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STUDY OF THE FBI'S  
OFFICE OF PROFESSIONAL RESPONSIBILITY

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## I. SUMMARY OF FINDINGS AND RECOMMENDATIONS

(1) The Commission has drawn the overall conclusion from our numerous interviews and review of OPR studies, statistics and individual cases, that OPR as an operating entity has lost touch with its original mission and no longer effectively serves the Director and the FBI as a whole. OPR has become an unfortunate lightning rod both outside and within the Bureau as a perceived source of unfairness and favoritism that adversely impacts morale at a time in our history when this country depends more than ever on one of the world's finest law enforcement agencies.

Of great concern is that OPR has become so stigmatized that it is extremely difficult to attract top personnel to sensitive OPR positions requiring the highest levels of experience, judgment, and discretion. Recruiting top-caliber people to the new OPR, or whatever the function may be called, will be the Director's greatest challenge if the improvements we suggest are to be successful.

- **Recommendation: The Commission's recommendations, taken together, are intended to address OPR's poor reputation and inefficiency. Our proposals, including (a) fundamental restructuring, (b) appointment of a working group to eliminate performance issues from OPR's jurisdiction and develop uniform punishment guidelines, and (c) improvement in OPR's process and procedures, should have a positive impact. Ultimately, however, effective and lasting reform of the FBI's disciplinary process will depend on the appointment of well-respected, experienced personnel to administer the OPR function.**

(2) The perception of a double standard of discipline favoring management over lower level employees, which has received considerable publicity and attention, persists throughout the FBI. We identified certain individual and anecdotal instances of actual disparate treatment, but we are unable to conclude, particularly in light of some changes that have been implemented and the spotlight that is trained on OPR, that a systemic, actual disparity exists today. Nevertheless, the perception itself has had an enormous adverse impact on morale and confidence in the FBI's internal disciplinary system.

- **Recommendation: As discussed, *infra*, a number of continuing issues contribute to the perception of disparity in punishment between management and lower level FBI employees. Actual disparate treatment in highly publicized, historic OPR cases (e.g., Ruby Ridge, Waco), initially created the well-justified perception that management received favorable consideration in disciplinary matters. We intend our collective recommendations to improve the disciplinary process and diminish the perception that disparate treatment persists.**

(3) We have identified a number of issues that contribute to the perception of disparity. They include:

(a) The fifteen-day statutory minimum suspension of SES officials has led to a view that there is a tendency to “round down” punishment of SES managers to letters of censure while non-SES employees receive terms of suspension for similar offenses.

- **Recommendation: Congress should eliminate the statutory fifteen-day minimum suspension.**

(b) The FBI’s punishment guidelines and precedent database, such as they exist, are vague, incomplete, and deeply flawed, which undermines the concept of fairness. Some perceive the inadequacies and ambiguity of these guidelines to allow favoritism toward senior level management.

- **Recommendation: The FBI should develop and uniformly apply effective “punishment guidelines.”**

(c) The “bright line” policy of termination for cases of “lying, cheating and stealing” has become blurred and no longer serves its original purpose. The resulting confusion over the standard also is viewed by some as allowing leniency for SES employees.

- **Recommendation: The “bright line” policy, well-intended as it was, should be eliminated from the disciplinary process because of its uneven application and the confusion it has created.**

(d) Senior FBI managers, more likely to be eligible for retirement than lower level employees, sometimes retire or resign while under investigation, fueling the perception that they have an escape route to avoid discipline not available to lower level employees.

- **Recommendation: we recommend that the Director, after considering the impact of our recommendations, reassess whether OPR matters should continue against the relatively few employees who retire or resign while a disciplinary matter is pending.**

(4) OPR's lack of timeliness in resolving cases remains a significant deficiency. Despite recent progress, the historical problem that too many OPR cases remain pending for over six months persists today. Underscoring the need for a better, automated case tracking system, the Commission has experienced great difficulty obtaining reliable statistics on the age of cases. Recent changes contributing to more expeditious case resolution include increased reliance on delegated investigations and adjudications, use of Assistant Inspectors In Place ("AIIP"s) to assist in investigations and establishment of an Initial Processing Office ("IPO").

- **Recommendation: The Commission makes a number of recommendations to improve the timeliness of OPR matters, such as more rigorous deadlines, better automation and elimination of minor misconduct issues that clog the system.**

(5) The 1997 merger of adjudications and investigations into a single entity, OPR, has led to significant concern that the adjudicators are acting more as prosecutors, with the investigators serving as their agents.

- **Recommendation: We recommend restructuring in several areas, including the return of Investigations to the Inspection Division reporting to the AD of Inspections, as well as the return of Adjudications to the Administrative Services Division reporting to the AD of Administrative Services, to assure appropriate checks and balances in the disciplinary process.**

(6) OPR's jurisdiction has expanded over the years and includes far too many petty or performance-based issues despite sporadic attempts to curtail or delegate OPR jurisdiction of some matters.

- **Recommendation: The FBI should eliminate petty or performance-based issues from the disciplinary process and relegate such matters, where appropriate, to supervisors in the field and at headquarters.**

(7) OPR's computer automation and databases are woefully lacking and are the source of considerable inefficiency and justifiable criticism.

- **Recommendation: The FBI should immediately assess its computer automation and database capability as it pertains to OPR and dedicate ample resources to a complete over-haul of its systems.**

(8) OPR investigators do not have a clearly defined career path and in some instances have remained on the job for too long. Term limits have not been imposed.

- **Recommendation: Term limits, preferably of three years, should be mandatory and, so that qualified investigators can be recruited, the FBI should ensure and formalize a positive career benefit for personnel who serve in these critical positions.**

(9) We have determined that a number of procedural rights in the disciplinary process are either lacking or ill-defined and that the manner in which investigations are performed can be improved. Our Recommendations Section addresses these areas or identifies the issues.

- **Recommendation: We have made a series of recommendations, *infra*, to improve investigative protocols and enhance procedural rights in the disciplinary process.**

(10) The background and experience of the adjudicators is highly variable and leads some to conclude that the OPR process is a “crap shoot,” depending on which adjudicator is assigned.

- **Recommendation: The position of “Adjudicator” should be professionalized and staffed with highly competent, field-experienced and fully trained adjudicators. As with investigators, term limits should be mandatory and the rotation should have a positive impact on the adjudicators’ career development.**

(11) The appellate standard of review, supposedly *de novo*, has become, in reality, a “clear error” or “substantial evidence” standard. Clarification is required.

- **Recommendation: The current *de novo* appellate standard of review should be changed to “substantial evidence,” a standard that we believe is reasonable and that comports with current OPR practice.**

(12) Communication to the field about OPR’s mission, its case outcomes and its process and procedures, is severely lacking.

- **Recommendation: OPR procedures and policy statements should be revised, republished to the field, and communicated through a comprehensive program that includes field meetings and effective electronic communications. Case descriptions and updates should be summarized and communicated to the field routinely. The FBI disciplinary process must become more transparent.**

## II. INTRODUCTION

### A. Mission Statement/Mandate

On May 23, 2003, FBI Director Robert Mueller requested Griffin Bell, former Attorney General of the United States, and Dr. Lee Colwell, former Associate Director of the FBI, to lead a comprehensive study of the FBI's Office of Professional Responsibility ("OPR"). Director Mueller, in his appointment letter to Judge Bell and Dr. Colwell, recognized that OPR, the entity within the FBI responsible for disciplining FBI employees, must provide a process that is fair, efficient, and credible (*see* Appendix). Director Mueller further recognized that media reports and Congressional inquiries had identified significant issues in the area of employee discipline that had contributed to an erosion of trust in the current process. The Director noted the need for practical recommendations that would improve OPR and strengthen public and institutional confidence in the FBI's internal discipline.

Without limiting the project, the Director listed several issues for the Commission to examine during the course of its review:

1. Whether the investigative and adjudicative functions both should remain within FBI/OPR, or should they be separated in some way either within the FBI or elsewhere in the Department of Justice?
2. Recommend guidance for issues that should be referred to OPR versus issues that should be handled through the performance review and evaluation process.
3. Is the current appellate process adequate and appropriate and should the standard on appeal be *de novo*?
4. Is the current OPR system appropriate for all levels of employees and is it perceived as such?
5. What lessons are to be learned from how the OPR process is handled in other law enforcement and intelligence agencies?

The Commission received no restrictions on the scope of its work and was encouraged to examine any issues deemed appropriate for improvement of OPR. Director Mueller anticipated that the Commission might identify additional issues that impact the OPR process and requested recommendations for corrective action. He pledged his full support in granting access to the

people and information required to perform an effective study and to develop informed, practical suggestions.

## **B. Process**

To accomplish Director Mueller's objectives, the Commission enlisted the assistance of attorneys and paralegals employed by King & Spalding LLP. An FBI liaison assisted in the scheduling of interviews and the identification and production of documents. The Commission consulted regularly with individuals possessing significant institutional knowledge of OPR. Throughout this Review, the Commission benefited from the full cooperation of the FBI and the Department of Justice.

To obtain a broad cross-section of opinions concerning OPR and to formulate informed recommendations, the Commission conducted over 50 "in person" interviews. We identified most of these people because of their current or former association with the FBI's OPR process. For example, we spoke with many individuals who supervised or worked in the investigative and adjudicative units of OPR and in the appellate unit of the Inspection Division. In addition to the individuals we identified, a number of people interviewed contacted the Commission and requested an opportunity to speak with us. We accommodated all such requests.

In addition to the in-person interviews, we received contacts (*e.g.*, telephone calls, letters, e-mails) from over 100 additional interested persons, most of whom we interviewed by phone or otherwise contacted. Many of the persons who approached the Commission did so after Director Mueller distributed an e-mail to all FBI employees inviting anyone interested to provide -- directly to King & Spalding LLP if they chose -- information or documentation regarding the OPR process that would assist in the study (*see* Appendix).

While some of the initial interviews were conducted at FBI headquarters, largely for the convenience of the witnesses, many of the later interviews were conducted at King & Spalding LLP without the FBI liaison present. The Commission adjusted the interview venue to address concerns raised by certain members of Congress that interviews at the FBI with FBI personnel present could chill the candor of some interviewees. We wish to emphasize that we were struck by the outpouring of critical information from every conceivable point of view about OPR and its process. We observed virtually no evidence of reluctance on the part of witnesses to speak candidly, although a few interviewees requested confidentiality. The Commission decided not to attribute information to anyone in this Report.

The Commission conducted broad and open-ended interviews to obtain as much information as possible. While interviews naturally focused on interviewees' experience and background, we asked each interviewee to provide more general insight, identify problems, and make recommendations for improvement.

Among the positions held by the people we interviewed were the following:

- Former DOJ Deputy Attorney General
- Associate DOJ Deputy Attorney General
- DOJ Inspector General (and members of his staff and Deputy)
- DOJ/OPR Directors (current, former, and acting)
- Current and former FBI Deputy Directors
- Current and former FBI Executive Assistant Directors, Assistant Directors, Deputy Assistant Directors, Inspectors, Unit Chiefs, Supervisory Special Agents, Special Agents, and support staff personnel familiar with the OPR process
- Current and Former Presidents of the FBI Agent's Association
- Representatives of the FBI's Special Agent Advisory Committee, the Mid-level Manager's Advisory Committee, and Aegis, a group representing FBI support employees
- Counsel to the FBI Agent's Association
- General Counsel and other officials of the Department of Defense
- CIA and DEA Officials

The Commission also reviewed voluminous documents relevant to the OPR process, including historical materials regarding the establishment and evolution of OPR; documents reflecting OPR policies, rules, and regulations; FBI organizational and budget documents; legislative materials and correspondence; FBI internal communications, memoranda, directives, statistics, manuals, and case files; and several internal and external reports concerning OPR and the OPR process.

### **C. History of FBI/OPR**

OPR was created in 1976 and located in the FBI's Inspection Division. Unlike today's OPR, this entity was responsible only for investigating allegations of criminal action or other serious misconduct by FBI employees. Adjudication of these matters rested with the Administrative Summary Unit, housed in the Personnel Division and subsequently in the Administrative Services Division.

In March 1997, the FBI Director (Louis Freeh) implemented the structure of OPR as it largely exists today. The Director combined the two separate investigation and adjudication functions from the Inspection Division and Administrative Summary Unit into a new stand-alone OPR.

This consolidation served multiple purposes. In part, the Director intended to enhance executive oversight of the entire disciplinary process by bringing the two functions together in an office that reports directly to the Deputy Director. By placing the units together, and directly below the Deputy Director, the Director hoped to increase the independence and accountability of the office. In addition, the change was intended to produce more timely resolution of cases.

As part of this restructuring, the FBI created the two positions of OPR Assistant Director and Deputy Assistant Director to supervise the freestanding office. The Assistant Director of OPR reports directly to the Deputy Director. The addition of these SES-level managers was intended to enhance OPR's stature.

The 1997 reorganization also created the independent Appellate Unit housed in the Inspection Division. Prior to this change, the appeals process was informal and not well understood by many FBI employees.<sup>1</sup> The creation of the Appellate Unit in the Inspection Division ensured that appeals would be reviewed by individuals in a different chain of command than those investigating and adjudicating cases, hopefully contributing to the objectivity and independence of the entire disciplinary process.

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<sup>1</sup> See Memorandum from the Director, to All SACs and All LEGATs, entitled "Appeal and Grievance Procedures" at 1, 2 (Oct. 3, 1995) (noting the general "confusion as to what processes [were] available to appeal varying types of personnel problems"). Appeals generally were decided by a superior of the individual who had handled the adjudication. When the case was a non-delegated disciplinary action or the subject was a member of the SES, the appeal was considered by the "next higher level of authority from the signatory official indicated on the disciplinary letter." *Id.* at 2. Appeals from discipline imposed by an Assistant Director or Special Agent in Charge were considered by the Assistant Director of the Personnel Division. *See id.*

Another change in OPR's organization occurred in January 1999 when the Law Enforcement Ethics Unit ("LEEU"), formerly known as the Office of Law Enforcement Ethics and Integrity ("OLEEI"), was moved from the Training Division to OPR.

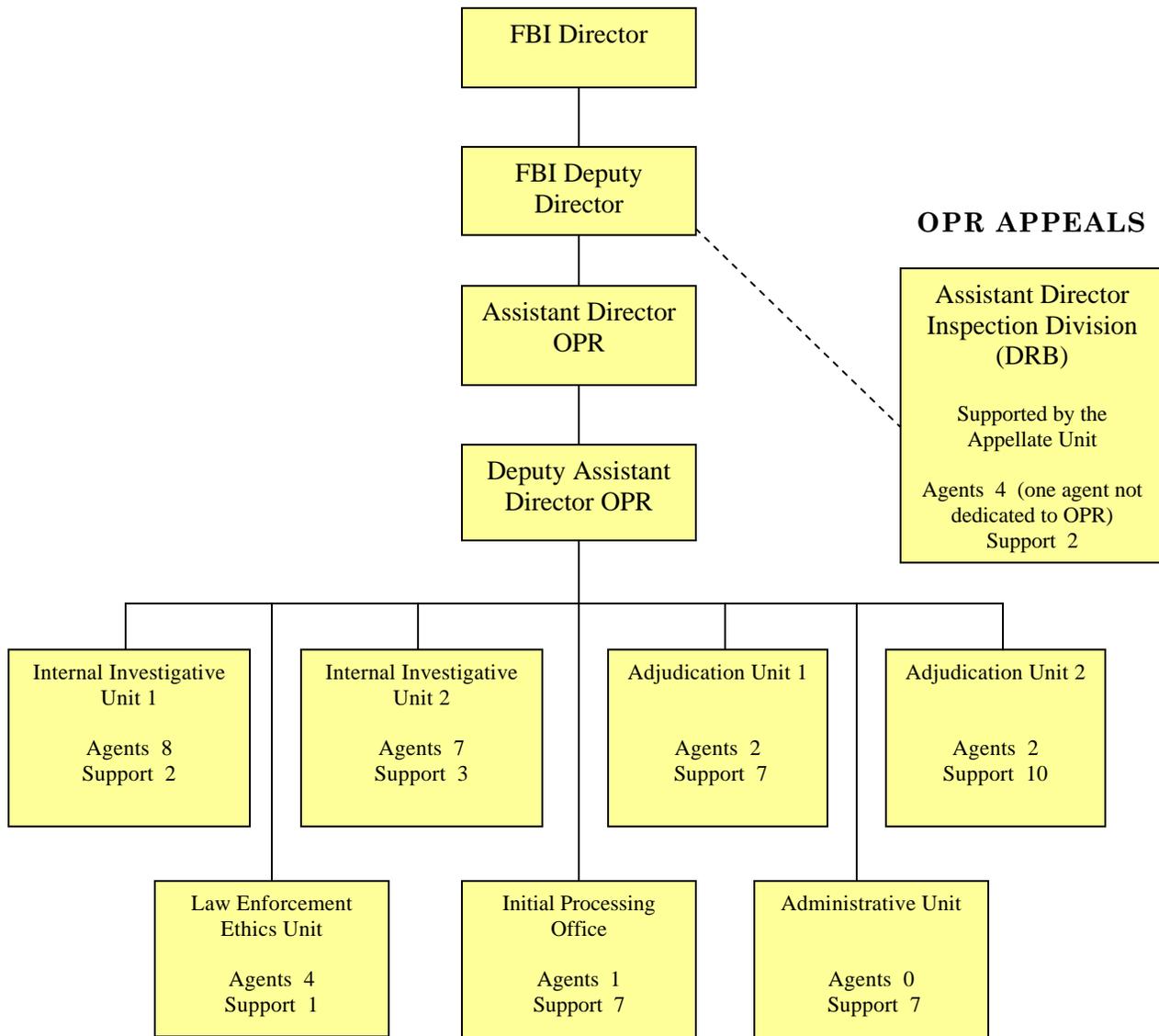
In July 2001, the Attorney General expanded the jurisdiction of the Department of Justice's Office of the Inspector General ("DOJ/OIG") to include the right to review all non-frivolous allegations of misconduct regarding FBI personnel. A representative of DOJ/OIG exercises this "right of first refusal" by selecting which cases DOJ/OIG investigates and which cases remain with FBI/OPR.

