UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MIGUEL A. CONTRERAS, et al., Plaintiffs))
v.) Case No. 1:02CV00923(JR)
TOM RIDGE, SECRETARY, DEPARTMENT OF HOMELAND SECURITY,))
Defendant. ¹)))

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Tom Ridge, Secretary for the Department of Homeland Security, hereby moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment and seeks dismissal of the Complaint. In support, the Court is respectfully referred to the accompanying Defendant's Statement of Material Facts as to Which There Is No Genuine Issue, Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, the Declarations, and the Exhibits.

Respectfully submitted,

ROBERT D. McCALLUM, JR.

Pursuant to Fed. R. Civ. P. 25(d)(1), Tom Ridge, Secretary of the Department of Homeland Security, is hereby substituted for the Secretary of Treasury. On March 9, 2003, the majority of the Customs special agent workforce became a part of the Bureau of Immigration and Customs Enforcement in the Department of Homeland Security.

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DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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¹ Pursuant to Fed. R. Civ. P. 25(d)(1), Tom Ridge, Secretary of the Department of Homeland Security, is hereby substituted for the Secretary of Treasury. On March 9, 2003, the majority of the Customs special agent workforce became a part of the Bureau of Immigration and Customs Enforcement in the Department of Homeland Security.

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<u>DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF</u> <u>DEFENDANT'S MOTION FOR SUMMARY JUDGMENT</u>

None of the plaintiffs in this case have stated class or individual claims that can survive summary judgment. Accordingly, summary judgment should be entered dismissing this action.

INTRODUCTION

Plaintiffs have filed a class action complaint ("Complaint") alleging employment discrimination on the basis of their Hispanic national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. Before an individual plaintiff may pursue a claim of discrimination against a federal agency, the plaintiff must exhaust his administrative remedies. Likewise, before a Title VII class action may be brought against the United States, at least one plaintiff is required to have exhausted the class action claims at the administrative level.

Only one of the eight named plaintiffs, Miguel Contreras, pursued a class action complaint at the administrative level. No other plaintiff filed an administrative class action complaint. Accordingly, Mr. Contreras' class administrative complaint is the only administrative complaint that is relevant for purposes of determining whether or not the class claims were properly exhausted.

In addition, even if certain class claims are properly exhausted, in order for them to be actionable, they must constitute claims for which Title VII permits recovery, i.e., they must constitute adverse employment actions. Finally, even if a claim is exhausted and constitutes an otherwise actionable claim, the claim must establish a prima facie case of discrimination before it can serve as a basis for a class claim of discrimination.

The Complaint alleges eight separate class claims of discrimination, but each one of the class claims is deficient under Title VII for a variety of reasons. Mr. Contreras failed to raise some of the claims in the administrative class complaint, he failed to raise some of the claims with an EEO counselor, and some of the claims do not constitute adverse employment actions covered by Title VII. Finally, Mr. Contreras cannot establish a prima facie case of discrimination with respect to the one failure to promote claim that he apparently exhausted in his class administrative complaint. His non-selection was attributed not to his national origin but to the fact that his rating score by an independent panel was so low that he failed to qualify for the Best Qualified List of candidates. Accordingly, without there being a single class claim that was exhausted, that was based on an adverse employment action, and that established a prima facie case of discrimination, the class claims of discrimination must be dismissed.²

² Consistent with the Court's instruction at the scheduling conference of December 19, 2002, the bases of this summary judgment motion are limited. This motion primarily addresses whether plaintiffs followed the requisite administrative procedures before bringing their Title VII claims to federal court and whether plaintiffs' claims are based on actionable adverse employment actions under Title VII. Defendant does not waive any arguments that have not been raised in this motion. Defendant also does not waive future arguments of dismissal on grounds that the plaintiffs' claims do not amount to adverse employment actions if facts discovered later support such arguments.

Moreover, not one of the plaintiffs alleges an actionable individual claim of discrimination.

Plaintiff John Yera, for example, never filed any EEO administrative complaint, and Plaintiff William

Velasco settled his only administrative discrimination complaint. Others have alleged claims that fall short of adverse employment actions, and many of the plaintiffs failed to consult with an EEO counselor either at all or in a timely manner. Because of the deficiencies, defendant respectfully requests that this Court dismiss, on this motion for summary judgment, all of the individual claims of discrimination as well as the class claims of discrimination.

STATEMENT OF THE CASE

Up until March 9, 2003, the United States Customs Service ("Customs" or "Customs Service") was a bureau within the United States Department of Treasury ("Treasury"). See Susan B. Zaner Declaration ("Zaner Declaration") ¶ 3. On March 9, 2003, the majority of the Customs Special Agent workforce became a part of the Bureau of Immigration and Customs Enforcement in the Department of Homeland Security (also "Customs" or "Customs Service"). See id. ¶ 3.

Customs Special Agents generally work in three offices. First, the Office of Investigations employs approximately 3,244 agents. See John J. Seraphin Declaration ("Seraphin Declaration") ¶ 5.

The mission of the Office of Investigations includes the investigation of terrorism, fraud, money laundering, child pornography, and other prohibited activities. See id. ¶ 4. Second, approximately 180 Special Agents work in the Office of Internal Affairs. Their job is to investigate criminal and serious misconduct by Customs employees. See id. ¶¶ 5-6. Third, approximately 97 Special Agents work in the Office of International Affairs. They conduct collateral investigations to support the domestic offices. See id. ¶¶ 5, 8.

Although Customs is headquartered in Washington, D.C., it maintains a presence nationwide.

See id. ¶ 9. Within the Office of Investigations, there are 20 Special Agent in Charge ("SAIC") offices spread throughout the country. See id. Each SAIC office has subordinate Resident Agent in Charge Offices ("RAIC"), for a total of approximately 99 RAIC offices. See id. Finally, there are approximately an additional 14 Resident Agent Offices, which report to the RAICs. See id. The Office of Internal Affairs has 4 SAIC offices and 21 RAIC offices throughout the United States. See id. ¶ 11. There are also Customs Attache offices located in many United States embassies abroad.

See id. ¶ 10. All series 1811 Special Agents³ (all plaintiffs are in the 1811 series, see Complaint ¶ 7) are required to agree to mobility as a condition of employment. See Seraphin Declaration ¶ 12.

I. MIGUEL CONTRERAS

Plaintiff Miguel Contreras began his employment with Customs as a GS-1811-12 Special

Agent (meaning a criminal investigator at the GS-12 level) in the Office of Enforcement (which later

became the Office of Investigations) in May 1988, in Calexico, California. See Zaner Declaration ¶ 23.

During a period of that time, he served as an EEO counselor for the Pacific Region of the U.S.

Customs Service. See Mariam Harvey Declaration ("Harvey Declaration") Exh. 17. In July, 1991, he was reassigned to a GS-1811-12 position in Riverside, California, and he served in that position until

August 1992, when he was promoted to a GS-13 Senior Special Agent in the Office of Enforcement in

³ Series 1811 is an occupational code for the criminal investigator position. Duties of these investigators include the investigation and enforcement of violations of Customs and related laws, rules and regulations. These investigations may be civil or criminal in nature and may conduction of interviews as well as the examination of physical, documentary, and other types of evidence. <u>See</u> Zaner Declaration ¶ 7.

Detroit, Michigan. See Zaner Declaration ¶ 34.

In June 1995, Mr. Contreras was laterally reassigned as a Senior Special Agent to the Office of Investigations in Yuma, Arizona, and on December 10, 1995, he was promoted to a GS-14 Supervisory Criminal Investigator (otherwise known as a Resident in Charge) in the Office of Internal Affairs in Calexico, California. See id. ¶¶ 25-26. As part of a settlement agreement in connection with disciplinary actions, Mr. Contreras voluntarily changed to a lower grade of GS-13, effective May 7, 2000, and he took a Criminal Investigator position in the Office of Investigations in Yuma, Arizona. See id. ¶ 28; Harvey Declaration ¶ 50.

Well accustomed to EEO procedures after serving as an EEO counselor, Mr. Contreras began his series of filing EEO discrimination complaints on September 26, 1994, and to date, he has filed twelve separate EEO complaints. One of these eleven complaints was bifurcated, making a total of twelve separate EEO administrative complaints. Only one of those complaints, however, was a class complaint. An administrative judge of the EEOC was assigned to handle the class administrative complaint, and the case proceeded at the administrative level until May 10, 2002, when – without waiting for an adjudication (a hearing was scheduled to commence in June) – Mr. Contreras withdrew his EEO class complaint and filed the instant Complaint. See Harvey Declaration ¶ 36, 40.

A. Mr. Contreras' Administrative Class Activity

_____1. Class Complaint Allegations

On March 23, 1995, Mr. Contreras filed his sole class EEO administrative complaint, titled "Complaint of Class Discrimination of Miguel Angel Contreras," which was later designated as TD 95-0014C. See Harvey Declaration ¶¶ 35, 36, Exh. 18, at 2. Mr. Contreras filed the class complaint "on

behalf of himself and all similarly situated past, present and future Hispanic Special Agents" at Customs. See id. at ¶ 35, Exh. 19. The administrative complaint stated that the class "includes a group of approximately twenty-seven (27) Hispanic GS-1811 Special Agents (Criminal Investigator) Grade 12-15, who are currently employed by [Customs'] Office of Investigations and Internal Affairs." See Harvey Declaration ¶ 35, Exh. 19.

Administrative class complaint TD 95-0014C first set forth several <u>individual</u> allegations of discrimination. <u>See Harvey Declaration Exh.</u> 18, at 2-3 ("DESCRIPTION OF INDIVIDUAL ALLEGATION[S] OF DISCRIMINATION OF THE AGENT"). It alleged specifically that:

- (1) Customs continued to seek "applications for a lateral transfer to the position of Resident Agent in Charge at Sells, Arizona" after Mr. Contreras submitted his name for consideration on January 25, 1995.
- (2) Despite Mr. Contreras' February 1, 1995 request to be sent to a two-week advanced financial/forfeiture training, his group supervisors did not submit his name as a nominee for consideration.
- (3) Customs failed to take action on Mr. Contreras' January 10, 1995 application for a lateral transfer to Merida, Mexico for the position of Customs Representative.
- (4) Customs selected a non-minority applicant for the position of Supervisory Criminal Investigator with the Office of Internal Affairs in the El Paso, Texas Office instead of Mr. Contreras. This vacancy position was announced September 26, 1994, and Mr. Contreras allegedly learned of the non-minority selection on January 6, 1995.⁴
- (5) On April 7, 1994, Customs selected others and not Mr. Contreras for reassignment after he volunteered to be reassigned to Arizona, Texas, or California.
- (6) Customs rejected over 38 of Mr. Contreras' applications for promotions to GS-1811-13 and 14 supervisory criminal investigator positions and/or lateral transfers

⁴ Mr. Contreras also alleged that he applied for the same position in Laredo, Texas, but he did not state whether the position had been filled or when. <u>See</u> Harvey Declaration Exh. 18, at 3.

during the course of his employment.

- (7) In January 1995, Mr. Contreras learned that someone else had been selected for a lateral transfer to serve as a senior Special Agent GS-1811-13 in Merida and Montgomery, Mexico.⁵
- (8) Despite a tentative selection in October 1993 for a lateral transfer to a customs representative position in Sonora, Mexico, management later disapproved Mr. Contreras' transfer, citing a policy that prohibited transfers prior to completion of a three-year stay in an agent's most recent location.

See Harvey Declaration ¶ 35, Exh. 18.

After listing these individual allegations of discrimination, Mr. Contreras alleged in the class EEO complaint that "[t]he aforementioned is provided in this formal class complaint of discrimination only to re-enforce Mr. Contreras [sic] allegation of discriminatory practices by [Customs]." <u>Id.</u>, Exh. 18, at 4 He then made the conclusory allegation that he and his class were discriminated against in the areas of promotions, hiring, work assignments, transfers, retention, training, pay, compensation for foreign language skills, awards, and discipline. <u>See id.</u> ¶ 35, Exh. 18, at 4-5. None of the class allegations, however, contained details such as when the allegedly discriminatory acts occurred.

After proceeding toward an administrative trial on the merits – i.e., after taking depositions and collecting other kinds of discovery – Mr. Contreras filed the instant Complaint in this Court.

2. EEO Counseling

Prior to filing the class administrative complaint, on January 9, 1995, Mr. Contreras requested EEO counseling regarding his class claims. See Harvey Declaration ¶ 33. Mr. Contreras' request for counseling was "triggered" by his alleged discovery on January 6, 1995, that he was not selected for a

⁵ This seems to be the same complaint as (3) above.

GS-14 position in El Paso, Texas. See id. ¶ 34, Exh.17. The counseling report explained that: "The Complainant feels that he was discriminated against when he was not selected for a GS-14 supervisory criminal investigator position. The complainant believes that his experience represents a microcosm of the experience of Hispanic Special Agents in the Customs Service nationwide." Id. Exh. 16.

B. Mr. Contreras' Administrative Activity on His Own Individual Behalf

In addition to Mr. Contreras' class administrative complaint, he filed eleven individual complaints of discrimination at the administrative level. The following provides a summary of the complaints to put them in context with the present action.

1. TD 94-3272

On September 26, 1994, Mr. Contreras filed a formal individual administrative EEO complaint of discrimination, designated TD 94-3272. See id. ¶ 28. The complaint alleged discrimination based on Hispanic national origin concerning a performance rating, denial of training, and also based on retaliation. See id. ¶ 28, Exh. 13. Mr. Contreras sought EEO counseling in connection with these claims on August 25, 1994. See id. ¶ 27, Exh. 11.

2. TD 95-3067

On January 6, 1995, Mr. Contreras filed a formal individual administrative EEO complaint of discrimination based on an October 5, 1994 suspension. See id. ¶ 30, Exh. 14. He sought counseling regarding this suspension on October 31, 1994, claiming that the suspension was imposed because of his national origin. See id. ¶ 29.

Administrative complaints TD 94-3272 and TD 95-3067 were accepted for processing, but were subsequently closed, on April 3, 1996, to await a decision on the class administrative complaint.

See id. ¶ 32; 29 C.F.R. § 1614.107(a)(1) (providing for dismissal of administrative complaints that state the same claim that is pending before the agency).⁶ Treasury consolidated these complaints with the class administrative complaint in 1998. See id. ¶ 38.

3. <u>TD 98-4017</u>

On October 23, 1997, Mr. Contreras filed a formal individual administrative EEO complaint alleging national origin discrimination and retaliation based on a non-selection to Senior Customs Representative in Hermosillo, Mexico, GS-1811-14, on or about April 15, 1997 or to Assistant Customs Attache in Bangkok, GS-1811-14, on or about August 27, 1997. See Harvey Declaration ¶ 42, Exh. 21. Mr. Contreras sought EEO counseling regarding these positions on July 7, 1997. See id. ¶ 41, Exh. 21. On August 16, 2002, Customs learned that this case was administratively closed because it contained the same allegations as the class action filed in federal district court. See id. ¶ 42; see also 29 C.F.R. § 1614.107(a)(3) (providing for dismissal of administrative complaints that are the basis of a pending civil action in a United States District Court in which the complainant is a party).

4. TD 98-4137

On March 17, 1998, Mr. Contreras filed a formal individual administrative EEO complaint, asserting discrimination based on his Hispanic national origin and on retaliation for prior EEO activity.

See Harvey Declaration ¶ 44, Exh. 24. Specifically, Mr. Contreras complained that he was not selected for four GS-1811-15 positions. See id. ¶ 44, Exh. 24. This case was administratively closed

⁶ See also http://www.eeoc.gov/federal/md110/chapter8.html Section III, C (describing administrative procedures regarding individual complaints that are filed on the same bases and issues as class complaints, e.g., "If the class complaint is dismissed at the certification stage, the individual complaint may still proceed, unless the same or another basis for dismissal applies.").

on January 5, 2000, because of the class administrative complaint. See Harvey Declaration ¶ 45; 29 C.F.R. § 1614.107(a)(1).

5. TD 99-4107

Mr. Contreras filed his next individual administrative EEO complaint on February 9, 1999, alleging discrimination and retaliation for not having been selected to GS-1811-15 Associate Special Agent in Charge positions in New Orleans and in San Juan on unspecified dates. See Harvey Declaration ¶ 46. On April 5, 1999, the complaint was dismissed as untimely, and no appeal was taken. See id.; Exh. 26.

6. TD 00-4106M

On January 18, 2000, Mr. Contreras filed his sixth individual administrative complaint, alleging discrimination on the bases of national origin, age, and retaliation for a proposed termination on September 28, 1999, and for a November 9, 1999, non-selection to Regional Special Agent in Charge positions in Long Beach, California and El Paso, Texas. See id. ¶¶ 47-48, Exh. 29. This case was bifurcated with the termination claim addressed in TD 00-4106M and the non-selection addressed in TD 00-4107. See id. ¶ 48. In October 2000, in connection with a Merit Systems Protection Board appeal on related disciplinary issues, Mr. Contreras reached a settlement agreement that resolved all issues pertaining to TD 00-4106M. See id. ¶ 50.

7. <u>TD 00-4107</u>

On February 10, 2000, the bifurcated case alleging discrimination based on national origin, age, and retaliation in connection with Mr. Contreras' November 9, 1999 non-selection to the Long Beach, California and El Paso, Texas Regional Special Agent in Charge positions was accepted for processing.

See id. ¶ 51. On February 26, 2000, Mr. Contreras contacted the Oakland Treasury Complaint

Center ("OTCC") about several other allegedly discriminatory non-selections, including: (1) a Special Agent in Charge, (Senior Executive Service ("SES")) position in New York City; (2) a Customs

Attache position, GS-1811-15, in Singapore, Montevideo, Berlin, or Vienna; and (3) the position of

Executive Director of Foreign Operations, GS-1811-15, in Washington, D.C. See id. ¶ 51, Exh. 31.

These additional claims also were accepted for processing. See id., Exh. 32.

On August 24, 2000, OTCC dismissed the portions of the complaint based on national origin because of the administrative class complaint. See id. ¶ 52; 29 C.F.R. § 1614.107(a)(1). Mr. Contreras withdrew his non-selection claim for a Special Agent in Charge position in New York City on November 8, 2000. See Harvey Declaration ¶ 52, Exh. 33.

8. <u>TD 00-4194</u>

On April 21, 2000, Mr. Contreras filed his eighth individual administrative complaint, TD 00-4194, alleging discrimination on the basis of national origin and retaliation. See id. ¶ 54, Exh. 34.

Specifically, Mr. Contreras alleged discrimination and retaliation concerning the reopening, by the Department of Treasury's Office of Inspector General, of a previously closed investigation. See id. ¶ 53, Exh. 34. In early 2002, an EEOC administrative judge dismissed this complaint for failing to state a claim because merely being the subject of an investigation did not make Mr. Contreras an aggrieved individual under Title VII. See id. ¶ 55, Exh. 36. No appeal has been taken on this dismissal. See id. ¶ 55.

9. TD 00-4269

Mr. Contreras filed his ninth individual administrative complaint of discrimination, TD 00-4269,

on July 11, 2000. See id. ¶ 57, Exh. 39. This complaint alleged national origin discrimination and retaliation for EEO activity when Mr. Contreras was not selected to the following positions in May 2000:⁷ (1) Regional Special Agent in Charge (SES level), in Long Beach, California; (2) Customs Representative, INTERPOL, (GS-15) in Lyon, France; (3) Associate Special Agent in Charge (GS-15) in Tucson, Arizona; and (4) Special Agent in Charge (SES level) in New Orleans, Louisiana. See id., Exh. 40. The administrative complaint also raised additional retaliatory harassment issues based on the following: (1) the Department of Treasury's initiation of an investigation on August 5, 1998 into Mr. Contreras' improper use or theft of government funds and/or property; (2) the Office of Investigations' request for GS-1811-15 lateral transfers to foreign offices, thereby precluding Mr. Contreras' applications to such positions; (3) Customs' utilization of a vetting process to discriminate against minorities; (4) the denial of Mr. Contreras' request to meet with the Commissioner of Customs in early 2000; (5) the denial of Mr. Contreras' request to attend the June 6, 2000 annual Customs National Hispanic Agents Association Conference; (6)the receipt of a memo on March 1, 2000 with an annotation next to his name, "If not fired ye"; (7) the discovery that the Special Agent in Charge in the Tucson office referred to employees who file EEO complaints as "cockroaches"; and (8) the denial of an undercover assignment with the Resident Agent in Charge in Nogales in June 2000. See id. ¶ 57, Exh. 39-40.

Although Mr. Contreras sought EEO counseling and/or wrote a letter to an EEO manager about most of these issues, he did not mention anything about the annual Customs National Hispanic

 $^{^7}$ As of May 7, 2000, Mr. Contreras had been "changed to a lower grade of [GS-13] at his request." Zaner Declaration \P 28.

Agents Association Conference to the counselor. See id. ¶ 56, Exh. 37-39. On August 25, 2000, the allegations based on national origin discrimination were dismissed because of the class EEO complaint.

See id. ¶ 58; 29 C.F.R. § 1614.107(a)(1). On September 27, 2000, OTCC consolidated the retaliation portion of the TD 00-4269 complaint with the class complaint, and on November 8, 2000, Mr. Contreras withdrew his allegation concerning his non-selection to the Special Agent in Charge position (SES) in New Orleans. See Harvey Declaration ¶ 58, Exh. 33.

10. TD 01-4096

On December 28, 2000, Mr. Contreras filed a formal individual administrative EEO complaint alleging retaliation for his EEO activities. See id. ¶ 60, Exh. 43. He alleged that he was denied leave on December 16, 2000; that he learned on October 2, 2000 that group supervisors were assigned new trucks, but that he was denied a new truck when he had been a supervisor; that he was denied the opportunity to work on a drug smuggling investigation on October 2, 2000; and that he received counseling from his supervisors regarding the management of his cases on October 4, 2000. See id., Exh. 43, at 3-4.

On December 5, 2000, Mr. Contreras contacted an EEO counselor about his working conditions. See id. ¶ 59, Exh. 41-42. This case was dismissed on November 15, 2002 because of the filing of the class Complaint in federal court. See id. ¶ 61; 29 C.F.R. § 1614.107(a)(3).

11. <u>TD 02-4162</u>

Mr. Contreras filed his last individual administrative complaint on April 5, 2002. See Harvey Declaration ¶ 63, Exh. 46. Mr. Contreras complained that he suffered discrimination based on national origin and retaliation for past EEO activity when he was issued a fitness for duty letter on March 6,

2002, and a letter of caution on March 7, 2002, and when he was reassigned to the San Luis, Arizona port of entry on March 18, 2002. See id. The complaint was dismissed after the filing of the instant Complaint. See id. ¶ 63; 29 C.F.R. § 1614.107(a)(3).

II. THE OTHER SEVEN PLAINTIFFS

Six of the seven remaining plaintiffs engaged in some administrative activity before filing the Complaint that is now before the Court. The following provides a summary of employment history and their administrative activity for comparison to the Complaint in evaluating whether they exhausted administrative remedies and are able to pursue individual claims of discrimination.

A. John Yera

Plaintiff John Yera began working for Customs as a Criminal Investigator, GS-1811-07, step 1, on November 21, 1988, in Newark, New Jersey. See Zaner Declaration ¶ 43. He was promoted at various times during the next twelve years, see id. ¶¶ 44-52, and effective July 29, 2001, he was promoted to a GS-1811-14, step 1, Criminal Investigator position in the Office of Investigations in Fairfax, Virginia. See id. ¶ 52. Mr. Yera has never filed an administrative EEO complaint against the Secretary of Treasury, either individually or as a class agent on behalf of a purported class of Customs employees. See Harvey Declaration ¶ 19.

B. William Velasco

Mr. Velasco began working in the U.S. Customs Service as a GS-1811-12, step 2, Criminal Investigator in 1982 after transferring from the U.S. Department of Treasury's Bureau of Alcohol, Tobacco and Firearms. See Zaner Declaration ¶ 68. He worked his way up to a Supervisory Criminal Investigator, GS-1811-15, step 5 position, in the Office of Internal Affairs in Washington, D.C.,

effective January 21, 1996. See id. ¶¶ 69-78. Mr. Velasco voluntarily retired from Customs on May 1, 1999. See id. ¶ 86.

Mr. Velasco filed a formal individual administrative complaint, designated TD 95-1245, on May 24, 1995, alleging discrimination on the basis of national origin after learning that he was not selected for three positions in January and February 1995. See Harvey Declaration ¶¶ 15-16, Exh. 5-6. On April 11, 1997, the complaint was settled and dismissed with prejudice. See id. ¶ 17. Mr. Velasco has filed no other administrative EEO complaint against the Secretary of Treasury, either individually or as a class agent on behalf of a purported class of Customs employees. See Harvey Declaration ¶ 18.

C. Frank Almonte

Plaintiff Frank Almonte entered on duty with Customs as a Customs Aid, GS-05, in the New York City Office of Enforcement on July 25, 1983. See Zaner Declaration ¶ 80. He began his work in the 1811 series in 1987 when he received a career appointment as a Criminal Investigator at the GS-05, step 10, level. See id. ¶ 82. Mr. Almonte received numerous promotions throughout his career, and he currently is at the GS-13 level. See id. ¶ 82-91.

On October 1, 2000, Mr. Almonte filed his only formal individual administrative EEO complaint, designated TD 01-3019, which alleged discrimination on the basis of Hispanic national origin in connection with his non-selection for a position of Senior Special Agent, GS-1811-13. See Harvey Declaration ¶ 12, Exh. 1-2. After receiving a promotion to a GS-13 Criminal Investigator in January 2001, see Zaner Declaration ¶ 91, he withdrew his administrative complaint stating that he did "not wish to purse this complaint any further." See Harvey Declaration ¶ 13, Exh. 3-4. Mr. Almonte has filed no

other administrative EEO complaint against the Secretary of Treasury, either individually or as a class agent on behalf of a purported class of Customs employees. See id. ¶ 14.

D. Stephen Mercado-Cruz

Plaintiff Stephen Mercado-Cruz became a Criminal Investigator for Customs in the GS-1811 series in 1985, when he was assigned to a position in the Office of Enforcement in San Luis, Arizona at a GS-09 level. See Zaner Declaration ¶ 95. On February 11, 2001, after a variety of promotions, he was promoted to a GS-1811-14, Supervisory Criminal Investigator position in the Office of Investigations in Calexico, California. See id. ¶ 105.

Mr. Mercado-Cruz filed his first two individual administrative EEO complaints, TD 91-2239 and TD 92-2018 in 1991, alleging discrimination on the basis of his Hispanic national origin and retaliation. See Harvey Declaration ¶ 20-21. Final agency decisions were issued for both of these complaints, on December 10, 1991 and February 3, 1993, respectively, finding no discrimination or retaliation. See id. ¶¶ 20-21, Exh. 7-8.

On January 18, 2000, Mr. Mercado-Cruz filed his third individual administrative EEO complaint, TD 00-4110, alleging discrimination on the basis of his Hispanic national origin because he was not selected for a promotion to Group Supervisor, GS-1811-14, in San Diego, California on or about November 9, 1999. See id. ¶ 23, Exh. 9. He also alleged retaliation for prior EEO activity. See id. ¶ 23, Exh. 9-10. These claims were dismissed on November 8, 2002, because they were the basis of the instant Complaint. See id. ¶¶ 24-25; 29 C.F.R. § 1614.107(a)(3). Mr. Mercado-Cruz has filed no other administrative EEO complaint against the Secretary of Treasury, either individually or as a class agent on behalf of a purported class of Customs employees. See Harvey Declaration ¶ 26.

E. Ramon Martinez

Mr. Martinez first began his career in the criminal investigator GS-1811 series on September 4, 1983, when he was assigned to a GS-07 position in Detroit, Michigan. See Zaner Declaration ¶ 31.

Mr. Martinez received numerous promotions, and as of April 23, 2000, he has been employed as a Criminal Investigator, GS-13, step 7, in the Office of Investigations in Baltimore, Maryland. See id. ¶ 42.

Mr. Martinez filed two individual administrative EEO complaints in 1994 and 1995, TD 941120 and TD 96-1078, in which he alleged discrimination based on his Mexican-American national
origin. See Harvey Declaration ¶ 66-67, Exh. 47-48. He complained, inter alia, about being
interrogated, locked out of his office, denied firearms, suspended, and reassigned to a physical security
specialist position. See id. On February 24, 1998, Mr. Martinez and the Treasury Department entered
into a settlement agreement in which he agreed to withdraw and dismiss his complaints with prejudice.
See id. ¶ 67.

Mr. Martinez filed one other individual administrative complaint, in January 1995, designated as TD 95-1127, on the basis of national origin discrimination and regarding a suspension. This case was dismissed as moot on February 15, 1995, and no appeal was taken. See id. ¶ 68, Exh. 49. Mr. Martinez has filed no other administrative EEO complaint against the Secretary of Treasury, either individually or as a class agent on behalf of a purported class of Customs employees. See id. ¶ 69.

F. Ricardo Sandoval

Plaintiff Ricardo Sandoval entered duty with the Customs Service as a Criminal Investigator, GS-1811-12, in the Office of Internal Affairs on September 10, 1990 in San Diego, California. See

Zaner Declaration ¶ 106. He was promoted numerous times, and as of November 2, 2002, Mr. Sandoval has been serving as a Supervisory Criminal Investigator, GS-1811-14, in the Office of Investigations in El Centro, California. See id. ¶ 111.

On November 8, 1993, Mr. Sandoval filed his first individual administrative complaint, TD 94-4099, alleging discrimination based on national origin. That complaint was withdrawn on April 4, 1994. See Harvey Declaration ¶ 80, Exh. 65. In 1994, he filed his second and third individual administrative complaints, designated TD 94-4070 and TD 94-4158, alleging discrimination based on national origin and retaliation concerning a non-selection and directed reassignments. See id. ¶¶ 82-83, Exh. 66-67. In March and April of 1995, the Department of Treasury issued a final agency decision, closing these administrative complaints, after finding no discrimination. See id. Mr. Sandoval did not appeal these dismissals with the agency. See id. ¶ 82-83.8

On August 30, 1996, Mr. Sandoval filed a fourth individual administrative complaint, TD 96-4247, alleging retaliation and age discrimination, based on an Internal Affairs Investigation of him. See id. \$\quad \text{8}\$ 85-86, Exh. 68-69. On March 26, 1998, a final decision was issued finding that the evidence did not support the claims, and Mr. Sandoval did not appeal this decision. See id. \$\quad 87\$, Exh. 70.

⁸ Although Mr. Sandoval did not appeal these complaints within the agency, based on Mr. Sandoval's own statements, he appears to have brought these claims to federal court and to have received an award for them. See Harvey Declaration ¶ 85 (in administrative complaint 96-4247, he alleged that "he had previously filed EEO complaints, TD 94-4158 and TD 94-4070, which were, at the time, the subject of a lawsuit in federal court in San Diego"); Complaint ¶¶ 81-82 (Mr. Sandoval received a recovery from a California federal jury in 1998 based on a retaliation claim).

⁹ Although on its face, the administrative complaint did not allege age discrimination, <u>see</u> Harvey Declaration Exh. 68 (complainant did not check box that would have indicated age was a basis of his discrimination claim, but did provide his date of birth), the complaint was processed as both an age discrimination and a retaliation claim. See id. Exh. 69.

On August 7, 1997, Mr. Sandoval filed his last administrative EEO complaint, TD 97-4289, alleging national origin discrimination and retaliation. See id. ¶81. This complaint was dismissed for failure to state a claim on September 18, 1997. See id. Mr. Sandoval did not appeal that dismissal, and he has filed no other administrative EEO complaint against the Secretary of Treasury, either individually or as a class agent on behalf of a purported class of Customs employees. See id. ¶¶81, 88.

G. Ruben Gonzalez

On March 15, 1987, Plaintiff Ruben Gonzalez took a Customs Criminal Investigator position, GS-1811-12, in Miami, Florida. See Zaner Declaration ¶ 55. Mr. Gonzalez received several promotions, rising to a temporary GS-15 in May, 1997. See id. ¶¶ 56-61. On March 10, 2002, he was promoted (permanently) to a Supervisory Criminal Investigator position, GS-1811-15, in the Office of Investigations in Houston, Texas. See id. ¶ 67.

On February 13, 1995, Mr. Gonzalez filed an individual administrative EEO complaint, designated TD 95-2142, alleging discrimination based on his Puerto Rican national origin based primarily on GS-14 promotions and assignment issues. See Harvey Declaration ¶ 71, Exh. 50. On June 23, 2002, the Treasury Complaint Center dismissed Mr. Gonzalez's complaint because it came within the scope of the instant Complaint. See id. ¶ 71; 29 C.F.R. § 1614.107(a)(3).

On February 2, 2000, Mr. Gonzalez filed a second individual administrative EEO complaint, designated TD 00-1091, in which he alleged race and national origin discrimination, and retaliation, because he was not selected for three GS-15 promotions on October 8, 1999. See Harvey

Declaration ¶ 73, Exh. 52-57. Mr. Gonzalez initially sought counseling for the alleged non-promotion

discrimination on December 6, 1999. See Linda Lynn Batts Declaration ("Batts Declaration"), ¶¶ 6
16. Mr. Gonzalez later requested that his records be changed to reflect that he sought counseling on November 5, 1999, the day he met with Linda Batts, Special Assistant to the Commissioner of Customs and EEO Director. Id.; Harvey Declaration ¶ 73, Exh. 53. However, his contact on November 5, 1999 with Ms. Batts did not constitute counseling with an EEO counselor. Ms. Batts is not, and was not an EEO counselor. See Batts Declaration ¶¶ 11-16. Indeed, during their November 5, 1999 meeting, Ms. Batts told Mr. Gonzalez that she was not a counselor and that their conversation would not toll the time frame for filing an EEO complaint. See id. ¶ 11. She also informed him that he would have to contact an EEO counselor within 45 days of any alleged discriminatory conduct. See id.

On May 4, 2000, the national origin and race allegations were dismissed pending the resolution of the class administrative complaint, and the retaliation claims were to be processed as an individual complaint under the separate designation TD 00-1209. See Harvey Declaration ¶ 73, 75. On July 19, 2002, TD 00-1209 and TD 00-1091 were dismissed because of the Complaint filed in this action. See id. ¶ 78; 29 C.F.R. § 1614.107(a)(3).

On January 3, 2001, Mr. Gonzalez filed a fourth individual administrative complaint, TD 01-1068, alleging age discrimination and retaliation when he was denied a cash award, not assigned to act as an Assistant Director or Director of the Financial Investigation Division, and not given career enhancing collateral duty assignments. See Harvey Declaration ¶ 76, Exh. 60. These same allegations on the basis of race and national origin discrimination were to be processed under designation TD 01-1086. See id. ¶ 76. On July 19, 2002, TD 01-1068 and TD 01-1086 were dismissed because of the instant Complaint. See id. ¶ 78; 29 C.F.R. § 1614.107(a)(3).

Mr. Gonzalez has filed no other administrative EEO complaint against the Secretary of Treasury, either individually or as a class agent on behalf of a purported class of Customs employees.

See Harvey Declaration ¶ 79.

ARGUMENT

All of the class claims should be dismissed on the basis of failure to exhaust administrative remedies, failure to state an actionable adverse employment action, or failure to establish a prima facie case of discrimination in the underlying individual claim that forms the basis of the class claim. To the extent the Complaint also alleges individual claims of discrimination for the eight named plaintiffs, each individual claim should be dismissed for failure to exhaust administrative remedies and/or for failure to state an actionable adverse action within the meaning of Title VII.

I. STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine issue of material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is properly regarded "not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

The initial burden is on the moving party to point out the absence of any genuine issue of material fact. See id. at 323. Once the initial burden of the moving party is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). In order to meet this burden, the non-moving party must go beyond the pleadings and show "by her own affidavits,

or by the 'depositions, answers to interrogatories, or admissions on file" that a genuine issue of material fact exists. Celotex Corp., 477 U.S. at 324 (quoting Fed. R. Civ P. 56(e)). The non-moving party must make a sufficient showing on all essential elements of the case with respect to which the non-moving party has the burden of proof. See id. at 323. In other words, a party must do more than create "some metaphysical doubt as to the material facts." Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

II. THE CLASS CLAIMS SHOULD BE DISMISSED IN THEIR ENTIRETY BASED ON FAILURE TO TIMELY EXHAUST ADMINISTRATIVE CLASS REMEDIES, FAILURE TO ASSERT ADVERSE EMPLOYMENT ACTIONS, AND/OR FAILURE TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION FOR THE UNDERLYING CLAIM

Title VII permits federal employees to bring causes of action against the federal government and its agencies for employment discrimination "based on race, color, religion, sex, or national origin."

See 42 U.S.C. § 2000e-16(a). This waiver of sovereign immunity, however, is limited, and attached to the right to bring suit "are certain preconditions," including "rigorous administrative exhaustion requirements and time limitations." Brown v. General Servs. Admin., 425 U.S. 820, 832-33 (1976).

"In order to bring a cause of action in federal court under Title VII, a plaintiff must first exhaust his administrative remedies." <u>Kidane v. Northwest Airlines, Inc.</u>, 41 F. Supp. 2d 12, 15 (D.D.C. 1999). "The principal exhaustion requirement is that the complainant must initially seek relief in the agency which has allegedly discriminated against him . . . and absent special circumstances, failure to exhaust calls for a dismissal of the action." <u>Siegel v. Kreps</u>, 654 F.2d 773, 776-77 (D.C. Cir. 1981); see also Albritton v. Kantor, 944 F. Supp. 966, 970 (D.D.C. 1996) ("Relief under Title VII depends upon the filing of a timely administrative charge."). In other words, "[a] timely administrative charge is a

prerequisite to initiation of a Title VII action in the District Court," and "a complainant who is tardy [] in filing his discrimination charge with the EEO Commission . . . ordinarily will be denied a judicial audience." Kilpatrick v. Riley, 98 F. Supp. 2d 9, 13 (D.D.C. 2000) (quoting Shehadeh v. C & P

Telephone Co., 595 F.2d 711, 717-18 (D.C. Cir. 1978)).

This exhaustion requirement applies to class actions as well, and "exhaustion of an individual Title VII claim is not sufficient to exhaust a class action." Belhomme v. Widnall, 127 F.3d 1215 (10th Cir. 1997), cert. denied, 523 U.S. 1100 (1998). Similarly, a class member who does not meet the administrative exhaustion requirements for pursuing a class action may not step into the shoes of someone who initiates a class action but who is not legitimately able to continue the class action. See Wakeen v. Hoffman House, Inc., 724 F.2d 1238, 1246 (7th Cir. 1994) ("[A] class member who does not meet the procedural prerequisites for waging a Title VII suit may not . . . take over as the sole class representative for someone who initiates but is not legitimately able to continue a class action"). In short, at least one class member must exhaust administrative remedies on behalf of the class, and if no class member has legitimately exhausted the remedies on behalf of the class, the class action in federal court must be dismissed. See Thomas v. Reno, 943 F. Supp. 41, 43 (D.D.C. 1996), affd, 159 F.3d 637 (D.C. Cir. 1997).

The administrative requirements (for purposes of this action) are twofold. First, the class representative must have filed an administrative complaint that contains the claims that are brought in federal court. See Mack v. Strauss, 134 F. Supp. 2d 103, 108-09 (D.D.C. 2001) ("[P]laintiff cannot bring claims in a lawsuit that were not included in his EEO charge."). Second, the class representative must have contacted an EEO counselor withing 45 days after the occurrence of the alleged

discriminatory employment action. See 29 C.F.R. § 1614.204(b) ("An employee or applicant who wishes to file a class complaint must seek counseling in accordance with § 1614.105"); 29 C.F.R. § 1614.105 (a)(1) ("An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.").

In addition to exhausting administrative remedies, not all employment decisions are actionable under Title VII, but only actions that constitute "adverse action by the employer" are "legally cognizable." Brown v. Brody, 199 F.3d 446, 453 (D.C. Cir. 1999). As explained by the Supreme Court in Burlington Industries, Inc. v. Ellerth, "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," and "in most cases inflicts direct economic harm." 524 U.S. 742, 761-62 (1998).

