

MEDIA ADVISORY: ATF Special Agent Jay Dobyns (ret.) Defeats the U.S. Department of Justice in U.S. Court of Federal Claims

FOR IMMEDIATE RELEASE

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(Additional statement of Jay Dobyns for media found at <http://blog.jaydobymsgroup.com/>)

In the United States Court of Federal Claims

No. 08-700C

Filed: September 16, 2014

JAY ANTHONY DOBYNS,
Plaintiff,

v.

THE UNITED STATES,
Defendant

OPINION

James Bernard Reed, Baird, Williams & Greer, Phoenix, AZ, for plaintiff.

David Allen Harrington and Kent Christopher Kiffner, Civil Division, United States Department of Justice, Washington, D.C., with whom was Assistant Attorney General Stuart F. Delery; Jeanne E. Davidson, Director ; Donald E. Kinner, Assistant Director, Civil Division, for defendant.

FRANCIS M. ALLEGRA, U.S. Federal Judge:

***“Who steals my purse steals trash;
‘tis something, Nothing;
'Twas mine, ‘tis his, and has been slave to thousands;
But he that filches from me my good name,
Robs me of that which not enriches him,
And makes me poor indeed.”¹***

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William Shakespeare, Othello, Act III.

TO MEDIA REPRESENTATIVE:

Today, Federal Judge Francis M. Allegra of the United States Court of Federal Claims released his trial court opinion following a three week trial to the bench, finding in favor of 27 year United States Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) undercover Special Agent Jay Dobyns (ret'd), against the defendant United States and the U.S. Department of Justice.

Between 2001 and 2003, Jay Dobyns became the first and only law enforcement officer to fully infiltrate the Hells Angels motorcycle gang, in addition to hundreds of other successful undercover investigations. Judge Allegra makes extensive findings of fact against the Department of Justice and ATF for grossly breaching a covenant of good faith and fair dealing that was part of Jay Dobyns' September 20, 2007, settlement agreement with ATF. That agreement arose from ATF's failure to properly manage and respond to past death and violence threats against Agent Dobyns. Judge Allegra awarded Jay Dobyns \$173,000 in monetary damages for emotional distress from the actions by the Department of Justice and ATF.

Judge Allegra also denied in full the government's counterclaims for royalties from Jay Dobyns' New York Times Top Ten Bestseller "NO ANGEL: My Harrowing Undercover Journey to the Inner Circle of the Hells Angels" and for contract payments for the sale of his life rights to 20th Century FOX for a motion picture. Judge Allegra awarded the federal government zero dollars (\$0.00) on its counterclaims.

James Reed, a partner at the Phoenix, Arizona law firm Baird, Williams & Greer, LLP, represented Dobyns during the entirety of the six year lawsuit, filed in October, 2008. Reed was assisted by senior trial paralegal Jeff Elder and associate attorney Carson Emmons.

1. The United States Court of Federal Claims released its Opinion today regarding the three week trial concerning this six year lawsuit by ATF Agent Jay Dobyns (retired) against the United States on behalf of ATF.

The Court summarized the lawsuit and outcome at page two of the Opinion as follows:

This contract case is before the court following an extensive trial in Tucson, Arizona, and Washington, D.C. Jay Dobyns, an agent of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), alleges that ATF officials breached an agreement that he had with the agency settling a prior dispute. He contends that ATF's conduct also breached the covenant of good faith and fair dealing associated with that agreement. Both breaches, Agent Dobyns asserts, give rise to the imposition of damages. Defendant, meanwhile, counterclaims that Agent Dobyns breached his employment contract with ATF, as well as federal regulations and ATF orders, by publishing a book based upon his experiences as an agent, and by contracting his story and consulting services to create a motion picture.

Based upon the extensive record, the court finds that there was no express breach of the settlement agreement here, but that defendant's conduct

associated with that agreement effectuated a breach of the covenant of good faith and fair dealing. Based upon the extensive record, the court concludes that defendant's conduct, indeed, constituted a gross breach of that covenant. Damages for mental distress, as well as pain and suffering, will be awarded because of this breach. As to the counterclaim, the court concludes that plaintiff did not breach his employment agreement with ATF by writing and publishing the book in question, because plaintiff's conduct was countenanced by the settlement agreement and by ATF officials. The court thus rejects defendant's counterclaim.

2. Role of ATF Special Agent Jay Dobyns (retired) in the investigation of the Hells Angels as part of ATF's "Operation Black Biscuit."

