I give you my commitment to be responsive to any questions or comments you may have as we move forward with this important work. I welcome your assistance in providing any information or suggestions as we move forward with our new responsibilities. That said, I hope that you withhold judgement on our performance until such time as we have had an opportunity to produce results.

Thank you for the opportunity to participate today. I will respond to any questions the Committee may have at this time.

###

ATTACHMENT

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Mary Mosley,) Civil No. 8:01CV-2407-T-17MAP
)
Plaintiff,)
)
v.)
)
Christine Todd Whitman, in her)
official capacity as Administrator of the)
United States Environmental Protection Agency,)
)
Defendant.)
_____)

DEFENDANT’S REPLY BRIEF

Defendant hereby files this reply in support of her motions to dismiss and for summary judgment in order to respond to issues raised by plaintiff for the first time in her response brief.

I. The Decision to Relocate the Ombudsman Functions Does not Violate the Inspector General Act.

In opposing defendant’s motions to dismiss and for summary judgment, plaintiff contends the proposed relocation of the ombudsman functions within EPA is a violation of the Inspector General Act of 1978, 5 U.S.C. app.3 §9 (hereinafter, the “IG Act.”) Plaintiff’s Memorandum in Opposition to Defendant’s Motions to Dismiss and for Summary Judgment, (hereinafter, “Pl. Opp. Br.”) at 14. Plaintiff’s complaint fails to raise this as a count, however, and plaintiff’s attempt to expand her case beyond the counts in her complaint and add a new claim in her response brief should not be allowed.

Moreover, the proposed transfer is not a violation of the IG Act.¹ The Office of Inspector General (OIG) at the Environmental Protection Agency was established in accordance with the IG Act, for the express purpose of, inter alia, conducting and supervising audits and investigations relating to EPA's programs and operations, 5 U.S.C. app. 3, §2(a)(1), and to provide leadership and coordination and recommend policies for activities designed to promote economy, efficiency, and effectiveness in the administration of such programs. Id. at §2(2). Pursuant to the act, the Inspector General can "conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment." 5 U.S.C. app. 3, §4(a)(1). To carry out these broad responsibilities, the Inspector General has extensive authority, including authority "to make such investigations . . . relating to the administration of the programs and operations of the . . . [EPA] as are, in the judgment of the Inspector General, necessary or desirable." Id. at § 6(a)(2).

The Inspector General may also demand access to agency records and reports; request information or assistance from federal, state, or local government agencies or units; issue subpoenas to entities other than federal agencies; administer or take oaths; and "select, appoint and employ such officers and employees as may be necessary" to carry out its responsibilities. Id. at § 6(a). Finally, the Act allows defendant to transfer offices or agencies, or functions, powers, or duties thereof, as she may determine are properly related to the functions of the OIG, and would, if so transferred, further the purposes of the IG Act, except that she cannot transfer program operating responsibilities under this provision. Id. at §9(a)(2).

¹While issues raised for the first time in a reply brief are not typically considered, see e.g., United States v. Kimmons, 1 F.3d 1144, 1145 (11th Cir. 1993), defendant provides this argument solely because plaintiff has raised the issue for the first time in her response brief. This argument is in addition to the arguments defendant raised in her motions to dismiss and for summary judgment.

Plaintiff contends the IG Act has been violated because the act does not specifically name the same ombudsman responsibilities listed in the long-expired statutory provision establishing the EPA's Office of the Ombudsman, and because, according to plaintiff, the ombudsman's functions are program operating responsibilities. Pl. Opp. Br. at 13-14. Both of these arguments fail.

The IG Act clearly states that the Inspector General can "conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment." 5 U.S.C. app. 3, §4(a)(1). One of the three basic areas of inquiry for such audits is to review program results to determine whether programs or activities meet the objectives established by Congress or the agency. S. Rep. No. 95-1071 at *29, reprinted in 1978 U.S.C.C.A.N. 2676, 2703-2704 (1978). As such, the terms of the statute authorize the Inspector General to conduct the same function of receiving and investigating complaints that the long-expired statute creating the Ombudsman office set forth. Id. § 6917(a)(d).² The November 27, 2001 memorandum transferring the ombudsman functions notes that defendant and the Inspector General expect the newly relocated ombudsman function will address public concerns across the spectrum of EPA programs. Exh. B to TRO Opp. at 2. Likewise, EPA's OIG maintains a hotline for the public to use. See Exhs. 1 & 2 attached hereto.

Moreover, the very elements of the ombudsman's functions that plaintiff contends must be protected are the elements that the IG Act provides the OIG. Plaintiff avers that the relocation of the ombudsman's functions will impair the ability of the Ombudsman to independently investigate and oversee EPA's handling of the Stauffer Chemical Superfund site. Complaint at

²The ombudsman functions have been retained at EPA as a matter of policy. Exh. B to Defs. TRO Opp. at 1-2.