Finally, for a plaintiff to bring a class claim of discrimination, the plaintiff must be able to prove that the defendant intentionally discriminated against the plaintiff himself by taking a challenged employment action. A plaintiff may prove intentional discrimination through direct evidence of discriminatory animus or, where only circumstantial evidence is available, through a three-part burdenshifting analysis established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Under the McDonnell Douglas approach, an employee must first establish a prima facie case of discrimination by demonstrating: (1) that he is a member of a protected class; (2) that he was similarly situated to an employee who was not a member of the protected class; and (3) that he and the similarly

situated person were treated disparately. See McDonnell Douglas, 411 U.S. at 802. If an employee successfully demonstrates a prima facie case, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action. See id. Should the employer carry this burden, "the presumption raised by the prima facie case is rebutted and drops from the case." Anderson v. Douglas & Lomason Co., 26 F.3d 1277, 1297 (5th Cir. 1994) (internal quotation marks omitted). The focus then shifts to the ultimate question of whether the defendant intentionally discriminated against the plaintiff, and the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a mere pretext for discrimination. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas, 411 U.S. at 804.

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"Although intermediate evidentiary burdens shift back and forth in this framework, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Waterhouse v. District of Columbia, 298 F.3d 989, 992 (D.C. Cir. 2002) (citations and internal quotation marks omitted). Moreover, a "moving party is entitled to judgment as a matter of law against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. (citations and internal quotation marks omitted).

* * *

The Complaint in this action presents eight class action claims based on alleged national origin discrimination. Discrimination is alleged in connection with (1) competitive positions and promotions; (2) transfer and assignments; (3) undercover and undesirable work; (4) discipline; (5) awards and

bonuses; (6) foreign language awards; (7) training; (8) hostile environment; and (9) retaliation.¹⁰

In evaluating whether the class allegations were exhausted at the administrative level, the only relevant administrative complaint is Mr. Contreras' EEO class complaint. It is conceded that he is the only one of the eight plaintiffs who filed an administrative class complaint. See Complaint ¶3. Because the exhaustion requirement applies to class actions, at least one plaintiff is required to have exhausted the class claims at the administrative level. Exhaustion of an individual Title VII claim does not satisfy exhaustion for class action purposes. See Belhomme v. Widnall, 127 F.3d 1215 (10th Cir. 1997), cert. denied, 523 U.S. 1100 (1998) ("exhaustion of an individual Title VII claim is not sufficient to exhaust a class action").

Accordingly, a comparison of Mr. Contreras' class administrative complaint with the Complaint in this action, shows that the class claims of discrimination cannot survive this motion for summary judgment.

A. The Class Claim Alleging Discrimination in Promotions Should Be Dismissed For Failure to Exhaust Administrative Remedies and Because the Underlying Individual Claim Does Not State A Prima Facie Case of Discrimination

The Complaint alleges that Customs discriminated against Hispanic Special Agents on the basis of their national origin by not selecting them for competitive positions. See Complaint ¶¶ 13-18. Mr. Contreras alleges that he was not selected for a variety of promotions, but fails to identify any one particular position. See, e.g., id. ¶¶ 19-20 ("From 1993-1995, Special Agent Contreras applied for numerous GS-14 supervisory positions throughout the United States and for many foreign assignments.

The Complaint also alleges an emotional distress claim, but this is a request for damages instead of a separate claim. See Complaint ¶¶ 84-85.

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For each of these positions, Agent Contreras met the qualifications and yet was not selected.").

At best, the only non-promotion claim that could form the basis for the class complaint would be an allegation based on Mr. Contreras' January 1995 non-selection for GS-14 Supervisory Criminal Investigator position in El Paso, Texas. This non-selection was raised in Mr. Contreras' administrative class complaint.¹¹

No other non-promotion claim could form the basis for the class Complaint. Although the administrative class complaint did summarily allege that Mr. Contreras had been rejected 38 times over the course of his employment for promotions or lateral transfers, it (like the instant Complaint) failed to even identify any promotions that Mr. Contreras did not receive or state which non-promotions he claimed were discriminatory. See Harvey Declaration ¶ 35, Exh.18. In any event, the other non-selections to which Mr. Contreras vaguely refers could only form the basis of a class claim if he learned of them within 45 days of January 9, 1995, the day he sought counseling on his class complaint. Mr.

¹¹ Mr. Contreras also alleged in his administrative class complaint that he applied for a GS-14 position in Laredo, Texas, under the same vacancy announcement that listed the El Paso position. See Harvey Declaration Exh. 18, at 3. Mr. Contreras, however, did not allege discrimination in connection with his non-selection for the Laredo position in the administrative complaint. Rather, he only alleged that "[o]n or about January 6, 1995, [he] learned that a similarly situated non-minority special agent had been selected for the El Paso, Texas position." Id. In the absence of any allegation of discrimination regarding the Laredo non-selection in the administrative class complaint, Mr. Contreras did not properly exhaust a class promotion claim based on the Laredo position. Nevertheless, even if Mr. Contreras had properly exhausted a Laredo claim, that claim could not survive summary judgment for the same reasons that the El Paso claim cannot survive. See n.13, infra.

¹²Mr. Contreras' administrative class complaint provides, "Mr. Contreras has been employed by USCS since May 18, 1988. . . . During his employment with USCS, Mr. Contreras has submitted over thirty-eight (38) applications for promotions to GS-1811-13 and 14 Supervisory Criminal Investigator positions and/or lateral transfers at USCS and was rejected each time." Harvey Declaration, Exh. 18, at 3.

Contreras does not allege anything of the sort, nor could he. When Mr. Contreras received EEO counseling prior to his filing of the administrative class complaint (in February 1995), he did not identify any recent non-promotion other than the Supervisory Criminal Investigator positions in Texas. See id. ¶ 34, Exh. 17, at 1 ("The complainant stated that when he was a GS/12 he applied for a GS/13 position thirty-five (35) times between 1988 and 1992 before he was selected to a GS/13 position."). In other words, he failed to seek or obtain counseling within the requisite 45 days after learning about the non-promotions except with respect to the El Paso position. Accordingly, in the absence of having identified in the administrative class complaint which of the 38 positions he believed he suffered discrimination in connection with, and in the absence of timely raising these non-promotions with the EEO counselor, see 29 C.F.R. § 1614.204(b), Mr. Contreras failed to exhaust them for purposes of the instant Complaint.

Turning to the El Paso non-selection claim, it cannot form the basis of the class failure to promote claim because Mr. Contreras cannot establish a prima facie case of intentional discrimination regarding his non-selection for that position. Therefore, that claim, which is the only claim that appears to have been exhausted in the class complaint, cannot survive summary judgment.

Mr. Contreras cannot establish a prima facie case of discrimination because he cannot demonstrate, under McDonnell Douglas, that he and a similarly situated person, who was not a member of his protected class, were treated disparately. See 411 U.S. at 802. He cannot so demonstrate because based on the low score his application received from an independent rating panel, the selecting official could not even consider his application along with the best qualified applicants.

The vacancy announcement for the El Paso position required each applicant to address six

criteria: (1) the ability to direct the operational activities of an office or program; (2) the ability to supervise others; (3) the ability to identify problems and develop innovative programs/systems to meet changing needs; (4) knowledge of federal law and procedure; (5) the ability to communicate and interact effectively with other elements and agencies; and (6) the ability to implement Equal Employment Opportunity Program initiatives. See Jacqueline Small Declaration ("Small Declaration") ¶ 8.

Fifty-two applicants applied under the El Paso announcement. See id. ¶ 6. Because more than 10 applicants applied, an independent panel of subject matter experts was established to review the applications. See id. ¶ 9. Each applicant was rated by the panel on each of the six qualification categories in order to establish a selection register of the best qualified applicants. See id. ¶¶ 10-12. The panel operated independently from the selecting official. See id. ¶ 9. The highest total score that an applicant could receive, after all six category scores were added up, was a 30.0. See id. at ¶ 14. Applicants for the El Paso position who scored under 22.5 did not make the selection register, or "best qualified list" ("BQL"). See id. ¶¶ 15-16. The selecting official was not authorized to select an applicant that applied competitively but did not make the BQL See id. ¶ 17.

Mr. Contreras received a total score of 3.0 out of 30.0, and as a result did not make the BQL See id. ¶ 18. The eight applicants who did make the El Paso BQL received scores of 22.5 or above (with the highest score at 28.5). See id. ¶ 16. Thus, Mr. Contreras was not even in the same class of applicants as the person who was selected for the position. His score of 3.0 was significantly lower, and because of his failure to make the BQL, the selecting official did not have the option to select Mr. Contreras for the El Paso position. See id. ¶¶ 17-18. Based on these undisputed facts, Mr. Contreras was not "similarly situated in all respects" to the employee who was selected Mitchell v. Toledo

Hospital, 964 F.2d 577, 583 (6th Cir. 1992). Therefore, under McDonnell Douglas, he cannot state a prima facie claim of intentional discrimination based on circumstantial evidence. Furthermore, he does not allege any direct evidence of intentional discrimination and does not purport to establish a claim on that basis.

Even if Mr. Contreras were somehow able to state a prima facie case of discrimination, his low score of 3.0, and resulting failure to qualify for the BQL, establishes a legitimate, nondiscriminatory reason for the non-selection, and his claim cannot survive summary judgment solely on that basis as well. Accordingly, his non-promotion claim regarding the El Paso position should be dismissed.¹³

В. The Class Claims Based on Transfers and Assignments Should be Dismissed for Failure to Exhaust Administrative Remedies and Because Transfers and Assignments are Not Actionable Employment Decisions Under Title VII

Next, the Complaint alleges discrimination against Hispanics in connection with transfers, assignments and the denial of other career-enhancing opportunities. See Complaint ¶ 27. Again, analyzing only Mr. Contreras' allegations for purposes of the class claims because he was the only plaintiff to have filed an administrative class complaint, this claim should be dismissed on the basis of failure to exhaust administrative remedies and for failure to state an actionable claim.

¹³ As stated in footnote 11, supra, Mr. Contreras also applied, under the same vacancy announcement that listed the El Paso position, for a similar position in Laredo, Texas. He did not, however, properly exhaust this claim. See n.11, supra. Nevertheless, even if he had exhausted the Laredo claim, it could not survive summary judgment for the same reasons stated for the El Paso position. Mr. Contreras'score for the Laredo position was also a 3.0, whereas the three candidates who made the BQL for that position scored from 22.5 to 28.5. See Small Declaration ¶ 16. Mr. Contreras thus did not make the BQL See id. ¶ 18. Therefore, as with the El Paso position, Mr. Contreras cannot establish a prima facie case of intentional discrimination on those facts. Furthermore, his failure to qualify for the BQL establishes a legitimate, nondiscriminatory reason for the non-selection.

The only lateral transfer mentioned in the Complaint is a 1993 application for a lateral foreign assignment to Hermosillo, Mexico as a Customs Representative. See Complaint ¶ 28. Mr. Contreras may have intended to include this transfer in his administrative 1995 EEO class complaint by mentioning an October 1993 Customs Representative position, see Harvey Declaration ¶ 35, but he failed to seek counseling on this transfer (or any other transfer) anytime in 1993 or in 1994 as required under the 45-day rule prescribed by 29 C.F.R. § 1614.204(b) and 29 C.F.R. § 1614.105(a)(1). See id. ¶¶ 33-34 (counseling sought January 9, 1995); see also id. ¶ 27 (August 25, 1994 counseling sought re performance rating and training); id. ¶ 29 (counseling sought October 31, 1994 re suspension). Absent exhaustion of the class claim concerning lateral transfers before raising it in this Court, it should be dismissed.

Furthermore, lateral transfers generally do not constitute adverse employment actions under Title VII. See Brown v. Brody, 199 F.3d 446, 457 (D.C. Cir. 1999) ("[A] plaintiff who is made to undertake or who is denied a lateral transfer – that is, one in which she suffers no diminution in pay or benefits – does not suffer an actionable injury unless there are some other materially adverse consequences Mere idiosyncracies of personal preference are not sufficient to state an injury."); Mungin v. Katten, Muchin & Zavis, 116 F.3d 1549, 1557 (D.C. Cir. 1997) ("[C]ircuits have held that changes in assignments or work-related duties do not ordinarily constitute adverse employment decisions if unaccompanied by decrease in salary or work hour changes"). Lateral moves for special agents in the 1811 series "are not promotion opportunities and do not change the employee's grade, base salary or benefits." Seraphin Declaration ¶ 21. Accordingly, without any showing – or even any allegation – of change in pay or benefits, the class claim based on transfers and reassignments is not

actionable under Title VII and should be dismissed.

C. The Class Claim Based on Assignments to Undercover and Other Undesirable
Assignments Should Be Dismissed Because It Was Not Exhausted at the EEO
Level and Also Does Not Amount to An Actionable Claim

The Complaint next contains allegations that the Customs Service uses a discriminatory method of assigning Hispanic agents to undercover assignments and other "undesirable" assignments. See Complaint ¶ 34. Mr. Contreras specifically alleges that he was assigned to a substantial amount of undercover work throughout his career. See id. ¶ 35. This class claim should fail for three reasons. First, the administrative class complaint does not mention discrimination in connection with undercover work. See Harvey Declaration ¶ 35, Exh. 18. Second, Mr. Contreras never sought EEO counseling regarding such "undesirable" undercover work. See Harvey Declaration ¶ 35, Exh. 17.

Third, assignments to perform undercover work do not constitute adverse employment actions within the meaning of Title VII. There is nothing coercive or adverse about receiving an undercover assignment at Customs. Participation in undercover operations "is always on a volunteer basis," and participation in the undercover training program is "one of the few strictly volunteer assignments at Customs." Kilcoyne Declaration ¶¶ 7-8. "Undercover operatives may opt out of an ongoing undercover investigation . . . at any time, to ensure the safety of the undercover agents." Id. ¶ 13. Accordingly, the allegations about discriminatory animus with respect to undercover work are unfounded.

Furthermore, instead of undercover operations being "devalued" as described in the Complaint, see Complaint ¶ 34, agents perceive undercover assignments as "enhanc[ing] their promotion potential," and participation in the undercover program "has been career enhancing for many special agents."

Kilcoyne Declaration ¶ 16. "[I]t is an honor to be recommended for participation." Id. ¶ 8. In fact,

Mr. Contreras himself has taken the position that undercover assignments are desirable. In his July 11,

2000 individual administrative Complaint, he alleged retaliatory harassment for having been denied

participation in a June 2000 undercover assignment. See Harvey Declaration ¶ 57, Exh. 40.

Accordingly, because undercover assignments are voluntary and desirable, instead of adverse, the class claim based on undesirable undercover assignments is not legally cognizable and should be dismissed.

See Brown v. Brody, 199 F.3d 446, 453 (D.C. Cir. 1999) (not all employment decisions are actionable under Title VII, but only actions that constitute "adverse action by the employer" are "legally cognizable").

D. The Class Discipline Claim Can Not Survive Summary Judgment Because It Was Not Administratively Exhausted, and Because the Underlying Allegations Do Not Amount to Actionable Claims under Title VII

The Complaint next alleges that "Hispanic Special Agents are disciplined more frequently and more harshly than similarly situated white Special Agents." Complaint ¶ 44. Mr. Contreras alleges several instances in which he claims he was unfairly disciplined: in 1992, he received a written reprimand for a security violation; in July 1998, he was investigated for theft; in October 1999, he received a letter of removal for divulging confidential information; in 2000, he was investigated about his contacts with his cousin's spouse, an alleged drug smuggler; and in 2002, he received a letter of caution. See Complaint ¶¶ 45-49. These allegations cannot survive summary judgment for a variety of reasons.

First, there was no mention of any incidents of discriminatory discipline in the administrative class complaint or in the counseling report that preceded the complaint. See Harvey Declaration ¶¶

34-35, Exh. 17-18. This failure to exhaust is enough in itself to require dismissal of all class disciplinary allegations.

But even if Mr. Contreras had exhausted the disciplinary claims in the administrative process, the claims would still not be actionable. Mr. Contreras resolved the October 1999 removal issue through a settlement agreement in October 2000. See Harvey Declaration ¶ 50. Claims that have been settled cannot form the basis of a federal action complaint. See Thomas v. Reno, 943 F. Supp. 41, 42-43 (D.D.C. 1996), aff'd, 159 F.3d 637 (D.C. Cir. 1997) ("Therefore, according to the terms and conditions of the Settlement Agreement, Ms. George was obligated to withdraw and dismiss her putative class action in December 1995 . . . [To uphold the argument that] Ms. George's individual settlement did not and could not settle the class EEO discrimination complaint would turn the class action process into a tag team form of litigation.").

Moreover, the remainder of the so-called disciplinary actions (i.e., reprimands and investigations) did not lead to any "material change in his title, duty, salary, benefits, or working hours, nor does he so allege." Walker v. Washington Metropolitan Area Transit Authority, 102 F. Supp. 2d 24, 29 (D.D.C. 2000). Investigations that do not lead to any form of discipline are not actionable.

See Moore v. Summers, 113 F. Supp. 2d 5, 23 (D.D.C. 2000) ("[N]o disciplinary action has been taken against Special Agent Moore as a result of the investigation. Consequently, there was no adverse action."), citing Yerdon v. Henry, 91 F.3d 370, 378 (2d Cir. 1996) (holding that charges of wrongdoing in workplace alone cannot serve as adverse actions because "if the charges were ultimately dismissed, [the plaintiff] would not have suffered any adverse effect from them"). Nor are reprimands, particularly those not affecting grade or salary, actionable. See Brown v. Brody, 199 F.3d at 458

(affirming that a formal criticism and a performance evaluation were not adverse); Walker,102 F. Supp. 2d at 29 (issuance of a Notice of Caution and Reinstruction did not constitute an adverse employment action). The investigations and reprimand that Mr. Contreras mentions in his Complaint did constitute disciplinary action, nor did they affect his pay or his benefits. See Mari Yonkers Declaration ("Yonkers Declaration") ¶¶ 4-13. For these reasons, the disciplinary portion of the class action Complaint should be dismissed.

E. The Class Claim Based on Awards and Bonuses Should be Dismissed for Failure to Exhaust

The Complaint next alleges a class claim that Customs' method of distributing awards and bonuses is "excessively subjective" and adversely impacts Hispanic agents. See Complaint ¶ 50. This allegation should be immediately dismissed because Mr. Contreras did not allege any harm in connection with awards and bonuses in his administrative class complaint or to an EEO counselor in connection with the class administrative complaint. See Harvey Declaration ¶¶ 34-35, Exh. 17-18. Moreover, Mr. Contreras, the only plaintiff who filed a class administrative complaint, does not allege any harm in connection with awards and bonuses in the Instant Complaint. Therefore, the class claim should be dismissed.

F. The Class Claim Based on Foreign Language Awards Should Be Dismissed for Failure to Exhaust

The Complaint also alleges class-wide discrimination based on Customs' distribution of foreign language awards. See Complaint ¶¶ 53-58. This claim should be dismissed as a class claim because the Complaint contains no allegations pertaining to Mr. Contreras, and similarly, Mr. Contreras' administrative class complaint makes no specific allegations about discrimination based on national

origin in connection with the distribution of foreign language awards. See Harvey Declaration ¶ 35, Exh. 18. Accordingly, the class foreign language discrimination claim has not been exhausted and should be dismissed.

G. The Class Training Claim Cannot Survive Summary Judgment Because it Was Not Exhausted at the Administrative Level and Because It Does Not Constitute An Actionable Title VII Claim

The seventh class allegation states that Customs discriminates against Hispanic Special Agents with regard to training opportunities. See Complaint ¶ 63. Mr. Contreras alleges that he requested to attend the Customs National Hispanic Agents Association annual training meeting, but was ultimately denied each year from 1995-2000. See Complaint ¶ 64. Mr. Contreras, however, did not bring an administrative class complaint based on these denials. See Harvey Declaration ¶ 35, Exh. 18. The only training Mr. Contreras specifically complained about at the administrative level had nothing to do with the Hispanic Agents Association. See id., Exh. 18. Rather, he based his administrative class claim on the denial of a request to be sent to a financial forfeiture session in February 1995. See Harvey Declaration ¶¶ 34-35, Exh. 17-18. In the absence of Mr. Contreras exhausting his administrative class remedies regarding the Customs National Hispanic Agents Association annual training meetings, he should be denied judicial review of these claims.

In addition, the denials of attendance at the annual training meetings do not amount to adverse employment actions because the meetings were not "materially related to [Mr. Contreras'] job responsibilities or possibilities for advancement." <u>Turlington v. Atlanta Gas Light Co.</u>, 135 F.3d 1428, 1436 n.11 (11th Cir. 1998), <u>cited with approval in Freedman v. MCI Telecomm. Corp.</u> 255 F.3d 840, 845 (D.C. Cir. 2001); <u>see also Burlington Indust. v. Ellerth</u>, 524 U.S. 742, 762 (1998) (in the

absence of direct economic harm or some other materially adverse consequence, a claim is not actionable under Title VII); <u>Brown</u>, 199 F.3d at 456 (a plaintiff "does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment").

Here, attendance the Customs National Hispanic Agents Association meetings would not have affected Mr. Contreras' "salary" or his benefits. See Richard J. Hoglund Declaration ("Hoglund Declaration") ¶ 10 ("[A]ttendance at such an event will not affect an employee's salary or benefits."). In other words, his absence from the Hispanic Agents Association meetings had no direct economic harm on Mr. Contreras, nor did it cause any material consequences with respect to his employment conditions. See id. ¶¶ 10-11 ("I have not viewed the attendance or non-attendance [at such professional conferences] as a critical factor in evaluating any employee's application for promotion. To my knowledge, the training which may be provided by such organizations is not sponsored, regulated or certified by Customs, nor is it accredited by any other educational institution, and as such, its benefit is difficult to measure.").

Furthermore, Mr. Contreras has attended more than 30 training courses since 1988, all of which Customs paid for. See Lee Heffelfinger Declaration ¶ 4, Exh. 1. In fact, he attended one 12-day training in 1995, four trainings in 1996 (one of which was a 12-day training), five trainings in 1998 (one of which was a 10-day training), and four trainings in 1999, see id., even though the general policy is "that an employee can only attend one professional association conference per year, at government expense." Hoglund Declaration ¶ 9. Therefore, Mr. Contreras' own substantial training record shows that he was not discriminated against in connection with job training opportunities. See Chica v.

Planning Research Corp., 179 F. Supp. 2d 575, 585 (D. Md. 2002) ("Against this backdrop of training opportunities provided by PRC, Chica has failed to establish how the denial of two training requests altered the terms and conditions of his employment"). Accordingly, the denial of attendance at Customs National Hispanic Agents Association annual training meetings cannot be viewed as an adverse action, and this class claim should be dismissed on summary judgment.

H. The Hostile Work Environment Class Claim Should Be Dismissed For Failure to Exhaust

The Complaint alleges that "Hispanic Special Agents are exposed to a severe and pervasive atmosphere of harassment and intimidation." Complaint ¶ 67. There is no allegation in the Complaint concerning Mr. Contreras personally that makes out a hostile work environment claim. Likewise, Mr. Contreras did not raise a hostile work environment claim in the administrative class complaint, nor did he seek EEO counseling prior to filing that administrative complaint about hostile work environment claims. See Harvey Declaration ¶¶ 34-35, Exh. 17-18.¹⁴ Accordingly, this class allegation should be dismissed for failure to exhaust.

I. The Retaliation Class Claim Should Be Dismissed for Failure to Exhaust

The Complaint finally asserts that the Hispanic Special Agents "have suffered systemic reprisals and retaliation for asserting protected rights under Title VII." Complaint ¶ 78. The Complaint sets forth only one allegation of retaliation concerning Mr. Contreras. Specifically, it alleges that shortly after Mr. Contreras provided deposition testimony regarding class-wide discrimination in the administrative

Nor did Mr. Contreras allege hostile work environment in any of his individual administrative complaints. See Harvey Declaration, ¶¶ 28, 30, 42, 44, 46, 48, 54, 57, 60, 63.

class action suit (in April 2002), he was put under investigation. Mr. Contreras did not initially allege retaliation as part of the class action administrative suit, nor did he timely raise an alleged class-wide retaliation issue with an EEO counselor or even in the administrative suit. See Harvey Declaration ¶¶ 34-35, Exh. 17-18. Furthermore, in January 2002, Administrative Judge Joel Kravetz expressly denied Mr. Contreras' request to add a retaliation claim to his administrative class complaint. See id. ¶ 39. Therefore, this claim was not administratively exhausted and should be dismissed.

* * *

In sum, Mr. Contreras is the only one of the eight named plaintiffs to have filed an administrative class complaint, and thus, his class administrative complaint is the sole complaint that should be examined in analyzing exhaustion of the class action. However, a review of Mr. Contreras' administrative class complaint, along with the EEO counselor reports that accompany that complaint, show that Mr. Contreras did not exhaust the administrative remedies for most of the class claims. In addition, several of the class claims do not constitute adverse employment actions under Title VII.

Finally, with respect to the class promotion claim, Mr. Contreras cannot establish a prima facie case of discrimination based on the El Paso non-selection, the only claim brought in the Instant Complaint that appears to have been properly exhausted in the administrative class complaint. Accordingly, this Court should rule that all of the class claims of discrimination should be dismissed on this motion for summary judgment.

III. THE INDIVIDUAL CLAIMS OF DISCRIMINATION SHOULD BE DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES AND/OR TO ALLEGE ACTIONABLE ADVERSE EMPLOYMENT ACTIONS

It appears that in addition to alleging class claims of discrimination, the Complaint also alleges

individual claims of discrimination. As with class claims, individual claims of discrimination must be exhausted at the administrative level to be actionable in federal court. See supra, at 22-24.

Furthermore, for individual claims to survive summary judgment, the alleged discriminatory acts must constitute actionable adverse employment actions within the meaning of Title VII. Not one of the individually named plaintiffs has alleged a Title VII claim that can survive summary judgment when tested against these requirements. Accordingly, this Court should dismiss all of the individual claims of discrimination.

A. Miguel Contreras

Mr. Contreras has not presented any actionable individual claims of discrimination, and, therefore, any and all of his individual claims should be dismissed on summary judgment.

1. Promotions

With respect to Mr. Contreras' claims that he was discriminated against based on national origin when he applied for promotions, he has not identified any specific promotion that he was denied.

See Complaint ¶¶ 19-20. Instead, the Complaint states, for example, that "From 1996 until the present, he has applied for over 40 GS-15 positions. . . . In most cases, white Special Agents with similar or less experience or qualifications were selected." Complaint ¶ 20. Accordingly, Mr. Contreras has not alleged any specific individual claim of discrimination. Moreover, to the extent he intended to allege an individual claim with respect to the El Paso non-selection in January 1995, as discussed, supra, at 28-30, this claim cannot survive summary judgment because it does not establish a prima facie case of discrimination. Thus, the Court should dismiss Mr. Contreras' individual discrimination promotions claim to the extent he has asserted such a claim.

2. <u>Transfers, Assignments and Career-Enhancing Opportunities</u>

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The only individual claim of discrimination relating to transfers, assignments and career - enhancing opportunities that Mr. Contreras alleged in the complaint was with respect to his non-selection to a 1993 GS-13 foreign assignment to Hermosillo, Mexico as the Customs Representative.

See Complaint ¶ 28. Not one of Mr. Contreras' individual administrative complaints, however, mentions a 1993 GS-13 Customs Representative position in Hermosillo, Mexico. See Harvey

Declaration ¶¶ 27-64. Moreover, as explained supra, at 31, this denied transfer does not constitute an adverse employment action. Accordingly, this claim should be dismissed for failure to exhaust administrative remedies and for failure to allege an actionable claim.

3. Assignments to Undercover and Undercover work

As an initial matter, and as explained <u>supra</u>, at 32-33, the Complaint's allegations about discrimination in connection with assignments to undercover work is unfounded. There is nothing coercive or adverse about receiving an undercover assignment while working for Customs.

With respect to Mr. Contreras, not one of his individual administrative complaints mentions an instance in which he was placed in an undercover operation, let alone because of any discriminatory animus. See Harvey Declaration ¶¶ 27-64.¹⁵ Moreover, the complaint in this action sets forth no specific instance or time frame of such an assignment.

Accordingly, there being nothing adverse or coercive about an undercover assignment, and

In fact, the only mention of the word undercover in Mr. Contreras' administrative complaints is in relation to a claim that he was denied participation in an undercover operation in 2002, not that he was coerced or placed in an undercover operation, as is alleged in the federal complaint. <u>See</u> Harvey Declaration ¶ 57, Exh. 43.

because Mr. Contreras failed to raise any claims about undercover assignments in the administrative proceedings, his individual claim of discrimination regarding undercover assignments should be dismissed.

4. <u>Discipline</u>

Mr. Contreras alleges discriminatory discipline in five instances, see Complaint ¶¶ 45-49, but each claim of discipline should be readily dismissed.

First, the 1992 reprimand, as explained <u>supra</u>, at 33-35, did not constitute official disciplinary action. Therefore, it cannot by definition qualify as an adverse employment action within the meaning of Title VII. Moreover, because Mr. Contreras never sought EEO counseling or filed an individual administrative complaint about the reprimand, this claim should also be dismissed on exhaustion grounds. <u>See</u> Harvey Declaration ¶¶ 27-64.

Next, in paragraphs 46, 48, and 49 of the Complaint, Mr. Contreras alleges discrimination with respect to two investigations and a "letter of caution." However, these claims are not actionable under Title VII because the investigations and letter of caution did not constitute official disciplinary action.

See supra, at 33-35; Yonkers Declaration ¶¶ 5-13. Mere investigations and warnings that do not involve any economic harm or material job consequences are not actionable under Title VII. See id. 16

Finally, with respect to the discrimination allegations concerning a 1999 letter of removal and a proposed 20-day suspension, Mr. Contreras himself admits that he reached a settlement agreement

¹⁶ Mr. Contreras also never filed an administrative complaint about the alleged investigation into his contacts with his cousin's spouse, a supposed drug smuggler. <u>See</u> Complaint ¶ 48; Harvey Declaration ¶¶ 27-64.

concerning these actions. <u>See</u> Complaint ¶ 47; <u>see also</u> Harvey Declaration ¶ 50. Therefore, his individual claims pertaining to the letter of removal and suspension should be dismissed. <u>See Thomas v.</u> Reno, 943 F. Supp. 41, 42-43 (D.D.C. 1996), affd, 159 F.3d 637 (D.C. Cir. 1997).

5. Awards, Bonuses, Foreign Language Awards and Hostile Environment

In the Complaint, Mr. Contreras has raised no specific claims of discrimination based on awards and bonuses foreign language proficiency awards, or harassment and hostile environment. See Complaint ¶¶ 50-62, 68-74.

6. Training

In the Complaint, Mr. Contreras complains that despite his requests, he was not permitted to attend the Customs National Hispanic Agents Association annual training meetings in years 1995-2000.

See Complaint ¶ 64. Mr. Contreras only brought an administrative complaint with respect to the year 2000 annual training conference. See Harvey Declaration ¶57. Mr. Contreras, however, failed to seek timely EEO counseling on this issue prior to filing the administrative complaint. See Harvey Declaration ¶ 56, Exh. 39-41. Thus, Mr. Contreras' individual training claim should be dismissed for failure to exhaust administrative remedies.

In any event, as explained above, the denial of attending a training conference does not constitute an adverse employment decision in the absence of direct economic harm, see <u>Burlington Industries</u>, Inc. v. Ellerth, 524 U.S. 742, 762 (1998), or some other "materially adverse consequence[]." <u>Brown v. Brody</u>, 199 F.3d 446, 457 (D.C. Cir. 1999). Mr. Contreras suffered no decrease in salary, diminution in benefits, or any other materially adverse consequence for not having attended these meetings. <u>See</u> Hoglund Declaration ¶ 9-11; <u>see also</u> Heffelfinger Declaration ¶ 4, Exh. 1 (indicating

that Mr. Contreras has attended over 30 training sessions since 1988). Accordingly, the allegations of discrimination based on the denial of trainings should be dismissed.

7. Retaliation

Mr. Contreras alleges only one individual claim of retaliation in the Complaint. That claim alleges that, on April 19, 2002, after giving deposition testimony regarding classwide discrimination, Mr. Contreras was told that he was the subject of an Internal Affairs investigation regarding his misuse of a government vehicle and for giving false statements to a supervisor. See Complaint ¶ 78. Mr. Contreras did not raise this retaliation allegation at the administrative level as he is required to do. See Harvey Declaration ¶¶ 37-64. Accordingly, this individual claim of retaliation should promptly be dismissed.

B. John Yera

Plaintiff John Yera has alleged individual claims of discrimination based on transfers, undercover work, foreign language awards, and hostile environment. See Complaint ¶¶ 33, 37-39, 60, 72-73.

Each of these claims, however, must be dismissed because Mr. Yera has never filed an administrative complaint against the Secretary of Treasury. See Harvey Declaration ¶ 19. Absent pursuit of his administrative remedies, his federal claims should be dismissed. See, e.g., Kidane v. Northwest

Airlines, Inc., 41 F. Supp. 2d 12, 15 (D.D.C. 1999) ("[P]laintiff's Title VII retaliation claim is barred for failure to exhaust administrative remedies.").

C. William Velasco

Plaintiff William Velsco has alleged individual claims of discrimination based on national origin for non-promotions, transfers, awards and bonuses, foreign language awards, and training. <u>See</u>

Complaint ¶¶ 22-23, 30, 52, 59, 67. Each of these claims must fail because the one administrative complaint that Mr. Velasco filed, asserting discrimination with respect to non-prom, was settled on April 11, 1997. See Harvey Declaration ¶¶ 16-18, Exh. 7; See Thomas v. Reno, 943 F. Supp. 41, 43 (D.D.C. 1996), affd, 159 F.3d 637 (D.C. Cir. 1997).

D. Frank Almonte

Plaintiff Frank Almonte has brought individual claims of discrimination based on non-selections to competitive positions, assignments to undercover work, foreign language proficiency awards, and a hostile work environment. See Complaint ¶ 24, 41, 62, 71. Each claim of discrimination based on national origin should be dismissed because he failed to exhaust his administrative remedies.

With respect to non-promotions, Mr. Almonte makes one specific claim of discrimination – that he was not promoted to a "GS-13 position in the SAIC/ New York office." Complaint ¶ 24. Mr. Almonte, however, withdrew his administrative complaint on this issue on January 24, 2001, after receiving a promotion on January 14, 2001 to a GS-13 Criminal Investigator. See Harvey Declaration ¶ 13, Exh. 3-4; Zaner Declaration ¶ 91. Because Mr. Almonte withdrew his administrative complaint, he failed to exhaust and therefore is prohibited from pursing this claim in federal court. See Thomas, 843 F. Supp. at 43. Mr. Almonte filed no other administrative complaints against the Secretary of Treasury, and therefore, his other claims of discrimination must be dismissed for failure to exhaust administrative remedies. See Harvey Declaration ¶ 14; Kidane, 41 F. Supp. 2d at 15.17

¹⁷ Mr. Almonte's claim regarding undercover assignments should be dismissed for the additional reason that an assignment to perform undercover work is not an adverse personnel action actionable under Title VII. <u>See</u> discussion, <u>supra</u>, at 32-33. Moreover, Mr. Almonte's allegations that vulgar language was used in the work place on two occasions hardly qualifies as severe and pervasive

E. Stephen Mercado-Cruz

Plaintiff Stephen Mercado-Cruz has filed claims of national origin discrimination based on undercover work, foreign language awards, and a hostile environment. See Complaint ¶¶ 40, 61, 69-70. Each of these claims should be dismissed for failure to exhaust administrative remedies. Mr. Mercado-Cruz filed a total of three administrative complaints against the Secretary of Treasury. The first two complaints resulted in findings of no discrimination on December 10, 1991, and February 3, 1993, respectively, and Mr. Mercado-Cruz has pursued no further activity on those complaints. See Harvey Declaration ¶¶ 20-21. Those complaints are therefore time-barred. See 29 C.F.R. § 1614.407(a). In any event, they did not address the issues raised in the instant Complaint. See id.

In his third individual administrative Complaint filed on January 18, 2000, Mr. Mercado-Cruz alleged discrimination and retaliation in connection with his non-selection to a group supervisor promotion on November 9, 1999. See Harvey Declaration ¶ 23. This administrative complaint, however, did not raise, mention, or discuss the grounds on which Mr. Mercado-Cruz bases his claims in this suit regarding undercover work, foreign language awards, or hostile environment. Accordingly,

harassment that would constitute a hostile environment Title VII claim. See Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80 (1998) (Title VII is not a "general civility code for the American workplace"); Freedman v. MCI Telecomm. Corp.. 255 F.3d 840 (D.C. Cir. 2001) ("[A] single stray comment does not a hostile environment make.") (citing Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001)); Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) (Title VII does not "purge the workplace of vulgarity"); Estes v. Georgetown Univ., 231 F. Supp. 2d 279 (dismissal "is appropriate where there is evidence of only isolated comments, teasing, or offhand comments."); Kidane v. Northwest Airlines, Inc., 41 F. Supp. 2d 12, 16 (D.D.C. 1999) ("[I]solated remarks are not sufficient to state a claim of hostile work environment under Title VII.").

¹⁸ Furthermore, the undercover work claim is not actionable because it fails to allege the type of adverse employment action required under Title VII. <u>See</u>, <u>supra</u>, at 32-33.

the claims in this action should be dismissed for failure to exhaust administrative remedies.

F. Ramon Martinez

Ramon Martinez alleges national origin discrimination based on non-selections to competitive positions and a hostile work environment. See Complaint ¶ 25-26, 74. These claims should be dismissed for three reasons. First, the Complaint does not even specify what competitive positions Mr. Martinez claims he failed to receive. Instead it merely alleges, inter alia, "[s]ince 1997, Special Agent Martinez has applied for numerous GS-14 positions and made the best qualified on several lists, yet has not been selected." Complaint ¶ 16. This vague allegation fails to state a claim because it does not set forth a basis upon which it reasonably could be determined whether he fulfilled the statutory and regulatory prerequisites to sue with respect to promotions.

Second, the hostile environment claim states that his supervisor referred to him as an "Excitable Mexican" and that another supervisor called him an "inferior Investigator." For the reasons discussed, supra, n.17, stray, isolated comments such as these do not, as a matter of law, constitute a hostile work environment claim.

Third – and fatal to all of his claims – Mr. Martinez failed to exhaust his administrative remedies. In 1994 and 1995, Mr. Martinez filed his first two individual administrative complaints, but neither one mentioned any promotion or hostile work environment claim. See Harvey Declaration ¶¶ 65-67. Furthermore, on February 24, 1998, Mr. Martinez entered into a settlement agreement with Customs, terminating those two administrative complaints. See Harvey Declaration ¶ 67. Mr. Martinez's third individual administrative complaint was based on a suspension, and it too did not mention any promotions or hostile work environment. See Harvey Declaration ¶ 68. In any event, the

third complaint was dismissed as moot on February 15, 1995. See Harvey Declaration ¶ 68, Exh. 49. Thus, any claims arising from it would be time-barred under 29 C.F.R. § 1614.407(a). Therefore, Mr. Martinez's individual claims of discrimination should be dismissed.

G. Ricardo Sandoval

Plaintiff Ricardo Sandoval alleges that he suffered discrimination based on his national origin because he has not been promoted to a GS-15 level. See Complaint ¶¶ 31-32.¹⁹ He also complains of retaliation. See id. ¶¶ 81-83. Both claims should be dismissed for failure to exhaust administrative remedies.

With respect to the allegations about non-promotions, Mr. Sandoval alleges that in February 2002, despite a request that he be placed as "the acting SAIC of the El Centro, California Office of Investigations," Customs denied him this GS-15 position. See Complaint ¶31. Mr. Sandoval also alleges that in his current position, he supervises five GS-14 supervisors, and he therefore should be compensated as the GS-15 level. See id. ¶32. Although Mr. Sandoval filed several administrative complaints, the most recent filing occurred on March 26, 1998. A final decision on that complaint was rendered finding no evidence of discrimination based on age or retaliation. See Harvey Declaration ¶87. Mr. Sandoval has not filed any subsequent complaints, and, in particular, no administrative complaint that mentions or alludes to any recent events, i.e., events on or after February 2002. Accordingly, Mr. Sandoval's failure to promote claims should be dismissed.

¹⁹ Mr. Sandoval's non-promotion allegations are contained in the "Discrimination In Transfers, Assignments and Denial of Other Career-Enhancing Opportunities" section of the complaint. Despite the placement of the claim, Mr. Sandoval seems to be alleging denial of a <u>promotion</u> to GS-15.

