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ACTION OFFICE: EDO

To: Bird, HR

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SUBJECT: Concerns Of Alleged Misclassification of Federal Law Enforcement Employees

cys: EDO
DEDMRS
DEDH
DEDM
AO
DEDR
OIG
OI

ACTION: Appropriate

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Date: Sat, Jan 10, 2004 11:10 PM
Subject: RE: I SAID THAT IF THIS LEGISLATION PASSES, NRC OI DELIBERATE MISCLASSIFICATION (FRAUD) WILL BE REVEALED; IT PASSED!

Yes, it passed!:

S.1683 Title: A bill to provide for a report on the parity of pay and benefits among Federal law enforcement officers and to establish an exchange program between Federal law enforcement employees and State and local law enforcement employees.

Sponsor: Sen Voinovich, George V. [OH] (introduced 9/30/2003) Cosponsors:

1 Related Bills: H.R.3205 Latest Major Action: 12/19/2003 Became Public Law No: 108-196.

Federal Law Enforcement Pay and Benefits Parity Act of 2003

1. HR 3205 IH 108th CONGRESS 1st Session

To provide for a report on the parity of pay and benefits among Federal law enforcement officers and to establish an exchange program between Federal law enforcement employees and State and local law enforcement employees.

IN THE HOUSE OF REPRESENTATIVES September 30, 2003

Mrs. JO ANN DAVIS of Virginia introduced the following bill; which was referred to the Committee on Government Reform

A BILL

To provide for a report on the parity of pay and benefits among Federal law enforcement officers and to establish an exchange program between Federal law enforcement employees and State and local law enforcement employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, SECTION 1. SHORT TITLE.

This Act may be cited as the 'Federal Law Enforcement Pay and Benefits Parity Act of 2003'. SEC. 2. LAW ENFORCEMENT PAY AND BENEFITS PARITY REPORT.

(a) DEFINITION- In this section, the term 'law enforcement officer' means an individual--

(1)(A) who is a law enforcement officer defined under section 8331 or 8401 of title 5, United States Code; or

(B) the duties of whose position include the investigation, apprehension, or detention of individuals suspected or convicted of

offenses against the criminal laws of the United States; and
 (2) who is employed by the Federal Government.

(b) **REPORT-** Not later than April 30, 2004, the Office of Personnel Management shall submit a report to the President of the Senate and the Speaker of the House of Representatives and the appropriate committees and subcommittees of Congress that includes--

- (1) a comparison of classifications, pay, and benefits among law enforcement officers across the Federal Government; and
- (2) recommendations for ensuring, to the maximum extent practicable, the elimination of disparities in classifications, pay and benefits for law enforcement officers throughout the Federal Government.

SEC. 3. EMPLOYEE EXCHANGE PROGRAM BETWEEN FEDERAL EMPLOYEES AND EMPLOYEES OF STATE AND LOCAL GOVERNMENTS.

(a) **DEFINITIONS-** In this section--

- (1) the term `employing agency' means the Federal, State, or local government agency with which the participating employee was employed before an assignment under the Program;
- (2) the term `participating employee' means an employee who is participating in the Program; and
- (3) the term `Program' means the employee exchange program established under subsection (b).

(b) **ESTABLISHMENT-** The President shall establish an employee exchange program between Federal agencies that perform law enforcement functions and agencies of State and local governments that perform law enforcement functions.

(c) **CONDUCT OF PROGRAM-** The Program shall be conducted in accordance with subchapter VI of chapter 33 of title 5, United States Code.

(d) **QUALIFICATIONS-** An employee of an employing agency who performs law enforcement functions may be selected to participate in the Program if the employee--

- (1) has been employed by that employing agency for a period of more than 3 years;
- (2) has had appropriate training or experience to perform the work required by the assignment;
- (3) has had an overall rating of satisfactory or higher on performance appraisals from the employing agency during the 3-year period before being assigned to another agency under this section; and
- (4) agrees to return to the employing agency after completing the assignment for a period not less than the length of the assignment.