The most recent addition to the OPR structure is the Initial Processing Office ("IPO"). Created in January 2003, the IPO assumed the responsibility previously resting with the Investigative Unit Chiefs to review incoming referrals to OPR. This change was designed to promote consistency in decisions to open cases, thereby decreasing the disparity in the standards used and in the numbers of cases opened and investigated by OPR's two Internal Investigative Units.

As a result of these structural changes, FBI's current OPR consists of seven units: two Internal Investigative Units ("IIUs"), two Adjudication Units, an Intake Unit (the IPO), an Administrative Unit, and the Law Enforcement Ethics Unit (the LEEU). Outside of OPR, the Inspection Division houses the Appellate Unit that oversees appeals of adjudications.

The following chart depicts FBI/OPR's current staffing and structure, including the independent Appellate Unit.

**Chart 1: FBI Office of Professional Responsibility**



In addition to the 1997 structural changes, Director Freeh modified procedural rights afforded to subjects of OPR investigations. The Director’s goal essentially was to extend to non-SES employees the same rights afforded to SES employees. However, at the same time, the Director instituted what came to be considered a “two-tiered” disciplinary process for SES and non-SES employees. Under the “two-tiered” disciplinary process, one entity reviewed

factual findings and proposed discipline for SES employees while a second, different entity performed these functions for non-SES employees.

In accordance with Director Freeh's changes, the Adjudication Unit evaluated the evidence and recommended punishment in all disciplinary matters involving non-SES employees. The Assistant Director of OPR or the Deputy Assistant Director of OPR then made the final decision regarding discipline based on the Adjudication Unit's recommendation.

In contrast, a SES board, composed of five SES members, evaluated factual findings and recommended discipline in matters concerning SES employees. The Adjudication Unit had a limited role in cases involving SES employees -- it provided only a summary of the investigation and the relevant precedent to the FBI's Deputy Director. The Deputy Director then determined whether the claims warranted the SES board's review of the case. If so, the SES board recommended discipline and the Deputy Director made the final disciplinary decision based on that recommendation.

Three years later, in August 2000, the Director eliminated the SES board to bring consistency to the adjudication of SES and non-SES employees.

**D. Department of Justice Office of the Inspector General –  
Right of First Refusal Over Allegations of FBI Misconduct**

As previously noted, the Department of Justice's Office of the Inspector General has primary jurisdiction to investigate allegations of serious misconduct or criminal wrongdoing against FBI employees. In 2001, the Attorney General vested DOJ/OIG with this authority by administrative order,<sup>2</sup> which Congress later codified in November 2002 by passage of the Department of Justice Appropriations Authorization Act.<sup>3</sup> Accordingly, DOJ/OIG elects which cases it will investigate and which matters remain with FBI/OPR.

Although DOJ/OIG has a right of first refusal to investigate allegations of misconduct, it has no authority to adjudicate and impose punishment. Rather, responsibility for approving discipline of FBI employees rests with the Deputy Attorney General for certain high-level SES employees<sup>4</sup> or with FBI/OPR

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<sup>2</sup> See 28 C.F.R §§ 0.29c, 0.29e (2003).

<sup>3</sup> See 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act, § 308(1), 5 U.S.C. App. 3 § 8E(b)(2) (2002).

<sup>4</sup> The Deputy Attorney General ultimately is responsible for the design and administration of the Senior Executive Service. See 28 C.F.R. § 0.157(c) (2003). The Deputy Attorney General's authority to discipline SES employees, however, has been largely delegated and is defined by reference to internal DOJ guidelines. See Personnel and Administrative Authorizations, 64 Fed. Reg. 46845 (Aug. 27, 1999).

adjudication and appellate officials, depending on the level of the subject under investigation and the nature of the proposed discipline. The FBI Director has the discretion to modify disciplinary actions for all GS-1 through GS-15 employees,<sup>5</sup> as well as for SES employees who do not report directly to the Director.<sup>6</sup>

One of the most significant reasons advanced for creation of DOJ/OIG oversight was the need to ensure integrity within FBI's disciplinary process through outside supervision. While this oversight function remains controversial and has been criticized as an unnecessary intrusion into FBI internal affairs, the Commission considers it appropriate to note that, according to some interviewees, this structure has improved the credibility of the FBI's disciplinary process.

DOJ/OIG expects that most allegations of misconduct in the FBI will be handled by FBI/OPR. DOJ/OIG generally will begin an investigation if it receives a *serious* allegation of misconduct that satisfies one of the following three criteria: (1) the allegation is against a senior FBI official (GS-15 or above), (2) it is a criminal allegation that likely would result in prosecution if proved, or (3) OIG determines that it would be preferable that an entity outside the FBI conduct the investigation (*e.g.*, because of conflicts of interest).<sup>7</sup> In addition to matters in these three categories, Director Mueller has made it his practice to refer all allegations of retaliation against whistleblowers directly to DOJ/OIG.

In the vast majority of cases, DOJ/OIG elects not to intervene and FBI/OPR investigates the matter without any further reporting requirements

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(footnote cont'd)

For FBI employees at the SES level, the governing internal guideline is the FBI's SES policy, which explains that the FBI Director may take final action relating to employment for all FBI employees except "Direct Reports." See "Federal Bureau of Investigation Senior Executive Service Policy" at 5. "Direct Reports" include: Assistant Directors (division heads), Executive Assistant Directors, and the Deputy Director. Special Agents in Charge are not considered Direct Reports and therefore fall within the Director's disciplinary authority. See Memorandum from the Deputy Director, to the Director, entitled "FBI Senior Executive Service (SES), SES Policy Revisions" at 2 (Apr. 20, 1998).

<sup>5</sup> In addition to the authority conferred upon the Director to discipline SES employees who are not Direct Reports, the Director is authorized to take final action regarding administration of personnel who are grade levels GS-1 through GS-15 and personnel in wage board positions. See 28 C.F.R. § 0.138(a) (2003).

<sup>6</sup> See discussion, *supra* note 4.

<sup>7</sup> See Memorandum from Glenn Fine, Inspector General, DOJ, to Director Mueller, entitled "OIG Investigative Procedures" at 5 (July 24, 2003).

to DOJ/OIG (known as a “Management Review”). Occasionally, DOJ/OIG may refer the case to FBI/OPR, but require that FBI/OPR apprise it of the investigative results (known as a “Monitored Referral”). The following table reflects the relative infrequency (4.8%) with which DOJ/OIG elects to investigate allegations of FBI misconduct:

**Table 1: DOJ/OIG Cases Opened, July 2001 - July 2003<sup>8</sup>**

Description of Cases/Complaints	Number of Cases/Complaints	Percentage of Cases/Complaints
FBI misconduct complaints reviewed by DOJ/OIG	1,657	100.0%
Cases opened/investigated by DOJ/OIG	80	4.8%
Monitored Referrals to FBI/OPR for investigation (continued reporting requirement)	76	4.6%
Management Reviews to FBI/OPR for investigation (no continued reporting requirement)	1,408	85.0%
Cases not classified (the complaint did not fall within any of the recognized categories of misconduct)	93	5.6%

<sup>8</sup> Statistics provided to the Commission by Deputy Inspector General, DOJ/OIG (July 2003).

**E. FBI's Current Process for Investigating and Adjudicating Allegations of Misconduct, and for Appealing Discipline**

**1. Initial Processing Office and Case Opening**

FBI/OPR receives complaints from a variety of anonymous and identified sources, such as FBI employees, the general public, and Congress. Each complaint now funnels through the Initial Processing Office, where it is given an administrative number and is shared with DOJ/OIG for its review and assignment.

By many accounts, the IPO is functioning as intended and is ensuring uniformity in the opening of cases. However, the IPO channels complaints to the Deputy Assistant Director of OPR before DOJ/OIG reviews the matter, ostensibly for a preliminary investigative decision in the event that DOJ/OIG permits FBI/OPR to keep the case for investigation.<sup>9</sup> We address the sequence of this review process in the Recommendations Section, *infra*.

If DOJ/OIG declines to investigate the allegation, the IPO officially determines, with the Deputy Assistant Director's approval, whether the complaint is sufficiently specific and credible to warrant a full-blown, formal investigation by OPR. (In theory, the IPO could have made this determination unofficially before DOJ/OIG's formal review, as explained above.)

Complaints that are frivolous and without sufficient factual basis are dismissed and placed in an administrative control file used as a repository for non-case related material, known as a "263-0" or "zero" file. In cases of doubt, the IPO may assign an investigator to conduct a Preliminary Inquiry to determine if the allegation merits a formal disciplinary inquiry. If so, the case is officially opened and an investigation ensues.

The FBI tracks the number of cases opened and, in August 2003, began tracking Preliminary Inquiries even if they resulted in a finding that the allegation was not sufficiently credible or specific to justify opening a formal investigation. However, the FBI does not track the number of frivolous complaints received and relegated to the zero file.<sup>10</sup>

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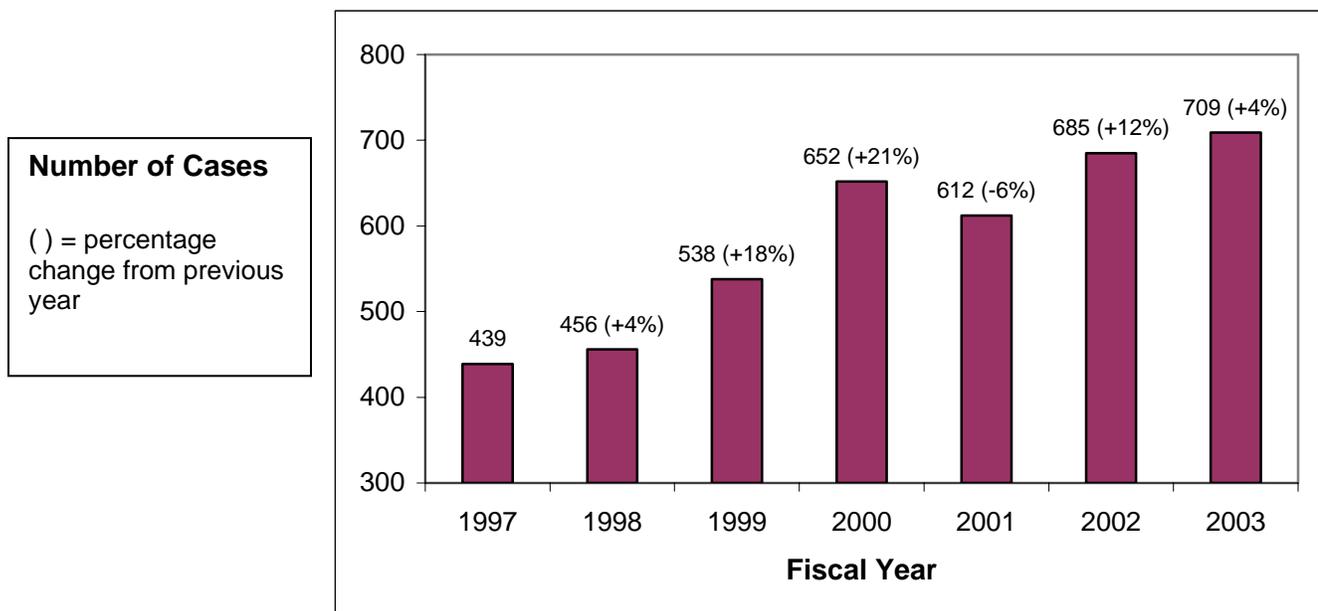
<sup>9</sup> See Appendix, for example, for a description of OPR improvements since September 3, 2002, including a summary of the Intake Office. See OPR Document regarding the Accomplishments of OPR Since September 2002 at 2 (undated).

<sup>10</sup> FBI/OPR's Administrative Unit estimates that OPR has assigned 7,500 administrative serial numbers to matters in zero files since 1993, or approximately 750 matters per year. This estimate could indicate the number of complaints received by OPR but not opened as formal investigations. However, OPR acknowledges that this estimate may not be reliable due to such factors as assigning

The Commission received two noteworthy observations regarding matters processed or resolved by FBI/OPR prior to the opening of a formal investigation: (1) zero files, which both field offices and OPR-HQ utilize, conceivably could be abused as a dumping ground for allegations that otherwise have merit, and (2) allegations conceivably could be processed using the designation of “unknown subject,” even where the subject is known, to minimize the seriousness of a complaint or to avoid having minor allegations associated with an individual in OPR’s database. The Commission has not independently verified any such pattern or practice at OPR, but the Commission has accounted for and addressed the possibility for abuse in these areas in formulating its recommendations.

The following graph reflects the number of new cases of alleged misconduct formally opened by OPR per fiscal year:

**Graph 1: New OPR Cases Opened by Fiscal Year (ending 9/30)<sup>11</sup>**



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(footnote cont'd)

different numbers to multiple, similar allegations from the same source, inconsistent or inaccurate internal filing procedures, or conversion of the matter to a formal investigation.

<sup>11</sup> Statistics provided by OPR Administrative Unit (Nov. 2003).

As Graph 1 indicates, the number of new cases opened by FBI/OPR has tended to increase annually from 1997-2003. As discussed *infra*, OPR's timeliness in resolving cases has improved recently, but timeliness remains a significant OPR deficiency.

## **2. OPR Investigations: Delegated and Retained**

OPR conducts formal investigations of alleged misconduct in one of two ways: (1) by delegating the investigation to the appropriate division head, typically the Special Agent In Charge ("SAC") of the subject's field office or resident agency (known as a delegated investigation only, or "DIO"), or (2) by retaining the full investigation at OPR, in which case the investigation is conducted either by a case supervisor in one of OPR's two Internal Investigative Units ("IIUs"), or by an Assistant Inspector-in-Place ("AIIP")<sup>12</sup> (known as a non-delegated investigation, or "NDI"). OPR estimates in its 2001 annual report that approximately seventy-five percent of OPR serious misconduct investigations are delegated to the field, the latest year for which OPR has collected this data.<sup>13</sup>

Subjects of complaints are notified of the allegations if an investigation is opened and are permitted to retain counsel at their expense. They are reminded after 180 days, and every thirty days thereafter, by an electronic communication if the case remains under investigation.<sup>14</sup> FBI/OPR has no written policies on whether OPR is permitted to inform subjects in greater detail about the investigation's status, a fact that has caused some interviewees considerable frustration.

During delegated investigations, the division head is responsible for assigning a Supervisory Special Agent ("SSA") (typically a GS-14 level, Special Agent with supervisory experience) to conduct the investigation, sometimes with assistance from a second SSA.

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<sup>12</sup> In October 2002, Director Mueller approved a policy requiring all candidates (AIIPs) for an Inspection Certification, as a prerequisite for promotion to the ASAC position, to complete one OPR credit as part of the six-credit certification. See Memorandum from OPR, to the Director's Office, entitled "Office of Professional Responsibility Reengineering Project" at 2 (Oct. 31, 2002). An AIIP may earn the one OPR credit by assisting in a non-delegated OPR investigation, an adjudication, or a training assignment.

<sup>13</sup> FBI OFFICE OF PROFESSIONAL RESPONSIBILITY, FISCAL YEAR 2001 REPORT at 5 (Mar. 2003).

<sup>14</sup> The initial 180-day time limit and the requirement that the subject be notified every thirty days are derived from the BADGE settlement. See Settlement Agreement Amendment at 5, *Johnson v. Reno*, Civ. No. 93-0206 TFH (D.D.C. May 17, 2000).

In theory, procedural safeguards protect an OPR subject from any actual or perceived bias associated with a colleague in the same field office or resident agency conducting the investigation. Most notably, OPR policy prohibits the delegated investigator from reviewing a subject in his/her chain of command.<sup>15</sup> The Commission has been informed that an OPR delegated investigator, in practice, is not permitted to investigate an employee in a higher grade, but OPR's recusal policy does not contain any express prohibition.<sup>16</sup>

Non-delegated investigations proceed in a similar fashion. After receiving a referral from the IPO, two investigators from OPR's Internal Investigation Units (or an AIIP) conduct the investigation. OPR investigators in the IIU, however, may investigate higher ranking employees if DOJ/OIG elects not to exercise jurisdiction over senior FBI employees.<sup>17</sup> Upon completion of the non-delegated investigation, an experienced supervisor in the IIU reviews the investigative package for sufficiency before sending the results to one of the two Adjudication Units.

