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Sent: Friday, January 29, 2010 3:16 PM
To: Sapountzis, Alexander
Subject: COMMENTS ON PROPOSED POSITIVE SAFETY CULTURE POLICY
Attachments: 34YEARSOFDECEPTION.doc

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40

11/06/2009
74FR 57525

Alexander,

Thanks for the opportunity to comment on the draft NRC safety culture policy. I have read the Federal Register notice, and intend to address questions 3 and 4.

The policy should be very well detailed as to what a licensee is expected to have in terms of a positive safety culture. Otherwise, interpretation of the policy by NRC inspectors will be uncertain, and probably uneven. As much detail as possible should be placed in the policy and in the guidance to headquarters and regional inspectors.

Lack of detail also prohibits licensees from knowing if they are meeting or exceeding NRC expectations as to a positive safety culture. Nuclear facilities may have sufficient understanding to implement such a culture, but detailed guidance should be issued to materials licensees, which are often smaller in scope and knowledge of NRC regulations and policies.

As Office of Investigations personnel often are involved in issues involving safety culture, detailed guidance and training should be provided specifically for them.

They should also have their current classification and training reviewed to insure that they know that they are investigating violations of the Commissions' regulations, such as Safety Culture, and not criminal matters (see attached file).

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NRC OFFICE OF INVESTIGATIONS (OI) SERIES 1811 MISCLASSIFICATION

Overview

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 misleading letters with the Civil Service Commission and its' successor, the Office of Personnel Management (OPM).

NRC Office of Investigations Special Agents' duties consist of non-custodial interviews with cooperative witnesses and document reviews of regulatory violations. For over nineteen years (1982-2001) they did not have criminal investigative authority, arrest powers or a need to carry weapons, and only one OI Special Agent was deputized (see below for more recent information) In March 2007, the OI Director admitted that OI personnel have never performed a single arrest. Due to their improper classification, GS-1811-12/13/14/15, they get premium pay, early retirement, 25% availability pay, and, unlike at other agencies, consider the first two hours at home as their qualifying time for availability pay. "Never Before Have Federal Investigators Done So Little For So Much!"

A very conservative analysis puts the value of these unjustified benefits at well over $700,000 per year; this has gone on for some 25 years ($17,500,000). The short story is that the NRC has misled OPM (and others) and the NRC Inspector General has allowed this to go on.

General inquiries to the NRC have brought the response that the NRC Inspector General has looked into the matter, and the matter is closed. The NRC should answer these simple questions:

(1) What is the statutory basis for NRC criminal investigative authority?
(2) Do these Investigators investigate individuals suspected of or convicted of violating major violations of the criminal laws of the United States?
(3) How many criminal investigations have been conducted, each year during 1981-2007? What percentage of the investigative workload does this reflect?
(4) Do these investigators have the authority to carry weapons, the authority to arrest, seize evidence, give Miranda warnings, and execute search warrants?
(5) How many search warrants have been executed by NRC personnel? How many wiretaps?
(6) Do these investigators have a "rigorous" position which includes unusual physical hazards due to frequent contacts with criminals (in non-controlled settings) and suspected criminals, working for long periods without a break, and being in on-call status 24 hours a day? What physical criteria must be met? What is the justification for certifying these positions as rigorous?
(7) How can NRC justify the considerable additional expense of classifying these positions as Criminal Investigators if they perform civil investigations?
(8) Was the information provided to justify OI deputations valid?

Executive Summary

Since at least 1982, NRC Office of Investigations (OI) personnel at grade levels of GS-12 - 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" factors, 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, and 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.

For LEO retirement credit, one must show that the **primary duties** of the position are the investigation, apprehension, and detention of criminals or suspects. **The most important factors, are: 1) frequently pursuing or detaining criminals; 2) an early mandatory retirement age; 3) a youthful maximum entry age; 4) the job is physically demanding requiring a youthful workforce; and 5) exposure to hazard or danger. The factors (above) may also be considered as appropriate.**

OI duties and authorities do not match these criteria, especially since NRC lacks statutory authority for performing criminal investigations. They lack arrest responsibilities, agency 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." In March 2007, the Director of OI admitted that **OI personnel have never performed a single arrest**. When OI was created, a proposed desk audit of investigative positions to determine the correct job classification was cancelled. 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) regarding 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 1982-2010.** 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 very conservative analysis indicates that the overpayments greatly exceed $700,000 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 calculated).

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 very 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), or collecting physical evidence.

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 to the Office of Inspector and Auditor for referral to DOJ. **Of central 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 <u>all</u> OI investigations were criminal investigations.**

Perhaps as 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 <u>conduct</u> criminal investigations was discussed, with the Commission strongly <u>objecting to</u> and <u>directing removal</u> of the term "<u>conduct</u>" 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 <u>not have</u> independent authority to conduct criminal investigations." "Yes, our policy is to first serve our <u>civil purpose</u> and then help DOJ." This briefing led to a commission paper used as guidance in negotiating a Memorandum of Understanding with the Department of Justice. The MOU process and how OI later subverted the MOU are detailed later.

On January 22, 1999 NRC advised OPM that it had updated OI position descriptions. Attached were 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 yet 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, and that any encounters with suspected criminals takes place in a "controlled [office] setting."**

The NRC Office of Inspector General (OIG) was extremely reluctant to initiate an investigation of this issue. The OIG eventually performed a review, 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.

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 (actually, possible investigation and subsequent 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 Ac 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**.

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, and 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 were 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 very 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 and misleading information in that determination. OPM should follow their options to provide "oversight of coverage determinations."

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 or handcuffs. It was well known within OI that the series 1811 classification would not stand the light of day.

Recent Information

In early 2010, the NRC proposed removing OI personnel from the National Treasury Employees Union (NTEU) bargaining unit, claiming that they had access to "national security information."

The Office of Investigations Lean Six Sigma (LSS) Process Improvement Project Report was issued in early 2009. The report was intended to identify why investigations were perceived as taking longer, and fewer investigations were being closed. The report disagreed with the perceptions and referred to a number of process improvements. The project charter noted that NRC investigations were costing "$74.66 per labor hour." This is well above the GS-15, step ten, hourly rate. Investigations are not charged to licensees; there is no resource recovery.

There are two excellent stories by Mike Stuckey, on MSNBC, regarding the deliberate misclassification of Nuclear Regulatory Commission (NRC) Office of Investigations Special Agents as criminal investigators, how they subsequently became Deputy U.S. Marshals, and how poorly they accounted for their firearms. Mikes' stories are at: http://www.msnbc.msn.com/id/17949763/ and http://www.msnbc.msn.com/id/20044076/.

FOIA requests to the NRC and the U.S. Department of Justice (DOJ), United States Marshals' Service, uncovered deputation documents. These documents show a series of deputation requests for specific cases, starting in 2001, followed by blanket deputation requests. These deputations are based on faulty information, as deputation is not necessary for individuals who interview cooperative individuals in an office setting. Submittals from the NRC to the DOJ improperly indicate that NRC personnel are expected to perform arrests, execute search warrants, protect witnesses, perform electronic surveillance, participate in anti-terrorism activities, and serve subpoenas, and "is necessary to ensure the safety of all involved personnel." It is also indicated that OI personnel have qualified with authorized firearms within the calendar year. See the OI Special Deputation Chronology.

The Government Accountability Office (GAO) issued "Federal Law Enforcement: Survey of Federal Civilian Law Enforcement Functions and Authorities," on December 19, 2006. GAO identified 104 federal civilian law enforcement components and administered two surveys to each--one survey on the primary authorities and the other survey on the job series classifications. NRC used questionable citations as to its criminal investigative authority; these can be found at http://www.gao.gov/special.pubs/gao-07-223sp/law_enforcement_survey_table.html.

An August 2005 NRC SECY (Commission) paper indicated: "**During the past five fiscal years, out of 244 cases referred to DOJ for prosecutorial review, DOJ has accepted only seven for "criminal prosecution" [2.9%] (actually, the term should be "investigation and possible subsequent prosecution")**.

The NRC OI Annual Report for 2004 (10/03-10/04) was issued February 2005, showing 46 cases referred to the DOJ, out of a total of 230 closed (20%). As in previous OI annual Reports, there were no statistics on how many cases the DOJ accepted. The report lacks items expected of a criminal investigative agency, such as arrests, searches, seizures, firearms training, as do previous annual reports. No indication of deputations is included in the annual report. The report is available in PDF format at: www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1830/index.html.

I was recently informed that James Fitzgerald, legal counsel to OI in recent years, had his employment classification changed to law enforcement. This should be looked into, as it appears bogus.

Misinformation

In looking into the misclassification at the NRC, be aware that you will be dealing with "true but misleading" statements. As an example, OI Special Agents, historically (1982-2001), have not been deputized. Several times, I got the answer from NRC Office of Human Resources staffers that OI personnel were not deputized, "but they could be!" This was another true but misleading statement which ignored "predominant, or primary duties" as a concept.

A better question, recently asked, is regarding their arrest record, as many law enforcement agencies are understandably proud of the number of arrests they make per year. The recently received answer was that NRC personnel had never arrested anyone, ever. Other questions would be the number of searches, seizures, wiretaps, and convictions. NRC is proud of the number cases referred to the Department of Justice, and may use the terminology that these are referred for prosecution. This is not correct; these cases are referred for DOJ review, and only the rare case is selected for subsequent DOJ investigation (most civil investigation information cannot be utilized in a criminal court of law), then prosecution.

James E. Foster
01/20/2010

Table of Contents

Overview 1
Executive Summary 2
Recent Information 5
Misinformation 6
The DOD IG Did it Right! 10
GAO Reports Related to Criminal Investigators 11
1997 U. S. Court of Appeals Decision 12
2001 U. S. Court of Appeals Decision 13
General Conclusions, NRC Documents 14
That's Entertainment! 17
How Did This Occur? 17
What did the NRC tell the Office of Personnel Management? 19
Table From Data in the NRC Annual Reports 22
What Has Been the Result of the Misclassification? 24
NRC Response to This Concern 26
What Now? 27
What About the Chronology? 27
The MOU with DOJ Process 28
Federal Statistics 30
Social Security Administration (SSA) IG Assessment Report And Sequence 30
Why the Attachments? 34
Attachment 1, Memorandum, Malsch to Fitzgerald 35
Added Clarification by James Foster 36
Attachment 2, Commission Briefing on Criminal vs Civil Investigations 37
Attachment 3, Memorandum of Understanding with DOJ 40
Attachment 4, General Chronology 45
Attachment 5, OI Special Deputation Chronology 56
Attachment 6, NRC OIG Report, Case File 99-016 63
Attachment 7, Commission Briefing, Comparison with OIG Report 79
Attachment 8, Fosters Comments on the OIG Report 81
Attachment 9, Additional Web Resources 86
Attachment 10, Digest of Significant Classification Decisions and Opinions, Art. 24-01 87
Attachment 11, Portions, Killion vs. The Dept. of the Treasury (09/18/1996) 89
Attachment 12, Portions, Houck vs. The Dept. of the Navy (04/15/1999) 90
Attachment 13, Portions, Townsend vs. The Dept of Justice (08/31/1999) 92
Attachment 14, Portions, J. Street, vs. The Dept. of the Navy (MSPB 01/10/2002) 95
Attachment 15, A Portion of the Testimony, John Vail, DOJ 97
Attachment 16, Portions, Redfearn vs. Dept. of the Interior, Appeals Court, (05/10/2002) 98
Attachment 17, OPM Information on Availability Pay 99

Available:

1. A more complete version of this file, with additional attachments, additional Chronology items.
2. The complete Memorandum, Malsch to Fitzgerald (10/15/1982), scanned, in PDF format.
3. The complete transcript of the full NRC Commission Briefing on Criminal vs. Civil Investigations (04/09/1984), scanned, in MS Word format.
4. The NRC Office of Investigations Investigative Procedures Manual, 1999, in MS Word format.

Office of Personnel Management Documents & Guidance

Three classifications, series 1801, series 1810, and series 1811, are generally most applicable to federal investigators. The 1801 series is utilized for "Compliance Specialists," otherwise not appropriately classifiable elsewhere in the 1800 group. **However, the 1801 series guide specifically speaks to positions where investigations relate to violations of regulations and criminal matters are referred to another agency for criminal investigation.** The 1801 series guide provides that:

> "Included in this group are occupations established primarily to **effect compliance of individuals or organizations with laws, rules, regulations, executive orders, or other mandatory guidelines. Compliance is assessed by such means as inspections, investigations, and analysis of reports.** Compliance may be obtained by methods such as persuasion, negotiation, and technical assistance. **Compliance may also require actions such as citation of violations, drafting of complaints, and referral of cases for administrative or legal proceedings."**

Series 1810, sometimes defined as "Civil Investigator, sometimes performs Criminal Investigations," provides the following:

This series includes **positions that involve** planning and **conducting investigations** covering the character, practices, suitability, or qualifications of persons or organizations seeking, claiming, or receiving Federal benefits, permits, or employment **when the results of the investigation are used to make or invoke administrative judgments, sanctions, or penalties. These positions require primarily a knowledge of investigative techniques a knowledge of the laws, rules, regulations, and objectives of the employing agency; skill in interviewing, following leads, researching records, and preparing reports; and the ability to elicit information helpful to the investigation from persons in all walks of life.**

There are basically no special qualification requirements for this position, as it is not expected to entail hazardous conditions, search and seizure, arrest of criminals, use of firearms, or potential hazards to others.

Classification information for the 1811 series, sometimes defined as "Criminal Investigator, sometimes performs Civil Investigations" is as described below:

This series includes **positions that involve planning and conducting investigations relating to alleged or suspected violations of criminal laws.** These positions require primarily a knowledge of investigative techniques and a knowledge of the laws of evidence, the **rules of criminal procedure**, and precedent court decisions concerning admissibility of evidence, constitutional rights, **search and seizure** and related issues; the ability to recognize, develop and present evidence that reconstructs events, sequences, and time elements, and establishes relationships, responsibilities, legal liabilities, conflicts of interest, in a manner that meets requirements for presentation in various legal hearings and court proceedings; and **skill in applying the techniques required in performing such duties as maintaining surveillance, performing undercover work, and advising and assisting the U.S. Attorney in and out of court.** It is also

indicated that "most criminal investigators must be skillful in such activities as: Maintaining surveillances; Performing undercover work; **Making arrests**; Taking part in raids."

Qualification information for the 1811 position is as follows: Use these individual occupational requirements in conjunction with the "Group Coverage Qualification Standard for Administrative and Management Positions." In addition, the following Medical Requirements apply: **The duties of positions in this series require moderate to arduous physical exertion involving walking and standing, <u>use of firearms</u>, and exposure to inclement weather.** Manual dexterity with comparatively free motion of finger, wrist, elbow, shoulder, hip, and knee joints is required. Arms, hands, legs, and feet must be sufficiently intact and functioning in order that applicants may perform the duties satisfactorily. Sufficiently good vision in each eye, with or without correction, is required to perform the duties satisfactorily. Near vision, corrective lenses permitted, must be sufficient to read printed material the size of typewritten characters. Hearing loss, as measured by an audiometer, must not exceed 35 decibels at 1000, 2000, and 3000 Hz levels. **Since the duties of these positions are exacting and responsible, and involve activities under trying conditions, applicants must possess emotional and mental stability. Any physical condition that would cause the applicant to be a hazard to himself/herself, or others is disqualifying.**

Additional guidance is provided for positions which involve mixed duties, such as performing both civil investigations and criminal investigations: **The series determination of such positions should be made in accordance with the General Introduction, Background, and Instructions to the Position Classification Standards.** In general, the guidance is that the **predominant duties of the position determine the appropriate series.**

Federal Personnel Manual Bulletin 842-3, "Interim Regulations on Air Traffic Controllers, Law Enforcement Officers, and firefighters Under the Federal Employees Retirement System," was issued on February 9, 1987. The bulletin indicates that a "Rigorous Position" means a position "the duties of which are so rigorous that employment opportunities are required to be limited to young and physically vigorous individuals..."

OPM transferred the responsibility for law enforcement officer determinations to the various federal agencies on December 7, 1993. An agency head's determination that a position is a primary position must be based solely on the official position description and any other description of the duties and qualifications. **However, OPM retains the authority to revoke an agency heads determination that a position is a primary or secondary position, or that an individual's service in any other position is credible.**

The OPM "CSRS and FERS Handbook for Personnel and Payroll Offices," April 1998, Chapter 46, contains guidance on the special retirement provisions for law enforcement officers. A definition of "primary duties" is included. Sections 46A3.2-5 and 46B3.2-4 detail OPM's oversight authority regarding coverage determinations, and the records required to be maintained by the determining agency:

> Upon deciding that a position is a law enforcement officer, each agency head must notify OPM stating the title of the position(s), the number of incumbents, and whether the position is a primary or secondary position, **Each agency must establish a file (5 CFR Sec.**

831.803 and Sec. 831.804) containing all coverage determinations made by an agency head, and all background material used in making the determination, Upon request by OPM, the agency will make available the entire coverage determination file for OPM to audit to ensure compliance with the provisions of this subpart, and, Upon request by OPM, an agency must provide to OPM a list of all approved positions and any other pertinent information requested. For rigorous positions, the list must show the specific entry age requirement and physical qualifications (physical requirements and/or medical standards) for each position.

An agency head's finding that a position is a rigorous position must be based solely on the official position description of the position in question and any other official description of duties and qualifications. The official documentation for the position should as soon as reasonably possible, establish that the primary duties of the position are so rigorous that the agency does not allow individuals to enter the position if they are over a certain age or if they fail to meet certain physical qualifications (physical requirements and/or medical standards) as determined by the employing agency head based on the personnel management needs of the agency for the position in question.

In June, 2000 (Office of Merit Systems Oversight and Effectiveness, Digest of Significant Classification Decisions and Opinions, Article No. 24-01), OPM determined that the GS-1810/1811 Guide had to be read in conjunction with the information contained in the more recently issued (April 1988) GS-083/085 Guide. That Guide clarifies that the GS-1811 series covers positions primarily responsible for investigating alleged or suspected **major offenses** or violations of specialized laws of the United States. . **The GS-083/085 Guide defines major crimes found in the GS-1811 occupation as a capital crime, those involving prescribed monetary values, or others that may vary in different jurisdictions.**

The DOD IG Did it Right!

The Department of Defense Inspector General (DOD IG), in November, 2000 did an outstanding review of a similar situation at the Defense Logistics Agency (DLA). The DOD IG concluded, following a review of their assigned duties, that the agencies' investigators were misclassified as criminal investigators, and recommended that most of them be reclassified. The full report is at: http://www.dodig.mil/Inspections/IPO/reports/2001S003.pdf. The evaluators concluded that (much like the NRC):

> "The agency's investigations, however, are primarily administrative in nature – cases are presented to criminal prosecutors only rarely (8 percent of investigative subjects). Commonly, these cases result in agency administrative action (60 percent of investigative subjects). In addition, the investigations do not generally involve a full range of criminal investigative techniques. As a result, there is a significant mismatch between actual DLA investigator duties and those prescribed for criminal investigators. **Although DLA has organized its investigative activities cost-effectively, e.g., employing criminal investigators who are not entitled to 20 year retirement or LEAP [Law Enforcement Availability Pay], the agency has not ensured that its criminal investigator skills and abilities are used to the fullest extent possible as OPM standards require."**

"DLA investigations do not routinely involve surveillance, NCIC checks, crime lab analysis, sting operations, search warrants, arrest warrants, or polygraph examinations. **Overall, DLA investigations are primarily administrative in nature (compliance with rules and regulations), and DLA investigator duties primarily involve collecting data through interviews and record reviews, and writing investigative reports for management action. These primary duties do not require the knowledge, skill, and abilities for a GS-1811 Criminal Investigator."**

"As noted previously, DLA criminal investigators are in noncovered positions and, therefore, are not entitled to 20 year retirement or Law Enforcement Availability Pay. Also noted previously, **although DLA criminal investigators can earn overtime and comptime, the cost is less than the agency would pay for Law enforcement Availability Pay. As a practical matter, therefore, DLA does not incur higher costs from hiring criminal, rather than general, investigators to staff DCIA. As a result of employing criminal investigators at DCIA, however, DLA is not meeting the OPM requirement to use its employee skills and abilities to the fullest extent possible and is operating contrary to the purpose for which the criminal investigative series was established."**

GAO Reports Related to Criminal Investigators

Report GAO/HEHS-97-162 (Letter Report, **09/02/97**), "Nuclear Power Safety: Industry Concerns With Federal Whistleblower Protection System," contains information on the OI caseload: "**Currently, 55 percent of NRC's Office of Investigations (OI) workload consists of investigating whistleblower discrimination allegations. However, in 96 of the 106 discrimination cases closed by OI in fiscal year 1996, no discrimination was found**." Further, in the same report, NRC staff advised GAO personnel that "while they do have the authority to refer such cases to Justice for consideration of criminal prosecution, such prosecution has occurred only once."

This GAO report is illustrative of the commonly accepted definition of the criminal investigator series as having statutory authority to conduct criminal investigations, authority to execute search warrants, make arrests, and carry firearms if necessary. The GAO report which touches on the OI caseload (55% discrimination cases) strongly suggests that the "wrongdoing" investigative workload, is proportionately small.

GAO/GGD-89-24, "Federal Workforce, Positions Eligible for Law Enforcement Officer Retirement Benefits," was specifically generated in response to a concern that "agencies may be inappropriately classifying jobs as law enforcement positions to help employee recruitment and retention." The report notes that law enforcement retirement benefits are more generous and costly than the benefits for regular employees. The report also includes an excellent discussion of eligibility criteria and position classification, including the comment that:

"Each position in an occupational series is assessed for retirement coverage on the basis of its own job description. Positions classified under the same job series do not always involve the same duties. Therefore, one position may receive law enforcement retirement coverage while another may not. For example, OPM's records showed that in 14 instances

since 1984, OPM denied law enforcement retirement to positions in the Criminal Investigator Series, GS-1811, by far the single largest law enforcement job series, because the specific duties of the positions did not meet the eligibility criteria."

A detailed discussion of "desk audits" as verifying that eligibility criteria are met followed the above. A table indicates that the NRC had a total of 38 law enforcement retirement eligible positions in 1987.

Related Merit Systems Protection Board Cases

Who is qualified as a criminal Investigator has been the subject of Merit System Protection Board (MSPB) reviews. A landmark case was Hobbs vs. Office of Personnel Management. The case is cited in multiple MSPB cases, including:

Ferrier vs. Office of Personnel Management, 1/12/1995
Taylor vs. Dept. of the Treasury, 1995
Martinez vs. Dept. of the Treasury, 7/24/1996
Killion vs. Dept. of the Treasury, 9/18/1996
Houck vs. Dept. of the Navy, 4/15/1999
Watson v. Dept. of the Navy, 08/17/2001

MSPB cases, in general, use the following ("Bingaman") criteria to determine criminal investigator status:

1. Performs investigations (long-term, complicated reviews);
2. Investigates individuals suspected of or convicted of violating criminal laws of the United States (employing agency must have criminal investigation authority);
3. Authority to carry weapons;
4. Authority to arrest, seize evidence, give Miranda warnings, execute search warrants;
5. The job 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 (rigorous position).

1997 U. S. Court of Appeals Decision

The Court of Appeals, in September 1997 reviewed several cases related to law enforcement officer credit. Portions of the decision follow:

> "an employee who qualifies for LEO retirement credit is eligible to retire upon attaining age 50 and completing 20 years of LEO service. By contrast, most civil service employees are eligible to retire at age 60 with 20 years of service or age 55 with 30 years of service. **An employee who qualifies for LEO retirement receives a larger annuity than ordinary civil service employees."**
>
> "The statutory standard for LEO eligibility under the CSRS requires that the duties of the employee's position be "primarily the investigation, apprehension, or detention of individuals suspected or convicted of [federal] offenses." The statutory standard for LEO eligibility

under the FERS is similar, but additionally requires that the duties of the employee's position be "sufficiently **rigorous** that employment opportunities are required to be limited to young and physically vigorous individuals."

A "law enforcement officer" within the statutory contemplation commonly **(1) has frequent direct contact with criminal suspects; (2) is authorized to carry a firearm; (3) interrogates witnesses and suspects, giving Miranda warnings when appropriate; (4) works for long periods without a break; (5) is on call 24 hours a day; and (6) is required to maintain a level of physical fitness.**

Because **the early retirement program "is more costly to the government than more traditional retirement plans** and often results in the retirement of important people at a time when they would otherwise have continued to work for a number of years," **the statutory term "law enforcement officer" has not been given expansive application. To the contrary, as this court has explained, the definition of law enforcement officer in section 8331(20) has been "strictly construed**.

2001 U. S. Court of Appeals Decision

James Watson et al.:

"the officer must show that the **primary duties** of his or her position, ... are the investigation, apprehension, and detention of criminals or suspects. **The most probative factors, are: 1) whether the officers are merely guarding life and property or whether the officers are instead more frequently pursuing or detaining criminals; 2) whether there is an early mandatory retirement age; 3) whether there is a youthful maximum entry age; 4) whether the job is physically demanding so as to require a youthful workforce; and 5) whether the officer is exposed to hazard or danger. The six Bingaman factors may also be considered as necessary and appropriate."**

Historical Perspective

The position of "Investigation Specialist," or later "Investigator," began with the Atomic Energy Commission (AEC). These positions were located in the Division of Compliance, and the investigation reports issued were titled "Compliance Investigations." These positions were clearly established to conduct civil investigations to determine compliance with the regulations found in 10 Code of Federal Regulations (Energy). The AEC was abolished in 1974, and in 1976 these positions, in the 1810 series, were still performing civil investigations. Investigations with any "criminal aspects" were referred to the Federal Bureau of Investigation (FBI). This system worked well; few referrals were made to the FBI, but almost all referrals were accepted for their investigation and subsequent prosecution.

AEC or NRC investigations in the 1960 - 1982 timeframe focused on complaints, radiation overexposures, allegations of improper power reactor construction, or any issue where regional management thought an investigator might aid in developing information. Some of these investigations were technical in nature; one investigation tracked the fabrication, heat treatment, and installation of large reactor vessel hold-down bolts.

These positions did not involve carrying firearms, giving Miranda warnings, search and seizure, arrests of suspects, execution of search warrants, performing wiretaps, nor frequent contact with criminals, or working long periods without a break, and had no physical requirements.

The AEC, and its successor, the NRC, as "exempt" agencies, have a relatively high grade structure, with GG-13 and GG-14 non-managerial investigative positions. As a result, attracting and hiring qualified individuals to the investigative positions was never a problem, and vacancies were filled as rapidly as the hiring and background investigation process would allow.

When OI was created in April 1982, it reported directly to the Commission, a prestigious position in the NRC. In 1987, the Commission decided that it had reported directly to them for a long enough period, and proposed making them a line office in one of the lower Commission organizations. OI strenuously objected to this move, and complained to Congress, as evidenced by the October 8, 1987 testimony of B. Hayes, Director, OI, before the Subcommittee on Nuclear Regulation. This led to the "Nuclear Investigations Improvement Act of 1989," HR 1835, which would have decreed that OI report directly to the Commission. The Bill did not pass, but is instructive in what it wanted OI to do:

> (1) **The Office of Investigations shall have the responsibility for initiating and conducting investigations into possible violations of any law the Commission is responsible for implementing (or any rule, regulation, order, license condition, or other requirement issued under any such law) in cases where there is information indicating that such violations were willfully or intentionally caused or were the result of careless disregard for regulatory requirements.**
>
> (2) **When the Director of the Office of Investigations has reasonable grounds to believe that there has been a violation of Federal criminal law, the Director, after notifying the Commission, shall report such violation to the Department of Justice**.

