Department of Homeland Security
Federal Law Enforcement Training Centers
Office of Chief Counsel
Legal Training Division

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The Federal Law Enforcement -Informer-

A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW ENFORCEMENT OFFICERS AND AGENTS

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer).* The Legal Training Division of the Federal Law Enforcement Training Centers' Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Centers. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at (912) 267-3429 or FLETC-LegalTrainingDivision@dhs.gov. You can join *The Informer* Mailing List, have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting https://www.fletc.gov/legal-resources.

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The Informer – October 2014

Case Summaries

FLETC Informer Webinar Series

1. Use of Force Legal Refresher

2-hour webinar presented by Tim Miller, FLETC Legal Division

This course will cover the *Fourth Amendment's* objective reasonableness test for seizing free citizens. It will cover the United States Supreme Court's analysis in *Graham v. Connor*, when deadly force and intermediate weapons are reasonable, and the defense of qualified immunity.

Date and Time: Friday November 14, 2014: 12:30 p.m. EST.

To join this webinar: **https://share.dhs.gov/uof-refresher**

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2. Law Enforcement Legal Refresher Training

2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

This two-hour block of instruction focuses on *Fourth* and *Fifth Amendment* law and is designed to meet the training requirements for state and federal law enforcement officers who have mandated two-hour legal refresher training requirements.

Date and Time: Tuesday November 18, 2014: 2:30 p.m. EST.

To join this webinar: **https://share.dhs.gov/lgd0312**

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6. Even though meeting rooms may be accessed before a webinar, there may be times when a meeting room is closed while an instructor is setting up the room.
7. Meeting rooms will be open and fully accessible at least one-hour before a scheduled webinar.
8. Training certificates will be provided at the conclusion of each webinar.

CASE SUMMARIES

Circuit Courts of Appeal

First Circuit

United States v. Tiru-Plaza, 2014 U.S. App. LEXIS 17388 (1st Cir. P.R. Sept. 9, 2014)

At approximately 11:00 p.m., police officers stopped a car containing four individuals for a traffic violation. The driver, Morales, could not produce a driver's license and he gave the officers a photocopy of the vehicle's original registration on which the vehicle identification number (VIN) was illegible. Suspecting the vehicle was stolen, one of the officers asked Morales to exit the vehicle and open the hood so the VIN on the engine could be inspected. Morales got out and as he raised the hood of the vehicle, the officer saw the handle of a pistol in the waistband of Morales' pants. The officer alerted his partner who immediately ordered Tiru, the front seat passenger, out of the vehicle. The officer frisked Tiru and discovered a pistol in the waistband of Tiru's pants. Tiru was charged with being a felon in possession of a firearm.

First, Tiru argued the officers unlawfully extended the duration of the traffic stop when they ordered Morales to open the hood of the vehicle. The court disagreed. When Morales failed to provide the officer with a driver's license and a legible vehicle registration, it was reasonable for the officer to suspect the car might have been stolen. Based on that suspicion, it was reasonable for the officer to check the VIN on the vehicle's engine. In addition, the time it took Morales to exit the car and open the hood was brief.

Tiru next argued the pat-down conducted by the officer was not a *Terry* frisk, but rather a search incident to an unlawful arrest. Again, the court disagreed. The officer lawfully directed Tiru to exit the car after his partner discovered Morales had a pistol. The officer then frisked Tiru, discovered the pistol in the waistband of Tiru's pants and then handcuffed and detained Tiru. Tiru was clearly under arrest after the discovery of the pistol in his waistband, not before.

Finally, Tiru argued the officer was not justified in frisking him just because his partner saw a pistol in the waistband of Morales' pants. The court did not agree. First, two police officers encountered four individuals, at nighttime, in a vehicle the officers had some reason to believe might be stolen. Second, the officers discovered that Morales had a pistol concealed in his waistband. Consequently, the court concluded that the officer's decision to frisk Tiru was supported by reasonable suspicion he might be armed and dangerous.

Click **HERE** for the court's opinion.