Similarly, Mr. Sandoval's retaliation claims should also be dismissed. The Complaint states that Mr. Sandoval already received a recovery from a California federal jury in 1998 based on this retaliation claim. See Complaint ¶83. Mr. Sandoval plainly cannot resurrect these retaliation claims that have already been fully adjudicated. Moreover, with respect to the allegations that Mr. Sandoval suffered retaliation when he was not selected to six GS-15 foreign attache positions, see Complaint ¶¶83, he fails to provide any dates for these non-selections, and, furthermore, none of his administrative complaints mentions these positions. See Harvey Declaration ¶¶80-88. Even if they did, the claims would be time-barred because the most recent administrative filing occurred in March 1998. See 29 C.F.R. § 1614.407(a). Based on the failure to file any administrative complaint about the denial of foreign attache positions, Mr. Sandoval's retaliation claims should be dismissed.

H. Ruben Gonzalez

Plaintiff Ruben Gonzalez alleges individual claims of national origin discrimination in connection with promotions, lateral transfers, undercover assignments, and awards and bonuses. See Complaint ¶¶ 21, 29, 36, 51. He also alleges retaliation for engaging in protected EEO activity. See id. ¶ 79. Each of these claims should be dismissed for a variety of reasons, including failure to state a claim, failure to exhaust administrative remedies, and/or failure to allege an actionable Title VII employment action.

Mr. Gonzalez's promotions claim does not cite a single job promotion he claims he failed to receive, but instead alleges that "[f]rom 1994 to 2001, Special Agent Gonzalez applied for over thirty-four (34) GS-15 and Senior Executive Service ("SES") supervisory positions including positions as SAIC, ASAIC, Director, Foreign Area Director, and Customs Liaison . . . and yet he was never

interviewed for any of them." Complaint ¶21. This vague allegation fails to state a claim because it does not set forth a basis upon which it reasonably could be determined whether he fulfilled the statutory and regulatory prerequisites to sue with respect to promotions.

Moreover, a review of Mr. Gonzalez's administrative complaints shows that only one of them mentions a promotion to a GS-15 position or to an SES position. See Harvey Declaration ¶ 73, Exh. 52. That administrative complaint, however, is defective because Mr. Gonzalez failed to seek EEO counseling within 45 days of October 8, 1999 – the date he learned of his non-promotion to the GS-15 Internal Affairs position. See 29 C.F.R. § 1614.105 ("An aggrieved person must initiate contact with a counselor within 45 days of the date of the matter alleged to be discriminatory"); Harvey Declaration ¶¶ 72-73; Batts Declaration ¶¶ 6, 17. Despite learning of the promotion on October 8, 1999, he waited until December 6, 1999 to seek counseling, which was past the 45-day deadline. See Harvey Declaration ¶¶ 72-73; Batts Declaration ¶ 6 (Mr. Gonzalez "first contacted an EEO counselor on December 6, 1999"), ¶ 11 ("I do not dispute having met with Mr. Gonzalez . . . [on or about November 1999]. However, I clearly recall informing him that I was not an EEO counselor, and that his discussions with me would not toll the time frame for filing an EEO complaint I reminded him that he would have to contact one of the agency's EEO counselors within 45 days of the alleged discriminatory event."). In other words, besides the fact that the allegations pertaining to Mr. Gonzalez's failure to promote claim were so vague that they cannot possibly constitute a claim, Mr. Gonzalez did not seek timely EEO counseling for the promotion claims. Thus, his promotion claim at the EEO level was untimely and should be dismissed.

Mr. Gonzalez's next claim, alleging discrimination in connection with lateral transfers, should be

dismissed for multiple reasons. First, like the promotions claim, he fails state what transfer(s) he believes to have been discriminatory. See Complaint ¶29 ("Special Agent Gonzalez attempted to secure a lateral transfer to other offices in the United States, but was denied. He was even denied other locations considered to be hardship areas such as the Texas-Mexico border and other areas on the southwest border.") Second, denial of a lateral transfer would not have resulted in a change in pay, or in diminution of benefits, so this lateral transfer claim is not actionable under Title VII. See Brown v.

Brody, 199 F.3d 446, 457 (D.C. Cir. 1999) ("[A] plaintiff who is made to undertake or who is denied a lateral transfer – that is, one in which she suffers no diminution in pay or benefits–does not suffer an actionable injury unless there are some other materially adverse consequences."); Seraphin Declaration ¶21 (stating that lateral moves for Special Agents in the 1811 series "do not change the employee's grade, base salary or benefits"). Finally, Mr. Gonzalez failed to file an administrative complaint alleging discrimination in connection with lateral transfers, and therefore, it should be dismissed on exhaustion grounds as well. See Harvey Declaration ¶ 70-79.

Next, Mr. Gonzalez's claims of discrimination in connection with assignments to undercover work should be dismissed because these claims concerning assignments were never raised in any administrative complaint. See Harvey Declaration ¶¶ 70-79, Exh. 50, 52, 60, 63. Furthermore, and as explained supra, at 32-33, there is nothing discriminatory or adverse about undercover work assignments, and, thus, they are not actionable under Title VII. See Brown, 199 F.3d at 453 (not all employment decisions are actionable under Title VII, but only actions that constitute "adverse action by the employer" are "legally cognizable"). Accordingly, the undercover claims should be dismissed.

Mr. Gonzalez also alleges that he was discriminated against on the basis of his national origin

when he was not paid a cash award for his participation in "Operation Powerplay." See Complaint ¶ 51. Mr. Gonzalez raised this cash award issue in administrative complaint TD 01-1068, although it is not clear that he based that claim on national origin discrimination. Although he marked the box indicating that race and national origin were bases of his administrative complaint, the written description of his claims in that complaint appears only to allege retaliation for EEO activity in connection with the cash award issue. See Harvey Declaration Exh. 60, p. 1 ("I appreciate your consideration in conciliating my current complaint of retaliation. . . . It is my believe [sic] that the U.S. Customs Service is continuously retaliating against me for exercising my rights in utilizing the EEO process."); id., Exh. 60, p.3 ("In the complaint the retaliation resulted in that [sic] I was denied cash awards"). Likewise, when Mr. Gonzalez sought EEO counseling regarding the cash award, his letter stated that he "believe[d] this additional act illustrates the continual disparate, adverse and retaliatory treatment against [him] for exercising [his] prerogative to utilize the EEO process and [his] membership in the Hispanic Class Action Litigation." <u>Id.</u>, Exh. 58, p. 3. Mr. Gonzalez does not, in the instant Complaint, allege a claim of retaliation based on the "Operation Powerplay" cash award.

In any event, Mr. Gonzalez's individual claim of national origin discrimination based on that award cannot survive summary judgment because it does not establish a prima facie case of discrimination. Under McDonnell Douglas, to establish a prima facie case, Mr. Gonzalez must show that he and a similarly situated person who was not a member of his protected class were treated disparately. See 411 U.S. at 802. Moreover, Mr. Gonzalez must show that he and the comparable person are "similarly situated in all respects." Mitchell v. Toledo Hospital, 964 F.2d 577, 583 (6th Cir. 1992). Mr. Gonzalez cannot make such a showing here.

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According to the manager who decided against giving Mr. Gonzalez an award for his participation in "Operation Powerplay," the participants who did receive the award "were either instrumental in the development and implementation of Operation Powerplay, volunteered for assignments including weekends and evenings, or ensured the timely and accurate communication and coordination of all enforcement activity under the auspices of this operation." Affidavit of Marcy Foreman ¶ 5, attached as Exhibit 1 to the Supplemental Declaration of Mariam Harvey. Mr. Gonzalez did not receive the award because he did not meet the criteria:

[T]here were a number of reasons that [Mr. Gonzalez] did not receive an award for his participation in Operation Powerplay. Firstly, there were limited monies to be awarded. Therefore, I established certain criteria when determining who should receive an award. Those criteria pertained to those employees who went above and beyond their assigned tasks. Specifically, those individuals who were instrumental in initiating and implementing the operation, and those individuals who volunteered to work evenings and weekends, received awards. To the best of my recollection, [Mr. Gonzalez] had the same opportunity as the other group members to volunteer to lead, initiate, and implement this operation. [He] chose not to. In addition, to the best of my recollection, [Mr. Gonzalez], unless assigned, did not volunteer for any evening or weekend shifts. [He] only did what was tasked, nothing above or beyond those duties.

<u>Id.</u>

Under these facts, Mr. Gonzalez was not "similarly situated <u>in all respects</u>" to the participants who received the award. <u>Toledo Hospital</u>, 964 F.2d at 583. Unlike those participants, he did not go above and beyond his assigned tasks and did not volunteer for any evening or weekend shifts. <u>See</u>

Affidavit of Marcy Foreman ¶ 5 (Exhibit 1 to the Supplemental Declaration of Mariam Harvey).

Because he failed to meet the basic criteria for the award (criteria based on factors, such as volunteering for assignments, which were in his control), he cannot make out a prima facie case of discrimination. His claim thus cannot survive summary judgment. Furthermore, his failure to meet the

basic criteria is a legitimate, nondiscriminatory reason for the denial of the award, and his claim could be dismissed solely on that basis as well.

Finally, Mr. Gonzalez's last federal claim alleges retaliation in connection with his participation in the administrative class complaint brought by Mr. Contreras. See Complaint ¶ 79. This claim should be dismissed for failure to exhaust. Mr. Gonzalez did not file an administrative complaint alleging retaliation for having participated in the Mr. Contreras' administrative suit. See Harvey Declaration ¶¶ 70-79. Accordingly, because he failed to follow the required administrative procedures, this individual claim should be dismissed.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment should be granted and judgment should be entered for the defendant.

Respectfully submitted,

ROBERT D. McCALLUM, JR.

OF COUNSEL: Assistant Attorney General

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MIGUEL A. CONTRERAS, et al., Plaintiffs	
v.) Case No. 1:02CV00923(JR)
TOM RIDGE, SECRETARY, DEPARTMENT OF HOMELAND SECURITY, Defendant.1)))) _)

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Rule 7.1(h), defendant Tom Ridge, Secretary for the Department of Homeland Security, by his counsel, the United States Department of Justice, hereby submits the following statement of material facts as to which there is no genuine issue in connection with the motion for summary judgment filed herewith:

I. Special Agents

- 1. Up until March 9, 2003, the United States Customs Service ("Customs" or "Customs Service") was a bureau within the United States Department of Treasury ("Treasury"). See Susan B. Zaner Declaration ("Zaner Declaration") ¶ 3.
- 2. On March 9, 2003, the Customs Special Agent workforce became a part of the Bureau of Immigration and Customs Enforcement in the Department of Homeland Security (also "Customs" or "Customs Service"). See Zaner Declaration ¶ 3; John J. Seraphin Declaration ("Seraphin Declaration") ¶ 1.
- 3. Series 1811 is an occupational code for the criminal investigator position. Duties of these investigators include the investigation and enforcement of violations of Customs and related laws, rules and regulations. These investigations may be civil or criminal in nature. Investigations include the utilization of various

Pursuant to Fed. R. Civ. P. 25(d)(1), Tom Ridge, Secretary of the Department of Homeland Security, is hereby substituted for the Secretary of Treasury. On March 9, 2003, the majority of the Customs special agent workforce became a part of the Bureau of Immigration and Customs Enforcement in the Department of Homeland Security.

- investigative techniques including interviewing, and examining physical, documentary, and other types of evidence. See Zaner Declaration ¶ 7.
- 4. Lateral moves for Special Agents in the 1811 series "do not change the employee's grade, base salary or benefits." Seraphin Declaration ¶ 21.

II. Undercover Operations and Assignments

- 5. Participation in undercover operations is always on a volunteer basis. <u>See</u> Paul Michael Kilcoyne Declaration ("Kilcoyne Declaration") ¶ 7.
- 6. Participation in the undercover training program is one of the few strictly volunteer assignments in Customs. See id. ¶¶ 8-9.
- 7. Undercover operatives may opt out of an ongoing undercover investigation at any time, to ensure the safety of the undercover agents. See id. ¶ 13.
- 8. Undercover assignments are perceived as enhancing agents' promotion potential. See id. ¶ 16.
- 9. Participation in undercover assignment has been career enhancing for many special agents. See id. ¶ 16.

III. <u>Miguel Contreras</u>

- 10. Mr. Contreras filed twelve separate administrative complaints with the Department of Treasury. See Mariam Harvey Declaration ("Harvey Declaration") ¶¶ 27-64.
- 11. Mr. Contreras is the only one of the eight plaintiffs who filed an administrative complaint alleging national origin discrimination on behalf of a class of Hispanic special agents. See Complaint ¶ 3; Harvey Declaration ¶ 35.
- 12. On March 23, 1995, Mr. Contreras filed his sole class EEO administrative complaint, titled "Complaint of Class Discrimination of Miguel Angel Contreras." This complaint was later designated as TD 95-0014C. See Harvey Declaration ¶ 35, Ex. 18.
- 13. Prior to filing the class administrative complaint, on January 9, 1995, Mr. Contreras requested EEO counseling regarding his class claims. See Harvey Declaration ¶ 33.
- 14. Not one of Mr. Contreras' individual administrative complaints mentions a 1993

- GS-13 Customs Representative position in Hermosillo, Mexico. <u>See</u> Harvey Declaration ¶¶ 27-64.
- 15. Mr. Contreras' individual administrative EEO complaint designated TD 99-4107 was dismissed as untimely on April 5, 1999, and no appeal was taken. See Harvey Declaration ¶ 46.
- 16. Mr. Contreras entered into a settlement agreement that resolved all issues relating to the allegations raised in his individual administrative complaint designated TD 00-4106M, concerning his removal in 1999. See Harvey Declaration ¶¶ 47-50.
- 17. In early 2002, an EEOC administrative judge dismissed administrative complaint TD 00-4194 for failing to state a claim on the grounds that being the subject of an investigation did not make Mr. Contreras an aggrieved individual under Title VII. See Harvey Declaration ¶ 55, Ex. 36. No appeal was taken on the dismissal. See id. ¶ 55.
- 18. Although Mr. Contreras sought EEO counseling and/or wrote a letter to an EEO manager about many of the issues raised in administrative complaint TD 00-4269, he did not mention anything about attending the annual Customs National Hispanic Agents Association Conference to the counselor. See id. ¶ 56, Ex. 37-39.
- 19. Attendance at the Customs National Hispanic Agents Association meetings would not have affected Mr. Contreras' salary or his benefits. See Richard J. Hoglund Declaration ¶ 10.
- 20. Attendance at such conferences is not a critical factor in evaluating an employee's application for promotion. See id. ¶ 11.
- 21. Mr. Contreras has attended more than thirty training courses since 1988, all of which Customs paid for. See Lee Heffelfinger ("Heffelfinger") Declaration ¶ 4, Ex. 1
- 22. Mr. Contreras attended one 12-day training in 1995, four trainings in 1996 (one of which was a 12-day training), five trainings in 1998 (one of which was a 10-day training), and four trainings in 1999. See id., Ex. 1.
- 23. Mr. Contreras voluntarily changed from a GS-14 grade to GS-13, effective May 7, 2000, and he took a Criminal Investigator position in the Office of Investigations in Yuma, Arizona. See Zaner Decl. ¶ 28.
- 24. There is no reference in the agency's electronic system that tracks disciplinary

actions to a written reprimand concerning Mr. Contreras for a security violation in 1992. Nor is there any reference to such a reprimand in Mr. Contreras's Official Personnel Folder or the Department of Agriculture database that is used to administer employee pay. See Mari Yonkers Declaration ("Yonkers Declaration") ¶ 7.

- 25. Any 1992 written reprimand concerning a security violation by Mr. Contreras did not result in an official disciplinary action by the agency. See id. ¶ 10.
- 26. Any 1992 written reprimand concerning a security violation by Mr. Contreras did not result in a reduction of pay or loss in benefits for Mr. Contreras. See id. ¶ 8
- 27. The letter of caution Mr. Contreras received on or about March 7, 2002 was not kept in his official personnel folder, it did not constitute an official disciplinary action, and it did not result in any reduction of pay or loss in benefits for Mr. Contreras. See Yonkers Declaration ¶ 5.
- 28. The agency's database for disciplinary actions contains no record of a 1998 investigation into Mr. Contreras's the possible misuse of the Treasury Enforcement Communications System ("TECS"). Nor is there a reference to such an investigation in Mr. Contreras's Official Personnel Folder or the Department of Agriculture database that is used to administer employee pay. See id. ¶ 11
- 29. Accordingly, this alleged investigation did not constitute an official disciplinary action, and it did not result in any loss of pay or benefits to Mr. Contreras. See id. ¶ 12.
- 30. The 2000 investigation concerning an allegation that Mr. Contreras disclosed confidential information to his cousin (by marriage) did not result in the imposition of any discipline. The investigation also did not result in the reduction of pay or loss of benefits. See id. ¶ 13.
- 31. The 1994 vacancy announcement for a GS-14 supervisory criminal investigator position Mr. Contreras applied for in El Paso, Texas, and in Laredo, Texas, required each applicant to address six criteria: (1) the ability to direct the operational activities of an office or program; (2) the ability to supervise others; (3) the ability to identify problems and develop innovative programs/systems to meet changing needs; (4) knowledge of federal law and procedure; (5) the ability to communicate and interact effectively with other elements and agencies; and (6) the ability to implement Equal Employment Opportunity Program initiatives. See Jacqueline Small Declaration ("Small Declaration") ¶¶ 4, 8.

- 32. Fifty-two applicants applied under the 1994 announcement. See id. ¶ 6.
- Because more than 10 applicants applied, an independent panel of subject matter experts was established to review the applications. See id. ¶ 9.
- 34. Each applicant was rated by the panel on each of the six qualification categories, in order to establish a selection register, or "best qualified list" ("BQL). See id. ¶¶ 10-12.
- 35. The panel operated independently from the selecting official. See id. \P 9.
- 36. The highest total score that an applicant could receive, after all six category scores were added up, was a 30.0. See id. ¶ 14.
- 37. Applicants for the El Paso position who scored under 22.5 did not make the BQL. See id. ¶¶ 15-16.
- 38. The selecting official was not authorized to select an applicant that applied competitively but did not make the BQL. See id. ¶ 17.
- 39. Mr. Contreras received a total score of 3.0 out of 30.0, and as a result did not make the BQL. See id. ¶ 18.
- 40. The eight applicants who did make the El Paso BQL received scores of 22.5 or above (with the highest score at 28.5). See id. ¶ 16.
- 41. Because of his failure to make the BQL, the selecting official did not have the option to select Mr. Contreras for the El Paso position. See id. ¶¶ 17-18.
- 42. Mr. Contreras' score for the Laredo position was also a 3.0, whereas the three candidates who made the BQL for that position scored from 22.5 to 28.5. See id. ¶ 16.
- 43. Mr. Contreras did not make the BQL for the Laredo position. See id. ¶ 18.

IV. John Yera

44. Mr. Yera has never filed an administrative EEO complaint against the Secretary of Treasury, either individually or as a class agent on behalf of a purported class of Customs employees. See Harvey Declaration ¶ 19.

V. William Velasco

45. Mr. Velasco has filed one formal individual administrative EEO complaint against the Secretary of Treasury, designated TD 95-1245. On April 11, 1997, that complaint was settled and dismissed with prejudice. See Harvey Declaration ¶¶ 15-18, Ex. 5-6.

VI. Frank Almonte

46. Mr. Almonte has filed one formal individual administrative EEO complaint against the Secretary of Treasury, designated TD 01-3019. See Harvey Declaration ¶ 12, Ex. 1-2. He withdrew that administrative complaint with prejudice on or about January 2001. See Harvey Declaration ¶ 13, Ex. 3-4.

VII. Stephen Mercado-Cruz

- 47. Mr. Mercado-Cruz filed two individual administrative EEO complaints, TD 91-2239 and TD 92-2018, in 1991. Final agency decisions were issued for these complaints, on December 10, 1991 and February 3, 1993, respectively, finding no discrimination or retaliation. See id. ¶¶ 20-21, Ex. 7-8.
- 48. Mr. Mercado-Cruz has filed only one other individual administrative EEO complaint against the Secretary of Treasury, TD 00-4110. See id.¶ 23, Ex. 9. This administrative complaint did not make the claims upon which Mr. Mercado-Cruz bases this suit, i.e., claims relating to undercover work, foreign language awards, or hostile environment.

VIII. Ramon Martinez

- 49. Mr. Martinez filed two individual administrative EEO complaints in 1994 and 1995, TD 94-1120 and TD 96-1078. See Harvey Declaration ¶¶ 66-67, Ex. 47-48. On February 24, 1998, Mr. Martinez and the Treasury Department entered into a settlement agreement, resolving these complaints. See id. ¶ 67.
- 50. Mr. Martinez has filed only one other individual administrative complaint against the Secretary, in January 1995, designated as TD 95-1127. This case was dismissed as moot on February 15, 1995, and no appeal was taken. See id. ¶ 68.

IX. Ricardo Sandoval

- 51. On November 8, 1993, Mr. Sandoval filed his first individual administrative complaint, TD 94-4099. That complaint was withdrawn on April 4, 1994. See Harvey Declaration ¶ 80, Ex. 65.
- 52. He filed his second and third individual administrative complaints, designated TD

94-4070 and TD 94-4158, in 1994. <u>See</u> Harvey Declaration ¶¶ 82-83, Ex. 66-67. The Department of Treasury issued a final agency decision, on March 13, 1995, dismissing these administrative complaints, after finding no discrimination. <u>See id.</u> Mr. Sandoval did not appeal these dismissals with the agency. <u>See id.</u> ¶¶ 82-83.

- On August 30, 1996, he filed a fourth individual administrative complaint, TD 96-4247, and on March 26, 1998, a final decision was issued, dismissing the complaint and finding that the evidence did not support the claims. Mr. Sandoval did not appeal this decision. See id. ¶¶ 85-87, Ex. 68-70.
- Mr. Sandoval filed his last administrative EEO complaint against the Secretary of Treasury on August 7, 1997, which was designated TD 97-4289. This complaint was dismissed for failure to state a claim on September 18, 1997, and Mr. Sandoval did not appeal that dismissal. See id. ¶ 81.

X. Ruben Gonzalez

- 55. Mr. Gonzalez filed his first administrative EEO complaint against the Secretary of Treasury on February 13, 1995, which was designated TD 95-2142. See id. ¶¶ 70-71, Ex. 50.
- Mr. Gonzalez filed his second administrative EEO complaint against the Secretary of Treasury on February 2, 2000, which was designated TD 00-1091. See id. ¶¶ 73, Ex. 52. He alleged race and national origin discrimination, and retaliation, because he was not selected for three GS-15 promotions on October 8, 1999. See id.
- 57. Mr. Gonzalez initially sought counseling for the alleged non-promotion discrimination on December 6, 1999. See Linda Lynn Batts Declaration ("Batts Declaration") ¶ 6.
- 58. Mr. Gonzalez later requested that his records be changed to reflect that he sought counseling on November 5, 1999, see Harvey Declaration ¶ 73.
- 59. Ms. Batts is not, and was not, an EEO counselor. See Batts Declaration ¶¶ 6-16.
- 60. During Ms. Batts' November 5, 1999 discussion with Mr. Gonzalez, she told him that she was not a counselor and that their conversation would not toll the time frame for filing an EEO complaint. See id. ¶ 11.
- 61. Ms. Batts informed Mr. Gonzalez that he would have to contact an EEO counselor within 45 days of any alleged discriminatory conduct. See id. ¶ 11.

- Mr. Gonzalez filed another administrative EEO complaint against the Secretary of Treasury on January 3, 2001, which was designated TD 01-1068, alleging retaliation in connection with the denial of a cash award and a denial of an assignment to serve as Assistant Director or Director of the Financial Investigation Division. See Harvey Declaration ¶ 76, Exh. 60.
- 63. Marcy Foreman, the manager in charge of distributing the cash award for "Operation Powerplay," established certain criteria in determining who should receive the award. See Affidavit of Marcy Foreman ¶ 5, attached as Exhibit 1 to the Supplemental Declaration of Mariam Harvey.
- 64. The criteria were necessary because there were limited monies to be awarded. <u>See</u> id.
- 65. Under those criteria, awards were given to those employees who went above and beyond their assigned tasks. See id.
- 66. Specifically, those individuals who were instrumental in initiating and implementing the operation, and those individuals who volunteered to work evenings and weekends, received awards. See id.
- 67. Mr. Gonzalez did not volunteer for any evening or weekend shifts. See id.
- 68. Mr. Gonzalez had the same opportunity as the other group members to volunteer to lead, initiate, and implement "Operation Powerplay." See id.
- 69. According to Marcy Foreman, Mr. Gonzalez "only did what was tasked, nothing above or beyond those duties," with respect to "Operation Powerplay." See id.
- 70. The participants who did receive the cash award were either instrumental in the development and implementation of "Operation Powerplay," volunteered for assignments including weekends and evenings, or ensured the timely and accurate communication and coordination of all enforcement activity under the auspices of the operation. See id.
- 71. Mr. Gonzalez filed no other administrative complaints against the Secretary of Treasury. See Harvey Declaration ¶ 79.

Respectfully submitted,

ROBERT D. McCALLUM, JR.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MIGUEL A. CONTRERAS, et al.,)
Plaintiffs)
)
v.) Case No. 1:02CV00923(JR)
)
TOM RIDGE, SECRETARY,)
DEPARTMENT OF HOMELAND)
SECURITY,)
Defendant. ¹)
	_)

PRAECIPE RE NOTICE OF EXHIBIT ATTACHMENT

Pursuant to paragraph 7 of Court's Order Establishing Procedures for Electronic Filing, the exhibits to Mariam Harvey's Declaration are filed separately, on compact disc, with the Clerk's Office because the documents total more than fifty pages. Contents of the exhibits are listed in the index attached hereto, and the compact disk will be accompanied by a conventional certificate of service. This praecipe is concurrently being filed with Defendant's Motion for Summary Judgment and its accompanying papers in support of the Motion.

¹ Pursuant to Fed. R. Civ. P. 25(d)(1), Tom Ridge, Secretary of the Department of Homeland Security, is hereby substituted for the Secretary of Treasury. On March 9, 2003, the majority of the Customs special agent workforce became a part of the Bureau of Immigration and Customs Enforcement in the Department of Homeland Security.

Respectfully submitted,

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MIGUEL A. CONTRERAS, et al., Plaintiffs)
v.) Case No. 1:02CV00923(JR)
TOM RIDGE, SECRETARY, DEPARTMENT OF HOMELAND))
SECURITY,)
Defendant.)
	_)

INDEX OF EXHIBITS TO DECLARATION OF MARIAM HARVEY

- 1. Individual Complaint of Employment Discrimination for Frank Almonte, with attachments, October 21, 2000
- 2. Memorandum to Linda Batts from Dorian Morley re: TD Case Number 01-3019, October 26, 2000
- 3. Withdrawal Statement of Frank Almonte, January 24, 2001
- 4. Letter to Frank Almonte from Dorian Morley re: withdrawal of complaint of TD Case Number 01-3019, January 24, 2001
- 5. Individual Complaint of Employment Discrimination for Evelio William Velasco, (no date) with attachments
- 6. Letter to Dave Jones from Michael Morgan-Gaide re: TD Case Number 95-1245, June 30, 1995
- 7. Case Data re: Stephen Mercado, Case No. 91-2239, July 1, 1991
- 8. Case Data re: Stephen Mercado, Case No. 92-2018, October 17, 1991
- 9. Individual Complaint of Employment Discrimination, Stephen Mercado, January 18, 2000, with attachments
- 10. Letter to Stephen Mercado from Lois Hofmann re: TD Case No. 00-4110, February 4, 2000

- 11. EEO Counseling Report re: Miguel Contreras, September 26, 1994
- 12. Memorandum to Stephen Thatcher from Miguel Contreras, September 6, 1994
- 13. Individual Complaint of Employment Discrimination, Miguel Contreras, September 26, 1994
- 14. Individual Complaint of Employment Discrimination, Miguel Contreras, December 30, 1994
- 15. Letter to Miguel Angel Contreras from Lourdes M. Garay, February 2, 1995
- 16. Complaint of Class Discrimination Report of EEO Counseling re: Miguel A. Contreras, March 15, 1995
- 17. Notes of Miguel Contreras's February 16, 1995 Interview with EEO counselor
- 18. Class Discrimination Complaint, Miguel Contreras, March 23, 1995 with attachments
- 19. EEO Counseling Report, Miguel Contreras, July 15, 1997, with attachments
- 20. Memo to Director, Office of Human Resources From Vanaster Brown, Jr., September 8, 1997
- 21. Individual Complaint of Employment Discrimination, Miguel Angel Contreras, October 16, 1997, with attachments
- 22. Memorandum to Director, Regional Complaints Center from Anna M. Morales, with attached EEO Counseling Report re: Miguel Contreras, March 30, 1998
- 23. Chronology of Events, Informal EEO Issue of Miguel Contreras
- 24. Individual Complaint of Employment Discrimination, Miguel A. Contreras, March 17, 1998, with attachment
- 25. Letter to Miguel A. Contreras from Jo Ann Blank, April 13, 1998
- 26. Letter to Miguel A. Contreras from Lois Hoffmann re: TD Case No. 00-4107, April 5, 1999, with attachments
- 27. EEO Counseling Report Individual Complaint of Miguel A. Contreras, January 12, 2000

- 28. Memorandum from Miguel Angel Contreras, November 26, 1999
- 29. Individual Complaint of Employment Discrimination, Miguel Contreras, January 18, 2000, with attachment
- 30. Letter to Miguel Contreras from Lois Hofmann re: TD Case No. 00-4017, February 10, 2000
- 31. Letter to Complaint Center from Miguel Angel Contreras, February 26, 2000
- 32. Letter to Miguel A. Contreras from Lois Hofmann re: TD Case No. 00-4107, August 24, 2000
- 33. Letter to Regional Complaint Center from Miguel Contreras, November 8, 2000
- 34. Individual Complaint of Employment Discrimination, Miguel Angel Contreras, April 21, 2000, with attachment
- 35. Letter to Miguel A. Contreras, from Lois Hoffmann re: TD Case No. 00-4194, August 21, 2000
- 36. Letter to Lois Hoffmann from Kurt Hodges (Administrative Judge -EEOC), with attached Order of Dismissal, December 24, 2002
- 37. U.S. Customs Service Informal Complaint Form re: Miguel Contreras, June 28, 2000; Counseling Report re: Miguel Contreras, June 6, 2000
- 38. EEO Counselor's Report Individual Complaint of Miguel Contreras, June 29, 2000
- 39. Individual Complaint of Employment Discrimination, Miguel Contreras, July 11, 2000, with attachment
- 40. Letter to Miguel A. Contreras from Lois Hoffmann re: TD Case No. 00-4269, August 25, 2000
- 41. EEO Counseling Report Individual Complaint of Miguel Contreras, December 21, 2000
- 42. Letter to Lorainee Cremin and William J. Gimmler from Miguel Angel Contreras, October 4, 2000

- 43. Individual Complaint of Employment Discrimination, Miguel Contreras, December, 28, 2000, with attachment
- 44. Letter to Miguel Contreras from Vincent Iglio (Customs Service), March 7, 2002
- 45. Letter to Miguel Contreras from Steve Arizaga (Customs Service) March 6, 2002
- 46. Individual Complaint of Employment Discrimination, Miguel Contreras, April 5, 2002, with attachments
- 47. Individual Complaint of Employment Discrimination, Ramon J. Martinez, May 18, 1994 with attachments
- 48. Individual Complaint of Employment Discrimination, Ramon J. Martinez, December 19, 1995, with attachment
- 49. Case Data re: Ramon J. Martinez Case No. 95-1127
- 50. Individual Complaint of Employment Discrimination, Ruben Gonzalez, February 13, 1995, with attachments
- 51. EEO Counseling Report Individual Complaint of Ruben E. Gonzalez, February 1, 2000 with attachments
- 52. Individual Complaint of Employment Discrimination, Ruben E. Gonzalez, February 2, 2000
- 53. Letter to Kittonia Brooks from Ruben Gonzalez, February 24, 2000
- 54. Memorandum to File from Kittonia Brooks re: Ruben E. Gonzalez TD Case No. 00-1091, February 24, 2000
- 55. Letter to Ruben Gonzalez from Michael Morgan-Gaide re: TD Case No. 00-1091, March 1, 2000
- 56. EEO Counselor's Report, October 10, 2000, with attachments
- 57. Memorandum to Special Assistant to the Commissioner from Michael Morgan-Gaide re: Complaint of Ruben Gonzalez TD Case No. 00-1209, July 25, 2000
- 58. Memorandum to Special Assistant to the Commissioner from Michael Morgan-Gaide re: Complaint of Ruben Gonzalez TD Case No. 00-1209, November 22, 2000

- 59. Memorandum to Martha Buracker and Edward Hoisington from Senora Coggs re: Request for Counseling, October 26, 2000; Memorandum to Laureen Cremin from Ruben E. Gonzalez re: Complaint of Hostile Work Environment/Retaliation, October 25, 2000
- 60. Letter from Ruben E. Gonzalez to Michael Morgan-Gaide, with attached Individual Complaint of Employment Discrimination, January 3, 2001
- 61. Memorandum to Special Assistant to the Commissioner from Michael Morgan-Gaide re: Complaint of Ruben Gonzalez TD Case No. 01-1068, February 2, 2001
- 62. Letter to Thomas Allison from Michael Morgan-Gaide re: Complaint of Ruben Gonzalez TD Case No. 01-1086, February 2, 2001
- 63. Letter to Thomas Allison from Michael Morgan-Gaide re: Complaint of Ruben Gonzalez TD Case No. 00-1209, July 5, 2001
- 64. Letter to Viola Cole from Ruben E. Gonzalez, June 12, 2001
- 65. Case Data re: Ricardo A. Sandoval Case No. 94-4099
- 66. Case Data re: Ricardo A. Sandoval Case No. 94-4070
- 67. Case Data re: Ricardo A. Sandoval Case No. 94-4158
- 68. Individual Complaint of Employment Discrimination, Ricardo Sandoval, August 30, 1996, with attachments
- 69. Memorandum to EEO Officer, South Pacific CMC from Director, Regional Complaint Center re: Complaint of Ricardo Sandoval TD Case No. 96-4247, November 13, 1996
- 70. Letter to Dennis L. Ross from Mariam G. Harvey re: Complaint of Ricardo Sandoval Case No. 96-4247, March 26, 1998, with enclosures

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MIGUEL A. CONTRERAS, et al., Plaintiffs,))
v.) Case No. 1:02CV00923(JR)
TOM RIDGE, Secretary,)
Department of Homeland Security,)
Defendant.	

DECLARATION

- I, LINDA LYNN BATTS, declare the following to be true and correct:
- 1. I am the Special Assistant to the Commissioner of Customs for Equal Opportunity and Director of EEO for the Bureau of Customs and Border Protection, formerly the U.S. Customs Service. I have held this position since February 1994. Prior to occupying this position, I served as the EEO Manager for the Foreign Service at the U.S. Department of State (1991-1994). I have also managed EEO programs at the Department of Interior (1990-1991), the Department of the Army (1989-1990), the Defense Mapping Agency (1986-1989), the Department of Veterans Affairs (1982-1986), and the U.S. Equal Employment Opportunity Commission (1979-1982). This declaration is based on my personal knowledge or information provided to me in my official capacity.
- 2. In my present position as EEO Director, I supervise a full time staff of 55 employees. My duties include, but are not limited to, coordinating the Bureau's civil rights program, including ensuring its adherence to civil rights laws as well as principles of fairness and equal opportunity in employment. As part of my official duties, managers and supervisors often meet with me on matters of concern to them regarding equal employment. Occasionally, managers

will contact me seeking advice and guidance relative to their rights and responsibilities. I also work with individual complainants, advising them of their rights and responsibilities under the equal employment opportunity laws.

- 3. To initiate an administrative EEO proceeding, an employee first "must consult [an EEO] Counselor prior to filing [an administrative] complaint "29 C.F.R. § 1614.105(a).
- 4. Section 1614.105 states: "(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter. (1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action."
- 5. I have reviewed several documents related to a formal EEO complaint, designated TD 00-1209, filed by Ruben Gonzalez. Specifically, I have reviewed an EEO counseling report dated February 1, 2000, prepared by Adline Tatum of my staff (Exhibit 1 hereto); Mr. Gonzalez's formal complaint, dated February 2, 2000 (Exhibit 2 hereto); a Memorandum to File, dated February 24, 2000, and authored by Kittonia Brooks, EEO Specialist (Exhibit 3 hereto): and a letter dated February 24, 2000, from Ruben E. Gonzalez to Ms. Kittonia Brooks at the Regional Complaint Center in Washington, D.C. (Exhibit 4 hereto).
- 6. Upon review of the aforementioned documents, it appears that Mr. Gonzalez first became aware of the alleged discrimination pertaining to his non-selections under vacancy announcement numbers HEADQ/99-148, 158, 159MCC, on October 8, 1999, and first contacted an EEO counselor on December 6, 1999 (Exhibit 2). I note that the date of December 6, 1999, is crossed out on the first page of the counseling report and replaced by a date of November 5,

1999. Under the handwritten "November 5, 1999" date on the counseling report is an annotation "K. Brooks" (Exhibit 1).

- 7. Exhibit 3 is a Memorandum to File, authored by Kittonia Brooks. The memo states that on February 24, 2000, Ms. Brooks spoke to Mr. Gonzalez about the date he first sought counseling because Mr. Gonzalez's complaint appeared to be untimely. In her memo, Ms. Brooks concludes that "the Center will use November 5, 1999, as the initial date Complainant sought counseling," because Mr. Gonzalez told her that he met with me on November 5, 1999, "regarding his non-selection issues." Ms. Brooks further states that she contacted Senora Coggs of my staff, who told her that I had met with Mr. Gonzalez on November 5, 1999, "regarding his non-selections."
- 8. Exhibit 4 is a letter from Ruben Gonzalez to Ms. Brooks in which he attempts to clarify the date he sought counseling on the above referenced non-selections. He states that he "first met with Linda Batts, Special Assistant to the Commissioner, EEO on November 5, 1999 and sought her counsel about my non-selection for a promotion to which I had made the Best Qualified List (BQL)."
- 9. Prior to the execution of this declaration, an EEO specialist or other agency official has never contacted me concerning the timeliness of Mr. Gonzalez's complaint of discrimination concerning vacancy announcement numbers HEADQ/99-148, 158, 159 MCC.
- 10. Rather, it appears that Ms. Brooks changed the date counseling was sought by Mr. Gonzalez to November 5, 1999, based upon information gathered from Mr. Gonzalez and Ms. Coggs regarding my meeting with Mr. Gonzalez on that date.
- 11. I do not dispute having met with Mr. Gonzalez during that approximate time frame (on or about November 1999). However, I clearly recall informing him that I was not an EEO

counselor, and that his discussion with me would not toll the time frame for filing an EEO complaint on the matters of concern to him. I reminded him that he would have to contact one of the agency's EEO counselors within 45 days of the alleged discriminatory event.

- 12. I further recall that Mr. Franklin Jones, Director of EEO Operations at the Customs Service, was present at the referenced November meeting with Mr. Gonzalez.
- 13. Concerning the substance of the discussion at the meeting, I recall Mr. Gonzales stating to us that he was not particularly interested in filing a complaint on this issue, but was meeting with Mr. Jones and myself to enlist our support in getting him promoted to the GS-15 level. He was emphatic that he wanted to obtain a promotion without having to initiate a complaint, indicated that he felt he was currently exceptionally qualified to do so, and stated that if he obtained a promotion, he would withdraw from any existing administrative EEO proceedings to which he was a party.
- 14. In my capacity as Special Assistant to the Commissioner, any number of employees express their EEO concerns to me. However, I always have made it a fundamental practice to inform them that I am not an EEO counselor, and that if they wish to file a discrimination complaint, they must contact an EEO counselor within 45 days of the event. We highly publicize the process throughout the agency through EEO posters and use of the payroll notices.
- 15. In my view, Mr. Gonzalez's meeting with me on or about November 1999, does not and cannot constitute the requisite contact with an EEO counselor as required by the regulations, and he was told this at the meeting. Furthermore, Mr. Gonzalez had previously filed formal EEO complaints and was aware of the regulatory requirement for timely contact with an EEO counselor.
 - 16. In addition, I did not authorize Ms. Kittonia Brooks to consider the meeting with Mr.