### **3. OPR Adjudications: Delegated and Retained**

OPR adjudicates allegations of misconduct in one of two ways: (1) by delegating *both* the investigation and adjudication to the appropriate division head, typically the SAC of the subject's field office or resident agency (known as a delegated investigation and adjudication, or "DIA"), or (2) by retaining the adjudication at OPR, in which case the adjudication is conducted under the supervision of one of the two Adjudication Unit Chiefs and final discipline is imposed either by one of the Unit Chiefs, the Deputy Assistant Director, or the Assistant Director of OPR.

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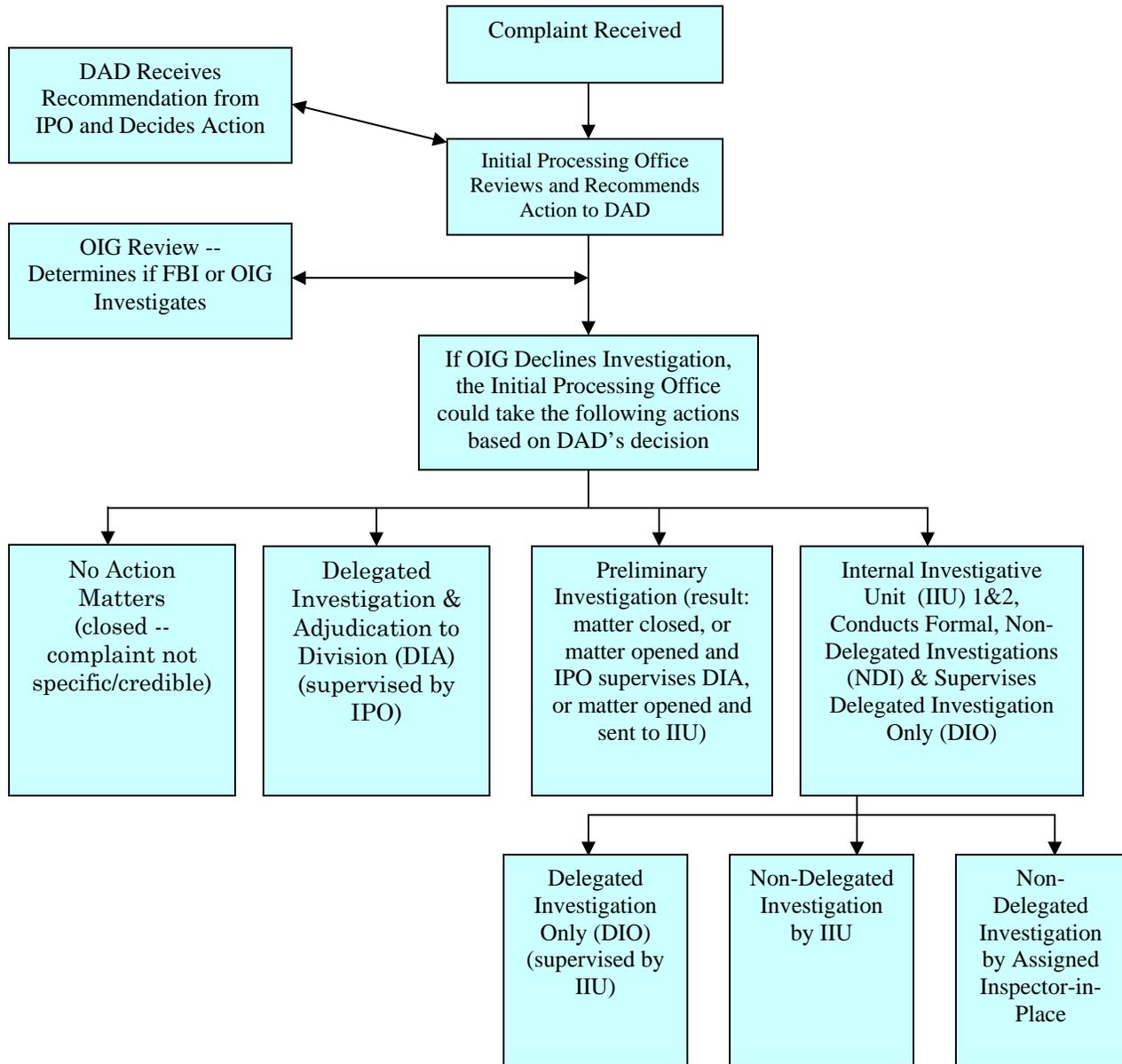
<sup>15</sup> The relevant OPR guideline indicates only that the investigation should be assigned to "a senior, mature personnel having no direct investigative or performance responsibility with regard to the subject or any witnesses in the inquiry." See "Guidelines for Conducting Delegated Investigation/Adjudication OPR Matters" at 1 (revised July 18, 2003). Similarly, the policy provides that adjudications should be assigned to "a senior, mature individual not connected with the investigative portion and having no performance responsibilities over the subject employee or with witnesses in the inquiry." *Id.* at 5.

<sup>16</sup> OPR's recusal policy applies broadly to all investigations and adjudications, regardless of whether they are delegated. See "Disciplinary Policy Guidance, Recusal Policy in Disciplinary Matters" (listing multiple grounds for recusal, but not including higher rank).

<sup>17</sup> Unlike delegated field investigators, OPR investigators at headquarters arguably are able to investigate subjects in the field -- even subjects of a higher grade -- without the same level of concern about the subject's relative position in the field office chain-of-command or the subject's residence in the same field office as the investigator. While we do not recommend an absolute prohibition against the investigation of higher ranking employees by non-delegated OPR investigators, we emphasize in our recommendations the value of enhanced oversight and recusal rules to protect OPR investigators against retaliation for performing their OPR responsibilities.

The following Chart depicts OPR’s process for investigating and adjudicating complaints.

**Chart 2: Breakdown of OPR’s Investigation Process**



OPR has attempted to delegate more investigations and adjudications to the field to relieve the caseload of OPR’s investigative and adjudication units and to improve OPR’s efficiency and timeliness. Most notably, in August 2002,

OPR implemented a policy delegating certain adjudications to field and headquarters division heads.<sup>18</sup>

This policy expanded previous delegation efforts and allowed delegation for both investigation *and* adjudication of less serious offenses involving employees at the GS-14 grade level and below, subject to review by OPR.<sup>19</sup> Generally, the Director approved the full delegation of certain administrative, non-criminal offenses with a penalty of less than fifteen days suspension. He also authorized a more refined schedule of offenses, with penalty ranges, that would qualify for delegation. The improved timeliness of OPR's handling of cases (as discussed in further detail below), coincides with these changes, lending some support to the conclusion that increased delegation of less serious offenses has improved OPR's efficiency. However, OPR has begun to track the number of DIA cases only recently and no information is available on the number of DIA matters or their results. Accordingly, the Commission has no meaningful data from which to determine whether DIAs are achieving their intended purpose.

During DIAs, the same recusal rules apply as for delegated investigations only (DIOs) -- field adjudicators are prohibited from having any performance review or appraisal responsibility over the subject, nor can they be involved in the investigation. The field adjudicator is required to review the investigation findings and determine whether each allegation is supported by a preponderance of the evidence. If so, the field adjudicator must consult the range of penalty options provided by the schedule of delegated disciplinary actions,<sup>20</sup> and consider a standard list of aggravating and mitigating considerations (known as the "Douglas Factors") to arrive at a final penalty recommendation.<sup>21</sup> The final investigative packet, including the punishment

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<sup>18</sup> See Electronic Communication from OPR, to All Divisions, entitled "Delegation of Disciplinary Action Authorities to EADs, ADICs, SACs and FBIHQ Division Heads," dated July 18, 2002 and initialed by Director Mueller on Aug. 6, 2002.

<sup>19</sup> See *id.* at 2 (also recognizing that previous delegation initiatives "have been unsuccessful because of insufficient tracking to ensure compliance with litigation obligations and deficiencies in the former table of penalties provided for delegated offenses").

<sup>20</sup> These penalty guidelines, which are used for a subset of delegated offenses, may be a productive starting point for the creation of the comprehensive set of punishment guidelines recommended by the Commission, *infra*.

<sup>21</sup> The twelve factors are explained in a well-known legal decision by the Merit Systems Protection Board, *Douglas v. Veterans Administration*, 5 M.S.P.B. 313, 5 M.S.P.R. 280 (1981). Although the *Douglas* decision is not binding on excepted service employees at the FBI, these factors nonetheless have been used as comprehensive guideposts to consider in imposing discipline. The Douglas Factors are: "(1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of

recommendation, is returned to the OPR Initial Processing Office for final approval.

Allegations involving the following categories are not delegated and continue to be adjudicated by OPR's two Adjudication Units: (1) criminal conduct, (2) the possibility of "adverse" disciplinary action (defined as suspension of fifteen days or more, demotion, or dismissal)<sup>22</sup> or (3) SES executives and other employees at the GS-15 grade. In cases involving discipline of fourteen days suspension or less for non-SES employees, an Adjudication Unit Chief can impose punishment as long as he/she first consults with the second Unit Chief in arriving at that result. The subject does not have any right to review the file prior to the Unit Chief's decision.

In cases involving adverse actions against non-SES employees, the Adjudication Unit Chief becomes the proposing official to either the DAD or the AD of OPR. The DAD is the deciding official for proposed demotions and suspensions of fifteen days or more for non-SES employees, while the AD decides all cases of proposed dismissal. In cases involving SES employees, regardless of the severity of discipline, the DAD is the proposing official and the AD is the deciding official. (In OPR's administrative structure, the DAD also directly oversees the two Investigative Units, a fact that some interviewees suggest undermines the independence of this phase of adjudication.)

OPR's disciplinary approval process for non-delegated matters is depicted in the following Chart:

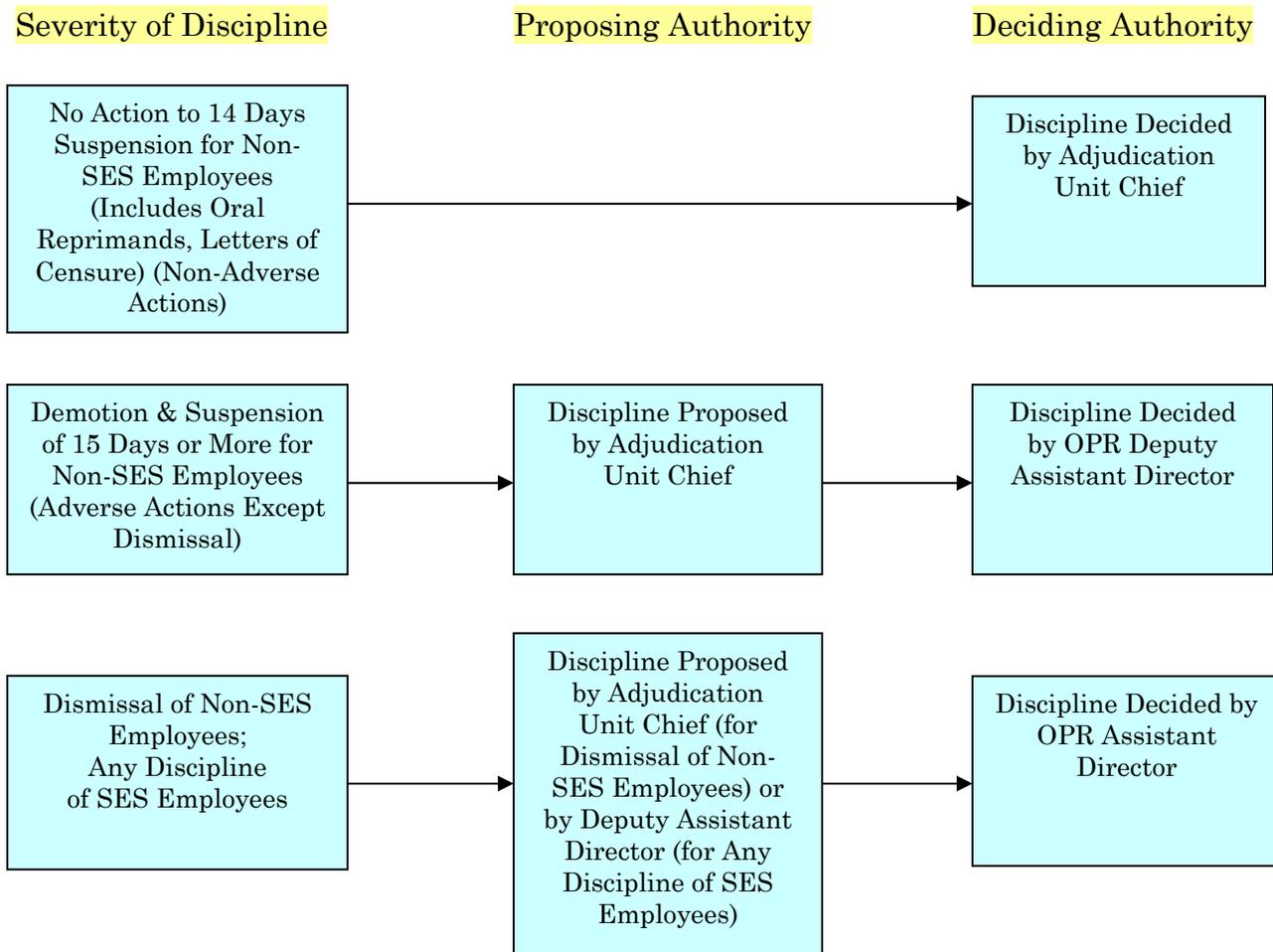
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(footnote cont'd)

employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that where [sic] violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others." See *Douglas v. Veterans Administration*, 5 M.S.P.B. 313, 332 (1981).

<sup>22</sup> This somewhat arbitrary distinction is derived, at least partially, from the Civil Service Reform Act of 1978, which distinguishes punishment of fifteen days or more from suspension of fourteen days or less. See 5 U.S.C. §§ 7502, 7512 (2003).

**Chart 3: OPR Adjudications -- Approval Process for Imposing Discipline**



Before the DAD or AD imposes punishment, the subject has the right to review the portion of the file relied upon by the official proposing discipline. The subject may submit a written response and may request an oral hearing.

**4. OPR Appeals and Disciplinary Outcomes**

OPR subjects are entitled to appeal to the Assistant Director of the Inspection Division (“INSD”) any punishment except oral reprimands and letters of censure. The appellate official(s) in the INSD review the investigative package and adjudication *de novo*, theoretically without any deference to the validity of the underlying OPR process. The Appellate Unit (“APU”) staff assistants prepare the file for review by the appellate official(s), and also may assist a subject in preparing the appeal. Imposition of any punishment is

stayed pending appeal.<sup>23</sup> Subjects' appellate rights vary depending on whether the discipline is "adverse:"

- (1) in cases of suspension of fourteen days or less, the appeal will be reviewed and decided by one official -- the AD or Deputy AD, INSD. The subject is entitled to an attorney, at his/her own expense, and may submit a written response. The subject is not entitled to see the investigative file.
- (2) in cases of suspension of fifteen days or more, demotion or dismissal, the subject is entitled to have the case reviewed by the Disciplinary Review Board ("DRB"). The DRB consists of three SES members, including the AD or DAD of the INSD (the Chairperson), one member chosen by the subject from a list of SES members, and one member chosen at random from the same list. A non-SES subject does not have any right to have a non-SES member on the DRB. Neither the subject nor counsel is entitled to make an oral presentation, but the subject is entitled to a redacted version of the file.

The number of appeals adjudicated by the APU has remained relatively constant during the past five years. The APU resolved fifty-five appeals in FY 2003 and fifty-six appeals in FY 2002, and historically has modified discipline in approximately 20% of cases, almost always by decreasing the appealed penalty. Also, the APU's DRB, which typically hears appeals of the most severe punishment, decides cases relatively infrequently: it decides approximately eleven appeals per year, or approximately 20% of all appeals heard by the APU over the past four fiscal years.

The following two tables depict: (1) the total number of appeals per year from FY 1997 through the beginning of FY 2004, as well as the rate of modification of the underlying charges or discipline, and (2) the number of appeals decided by the DRB.

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<sup>23</sup> The exceptions to this stay rule are oral reprimands and letters of censure, which currently cannot be appealed, and dismissals. Dismissal is the one appealable disciplinary action not stayed pending appellate review, a practice with which the Commission agrees. See Decision Memorandum from OPR, to the Director's Office, entitled "Policy Revision in Appeals of Disciplinary Actions" at 1 (Jan. 16, 2002).

**Table 2: Historical Perspective of Appeals, FY 1997-2004**

FY	TOTAL APPEALS		TOTAL APPEALS		% of Adjudications Resulting in Modifications
	Received	Adjudicated	Sanctions Modified	Charges Modified	
1997	21	2	0	0	--
1998	48	32	4	0	13%
1999	56	51	6	2	16%
2000	29	56	3	1	7%
2001	48	48	11	2	27%
2002	56	56	17	0	30%
2003	66	55	12	0	22%
2004 (partial)	8	12	3	0	25%
<b>TOTAL</b>	<b>332</b>	<b>312</b>	<b>56</b>	<b>5</b>	<b>20%</b>

**Table 3: Number of Appeals Decided by the Disciplinary Review Board**

FY	DRBs Conducted	DRBs as a Percentage of Total Appeals Adjudicated for FY	2 to 1 Decisions	Percentage of Split Decisions
2000	13	23%	none	0%
2001	14	29%	7	50%
2002	10	18%	3	30%
2003	7	13%	3	43%
<b>TOTAL</b>	<b>44</b>	<b>20%</b>	<b>13</b>	<b>30%</b>

Overall, the FBI has disciplined approximately one-half of those FBI employees subjected to full-blown, formal OPR investigation, as depicted in the following Table.