General Conclusions, NRC Documents

OPM, GAO, MSPB, and U.S. Court of Appeals documents provide criteria for determining if an individual should be classified as in the 1811 job series and receive early retirement and premium pay benefits. OI personnel do not meet these criteria.

OI personnel do not perform criminal investigations. OI lacks a statutory basis for performing criminal investigations. The Atomic Energy Act and other legislation give the responsibility for nuclear industry criminal investigation to the FBI. The mission of OI (from NUREG-0325, "NRC Organizational Charts and Functional Statements"), does not include the word "criminal." 10 CFR 1.36, "Office of Investigations" does not contain the word "criminal." The "General Statement and Policy for Enforcement Actions," Indicates:

> XI. Referrals to the Department of Justice
>
> **Alleged or suspected criminal violations of the Atomic Energy Act (and of other relevant Federal laws) are referred to the Department of Justice (DOJ) for investigation**. Referral to the DOJ does not preclude the NRC from taking other

enforcement action under this policy. However, enforcement actions will be coordinated with the DOJ in accordance with the Memorandum of Understanding between the NRC and the DOJ, (53 FR 50317; December 14, 1988).

Appendix E of the Enforcement Manual, **the Memorandum of Understanding Between the NRC and DOJ states that NRC will "provide information regarding such criminal violations to the appropriate investigative agency having jurisdiction over the matter." In practice, NRC referrals to DOJ are then investigated either by DOJ personnel or a Grand Jury.**

On April 3, 1980, Ward, IE Senior Investigator, wrote, "**We are not proposing that IE [Inspection and Enforcement] or anyone else in NRC undertake criminal investigations, per se. We share the OELD [Office of the Executive Legal Director] view that neither IE nor OIA [Office of Inspector and Auditor] possesses such authority** and that legislative changes would be needed to obtain it." Yet, shortly thereafter, (09/07/80) Ward signed personnel actions classifying IE investigators in the 1811 series, knowing that they lacked the authority to perform criminal investigations.

The Office of the Executive Legal Director (OELD) reviewed whether NRC conducts criminal investigations and the lack of need to provide "Miranda" warnings in a comprehensive memorandum dated April 14, 1980: **"NRC investigations involve the gathering of evidence for civil enforcement actions and not criminal actions**. "Miranda" warnings, a requirement of criminal procedure, are not normally associated with NRC investigations. However, notwithstanding **the civil focus of NRC investigations**, an NRC investigation may uncover evidence that might form a basis for a criminal referral to the Department of Justice. Examples of such referrals would be willful violations of certain provisions of the Atomic Energy Act and falsification of certain records (18 USC 1001)."

Well before OI was created, and for sometime afterward, OI was not the NRC interface with the Department of Justice; referrals were made through the NRC Office of Inspector and Auditor, the predecessor of the current NRC Office of Inspector General. The "IE/OIA Policy for Referral of Criminal Matters to DOJ/FBI", drafted in August 1980, was finalized November 29, 1980. This was also documented in a memorandum dated July 16, 1982, from Chairman Palladino to J. Fitzgerald, then Acting Director of the Office of Investigations. The memorandum provided OI with various authorities, including the authority to "Advise and assist the Office of Inspector and Auditor in referrals to the Department of Justice stemming from investigations by OI." This long-standing policy was reconfirmed on March 4, 1983, when the "OI Policies" were adopted by the Commission. OI Policy 13 was that: "The Office of Inspector and Auditor (OIA) shall be the primary office responsible for referral, and related discussions of investigative matters with the Department of Justice (including U.S. Attorneys and the Federal Bureau of Investigation)."

J. Fitzgerald requested that the NRC Office of General Counsel provide him with an opinion on whether the NRC had the authority to conduct criminal investigations on June 25, 1982, prior to the creation of the Office of Investigations. In the response memorandum of October 15, 1982 from Martin Malsch. to J. Fitzgerald, "Request for Legal Research and Opinion," the NRC Deputy General Counsel advised: "The Atomic Energy Act does not explicitly give the NRC such authority -- indeed the Act should probably be read as depriving NRC of such authority -- and we conclude a court would most likely conclude that the **NRC does not have the authority to conduct an**

investigation solely for criminal purposes."***...Your memo posited a second part to this question, i.e., whether the NRC should conduct criminal investigations under any circumstances. The simple legal answer to this question is that, since it does not have the statutory authority to do so, it should not.*** **(See Attachment 1)**

On August 26, 1983 then Commissioner Victor Gilinsky wrote to the NRC Chairman and other commissioners: "The NRC staff should understand that their investigations of wrongdoing are **civil investigations**. Criminal investigations are the province of the Department of Justice."

On April 9, 1984, the Commission received a Briefing on Criminal versus Civil Investigations. A draft paper giving OI the authority and responsibility to conduct criminal investigations was discussed, with the Commission strongly objecting to and then directing the removal of the term "conduct." "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.**" (J. Fitzgerald). Even assists to the DOJ were to be a secondary priority. "Yes, our policy is to first serve our civil purpose and then help DOJ."

On March 1, 1988, the NRC provided clarification regarding the October 8, 1987 testimony of B. Hayes, Director, OI, before the Subcommittee on Nuclear Regulation. Hayes indicated "I was also referring to at least three **important authorities** given to Inspectors General, but **currently not given to OI.** These are: (1) the authority of the Director, OI, to appoint, direct, and supervise all subordinate OI personnel, (2) **statutory authority to conduct criminal investigations**." Hayes was well aware that OI, and the NRC, lacked criminal investigative authority.

That OI lacks statutory authority to perform criminal investigations is known to the Commission; it is not an oversight. Nor is it something which the Commission planned to change. Per a letter from then Chairman Lando Zech to Manuel Lujan, of the House of Representatives Subcommittee on Energy and the Environment Committee on Interior and Insular Affairs on August 3, 1988:

> "**The Commission does not believe that a grant of authority to OI to conduct criminal investigations would enhance our ability to protect public health and safety or the government's ability to prosecute criminal violations of the Atomic Energy Act.** The granting of such authority is unnecessary to fill any gap in existing civil and criminal enforcement powers and would merely duplicate existing authority vested in the Department of Justice (DOJ). Under the Atomic Energy Act, the Commission has broad investigative powers that the Commission has authorized OI to exercise in resolving allegations of wrongdoing in activities regulated by the NRC. **Evidence gathered by OI may provide the basis for civil enforcement action as well as reveal possible criminal wrongdoing. In the latter case, NRC, through OI, refers possible criminal violations to DOJ for its review. DOJ may elect to pursue the matter further using its investigative resources and prosecutorial powers and often requests the assistance of our investigative or technical staff, which we provide. The Commission believes this arrangement has worked well. To expand OI's role by granting it independent criminal investigative authority would unnecessarily complicate civil investigative matters without any appreciable improvement in the government's ability to investigate or prosecute criminal acts. For example, exercise of criminal authority by OI would trigger certain procedural rights (such as Miranda warnings), might require**

separation of the civil and criminal investigative staff, or could cause delays in civil investigations necessary to resolve public safety issues. The Commission believes the existing scheme of parallel investigative powers in the NRC and DOJ better serves our mutual interest in effective civil and criminal law enforcement."

OI investigations pertain to violations of 10 Code of Federal Regulations (10 CFR) rather than federal criminal law. While willful violation of certain sections of 10 CFR can have criminal implications, such cases are a very small percentage of the investigative caseloads, and OI findings are provided to DOJ for criminal investigation. Contact with criminals is minimal, at most. Most work is performed in a non-rigorous office setting, performing interviews (with a court reporter to do the transcribing) and document reviews.

OI positions do not meet the qualification requirements for the 1811 series. They lack arrest responsibilities, authority to carry firearms or other weapons, do not perform undercover work, do not execute search or seizure warrants, are not exposed to hazardous conditions nor inclement weather. They clearly meet the series 1801 or 1810 classification and qualification criteria.

That's Entertainment!

In 1999, I discovered that another document (J. Keppler's 1983 response to a report) had referred to the Malsch memorandum dated October 15, 1982 (described previously). I filed a FOIA request for this document, and a response came on April 23, 1999. I was delighted to immediately notice that the requested document was enclosed, so much so that I did not look at the transmittal letter. Several days later, C. Reed of the NRC FOIA staff contacted me (I had dealt with her on several past occasions) to inquire if I was disappointed with their response. My answer was that I was very happy with their response, as they had provided the requested document. She responded in great surprise, indicating that they had denied my request based on attorney-client privilege!

The document had apparently been attached to the denial letter by accident. She asked if I could send the document back, and I declined. Several days later, I told her I would like to send a box of chocolates to whoever had made the mistake, and was told that the NRC Inspector General had opened an inquiry into whether there had been a conspiracy to send me the document, in which the NRC Deputy General Counsel advised that, lacking statutory authority, NRC personnel should not conduct criminal investigations under any circumstances. This is the same NRC IG who strongly resisted looking into my issues, and ignored virtually all of the provided information.

How Did This Occur?

The original classification for NRC investigators was series 1810 (1970s-1982). There were several NRC investigative personnel, mostly former Naval Investigative Services, Drug Enforcement Agency and Alcohol, Tobacco and Firearms personnel, who wanted the retirement and premium pay benefits they had in their previous positions, even though this was not justified by the work at NRC. Several knowledgeable senior NRC managers were strongly against changing the classification to series 1811. Baci (and Gilbert, possibly others) were rumored to have filed a grievance to make their classification 1811, when only Ward was so classified. (See the section on "What Did the NRC Tell the Office of Personnel Management?")

The headquarters unit involved with investigations did some very unusual and highly questionable things. At least one individual, Williamson, was made an 1811 when he came on with the agency from the Naval Investigative Service in December 1979, even though the position was not so classified. I have paperwork dated September 7, 1980 saying that Ward was my supervisor (he was not), and my classification had changed to series 1811. J. Keppler, then Region III Regional Administrator, and others found out about this change, and he changed his employees, including me, back to 1810 series on November 30, 1980. The discussion raged, and just before OI was created, there was supposed to be a "desk audit" to determine if the series 1811 classification was supportable. When OI was created, in July 1982, this "desk audit" was cancelled. The 1811 series classification was then deliberately put in place. Fortuna and OI Director J. Fitzgerald subsequently advised me that the 1811 classification was for reason of easily hiring experienced investigators, and I advised them (7/82) that this was not the purpose of a job classification, to no avail.

When OI went before the Commission and stated that they would conduct criminal investigations the Commission balked. OI management then scoured the dictionary and came up with the term "wrongdoing" to define the kind of investigation they would pursue. This somewhat vague term was then used in place of the word "criminal" whenever describing OI investigations. More properly, a criminal investigation looks at indications of "criminal wrongdoing."

> Roget's II: The New Thesaurus, Third Edition. 1995: wrongdoing: NOUN: 1. A wicked act or wicked behavior: crime, deviltry, diablerie, evil, evildoing, immorality, iniquity, misdeed, offense, peccancy, sin, wickedness, wrong. See RIGHT. 2. Improper, often rude behavior: horseplay, misbehavior, misconduct, misdoing, naughtiness.

Wrongdoing is defined in NRC Management Directive 8.8, Management of Allegations," (near the back) as **an intentional violation of regulatory requirements or a violation resulting from careless disregard of, or reckless indifference to, regulatory requirements.**

Why does one have to search the NRC so thoroughly to find a definition of the term "wrongdoing?" The term is utilized in many NRC documents, but finding the definition is unusually difficult. Wouldn't it be easier to simply say that the NRC Office of Investigations investigates violations of NRC requirements? That statement, however clear and straightforward, would involve recognizing that they are not performing law enforcement activities.

To find the NRC definition, one can also go to the NRC Enforcement Manual, now revision 5, dated September 28, 2006, then go to Chapter 6, Section 6.2, and carefully read the following:

"Wrongdoing involves a violation of NRC requirements resulting from discrimination, deliberate misconduct, or careless disregard."

It was, and is well known within OI that the series 1811 classification would not stand the light of day under any kind of objective review. OI investigative duties simply do not measure up to a standard which takes into account your arrest record during the period you are so classified, and the stress of the position. The former RIII OI Field Office Director once stated that "NRC is the best-kept secret on the 1811 circuit!"

What did the NRC tell the Office of Personnel Management?

Headquarters personnel first sought to have their positions classified as deserving of law enforcement officer retirement by a letter to the Civil Service Commission on September 9, 1975, indicating that a review of Federal Personnel Manual 831-41 (December 27,1974) and a substantial in-house review justified this. A subsequent in-house memo from Dudley Thompson to G. Davidson on June 26, 1979 sought to have two individuals, Ward, and Baci classified in the 1811 series. On November 4, 1979, the Acting Chief of OPM's Benefits Policy Staff, Mr. K. Glass, advised via a letter that the headquarters Executive Office for Operations Support OI investigator (only!) position, held by Ward, was covered under 5 USC 8336(c) (law enforcement retirement). Ward needed other positions in OI similarly classified, to support his classification. A December 23, 1983 letter from Hayes to Bird, asked for review of all OI investigator positions for consistency with 5 U.S.C. 8331(20).

A letter dated **April 11, 1984** from Bird to OPM provided answers to several OPM questions. Answer number three addressed the estimated 40-50% percentage of time OI personnel were involved in criminal investigations. **OPM requested a "breakdown of all types of investigations performed by your investigators (criminal and non-criminal) and a comparison of the time (by percentage) devoted to each type of investigation." The breakdown was not provided; the answer was "virtually all OI investigations involve ostensible criminal violations."** A discussion of crimes related to NRC regulations was included, including a reference to conspiracy and mail fraud! The answer to the primary question was that "all of the incumbents' time is spent on investigations; however, 40 to 50 percent of their time is spent in the field."

Letters were sent to OPM, asking to have the investigator positions as they existed in the previous NRC Office of Inspection and Enforcement qualify for the 1811 series. I personally held such a position for five years, and had been told it did not qualify as 1811 experience. On September 10, 1985, OPM requested additional information regarding the percentage of time the incumbents spend conducting investigations of violations of the criminal codes for these positions. The patently false answer again was "All of the incumbents' time is spent on these types of investigations."

A letter to OPM on December 24, 1986 erroneously indicated that the OI 1811-9 position involved investigations of fraud against the government, theft of government property, conflicts of interest and bribery!

On June 21, 1988 The NRC advised OPM a review of Federal Personnel Manual (FPM) Bulletin 842-3 had been performed, and the NRC certified that the positions of OI investigators met the "rigorous" definition contained in the FPM. FPM Bulletin 842-3, "Interim Regulations on Air Traffic Controllers, Law Enforcement Officers, and Firefighters Under the Federal Employees Retirement System," was issued on February 9, 1987. The bulletin indicates that a "Rigorous Position" means a position "the duties of which are so rigorous that employment opportunities are required to be limited to young and physically vigorous individuals..." The NRC letter supported this decision by indicating that applicants would be under 35 years, and "every investigator is required to undergo a pre-employment medical examination and an annual examination thereafter." **No minimum physical criteria were provided (none then existed)**, and

it was not stated that the individual had to "pass" the examination. The NRC OI Investigative Procedures Manual, August 1999, section 2.5, indicated:

> "Field Office Directors should encourage physical fitness, wellness, and/or stress reduction programs tailored to individual agent needs and evaluation. It is recommended and should be encouraged that agents take an annual physical and share the results with the Field Office Director."

In general, almost all of the communications between the NRC and the Civil Service Commission or Office of Personnel Management on the subject of the 1811 classification and law enforcement retirement contained vague, erroneous, or misleading and false information. This led to an extended 8-year series of letters and responses. None of the above letters indicated that NRC lacked criminal investigative authority, or that NRC investigators did not have arrest authority, carry weapons, issue Miranda warnings, or work under strenuous conditions. Letters from NRC to OPM fraudulently indicated high percentages of criminal investigations, or investigations involving "matters of potential criminality covering a wide spectrum of violations."

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, for the first time, that OI investigators have not "been deputized to make arrests or carry firearms."** Past and recent NRC vacancy announcements have **lacked** the typical wording of positions involving firearms:

> "Applicants for this position are required to qualify with and use firearms and other weapons as part of assigned duties and to maintain such qualifications. Because of an amendment to 18 U.S.C. 922(g)(9), which became effective September 30, 1996, and referred to as the Lautenberg Amendment, applicants are ineligible for this position if at any time they have been convicted of a misdemeanor or felony crime of domestic violence"

The attached position descriptions (not the evaluation) noted, also for the first time, that **"much of the work is performed in an office setting." This statement indicates that the previous certifications that the positions met the definition of "rigorous" were incorrect.**

The Evaluation Statement references the appropriate 1972 grade-level guide. However, portions of that guide also describe the "Distinctions Between General And Criminal Investigating Occupations," indicating that "**most criminal investigators must be skillful in such activities as: Maintaining surveillances; Performing undercover work; Making arrests; Taking part in raids." This, and other information I provided, was not discussed**. The position qualifications were likewise not discussed. Statements concerning the various techniques OI investigators might use are included, without reference to the percentage of time the positions predominantly involve these actions. In some cases, such as "using polygraphs," these appear to be extremely infrequently performed tasks. The criteria developed through case law were absent.

At one point, OI personnel wanted to be a part of the about-to-be-formed Inspector General's (IG) office at the NRC, legitimizing their 1811 status, and this almost succeeded. The NRC IG bill, as introduced in the Senate, provided for the transfer to the newly created Office of the Inspector

General at the Nuclear Regulatory Commission not only the personnel and functions of the Office of Internal Audit which performed "the typical IG functions that is, internal audit and investigations," but also the functions of the Office of Investigations ("OI"), which conducted program investigations of NRC licensees.

The Senate Report described the transfer of OI to the Inspector Genera as "consistent" with the Act. When the bill was reported from the Committee to the full Senate, however, there was NRC Commission objection to the transfer of OI to the NRC Office of the Inspector General on the ground that it would interfere with the authority of the Commission to perform its regulatory functions resulting from its loss of control of the investigative unit, which conducted investigations integral to the Commission's **regulatory mission**. As a result, the Committee Chairman, Senator Glenn, agreed to drop the transfer of OI to the Office of the Inspector General from the bill.

What Does OI (Predominantly) Do?

OPM defined as predominant, or primary, duties which are: (a) paramount in influence or weight; and constitute the basic reasons for the existence of the position; (b) occupy a substantial portion of the individual's working time over a typical work cycle; and (c) are assigned on a regular and recurring basis. In general, if an employee spends an average of at least fifty percent of their time performing a duty or group of duties, they are primary duties. A June 2001 report by the NRC Discrimination Task Force stated that 44% of the OI caseload consists of discrimination cases.

Predominantly, allegations or concerns come to the NRC regional technical staff, to either inspectors or the regional Allegation Coordination Staff. Per a detailed procedure, allegations are documented, reviewed by members of an Allegation Review Board, and assigned as deemed appropriate. Allegations meeting certain criteria, such as possible deliberate violations of the regulations in 10 Code of Federal Regulations (10 CFR), are referred to OI. Some willful violations of portions of the regulations in 10 CFR have associated criminal penalties, but such criminal penalties are imposed extremely rarely. Per agreement, the possible violation(s) of 10 CFR are provided to OI personnel, who may not be conversant with10 CFR.

OI assigns the case to an investigator. The investigator may confer with the technical staff, and typically travels to interview the alleger with a court reporter present to generate a transcript of the interview. Interviewees are not under arrest or restraint, and may have a lawyer present. Such interviews seldom approach the rigor associated with the term "interrogation." A trip to another location may be made, where other interviews and document reviews are conducted. The investigator may visit a power reactor site, but is not qualified (site access training) for unfettered site access, and will go into the plant itself on an extremely infrequent basis. Most investigators are also not engineers, so complex technical issues are not normally the subject of investigations.

The investigator will write a report summarizing aspects of the various interviews and document analyses, and present a conclusion. The report is often provided to the Department of Justice (DOJ) for review. A very low percentage of OI reports are accepted for DOJ action. Those that are accepted normally receive DOJ criminal investigation in the form of a Grand Jury Investigation, or investigation by the Federal Bureau of Investigation. The report is also provided to the regional and Headquarters staff for review, and a determination as to whether the staff finds the report's

conclusions defensible. A small but significant number of reports have not been supported following the staffs' review.

There are numerous variations on this theme. The OI investigator may obtain documentation of an investigation conducted by another organization; activist groups may be involved in support of an alleger, and be contacted; some technical issues may be involved which require staff review, etc.

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. I am not personally aware of OI personnel using polygraphs, obtaining search warrants (themselves), serving Grand Jury subpoenas, or serving NRC subpoenas.

OI has been in existence for almost twenty-five years. Years of data could be utilized to determine how often OI personnel perform certain actions. As an example, in the last nineteen years it has been unnecessary for OI investigators to be deputized, to carry weapons, or have physical performance standards. How many total OI investigations have been performed, and how many of these have been accepted by the DOJ for criminal investigation? How many have required OI testimony? How many of the total cases have been investigated by the DOJ and successfully prosecuted (an individual convicted of violating the criminal laws of the United States)?

Using the chart following, a general analysis can be made, making a "leap of faith", and assuming that OI cases referred to the DOJ for "prosecutorial review" are potential criminal cases, and that those accepted for DOJ criminal investigation and prosecution are actual criminal cases.

Further assuming that DOJ accepts 30% of the cases referred (higher than the 3% estimated), then the OI *criminal caseload is typically 5-6% of the total caseload.* Conviction percentages are estimated to be 2.3% of the total caseload. ***Note that during the timeframe of 1982-1986, when OI personnel were in the process of obtaining criminal investigator classifications, the percentage of referrals was especially low.***

Table From Data in the NRC Annual Reports

YEAR	OI CASES CLOSED	OI CASES TO DOJ FOR REVIEW*	PERCENTAGE OF TOTAL CLOSED (%)
1998	194	53	27.31%
1997	238	72	30.25%
1996	240	66	27.50%
1995	259	42	16.22%
1994	256	23	8.98%

1993**	216	26	12.08%
1992	119	19	16.00%
1991	65	18	27.69%
1990	119	28	23.53%
1989	88	28	31.82% maximum
1988	107	28	26.17%
1987	78	19	24.36%
1986	141	11	**7.80%**
1982-85***	581	36	**6.20%** MINIMUM
1982-1998 GRAND TOTAL	**2701**	**469***	**17.36%**

Does not mean accepted by DOJ; that data was not included in NRC Annual Reports.
****OI referral procedures changed, some "cases" documented telephone contacts.**
*****Timeframe of many submittals to OPM, claiming 100% criminal investigations.**

A letter of February 2, 1987, from Winkle, OPM, to Benson, NRC, clearly described OPM's "primary duty criteria for general coverage under 5. U.S. C. 8336 (c)(1) law enforcement benefits. "In general, if an employee spends an average of at least **50%** of his or her time performing a duty or group of duties, they are his or her primary duties."

In the same letter, responding to a December 9, 1986 letter from NRC, OPM further advised that "you informed us that 40% of the incumbent's time is spent managing or conducting criminal investigations, and that approximately 60% of the incumbent's time is spend investigating other irregularities in the administration of Commission programs/activities and inspecting activities within the commission." "Therefore, since the majority of the incumbent's time will be spent investigating non-criminal matters, general coverage for this [OIA] position is denied."

NRC appealed the decision in the above letter on February 2, 1987. By letter of June 29, 1987, the OPM decision denying coverage for OIA personnel was sustained. OPM expected an OI criminal investigator position to involve at least 50% criminal investigations, and this was **never true**.

An August 2005 NRC SECY paper indicated: "**During the past five fiscal years, out of 244 cases referred to DOJ for prosecutorial review, DOJ has accepted only seven for criminal prosecution**." No statistics were available as to successful prosecutions.

What Has Been the Result of the Misclassification?

The result of the misclassification was that NRC OI investigative personnel were eligible for otherwise unavailable **early retirement** and **premium pay**. Public Law 80-879 (7/2/48) extended 20 year retirements to officers and employees whose duties "are primarily the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States." Under the Office of Personnel Management guidelines, federal employees who believe a period of their service entitles them to the law enforcement retirement provisions can request a determination that their service is creditable. According to OPM guidelines, "the employee bears the burden of proof with respect to credit under the special provisions covering law enforcement officers..." The guidelines further state that "For law enforcement officers [this proof] includes a list of the provisions of Federal criminal law the incumbent was responsible for enforcing and the arrests made." OI personnel could not possibly meet this test, lacking both federal criminal laws enforced and records of arrests made.

Criminal investigators work both scheduled and unscheduled overtime. This often resulted in investigators working long and unusual hours. In addition, they are required to be on call for certain periods each month. Historically, criminal investigators received overtime compensation of one and one-half times their basic hourly rate for both scheduled and unscheduled overtime hours worked, but received no compensation for the time they were on call.

AUO pay is determined as a percentage, not less than 10 percent nor more than 25 percent, of an employee's rate of basic pay fixed by law or administrative action for the position held by the employee, including any applicable special pay adjustment for law enforcement officers under section 404 of the Federal Employees Pay Comparability Act of 1990, locality-based comparability payment, or continued rate adjustment, before any deductions and exclusive of additional pay of any other kind.

Congress enacted the Law Enforcement Availability Pay Act of 1994 (LEAP) to establish a uniform system of compensation for the excessive and unusual hours worked by federal criminal investigators. LEAP provided availability pay for criminal investigators who met eligibility requirements based on an annual minimum average of AUO hours worked. This availability pay was, in effect, a 25% increase in the basic pay of each qualifying criminal investigator.

Availability pay was primarily intended to be in lieu of premium pay for unscheduled overtime hours. Despite the suggestion of the designation "availability," it was not solely intended to compensate for on-call time. From the government's perspective, availability pay was designed to gain control over AUO while at the same time recognizing investigators' proper claim for some compensation for the extensive on-call time required of them. The balance was struck by providing a 25% pay increase (over each qualifying investigator's basic pay, including locality pay) to compensate for (1) all on-call time, (2) all unscheduled overtime, and (3) the first two hours of scheduled overtime during a day in the investigator's regular work-week. Thus, after enactment of LEAP, the only premium pay for which the criminal investigators were eligible with respect to a regular work-day was for overtime hours (1) scheduled in advance of the work-week and (2) in excess of ten hours of work. Availability pay was intended to replace AUO pay. A criminal investigator who is entitled to receive availability pay may not receive AUO pay.

Per a memorandum from Bird, dated November 3,1994, OPM had not published implementing regulations for availability pay, but it was to be provided to OI personnel: "All employees on the list are already receiving 25 percent Administratively Uncontrollable Overtime except for those listed below. Nonetheless, these employees [those listed below] also should be paid the 25 percent availability pay." Listed were four individuals.

Each criminal investigator may be paid availability pay. Availability pay shall be paid to ensure the availability of the investigator for unscheduled duty. Availability pay provided to a criminal investigator for such unscheduled duty shall be paid instead of premium pay provided, except premium pay for regularly scheduled overtime work as provided under [5 U.S.C.] section 5542, night duty, Sunday duty, and holiday duty. During the regular work-week, the only overtime pay criminal investigators are entitled to accrue is for regularly scheduled overtime for work in excess of ten hours per day on a regular work-day.