¶¶7, 14, 18, 30, 41. As explained above, OIG has extensive authority to “conduct, supervise, and coordinate audits and investigations relating to the programs and operations” of EPA, 5 U.S.C. app. 3, §4(a)(1), and OIG has access to agency records and reports, and to a wide-range of investigatory tools, such as subpoenas, to conduct its investigations and audits. OIG’s audit, investigatory, and subpoena powers are “very broad.” Winters Ranch Partnership v. Viadero, 123 F.3d 327, 330 (5th Cir. 1997).

Furthermore, OIG has the independence that plaintiff contends is imperative. Congress created OIG in order to ensure that the body investigating an agency have the requisite level of independence to effectively conduct its investigation. S. Rep. 95-1071 at *7, reprinted in 1978 U.S.C.C.A.N. 2676, 2682 (1978). See also Winters Ranch Partnership, 123 F.3d at 333 (noting that purpose of the IG Act was to establish an OIG in each agency “to effect independent and objective audits and investigations of the programs and operations of each agency.”). Moreover, defendant’s November 27, 2001 memorandum transferring the ombudsman’s functions noted that the relocation to the OIG would give the function the independence and impartiality recommended by a number of members of Congress. Exh. B to Defs. TRO Opp. at 1-2. Thus, plaintiff has failed to demonstrate that the OIG cannot assume the ombudsman’s functions under the IG Act.

Plaintiff also contends that the ombudsman’s functions are “central to the operations of the agency” and therefore, are a program operating responsibility that cannot be transferred to the OIG. Pl. Opp. Br. at 14. Plaintiff fails to provide any evidence or explanation to support her conclusion, and, in any event, her argument fails because the ombudsman’s functions are not a “program operating responsibility.” While the IG Act does not define the term, “program operating responsibility,” courts have equated the term to “congressionally-delegated”

responsibilities, Winters Ranch Partnership, 123 F.3d at 334; to “long-term” regulatory responsibilities, id. at 334-36; to “those activities which are central to an agency’s statutory mission,” United States v. Hunton & Williams, 952 F. Supp. 843, 850 (D.D.C. 1997); and to “day-to-day,” “hands-on” responsibilities for the overall administration of an agency’s programs. Greene v. Sullivan, 731 F.Supp. 835, 836 (E.D. Tenn. 1990). The United States Court of Appeals for the Eleventh Circuit found an investigation was not a program operating responsibility because it was initiated by the Inspector General in response to an allegation of fraud and abuse, and not as part of a regulatory compliance audit that would be within the authority of another office to conduct. Inspector General of the United States Department of Agriculture v. Glenn, 122 F.3d 1007, 1010 (11th Cir. 1997).

The ombudsman’s functions at EPA are no longer governed by statute, 42 U.S.C. §6917(d), and have been retained by EPA as a matter of policy. Exh. B to Defs. TRO Opp. at 1-2. Plaintiff has provided no evidence suggesting that the ombudsman’s functions are routine, long-term responsibilities statutorily provided to a particular office within EPA, and central to EPA’s mission. Moreover, the rationale behind prohibiting the transfer of program operating responsibilities is to preserve the function of the OIG as an independent and objective inspector of the agency’s operations. Winters Ranch Partnership, 123 F.3d at 334. As explained above, defendant has decided to move the ombudsman’s functions to allow for, among other things, the necessary independence of the ombudsman functions. Nov. 27, 2001 Memo, Defs. Exh. B to TRO Opp. at 1-2.³

³The legislative history to the IG Act provides an example of an EPA investigation that would clearly fall within the IG’s authority. Senate Report No. 95-1071 notes that while the OIG would not likely review an allegation that a specific sewage treatment plant was not operating according to technical specifications, the OIG would properly review an allegation that EPA had approved plans for a faulty sewage treatment system because an agency official was

Finally, the fact that the ombudsman's function was previously located within a program office, the Office of Solid Waste and Emergency Response, does not mean that it is a "program operating responsibility." The IG Act allows defendant to transfer "offices or agencies, or functions, powers, or duties thereof, " as she may determine are properly related to the functions of the OIG, and, if so transferred, would further the purposes of the OIG Act. 5 U.S.C. app., §9(a)(2). To conclude that a function is a "program operating responsibility" simply because it is found within a program office within an agency would nullify the provision allowing defendant to, in her discretion, transfer offices or agencies, or functions thereof, to the OIG. 5 U.S.C. App. 3, §9(a)(2).

Plaintiff cites Truckers United For Safety v. Mead, 251 F.3d 183, 186 (D.C. Cir. 2001), which is distinguishable here. In Mead, the court found that the OIG had improperly "lent" its search and seizure powers to a routine agency investigation that, by statute, was charged to another office to conduct. 251 F.3d at 186-87, 189. The Mead court noted that OIG's investigation was not an audit of agency enforcement procedures or policies, or an investigation relating to abuse or mismanagement at the agency. Id. at 189. Here, in contrast, the Inspector General is not lending her authority to an investigation which is under the statutory authority of another office, or which is being conducted by another office within EPA, such as by OSWER. Moreover, EPA has maintained an ombudsman function not pursuant to statute or as required by Congress, but only as a matter of agency policy. Ex. B to Defs. TRO Opp. at 1-2. Defendant has decided to move the ombudsman's functions to OIG, pursuant to her authority under 5

improperly influenced in his decision. S. Rep. No. 95-1071 at *28, reprinted in 1978 U.S.C.C.A.N. 2676, 2703 (1978).

