

TO: County Prosecutor, O'Neil County, New York State  
FROM: Gary Lehman (Respectfully Submitted to Professor Eugene O'Neil, John Jay College of Criminal Justice, City University of New York CUNY)  
Office of the Inspector General, Department of Transportation (DOT)  
DATE: May 3, 2015  
RE: CASE STUDY for Professor O'Neill CRJ754 – Investigative Techniques:



Official Misconduct at DOT/Government Labor Union for Employees, O'Neill County NY

Executive Summary

A tip was received (month/day 01/07) from a DOT employee charging varied official misconduct by the DOT site Manager of Customer Service and office staff at DOT / 234 North Elm Street, Ottumwa NY. Subsequent investigations, surveillance and findings during a search warrant of the premises established varied DOT violations and criminal violations including: DOT violations for conducting non-DOT personal and religious activities during DOT working hours both on and off DOT premises; DOT violation of misappropriation of DOT computer and network assets/facilities; criminal violation for requesting political contributions from a contractor; criminal possession of child pornography on DOT premises; criminal misappropriation of DOT personnel on DOT time; and criminal violation for engaging in political work on DOT time.

The following investigative actions were conducted by OIG between 01/15 and 01/22: interview of DOT staff member Mary Marshall who made the charges (01/15); visual site inspection DOT site located at 243 North Elm Street 01/16; surveillance of 234 North Elm Street (01/17) and moving surveillance to track personnel; surveillance of 234 North Elm Street (01/18) and moving surveillance to track personnel; interview of DOT staff member Rhonda Richards at 234 North Elm Street (01/21); interview of Bernie Brown of ABC Inc., computer consultant to DOT collocated at 234 North Elm Street (01/21); search of office and file cabinets of DOT supervisor Jerry Johnson (site manager of DOT customer service at 234 North Elm Street) (01/22); and interview of Jerry Johnson (01/22).

***OIG/DOT recommends following criminal prosecution/disciplinary actions and measures be taken:***

**Jerry Johnson**

- Obtain and execute search warrant with urgency at home of Jerry Johnson (JJ) to seize home computer – reason: child pornography is hosted on home computer of JJ according to his own statement during JJ's 01/22 interview; action recommended in accordance with Child Pornography law 18 U.S.C. § 2252- Certain activities relating to material involving the sexual exploitation of minors (possession, distribution and receipt of child pornography) Reference (1)
- Criminal prosecution of JJ for supervisory personnel exploitation of subordinate employees - based on moving surveillance observations 1/17 and 1/18 and personnel interviews of Rhonda Richards and Mary Marshall 1/21 & 1/15 respectively, in accordance with Part 3 - SPECIFIC OFFENSES Title L - OFFENSES AGAINST PUBLIC ADMINISTRATION Article 195 - (195.00 - 195.20) OFFICIAL MISCONDUCT AND OBSTRUCTION OF PUBLIC SERVANTS GENERALLY 195.20 - Defrauding the government, section (a) (ii) Reference: (2)
- Invoke DOT Administrative Discipline for conducting personal activities while on DOT duty - based on moving surveillance observations 1/17 and 1/18 and office search of DOT234 North Elm Street 1/22, in

accordance with DOT Personnel Rules of Employment (prohibiting political campaigning at work) **and/or** Criminal Prosecution for using DOT facilities to engage in personal work (in this instance, political campaigning) 2010 New York Code PEN - Penal Part 3 - SPECIFIC OFFENSES Title L - OFFENSES AGAINST PUBLIC ADMINISTRATION Article 195 - (195.00 - 195.20) OFFICIAL MISCONDUCT AND OBSTRUCTION OF PUBLIC SERVANTS GENERALLY 195.20 - Defrauding the government. § 195.20 (a) (ii) Reference (2)