Pursuant to LEAP, such overtime was regularly scheduled overtime, the first two hours of which (on a regular work-day) were compensated by availability pay and the second two hours of which were covered by premium pay. Title 5 U.S.C. 5542(d), added by LEAP, provides that, for one receiving availability pay, there shall be no additional compensation for the first two hours of scheduled overtime on a regular workday. **It is my understanding that OI personnel count the first two hours <u>at home</u> as the time when they are "available."** Call-ins are extremely infrequent.

Availability pay is paid to criminal investigators who are required to work an average of two unscheduled duty hours a day in excess of each regular work day. Under the statute, each criminal investigator receiving availability pay and his or her supervisor must "make an annual certification to the head of the agency that the investigator has met, and is expected to meet, the requirements" for such pay.

(1) such investigator shall be compensated under such subsection (a), at the rates there provided, for overtime work which is scheduled in advance of the administrative workweek -
(A) in excess of 10 hours on a day during such investigator's basic 40 hour workweek; or
(B) on a day outside such investigator's basic 40 hour workweek; and
(2) such investigator shall be compensated for all other overtime work under section 5545a [providing for availability pay].

The effect of this LEAP provision on computation of regularly scheduled overtime is that each criminal investigators receiving availability pay may be required to work two extra hours during each regular work-day (up to ten extra hours a week) without additional compensation. Congress intended this result in partial exchange for the criminal investigator receiving a guaranteed 25% pay increase. Congress foresaw the guarantee of a 25% salary increase for all eligible criminal investigators and uniform application of additional compensation as the best way to maximize cost savings and investigative efforts in the field.

OI investigative personnel receive <u>25%</u> availability pay. The 25% "availability pay" is included in the OI Investigators basic pay, and therefore raises the total considered for Thrift Savings Plan purposes and the "high three" salary years utilized to determine retirement pay. A very conservative calculation of overpayments conducted <u>without this</u>

consideration indicated that well over $700,000 was overpaid each year. Assumedly, the total amount of AUO (1982-1995?) or availability pay (post 1995-2007) received by OI personnel over the years amounts to millions of dollars. Something over **$17,500,000** is involved here.

NRC Response to This Concern

On February 11, 1988, I sent an early version of this concern to V. Stello, Executive Director for Operations. I later sent it to Chairman Selin. There was no response.

On August 6, 1997, I first E-mailed a simple question to NRC Inspector General and Human Resources personnel regarding classification of Office of Investigations personnel as series 1811 (Criminal Investigator) versus series 1810 (Civil Investigator). With some encouragement (an E-mail to the Chairman's staff), Human Resources personnel responded to my question. Their response was that they do not base "classification of positions into the 1811 series on arrest authority, the carrying of weapons or degree of hazard." Knowing this to be incorrect, I began to research series 1811 classification information on the agency document control system and the Internet, finding a wealth of information.

On August 20, 1998, NRC Commissioner McGaffigan received my concern and responded that he had contacted the NRC Inspector General, and passed my concern on to the Senate Governmental Affairs Committee. I never heard from the Governmental Affairs Committee.

In mid-October, 1998, Illinois Senator Durbin sent my concern package to the Chairman. On October 26, 1998, I received the first indication (voice mail from IG personnel) that the IG was addressing my concern. No action had been taken for over a year; the NRC had unnecessarily paid several hundred thousand dollars to Office of Investigations personnel during this period. The assigned IG Investigator advised that the investigative phase of his review was completed in December, 1998, and report writing had begun. The IG investigator did not advise me of other related actions, such as the October, 1998 meeting between OI and the Office of Human Resources. The IG investigator left the NRC in March, 1999 without advising me.

My FOIA request (NRC and OPM documents) was provided and I obtained copies of documents of interest. When the IG Investigator would not advise me whether my concern had been sent to OPM, I mailed, E-mailed and faxed my concern package to OPM, and received indication that the Office of Merit Systems Oversight would review the issue. I subsequently contacted the House Subcommittee on the Civil Service (Mr. Ned Lynch, now deceased), which took an interest and discussed the status of my issues with the General Accounting Office (GAO) and OPM.

S. P, consultant, prepared a report entitled "Report to the Nuclear Regulatory Commission Office of the Inspector General Regarding the Classification of Positions to GG-1811, Criminal Investigator Series, dated September, 1999. This report was utilized as an attachment to a memorandum to then Chairman Dicus, dated October 25, 1999, entitled "Alleged Improper Classification of Office of Investigations (OI) Investigators in GG-1811 Series." Both documents indicate that a review of my concerns did not validate my position that the OI investigators were misclassified.

However, a review of the documents revealed that most of the information I had provided, such as detailed discussion of the regulations and their bases, the 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, the percentage of times OI investigators actually perform certain functions, OI criminal caseload statistics, discussion of several internal NRC memorandum, testimony of agency personnel, discussion of case law and Merit Systems Protection Board decisions, and the detailed chronology of events had not been addressed. The OIG review was significantly inadequate. A FOIA request revealed that other records referenced in this document had not been reviewed. A detailed chronology, based on data developed by myself and the documents contained in the NRC Inspector General case file, is attached.

What Now?

Once it is determined that the series 1811 classification is not and never was appropriate, several things will need to be done. First, the classification will need to be changed as appropriate, most likely to the 1801 or 1810 classification. Then, a determination will need to be made if the investigators have been overpaid as a result of the misclassification (25% "availability pay"). Actual overtime worked may reduce this amount. If overpaid, the amount of overpayment should be determined and a decision made as to how much of the figure will be "forgiven" by the agency.

What About the Chronology?

The Chronology portrays an interesting sequence of events. Ward first succeeds in having his position classified as a primary 1811 position on November 4, 1979 although it should be a secondary position. This was done by indicating that he, himself, did investigations. To my knowledge, Ward never performed investigations himself. The word at NRC headquarters was "Ward does not travel." Do any reports list him as the investigator? Coverage for others would wait until May 1984 (the rumors of grievances being filed in this timeframe were undoubtedly true)!

Then, at various times, the various NRC senior management and legal groups clearly indicate NRC does not have the authority to do, and does not do, criminal investigations. However, the efforts to get the OI positions approved as 1811s by OPM continued, as though OI was ignoring NRC management, and the staff in Human Resources was uninformed and unconcerned that the statements made to OPM were not clear and detailed.

Of Interest, even individuals in OIA and OI generated letters and memoranda which describe NRC investigations as civil investigations, even postponing such civil investigations when requested by Department of Justice (DOJ) personnel.

In summary, it appears that all the parties, with the possible exception of the Office of Human Resources, knew that **NRC performed civil investigations which sometimes developed indications of criminal actions.** The investigations which indicated likely criminality were referred to the DOJ for review, not even directly, but through the Office of Inspector and Auditor. Those accepted by the DOJ for action were investigated and often prosecuted. The criminal investigation was performed by the DOJ, sometimes (a very small percentage of all cases) with some assistance from OI.

The Deputation Chronology addresses deputation. If one is not employed in a primary law enforcement agency, then temporary deputation from the Department of Justice must be requested in order to become deputized. The United States Marshals Service, with the approval of the Attorney General, has the authority to deputize selected officers or employees of the Unites States in furtherance of federal law enforcement missions. Procedurally:

A. Special deputation shall be authorized only upon a showing of facts that indicate that the federal interest requires such deputation. All deputations expire automatically on June 30 of each year, if not specified sooner. Renewals must be initiated by the requesting agency and must include specific justification.

B. Only federal employees shall be deputized unless circumstances are such that not enough qualified federal employees are available for a given mission and/or a special requirement exists for specific non-federal employees.

C. Federal agencies soliciting special deputations shall be required to evaluate and nominate only those persons who have held positions and have shown expertise in the law enforcement field. Such requests must be made to the Deputy Director, U.S. Marshals Service, by the requesting federal agency. The request must state the specific reason for the deputations; must identify the nominees; and must certify that the nominees have qualified with the use of firearms within the last twelve months.

It is actually *prima facie* evidence that one does not have a statutory "primary law enforcement position," when deputization must be obtained in this fashion.

Previous FOIAs produced a single document, indicating that a single NRC OI Investigator was deputized for the period covering August 21, 1992 - August 31, 1993, one year. **Being deputized was not one of the "primary duties" of the OI Special Agent position during 07/1982-10/2001**. The Deputation Chronology details later deputations and the reasons cited for the deputation requests.

<u>The MOU with DOJ Process</u>

The sequence which led to the Memorandum of Understanding with the Department of Justice follows:

04/03/80 Memo, Ward, IE Senior Investigator, "We are not proposing that IE or anyone else in NRC undertake criminal investigations, per se. We share the OELD view that neither IE nor OIA possesses such authority and that legislative changes would be needed to obtain it."

04/14/80 Memo, NRC OELD: "NRC investigations involve the gathering of evidence for civil enforcement actions and not criminal actions. "Miranda" warnings, a requirement of criminal procedure, are not normally associated with NRC investigations."

10/15/82 Memo, M. Malsch to J. Fitzgerald, "Request for Legal Research and Opinion," the Deputy General Counsel advised: "The Atomic Energy Act does not explicitly give

the NRC such authority -- indeed the Act should probably be read as depriving NRC of such authority -- and we conclude a court would most likely conclude that the NRC does not have the authority to conduct an investigation solely for criminal purposes." Your memo posited a second part to this question, i.e., whether the NRC should conduct criminal investigations under any circumstances. The simple legal answer to this question is that, since it does not have the statutory authority to do so, it should not."

12/06/83 SECY-83-497 "NRC CONDUCT OF CIVIL VERSUS CRIMINAL INVESTIGATIONS"

04/09/84 NRC Commission Briefing on Criminal v. Civil Investigations.

05/22/84 SECY-84-212, "CIVIL VERSUS CRIMINAL INVESTIGATIONS," Revised per 04/09/84 briefing.

09/10/84 SECY-84-212A, CIVIL VERSUS CRIMINAL INVESTIGATIONS," adds "NRC will not defer its civil investigation for a period longer than 120 days..."

11/23/88 Memorandum of Understanding with the Department of Justice developed using the guidance in SECY-84-212A, (53 FR 50317, Published 12/14/88).

The MOU, per Commission direction, and signature by the Chairman, indicates:

"E. NRC Assistance to DOJ

The NRC will make reasonable efforts, at DOJ's request, to provide informal assistance regarding applicable NRC requirements, technical issues, and factual circumstances. Such assistance should be requested directly from the Director, Office of Investigations, who will forward requests for technical assistance to the Deputy Executive Director for Regional Operations. A request that one or more NRC investigators be assigned to the DOJ investigation or that NRC technical experts be assigned to assist DOJ and the grand jury should be made in writing. Such requests must bear the signature of a United States Attorney or Deputy Assistant Attorney General, as appropriate. These requests will be considered by NRC on a case-by-case basis."

The July 15, 1999 NRC Office of Investigations Investigative Procedures Manual, 3rd edition, contains the following, which is completely inconsistent with the MOU. It appears that the 10/21/1985 and 01/1989 versions did not contain this guidance.

"8.2.3.2. Post-Referral Investigation

The DOJ or other Federal agency to which the matter is referred has the discretion and responsibility to perfect a case for prosecutorial purposes.
The extent of OI assistance will depend on available resources and will be coordinated through OI:HQ and documented in the case chronology. It is not required for an AUSA to submit a written request to OI for OI agents to assist in DOJ prosecution efforts. Such assistance is routine and encouraged."

OI subverted the Commission's intent without their approval, as the development of the MOU was a long and detailed process, including being published in the Federal Register.

Federal Statistics

The U. S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, has published statistics regarding Federal Law Enforcement Officers, 1998 (March, 2000), 1996, and 1994. For the purpose of this biennial census, "Federal law enforcement officer" is defined as any full-time Federal employee who is authorized to carry a firearm and make arrests." DOJ personnel advised me that "**Personnel from the Nuclear Regulatory Commission, Office of Investigations, do not have the authority to make arrests and therefore were not included in our 1998 study and are not included in our 2000 study, currently ongoing**."

Social Security Administration (SSA) IG Assessment Report And Sequence

- Industry complains about the criminal investigative methodology of NRC OI investigations; (GAO report in 1997)
- The Discrimination Task Group (DTG) is formed;
- The DTG report is reviewed and voted upon;
- The Commission approves an **independent** review of OI criminal investigation practices;
- The IG strongly recommends cancellation of a contract with one independent group, and that the review be done by another agency's IG;
- The Social Security Administration (SSA), an "independent group (?)" is selected (by the NRC IG?);
- The SSA report recommends deputation and statutory criminal investigative authority, both things OI wanted to support 1811 classifications;
- The SSA recommendations go to the commission and are, by "negative consent," approved (OI does not request statutory authority);
- With commission "approval" OI requests blanket deputation;
- Blanket deputation makes OI personnel Deputy U.S. Marshals;
- The OI "criminal investigation techniques" are increased not decreased.

09/12/2002 SECY-02-0166, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues" sent to the Commission.

03/26/2003 SECY-02-0166: The staff should perform an assessment of the investigative techniques used by the Office of Investigations (OI). In this connection, the Commission understands that DOL generally undertakes its investigations using informal interviews and does not commonly resort to criminal investigative techniques. Although such an evaluation of OI practices might start with a self-assessment, advice from an independent group should also be sought. The independent review group should report its recommendations to the Commission through the EDO.

Commissioner Merrifield: I have learned from my discussions with people who have been involved in investigations of intimidation and harassment cases of their general distaste for

the process. Whether they be the alleger or the individual against whom the allegations have been charged, they have expressed concerns over the length of time that it takes to conduct the investigation, the resultant uncertainty of their status within their organization, and sometimes, the heavy handedness on the part of NRC investigators. The Office of Investigations (OI) workforce is highly dedicated and well trained. The investigative techniques of a good criminal investigator, however, do not easily translate to a setting where the activities being investigated are hardly ever prosecuted and where a quick decision would be best for all individuals involved. Consequently, after dozens of hours of conversations with individuals who have been caught up in our investigations, I am convinced that the "tried and true investigative practices" utilized by our OI staff are frequently not the right practices for the allegation process we are attempting to oversee....While I agree with the Chairman's suggestion to seek advice from an **independent group** for an assessment of OI's investigative techniques and recommendations for improvements, I believe this group should report its recommendations to the Commission through the EDO. I do not believe self-assessment by OI would provide the same benefit.

Commissioner McGaffigan: I have long held concerns (expressed in my vote on SECY-97-147) regarding the impact of OI investigations, as necessary as they may sometimes be, and thus I support the Chairman's call for assessment and advice from an **independent group** on OI practices. In that regard, I am mindful of the graph in the current SECY (Attachment 1, page 13) that shows that, despite the increased OI resources which allowed the opening of more investigations, the number of cases substantiated has remained at a fairly constant low level.

03/05/2005 SSA "Report on the Qualitative Assessment Review of the Nuclear Regulatory Commission's Office of Investigations" sent to Guy Caputo, with a copy to Hubert Bell. They found that: (1) OI did not have a statutory basis for conducting criminal investigations (this would normally rate as a major finding), and recommended that they obtain legislative changes to address this (2) OI investigations mostly consist of interviews with court reporters present, and that this would be considered as extremely unusual by other federal investigative agencies (3) OI personnel issued firearms only qualify twice per year, versus four times a year for other federal criminal investigative agencies. They did not look carefully at the OI requests for deputation, but amazingly concluded that since DOJ deputized them, it must have been OK. This means that they did not look at the basis for the requests (hazards to the investigators, number of times this happened). Their finding that titles of courses at the Federal Law Enforcement Training Center had changed suggests that little post-employment training (discussed in the most general of terms in the report) is being conducted. Their entire review of OI techniques addressed conformance with OI procedures and the above interviews with court reporters present. Note: an interview with a court reporter present is done in non-threatening situations only, due to the hazard to the court reporter. Recommendations included having new employees immediately apply for deputation (If they were aware that OI only ever did administrative-type interviews, why did they recommend deputation?)

06/01/2005 Memorandum from EDO sends response to SSA review suggestions for the NRC Office of Investigations program to the Commission. Informational memo for the

Commission, no policy issue or vote. NRC Commissioner Merrifield, when interviewed by Mike Stuckey in 2007, indicates he believed OI had criminal investigation authority.

05/05/2006 EDO memorandum sends SECY-06-0102 "Evaluation of the Pilot Program on the Use of Alternative Dispute Resolution in the Allegation and Enforcement Programs" to the Commission. "In response to a Discrimination Task Group recommendation and Commission direction, a qualitative assessment review of OI was conducted by the Social Security Administration (SSA) OIG. The SSA OIG made two suggestions regarding ADR."

The SSA IG eleven-person review team actually found almost all of the important things. Then they buried them in their report.

1. They found that OI did not have a statutory basis for conducting criminal investigations (this would normally rate as a major finding), and recommended that they obtain legislative changes to address this.

2. They found that OI investigations mostly consist of interviews with court reporters present, and that this would be considered as extremely unusual by other federal investigative agencies. This should have rung many bells.

3. They found that OI personnel issued firearms only qualify twice per year, versus four times a year for other federal criminal investigative agencies. They deleted this from the body of the redacted report, but forgot that it was in the summary. This should have rung many more bells as to WHY do they qualify semiannually, and HOW can they justify this.

4. They did not look carefully at the OI requests for deputation, but amazingly concluded that since DOJ deputized them, it must have been OK. This means that they did not look at the basis (maybe they did) for the requests (hazards to the investigators, number of times this happened).
Their approach is so very, very wrong that it suggests that they found out more.

5. They did a poor job of looking at training, and their finding that titles of courses at the Federal Law Enforcement Training Center had changed suggests that little post-employment training (discussed in the most general of terms in the report) is being conducted.

6. Their entire review of OI techniques addressed conformance with OI procedures and the above interviews with court reporters present. Note: an interview with a court reporter present is done in non-threatening situations only, due to the hazard to the court reporter.

If they were aware that OI only ever did administrative-type interviews, why did they recommend deputation? The authors are not identified.

After a short period with OI, any good auditor, after discussing the NRC definition of "wrongdoing," finding that they had never arrested anyone (this should have been a major audit finding), and their statutory authority (or lack thereof),their interviews with court reporters present, and their firearms qualifications, would know he was not dealing with criminal investigators.

Do those involved with the SSA report have anything in common?

Guy Caputo

Director, NRC Office of Investigations. He served in a variety of Secret Service assignments, both in the field and at headquarters until coming to the Nuclear Regulatory Commission on January 01, 1994.

Before becoming Deputy Director of the Secret Service in 1990, he was Assistant Director of the Office of Protective Operations with responsibility for overall planning and implementation of protective security programs.

He began his career as a Special Agent in the New York Field Office in 1969. For a short 3-month period, he was Acting Director of the Secret Service (09/30/1993 - 12/7/1994).

Hubert T. Bell

April 4, 1996 President Clinton Named Hubert T. Bell, Jr. Inspector General of the U.S. Nuclear Regulatory Commission. He had over twenty eight years experience in the U.S. Secret Service.

Since May of 1994, he served as executive director of workforce planning and diversity management.

From August 1993 to April 1994, he was Assistant Director of the Office of Inspection.

Other assignments with the Secret Service include Assistant Director of the Office of Protective Operations; Deputy Assistant Director of the Office of Investigations; Special Agent In Charge, Vice Presidential Protective Division; and special agent in charge, Honolulu, Hawaii Field Office.

Richard A. Rohde

Currently the Assistant Inspector General for Investigations in the Office of the Inspector General (OIG), Social Security Administration (SSA). In September of 1999, Mr. Rohde joined the SSA OIG as the Special Agent in Charge of the External Affairs Division. He had approximately 24 years in the Secret Service (12/1975 – 09/1999).

He began a career with the United States Secret Service in December of 1975. While employed by the Secret Service, Mr. Rohde held the following positions: Special Agent - Springfield, Illinois, New York, New York, and Counterfeit Division -Washington, DC; Assistant to the Special Agent in Charge - Los Angeles, California; Special Agent in Charge - Counterfeit Division and the Baltimore Field Office; and Deputy Assistant Director - Office of Investigations.

Name	With Secret Service	Positions Held
Guy Caputo	00/00/1969 - 01/01/1994	Special Agent, New York Field Office, 1969. Assistant Director of the Office of Protective Operations, Deputy Director of the Secret Service in 1990, Acting Director of the Secret Service (09/30/1993 - 12/7/1994).
Hubert Bell	00/00/1968 – 04/00/1996	Executive director, workforce planning and diversity management. 8/1993- 4/1994, Assistant Director, Office of Inspection. Assistant Director, Office of Protective Operations; Deputy Assistant Director, Office of Investigations; Special Agent In Charge, Vice Presidential Protective Division; Special Agent in charge, Honolulu, Hawaii Field Office.
Richard Rohde	12/00/1975 – 00/00/1999	Special Agent - Springfield, Illinois, New York, New York, and Counterfeit Division -Washington, DC; Assistant to the Special Agent in Charge - Los Angeles, California; Special Agent in Charge - Counterfeit Division and the Baltimore Field Office; and Deputy Assistant Director - Office of Investigations

Why the Attachments?

The attachments were meant to support the statements made in the main body of the document, and provide examples of the legal precedents regarding the 1811 classification, availability pay, "rigorous position," "primary duties," "contact with criminals," and other issues. The attachments also serve to refute the NRC OIG review of my complaint and the consultants' report which was attached, by providing the criteria by which the consultants' evaluation should have been made.

Attachment 1, Memorandum, Malsch to Fitzgerald

The following retyped document is a memorandum from Martin Malsch, NRC Deputy General Counsel, to James Fitzgerald, Acting Director, Office of Investigations, dated October 15, 1982. The memorandum is entitled "Request for Legal Research and Opinion."

The memorandum indicates that, on June 25, 1982, prior to the formal creation of the NRC Office of Investigations, Mr. Fitzgerald requested legal opinions on (1) whether the NRC has the authority to conduct criminal investigations, and (2) the obligations and responsibilities of the NRC in accepting stolen items as evidence of alleged violations of NRC regulations. The response was: (retyped section follows)

"As explained more fully below, ***we believe (1) that the NRC does not have the authority to conduct criminal investigations*** (emphasis added), and (2) that the NRC can legally accept and use stolen items where the NRC was not involved in the original wrongful taking.

(1) NRC And Criminal Investigations

(a) Whether the NRC has the authority to conduct criminal investigations

Section 161 (c) of the Atomic Energy Act, 42 U.S.C. 2201 authorizes the Commission to "make such studies and investigations [and] obtain such information....as the Commission may deem necessary or proper to assist it in exercising any authority provided in this Act, or in the administration or enforcement of this Act or any regulations or orders issued thereunder. Since the Atomic Energy Act contains criminal provisions, section 161 (c) can be read as authorizing the NRC to conduct criminal investigations. However, a more specific provision in the Act should be construed as overriding the more general language in 161 (c). Section 221 (b) of the Atomic Energy Act, 42 U.S.C. 2271, provides that "[t]he Federal Bureau of Investigation of the Department of Justice shall investigate all alleged or suspected criminal violations of this Act." This section by its terms seems to give all criminal investigative authority under the Atomic Energy Act to the Department of Justice, and ***it would therefore appear that the NRC does not have the statutory authority to conduct criminal investigations***. (emphasis added)

This conclusion is also supported by case law which holds that courts will not enforce agency subpoenas where those subpoenas are issued solely to aid a criminal investigation (citations follow)(omitted).

(Discussion of a Supreme Court case [LaSalle]) (omitted).

(Discussion of a subpoena in a case [McGovern]). (omitted).

Although neither McGovern nor any other case dealt with the explicit question of whether Congress has granted the NRC the authority to conduct criminal investigations, they do indicate that courts will not read such authority into a statute where it is not explicitly granted. The Atomic Energy Act does not explicitly give the NRC such authority --- indeed the Act should probably be read as depriving NRC of such authority -- and we conclude that

a court would most likely conclude that the NRC did not have the authority to conduct an investigation solely for criminal purposes. (emphasis added)

(b) Legal considerations in conducting criminal investigations

Your memo posited a second part to this question, i.e., whether the NRC should conduct criminal investigations under any circumstances. The simple legal answer to this question is that, since it does not have the statutory authority to do so, it should not. (emphasis added) This answer may not appear so simple as a policy matter, however, if the Department of Justice requests the NRC to conduct such an investigation, as it has in the past. If it should be decided as a policy matter that such investigations should be conducted, there are several legal considerations which should be taken into account.

First, as indicated previously, courts will provide no assistance in such an investigation, e.g., they will not enforce subpoenas issued solely to aid a criminal investigation. See, e.g., United States v. LaSalle National Bank, supra.

Second, it is possible that a court in a criminal prosecution would exclude evidence obtained through an administrative investigation where that investigation was conducted solely to obtain evidence for a criminal prosecution. See, e.g., United States v. Lawson, 502 F. Supp. 158 (D. Md. 1980). In Lawson the court excluded evidence obtained under an administrative warrant when the sole purpose of issuing the warrant had been to obtain evidence for use in a criminal proceeding. The court's decision was based on the fact that the standard for obtaining an administrative search warrant is much less stringent than that for obtaining a criminal search warrant.

We believe that courts would exclude evidence obtained in a manner that subverted the normal criminal process, as in Lawson. The result would not be so clearcut, however, where investigators do no more than FBI investigators would do and in no way undermine the normal criminal processes. In that type of case we do not believe that a court would necessarily find the "search" to be unreasonable and violate the fourth amendment. Nonetheless, due to a lack of precedent the possibility of exclusion does remain."

(Remainder of memorandum, dealing with stolen evidence, omitted for brevity.)

Added Clarification by James Foster:

42 U.S.C. 2011 to 2296, is the Atomic Energy Act of 1954 (AEA), and established programs related to atomic energy, including a program for Federal control of the possession, use, and production of nuclear energy and special nuclear material.

42 U.S.C. 2271 to 2181 (Sections 221 to 233, as amended, AEA), gives the FBI the authority to investigate alleged or suspected criminal violations of the Act, makes violations of the Act criminal, and provides for injunction and contempt proceedings.

Attachment 2, Commission Briefing on Criminal vs Civil Investigations

On **April 9, 1984**, the **full NRC Commission** received a **Briefing on Criminal versus Civil Investigations**. Attendees:

Nunzio Palladino, Chairman
Victor Gilinsky, Commissioner
Thomas Roberts, Commissioner
James Asselstine, Commissioner
Frederick Bernthal, Commissioner
Samuel Chilk, Commission Secretary

George Messenger, Office of Inspector and Auditor
Benjamin Hayes, Office of Investigations
Roger Fortuna, Office of Investigations
James Murray, Office of the Executive Legal Director
James Fitzgerald, Office of the General Counsel
Martin Malsch, Office of the General Counsel

A draft paper giving OI the authority and responsibility to conduct criminal investigations was the subject of the briefing. The relationship of the agency with the Department of Justice (DOJ) was also discussed. The resulting document was to be utilized in devising a Memorandum of Understanding (MOU) between the NRC and the DOJ. James Fitzgerald, of the Office of the General Counsel (OGC), was the primary presenter before the Commission.