U.S.C. app. 3, §9(a)(2). The proposed relocation is not a violation of §9(a)(2) of the IG Act.⁴

II. Plaintiffs in Two Other Cases Raising Identical Causes of Action Have Not Filed Motions to Consolidate.

Plaintiff also raises, for the first time, the issue of “a transfer and consolidation pursuant to 28 U.S.C. §1407.” Pl. Opp. Br. at 3. Defendant will respond to any motions to transfer, consolidate, or any other motion, when plaintiff files and serves said motion. Defendant notes, however, that she has verbally advised plaintiff that she is opposed to a voluntary dismissal, without prejudice, by plaintiff of the action in this Court.

Moreover, plaintiff offers no evidence in support of her assertion that plaintiffs in several other districts in which the Ombudsman is involved on behalf of the community are intervening in [Martin v. Whitman, No. 1:02CV00055 (RWR) (D.D.C.)] rather than continuing with their suits where they were originally filed suit.” Pl. Opp. Br. at 3. On the contrary, there are currently two other cases pending in federal district court which raise counts virtually identical to this action. Throop Borough v. Whitman, No. 3:CV-01-2461 (James M. Munley) (M.D. Pa.); City of Smeltonville v. Whitman, Cv. No. 02-0005-N-EJL (D. Idaho). Defendant has moved to dismiss the Throop Borough case. Exh. 2 hereto. Defendant’s response to the amended complaint in City of Smeltonville is due April 16, 2002. Order attached hereto as Exh. 3.⁵

⁴Plaintiff states that the proposed relocation will eliminate the Office of the Ombudsman. Pl. Opp. Br. at 14, n.6. While the office itself will not be in existence, the November 27, 2001 Memorandum makes clear that the ombudsman’s functions are being transferred to OIG. Defs. Exh. B to Defs. TRO Opp. Thus, as this Court recognized in denying plaintiff’s motions for a TRO and preliminary injunction, Dec. 28, 2001 Order at 7, the ombudsman’s functions will continue at EPA.

⁵Plaintiff makes several references to allegations allegedly raised in connection with the Martin case. Pl. Opp. Br. at 3, n.1. As noted in defendant’s brief in support of her motions to dismiss and for summary judgment, the Martin case involves a claim that the relocation violates the Ombudsman’s First Amendment rights. Defs. Memo. at 5-6 and Exh. 3 thereto. Except for the allegation regarding the removal of Hugh Kaufman from Ombudsman functions, plaintiff has

III. Plaintiff Has Not Asserted A Claim For Retaliatory Discharge.

Finally, plaintiff raises for the first time a contention that there is a material issue of fact as to whether the proposed relocation of the Ombudsman functions is a “retaliatory discharge of the National Ombudsman.” Pl. Opp. Br. at 2. While defendant disagrees that there are any material issues of fact here, this particular statement is objectionable because, as with the claim that the IG Act has been violated, plaintiff has not brought a claim here that the proposed relocation is a “retaliatory discharge.” Again, plaintiff is using her opposition brief to add new claims to her case, without moving for leave to amend her complaint.⁶

CONCLUSION

For the reasons expressed above, as well as in defendant’s memorandum supporting her motions to dismiss and for summary judgment, defendant’s motions to dismiss and for summary judgment should be granted.

Dated: April 8, 2002

Respectfully submitted,

MAC CAULEY
UNITED STATES ATTORNEY

OF COUNSEL:
Charles G. Starrs
Office of the General Counsel
Environmental Protection Agency

Warren Zimmerman, Chief, Civil Division
United States Attorney’s Office for the
Middle District of Florida

not raised the allegations in footnote 1 of her response brief in her complaint, and she does not appear to rely on them in support of her case.

⁶It is doubtful that plaintiff would have standing to bring a claim for retaliatory discharge, as she is not an EPA employee affected by the proposed transfer of the Ombudsman functions.

1200 Pennsylvania Ave., NW (2377A)
Washington D.C. 20460
Phone: 202-564-1996
Fax: 202-564-5432

Mark Bialek
Counsel to the Inspector General
Office of the Inspector General
Environmental Protection Agency
1200 Pennsylvania Ave., NW (2411)
Washington D.C. 20460
Phone: 202-260-4733
Fax: 202-401-0068

Fla. Bar # 652040
400 N. Tampa St. #3200, Tampa, FL 33602
813-274-6335
813-274-6200 - fax

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

Donna S. Fitzgerald, Trial Counsel,
Connecticut Bar. No. 411810
Barclay Samford, NM Bar No. 12323
General Litigation Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 663,
Washington D.C. 20044-0663
Phone: 202-305-0476,
Fax: 202-514-8865

ATTORNEYS FOR DEFENDANT