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Second Circuit

United States v. Andino, 2014 U.S. App. LEXIS 17950 (2d Cir. N.Y. Sept. 16, 2014)

Federal agents arrested Montanez for several drug related offenses. After his arrest, Montanez told the agents he had cocaine in the house he shared with his girlfriend, Andino. Montanez gave the agents written consent to search the house and told the agents Andino would know where the cocaine was located.

The agents went to Andino's house and knocked on the door. After Andino answered the door, the agents told her Montanez had been arrested and that he had given the agents consent to seize the cocaine located inside the house. Andino slammed the door and ran toward the interior of the house. Agents positioned outside a window heard a faucet begin to run in the kitchen and drawers being opened and closed. Believing that Andino was in the process of destroying the cocaine, an agent entered the house through a window. After the agent secured Andino, who had emerged from the kitchen, the agent opened the door to allow the other agents to enter. One of the agents then went into the kitchen where the faucet was still running. The agent seized a plastic baggy in the sink containing a milky white residue. The agents arrested Andino. Laboratory testing later confirmed the white residue in the plastic baggie was cocaine.

Andino argued the agents' warrantless entry into her home violated the *Fourth Amendment*.

The court disagreed, holding the agents' warrantless entry was justified by exigent circumstances, specifically, the imminent destruction of evidence. Upon learning the officers were looking for cocaine, Andino slammed shut the front door, ran from the door, opened and closed drawers and turned on the kitchen faucet. As a result, it was reasonable for the officers to conclude that Andino was attempting to wash the cocaine down the kitchen sink. In addition, the exigency still existed after the first agent entered into the house and secured Andino, as the kitchen faucet was still running when she was seized. It was only after the agents seized Andino and turned the faucet off that the potential for the destruction of evidence had ended. However, when the agent turned off the faucet, he was able to lawfully seize the plastic baggie of cocaine in the sink under the plain view doctrine.

Click **HERE** for the court's opinion.

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Third Circuit

United States v. Mallory, 2014 U.S. App. LEXIS 17228 (3d Cir. Pa. Sept. 3, 2014)

Police officers saw a revolver in the waistband of Mallory's pants while Mallory was standing on a public sidewalk outside a house where he lived on weekends. Mallory refused the officers' commands to stop and ran into the house. The officers entered the house, without a warrant, and ordered all of the occupants outside while the officers searched the house for Mallory. The officers found Mallory in a bathroom, handcuffed him and arrested him for unlawful carrying of a firearm on public streets. As the officers escorted Mallory from the house, one of the officers found a revolver under an umbrella in the foyer behind the front door, which had swung open into the house. The government indicted Mallory for being a felon in possession of a firearm.

Mallory filed a motion to suppress the revolver, arguing the officers' warrantless entry into the house and search behind the front door violated the *Fourth Amendment*.

First, the court held the officers had probable cause to believe Mallory had committed a crime by carrying a firearm in a public place. Second, the court held the officers warrantless entry into the house was justified under the exigent circumstances doctrine because the officers were in "hot pursuit" of Mallory. The court noted this exigency allowed the officers to enter the house and search for Mallory and to search for places where he might have hidden the revolver. However, once the officers found Mallory and handcuffed him, the exigency justifying the officers' warrantless search, the hot pursuit of an armed suspect, no longer existed. By the time the officer searched behind the front door under the umbrella, other officers had secured Mallory and were escorting him out of the house. In addition, there was no evidence the other occupants of the house posed a threat to the officers or knew of location of the revolver. Once the officers had secured the house and arrested Mallory, nothing prevented the officers from continuing to control the house until a search warrant could be obtained.

Click **HERE** for the court's opinion.

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Sixth Circuit

Krause v. Jones, 2014 U.S. App. LEXIS 16979 (6th Cir. Mich. September 3, 2014)

When police officers tried to arrest Krause on an outstanding drug warrant, Krause fled into his house and hid in a bedroom closet with a pistol. Krause told the officers he had multiple guns in the bedroom and that he would kill anyone who tried to come in. A police negotiator talked with Krause for over eight hours in an attempt to get Krause to surrender. After a pole camera appeared to show Krause sleeping in the closet, the officers decided to enter the bedroom to apprehend him. One of the officers rolled a flash bang device into the bedroom while Officer Jones entered the room simultaneously. As Jones entered the bedroom, Krause fired a shot at him. Jones returned fire, killing Krause. The subsequent investigation revealed Krause had fired one round from a .38 caliber revolver and that Krause had suffered twenty gunshot wounds. Krause's mother sued Jones and several other officers, claiming the officers violated her son's rights by using excessive force when entering the bedroom and shooting Krause.