Media of Jay Dobyns re ATF's Operation Black Biscuit (Hells Angels Investigation)

CNN: <http://www.cnn.com/2007/LAW/02/05/atf.agent/index.html?s=PM:LAW>

CNN:

http://www.cnn.com/2007/LAW/02/05/dobyns.hellsangels/index.html?eref=rss_mostpopular

History Channel/Gangland http://www.liveleak.com/view?i=476_1200881806

History Channel/America's Book of Secrets <http://www.history.com/shows/americas-book-of-secrets/episodes/season-2>

Discovery Channel <http://investigation.discovery.com/tv-shows/deadly-devotion/deadly-devotion-videos/dangerous-ground.htm>

National Geographic

Channel <http://channel.nationalgeographic.com/channel/videos/undercover-biker/>

Arizona

Republic <http://archive.azcentral.com/specials/special42/articles/0123hellsangels23.html>



The Court of Federal Claims, in its Findings of Fact in the Opinion, p. 3, wrote the following about Agent Dobyns and the Hells Angels Investigation by ATF, code-named Operation Black Biscuit:

Agent Dobyns became an ATF agent in 1987. From early 2001 to July 2003, he participated in an investigation known as Operation Black Biscuit, which targeted members of the Hells Angels Motorcycle Club (Hells Angels). For nearly two years, Agent Dobyns posed undercover as a member of the Tijuana-based

Solo Angeles, as part of a task force that included other ATF agents. As part of this operation, Agent Dobyms and others staged the fake murder of a member of the rival Mongols Motorcycle Club. The staged murder impressed the Hells Angels leadership, causing the club to vote Agent Dobyms as a full “patched” member.

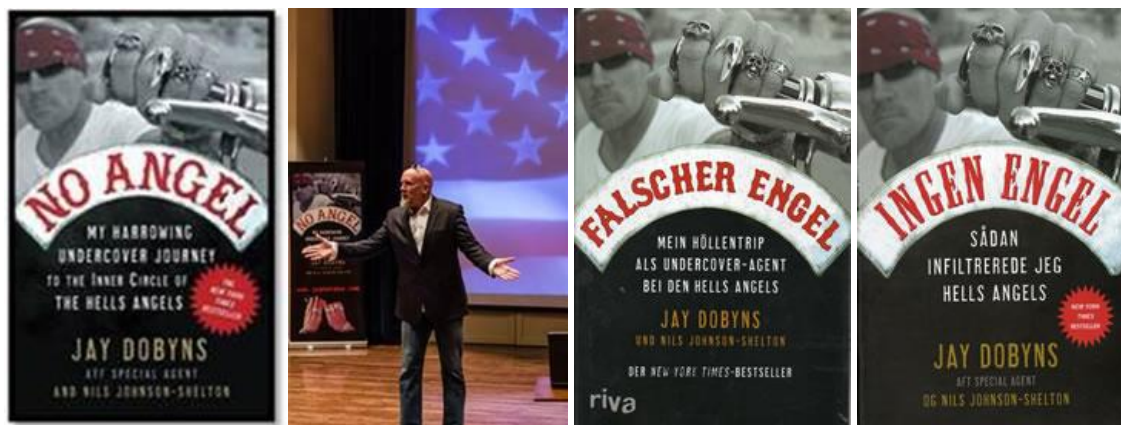
During this time, Agent Dobyms was stationed in one of ATF’s Tucson Field Offices and lived with his family in the Tucson area. In 2003, Operation Black Biscuit and parallel raids ended with the indictment of 36 people (16 as a direct result of the undercover operation), including 16 Hells Angels. The individuals were indicted on racketeering and murder charges. However, a number of setbacks involving the prosecution of these individuals eventually led to some of the defendants receiving reduced sentences and others having their charges dismissed. The disclosure of Agent Dobyms’ identity in court led to threats of death and violence directed against him and his family.

As a result of his work at Operation Black Biscuit, as well as on other investigations, Agent Dobyms received twelve ATF Special Act Awards, two ATF Gold Stars for critical injuries received during investigative operations, an ATF Distinguished Service Medal for outstanding investigative accomplishment, and the United States Attorney’s Medal of Valor award.

Plaintiff’s Final Demonstrative Exhibit 21 presented at closing argument of trial on February 18, 2014, added to that description of Jay Dobyms’ career:

In 1987, during his first week on the job for ATF, while attempting to apprehend a felon, Agent Dobyms was taken hostage and shot in the back, through his lung and chest, and two years later, was shot at and run over by a gang vehicle during an undercover operation in Joliet, Illinois. [Trial testimony of Jay Dobyms, pages 732:1-7].

In 2009, Jay Dobyms wrote a book about that experience that became a New York Times Top Ten bestseller entitled *No Angel: My Harrowing Undercover Journey to the Inner Circle of the Hells Angels* (Random House / Crown Publishing). *No Angel* is now in its fourth publishing, translated into seventeen different languages around the world.



Dobyns initially optioned his life rights to 20th Century Fox, represented by Reed at Baird Williams & Greer during the 2006-2007 negotiation with FOX Studios. Tony Scott was set to direct and the film went into pre-production. Following Tony Scott's tragic death, the film project went into a respectful waiting period that ultimately evolved into Fox's decision to not to make the film. Dobyns is in the process of reselling his life rights for film.

3. August 10, 2008, arson of the home of Jay Dobyns.

On August 10, 2008, Dobyns' home was set fire to in the middle of the night, with his wife and two children inside, four months after ATF withdrew the covert ID's that Dobyns and his wife Gwen had possessed for several years. ATF pulled the ID's for what Dobyns argued at trial was resentment over a September 20, 2007, settlement that Dobyns received against ATF for ATF's mismanagement of threats of death and violence against him. The threats were so severe and ATF's reaction to them, so incompetent, that, ultimately in June 2009, the Justice Department's Office of Special Counsel sent a letter to President Obama, detailing ATF's incompetent mismanagement of threats against one of its undercover agents.