(e) **WRITTEN AGREEMENT-** An employee shall enter into a written agreement regarding the terms and conditions of the assignment before beginning the assignment with another agency.

Sen. George Voinovich, R-Ohio, has introduced similar legislation to review pay and benefits for the federal government's 129,000 law enforcement officers to explore ways to stabilize recruitment and retention efforts. After the establishment of the Transportation Security Administration (TSA) in 2001, many officers took jobs with the new agency due to its better pay and benefits. This left other federal law enforcement agencies competing for recruits. Additionally, the

Department of Homeland Security's new personnel system could further attract officers from other agencies and create additional recruiting and retention challenges. "Since 9-11 the role and responsibilities of our federal law enforcement officials have become higher profile as the risks have increased," Voinovich said. "That means we need a compensation system . . . which prevents the various federal law enforcement agencies from having to compete against one another for recruits." His bill would require the Office of Personnel Management (OPM) to review the classification, compensation and benefits of federal law enforcement officers, and requires OPM to recommend ways to remedy possible disparities. There would also be an employee exchange program between federal, state, and local law enforcement officers to maintain a well-trained workforce. The Senate legislation is endorsed by the national Fraternal Order of Police and the FBI Agents Association. Rep. Jo Ann Davis, R-Va., has introduced a similar bill in the House.

Any competent review will find that NRC Office of Investigations Investigators were deliberately misclassified in the 1811 series so that they could get premium pay and early retirement, and that the NRC has misled OPM on various occasions over the last two decades or more regarding their duties. The basis issue here is that a group of Nuclear Regulatory Commission (NRC) employees have obtained criminal investigator job classifications which are not warranted by their positions, which involve only civil investigations of "wrongdoing," defined as an "intentional violation of regulatory requirements or a violation resulting from careless disregard of, or reckless indifference to, regulatory requirements." This was done through an eight-year (09/75 - 05/84) exchange of letters with the Civil Service Commission and its' successor, the Office of Personnel Management (OPM). The result is that the above employees improperly obtained early, 20 year retirement, a more favorable retirement package, and 25% more salary. A very conservative analysis puts the value of these unjustified benefits at \$600,000 per year; this has gone on for some 21 years. More details follow:

Since at least 1982, Nuclear Regulatory Commission (NRC) Office of Investigations (OI) personnel at grade levels of GS-13, GS-14, and GS-15 have been misclassified as series 1811, "Criminal Investigator." To be classified in this series, an individual must meet most of the "frontline law enforcement" criteria, and have them largely constitute the position duties:

1. Perform investigations (long-term, complicated reviews).
2. Investigate individuals suspected of or convicted of violating criminal laws of the United States (employing agency must have criminal investigation authority).
3. Have the authority to carry weapons.
4. Have the authority to arrest, seize evidence, give Miranda warnings, execute search warrants.
5. Have a "rigorous" position which includes unusual physical hazards due to frequent contacts with criminals and suspected criminals, working for long periods without a break, and being in on-call status 24 hours a day.

OI duties and authorities do not match these criteria, especially since NRC lacks statutory authority for performing criminal investigations. They lack arrest responsibilities, authority to carry firearms or other weapons, do not perform undercover work, do not execute search or

seizure warrants, do not give Miranda warnings, and are not exposed to hazardous conditions nor inclement weather. Most work takes place in an office setting, and is not "rigorous." OI investigations do not involve felonies, but violations of the regulations contained in 10 Code of Federal Regulations (Energy). None of their work is "frontline law enforcement work, entailing unusual physical demands and hazards." When OI was created, a proposed desk audit of investigative positions to determine the correct job classification did not occur. OI personnel have indicated that "NRC is the best-kept secret on the 1811 circuit!"

Letters from the NRC to the Civil Service Commission or Office of Personnel Management (OPM) on the subject of the 1811 classifications and law enforcement retirement contained vague, erroneous, or misleading and false information. These letters indicated high percentages of criminal investigations, or investigations involving "matters of potential criminality covering a wide spectrum of violations."