The court held that Jones and the other officers were entitled to qualified immunity. Regarding the officers' use of the flash bang, the court stated the plaintiff did not identify any way in which the device unlawfully seized or otherwise harmed Krause. Nonetheless, the court found the officers' use of the flash bang was reasonable. The officers were faced with a man resisting arrest on drug charges, who threatened to shoot the officers, and refusing all requests to surrender peacefully. As a result, the officers decided to use a flash bang to minimize the risk of injury to themselves as they entered the room and attempted to subdue Krause before he could act.

The court further held the officers' use of deadly force, by shooting Krause, was objectively reasonable. Officer Jones fired at Krause after he saw the flash of a gun as he entered the bedroom. An officer in Jones' position, who knew Krause was armed and who heard Krause threaten to shoot the officers, could reasonably believe that Krause posed a serious threat to him and the officers behind him. The fact that Jones fired his weapon on fully automatic, striking Krause with twenty rounds was not relevant, as no evidence showed that Jones continued firing after Krause was incapacitated or that Krause had surrendered.

Click **HERE** for the court's opinion.

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Eighth Circuit

Aipperspach v. McInerney, 2014 U.S. App. LEXIS 17201 (8th Cir. Mo. Sept. 5, 2014)

Police officers received a call from Hart who reported that his friend, Al-Hakim, refused to leave Hart's apartment. When officers arrived, Al-Hakim was gone, but the officers learned there might be an outstanding warrant for Al-Hakim's arrest. The officers searched the woods behind Hart's apartment and found Al-Hakim sitting at the bottom of a ravine. An officer asked Al-Hakim to come up and talk, but Al-Hakim refused, and produced what appeared to be a black handgun. Additional officers responded, and Al-Hakim was ordered to drop his weapon no fewer than twelve times. Al-Hakim refused to drop the weapon, instead Al-Hakim briefly pointed it the officers' direction. An officer warned Al-Hakim that if he pointed the weapon at the officers again, the officers would shoot. A few minutes later, when Al-Hakim attempted to change position, he slipped and fell backwards. When Al-Hakim regained his balance, he pointed his weapon at the officers. The officers fired their weapons at Al-Hakim, killing him. The officers recovered Al-Hakim's weapon, which turned out to be a Daisy air pistol. Al-Hakim's estate sued the police officers, claiming the officers' use of deadly force was unreasonable under the circumstances.

The court held the officers were entitled to qualified immunity. In this case, the officers were confronted with a suspect who held what appeared to be a handgun, refused repeated commands to drop the gun, pointed the gun once at the officers and then pointed the gun a second time in the direction of the officers. The court concluded the officers acted reasonably, making a split-second judgment in a situation where Al-Hakim posed a threat of serious physical harm to the officers. The court further noted that video footage from a news helicopter confirmed the officers' sequence of events.

Click **HERE** for the court's opinion.

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Ninth Circuit

United States v. Dreyer, 2014 U.S. App. LEXIS 17717 (9th Cir. Wash. Sept. 12, 2014)

A special agent of the Naval Criminal Investigation Service (NCIS) began investigating the online distribution of child pornography. The agent, located in Georgia, used a software program to search for any computers located in Washington State sharing known child pornography files on the Gnutella file-sharing network. As a result, the agent found a computer sharing several images and a video depicting child pornography. The agent connected Dreyer to the IP address where the files originated. After the agent determined that Dreyer had no current military affiliation, the agent summarized his investigation and forwarded his report to the NCIS office in Washington State. The NCIS in Washington State then turned the information over to a police officer in a local police department. Based on that information, the officer obtained a warrant and seized Dreyer's computer. A subsequent search discovered numerous images and videos of child pornography. The federal government indicted Dreyer on two child pornography charges.

Dreyer argued the evidence admitted against him at trial should have been suppressed because military enforcement of civilian laws is prohibited.