**Table 4: Disciplinary Outcomes of Formal Inquiries  
Completed During Each Fiscal Year**

FY	Employees Investigated	Employees Disciplined <sup>24</sup>	Percent Disciplined	SES Employees Investigated	SES Employees Disciplined <sup>25</sup>	Percent SES Disciplined	Percent Non-SES Disciplined
1999	553	278	50.3	17	8	47.1	50.4
2000	585	315	53.9	17	5	29.4	54.6
2001	636	347	54.6	13	5	38.5	54.9
2002	799	466	58.3	12	5	41.7	58.6
2003	803	423	52.7	21	7	33.3	53.2
Total 1999-2003	3,376	1,829	54.2	80	30	37.5	54.6

Given the small sample size of SES employees, it is difficult to draw meaningful comparisons between rates of discipline for SES and non-SES employees. As demonstrated by Table 4, the limited data available suggest that SES employees investigated tended to be disciplined somewhat less than non-SES employees investigated, a conclusion that does not account for employees who resign or retire under investigation. Assuming for the sake of argument that the thirteen SES employees who resigned or retired under investigation would have been disciplined, the overall rates of discipline of SES and non-SES employees over the past five years would have been virtually identical (approximately 54%).

It is also worth noting that even though far fewer SES employees have been subjects of formal inquiries compared to non-SES employees, SES

<sup>24</sup> The number of employees disciplined does *not* include employees who resigned or retired during administrative inquiries. Generally, less than 10% of employees under investigation retire or resign. For example, in 2002, 51 employees resigned or retired during the disciplinary process. In 2001, 45 employees resigned or retired, 8 of whom had been proposed for adverse disciplinary action. In 2000, 63 employees resigned or retired, 10 of whom had been proposed for adverse disciplinary action. In 1999, 43 employees resigned or retired, 8 of whom had been proposed for adverse disciplinary action.

<sup>25</sup> The number of SES employees disciplined does *not* include the thirteen SES employees who resigned or retired during administrative inquiries from FY 1999 through FY 2003: 2 (FY 03), 1 (FY 02), 2 (FY 01), 4 (FY 00), 4 (FY 99).

employees comprise only a small fraction of the total FBI workforce -- less than one percent.<sup>26</sup> In fact, over the past five years, SES employees were over three times *more likely* to be subjects of formal inquiries than non-SES employees, with approximately 8.8% of SES employees subjected to formal inquiries during that period compared to approximately 2.4% of non-SES employees.<sup>27</sup>

Upon completion of an investigation, adjudication and final imposition of discipline by either the DRB or the AD/DAD of Inspections, subjects have no additional rights of appeal. However, the Director reserves discretionary authority to modify discipline for all employees, except for certain senior FBI executives who are required to be disciplined by the Deputy Attorney General.<sup>28</sup> The Director has invoked this discretion sparingly, if at all.<sup>29</sup>

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<sup>26</sup> The number of FBI SES employees for the last five years were: 196 (FY 03), 169 (FY 02), 173 (FY 01), 187 (FY 00), 182 (FY 99). The total number of FBI employees during the same period were: 27,856 (FY 03), 27,119 (FY 02), 26,837 (FY 01), 27,617 (FY 00), 28,456 (FY 99).

<sup>27</sup> For example, in 2003, 782 non-SES employees were subjects of formal investigations, or 2.8% of the 27,660 non-SES FBI workforce. By comparison, in 2003, 21 SES were subjects of formal investigations, or 10.7% of the 196 SES FBI workforce.

<sup>28</sup> See Memorandum from Director Freeh, to All Special Agents In Charge, regarding Creation of a Single Disciplinary System for all Employees at 3 (Aug. 15, 2000). See also discussion, *supra* note 4.

<sup>29</sup> Director Mueller has never utilized his discretion to modify punishment imposed by OPR.

### III. FINDINGS

#### A. Overview

The Commission found significant issues concerning OPR timeliness, efficiency, and fairness that must be addressed. The OPR process, and certain high-profile OPR matters, have generated intense scrutiny by concerned parties both inside and outside the FBI. Discipline of FBI employees has been the subject of congressional inquiries and committee hearings, reviews by the Department of Justice's Office of the Inspector General, *60 Minutes* investigative reports, FBI Inspection Division assessments, FBI senior management directives, and even evaluations and statistical analyses performed by OPR itself.

These reviews raise a wide variety of issues regarding OPR. Prominent among them are concerns relating to an actual or perceived double-standard of discipline, an actual or perceived climate of retaliation against FBI employees who report misconduct by superiors, and a chronic and systemic lack of timeliness in the OPR process. Other significant issues are raised in these reviews as well, including (a) the role of the Department of Justice's Office of the Inspector General in the FBI/OPR process, (b) the improvement of OPR's process, structure, and quality control (*e.g.*, the configuration, staffing, and management of OPR's intake, investigative, adjudicative, and appellate functions; the training and expertise of OPR investigators and adjudicators), (c) the lack of functional electronic communications systems and databases to facilitate the OPR process, (d) the scope of OPR's jurisdiction (*e.g.*, separation of performance and disciplinary issues), and (e) the relative merits of delegating OPR investigative and adjudicative responsibility for certain offenses to the field.

The Commission concluded that many of the issues and concerns raised in these previous reviews continue to undermine OPR's effectiveness. As these issues are well-documented, we do not revisit them in great detail in this Report. Two of the more public issues involving OPR -- the actual or perceived double standard of discipline, and the actual or perceived climate of retaliation -- are discussed at length in the Department of Justice, Office of the Inspector General Report, dated November 2003, entitled, *A Review of Allegations of a Continuing Double Standard of Discipline at the FBI*, in a previous OIG Report, dated November 15, 2002, entitled, *A Review of Allegations of a Double Standard of Discipline at the FBI*, in a third OIG Report released in February 2003 and entitled, *A Review of the FBI's Response to John Roberts' Statements on 60 Minutes*, and in an FBI/OPR Report dated September 1, 1999, entitled, *A Higher Standard or a Double Standard?* These issues are the subject of several

congressional inquiries as well, including a lengthy hearing of the Senate Judiciary Committee on July 18, 2001.

Concerns about the timeliness of the OPR process are discussed in the foregoing reports and in several other reviews, including a Statistical Report generated by OPR on May 21, 2003, entitled, *Number of Days It Took for Cases to Close in FY 00-03 (By Offense Code)*, an Inspection Division assessment of OPR conducted for the period March 5, 1997, through May 1, 2000, and an electronic communication from the FBI's Deputy Director dated May 13, 2003, regarding improvements to OPR.

Other issues complicating OPR's effectiveness -- and bearing directly on the specific areas of inquiry identified by Director Mueller -- are discussed in these and numerous other documents considered by the Commission. In the attached Appendix, we include a non-exhaustive collection of documents that are relevant both to this Review and, more generally, to understanding the FBI's disciplinary process and history. OPR shortcomings deemed most troubling by the Commission are evident in our recommendations, which are the focus of this Report.

## **B. Findings Concerning Actual or Perceived Disparate Treatment**

Few of the recurring criticisms lodged against OPR generate more attention -- or cause more damage to FBI morale -- than the allegation that FBI senior managers are treated more leniently in the OPR process than rank and file employees. Recognizing the gravity of this criticism, the FBI and Department of Justice have grappled with this issue on several occasions.

In September 1999, the FBI's Law Enforcement Ethics Unit, a unit within OPR, examined whether a disciplinary "double standard" exists at the FBI, and concluded generally that, in the cases reviewed, senior FBI managers were disciplined less harshly than line employees.<sup>30</sup> The Department of Justice Office of the Inspector General has twice studied the problem, issuing reports in November 2002 and November 2003.<sup>31</sup> Noting the difficulty in comparing individual cases -- and in drawing definitive conclusions based on the limited number of cases reviewed -- OIG determined in both of these reports that there

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<sup>30</sup> See FBI LAW ENFORCEMENT ETHICS UNIT, FBI SENIOR EXECUTIVE SERVICE ACCOUNTABILITY - A HIGHER STANDARD OR A DOUBLE STANDARD? (Sept. 1, 1999).

<sup>31</sup> See U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF ALLEGATIONS OF A DOUBLE STANDARD OF DISCIPLINE AT THE FBI (Nov. 15, 2002) ("OIG REPORT I"); U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF ALLEGATIONS OF A CONTINUING DOUBLE STANDARD OF DISCIPLINE AT THE FBI (Nov. 2003) ("OIG REPORT II").

was insufficient evidence from which to “conclusively establish” that the FBI disciplinary process systematically favors senior managers over less senior employees. However, in its earlier report, OIG also concluded that “the FBI suffered and still suffers from a strong, and not unreasonable, perception among employees that a double standard of discipline exists within the FBI.”<sup>32</sup> In its subsequent report, OIG noted that many of the troubling issues it had encountered in 2002 persisted, and echoed its earlier conclusion that “the perception of a double standard is valid.”<sup>33</sup>

Our interviews and review of documents failed to confirm the existence of actual, systemic disparate treatment. Many OPR investigations and adjudications have unique, distinguishing facts and factors that make case comparison difficult at best. Simplistic conclusions of disparate treatment often break down once a case file is reviewed in its entirety. We were guided by the considerable scrutiny already given to this problem, particularly by OIG, and we decided not to duplicate the prior studies. Accordingly, we have developed our recommendations on the premise that at least a perception of disparity exists and that individual cases may be, in fact, unfairly decided. We confirmed the existence of this perception through the allegations, often anecdotal, of interviewees.

Our conclusion that the perception persists has led us to focus on systemic measures to address the issue of disparate treatment, whether actual or perceived. We do, however, wish to highlight several recent examples we encountered of arguable disparate treatment. It is worthwhile to note that the first example includes both the facts discovered by reviewing the relevant OPR files and the facts as described to us during an interview.

- One example of alleged disparate treatment involves a prostitution sting that incriminated two FBI agents at different grade levels. In 1999 and 2000, a Supervisory Special Agent from a field office and a lower ranking Special Agent from the same field office were both detained by local law enforcement for soliciting a prostitute.

The supervisor was observed soliciting a prostitute while he was on Bureau time, in his Bureau car. Despite being stopped and questioned by law enforcement officers, the supervisor was subsequently “unarrested” by the local officers. While the case was pending, the

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<sup>32</sup> See OIG REPORT I at 2-3.

<sup>33</sup> See OIG REPORT II at 37.

SSA maintained his position in the field. The case was adjudicated in early 2002 and the SSA received a forty-five-day suspension.

Approximately eight months after the SSA's incident, a Special Agent from the same field office, in his own car, after work hours, was also caught in a prostitution sting. This agent's involvement in the sting made local television news. After his arrest, he was removed from his position dealing with matters of national security and assigned to less critical duties. The agent retired about a year and a half after the incident occurred, before his case had been adjudicated. The recommended punishment in his case, however, had been a twenty-four-day suspension and loss of effectiveness transfer.

During an interview with the Commission, an individual cited the above-mentioned case as an example of disparate treatment. The interviewee correctly described most of the facts surrounding the incidents. However, his perception of the punishment was *inaccurate*, did not coincide with the actual discipline imposed, and did not support the allegation of disparate treatment.

This case is significant as it demonstrates both that the perception of disparate treatment is not always accurate, and that delays in resolving OPR cases nonetheless significantly contribute to the perception that individuals are treated inequitably. The fact that the supervisor's discipline was not imposed until *nearly two and a half years had passed* contributed to the interviewee's conclusion (even though inaccurate) that the supervisor had received minor discipline, if any. The decision to remove the agent from his previous duties and assign him to lesser duties appeared to support the impression that the two had not been treated equally, even though, in fact, the higher ranking employee eventually received a longer suspension.

- A second example of disparate outcomes for seemingly similar behavior involves driving a vehicle while intoxicated. This example demonstrates that situations may appear similar on the surface, but often have factual nuances that may account for their substantially different outcomes. Although multiple sources described the alleged disparity between these cases, their factual differences make it difficult to determine whether they may be considered examples of disparate treatment.

In late 1996, a field-based Special Agent was alleged to have driven his Bureau car while under the influence of alcohol, causing an

accident. The agent also was alleged to have fled the scene and to have been less than fully candid with law enforcement officers. During the investigation a lack of candor charge was added to the subject's list of offenses. After a delegated investigation in the field, the OPR subject was informed by the acting SAC that he would receive a substantial suspension. After the investigation results were reviewed by OPR Adjudicators, however, the agent was dismissed from the FBI.

In contrast to the above situation, in early 1999, a more senior employee, a Special Agent in Charge of a field office, received less severe punishment for allegedly driving his personal car while under the influence of alcohol. In this case, state law enforcement officers were called to the scene. The SAC refused to submit to a blood alcohol content test and resisted arrest. The SAC's behavior was so disruptive that multiple officers had to subdue him. This individual received a substantial suspension, but was not dismissed.

As with many specific cases the Commission reviewed, there are multiple factual nuances that may influence outcomes. Here, there is an appearance of disparate treatment favoring the management official, but the fact that he was stopped in his personal car and not his Bureau car (as was the agent), as well as the fact that the Special Agent's case involved a lack of candor charge, may have affected the result.

- A third example of arguable disparate treatment involves allegations about agents at different grade levels who failed to report serious misconduct by other agents.

In 2001, two Special Agents were reported to OPR for failing to report allegations that another agent was engaged in an affair with the wife of an individual related to an ongoing case. Each agent ultimately received a five-day suspension (one agent's punishment was reduced from ten to five days on appeal).

In contrast, in 2003, two SES-level employees were reported to OPR for failing to report another agent's contact (relating to an alleged domestic disturbance) with a local law enforcement agency. The Inspection Division handled the investigation and recommended that one SES employee receive a letter of censure for the offense of failure to report and that the second SES employee receive an oral reprimand for poor judgment. The Assistant Director of the

Inspection Division determined that the first employee's discipline was appropriate, but modified the second's discipline to non-disciplinary counseling, which would not appear in his personnel file. The second employee was a high level agent (an ASAC, GS-15) when the incident occurred and had been promoted to a SES position by the time discipline was decided and imposed.

The Commission has no way of knowing whether the statutory fifteen-day minimum suspension affected the decision to discipline the SES-level employees with only a letter of censure and non-disciplinary counseling compared to the five-day suspensions received by lower ranking Special Agents.

- A final example of arguable disparate treatment pertains to two cases opened in 2002, both involving the improper use of FBI space and time to engage in sexual activities with other FBI employees.

In one case, a Special Agent had an affair with another FBI employee for nearly two years. During the affair, the two employees utilized Bureau space and vehicles to engage in sexual activities. Some of these instances occurred on Bureau time. The Special Agent was suspended for sixty days.

In contrast, a SES-level official had an affair with another employee for over five years. The SES-level employee also used Bureau space and time to engage in sexual activities with the other FBI employee. This individual received a lesser, fifteen-day suspension.

Given the Commission's general objective -- to promote a more efficient and fair OPR process -- many of our recommendations could be viewed as responsive, in varying degrees, to concerns of disparate treatment reflected in these examples or to perceived "unfairness" in the disciplinary process. OIG already has recommended some pragmatic corrective measures, and the concerns underlying OIG's recommendations surfaced in a number of our interviews as well.

### **C. Timeliness of OPR Investigations**

OPR's lack of timeliness in resolving cases remains a significant OPR deficiency. OPR's timeliness generally has improved since 2001, but remains well beyond levels that are necessary for a fair and efficient administration of FBI discipline.

OPR has two sets of statistics to assess timeliness: (1) the average age of cases pending at the end of each fiscal year, and (2) the average duration that closed cases spent in each OPR unit. We believe that while both measures are probative of timeliness, the latter approach is more informative largely because it tracks closed, not pending, cases. Nonetheless, statistics in both areas tend to indicate that OPR has made some recent progress in administering discipline by lowering the average age of pending cases and by decreasing the number of days cases spend in OPR’s Investigative and Adjudication Units.

As Table 5 indicates, at the end of FY 2003, a greater percentage of cases had been pending for 180 days or less than in previous years, with 62.1% of cases at the end of FY 2003 having been pending for 180 days or less, an improvement of over 22% compared to FY 2002. Similarly, the number of older cases pending for over one year decreased in FY 2003 to 15%, an improvement of 11% compared to FY 2002.

**Table 5: Historical Data on Age of Pending Cases**  
**(\* not including time for appeals, if any)**

Age of Pending Cases	9/30/98	9/30/99	9/30/00	9/30/01	9/30/02	9/30/03
More than 2 Years	2.7%	1.8%	1.3%	2.3%	3.5%	5.2%
1 to 2 Years	14.0%	6.5%	11.4%	25.2%	22.5%	9.8%
181 Days to 1 Year	20.9%	27.1%	18.9%	25.7%	34.0%	22.9%
180 Days or Less	62.5%	64.6%	68.5%	46.8%	40.0%	62.1%
<b>Total Open More than 180 days</b>	<b>37.6%</b>	<b>35.4%</b>	<b>31.6%</b>	<b>53.2%</b>	<b>60.0%</b>	<b>37.9%</b>

Table 5 also demonstrates that, despite OPR’s apparent improvement in 2003, entirely too many cases have been pending for over six months both in 2003 and historically.