Gonzalez to constitute the requisite contact with an EEO counselor. In fact, I have never discussed this matter with her. I believe that her change of the date upon which EEO counseling was sought was in error.

17. It is my opinion that the above referenced complaint filed by Mr. Gonzalez is untimely.

I declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: March /92003.

Special Assistant to the Commissioner Bureau of Customs and Border

Protection

1300 Pennsylvania Ave, NW

Washington, D.C. 20229

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EXHIBIT 1

EEO COUNSELING REPORT - INDIVIDUAL COMPLAINT PART I (Through Initial Interview)

(Follow separate instructions) 3. EEO Counselor Name, 4. Date Counseling First Sought Regional Complaints EEO Officer Name, Address & Telephone inter Name, Address Address & Telephone December 6, 1999 November 5, 1999

5. Date of First Inc. Number Telephone Number Number ADLINE TATUM 1300 PENN AVE NW MICHAEL MORGAN-GAIDE FRANKLIN C. JONES 5. Date of First Interview WASHINGTON, D.C. WASH, RCC 1300 PENN AVE. NW (20) 927-0707 800 K STREET NW WASHINGTON, D.C. 20229 December 14, 1999 STE 640 WASHINGTON, D.C. 20001 (202) 927-1464 (202) 377-6730 6. Employee or Applicant: 8. Matter Causing Complaint or Issue COMPLAINANT'S NAME Ruben E. Gonzalez TITLE/SERIES/GRADE GS-1811-14 ☐ Appointment ☐ Pav ☐ Time/Attendance **HOME ADDRESS** 14703 Flagler Ct. ☐ Assign of Duties 🂢 Promotion CITY, STATE ZIP CODE Centreville, VA ☐ Training WORK TELEPHONE NUMBER (703) 266-4961 Work (202) 927-4195 □ Awards □ Reassignment Within Grade Incr. Basis or Type of Discrimination: ☐ Change to ☐ Working □ Reinstatement Lower Grade Conditions ☐ AGE (Date of Birth) KRACE ☐ COLOR ☐ Removal/ ☐ Classification Separation Other (Explain) ☐ Reprin ☐ Conversion to Full Time/CC □ NATIONAL ORIGIN □ SEX □ RELIGION ☐ Retire ☐ Evaluation/Appraisal ☐ Sexua ☐ Exam/Test Harass RETALIATION/REPRISAL NDICAP: for Involvement in ☐ Harassment □ Suspe ☐ MENTAL _ Complaints Process ☐ Overtime ☐ Termination ☐ PHYSICAL ___ During Probation 9. An EEO Counselor cannot reveal the identity of a person who has come for counseling, except when authorized to do so by the person counseled. Is Complainant willing to have his/her name revealed during the counseling stage? Yes 🗆 No 🗀. If answer is "Yes," Complainant must given permission by signing name in the space following: 10. Give date Complainant became aware of alleged discrimination if Organization Where Alleged Discrimination Occurred and Date of 11. Occurrence. substantially different from that shown in 10. Explain. U.S. Customs Service Office of Internal Affairs, HQ

If complaint appears to be untimely, what explanation is offered to explain why Counselor was not contacted within 45 (forty-five) days?

12.

EEO COUNSELING REPORT - INDIVIDUAL COMPLAINT

PART I (Through Initial Interview)

(Fol	low	separate	instr	uctions)

13.	Provide a brief description of complaint, summarizing actions which ca	used counseling to be sought and which complainant believes are discriminatory.
	· <u>-</u>	
ennounder Promoter referred white, the GS-15 general the History GS-15's	need under the merit promotion vacancy announcement. He was refer- tion Certificate for the four vacant positions. The complainant indicated on the BQ list and was not interviewed for any of the vacant position three males and one female. The complainant stated that within the O- grade level. There is only one(1) Black SES. The complainant also stated spanic Association as well. The complainant stated that there is no division of the same of the	Tice of Internal Affairs (three vacancy announcement). The positions were red to the Selecting Official(s) under the Best-Qualified (BQL) Merit ted that during the selection process he was not notified of his status of being us. The complainant stated that the persons selected for the positions were office of Internal Affairs there are no Hispanics, Black males or females at the ated that he was also denied a lateral transfer because of his involvement with tersity, in fact in the entire history of IA, there has only been two male Hispanic 12 times and has made the BQL nine (9) times. The complainant also advised
(OI). T	There are approximately 9 GS 1811-15 in the Office of Internal Affairs	nt stated that there are currently 88 GS 1811-15 in the Office of Investigations s (IA), 100% Non-Hispanics. The complainant stated that 10 Hispanics in OI mplainant stated that based on the qualifications alone, he is more qualified than
14.	Remedial Action Desired by Complainant.	
Promot	otton GS-15	
•		

15.	On the same matter, has Complainant filed a grievance under negotiated griev	vance procedure?
	On the same matter, has Complainant filed a grievance under the Agency griev	vance system?
	If the issue presented constitutes a Mixed-Case Complaint, has Complainant appealed to the Merit Systems Protection Board?	□ Yes , ♥ No
	If grievance or appeal has been filed, what is its status?	V •
16.	Does Complainant elect to have a representative?	17. Signature of Counselor and Date Signed
	□ Yes	adline talum
		2-1-00
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EEO COUNSELING REPORT – INDIVIDUAL COMPLAINT PART II (For counseling after initial interview)

18. Contacts Du	uring EEO Counse <u>ling</u> Inquiry			
ાe(s) of Contact (Col. 1)	Name, Title, Grade Telephone (Col. 2)	Organization Administrative Code (Col. 4)	REASON FOR CONTACT (Complainant, Witness, Management Official, Personnel, Etc.) (Col. 4)	Time Spent by Person Contacted (Col. 5)
1/19/00	Miguel Contreras (520) 344-0088 x511	USCS	Witness Historical/personal knowledge	
1/19/00	Rick Sandoval (760) 353-9090 x 107	USCS	Witness Historical/personal knowledge	_
				,
			·	
	·			

19. INFORMATION DEVELOPED DURING INQUIRY (Identify the source of each fact, attach relevant documents provided by employee/applicant, management officials involved, other witnesses, Personnel, etc., or those obtained by the Counselor.)

On October 28, 1999, the complainant requested a meeting with Mr. David Cohen, the Commissioner's Chief of Staff for law enforcement matters. The complainant met with Mr. Cohen and discussed the issue of his non-selection for a variety of positions and the lack of Hispanics and diversity. The complainant stated that Mr. Cohen asked that he wait before filling an EEO complaint and he would call him back. The complainant stated that Mr. Cohen did not call therefore; the complainant spoke with Linda Batts, Special Assistant to the Commissioner, EEO.

The complainant advised that a <u>member of the evaluation panel</u>, for one of the positions he made the BQ list, and who (panel member) did not apply for the position, was subsequently selected for the job.

The complainant advised that because he spoke out a an Hispanic Conference held in Miami and convinced the Hispanic Association to join and support the Hispanics Class Action against Customs he is being retaliated against.

The selection packages for the four positions the complainant applied for were requested from personnel, but has not been received.

20. Counselor's suggestions to Management Official(s) to Resolve Complaint.

No review of selection packages, therefore management was not consulted.

EEO COUNSELING REPORT – INDIVIDUAL COMPLAINT PART II (For counseling after initial interview)

	M			poultod			
	No revi	ew or selection packages, tr	nerefore management was not co	i isuneu.			
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					<u></u>		
22.	Summary de	escription of Complaint Issu	es Developed During Counseling	. (Specify typ	e of discrimination a	alleged and actions which C	Complainant believes to be
	discriminate	ory. Show dates and occurr	rences.)				
							-
Non-sele	ction						
		iliation - Race - Hispanic					
				•			
							
22	Damadial A	ction Desired					
23.	Remedial A	Coon Desired					
Promotio	n to GS-15						
		 	,				
24.	Cricumana	and Amenala					
74 .	GIREVAINE &	and Appeals					
NC	ONE						
			•				
25.	Total Numb	er of Hours Spent Counsell	ing this Case. (Include all contac	ts,	26. Date	e of Final Interview	27. Date of this Re
	preparation	and travel time.)			NOT	TICE ISSUED	
	TOTAL HO	OURS = Hours			l NOI	ICE ISSUED	2-1-00
		1.0013			1	-1-00	
	 				<u>~</u>	1-00	
			,				
28.	Signature o	f Counselor			29. Date	Report Sent or Delivered	to Complaints Center
		+ ,					
						4 1	
	CRA	lere /a	Kum		·	9-/-	00
30.	Enclosures	(List and Tab and give dup	licate legible copies to Complaina	ant".)			
		* COPY OF PART II. PLUS APPR	OPRIATE ATTACHMENTS, MUST BE DE	LIVERED TO CO	MPLAINANT OR COMP	LAINANT'S REPRESENTATIVE.	WHEN COMPLAINT IS FILED.
		TO THE PART HAT BOOKER IN	and the first of the period of				
,,	L 4	COMMENTS	4				
Atta	chment#	COMMENTS and/or	description				

I, Ruben E. Gonzalez, HAVE RECEIVED NOTICE OF MY RIGHT TO

REMAIN ANONYMOUS DURING THE INFORMAL COUNSELING INQUIRY OF THE

PRE-COMPLAINT PROCESS.

Check one:



I AUTHORIZE THE EEO COUNSELOR TO REVEAL MY IDENTITY DURING ANY INFORMAL INQUIRIES INTO THE MATTER(S) WHICH I HAVE DISCUSSED WITH THE EEO COUNSELOR IN ANY ATTEMPTS TO FACILITATE A RESOLUTION OF MY INFORMAL PRE-COMPLAINT.

I DO NOT AUTHORIZE THE EEO COUNSELOR TO REVEAL MY IDENTITY DURING ANY INFORMAL INQUIRIES INTO THE MATTER(S) WHICH I HAVE DISCUSSED WITH THE EEO COUNSELOR. I UNDERSTAND THAT MY RIGHT TO ANONYMITY IS VALID ONLY DURING THE INFORMAL, PRE-COMPLAINT COUNSELING STAGE AND WILL CEASE UPON MY FILING A FORMAL COMPLAINT OF DISCRIMINATION.

Complainant's Signature

(

Notes from meeting with Ruben Gonzalez

12/6/99

Complainant, Ruben Gonzale GS-1811-14, Office of Investigations, HQ

Bases: Race Hispanic Issues: Non Selection

Resolution: GS-15 in this order of preference--Tucson, El Paso, Miami or HQ.

Mr. Gonzalez, began the meeting by providing me with the following information: Mr. Ruben indicated he attempted to meet with the Commissioner to discuss his frustration and futile attempts in getting promoted to the GS-15. While he was unable to meet with the Commissioner, he was able to meet with the Commissioner's Chief of Staff.

Accordingly, Mr. Gonzalez applied for 4 GS-15 positions within the Office of 🖄. The positions were announced under a merit promotion vacancy announcement. He was referred to the Selecting Official(s) under the Best-Qualified (BQL) Merit Promotion Certificate for the four vacant positions. The positions were located in Tampa, Tucson. and Headquarters (2). Mr. Gonzalez indicated that during the selection process he was not notified of his status of being referred on the BQ list and was not interviewed for the any of the vacant positions. During our conversation, Mr. Ruben disclosed the race and sex of the persons selected for the positions. The persons selected for the positions he applied for are white, three are males and one is a female.

Mr. Gonzalez disclosed that within the Office of Internal Affairs there are no Hispanic and Black males or females at the GS-15 grade level. There is only one 1 Black SES (Marvin Washington).

Although Mr. Gonzalez applied for the 4 previous mentioned positions; he did not submit his application for the vacancy announcement for a position in Chicago. He noted that the person selected for the vacant position in Chicago is a white male.

According to Mr. Gonzalez there is no diversity, in fact in the entire history of IA, there has only been three male Hispanic GS-15's and no females.

The following is information from Mr. Gonzalez regarding the selectees for the four vacant positions he applied for under the four vacancy announcements:

Vacancy Announcement/Position - Director Internal Investigation (HQ) GS-1811-15. Office of Internal Affairs Applicant selected is a white female. She has no field experience other than acting TDY's. The TDY tours have been, not less than 30 days and not more than 4 months. She has only worked in IA there is no experience in other offices within the Customs Service. Mr. Gonzalez believes she is does not qualify for the position, yet she was acting in this position prior to being permanently reassigned to the position. Another area she lacks experience according to Mr. Gonzalez, where he exceeds is that she has never made an arrest.

Mr. Gonzalez has worked in several field offices for more than 4 months. His field experience extends to several years at different Customs locations. He also noted his experience includes working in other Customs Offices, he has made several arrests and has supervisory experience.

Vacancy Announcement/Position-Director Special Investigation Unit (HQ) GS-1811-15. Office of Internal Affairs Applicant selected is a white male. Although the employee has one or two year's experience as a supervisor he has limited Permanent Change Station's (two). Mr. Gonzalez was not certain, whether the applicant completed a Headquarters tour and worked in the Office of Investigations. The employee moved from a field position to HQ, then from Tampa or Miami to his current position. (My notes are unclear).

Mr. Gonzalez has experience as supervisor, more than two PCS's (maybe four) including Headquarters experience.

Vacancy Announcement/Position-Deputy Regional Special Agent In Charge (SAC Tucson-Region 3) GS-1811-15. Office of Internal Affairs -Applicant selected is a white male. The applicant selected for this position was promoted in place. He has no Headquarters tour of duty experience and no college degree. Mr. Gonzalez is unsure of the number of PCS's the employee has been involved in with Customs.

The significant differences in the comparative qualifications between Mr. Gonzalez and the applicant shows that Mr. Gonzalez has a college degree, Headquarters experience and is Hispanic (bilingual). The population of Tucson is 90% Hispanic, Mr. Gonzalez is Hispanic. Accordingly, the cultural environment is more conducive to Mr. Gonzalez's heritage and background, knowledge, work experience, skills, and cultural and diversity experiences.

Vacancy Announcement/Position-Deputy Regional Special Agent In Charge (SAC Tampa) GS-1811-15 Office of Internal Affairs - Applicant selected is a white male and was selected so he could retire in Tampa. There was another Hispanic Male listed on the Best-Qualified Certificate list for this position with superior qualifications. The employee resides in Florida, with two Master Degrees, completed the Harvard School for SES candidates yet he was passed over in the selection of a white male applicant for this position. Consequently two Hispanic males with outstanding qualifications applied for this position and were passed over for someone with substandard qualifications and skills.

Mr. Keefer, Assistant Commissioner Office of Internal Affairs was and is currently the selecting official on the vacancy announcements named in this complaint. Mr. Gonzalez reiterated he was not interviewed for any of the positions and was unaware of any official interviews conducted by Mr. Keefer. While Mr. Keefer has been with Customs for approximately a year, there is concern regarding the manager or supervisor recommending employees for selection to Mr. Keefer for these positions. The employees selections made under these vacancy announcements were internal

employees. It is noted the selections were made from four different vacancy announcements. The effective date of the selections was October 8, 1999.

Currently Mr. Gonzalez has applied for the following GS-15 vacancy announcements in the Office of Internal Affairs.

- 1. Director Investigative Operations Headquarters
- 2. Assistant Director Covert Operations -Headquarters (BQ List)
- 3. Director of Foreign Operations
- 4. Assistant Area Director of Foreign Operations
- 5. Associate Special Area in Charge-Office of Investigations, Miami, New Orleans (BQ List), Tucson, and Baltimore. The panel has not met to rate and rank applicants for the BQ List for Miami, Tucson and Baltimore. This is one announcement with multiple locations.
- 6. Special Agent in Charge, Boston
- 7. Deputy Director Air Marine— (GS-1801-15)

The qualifications are the same for the above mentioned positions.

The Complainant has not received any information nor had any discussions regarding the issue of his non-selection for the positions he sought. He feels he meets the requirements for the positions, based on his experience, education, knowledge and skills. Additionally, Mr. Gonzalez states there is nothing derogatory in his file that precludes him from being selected for any of these positions.

Although there is no set procedure or any process in place to advance your career, it is known that within Customs you must move around the Country to gather knowledge and diverse experience to enhance your skills. In addition the unofficial guidelines include a tour of Headquarters to reach the upper management level at Customs. The unofficial guidelines include a tour through Internal Affairs that can enhance the employee's knowledge and skills. Mr. Gonzalez feels he has followed the "unofficial" rules.

On 10/28/99 Mr. Gonzalez requested a meeting with David Cohen, the Commissioner's Chief of Staff for law enforcement matters. He met with David and discussed the issue of his non-selection for a variety of positions along with other issues. He noted in his conversation with David Cohen the lack of Hispanic and diversity. David Cohen asked the complainant to wait before filing an EEO complaint and he would call him back. David Cohen did not call therefore; the complainant spoke with Linda Batts, Special Assistant to the Commissioner, EEO.

The complainant met with Linda and reiterated his frustrations and his futile conversation with David Cohen. Linda sent an E-mail message to David Cohen noting her conversation with the complainant. Again, Mr. Cohen responded that he would get back to her after he reviews information from HRM. To date, he has not responded to the complainant or Linda Batts.

Heaver

> 11/10/99 the complainant met with Linda Batts, Franklin Jones, Director Complaints Processing Branch, (HQ-EEO), and George Hebi, Director for National Labs. He was the previous Assistant Commissioner for Internal Affairs. He attended the meeting on behalf of the complainant, as the complainant's representative.

Accordingly, the complainant made several attempts to resolve his complaint on several occasions through David Cohen or Linda Batts, but to no avail.

Ed Menderos was the last Hispanic grade GS-15 in the field and that was 8 years ago. Mr. Menderos agreed to be a witness for the complainant.

Bill Valsco agreed to be a witness for the Complainant.

Joe Trufillo who worked in El Paso, was hired from an outside agency and retired in 1998. The complainant indicated that Joe Truijillio was forced to retire.

The complainant will be on leave December 20, 1999-January 3, 2000.

- > 12/7/99 Complainant called and stated Lawrence Berger, General Counsel for the Federal Law Enforcement Association (FLEOA) will be his representative if he elects mediation. If we have any questions call (516) 873-8600.
- > 12/8/99 the complainant and I discussed his promotion to the GS-14. I needed the effective date and he indicated he received his promotion to the grade GS-14 July 21, 1996. He also told me he is aware of the class action complaint. The complainant feels his complaint may be settled early due to the class action.

During our conversation he mentioned there are 2 Hispanic RAC's grade GS-14 that are supervisors and they are located in Puerto Rico and the Sourthwest Border. In Headquarters there is a Hispanic female GS-14 and a Black male in the Office of Internal Affairs

Mr. Gonzalez restated his frustration and disappointment in being denied his promotion. He has been seeking the GS-15 within Customs for 2 years. All jobs he applied he has made the Best-Qualified list, however he has not been selected.

Senora Coggs 12/9/1999

U.S. CUSTOMS SERVICE EEO COUNSELOR'S REPORT

COMPLAINANT: Ruben E. Gonzalez SOUGHT COUNSELING: Dec 14, 1999

(202) 927-4195

COUNSELOR: ADLINE TATUM

INITIAL COUNSELING: January 30, 2000

(202) 927-0707

On December 14, 1999, I met with the complainant and conducted the initial interview. During this interview the complainant stated that he applied for four GS-15 position within the Office of Internal Affairs. The positions were announced under the merit promotion vacancy announcement. He was referred to the Selecting Official(s) under the Best-Qualified (BQL) Merit Promotion Certificate for the four vacant positions. The complainant indicated that during the selection process he was not notified of his status of being referred on the BQ list and was not interviewed for any of the vacant positions. The complainant stated that the persons selected for the positions were white, three males and one female. The complainant stated that within the Office of Internal Affairs there are no Hispanics, Black males or females at the GS-15 grade level. There is only one(1) Black SES. The complainant also stated that the Director, Smuggling advised him that he was not selected for a lateral because he was too involved in the Hispanic Association. The complainant stated that there is no diversity, in fact in the entire history of IA, there has only been two male Hispanic GS-15's and no females.

The complainant stated that he has applied for GS 1811-15 approximately 12 times and has made the BQL nine (9) times. The complainant also stated and provided proof of qualification for SES on two occasions. The complainant stated that there are currently 88 GS 1811-15 in the Office of Investigations (OI). There are approximately 9 GS 1811-15 in the Office of Internal Affairs (IA), 100% Non-Hispanics. The complainant stated that 10 Hispanics in OI and None in IA at the GS 1811-15 level does not equate to diversity. The complainant stated that based on the qualifications alone, he is more qualified than those selected and that he is a victim of discrimination and retaliation.

On October 28, 1999, the complainant requested a meeting with Mr. David Cohen, the Commissioner's Chief of Staff for law enforcement matters. The complainant met with Mr. Cohen and discussed the issue of his non-selection for a variety of positions and the lack of Hispanics and diversity. The complainant stated that Mr. Cohen asked that he wait before filing an EEO complaint and he would call him back. The complainant stated that Mr. Cohen did not call therefore; the complainant spoke with Linda Batts, Special Assistant to the Commissioner, EEO.

The complainant advised that a <u>member of the evaluation panel</u>, for one of the positions he made the BQ list, and who (panel member) did not apply for the position, was subsequently selected for the job.

The complainant advised that because he gave a presentation, at a conference recommending the Hispanic Association support the Class Action against Customs, which was favorable, he is being retaliated against.

The selection packages for the four positions the complainant applied for were requested from personnel, but has not been received.

Mr. Keefer, Assistant Commissioner, Internal Affairs, stated that race was not an issue regarding the selection of these positions and the selections were strictly on merit.

Mr. Keefer stated that there is a lack a diversity in the Office of Internal Affairs and that they were trying to make changes. He stated that more diversity is need in Internal Affairs. Mr. Keefer also stated that he does not know the complainant and therefore race was not a factor in the selection.

RESOLUTION:

Promotion to a GS-15 he was denied

WITNESS STATEMENT

Mr. William Keefer Assistant Commissioner, Internal Affairs

Mr. Keefer stated that race was not an issue regarding the selection of the position the complainant applied for and the selections were strictly on merit.

Mr. Keefer also stated that there is a lack of diversity in the Office of Internal Affairs and that they were trying to make changes. Mr. Keefer then stated that he does not know the complainant and therefore race was not a factor in the selection.

Miguel Contreias – GS 1811/14 Group Supervisor – Ol

Mr. Contreias believes that the complainant is being discriminated against as well as Hispanics. He stated that management is discriminating against Hispanics the way they are handling the disciplinary action and promotions – using the vetting process to perpetuate discrimination. The witness stated that anyone who is or have been under investigation can not be promoted according to the Commissioner's guidelines and anyone facing any adverse action can not be considered for promotion.

The witness also stated that in lieu of the EEO process, ADR has been offered to management and they decline to participate. In his attempt for ADR – he received a letter or proposed removal from the Customs Service for failure to take action against an employee.

The witness stated that he has several EEO Formal complaints which were consolidated in a Class Action suit which currently has over 200 participants and that this Class Action was certified October 22, 1999. The complainant is apart of the Class Complaint.

The witness stated that the complainant, at a conference in Miami, took the podium and spoke about the Class Complaint. The witness stated that he was advised that the Commissioner has commented that if any Customs employee who files an EEO, is a disloyal employee, and will be treated accordingly.

TID= P6HQase 1:02-cv-00923-JR Document 22-5 Filed 03/20/2003 Page 19 of 31 10/08/99 09:33 ** SELEC' PNL OR THE OFFICE OF INTEP L AIRS ** ENTERED BY: WAYNE WALLACE PAGE 1 OF 2 The Commissioner and I are pleased to announce the following selections: Director, Internal Investigations - here been in the Division, Headquarters Linda M. Anderson Deputy Regional Special Agent in - Sur in rime of more James B. ("Breck") Ellis Charge, Tucson (Region 3) George E. Evancheck Director, Special Investigations _ |-270 - 150-Unit, Headquarters 1-2 P63 John G. Shirley Deputy Regional Special Agent in _ A 145 pm. whenty 1~ 5-de - 15 m Charge, Tampa (Region 2) way - you Ching MORE (PF1=HELP) (PF3=MAIN MENU) (PF4=INDEX) (PF7=PREV PAGE) (PF8=NEXT PAGE) (PF9=ACCS CTRL) (PF16=PRINT ITEM) (PF20=FREE TEXT)

- White

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11/10/99 11:13 ** SELECTION R THE OFFICE OF INTERNAL. AIRS **
ENTERED BY: WAYNE WALLACE

PAGE 1 OF

I am pleased to announce that the Commissioner has selected _ Thomas J. Howe to be the Deputy Regional Special Agent in Charge, Chicago, Illinois. Mr. Howe is currently Resident Agent in Charge, Office of Investigations, Key Largo, Florida.

Authorized by:

William A. Keefer Assistant Commissioner

Office of Internal Affairs

(PF1=HELP) (PF8=NEXT PAGE) (PF9=ACCS CTRL)

(PF3=MAIN MENU)

(PF4=INDEX)

(PF7=PREV PAGE) (PF20=FREE TEXT)

(PF16=PRINT ITEM)

Case 1:02-cv-00923-JR Document 22-5 Filed 03/20/2003 Page 21 of 31

DATE: 07/12/99

PER-12-OM:H

ANNOUNCEMENT #: HEADQ/99-148 MCC

TITLE: SUPERVISORY CRIMINAL INVESTIGAT

SERIES & GRADE: GS-1811-15

OPEN: 05/05/99 CLOSE: 06/03/99

RUBEN E. GONZALEZ 14703 FLAGLER COURT CENTREVILLE, VA 20120

Dear RUBEN E. GONZALEZ:

Per your request, the scores you received for the above referenced announcement are provided below. The vacancy was paneled and the application was scored using a group scoring method. The highest possible score for primary criteria is 6.0, for secondary criteria is 4.0.

Your scores for Grade 15 are as follows:

TOTAL Primary Secondary 31.50 6.0 6.0 6.0 4.5 3.0

Note: refer to your copy of the Vacancy Announcement to determine the meaning of the criteria applied.

Listed below are the locations to which you applied where referral lists of qualified candidates have been generated. An asterisk (*) indicates your name was included on the list. The format of the data is DATE/LOCATION/GRADE.

* 06-25-99/WASHINGTON, DC/15

Your interest in the U.S. Customs Service is appreciated.

Sincerely,

M. CINDY CASEY
PERS MGMT SPECLST

DATE: 07/12/99

PER-12-OM:H

ANNOUNCEMENT #: HEADQ/99-158 MCC

TITLE: SUPERVISORY CRIMINAL INVESTIGAT

SERIES & GRADE: GS-1811-15

OPEN: 05/12/99 CLOSE: 06/01/99

RUBEN E. GONZALEZ 14703 FLAGLER COURT CENTREVILLE, VA 20120

Dear RUBEN E. GONZALEZ:

Per your request, the scores you received for the above referenced announcement are provided below. The vacancy was paneled and the application was scored using a group scoring method. The highest possible score for primary criteria is 6.0, for secondary criteria is 4.0.

Your scores for Grade 15 are as follows:

------ Criteria ------

TOTAL Primary 29.50 6.0 6.0 6.0 4.5

Secondary 3.0 4.0

Note: refer to your copy of the Vacancy Announcement to determine the meaning of the criteria applied.

Listed below are the locations to which you applied where referral lists of qualified candidates have been generated. An asterisk (*) indicates your name was included on the list. The format of the data is DATE/LOCATION/GRADE.

* 07-02-99/TUCSON/15

* 07-02-99/TAMPA/15

Your interest in the U.S. Customs Service is appreciated.

Sincerely,

M. CINDY CASEY
PERS MGMT SPECLST

DATE: 07/12/99

PER-12-OM: H

ANNOUNCEMENT #: HEADQ/99-159 MCC

TITLE: SUPERVISORY CRIMINAL INVESTIGAT

SERIES & GRADE: GS-1811-15

OPEN: 05/12/99 CLOSE: 06/02/99

RUBEN E. GONZALEZ 14703 FLAGLER COURT CENTREVILLE, VA 20120

Dear RUBEN E. GONZALEZ:

Per your request, the scores you received for the above referenced announcement are provided below. The vacancy was paneled and the application was scored using a group scoring method. The highest possible score for primary criteria is 6.0, for secondary criteria is 4.0.

Your scores for Grade 15 are as follows:

----- Criteria -----TOTAL Primary Secondary

29.50 6.0 6.0 6.0 4.5 3.0 4.0

Note: refer to your copy of the Vacancy Announcement to determine the meaning of the criteria applied.

Listed below are the locations to which you applied where referral lists of qualified candidates have been generated. An asterisk (*) indicates your name was included on the list. The format of the data is DATE/LOCATION/GRADE.

* 07-02-99/WASHINGTON, DC/15

Your interest in the U.S. Customs Service is appreciated.

Sincerely,

M. CINDY CASEY PERS MGMT SPECLST

· Action

Author: RUBEN E GONZALEZ at HQ-3_PO

Date: 12/15/99 1:02 PM

Priority: Normal Receipt Requested

TO: ADLINE TATUM at HO-4 PO

Subject: FYI

----- Message Contents -------

Adline, I have some documents I want to provide you that may assist you with your interview of Ms. Elissa Brown.

I strongly believe that Ms. Brown either knowingly or was manipulated into retaliating against me, because of my involvement with the Hispanic Association.

Not only was I denied a lateral within her division as Assistant Director at the same grade, but I was transferred out of her Division without any explanation, when others in the Division had never been subjected to being transferred

Although I received commendations and a incentive award while in the Smuggling Division, Ms. Brown did not see fit to grant me a annual cash award. Everybody else to my knowledge received the cash awards. When I asked Ms. Brown why I did not received the award, she stated that she thought I had received same. Furthermore, she said that she would check into it and let me know. This conversation took place in her office about 5/6 months ago. I have not received any award or received any explanation to date.

As you will note from the documents, I had more assignments (PROGRAMS) in the Smuggling Division than the other Agents. I received letters of commendation and a certificate from visiting Argentinean Judges I provided training for in U.S. Smuggling Investigations techniques.

Additionally, as you will note from the TECS message for the Assistant Director position, experience in Marine Enforcement Programs would have made me one of the Best Qualified. Especially, since I was a RAIC responsible for both investigations and marine interdiction. (P.S. I was also received the Commissioners Unit Citation for my accomplishments in the Marine Programs).

I asked Ms. Brown if I was Best Qualified why wasn't I selected. Ms. Brown related that Ms. Connie Fenchel told her that I was too involved in the Hispanic Association. Ms. Brown also related that they (?) did not believe I would complain because it was the same grade.

I know that management knows my involvement with the Hispanic Association and that I was/am an advocate of the Class Action and have publicly stated my membership and support of the Class Action.

For the reasons stated above I know I am a victim of Discrimination/Retaliation. This Retaliation/Discrimination has further precluded me from being selected to GS-1811-15.

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EXHIBIT 2

Cuse 1.02 ev ods20 dit Bocumen	
	FOR OFFICE USE ONLY
\\$\ \ \$\ \ \$\\\$\\\$\\\$\\\$\\\$\\\$\\\$\\\$\\\$\\\$\\\$\\\$\	DEPARTMENT CASE NUMBER OO-1091 FILING DATE
NDIVIDUAL COMPLAINT OF EMPLOYMENT DE THE TRE	ASURY 2-2-00
	-+ Identification
Part I Complaina	5. Name and Address of Organization Where You Work (If a
. Name (Last, First, Middle Initial) Gonzalez, Ruben E.	Treasury Employee)
	Bureau Customs
2. Telephone/Fax (Include Area Code)	
Home: 703-2664961 Fax: Work: 202-9274195 Fax: 202-9279373	Office and Organizational Component Office of Investigations /Internal Affairs
Work: 202-92/4195 Table 202 3. Present Home Address (You must notify the Department of any changes of address while complaint is pending, or your any changes of address while complaint is pending.	1200 Pennsylvania
complaint may be dismissed)	Street Address Ave., NW
14703 Flagler Court	1
Street Address	City Washington Sales to this Complaint
	Probationary Carear
City Centreville State VA 20120 Zip Code	·
City General Transport the Federal	Date Left Treasury Employment
government, list your most resemble	Date of Retirement
Program Manager/Special Agent Series 1811 Grade 14	Other Specify
Title Series Series	aint are true, complete, and correct to the best of my knowledge
7.1 certify that all of the statements and belief.	2/2/00
Attorney Represe	ntative
Signature of Complainant or Attorney Representation	tion of Representative
Part II Designat	(IO) O contains does
8. You may represent yourself in this complaint or you not have to be an attorney. You may change your detent the Department immediately in writing of any change Part.	may choose someone to represent you. Your representative does esignation of a representative at a later date, but you must notify ge, and you must include the same information requested in this
	(Please Print Name) to serve a
"I hereby de my represent the course of this act on my benefit."	complaint. I understand that my representative is authorized to
act on my boules.	Employer (If Federal Agency)
Anthonic Mailing Address	10. Representative's Employer (If Federal Agency)
9. Representative's Mailing Address	
	11. Representative's Telephone/ Fax (Include Area Code)
Firm/Organization	
	Telephone Fax
Street Address	
1	
State Zip Code	12. Complainant's Signature Date

State

Çity

	Discriminatory Actions
 Name and Address of Treasury Bureau that took the action at issue (if different than item 5.) 	14. If your complaint involves nonselection for a position, please complete the following:
same as #5	
Bureau Office and Organizational Component	
-	Dir and Assoc SAIC 1811-15
Street Address	Position Title Series Grads
	HeadQ/99-148,158,159MCC 100899
City State Zip Code	Vacancy Announcement Number Date Learned of Nonselection
applicants because of your race, color, religion, sex, na EEO process or opposition to alleged discriminatory pr as a result of this action. (You may but are not require On 100899, selections for GS181 Comm., Kelly of three white mal the Selecting Official under th and more qualified than those s was discriminated and retaliate in the recently certified Hispa 1811-15 scale and OI has only a the Office of Investigations. A for one the positions was subse a possible violation of Merit person did not apply for the po- not allowing me the opportunity	eve was discriminatory, (B) Give the date when the action occurred, and c) Describe how you were treated differently than other employees or ational origin, age, disability, or in retaliation for your participation in the actices; (D) indicate what harm, if any, came to you in your work situation to attach extra sheets.) 11-15 positions were made by A/C IA Keefer and les and one white female. I was referred to me BQL., but not selected. I know I am equally selected based on my education and experience. I see because I am a Hispanic and my involvement anic Class Action. IA has NO Hispanics in the approx., 10 Hispanicsfrom 88-GS15 position within additionally, a member of the evaluation panel equently selected. This selection to me was System in itself. It is suspected that the exition. This selection is an unfair way of to fairly compete, by selecting a white female.
☑ Race (State Race). Hispanic	
Color (State Color)	
	Physical Diseasily (Spanity)
☐ Religion (State Religion)	☐ Mental Disability (Specify):
☐ Sex (Specify)	Retaliation Reprisal (Dates of Prior EEO Activity):
National Orgin (Specify) Puerto Rican	121294
17. What remedial or corrective action are you see	
Promotion to GS1811 -15	wild to resolve this tistust t
Part IV Co	
Month Year	020100 Month Day Year
19. When did you first become aware of the alleged discrimination? 100899	24. On this same matter, have you filed a grievance or
Month Day Year	appeal under:
20. When did you contact an EEO counselor?	Negotiated grievance procedure YES NO
120699	Agency grievance procedure . TYES T NO
Month Day Year	MSPB appeal procedure
21. Did you discuss all actions raised in item 15 with an	
EEO counselor? YES NO	If you filed a grievance or appeal, provide date filed, case number, and present status.
22. Name and telephone number of EEO counselor.	
Adline Tatum 202-9270707	
Name Telephone No.	- Comment of the second of the

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EXHIBIT 3

MEMORANDUM TO THE FILE

Ruben E. Gonzalez
TD Case Number: 00-1091

On February 24, 2000, I spoke with Complainant regarding clarification of his formal complaint of discrimination. First, I inquired about the date counseling was first sought because the complaint appeared to be untimely. The formal complaint revealed that Complainant became aware of discrimination on October 8, 1999. However, the Report of Counseling indicated that counseling was first sought on December 6, 1999. Based on the identified dates more than 45 days passed before Complainant sought counseling. In my conversation with Complainant, I learned that he actually met with Linda Batts, Special Assistant to the Commissioner on November 5, 1999, regarding his non-selection issues. Prior to my conversation with Complainant, I spoke with Senora Coggs, Director, Equal Employment Opportunity regarding the initial counseling date. Ms. Coggs stated that Complainant met with Ms. Batts on November 5, 1999, regarding his non-selections. I also requested a statement from the EEO Office or an amended Report of Counseling to reflect the correct date that counseling was initially sought. Consequently, the Center will use November 5, 1999, as the initial date Complainant sought counseling.

Next, I asked Complainant to explain whether he intended to include national origin as one of the bases for this complaint. This question was presented to Complainant because the Report of Counseling did not indicate national origin as a basis; however, the formal complaint did. Complainant stated that he wanted national origin (Puerto Rican) as one of the bases.

Finally, I requested that Complainant respond to my concerns by faxing a statement to my attention regarding the above.

Kittonia Brooks EEO Specialist 2/24/00 Case 1:02-cv-00923-JR Document 22-5 Filed 03/20/2003 Page 30 of 31

EXHIBIT 4

FEB 2 4 2000

Ms. Kittonia Brooks Regional Complaint Center Equal Employment Opportunity Commission 1400 L Street, NW Washington, D.C.

Dear Ms. Brooks:

I appreciate the opportunity to clarify the date I first sought counseling from EEO. In the EEO counseling report, Part 1, sub-number # 4, reflects the date of December 6, 1999. In fact I first met with Linda Batts, Special Assistant to the Commissioner, EEO on November 5, 1999 and sought her counsel about my non-selection for a promotion to which I had made the Best Qualified List (BQL).

Reference also is made to Part 1 sub-number #12 of the counseling report, where it simply states that counseling was "TIMELY".

Additionally, reference is made to Part 1 sub-number #7 of counseling report, Race is reflected as HISPANIC, not as national origin. I would appreciate if you would include my national origin, Puerto Rican in my complaint.

Therefore, Hispanic, born in Puerto Rico.

If I can be of any further assistance please call me at 202-927-4195.

Ruben E. Gonza

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MIGUEL A. CONTRERAS, et al., Plaintiffs,)
v.) Case No. 1:02CV00923(JR)
TOM RIDGE, Secretary, Department of Homeland Security,)
Defendant.)
	,

DECLARATION

- I, MARIAM HARVEY, declare the following to be true and correct:
- 1. I am the Assistant Director for Complaint Operations, Office of Equal Opportunity Program (OEOP), Department of the Treasury, Washington, D.C. I have held this position since August 2001. Prior to occupying this position, I served as Deputy Director, OEOP, from 1999-2001. I was the Chief, Complaint Operations, from approximately 1996 to 2001. This declaration is based on my personal knowledge or information provided to me in my official capacity.
- 2. OEOP administers the Department of Treasury's equal employment opportunity (EEO) program by providing policy, oversight and technical guidance to the Department's bureaus. OEOP also manages the Department's EEO complaint process, providing for the consideration and disposition of formal EEO complaints from Treasury employees and applicants for employment, and providing oversight to the four Treasury Complaint Centers, which are responsible for the acknowledgement, acceptance, dismissal and investigation of complaints for all of the Department's bureaus.

EEO Records

- 3. As the Assistant Director for Complaint Operations, OEOP, I am the custodian of official agency records relating to the filing, administration, and disposition of formal administrative complaints presented to the Department of the Treasury, including the United States Customs Service before it was transferred to the Department of Homeland Security on March 9, 2003.
- 4. To initiate an administrative EEO proceeding, an employee first "must consult [an EEO] Counselor prior to filing [an administrative] complaint...." 29 C.F.R. § 1614.105(a). The employee must initiate counseling within 45 days of the allegedly discriminatory event, or within 45 days of when he/she first became aware of discrimination. Upon consultation, the EEO counselor typically prepares a written report. Within the Department of Treasury, EEO counseling is normally conducted by an employee of the bureau where the complaint arose. However, counselors may be contractors or may be employees of another Treasury bureau or another agency.
- 5. If an EEO matter is not resolved informally during the counseling period, the counselor issues a Notice of Right to File a Discrimination Complaint (NRFDC), and the employee must file a written formal administrative complaint within fifteen days from receipt of the NRFDC in order to pursue the matter. Such complaints are filed with one of the four Treasury Complaint Centers (TCCs), previously known as the Regional Complaint Centers.
- 6. The Treasury Department delegates to the TCCs the authority to acknowledge, accept, dismiss (fully or partially), and investigate claims of discrimination. Typically, the TCC defines the issue of the complaint based on the EEO counseling report and the formal complaint. It is

standard practice for the TCC to provide the complainant the opportunity to comment on whether the defined issue accurately reflects the complainant's claims. The TCC further determines, based on applicable law, regulations and policy guidance, whether the complaint should be accepted or dismissed.