- Invoke DOT Administrative Discipline for unauthorized use of DOT Computer Assets and Network resources for personal activities (church work) - based on results of office search of DOT/234 North Elm Street 1/22, in accordance with DOT Computer Use Policy (accepted by Jerry Johnson on each use of the DOT computer system)
- Invoke continuous computer auditing for all non-government email and internet usage for JJ logon ID to ensure IT resource usage in accordance with DOT Computer Use Policy (accepted by Jerry Johnson on each use of the DOT computer system)
- Criminal Prosecution for conducting political work on DOT-time – based on moving surveillance observations 1/17 and 1/18 and office search results of DOT/234 North Elm Street 1/22 which resulted in finding evidence of DOT-time based political electioneering in multiple locations; informing case: The Hatch Act, 5 U.S.C. §§ 7321-7326 (4) §7324 in particular. References (4) (6)
- Subpoena campaign contribution records from political candidate Carlson for Governor to determine and validate that ABC Inc. and/or B. Brown contributed \$800 to the election campaign as alleged by B. Brown in his 01/22 interview, with intent upon confirmation to commence criminal prosecution against JJ for requesting political contributions from a contractor to the DOT- in accordance with 2011 US Code Title 18 – Crimes and Criminal Procedure Part I – CRIMES (§§ 1 – 2725) Chapter 29 – ELECTIONS AND POLITICAL ACTIVITIES (§§ 591 – 617) Section 602 – Solicitation of political contributions Reference (3)
- Criminal Prosecution for using DOT facilities to engage in personal work (in this instance, religious counseling) 2010 New York Code PEN – Penal Part 3 – SPECIFIC OFFENSES Title L – OFFENSES AGAINST PUBLIC ADMINISTRATION Article 195 – (195.00 – 195.20) OFFICIAL MISCONDUCT AND OBSTRUCTION OF PUBLIC SERVANTS GENERALLY 195.20 –Reference (2)
- Criminal Prosecution for the Obstruction of Justice (lying to investigators on multiple accounts during interview of 01/22 at DOT/234 North Elm Street) Viz. ‘Whoever obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice’ 18 U. S. C. § 1503’ Reference (8)

#### **Rhonda Richards**

- Adverse DOT Employment Action/Discipline, specific action to be determined. Recommending either two-week pay suspension or four-week period at half-pay for repeated, extended violations of DOT’s expectation for employees to report abusive supervisory behavior and temporary administrative reassignment

#### **Bernie Brown**

- Immediate cancellation of computer consulting contract between DOT and ABC (Bernie Brown’s employer) and DOT due to violation of DOT rules by ABC, INC.

#### **Mary Marshall**

- Recommending immunity from any criminal or DOT Administrative Discipline in recognition for having come forward, fulfilling the DOT Personnel requirement to report abusive supervisory behavior

*Gary A. Lehman*

Gary A. Lehman, OIG/DOT

## Investigation Summaries and Salient Observations and Findings

In this section we will summarize each element of the investigation and highlight the most important observations of each. Routine facts, observations/statements of a personal nature and those which are non-provable are omitted. Noteworthy items are in bold typeface.

### Statement by Mary Marshall (01/07), Interview of Mary Marshall who made allegations (01/15)

Ms. Marshall claimed that her supervisor Jerry Johnson would do non-DOT work while on DOT work hours and while on the DOT premises. The nature of the work included religious work (Johnson is an ordained minister whose work included paperwork and personal counseling of congregants) and local political campaign work while on DOT duty. The 1/15 interview of Marshall was conducted by Lehman and Frank Friendly (NY State Trooper sworn investigator detailed to DOT/OIG). During this interview, Ms. Marshall further claimed that Johnson used his assistant Rhonda Richards to assist with political campaign work. Marshall charged that contractor Bernie Brown (co-located with Johnson at same location) supports Johnson's choice of candidates in order to maintain his contract with DOT.

