



The Case of the Aggressive Investigative Tactics

By Michael H. Weiere • January 28, 2015

I nearly forgot my enjoyment watching black-and-white 1950s and 60s reruns of the *Perry Mason* television series. Gone are the days when defense counsel identifies an obvious, flagrant violation of the civil rights of the accused. Or so I thought.



A United States District Court Judge recently questioned the federal government's investigative methods in support of the prosecution of a claimant of federal workers' compensation benefits in *U.S.A. v. Brian W. Hendricks*.¹ The government's investigation included conducting over 1,000 hours of surveillance, establishing a sham business, and using an undercover agent to pose as a vocational rehabilitation counselor and interview the claimant.²

The United States government brought Grand Jury Charges against Brian W. Hendricks³, a U.S. Postal Service Carrier for East Vancouver, Washington for alleged fraudulent receipt of federal benefits under the Federal Employees' Compensation Act, (FECA).⁴ On behalf of Mr. Hendricks, an Assistant Federal Public Defender filed a formal motion to exclude certain evidence⁵ allegedly obtained by the government through unconstitutional and otherwise illegal means.

Investigation, including *sub rosa* (secretive) surveillance, is a common and legitimate practice of many government and private administrators of statutory workers' compensation benefits. Some jurisdictions limit the manner in which surveillance may be performed. For example, in Washington state video recording may be obtained from a public venue such as a park or city street without permission of the subject individual; whereas audio recording requires consent.

The federal prosecution of Mr. Hendricks is purportedly supported by evidence obtained through investigation. An undercover agent is alleged to have sent Mr. Hendricks a letter from "Badger Recreation Promotions," a fictitious business. The letter declared Mr. Hendricks was "randomly selected for a free adventure package", an all-expense-paid deep sea fishing expedition.⁶ Mr. Hendricks accepted the free adventure package and an

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investigator observed the claimant of federal workers' compensation benefits and presumably obtained *sub rosa* video recording of his physical activities during the eight-hour fishing excursion.

The prosecution also relies upon an interview of Mr. Hendricks conducted by an undercover agent of the Office of the Inspector General of the U.S. Postal Service posing as a vocational rehabilitation counselor.⁷ Mr. Hendricks answered questions of the faux vocational counselor and completed a questionnaire in which he allegedly considered himself "totally disabled."⁸ He was never informed of his right to decline the interview; rather, he was advised that failure to cooperate may jeopardize continued receipt of his federal workers' compensation benefits.⁹

I am neither a federal prosecutor nor a criminal defense attorney.¹⁰ Nonetheless, I am surprised by the aggressive nature of the surveillance and investigative tactics supported by federal prosecution in *U.S.A. v. Hendricks*.

Investigative surveillance of a workers' compensation claimant is typically performed through "passive" observation of the individual to document activity and behavior. The investigator simply records what is observed.

In *U.S.A. v. Hendricks*, the government appears to have actively manufactured circumstances that may not have otherwise occurred and then recorded Mr. Hendricks' reaction and behavior. In addition, a federal investigator posed as a vocational counselor for an interview that purportedly required Mr. Hendrick's cooperation under threat of loss of his federal workers' compensation benefits. The investigator again actively established a circumstance and obtained statements from Mr. Hendricks that he could have refused to provide had he been informed of his right to decline the interview. Ironically, had the workers' compensation administrator assigned a vocational counselor to conduct the interview and then supplied the evidence (likely under subpoena) to the Office of the United States Attorney or Postal Inspector there may be little argument to the legitimacy of the evidence.

The issue of concern is not whether Mr. Hendricks effectively stole federal benefits. If he did, then the federal government should obtain and present the requisite evidence to obtain a conviction in a lawful manner. The gravamen of criticism against the federal government is its apparent excessive and possibly illegal use of investigative tactics to secure the evidence to prosecute.

Under typical circumstance, investigative surveillance should be performed passively to document behavior; not actively to manufacture events and record responsive conduct that may not have otherwise occurred. Otherwise, the entity for whom the investigation is performed may be exposed to liability for various violations of individual rights.¹¹

In this particular matter, the federal court system will determine whether government's investigative tactics violated Mr. Hendricks' constitutional and

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statutory rights.¹² Regardless, I can hear Raymond Burr's voice as Perry Mason declares, "The prosecution, your honor, appears to not have acted prudently or wisely." ■

¹ United States District Court for the District of Oregon, Case No. 3:14-cr-00259-JO-1

² Denson, Brian, *Did agents do too far by setting up sham fishing trip, posing as a Rehab Therapist to Catch Accused fraudster?*, The Oregonian/OregonLive, January 10, 2015.

³ Case No. 3:14-cr-00259-JO-1.

⁴ 5 U.S.C. Sec. 8101, et seq.

⁵ *Motion to Suppress All Oral and Written Statements Made on January 7, 2014*, filed on December 3, 2014.

⁶ Exhibit C, Page 18 of Hendricks' *Motion to Suppress All Oral and Written Statements Made on January 7, 2014*, filed on December 3, 2014.

⁷ Grand Jury Indictment, Count 1, finding Number 6.

⁸ Grand Jury Indictment, Count 1, Finding Numbers 7 and 8. Finding number states, in part, "Hendricks considered himself 'totally disabled' . . ." and ". . . unable to perform . . . kneeling, squatting, climbing, bending, reaching, and driving."

⁹ *Motion to Suppress All Oral and Written Statements Made on January 7, 2014*, pages 3 & 4.

¹⁰ I am a former Investigator for the Washington State Department of Corrections, assigned to the Office of the Attorney General of Washington for extraditions and post-conviction defense.

¹¹ For example, an investigator must take care to obtain sub rosa surveillance from property legitimately accessible by the general public or expose the investigator and his/her client to civil or criminal liability for trespass.

¹² If the federal government did violate Mr. Hendricks' rights, then he may have a claim against the United States Attorney and the Postal Inspector for civil rights violations under 42 U.S.C. Sec. 1983.

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