- 7. Formal administrative complaints of employment discrimination brought by Treasury employees are filed against the Secretary of the Treasury. Authority to settle such complaints, however, lies with the appropriate bureau.
- 8. OEOP maintains all EEO records, including counseling records and administrative complaints, relating to the processing of a formal complaint of discrimination, with the exception of records relating to (1) complaints that are dismissed at a TCC for one of the reasons outlined in 29 CFR § 1614.107, and (2) complaints that are settled while the complainant was still in the TCC's jurisdiction. Records falling under the two stated exceptions are maintained in one of the TCCs, unless an appeal to the Equal Employment Opportunity Commission, Office of Federal Operations (EEOC, OFO) is filed, whereby the records would be maintained by OEOP. EEO records maintained by OEOP are kept for at least four years after the matter is resolved, pursuant to the National Archives and Records Administration (NARA) records retention schedules.
- 9. As a routine business practice, this office maintains a file for each administrative complaint. The complaint files are identified by a unique Treasury Department (TD) number. In addition, complaints are tracked in an electronic database known as the Complaint Tracking System (CTS), which is administered for the Department of the Treasury by the Internal Revenue Service (IRS). The CTS database tracks the status of complaints by TD number and/or complainant's name.

10. I caused a thorough search to be made of EEO complaint records of this office to determine whether Frank Almonte, Miguel Contreras, Ruben Gonzalez, Ramon Martinez, Stephen Mercado-Cruz (as well as Stephen Mercado), Evelio W. Velasco (as well as E. William Velasco and Bill Velasco), Ricardo Sandoval and John Yera, filed formal administrative complaints of discrimination against the Secretary of Treasury, and if so, the nature of those complaints.

Frank Almonte

TD 01-3019

- 11. An examination of the EEO complaint records of this office indicates that on September 12, 2000, Mr. Almonte sought EEO counseling regarding his non-selection for promotion to a GS-13 Senior Special Agent position (vacancy announcement number CAAPS/00-002KRH). Mr. Almonte claimed to have learned of this non-selection on September 5, 2000. The initial counseling interview was held by a Customs EEO counselor on September 19, 2000. A NRFDC was hand-delivered to Mr. Almonte on October 13, 2000.
- 12. On October 21, 2000, Mr. Almonte filed a formal individual administrative EEO complaint, which was designated TD 01-3019 (Exhibit 1 hereto). On October 26, 2000, the Chicago Regional (now Treasury) Complaint Center (CTCC), notified Customs that the following issue was accepted for processing: "[w]as the complainant discriminated against based on his national origin (Hispanic) when on or around September 5, 2000 he learned that he was not selected for the position of Senior Special Agent, GS-1811-13 announced under Vacancy Announcement #CAAPS/00-002KRH?" (Exhibit 2 hereto).

- 13. On January 24, 2001, Mr. Almonte withdrew his formal complaint of discrimination, (Exhibit 3 hereto) and was thereafter notified by the CTCC that the Department terminated the processing of the complaint (Exhibit 4 hereto). Mr. Almonte indicated that he did "not wish to pursue this complaint any further" (Exhibit 3).
- 14. An examination of the records of this office indicates that Mr. Almonte has not filed any administrative complaints of discrimination against the Secretary of the Treasury either individually or as a class agent on behalf of a purported class of Customs employees, other than the complaint of discrimination described above and the documents referred to therein.

Evelio W. Velasco

TD 95-1245

- 15. An examination of the EEO complaint records of this office indicates that on February 15, 1995, Mr. Velasco sought EEO counseling regarding his non-selection for the positions of Criminal Investigator (CI) (Special Assistant); Special Agent in Charge (SAC), Los Angeles; and Assistant SAC (ASAC), San Diego.
- 16. On May 24, 1995, Mr. Velasco filed a formal individual administrative EEO complaint of discrimination, designated TD 95-1245, regarding the above-mentioned non-selections (Exhibit 5 hereto). The issues accepted for processing by the Washington TCC (WTCC) on June 30, 1995, were whether Mr. Velasco was discriminated against based on national origin (Hispanic) when (a) on or about January 18, 1995, he learned that he was not selected for the position of Criminal Investigator (CI) (Special Assistant), under Vacancy Announcement (VA) # EEB-94-14WM; (b) on January 23, 1995, he learned that he was not

selected for the position of Supervisory CI, Special Agent In-Charge (SAC), VA# EEB-94-13 WM; and (c) on February 28, 1995, he learned that he was not selected for the position of Supervisory CI, Assistant SAC (ASAC), VA# EEB 94-12 WM (Exhibit 6 hereto).

- 17. On April 11, 1997, Mr. Velasco and Customs entered into a settlement agreement that resolved all issues related to TD 95-1245 and led to Mr. Velasco's withdrawal of that complaint.
- 18. An examination of the records of this office indicates that Mr. Velasco has not filed any administrative complaints of discrimination against the Secretary of the Treasury either individually or as a class agent on behalf of a purported class of Customs employees, other than the complaint of discrimination described above and the documents referred to therein.

John Yera

19. An examination of the EEO complaint records of this office indicates that, as of the date of this declaration, John Yera has never filed a formal administrative EEO complaint against the Secretary of the Treasury, either individually or as a class agent on behalf of a purported class of Customs employees.

Stephen Mercado-Cruz

TD 91-2239 and TD 92-2018

20. An examination of the records of this office indicates that, prior to 2000, Mr. Mercado-Cruz filed two formal individual administrative EEO complaints, designated TD 91-2239 and TD 92-2018, on July 1, 1991 and October 17, 1991, respectively. In accordance with

NARA's four-year record retention schedule, this office no longer maintains files related to these complaints. However, CTS records show that in TD 91-2239, Mr. Mercado-Cruz alleged discrimination on the basis of national origin (Hispanic) and retaliation regarding issues of evaluation/appraisal. According to CTS, the case was closed on the merits on December 10, 1991, with no finding of discrimination (Exhibit 7 hereto).

21. TD 92-2018 concerned allegations by Mr. Mercado-Cruz that he was discriminated against on the basis of his national origin (Hispanic) and retaliation regarding issues of evaluation/appraisal. According to CTS, the case was closed on the merits on February 3, 1993, with no finding of discrimination (Exhibit 8 hereto).

TD 00-4110 and 00-4296

- 22. An examination of the EEO complaint records of this office indicates that on December 6, 1999, Mr. Mercado-Cruz sought EEO counseling regarding his non-selection for a group supervisor position at the RAIC/OI (Resident Agent in Charge/Office of Investigations) in Calexico, CA, on the basis of reprisal and national origin discrimination. Mr. Mercado-Cruz claimed that he was notified on November 9, 1999 of this non-selection. On January 5, 2000, the EEO counselor sent Mr. Mercado-Cruz a NRFDC by certified mail.
- 23. On January 18, 2000, Mr. Mercado-Cruz filed a formal individual administrative EEO complaint, which was designated TD 00-4110 (Exhibit 9 hereto). The complaint was accepted for processing on February 4, 2000. The issue was defined as whether the complainant was discriminated against on the basis of his national origin (Hispanic) and/or in retaliation for prior EEO activity when he was not selected for the position of Group Supervisor, GS-1811-14

Page 8 of 32

(SAC San Diego, CA), VA# AN41811, on or about November 9, 1999 (Exhibit 10 hereto). On March 17, 2000, the San Francisco Regional Complaint Center (now Oakland TCC (OTCC)) notified the complainant that it was ceasing processing of this individual complaint because it came within the definition of the class complaint filed under number TD 95-0014C by Miguel Contreras on behalf of other special agents of Hispanic national origin.

Case 1:02-cv-00923-JR

- 24. On August 21, 2000, the OTCC notified Mr. Mercado-Cruz that it decided to bifurcate TD 00-4110 into two separate actions, TD 00-4110 and TD 00-4296. The issue and basis accepted for processing under TD 00-4296, was whether Mr. Mercado-Cruz was retaliated against for prior EEO activity related to his non-selection for the position of Group Supervisor, GS-1811-14 (SAC San Diego, CA), VA# AN41811, on or about November 9, 1999. He was further notified that TD-4110 would remain inactive and TD-4296 would be processed.
- 25. On May 31, 2001, the OTCC wrote to Mr. Mercado-Cruz indicating that it would cease processing of TD 00-4110 and TD 00-4296, because they came within the definition of the class complaint. On November 8, 2002, the OTCC dismissed both complaints because they were the basis of a pending civil action in U.S. District Court.
- 26. An examination of the records of this office indicates that Mr. Mercado-Cruz has not filed any administrative complaints of discrimination against the Secretary of the Treasury either individually or as a class agent on behalf of a purported class of Customs employees, other than the complaints of discrimination described above and the documents referred to therein.

Miguel Contreras

TD 94-3272 and TD 95-3067

- 27. On August 25, 1994, Mr. Contreras sought EEO counseling regarding allegations that he was being discriminated against on the basis of his national origin on the following matters: evaluation/appraisal (non-merit pay), harassment, training, and working conditions. Specifically, he alleged that on July 25, 1994, he received a performance appraisal with an overall rating of "Fully Successful" but with negative remarks in three areas (Exhibit 11 hereto). He also complained to the counselor that he had received inadequate training (Exhibit 12 hereto). On September 26, 1994, a NRFDC was hand-delivered to Mr. Contreras.
- 28. On September 26, 1994, Mr. Contreras filed a formal individual administrative EEO complaint of discrimination, which was designated TD 94-3272. The formal complaint alleged discrimination due to his national origin (unspecified) concerning his performance appraisal, retaliation and inadequate training (Exhibit 13 hereto).
- 29. On October 31, 1994, Mr. Contreras sought EEO counseling regarding the imposition of an October 5, 1994 suspension. At counseling, Mr. Contreras claimed that the suspension was imposed because of his national origin. On December 6, 1994, Mr. Contreras agreed to extend the counseling period for 30 days. On December 29, 1994, Mr. Contreras was issued a NRFDC.
- 30. On January 6, 1995, Mr. Contreras filed a formal individual administrative EEO complaint, which was dated December 30, 1994. The complaint, designated TD 95-3067, contained allegations of discrimination related to the suspension of October 5, 1994 (Exhibit 14 hereto).

- 31. On February 2, 1995, the Chicago Regional (now Treasury) Complaint Center (CTCC) notified Mr. Contreras that TD 94-3272 and TD 95-3067 had been accepted for processing. The issues defined were whether Mr. Contreras was discriminated against on the basis of his national origin and retaliated against for prior EEO activity when (1) on July 25, 1994, he received a performance appraisal with an overall rating of "Fully Successful" but with negative comments in various performance elements; (2) he was not allowed to participate in a training class on September 19, 1994; (3) he was "subjected to a higher level of supervision"; and (4) on October 5, 1994, he was suspended for three days (Exhibit 15 hereto).
- 32. On April 3, 1996, the CTCC notified Mr. Contreras by letter that it was administratively closing TD 94-3272 and TD 95-3067, because the processing of those complaints was affected by matters Mr. Contreras was pursuing in another forum. The letter did not identify the forum, but it apparently was referring to the EEOC's processing of TD 95-0014C (see below), the administrative class complaint pursued by Mr. Contreras. The CTCC stated that, after a decision was made in the other forum (on, presumably, the class complaint), Mr. Contreras would have 15 days to notify the CTCC that he wished to reinstate the administrative processing of TD 94-3272 and TD 95-3067.

TD 95-0014C/95-0014CR

- 33. On January 9, 1995, Mr. Contreras sought counseling regarding his non-selection for a GS-14 Supervisory CI position. He claimed he became aware of the non-selection on January 6, 1995 (Exhibit 16 hereto).
 - 34. On February 16, 1995, Mr. Contreras was interviewed by an EEO counselor.

Counseling records indicate that during the interview, Mr. Contreras stated his desire to file a class action complaint because of his belief that Hispanic Special Agents (SA's) of the Customs Service, ranging from GS-12 to GS-15, were being discriminated against in the areas of promotions, reassignments, details, job training and language skills (Exhibit 17 hereto). Notes from the interview indicate that the complaint was triggered by Mr. Contreras's alleged discovery on January 6, 1995, that he had not been selected for a Supervisory Criminal Investigator Resident Agent in Charge (RAIC) GS-1811-14 position that he had applied for under VA# ENF1/94-072JS, dated September 26, 1994. The announcement covered duty locations in Miami, Florida, El Paso, Texas, and Laredo, Texas, but Mr. Contreras only applied for El Paso and Laredo. Mr. Contreras also alleged that (1) as a GS-12 from 1988 to 1992, he had applied for GS-13 positions thirty-five times before being selected, and that he had applied at least five times since then for a promotion to GS-14 without being selected; (2) he had applied, at an unspecified time, for a position in Mexico but his application had been "blocked" by his supervisor in Detroit, who cited a need for his Spanish language skills in Detroit, as well as the fact that Mr. Contreras had been in Detroit for only thirteen months; (3) he had been denied adequate training, citing the denial of his January 31, 1995 request to attend an Advanced Financial Forfeiture class and the denial of his request to attend the Customs National Agents Associations First Annual Training Conference on March 7-8, 1995; and (4) Hispanics were underrepresented nationwide and particularly in Arizona, citing his own nonselection for several unspecified positions in Arizona, as well as for a GS-13 position in Sells, Arizona. On March 15, 1995, a NRFDC was issued to Mr. Contreras via certified mail.

35. On or about March 23, 1995, Mr. Contreras filed an administrative EEO class

complaint of discrimination "on behalf of himself and all similarly situated past, present, and future Hispanic agents" at Customs, alleging that the class "includes a group of approximately twenty-seven (27) Hispanic GS-1811 Special Agents (Criminal Investigator) Grade 12-15, who are currently employed by [Customs's] Office of Investigation and Internal Affairs" (Exhibit 18 hereto). The class complaint contained allegations that Mr. Contreras had been individually discriminated against when (1) Customs continued to seek applications for a lateral transfer position of Resident Agent in Charge (RAIC), Sells, Arizona, even after he applied for the position on January 25, 1995; (2) his February 1, 1995 request to attend a two-week advanced financial/forfeiture training was not referred for consideration; (3) no action was taken on his January 10, 1995 application for a lateral transfer to a position in Merida, Mexico, though the status of the vacancy announcement was unknown to him at the time of the complaint; (4) after applying for two Supervisory Criminal Investigator positions in El Paso and Laredo, Texas on January 6, 1995, he learned of his non-selection for the El Paso position; (5) on April 7, 1994, he was not selected for a rotational reassignment in the Offices of Investigation and Internal Affairs (OI/IA), after applying for such reassignments in Arizona, Texas, and California; (6) over the course of his employment with Customs, at least 38 of his applications for promotions to GS-1811-13 and 14 Supervisory CI positions and/or lateral transfers were rejected; (7) in January 1995, he learned of his non-selection for a lateral transfer to Monterrey, Mexico; and (8) after being tentatively selected in October 1993 to a Customs Representative position in Mexico, his transfer was denied by management officials who cited a mobility policy that precluded employees from transferring within a three year period after their last transfer. The class complaint also alleged class-wide discrimination in the areas of promotions, recruitment, hiring,

work assignments, geographic assignments, transfers, retention, training, foreign language pay, awards, and discipline. Mr. Contreras did not indicate whether he had contacted an EEO counselor within 45 days of any alleged adverse employment action pertaining to any of these allegations.

- 36. On April 12, 1995, OEOP asked EEOC to assign an Administrative Judge (AJ) to handle the class complaint, designated as TD 95-0014C. On November 21, 1995, the AJ issued an opinion recommending that Mr. Contreras's complaint be processed on behalf of a class. The opinion found that the complaint, on behalf of all past, future, and other Hispanic GS-1811 SA's (CI's) grades 12-15, who are currently employed by the agency's OI and IA, and who were geographically dispersed, met administrative class requirements.
- 37. On December 21, 1995, OEOP issued a final decision rejecting the recommendation to process Mr. Contreras' complaint on behalf of a class, determining that "the class complaint is untimely and also does not meet the prerequisites of class complaints." With respect to timeliness, the agency noted that Mr. Contreras "did not timely raise any allegations of his own experiences with respect to hiring, job assignments, retention, or the use of language skills which occurred within forty-five (45) days of January 9, 1995."
- 38. Mr. Contreras appealed the agency's December 21, 1995 decision. On May 11, 1998, the EEOC OFO reversed and vacated the agency's decision and certified the class complaint. The EEOC also stated that the class agent's efforts to consolidate his own individual complaints were proper and consolidated TD 94-3272 and TD 95-3067 with the class complaint. On October 22, 1999, OFO denied a request by Customs to reconsider its reversal of the agency's decision, and ordered the agency to process the complaint as a class.

- 39. On June 22, 2000, EEOC AJ Matthew Bradley defined the class as "All Special Agents (Criminal Investigators, job series 1811, grades 12 through 15, of Hispanic national origin, employed in the Office of Investigations and the Office of Internal Affairs of the United States Customs Service." The AJ continued: "The class does not include applicants. Nor does it include Air Interdiction Officers. However, the class does include agents employed after January 9, 1995. The decision certifying the class does so based upon the theory that the Agency's policies and practices toward Spanish-speaking agents, specifically regarding how they are assigned, have a negative impact with respect to training, promotions, awards, and discipline." The parties processed the case using these definitions of the class and issues until January 2002, when class counsel requested that retaliation be included as an issue. AJ Joel Kravetz denied this request in February 2002.
- 40. On May 10, 2002, Mr. Contreras withdrew his class complaint from the administrative process and filed a complaint in the District Court of the District of Columbia.

TD 98-4017

- 41. On July 7, 1997, Mr. Contreras sought EEO counseling concerning his non-selection for a reassignment as Senior Customs Representative in Hermosillo, Mexico (Exhibit 19 hereto). He claimed that he learned of this non-selection on May 22, 1997. At some point later during counseling, he also raised his non-selection, on or about August 27, 1997, for the position of Assistant Customs Attache, Bangkok (Exhibit 20 hereto). A NRFDC was issued on October 10, 1997, and sent by certified mail.
 - 42. On October 23, 1997, Mr. Contreras filed an individual administrative EEO

complaint, designated as TD 98-4017 (Exhibit 21 hereto). Accepted for processing on December 11, 1997, the complaint alleged that Mr. Contreras was discriminated against on the basis of his national origin (Hispanic) and/or in retaliation for his prior EEO activity when he was not selected for the position of Senior Customs Representative (Hermosillo, Mexico), GS-1811-14, on or about April 15, 1997; and for the position of Assistant Customs Attache (Bangkok), GS-1811-14, on or about August 27, 1997. On August 16, 2002, Customs was informed by Administrative Judge Salvador that the complaint was dismissed at the agency's request because it contained the same allegations as the class action filed in federal district court.

TD 98-4137

- 43. On November 3, 1997, Mr. Contreras sought EEO counseling concerning his non-selection for a promotion to Attache, Bogota, Colombia (Exhibit 22 hereto). He claimed that he learned of this non-selection on October 17, 1997. Also during the counseling phase, Mr. Contreras claimed that he learned that he was not selected for three additional positions: Attache, Caracas (notified 12/8/97), Treasury Liaison (notified 12/17/97), and Associate SAC (ASAC) (Chicago) (notified 1/21/98) (Exhibit 23 hereto). The basis for the discrimination was noted as national origin (Hispanic) and retaliation. A NRFDC was issued on March 12, 1998.
- 44. On March 17, 1998, Mr. Contreras filed a formal individual administrative EEO complaint regarding these non-selections (Exhibit 24 hereto). On April 13, 1998, the San Francisco Regional Complaint Center (now Oakland TCC) designated the complaint as TD 98-4137, and the issue accepted for processing was whether Mr. Contreras was discriminated against on the basis of national origin (Hispanic) and/or in retaliation for prior EEO activity,

when he was not selected for (1) the Customs Attache, GS-1811-15 position in Bogota, Colombia, under VA# INVSC/97-111TKC, on October 17, 1997; (2) the Customs Attache, GS-1811-15 Caracas, Venezuela, position under VA# INVSC/97-111TKC, on December 8, 1997; (3) the position of CI (Special Assistant), GS-1811-15, in Washington, D.C., under VA# INVSC/97-158TKC on December 17, 1997; and (4) the ASAC, GS-1811-15 in Chicago, IL and/or Miami, FL, under VA# INVSC/97-215TKC on January 21, 1998 (Exhibit 25 hereto).

45. On January 5, 2000, OEOP discontinued processing the complaint because it came within the definition of the class complaint.

TD 99-4107

46. On April 29, 1998, Mr. Contreras sought EEO counseling concerning his non-selection on unspecified dates for positions in New Orleans and San Juan. A NRFDC was issued on October 19, 1998 and sent to Mr. Contreras by certified mail on October 20, 1998. On February 9, 1999, Mr. Contreras filed an individual administrative EEO complaint, alleging that he was discriminated against on the basis of national origin and in retaliation for previous EEO activity when he was not selected for GS-1811-15, ASAC positions in New Orleans and San Juan on unspecified dates. In the formal administrative complaint, Mr. Contreras explained that he did not file the complaint on time because he did not receive the NRFDC, which had been sent to his old address but which he had left in September 1998 due to divorce proceedings. The complaint was designated as TD 99-4107, and a request for information about the timeliness of the filing of the formal complaint was sent to Mr. Contreras on March 18, 1999. Mr. Contreras did not respond, and the complaint was dismissed as untimely filed on April 5, 1999, because he

had provided no justification that would support waiving the time limits (Exhibit 26 hereto). There is no information in the case file indicating that Mr. Contreras appealed the dismissal.

TD 00-4106M and TD 00-4107

- 47. On October 20, 1999, Mr. Contreras sought EEO counseling concerning a September 28, 1999 proposed termination (Exhibit 27 hereto). Later during the counseling period, he also raised a November 9, 1999 non-selection for Regional Special Agent in Charge positions in Long Beach, CA and El Paso, TX (Exhibit 28 hereto). A NRFDC was issued on January 12, 2000, and sent to Mr. Contreras by certified mail on January 13, 2000.
- 48. On January 18, 2000, Mr. Contreras filed an individual administrative EEO complaint alleging discrimination on the bases of national origin, age, and retaliation regarding the proposed termination and November 9, 1999 non-selection (Exhibit 29 hereto). On January 24, 2000, the complaint was bifurcated, with the proposed termination addressed in TD 00-4106M and the non-selection in TD 00-4107. On January 25, 2000, the OTCC dismissed 00-4106M because it concerned a proposal to take a personnel action. Mr. Contreras appealed the proposed termination on February 8, 2000.
- 49. On April 18, 2000, Mr. Contreras's appeal regarding the proposed termination became moot because Customs decided not to terminate him.
- 50. In October 2000, in connection with a Merit Systems Protection Board (MSPB) appeal on related disciplinary issues, Mr. Contreras reached a settlement agreement that resolved all issues pertaining to TD 00-4106M.
 - 51. On February 10, 2000, TD 00-4107, the bifurcated portion of the complaint

pertaining to the non-selection, was accepted for processing. The issue was defined as whether Mr. Contreras was discriminated on the basis of age (date of birth: November 23, 1955), national origin (Mexican American/Hispanic) and/or in retaliation for prior EEO activity when he was not selected for the positions of Regional SAC, ES-1811, Office of Internal Affairs (El Paso, TX, and Long Beach, CA), on November 9, 1999, under VA# EXSER-99-009NCN (Exhibit 30 hereto). On February 26, 2000, Mr. Contreras contacted the OTCC about a number of other non-selections (Exhibit 31 hereto). On March 17, 2000, processing ceased on TD 00-4107 because the individual complaint came within the definition of the class complaint. On August 24, 2000, the OTCC notified Mr. Contreras that it would continue processing a portion of the complaint (Exhibit 32 hereto). The accepted issues, as amended, were whether the complainant was discriminated against on the basis of his age and/or in retaliation for previous EEO activity when he was not selected for the positions of (1) Regional SAC, ES-1811, Office of Internal Affairs (El Paso, TX and Long Beach, CA), VA# EXSER-99-009NCN, on November 9, 1999; (2) SAC (Senior Executive Service (SES)), Office of Investigations, New York, NY, under VA# EXSER-99-010NCN, on or about February 3, 2000; (3) Customs Attache, Singapore, Montevideo, Berlin, and Vienna, GS-1811-15, VA# INVSC/99-029-TKA, on or about February 24, 2000; and (4) Executive Director of Foreign Operations, GS-1811-15, Headquarters, Washington, D.C., VA# INVSC-99-139JS, on or about February 24, 2000.

52. By separate letter on August 24, 2000, the OTCC dismissed the portions of the complaint based on national origin because they stated the same claims that were pending before the EEOC in the class action. On November 8, 2000, Mr. Contreras submitted a letter withdrawing his allegation concerning the New York non-selection (Exhibit 33 hereto).

TD 00-4194

- 53. On March 17, 2000, Mr. Contreras sought EEO counseling on the basis of retaliation concerning the reopening, by the Office of Inspector General (OIG), of a previously closed investigation into a 1997 incident involving Mr. Contreras. A NRFDC was issued on April 11, 2000. It was sent by certified mail on April 12, 2000, and Mr. Contreras signed the form for a hand delivery on April 18, 2000.
- 54. On April 21, 2000, Mr. Contreras filed an individual formal administrative EEO complaint, designated TD 00-4194, alleging discrimination on the basis of national origin and retaliation regarding the reopening of the investigation (Exhibit 34 hereto). By letter dated April 27, 2000, the OTCC advised Mr. Contreras that it would cease processing the case because it came within the definition of the class complaint. By letter dated August 21, 2000, the OTCC advised Mr. Contreras that it would resume processing of the complaint. The issue accepted for processing was whether Mr. Contreras was discriminated against based on his national origin (Hispanic) and in retaliation for prior EEO activity when, in March 2000, the OIG reopened an investigation into an incident that occurred in 1997 (Exhibit 35 hereto).
- 55. In February 2002, the agency filed a motion to dismiss TD 00-4194. After considering that motion and Mr. Contreras's response, the AJ determined that TD 00-4194 should be dismissed because it did not state a claim, in that simply being the subject of an OIG investigation did not render Mr. Contreras an "aggrieved person" (Exhibit 36 hereto). There is no information in the case file indicating that Mr. Contreras appealed the dismissal.

TD 00-4269

- 56. On May 20, 2000, Mr. Contreras sought counseling about a non-selection, which he claimed that he learned about on May 15, 2000, for a promotion to a position in Singapore (Exhibit 37 hereto). During the counseling period, Mr. Contreras also complained about (1) additional non-selections in May 2000 for promotions to positions in Long Beach, Singapore, Lyon, Tucson, and New Orleans; (2) OIG investigations for which he received information under the Freedom of Information Act on May 31, 2000; (3) an OI policy to fill positions by lateral reassignment, which he learned of on May 30, 2000; and (4) the use by Customs of a "vetting" process (Exhibit 38 hereto). He also told the counselor that that the Tucson SAC said an employee who files a complaint is a "cockroach" Id. On June 28, 2000, a NRFDC was sent to Mr. Contreras by certified mail.
- 57. On July 11, 2000, Mr. Contreras filed an individual formal administrative EEO complaint, designated TD 00-4269 (Exhibit 39 hereto). The issues accepted for processing on August 25, 2000, were whether Mr. Contreras was discriminated against in retaliation for prior EEO activity when he was not selected for (1) an Acting assignment and the positions of Regional SAC (SES), IA, Long Beach, CA, VA# EXSER-00-002PJ, on or about May 19, 2000; (2) the position of Customs Representative, INTERPOL, Lyon, France, VA# INVSC-99-029TKA, on or about May 15, 2000; (3) ASAC, OI, Tucson, AZ, VA# INVSC-00-007-JS, on or about May 19, 2000; and (4) SAC, Senior Executive Service (SES), OI, New Orleans, LA, VA# EXSER-99-010NCN, an or about May 25, 2000. Also accepted were allegations as to whether Mr. Contreras was subjected to harassment in retaliation for prior EEO activity when (1) he learned on May 31, 2000, that Treasury's OIG initiated an investigation on

August 5, 1998, concerning his alleged improper use of the Treasury Enforcement Communications System (TECS) and theft/misuse of funds/property; (2) he learned on May 30, 2000, that the OI requested GS-1811-15 lateral transfers to foreign offices precluding his application for these positions; (3) Customs utilized a "vetting" process to perpetuate discrimination against Hispanics and other minorities; (4) he was not allowed to meet the Commissioner of Customs in early 2000; (5) he was denied attendance on June 6, 2000, at the annual Customs National Hispanic Agents Association Conference; (6) he was issued a memorandum on March 1, 2000, from the Acting ASAC, with an annotation next to his name, "If not fired yet"; (7) he learned that the SAC (Tucson) referred to employees who file EEO complaints as "cockroaches"; and (8) he was denied participation in an undercover assignment with the RAIC (Nogales) in June 2000 (Exhibit 40 hereto).

58. An August 25, 2000 letter dismissed the allegations identified above that were filed on the basis of national origin because they stated the same claims pending before the EEOC in the class action. On November 8, 2000, Mr. Contreras submitted a letter withdrawing the allegation concerning the New Orleans non-selection (Exhibit 33).

TD 01-4096

59. On December 5, 2000, Mr. Contreras contacted an EEO counselor about his working conditions (Exhibit 41 hereto). He provided the counselor with a copy of an October 4, 2000 letter he wrote, which complained of a hostile work environment due to a pattern of harassment and retaliatory actions (Exhibit 42 hereto). A NRFDC was issued by certified mail on December 21, 2000.

- 60. On December 28, 2000, Mr. Contreras filed a formal individual administrative EEO complaint alleging retaliation by the agency concerning various matters (Exhibit 43 hereto). On February 28, 2001, the formal complaint, designated as TD 01-4096, was accepted. The allegations were whether Mr. Contreras was retaliated against for prior EEO activity when (1) he was denied leave on December 16, 2000; (2) he learned on October 2, 2000, that group supervisors were assigned new trucks but he was denied a new truck when he was group supervisor; (3) he was not allowed to work a significant drug smuggling investigation on October 3, 2000, and (4) he was counseled by his supervisor on October 4, 2000.
- 61. On November 15, 2002, the OTCC requested that TD 01-4096 be returned for dismissal due to the filing on May 10, 2002 of a class complaint by Mr. Contreras. An order of dismissal was issued by the EEOC on December 24, 2002.

TD 02-4160

- 62. On March 11, 2002, Mr. Contreras contacted an EEO counselor concerning a letter of caution and a letter of fitness for duty, both issued to him in March 2002 (Exhibits 44 and 45 hereto). At some point later during counseling, he discussed his reassignment to the San Luis, AZ, port of entry on March 18, 2002. On April 3, 2002, a NRFDC was sent to the Complainant by certified mail.
- 63. On April 5, 2002, Mr. Contreras filed a formal individual administrative EEO complaint, designated TD 02-4160 (Exhibit 46 hereto). On November 15, 2002, the OTCC identified the allegations but then dismissed the complaint. The allegations were whether Mr. Contreras was discriminated against on the basis of national origin (Hispanic) and in retaliation

for participation in the EEO process when he was (1) issued a March 6, 2002 fitness for duty letter, (2) issued a March 7, 2002 letter of caution, and (3) reassigned to the San Luis, AZ, port of entry on March 18, 2002. The OTCC found that this complaint was the basis of a pending civil action in federal district court and dismissed the complaint.

64. An examination of the records of this office indicates that Mr. Contreras has not filed any administrative complaints of discrimination against the Secretary of the Treasury, either individually or as a class agent on behalf of a purported class of Customs employees, other than the complaints of discrimination described above and the documents referred to therein.

Ramon Martinez

TD 94-1120 and TD 96-1078

- 65. An examination of the records of this office indicates that on April 5, 1994, Mr. Martinez sought EEO counseling, alleging he was discriminated against based on his national origin when his Treasury Enforcement Communications System (TECS) access was removed, access to his office was denied, and he was denied access to qualify in firearms with Internal Affairs (IA). He alleged that these events occurred in March 1994. The NRFDC was issued on May 3, 1994.
- 66. On May 18, 1994, Mr. Martinez filed a formal individual administrative EEO complaint, designated TD 94-1120 (Exhibit 47 hereto). On August 3, 1994, the Director, Regional Complaints Center, Washington, accepted the complaint on the allegations as to whether the Mr. Martinez was discriminated against because of his national origin (Mexican-American) when allegedly: on March 3, 1994, he was interrogated by IA; on March 7, 1994, he

was locked out of his office; on March 7, 1994, he was denied TECS system access; on March 9, 1994, he was advised he would be detailed to the Office of Management Inspections; and on March 17 and 18, 1994, he was told he could not qualify with firearms.

67. On August 17, 1995, Mr. Martinez contacted an EEO counselor alleging national origin discrimination and retaliation regarding a July 5, 1995 decision to suspend and reassign him. On December 4, he was issued a NRFDC. On December 19, 1995, Mr. Martinez filed a formal individual administrative EEO complaint, alleging he was discriminated against on the basis of national origin and reprisal when he was issued a five-day suspension and reassigned to a Physical Security Specialist, GS-080-13 position in the Security Programs Division, effective July 23, 1995 (Exhibit 48 hereto). This complaint was assigned case number TD 96-1078. TD 94-1120 (above) and 96-1078 were consolidated for hearing on February 18, 1997. On February 24, 1998, Mr. Martinez and the agency entered into a settlement agreement resolving case numbers TD 94-1120 and 96-1078. As a result of the settlement agreement, Treasury terminated the processing of those complaints.

TD 95-1127

68. CTS records indicate that a formal individual administrative EEO complaint of discrimination was filed by Mr. Martinez on January 27, 1995, on the basis of his national origin and on the issue of a suspension. This complaint was assigned case number 95-1127. Our electronic records indicate that the case was dismissed on February 14, 1995 as a moot issue (Exhibit 49 hereto). There is no information in the case file indicating that Mr. Martinez appealed the dismissal.

69. An examination of the records of this office indicates that Mr. Martinez has not filed any administrative complaints of discrimination against the Secretary of the Treasury, either individually or as a class agent on behalf of a purported class of Customs employees, other than the complaints of discrimination described above and the documents referred to therein.

Ruben Gonzalez

TD 95-2142

- 70. An examination of the records of this office reveals that on December 12, 1994, Ruben Gonzalez sought EEO counseling regarding alleged discrimination that occurred on approximately December 12, 1994. Mr. Gonzalez was interviewed by the EEO counselor on January 4, 1995. During counseling, Mr. Gonzalez alleged that he was discriminated against on the basis of his national origin (Puerto Rican) when he was not placed on a best qualified list (BQL) or selected for a supervisory GS-14-1811 position with Internal Affairs in either Miami or El Paso. A NRFDC was issued on February 9, 1995.
- 71. On February 13, 1995, Mr. Gonzalez filed a formal individual administrative EEO complaint of discrimination, designated TD 95-2142 (Exhibit 50 hereto). The formal complaint of discrimination was based primarily on promotion and assignment issues. On June 23, 2002, in accordance with EEOC regulation 29 C.F.R. § 1614.107(a)(3), the Treasury Complaint Center dismissed Mr. Gonzalez's complaint because it was the basis of a pending civil action in United States District Court.

TD 00-1091

72. On December 6, 1999, Mr. Gonzalez sought EEO counseling, alleging that he was discriminated against, based upon his race (Hispanic), when he was not selected for four GS-15 positions within the Office of Internal Affairs Internal Affairs (VA#'s HEADQ/99-148, 158, and 159MCC) (Exhibit 51 hereto). Mr. Gonzalez allegedly became aware that he was not selected for these vacancies on October 8, 1999. Mr. Gonzalez also indicated his belief that he was denied a lateral transfer based upon his participation in the class action. On February 1, 2000, the EEO Counselor provided Mr. Gonzalez with a NRFDC.

73. On February 2, 2000, Mr. Gonzalez filed a formal individual administrative EEO complaint of discrimination, alleging that he was discriminated against because of his race and his prior participation in the administrative class action complaint filed by Mr. Contreras, when he was not selected under vacancy announcements HEADQ/99-148, 158, and 159MCC (Exhibit 52 hereto). This was assigned case number TD 00-1091. By a letter dated February 24, 2000, Mr. Gonzalez requested that the Washington TCC (WTCC) amend his complaint to reflect that he first met with Linda Batts, Special Assistant to the Commissioner on EEO, on November 5, 1999, regarding his nonselection for VA#'s HEADQ/99-148, 158, and 159MCC, and to include his national origin as Puerto Rican (Exhibit 53 hereto). On February 24, 2000, the WTCC prepared a memorandum to file indicating the correct date of counseling should have been November 5, 1999, not December 6, 1999 (Exhibit 54 hereto). On March 1, 2000, the WTCC informed Customs and Mr. Gonzalez, that the following issue had been accepted: whether management discriminated against Mr. Gonzalez based upon race (Hispanic), national origin (Puerto Rican), and retaliation (prior EEO complaint and participation in Hispanic class action),

when management did not select him on October 8, 1999, for promotion to the positions of Supervisory CI, GS-1811-15, under VA#'s HEADQ/99-148MCC; HEADQ/99-158MCC; and HEADQ/99-159MCC (Exhibit 55 hereto). On May 4, 2000, the WTCC notified Customs that TD 00-1091 was administratively closed pending a decision on the class complaint.

TD 00-1209, TD 01-1068 and TD 01-1086

74. From the records in our office, it appears that Mr. Gonzalez contacted an EEO counselor on July 14, 2000, to complain about a continuing pattern of non-selections (Exhibit 56 hereto). It appears that some of these non-selections occurred while counseling was ongoing; other announcements were open at the time of the complaint and closed or were canceled shortly after his complaint was filed.

75. On July 25, 2000, the WTCC notified Customs that the individual complaint in TD 00-1091 (above) would be divided, with the retaliation claim being processed as an individual complaint (TD 00-1209). The issue accepted in the July 25, 2000 memorandum regarding TD 00-1209 was whether management discriminated against Mr. Gonzalez based upon retaliation for previous EEO activity and participation in the class complaint, when management did not select Mr. Gonzalez on October 8, 1999, for promotion to GS-15 under IA VA#'s HEADQ/99-148MCC, 158MCC and 159MCC (Exhibit 57 hereto). The counselor issued a NRFDC on September 22, 2000. On September 29, 2000, Mr. Gonzalez wrote to the Director of the WTCC, asking that certain other non-selections be consolidated with TD 00-1209. On November 22, 2000, the WTCC notified Customs that they had amended the acceptance letter issued July 25, 2000, to include whether Mr. Gonzalez was discriminated against on the basis of

retaliation for prior EEO activity when management did not select him from October 1999 through October 2000, for promotions in the following vacancies: (1) HEADQ/99-148MCC; (2) HEADQ/99-158MCC, (3) HEADQ/99-159MCC, (4) INVSC/99-133JS, (5) INVSC/99-138JS, (6) INVSC/99-144JS, (7) INVSC/99-147J, (8) INVSC/99-163JS, (9) INVSC/99-TKA, (10) INVSC/00-007JS, (11) INVSC/00-061JS, (12) INVSC/00-070JS, (13) INVSC/00-072JS, (14) INVSC/00-074JS, (15) INVSC/00-102, (16) INVSC/00-108JS, (17) INVSC/00-122, and (18) HEADQ/00-154MMC (Exhibit 58 hereto).