### Visual site inspection 243 North Elm Street 01/16

The location was visited and visually inspected externally and internally by Lehman and Friendly in order to determine optimal surveillance positions. The office locations, windows, and internal personnel workplaces were documented for the surveillance team.

### Surveillance of 234 North Elm Street (01/17)

The site surveillance was conducted by Lehman, Friendly and Investigator Thomas Tunney. It commenced at 07:00 and ended at 16:02. Staff (including Johnson and Richards) started arriving in advance of the workday. At 08:55 Johnson and Richards left the DOT facility and a moving surveillance was initiated by Lehman and Friendly. **At 09:00 Johnson and Richards entered the Carlson for Governor campaign office located at 449 North Elm Street until 09:45, at which time Richards walked to another nearby Carlson for Governor location at 735 North Elm Street; and at 10:07 Johnson entered a church located at 4321 West Monroe Street. Johnson exited the church at 13:15PM and picked up Richards at 13:37 at the second Carlson for Governor location.** Richards and Johnson then returned to DOT/234 North Elm Street arriving at 15:01, and Johnson left and locked the premises at 16:00.

**Findings:** Johnson violated policies of DOT prohibiting 1) political work or 2) religious work on DOT time and 3) compelling a subordinate to perform work of a personal nature while on DOT time. Richards violated DOT policies by 1) doing political work on DOT time and 2) choosing to not report the abuse of supervisory position by her supervisor compelling her to work on non-DOT related work; it is a basic obligation of public service that "[e]mployees shall disclose waste, fraud, abuse, and corruption to appropriate authorities." 5 C.F.R. § 2635.101(b)(11) (from MSPB) Reference (7).

#### Surveillance of 234 North Elm Street (01/18)

The site surveillance was conducted by Lehman, Friendly and Investigators Thomas Tunney and Carl Crawford. It commenced at 07:00 and ended at 15:10. Surveillance observed routine 'business as usual' (BAU) activities until 09:50 at which time **Richards exited the DOT facility and returned to 449 North Elm Street at 10:01, (Carlson for Governor campaign office). She remained there until 12:15, then proceeded to second Carlson location at 735 North Elm Street at 12:38, exiting at 14:10** and returning to DOT/234 North Elm Street at 14:38. **Johnson exited the DOT facility at 10:15, returning to the church at 10:28, exiting at 13:15 and arriving at 449 North Elm Street at 13:37 (Carlson campaign office), leaving at 14:50 and arriving at DOT/234 North Elm Street at 15:07.**

**Findings:** *Johnson violated policies of DOT prohibiting 1) political work or 2) religious work on DOT time and 3) compelling a subordinate to perform work of a personal nature while on DOT time. Richards violated DOT policies by 1) doing political work on DOT time and 2) choosing to not report the abuse of supervisory position by her supervisor compelling her to work on non-DOT related work; it is a basic obligation of public service that "[e]mployees shall disclose waste, fraud, abuse, and corruption to appropriate authorities." 5 C.F.R. § 2635.101(b)(11) (from MSPB). Reference (7).*

#### Interview of Rhonda Richards, DOT employee at DOT/IG 2325 South Hampshire Road (01/21)

Interview of subject conducted by Lehman and Friendly at 14:30. Before the interview Richards was advised of her Administrative Rights and confirmed she understood them; and that she wished to make a statement. Richards stated 1) that she had seen Johnson conducting personal business while on DOT time at DOT/234 North Elm Street 2) that she had seen numerous church parishioners at DOT meeting with Johnson 3) that Johnson used his DOT-issued computer for personal business and his DOT file cabinets in part for both church and political business 4) that Johnson directed her to do political work (political organization administrative phone calls, document delivery and typing documents, often on the DOT computer) 5) Richards stated that she was aware that both she and Johnson were violating DOT Personnel Rules and 6) that she broke the Personnel Rules for fear of losing her job if she refused. Richards stated that on 1/17 she was not in her office working and denied having been at the Carlson for Governor campaign office at 735 North Elm Street. Richards stated that she did go to the Carlson for Governor campaign office on 01/18 to conduct DOT business. Finally Richards indicated that she had gone to the Carlson for Governor office on 01/17 to pick up tickets for a fundraiser being held by the candidate.