The Commission strongly objected to and then directed the removal of the term "conduct" from the resulting document. James Fitzgerald indicated that "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." **The Commission clearly understood that OI did not conduct criminal investigations**.

NRC Chairman Palladino also made the point that even investigatory assists to the DOJ were to be a secondary priority, as the NRC had limited resources, and that the rare "loaning of investigators to the DOJ should involve a written request and receive Commission approval."

This document is clear: The NRC lacks authority to conduct criminal investigations; OI conducts civil investigations; requests from DOJ are so rare that a written request and Commission approval should be required for the diversion of our resources from our civil purpose. The entire Nuclear Regulatory Commission participated in this deliberation and conclusion.

SECY-84-212, "Civil Versus Criminal Investigations" (May 22, 1984, 3 pages, microfilm address 67351-145) was the result of this Commission Briefing. SECY-84-212A followed. Both specifically refer to OI civil investigations.

Selected Portions, Briefing on Criminal vs. Civil Investigations

Pg. 2, lines 7-11, Chairman Palladino: By memorandum dated September 1, 1983, I requested OGC, OIA, and OI to develop a Commission paper addressing NRC's conduct of civil v. criminal investigations for our consideration. The paper was provided to us in December, SECY-83-497, and forms the basis for our discussion today.

Pg. 3, lines 8-13, James Fitzgerald: The paper that you have before you discusses two general areas of concern that had been issues in the investigations area for some time. That is the authority and responsibility for NRC to conduct criminal investigations and the relationship of the agency with the Department of Justice when the Department has on occasion requested that the Commission stay its investigation or enforcement action until completion of a Department action.

Pg. 4, lines 9-13, James Fitzgerald: The real dividing line between these investigations is the purpose for which the investigation is going to be put. Is it going to be to secure enforcement of our civil regulations or orders, or is it for a criminal enforcement purpose.

Pg. 5, lines 8-11, James Fitzgerald: Now, 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.

Pg. 6, line 25, James Fitzgerald: Well, OIA, OGC, and OI in this paper recommend that the Commission in appropriate circumstance assist the Department of Justice.

Pg. 7, line 3-4, Chairman Palladino: It doesn't say that, does it? I thought it says "conduct."

Pg. 7, lines 5-6, Commissioner Asselstine: The way the options were formulated was "conduct," yes.

Pg. 7, lines 7-8, Chairman Palladino: Yes, "Will conduct investigations," and I have comments on that.

Pg. 7, lines 14-23, Chairman Palladino: Incidentally, you say that an investigation can serve both criminal and civil purposes, or civil and criminal purposes. And yet, on page 3 you do talk about the differences and you mention them earlier, between criminal and civil investigations, at least in the footnote. It seems to me that the procedures regarding criminal safeguards do affect that collecting. You can't do exactly the same thing under our procedures as the FBI could do under theirs.

Pg. 13, lines 22-25, Pg 14, line 1: Chairman Palladino: But I want to point out that on page 3 it says, "Terming the investigation 'civil' means only that there is a valid NRC civil enforcement purpose and, therefore, that criminal safeguards and procedures are not required.

Pg. 16, lines 3-17, Ben Hayes: What I have attempted to do over the last year or so is to provide the Commission and the staff with a thorough, complete investigation that hopefully satisfies our regulatory needs. That is my first objective.

Pg. 16, lines 11-17, Ben Hayes: Upon receiving input from the staff at that point, then we looked at it for potential criminal sanctions. There may or may not be some there. And if we feel as though at least there is a potential, or suspected or – I forgotten the Attorney General's language in that area, but then we refer those particular cases where in our view there may be some criminal sanctions, to the Department for their review.

Pg. 20, lines 5-13, Chairman Palladino: Under the recommendations for guidance you say, "That the Commission authorize OI to state in its negotiations with DOJ that NRC, in appropriate circumstances, will (i) conduct investigations at DOJ's request." My feeling would be that we should say, "(i) assist in the conduct of investigations at DOJ's request."

Pg. 21, lines 18-25, Pg. 22, line 1: Commissioner Asselstine: Is it realistic or feasible to say, "Look, what we would like to do is get our civil investigation done. At that point we'll tell you that we have completed our investigation. We will identify any potential criminal items that we think might be of interest to you. We will give you our investigation materials and then ask for your judgment about whether we can go ahead or whatever."

Pg. 33, lines 23-25, Pg 34, line 1: Chairman Palladino: I think a policy question we ought to address, and that is the loaning of investigators to the Department of Justice should require Commission approval because it does impact on your limited resources.

Pg. 42, lines 14-22, Commissioner Bernthal: Thirdly, I'm concerned that this policy statement here, which you have softened from "conduct investigations" to "assist in investigations," that may still not quite be the right implication, it seems to me. We may want to make sure that we cooperate in every way necessary with DOJ, but that we not by any policy statement give the implication that we are going to be aggressive or proactive in achieving criminal investigation of objectives. (Emphasis added)

Pg. 46, lines 12-16, James Murray: Its bound to be small, Commissioner Bernthal because what we call "material false statement" is very, very rarely a criminal act. I don't know of any that are criminal acts. They are 1001 violations, 18 USC 1001, they are not violations of the Atomic Energy Act.

Pg. 47, lines 21-22, Commissioner Bernthal: ...referrals to the Department of Justice, oddly enough, were to go through OIA which implied going through the Commission.

Pg. 55, lines 8-13, Chairman Palladino: Now wait a minute, I'm going to make the following suggestion, that OGC rewrite the 1 and two recommendations to encompass what you think we have said, such as "assist in the conduct of investigations," requiring "written requests from the Deputy Assistant Attorney General."

Pg. 57, lines 17-18, Chairman Palladino: Yes, our policy is to first serve our civil purposes and then help DOJ.

Pg. 57, lines 19-20, Commissioner Asselstine: Yes, But I'm not sure if there is much difference between "cooperate" and "assist."

Pg. 57, lines 22-24, Commissioner Asselstine: But it's certainly better than "conduct."

(**Laughter**)

Attachment 3, Memorandum of Understanding with DOJ

MOU Between the NRC and DOJ

(NUREG/BR-0195 Rev. 11/98)

This document includes a copy of the Memorandum of Understanding (MOU) between the NRC and the Department of Justice (DOJ) that was published in the Federal Register on December 14, 1988.

53 FR 50317
Published 12/14/88
Effective 11/23/88

I. Purpose:

The Nuclear Regulatory Commission (NRC) and the Department of Justice (DOJ) enter into this agreement 1) to provide for coordination of matters that could lead both to enforcement action by the NRC as well as criminal prosecution by DOJ, and 2) to facilitate the exchange of information relating to matters within their respective jurisdictions. This agreement does not affect the procedures and responsibilities set forth in the April 23, 1979 Memorandum of Understanding between the NRC and the Federal Bureau of Investigation regarding cooperation concerning threats, theft, or sabotage in the U.S. nuclear industry. Similarly, this agreement does not apply to those matters arising from internal investigations conducted by the NRC Office of Inspector and Auditor. (*Added Note: Now the Inspector General*)

This Memorandum of Understanding is not intended to, does not, and may not be relied upon to, create any rights or benefits, substantive or procedural, enforceable at law by a party to litigation with the United States. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of DOJ.

II. Background:

Under federal statutes, the NRC has the responsibility to protect the radiological health and safety of the public, the public interest, the common defense and security, and the environment (hereinafter collectively referred to as public health and safety), from hazards that might arise from the material and facilities which it regulates. The enforcement program of the NRC is designed to fulfill these responsibilities by ensuring compliance with NRC requirements, obtaining prompt correction of violations and adverse conditions affecting safety, encouraging improvement of licensee performance, and deterring future violations. In contrast, **criminal prosecutions for willful violations of NRC requirements are the responsibility of the DOJ**. Such prosecutions provide an additional tool to assure compliance and to deter future violations. Therefore, it is useful and desirable for the NRC and the DOJ to coordinate to the maximum practicable extent their different responsibilities.

Under the Atomic Energy Act of 1954, as amended, **the NRC has the authority to conduct such investigators as it may deem necessary or proper to assist it in determining whether**

enforcement or other regulatory action is required under the Act, or any regulations, licenses, or orders issued thereunder.

Enforcement actions within NRC authority include license revocations, suspensions and modifications, cease and desist orders, civil penalties, and notices of violation. The NRC has the authority to take such action as it deems necessary to protect the public health and safety, including the authority, when appropriate, to take immediate action.

The Department of Justice has the responsibility to determine whether to institute criminal prosecution for violations of all federal statutes, including the Atomic Energy Act of 1954, as amended. Such violations are typically developed and brought to the attention of DOJ by law enforcement or investigative agencies, such as the Federal Bureau of Investigation, the Postal Inspection Service, and the various Treasury enforcement agencies. Similarly, **suspected criminal violations of the Atomic Energy Act, as amended, or Title 18 of the United States Code may be identified during the course of NRC investigations and referred to DOJ for prosecutive determination.**

Thus, both the NRC and DOJ have authority and responsibility to investigate and take action for certain violations that may arise out of the same factual matters. Although each agency will carry out its statutory responsibilities independently, the agencies agree that the public health and safety would be enhanced by cooperation and timely consultation on proposed enforcement actions where both civil and criminal violations appear to exist, and by the timely exchange of information of mutual interest. As an example, it may be appropriate in some cases for the NRC to stay its hand pending a criminal prosecution. Conversely, in other cases the public health and safety may require immediate NRC action that could impact a potential criminal prosecution. Both agencies recognize that these enforcement decisions are inherently matters of judgment for each agency to decide for itself, with due regard, however, for the views of the other.

III. Areas of Cooperation:

A. DOJ Notification to NRC of Information Concerning Public Health and Safety

Should DOJ learn of or discover health or safety related information concerning a matter within the jurisdiction of the NRC, and not already reasonably known to the NRC, DOJ shall communicate such information to the NRC as soon as practicable, unless such information is determined by DOJ to be grand jury material. See Rule 6(e) of the Federal Rules of Criminal Procedure.

Should DOJ, during grand jury proceedings, discover health or safety related information concerning a matter within the jurisdiction of the NRC, and not already reasonably known to the NRC, which may warrant immediate regulatory action to protect the public health and safety, DOJ promptly will seek a court order, pursuant to the inherent authority of the court to supervise the grand jury, for disclosure of such information to the NRC for use in connection with its safety enforcement responsibilities.

B. NRC Notification to DOJ of Suspected Criminal Violations

If NRC learns of or develops information regarding suspected criminal violations on matters not within the regulatory jurisdiction of the NRC, the NRC will provide the information regarding such suspected criminal violations to the appropriate investigative agency having jurisdiction over the matter.

Should NRC learn of or develop information regarding any suspected criminal violations, including Atomic Energy Act violations, on matters within the regulatory jurisdiction of NRC, it will notify DOJ in the following manner. With respect to matters not involving special circumstances, as described below, the NRC's Director, Office of Investigations (OI), will formally refer the matter to DOJ for prosecutive determination if, on completion of its investigation, the Director, OI, has determined that sufficient evidence has been developed to support a **reasonable suspicion** that a criminal violation has occurred. Whenever any of the special circumstances listed below occurs, and the Director, OI, has a reasonable suspicion that a criminal violation has occurred, the Director of OI will promptly notify the DOJ of a matter involving such special circumstance(s), notwithstanding the fact that an investigation has not yet been completed by NRC. The special circumstances involve:

(1) a matter where death or serious bodily injury is involved;
(2) a matter under investigation which is likely to generate substantial national news media attention;
(3) a matter where there is evidence of ongoing activity designed to obstruct the investigation;
(4) a matter which may require extraordinary investigative measures which require legal assistance from DOJ.

When a matter arises in which the NRC concludes that regulatory action is necessary to protect the public health and safety, or that it is necessary to propose a civil penalty, and the Director, Office of Enforcement (OE), has been informed by the Director, OI, that there is a reasonable suspicion that a criminal violation has occurred, the Director of OE will promptly notify the DOJ of such matter, notwithstanding the fact that an investigation has not yet been completed by NRC. Any action by the NRC is to be coordinated with DOJ as prescribed in Section C. below.

Notification to DOJ will not normally result in cessation of the NRC investigation.

C. Procedure When NRC Regulatory Activities Run Parallel to or May Affect Future DOJ Activity

NRC regulatory activities with respect to matters that have been referred to DOJ for criminal prosecution, or to which the notification provisions of Section B. apply, shall be coordinated as follows:

1. If the NRC concludes at any time that it lacks reasonable assurance that activities authorized by a license are being conducted without endangering the health and safety of the public and the NRC concludes that immediate action is required to protect the public health, safety, or interest, it will proceed with such action as is necessary to abate the immediate problem. If time permits, the NRC shall notify DOJ of its proposed action prior to

acting, but, in any event, shall notify DOJ of its action as soon as practicable. This paragraph shall apply only to those situations that do not allow sufficient time for reasonable consultation.

2. If the NRC concludes that regulatory action is necessary in the public interest, other than the actions described in paragraphs 1 and 3 herein, the NRC shall first consult with DOJ concerning its contemplated action. The NRC shall take into account the views and concerns of DOJ and proceed in a manner that accommodates such views and concerns to the fullest extent possible, consistent with the regulatory action required. Such cooperation at the staff level shall include the seeking of a stay, upon DOJ's request, of discovery and hearing rights during the proceeding for a reasonable period of time to accommodate the needs of a criminal investigation or prosecution, provided that DOJ supports such action with appropriate affidavits or testimony as requested by the presiding officer.

3. If the **NRC** concludes that it is necessary to propose a civil penalty, it shall notify DOJ of its contemplated action, and **shall defer the initiation of such proceeding until DOJ either concludes its criminal investigation/prosecution** or consents to the action, except that if a statute of limitations bar to a civil penalty proceeding is imminent, the NRC may initiate such proceeding after consultation with DOJ. In such event, the NRC staff shall accommodate the needs of DOJ by seeking a stay, upon DOJ's request and with DOJ support as described in paragraph 2 above, of discovery and hearing rights during the civil penalty proceeding for a reasonable period of time.

D. Time Frame for Notification in Matters Referred to DOJ

1. If, on completion of its investigation, the NRC concludes that civil enforcement action is appropriate, it will notify DOJ of its contemplated action normally within 45 days of its referral to DOJ.

2. **DOJ will notify the NRC, normally within 60 days of the referral, of its preliminary decision as to whether a criminal investigation or prosecution is warranted.**

E. NRC Assistance to DOJ

The NRC will make reasonable efforts, at DOJ's request, to provide **informal assistance** regarding applicable NRC requirements, technical issues, and factual circumstances. Such assistance should be requested directly from the Director, Office of Investigations, who will forward requests for technical assistance to the Deputy Executive Director for Regional Operations. A request that one or more NRC investigators be assigned to the DOJ investigation or that NRC technical experts be assigned to assist DOJ and the grand jury should be made in writing. **Such requests must bear the signature of a United States Attorney or Deputy Assistant Attorney General, as appropriate. These requests will be considered by NRC on a case-by-case basis.**

F. Exchange of Information Related to Civil or Criminal Enforcement

Following a DOJ decision not to prosecute a referred case, or at the conclusion of a criminal proceeding, DOJ will provide NRC, upon its request, information not protected from disclosure by Rule 6(e), Fed.R.Crim.P., relevant to the associated civil case. Similarly, NRC will provide information to DOJ, upon its request, on matters being considered by DOJ.

IV. Implementation:

The DOJ official responsible for implementation of the notification responsibilities of this agreement is the Chief, General Litigation and Legal Advice Section, Criminal Division; the NRC official responsible for implementation of the notification responsibilities of this agreement with respect to information regarding suspected criminal violations is the Director, Office of Investigations; the NRC official responsible for the notification responsibilities of this agreement with respect to enforcement action is the Director, Office of Enforcement, or the Assistant General Counsel for Enforcement, as appropriate.

V. Effective Date:

This agreement is effective when signed by both parties.

Original Signed by
Lando W. Zech, Jr.
Chairman
U.S. Nuclear Regulatory Commission
Date: October 31, 1988

Original Signed by
Edward S. G. Dennis
Assistant Attorney General
Criminal Division
U.S. Department of Justice
Date: 11/23/1988

Attachment 4, General Chronology

CHRONOLOGY

00/02/72	OPM document - Grade-Level Guides for Classifying Investigator Positions GS-1810/1811
11/21/74	Memo to Gillen from Director of Inspections Subj: LAW ENFORCEMENT RETIREMENT INSPECTIONS DIVISION PERSONNEL re: certain individuals (may be draft document at that time - handwriting on letter 1810/1811)
01/17/75	Letter to Bureau of Retirement, CSC from Jones, NRC w/attached PD's
09/09/75	**Letter to Bureau of Retirement, Civil Service Commission, from C. Jones, OP w/att PD's. Headquarters personnel first clearly seek law enforcement officer retirement, indicating this is justified by review of Federal Personnel Manual 831-41, and "substantial in-house review."**
01/00/76	J. Foster hired as NRC Region III Investigator, series 1810.
02/12/76	Note to US Civil Service Commission from Pine, OP, NRC Subj: ADDITIONAL INFO REQUESTED ON THE COVERAGE OF POSITIONS, INVESTIGATOR AND SUPERVISORY INVESTIGATOR, NRC UNDER 5 USC 8336(c)
06/21/76	Letter to Jones, OPM from Bowler NRC, re: incumbents meet retirement requirements
05/09/78	**Letter, NRC Chairman Hendrie to Moss, Subcommittee on Oversight and Investigation. Question 44, "With regard to criminal investigations, it is NRC's practice and policy that once a determination has been made that a suspected or alleged criminal violation has substance, referral is made to the Department of Justice. This referral is made by the Office of Inspector and Auditor after appropriately informing or consulting with the Office of the General Counsel."**
06/26/79	**Memo, Thompson to OPM, seeks to have two individuals, Ward, and Baci, classified in the 1811 series.**
08/06/79	Letter to Doyle, OPM from Bird re: Definition of Law Enforcement Officer
11/04/79	Letter, Acting Chief of OPM's Benefits Policy Staff, approves **Ward's** headquarters Executive Office for Operations Support investigator **position, only, as covered under 5 USC 8336(c).**
04/03/80	**Memo, Ward, IE Senior Investigator, "We are not proposing that IE or anyone else in NRC undertake criminal investigations, per se. We share the OELD view that neither IE nor OIA possesses such authority and that legislative changes would be needed to obtain it."**

04/14/80 **Memo, NRC OELD: "NRC investigations involve the gathering of evidence for civil enforcement actions and not criminal actions. "Miranda" warnings, a requirement of criminal procedure, are not normally associated with NRC investigations."**

09/07/80 **Paperwork incorrectly stating Ward was my supervisor, and my classification had changed to series 1811.**

11/30/80 J. Keppler, Region III Administrator, changed his employees back to 1810 series.

05/26/81 **Letter, Greenspun (DOJ) to Cummings (NRC OIA): "The following question has been presented to us by the NRC: At what stage or under what circumstances in an investigation by an administrative agency, must the investigators provide information to or clarify for witnesses that the investigation has criminal ramifications?'..." This question usually arises when investigations or audits for administrative purposes develop information of possible criminal violations."**

06/25/82 **J. Fitzgerald asks for a legal opinion from the Office of General Counsel as to whether the NRC has the authority to conduct criminal investigations. *Note that this precedes the formal creation of the Office of Investigations.***

07/16/82 Memo from Chairman Pallidino to J. Fitzgerald, Acting Director of the Office of Investigations. Subj: DELEGATION OF AUTHORITY. This provided OI with various authorities, including the authority to "Advise and assist the Office of Inspector and Auditor in referrals to the Department of Justice stemming from investigations by OI."

07/19/82 **OFFICE OF INVESTIGATIONS CREATED.** J. Fitzgerald, Acting Director.

10/15/82 **Memo, M. Malsch to J. Fitzgerald, "Request for Legal Research and Opinion," the Deputy General Counsel advised: "The Atomic Energy Act does not explicitly give the NRC such authority -- indeed the Act should probably be read as depriving NRC of such authority -- and we conclude a court would most likely conclude that the NRC does not have the authority to conduct an investigation solely for criminal purposes."Your memo posited a second part to this question, i.e., whether the NRC should conduct criminal investigations under any circumstances. The simple legal answer to this question is that, since it does not have the statutory authority to do so, it should not." (Attachment 1)**

12/22/82 Memo for Palladino, Gilinsky, Ahearne, Roberts, Asselstine from J/ Fitzgerald, Acting Director Subj COMMISSION ACTION ON OI POLICY PROPOSALS w/att

06/15/83 **Memo, Director, OIA, to Plaine, General Counsel. "....the Hartman matter which at this time, is the subject of an ongoing criminal investigation by DOJ and an ongoing civil investigation by NRC."**

08/26/83 Memo, NRC Commissioner Gilinsky to the NRC Chairman and other commissioners: Subj: NRC INVESTIGATIONS w/att" **The NRC staff should understand that their investigations of wrongdoing are civil investigations.** Criminal investigations are the province of the Department of Justice." (3 pgs)

09/01/83 **Memo from NRC Chairman Nunzio Palladino, requesting that OGC, OIA, and OI develop a Commission paper addressing NRC's conduct of civil vs. criminal investigations for the Commission's consideration**. Resulting paper discussed at 04/09/1984 Commission Briefing on Criminal vs. Civil Investigations.

12/06/83 Policy Issue SECY-83-497 Subj: NRC CONDUCT OF CIVIL VERSUS CRIMINAL INVESTIGATIONS

12/15/83 Memo to Bird from Messenger Subj: COVERAGE OF OIA INVESTIGATORS AND SUPERVISOR FOR PURPOSES OF RETIREMENT UNDER 5 USC 8336(c)

12/23/83 Letter, NRC OI Director Hayes to Bird, Subj: POSITION DESCRIPTIONS FOR OPM REVIEW FOR 5 USC 8336(c) asks for review of OI investigator positions for consistency with 5 U.S.C. 8331(20).

12/29/83 Memo for Kirwan from Dickerson Subj: COVERAGE OF INVESTIGATORS AND SUPERVISORS FOR PURPOSES OF RETIREMENT UNDER 5 USC 8336(c)

02/15/84 Letter to Dickerson, NRC from Arrington asking for organizational chart for OI

02/23/84 Letter to Kirwan from Bird w/OIA Position Descriptions

03/02/84 Letter to Kirwan, OPM from Bird, NRC confirming retirement coverage for 1811's and enclosing PD's

04/09/84 **NRC Commission Briefing On Criminal v. Civil Investigations**; page 5, lines 8-11: "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." (J. Fitzgerald). Page 57, lines 17-18: "Yes, our policy is to first serve our civil purpose and then help DOJ." (NRC Chairman Palladino).

04/11/84 Letter to Arrington, OPM from Bird, NRC asking for additional info w/attachments

04/11/84 Letter, Bird to OPM provides vague answers to several OPM questions. **OPM requested a "breakdown of all types of investigations performed by your investigators (criminal and non-criminal) and a comparison of the time (by percentage) devoted to each type of investigation." The breakdown was not provided; the answer was "virtually all OI investigations involve ostensible criminal violations."** A discussion of crimes related to NRC regulations was included, including a reference to conspiracy and mail fraud.

04/18/84 Memo for Dircks, from Chilk, Secretary. Describes 04/09/84 briefing (above). OI is to cooperate or assist in (rather than conduct) DOJ investigations only after written request from DOJ. SECY-83-497 recommendations to be revised.

05/17/84 **Letter to Bird from Arrington, OPM, re General coverage under 5 USC 8336(c)(1). OPM approved general coverage for the OI investigator positions. (2 pgs) w/atts (13 pgs) 09/09/75 - 05/17/84 letter exchange ends!**

05/22/84 J. Fitzgerald, Policy Issue SECY-84-212, "CIVIL VERSUS CRIMINAL INVESTIGATIONS," Revised per 04/09/84 briefing (above). "With regard to assisting DOJ in criminal investigations, OI may provide such assistance..., and when to do so would not adversely affect those **OI civil investigations** requiring prompt action for public health and safety reasons...and wishes the NRC to delay its **civil investigation** or enforcement action,.."

06/29/84 Letter to OPM from Bird re: request for coverage

07/05/84 Lando Zech becomes a Commissioner of the Nuclear Regulatory Commission.

09/10/84 **J. Fitzgerald, SECY-84-212A, CIVIL VERSUS CRIMINAL INVESTIGATIONS," as above, but adds "NRC will not defer its civil investigation for a period longer than 120 days..."**

04/02/85 Letter to the Honorable Tom Bevill from Lando Zech w/Memorandum of Understanding between the NRC and DOJ

05/00/85 **OPM approved coverage for the Director and Deputy Director of OI under the secondary/administrative category of 5 U.S.C. 8336(c).**

09/10/85 Letter, from Lattanzi, OPM, to Bird, requests additional information regarding the percentage of time investigators, as they were in the Office of Inspection and Enforcement, conducted investigations of violations of criminal codes.

07/01/86 Lando Zech becomes Chairman of the NRC.

08/11/86 Letter to Lattanzi, OPM from McDermott (5 pgs) re: requesting additional info on law enforcement positions

12/10/86 Letter to McDermott from Winkle re: determination of credibility of retirement for former positions in IE

02/02/87 Letter to Benson, NRC, describing OPM's "primary duty" criteria: "In general, **if an employee spends an average of at least 50% of his or her time performing a duty or group of duties, they are his or her primary duties..."**40% of the incumbent's time is spent managing or conducting criminal investigations. ...Therefore, since the majority of the incumbent's time will be spent investigating non-criminal matters, general coverage for this [OIA] position is **denied.**"

02/09/87 **FPM Bulletin 842-3, "Interim Regulations on Air Traffic Controllers, Law Enforcement Officers, and Firefighters Under the Federal Employees Retirement System." A "Rigorous Position" means a position "the duties of which are so rigorous that employment opportunities are required to be limited to young and physically vigorous individuals..."**

05/15/87 **Memo, B. Hayes to Weld, Asst. Atty. General: OI "will comply with your request to hold the OI investigation concerning activities at Advanced Medical Systems, Inc. (AMS) in abeyance until a criminal investigation has been completed. OI will, therefore, stop its investigation on this matter..."**

05/27/87 Letter to Dickerson from Wolf re: copies of all correspondence between NRC and OPM re: 8336(c)(1)

06/29/87 Letter to Williams from Winkle re: retirement coverage

02/11/88 Memo for Stello, NRC Executive Director for Operations, from James Foster, early version of this concern, Subj: RECOMMENDATIONS FOR IMPROVEMENT OF THE NRC INVESTIGATIVE PROGRAM w/att No response.

03/01/88 **NRC clarification, regarding October 8, 1987 testimony of B. Hayes, Director, OI, before Subcommittee on Nuclear Regulation. Hayes indicated "I was also referring to at least three important authorities given to Inspectors General, but currently not given to OI. These are: (1) the authority of the Director, OI, to appoint, direct, and supervise all subordinate OI personnel, (2) statutory authority to conduct criminal investigations,.."**

04/14/88 Letter to Klinger from Bird w/ PD for Office of Inspector and Auditor, Organizational Chart and Elements and Standards

04/26/88 The Committee on Interior and Insular Affairs: Subcommittee on Energy and the Environment, a hearing on H.R. 4140, "Nuclear Investigations Improvement Act of 1988." Testimony from Senator Breaux; Representatives Mavroules and Glickman; and the NRC: Lando W. Zech, Chairman; Thomas M. Roberts, Frederick M. Bernthal, Kenneth M. Carr and Kenneth C. Rogers, Commissioners; and Ben B. Hayes, Director, Office of Investigations. Hayes: " The second additional authority would be express criminal investigative authority, concurrent with the FBI, for violations of statutes or regulations..."Zech: "OI....should continue to be able to report possible criminal violations to the department of Justice."