4. The ensuing lawsuit by Jay Dobyns against the United States.

Baird Williams & Greer, on behalf of Dobyns, who was extensively involved in the drafting of many pleadings, and particularly the complaints, filed suit in October 2008, against the United States in the U.S. Court of Federal Claims, alleging ATF's breach of the 2007 settlement agreement between Dobyns and ATF. Dobyns contended that the agreement contained express and implied obligations to protect his safety from the investigative targets of his and the agency's investigations, and that ATF certainly could not take actions that would reduce the safety of Dobyns and his family, such as withdrawing covert ID's and failing to adequately investigate an arson of his home.

The Department of Justice moved to dismiss the action in 2009, and the Court of Claims denied the motion. In 2012, both sides filed motions for summary judgment, which the court also

denied. The trial to the bench took place in Tucson, Arizona, in June 2013 for two weeks, and concluded during July 2013 in Washington DC with the third and final week of trial.

The three week bench trial was closed to the public, but the February 18, 2014, three hour closing argument was open to the public. Several news outlets attended, and video clips of comments outside the courthouse are found immediately below.



From left – senior trial paralegal Jeff Elder, ATF Agent Jay Dobyns, lead trial attorney James Reed, and attorney Carson Emmons.



First and second photos - Lead trial attorney James Reed in front of the U.S. District Courthouse in Tucson, Arizona after closing argument on February 18, 2014. Third photo – Dobyns and Reed at trial midpoint, following two weeks in Tucson, and before the final week of trial in Washington, DC.

Media Coverage regarding Dobyns v. United States, in the U.S. Court of Federal Claims

Wall Street Journal <http://online.wsj.com/article/SB123611461950722501.html>

Tucson Daily Star http://tucson.com/news/local/tim-steller-public-locked-out-of-trial-in-former-atf/article_5943c5fd-3fbf-58e7-a9fe-2e85935941c3.html

Washington Post http://articles.washingtonpost.com/2009-06-21/news/36776731_1_atf-gang-member-notorious-motorcycle-gang

Newsweek <http://www.thedailybeast.com/newsweek/2009/03/06/a-very-hellish-journey.html>

Arizona Republic <http://www.azcentral.com/news/articles/2010/02/11/20100211aft-agent-and-aft-in-legal-battle.html>

Townhall Magazine

http://townhall.com/columnists/katiepavlich/2011/10/21/atf_ignored_death_threats,_tried_to_frame_whistleblower_agent_to_cover_corruption

Post-Trial New Coverage - Video

KGUN9 ABC News: <http://www.jrn.com/kgun9/news/It-was-worse-than-a-mess-Stunning-testimony-in-ATF-agent-Jay-Dobyns-case-against-the-Feds-246078711.html>

NRA News: <http://www.youtube.com/watch?v=Gr60sT9gYlk>

The trial testimony established that ATF's response to the fire scene was incompetent and prejudicial to an effective criminal investigative followup.

Plaintiff's Demonstrative Exhibit 20 at closing argument set forth a few of the damning trial testimony excerpts criticizing ATF's handling of the fire and arson investigation.

Special Agent in Charge, Phoenix Field Division, Thomas Atteberry trial testimony, page 2032:13-23, stated:

13 Q And as a part of doing that review of the
14 file, did you reach certain conclusions about the
15 quality of ATF's response to the fire event on
16 August 10, 2008?

17 A Yes, sir.

18 Q And what were those conclusions?

19 A They were unacceptable.

20 Q Can you please --

21 A They were unprofessional. I was embarrassed
22 because that's not the way we operate, and we should
23 have cleared the bench when that fire happened.

Tristan Moreland trial testimony, page 1299:13-1300:1, concurred:

13 Q Mr. Moreland, do you feel you're in a
14 position to critique the totality of the quality of
15 ATF's response to the fire at Agent Dobyns home?

16 A I do.

17 Q And what is that critique?

18 A In a macro sense, a few words, it was
19 inadequate between that and horrendous. If you'd like
20 me to expand, I could critique it element by element.
21 But in general, it was an extremely poor response.

22 Q In terms of other ATF responses to
23 residential arsons, how would you rate the quality of
24 ATF's response to this one?

25 A It's probably the worse response we've ever
1 given to any fire I've ever been part of.

Charles Higman trial testimony, page 950:15-951:3, in charge of ATF's arson response, also concurred:

15 Question: "So once again, from your
16 perspective, ATF's involvement in the investigation of

17 the arson was a mess."
18 Answer: "It was worse than a mess. It was
19 not thought out well. They only saw what was here.
20 They didn't look down the road at what was going to
21 occur later. They didn't understand the ramifications
22 of what they were doing at the time."
23 Do you stand by that testimony?
24 A Of my testimony today or my testimony during
25 the deposition?
1 Q Do you stand by that testimony in your
2 deposition?
3 A Yes.