The court agreed. The Posse Comitatus Act (PCA) "prohibits Army and Air Force military personnel from participating in civilian law enforcement activities. In addition, the Ninth Circuit has held that,

"although the PCA does not directly reference the Navy, PCA –like restrictions" apply to the Navy as a matter of Department of Defense (DOD) and naval policy. The court also recognized that the PCA-like restrictions on direct assistance to civilian law enforcement officers apply to civilian NCIS agents.

In this case, the agent conducted a broad investigation into sharing of child pornography by anyone within the state of Washington, not just those on a military base or with a reasonable likelihood of a Navy affiliation. Consequently, the court held that the agent's surveillance on all computers in Washington amounted to impermissible direct active involvement in civilian enforcement of the child pornography laws.

The court further held that suppression of the evidence against Dreyer was warranted because the record indicated that the agent in this case, and other NCIS agents routinely carry out broad surveillance activities that violate the restrictions on military enforcement of civilian law.

Click **HERE** for the court's opinion.

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Tenth Circuit

United States v. Tubens, 2014 U.S. App. LEXIS 16906 (10th Cir. Utah Sept. 2, 2014)

Two police officers followed a Greyhound bus to a truck stop where the bus was scheduled to stop for a twenty-minute passenger break. After obtaining consent from the bus driver, the officers deployed their drug-sniffing dogs into the luggage compartment of the bus. Both dogs separately alerted to the presence of drugs in a black suitcase. The officers removed the suitcase from the bus and after locating its Greyhound identification tag, determined the suitcase belonged to Tubens.

After the passengers reboarded the bus, one of the officers boarded and announced to the passengers that he was looking for Mr. Tubens. After none of the passengers admitted to being Tubens, the officer asked the passengers to produce their bus tickets so he could inspect them. The officer eventually located Tubens, who had been on the bus the entire time. Tubens told the officer he had not come forward because he had not heard the officer call his name. Tubens voluntarily exited the bus with the officer and consented to a search of the black suitcase. While one of the officers searched the suitcase, the other officer asked Tubens if he had any carry-on luggage. Although Tubens denied having any other luggage, the officer went onto the bus to the area where Tubens had been sitting. The officer discovered a square case and a paper sack on the luggage rack directly above Tubens' seat. When shown these items, Tubens admitted to the officer that they belonged to him. In addition, while on the bus, another passenger told the officer she saw Tubens attempting to push something else down the luggage rack, out of his immediate proximity. The officer eventually located a black bag close to where Tubens had been sitting and established that it did not belong to any of the other passengers on the bus. When the officer asked Tubens about the black bag, Tubens denied ownership. After explaining the black bag had been abandoned, the officer searched it, discovering methamphetamine, and two prescription pill bottles with Tubens' name on them. The officer arrested Tubens.

Tubens argued the evidence located in the black bag should have been suppressed because he did not voluntarily abandon the black bag. Specifically, Tubens claimed his denial of ownership of the black bag was caused by an unlawful *Terry* stop.

The court disagreed. First, the positive alerts from the dogs provided probable cause to believe the suitcase located in the bus's luggage compartment contained cocaine. As a result, the officers were

justified in removing the suitcase from the bus's luggage compartment, locating its owner, Tubens, and detaining him for further questioning.

Second, even though Tubens denied possessing any carry-on luggage, it was reasonable for the officer to reenter the bus to confirm this. The officer already believed Tubens had lied when Tubens told the officer he had not heard the officer call his name on the bus. In addition, the officer testified that based on his training and experience, the officer knew drug traffickers often moved their stash between their checked and carry-on bags to avoid detection.

Third, after the officer located the square case and paper sack on the bus, which Tubens admitted were his, the officer was justified in boarding the bus again to look for other luggage that belonged to Tubens. When the officer found the black bag, which another passenger claimed Tubens had been trying to conceal, it was reasonable for the officer to ask Tubens if the bag belonged to him.

Although Tubens was under investigation when he disclaimed ownership of the black bag, the court concluded Tubens voluntarily abandoned the bag during a valid *Terry* stop. As a result, the court held Tubens did not have standing to challenge the search of the bag.