05/25/88 Memo for Zech, Roberts, Carr, Rogers from Parler, Subj: ISSUES REGARDING OI MISSION AND ROLE OF INVESTIGATIONS (FOIA denied)(8 pages).

06/14/99 Letter to Lando Zech from Manuel Lujan, provides 6 questions. Question 2: "Do you believe that your Office of Investigations should be granted the authority to conduct criminal investigations, concurrent with the FBI, for violations of statutes or regulations otherwise within the civil jurisdiction of the NRC?"

06/21/88	**Letter, NRC (original signed by Lando Zech?) advises OPM that a review of Federal Personnel Manual (FPM) Bulletin 842-3 had been performed, and certified that positions of OI investigators met "rigorous" definition. Mentions a "pre-employment medical examination and an annual examination thereafter." FOIA documents do not support annual medical examinations.**
08/03/88	**Nuclear Investigations Improvement Act : hearing before the Subcommittee on Energy and Power of the Committee on Energy and Commerce, House of Representatives, One Hundredth Congress, second session on H.R. 4140.**
08/03/88	**Letter, NRC Chairman Zech to M. Lujan Jr., of the House of Representatives Committee on Interior and Insular Affairs: "The Commission does not believe that a grant of authority to OI to conduct criminal investigations would enhance our ability to protect public health and safety or the government's ability to prosecute criminal violations of the Atomic Energy Act."**
12/14/88	**MOU with DOJ, signed by Lando Zech.**
04/12/89	Nuclear Investigations Improvement Act of 1989 (never passed)!
12/20/89	Letter to Klinger from Bird re: certain positions located in former NRC Office of Inspection and Enforcement
12/05/90	**OPM issued guidelines for law enforcement retirement, Federal Register, Volume 55, No. 234).**
02/11/91	Letter to Bird from Williams re: approving general coverage
03/12/91	Letter to Shapiro from Bird re: approval for retirement coverage
04/04/91	Letter to Bird from Young re: retirement coverage
01/13/92	Letter to Shapiro, OPM from Bird re: retirement coverage w/attached PD's
05/12/92	Letter to Young from Chan re: PD numbers, w/attached Criminal Investigator Positions, Position Action and Evaluation Grades 16-18 & STS and SES and PD's
05/22/92	Letter to Smith, OPM, from James Taylor, OIG positions and OI positions "rigorous."
06/30/92	Letter to Keeney, Deputy Assistant Attorney General, DOJ, from B. Hayes, NRC, re: deputization of Driskill, OI, as a part of a Joint Task Force re substandard fittings/fasteners.
08/04/92	Letter to Thompson, DOJ, from Hutchinson, OI; responding to request for OI authority to conduct investigations. Quotes from paragraph 2.2 of the OI Investigative Procedures Manual (deputization discussion).

08/21/92 DOJ form re: deputation for Senior Investigator.

07/29/92 Letter to Bird from Young re: retirement coverage

02/04/93 Letter to Lattanzi, OPM from Williams w/PD attachment for Deputy Assistant Inspector General and Organizational Chart and Functional Statement for OIG

02/26/93 Letter to Williams from Young re: 6c retirement entitlement

09/00/93 Department of Labor OIG Report re 1811 misclassification.

12/07/93 **OPM transferred responsibility for law enforcement officer determinations under 5 U.S.C. 8336(c) to federal agencies.**

01/09/94 Mr. G. Caputo begins work at the NRC, coming from the Secret Service.

11/03/94 **Memo, Bird to Scroggins, Deputy Chief Financial Officer, Implementation of law enforcement availability pay act of 1994. "All employees on the list are already receiving 25 percent Administratively Uncontrollable Overtime except for those listed below. Nonetheless, these employees also should be paid the 25 percent availability pay."**

00/00/95 Ferrier v. Office of Personnel Management, 66 M.S.P.R. 241, 245, the appellant had to pass a five-event Physical Fitness Battery.

07/14/95 E-mail from Kammerer, ADM, to Powell, ADM, regarding long ago discussion with Jim Fitzgerald, OGC, regarding why (j)(2) [FOIA] exemption does not apply to OI. ((J)(2) FOIA exemption is only for agencies whose principal function is enforcement of criminal laws).

11/15/95 GAO Report Testimony entitled, "Information on Certain Agencies' Criminal Investigative Personnel and Salary Costs" (GAO/T-GGD-96-38)

01/16/96 5 U.S.C. Sec. 5545a provides for availability pay for criminal investigators, to "ensure the availability of criminal investigators for unscheduled duty in excess of a 40 hour week based on the needs of the employing agency."

09/00/96 GAO report: "Investigative Authority and Personnel at 13 Agencies" (GAO/GGD-96-154).

09/18/96 Killion vs. Dept. of the Treasury, MSPB

08/06/97 **Foster E-mailed a question to the NRC Inspector General and Human Resources personnel regarding classification of Office of Investigations personnel as series 1811 (Criminal Investigator) versus series 1810 (Civil Investigator).**

09/06/97	Bingaman v. Department of Treasury court decision, the court approved of certain factors found by the MSPB to denote a Law Enforcement Officer.
09/23/97	U. S. Court of Appeals, (various petitioners vs. Department of the Treasury, 96-3368).
10/29/97	MSPB transcripts re: R. Davis and Dept of Veteran Affairs and retirement, from Internet)
01/22/98	E-mail from James Foster re: OI Misclassification - related GAO reports
02/09/98	E-mail from James Foster re: OI CLASSIFICATION FRAUD, WASTE & ABUSE IN THE NRC
02/24/98	Memo to Bell from Thadani Subj: ALLEGATION OF MISCLASSIFICATION AND POTENTIAL FRAUD, WASTE AND ABUSE w/various e-mails from J. Foster
03/11/98	Memo for NRC Chairman Zech from Thompson (2 pgs) Subj: RECOMMENDATIONS OF THE OI ORGANIZATIONAL REVIEW GROUP w/ two Reports of the Organizational Review Group to the Commission. (67 pgs)
05/05/98	Memo to Childs from Special Agent re: Allegation 3618 (5 pgs)
07/14/98	MSPB case (Eatmon, et al. vs. Department of Energy).
08/20/98	Memo to Dixon, Freeman, Meyer and Spring Subj: 1811 CRIMINAL INVESTIGATOR STATUS
08/27/98	Memo to Chairman Jackson from Bell Subj: OIG NO 3618/ALLEGATION OF 1811 SERIES MISCLASSIFICATION
08/28/98	Memo to Hubert Bell from E. McGaffigan Subj: YOUR MEMO TO CHAIRMAN JACKSON OF AUGUST 27, 1988
10/13/98	Letter from PCIE to Shirley Jackson re: matter of J. Foster
10/14/98	Letter to Childs from Wilson, Chief, Retirement Policy Division, OPM
10/19/98	Letter, Illinois Senator Richard Durbin to NRC, concerns attached.
10/19/98	Letter to Shirley Jackson from Richard Durbin, United States Senator re: request from James Foster (12 pgs)
10/26/98	**I received the first indication (voice mail from IG personnel) that the NRC IG was addressing my concern (following Durbin and PCIE letters).**

10/28/98	"Evaluation Statement" documenting meeting between OI and NRC Office of Human Resources personnel.
11/10/98	OIG Investigative Plan
11/10/98	Letter, NRC Executive Director for Operations Travers to Illinois Senator Durbin.
11/11/98	Interoffice memo from OIG Investigator McClam to Fitzgerald re: 1811 misclassification w/att (12 pgs)
12/01/98	Memo to Chairman Jackson from Travers Subj: EVALUATION OF INVESTIGATOR POSITIONS IN THE OFFICE OF INVESTIGATIONS w/revised PD's and Evaluation Statement (19 pgs)
12/10/98	E-mail from James Foster to Reed re: OIG review of documents
12/11/98	E-mail from Reed to McClam re: FOIA req from Foster (1 pg)
01/22/99	Letter, to Flynn from Bird, NRC advises OPM of updated OI position descriptions. (1 pg) Attached were the "Evaluation Statement" dated October 28, 1998, two revised position descriptions, and selection of previous correspondence.
02/12/99	**Response Letter, NRC Executive Director for Operations Travers to Honorable Senator Richard Durbin: positions properly classified. (21 pgs)**
03/16/99	E-mail from James E. Foster to McClam
03/??/99	**NRC Inspector General Investigator McClam (assigned investigator) leaves the agency.**
04/01/99	Closing Memo to File 99-06I
04/15/99	Houck vs. Dept. of the Navy, 4/15/99, MSPB case, no LEO retirement if not a rigorous position.
06/22/99	Letter to H. Bell from Edward J. Markey, Member of Congress re: alleged misclassification of OI employees.
09/20/99	Letter to Rathbun from Richard Durbin, United States Senator w/Letter from Foster (2 pgs)
09/23/99	"Report to the Nuclear Regulatory Commission Office of the Inspector General Regarding the Classification of Positions to GG-1811, Criminal Investigator Series". (33 pgs)
10/08/99	Letter to James Foster from Bird (1 pg)

10/18/99	Letter to OIG employee from Jennings, Retirement Policy Division, OPM w/enclosure (8 pgs)
10/25/99	Closed Investigation Checklist (1 pg)
10/25/99	**Memo to Chairman Dicus from Bell Subj: ALLEGED IMPROPER CLASSIFICATION OF OFFICE OF INVESTIGATIONS (OI) INVESTIGATIONS IN GG1811 SERIES (CASE FILE 99-06I) (20 pgs)**
11/09/99	Letter to Honorable Richard Durbin from Bell, transmitting report (3 pgs)
11/23/99	E-mail from James Foster to Dicus, McGaffigan, Bell, etc (1 pg)
12/28/99	Nelson vs. Department of the Navy, No. 99-3234 (Fed. Cir. 12/28/1999)
03/14/00	Jennings, OPM, advises no further action contemplated, based on NRC OIG report conclusions (E-mail).
05/24/00	Article in NTEU chapter 208 newsletter "Your Voice."
06/00/00	Office of Merit Systems Oversight and Effectiveness, Digest of Significant Classification Decisions and Opinions, Article No. 24-01, OPM determined that the GS-1810/1811 Guide had to be read in conjunction with the information contained in the more recently issued (April 1988) GS-083/085 Guide. That Guide clarifies that the GS-1811 series covers positions primarily responsible for investigating alleged or suspected **major offenses**.
07/12/00	Letter from Schuh, Assistant Director, OPM's Office of Merit Systems Oversight, "**OPM's Retirement and Insurance Service** has responded to you about this matter numerous times in the past and **continues to believe its original [1985] decision was correct.**" "Such coverage determinations have been delegated to agencies since 1993, and, since then, NRC has continued to consider its GS-1811 positions as eligible for section 8336(c) coverage." **"We have considered all of your concerns and do not believe that there is anything further that we can do in this matter."**
08/16/00	E-mail from Jennings: "Thank you for your August 10, 2000, e-mail to Director Lachance. Your e-mail was forwarded to this office (Retirement Policy Center) for a reply. On February 22, 2000, you sent an e-mail to us describing the same concerns that you raised in your August 10, 2000, e-mail to the Director. We believe that our reply to your e-mail of February 22, 2000, fully responds to the issues raised in your e-mail. We cannot add anything to our response. We are attaching a copy of our previous response to your concerns.
08/28/2000	Article by Jenny Weil in newsletter "Inside NRC."

02/02/2001	Letter from OPM, Atomic Energy Act gives OPM "no legal authority to review classification determination by the NRC." Believed to be inaccurate, and inconsistent with a Presidential Order.
07/??/2001	Durbin staff contacts NRC, obtains IG report, closes case.
03/27/2002	C. Johnson, of the Atlanta OPM office, advises that his office has oversight of NRC and that they will review NRC and look at my issues at some unscheduled date. I never heard from them.
08/05/2005	COMSECY-05-0033, STAFF PLAN TO ADDRESS SUPPLEMENTAL STAFF REQUIREMENTS MEMORANDUM - DISCUSSION OF ENFORCEMENT ISSUE; proposed changes developed after evaluating the frequency of cases accepted by the Department of Justice (DOJ); "During the past five fiscal years, out of 244 cases referred to DOJ for prosecutorial review, DOJ has accepted only seven for criminal prosecution."
08/21/2008	NRC Office of Investigations Lean Six Sigma Process Improvement Project Report (18 pages)

Attachment 5, OI Special Deputation Chronology

07/19/1982 NRC Office of Investigations formed.

08/21/1992 Deputation for one OI Agent (only) Donald Driskill for participation in a task force on substandard fasteners. NRC OI sent a letter to DOJ, claiming he would be in danger as the reason for the deputation. It was the first deputation, **in AEC/NRC history**. He was deputized, then, apparently, did nothing on the case(s). NRC and DOD could not find any report (or draft report) resulting for this **first-ever** deputation.

08/00/1997 NRC (Inspector General?) receives (from DCIS?) 16 Smith & Wesson 357 Magnum revolvers; no OI deputations until October 2001, some 4 years later.

12/13/1999 U.S. Enrichment Corporation (USEC) Purchase Order, to Hunt Valve Company for UF6 cylinder valves.

00/00/2000 T. Gonter hired at Hunt Valve Company.

00/00/2001 T. Gonter records conversations for the DOD. Both the Gonters wore "wires" for the Defense Criminal Investigative Service (DCIS).

06/22/2001 Nuclear Regulatory Commission (NRC) investigation of Hunt Valve initiated. Investigation to span 5.5 years (06/22/2001 – 12/16/2006), and be the basis for many deputations.

08/20/2001 The NRC conducted a special-announced vendor inspection of the Hunt Valve during August 20-23, 2001. Exit meeting held 08/23/2001.

08/23/2001 T. Gonter fired from Hunt Valve Company.

00/00/200? Undated single page document, "Special Deputation Authority," believed to have been generated in this general timeframe. "This was the process as it existed in 1992 and in 1994 when we received authority to deputize D.Driskill. and applied for the authority to deputize B. McNulty and P. Joukoff:" (Note: Only Driskill was deputized)

08/31/2001 Several "Application for Special Deputation" forms filled out in NRC Region III. Forms indicate deputation is needed to: protect persons under federal assault statutes, carry or transport weapons for personal protection, make arrests or execute search warrants supporting a federal task force, to operate electronic surveillance or support the violent crime initiative, and to investigate other title 18 violations.

09/06/2001 Letter from R. Paul to E. Gilbert, DOJ, initial deputation request, seven individuals from OI RIII. "This investigation will involve interviews of Hunt employees, contractors, customers and other witnesses, which will be conducted at the interviewee's home during evening hours. Some of these employees will be targets of the joint investigation and some of the employees are known to have prior criminal convictions. Evidence from witnesses and subject testimony will be gathered in support of a search warrant which will be conducted shortly after the interviews are

conducted. In addition, the SAs will be called upon to provide for the safety and welfare of the confidential informants involved in this case."

09/17/2001 "Federal agents closed down the [Hunt Valve Company] East State Street facility while **executing a search warrant** on the premises. Agents could be seen loading boxes of documents into rental trucks parked outside the building." ***NRC OI did not receive deputation in time for this effort.***

10/12/2001 Letter, Sierleja (Asst. U.S. Attorney, DOJ, Ohio) to Jarvis (USMS Special Deputation Program). Request for Special Deputation Authority for the NRC's Region III Office of Investigations. This "relates to a joint investigation with the US Department of Defense (DOD), Defense Criminal Investigative Service, Columbus, OH; Naval Criminal Investigative Service, Great Lakes, IL; and the US Department of Energy, Office of Inspector General, Oak Ridge, TN." "Special Deputation is necessary to effect arrests, execute search warrants, and ensure the collective safety of all agents participating in this investigation." Hunt Valve.

10/22/2001 Letter, Caputo to USMS. A follow-up request for Special Deputation Authority for eight (8) individuals. Initial request submitted 09/06/2001 in conjunction with the execution of an impending search warrant at Hunt Valve Company. Search warrant was executed 09/17/2001 by a multi-agency group which included the Defense Criminal Investigative Service, the Naval Crime Investigative Service, the Department of Energy Office of Inspector General, and the NRC OI. The investigation relates to suspected violations of Title 18, U.S.C., Sections 287 (Fraud against the government) and Title 10 CFR Part 21 (Reporting of Defects and Noncompliance). "The following are the law enforcement activities specifically involved in the NRC investigation which require the deputation of these OI Special Agents: Executing additional search warrants, potential arrests, serving Grand Jury subpoenas, interviewing witnesses and targets in high risk areas, as well as conducting electronic and normal surveillance of witnesses and targets. In addition, OI agents may be tasked to independently provide protection for confidential informants who are cooperating with the Government."

10/25/2001 NRC Inspection Report 99902011-2001-201, issued, which identified a number of significant deficiencies with Hunt's compliance with quality assurance (QA) requirements.

10/0?/2001 DOJ deputation approval, not provided under FOIA.

06/07/2002 The Assistant U.S. Attorney, Northern District of Ohio, requested that any NRC Hunt Valve Company enforcement action be held in abeyance until a determination was made concerning criminal prosecution.

09/12/2002 SECY-02-0166, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues" sent to the Commission.

10/2002 NRC notified licensees of two safety concerns relating to the Hunt valves: The cracked packing nuts and significant deficiencies in the company's quality assurance program. U.S. Navy concludes Hunt documentation unreliable.

03/17/2003 Letter, Sierleja to Finan, Request for Special Deputation Authority for Region III OI personnel. Hunt Valve case.

03/26/2003 SECY-02-0166: The staff should perform an assessment of the investigative techniques used by the Office of Investigations (OI). In this connection, the Commission understands that DOL generally undertakes its investigations using informal interviews and does not commonly resort to criminal investigative techniques. Although such an evaluation of OI practices might start with a self-assessment, advice from an independent group should also be sought. The independent review group should report its recommendations to the Commission through the EDO. Commissioner Merrifield: I have learned from my discussions with people who have been involved in investigations of intimidation and harassment cases of their general distaste for the process. Whether they be the alleger or the individual against whom the allegations have been charged, they have expressed concerns over the length of time that it takes to conduct the investigation, the resultant uncertainty of their status within their organization, and sometimes, the heavy handedness on the part of NRC investigators. The Office of Investigations (OI) workforce is highly dedicated and well trained. The investigative techniques of a good criminal investigator, however, do not easily translate to a setting where the activities being investigated are hardly ever prosecuted and where a quick decision would be best for all individuals involved. Consequently, after dozens of hours of conversations with individuals who have been caught up in our investigations, I am convinced that the "tried and true investigative practices" utilized by our OI staff are frequently not the right practices for the allegation process we are attempting to oversee....While I agree with the Chairman's suggestion to seek advice from an independent group for an assessment of OI's investigative techniques and recommendations for improvements, I believe this group should report its recommendations to the Commission through the EDO. I do not believe self-assessment by OI would provide the same benefit.

0?/00/2003 16 Smith and Wesson 357 Magnum revolvers transferred from the NRC Inspector General's Office to OI (?). These were supposedly given to the NRCOIG by the DCIS (?) in August 1997, and kept by OI until September 2006.

06/03/2003 Letter, O'Connor, U.S. Attorney to Finan, Assistant Director, Special Deputation Program, USMS. Request for Special Deputation authority for the NRC's Region I Office of Investigations field office. This relates to a joint investigation by the Social Security Administration, Office of Inspector General, in conjunction with the Connecticut Anti-Terrorism Task Force, and the US Attorney's Office, District of Connecticut.

06/13/2003 Letter, Caputo to USMS, request for special deputation authority for RI personnel relative to a joint special investigative project by OI, the Social Security Administration, in conjunction with the Connecticut Anti-Terrorism Task Force.... The joint investigative project will generally include surveillance, execution of search and arrest warrants, and other law enforcement activities in potentially dangerous areas..." The investigation relates to potential violations of Title 18 U.S.C., Section 1001 (False statements) NRC regulations stipulated in Title 10 Code of Federal Regulations, parts 50.5 and 73.56, and SSA [Social Security Administration] violations. Special Deputation is necessary to effect arrests, execute search warrants, and ensure the collective safety of all agents participating in the project."

07/29/2003 Deputation request approved by DOJ, not provided under FOIA.

08/07/2003 Handwritten note, contact with Finn of USMS. They tracked down our Spec. Dep. Request at DOJ. It was approved 07/29/2003.

10/20/2003 Letter, Caputo to USMS, Request for Special Deputation Authority for J. B. Hunt Valve case (3-2001-024). "It is **anticipated** that Special Agent J.B. [at NRC for three months] will be assigned to assist in the investigation." "...in order to effect arrests, execute search warrants, and ensure the collective safety...."

10/30/2003 Letter, Sierleja to Finan, Request for Special Deputation Authority for Region III OI personnel. Relates to ongoing criminal investigation being conducted by the US Attorney's Office, Northern Judicial District of Ohio. Case 3-2002-006, Davis-Besse vessel head corrosion case.

11/05/2003 Letter, Caputo to Deem, USMS. Request for Special Deputation Authority. Hunt Valve case 3-2001-024. The investigation.....involves suspected violations of Title 18 U.S.C., Sections 371 (Conspiracy) and 1001 (False Statements); to include NRC regulations stipulated in Title 10 Code of Federal Regulations, Parts 50.5 and 50.0, both of which have criminal sanctions. Special deputation is necessary in order to conduct witness interviews in..."

11/17/2003 Letter, Caputo to USMS. Request for Special Deputation Authority. Involves four RII and RIV Special Agents. "Further, agents listed above will be assigned to provide investigative assistance to OI's Region III field Office." Case 3-2002-006, Davis-Besse vessel head corrosion case.

11/18/2003 Letter, Sierleja to Finan, Request for Special Deputation Authority for Region IV OI personnel. . Relates to ongoing criminal investigation being conducted by the US Attorney's Office, Northern Judicial District of Ohio. Case 3-2002-006, Davis-Besse vessel head corrosion case.

12/04/2003 Letter, Caputo to USMS. Request for Renewal of Special Deputation Authority for NRC's Office of Investigations Field Office-Region III. Case 3-2001-024 (Hunt Valve).

12/09/2003 Letter, USMS to Caputo. "The Deputy Attorney General has approved your request to extend law enforcement authority, as Special Deputy U.S. Marshals."

06/21/2004 Hunt Valve Quality Manager was subsequently charged on June 21, 2004, with one count of conspiracy to defraud the U.S. government.

07/15/2004 Aldrich (Hunt Valve Company) pleads guilty.

10/27/2004 Letter, Sierleja to Finan, Request for Extension of Special Deputation Authority for Region III OI personnel. Relates to ongoing criminal investigation being conducted by the US Attorney's Office, Northern Judicial District of Ohio. Case 3-2002-006, Davis-Besse vessel head corrosion case.

11/23/2004 Letter (fax), Eva Gilbert to Blair Deems. Request for Special Deputation Authority, for Hunt Valve case, signed by Sierleja.

11/23/2004 Letter, Sierleja to Finan, Request for Special Deputation Authority for Region II OI personnel. Relates to ongoing criminal investigation being conducted by the US Attorney's Office, Northern Judicial District of Ohio. Case 3-2002-006, Davis-Besse vessel head corrosion case.

11/29/2004 E-mail, S. V. Perkins to J. Ulie. "Attached is the deputation letter for Hunt Valve. I still haven't gotten the signed letter back from Dave for Chris'case."

12/03/2004 Letter, Caputo to USMS. Request for Initial Renewal of Special Deputation authority. Nineteen (19) individuals listed. Davis-Besse investigation, and Title 18, U.S.C. Sections 371 (conspiracy) and 1001 (false statements) and NRC Regulations in 10 C.F.R. Parts 50.5 (Deliberate misconduct) and 50.9 (Completeness and accuracy of information). Special Deputation is necessary in order to conduct witness interviews in..." Case 3-2002-006, Davis-Besse vessel head corrosion case.

12/03/2004 Letter, Caputo to USMS. Request for /Renewal of Special Deputation authority. Hunt Valve Case, 3-2001-024 and 3-2001-024S. Twelve individuals listed, also listed in 12/03/2004 letter, above. "Special deputation is necessary in order to conduct witness interviews in potential high risk areas, render witness protection, perform subpoena service, execute search warrants, conduct electronic and/or normal surveillance-related activities, and ensure the collective safety of all agents participating in the investigation." "the use of a faulty Hunt valve on cylinders containing or storing UF6 could potentially cause an inadvertent release of UF6, which would then produce an uncontrolled nuclear chain reaction and, in a short period of time, generate the release of a large amount of radiation (the last is an almost direct quote from NRC Inspection Report 99902011-2001-201)."

12/15/2004 Letter, USMS to Caputo. "We received your request to renew deputations of the Nuclear Regulatory Commission's employees participating in investigations of [redacted], and Hunt Valve Company."

02/16/2005 Lawrence Kelly (Hunt Valve Company) charged.

03/05/2005 Social Security Administration (SSA) performs a "Qualitative Assessment Review" of NRC OI. Report contains some sixteen recommendations, one of which is to seek blanket deputation to reduce deputation paperwork.

03/15/2005 Note by Dean (D-note) sends SSA report on the practices of the NRC Office of Investigations to the Commission. Response due by July 1, 2005.

04/05/2005 Email, M. F. to Gartman (NRC), [discussion of blanket deputation] Subject: **OI's Deputation History**. "Since 10/2001, OI Special Agents have been deputized on 3 separate investigations. Currently, 17 of 33 Special Agents are deputized or 52%. This includes 100% (2 of 2) of HQ Special Agents, 25% (1 of 4) of the Field Office Directors, and 52% (14 of 27) of the field Special Agents." "there was one prior request for deputation in 1992 which involved only one Special Agent...."

04/06/2005 Lawrence Kelly (Hunt Valve Company) pleads guilty.

06/01/2005 Memorandum from EDO sends response to SSA review suggestions for the NRC Office of Investigations program to the Commission. Informational memo for the Commission, no policy issue or vote. [NRC Commissioner Merrifield, when interviewed, indicates he believed OI had criminal investigation authority before this.]

06/02/2005 At sentencing, Aldrich (Hunt Valve) read a statement saying that there was no way to know for sure whether the valves posed a threat to the submarines. "There will always be the uncertainty that there could someday be a problem with this material," Aldrich said in an apology to U.S. District Court Judge Lesley Wells in Cleveland. "A sample product has been re-tested and found to be acceptable," Aldrich said. "But in the environment that these materials are used in, sampling will never replace a hundred percent assurance of acceptability. This product assurance was entrusted to myself and the management of Hunt Valve. I/we failed to provide that assurance.

08/16/2005 Email, USMS to Caputo. "As a follow up to our telephone conversation, please draft a cover memo **outlining the reasons why you need / require special deputation on a full time basis and not case by case**. The reasons and explanation that we discussed on the telephone are valid."

08/19/2005 Email, Caputo to OI field office directors. FWD: Special Deputations. "As you can see by the email from Blair Deem, U.S. Marshal's Service, we continue to make significant progress in **our quest for Blanket Deputation**."