The Court found that the response by ATF to the arson scene was unacceptable. At page 14 of the Opinion, footnote 16, the Court wrote:

FN16 Agent David Korn, an agent in one of the Tucson field offices, apparently responded to the fire scene that evening. He later conducted an interview based on a lead provided by Agent Dobyys. Agent Korn intended to conduct additional interviews at a local prison the next day, but was advised by other agents not to do so. Agent Korn later had a conversation with Agent Higman, in which he was told not to conduct any further interviews. Also on August 11, 2008, Phoenix Field Division Group Supervisor Peter Forcelli tried to send agents from his group to assist in the investigation, but was instructed not to do so by SAC Newell. In this conversation, SAC Newell told Agent Forcelli that the fire was "just minor scorching and PCSO had it under control." Pictures in the record reveal that SAC Newell's description of the fire was inexcusably inaccurate and that the fire was a total loss.

The Court concluded that ATF ignored credible suspects and continued to monitor and pursue Jay Dobyys as the primary and sole suspect. The Court wrote:

Several days later, Agents Hildick and Moreland interviewed Agent Dobyys and his family regarding the fire. Agent Dobyys was aware that a standard arson investigation required that the homeowner initially be viewed as a potential suspect. Based on their interviews with the family and their observations of the fire scene, both Agents Hildick and Moreland ruled out Agent Dobyys and his family as suspects in the fire. Despite this, the record reveals that several ATF officials, including ASAC Gillett and Agent Higman, continued to view Agent Dobyys as a suspect and did so for a number of years. [...] The IAD investigation revealed that, despite this transfer, Agent Higman and ASAC Gillett purposely slowed the investigation into the fire because they felt that another agency should be conducting the investigation; [...] Along these same lines, in a conversation with Agent Bayer, Agent Higman indicated that he wanted the case to be on a "slow roll." Agent Higman likewise indicated to Agent Maynard, the other agent assigned to investigate the arson, that they were going to "slow walk this thing" until the FBI accepted the investigation. ATF did not offer a reward for information regarding the fire, even though rewards had been offered in similar

circumstances; other agents had recommended to SAC Newell and ASAC Gillett that such a reward be offered.

Dobyns argued at trial that any audio recording surveillance of Jay Dobyns by ATF would prove that ATF had pursued Jay as a suspect despite claiming that they had never done so. The Department of Justice stipulated that the recording of Jay Dobyns' telephone calls was improper:

94. On August 22, 2008, and August 27, 2008, ATF Agent Matt Bayer tape recorded conversations with Mr. Dobyns without Mr. Dobyns' knowledge.

95. ATF did not seek, and had not obtained, authorization to record Agent Dobyns without his knowledge on August 22, 2008, or August 27, 2008.

The Court writes:

On August 22, 2008, and August 27, 2008, Agents Matt Bayer and Robert Maynard, at the direction of Agent Higman, tape-recorded conversations with Agent Dobyns without his knowledge. Defendant has stipulated that ATF did not seek, and did not obtain, authorization to record Agent Dobyns without his knowledge.²¹ In the midst of these recording sessions, Assistant Director Carroll visited the Phoenix Field Division to obtain a briefing on the status of the Dobyns' fire investigation. The record suggests that ASAC Gillett withheld information from both Assistant Director Carroll and SAC Newell at this time; amongst the information withheld was the fact that Agents Bayer and Maynard had been requested to record conversations with Agent Dobyns without his knowledge (the first of the recordings occurred before the meeting with Assistant Director Carroll; the second thereafter). Overall, at or around this time, ASAC Gillett and Agent Higman instituted several measures to prevent agents from the Field Division, as well as supervisors in ATF headquarters, from having access to information regarding the investigation into the Dobyns fire. According to the IAD investigation, those measures included circumventing the reporting requirements in ATF's "N-Force" case management reporting system, designating the N-Force case file as being covered by Fed. R. Crim. P. 6(e) when no grand jury investigation existed, storing files off-site at a location provided by the United States Air Force, and withholding information from ATF superiors in briefings.²²

Gillett's and Higman's efforts to keep their pursuit of Jay Dobyns as a suspect secret was documented in an email from Gillett to Higman during the arson investigation. The Court set forth the emails between Gillett and Higman in the Opinion at page 17, with Gillett's August 21, 2008, 4:02 PM email stating the following:

However, what I can control (and fully intend to control) is the specific information that is briefed to the chain of command.

I'll shoot straight, I think that you could tell during our meeting on Tuesday, I am no more happy about these circumstances than you. However, like you, I've

been ordered to proceed down this investigative path, so I will. What I won't do is compromise my integrity or the integrity of this investigation. I stand with you and your agents on this, so not releasing significant details (to anyone) that we may discover that would compromise our work won't come from me. I'll go out of my way to conceal them. Please trust that (and for the record I am not inferring anything from your prior comments) I have enough L.E. [law enforcement] and Intelligence community experience to know how to protect myself and my subordinates. (I can hide the ball with the best of them).