The excessive delay in resolving OPR matters also is supported by the second measure of OPR timeliness. As Table 6 indicates, cases spend a significant and unacceptable duration in OPR’s Investigative and Adjudication Units. For example, with respect to cases closed during FY 2003, OPR estimates that cases spent an average of 106 days in OPR’s Internal

Investigative Unit(s) and 121 days in the Adjudication Unit(s), for a total average of 227 days per case, prior to any appeals. While this average of 227 days per case is inflated due to the minority of cases that are extremely old, it is the Commission’s view that timeliness in both investigations and adjudications must be improved significantly.

If a case is appealed, the Appellate Unit’s goal is to resolve “nonadverse” action cases within sixty days and “adverse” actions cases within ninety days. In FY 2003, the APU’s overall average resolution time was 111 days, compared to eighty-eight days in FY 2002 and seventy-one days in FY 2001, annual increases of 26% and 24%, respectively.

**Table 6: Average Number of Days Cases Spent in OPR, By Unit**

FY	Avg. days case in Investigative Unit(s)	Avg. days case in Adjudication Unit(s)	Total (no appeal)	Change from previous year	Avg. days case on appeal/DRB	Total avg. days of OPR case if appeal
1999	132	162	294	--	238	532
2000	141	177	318	8%	71	389
2001	130	152	282	(-11%)	71	353
2002	113	101	214	(-24%)	88	302
2003	106	121	227	6%	111	338

OPR’s general improvement in timeliness (except for appeals) since 2001, while still at an unacceptable level, arguably is attributable to a number of changes implemented in the last two years, such as:

- increased reliance on field investigations and adjudications (DIAs) and field investigations only (DIOs);
- use of Assistant Inspectors In Place (AIIPs) for two-week periods to assist in conducting OPR investigations;
- establishment of the Initial Processing Office; and,
- appointment of an experienced supervisor within OPR’s Investigation Unit(s), with adjudication and investigative experience, to review the investigative file for completeness prior to submitting the file to one of the Adjudication Units.

The Commission has concluded that the vast majority of OPR matters should be resolved in less than ninety days, preferably sixty days, and that this goal is realistic for matters that are, by definition, administrative in nature. If

appealed, more time would be necessary, but the subject at least would be aware of the preliminary resolution of the allegation and the proposed punishment, if any. Also, criminal matters understandably may take longer, but such cases historically account for less than 10% of OPR's cases. Accordingly, OPR's timeliness, despite some progress, remains a deficiency that accounts for significant and justified criticism of the OPR's disciplinary process.

#### **D. OPR Staffing and Lessons Learned From Other Agencies**

One of the Commission's most disturbing findings, which perhaps is not surprising given the relentless criticism directed at OPR, is that morale is generally poor and that few in the FBI view assignment to OPR as a positive, career enhancing move. To be sure, there are some extremely competent, dedicated OPR employees. However, based on our observation and the conclusions we have drawn from interviews, there is tremendous variability in the quality of the OPR staff, from top to bottom. Some OPR employees have held positions for too long at the risk of becoming jaded and detached from the practical context in which OPR matters should be judged. Others may lack appropriate backgrounds or training for their assigned responsibilities.

Due to both the nature of OPR assignments -- investigating and adjudicating misconduct of peers -- and because of the deterioration of morale in an organization that some have characterized as a "snake pit," top notch FBI employees view OPR as a dead end, distasteful job. That attitude must change, but such a transformation likely will have to occur gradually. Some of the recommendations in this Report may improve the situation, but ultimately the Director must appoint and incentivize the right people for these difficult jobs. Otherwise, there is no structure or list of improvements that will allow OPR to function successfully.

One significant issue identified by the Commission is whether current OPR staffing levels are appropriate and whether they should be augmented or cut. Some observers have opined that OPR is overstaffed, has opened too many minor cases as a result, and generally should be streamlined to focus only on the most serious misconduct issues. Others contend that OPR is understaffed, that it is obligated to investigate all specific and credible allegations of misconduct, and that more personnel are needed to ensure timely resolution of cases.

The Commission reserves any finding on OPR staffing levels until the FBI can evaluate the impact of our recommendations, if implemented. It may be that our suggestions mitigate the argument for more personnel by enhancing OPR's effectiveness and better defining its mission. On the other

hand, certain recommendations, such as allowing all employees to elect to appeal any suspension to the Disciplinary Review Board, may require allocating more resources to discrete units (*e.g.*, more and/or dedicated employees to support and serve on the DRB).

In assessing one of the issues identified by Director Mueller -- whether any lessons are to be learned from how the OPR process is handled in other law enforcement and intelligence agencies -- we found the Drug Enforcement Agency's disciplinary process generally to be most analogous, and therefore informative specifically on the question of staffing levels. For purposes of guiding our detailed recommendations, we were unable to draw meaningful comparisons to other agencies we contacted due to a variety of factors, such as core dissimilarities in disciplinary structures (*e.g.*, Customs) or the differing nature of the agency (*e.g.*, Department of Defense -- military versus civil approaches to discipline).

Unlike FBI employees, DEA personnel are not excepted service employees and therefore have Merit Systems Protection Board ("MSPB") rights and may appeal certain levels of discipline to the MSPB (generally termination, demotion and suspensions of fifteen days or more). Nonetheless, the DEA's OPR conducts the investigation and independent units adjudicate the matter prior to any potential MSPB involvement. During adjudication, the DEA's Board of Professional Conduct, which consists of three GS-15 level employees (not full-time in this capacity), serves as the proposing entity, and one of two full-time GS-15 level employees appointed by the Career Board serves as the deciding official. SES adjudication is handled by higher ranking officials.

The DEA dedicates more than double the number of full-time agents to investigate OPR matters compared to the FBI, despite having approximately one-third the number of employees and typically investigating no greater number of cases. For example, the DEA has committed thirty-four full-time agents, usually experienced GS-14 or GS-15 level agents, to investigate OPR matters. By comparison, there are fifteen full-time agents in FBI/OPR's Investigative Units, a ratio inconsistent with the size of the agencies -- DEA has approximately 9,700 employees compared to approximately 28,000 employees at the FBI.

The number of cases investigated also does not explain this difference in full-time investigators. The DEA estimates that it received approximately 700 "intakes" in 2003, which number includes all OPR complaints that received an administrative tracking number even if a full investigation never ensued, compared to 709 complaints resulting in formal inquiries by FBI/OPR in 2003, which number does *not* include frivolous allegations received and placed in

FBI/OPR's administrative zero files. Accordingly, the FBI appears to investigate at least as many OPR allegations as the DEA, and does so with the support of fewer full-time investigators.

Other factors complicate this numeric comparison, such as (1) both agencies utilize non-OPR field agents for delegated investigations at an unknown frequency, and (2) the relative complexity of FBI and DEA allegations of misconduct is not clear (*e.g.*, DEA/OPR allegations of drug-related misconduct ostensibly could be more complicated and require more resources per case). However, this comparative exercise is useful in demonstrating that no definitive staffing conclusion about FBI/OPR presently can be reached without a better understanding of the effect of the Commission's recommendations, which include a more accurate and sophisticated tracking by OPR of delegated investigations and their effectiveness.

In addition to staffing, the Commission found a number of other aspects of the DEA's disciplinary process informative to this Review, such as:

- DEA/OPR investigators have term limits and rotate every two or three years.
- DEA/OPR investigators may apply for the position or be assigned. Qualities sought in candidates include significant investigative experience, writing skills and good judgment. Candidates who have been the subject of a minor OPR inquiry also are considered favorably, presumably because having endured such an experience brings balance and fairness to an OPR investigator's approach.
- DEA/OPR investigators are considered favorably for promotion or lateral placement at the conclusion of their OPR assignment, partially in recognition that an OPR job typically is not a preferred position.
- DEA/OPR uses written statements, taped interviews, or court reporter transcripts to memorialize subject and witness interviews and to deter malicious OPR allegations. Each of these three options first requires the subject or witness to be sworn under oath. The subject and complainant also are given the option to submit to a polygraph, with the complainant's refusal to do so documented in the investigative file. (The subject's refusal apparently is not documented due to MSPB considerations.)
- DEA/OPR's full-time investigators are divided into four field offices and two offices at headquarters. To minimize conflicts-of-interest, the

four field offices are staffed with investigators that previously had not been placed in that office. Recusals also are encouraged to maintain the integrity of OPR's investigation.

- DEA/OPR investigators, housed in the Inspection division, submit their final report to adjudicators in DEA's Human Resources division, a design intended to maintain the independence of OPR's investigation and adjudication functions.

Many aspects of these and other DEA approaches are consistent with the recommendations suggested by the Commission.

#### **E. OPR Structure**

As has been discussed, OPR's structure has evolved in an effort to achieve fairness while improving efficiency. We maintain that the most important way to increase confidence in OPR is to designate and motivate the best people for the critical jobs that are OPR's backbone.

One persistent structural issue -- indeed, it was an issue certified to us by Director Mueller -- is whether investigators and adjudicators should remain organizationally tied to each other as they are now. We received many varied opinions on whether the current system is optimal. On the one hand, many perceive the adjudicators to be operating as prosecutors, with the investigators acting as their agents. The notion that they are neutral fact-finders is belied by their function. Agents in the field, in particular, are highly skeptical of this system and their ability to receive fair treatment. Others have noted that adjudicators and investigators both report through the same chain of command to the DAD of OPR, a fact that further supports their perception that the two groups are not truly independent.

On the other hand, there are obvious efficiencies and synergies that flow from this structure. Adjudicators can more readily ensure that the investigation is completed to their satisfaction and that bureaucratic delay in obtaining investigative follow-up has been reduced. Those involved in these units generally believe the current system operates well and oppose a return to the original system that housed the two functions in separate divisions.

On balance, however, we conclude that the perception of due process and fundamental fairness, so crucial to the confidence we wish to restore in OPR, is suffering from the current structure, which conclusively tips the scales in favor of separation of function. Accordingly, our recommendations will reflect that structural change.

## **F. Other Findings**

### **1. OPR Jurisdiction**

We are concerned that OPR's jurisdiction has expanded to include performance issues, which only serve to clog the OPR system, absorb limited resources, and diminish the stature of the office itself. Lost property, attendance, and other similar matters should be handled in the field as performance issues. The current list of OPR offenses, including subcategories, consist of over 185 often ill-defined transgressions in need of definition and delineation. Until this is done, OPR's efforts to distinguish performance and misconduct matters will be undermined to the considerable detriment of its efficiency and fairness.

### **2. Automation & OPR's Intake System**

OPR is generally plagued with inadequate or nonexistent automation support, including:

- OPR does not adequately track incoming allegations;
- Cases that are formally investigated, while technically tracked, are not effectively monitored by software that quickly provides OPR with meaningful data, such as whether the case has been delegated to the field for action and other important indicators of case status and staffing;
- OPR has difficulty obtaining accurate statistical information on cases in a timely fashion, due largely to inadequacies in existing OPR technology;
- OPR's latest annual report trailed the close of the fiscal year by over a year, a delay attributable largely to the failure to capture automatically key information throughout the year;
- OPR's precedent database is entirely deficient, a finding repeated throughout this Report.

While we have concluded that the Initial Processing Office has improved OPR's handling and opening of cases, improved technology in this and other areas is essential to improving OPR's timeliness and credibility.

### **3. Procedural Rights**

Interviewees made numerous suggestions relating to the need to clarify or add procedural rights for OPR subjects and to ensure the impartiality of investigators. We found many of the suggestions to have merit and have recommended improvements relating to the following topics: (a) signed, sworn witness statements, (b) access to the investigative file, (c) adequate notice of allegations and reasonable updates on OPR progress, (d) OPR recusal rules and protections against retaliation for investigating or reporting misconduct, (e) documentation of communications regarding OPR matters; and (f) protection against unfounded allegations of misconduct and selective prosecution of cases.

### **4. Adjudications**

In January 1994, Director Freeh established a “bright line” policy of discipline, which clarified that “lying, cheating, or stealing” constituted grounds for immediate termination.<sup>34</sup> The Director provided certain examples of the conduct at issue, including voucher fraud, theft, false statements under oath, and falsification of investigative activities.<sup>35</sup> The “bright line” test has led to confusion and undermined the beneficial impact it was intended to have. Furthermore, reliance upon the Douglas Factors has implied that FBI employees are entitled to full MSPB rights, which they generally are not.<sup>36</sup> Our recommendations address these issues.

We also found significant variability in the experience and background of individual adjudicators. While some suggest a benefit from the varied backgrounds, which are enhanced by a “team” approach, we conclude that confidence in the system can only be achieved if the qualifications of the adjudicators are unassailable. We also found that some adjudicators have remained in that position for too long and, as with the investigative personnel, we recommend term limits.

The OPR precedent database is largely unhelpful because of enormous variance in decisions over the years and infirmities in automation. Our

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<sup>34</sup> See Memorandum from the Director, to All SACs, All LEGATs, RCA, NERSC, EPIC, BITC, SITC, and Clarksburg Satellite Facility, regarding the “bright line” policy (Jan. 3, 1994).

<sup>35</sup> See *id.* at 2-3.

<sup>36</sup> FBI employees who are preference-eligible veterans are the exceptions to the rule that FBI employees do not have MSPB rights. Veterans are preference-eligible if they are disabled or served on active duty during certain specified time periods or in military campaigns. Accordingly, the formal Douglas Factors should continue to be applied in these cases.

recommendation to establish punishment guidelines prospectively should render the flawed precedent database obsolete.

## **5. Appellate Process**

The appellate division is functioning well. The three most significant appellate issues raised with us are: (1) the appropriate standard of review (one of Director Mueller's certified issues as well), (2) the absence of a non-SES member on the appellate board when a non-SES subject is involved, and (3) the question of whether a subject can or should be promoted while an OPR proceeding or appeal is pending. We address these and other issues in our recommendations.

## **6. Communication and OPR Transparency**

One of our more significant findings is the lack of communication and understanding about OPR in the field, and even among some OPR staff. That situation must be addressed through a comprehensive program if OPR is ever to reduce the level of distrust and confusion associated with it today. We make initial recommendations but realize that the parameters of a comprehensive OPR communications program are best reserved for the FBI specialists.

#### IV. RECOMMENDATIONS<sup>37</sup>

##### A. Recommendations to Address Perception of Disparate Treatment

##### 1. Congress Should Eliminate the Fifteen-Day Minimum Suspension for SES Officials

Title 5 of the Code of Federal Regulations, Chapter 1, Subpart F, Section 752.601(b)(1) states that federal agencies may not suspend a member of the Senior Executive Service (“SES”) for less than fifteen days. As a result, when disciplining FBI SES managers, if a letter of censure is deemed insufficient punishment, OPR officials must impose a suspension of fifteen days or more. This gap in available disciplinary options for SES members has contributed significantly to concerns of disparate treatment. A number of interviewees told us that the tendency is to “round down” to a letter of censure rather than “round up” to fifteen days when an offense would ordinarily result in a few days suspension.

For example, a number of interviewees raised the issue of unequal treatment of SES and line FBI employees in the context of accidental weapon discharges. In 1997, Director Freeh mandated that, absent definitive mitigation, accidental discharges of a weapon in disregard of established safety procedures would result in a minimum suspension of three days. The perception of a number of interviewees is that, pursuant to this mandate, non-SES employees have received three-day suspensions under circumstances where SES members received letters of censure. Perhaps contributing to this disparity is another perception described by some of the SES interviewees that a letter of censure has a greater impact on the career of a senior manager than it does on the career of a line employee.

Despite the perceived tendency to “round down,” it appears that some SES members also may suffer as a result of this statutory fifteen-day minimum. According to one SES senior manager we interviewed, he received a fifteen-day suspension because one of the three members of his Disciplinary Review Board believed that he should be suspended for a particular indiscretion, but only for one day. Unable to impose the one-day suspension, but concerned that a letter of censure was insufficient punishment, the Board reluctantly imposed a fifteen-day suspension.

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<sup>37</sup> We have included a summary matrix of the Commission’s recommendations behind the first tab of the Appendix.

This Commission joins in OIG's recommendation -- supported by the FBI -- that the Congress abolish the statutory fifteen-day minimum suspension.<sup>38</sup> The FBI may still hold SES employees to a higher standard of conduct in the absence of this mandatory, minimum length of suspension.

**2. FBI Should Develop and Uniformly Apply Effective "Punishment Guidelines"**

If FBI discipline is to be applied fairly and uniformly, it is critical that the FBI establish and apply "punishment guidelines" for use in the OPR process. The FBI should establish a working group to study the universe of potential OPR offenses, be guided but not bound by past precedent, and assign to each clearly-defined offense a narrow range of disciplinary options. Although the penalty guidelines for the subset of delegated offenses were a step toward establishing a comprehensive set of punishment guidelines, the concept of narrow and specific guidelines must be applied to all OPR offenses.