The position of "Investigation Specialist," later "Investigator," began with the Atomic Energy Commission (AEC). These positions were series 1810, located in the Division of Compliance, and the investigation reports issued were titled "Compliance Investigations." These positions were clearly originally established to conduct civil investigations to determine compliance with the regulations found in 10 Code of Federal Regulations (Energy).

OI investigative personnel actually perform the duties and responsibilities of the series 1801 or 1810 classifications, and meet the 1801 or 1810 position classification guidelines and qualification requirements. Personnel classified in series 1801 or 1810 do not receive early retirement nor availability premium pay. The 1801 series guide, for example, specifically speaks to positions where investigations relate to violations of regulations and criminal matters are referred to another agency for criminal investigation.

The result of the misclassification is that the NRC has unnecessarily paid OI investigators early retirement and premium pay (Administratively Uncontrollable Overtime [AUO] or "availability pay" of 25% of their salary), amounting to hundreds of thousands of dollars per year, and totaling millions of dollars during the period 1982-2003. The 25% availability pay is included in the OI investigators' basic pay, and therefore raises the "high three" salary years utilized to determine retirement pay. Also, a more beneficial percentage is used to calculate retirement benefits. A conservative analysis indicates that the overpayments exceed \$640,000 per year (the effect on Thrift Savings Plan agency contributions and retirement benefits of an additional 25% during an employee's "high three" years was not factored in).

OI Investigations largely consist of interviews with a court reporter present, and document reviews. Between 7% - 30% of the cases are referred to the Department of Justice (DOJ) for prosecutorial review, but few are accepted for further investigation, and even fewer result in convictions. In extremely rare cases, the OI investigator may provide assistance to the DOJ in its review or investigation, and may provide testimony in court or before a Grand Jury. In vanishingly rare cases, the investigator may assist in obtaining and executing a search warrant (accompanying the primary law enforcement officers), collecting physical

evidence, or take scene photographs.

A chronology of events indicates that NRC senior management was well aware that NRC did not have the authority to conduct criminal investigations, had not given such authority to OI, and that OI did not perform criminal investigations. In the early years, OI did not even directly interface with the DOJ, but passed their investigations along to the Office of Inspector and Auditor for referral to DOJ. Of importance is a memorandum dated October 15, 1982 in which the NRC Deputy General Counsel advised that, lacking statutory authority, NRC personnel should not conduct criminal investigations under any circumstances. Subsequently, numerous submittals were made to OPM, claiming that all OI investigations were criminal investigations.

More importantly, on April 9, 1984, the full NRC Commission received a Briefing on Criminal versus Civil Investigations. A draft document giving OI the authority to conduct criminal investigations was discussed, with the Commission strongly objecting to and directing removal of the term "conduct" and substitution of the word "assist." Quotes: "we believe that the Commission - and OGC has taken this position in the past - that the Commission does not have independent authority to conduct criminal investigations." "Yes, our policy is to first serve our civil purpose and then help DOJ."

On January 22, 1999 the NRC advised OPM that it had updated OI position descriptions. Attached was an Evaluation Statement dated October 28, 1998, two revised position descriptions, and a selection of previous correspondence between OPM and the NRC. The evaluation statement notes that OI investigators have not "been deputized to make arrests or carry firearms." The attached position descriptions indicate that "much of the work is performed in an office setting." This statement indicates that the previous NRC certifications that the positions met the definition of "rigorous" were incorrect at best.

The NRC and NRC Office of Inspector General (OIG) have shown inability to impartially review this issue, and the OIG was extremely reluctant to initiate an investigation. The OIG eventually performed a review of my concerns, but it has many weaknesses, did not address the bulk of the information provided, and likewise did not provide the report's consultant with this information. Mr. Hubert T. Bell and Mr. David C. Lee of the OIG were investigating the classification of Mr. Guy Caputo's (their previous supervisor) current employees. This provides a logical explanation of their extreme reticence to initiate an investigation, and how it could be so inadequate. However, a close reading of the IG report reveals that it does substantiate my statements. My complaint to the Presidents Council on Integrity and Effectiveness (PCIE) regarding the quality and impartiality of the report was, by their words, "not persuasive." An excellent investigation of a very similar complaint, by the Department of Labor, is attached for comparison.