**Findings:** *In the interview Richards initially attempted to mislead investigators relative to her (surveillance-team) observed activities on 1/17. Full unencumbered cooperation with investigators was expected from Richards, and not given. It has already been established that Richards violated DOT policies by 1) doing political work on DOT time and 2) choosing to not report the abuse of supervisory position by her supervisor compelling her to work on non-DOT related work.*

Interview of Bernie Brown, Contractor at DOT/IG 2335 South Hampshire Road (01/21)

Interview conducted by Lehman and Friendly at 16:30. During the interview Brown stated that he had contributed to political candidates supported by Johnson, but that he had felt no coercion by Johnson to do so. Brown also stated he bought fundraising tickets from Johnson due to pressure to keep his DOT contract.

**Findings:** *In the interview Brown implicates Johnson in violation of DOT Personnel Rules prohibiting supervisory personnel from requesting political contributions from any contractor who conducts business with DOT.*

Search of office of Jerry Johnson (Site Manager Customer Service at DOT/234 North Elm Street) (01/22)

Search of office occupied by Jerry Johnson attended by Lehman, Friendly, Tunney and Crawford commencing at 10:24. Lehman and Friendly conducted the office search. Six of the eight drawers contained work-related files and materials. Two of the eight drawers in the file cabinets contained church-related paperwork including notes from counseling sessions and political campaign documents. The DOT-labeled computer was also examined and it was discovered to contain information related to both political work and church work. A personal laptop (no DOT asset tag) was discovered to contain child pornography. Following items seized: Johnson's briefcase, Johnson's DOT-tagged computer, and both four-drawer file cabinets as well as all of the documents contained therein.

**Findings:** *Evidence for Johnson's criminal prosecution for possession of child pornography, criminal prosecution for conducting political work on DOT-time; DOT administrative discipline for conducting non-DOT business on DOT time; DOT administrative discipline for use of DOT Computer Assets and Network resources for Personal business and DOT administrative discipline for using DOT facilities to engage in religious counseling.*

Interview of Jerry Johnson at DOT / 234 North Elm Street (01/22)

Lehman and Friendly conducted interview with Johnson commencing at 11:00. Johnson denied ever doing any political work on DOT time. Johnson claimed to 'not know how the political documents got in his office file cabinet'. Johnson stated that he never forced any employee to do political work. Johnson stated that he was not aware of Rhonda Richards ever doing any political work on DOT-time. Subject claimed that Mary Marshall did political work on DOT-time and that after confronting Marshall about this, Marshall was transferred to another DOT office. Johnson declined to discuss the child pornography on his personal laptop and indicated that he had similar photographs on his computer at home. Johnson then misrepresented his work activities on 1/17,

and before discussing the events of 1/18 stated that he did not wish to make any additional statements until he contacted his attorney. At this point the interview was summarily terminated at 11:45.

**Findings:** *Johnson admitted to criminal possession of child pornography at his home; lied about conducting political work on DOT-time; and attempted to mislead investigators regarding engaging in non-DOT business (church counseling) on DOT time.*