While some current OPR "guidelines" exist, they assign wide ranges of disciplinary options to ambiguously-defined offenses and offense categories. It must be clear that, once an offense has been established by a fair investigation, disciplinary authorities (whether OPR officials or authorities acting under delegated authority in the field) may not depart from the narrow punishment options except as authorized under clearly-defined mitigating and aggravating criteria.

The most comprehensive collection of guidelines regarding disciplinary matters is the Schedule of Disciplinary Offenses and Penalties for FBI Employees, found in the Manual of Administrative Operations and Procedures ("MAOP"), Part 1, Section 13-13. This schedule, however, is only one of multiple FBI documents containing guidelines on discipline. For example, a Schedule of Delegated Disciplinary Actions exists, as does a list of items that are considered OPR matters, found in the Manual of Investigations Operations and Guidelines ("MIOG"), Part 1, Section 263-2(5). There is also a Standard Offense Code List.

Although a wealth of information describes OPR disciplinary offenses and their corresponding range of punishments, the policies generally are not useful -- they are too broad, in conflict, or merely suggest rather than require a particular range of punishments. For example, the Schedule of Disciplinary Offenses and Penalties for FBI Employees is preceded by the statement: "This schedule is to be used only as a guide in determining appropriate discipline

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<sup>38</sup> See OIG REPORT I at 72-73 & n.30.

based on the violation of regulations by Bureau employees.” The schedule, therefore, serves as a recommendation only, and does not set absolute limits or list aggravating or mitigating factors that would justify variance from its suggested punishments.

The Schedule of Disciplinary Offenses and Penalties for FBI Employees also is too broad. A number of offenses carry suggested punishment such as “Oral reprimand to fifteen-day suspension” or “Oral reprimand to removal.” The offense of “Unauthorized possession of, use of, or loss or damage to government property other than motor vehicle or aircraft” is listed with the recommended punishment of “No action to removal.” Suggested ranges of punishment that extend from no action to dismissal are too expansive to be useful in applying discipline or educating employees regarding potential consequences of their actions.

The Standard Offense Code List appears to break down broad categories of offenses into subsets that are more useful. For example, drug offenses are divided into the categories of sales, possession, purchase, use of marijuana, use of hard drugs, pre-FBI employment use, and other similar categories. Although this Standard Offense Code List creates subsets for the categories of conduct that are considered OPR offenses, it does not appear to create punishment ranges that coincide with the subset offenses.

Moreover, these policies often appear to conflict with one another. For example, the Schedule of Delegated Disciplinary Matters lists the offense of absence from the workplace for less than eight hours as a “Level One Offense” automatically warranting the maximum discipline of an oral reprimand. The Schedule of Disciplinary Offenses and Penalties for FBI Employees, on the other hand, provides that the offense of an “Unexcused or unauthorized absence of 8 hours or less” be punished with up to a three-day suspension.

The Commission submits that one set of meaningful punishment guidelines is essential to ensuring uniformity and fairness in the discipline of FBI employees.

### **3. Other OIG Recommendations To Address Disparate Treatment Supported by this Review**

In its reports of November 2003 and November 2002, OIG recommends a number of corrective measures to address concerns of disparate treatment, some of which are compelling. For reasons previously noted, we did not undertake to revisit OIG’s findings. However, criticisms and concerns raised by

a number of interviewees reinforce the need to act on several of OIG's recommendations.

First, interviewees suggested that the perception of disparate treatment has been fueled by uneven application of the "bright line" policy. While everyone agreed that Director Freeh had the best of intentions to terminate employees who violated the basic ethical requirements of the FBI, in the view of some, the "bright line" apparently became the "gray line," or as one agent remarked, it had a "dimmer switch." Indeed, there was a perception that the bright line tended to become more blurry, the higher the rank of the subject. OIG has recommended that the FBI decide whether it will maintain this "bright line" policy or instead terminate the policy and consider mitigating and aggravating circumstances in cases of "lying, cheating, or stealing."<sup>39</sup> We recommend that reference to the "bright line" as part of OPR adjudications be eliminated at the same time that the FBI reemphasizes that "lying, cheating, stealing" type of offenses will not be tolerated and, in most instances, will result in termination.

Second, interviewees noted a perception -- based in fact, according to OIG and OPR's own statistics -- that senior FBI managers occasionally retire or resign while under OPR investigation. Because senior managers are more likely to be eligible for retirement than lower level employees, they may be more apt to retire while under investigation. In such cases, the OPR process is halted before a final decision concerning discipline can be made and reflected in the (former) employee's file.

OIG has recommended that OPR consider pursuing a final decision against the former employee in cases where a current employee in the same matter receives discipline, as such an investigation likely would not expend significant additional resources.<sup>40</sup> The Director also may wish to consider requiring the OPR process to continue against all former employees, which would entirely eliminate the perception that the ability to retire or resign fosters disparate treatment. If implemented, some of our suggestions (*e.g.*, removing performance matters from OPR), could ease the strain on OPR's limited resources and permit OPR to complete investigations of the relatively few employees who retire or resign during the disciplinary process. Thus, we reserve this issue for the Director's future evaluation after an assessment of the overall impact of our recommendations.

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<sup>39</sup> See OIG REPORT I at 73-74; OIG REPORT II at 38.

<sup>40</sup> See OIG REPORT I at 75. See also notes 24 & 25, *infra* (providing statistics on the small number of employees, including SES employees, who retire or resign under OPR investigation).

We also conclude that FBI employees who retire under investigation should not be permitted to become paid consultants or contractors for the FBI until and unless the OPR process is completed.

Finally, as noted by OIG, the FBI should proceed carefully when considering whether to promote or award bonuses to individuals under OPR investigation for serious allegations of misconduct.<sup>41</sup> It is our view that, on balance, it is better to maintain some level of discretion over such decisions rather than issue an absolute prohibition, especially since almost half of all employees formally investigated by OPR are not ultimately disciplined. Improving the timeliness of OPR investigations will greatly minimize this issue.

## **B. Recommendations Regarding OPR Structure**

Second only to the controversy surrounding perceived disparate treatment in the OPR process is the debate over the proper structure of OPR. As discussed previously, OPR's structure and procedures have changed repeatedly, all in good faith attempts to achieve fundamental fairness in a process that is inherently controversial. We hesitate to further alter OPR's structure, and provide our suggestions with the knowledge that yet another period of adjustment will be required if our recommendations are adopted. Nevertheless, while there is no single structural answer to OPR's shortcomings, we have become convinced that the co-location of investigations and adjudications within OPR has caused considerable consternation and detracted from the credibility of the disciplinary process.

The reorganization in 1997 merged adjudications and investigations into the same division. The benefit has been, in some instances, efficiency and more timely resolution of OPR matters. We do not discount the importance of resolving OPR investigations as swiftly as possible consistent with fundamental fairness. Nevertheless, there is a strong perception in the field that adjudicators, rather than acting like neutral judges as their title would connote, operate more like prosecutors, with the investigators serving as their agents.

There may be a tendency for the adjudicators in this perceived role to become invested in directing and "making their case," thereby eliminating one of the important checks in a disciplinary system dedicated to fairness. The adjudicator, who serves as a proposing or deciding official depending on the case, should not be perceived as partial. Therefore, the Commission

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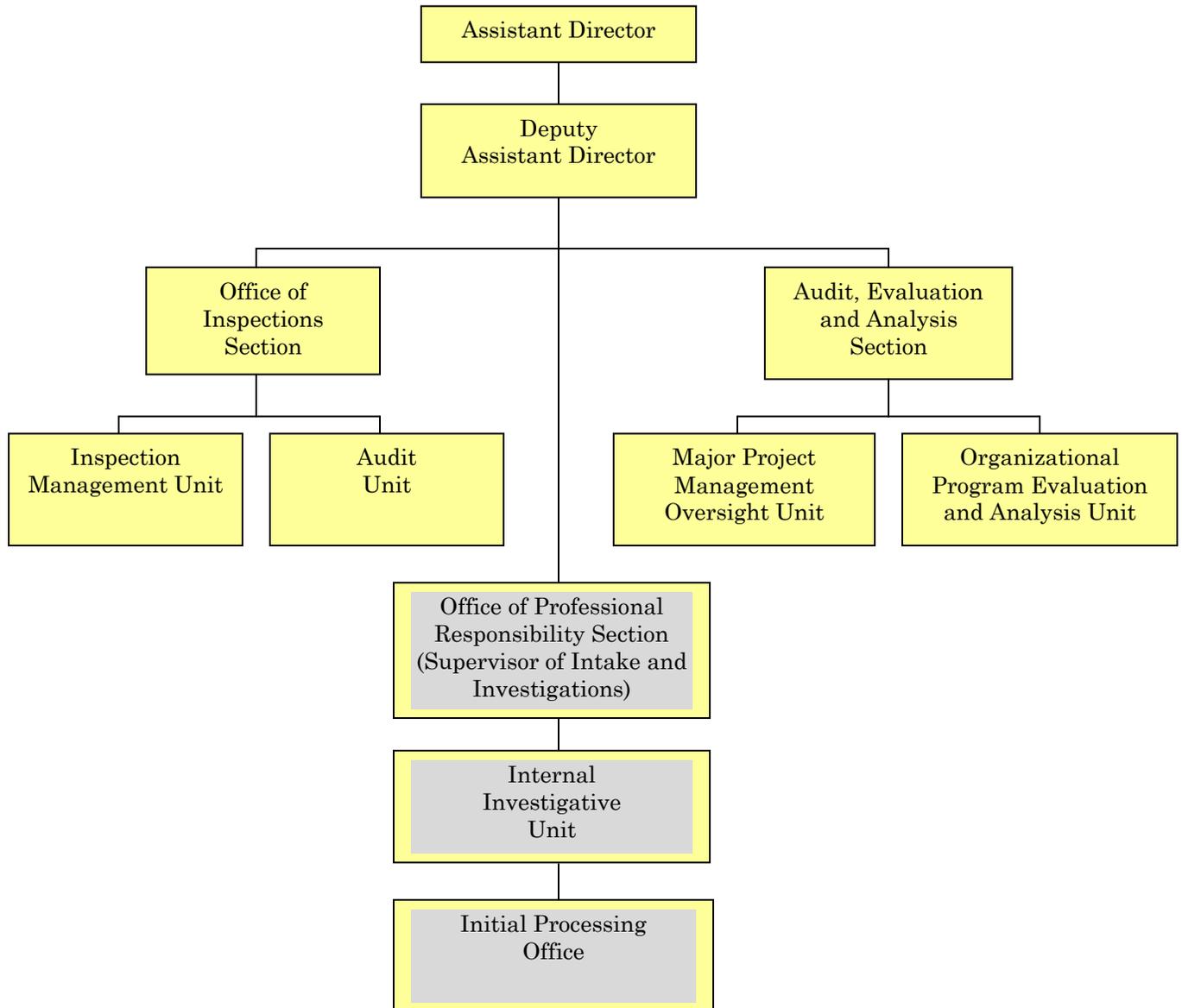
<sup>41</sup> *See id.*

recommends that adjudications and investigations be returned to separate divisions. We offer the following structural improvements for consideration:

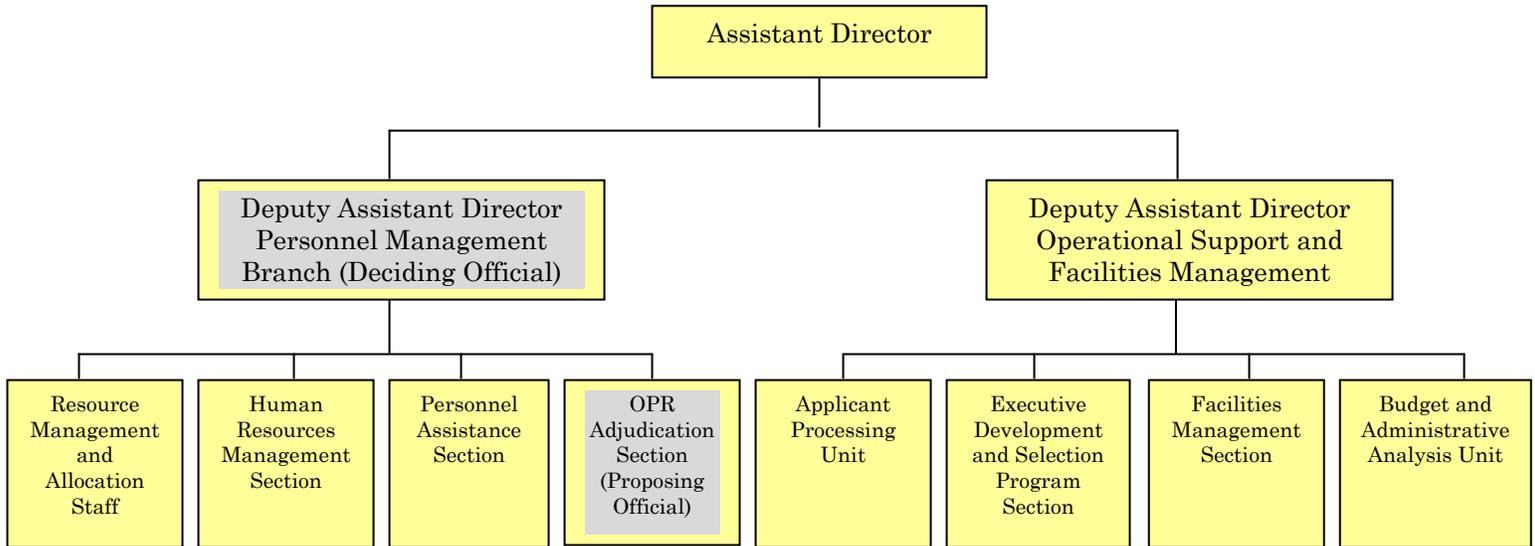
- Investigations should return to the Inspection Division, reporting to the AD of Inspections. The new Supervisor of the Investigations Section within the INSD should direct both the IPO and the Investigative Unit, effectively serving in an oversight capacity similar to the current DAD of OPR. Consistent with current practice, the proposed Investigative Unit should supervise delegated field investigations only (DIOs). However, as discussed below, delegated investigations and adjudications (DIAs) should be monitored by adjudication officials at headquarters, not the IPO.
- Adjudications should return to the Administrative Services Division, reporting to the AD of Administrative Services. The DAD of Administrative Services should serve as the deciding official for *all* non-delegated adjudications, with the OPR adjudicator the proposing official, both of whom would be guided by the newly-developed punishment guidelines previously described. Proposed discipline by field adjudicators in less serious, delegated adjudications (DIAs) should no longer be monitored and approved by OPR's Intake Unit (which, according to our recommended structure, would move to the Inspection Division), and instead should be supervised by adjudication official(s) at headquarters. These supervisory adjudicators may request additional investigation, if necessary, but their primary function in DIAs should be limited to serving as a safeguard against any aberrant and unjustified punishment recommendations by field adjudicators. Our proposed punishment guidelines should minimize this risk, and we thus would expect the supervisory adjudicators to afford great deference to the judgment of field adjudicators in these less serious, DIA cases.
- The Appellate Unit, which generally appears to be functioning well, should move from the Inspection Division to ensure independence from Investigations and become a stand-alone division reporting directly to the FBI Deputy Director. Additional recommendations regarding the appellate process and DRB composition are discussed *infra*.
- Investigations and adjudications should each be headed by a highly regarded, senior level official with extensive field experience, likely a Section Chief.

The following three charts reflect the OPR structure proposed by the Commission.