I have said it before, but for the record (and probably future disclosure in court) I'll say it again: I fully intend that this is the last stop on the career path of George Gillett, but this case likely guarantees it.

When ATF Certified Fire Investigator Mike Hildick reported the findings of his ATF Cause and Origin Report of the fire to ATF's George Gillett, consisting of a conclusion that the fire was arson and that Jay Dobyms and his family had no role whatsoever in it nor did they know who did, findings supported by ATF's on-scene Senior Special Agent Tristan Moreland, Gillett tried to pressure Hildick into changing the findings. The Court writes in its Opinion at p.19:

On August 25, 2008, ASAC Gillett and Agents Hildick, Moreland, Bettendorf and Heffner held a meeting about the fire. At that meeting, ASAC Gillett characterized the conclusions reached by Agent Hildick in his Cause and Origin report regarding the fire as being "unpopular" – a statement that was conspicuous to the agents in attendance, as Agent Hildick's report had not yet been released to anyone.

Instead of pursuing legitimate suspects, Gillett and Higman stored their own personal investigation targeting Jay Dobyms as the prime suspect out of the electronic record-keeping system for ATF, preventing ATF headquarters and other investigating agents, such as Hildick, Moreland, Forcelli, and supervisors such as Carson Carroll and William Newell, and of course Dobyms, from being aware of the relentless pursuit of Dobyms by Gillett and Hildick as the only suspect in the arson, and their diversion of all investigative focus and resources from legitimate suspects.

The Court refers to an ATF Internal Affairs Division official report of investigation of the conduct of George Gillett and William Newell related to the arson investigation, and writes at page 22 of the Opinion:

In April of 2012, IAD initiated a formal investigation regarding multiple complaints from Agent Dobyms concerning ATF's response to the fire at his residence and subsequent follow-up. The investigation was initiated by Julie Torres, the Assistant Director of IAD. On October 11, 2012, IAD completed Report of Investigation No. 20120079. The report was submitted by Agent Christopher J. Trainor, reviewed by SAC John F. Ryan and eventually approved by Assistant Director Torres. Agent Trainor's work in completing this report was exhaustive, and entailed interviewing a number of witnesses; reviewing depositions; checking with compliance with ATF Orders; reviewing documents, files and logs available through the N-Force case management system; and reviewing various other internal ATF memoranda.

IAD made several findings regarding the mismanagement of the response to the fire and the subsequent investigation thereof. IAD concluded that the leadership of the Phoenix Field Division, including SAC Newell, ASAC Gillett and Agent Higman delayed the ATF response at the residence of Agent Dobyys in ways that harmed the subsequent investigation. IAD found that these individuals failed properly to staff the investigation of the fire and failed, in particular, to protect the fire scene and secure evidence available at the scene. IAD also faulted SAC Newell, ASAC Gillett and Agent Higman for their poor coordination of the investigation, including the failure to assign a supervisor at the scene to coordinate ATF's response.²⁶

IAD further concluded that SAC Newell, ASAC Gillett and Agent Higman targeted Agent Dobyys as a suspect in the arson of his home, even after highly-respected agents within the Phoenix Field Office had concluded otherwise based on interviews and evidence found at the scene of the fire. IAD found that this conduct led investigators to ignore credible suspects. IAD also found that, during this time, two recordings of Agent Dobyys' phone calls were made without his knowledge or consent, and that proper authorization for the use of that surveillance was not obtained from ATF Headquarters or from the U.S. Attorney's Office for the District of Arizona. See ATF Order 3530.2 and ATF Brief 3100.05. IAD also determined that this use of electronic surveillance was not documented in the fashion required by various ATF orders, and the surveillance evidence so produced was not stored in the Field Office's evidence vault, as required by ATF Orders.²⁷ IAD, moreover, found that ASAC Gillett and Agent Higman instituted a system to report investigative activity regarding the fire that violated ATF policy and took steps to prevent the full and accurate briefing of information and investigative activities to their superiors, including SAC Newell and the Director and Deputy Director of ATF.²⁸ The IAD report further found that Agent Higman provided a briefing to the FBI (when the latter took over the investigation from ATF) that included false information and portrayed Agent Dobyys as ATF's lead suspect in the fire – even though Agents Hildick and Moreland had eliminated Agent Dobyys as a suspect based on their interviews with him and his family and their review of the evidence at the scene.

Indeed, in 2012 and 2013, ATF's Office of Internal Affairs investigated the allegations of Jay Dobyys' lawsuit and agreed with the allegations of the lawsuit. The conclusions of the October 11, 2012 ATF internal Affairs Report (Plaintiff's Trial Exhibit 272/Demonstrative Exhibit 10 at closing argument) were as follows:

DEPARTMENT OF JUSTICE
Bureau of Alcohol, Tobacco; Firearms and Explosives Report of Investigation

SUBJECT OF INVESTIGATION

NAME: NEWELL, William D.

SERIES/GRADE: 1811/SES

SSN: XX:X-:XX-5470

EOD: 9/24/1989 ' I

DOB: 4/1/1966

NAME: GILLET JR, George T.