09/07/2005 Letter, Caputo to USMS. No title. "Since September 11, 2001, OI Special Agents have become involved in various Joint Terrorism Task Forces throughout the country." "During the conduct of our investigations, OI Special Agents routinely interview witnesses and suspects in potentially dangerous circumstances; e.g., late night/early morning, in remote locations, and in hostile environments." In addition, we utilize traditional investigative techniques such as consensual monitoring and surveillance. Since OI has administrative subpoena power to compel the production of testimony and documents, agents also serve these subpoenas to individuals and licensees suspected of wrongdoing." OI Special Agents are granted Special Deputation on a case-by-case basis, and, in fact, 18 of our agents are currently deputized on specific investigations. However, because of the nature of our investigative mission, the situations agents encounter on a routine basis, and the inherent efficiency of the Blanket Deputation process, **I am requesting that Blanket Deputation be granted to OI** Special Agents, to be renewed annually."

10/07/2005 Handwritten note. Gilbert called - deputation approved by DOJ!

10/14/2005 U.S. Marshals Service replies to Guy Caputo's (OI) request for blanket deputation of NRC personnel, granting his "request to grant a blanket deputation for the special agents of the Nuclear Regulatory Commission." "Some of your agents are currently deputized and this authority is granted to them, however, it will not be necessary for them to be sworn-in again. Special deputation authorization will be immediately sent to those agents who are not deputized."

01/19/2006 Letter to B. Deem, request for deputation of agent Borden.

01/20/2006 NRC Memo, "Plan of Action for Potential Enforcement Cases Within 6 Months of the Statute of Limitations Expiration." Discusses Hunt Valve Case, and has a note on the bottom of

page 2: "Although OI Report No. 3-2001-024 was not specifically provided to the Department of Justice, information contained within the report was used for part of the criminal prosecution [followed by a list of participating agencies].

03/21/2006 Letter to B. Deem, request for deputation for agent Gallagher.

05/05/2006 EDO memorandum sends SECY-06-0102 "Evaluation of the Pilot Program on the Use of Alternative Dispute Resolution in the Allegation and Enforcement Programs" to the Commission. "In response to a Discrimination Task Group recommendation and Commission direction, a qualitative assessment review of OI was conducted by the Social Security Administration (SSA) OIG. The SSA OIG made two suggestions regarding ADR."

05/25/2006 Letter to B. Deem, request for deputation for McFarlane.

06/07/2006 Note to M. F. from USMS, "received request for Special Deputation for McFarlane, however, would you please complete the Supporting Agency Information portion of the application and re-fax it to me?" Also, the limitations for NRC's Special Deputation are to make arrests or execute search warrants supporting a federal task force, and to monitor Title III intercepts. In the future, please include these limitations under the Justification portion (under other) of the application form." [Title III intercepts refers to electronic surveillance and wiretapping]

09/14/2006 Email, Caputo to OI Field Office Directors. The blanket deputation will expire on October 31, 2006.

09/00/2006 OI disposes of 16, 357 Smith & Wesson handguns obtained by the NRCOIG (from DCIS?) in August, 1997, upgrades to Glocks.

10/03/2006 Letter, Caputo to USMS, Request for blanket deputation. "Based on the nature of our investigative mission, the situations the agents encounter on a routine basis, and the inherent efficiency of the deputation process, I am requesting Blanket Deputation be granted to OI Special Agents for a period of three years."

11/07/2006 U.S. Marshals Service responds to Guy Caputo (OI), granting his "request to renew the blanket deputation for the Nuclear Regulatory Commission (NRC)."

12/16/2006 Investigation **completed** by the U.S. Nuclear Regulatory Commission (NRC) Office of Investigations (OI) at the Hunt Valve Company (Hunt) facility in Salem, Ohio. NRC OI Investigation spans 06/22/2001 – 12/16/2006 or **5.5 years.**

Attachment 6, NRC OIG Report, Case File 99-016

SCANNED DOCUMENT
UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

October 25, 1999

OFFICE OF THE
INSPECTOR GENERAL

MEMORANDUM TO: Chairman Dicus

FROM: Hubert T. Bell
Inspector General

SUBJECT: ALLEGED IMPROPER CLASSIFICATION OF OFFICE OF INVESTIGATIONS (OI) INVESTIGATORS IN GG-1811 SERIES (CASE FILE 99-061)

The Office of the Inspector General (OIG), U.S. Nuclear Regulatory Commission (NRC), initiated this review after receiving an allegation from James E. Foster, Region III, that since 1982, Office of Investigations (OI) investigators have been inappropriately classified in the criminal investigator GG-1811 series. Foster claimed that OI duties and authorities do not match the criteria for OI investigators to be classified in the GG-1811 series because the NRC lacks statutory authority to perform criminal investigations. Foster further alleged that the OI investigators lack arrest authority, authority to carry firearms or other weapons, do not perform undercover work, do not execute search or seizure warrants, and are not exposed to hazardous conditions or inclement weather. Finally, Foster stated that OI investigators actually perform all the duties and responsibilities of a general investigator GG-1810 series and should be classified as such.

In addition to his concerns that OI investigators were inappropriately classified in the GG-1811 positions, Foster claimed that as a result of the improper classification, OI investigators had wrongly benefited from the early retirement provisions given to federal law enforcement personnel. Foster maintained that OI investigators obtained the benefits of the early retirement provisions without performing in a position which merits such benefits. Additionally, during the course of this review, Foster submitted correspondence to OIG alleging that the NRC provided vague, erroneous or misleading information to the Office of Personnel Management (OPM) concerning the criminal investigative activities conducted by OI.

During an OIG interview, Foster stated that in the early 1980s, prior to the OI investigators becoming GG-1811s, he was the Director of the Region III OI Field Office. Foster stated that after the OI investigators became GG-1811s, he was forced from the Director's position because he did not have prior GG-1811 experience. Foster maintained that OI does not have criminal investigative authority and that OI investigators should not be classified in the GG-1811 series.

The focus of this OIG review was whether there was any misconduct on the part of NRC staff with respect to the classification of OI investigators in the GG-1811 series and the resultant granting to OI investigators by OPM special law enforcement officer retirement provisions. Consequently, this OIG review examined the accuracy of the position descriptions developed by the NRC to classify the OI investigators as GG-1811 and the appropriateness of the classification of OI investigators in the GG-1811 series. Also, OIG examined the accuracy of the information provided to OPM by the NRC in 1983, after OI was created, which was used by OPM in making their determination to grant the OI investigator positions general coverage under 5 U.S.C. 8336(c), the special law enforcement retirement provisions for law enforcement officers.

During the course of this review, OIG examined historical documents leading up to and following the creation of OI. Also, OIG obtained and reviewed the OPM file containing correspondence between NRC and OPM which was used by OPM to grant coverage under 5 U.S.C. 8336(c) for the OI criminal investigator positions (GG-1811 series). OIG relied on the OPM file because it contained the most complete documentation of the position descriptions that existed at the time the agency classified the criminal investigator positions in the GG-1811 series. These position descriptions were then used by OPM as the basis for granting the special law enforcement retirement coverage to OI investigators. During our review of NRC historical documents concerning OI, OIG noted that SECY-84-32 and SECY-84-212, dated January 25, 1984 and May 22, 1984, respectively, documented that OI has the authority to conduct investigations that have both criminal and civil enforcement implications and to assist the Department of Justice (DOJ) in conducting investigations solely for criminal prosecution purposes.

The OPM file reviewed by OIG contained correspondence between the NRC and OPM dated between September 1975 and November 1990. OIG learned that in November 1979, the U.S. Civil Service Commission (CSC), OPM's predecessor, approved a request by the NRC for coverage under the law enforcement retirement provisions for an investigator position in the Office of Inspection and Enforcement (OIE), NRC. After OI was created in July 1982, NRC requested OPM to approve law enforcement retirement provisions for the investigator positions in the newly created OI. The following chronology is taken from the correspondence between OPM and the NRC regarding the agency's request for 5 U.S.C. 8336(c) coverage:

> In December 1983, Division of Organization and Personnel (DOP), NRC, requested that OPM approve the OI investigators and supervisors under the special retirement provisions for law enforcement officers. As documentation of the duties performed by the investigators, copies of the investigators' job descriptions were attached to the memorandum. The duties outlined in the job descriptions stated in part that an agent investigates violations of NRC regulations and/or Federal laws; administers oaths and affirmations; serves subpoenas; gathers facts through such methods as interview, observation, and interrogation; gathers and preserves evidence; uses cameras, photostatic machines and tape recorders to obtain and record evidence and documents. Also, an agent assists in the referral of assigned cases for criminal prosecution at the request of federal, state or local prosecutors.

In addition, the job descriptions stated that investigations were frequently conducted at power plant construction sites which could expose the investigator to a hostile environment as well as plant hazards and that investigators met with individuals in remote locations which could pose a threat to the investigator. These job descriptions made no mention of investigators making arrests, carrying a firearm, or executing search warrants.

In February 1984, OPM advised NRC that their December 1983 request would be considered as an initial request for coverage for the OI investigator positions under 5 U.S.C. 8336(c) because the prior approval granted by CSC in November 1979 was for one investigative position in OIE, NRC. Additionally, OPM requested more information on the OI investigator positions which was subsequently provided by NRC. OIG noted that the information provided by NRC to OPM essentially described the OI investigative function.

In May 1984, OPM approved general coverage for the OI investigator positions under 5 U.S.C. 8336(c). Subsequently, in May 1985, OPM approved coverage for the Director and Deputy Director of OI under the secondary/administrative category of 5 U.S.C. 8336(c).

OIG interviewed James F. McDermott, Deputy Director, Office of Human Resources (HR), NRC, who stated that the information contained in correspondence from NRC to OPM concerning the OI investigator positions was provided by OI to HR and reviewed by the NRC, Office of the General Counsel (OGC). He said he was comfortable with the information NRC provided to OPM.

James A. Fitzgerald, former Assistant General Counsel, OGC, NRC, who is currently the Deputy Director in OI, told OIG that he was part of a group which formed OI in 1982. Fitzgerald stated that from April 20, 1982 to January 1983, he was the Acting Director of OI. At OIG's request, Fitzgerald reviewed the OI investigators' job descriptions which were sent to OPM in 1983 to support NRC's request for the law enforcement retirement provisions for these positions. Fitzgerald advised OIG that the job descriptions accurately described the work performed by the OI investigators in 1983 as well as today. Fitzgerald pointed out to OIG that OPM's guidelines regarding the GG-1811 series criminal investigator positions do not mandate that GG-1811s carry a firearm or make arrests; it merely stipulates that these functions are normally associated with the duties and responsibilities of an GG-1811 criminal investigator.

William D. Hutchinson, Assistant to the Director, OI, NRC, advised OIG that since he began his employment with OI on August 19, 1984, OI investigators have been conducting criminal investigations. Hutchinson further stated that OI investigators execute search warrants, serve grand jury subpoenas, prepare affidavits and testify in criminal court like any other GG-1811 criminal investigator. Hutchinson pointed out to OIG that the only difference between the OI GG-1811 criminal investigators and the GG-1811 criminal investigators assigned to other federal law enforcement agencies is OI investigators do not carry firearms or make arrests. He said that each year, OI submits an annual report to the

NRC Commission which outlines the number of criminal cases OI referred to DOJ for prosecution.

OIG reviewed the Annual Reports submitted by OI to the NRC Commission for the period 1989 to 1997. These Annual Reports gave a narrative outline of significant investigations conducted by OI as well as the cases that resulted in DOJ referrals. **OIG determined that over the review period, an average of 22 percent of OI's cases were referred to the DOJ for criminal prosecution**. (Emphasis added)

As an illustration of the sort of criminal investigations conducted by OI, OIG recently learned that between 1996 and 1999, OI participated in a major investigation concerning a major utility in the northeast which resulted in the utility's pleading guilty to 19 federal felony criminal counts for lying to the NRC. OIG found that OI conducted the investigation of NRC licensee criminal wrongdoing in conjunction with DOJ and that OI is continuing to pursue additional potentially criminal matters with DOJ.

Based on OIG's review of records and interviews of cognizant individuals, OIG determined that the position descriptions developed by the agency after OI was created in 1982 accurately characterized the activities of an OI investigator. However, OIG did not have the expertise to determine whether NRC's initial classification of the OI investigator positions in the GS-1811 series was handled appropriately by the agency. Therefore, OIG secured the services of an independent consultant with the expertise to review this issue. As a consultant, OIG obtained an individual who was a former supervisory personnel management specialist at OPM and employed by that agency and its predecessor from 1973 to 1998.

The OIG consultant reviewed whether it was appropriate for the NRC to classify the OI positions as criminal investigators, GG-1811, at the time OI was established. The consultant examined documents and materials related to the establishment of OI and whether the OI mission supported the use of GG-1811 positions. In addition, the consultant reviewed the OPM file documenting the correspondence between NRC and OPM from September 1975 through November 1990, which contained the relevant OI GG-1811 position descriptions used by the NRC to support their request for 5 U.S.C. 8336(c) coverage. The consultant compared these position descriptions with the OPM Grade-Level Guides For Classifying Investigator Positions, GS-1810/1811, dated February 1972. The consultant also reviewed OPM guidance for distinguishing between the general investigator, GS-1810 and GS-1811, criminal investigator positions. The OIG consultant concluded that the decision to classify the OI investigator positions as criminal investigators, GG-1811, was reasonable and appropriate.

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.

Based on their review of information submitted by the NRC, OPM granted law enforcement retirement coverage under 5 U.S.C. 8336(c) to the OI investigator positions. OIG noted that in its review of the OI law enforcement retirement coverage, OPM asked a series of questions that it deemed were material to its decision, and OPM required the NRC to provide answers to these questions. OIG found no information provided in response to these questions by the NRC to OPM that was false. OIG found that the correspondence over the years contained various descriptions of the criminal investigations conducted by OI and the amount of time OI spent conducting these activities. OIG learned from OPM that the information provided by NRC that may have varied was not material in OPM's decision to grant approval to the NRC for law enforcement retirement coverage under 5 U.S.C. 8366(c) for the criminal investigator positions in OI.

During this review, OIG uncovered no indication of wrongdoing by NRC staff concerning the classification of OI investigators in the GG-1811 series which resulted in OPM granting the OI investigator positions special law enforcement retirement coverage under 5 U.S.C. 8336(c). Specifically, this review determined that the information contained in the position descriptions developed by the agency after OI was created in 1982 and in correspondence submitted by NRC to OPM essentially described the OI investigative function. Also, the OIG consultant concluded that the agency's decision to classify the OI investigator positions as GG-1811 criminal investigators was reasonable and appropriate. Based on the agency's classification of the OI investigators in the GG-1811 series, OPM granted these positions law enforcement retirement coverage under 5 U.S.C. 8336(c).

Attachment:
OIG Consultant Report

REPORT TO THE NUCLEAR REGULATORY COMMISSION OFFICE OF THE INSPECTOR GENERAL REGARDING THE CLASSIFICATION OF POSITIONS TO GG-1811, CRIMINAL INVESTIGATOR SERIES SEPTEMBER, 1999

INTRODUCTION

The purpose of this report is to advise the Office of the Inspector General (OIG), Nuclear Regulatory Commission (NRC), regarding the appropriateness of actions taken by the NRC to classify several positions as Criminal Investigators, GG-1811. These actions were accomplished generally coincidental to the establishment of the NRC Office of Investigations (OI).

THE TASK

My specific task was to determine whether it was appropriate for the NRC to classify positions as Criminal Investigators, GG-1811, at the time when the OI was established. The process used to draw a conclusion for this report consisted of an analysis of relevant OI GG-1811 position descriptions and a comparison of those position descriptions with the U.S. Office of Personnel Management Grade-Level Guides For Classifying Investigator Positions, GS-1810/1811, dated Feb 1972. The analysis also included an examination of documents and materials related to the establishment and early days of the OI in order to assess the mission and organization of OI and whether the OI mission supported the use of GG-1811 positions.

METHODOLOGY

This task focused on actions taken and decisions made years ago. However, even though substantial time had elapsed and many organizational changes had occurred, documentation sufficient to carry out this task was available from the OI, the Office of Human Resources (OHR), and the OIG.

Since it was not possible to perform a "desk audit" of positions that are almost 20 years old (i.e., interview the incumbents of the positions), the only reasonable approach in carrying out this analysis is to accept that "official" position descriptions (supplemented and confirmed by information from other official documents and interviews with NRC officials with direct knowledge of the establishment of OI) accurately reflect the GG-1811 positions and their organizational environment during the time period of interest.

The general fact finding approach included discussions with individual staff listed below from several NRC organizations, review of available documents, further follow up discussion, and analysis of the available materials and information, finally synthesized in this report.

Persons Interviewed:

Office of the Inspector General
R Raspa

Office of Human Resources
P Bird, Director
M Fox
J McDermott
Office of Investigations
Guy P. Caputo, Director
James Fitzgerald, Deputy Director

MATERIALS REVIEWED AND CONSIDERED

Item 1. U.S. Office of Personnel Management, The Classifier's Handbook.

Item 2. U.S. Office of Personnel Management Grade-Level Guides For Classifying Investigator Positions, GS-1810/1811, dated Feb 1972.

Item 3. Position Descriptions attached to memorandum dated December 23, 1983, from Ben Hayes, Director, Office of Investigations to Paul Bird, Director, Division of Organization and Personnel, Office of Administration. These include the following position descriptions:

Primary Positions
Senior Investigator, GG-1811-14, task Leader, OI Field Office
Investigator, GG-1811-13, OI Field Office
Investigator, GG-1811-12, OI Field office
Investigator, GG-1811-11, OI Field Office
Investigator, GG-1811-13, OI Field Operations
Investigator, GG-1811-12, OI Field Operations

Secondary positions
Supervisory Investigator, GG-1811-14, Director, OI Field Office
Supervisory Investigator, GG-1811-15, Director, OI Field Operations
Policy and Special Projects Assistant, GG-1811-15, OI HQ
Senior Investigator, Operations Officer, GG-1811-14, OI Field Operations

Item 4. Letter to William Dirks, Acting Executive Director for Operations, NRC, from Lawrence Lippe, Criminal Division, U.S. Department of Justice, dated 3/7/80.

Item 5. Letter to James E. Cummings, Director, Office of Inspector and Auditor, NRC, from Lawrence Lippe, Criminal Division, U.S. Department of Justice, dated 5/26/81.

Item 6. Memorandum for NRC Commissioners, Proposals on Policy, Procedural and Quality Control Guidance, and Training Programs, from James Fitzgerald, Acting Director, OI, dated 6/17/82.

Item 7. Memorandum for NRC Commissioners, Actions for Improvement in NRC Investigations, from James Fitzgerald, Acting Director, OI, dated 7/16/82.

Item 8. Policy Issue for NRC Commissioners, NRC Conduct of Civil Versus Criminal Investigations, from George Messenger, Acting Director, Office of Inspector and Auditor, dated 12/6/83.

Item 9. Memorandum for William J. Dircks, Executive Director for Operations, NRC, from Samuel J. Chilk, Secretary, NRC, 4/18/84.

Item 10. Policy Issue for NRC Commissioners, NRC Conduct of Civil Versus Criminal Investigations, from James Fitzgerald, Assistant General Counsel, NRC, 5/22/84.

Item 11. Letter to Chairman Nunzio Palladino, NRC, from Stephen S. Trott U.S. Department of Justice, dated 3/18/85.

Item 12. Letter to Chairman Tom Bevill, Subcommittee on Energy and Water Development, from Commissioner Asselstine, dated 4/2/85.

Item 13. Memorandum of Understanding between the Nuclear Regulatory Commission and the Department of Justice, signed 10/31/88 and 11/23/88, outlining responsibilities of each agency in criminal investigation and prosecution matters.

Item 1, above, provides guidance to Federal government position classification specialists in the classification of positions to the correct series and grade. Items 2 and 3 are the core documents used in the evaluation of the NRC GG-1811 positions. Item 2 is the U.S. Office of Personnel Management Classification Standard and Grade Level Guide to determine the correct series and grade for investigator positions for U.S. Government Executive Branch agencies covered by competitive service requirements. Although NRC is not required to be covered by competitive service rules and regulations, since it is in the "excepted service", it has chosen to abide by the competitive service classification standards issued by the U.S. Office of Personnel Management. Item 3 includes NRC position descriptions for investigators at the time of and immediately after the establishment of NRC's OI.

The other items are memoranda, letters, and other documents that serve to illustrate and describe some important environmental and organizational issues related to the establishment of the OI and the classification of the investigator positions. They have been used to help better understand the organizational intent of NRC in establishing OI and the criminal investigator positions.

A review of these documents shows that for many years the NRC has been debating and considering the role of investigation activities within the NRC, the need to improve the effectiveness of NRC investigation activities, how such work should be defined, and where and how such work should be assigned, carried out, and managed. These issues were discussed prior to and during the time of the establishment of OI, and the discussions continued even after the establishment of OI. The overall theme of the wide ranging analyses and discussions was clearly a effort to improve the effectiveness of NRC investigation activities, and that led to the establishment of OI and the assignment of investigatory responsibilities to OI. Based on the document review, criminal investigation has been accepted as, and appears to be, a legitimate activity in the regulatory enforcement process.

Several conclusions can be drawn <u>from the reviewed documents</u>.

• Before the establishment of OI, there was concern expressed by Congress and the Department of Justice that the NRC investigation program was not adequately managed and carried out. Such concerns, in addition to those expressed within NRC, provided the impetus for the efforts directed at improving the investigatory capabilities of the NRC and the establishment of OI. Items 4 and 12 include discussions of these issues.

• It is of little or no relevance to the analysis of the classification issues whether properly done investigation work results in either civil or criminal penalties. According to the reviewed documents, including statements made by Department Justice officials, the matter of type of penalty often arises after the investigation has been initiated (and possibly conducted) by NRC investigators. During the investigatory phase of the process, the investigation work that results in a civil or a criminal penalty is basically the same. The issue, therefore, is whether NRC investigators applied the appropriate investigation techniques, rather than the nature of the potential resolution of the investigations. This is addressed in item 5, above, where Mr. Lippe stated that "Conceivably, every investigation or audit by the NRC could have criminal, as well as civil potential, since the same conduct can be the basis for both violations. Accordingly, virtually all process, questions or documents obtained have the potential for revealing evidence of a crime, or confirming that one took place."

• It is clear that NRC has the authority to conduct investigations that may result in criminal penalties, although that is not a central issue in this task. Regarding this point, the discussion within the NRC often combines several issues related to the authority of NRC to conduct "criminal" investigations. Several times, these discussions swayed between using the term criminal to mean relating to a crime not necessarily within the investigatory authority of the NRC (i.e., theft), and using the term criminal to refer to a possible or likely penalty (i.e., a criminal penalty, as opposed to a civil penalty).

Significantly, item 8 concludes that, **while the NRC does not have the authority to unilaterally carry out investigations of crimes, there is no prohibition on the NRC to assist the Department of Justice in its investigations of criminal activities. This is further discussed in item 10, that summarized the NRC Commissioners decisions to permit NRC criminal investigators to assist the Department of Justice in criminal investigations upon the written request of the Department of Justice, and to notify the Department of Justice when NRC investigators uncovered matters of possible criminal violation.** This is of significance to support the conclusion that NRC investigators worked in an environment where GG-1811 work is performed. (Emphasis added)

• Item 13, the Memorandum of Understanding between the NRC and the Department of Justice), signed in 1988, puts into affect all the earlier discussions and decisions related to the long discussed criminal investigation issues, including formally establishing that NRC criminal investigators could assist the Department of Justice in carrying out criminal investigations. That document makes clear that NRC had the authority and the responsibility to conduct the kinds of investigations that have all the characteristics of investigations that are performed by criminal investigators properly classified to criminal investigator positions.

OCCUPATIONAL ANALYSIS

The U.S. Office of Personnel Management (OPM) publication, "The Classifier's Handbook," (beginning on page 26) provides the following guidance for determining the appropriate series of a position:

• "Important to fully understanding the position is consideration of such factors as the position's relationship to other positions, its primary purpose or reason for existence, the mission and responsibility of the organization in which it is located, and the qualifications required to do the work. It is helpful to review organization charts, mission and function statements, technical and procedural manuals, classification standards and agency guides, position description files, and any other available documents relating to the position. Supervisors and managers can be helpful, and often essential, sources of information."

• "In most cases, the occupational series will represent the primary work of the position, the highest level of work performed, and the paramount qualifications required."

• "Mixed Series"

A 'mixed series' position involves work covered by more than one occupational series. For most positions, the grade-controlling work determines the series. Sometimes, however, the lower grade duties are more closely related to the basic purpose of the position. When the work of the position is covered by two or more series in one occupational group and no one series predominates, use the general series for that group, typically the -01 series, for the position. Use the general series also for positions that are not covered properly by any other series in the group but are related closely to the work of the group. When the work of the position falls into more than one occupational group, the proper series may be more difficult to determine. You must consider a number of factors as described below regarding the position. Consider these factors together, since no single one necessarily will result in the most logical decision.

Paramount knowledge required: Most positions have a paramount knowledge requirement even though there may be several different kinds of work assigned to the position. The paramount knowledge is the most important type of subject matter knowledge or experience required to do the work.

Reason for existence: The primary purpose of the position or management's intent in establishing the position is a positive indicator to the appropriate series.

Organizational function: The mission or function of an organization can often provide an indication of the appropriate series for a position. Thus, for example, the Supply Clerical and Technician Series, GS-2005, may be the most appropriate series for a position located in a supply services organization and assigned supply, procurement, and financial clerical duties. On the other hand, a similar position located in an acquisitions organization may be classified better in the Procurement Clerical and Technician Series, GS-1106.

Line of promotion: The normal line of promotion for the position and/or similar positions in the organization frequently will indicate the occupational specialization toward which the position is oriented.

Recruitment source: Supervisors and managers can help by identifying the occupational areas that provide the best qualified applicants to do the work."

Key to determining the most appropriate series of a position, then, is 1) the mission and responsibility of the organization in which the position is located, 2) the position's relationship to other positions in the organization, 3) the position's primary purpose or reason for existence, 4) the line of promotion of the position, 5) the qualifications and knowledge required to do the work of the position, and 6) sources of recruitment for well qualified candidates for the position. These are all important considerations and they have been considered in attempting to resolve this particular issue. (Although I do not consider the positions in question to be mixed series, I believe that it still useful to consider the mixed series determination factors since they are generally applicable in determining the series of any position.)
These general criteria are addressed in the following paragraphs.

General Considerations

1) The mission and responsibility of the organization in which the position is located,
2) The position's relationship to other positions in the organization, and 3) The position's primarily purpose or reason for existence

From a review of items 4 through 9, it is clear that prior to the establishment of OI, there was a great deal of concern expressed by the Department of Justice and Members of Congress about the ability, training, and effectiveness of NRC investigators and the organizational placement of those investigators within NRC. Those documents make clear that OI was established to improve the effectiveness of NRC criminal investigation activities, with a greater emphasis on successful criminal investigation activities in those areas for which NRC had investigatory authority and responsibilities. Although it was not within the scope of this work to conduct an organizational analysis of the NRC at the time of the establishment of OI in order to fully explore the relationship of OI GG -1811 positions to investigators in other parts of NRC, it is clear from a review of the cited documents that a more effective criminal investigation program was the goal of the establishment of OI and the employment of experienced criminal investigators.