Click **HERE** for the court's opinion.

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Eleventh Circuit

Saunders v. Duke, 2014 U.S. App. LEXIS 17334 (11th Cir. Fla. Sept. 8, 2014)

Saunders entered the front seat of an undercover police officer's car and sold him narcotics. After the sale, other police officers ordered Sanders from the car, pushed him to the ground and handcuffed him. After he was handcuffed, Saunders was held down against the hot pavement on his stomach. Saunders told the officers he was "getting burnt," and was holding his face up off the hot pavement. Although Saunders was not resisting or attempting to flee, one of the officers slammed Saunders' face onto the pavement. As a result, Saunders suffered injuries to his teeth, jaw and head.

Saunders sued the officers for excessive use of force in violation of the *Fourth Amendment*.

The court held Saunders sufficiently alleged a gratuitous use of force; therefore, the officers were not entitled to qualified immunity. According to Saunders, he held his head up to avoid having his face burned by the hot pavement. Although Saunders was not resisting or posing a threat to anyone, he claimed one of the officers "slammed" his head into the pavement with "extreme force." The court concluded if a jury found these allegations to be true, then such a use of force would be excessive. In addition, the court noted a handcuffed, non-resisting suspect's right to be free from excessive force had been established at the time of this incident.

Click **HERE** for the court's opinion.

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Berry v. Leslie, 2014 U.S. App. LEXIS 17782 (11th Cir. Fla. Sept. 16, 2014)

Officers with the Orange County Sheriff's Office (OCSO) and representatives from the Florida Department of Business and Professional Regulation (DBPR) conducted an unannounced, warrantless inspection of a barbershop owned by Berry. Once inside the barbershop, police officers handcuffed and frisked Berry and two other barbers. In addition, police officers inspected each of the barbers' workstations by looking through their drawers, and officers searched an unlocked storage room in the back of the barbershop where no barbering services were rendered. After approximately one-hour, it was determined all of the barbers possessed valid licenses and that the barbershop was in compliance with all safety and sanitation rules. Berry and the two barbers were released from their handcuffs and not charged with any crimes.

Berry and the other barbers sued the police officers claiming the barbershop inspection violated the *Fourth Amendment* by subjecting them to an unreasonable search and seizure.

The court agreed, holding the police officers were not entitled to qualified immunity.

The DBPR is in charge of regulating and enforcing statutes and rules associated with professional licenses in Florida, to include barbershops. Under the rules, DBPR inspectors are authorized to conduct inspections, once every two years, to ensure that barbershops are in compliance with state licensing and sanitation laws.

Here, the court held the officers' show of force, and the search of the Berry's barbershop was unreasonable in view of the fact that DBPR inspectors visited the barbershop two days before the "sweep," and had already determined that Berry and his employees were in compliance with state regulations. In addition, unlike previous inspections of Berry's barbershop, which were conducted by a single DBPR inspector, without the assistance of police officers, this inspection was executed with a tremendous and disproportionate show of force for no legitimate reason. In this case, the court noted that officers with the OCSO prepared a detailed operations plan, which included details on how to seize evidence, gather intelligence and interview potential confidential informants. The court stated the sweep at the barbershop, purportedly to check for licensing violations, was gratuitous at best.

Finally, the court found the statute authorizing the DBPR to inspect barbershops vests the authority to conduct the inspections in the DBPR alone. While law enforcement officers may accompany DBPR inspectors to provide assistance to arrest individuals whom the DBPR inspectors determine to be in violation of the law, the law enforcement officers do not have the authority to conduct barbershop inspections themselves. However, in this case, police officers opened drawers at the barbers' workstations and searched a storage room in the back of the barbershop.

Click **HERE** for the court's opinion.

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District of Columbia Circuit

Wesby v. District of Columbia, 765 F.3d 13 (D.C. Cir. 2014)

Police officers responded to a noise disturbance call at a house. When the officers arrived, they discovered twenty-one men and women having a party. One of the women told the officers a woman, named Peaches, who was renting the house had given her permission to be in the house, while others said they had been invited to the party by another guest. Peaches was not present, but when one of the officers spoke to her on the phone Peaches told the officer she had permission to be at the house. The officer eventually contacted the homeowner who denied Peaches was renting the house and denied the partygoers had his permission to be inside his house. A sergeant who had arrived on the scene during the investigation directed the officers to arrest everyone in the house for unlawful entry, a violation of District of Columbia law. Sometime later, the charges against the arrestees were changed to disorderly conduct.