SERIES/GRADE: 1811/GS-15

SSN: XX:X-:XX-2084

EOD: 1/13/1991

008: 8/25/1960
POST OF DUTY: CTD
DIRECTORATE: OSII:
DATE OF REPORT

October 11, 2012

In April 2012, the Internal Affairs Division (IAD) initiated a formal investigation regarding multiple complaints from Special Agent (SA) Jay Dobyms relating to the ATF response to a fire that occurred on August 10, 2008 at his residence, and the subsequent ATF investigation. The complaints have been transmitted in various formats including Office of the Inspector General online submissions, e-mails, and letters.

SA Dobyms alleged general mismanagement, job performance failure and violation of ATF policy by then Special Agent in Charge (SAC) William D. NEWELL, Phoenix Field Division (FD); then Assistant Special Agent in Charge (ASAC) George T. GILLETT, Phoenix FD; and retired Resident Agent in Charge (RAC) Charles HIGMAN, Tucson II Field Office (FO). The following specific allegations were investigated in this IAD investigation:

1. Inadequate Response Time to the Fire Scene by the Phoenix FD

The IAD investigation revealed that the leadership of the Phoenix Field Division (FD), including then Special Agent in Charge (SAC) William NEWELL, Assistant Special Agent in Charge (ASAC) George GILLETT, and retired Resident Agent in Charge (RAC) Charles HIGMAN; delayed the ATF response to the fire at the residence of Special Agent (SA) Jay Dobyms.

2. Inadequate Staffing of the Response to the Fire Scene

The IAD investigation. revealed that the Phoenix Field Division management team, including then SAC NEWELL, then ASAC George GILLETT, and retired RAC Charles HIGMAN failed to properly staff the investigation of the fire scene.

3. Unauthorized Use of Electronic Surveillance (ES) to Record SA Dobyms' Telephone Calls

The IAD investigation revealed that two recordings of SA Dobyms' phone calls were made without his knowledge or consent, and that proper authorization for the use of said electronic surveillance was not obtained.

4. Failure to Properly Document the Use of Electronic Surveillance as Required by ATF Orders.

The IAD investigation revealed that the use of electronic surveillance was not documented as required by ATF orders. The electronic surveillance evidence was not stored in the Field Office vault in accordance with ATF orders. .

5. Failure to Report Investigative Activity in N-Force as Required by ATF Orders

The IAD investigation revealed that ASAC GILLETT and RAC HIGMAN instituted a system to report investigative activity in UI 785085-08-0075 (regarding the fire) that violated ATF policy.

6. Improper Designation of the N-Force Case File Regarding the Fire as 6(e) -Grand Jury Protected

The IAD investigation revealed that UI 785085-08-0075 was improperly given the 6(e) designation within N-Force.

7. Withholding Critical Information Regarding the investigation from the Chain of Command, Including the SAC, Deputy Assistant Directors. Assistant Director's. etc.

The IAD investigation revealed that ASAC GILLETT and RAC HIGMAN agreed to prevent a full and accurate briefing of information and investigative activities to their superiors, including SAC NEWELL and ATF HQ DADs, Ads, the Deputy Director, and the Director.

8. Continuing to Investigate SA Dobyms as a Suspect in the Fire After He Had Been Eliminated as a Suspect by Senior SA's from the Phoenix FD

The IAD investigation revealed that the Phoenix FD continued to investigate SA Dobyms as a suspect in the fire despite the fact that two senior SAs from the Phoenix FD had ruled SA Dobyms and his family out as suspects in the fire.

9. SA Dobyms Briefed as a Suspect in the Fire to the FBI

The IAD investigation revealed that RAC HIGMAN provided a briefing to the FBI (when the FBI took over the investigation from ATF) that included false information and portrayed SA Dobyms as ATF's lead suspect in the fire, after SA Dobyms had been eliminated as a suspect by senior SA's from the Phoenix FD.

10. Pressure Applied to Certified Fire Investigator.

The IAD investigation revealed that ASAC GILLETT made an improper statement to a Certified Fire Investigator from the Phoenix FD regarding conclusions reached about the fire.

11. ATF Failed to Offer a Reward for Information Regarding the Fire.

The IAD investigation revealed that no reward for information was offered by ATF regarding the arson that occurred at SA Dobyms residence.

The Court similarly agreed with the conclusions of ATF's Internal Affairs Division report of investigation regarding the withdrawal of plaintiff's covert ID's, issued for his and his wife's protection from pending death and violence threats. The Court wrote in its Opinion:

In 2012, IAD initiated an internal investigation regarding complaints made by Agent Dobyms relating to the withdrawal of the fictitious undercover identification issued to him and his family. On May 13, 2013, IAD completed Report of Investigation No. 20130060. The report was submitted by Agent Trainor, reviewed by SAC Gwen A. Golden, and eventually approved by Michel P. Gleysteen, an Assistant Director of OPRSO. The IAD report primarily focused

on the actions of three individuals: Chief Vidoli, SAC Newell and former NIBIN Chief Pugmire. [...]