76. On October 26, 2000, Mr. Gonzalez submitted a request for EEO counseling regarding his failure to receive a cash award on October 16, 2000 (Exhibit 59 hereto). A NRFDC was issued on December 20, 2000. On January 3, 2001, Mr. Gonzalez filed a formal individual administrative EEO complaint, designated TD 01-1068 (Exhibit 60 hereto). On February 2, 2001, the WTCC accepted the complaint. The issue accepted was whether Mr. Gonzalez was discriminated against on the basis of reprisal and age when he was denied a cash award, not assigned to act as Assistant Director or Director of Financial Investigation Division, and not given career enhancing collateral duty assignments (Exhibit 61 hereto). The record does not contain the dates that Mr. Gonzalez alleged the discriminatory events (other than the failure to receive the cash award) occurred. Also, on February 2, 2001, it appears that the WTCC accepted the same claim on the basis of race (Hispanic) and national origin (Puerto Rican), designated this claim TD 01-1086, and notified Mr. Gonzalez that the WTCC ceased processing the claim because it fell within the definition of the class complaint (Exhibit 62 hereto).

77. On March 1, 2001, Mr. Gonzalez was notified that 01-1068 would be consolidated with 00-1209. On July 5, 2001, the Complaint Center responded to Mr. Gonzalez's request of

June 12, 2001 to further amend his complaint, 00-1209. The amended claims included Mr. Gonzalez's non-selection on the basis of retaliation for (1) SAC, GS-1811-15 under INVSC/01-011, (2) SAC, Denver, CO in June 2001, (3) SAC, San Antonio, TX, in June 2001, and (4) Deputy Regional SAC, announced under HQINT/01-003GH (Exhibit 63 hereto). Mr. Gonzalez claimed that he learned of these non-selections in letters dated June 6, 2001 (Exhibit 64 hereto).

- 78. On July 19, 2002, the WTCC notified Mr. Gonzalez that TD 00-1209 and 01-1068 would be dismissed because the complaints were the basis of a pending civil action in United States District Court.
- 79. An examination of the records of this office indicates that Mr. Gonzalez has not filed any administrative complaints of discrimination against the Secretary of the Treasury, either individually or as a class agent on behalf of a purported class of Customs employees, other than the complaints of discrimination described above and the documents referred to therein.

Ricardo Sandoval

TD 94-4099 and TD 97-4289

- 80. According to the CTS records maintained by this office, Mr. Sandoval filed a formal individual administrative EEO complaint on November 8, 1993, alleging discrimination based on national origin. The complaint was designated 94-4099. No issues were listed. Mr. Sandoval withdrew his complaint on April 4, 1994 (Exhibit 65 hereto).
- 81. On August 7, 1997, Mr. Sandoval filed a formal individual administrative EEO complaint of discrimination alleging discrimination based on national origin and reprisal for prior EEO activity. The complaint was designated 97-4289. The matters causing the complaint

are indicated as terms and conditions of employment. The case was dismissed on September 18, 1997, due to his failure to state a claim. There is no information in the case file indicating that Mr. Sandoval appealed the dismissal.

TD 94-4070 and TD 94-4158

- 82. According to CTS, Mr. Sandoval filed a formal individual administrative EEO complaint of discrimination on February 3, 1994. The complaint was assigned case number TD 94-4070. The basis of the complaint was national origin and reprisal and concerned a promotion/non-selection and a directed reassignment. The Department of the Treasury issued a final agency decision finding no discrimination on March 10, 1995 (Exhibit 66 hereto). There was no appeal of this decision.
- 83. According to CTS, Mr. Sandoval filed a formal individual administrative EEO complaint of discrimination on June 8, 1994. The complaint was assigned case number TD 94-4158. The basis of the complaint was national origin and reprisal and concerned a directed reassignment. The Department of the Treasury issued a final agency decision finding no discrimination on April 10, 1995 (Exhibit 67 hereto). There was no appeal of this decision.

TD 96-4247

84. An examination of the EEO complaint records of this office indicates that on June 18, 1996, Mr. Sandoval sought EEO counseling because he allegedly was subjected to harassment and retaliation in the form of an Internal Affairs (IA) investigation that was unfounded and intended only to harass him. The counseling report notes that he claimed he

became aware of the alleged discrimination on May 7, 1996. On August 19, 1996, Mr. Sandoval was issued a NRFDC.

- 85. On August 30, 1996, Mr. Sandoval filed a formal individual administrative EEO complaint of employment discrimination with the Department of the Treasury (Exhibit 68 hereto). This complaint was designated 96-4247. He alleged that he had previously filed EEO complaints, TD 94-4158 and TD 94-4070, which were, at the time, the subject of a lawsuit in federal court in San Diego, and that two IA agents initiated investigations of him based on unfounded allegations.
- 86. On November 13, 1996, the San Francisco Regional Complaints Center notified the Customs Service that it had received a formal complaint of discrimination from Mr. Sandoval and accepted the following basis and issue for processing: whether the agency conducted an Internal Affairs investigation on Mr. Sandoval from March 20 through May 7, 1996, because of discrimination based on his age (Date of Birth: May 10, 1955) and in retaliation for prior EEO activity (Exhibit 69 hereto).
- 87. On March 26, 1998, OEOP rendered a final decision on Mr. Sandoval's complaint, finding that the evidence was not sufficient to support a claim of discrimination based on age or retaliation (Exhibit 70 hereto). OEOP further notified Mr. Sandoval of his appeal rights. There was no appeal taken.
- 88. An examination of the records of this office indicates that Mr. Sandoval has not filed any administrative complaints of discrimination against the Secretary of the Treasury, either individually or as a class agent on behalf of a purported class of Customs employees, other than the complaints of discrimination described above and the documents referred to therein.

I declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: March 19, 2003

Maucin Harner MARIAM HARVEY Assistant Director for Complaint Operations

Office of Equal Opportunity Program

Department of the Treasury

1500 Pennsylvania Avenue, NW

Metropolitan Square, Room 6070

Washington, D.C. 20220

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Plaintiffs,)	
)	
v.)	Case No. 1:02CV00923(JR)
)	
TOM RIDGE, Secretary,)	
Department of Homeland Security,)	
Defendant.)	

DECLARATION

- I, PAUL MICHAEL KILCOYNE, declare the following to be true and correct:
- 1. I am the Director, Covert Operations Division (COD), Bureau of Immigration and Customs Enforcement. Prior to March 9, 2003, I held this position in the U.S. Customs Service. On March 9, 2003, I was transferred, along with the majority of special agents at the Customs Service, to the Bureau of Immigration and Customs Enforcement in the Department of Homeland Security. I have been Director of the COD since July 2001 and joined the Customs Service as a special agent in September 1985. I served in the Customs Headquarters Smuggling Investigations Division from 1991 to 1998, and as the Associate Special Agent in Charge (ASAIC) in San Juan, Puerto Rico, from January 1998 through July 2001. Before joining Customs, I was a police and training officer with the Los Angeles Police Department for seven years.
 - 2. The COD was established in the Customs Service in the mid-1980s.
- 3. The COD coordinates, reviews, plans and implements all certified Customs covert operations. The COD also trains and certifies special agents for undercover work, and

additionally certifies other agency employees and state and local law enforcement personnel who participate with special agents in task forces.

- 4. As Director, I oversee all of the program managers in the Division to ensure that all undercover operations are in compliance with established Customs policy and procedure. I have personally performed training for covert operations regarding controlled deliveries and case management.
- 5. "Certified" covert operations (also known as undercover operations) are likely to be long term, undercover investigations, conducted by special agents who have volunteered, been trained, screened and certified.
- 6. Many special agents also perform "casual" undercover duties as an element of one of their own investigations, or assist other investigations by performing undercover duties, such as a "buy," a "pick-up" or a "drop off" of money or contraband, or making a telephone call or engaging in a conversation during a meet or introduction scenario.
- 7. Participation by special agents in all covert operations, both certified and casual, is always on a volunteer basis.
- 8. Special agents in the certification program are clearly instructed that their participation in the program is one of the few strictly voluntary assignments at Customs. Specifically, agents either volunteer for participation, or they can be recommended by a supervisor. However, even recommended agents are not required to participate in the program. In my experience, it is an honor to be recommended for participation.
- 9. Because certification training for undercover operations is conducted on a volunteer basis, special agents are provided several opportunities to opt out of the training program.

- 10. During undercover training, students are advised by the instructor that they should be involved in the planning stages of all undercover operations, and any apprehensions they may have should be resolved to their satisfaction prior to proceeding with the operation. As an additional safeguard, throughout the undercover certification class, students are advised to discuss with fellow students and experienced class coordinators (who are peers in the program), any issues or apprehensions they may have about working as an undercover operative.
- 11. During training, a psychological evaluation and certification of every agent is conducted by a licensed psychologist specializing in undercover as well as law enforcement matters. This is done to assess the agent's ability to participate in undercover operations and to determine their capacity to perform undercover work. The psychological evaluation is also intended to ensure that the agent is voluntarily participating in the program. Furthermore, every SAIC office has an undercover operations psychological liaison coordinator, who has access to the contract psychologist, in the event any psychological issue should arise pertaining to undercover operatives.
- 12. Annual evaluations are made of undercover agents' ability to continue in the operations at the field level.
- 13. Undercover operatives may opt out of an ongoing undercover investigation (both certified and casual) at any time, to ensure the safety of the undercover agents.
- 14. No special agent is forced to perform undercover work of any kind, even on an informal basis, since to do so could jeopardize the safety of the agent or others, and result in an unsuccessful investigation.

3

15. Numerous Hispanic special agents, as well as agents of other national origins and races, have performed undercover work, solely on a volunteer basis, as coordinators, instructors, students, and operatives.

Case 1:02-cv-00923-JR

- 16. Many special agents have told me that they participated in the covert operations program because it enhanced their promotion potential. In my experience, participation in the certified undercover program has been career enhancing for many special agents.
- 17. The COD maintains a database of certified undercover operatives. This database indicates which special agents are available to perform undercover operations, as well as their level of certification, specialized skills, availability for participation, performance parameters, and all federally issued identifications and/or licenses.
- 18. A recent inquiry of the COD database and class and certification files was performed and the information was utilized to create the attached Exhibit 1.

The Plaintiffs

- 19. The COD records reflect that Miguel Contreras completed undercover operative school on March 21, 1991, but that he has not participated in any certified undercover operations. Headquarters has not assigned him any undercover ID. (Exhibit 1)
- 20. The COD records do not reflect that Ruben Gonzalez has attended the undercover operative school or participated in any certified undercover operations. Nor has Headquarters assigned him any undercover identification. (Exhibit 1)
- 21. The COD records reflect that Stephen Mercado completed undercover operative school on July 22, 1993. Additionally, Mr. Mercado completed an undercover psychological

evaluation on March 28, 1995. The records reflect that Mr. Mercado's participated in Operation Whiteline. (Exhibit 1)

- 22. The COD records reflect that Ricardo Sandoval completed undercover manager's school April 19, 1994. Mr. Sandoval was also issued an undercover social security number on February 11, 1998, which he returned to COD on November 26, 2001. The database does not reflect participation in any certified undercover operations. (Exhibit 1)
- 23. The COD records reflect that Ramon Martinez completed the undercover operative school on May 24, 1991. The records do not reflect issuance of any undercover identification or participation in any certified undercover operations. (Exhibit 1)
- 24. The COD records reflect that Frank Almonte completed the undercover operative school on May 6, 1995. The records do not reflect issuance of any undercover identification or participation in any certified undercover operations. (Exhibit 1).
- 25. The COD records reflect that William Velasco completed the undercover operations manager school on May 5, 1998. The records reflect issuance of an undercover operative credit card on August 5, 2002. The records do not reflect issuance of any other undercover identification or participation in any certified undercover operations. (Exhibit 1).
- 26. The COD records reflect that John Yera completed the undercover operative school on March 21, 1991. The records reflect issuance of an undercover social security number on November 13, 1989. (Exhibit 1).

I declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: 03/15, 2003.

PAUL MICHAEL KILCOYNE

Director, Covert Operations Division

Bureau of Immigration and Customs Enforcement

1300 Pennsylvania Ave, NW

Washington, D.C. 20229

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EXHIBIT 1

This information was obtained by checking covert database, covert class tolders/records and UC agent file folders.

Miguel Contreras

UC class # 9302

Date 03211991

Short term UC certification (03191991) UC Managers # 9301 Date 12031992

No UC ID listed in database No UC ops listed in database No UC agent file folder

Ruben Gonzalez

Not listed in database No UC agent file folder

Not listed in any class folders/records

Stephen Mercado

UC class # 9302

Date 07221993

Short term UC certification (07221993)

UC Mangers # 9601 UC Psych Coord (# unk) Date 03071996 Date 04281995)

UC Recordkeeper # 9601

Date unk

No UC ID listed in database

Operation Whiteline listed in database (no dates)

No UC agent file folder

Ricardo Sandoval

UC Managers # 9402 Date 05191994

No UC ops listed in database

UC SSN ID issued 02111998, returned 11262001

UC agent folder just lists UC ID info

Ramon Martinez

UC class # 9103 (IA) Date 05241991 No certification listed in database No UC ID listed in database No UC ops listed in database UC agent file folder only has bio info

Frank Almonte

UC class (# unk)

Date 04061995

No certification listed in database UC credit card issued 08052002 No UC ops listed in database

No UC agent file folder

William E. Velasco

UC Managers (# unk) Date 04151988

Not listed in database No UC agent file folder

John Yera

UC class # 9302

Date 03211991

Short term UC certification (03191991)

UC SSN ID issued 11131989 No UC ops listed in database

No UC agent file folder

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MIGUEL A. CONTRERAS, et al.,) Plaintiffs,	
v.)	Case No. 1:02CV00923(JR)
TOM RIDGE, Secretary,) Department of Homeland Security,) Defendant.)	

SUPPLEMENTAL DECLARATION

- I, MARIAM HARVEY, declare the following to be true and correct:
- 1. I am the Assistant Director for Complaint Operations, Office of Equal Opportunity Program (OEOP), Department of the Treasury, Washington, D.C. I have held this position since August 2001. Prior to occupying this position, I served as Deputy Director, OEOP, from 1999-2001. I was the Chief, Complaint Operations, from approximately 1996 to 2001. This declaration is based on my personal knowledge or information provided to me in my official capacity.
- 2. On March 19, 2002, I executed a declaration in connection with the above referenced litigation. That declaration contained 88 paragraphs and 70 exhibits.
- 3. As previously attested to, as the Assistant Director for Complaint Operations, OEOP, I am the custodian of official agency records relating to the filing, administration, and disposition of formal administrative complaints presented to the Department of the Treasury, including the Bureau of Customs and Border Protection (formerly known as the U.S. Customs Service).
 - 4. Attached hereto is one additional exhibit obtained from Plaintiff Ruben Gonzalez's

Filed 03/20/2003

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investigative file designated TD-1068. This exhibit is an Unsworn Declaration from Marcy Foreman that was executed on July 16, 2001. At the time, Ms. Foreman was the Division Director, Financial Investigative Programs at the Customs Service.

5. This Exhibit is a true and correct copy of the Unsworn Declaration of Marcy Foreman contained in the above referenced investigative file.

I declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: Manch 20, 2003

MARIAM HARVEY

Assistant Director for Complaint Operations
Office of Equal Opportunity Program
Department of the Treasury

1500 Pennsylvania Avenue, NW

Metropolitan Square, Room 6070

Washington, D.C. 20220

EXHIBIT 1

AFFIDAVIT OF **Marcy Foreman** (Management Official)

UNSWORN DECLARATION

SUBJECT: Discrimination Complaint of Ruben Gonzales v. Paul H. O'Nelli, Secretary of the Treasury

> UNSWORN DECLARATION UNDER PENALTY OF PERJURY In response to information requested by EEO Investigator Benjamin R. Lazaro, and in accordance with the provisions of 28 U.S.C. 1746, I, the undersigned, Marcy M. Forman, do hereby make the following unsworn declaration, under penalty of perjury, pertinent to the above stated subject:

- Please state your name, title, series, grade and age. 1.
 - I am employed by U.S. Customs Service as the Division Director, Financial Investigative Programs, GS-1811-15, in Washington, D. C. My date of birth is November 16, 1959.
- Did you have knowledge of the Complainants prior activity in the EEO 2. process (filed an EEO complaint and is a member of a class complaint)? If so, when did you become aware and how did you acquire this knowledge? What was your role in that prior EEO activity? Were you aware of the Complainant's Age?
 - Yes, I learned of the prior EEO complaint filed by the complainant when an EEO counselor, out of Front Royal, Virginia contacted me. I had heard that the complainant was probably a member of the Hispanic Agents class action complaint, but I do not recall who told me or when. Regarding the prior EEO complaint, the only role I had that I am aware of was giving a statement to the EEO counselor out of Front Royal. I am not aware of the complainant's age.
- Please provide a brief employment history for the last two years. 3.
 - Division Director, Financial Investigations Division, 09/12/99 Present, Assistant Special Agent in Charge, Houston, Texas, 05/97-09/99

Mar-20-2002 02.25--

- What is your professional relationship with the Complainant and what 4. is the duration of this relationship?
 - I am the complainant's second line supervisor. I have been the complainant's second line supervisor since my arrival on September 12, 1999.
- Why was the Complainant denied an award for his participation in 5. Operation Powerplay? Please describe the process involved in the giving of awards for this operation. Please indicate who received awards for this operation and why they received awards
 - I was the manager who made the decisions as to who received these awards. I am also the initiating official on the award submission, and John Varrone, Assistant Commissioner of Investigations, is the approving official. Based upon my recollection, there were a number of reasons that the complainant did not receive an award for his participation in Operation Powerplay. Firstly, there were limited monles to be awarded. Therefore, I established certain criteria when determining who should receive an award. Those criteria pertained to those employees who went above and beyond their assigned tasks. Specifically, those Individuals who were instrumental in initiating and implementing the operation, and those individuals who volunteered to work evenings and weekends, received awards. To the best of my recollection, the complainant had the same opportunity as the other group members to volunteer to lead, initiate, and implement this operation. The complainant chose not to. In addition, to the best of my recollection, the complainant, unless assigned, did not volunteer for any evening or weekend shifts. The complainant only did what was tasked, nothing above or beyond those duties.

The following individuals received awards for Powerplay.

- Carlos Cortez Supervisory Intelligence Analyst, Ol 1.
- Martha Schwing Intelligence Analyst, Ol 2
- Donald Anderson Program Analyst, OFO 3.
- Efrain Perez Program Officer, OFO 4.
- Charles Bartoldus Deputy Director, Outbound Programs, OFO 5.

- Marcy Forman Division Director, Financial Investigative Programs Ol 6.
- 7. Catherine Sanz - Program Manager, Ol
- John Kelleghan Program Manager, Ol 8.
- Joseph Catanzarite Program Manager, Ol 9.
- Pamela Caudill Program Manager, Ol 10.
- Dale Hickman Program Manager, Ol 11.
- Angelo Torres Program Manager, Ol 12.
- Michelle Gonzalez Desk Officer, Ol 13.

The aforementioned listed employees received awards because they were either instrumental in the development and implementation of Operation Powerplay, volunteered for assignments including weekends and evenings, or ensured the timely and accurate communication and coordination of all enforcement activity under the auspices of this operation.

- 6. Why was the complainant not assigned to act in the position of Assistant Director or Director of the Financial Investigations Division? Please describe what criteria are used to determine acting assignments in the Division. Please indicate who has acted in the positions and the reasons they were selected during the last two vears.
 - The complainant was not assigned to act in the position of Assistant Director or Director of Financial for several reasons. Foremost, I, as the Director, having supervised the complainant, did not have confidence in the complainant's ability to successfully act in those positions. The complainant, in my opinion, lacked the depth of knowledge, experience. and judgmental abilities. During my tenure as the Financial Director, I cannot recall when the complainant was assigned a project or task that he did not ask the Assistant Director or his co-workers where he could get the information and/or how to complete the assignment. The complainant would regularly seek assistance on assignments that, at his level and position, should have been routine. The complainant, when present in the office, would spend a significant amount of time on the telephone and/or visiting with co-workers discussing what I believe were personal matters. During the last fiscal year, the complainant took a great deal of annual and sick leave. In fact, the complainant had taken so much leave that when calculating the complainant's certification for Law Enforcement Availability Pay (LEAP), he almost did not qualify. The complainant was counseled

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regarding his time and attendance since he would routinely arrive at the office at 8:00 a.m. and leave between 4:45 p.m. and 5:00 p.m. (Note: The complainant did not have authorization to leave before 5:00 p.m. and it would be extremely difficult to qualify for LEAP under this schedule). Additionally, there are many issues and taskings that arise after 5:00 p.m. that the complainant is routinely not available to address.

The criteria I used for determining acting assignments were rather simple. Unless otherwise engaged or committed, the Assistant Director for the Division usually acts in my stead. When he is not available, I will then select an employee who is knowledgeable of the program and who I am confident will address taskings as assigned. I do not recall designating an acting Assistant Director, if the permanent Assistant is acting in my stead.

To the best of my recollection the following employees have acted in the position of Director, Financial Investigative Programs:

- Anthony Mangione, Assistant Division Director
- Peter Smith, Assistant Division Director (reported March, 2001)
- John Kelleghan, Program Manager
- Martin Schramm, Program Manager
- Catherine Sanz, Program Manager
- Joe Catanzarite, Program Manager
- Pam Caudill, Program Manager
- Dave Atwood, Program Manager

This list is complete to the best of my knowledge and recollection. As stated above, the Assistant Directors were always selected to act unless they were not available. The Program Managers listed above were selected to act at various times. Their selection was based on their knowledge, experience, dependability and initiative while assigned to this division.

- 7. Why was the Complainant not given career enhancing collateral duty assignments? Please describe what criteria are used to determine collateral duty assignments. Please indicate anyone that has been given collateral duty assignments during the last two years and why they were chosen for the assignments.
 - The only collateral assignments that I am aware of in the Financial Investigations Division are; Classified Document Custodian and Alternate, and the National Fitness Coordinator. It should be noted that the complainant was the Alternate Classified Document Custodian for a period of time. These duties were reassigned as the complainant was given an extended TDY and Peter Smith, who had recently arrived as the new Assistant Director, was available to take over this tasking. I do not view these collateral duties as necessarily career enhancing, and as stated above, the complaint did occupy one of these assignments. I do not recall the complainant ever requesting and/or indicating an interest in a collateral assignment.

To the best of my recollection the following individuals have been assigned collateral duties during the last two years:

- John Kelleghan, Primary Classified Document Custodian
- Ruben Gonzalez, Alternate Classified Document Custodian
- Peter Smith, Alternate Classified Document Custodian
- Anthony Mangione, Alternate Classified Document Custodian
- Dave Atwood, Primary Classified Document Custodian
- William John Davis, National Fitness Coordinator

I was responsible for the selection of John Kelleghan and Peter Smith as Primary and Alternate Classified Document Custodians. Program Manager Kelleghan was selected as he had performed the same duties while assigned to Internal Affairs. Assistant Director Smith was selected as an alternate due to his availability and position.

The Deputy Assistant Commissioner for Investigations selected William John Davis at the National Fitness Coordinator.

- 8. Was the Complainant's age and involvement in the EEO process factors in the denial of a cash award for his participation in Operation Powerplay? Were they a factor in not giving him acting assignments as Assistant DD or Director Financial Investigations? Were they a factor in him not being given career enhancing collateral duty assignments?
 - The complainant's age and involvement in the EEO process were never factors or considerations in the decision not to award the complainant for his participation in Operation Power Play. As stated in question 2, to date, I am not aware of the complainant's age nor do I consider it a factor in his job performance. The complainant's involvement in the EEO process had no bearing on his failure to receive an award. The complainant was never denied an Acting position based upon his age or involvement in the EEO process. The complainant, during my tenure as Division Director, has not demonstrated the knowledge, initiative and leadership abilities needed to take on this responsibility. These are job performance criteria and nothing else. In regard to career enhancing collateral duties, the complainant for a period of time was assigned a collateral duty. I do not view the collateral duties as described above as necessarily career enhancing. Even so, the complainant's age and involvement in the EEO process never played a role in the selection process.
- 9. Please provide any information you may deem necessary that is relevant to the issues in these claims.
 - I believe it would be extremely helpful to interview the complainant's co-workers, current and former, to get a perspective of the complainant's work performance. I have been approached by co-workers within and outside of the division who have expressed concern and/or disdain with the complainants work performance.

belief.

Executed on this /b day of July , 2001, at Washington, D. C.

> (Signature) Marcy M. Forman **Division Director** Financial Investigations Division Office of Investigations 1300 Pennsylvania Ave, NW Washington, D.C. 20229

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MIGUEL A. CONTRERAS, et al., Plaintiffs,))
v.) Case No. 1:02CV00923(JR)
TOM RIDGE, Secretary,)
Department of Homeland Security,	
Defendant.)

DECLARATION

- I, LEE HEFFELFINGER, declare the following to be true and correct:
- 1. I am the Acting Executive Director, Administration, Planning, and Policy in the Office of Investigations, Bureau of Immigration and Customs Enforcement. Prior to March, 2003, I held this position in the U.S. Customs Service. In March, 2003, my office was transferred to the Bureau of Immigration and Customs Enforcement in the Department of Homeland Security. I also served as the Deputy Executive Director, Administration, Planning, and Policy in the Customs Service from August 25, 2002 to November 5, 2002. This declaration is based on my personal knowledge or information provided to me in my official capacity.
- 2. In my present position as Acting Executive Director, I supervise a full time staff of 103 employees. My duties include, but are not limited to matters related to financial resources, personnel, case management, information disclosure, and logistics within the Office of Investigations.
- 3. On or about March 12, 2003, at the request of Customs counsel, I directed a member of my staff to retrieve the official training records of Miguel A. Contreras. The agency's official

training records are contained in an electronic database known as the Training Records and Enrollment Network (TRAEN). TRAEN stores training information on employees. In addition, per Customs Directive 51410-018A dated January 18, 2001, TRAEN also includes all completed training of 1 hour or more and required training regardless of length. TRAEN began in 1990 but includes all previous databases since 1982. Previously, the Customs Training Policy was described in Customs Directive 51410-018 dated June 4, 1993.

- 4. The official record of training by Miguel Contreras, Exhibit 1, indicates that from 1988 to the present, he participated in 32 Customs sponsored training classes. This means that Customs paid all costs associated with the training. These classes include, but are not limited to Basic Agent Training, Critical Incident Training, and Imprest Fund Training.
- 5. Attached as Exhibit 2 is a key to understand the acronyms associated with where the training was conducted. By way of example, 6YU equates to RAIC, Yuma, Arizona.

I declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: _3/19 /_____, 2003.

LEE HEFFELFINGER

Acting Executive Director

Administration, Planning, and Policy

Office of Investigations

Bureau of Immigration and Customs and

Enforcement

1300 Pennsylvania Ave, NW

Washington, D.C. 20229

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EXHIBIT 1

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PAGE

COMPLETED TRAINING REPORT

REPORT SELECTION BASED ON:

NAME: MIGUEL A CONTRERAS

EMPLOYEE TYPE: ALL EMPLOYEE LEVELS
ACTIVE AND SEPARATED EMPLOYEES

REPORT SORTED ON: SSN

	REPORT SORTED O	IN: SSN														
	6															6 F
R∣	140 T NAME	ELDOT NAME					COURSE		SESSN	START	END	T.T. C	TRN		HOURS	CE
	LAST NAME	FIRST NAME	SSN	ORG CODE	IES	DE	CODE	CODE	NBR	DATE	DATE	TITLE	CAT	GOV	NONGOV	UNITS
	CATRERAS		F0/000/07	0/477004	4044	47		OVE	0500	00 (44 (05	00 (22 (05	FORFELT FINANCE	- 07	0.00	0.00	0.00
L,		MIGUEL	526022423						9502			FORFEIT FINANCE		0.00		0.00
	CONTRERAS	MIGUEL	526022423				CBES	CNT	8906			BASIC AGENT	07	0.00		0.00
C)	CONTRERAS	MIGUEL	526022423				CFIC	CNE	9802			FRAUD INVEST	07	0.00		0.00
CI	CONTRERAS	MIGUEL	526022423				CIIA	CNF	9801			CRITICAL INCIDE		0.00		0.00
C	CONTRERAS	MIGUEL	526022423				CSS					SUPERVISORY SEM	05	0.00		0.00
C	OONTRERAS	MIGUEL	526022423							12/04/90			12	0.00		0.00
C)	CONTRERAS CONTRERAS	MIGUEL MIGUEL	526022423				EEOCBT	6TU MSD				EEO CPTR TRNG EEO MEDIATION	05	0.00		0.00
C)		MIGUEL	526022423				EEOMED					HARDLINE ETHICS		0.00		0.00
CI	CONTRERAS CONTRERAS	MIGUEL	526022423 526022423				HET	MSD CNF				IA SEMINAR	07	0.00		0.00
C	CONTRERAS	MIGUEL	526022423				IAS IMPF	OMI		05/27/98			01	0.00		0.00
C	CONTRERAS	MIGUEL	526022423				IMPF	OMI		06/01/98				0.00		0.00
C)	CONTRERAS	MIGUEL	526022423				NSAM		9204			NARCCO SMUG		0.00		0.00
C!	CENTRERAS	MIGUEL	526022423				OGEIA	CNF				OGE ETHICS	08	0.00		0.00
CI	QONTRERAS	MIGUEL	526022423				PSSM					PHY SURV SCHOOL		0.00		0.00
Ci	CONTRERAS	MIGUEL	526022423				PURCHA					PURCHASE CARD	10	0.00	0.00	0.00
C	CONTRERAS	MIGUEL	526022423				SSAS	CNE	0103			SA REFRESHER	ŌĒ	0.00	0.00	0.00
Ci	CONTRERAS	MIGUEL	526022423				SSAS					SA REFRESHER	ΟE	0.00	0.00	0.00
Ci Ci	CONTRERAS	MIGUEL	526022423				UCMS					UC MANAGERS	07	0.00	0.00	0.00
C	CONTRERAS	MIGUEL	526022423				UCOS					UC OPERATIVES	07	0.00	0.00	0.00
Ci	CONTRERAS	MIGUEL	526022423				Z06100					BEGINNING WORD		0.00	0.00	0.00
Ci	CONTRERAS	MIGUEL	526022423	06133001	1811	14	Z06100	6YU	00652	09/07/99	09/07/99	MICROSOFT OFFIC	:	0.00	0.00	0.00
Ci	CONTRERAS	MIGUEL	526022423	06133001	1811	13	042703	6YU	02001	11/19/01	11/19/01	OFFICER TRNG	04	0.00	0.00	0.00
Ci	CONTRERAS	MIGUEL	526022423	06133001	1811		042709					HANDGUN SKILLS	04	0.00	0.00	0.00
Ci	CONTRERAS	MIGUEL	526022423	06133001	1811	13	042711	6YU	02001	04/30/02	04/30/02	SHOTGUN SKILLS	04	0.00	0.00	0.00
Ci	CONTRERAS	MIGUEL	526022423				042719	6YU	02001	04/30/02	04/30/02	TACT SHOOTING	04	0.00	0.00	0.00
C	CONTRERAS	MIGUEL	526022423	06133001	1811	13	042720	6YU	02001	11/19/01	11/19/01	POINT SHOOTING	04	0.00	0.00	0.00
Ci	CONTRERAS	MIGUEL	526022423				042721	6YU	02001	11/19/01	11/19/01	PUSH VERT TRKIN	I 04	0.00	0.00	0.00
Ci	CONTRERAS	MIGUEL	526022423				042729					USE OF FORCE	04	0.00	0.00	0.00
C	CONTRERAS		526022423				042749					MAKE WEAPON SAF		0.00	0.00	0.00
Č	CONTRERAS	MIGUEL	526022423				044700			11/15/01			04	0.00	0.00	0.00
Č	CONTRERAS	MIGUEL	526022423	06133001	1811 ′	13	084701	6YU	01002	09/30/01	09/30/01	IA3	80	0.00	0.00	0.00
CI	23															
CI																
	THAL NUMBER OF	RECORDS:	32													
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Case 1:02-cv-00923-JR Document 22-9 Filed 03/20/2003 Page 5 of 10

EXHIBIT 2

TRAEN COURSE SCHEDULE PRD CPE20302 CME20301 SEL: TR I 1 _ _ TRAEN COURSE SCHEDULE PRD CPE20302 CME20301

SEL: TR I 1 Case 1:02-cv-00923-JECADECUIOCATIZON COPFED 03/20/2003 Page 6 of 10

STARTING LOCATION CODE: CNE

CODE DESCRIPTION

CNE CUSTOMS NATIONAL ENFORCEMENT TRAINING CNF CUSTOMS NATIONAL INTERNAL AFFAIRS TRAINING CNG CUSTOMS NATIONAL GENERAL TRAINING CNI CUSTOMS NATIONAL INSPECTION & CONTROL TRAINING
CNJ CUSTOMS NATIONAL ACADEMY DIRECTOR
CNL CUSTOMS NATIONAL CHIEF COUNSEL TRAINING CNM CUSTOMS NATIONAL MANAGEMENT TRAINING CNN CUSTOMS NATIONAL NON-ALIGNED TRAINING CNO CUSTOMS NATIONAL EEO TRAINING CNR CUSTOMS NAT'L STRATEGIC TRADE/REGULATORY AUDIT TRN

CNS CUSTOMS NATIONAL SPANISH LANGUAGE TRAINING

CNT CUSTOMS NATIONAL TRAINING

2009 PLACE CURSOR ON LOC CODE AND PRESS 'ENTER'

PF1-SCRN HELP 2-FIELD HELP 3-RETURN 5-CLEAR 7-PREVIOUS 8-NEXT 9-SUBMENU 10-MAIN MENU 11-ASDM 12-LOGOFF

SEL: TR I 1 TRAEN COURSE SCHEDULE PRD CPE20302 CME20301

SEL: TR I 1 Case 1:02-cv-00923-JEDCAPGCUMCEAT22N9 COPRED 03/20/2003 Page 7 of 10 10 11:05

STARTING LOCATION CODE: 6YU

CODE DESCRIPTION

6YU RAC, YUMA, AZ
600 SOUTHWEST REGION
61A INTERNAL AFFAIRS, RAC MCALLEN (DEACTIVATED)
62A INTERNAL AFFAIRS, RAC EL PASO
621 PORT ARTHUR, TX
622 GALVESTON, TX
623 BROWNSVILLE, TX
624 EL PASO, TX
625 PHARR, TX
626 NOGALES, AZ
627 LAREDO, TX
63A INTERNAL AFFAIRS, RAC SAN ANTONIO

2009 PLACE CURSOR ON LOC CODE AND PRESS 'ENTER'
PF1-SCRN HELP 2-FIELD HELP 3-RETURN 5-CLEAR 7-PREVIOUS
8-NEXT 9-SUBMENU 10-MAIN MENU 11-ASDM 12-LOGOFF

SEL: TR I 1 _ TRAEN COURSE SCHEDULE PRD CPE20302 CME20301

SEL: TR I 1 PRD CPE20302 CME20301

TRAEN COURSE SCHEDULE PRD CPE20302 CME20301

STARTING LOCATION CODE: OMI

OMI OFFICE OF MANAGEMENT - INDIANAPOLIS TRAINING
OML OFFICE OF MANAGEMENT - LOGISTICS AKA OSH
OMP OFFICE OF MANAGEMENT - PROCUREMENT
OMT OFFICE OF MANAGEMENT - TRAINING (OFFICE OF)
OMO OFFICE OF MANAGEMENT - MGMT STAFF
OOP HEADQUARTERS, OFFICE OF PLANNING
OPA HEADQUARTERS, OFFICE OF PUBLIC AFFAIRS
OPO HEADQUARTERS OFO, PASSENGER OPERATIONS DIVISION
ORR HEADQUARTERS, OFFICE OF REGULATIONS AND RULINGS
OSP HEADQUARTERS, OFFICE OF STRATEGIC PROBLEM SOLVING
OSS ADMIN SYSTEMS SUPPORT DIVISION
OTD HEADQUARTERS, OFFICE OF TRAINING AND DEVELOPMENT

2009 PLACE CURSOR ON LOC CODE AND PRESS 'ENTER'

PF1-SCRN HELP 2-FIELD HELP 3-RETURN 5-CLEAR 7-PREVIOUS
8-NEXT 9-SUBMENU 10-MAIN MENU 11-ASDM 12-LOGOFF

SEL: TR I 1

TRAEN COURSE SCHEDULE

PRD CPE20302 CME20301

SEL: TR I 1 Gase 1:02-cv-00923-JEOCAPOCULO ENTRA COURSE SCHEDULE PRO CPE20302 CME20301 PF ___

STARTING LOCATION CODE: MSD

CODE DESCRIPTION

MSD CMC SAN DIEGO

MSE CMC SEATTLE

MSF CMC SAN FRANCISCO MSJ CMC SAN JUAN

MSY AVIATION BRANCH NEW ORLEANS - AKA AEN

MTA CMC TAMPA

MTU CMC TUCSON
NCC NATIONAL COMMUNICATIONS CENTER (SECTOR)
NCS NATIONAL COMMODITY SPECIALIST TRAINING

NDA NAFTA CENTER, DALLAS, TX

NYC AVIATION UNIT NEW YORK
OFO HEADQUARTERS, OFFICE OF FIELD OPERATIONS

2009 PLACE CURSOR ON LOC CODE AND PRESS 'ENTER'

PF1-SCRN HELP 2-FIELD HELP 3-RETURN 5-CLEAR 7-PREVIOUS 9-SUBMENU 10-MAIN MENU 11-ASDM 12-LOGOFF 8-NEXT

PRD CPE20302 CME20301 TRAEN COURSE SCHEDULE SEL: TR I 1 SEL: TR I 1 Gase 1:02-cv-00923-JHOC PRO CPE20302 CME20301

PF

STARTING LOCATION CODE: 6TU

CODE DESCRIPTION

6TU SAC, TUCSON

6YU RAC, YUMA, AZ

SOUTHWEST REGION
61A INTERNAL AFFAIRS, RAC MCALLEN (DEACTIVATED)
62A INTERNAL AFFAIRS, RAC EL PASO

621 PORT ARTHUR, TX

622 GALVESTON, TX

623 BROWNSVILLE, TX 624 EL PASO, TX

625 PHARR, TX

626 NOGALES, AZ

627 LAREDO, TX

2009 PLACE CURSOR ON LOC CODE AND PRESS 'ENTER' PF1-SCRN HELP 2-FIELD HELP 3-RETURN 5-CLEAR 7-PREVIOUS 9-SUBMENU 10-MAIN MENU 11-ASDM 12-LOGOFF 8-NEXT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MIGUEL A. CONTRERAS, et al., Plaintiffs,))
V.) Case No. 1:02CV00923(JR)
TOM RIDGE, Secretary,)
Department of Homeland Security,)
Defendant.)

DECLARATION

- I, RICHARD J. HOGLUND, declare the following to be true and correct:
- 1. I am the Interim Director of Customs Investigations, in the Bureau of Immigration and Customs Enforcement. Prior to March, 2003, I was the Acting Assistant Commissioner, Office of Investigations, U.S. Customs Service. In March, 2003, my office was transferred to the Bureau of Immigration and Customs Enforcement in the Department of Homeland Security. This declaration is based on my personal knowledge or information provided to me in my official capacity.
- 2. In my present position as Interim Director, I am responsible for the activities of approximately 3,244 Special Agents, and a total staff of about 4,200. My duties include, but are not limited to, the management and control of enforcement programs involving investigations pertaining to, among other things, terrorist funds and weapons of mass destruction. I am also the selecting official for merit promotions through the GS-14 level. I am the recommending official for GS-15 selections.
 - 3. I am aware of the organization known as the Customs National Hispanic Agents

Association, commonly referred to as CNHAA.

- 4. It is my understanding that the CNHAA, established in 1995, is a non-profit organization established to promote the United States Customs Service (now the Bureau of Immigration and Customs Enforcement) and the general welfare of Customs employees, particularly Customs special agents of Hispanic descent.
- 5. I understand that CNHAA sees its mission as fostering a positive employee/management relationship, as well as nurturing and improving the relationship of Customs with the community, particularly the Hispanic community. Furthermore, it works to assure the equitable hiring, training, assignment, development, promotion and fair treatment of all employees, particularly employees of Hispanic national origin.
- 6. I believe that the CHNAA bylaws indicate that the main purpose of CHNAA is to improve Customs, particularly its special agent workforce, which is accomplished by working with and supporting other organizations that represent minorities and women; working closely with Customs management in the Offices of Investigations and Internal Affairs and their counterparts in other Customs elements; assisting in the identification of members and other potential Hispanic candidates for advancement within Customs; serving as an advocate for members and Hispanic employees in Customs that CNHAA represents relative to assignments and promotions; working to increase the number of Hispanic managers in the Customs elements the CNHAA represents; actively participating in activities promoting education and training for Hispanic employees in the Customs elements that CNHAA represents; assisting members who terminate employment with Customs, under honorable conditions, to obtain employment with other government agencies or in the private sector; and working to obtain the support of all

Customs managers in meeting the objectives of CNHAA.