4) The line of promotion of the position
The documents did not directly address the line of promotion for criminal investigators. However, since there was a well established career structure with positions established at the grade 14 and 15 levels, and those positions required criminal investigation experience, it would be reasonable to assume that any lower graded criminal investigators would aspire to and be promoted to higher graded criminal investigator positions.

5) The qualifications and knowledge required to do the work of the position
Regarding the qualifications and knowledge required to do the work, all the position descriptions make clear that criminal investigation experience was required at each of the grade levels.

6) Sources of recruitment for well qualified candidates for the position
The documents and interviews with NRC staff involved with the establishment of OI show that the intent of OI was to hire experienced criminal investigators to staff the new OI. Staffing efforts were focused on obtaining experienced criminal investigators from well established criminal investigation agencies that would have employed well trained staff with up to date skills. This was done to enable OI to quickly assume expanded and more focused criminal investigation activities. As far as I was able to determine, inexperienced staff were not hired into OI criminal investigator positions.

Specific Considerations in Classifying Positions as Criminal Investigators

Item 2, the OPM Grade-Level Guides For Classifying Investigator Positions, GS-1810/1811, dated Feb 1972, provides specific guidance for distinguishing between General Investigator, GS-1810, and GS-1811, Criminal Investigator positions.

That Guide defines the work of General Investigators, GS-1810, as follows:

> "This series includes positions that involve planning and conducting investigations covering the character, practices, suitability or qualifications of persons or organizations seeking, claiming, or receiving Federal benefits, permits, or employment when the results of the investigation are used to make or invoke administrative judgments, sanctions, or penalties. These positions require primarily a knowledge of investigative techniques and a knowledge of the laws, rules, regulations and objectives of the employing agency; skill in interviewing, following leads, researching records, and preparing reports; and the ability to elicit information helpful to the investigation from persons in all walks of life."

Criminal Investigators, GS-1811, are defined as follows:

> "This series includes positions that involve planning and conducting investigations relating to alleged or suspected violations of criminal laws. These positions require primarily a knowledge of investigative techniques and a knowledge of the laws of evidence, the rules of criminal procedure, and precedent court decisions concerning admissibility of evidence, constitutional rights, search and seizure and related issues; the ability to recognize, develop and present evidence that reconstructs events, sequences, and time elements, and establishes relationships, responsibilities, legal liabilities, conflicts of interest, in a manner that meets requirements for presentation in various legal hearings and court proceedings; and skill in applying the techniques required in performing such duties as maintaining surveillance, performing undercover work, and advising and assisting the U.S. Attorney in and out of court."

That OPM guide, in the section titled Distinctions Between General and Criminal Investigating Occupations, states:

"All Federal investigators perform fact-finding and reporting duties on assignments that normally unfold over a period of time. The key distinctions between the general and criminal investigating occupations lie in the different kinds of investigations performed by each and the different knowledge, skills, and abilities those different kinds of investigations impose.

General Investigating Series, GS-1810

Investigations in this occupation result in civil or administrative actions, judgments, sanctions, or decisions. For example, employees in this occupation investigate individuals or organizations seeking or receiving benefits, licenses, loans or employment from the Federal Government or otherwise involved in civil matters of concern to Federal agencies, such as claims, loans or loan guarantees, insurance, malpractice suits, guardianship and custody matters, pensions, etc. This work requires a knowledge of the laws, rules and regulations of the employing agency, skill in interviewing, following leads, researching records, and reconstructing events, and the ability to prepare reports of findings.

Criminal Investigating Series, GS-1811

Positions in this occupation are concerned with investigations of alleged or suspected violations against the laws of the United States. This work requires, in addition to the knowledge, skills, and abilities described for the General Investigating Series, GS-1810, a knowledge of the criminal laws and Federal rules of procedure which apply to cases involving crimes against the United States, for example:

Knowledge of what constitutes a crime or violation as defined in pertinent statutes, including the Uniform Code of Military Justice, and statutes with antifraud or similar criminal penalties;
- The kind of evidence that is required to prove that a crime was committed;
- The relationships among the criminal investigative jurisdictions of various agencies;
- Decisions and precedent cases involving:
    - admissibility of evidence
    - search and seizure
    - arrest authority
- Sources of information, i.e., informants, and methods of obtaining required evidence;
- The methods and patterns of criminal operations;
- Availability and use of modern detection devices and laboratory services;
- Awareness of continuing advances in investigative technology.

The purpose of the case, i.e., alleged or suspected violation of criminal law, imposes additional requirements on most positions in the Criminal Investigating Series, GS-1811. For example, most criminal investigators must be skillful in such activities as:
- Maintaining surveillance;
- Performing undercover work;
- Making arrests;
- Taking part in raids.

There are also instances in which investigators follow leads that indicate a crime will be committed rather than begin an investigation after a crime has been committed."

As is evident from the above, there are some basic similarities between the General and Criminal Investigator positions. However, there are some very key characteristics that distinguish Criminal Investigator from General Investigator positions. Most importantly, Criminal Investigators are concerned with investigations of alleged or suspected violations against the laws of the United

States. In order to carry out this work, criminal investigators must possess a knowledge of the criminal laws and Federal rules of procedure which apply to cases involving crimes against the United States. In addition, they must have knowledge of the kind of evidence that is required to prove that a crime was committed, be aware of and understand the relationships among the criminal investigative jurisdictions of various agencies, be familiar with decisions and precedent cases involving admissibility of evidence, search and seizure, and arrest authority, understand how to develop sources of information, have knowledge of and understand the methods and patterns of criminal operations, know how to take advantage of modern detection devices and laboratory services, and have an awareness of continuing advances in investigative technology. These are characteristics the Criminal Investigators generally do not share with General Investigators It is important to note that the OPM guidance makes clear that although most Criminal Investigators would be expected to be skillful in activities such as maintaining surveillance, performing undercover work, making arrests, and taking part in raids, these are not required activities for all Criminal Investigators, and the absence of regular or frequent participation in such activities by itself would not be reason to exclude persons from the Criminal Investigator category.

SUMMARY OF FINDINGS

Using the position descriptions attached to the December 23, 1983 memorandum, it is possible to determine whether those position descriptions included the characteristics required for classification as a Criminal Investigator. The results of that analysis are summarized in the table on the following page.

Based on my analysis of the above listed position descriptions, and comparison of those position descriptions with the Office of Personnel Management guidance for classifying Criminal Investigator positions, and based on the demonstrated need of NRC to conduct criminal investigations in those areas for which NRC has investigatory authority and responsibility, I have concluded that the decision to classify the OI Investigator positions as Criminal Investigators, GG-1811, was reasonable and appropriate.

CHARACTERISTIC	IDENTIFIED IN EACH POSITION DESCRIPTION?	COMMENTS
Concerned with investigations of alleged or suspected violations against the laws of the United States.	Yes	Explicit statement in each position description.
Possess a knowledge of the criminal laws and Federal rules of procedure which apply to cases involving crimes against the United States.	Yes	Explicit statement in each position description.
Have knowledge of the kind of evidence that is required to prove that a crime was committed.	Yes	Explicit statement in each position description.
Be aware of and understand the relationships among the criminal investigative jurisdictions of various agencies.	Yes	Explicit statement in each position description.
Be familiar with decisions and precedent cases involving admissibility of evidence, search and seizure, and arrest authority.	Yes	Explicit statement in each position description.
Understand how to develop sources of information.	Yes	Not explicitly stated in each position description, but integrated in broader statements of duties and knowledge required.
Have knowledge of and understand the methods and patterns of criminal operations, know how to take advantage of modern detection devices and laboratory services.	Yes	Not explicitly stated in each position description, but integrated in broader statements of duties and knowledge required.
Have an awareness of continuing advances in investigative technology.	Yes	

ATTACHMENTS (Not included)

Resume of SP

U.S. Office of Personnel Management, The Classifier's Handbook.

U.S. Office of Personnel Management Grade-Level Guides For Classifying Investigator Positions, GS-1810/1811, dated Feb 1972.

Position Descriptions attached to memorandum dated December 23, 1983, from Ben Hayes, Director, Office of Investigations to Paul Bird, Director, Division of Organization and Personnel, Office of Administration.

Letter to William Dirks, Acting Executive Director for Operations, NRC, from Lawrence Lippe, Criminal Division, U.S. Department of Justice, dated 3/7/80.

Letter to James E. Cummings, Director, Office of Inspector and Auditor, NRC, from Lawrence Lippe, Criminal Division, U.S. Department of Justice, dated 5/26/81.

Memorandum for NRC Commissioners, Proposals on Policy, Procedural and Quality Control Guidance, and Training Programs, from James Fitzgerald, Acting Director, OI, dated 6/17/82.

Memorandum for NRC Commissioners, Actions for Improvement in NRC Investigations, from James Fitzgerald, Acting Director, OI, dated 7/16/82.

Policy Issue for NRC Commissioners, NRC Conduct of Civil Versus Criminal Investigations, from George Messenger, Acting Director, Office of Inspector and Auditor, dated 12/6/83.

Memorandum for William J. Dircks, Executive Director for Operations, NRC, from Samuel J. Chilk, Secretary, NRC, 4/18/84.

Policy Issue for NRC Commissioners, NRC Conduct of Civil Versus Criminal Investigations, from James Fitzgerald, Assistant General Counsel, NRC, 5/22/84.

Letter to Chairman Nunzio Palladino, NRC, from Stephen S. Trott, U.S. Department of Justice, dated 3/18/85.

Letter to Chairman Tom Bevill, Subcommittee on Energy and Water Development, from Commissioner Asselstine, dated 4/2/85.

Memorandum of Understanding between the Nuclear Regulatory Commission and the Department of Justice, signed 10/31/88 and 11/23/88, outlining responsibilities of each agency in criminal investigation and prosecution matters.

Attachment 7, Commission Briefing, Comparison with OIG Report

WHAT THE COMMISSION SAID
During the 1984 Briefing on Criminal vs. Civil Investigations
Compared to: the NRC OIG consultant's Conclusions

James Fitzgerald:... the Commission does not have independent authority to conduct criminal investigations.

Chairman Palladino: ... on page 3 you do talk about the differences and you mention them earlier, between criminal and civil investigations, at least in the footnote. It seems to me that the procedures regarding criminal safeguards do affect that collecting. You can't do exactly the same thing under our procedures as the FBI could do under theirs.

Chairman Palladino: ... "Terming the investigation 'civil' means only that there is a valid NRC civil enforcement purpose and, therefore, that criminal safeguards and procedures are not required.

Ben Hayes: What I have attempted to do over the last year or so is to provide the Commission and the staff with a thorough, complete investigation that hopefully satisfies our regulatory needs.

Ben Hayes: we refer those particular cases where in our view there may be some criminal sanctions, to the Department for their review.

Chairman Palladino: ... you say, "That the Commission authorize OI to state in its negotiations with DOJ that NRC, in appropriate circumstances, will (i) conduct investigations at DOJ's request." My feeling would be that we should say, "(i) assist in the conduct of investigations at DOJ's request."

Commissioner Asselstine: Is it realistic or feasible to say, "Look, what we would like to do is get our civil investigation done. At that point we'll tell you that we have completed our investigation. We will identify any potential criminal items that we think might be of interest to you."

Commissioner Bernthal: ..., I'm concerned that this policy statement here, which you have softened from "conduct investigations" to "assist in investigations," that may still not quite be the right implication, it seems to me. We may want to make sure that we cooperate in every way necessary with DOJ, but that we not by any policy statement give the implication that we are going to be aggressive or proactive in achieving criminal investigation of objectives.

Chairman Palladino: Yes, our policy is to first serve our civil purposes and then help DOJ.

WHAT THE OIG CONSULTANT CONCLUDED

It is clear that NRC has the authority to conduct investigations that may result in criminal penalties, although that is not a central issue in this task.

...while **the NRC does not have the authority to unilaterally carry out investigations of crimes**, there is no prohibition on the NRC to assist the Department of Justice in its investigations

of criminal activities. This is further discussed in item 10, that summarized the NRC Commissioners decisions to permit NRC criminal investigators to assist the Department of Justice in criminal investigations upon the written request of the Department of Justice, and to notify the Department of Justice when NRC investigators uncovered matters of possible criminal violation. **This is of significance to support the conclusion that NRC investigators worked in an environment where GG-1811 work is performed.**

Foster's Notes Regarding this Comparison:

1. The consultant clearly understood that the NRC lacks criminal investigative authority!
2. No agency, individual or entity is prohibited from assisting the DOJ!
3. Anyone can assist the DOJ, even non-citizens, this does not make one an 1811!
4. The "environment" was not the question, and he is totally wrong!
5. One gets the feeling he really had to work at this, and did not want to address the percentage of time ("primary duties") spent conducting criminal investigations!

Attachment 8, Fosters Comments on the OIG Report

FOSTER'S COMMENTS ON THE NRC OIG REPORT

The NRC Office of Inspector General (OIG) review of my concerns regarding the classification of Office of Investigations (OI) Investigators, and their being provided early retirement and premium pay contains many weaknesses. The introduction suggests that I simply made statements and did not submit a highly detailed, documented concern complete with references to numerous documents, a chronology of events and citations from court cases. The many documents I personally provided are not mentioned or addressed. More than sufficient information was provided for a comprehensive investigation.

The review then consists of interviews with the individuals who either approved the provision of law enforcement officer (LEO) benefits, or who were currently benefiting from those benefits. However, no reference was made to the LEO early retirement and 25% "availability pay" benefits. The use of a consultant, while normally very worthwhile, did not appear to aid the comprehension of my concerns, and it appeared that the consultant was not given the information I provided. The consultant's report only lists 13 selected documents, few that I provided. The criteria utilized by the Merit Systems Protection Board and other federal agencies to determine qualification for LEO benefits of early retirement and premium pay were not even mentioned.

Several salient points were not addressed: the Malsch memorandum (indicating NRC should not conduct criminal investigations under any circumstances), and the statements by NRC management that NRC did not conduct criminal investigations, and lacked the statutory authority to do so. The certification by NRC that the positions were "rigorous", but later described as consisting of work in an office setting, is not touched upon. The sequence of events where William Ward, and no one else, for quite some time (I assume this is where Peter Baci filed a grievance), is given LEO benefits apparently did not seem unusual.

The report does agree that Office of Investigations Investigators lack arrest authority, authority to carry firearms or other weapons, and that a small percentage of OI cases were referred to the Department of Justice. That this is inconsistent with statements to the Office of Personnel Management is not addressed.

Most importantly, a close reading of the OIG report reveals that it substantiates my statements: OI does not have criminal investigative authority, does not conduct arrests nor have firearms authority, and during the review period, 22% of the OI investigations were referred to DOJ (no mention of the percent of these accepted for investigation by DOJ). The fact that, by my estimate, 6-7% of the OI investigations will be investigated by DOJ (this turned out to be optimistic) is salient; OPM rejected an NRC request for Law Enforcement Officer Retirement for the Director, Office of Inspector and Auditor when advised that 40% of the work was criminal investigation related (less than the required 50%).

The following comments address sections of the OIG report itself:

OIG learned that **in November 1979, the U.S. Civil Service Commission (CSC), OPM's predecessor, approved a request by the NRC for coverage under the law enforcement retirement provisions for an investigator position in the Office of Inspection and Enforcement (OIE), NRC**. After OI was created in July 1982, NRC requested OPM to approve law enforcement retirement provisions for the investigator positions in the newly created OI. (**Didn't this seem strange, that only one position was approved between 11/1979 - 05/1984?**)

OIG determined that over the review period, an average of **22 percent of OI's cases were referred to the DOJ for criminal prosecution. ("prosecution" should be "prosecutive review", fewer were investigated, and much fewer were actually "prosecuted."**

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. (Yes, and it was/is not true, actually much less than 22%! OPM based its decision on a number in excess of 50%, and this was never true.)**

It is clear that NRC has the authority to conduct investigations that may result in criminal penalties. The discussion within the NRC often combines several issues related to the authority of NRC to conduct "criminal" investigations. Several times, these discussions swayed between using the term criminal to mean relating to a crime not necessarily within the investigatory authority of the NRC (i.e., theft), and using the term criminal to refer to a possible or likely penalty (i.e., a criminal penalty, as opposed to a civil penalty).

Significantly, while the NRC does not have the authority to unilaterally carry out investigations of crimes, there is no prohibition on the NRC to **assist** the Department of Justice in its investigations of criminal activities. The NRC Commissioners decisions to permit NRC criminal investigators to **assist** the Department of Justice in criminal investigations **upon the written request of the Department of Justice, and to notify the Department of Justice when NRC investigators uncovered matters of possible criminal violation. (Such written requests are nonexistent!)**

the Memorandum of Understanding between the NRC and the Department of Justice), signed in 1988, puts into affect all the earlier discussions and decisions related to the long discussed criminal investigation issues, including formally establishing that **NRC criminal investigators could assist the Department of Justice in carrying out criminal investigations.**

The purpose of the case, i.e., alleged or suspected violation of criminal law, imposes additional requirements on most positions in the Criminal Investigating Series, GS-1811. For example, most criminal investigators must be skillful in such activities as:
- Maintaining surveillance;

- Performing undercover work;
- Making arrests;
- Taking part in raids.

It is important to note that **the OPM guidance makes clear that although most Criminal Investigators would be expected to be skillful in activities such as maintaining surveillance, performing undercover work, making arrests, and taking part in raids,** these are not required activities for all Criminal Investigators, and the absence of regular or frequent participation in such activities by itself would not be reason to exclude persons from the Criminal Investigator category. (**The merit system protection board thinks it is necessary for law enforcement officer retirement benefits. This conclusion is contrary to MSPB decisions and Appeals Court determinations.)**

Attachment 9, LEO versus Regular Retirement Costs Per Person

LEO VS REGULAR RETIREMENT COSTS PER PERSON PER YEAR
TWO OLDER ANALYSES

1:

	High-Three $75,000 50 years old, 20 years service			**High-Three $100,000 57 years old, 25 years of service**		
	Regular Retirement Annuity	LEO Retirement Annuity	Difference	Regular Retirement Annuity	LEO Retirement Annuity	Difference
CSRS	$24,504	$37,500	**$12,996**	$46,248	$60,000	**$13,752**
FERS	$15,000	$25,500	**$10,500**	$18,852	$39,000	**$20,148**

Most current employees will be in the FERS system, so LEO retirement benefits account for $10,500 - $20,148 per person, per year of retirement, under this analysis. If the "high three" value is higher (due to 25% availability premium pay, for example) the amounts would increase considerably. Increased costs of $12,000 - $22,000 would be involved.

Using the **lesser** of the two cases, if the retiree is in retirement for ten years before death, costs per individual could range equal $120,000 or more per individual. **With 20 year early retirement at age fifty, the retirement period could equal or exceed twenty years, and the conservative cost differential for a *single individual* would be approximately $240,000.**

Not included in this analysis are the related costs of early retirement; paying a current employee their salary and premium pay and an employee who otherwise would not have retired extra retirement benefits, at the same time. (**Adapted from an analysis performed by the Association of Assistant U.S. Attorneys)**

2:
At the request of the Department's Office of Personnel Policy, the Treasury OIG developed a model to estimate the costs associated with various proposals for converting Treasury employees to LEO status. The model consists of certain formulas and assumptions, which were based on those previously used by the Office of Personnel Management (OPM) for estimating the financial impacts of granting LEO status to selected employees at several Federal agencies. Additional assumptions were based on discussions with Office of Personnel Policy staff.

In applying the model, the OIG selected a group of 8,172 Treasury employees who were on the Department's payroll for pay period 10 in 1997. As a result, all computations were made using the actual annualized salary information for this group for pay period 10. The estimate includes increased costs to the Government for salary, and retirement and other benefits. Any subsequent changes to legislation or regulations could alter the factors contained in the OIG's formulas and would likely cause a different outcome for the calculations.

The model found that Treasury would annually incur an additional $50.6 million to provide LEO status to the specific group of 8,172 employees [added: **$6,191.87 per employee per year, not counting 25% availability pay**]. This projected annual growth consists of the following Departmental increases: (1) $14.9 million for base pay; (2) $216,000 for MEDICARE contributions; (3) $741,000 for Social Security contributions; (4) $537,000 for Thrift Savings Plan contributions; (5) $1.1 million for Civil Service Retirement System (CSRS) contributions; and (6) $33.1 million for Federal Employees Retirement System (FERS) contributions. The Federal Government also would be required to annually provide $24.4 million in additional contributions to CSRS for this group of employees as current employee and employer contributions fall far short of full funding needs. (As a result of this deficit, funds are appropriated annually to provide additional contributions to CSRS).

The amount of employee and employer contributions for past service will fund only a portion of the estimated increased LEO retirement costs. If the 8,172 Treasury employees are provided credit for past service, no mechanism exists to recover these large costs, which will have to be borne by taxpayers in the form of an unfunded liability to CSRS and FERS. Using the OPM Chief Actuary Office's calculations and factors, the OIG estimated that this one-time unfunded liability for CSRS and FERS would total nearly $539.1 million. **(Department of the Treasury Office of Inspector General Report #OIG-97-E03)**

Attachment 9, Additional Web Resources

An excellent OPM study of Federal Law enforcement Officers and their classification and pay can be found at: http://www.opm.gov/oca/leo_report04/.

A report on Federal Law Enforcement Officers, by the Bureau of Justice Statistics (they only consider gun-carrying personnel as federal law enforcement officers) as can be found at: http://www.ojp.usdoj.gov/bjs/abstract/fleo04.htm.

A department of Justice web site requires that management insure that most availability pay hours actually be worked: http://www.usdoj.gov/jmd/ps/chpt2-1.htm.

Attachment 10, Digest of Significant Classification Decisions and Opinions, Art. 24-01 June 2000

United States Office of Personnel Management
Office of Merit Systems Oversight and Effectiveness
Digest of Significant Classification Decisions and Opinions

This issue arose as a result of OPM's adjudication of two group classification appeals. The appellants worked in security and law enforcement organizations at the local and regional level. They were not part of the agency's centrally managed criminal investigations organization. Their positions were classified to the General Investigating Series, GS-1810. **The appellants claimed that they planned and conducted investigations relating to alleged or suspected violations of criminal law covered by the Criminal Investigating Series, GS-1811.**

The appellants needed to know what constituted a crime, the kind of evidence required to prove that a crime was committed, the methods and patterns of criminal operations, and the decisions and precedents that control search and seizure, admissibility of evidence, and arrest authority. The appellants worked in cooperation with other Federal, State and local criminal investigation organizations. They employed criminal investigative techniques such as surveillance, covert photography, executed searches, and used information supplied by informants. They were directly authorized to conduct property investigations involving Government funds of up to $2,500. They also investigated child pornography, computer theft, workers compensation and other cases. The appellants gathered and preserved evidence for forensic analysis and used photography for covert recording of criminal activity. **They had the authority to carry weapons and make arrests.**

The Grade-Level Guides for Classifying Investigator Positions (GS-1810/1811 Guide) list specific knowledge, skills, and abilities that distinguish GS-1810 and GS-1811 positions. OPM found that the appellants spent all of their time investigating criminal or **potentially criminal** violations of Federal law. Given these facts, OPM found the positions were excluded from the GS-1810 series.

However, OPM also found that the mission and functions assigned to the appellants' organizations and, therefore their positions, did not support their claim that they performed criminal investigations within the meaning of the GS-1811 series. **The agency's criminal investigations service was responsible for investigating actual, suspected, or alleged major criminal offenses**. In contrast, activities and regional offices (local) were authorized to maintain limited investigative capability for resolving minor offenses punishable by confinement of one year or less. An internal agency instruction stipulated that local investigators were permitted to investigate major crimes when the criminal investigations service declined jurisdiction. However, certain matters had to be referred to that service, including such cases as loss of ordnance, narcotics, dangerous drugs or controlled substances; incidents of aberrant sexual behavior involving force/coercion or when children were involved; and thefts of minor amounts of personal property when ordnance, contraband, or controlled substances were involved.

The distinction between high level police work, discussed in the Grade Evaluation Guide for Police and Security Guard Positions (GS-083/085 Guide) as detective assignments, and lower level criminal investigating work can be difficult to make because the case work is often similar. OPM determined that the GS-1810/1811 Guide had to be read in conjunction with the information

contained in the more recently issued GS-083/085 Guide. That Guide clarifies that the GS-1811 series covers positions primarily responsible for investigating alleged or suspected **major offenses** or violations of specialized laws of the United States. While agency policy typically required the criminal investigations service's involvement in violent crimes, this did not mean that the GS-1811 series alone covered all such crimes within its occupational definition. The GS-083/085 Guide defines major crimes found in the GS-1811 occupation as a capital crime, those involving prescribed monetary values, or others that may vary in different jurisdictions. Level 1-4 in the GS-083/085 Guide specifically includes investigating violent crimes and conducting long-term investigations, within the meaning of the GS-083 occupation. Therefore, OPM found that higher level detective work in the GS-083 series was very similar to the appellants' assignments.

Both guides recognize employees in the GS-083 and GS-1811 occupations frequently help one another. GS-1810/1811 Guide grade level distinctions are based on primary case agent responsibility. Helping in a case by executing warrants, conducting surveillance, and conducting interviews has no particular impact with respect to determining the grade level of an investigator's position. Similarly, OPM concluded **the appellants' assignments in serving warrants, contacting local and State authorities to obtain and/or provide background information on suspects, and traveling across state lines to perform searches and conduct interviews and suspect surveillance failed to prove that the appellants were performing GS-1811 functions**. OPM found that travel across state lines in the GS-1811 occupation typically meant investigating criminal enterprises that operate in multiple jurisdictions.

OPM concluded the appellants' cases were long-term investigations within the meaning of the GS-083/085 Guide in that they extended from several days to several weeks, were local in nature, and were resolved by applying investigative and related techniques typical of the GS-083 occupation. Furthermore, agency policy limited the breadth, depth, and complexity of investigations that could be managed by the appellants. OPM found all the positions were covered by the GS-083 series.

Attachment 11, Portions, Killion vs. The Dept. of the Treasury (09/18/1996)

The CSRS defines "law enforcement officer" as "an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee who is engaged in this activity who is transferred to a supervisory or administrative position." An employee engaged in investigation, apprehension, or detention occupies a "primary" LEO position.

Under the CSRS, an employee in an LEO position becomes eligible for an annuity at a younger age and with fewer years of service, and that is computed at a higher rate, than an employee in anon-LEO position. This preferential retirement provision was enacted because Congress determined that the ranks of LEOs "should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most occupations in the Federal Service." Thus, one of the "primary ... reasons" for special LEO retirement coverage was the legislative determination that "the government's frontline law enforcement work require[s] a youthful workforce capable of meeting ... stringent physical requirements and performing at peak efficiency."

Analyses provided by the appellant have led to indictments and convictions. The above-described activities could be considered "investigation" in the ordinary sense of that word. Furthermore, these activities were aimed exclusively at those "suspected ... of offenses against the criminal laws of the United States."

Significantly, many of the traditional indicia of LEO status are lacking. .. **the appellant has never made an arrest or given a Miranda warning. He has never been authorized to carry a firearm. He has generally worked 40 hours per week at regularly-scheduled times**, and has not been on call. **The appellant has interviewed cooperative witnesses**; the Special Agent is responsible for conducting any interview of a suspect. ... **he has never executed a search warrant or participated in a raid**. In short, **the appellant has had minimal contact with criminals or suspected criminals**.

