

# Hearing Process Proves a Challenge for ORI

Ever wonder how a scientific misconduct investigation might fare if it were conducted more like a normal legal proceeding? So did the Public Health Service's Office of Scientific Integrity (ORI), which set up a court-like process late last year in response to demands that researchers accused of misconduct have the right to contest the evidence against them and confront their accusers. The new legal process had its public debut last week in the case of former National Institutes of Health (NIH) virologist Mikulas Popovic, who is appealing ORI's conclusion earlier this year that he committed scientific misconduct. Judging by the early signs, it may be more fair for the accused, but it's not likely to make life easier for the embattled ORI.

ORI lawyers got off to a bad start in the hearing, expected to last through this week, when the "judge"—Celia Ford, a Public Health Service attorney serving as the presiding panel member of the new Research Integrity Adjudications Panel—imposed some unexpected constraints. She limited the scope of charges the office may bring up in the hearing and forced it to shoulder the burden of proof that the alleged misconduct was not honest error. "It places a very heavy burden on ORI—a burden that we were not aware of when we started," says lead ORI attorney Marcus Christ. And the precedent set by the rulings may make it more difficult for the office to defend findings of misconduct in other cases.

In 1984 Popovic and his laboratory chief at the time, Robert Gallo, were principal authors of an article in *Science* that claimed the first identification of the AIDS virus. ORI, in a report issued earlier this year (*Science*, 8 January, p. 168), alleged that the paper contained falsifications. Popovic, ORI concluded, had committed misconduct in four instances, including misrepresenting a step in one experiment, indicating that certain other experiments were not done when they actually were, and substituting a 10% figure in a table for an ambiguous reading in a lab notebook.

ORI determined that Gallo also committed misconduct in the preparation of the AIDS papers, particularly in mischaracterizing the contributions of Luc Montagnier's group at the Pasteur Institute.

Popovic concedes that there are misstatements in the paper, but he says he didn't make them; he claims others edited the man-



**Day in court.** Mikulas Popovic gets a chance to rebut his accusers.

uscript and his English was neither good enough nor was he given enough time to check the paper carefully to ensure that the changes were correct. ORI does not accept this defense, arguing that it was his responsibility as lead author to ensure that he understood and could vouch for the wording in the article.

The office recommended that both scientists be given a sanction of 3 years of supervision. Both appealed; Popovic's hearing began on 7 June, and Gallo's is scheduled to start in mid-July. Ford and two other panel members who are attending parts of the hear-

ing are expected to make a final decision in Popovic's case within 3 to 4 months.

The facts in the case have been aired long and often in the nearly 4 years Popovic and Gallo have been under investigation, and little new evidence or arguments were raised in the first week of Popovic's hearing. What was new was the format of the appeal. In the past, the opportunity for a court-like hearing was restricted to those cases where federal officials recommended that a scientist be barred from receiving federal funds for some period. In all other cases, the only avenue of appeal was to respond to a draft report in writing, but without the opportunity to cross-examine witnesses or examine evidence. (One case has already gone through the new process, but it was closed to the public in May due to an administrative mix-up (*Science*, 14 May, p. 883). Popovic, however, specifically requested that his hearing be opened.)

Indications that ORI was going to have an uphill struggle in this courtroom setting emerged even before the hearing, during a preliminary conference between Ford and the two groups of attorneys. In preparing their

case, ORI attorneys had operated on the assumption that they must show that there had been falsification, but that the burden of proof would be on the defense to show that any inaccuracies were due to honest error. But Ford ruled that ORI itself must prove that the incorrect passages could not have been "honest error or an honest difference in interpretation."

In their early arguments, ORI attorneys tried to demonstrate what they saw as a "pattern" of deception, going beyond the four specific charges in the ORI report. Ford, however, ruled those allegations out of order; ORI must restrict itself to the charges specifically leveled at Popovic in the report, she said.

The two teams plan to call some 30 witnesses, including Gallo, various researchers expert in fields related to the case, journal editors, NIH officials, and possibly even Popovic's wife. Only the prosecution witnesses testified in the first week, but Popovic's team (his principal attorney is Barbara Mishkin of the firm Hogan & Hartson) won most of the procedural decisions. As a result, one source close to the investigation now believes ORI has a "less than even" chance of winning. A loss in this case might also set a precedent for the Gallo hearing, which will be in front of the same panel.

ORI attorneys don't agree that the rules have changed enough to torpedo their case, but ORI director Lyle Bivens acknowledges that the appeals process is not working in the way he envisioned it. Bivens says he hoped the board would have included scientists, rather than a solid cast of government attorneys. Indeed, he says, he is "disappointed" by the failure of ORI's early efforts to get the active participation of the scientific community at the hearing stage, as opposed to during investigations. One of the research groups that ORI approached for help was the Federation of American Societies for Experimental Biology (FASEB), but FASEB declined to participate. FASEB president Shu Chien says the association was concerned that the process was more judicial than scientific, and that the FASEB board was more comfortable with scientists participating on institution-level hearings than on the federal level. Chien says FASEB was also concerned that a formal agreement between ORI and the association would make FASEB essentially an extension of ORI.

Nevertheless, although the process that ORI created may have made scientific misconduct cases more difficult to prosecute, Bivens says it is an improvement on the old procedures. It may be more work for ORI's staff—for potentially less return—but he argues that this is simply the cost of justice. Due process, he says, is in government misconduct investigations to stay, even if it means ORI loses a few cases.

—Christopher Anderson