The NRC OIG determined that over the review period, an average of 22 percent of OI's cases were referred to the DOJ for criminal prosecution. During OIG's review of correspondence between OPM and NRC, OIG found that in a number of instances, OPM requested clarification concerning the nature of criminal violations investigated by OI and the amount of time OI spent conducting these investigations. OIG noted that the NRC

described the nature of the criminal activities and amount of time OI spent conducting these activities in "various ways." Generally, the correspondence submitted by the NRC to OPM indicated that almost all of the incumbent's time was spent conducting criminal investigations which included violations of the Atomic Energy Act and violations of the Federal criminal code, Title 18.

OPM based its coverage decision on statements that the OI positions involved 100% criminal investigation involvement (or at least more than 50%), and this was never true. Please see the discussion under "What Does OI (Predominantly) Do?"

What would have happened if NRC had approached OPM in the early 1980's, and, in complete honesty, advised that the agency had no criminal investigative authority, did civil investigations only, but wanted to grant Law Enforcement Officer retirement and premium pay benefits to their investigators? NRC would have to note that the investigators are not deputized, have no arrest authority, have no necessity to give "Miranda" warnings, cannot carry weapons, nor execute search warrants. The vast bulk of their investigative work is performed in a non-rigorous office setting, and consists of interviews with mostly agreeable individuals, and document reviews. The job does not include unusual physical hazards due to frequent contacts with criminals and suspected criminals, or working for long periods without a break. No minimum physical standards are in place. The investigators rarely testify in court, and almost never are called into the office on an emergency basis. Investigations indicating possible criminality are referred to the Department of Justice, but few are accepted and fewer investigated or prosecuted. In such a situation, would OPM have likely agreed with the classification of such investigators in the 1811 series and the granting of LEO retirement benefits and 25% premium pay? The answer should be "no."

Justification of a job classification as making hiring investigators easier is an inappropriate approach. In any case, the NRC is an "exempt" agency, has a relatively high grade structure, with GS-13 and GS-14 non-managerial investigative positions. As a result, attracting and hiring qualified individuals to the investigative positions was never a problem, and vacancies were historically filled as rapidly as the hiring and background investigation process would allow.

OPM has not been anxious to review or revise their May 17, 1984 decision in this matter, even if the NRC provided erroneous information in that determination. OPM should follow their options to provide "oversight of coverage determinations," as provided in 5 CFR 831.911 (a thru d).

Some individuals may claim that they were unaware that the position did not meet series 1811 requirements during their employment with the NRC. However, individuals coming from other law enforcement agencies very rapidly divined that the NRC position was different, when they were not assigned firearms nor handcuffs. It was well known within OI that the series 1811 classification would not stand the light of day.

Regarding deceiving OPM, a portion of the Nuclear Regulatory Commission's May 28, 2003 response to Mr. Ronald Sanders, Associate Director For Strategic Resources Policy, Office of Personnel Management,

regarding the "COLLECTION OF INFORMATION REGARDING EMPLOYEES WITH LAW ENFORCEMENT DUTIES," was that "NRC Office of Investigation (OI) LEOs when deputized as Special Deputy U.S. Marshals have full arrest authority. Deputations are maintained for the duration of the investigation," and "NRC LEOs who are deputized as Special Deputy U.S. Marshals, carry firearms in accordance with agency policy while in the performance of official duties."

A FOIA request to the NRC for any records regarding deputization of NRC OI personnel, produced two documents, both related to the proposed deputization of a single OI investigator circa June-August 1992. The documents indicate that there was discussion of this deputization; neither of the documents indicates that the deputization occurred. As my FOIA request covered 1982-2002, no OI personnel have been deputized in that timeframe, some twenty years. A later response to my FOIA, from the Department of Justice, indicated that one (and one only) OI investigator had been deputized for one year to work on one case in the twenty period specified.

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