### Comments on Recommendations

- No search warrant was required or obtained for the search of the DOT office as there was no reasonable expectation of privacy in a publicly-accessible, unlocked government facility with the inherent quality of explicit public access given that the office was a DOT-customer service facility. Informing case law: ***O'Connor v. Ortega, 480 U.S. 709 (1987)***
- Seizure (for subsequent and further intensive examination) of file cabinets, DOT-tagged desktop computer, and unlocked briefcase in plain sight was justified because there was no reasonable expectation of privacy in a public government facility in an unlocked government office, and search was triggered by interview with Rhonda Richards the day before the search, in which she alleged that the office and contents therein would contain evidence of political and religious work conducted during DOT time, constituting official misconduct in multiple ways
- Regarding child pornography on Jerry Johnson's personal laptop: seizure of the personal laptop was NOT executed in recognition that no search warrant had been obtained; the contents of personal laptop were examined as consequence of interview comments made by Rhonda Richards (who indicated that she had been directed to use it for political correspondences and political use by Jerry Johnson); and examination of personal laptop was deemed appropriate and lawful because it was in an unlocked location with neither a system access password nor a folder access password and thus demonstrably "in plain sight" with no reasonable expectation of privacy; and with a clear and present motive for the laptop examination. A DVD copy of the 'My Porn' folder was made; the DVD copy may be judged ineligible for prosecution of Jerry Johnson under the Child Pornography law; and therefore a search warrant is requested for immediate execution based on comments freely made (i.e. not coerced) by Jerry Johnson during the 01/22 interview in which he indicated presence of similar child pornography on his home computer
- Bernie Brown and Jerry Johnson were not advised of their Miranda rights because at the time of the interview there was no custodial interrogation or detention which would have required Mirandizing. In both cases Brown and Johnson were not being detained and in each case, invoked their Sixth Amendment right to an attorney - at which point the interviews were immediately terminated
- No criminal or civil action is recommended against Information Technology consultant Bernie Brown, employee of ABC currently on assignment supporting DOT, however we recommend immediate cancellation of all DOT Information Technology (and any other if exist) contracts

with Brown's employer and vendor ABC Inc. reflecting loss of confidence in integrity of and business conduct and practices of ABC Inc.

- Recommended temporary administrative reassignment and adverse salary action for Rhonda Richards is based on multiple objectives of 1) generally discouraging future DOT Personnel Rule violations 2) specifically discouraging Rhonda Richard's personal future DOT Personnel Rule violations 3) achieving pro forma redress for Department of Transportation and 4) establishing and/or restoring corrective behavior in compliance with DOT Personnel Rules by Rhonda Richards
- Jerry Johnson might claim First Amendment violation by prohibition of religious discussions/counseling. Following ruling provides guidance: Berry VS. Department of Social Services. Case involved use of Department of Social Services conference room for prayer meetings. Essential conclusion by court: "We conclude that these restrictions were reasonable and the Department's reasons for imposing them outweigh any resulting curtailment of Mr. Berry's rights under the First Amendment of the United States Constitution or Title VII of the Civil Rights Act of 1964. The district court's grant of summary judgment to the Department and the denial of summary judgment to Mr. Berry are AFFIRMED". Daniel M. Berry, Plaintiff-appellant, v. Department of Social Services, Tehama County; Bill Snelson, Director, Defendants-appellees, 447 F.3d 642 (9th Cir. 2006) Annotate this Case U.S. Court of Appeals for the Ninth Circuit - 447 F.3d 642 (9th Cir. 2006) Argued and Submitted November 18, 2005 Filed May 1, 2006. Reference (5)

## References

- (1) [http://www.justice.gov/criminal/ceos/citizensguide/citizensguide\\_porn.html](http://www.justice.gov/criminal/ceos/citizensguide/citizensguide_porn.html)
- (2) <http://law.justia.com/codes/new-york/2010/pen/part-3/title-l/article-195/195-20/>
- (3) <http://law.justia.com/codes/us/2011/title-18/part-i/chapter-29/section-602/>
- (4) <http://www.oge.gov/Topics/Outside-Employment-and-Activities/Political-Activities/>
- (5) <http://law.justia.com/cases/federal/appellate-courts/F3/447/642/505318/>
- (6) <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/pdf/USCODE-2010-title5-partIII-subpartF-chap73-subchapIII.pdf>
- (7) <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=662503&version=664475>
- (8) <https://supreme.justia.com/cases/federal/us/515/593/case.html>