The IAD report made several key findings about ATF's withdrawal of backstopping for Agent Dobyns and his family. It summarized the prior threats that had been made against Agent Dobyns, including those that had occurred between 2003 and 2006. The report described the 2003 issuance of backstopped fictitious identification to Agent Dobyns and his family by ATF's Undercover Branch, and the other steps taken to provide security for the Dobyns family. The report detailed ATF's failure to properly institute the 2004 "emergency relocation" of Agent Dobyns and his family – a relocation in which, inexplicably, no backstopping was provided.³⁰ [...]

The report closely examined the actions taken by Chief Vidoli, former NIBIN Chief Pugmire and SAC Newell relating to the withdrawal of the fictitious identification that had previously been issued to Agent Dobyns and his family. [...] It further emphasized that the withdrawal of identification demanded by Chief Vidoli was unprecedented – that this was the only instance in which Chief Vidoli ever withdrew backstopping issued to an ATF employee. In sum, the IAD Investigation found no valid reason for the withdrawal of the fictitious identification previously issued to the Dobyns family.

In general, the IAD investigation revealed that information available to Chief Vidoli confirmed that threats against the Dobyns had been substantiated and were extant, the evidence of which included a copy of the June 2007 threat assessment that OPSEC Branch Chief Amy Walck provided to him. Indeed, the central conclusion of the report was that Chief Vidoli, NIBIN Chief Pugmire and SAC Newell ignored information about threats to Agent Dobyns and his family in deciding to remove the fictitious identification. And the report underscored that the removal of fictitious identification put Agent Dobyns and his family at risk.

Ultimately, the Court adopted the IAD report's findings and the testimony of numerous witnesses, supported by key documents frequently authored by malfeasant actors involved in the arson response, with the Court determining that the covenant of good faith and fair dealing was violated by the federal government, on behalf of ATF. The Court's Opinion states at page 37:

To begin with, the essence of the Settlement Agreement was to ensure the safety of Agent Dobyns and his family – and, secondarily, that ATF employees would not discriminate against Agent Dobyns.

The ATF officials who entered into the Settlement Agreement with Agent Dobyns understood all this, as they had years of law enforcement experience with the agency. They recognized that this was no ordinary employment dispute and that the \$373,000 being paid to Agent Dobyns related to the fundamental failure of ATF officials to act in conformity with the assurances that had been given to Agent Dobyns and his family – the same assurances that were given to all ATF agents in the form of policies, procedures and orders designed to promote agent safety. The record makes this understanding clear. And yet it appears that certain ATF officials – albeit not the ones who signed the Settlement Agreement

– set out to reappropriate the benefits that Agent Dobyms expected to obtain from the bargain; to act in a fashion designed to undercut the Settlement Agreement’s purpose so as to “deprive [Agent Dobyms] of the contemplated value.” *Metcalf Constr.*, 742 F.3d at 991.

Some of these ATF officials undermined that bargain literally within weeks after it was first cut. [...] In early November, Chiefs Pugmire, Vidoli and Walck determined that Agent Dobyms would be required to return all identifications and license plates issued to him and his family. They took this action even though, at the time of the Settlement Agreement, a June 22, 2007, assessment still viewed Agent Dobyms as at risk of harm. The subsequent IAD investigation revealed that the information presented to, or available to, SAC Newell and Chiefs Pugmire, Vidoli and Walck should have made clear that risks were still present and that backstopping was still necessary. Moreover, the IAD investigation confirmed that this had been the only instance in which Chief Vidoli ever withdrew the backstopping of an ATF Agent.

[...] However, the critical point here is not whether these individuals acted negligently, or even in bad faith. But whether that their lack of diligence and failure to cooperate, coming little more than five weeks after the signing of the Settlement Agreement, had the effect of putting Agent Dobyms at risk, thereby breaching to covenant of good faith and fair dealing. The court believes that it did. See *Malone v. United States*, 849 F.2d 1441, 1445-46, *modified*, 857 F.2d 787 (Fed. Cir. 1988) (government breached covenant via its “lack of diligence and interference with or failure to cooperate”); see also *N. Star Alaska Hous. Corp.*, 76 Fed. Cl. at 212.

Moreover, the withdrawal of the backstopping revealed a more deep-seated problem – that, despite the efforts reflected by the Settlement Agreement, ATF still was inadequately prepared to respond systematically and individually to the sorts of threats experienced by Agent Dobyms and his family. Documentation of this may be found in both of the IAD reports in question. Indeed, nearly two years after the Settlement Agreement, on June 18, 2009, the U.S. Office of Special Counsel, working with the DOJ Inspector General, generally sustained Agent Dobyms’ allegations regarding the inadequate response to threats against him, finding that ATF failed to investigate adequately and “needlessly and inappropriately” delayed its response to additional threats made against him.⁴⁷

FN 46. [...] Agent Trainor’s IAD report on the removal of the backstopping provided hundreds of findings, and was based upon hundreds of documents and five months of interviews. That report concluded that there was “no valid reason” to explain ATF’s withdrawal of the fictitious identifications previously held by Agent Dobyms and his family. Agent Trainor’s IAD findings were reviewed and approved by SAC Gwen Golden on May 9, 2013, and forwarded to the PRB by OPRSO Assistant Director Gleysteen on May 13, 2013.