- 7. I have been informed that there are approximately 250 members. The organization's focus is to provide a mechanism to all Hispanic Customs officers to receive specialized training, mentoring and guidance in career development. The organization is similar to other advocacy groups such as the National Association of Black Customs Enforcement Officers (NABCEO), Women in Federal Law Enforcement (WIFLE) and National Organization of Black Law Enforcement Officers (NOBLE).
- 8. I believe that the Association will host its 6th annual Professional Development Training Conference in Las Vegas in late June, 2003. The agenda for last year's conference included, but was not limited to, presentations on Green Quest, Anti-Terrorism, street survival, managing stress, identity fraud, and cyber crimes. Last year's attendance exceeded 100 members.
- 9. The policy to attend professional association conferences, such as the CNHAA conference, is governed by Customs issuances dated March 27, 1996, and July 12, 1999, from the Assistant Commissioner, Office of Investigations, and Internal Operating Procedures Notification (IOPN) dated October 6, 2000. Attached hereto as Exhibit 1, 2, and 3. Briefly, all employees may attend these conferences. However, each SAIC office has a limited budget within which to pay the expenses of the employee who is to attend the conference. Accordingly, the general policy has been that an employee can only attend one professional association conference per year, at government expense (except if the employee holds an office in the organization, in which case an exception may be granted to attend more often). Furthermore, "attendance at these events is a privilege bestowed on employees by management and is not an entitlement." See

Exhibit 3.

10. In my view, such events may enhance an employee's professional development.

However, attendance at such an event will not affect an employee's salary or benefits.

11. I have been both a recommending official and a selecting official with Customs. In

my view, while the attendance at a professional association meeting may be a beneficial activity

for employees, I have not viewed the attendance or non-attendance as a critical factor in

evaluating any employee's application for promotion. To my knowledge, the training which may

be provided by such organizations is not sponsored, regulated or certified by Customs, nor is it

accredited by any other educational institution, and as such, its benefit is difficult to measure.

I declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the foregoing is true

and correct to the best of my knowledge and belief.

Executed on: March 18, 2003, at Washington, D.C.

RICHARD J. HOGLUND

Interim Director

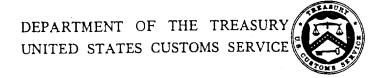
Customs Investigations

Bureau of Customs and Border Protection

Case 1:02-cv-00923-JR Document 22-10 Filed 03/20/2003 Page 5 of 14

EXHIBIT 1

UNITED STATES GOVERNMENT Memorandum



DATE:

MAR 27 1996

FILE: PER-3-OI:OA MC

01-96-52009

TO

: See Distribution

FROM : Assistant Commissioner Office of Investigations

SUBJECT: Proposed Interim Policy Guidelines for Attendance at

Advocacy Group Conferences

This memorandum establishes the interim policy for employee attendance at advocacy group conferences (e.g. NOBLE, NABCEO, CNHAA, etc.).

Albeit the ICWIFLE is not considered an advocacy group, I am requesting, for the purpose of adherence to the interim policy guidelines, that the ICWIFLE be considered a "special association" and included with the other advocacy groups insofar as determinations are made concerning requests for attending training approved by any of these groups.

By way of background, in January 1995, the Offices of Chief Counsel and Equal Employment Opportunity reviewed the U.S. Customs policy relative to participation in "special advocacy groups". ICWIFLE was cited as an example of a special advocacy group.

At an ICWIFLE meeting on February 16, 1995, the Deputy Director, Ethics Office, Justice Management Division, was requested to review the Memorandum of Understanding for the interagency committee relative to statutory prohibitions under Title 18 U.S.C 205. Based on the Directors's review, the ICWIFLE was considered a U.S. Government agency and not an advocacy group.

The following guidelines listed below is our current policy regarding attendance at advocacy group conferences. These guidelines will provide direction until such time as a uniform Treasury wide policy is formulated.

- 1.) Pursuant to the guidelines related to training described below, an employee can attend no more than one conference per year at the expense of the government. Any employee wishing to attend additional conferences, during the fiscal year, may do so at the employee's own expense, (e.g. travel, annual leave, etc.), consistent with office operational needs and subject to supervisory approval.
- 2.) Funding for attendance at these events will have to be borne by individual office budgets. When approving attendance, consideration should be given to what can be approved without seriously impacting operational spending requirements. Please note that funds allocated to office travel accounts will not be supplemented by Headquarters as a result of funding shortages.

The intent of the above provisions is to continue, as closely as possible, our current policy and practice that authorizes the payment of expenses for employees to attend advocacy group conferences so long as the conferences provide training that meets the valid needs of the Customs Service (5 U.S.C. 4109). Also, we wish to allow the widest possible employee participation within the limits of operational necessity and funds availability.

In the case of internal advocacy groups, it has not always been clear that the training offered by these groups has always met the valid needs of the Customs Service. Therefore, before granting official time for training in conjunction with employee associations and advocacy groups, the approving official should ensure that the training will enhance the professional development or skills of an employee in his/her current position and that the association is approved or sanctioned by Customs.

Until such time as a policy is established, the administering of official time will be at the discretion of all Office Directors, SACs, Air Center Directors, and Air Branch Chiefs consistent with office operational needs. These managers are authorized approval to grant official time in any amount up to, and including, five working days for attendance at approved work related training.

- 3 -

Approval authority for official time in excess of five working days will be at the Deputy Assistant Commissioner level. Requests in excess of 10 working days will require my approval.

Walter B. Biondi

cc: Headquarter Directors
Special Agents in Charge

Air Branch Chiefs Customs Attaches Case 1:02-cv-00923-JR Document 22-10 Filed 03/20/2003 Page 9 of 14

EXHIBIT 2

UNITED STATES GOVERNMENT Memorandum

DEPARTMENT OF THE TREASURY UNITED STATES CUSTOMS SERVICE

DATE:

JUL 1 2 1999

FILE: PER-3-OI:AD:OSB

TO

: See Distribution

FROM

: Assistant Commissione

Office of Investigations

SUBJECT: Proposed Policy Guidelines for Attendance at Association/Advocacy Group

my lock

Conferences

This memorandum establishes the policy guidelines for employee attendance at association/advocacy group conferences/meetings (e.g. NOBLE, NABCEO, CNHAA, ICWIFLE, etc.). It replaces the memorandum dated March 27, 1996, subject: Proposed Interim Policy Guidelines for Attendance at Advocacy Group Conferences.

The Office of Investigations (OI) encourages employee participation in the many recognized organizations available at Customs. The intent of the following is to establish a uniform policy that will allow the widest possible employee participation within the limits of operational necessity and funds availability.

- Managers (Executive Directors, Office Directors, Special Agents in 1.) Charge, Resident Agents in Charge, Attaches, Customs Senior Representatives and Air Branch Chiefs) are authorized, at their discretion, to grant official time, in any amount, for attendance at any organization/advocacy group meeting/conference as long as it does not seriously impact the operational needs of their office and it qualifies as legitimate agency training.
- Funding for attendance (travel, per diem, etc.) at these events is 2.) authorized, but will have to be borne by individual office budgets. Please note that funds allocated to office travel accounts will not be supplemented by Headquarters as a result of funding shortages.

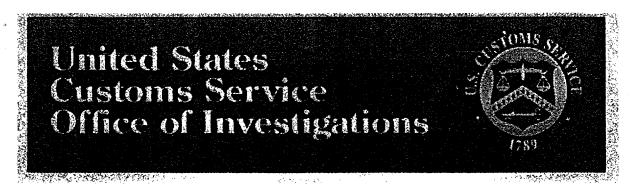
Any further questions should be directed to the Director, Financial & Logistics Management, Administration, Planning & Policy at (202) 927-1960.

Distribution: All Executive Directors All Air Branch Chiefs

All Attaches and Senior Customs Representatives

All Special Agents in Charge All Resident Agents in Charge Case 1:02-cv-00923-JR Document 22-10 Filed 03/20/2003 Page 12 of 14

EXHIBIT 3



INTERNAL OPERATING PROCEDURES NOTIFICATION (IOPN)

NUMBER:

00-07

DATE:

OCT - 6 2000

SUBJECT:

Guidelines for Attendance at Professional Association Group

Training Conferences and Meetings

PROPOSING OFFICE:

Administration, Planning and Policy

Office of Investigations (OI)

DISTRIBUTION:

All OI Personnel

This establishes OI policy guidelines for employee attendance at professional association group training conferences and meetings. This replaces the memorandum dated March 27, 1996, "Proposed Interim Policy Guidelines for Attendance at Advocacy Group Conferences," and the July 12, 1999, memorandum, "Proposed Policy Guidelines for Attendance at Association/Advocacy Group Conferences." The intent is to establish a uniform policy that will allow the widest possible employee participation, within the limits of operational necessity and funds availability.

Funding for attendance (travel, per diem, etc.) at these events is the responsibility of the individual office. Office travel accounts will not be supplemented by Headquarters as a result of funding shortages.

Attendance at these events is a privilege bestowed on employees by management and is not an entitlement. In general, recognized professional law enforcement associations that may enhance an employee's professional development include, but are not limited to, the Hispanic American Police Officer Organization; the International Association of Chiefs of Police; the National Organization of Black Law Enforcement Executives; the National Association of Blacks in Criminal Justice; the National Black Police Association; Women in Federal Law Enforcement; the National Native American Law Enforcement Association; the Customs National Hispanic Agents Association; and the Federal Law Enforcement Officers Association.

The authority to approve attendance at no more than one professional association group training conference or meeting a year, at Government expense, is delegated to Executive Directors; Deputy Executive Directors; Special Agents in Charge;

Customs Attachés; and Air and Marine Branch Chiefs. These officials may grant the use of official time or excused absence from duty up to 5 working days for employees to attend professional association training conferences and meetings. Approval or denial decisions should be based on staffing considerations, workload, budget, and, foremost, the needs of the Service.

Local management may approve an exception to the policy and allow attendance at more than one professional association training conference or meeting a year if the employee holds an official position within the association, or has been given specific responsibilities by an organization without necessarily holding an officially designated position. In these instances, approving officials may approve the employee's attendance at more than one event a year.

All other requests from the same employee to attend more than one professional association training conference or meeting within one year must be forwarded to the Assistant Commissioner for approval or denial. All requests for official time or excused absence from duty in excess of 5 working days to attend professional association training conferences or meetings must be forwarded to the Assistant Commissioner for approval or denial.

If employees elect to use annual leave to attend professional association training conferences and meetings, the leave is subject to supervisory approval. In this case, employees will be responsible for funding their own travel and registration expenses.

Assistant Commissioner
Office of Investigations

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MIGUEL A. CONTRERAS, et al., Plaintiffs,)
v.) Case No. 1:02CV00923(JR)
TOM RIDGE, Secretary,)
Department of Homeland Security,)
Defendant.)
	_)

DECLARATION

- I, JOHN J. SERAPHIN, declare the following to be true and correct:
- 1. I am the Director of Workforce Management for the Office of Investigations, Bureau of Immigration and Customs Enforcement. I held this same position in the U.S. Customs Service from May 2001 to March 2003 (on March 9, 2003, the Office of Investigations workforce was transferred to the Bureau of Immigration and Customs Enforcement in the Department of Homeland Security). Prior to that, I was the Acting Director, Workforce Management from December 2000 to May 2001. I joined the Customs Service in 1978. This declaration is based on my personal knowledge or information provided to me in my official capacity.
- 2. In my current position, my duties include the processing and coordination of all personnel actions for the Office of Investigations, including hiring, training, staffing levels, reassignments and promotions.
- 3. My office also oversees the Hardship Review Board and the foreign language award program.
- 4. The mission of the Office of Investigations includes investigation of terrorism, fraud, money laundering, child pornography, and the smuggling of arms, narcotics, and other prohibited

or regulated items.

- 5. Approximately 3,244 special agents serve in the Office of Investigations (OI). Special agent criminal investigators also serve within the Office of Internal Affairs (IA) (approximately 180), and the Office of International Affairs (INA) (approximately 97).
- 6. The approximately 180 agents who serve within IA investigate criminal and serious administrative misconduct by Customs employees. Agents often rotate between OI and IA, and a typical tour within IA is three to five years.
- 7. Rotations to IA are filled by a number of mechanisms: (1) merit promotions (i.e., agents are promoted into IA from OI, IA or INA); (2) responses to Treasury Enforcement Communication System (TECS) announcements that seek volunteers; (3) a nomination system (OI supervisors nominate agents working for them); and (4) requests by IA for certain agents that have come to their attention. Only experienced agents (GS-13 and above) are rotated or promoted into IA and INA.
- 8. Criminal investigators in INA conduct collateral investigations to support the domestic offices; initiate investigations for referral to the domestic offices; conduct liaison with local law enforcement officials/foreign counterparts to accomplish the aforementioned responsibilities; and assist the international trade community and general public on Customs issues.
- 9. The mission of Customs, which is headquartered in Washington, D.C., mandates a presence throughout the country, with a current total of 20 Offices of the Special Agent in Charge (SAIC), in OI. A number of subordinate field offices report to each SAIC; each of these subordinate offices is called a Resident Agent in Charge (RAIC). Customs maintains approximately 99 RAIC offices. There are also offices subordinate to the RAICs called Resident

Agents Offices (RAs), of which there are approximately 14.

- 10. Customs Attache offices are located in many U.S. embassies abroad.
- 11. In addition, IA is broken into four Regional Special Agent in Charge offices with an additional presence in 21 RAIC offices.
- 12. Currently, all series 1811 special agents, regardless of office, are required to agree to mobility as a condition of employment, as stated in the pre-employment documents filled out by applicants. Agents therefore agree, prior to entering duty, that they are aware that they may have to relocate for the good of the service, and they agree to do so if and when it is necessary. Mobility is also listed as a work environment factor in most, if not all, GS-1811 position descriptions.
- 13. New series 1811 special agents may not decline the location of their first assignment and are required to remain in that assignment for at least three years. After that time, they may apply for a lateral reassignment or rotation elsewhere.
- 14. Mandatory employee relocations are called directed reassignments, for which moving and relocation expenses are paid by the government.
- 15. The directed reassignment process is utilized to move employees to offices and locations where they are needed.
- 16. Under authority of Customs Directive 099-51335-002 (entitled "Directed Reassignments," and dated August 23, 1984), Assistant Commissioners at Customs, with the concurrence of the Commissioner, can direct and effect reassignment of employees under their line of authority as well as employees from other functional areas in headquarters and the field.
- 17. Reassignments pursuant to Directive 099-51355-002 are only to be effectuated for legitimate management considerations such as, but not limited to, the need for an employee's

special expertise, lack of work at an employee's present location, backlog of cases at the new location, the elimination of tensions in the work place caused by personality conflicts, and/or the need to remove an employee from an environment where his/her effectiveness has been compromised.

- 18. I have implemented reassignments for additional legitimate management considerations such as staffing imbalances, new program needs, special projects, and for disciplinary reasons.
- 19. In my experience, directed reassignments have only been effectuated for the legitimate management considerations specified above.
- 20. In the case of directed reassignments, such relocations do not change the employee's base salary or benefits. However, the locality pay may change from location to location, and like any move, the nature of the work may change depending on the needs of the specific office to which the agent is reassigned.
- 21. In the case of voluntary lateral reassignments, usually the reassignment opportunity is advertised in TECS, and all interested special agents can apply for the assignment. Lateral reassignments are not promotion opportunities and do not change the employee's grade, base salary or benefits.

I declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief.

Executed on:

, 2003.

JOHN J SERAPHIN

Director, Workforce Management

Office of Investigations

Bureau of Immigration and Customs Enforcement

1300 Pennsylvania Ave, NW

Washington, D.C. 20229

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Case No. 1:02CV00923(JR)

DECLARATION

- I, JACQUELINE SMALL, declare the following to be true and correct:
- 1. I am a Personnel Management Specialist with the Office of Human Resources

 Management, Bureau of Customs and Border Protection (formerly known as the U.S. Customs

 Service). In March 2003, my office was transferred to the Department of Homeland Security. I

 have held this position for seven years. Prior to this position, I served as Personnel Staffing

 Specialist. This declaration is based on my personal knowledge or information provided to me in

 my official capacity.
- 2. In my present position my duties include, but are not limited to, (1) providing staff, position management, pay administration and related services to Headquarters and field offices; (2) providing expert advice on personnel issues to the Branch Chief and to other personnelists; (3) serving as a special assistant to the Branch Chief; (4) providing quality assurance of branch work products; and (5) conducting special projects or studies.
- 3. In 1994, I was the Personnel Staffing Specialist on Announcement No. ENF1/94-072JS (Exhibit 1 hereto).

- 4. This announcement was generated at the request of the agency's Office of Internal Affairs, which was seeking applications to fill GS-1811-14 Supervisory Criminal Investigator positions in Miami, Florida; Laredo, Texas; and El Paso, Texas.
 - 5. The announcement was opened on September 26, 1994, and closed October 17, 1994.
 - 6. The records indicate that 52 applicants applied under this announcement.
- 7. Applicants could apply for one, two, or all three of the locations noted on the announcement.
- 8. The announcement required each applicant to address six criteria. These criteria were: (1) the ability to direct the operational activities of an office or program; (2) the ability to supervise others; (3) the ability to identify problems and develop innovative programs/systems to meet changing needs; (4) knowledge of federal laws and procedures and, specifically criminal and civil laws and procedures; (5) the ability to communicate and interact effectively with other elements and other federal, state, and local agencies; and (6) the ability to implement Equal Employment Opportunity Program initiatives.
- 9. Because more than 10 applicants applied for the vacancies, a panel of subject matter experts was established to review the applications. While I do not recall the specific number of panel members or their names, it is my belief that, pursuant to the ordinary practice at the time, there would have been three GS-14 members of the panel, with at least two from the Office of Internal Affairs. The panel was independent from the selecting official.
- 10. Typically, the panel members would first review and score each application individually. As indicated above, the vacancy announcement provided six criteria upon which the scoring was based.

- 11. Each primary criterion was scored with a 6 (excellent), 4.5 (good), 3 (moderate) or 0 (nothing). Each secondary criterion was scored with a 4 (excellent), 3 (good), 2 (moderate) or 0 (nothing).
- 12. Ordinarily, once each individual panel member rates an applicant, and before a score can be attributed to the applicant, a consensus score among the raters must be reached. For example, if on the first qualification an applicant received a score of 6 from two of the raters and a score of 4.5 from the remaining rater, a discussion among the raters would occur to arrive at a single score, either 6 or 4.5, for the particular qualification.
- 13. Once all the applicants received a total consensus score, I would then input that score in the database tracking that announcement. The scores for Announcement No. ENF1/94-072JS are attached as Exhibit 2.
- 14. As indicated in Exhibit 2, under the heading CRIT, applicants under this announcement received a range of different scores, e.g., 30, 255, 75. As the maximum number of points for each primary criterion is 6, and secondary criterion is 4, the total number of points an application could receive is 30.0. Accordingly, these numbers do not show a properly placed decimal point. Therefore, the scores should be read, e.g., 3.0, 25.5, 7.5.
- 15. Typically after the scores are calculated, a cutoff score is established. While I do not recall exactly what that cutoff score was for Vacancy Announcement ENF1/94-072JS, in my opinion it was 22.5, because that was the lowest score indicated on the three selection registers under this announcement.
- 16. After the cutoff score is established, a selection register is created for each vacancy.

 The selection register is also referred to as the best-qualified list ("BQL"). The selection register

would consist of the top ten candidates, in rank order, that made the cutoff score. For the El Paso position, only eight applicants were on the selection register, or BQL, because only eight El Paso candidates made the cutoff score (Exhibit 3 hereto). The scores of these eight applicants ranged from 28.5 to 22.5. For the Laredo position, only three candidates made the BQL, along with one alternate-staffing candidate (a candidate that does not have to apply for a vacancy competitively because he/she has already attained that grade level in the announcement). The scores for those three candidates ranged from 28.5 to 22.5 (Exhibit 4 hereto).

- 17. Once the selection register is created, the selecting official may select any of the candidates on that list, or select an alternate staffing person if available. The selecting official may not select an applicant that applied competitively but did not make the BQL.
- 18. Mr. Contreras received a score of 3.0, and did not make the BQL for either the Laredo or El Paso positions. The selecting official, therefore, did not have the option of choosing Mr. Contreras for those positions.
- 19. I note that several applicants received no score. In my opinion, this signifies that they were either candidates eligible for non-competitive selection (alternate staffing), or the application was withdrawn at the applicant's request.

I declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: *March 19*, 2003.

ACQUELINE SMALL

Personnel Management Specialist

Bureau of Customs and Border Protection

1300 Pennsylvania Ave, NW

Washington, D.C. 20229

Case 1:02-cv-00923-JR Document 22-12 Filed 03/20/2003 Page 6 of 20

EXHIBIT 1

Filed 03/20/2003

IU

Page 7 of 20



POSITION TITLE

GS-1811-14

PAY PLAN, SERIES AND GRADE

ORGANIZATION AND DUTY STATION

DEPARTMENT OF THE TREASURY UNITED STATES CUSTOMS SERVICE MERIT PROMOTION PLAN

VACANCY ANNOUNCEMENT

Supervisory Criminal Investigator (Resident Agent-in-Charge)

Position to be filled is based on proposed reorganization

VACANCY ANNOUNCEMENT NUMBER ENF1/94-072JS OPENING DATE 09-26-94 CLOSING DATE

Bargaining Unit Position Non-Bargaining Unit Position At the discretion of the Selecting Official.

NUMBER OF VACANCIES additional vacancies may be filled within 60 days after the closing date.

AREA OF CONSIDERATION

SERVICEWIDE: Applications will be accepted from U.S. Customs and the Department of Treasury status candidates only.

10-17-94

Office of Organizational Effectiveness Office of Internal Affairs Office of Special Agent-in-Charge **Duty Locations: See Remarks**

Unless otherwise noted any employee of the Department of the treasury may apply and be considered for any position.

ALL APPLICATION MATERIALS MUST BE RECEIVED IN THE OFFICE OF HUMAN RESOURCES BY THE CLOSE OF BUSINESS ON OR BEFORE THE CLOSING DATE LISTED ON THIS VACANCY ANNOUNCEMENT. NOTE THAT APPLICATIONS SENT BY FEDERAL EXPRESS, PRIORITY MAIL, OR COURIER WILL NOT BE CONSIDERED UNLESS THEY ARE RECEIVED ON OR BEFORE THE CLOSING DATE.

SUMMARY OF DUTIES: The incumbent serves as first-line supervisor to approximately 3-6 Senior Special Agents who are responsible for conducting investigations which are criminal, civil and/ or administrative in nature. Responsible for the planning, organization, administration and coordination of all investigations and programs. Supervises, directs and conducts complex and sensitive investigations involving Customs employees at all levels within area of responsibility. Reviews, conducts surveys, and provides guidance and analysis of investigations. Provides guidance and advice to District and Regional management and Internal Affairs management concerning investigative strategy.

SUMMARY OF QUALIFICATION REQUIREMENTS

SPECIALIZED EXPERIENCE: One (1) year of specialized experience in or related to investigation of criminal violations that provided the specific knowledge, skills, and abilities to perform successfully the duties of the position. The one (1) year of qualifying specialized experience must have been equivalent to the level of difficulty and responsibility comparable to the next lower grade in the Federal service. Examples of qualifying specialized experience include:

Leadership or membership of a military intelligence or criminal investigative team or component in which the	:
principal duties consisted of security investigation, intelligence gathering, or criminal prosecution.	

Analyzing	or evaluating	raw investigative	data and	preparing	comprehensive	written	investigative	reports.

Investigating	complex claims	involving	suspected	crimes o	or alleged	fraud.

Continued.on Reverse

EQUAL EMPLOYMENT OPPORTUNITY: All candidates will be considered without discrimination for any nonmerit reason such as race, color, religion, sex, age, national origin, lawful political affiliation, marital status, physical handicap (if not a job factor), or membership or nonmembership in an employee organization.

CUSTOMS FORM 48/07/1785

בטים דותר אותר

SEP-26-1994 16:32 FROM U.S. CUSTOMS ... POSITION TITUE ase 1:02-cv-00923-JR Document 22-12

Filed 03/20/2003 ANN SOUCEMENT NUMBER

_:1/94-072JS

Supervisory	/ Criminal	Investigator
-------------	------------	--------------

CLOSING DATE

_ Investigating criminal cases	requiring the use of	f recognized	investigative	methods	and tech	niques a	and	tha
may have included appearin	g in court to present	evidence.			2	-		

10

__Supervising or conducting interviews or interrogations that involved eliciting evidence, data or surveillance information.

Law enforcement work in which 50 percent or more of the time involved criminal investigations requiring the use of surveillance, undercover, or other criminal detection methods or techniques.

Investigating computerized business and/or accounting systems and forming sound conclusions as to relate criminal business practices and compliance with Federal laws regulations.

Investigative work that required rapid, accurate judgment and sound decision-making in applying regulation instructions, and procedures.

HOW TO APPLY

Bargaining Unit Positions: <u>Customs Employees</u> wishing to be considered for this vacency should (1) forward a completed and originally-eigned SF-171 to the Parsonnel Office listed below, and (2) give a completed Supplemental Qualifications Statement (CF-207). Appraisal for Promotional Opportunities (CF-308), at copy of their current performance appraisal of record (either CF-185 or CF-281) to their immediate supervisor on or before the closing date.

Non-Bargaining Unit Positions: <u>Customs Employees</u> wishing to be considered for this vacancy should (1) forward a completed and originally-signed SF-171 to Personnel Office listed below, and (2) give a completed Supplemental Qualifications Statement (CF-307). Appraisal for Promotional Opportunities (CF-306), are copy of their current performance appraisal of record (either CF-188 or CF-281) to the Personnel Office listed below to be received on or before the closing de

All other applicants (see area of consideration) should forward a completed and originally-signed SF-171 and a copy of their current appraisal of record to the Personnel Office listed below. The CF-307, Supplemental Quartications Statement (or its equivalent), is optional, but should be submitted in order to receive complete consideration. Forms are available from the Personnel Office listed below.

(Does not apply unless chacked.) This position is covered by Manual Supplement 51335-11 (formerly 51920-03). Selection Procedures for Key Managerial Position. Applicants are to submit (1) a completed and originally-signed SF-171, to the Personnel Office listed below, and (2) a copy of their most recent supervisory appraisal of performance and a CF-308. Employee Supplemental Qualifications Statement and Supervisory Appraisal for SES/Key Managerial Position to their current supervisor on or before the closing date. Applicants for these positions should not submit CF-308 or CF-307.

IMPORTANT NOTES:

- Applicants wishing to be notified of the receipt and disposition of their application should complete a CF-69. Notification to Applicant, and submit it with their 171 to the Personnel Office.
- All applicants are requested to complete and submit an OPM Form 1386, EEO Background Survey Data Questionnaire, with their SF-171 at the time of applica
 However, completion of this form is strictly voluntary and will in no way impact upon your consideration.
- Applications or requested supplemental information forms are not to be mailed in U.S. Government "For Official Use Only" postage and fees paid envelopes.
- 4. The SF-171 must be received in the Personnel Office below on or before the closing date listed on this vecency announcement.

Bargaining Unit Position: Customs Employees The \$F-171 must be postmerked by the closing date listed on this vacancy. Applicants must give a copy of the 306, CF-307, and most recent appraisal of record to their supervisor on or before the closing date.

Non-Bargaining Unit Position: Quatoms Employees The SF-171, CF-307, and most recent appraisal of record must be received in the Personnel Office listed by or before the closing date.

No additional information or attachments, other than as specified above, are to be submitted. Do not submit copies of position description, awards, or training certificates.

6. Qualification determinations will be based solely upon information submitted in accordance with the instructions on this vacancy ennouncement.

MAILING ADDRESS:

ADDITIONAL INFORMATION ABOUT THIS YACANCY OR ABOUT THE APPLICATION PROCEDURES MAY SE OSTAINED BY CONTACTING:

U.S. Customs Service
Office of Human Resources
Attn: ENF1/94-072JS

P.O. Box 66360

Washington, D.C. 20035-6360

For copies: (202) 634-5240

For information: (202) 634-5065

TU SAN JUHN TU SAN JUHN U_S CLISTOMS , FROM MACANCY ANNOUNCEMENT NO. ¥F1/94-072JS Supervisory Criminal Investigator CLOSING DATE 10-17-04 CONDITIONS OF EMPLOYMENT AND OTHER REQUIREMENTS OF THIS VACANCY (those which apply have been checked). MAXIMUM ENTRY AGE. Applicants who have not previously held a law enforcement position as defined in 5 USC 8331 are subject to a maximum age restriction in filling this position. Individuals who will reach their 37th birthday before a certificate of best-qualified candidates is forwarded to the Salection Official (approx. 5-10 days after the closing date of this announcement) will be found ineligible for this position. Individuals who seech age 97 after the certificate of best-qualified candidates has been issued but before the selection process has been completed will not be excluded because of age. Please be certain to indicate date of birth on application. X LAW ENFORCEMENT RETIREMENT. This position has ___primary _x_secondary coverage under 5 USC 8336(c). Employees who reach age 50 or over with at least twenty years of creditable service as a law enforcement officer are qualified for law enforcement retirement. Employees who reach age 55 with at least twenty years of creditable service as a law enforcement officer are subject to mandatory retirement from that position. BACKGROUND INVESTIGATION. This is a sensitive position and the tentative selectee must undergo and successfully complete a background investigation as a condition of placement/retentionin the position. * PHYSICAL EXAMINATION. There are specific physical requirements for this position and the tentative selectos will be required to undergo a physical examination prior to actual placement in the position. The Customs Service will provide the required examination to all tentative selecters. x FITNESS PROGRAM PARTICIPATION, Foskion(s) filled from this vecency announcementers covered by the Customs Mandatory Fitness Program for Law Enforcement Positions. Selectes will be required to undergo regular physical examinations. Employees who occupy positions included in the Program may, in the future, be required to maintain a level of physical fitness in accordance with the standards and policies of the U.S. Customs Service; failure to maintain such a level of fitness may lead to removal from the position or other actions as may be specified in the program. SUPERVISORY/MANAGERIAL PROBATIONARY PERIOD. Selectes may be required to serve a one-year probationary period upon appointment to this position in accordance with the Customs Policy on the probationary period for new supervisors and managers. Completion of an appropriate supervisory training course is required in accordance with Customs Directive 51250-08. Completion of a 2-week basic supervisory seminar at the Customs Service Academy in Glynco, Georgia is a prerequisite for appointment to a supervisory position. Candidates from within the service will not be placed in the position prior to completion of the course. OVERTIME. This is a position which requires regular and recurring overtime work and the selectee must be available for such assignments. X ADMINISTRATIVELY UNCONTROLLABLE OVERTIME (AUO). AUO is approved for this position. x FREARMS. Selectes must qualify in the use of firearms after appointment and may be required to carry and use firearms in the performance of the duties of this position. x DRIVER'S LICENSE. Selectes must possess or be able to obtain a valid state driver's license. x MOBILITY. Selecteemust be available for both temporary assignments and permanent reassignments as the workload and needs of the Service dictate. TAX RECORD CHECK. Selected is subject to the requirement of the U.S. Department of the Trassury to undergo a pre-appointment as well as an annual income tax filing record check. MANDATORY COMPLETION OF BASIC TRAINING. Acceptance of this position will require that the selectes spend weeks at in a formalized course of required basic technical training which must be successfully completed according to the standards of the U.S. Customs Service. Failure to successfully complete the required course of basic training in accordance with the standards and policies of the U.S. Customs Service will be ground for mandatory removal from this positions such failure will result in either assignment to a different position, demotion, or separation from the Service by appropriate procedures. x TRAVEL. This position requires ____ daily _x overnight travel on a regular and recurring basis in order to accomplish the duties assigned. UNIFORMS. This position requires the selectageto wear an officially-approved uniform while in a duty status. DRUG TESTING. The position(s) which may be filled from this vacancy announcement have been identified as Testing Designated Positions under the U.S. Customs Serviced, Drug-Free Workplace Program. Satisfactory completion of the-drug test is a condition of placement and/or employment in the position and incumbents of this position are, thereafter, subject to Random Drug Testing. REMARKS (those which apply to this vecency have been checked). level will have noncompetitive promotion potential THIS POSITION HAS KNOWN PROMOTION POTENTIAL. Selectes entering this position below the GS___ to the full performance level provided that all qualification requirements have been met, the ability to work at the higher level (see been demonstrated, and there is higher level work to be performed. MERIT PAY. This position is covered under the provisions of the Merit Pay System. ROSTERS. This is a long-term vacancy announcement which will be used to prepare a roster of best qualified candidates which may be used for a period of months from the closing date of this announcement. Applicants who will become sligible for consideration during the life of this announcement must apply by the closing data. Applicants for bergaining unit positions must meet all time-in-grade and qualification requirements in order to be referred. Applicants for non-bargaining unit positions will be raferred when they are within xixty days of meeting all qualification and time-in-grada requirements for the position. COST-OF-LIVING ALLOWANCE/GOVERNMENT QUARTERS. Selectee may be eligible for a cost-of-living allowance (a fixed percentage of the base salary) or for government furnished quarters at cortain duty stations. GENERIC VACANCY ANNOUNCEMENT ROSTER. This is a long-term vacancy announcement which will be used to prepare a roster of best qualified candidates which may be used for a period of 1 year from the closing date of this announcement. Candidates may indicate a specified number of geographic prefarences (depending on the occupation). Complete procedures for identification of preference, declination of offers and suspension of application are contained on the attachment to this announcement.

ADDITIONAL REMARKS maybe found on the reverse of this sheet.

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5EF-26-1994 16:34 FRUM U 5 CUSTUMS	10 SHY JUHY F.W.	. ــــــــــــــــــــــــــــــــــــ
POSITION TITLE Case 1:02-cv-00923-JR Document 22-12	I/34-072JS	• •
Supervisory Criminal Investigator	CLOSING DATE	ì

ELIGIBLE CANDIDATES WILL BE EVALUATED AS PROVIDED IN THE CUSTOMS SERVICE MERIT PROMOTION PLAN AGAINST THE FOLLOWING CRITERIA:

- 1. Ability to direct the operational activities of an office or program. (Focus upon management techniques used and systems developed and/or implemented to improve activities of the office or program).
- 2. Ability to supervise others. (Describe permanent and temporary assignment (s), including time frames, specify ye responsibilities and supervisory techniques used).
- 3. Ability to identify problems and develop innovative programs/systems to meet changing needs. (Clearly indicate your role and degree of participation in the problem identification and solving process, specify techniques you have used to develop).

ONLY HIGHLY QUALIFIED CANDIDATES WILL THEN BE EVALUATED AGAINST THE FOLLOWING SECONDARY CRITERIA:

- 4. Knowledge of Federal laws and procedures and, specifically criminal and civil laws and procedures. (Describe yo degree of participation in various investigations specifically your role and the nature, extent and outcome of the investigations).
- 5. Ability to communicate and interact effectively with other elements and other Federal, state, and local agencies. (Describe your participation in investigations, special assignments, etc., in which you had a role as coordinator or agency representative).
- 6. Ability to implement Equal Employment Opportunity Program initiatives. (Describe experience and/or training the demonstrates use of affirmative action techniques for employee recruitment, placement, selection for training, and employee recognition, etc.).

REMARKS:

<u>IMMIGRATION REQUIREMENS:</u> The Immigration Reform and Control Act of 1986 seeks to preserve jobs for those who are legally entitled to them: American citizens and aliens who are authorized to work in our country. This law requires employers to verify that persons are eligible to work in the United States and requires employees to provide a document or documents that establish identity and employment eligibility.

DUTY LOCATIONS:

Miami, Florida El Paso, Texas Laredo, Texas

Applications are not to be mailed in U.S. Government "FOR OFFICIAL USE ONLY" postage and fee paid envelopes. Names of individuals submitting applications in government envelopes will be referred to the Office of Internal Affairs action.

All application materials must be sent to the mailing address listed in this announcement. All material must have the vacancy announcement number thereon, including the envelope in which the materials are mailed. There may be delays receipt and processing of improperly addressed correspondence.

Completion of a 2 week Basic Supervisory Seminar at the Customs Service Academy in Glynco, GA is a prerequisite for appointment to a supervisory position. Candidates from within the Service will not be placed in the position prior to completion of the course.

SF-171'S AND CF-307'S RECEIVED AFTER THE CLOSING DATE OF THIS VACANCY ANNOUNCEMENT WILL NOT BE CONSIDERED.