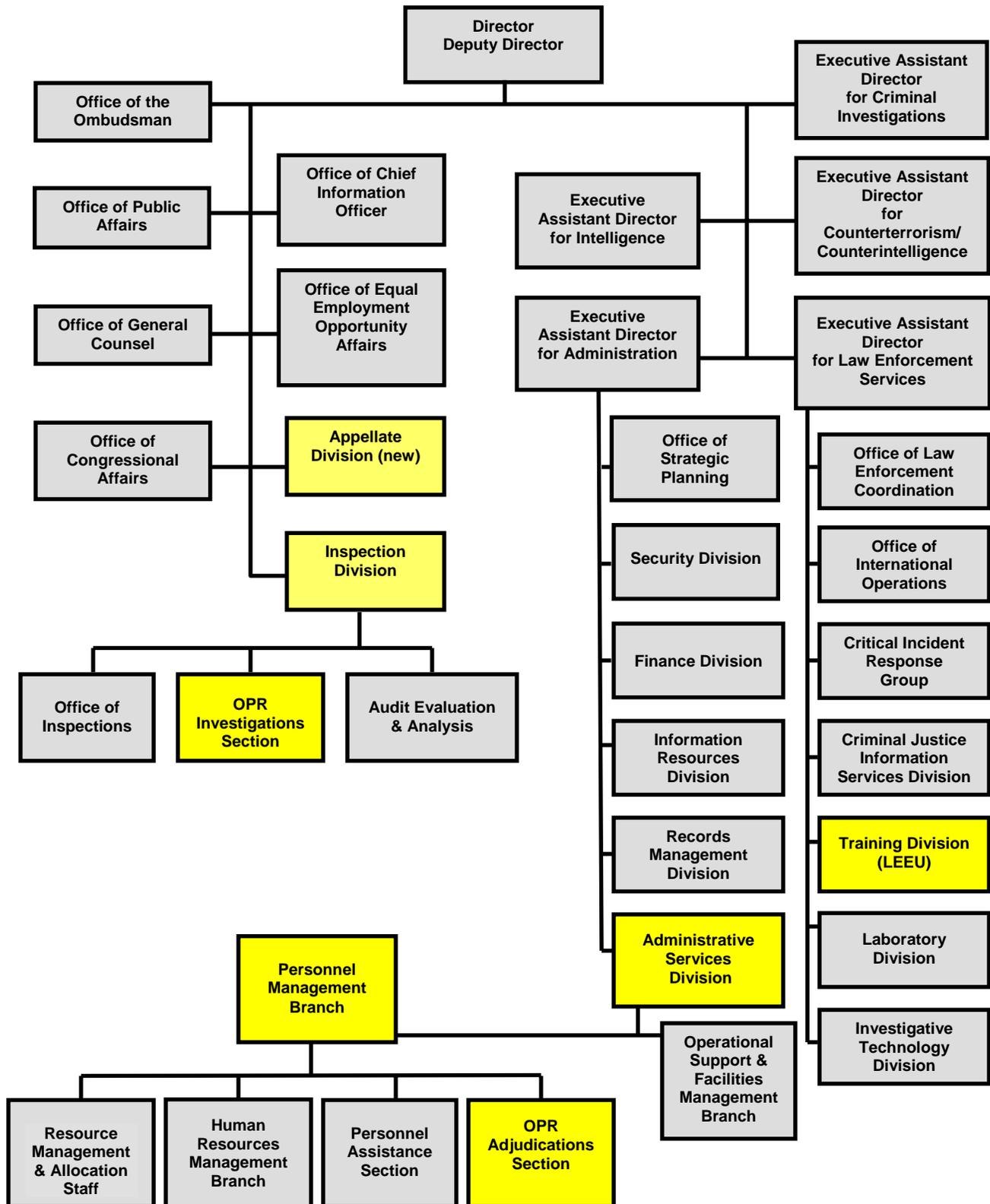
**Chart 4: Proposed Inspection Division**



**Chart 5: Proposed Administrative Services Division**



**Chart 6: Proposed FBIHQ Organizational Structure**  
 (Substructure Included Only for Divisions Affected by Recommendations)



To ensure that the separation of investigations and adjudications does not delay case resolution, strict time limits and streamlined procedures should be developed to minimize beauracatic delay. Recommendations regarding timeliness are discussed further in the following sections.

### **C. Recommendations Regarding DOJ/OIG Oversight**

Some interviewees recognized the value of DOJ/OIG oversight of the FBI disciplinary process, partially due to distrust of OPR and its performance, but suggested three process improvements in cases investigated by DOJ/OIG:

- (1) better training of DOJ/OIG investigators to alleviate perceptions of variable investigative quality;
- (2) rotations of FBI/OPR investigators through DOJ/OIG to provide practical insight and institutional knowledge of the FBI to DOJ/OIG investigators. Such appointments, which presumably would have term limits, also would provide these rotating FBI agents a level of insulation and independence from any potential FBI influence when participating in investigations of other FBI personnel; and,
- (3) DOJ/OIG's adoption of procedural rights that FBI/OPR affords to FBI employees under investigation.

As to the last suggestion, some interviewees believe that DOJ/OIG, in practice, does not always inform subjects that they are under investigation or advise them of their rights to the same degree as FBI/OPR. However, DOJ/OIG's formal investigative procedures state that OIG "normally" provides subjects of administrative investigations of misconduct written notice and a summary of the alleged misconduct within thirty days of the OIG's initiation of an investigation.<sup>42</sup> (Subjects of criminal -- as opposed to administrative -- investigations are not similarly notified.) Also, DOJ/OIG's policy "normally" requires that subjects receive an administrative or criminal advisement of rights, depending on the nature of the allegation.

The Commission has not independently verified whether DOJ/OIG, in fact, routinely notifies subjects of administrative investigations or advises them of their rights. However, the Commission recommends that DOJ/OIG promptly inform administrative subjects of the opening of *all* cases, as well as advise them of their procedural rights, and that criminal subjects be notified unless doing so would jeopardize the investigation.

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<sup>42</sup> See Memorandum from Glenn Fine, Inspector General, DOJ, to Director Mueller, entitled "OIG Investigative Procedures" at 1, exhibits 1, 2 (July 24, 2003).

#### **D. Recommendations Regarding OPR Jurisdiction**

OPR's jurisdiction has expanded over the years and, despite attempts to differentiate between performance versus OPR issues, it is difficult to reduce the jurisdictional span of a bureaucratic entity such as OPR. We recommend that the Director appoint a working group to delineate performance versus OPR issues. OPR's jurisdiction should be reserved for serious cases of misconduct, not as a clearinghouse for any conceivable issue related to an employee's behavior. The SACs are willing and able, with possible assistance from Personnel Officers and the Administrative Services Division, to manage performance issues.

We have received input from some interviewees on where to draw the line between performance and OPR misconduct issues, and we will provide that information for the working group's consideration.

#### **E. Recommendations Regarding OPR Components**

##### **1. Automation and the Intake System**

With regard to the IPO or intake office, we generally have found that it has been successful in bringing uniformity to the case opening process. Accordingly, under our proposed restructuring, the Intake Officer, who optimally is an experienced field investigator and supervisor, should coordinate with the new Section Chief of Investigations to open OPR matters as appropriate.

In contrast to the existing OPR intake structure, however, DOJ/OIG and the IPO/Intake Supervisor should review all complaints *concurrently* -- the IPO or Intake Supervisor (presently the DAD of OPR) should not assess and classify the allegation prior to DOJ/OIG review. This straightforward procedural change still would permit the IPO to assign an administrative serial number to the allegation, but would eliminate any perception that FBI/OPR substantively reviews cases before DOJ/OIG's authorization.

The following, additional recommendations should be considered to improve the intake system:

- (1) OPR must immediately automate an effective case tracking system for all allegations;
- (2) OPR should promulgate a policy concerning the handling of anonymous complaints -- the policy should list the standards and practices to be followed when an anonymous complaint is made

and, unless an anonymous complaint can be independently verified as credible and specific, it should not be pursued; and,

- (3) The OPR referral system should be clarified, simplified and centralized. Consideration should be given to establishment of a complaint hotline, including an 800 number and internet referrals.

Ineffective automation has contributed to a number of problems in the OPR process, including delay, loss of confidence in the system, and an inability to trend or learn from precedent or other historic experience. We urge immediate attention to automation in multiple areas.

More generally, OPR should have access to improved hardware and software to discern and catalogue meaningful and immediate information about cases, such as how many days a case has been in Investigations or Adjudications, whether the case has been delegated to the field and for how long, and which OPR personnel have been assigned to the matter. OPR should be able to provide year-to-date totals without delay on such issues as types of discipline imposed per offense and the grade of the subject, and a supervisor should have the capability to review a full electronic history of a matter, including investigators' electronic notes of actions on the matter, electronic signed, sworn statements, and matter status.

The Commission has concluded that these types of automation enhancements are essential for improving timeliness, accountability, and overall credibility in the disciplinary process.

## **2. Investigations**

Our Review identified multiple issues relating to investigations and whether they are being conducted promptly and fairly. As discussed previously, we suggest separating investigations from adjudications and submit that a single investigative unit is appropriate. As with every area of OPR, we are concerned that OPR fails to attract the most qualified personnel for these key positions. An established career benefit must be created to help incentivize top agents to serve in an OPR capacity, including protection against the risk of retaliation by subjects during the OPR employee's subsequent career development (*e.g.*, strict Career Board recusal rules, etc.). We also believe that a term limit of three years should be mandatory.

### **Procedural Rights & Additional Process Considerations**

During the course of our interviews, we received numerous suggestions about enhancing the procedural rights of OPR subjects and improving the manner in which investigations are performed. We found a number of the suggested improvements to be worthy of consideration:

- Signed, sworn witness statements should be mandatory for interviews of all subjects, employee witnesses,<sup>43</sup> and complainants,<sup>44</sup> subject to one exception for statements of admission, as explained, *infra*. Complainants requesting confidentiality should have their identities protected and statements appropriately redacted if the investigative file is requested by the subject, consistent with FBI/OPR's current practice. For statements by non-FBI witnesses, investigators should have the discretion to utilize either a signed, sworn statement or a less formal internal memorandum, which does not require the interviewee to be sworn under oath or to review the memorandum (*e.g.*, an FBI-302).<sup>45</sup> All individuals giving a signed, sworn statement should be able to add excluded facts to their sworn statement before signing it.

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<sup>43</sup> The following highlights the procedural confusion that exists in a number of areas: currently, if the case is Delegated for Investigation Only (DIO) or a Non-Delegated Investigation (NDI), signed, sworn statements ("SSSs") are required for all FBI employees, both subjects and witnesses. See "Guidelines to Conducting OPR Investigations, Delegated Investigation/Adjudication, Delegated Investigation, Non-Delegated Investigation, Preliminary Inquiries" at 8, 14 (revised Sept. 10, 2002). In contrast to DIOs and NDIs, the most recent guidelines on conducting Delegated Investigation/Adjudication (DIA) matters indicate that the use of SSSs is *discretionary* in DIA matters. See "Guidelines for Conducting Delegated Investigation/Adjudication OPR Matters" at 2 (revised July 18, 2003). Although the 2003 guidelines indicate that SSSs are discretionary in all DIAs, two earlier OPR documents, which do not appear to have been superseded, require SSSs for Level Three and Four DIAs. See "Guidelines to Conducting OPR Investigations, Delegated Investigation/Adjudication, Delegated Investigation, Non-Delegated Investigation, Preliminary Inquiries" at 13-14 (revised Sept. 10, 2002); Electronic Communication from OPR, to All Divisions, entitled "Delegation of Disciplinary Action Authorities to EADs, ADICs, SACs and FBIHQ Division Heads" at 4 (July 18, 2002). Under these two older policies, FBI employees may avoid making a signed, sworn statement if the case is a DIA involving a Level One or Two offense and the subject submits a communication that resolves all pertinent issues and acknowledges responsibility for the offense. See "Guidelines to Conducting OPR Investigations, Delegated Investigation/Adjudication, Delegated Investigation, Non-Delegated Investigation, Preliminary Inquiries" at 13-14 (revised Sept. 10, 2002); Electronic Communication from OPR, to All Divisions, entitled "Delegation of Disciplinary Action Authorities to EADs, ADICs, SACs and FBIHQ Division Heads" at 4 (July 18, 2002).

<sup>44</sup> At this time, complainants are not uniformly asked to give signed, sworn statements.

<sup>45</sup> Current OPR policy does not permit the use of SSS for non-FBI employees. See "Guidelines for Conducting Delegated Investigation/Adjudication OPR Matters" at 2 (revised July 18, 2003); "Guidelines to Conducting OPR Investigations, Delegated Investigation/Adjudication, Delegated Investigation, Non-Delegated Investigation, Preliminary Inquiries" at 8 (revised Sept. 10, 2002).

- The practice of allowing subjects in certain DIA cases to submit a statement of admission instead of enduring a formal interview and giving a signed, sworn statement should be retained and broadened to include additional non-serious offenses.<sup>46</sup> The practice should be utilized as early as possible in the disciplinary process and be more widely publicized to the field. In addition, the FBI should clarify the advantages of the practice, which allows employees to acknowledge mistakes early in the OPR process, to accept an immediate punishment according to the guidelines, to avoid a lengthy investigation and adjudication, and to resolve the matter expeditiously.
- A number of people suggested that subjects should be able to refute allegations early in the process. We hesitate to recommend a strict policy on this issue because it could place undue pressure on a subject to come forward or risk a likely assumption that he/she is guilty. OPR's written notification to subjects of the nature of the allegation, while perfunctory, does include a statement that the subject can provide a written response.<sup>47</sup>

We do conclude that a subject should be allowed, if they so choose, to provide the names of witnesses, provide documentary evidence, and/or make a written statement early in an investigation if they wish to do so. This recommendation would help address the criticism, articulated by some interviewees, that key witnesses were not interviewed until late in the process or not at all.

- A number of interviewees recommended the tape-recording of all statements, whether of a subject, employee witness, or complainant, as back-up to the signed, sworn statement. Some interviewees expressed concern that because signed, sworn statements are drafted by investigators, they may be incomplete or overly critical of the subject. Moreover, facts not included in the statement because they appeared unimportant at the time may become more relevant, especially if a lack of candor issue arises. A record of the interview

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<sup>46</sup> See discussion, *supra* note 43.

<sup>47</sup> The subject receives three OPR forms when he signs the OPR Notification Form. One of these forms, OPR-1, is entitled, "The FBI's Disciplinary Process." A portion of that document states, "You are directed to identify, during your interview or as soon as possible thereafter, any testimony, documents or other evidence which you believe are exculpatory or favorable, so OPR can conduct appropriate investigation. Pertinent written documentation or other related material presented by you or your attorney will be made a part of the OPR file, and will be considered before any administrative action is decided."

would ensure neutral accountability for both investigators and interviewees should disputes arise about the content of the interview, the manner in which it was conducted or the motivation for making a misconduct allegation to OPR.

- The Commission recommends that investigators be required to include all exculpatory evidence in the final investigative packet.
- Subjects should be able to view the investigative file, including their own statements again, before an adjudication has been made. (If a complainant requests anonymity, the file should be appropriately redacted, as mentioned previously.) This access should include the ability to review the referral statement that initiated the OPR investigation. Currently, only SES employees and subjects of proposed adverse actions are entitled to review the file prior to final adjudication. This opportunity should be expanded to all employees regardless of the level of discipline.
- Subjects must be informed of the allegations against them in a timely and comprehensive fashion. Some interviewees believe that timely notice has been the exception rather than the rule. Most importantly, subjects must be provided sufficient detail to understand the allegations against them and to defend themselves.
- Subjects receive notification after 180 days, and every thirty days thereafter, if an allegation remains under investigation,<sup>48</sup> but OPR has no policy of informing subjects of OPR's progress. It is the Commission's view that, given the lack of timeliness in many OPR matters, subjects should know after the first sixty days: (1) if the matter is being handled by DOJ/OIG or FBI/OPR, (2) whether the matter is in the investigation or adjudication phase, and (3) if the matter is in OPR's investigative phase, whether the complainant has been interviewed, and when OPR realistically expects to conclude the investigation.
- With regard to delegated investigations only (DIOs), the chain of command for reporting the investigator's findings should be directly to the new OPR Investigations Section in the Inspection Division at headquarters, not through the local office. (The input of the local

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<sup>48</sup> The initial 180-day time limit and the requirement that the subject be notified every thirty days comes from the BADGE settlement. See Settlement Agreement Amendment at 5, *Johnson v. Reno*, Civ. No. 93-0206 TFH (D.D.C. May 17, 2000).

office into mitigating and aggravating factors may be solicited by Adjudicators after they receive the final investigation package from the Inspection Division.) Delegated investigations and adjudications of minor offenses (DIAs) should continue to be handled almost entirely in the field, with limited headquarters involvement by supervisory adjudicators, as previously described.

Regardless of whether the delegated investigation is a DIO or DIA, consideration should be given to whether an investigator from the subject's same office should handle the OPR or whether an investigator from another office should assume the responsibility. One significant factor in this decision is the size of the field office or resident agency, with smaller offices less likely to have multiple chains of command to insulate and separate a field investigator from the subject.

- FBI's recusal rules should be modified to require *expressly* that a subject of an OPR must not, in any future capacity (*e.g.*, career board, inspections, performance evaluations, etc.), have input into evaluating his/her OPR investigator or adjudicator.<sup>49</sup> Serious consideration should be given to adding a senior OPR official to the career board (SES, Mid-Level and Field Career Boards) of any candidate who has OPR experience. The OPR representative could serve in either a voting or advisory capacity.<sup>50</sup> This addition would help to prevent any possible retaliation against an employee who participated in the FBI's disciplinary process and to ensure that these OPR positions generally become career enhancing rotations.

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<sup>49</sup> The FBI does not have a written a policy to protect OPR employees by limiting who may sit on their career boards, aside from a limited rule prohibiting nepotism. *See* FBI Manual of Administrative Operations and Procedures, Part 1, 1-15.4. In contrast, the FBI has drafted a recusal policy restricting who may participate in an OPR matter. This policy protecting OPR subjects lists several categories of individuals who "will recuse themselves" from participating in an OPR case. One category is individuals who have brought a complaint against the subject or who have been the target of a complaint brought by the subject. *See* "Disciplinary Policy Guidance, Recusal Policy in Disciplinary Matters" (listing multiple grounds for recusal). While the current policy is well reasoned and appropriate, additional restrictions could be added. For example, the FBI should consider an explicit prohibition on investigating or adjudicating personal friends or members of the same task force or team unit.

<sup>50</sup> The FBI permits certain nonvoting agents to attend career board meetings and represent the interests of its constituency. *See, e.g.*, FBI Manual of Administrative Operations and Procedures, Part 1, 3-3.4 (allowing for a nonvoting, minority representative in the absence of a minority representative on the voting board).