Moreover, **the appellant's work has not been hazardous**. That the appellant could only describe two encounters after more than 23 years shows that any danger to him has been fleeting and incidental. In fact, **at least 80% of the time the appellant has worked in "an office setting." (an employee's "frequent" involvement in situations presenting "great danger" supported a finding that he was entitled to LEO retirement coverage)**.

...The appellant's work has not been any more physically demanding than a typical federal white-collar job. Indeed, there is no physical fitness requirement listed in the two position descriptions under which the appellant has worked.

...the appellant is not entitled to LEO retirement coverage. **In the absence of hazards, unusual physical demands, or any other traditional indicia of LEO status, granting preferential retirement treatment based on the appellant's duties ... would not be consistent with the legislative intent....cases do not hold that a position that does not involve hazards, has no unusual physical demands, and lacks the traditional indicia of LEO status, should nevertheless be treated as a primary LEO position**.

Attachment 12, Portions, Houck vs. The Dept. of the Navy (04/15/1999)

An employee seeking LEO retirement credit under FERS show that the duties of his position should be limited to young and physically vigorous individuals. It is well settled, however, that this "young and physically vigorous" requirement applies as well to employees seeking LEO retirement credit under CSRS. See Bingaman v. Department of the Treasury, (Fed. Cir. 1997); Hobbs v. Office of Personnel Management, ("the legislative intent behind the preferential retirement provisions for firefighters and LEOs was to provide for their early retirement based on a determination that these positions should be 'composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service").

A LEO covered by FERS or CSRS commonly: (1) has frequent direct contact with criminal suspects; (2) is authorized to carry a firearm; (3) interrogates witnesses and suspects, giving Miranda warnings when appropriate; (4) works for long periods without a break; (5) is on call 24 hours a day; and (6) is required to maintain a level of physical fitness. Bingaman,. No single factor, however, is essential or dispositive to the LEO retirement credit determination. In determining whether the appellants meet the requirements of establishing their entitlement to LEO retirement coverage, the Board must examine all relevant evidence, including their position descriptions. The appellants, as applicants for LEO retirement coverage, bear the burden of proving their entitlement to it by preponderant evidence.

The primary duties of an LEO position are those duties that: (a) are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position; (b) occupy a substantial portion of the individual's working time over a typical work cycle; and (c) are assigned on a regular and recurring basis.

"Primary" duties do not include duties of an emergency, incidental, or temporary nature, even if those duties occupy a substantial portion of the employee's time over a typical work cycle. See id. In general, **if an employee spends an average of at least 50 percent of his time performing a duty or group of duties, they are his primary duties.**

Here, the AJ concluded that the appellants are entitled to LEO retirement credit based on his findings that **the primary duties of their positions are the investigation, apprehension, or detention of individuals suspected or convicted of Federal offenses, that their positions should, as soon as reasonably possible, be limited to young and physically vigorous individuals; and that their positions constitute "frontline law enforcement work" entailing numerous unusual physical demands and hazards. For the reasons set forth below, we disagree with the last two findings.**

The parties stipulated that the appellants have the authority to make arrests(4) and/or detain persons suspected of committing crimes, including crimes that could constitute violations of the criminal laws of the United States, that they are authorized to carry weapons, and that they interrogate witnesses and suspects and give Miranda warnings when appropriate. The position description (PD) for Investigators states that "[t]he purpose of this position is to plan and conduct investigations of compensation and travel claims, allegations of waste, fraud and abuse, and cases of felonies and/or misdemeanors involving government or private property at the Shipyard and

areas under the jurisdiction of the Shipyard Commander." Under "Scope and Effect," the PD states that the Investigator position "involves investigating and analyzing criminal violations to apprehend and prosecute violators." Almost all of the major duties listed in the PD involve the investigation of Federal offenses.

The Investigators perform some duties that are clearly law enforcement in nature. The Investigators spend a substantial portion of their day performing such duties. The duties of an Investigator are to follow up on preliminary investigations done by the uniform services, to question potential suspects, collect potential evidence, preserve the evidence, and apprehend persons suspected of committing crimes). **However, although being authorized to carry a firearm, interrogating witnesses and suspects, giving Miranda warnings, making arrests, investigating Federal offenses, and collecting and preserving evidence are indicia of LEO status, they alone are insufficient to qualify the appellants for primary LEO retirement coverage.** The appellants testified, however, that they question and interrogate potential suspects nearly every day. Thus, **the appellants have shown that they have frequent contact with criminal suspects** notwithstanding the large number of their cases that are property crimes.

In Fitzgerald, the Board noted that there were detectives and officers who were the primary criminal investigators for the agency and that their presence affected the frequency of an officer's contact with criminals. Here, however, at most only 40% of the appellants' investigations consist of preliminary or complete investigations, or providing assistance in investigations of cases that are under the jurisdiction of the Naval Criminal Investigative Service (NCIS) or the Federal Bureau of Investigation; the remainder of the cases investigated are under the Shipyard's jurisdiction and are assigned exclusively to the appellants. **Frequent contact with potential criminal suspects, however, is just one indicator of LEO status. LEO eligibility under FERS or CSRS also requires a showing that the duties of the employee's position should be limited to young and physically vigorous individuals.** For the reasons discussed below, we find that the appellants have not made such a showing.

Although **the appellants carry beepers and are on-call 24 hours a day**, they only occasionally work overtime. Furthermore, the appellants have not shown that they regularly work long periods without breaks. Further, **like the appellants in Fitzgerald, the appellants are required to pass an annual physical, but not a physical fitness stress test**. Moreover, **the PD for Investigators does not set forth particularly dangerous conditions or physically rigorous duties.** (under "Physical Demands," the PD merely states that "[t]he work is partly sedentary and partly requires standing an walking associated with the examination of facilities and contacts with personnel incident to the law enforcement program," and under "Work Environment," states that **the "[w]ork is performed in both an office environment**")

Nor have the appellants shown that their work is particularly hazardous. The appellants have not shown that the duties of their Investigator positions should be limited to young and physically vigorous individuals. Bingaman, Hobbs. ...Under all of the above circumstances, we conclude that the appellants have not met their burden of showing that they have met the requirements that would entitle them to LEO coverage.

Attachment 13, Portions, Townsend vs. The Dept of Justice (08/31/1999)

Some of the factors associated with entitlement to LEO service credit are: (1) frequent direct contact with criminal suspects; (2) authorization to carry a firearm; (3) interrogation of witnesses and suspects, giving Miranda warnings when appropriate; (4) working for long periods without a break; (5) being on call 24 hours a day; and (6) being required to maintain a level of physical fitness. In addition to these general factors, the Board has emphasized that "it is not a position's efficacy or its contribution to a particular law enforcement mission which determines eligibility for [LEO] retirement credit, but rather its character as **'frontline law enforcement work," entailing unusual physical demands and hazards.**

... Diversion Investigators as a group do not meet several of the indicia of law enforcement work: (1) the DI position description emphasizes regulatory investigations and lists support of the criminal investigation program as the last of a number of major duties; (2) DIs do not carry firearms; (3) DIs do not make undercover purchases, or control or pay confidential informants; (4) DIs do not make arrests or execute search warrants; and (5) DIs are not required to maintain a high level of physical fitness.

The appellant sometimes had to work in bad neighborhoods and deal with unsavory individuals, that he interrogated witnesses and suspects, giving Miranda warnings where appropriate, that he sometimes worked long and irregular hours, and that the businesses' premises he visited were sometimes unclean and uncomfortable. The appellant has not adduced evidence, however, indicating that his duties were any more rigorous or hazardous than were Hannon's.

Over half of the appellant's duties during the 1986 to 1991 period **may well have been in support of criminal investigations. As in Hannon, however, the evidence shows that, based on all the relevant factors, the appellant's primary duties as a Diversion Investigator did not constitute the "frontline law enforcement work," entailing unusual physical demands and hazards," that is required for primary LEO service credit**.

Attachment 14, Portions of Hall vs. U.S. Treasury (U.S. Court of Appeals 09/04/2001)

Regarding the meaning of the term "apprehension," the Board has stated that apprehension is the "seizure, taking, or arrest of a person on a criminal charge." Because Hall acknowledged in his own testimony that he did not apprehend anyone in the time period at issue, whether the Board erred in ignoring its own prior definition of "apprehension" is irrelevant. While Hall's duties indicate that he causes the apprehension of criminal suspects, the statute is written to cover those who apprehend criminal suspects, not those who cause the apprehension of criminal suspects. In Ferrier, the Board stated that "investigation in section 8331(20) refers to criminal investigation . . . . Factors that distinguish criminal investigation from non-criminal investigation include unusual physical hazards for the investigator arising from frequent contacts with criminals and suspected criminals, working for long periods without a break, on-call status 24 hours a day, and carrying weapons . . . ."

Hall reads the statutory language to require him to simply prove that his duties "are primarily the investigation, apprehension, or detention of . . . suspected or convicted [criminals]." 5 U.S.C. § 8331(20) (1994).

This court thoroughly considered the statutory language and legislative history in Bingaman. Based on that thorough review, this court held that the statutory term "law enforcement officer" should be strictly construed, and that the legislative history of the statute indicates that it was enacted to ensure that the covered LEO positions "should be composed, insofar a s possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service.

... this court in Bingaman determined that the statutory term "law enforcement officer" should be limited to "those law enforcement personnel who are most immediately involved in the process of criminal investigation and arrest." To determine whether a particular employee is "most immediately involved in the process of criminal investigation and arrest," the court reiterated the Board's formulation of the following factors: (1) has frequent direct contact with criminal suspects; (2) is authorized to carry a firearm; (3) interrogates witnesses and suspects, giving Miranda warnings when appropriate; (4) works for long periods without a break; (5) is on-call twenty four hours a day; and (6) is required to maintain a level of physical fitness.

The Bingaman factors are thus considerations that bear on the question of whether an employee qualifies for LEO retirement credit. Although no single factor is essential or dispositive, we stated in Bingaman that these considerations "capture[ ] the essence of what Congress intended" in enacting 5 U.S.C. § 8331. The Bingaman considerations are relevant to determining whether an employee is a law enforcement officer because they are relevant to determining whether an employee's duties are primarily criminal investigation, apprehension, or detention.

Attachment 15, Portions of Gallagher vs. U.S. Treasury (U.S. Court of Appeals 09/05/2001)

The administrative judge found that Gallagher's position description as Inspector emphasized regulatory investigations and listed support of the criminal investigative program as the last of a number of major duties. The administrative judge thus found that the position description does not support LEO credit.

...the administrative judge found that while Gallagher was authorized to carry a firearm, he did not interrogate witnesses or give Miranda warnings on a regular basis. ...Gallagher occasionally worked long hours and could be called in to work on his day off, he generally did not work long hours and was not actually on call twenty-four hours a day. Finally, the administrative judge noted that Gallagher did not have to maintain a level of physical fitness in his position as an Inspector.

The administrative judge found that **Gallagher's primary duties did not capture the essence of what Congress intended to be law enforcement work in the sense of the LEO statute. Indeed, his primary duties were ones specifically excluded from the regulatory definition of a law enforcement officer at 5 C.F.R. §831.902**, namely, maintaining law and order, protecting life and property, guarding against or **inspecting for violations of law, and investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States.**

Something more is required before the employee can be said to have engaged in the " 'frontline law enforcement work,' entailing unusual physical demands and hazards" that is necessary for "a particular position" to "qualify" as a "law enforcement officer" under 5 U.S.C. §8331(20).

In this case, the administrative judge determined that Gallagher's primary duties were not investigation, apprehension, or detention. The administrative judge analyzed the evidence in view of the Bingaman factors and found that **while Gallagher is authorized to carry a firearm, he does not have frequent direct contact with criminal suspects; and the contact he does have is not unusually hazardous. Furthermore, the administrative judge found that Gallagher does not interrogate witnesses and give Miranda warnings on a regular basis, he does not generally work long hours, nor was he actually on call twenty-four hours a day. Finally, the administrative judge found that Gallagher was not required to maintain any specific level of physical fitness as an Inspector.**

Attachment 14, Portions, J. Street, vs. The Dept. of the Navy (MSPB 01/10/2002)

Regulations promulgated by the Office of Personnel Management (OPM) and codified at 5 C.F.R. §§ 842.802 set forth a 3-prong test for determining whether a position is a LEO position. Under the regulatory test, an appellant must establish that the "primary duties" of his position are LEO duties, as defined by 5 U.S.C. §§ 8401(17)(A). According to 5 C.F.R. §§ 842.802, "primary duties" are duties that: "(a) Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position; (b) Occupy a substantial portion of the individual's working time over a typical work cycle; and (c) Are assigned on a regular and recurring basis." Duties that are of an emergency, incidental or temporary nature cannot be considered "primary" even if they meet the substantial portion of time criterion, i.e., the second prong. 5 C.F.R. §§ 842.802.The regulations further provide that LEO primary duties do not include "maintaining order, protecting life and property, guarding against or inspecting for violations of law, **or investigating persons other than those who are suspected or convicted of offenses against the criminal laws of the United States**."

The Board stated in Watson v. Department of the Navy, which was affirmed by the U.S. Court of Appeals for the Federal Circuit in Watson v. Department of the Navy, 262 F.3d 1292 (Fed. Cir. 2001), that decisions like Alford placed too much emphasis on the day-to-day activities of an individual during a limited period of time.. Accordingly, both **the Court and the Board in Watson held that the "incumbent-oriented" approach used in Alford did not adequately take into account the first prong of the definition of "primary duties" in 5 C.F.R. §§ 842.802, and that the inquiry should therefore focus on the duties inherent in the position and the basic reasons for its existence.**

The Court observed that the definition of a primary LEO position in sections 831.902 and 842.802 consisted of the 3 criteria set forth above, namely, that **primary duties are ones that "(i) are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position; (ii) occupy a substantial portion of the individual's working time over a typical work cycle; and (iii) are assigned on a regular and recurring basis." The Court found that "[t]he inclusion of the conjunctive "and" in section 831.902 and 842.802 clearly indicates that all three criteria must be demonstrated in order for a position to be LEO-eligible.**"

The Court went on to say that a position-oriented approach was consistent with the regulations because **the factors set forth in Bingaman v. Department of the Treasury, 127 F.3d 1431 (Fed. Cir. 1997), for determining LEO eligibility "only considered prongs (ii) and (iii) to determine whether the officers" duties occupied a "substantial portion" of their working time (prong (ii)), and were assigned on a "regular and recurring basis (prong (iii))."**" Using the language on which the dissent relies, the Court stated that the position-oriented approach was the correct way to analyze a claim for LEO service credit because it "affirmatively involves consideration of prong (i) ... so as to ensure that in addition to consisting of duties that occupy a substantial portion, if not 50 percent or more, of the officers" working time (prong (ii)) and that occurred on a regular and recurring basis (prong (iii)), the position exists currently as a LEO position [prong (i)]."

The Court therefore linked the percentage of time worked on certain duties to prong (ii), namely, the "substantial portion" criterion. This is logical since the percentage of time spent on various

duties by the incumbent indicates whether LEO duties are a "substantial portion" of the job. This is an incumbent-oriented approach. **Prong (i), in contrast, deals with whether the position does or does not exist as a LEO position. For purposes of that prong, the Board examines whether the duties of the position that are "paramount in influence or weight" are LEO duties. This is a position-oriented approach. The question to be asked and answered in prong (i) is whether the position exists or is designated as a LEO position**.

With respect to prong (i), the Court identified at least 2 types of evidence which are extremely important indicators of whether a position is a LEO position. First, the Court stated that the position description is "quite probative in determining whether the position really exists as a LEO position." Second, the Court found that a maximum age for entry into a position is "highly probative" as to whether the position is a LEO position in light of the early retirement afforded to LEOs and the fact that LEO positions are limited to young and vigorous individuals.

Despite all of the language in the position description showing that the appellants" positions did not primarily exist to perform LEO duties, the dissent focuses on one sentence in the position description describing the "purpose of the work" of a GS-083 Police Officer as the "investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States." The appellants provided no explanation of how, when or why that sentence was placed in their position descriptions or what duties may have been included in that sentence. The one conclusory and unexplained sentence in the position description on which the dissent relies does not outweigh the considerable evidence of record showing that the positions held by the appellants do not exist primarily to investigate, arrest, apprehend or detain individuals suspected or convicted of offenses against the criminal laws of the United States. Thus, we are not persuaded by that sentence.

Because the appellants did not show that their positions met the first prong of the 3-prong test for entitlement to LEO service credit, we need not go on to examine the evidence which is material to prongs 2 and 3, that is, the evidence related to the Bingaman factors. Accordingly, we sustain the agency's denial of the appellants" requests for LEO service credit.

Attachment 15, A Portion of the Testimony, John Vail, DOJ

Before the House of Representatives Committee on Government Reform, Subcommittee on the Civil Service, September 9, 1999:

The Department does not support extending law enforcement retirement coverage to AUSAs because they do not perform and are not expected to perform front-line law enforcement duties. As an initial matter, a number of AUSAs handle civil rather than criminal cases. Of those AUSAs who work on criminal cases, their primary duty is the preparation and presentation of the Governments case in the prosecution of individuals suspected of violating Federal criminal laws. While they may participate in the investigative process, it is not in a front-line law enforcement capacity. **They ordinarily do not carry weapons; they do not have the authority to execute arrest or search warrants; they do not conduct surveillance or undercover work of any kind; and they are not required to maintain a high level of physical fitness**.

The Department also cannot afford the **cost of LEO coverage** for AUSAs. **The proposed change to law enforcement benefits in H.R. 583 would cost the United States Attorneys an estimated $585 million in the first year.**

Attachment 16, Portions, Redfearn vs. Dept. of the Interior, Appeals Court, (05/10/2002)

The Office of Personnel Management ("OPM") has issued a regulation explaining the term "primary duties." Under that regulation, "primary duties" are duties that -

> **(1) (i) Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;**
> **(ii) Occupy a substantial portion of the individual's working time over a typical work cycle; and**
> **(iii) Are assigned on a regular and recurring basis.**
> **(2) Duties that are of an emergency, incidental, or temporary nature cannot be considered "primary" even if they meet the substantial portion of time criterion.**

5 C.F.R. §§ 831.902 (2001). A duty typically is considered a primary duty if an employee spends an average of at least 50 percent of his or her time in its performance.

In an initial decision, the administrative judge ("AJ") held that Mr. Redfearn was not entitled to LEO credit because he had not shown the duties of his position to be primarily those associated with law enforcement. There was **no evidence presented to suggest that Mr. Redfearn's position involved regular arrests, investigations, or court appearances, or that it required training in areas typical to law enforcement, such as the giving of Miranda warnings, the collection of evidence, and the detention of suspects.**

Additionally, the officers' manual provided training on firearms, the use of force and deadly force, chemical mace, arrests, evidence management, and the investigation of crimes. ... unlike in Ferrier, there is **no evidence here "to show that the appellant's position was that of a Police Officer or Agent who frequently made arrests, frequently investigated crimes committed on the Refuge, and frequently testified in civil or criminal matters as a witness."**

The Board reviewed evidence descriptive of Mr. Redfearn's position and determined that **the basic reasons for the existence of his position were not related to law enforcement.** The Board also concluded that Mr. Redfearn did not have frequent contact with criminal suspects or that he was ever involved in investigations of criminal matters.

Attachment 17, OPM Information on Availability Pay

Availability pay is a type of premium pay that is paid to Federal law enforcement officers (LEO's) who are criminal investigators. Due to the nature of their work, criminal investigators are required to work, or be available to work, substantial amounts of "unscheduled duty."

Eligibility for availability pay is limited to criminal investigators who are properly classified in the GS-1811 (Criminal Investigations) series under Office of Personnel Management standards. Employees in this group must also meet the definition of "law enforcement officer" in 5 U.S.C. 5541(3) and 5 CFR 550.103, which generally requires that the employee be covered under the early retirement provisions for LEO's. However, **a criminal investigator is also entitled to availability pay if he or she holds a supervisory or administrative position that has been officially approved as a "secondary position" under the LEO retirement provisions, even if the criminal investigator is not personally covered by those provisions.**

By law, availability pay is fixed at 25 percent of a criminal investigator's rate of basic pay. However, the biweekly maximum earnings limitation for LEO's in 5 U.S.C. 5547(c) applies.

"Unscheduled duty" consists of those hours when a criminal investigator performs work, or is determined by the agency to be available to perform work, that are not part of the criminal investigator's basic 40-hour workweek and are not regularly scheduled overtime hours, excluding the first 2 hours of overtime work on a basic workday. Each criminal investigator and the designated supervisory officer shall make an annual certification to the head of the agency attesting that the investigator (1) currently meets the "substantial hours requirement" and (2) is expected to meet the requirement during the upcoming 1-year period.

Substantial Hours Requirement

A criminal investigator is eligible for availability pay only if he/she has an annual average of 2 or more hours of unscheduled duty per regular workday. Availability hours (nonwork) on days that are not "regular workdays" cannot be credited for this determination.

A "regular workday" includes each day in the criminal investigator's basic workweek in which the criminal investigator completes at least 4 hours of work. Hours that do not count include overtime hours, unscheduled duty hours, hours when the employee is traveling outside the official duty station, hours of approved leave, holiday hours, and hours of excused absence.

Attachment 18, What Did NRC Cite To GAO As Its Authorities?

42 U.S.C. 2273

This section applies to offenses related to nuclear energy not specifically addressed elsewhere. This provision covers, violations of statutes dealing with rules and regulations, license conditions, and orders of both the Nuclear Regulatory Commission and the Department of Energy.

(a) Generally, whoever willfully violates, attempts to violate, or conspires to violate, any provision of this chapter for which no criminal penalty is specifically provided or of any regulation or order prescribed or issued under section 2095 or 2201(b), (i), or (o) of this title shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both, except that whoever commits such an offense with intent to injure the United States or with intent to secure an advantage to any foreign nation, shall, upon conviction thereof, be punished by a fine of not more than $20,000 or by imprisonment for not more than twenty years, or both. (b) Construction or supply of components for utilization facilities; impairment of basic components; "basic component" defined; posting at construction sites of utilization facilities and on premises of component fabrication plants. Any individual director, officer, or employee of a firm constructing, or supplying the components of any utilization facility required to be licensed under section 2133 or 2134(b) of this title who by act or omission, in connection with such construction or supply, knowingly and willfully violates or causes to be violated, any section of this chapter, any rule, regulation, or order issued thereunder, or any license condition, which violation results, or if undetected could have resulted, in a significant impairment of a basic component of such a facility shall, upon conviction, be subject to a fine of not more than $25,000 for each day of violation, or to imprisonment not to exceed two years, or both. If the conviction is for a violation committed after a first conviction under this subsection, punishment shall be a fine of not more than $50,000 per day of violation, or imprisonment for not more than two years, or both. For the purposes of this subsection, the term "basic component" means a facility structure, system, component or part thereof necessary to assure - (1) the integrity of the reactor coolant pressure boundary, (2) the capability to shut-down the facility and maintain it in a safe shut-down condition, or (3) the capability to prevent or mitigate the consequences of accidents which could result in an unplanned offsite release of quantities of fission products in excess of the limits established by the Commission. The provisions of this subsection shall be prominently posted at each site where a utilization facility required to be licensed under section 2133 or 2134(b) of this title is under construction and on the premises of each plant where components for such a facility are fabricated.
(c) Criminal penalties (Emphasis added)
Any individual director, officer or employee of a person indemnified under an agreement of indemnification under section 2210(d) of this title (or of a subcontractor or supplier thereto) who, by act or omission, knowingly and willfully violates or causes to be violated any section of this chapter or any applicable nuclear safety-related rule, regulation or order issued thereunder by the Secretary of Energy (or expressly incorporated by reference by the Secretary for purposes of nuclear safety, except any rule, regulation, or order issued by the Secretary of Transportation), which violation results in or, if undetected, would have resulted in a nuclear incident as defined in section 2014(q) of this title shall, upon conviction, notwithstanding section 3571 of title 18, be subject to a fine of not more than $25,000, or to imprisonment not to exceed two years, or both. If the conviction is for a violation committed after the first conviction under this subsection,

notwithstanding section 3571 of title 18, punishment shall be a fine of not more than $50,000, or imprisonment for not more than five years, or both.

42 U.S.C. 2201(c)

Issue subpoenas under the authority of section161(c) of the Atomic Energy Act of 1954.

10 CFR 1.36, (cited as primary authority to conduct criminal investigations)

10 Code of Federal Regulations (CFR)(Energy), Section § 1.36 Office of Investigations.
The Office of Investigations (OI):
(a) Conducts investigations of licensees, applicants, their contractors or vendors, including the investigation of all allegations of wrongdoing by other than NRC employees and contractors;
(b) Maintains current awareness of inquiries and inspections by other NRC offices to identify the need for formal investigations;
(c) Makes appropriate referrals to the Department of Justice;
(d) Maintains liaison with other agencies and organizations to ensure the timely exchange of information of mutual interest; and
(e) Issues subpoenas where necessary or appropriate for the conduct of investigations.
[54 FR 53315, Dec. 28, 1989]
[Not a single word "criminal," and NRC defines "wrongdoing" as "intentional violation of regulatory requirements or a violation resulting from "careless disregard" of, or "reckless indifference" to, regulatory requirements."]

28 U.S.C. 566(c)(d): TITLE 28, PART II, CHAPTER 37, § 566

§ 566. Powers and duties
(a) It is the primary role and mission of the United States Marshals Service to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals and the Court of International Trade.
(b) The United States marshal of each district is the marshal of the district court and of the court of appeals when sitting in that district, and of the Court of International Trade holding sessions in that district, and may, in the discretion of the respective courts, be required to attend any session of court.
(c) Except as otherwise provided by law or Rule of Procedure, the United States Marshals Service shall execute all lawful writs, process, and orders issued under the authority of the United States, and shall command all necessary assistance to execute its duties.
(d) Each United States marshal, deputy marshal, and any other official of the Service as may be designated by the Director may carry firearms and make arrests without warrant for any offense against the United States committed in his or her presence, or for any felony cognizable under the laws of the United States if he or she has reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

28 C.F.R. 0.112 SPECIAL DEPUTATION

The Director, United States Marshals Service, is authorized to deputize the following persons to perform the functions of a Deputy U.S. Marshal in any district designated by the Director:

(a) Selected officers or employees of the Department of Justice;
(b) Selected federal, state, or local law enforcement officers whenever the law enforcement needs of the U.S. Marshals Service so require;
(c) Selected employees of private security companies in providing courtroom security for the Federal judiciary;
(d) Other persons designated by the Associate Attorney General pursuant to 28 CFR 0.19(a)(3). All such deputations shall expire on a date certain which shall be stated on the face of the deputation.[Order No. 1047–84, 49 FR 6485, Feb. 22, 1984, as amended at 61 FR 33657, June 28, 1996]

18 U.S.C. 3053:TITLE 18, PART II, CHAPTER 203, § 3053

§ 3053. Powers of marshals and deputies
United States marshals and their deputies may carry firearms and may make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

MOU with DOJ 53FR50317 (1988)

In March 2007, the Director of OI stated that the MOU with DOJ, a "twenty year old document" was not being followed! See Attachment 3.