The record in this case reveals other instances in which the covenant was breached. This is certainly the case with respect to actions taken by ASAC Gillett and Agent Higman in regards to the investigation of the August 10, 2008, fire at the Dobyms’ home. [...] In the court’s view, the evidence showed that ASAC Gillett and Agent Higman knew that Agent Dobyms was not responsible for the

fire, and still allowed him to be treated as a suspect as a form of payback. Moreover, ATF officials knew, or should have known, that individuals like ASAC Gillett and Agent Higman should not have been allowed to participate in the investigation – as it turned out their conduct was not only reprehensible, but predictably so. In donning blinders in this regard, ATF officials compounded the potential harm that might have befallen the Dobyns family. And acting in the aggregate, these ATF officials and employees further reappropriated essential features of the bargain represented by the Settlement Agreement, thereby again breaching the covenant of good faith and fair dealing.⁴⁸

[...] That said, it is the court's view that the actions taken by ATF officials and agents during the time period proximate to the execution of the Settlement Agreement severely undermined the intent of the agreement and thereby effectuated a breach of the covenant of good faith and fair dealing. And those actions, and the covenant breached thereby, entitle plaintiff to damages.⁴⁹

The Court selected among several damages theories which Dobyns presented to the Court, and ultimately awarded \$173,000 against the federal government. Several thoughts in this regard are appropriate. First, to obtain ANY monetary judgment against the federal government is an extraordinarily difficult challenge. The fact is that the government is vulnerable to suit only on terms that are established by the Congress, ones that exclude the possibility of punitive damages. Which leads to the second point – were punitive damages available in this action, they might have totaled in the millions of dollars. The standards for punitive damages includes malice worthy of particular punishment; the Court's opinion makes clear that the conduct of ATF through George Gillett and Charles Higman could be so characterized. In an ordinary civil action against a private party defendant instead of the federal government, the punitive damages for such conduct described in the Court's findings of fact might have been extraordinary.

Finally, the Court made clear that it had awarded to Jay Dobyns something far more valuable than money – it returned to him his good name and professional reputation, and instead publicly pilloried those bad actors and negligent persons at ATF who set out to harm Dobyns.

The Court made short work of the government's counterclaims against Jay Dobyns for royalties from the sales of his book "NO ANGEL: My Harrowing Undercover Journey to the Inner Circle of the Hells Angels", and the return of contractual payments by 20th Century FOX Films for Jay Dobyns' life rights for a motion picture, finding that ATF knew about those two creative projects before negotiating and signing the September 20, 2007, settlement agreement, and expressly waived claims for such outside work in the settlement agreement. The Court found no breach of the settlement agreement by Jay Dobyns and awarded the government zero dollars (\$0.00) for its counterclaims.

The Court writes in its Conclusion:

III. CONCLUSION

"The United States wins its point whenever justice is done its citizens in the courts." So wrote Solicitor General Frederick Lehman in the government's brief in *Brady v. Maryland*, 373 U.S. 83, 87 (1962), in words now carved into the office rotunda of the Attorney

General. Presumably, what holds true for the citizenry in general ought to hold true for Federal agents who risk their lives in law enforcement. But if that is so, how does one explain this case?

Unfortunately, how certain ATF officials acted in the aftermath of the Settlement Agreement bears little resemblance to the lofty sayings carved into the facades of the Department of Justice. What happened here is more reminiscent of a Franz Kafka novel, “The Trial.”⁷¹ There, Kafka depicts a totalitarian state in which the government suppressed freedom via a deluge of circuitous and irrational process. One of the techniques employed was the “non-final acquittal.” Kafka describes these acquittals thusly: “That is to say, when [the accused] is acquitted in this fashion the charge is lifted from [his] shoulders for the time being, but it continues to hover above [him] and can, as soon as an order comes from on high, be laid upon [him] again.” *Id.* at 158. Experiences like these unfortunately bring to mind those that Agent Dobyns experienced in the years following the execution of the Settlement Agreement – a time that should have been one of healing and reconciliation, but that instead gave certain ATF officials and agents the opportunity to harm Agent Dobyns further. In the court’s view, the actions of these ATF employees indisputably breached the covenant of good faith and fair dealing. That breach caused Agent Dobyns to suffer mental distress, as well as pain and suffering, which, in turn, entitles him to the damages awarded below. Hopefully, this will bring this Kafkaesque story to an end.

Based on the foregoing, the court finds that defendant did not breach the Settlement Agreement, but did breach the covenant of good faith and fair dealing. Based on the breach of the covenant, the court finds that plaintiff is entitled to damages in the amount of \$173,000. The court further finds that defendant is not entitled to recover anything with respect to its counterclaim.⁷²

IT IS SO ORDERED. ⁷³

s/Francis M. Allegra Francis M. Allegra, Judge

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