- As a corollary recommendation, we also suggest that candidates for promotion receive the identities of all career board members in advance (including any replacements who may be designated by the appointed member), which will enhance the ability of candidates with OPR experience to identify potential conflicts relating to discipline before career board decisions.<sup>51</sup>
- All communications about an OPR matter should be documented formally and thoroughly in the subject's file. Several interviewees, including an OPR adjudicator, suggested that this requirement would help alleviate any perception that OPR matters are influenced by off-the-record discussions, whether for benevolent or vindictive purposes.
- The FBI should publish a policy outlining the information that can be provided to an OPR subject, witness, and complainant, including an explanation of the Privacy Act, and what information they can share with others. Some interviewees expressed frustration that OPR investigators may have exaggerated privacy concerns by warning them not to discuss the OPR matter with *anyone* (even spouses). This rigid approach may unnecessarily alienate witnesses and complainants, as well as intimidate subjects into not defending themselves or attempting to obtain exculpatory materials. Currently, too much variability exists in the information and guidance provided to subjects, witnesses, and complainants, depending on the OPR employee who fields the question.
- A number of interviewees believed that investigators stray unnecessarily from the initial allegations of misconduct and expand investigations inappropriately. Some observers have analogized this perceived "witch hunt" mentality to criticism of the Independent Counsel statute, noting the need to address whether OPR's mandate to investigate should be confined to the initial misconduct complaint.

The Commission recognizes that while it certainly may be appropriate for an OPR investigation to exceed the parameters of the original allegations, particularly if additional serious misconduct is identified, a presumption should exist against such collateral reviews. Any charges added to the investigation should be approved by a

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<sup>51</sup> While the Commission has been informed that the career board process is transparent and the participants generally known by title, specific agent names and replacement members may not be conveyed to the candidate in advance. We are of the view that this procedural safeguard can be accomplished with modest imposition on career board participants.

supervisor not conducting the original investigation and promptly conveyed to the subject. We recommend that the FBI develop criteria to identify which subset of misconduct allegations are sufficiently serious to warrant an expansion of the initial investigation, an exercise dependant on our recommendation that the FBI first re-define its existing offenses and develop punishment guidelines.

- To supplement our recommendation that the FBI appoint a working group to establish streamlined offenses and punishment guidelines, two types of misconduct should be highlighted as independent grounds for discipline: (1) bringing false and malicious claims of misconduct against an FBI employee, and (2) retaliation, whether against a complainant for bringing a good faith complaint or against any FBI/OPR employee for performing OPR duties. While these categories of misconduct may be a basis for discipline under current OPR offense codes, we believe that they warrant further emphasis by the FBI given the sensitivity of these areas to multiple interviewees.

### **3. Adjudications**

Again, as discussed above, the adjudicative and investigative functions should be separated into different divisions. As with investigations, we submit that a single adjudication unit is appropriate and that three-year term limits should be mandatory. We have found that many people remain confused about the standards for adjudication, including whether the “bright line” test remains viable and how the Douglas Factors are to be applied, if at all. We also determined that there is significant variability in the experience and background of individual adjudicators. Accordingly, we make the following recommendations:

- Adjudications should be fully professionalized -- as with investigations, the Director must ensure the recruitment of highly competent, fully trained adjudicators who perceive the OPR position as a positive for career development.
- Enhanced recusal rules should be strictly and uniformly enforced to protect OPR adjudicators and investigators from any potential negative career impacts.
- As stated previously, we recommend that the Director appoint a working group of, at minimum, experienced FBI field investigators and supervisors to establish definitively the elements of OPR

offenses and to better delineate degrees of misconduct versus performance issues.

- As stated previously, the working group also should establish punishment guidelines, complete with aggravating and mitigating factors (as replacement for the Douglas Factors), to diminish the perception of vagueness that leads to disparity. Consideration should be given to having three levels of penalty for each offense, with the middle of the three levels the default unless aggravating or mitigating factors justify the higher or lower punishment. The vernacular of the “bright line” test should be eliminated, although the principle behind it -- termination for offenses relating to “lying, cheating, and stealing” -- should be reiterated. The existing precedent database can be utilized to assist in establishing the guidelines, but should be eliminated as a future reference source because of its enormous variability.
- As stated previously, the fifteen-day minimum for suspension for SES employees should be eliminated. The Commission recognizes that the FBI cannot implement this recommendation unilaterally and that Congressional action is required.
- To respond to the criticism that the proposing official (adjudicator) is too close to the deciding official, the deciding official should have the benefit not only of the proposed discipline but also the subject’s response when reaching a decision. Therefore, subjects of disciplinary actions, regardless of the severity (*e.g.*, including letters of censure), should have a right to review the investigative file before submitting a response to the deciding official.
- A subject’s case should be closed as soon as he/she is cleared of the allegations, regardless of whether there are other ongoing OPR investigations into the incident.
- A subject who is cleared should be immediately returned to his/her previous position with full privileges, including restoration of any lost salary and routine grade advancements. Such allegations should not be considered by the Director or career boards in promotion decisions.

#### 4. Appellate Process

We found the appellate process to be the least controversial aspect of the FBI's disciplinary process. The three most significant appellate issues we identified are: (1) the appropriate standard of review, (2) the absence of a non-SES member on the appellate board when a non-SES subject is involved, and (3) the question of whether a subject can or should be promoted while an OPR proceeding or appeal is pending. The following are our recommendations:

- We were told that in many instances a “clear error” or “substantial evidence” standard of review is, in fact, being used for OPR appeals, even though the standard of review is supposed to be *de novo*.<sup>52</sup> We believe that the standard of review should be clarified and that a substantial evidence standard is most appropriate. The *de novo* standard is impractical and unnecessary, if it ever really is applied. We wish to emphasize, however, that the heightened standard of review still will enable the appellate body to remedy errors in the investigation and adjudication phases, as well as permit the appellate body to continue to serve as an important check and balance on the entire OPR process.
- Non-SES subjects should have a voting, non-SES individual included on their three-member Disciplinary Review Board. (In these cases, the subject still would be permitted to choose one of the two SES members of the DRB, with the non-SES member chosen at random from a standing panel of candidates.) While some concerns have been raised that a non-SES member of the DRB will feel intimidated, on balance the inclusion of a non-SES representative would add to the perception that the system is not tilted in favor of SES subjects.

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<sup>52</sup> The “substantial evidence” standard of review requires the appellate body to affirm the lower body’s findings if supported by substantial evidence, defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” See *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986) (quoting *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 477 (1951)). Another articulation of the test explains substantial evidence is evidence furnishing “a substantial basis of fact from which the fact in issue can be reasonably inferred...[It is] more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established.” See *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 299-300 (1939).

- The DRB should be selected from a standing group of people with substantial institutional FBI knowledge who have a context of experience in which to make a decision.
- We found a significant split in opinion as to whether an OPR subject should be promoted during the pendency of a matter. The best way to minimize this issue is to ensure the timely resolution of all OPR matters and to delineate clearly between performance and serious misconduct matters. Recognizing the reality that it will not always be possible to quickly conclude a matter, we believe the need for some flexibility and discretion in promotional decisions rather than an absolute prohibition is preferable. However, the presumption against promotion during the pendency of an OPR makes sense absent due diligence that satisfies the career board that the OPR matter lacks merit or is peripheral to the criteria critical to promotion.
- The precedent database is deeply flawed and, prospectively, the FBI should develop and maintain a comprehensive, computerized database of decisions.
- Currently, a subject (1) cannot have a DRB review the case when appealing a “non-adverse action” (the appeal would be decided by only one official), (2) cannot appeal letters of censure or oral reprimands -- relatively minor discipline that nonetheless could negatively affect a subject’s career advancement, and (3) cannot access his/her file when appealing a non-adverse action. We are recommending the elimination of the “non-adverse action” distinction and, accordingly, anyone appealing suspension, *regardless of severity*, demotion or termination (1) should have the appeal decided by the DRB, and (2) should receive access to the file. We also recommend allowing subjects to appeal oral reprimands and letters of censure, with the appeal decided by one official in the Appellate Unit (*e.g.*, the Chairperson of the DRB) rather than by the entire DRB. Subjects appealing these less severe forms of discipline also should have access to the file.

We anticipate that the DRB’s workload will increase as a result of this recommendation, perhaps necessitating additional resources to ensure timeliness. While we are reluctant to expand the DRB’s mandate, we view the fairness and uniformity it would infuse into the disciplinary process as essential to OPR’s credibility.

- The DRB currently has the authority to increase punishment on appeal, although it rarely, if ever, does so. The Commission recommends the removal of this discretion to enhance discipline on appeal, replacing it with an advisory power to remand a matter back to Adjudications for further consideration of aggravating factors articulated by the DRB (or by the single appellate official). The adjudication official nonetheless may determine on remand that increased punishment is not warranted. If the adjudication official does impose greater discipline, the subject should be allowed to appeal that result to ensure that the level of increase is not excessive.
- Subjects or their attorneys should have the right to make a statement to the appellate official(s) and to answer questions, whether in-person or telephonically.
- Subjects should receive a brief written explanation of the appellate officials' findings and decision, a requirement under OPR's existing policies that may not always be followed in practice.<sup>53</sup> A subject currently may receive a boilerplate letter<sup>54</sup> describing the ultimate decision on appeal without any articulation of the specific reasons (e.g., findings) justifying that outcome. We do not recommend requiring the DRB or single appellate official to provide the subject with a lengthy recitation of their deliberations, but they should briefly include in their notification letter the basic factors supporting the decision. It appears that the Deputy Assistant Director of the Inspection Division, when serving as the appellate official in a case, has followed a more thorough and favored approach to notification letters. The Commission reviewed several letters from the DAD to subjects that included a discussion of the factors contributing to the appellate decision.<sup>55</sup>

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<sup>53</sup> See OPR Form OPR-1, entitled "The FBI's Disciplinary Process" at 3 (Jan. 13, 1999) (explaining that when the DRB reviews an individual's case, the individual "will be notified in writing of the DRB's findings and decision").

<sup>54</sup> For an example of the type of notification letter that a subject receives after the DRB's conclusion, see Sample Notification Letter from the Assistant Director, Inspection Division, to a Subject, regarding the Disciplinary Review Board's Consideration of the Subject's Appeal (Mar. 31, 2003), available in the Appendix.

<sup>55</sup> For an example of the type of notification letter that a subject receives from the DAD of Inspections, see Sample Notification Letter from the Deputy Assistant Director, Inspection Division, to a Subject, regarding the Deputy Assistant Director's Consideration of the Subject's Appeal (June 10, 2003), available in the Appendix.

- Post-appeal consideration of misconduct: the FBI's current practice in promotion decisions is to consider misconduct allegations and discipline within the past three years.<sup>56</sup> The Commission concurs that this limitations period is appropriate for employees subject to most forms of administrative discipline. However, we submit that when the Director and career board members make promotion decisions, they should be permitted to consider the most severe types of misconduct for a retrospective of longer than three years. Consistent with our broader recommendation that the FBI streamline offenses and better delineate degrees of misconduct versus performance issues, we recommend that this working group (1) identify the most serious subset of these new misconduct categories relevant to promotion decisions,<sup>57</sup> and (2) suggest an appropriate limitations period for the most serious offenses.

## **5. Communication and OPR Transparency**

Mindful of the need for privacy and confidentiality, the FBI's disciplinary process must become more transparent and understandable to the average field agent and support person. The perceived complexity and actual nuances in the current process are overwhelming.

Once the Director has determined which of our recommendations to adopt, OPR policy statements and the appropriate sections of the Manual of Investigations Operations and Guidelines ("MIOG") and Manual of Administrative Operations and Procedures ("MAOP") should be revised, republished to the field and communicated through a comprehensive program that includes field meetings and effective electronic communications. Case descriptions and updates should be summarized and communicated to the field routinely and no less than bi-annually. The FBI should provide subjects with more information on how the process works -- a road map of what to expect. A counselor who can explain the system would help ensure acceptance of the revised disciplinary process. A new, comprehensive collection of all guidelines, procedural rights and forms, process descriptions, tables, statistics, graphs, contact information if questions arise, and other pertinent information should be collected in one FBI disciplinary manual and provided to every FBI employee on a routine basis.

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<sup>56</sup> See, e.g., FBI Manual of Administrative Operations and Procedures, Part 1, 3-3.2.2.

<sup>57</sup> This subset of the newly-defined OPR offenses conceivably could overlap in total or in part with the second subset of offenses that we have recommended, *supra*, that the working group identify as sufficiently serious to overcome the presumption against expanding investigations beyond the original misconduct allegations.

## **6. Law Enforcement Ethics Unit & Training**

The Law Enforcement Ethics Unit (“LEEU”) of OPR, formed in 1996 as a stand-alone unit within the Training Division (“TD”), has become controversial to those who believe the FBI has abandoned LEEU’s intended mission. Our understanding is that LEEU’s original purpose was to furnish the ethics component of the FBI’s training curriculum at Quantico. We interviewed several current or former FBI officials from LEEU, and they expressed their perception and concern that the FBI is deemphasizing and marginalizing LEEU. We are unable either to endorse or criticize LEEU’s curriculum or format for general ethics training, but we do have a number of recommendations regarding LEEU that we believe would improve OPR.

The FBI’s recent re-engineering efforts have included the consolidation of most training into the TD. One question has been whether the LEEU also should be relocated from OPR and returned to its original location in the TD. The Commission has concluded that the LEEU should be moved to the TD, but for reasons that may not be immediately obvious.

The organizational location of LEEU in either OPR or the TD is not as significant to us as its mandate and impact on training. LEEU is physically housed at the FBI Academy in Quantico, Virginia, near the TD (also located at the Academy) but removed from OPR headquarters in Washington, D.C. Therefore, the LEEU would need to coordinate with one external unit (whether OPR or the TD) regardless of its organizational location within the other. It may be more efficient for LEEU to be part of the TD given their physical proximity, but the Commission does not consider the technical location of the LEEU the critical factor in moving it to the TD.

More importantly, the Commission views LEEU as ancillary to OPR’s core function of investigating and adjudicating allegations of serious misconduct. One justified criticism of OPR is that it has expanded beyond this exceptionally important but narrow mission, diluting its reputation and efficacy in the process.

It appears that the LEEU’s function of ethics training, while certainly important to reduce misconduct and thus related to OPR’s mandate, is more general in nature and not uniquely suited to being in OPR. One source knowledgeable about LEEU stated that prior to 2001, most of OPR’s employees had not even personally met an LEEU instructor.

Also, LEEU’s access to OPR files and incorporation of case results into training curriculum is not dependant on the LEEU’s current status within

OPR, nor, in our view, does its effectiveness in ethics training depend on its affiliation with OPR. LEEU plays no role in investigating cases or deciding punishment, and does not offer any training unique to OPR personnel.<sup>58</sup> Accordingly, the Commission concludes that the OPR designation should be reserved for disciplinary matters only, and that OPR's mission would be better defined if LEEU's expertise emanated from the Training Division.

This restructuring should not be interpreted as minimizing LEEU's importance. On the contrary, the Commission recommends expanding LEEU's mandate consistent with the following observations.

LEEU's curriculum may be more meaningful if supplemented with ethics modules that are incorporated into broader New Agent training classes. In addition to an independent philosophical program, certain academics recommend that ethics be incorporated as part of more practical courses such as those in the FBI's existing Quantico curriculum. LEEU may elect to continue offering certain stand-alone training courses, but we question, based partially on a recent study of the impact of a semester-long criminal justice ethics course on students' value orientation,<sup>59</sup> whether such training alone can be effective.

We recommend that the FBI, as part of its ongoing review of education and training curriculum, consider whether the mission of LEEU is better accomplished through the integration of ethics in core training courses. Our recommendation should not be mistaken for a suggestion that ethics should be anything but a major FBI priority. Particularly in light of the questions that have been raised in the OPR context, the FBI must place a renewed focus on the paramount importance of ethics and integrity above all else. Therefore, we recommend that the FBI consider expanding the mission of LEEU to include developing an ethical training component for all core competency instruction for New Agent Candidates and support employees.

We also believe that OPR investigators and adjudicators should receive more routine, structured training -- both on ethics and on the rudiments of

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<sup>58</sup> The LEEU is responsible for developing, implementing, coordinating, and managing the ethics and integrity initiatives for the entire FBI. These initiatives include providing instruction to New Agent Trainees, field Agents, FBI support employees, outside law enforcement officers enrolled in the National Academy, and other domestic and foreign law enforcement agencies.

<sup>59</sup> See Beth E. Bjerregaard & Vivian B. Lord, *Ethics Courses: Their Impact on the Values and Ethical Decisions of Criminal Justice Students*, 14:2 JOURNAL OF CRIMINAL JUSTICE EDUCATION at 191 (2003). Drawing lessons from the history of medical education, other observers have suggested that ethics modules are most successfully integrated into the existing medical curriculum.

conducting OPR matters appropriately. Some interviewees suggested that OPR personnel only receive on-the-job, informal training on OPR rules and procedures, a troubling practice given the potential impact of the OPR process on a subject's career. We recommend that all new OPR employees (including temporary AIIPs) receive such training before working on any OPR matters, and that existing OPR employees receive continuing education at least annually.

Because LEEU does not have the expertise to conduct OPR-specific training, an appropriate current or retired FBI employee with substantial OPR experience should be appointed to develop and implement this training protocol. The designee should be dedicated exclusively to this function, if necessary, with assistance from the Training Division. Given the Commission's recommendation that OPR employees have term limits and rotate, the need for this training may become even more pronounced and require the authorization of an additional OPR position.