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EXHIBIT 2

NAME			SOC SEC #	RECVD	STA	GR	CRIT	LETTER
				-				
FLYNN	THOMAS	G	028342081	101194		14	30	101394
MANGIONE	ANTHONY	V	035462261	101894		14	255	101994
WILKOWSKI	WALTER	R	040429441	102094		14	30	102194
TIGHE	JAMES	F	042387491	101494		14	30	101794
DEVANEY	JOHN	J	055604116	101794		14	285	101894
GILLETTE	HOWARD	D	058344690	102094	A			102594
GONZALEZ	RUBEN	Ε	058486883	101894		14	30	101894
SORANNO	DONA	- R	059501133	101794	J	14		101894
CALLAN	STEPHEN	R	080409961	101394		14	270	101394
LYNCH	BRIAN	P	082347278	101894		14	30	101994
IGLIO	VINCENT	Ā	093522074	101894		14	255	101894
PALETTI	JOHN	W	107420310		.J	14		101894
		,,,	107467194	101894	J	14	30	101994
MAHABIR	JOEL	М	109448184	101394		14	225	101394
CONNOLLY	RAYMOND			101394		14	30	101894
CATANIA	LENORE	A	·119408881 Line Opt		DV			101094

PF5 = VAC VIEW

PA2 = ASD MENU

MES B NCENT A KADIS EGORY C NRY D HN I UL V	SOC SEC # 127444101 138388297 140367145 145366887 148402073 154448102	101794 101894 101794 101894 101394 101494	STA	GR 14 14 14 14 14	CRIT 225 30 225 30	LETTER 101894 101994 101894 102194 102694 101794
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EGORY C NRY D HN I	145366887 148402073 154448102	101894 101394 101494	F	14 14		10219 4 102694
NRY D HN I	148402073 154448102	101394 101494	F	14		102694
HN I	154448102	101494	F		30	
		•		14	30	101794
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	+ J / 1 = J J = 1	101894		14	75	101994
VID A	172427057	101794		14	30	101994
SEPH P	185385397	′ 101894 ُ		14	225	101994
EGORY N	219745053	101894		14	30	101894
RY J	227705619	101894		14	225	101994
VID H	228720031	. 100394		14	30	101394
RK H	262171671	101394	В			101894
OTT E	262296491	101894		14	255	101894
VIN J	264926746	101794		14	30	101894
	VID H RK H OTT E	VID H 228720031 RK H 262171671 OTT E 262296491 VIN J 264926746	VID H 228720031 100394 RK H 262171671 101394 OTT E 262296491 101894 VIN J 264926746 101794	VID H 228720031 100394 RK H 262171671 101394 B OTT E 262296491 101894 VIN J 264926746 101794	VID H 228720031 100394 14 RK H 262171671 101394 B OTT E 262296491 101894 14 VIN J 264926746 101794 14	VID H 228720031 100394 14 30 RK H 262171671 101394 B OTT E 262296491 101894 14 255

PF3 = VAS MENU PF7 = SCROLL BACKWARD PF8 = SCROLL FORWARD PF12 = PTS MENU PF5 = VAC VIEW PA2 = ASD MENU

03/03/03 Case 21:02-cv-200923CABNTS DECEMBENT PRED 03/20/2003 Page PA46620 CMK48701

Browse Key:	NAME:					SSN	:	
NAME			SOC SEC #	RECVD	STA	GR	CRIT	LETTER
CARTER	JOHN	R	265905524	100594		14	30	101994
DEPP	PEDEN	L	267049783	101894		14	30	101894
MCCABE	BRIAN	F	267807545	101894	J	14		101994
ROGERS	GARY	S	364522500	101494	J	14		101794
WARD	RICHARD	С	429844127	101894		14	30	
DASPIT	STANLEY	${f T}$	436764611	101894		14	255	101894
PERNICIARO	KEITH	J	439086772	101894		14	225	101994
POVLISH	CLINTON	E	449021379	102094		14	30	101994
PINEDA	GERARDO		450136642	101894		14	30	101994
HARGROVE	GARY	K	457787741	101794		14	245	101894
SAMPLE	MICHAEL	D	460805191	101894		14	30	101994
PAYAN	MARCOS		465764106	101194		14	30	101394
FUNK	ANDREAS	Н	512524156	101894		14	225	101894
DAVIS	SCOTT	Α	523882611	101194		14	285	101394
CONTRERAS	MIGUEL	A	526022423	100394		14	30	100594
			Line Opt	tions: (CDV	B L	R G Q	

PF12 = PTS MENU PA2 = ASD MENU

PF3 = VAS MENU PF7 = SCROLL BACKWARD PF8 = SCROLL FORWARD

PF5 = VAC VIEW

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SSN: Browse Key: NAME:

NAME			SOC SEC #	RECVD	STA	GR	CRIT	LETTER
		. 						
WALKER	DANIEL	R	526706074	101894	J	14		101994
BIGLER	JACK	M	536429390	101394	F			110494
PARKER	THOMAS	W	545021426	102494		14	255	101994
PARKER	STEVEN	W	555548456	101894		14	30	101894
BEARD	CHARLES	D	560644972	101394		14	30	
DAVILA	RAMON	S	580092214	101494		14	30	101794
SHAW	HENRY	A	585302149	101494		14	30	101794

END OF APPLICANTS FOR THIS VACANCY Line Options: C D V B L R G Q PF3 = VAS MENU PF7 = SCROLL BACKWARD PF8 = SCROLL FORWARD PF12 =

PF12 = PTS MENU PA2 = ASD MENU PF5 = VAC VIEW

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EXHIBIT 3



U.S. CUSTOMS SERVICE MERIT PROMOTION PLAN

SELECTION REGISTER

Pr					
J. Lc	Position Crim	inal Investigator (Resident Age	ent-in-Charge)		2. Grade GS-1811-14
	Location Supervisory	inal investigator (Resident inge	4. No of Vacancies	5. Announcement No.	6. Closing Date
3. C	El Paso, Texas		one	ENF1/94-072JS	10-17-94
i B	3. Candidates eligible for noncompet	titive selection — see reverse, Part E, and instructions.			
\neg		ed for Selection (The numbers in the left column are to be us right column are to be used for non-bargaining unit position			25.d. of the Customs Merit Promotion was convened and candidates on this
_	FOR BARGAINING	Name (Candidates are listed in RANK ORDER)		NON-BARGAINING	BETICAL UNDER.
	UNIT POSITIONS	Show "S" beside selectee name(s)	LJUNIT	POSITIONS	f
	5-	Davis, Scott			
		Mangione, Anthony	(Jacquelen	Snall
	-	Iglio, Vincent	(7	
One	-	Lawrence, Scott		Jacqueline Small Personnel Staffi 11-7-94	
	One vacancy	Parker, Thomas		Parts Number: 9	91020000-94-0241
ſwo		Hamanana Cana			
Thre	(wo vacancies	Hargrove, Gary			
	Three vacancies	O'Connell, Mary			•
Fou					
=ive	Four vacancies	Perniciaro, Keith			
3ix	Five vacancies				
3 ev :	Six vacancies			One vacancy	
∃igt	Seven vacancies		· •	Two vacancies	
4ine	Eight vacancies		_	Three vacancies	
- en	line vacancies			Four vacancies	
Elev	Ten vacancies		 	Five vacancies	
ſ w e	Eleven vacancies			Six vacancies	
	fwelve vacancies			Seven vacancies	
	•			Eight vacancies	
				Nine vacancies	,
			_	—— Ten vacancies	
ševi	-		· · ·	Eleven vacancies	
75	Seventeen Vacancies			Twelve vacancies	
Action Taken by Selection Official	à	☐ Readvertise: expan	Remarks		
etina	Selection for	vacancies indicated above 2 area of consideration			
Selec	Selection for Selection for Afternale action requested Reassign/transfer	as follows		_	
<u>i</u>	Reassign/transfer	(Name)	Selecting Officer (Signature	7 / / / / / / / · · · · ·	Date June 94

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EXHIBIT 4



Case 1:02-cv-00923-JR

DEPARTMENT 02 THE TREASURY 03/20/2003 Page 19 of 20 UNITED STATES CUSTOMS SERVICE

U.S. CUSTOMS SERVICE MERIT PROMOTION PLAN

SELECTION REGISTER

51335, P&PM

I. Position	read the information below and instructions on the reverse before minal Investigator (Resident A		rge)	2. Grade GS-1811-14
3. Location	3 ,	4. No of Vacancies	5. Announcement No.	6. Closing Date
Laredo, Texas		One	ENF1/94-072JS	10-17-94
	etitive selection — see reverse, Part E, and instructions. rred for Selection (The numbers in the left column are to be		As provided for in Section	25.d. of the Customs Merit Pro
	tred for salection (the numbers in the left column are to be the right column are to be used for non-bargaining unit positi			was convened and candidates
FOR BARGAINING UNIT POSITIONS	Name (Candidates are listed in RANK ORDE Show "S" beside selectee name(s)	R)	FOR NON-BARGAINING UNIT POSITIONS	-
	Davis, Scott		Λ Λ .	8 .00
	Mangione, Anthony		Jacqueline,	Small
	Funk, Andreas		Jacqueline Small	
			Personnel Staffing	g Specialist
One vacancy		_	Parts Number: 910	020000-94-0241
Two vacancies			ALTERNATE STAFFING	G CANDIDATES
Three vacancies				
Four vacancies	1			
•				
ive vacancies				
Six vacancies		~	One vacancy	
Seven vacancies			Two vacancies	
Eight vacancies			Three vacancies	
line vacancies			Four vacancies	
en vacancies			Five vacancies	
Eleven vacancies		~	Six vacancies	
welve vacancies			Seven vacancies	
			Eight vacancies	
			Nine vacancies	
		-	Ten vacancies	
-			Eleven vacancies	
seventeen Vacancies			Twelve vacancies	
3. Alternate action requeste	vacancies indicated above. 2. Readvertise: expanded as follows: Panul Walker			

E. Candidates Eligible for Noncompetition	Document 22-12	Flied 03/20/2003	Page 20 of 20	4 940
Competitive promotion procedures are not applicable to	the following candidates	they may be selected in any	order as an alternate staffing	mothod of
Walker, Daniel				metriod.
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NSTRUCTIONS: Your most important responsibility as a	selecting official is to sale-	the individual what is		
NSTRUCTIONS: Your most important responsibility as a sering filled. In making this decision, you should be aware of	the following options, as	well as requirements, which and	NV to the selection process	
The candidates on the best qualified list are referred in ran ould review the best qualified candidates' qualifications as	k order. Selection may be reflected on their applicant	made without regard to point	scores within the best qualified	group. You

- The candidates on the best qualified list are referred in rank order. Selection may be made without regard to point scores within the best qualified group. You should review the best qualified candidates' qualifications as reflected on their applications and other documents; you should also review the CF-62 so that you can consider the ratings received by each best qualified candidate for the various criteria. If you wish to select from the best qualified list, please note the following requirements:
 - For bargaining unit positions, if you are selecting for more than 1 position, selection for the first vacancy must be made from among the first five candidates on the list (unless more than 5 were referred for one vacancy); selection for the second vacancy must be made from among the first six candidates, and so forth.
 - For non-bargaining unit positions, if you are selecting for more than 1 position, selection for the first vacancy must be made from among the
 first ten candidates on the list, selection for the second vacancy must be made from among the first eleven candidates, and so forth.
 - If the evaluation board has referred best qualified candidates for more than one vacancy (check the number of vacancies shown in Item A.4.), but you decide to select for fewer than this number of vacancies, selection must be made from among the appropriate number of candidates who would to help you in applying these rules.
 - For bargaining unit positions, a selection technique utilized by the selecting official must be uniformly applied to all candidates referred on the best qualified list, e.g., if one candidate is interviewed, all will be interviewed. For non-bargaining unit positions, if one candidate on the best qualified list is interviewed, all candidates referred should be interviewed.
 - If no selection action is taken within 60 days following the closing date of the vacancy announcement, a new vacancy announcement may need to be issued unless a timely extension is obtained by the issuing personnel office.
- There is no obligation to select from the best qualified list. You may instead initiate other recruitment methods, identify an alternate staffing candidate, expand the area of consideration, etc. The candidates listed in Item E. above are eligible for selection in any order as an exception to competitive promotion procedures. Such candidates are considered separately and may be selected as an alternate staffing method.
- After indicating your course of action in Item D., this document and all related material should be forwarded to the personnel office in a controlled envelope. The appointments of selectee(s) may be subject to approval by higher authority or special investigative requirements, and no information concerning selection should be released by you at this time. You will be advised by your personnel office at such time as this information may be released.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MIGUEL A. CONTRERAS, et al., Plaintiffs,)
v.) Case No. 1:02CV00923(JR)
TOM RIDGE, Secretary, Department of Homeland Security, Defendant.)))
	_)

DECLARATION

- I, MARI YONKERS, declare the following to be true and correct:
- 1. I am the Director of Employee Relations for the Office of Human Resources

 Management, Bureau of Customs and Border Protection (formerly the United States Customs

 Service). I have held this position for two years. I previously served as the Director, Labor

 Relations, with the Department of the Navy, Indian Head facility from October 31, 1999, to

 December 31, 2000. I have also served as a Branch Chief, Employee Relations, Headquarters

 Operations, at the Customs Service. I have been employed by the federal government for 16

 years in the labor/employment area and I am currently a GS-15. This declaration is based on my

 personal knowledge or information provided to me in my official capacity.
- 2. In my current position, my duties include the administration of the agency's Discipline Review Board (DRB). The DRB is comprised of approximately 50 senior managers and supervisors selected throughout the service who propose all adverse actions based on employee misconduct. In addition, I provide advice and guidance to agency senior management on imposition of discipline and adverse actions.
 - 3. I have been asked to provide information concerning the significance of (1) a letter of

caution that was issued to Miguel Contreras on or about March 7, 2002; (2) a 1992 written reprimand Mr. Contreras received for a security violation; (3) a 1998 investigation by the Treasury's Office of Inspector General (OIG) into Mr. Contreras's possible misuse of the Treasury Enforcement Communications System (TECS); and (4) a 2000 investigation by OIG into an allegation that Mr. Contreras disclosed confidential information to his cousin (by marriage), who was an alleged member of a drug smuggling organization.

- 4. The letter of caution was issued in connection with an interview that Mr. Contreras gave to a newspaper. The resulting article and Mr. Contreras's picture appeared in a local paper, Bajo El Sol. Briefly, the article identified Mr. Contreras as a federal agent with the Customs Service.
- 5. Letters of caution, such as the one received by Mr. Contreras, are not kept in an employee's official personnel folder, and they do not constitute an official disciplinary action. Further, the issuance of such a letter does not result in any reduction of pay or loss in benefits.
- 6. The main purpose of a letter of caution is to put the employee on notice that particular conduct lacked good judgment.
- 7. There is no reference to any 1992 written reprimand for a security violation in the agency's electronic system that tracks disciplinary actions. Nor is there any reference to such a reprimand in Mr. Contreras's Official Personnel Folder or the Department of Agriculture database that is used to administer employee pay.
- 8. Accordingly, records do not indicate that the issuance of such a reprimand resulted in any reduction of pay or loss of benefits for Mr. Contreras.
- 9. Customs counsel informed me that the 1992 written reprimand was issued to Mr. Contreras by a Security Control Officer (SCO), a Customs employee, because Mr. Contreras had

left his TECS terminal on and unattended. I have further been informed that on or around 1992, Customs Headquarters had become concerned about security awareness/lapses pertaining to TECS, and a program was initiated wherein lapses witnessed by an SCO were to be written up as special security reprimands and were to remain in the local office files for one year.

Case 1:02-cv-00923-JR

- 10. In my opinion, the special security reprimand issued by the SCO is not the type of letter of reprimand that constitutes official disciplinary action by the agency. In the case of official disciplinary action, unlike here, the letter of reprimand would ordinarily be issued by the employee's supervisor, and the employee would have a right to challenge the reprimand through the administrative grievance process through a higher level official. Based on these facts, it is my opinion that the 1992 reprimand did not constitute official disciplinary action by the agency. Instead, it is more akin to a letter of caution, which is designed to remind the employee of appropriate behavior (and in this instance, the importance of security awareness related to the TECS system). In any event, there are no records showing any decrease in pay or reduction of benefits as a result of a 1992 reprimand.
- 11. Concerning the 1998 investigation into the possible misuse of TECS by Mr.

 Contreras, no such record of the investigation is contained in the agency's database of disciplinary actions. Nor is there a reference to such an investigation in Mr. Contreras's Official Personnel Folder or the Department of Agriculture database that is used to administer employee pay.
- 12. Accordingly, this alleged investigation does not constitute official disciplinary action and did not result in the loss of pay or benefits to Mr. Contreras.
- 13. The 2000 investigation concerned the allegation that Mr. Contreras disclosed confidential information to his cousin (by marriage), Armando Duarte, an alleged drug smuggler.

This allegation was not substantiated and did not result in the imposition of any discipline.

Accordingly, it did not result in the reduction of pay or loss of benefits.

I declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: March 19, 2003.

MARI YONKER

Director, Employee Relations

U.S. Customs Service

1300 Pennsylvania Ave, NW

Washington, D.C. 20229

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MIGUEL A. CONTRERAS, et al., Plaintiffs,)
v.) Case No. 1:02CV00923(JR)
TOM RIDGE, Secretary, Department of Homeland Security, Defendant.))) _)

DECLARATION

- I, SUSAN B. ZANER, declare the following to be true and correct:
- 1. I am a Supervisory Personnel Management Specialist for the Office of Human Resources Management, Bureau of Customs and Border Protection, formerly known as the U.S. Customs Service. I have held this position since October 4, 1992. Prior to occupying this position, I served as a Supervisory Personnel Staffing Specialist. I joined the Customs Service on April 15, 1974. This declaration is based on my personal knowledge or information provided to me in my official capacity.
- 2. In my current position, my duties include the review and implementation of the Customs personnel systems, policies and procedures, and national recruitment.
- 3. On March 9, 2003, the U.S. Customs Service was transferred from the Department of Treasury to the Department of Homeland Security and renamed the Bureau of Customs and Border Protection. Also, on the same date, the majority of the Customs special agent workforce was transferred to the new Bureau of Immigration and Customs Enforcement in the Department of Homeland Security.
 - 4. Generally speaking, Customs has been and remains the guardian of the nation's

borders; the agency's mission is to enforce the laws of the United States, safeguard the revenue, and foster lawful international trade and travel.

5. Prior to the government reorganization mentioned above, the Customs Service was comprised of approximately 20,000 employees, including, but not limited to, customs inspectors, import specialists, special agents, lab personnel, attorneys, accountants, personnelists, labor and employee relations specialists, congressional liaisons, public affairs specialists, entry specialists and other support personnel. The Bureau of Customs and Border Protection is now comprised of approximately 40,000 employees. The Bureau of Immigration and Customs Enforcement is comprised of approximately 14,000 employees, including, but not limited to, special agents, detention officers, attorneys, personnel staff, and labor and employee relation specialists.

Non-competitive Advancement

- 6. Prior to July 2001, the career ladder for a Customs special agent, GS-1811, was GS-5 through GS-12. This meant that individuals hired as special agent, GS-1811, below the grade 12, could advance to grade 12 through a series of automatic promotions pursuant to a designated time frame. Promotions beyond grade 12 required applying through a competitive merit-based selection process. Promotions to grades 13 and above were processed under the agency merit promotion plan procedures.
- 7. Series 1811 is an occupational code for the criminal investigator position. Duties of series 1811 employees include the investigation and enforcement of violations of Customs and related laws, rules and regulations. These investigations may be civil or criminal in nature. Investigations may include the conduction of interviews as well as the examination of physical, documentary and other types of evidence.
 - 8. In July 2001, the "journeyman level" for a Customs special agent, GS-1811, was

raised to the GS-13 level. This was done through a classification review of the duties of the position. The raising of the journeyman level allowed individuals hired as special agents below the GS-13 level to progress to the GS-13 without additional competition.

Merit Promotion Process

- 9. All competitive promotions for special agent positions occur in accord with the agency's Merit Promotion Plan.
- 10. The Merit Promotion Plan (Customs Directive Number 51335-03) was issued on August 13, 1986 (effective date was July 1, 1986). The plan provides systematic procedures for filling positions through competitive promotion procedures to ensure that applicants receive fair consideration for advancement opportunities for which they are eligible, and to ensure that positions are filled by well-qualified individuals who can perform their duties effectively.
- 11. Under the merit promotion procedures, vacancy announcements are issued and applicants apply for vacant positions by submitting an application, Form CF-307 (Supplemental Qualifications Statement), Form CF-306 (Appraisal for Promotional Opportunities) and a copy of their current performance appraisal.
- 12. An evaluation panel rates each applicant on the significant job-related knowledge, skills, and abilities critical for successful performance in the position to be filled. Numerical ratings are assigned based on these criteria to distinguish between the highly qualified and best qualified candidates. The 10 highest scoring candidates are then referred as best qualified to the selecting official in rank order. If fewer than ten candidates apply, the best-qualified list is referred in alphabetical order. If he/she wishes to do so, the selecting official can interview the candidates referred for selection.
 - 13. At any time during the process of filling a position, a selection may be made from an

alternate staffing method.

- 14. In 1991, Appendix C was added to the Merit Promotion Plan. Appendix C described the procedures to be used for filling Supervisory Criminal Investigator, GS-1811-13 and 14, and Supervisory Customs Inspector, GS-1890-12, positions through the Customs Automated Merit Promotion System (CAMPS). CAMPS was an automated system in which applicants were rated, ranked and referred for consideration based on information provided by the applicant in an optically scanned application booklet.
- 15. CAMPS was utilized for supervisory special agent positions until approximately 1993. After CAMPS, traditional merit promotion application procedures were utilized and occasionally modified.
- 16. In April of 1996, the Office of Personnel Management's (OPM) Microcomputer
 Assisted Rating System (MARS) was utilized to fill GS-1811-13 and 14 positions in the Office
 of Investigations throughout the Customs Service. This system was referred to as "Telephone
 Application Processing System" (TAPS) and the announcement numbers were WA18113 and
 WA18114. MARS automated the entire application process by allowing applicants to respond to
 questions relative to their work experience.
- 17. Beginning in September of 1997 through October of 2000, three more announcements were processed utilizing the OPM MARS system. This system was called Customs Automated Application Processing System (CAAPS). Vacancy announcements WA31811 and WA41811, and announcements AN31811 and AN41811 were utilized to fill GS-1811-13 and GS-1811-14 positions within the Office of Investigations and the Office of Internal Affairs throughout the Customs Service. Vacancy announcements CAAPS/00-002KRH and CAAPS/00-001KRH added the Office of Training and Development 1811 positions.

- 18. In mid-1999, the Foreign Assignment Review Board (FARB) was created. The FARB is responsible for review and screening of applicants for Customs Attaché and Senior Customs Representative positions at GS-1811-15 and GS-1801-15, respectively.
- 19. On November 15, 2000, additional changes to the Merit Promotion Plan were issued. These changes revised several sections of the plan in order to reduce time in filling positions, improve customer service and eliminate unnecessary review.
- 20. On November 20, 2000, the first special agent 14 (SA-14) announcement opened. SA-14 is a test/examination process specially designed and pre-tested within Customs in order to objectively and fairly measure GS-13 Agent's potential to perform as supervisors or in non-supervisory positions at the GS-14 level.
- 21. On March 25, 2002, the second Special Agent (SA-14) announcement opened. This announcement solicited applications in a different manner from the first SA-14 announcement. Applicants applied on-line, through the Customs Internet-based CareerFinder system by first registering in the CareerFinder system and submitting an application and a resume through CareerFinder.

THE PLAINTIFFS

22. In conjunction with my staff, I have tracked the Customs career progression of each of the named plaintiffs by examining their official personnel files and the Customs personnel history electronic database (PERHIS).

Miguel A. Contreras

23. The official personnel records of Miguel Contreras indicate that he joined the Customs Service as a special agent, GS-1811-12, in the Office of Enforcement, in May 1988, in Calexico, California.

- 24. In July 1991, Mr. Contreras was reassigned to a GS-1811-12 position, in the Office of Enforcement, Riverside, CA. He served in that position until August 1992, at which time he was promoted to a GS-13 senior special agent in the Office of Enforcement in Detroit, Michigan.
- 25. From October 11, 1994, to October 13, 1994, Mr. Contreras served a suspension. He remained in Detroit until June 1995, at which time he was laterally reassigned as a senior special agent to the Office of Enforcement in Yuma, Arizona. He remained in that position until December 10, 1995.
- 26. On December 10, 1995, Mr. Contreras was promoted to a GS-14 Supervisory Criminal Investigator (a.k.a. Resident in Charge) in the Office of Internal Affairs in Calexico, California. He served in that position until May 1999.
- 27. In May 1999, Mr. Contreras was reassigned to a Supervisory Criminal Investigator GS-1811-14 position in the Office of Investigations, Yuma, Arizona.
- 28. On May 7, 2000, the personnel records indicate that Mr. Contreras was changed to a lower grade. He voluntarily took a GS-13, step 10 Criminal Investigator position in the Office of Investigations in Yuma, Arizona.

Ramon Martinez

- 29. The official personnel records of Ramon J. Martinez indicate that he began his career with the Customs Service when he was appointed as a Customs Inspector, GS-1890-05-01, in the agency's Inspection and Control Division, on April 4, 1982, in Detroit, Michigan.
- 30. On April 17, 1983, Mr. Martinez was promoted to the position of Customs Inspector, GS 1890-07-01, in the Inspection and Control Division, in Detroit, Michigan.
- 31. On September 4, 1983, Mr. Martinez was reassigned to the position of Criminal Investigator, GS 1811-07-01, in the Office of Enforcement, in Detroit, Michigan.

- 32. On September 16, 1984, Mr. Martinez was promoted to the position of Criminal Investigator (special agent), GS-1811-09-01, in the Office of Enforcement, in Detroit, Michigan.
- 33. On September 29, 1985, Mr. Martinez was promoted to the position of Criminal Investigator (Special Agent), GS-1811-11, in the Office of Enforcement, in Detroit, Michigan.
- 34. On January 19, 1986, Mr. Martinez was reassigned to the position of Criminal Investigator, GS-1811-11-01, in Office of Enforcement, in Reston, Virginia.
- 35. On October 12, 1986, Mr. Martinez was promoted to the position of Criminal Investigator, GS-1811-12, in Reston, Virginia.
- 36. On June 5, 1988, Mr. Martinez was reassigned from the position of Criminal Investigator, GS-1811-12-02, in the Office of Enforcement, Reston, Virginia, to the position of Criminal Investigator, GS-1811-12-02, in the Office of Enforcement, in Miami, Florida.
- 37. On January 14, 1990, Mr. Martinez was reassigned from the position of Criminal Investigator, GS-1811-12-04, in the Office of Enforcement, Intelligence Division, in Miami, Florida to the position of Criminal Investigator, GS-1811-12-04, in the Office of Internal Affairs, in Miami, Florida.
- 38. Effective September 22, 1991, Mr. Martinez was promoted from Criminal Investigator, GS-1811-12-05, in the Office of Internal Affairs to a Criminal Investigator, GS 1811-13-02, in the Office of Internal Affairs in Miami, Florida.
- 39. On June 3, 1992, Mr. Martinez accepted a directed reassignment to the position of Criminal Investigator, GS 1811-13, within the Office of Internal Affairs, in Washington, D.C. The reassignment became effective August 23, 1992.

- 40. On July 23, 1995, Mr. Martinez was reassigned out of the GS-1811 series to the position of Physical Security Specialist, GS-0080-13-05, in the Office of Internal Affairs in Washington, D.C.
- 41. Mr. Martinez remained in this position for nearly three years until he was reassigned, on March 1, 1998, to the position of Criminal Investigator, GS 1811-13-06, Office of Internal Affairs, in Washington, D.C.
- 42. On April 23, 2000, Mr. Martinez was reassigned to a GS –1811-13-07, Criminal Investigator position in the Office of Investigations, in Baltimore, Maryland.

John Yera

- 43. The official personnel records of John Yera indicate that he joined the Customs Service as a Criminal Investigator, GS-1811-07-01, in the Office of Enforcement, in Newark, New Jersey, on November 21, 1988.
- 44. Mr. Yera was promoted on December 3, 1989, to a Criminal Investigator position, GS-1811-09-01, in the Office of Enforcement in Newark, New Jersey.
- 45. On June 3, 1990, Mr. Yera was reassigned to the Office of Enforcement, Smuggling Investigations Division, Newark, New Jersey. His position title and grade remained the same as a Criminal Investigator, GS-1811-09-01.
- 46. On December 16, 1990, Mr. Yera was promoted to a GS-1811-11-01 Criminal Investigator position, in the Office of Enforcement in Newark, New Jersey.
- 47. Mr. Yera was injured during the performance of his duties on or about June 25, 1991 and did not return to work until May 2,1993.
- 48. On May 30, 1993, Mr. Yera was promoted to a GS 1811-12-01, Criminal Investigator position, in the Office of Enforcement, Newark, New Jersey.

- 49. Mr. Yera remained a GS-12 Criminal Investigator for almost five years in Newark, New Jersey.
- 50. Effective April 12, 1998, Mr. Yera was promoted to the position of Criminal Investigator, GS-1811-13-02, in the Office of Investigations, Newark, New Jersey.
- 51. On December 6, 1998, Mr. Yera was reassigned to a GS-1811-13-02, Criminal Investigator position in the Office of Investigations, in Sterling, Virginia.
- 52. Effective July 29, 2001, Mr. Yera was promoted to a GS-1811-14-01, Criminal Investigator position in the Office of Investigations, in Fairfax, Virginia.

Ruben Gonzalez

- 53. The official personnel records of Ruben Gonzalez indicate that he joined the Customs Service on February 24, 1980, as a Customs Patrol Officer, GS-1884-05, step 7, in the Office of Operations, New York, New York. He served with the Customs Service in this capacity until 1983, at which time he became a Criminal Investigator with the Bureau of Alcohol, Tobacco and Firearms.
- 54. Effective September 14, 1986, Mr. Gonzalez was promoted from a Criminal Investigator GS-1811-11, step 2 position, to a Criminal Investigator GS-1811-12, step 1 position with the Bureau of Alcohol, Tobacco and Firearms, Ft. Lauderdale, Florida.
- 55. Effective March 15, 1987, Mr. Gonzalez transferred to the Customs Service, Office of Enforcement, Miami, Florida, as a Criminal Investigator, GS-1811-12.
- 56. Effective January 28, 1990, Mr. Gonzalez was promoted from Criminal Investigator GS-1811-12, step 5 to Criminal Investigator (Senior Special Agent) GS-1811-13, step 2, in the Office of Enforcement, Miami, Florida.

- 57. Effective March 11, 1991, Mr. Gonzalez was reassigned from the Office of Enforcement, Miami, Florida, to the Office of Internal Affairs, San Juan, Puerto Rico, as a GS-1811-13, step 3.
- 58. Effective March 6, 1994, Mr. Gonzalez was reassigned to a GS-1811-13, step 5 Supervisory Criminal Investigator position in Fajardo, Puerto Rico.
- 59. Effective July 21, 1996, Mr. Gonzalez was promoted from Supervisory Criminal Investigator, GS-1811-13, step 6, to Supervisory Criminal Investigator, GS-1811-14, step 3, in Fajardo, Puerto Rico, with the Office of Investigations.
- 60. Effective February 16, 1997, Mr. Gonzalez was reassigned to the Office of Investigations, Administrative Division, Washington, D.C., as a Criminal Investigator, GS-1811-14 step 3.
- 61. Effective May 25, 1997, Mr. Gonzalez was given a temporary promotion, not to exceed past September 9, 1997, from a Criminal Investigator, GS-1811-14, step 3, to a Supervisory Criminal Investigator, GS-1811-15 step 1, in the Office of Investigations in Washington, D.C.
- 62. Effective September 9, 1997, when the temporary promotion ended, Mr. Gonzalez was changed to a Criminal Investigator, GS-1811-14, step 4, in the Office of Investigations, Washington, D.C.
- 63. Effective January 18, 1998, Mr. Gonzalez was reassigned within the Office of Investigations, Operations Division, Smuggling Branch in Washington, D.C., as a GS-1811-14, step 4.
- 64. Effective March 28, 1999, Mr. Gonzalez was reassigned within the Office of Investigations, to the Financial Branch in Washington, D.C., as a GS-1811-14, step 4.

- 65. Effective March 5, 2001, Mr. Gonzalez was given a temporary promotion, not to exceed past July 2, 2001, from a Criminal Investigator, GS-1811-14, step 5, in Washington, D.C., to a Supervisory Criminal Investigator, GS-1811-15, step 2, in the Office of Investigations, Los Angeles, California.
- 66. Effective July 3, 2001, when the temporary promotion ended, Mr. Gonzalez was changed back to the position of Criminal Investigator, GS-1811-14, step 6, in the Office of Investigations, Financial Branch, Washington, D.C.
- 67. On March 10, 2002, Mr. Gonzalez was promoted to a Supervisory Criminal Investigator position, GS-1811-15, step 3, in the Office of Investigations, Houston, Texas.

Evelio W. Velasco

- 68. The official personnel records of Evelio W. Velasco indicate that on February 7, 1982, Mr. Velasco transferred from the Bureau of Alcohol, Tobacco and Firearms to the U.S. Customs Service as a Criminal Investigator, GS-1811-12, step 2, in the Office of Regional Director, Investigations, Miami, Florida.
- 69. On December 26, 1982, Mr. Velasco was promoted from Criminal Investigator GS-1811-12, step 3, to Criminal Investigator, Senior Special Agent, GS-1811-13, step 1 in the Office of the Regional Commissioner, Office of Enforcement, Investigations Division, Miami, Florida.
- 70. On October 13, 1985, Mr. Velasco was promoted from Criminal Investigator, GS-1811-13 step 5, to a Supervisory Criminal Investigator, GM-1811-14, step 00, in the Office of Enforcement, Miami, Florida.

- 71. On July 20, 1986, Mr. Velasco was reassigned to the Office of the Regional Director, Internal Affairs, Internal Security Division, in Miami, Florida, as a Supervisory Criminal Investigator, GM-1811-14, step 00.
- 72. On August 2, 1987, Mr. Velasco was given a temporary promotion, not to exceed past November 29, 1987, to the Regional Director (Internal Affairs) position, GM-0340-15, step 00 in Houston, Texas.
- 73. When the temporary promotion ended on November 22, 1987, Mr. Velasco was changed back to his permanent position of Supervisory Criminal Investigator, GM-1811-14, in Internal Affairs, Miami, Florida.
- 74. On January 17, 1988, Mr. Velasco was reassigned from his position of Supervisory Criminal Investigator, GM –1811-14, in the Office of Internal Affairs, Miami Florida, to a Supervisory Criminal Investigator, GM-1811-14 position in the Office of Enforcement, Atlanta, GA.
- 75. On September 6, 1992, Mr. Velasco was reassigned to a Criminal Investigator, GM-1811-14 position in the Office of Enforcement, Washington, D.C.
- 76. On January 24, 1993, Mr. Velasco was reassigned to a Supervisory Criminal Investigator, GM-1811-14 position in the Financial Crimes Enforcement Network (FINCEN) Director's Office, Arlington, VA.
- 77. On September 18, 1994, Mr. Velasco was reassigned to a Criminal Investigator, GM-1811-14 position in the Office of Enforcement, Washington, D.C.
- 78. Effective January 21, 1996, Mr. Velasco was promoted from a Criminal Investigator position, GM-1811-14, step 00, in the Office of Investigations, Operations Division, Smuggling

Branch to a position of Supervisory Criminal Investigator, GS-1811-15, in the Office of Internal Affairs, Professional Responsibility Division, Operations Branch, Washington, D.C.

79. On November 11, 1998, Mr. Velasco submitted his application for voluntary immediate retirement. Mr. Velasco's retirement was effective May 1, 1999. At the time of his retirement, Mr. Velasco was a Supervisory Criminal Investigator, GS-1811-15, in the Office of Internal Affairs, Washington, D.C.

Frank Almonte

- 80. The official personnel records of Frank Almonte indicate that he joined the Customs Service as a Customs Aid, GS-1897-05, step 1, in the Office of Enforcement, New York, NY, on July 25, 1983. He remained in this position, progressing to GS-7, until March 29, 1987.
- 81. Effective March 29,1987, Mr. Almonte was promoted from a Customs Aid, GS-1897-07, in the Office of Enforcement, New York, NY to an Enforcement Coordinator position, GS-301-09, in the Office of Enforcement, New York, NY.
- 82. Effective July 19, 1987, Mr. Almonte was given a Career Appointment as a Criminal Investigator, GS-1811-05, step 10, in the Office of Enforcement, New York, NY.
- 83. Effective July 31, 1988, Mr. Almonte was promoted from a Criminal Investigator, GS-1811-05 step 10, to a Criminal Investigator, GS-1811-07 step 8, in the Office of Enforcement, New York, NY.
- 84. Effective August 13, 1989, Mr. Almonte was promoted to Criminal Investigator, GS-1811-09, step 3, in New York, NY.
- 85. Effective November 5, 1989, Mr. Almonte was reassigned within the Office of Enforcement, Strategic Investigations Division, as a Criminal Investigator, GS-1811-09, step 3, in New York, NY.

- 86. Effective August 26, 1990, Mr. Almonte was promoted from a Criminal Investigator, GS-1811-09, step 4, to a Criminal Investigator GS-1811-11, step 1, with the Office of Enforcement, Strategic Investigations Division, New York, NY.
- 87. Effective August 25, 1991, Mr. Almonte was promoted from a Criminal Investigator, GS-1811-11, step 2, to Criminal Investigator, GS-1811-12, step 1, with the Office of Enforcement, Strategic Investigations Division, New York, NY.
- 88. Effective July 12, 1992, Mr. Almonte was reassigned to the Office of Enforcement, Smuggling Investigations Division, New York, NY, as a GS-1811-12, step 1.
- 89. Effective August 8, 1993, Mr. Almonte was reassigned within the Office of Enforcement, Smuggling Investigations Division, New York, NY, as a Criminal Investigator, GS-1811-12, step 2.
- 90. Effective December 24, 1995, Mr. Almonte was reassigned to the Office of Investigations, JFK Airport, Queens, New York, as a Criminal Investigator, GS-1811-12, step 4.
- 91. Effective January 14, 2001, Mr. Almonte was promoted from a Criminal Investigator, GS-1811-12 step 7, to Criminal Investigator, GS-1811-13, step 3, in the Office of Investigations, JFK Airport, Queens, New York.

Stephen Mercado

- 92. The official personnel records of Stephen Mercado indicate that on July 29, 1981, he was appointed as a Customs Inspector GS-1890-7-01, in the Office of the District Director, San Luis, AZ.
- 93. Effective August 8, 1982, Mr. Mercado was promoted to a position of Customs Inspector, GS-1890-9, in the Office of the District Director, San Luis, AZ.

- 94. On September 4, 1983, Mr. Mercado was reassigned to a position of Customs Patrol Officer, GS-1884-09, in the Office of Enforcement, San Luis, AZ.
- 95. Effective November 10, 1985, Mr. Mercado was reassigned to a position of Criminal Investigator, GS-1811-09, in the Office of Enforcement, San Luis, AZ.
- 96. On November 23, 1986, Mr. Mercado was promoted from a GS-1811-09-04, Criminal Investigator, to a GS-1811-11-01 Criminal Investigator in the Office of Enforcement, in Yuma, AZ.
- 97. On December 6, 1987, Mr. Mercado was promoted to a position of Criminal Investigator, GS-1811-12-01, in the Office of Enforcement, Yuma, AZ.
- 98. Effective January 15, 1989, Mr. Mercado was promoted from the position of Criminal Investigator, GS-1811-12-02, to a Supervisory Criminal Investigator, GS-1811-13-00, in the Office of Enforcement in Douglas, Arizona.
- 99. Effective July 29, 1990, Mr. Mercado took a voluntary change to lower grade to a GS-1811-12 Criminal Investigator position in the Office of Enforcement, Yuma, Arizona.
- 100. On November 24, 1996, Mr. Mercado was promoted from a GS-1811-12-10 Criminal Investigator position in Yuma, AZ, to a GS-1811-13-06 Criminal Investigator position in the Office of Investigations, Yuma, AZ.
- 101. Effective March 2, 1997, Mr. Mercado was given a temporary promotion, not to exceed past June 1, 1997, to a GS-1811-14-03 Supervisory Criminal Investigator position in the Office of Investigations, Yuma, AZ
- 102. On June 2, 1997, when his temporary promotion expired, Mr. Mercado was changed back to a Criminal Investigator, GS-1811-13 position in the Office of Investigations, Yuma, AZ.

- 103. On May 7, 2000, Mr. Mercado was given a temporary promotion, not to exceed past June 6, 2000, to a GS-1811-14-04 Supervisor Criminal Investigator in the Office of Investigations, Yuma, AZ.
- 104. On May 27, 2000, Mr. Mercado was changed back to a Criminal Investigator GS-1811-13 position in the Office of Investigations, Yuma, AZ.
- 105. Effective February 11, 2001, Mr. Mercado was promoted to a Supervisory Criminal Investigator position, GS-1811-14, in the Office of Investigations, Calexico, CA.

Ricardo Sandoval

- 106. The official personnel record of Ricardo Sandoval indicates that he joined the Customs Service as a Criminal Investigator, GS-1811-12, in the Office of Internal Affairs, San Diego, CA, on September 10, 1990.
- 107. On December 1, 1991, Mr. Sandoval was promoted to a position of Criminal Investigator, GS-1811-13, in the Internal Security Division, Office of Internal Affairs, Otay Mesa, California.
- 108. There is documentation in Mr. Sandoval's official personnel record of the following personnel actions: (a) Effective September 6, 1992, Mr. Sandoval was reassigned to a position of Criminal Investigator, GS-1811-13, in the Office of Internal Affairs, Calexico, CA; (b) on November 13, 1994, Mr. Sandoval was reassigned to a Criminal Investigator, GS-1811-13, position in the Office of Enforcement, El Centro, CA.
- 109. In addition, the official personnel record indicates that the following actions were processed during November or December of 1998; however the record does not indicate the reason why the actions were processed: (a) Effective December 1, 1992 promotion to a Supervisory Criminal Investigator, GS-1811-14, Office of Enforcement, Calexico, California; (b)

Effective November 13, 1994 – reassignment to a Supervisory Criminal Investigator, GS-1811-14, Office of Enforcement, El Centro, California (this action was a correction of the earlier action processed effective November 13, 1994); (c) Effective May 24, 1998 – reassignment to a Supervisory Criminal Investigator, GS-1811-14, Office of Investigations, El Centro, California.

- 110. Effective September 8, 2002, Mr. Sandoval was given a temporary promotion, not to exceed past November 1, 2002, to a position of Supervisory Criminal Investigator, GS-1811-15, in the Office of Investigations, San Diego, CA.
- 111. Effective November 2, 2002, the temporary promotion ended and Mr. Sandoval was returned back to his permanent position of Supervisory Criminal Investigator, GS-1811-14, in the Office of Investigations, El Centro, California.
- 112. As discussed above, a review of the Official Personnel Folder indicates that there were numerous corrective and cancellation actions. The corrective actions were dated several years after the original effective date. This leads the reviewer to believe that there may have been some directions such as a grievance decision, settlement agreement, or other court ordered action that mandated the corrective/cancellation actions.

I declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: March 19, 2003.

Susan B. Zaner SUSAN B. ZANER

Supervisory Personnel Management Specialist Office of Human Resources Management Bureau of Customs and Border Protection 1300 Pennsylvania Ave., N.W. Washington, D.C. 20229