Sixteen of the arrestees sued five police officers for false arrest, as well as the District of Columbia for negligent supervision by the police sergeant.

The court held the officers were not entitled to qualified immunity.

First, the court held it was unreasonable for the officers to believe the plaintiffs had entered the house unlawfully. First, the officers knew the plaintiffs had been invited to some kind of party at the house. Second, the officers had explicit, uncontested statements from Peaches and another guest at the scene that Peaches had told the people inside the house that they could be there. Finally, the officers had a statement from the homeowner that he had been trying unsuccessfully to arrange a lease with Peaches and that he had not given the people in the house permission to be there. However, the homeowner never told the officers that he or anyone else had told the plaintiffs that they were not welcome in the house. All of the information the officers had obtained by the time of the arrests made it clear the plaintiffs believed they had lawfully entered the house with the consent of someone they believed to be the lawful occupant. As a result, the officers did not have probable cause to arrest the plaintiffs for unlawful entry.

Next, the court held the officers did not have probable cause to arrest the plaintiffs for disorderly conduct. A disorderly conduct violation under District of Columbia law requires that an arrestee disturb a "considerable number of persons," and creates a "breach of the peace." Here, the evidence only established that one neighbor called the police to complain about noise that evening.

Finally, the court held the facts in this case demonstrated that the sergeant, one of the District of Columbia's supervisory officials, directed his subordinates to make arrests that he should have known was not supported by probable cause. Therefore, the plaintiffs were entitled to judgment as a matter of law on their negligent supervision claim.

Click **HERE** for the court's opinion.

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United States Dep't of Homeland Sec. v. FLRA, 751 F.3d 665 (D.C. Cir. 2014)

The National Treasury Employees Union (NTEU) and Customs and Border Protection (CBP), an agency within the Department of Homeland Security (DHS), negotiated a collective bargaining agreement (CBA). Article 22, Section 2 of the CBA included the following provision:

> An employee [in CBP] being interviewed by a representative of the Agency (e.g., Department of Homeland Security Office of Inspector General) in connection with either a criminal or non-criminal matter has certain entitlements/rights regardless of who is conducting the interview.

Among other things, Article 22 required that union officials:

> Receive advance notice of employee interviews; that interviews be conducted at the worksite; that employer representatives act professionally; that the employer representatives provide employees with specific negotiated forms with their rights outlined prior to conducting the interview; and that employer representatives advise employees of their right to union representation if the employee may be subject to discipline or adverse action before the interview is conducted.

Article 22 had the effect of requiring all employer representatives to adhere to these negotiated provisions when conducting investigatory interviews, criminal and non-criminal, of CBP bargaining unit employees. In addition, Article 22 specifically identified employees from DHS's Office of Inspector General (OIG) as employer representatives when the OIG conducted investigations of CBP employees.

DHS objected to Section 2 of the proposed CBA claiming that the procedures followed by DHS's OIG in conducting its investigations are non-negotiable. After the Union and CBP removed Section 2 from the CBA, DHS approved the agreement without that provision. Consequently, the Union filed an appeal with the Federal Labor Relations Authority, (FLRA).

The FLRA agreed with the Union, ruling that the disputed CBA provision concerning the procedures to be followed by the OIG in conducting its investigations were negotiable.

The government appealed the ruling by the FLRA. The Court of Appeals for the District of Columbia agreed with the government. The court held the proposal advanced by the union would compromise the independence of the Office of Inspector General and would be inconsistent with the Inspector General Act (IG Act), 5 U.S.C.S. App. 3 §§ 1-13, within the meaning of the Federal Service Labor-Management Relations Statute (FSLMRS) 5 U.S.C.S. §§ 7117(a)(1). In addition, the court held proposals to regulate OIG investigations authorized by the IG Act were not proper subjects of collective bargaining under the FSLMRS.

Click **HERE** for the court's opinion.

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