

United States Senate
WASHINGTON, DC 20510

November 2, 2022

VIA ELECTRONIC TRANSMISSION

The Honorable Michael E. Horowitz
Inspector General
Department of Justice

Dear Inspector General Horowitz:

On October 5, 2022, I wrote to the Justice Department and FBI with respect to lawful, protected whistleblower disclosures provided to my office that included allegations and records showing hundreds of FBI employees retired or resigned because of sexual misconduct allegations against them and that they did so in order to avoid accountability. The allegations and records paint a disgraceful picture of abuse and misconduct within the FBI.¹ Simply put, such misconduct is beyond unacceptable and must be put to an end.

In my letter, I noted that after the *Associated Press* news article, *Under the Rug: Sexual Misconduct Shakes the FBI's Senior Ranks*, the Justice Department reviewed the FBI's disciplinary case database, Javelin.² That review produced a Justice Department document titled "Retirements and Resignations During Unwelcome Sexual Conduct Adjudications."³ The document noted that the Justice Department reviewed 8,686 summaries in Javelin and found that from 2004 to December 23, 2020, "665 FBI employees, including 45 [Senior Executive Service]-level employees have retired or resigned following an FBI or [Justice Department Office of Inspector General] investigation into alleged misconduct, but prior to [the Office of Professional Responsibility's] issuance of a final disciplinary letter."⁴ It's been alleged to my office that the data involved an element of sexual misconduct, which comports with the purpose of the Javelin review that was done because of the *Associated Press* article. That document is attached to this letter.

Importantly, the document notes, "[t]his dataset does not include retirements or resignations which occurred during an ongoing misconduct investigation or prior to the initiation of a formal investigation."⁵ In other words, it appears that the number of retirements and resignations could be much higher than 665 individuals. The document also notes that one of the cases referenced in the *Associated Press* article isn't referenced in the FBI's disciplinary case precedent, which indicates the Javelin database might have incomplete data.⁶

¹ Although the documents do not delineate between male and female employees who suffered under sexual misconduct, allegations provided to my office, as well as news reports cited in my October 5, 2022, letter make clear that female employees are the primary victims.

² Jim Mustian, *Under the Rug: Sexual Misconduct Shakes FBI's Senior Ranks*, Associated Press (Dec. 10, 2020) <https://apnews.com/article/fbi-sexual-misconduct-investigation-a0d33e4770acef8ff5f4a48f0267202c>.

³ Retirements and Resignations during Unwelcome Sexual Conduct Adjudications (December 23, 2020). Attachment.

⁴ *Id.*

⁵ *Id.*

⁶ According to the document, the Roger C. Stanton matter was not referenced in the disciplinary database.

The second document that I wrote about, “Inconsistent Adjudication of Non-Consensual Sexual Misconduct,” relates to Director Wray’s emailed directive on December 11, 2020, advising all employees about the FBI’s zero-policy stance on sexual harassment and sexual misconduct.⁷ That document notes the following concern, “[r]ecent sexual misconduct cases appear to show [the Office of Professional Responsibility’s] application of this directive has resulted in seemingly random penalties and disparate treatment, potentially compromising the consistency, fairness, and due process of the FBI’s disciplinary system.”⁸ In other words, the same misconduct can result in very different penalties with “lower-graded” employees receiving harsher penalties than senior employees.⁹ The document further notes that “[t]his inconsistency has compounded since Director Wray’s December 2020 email.”¹⁰ That document is also attached to this letter.

In response to media inquiries, the FBI “told [the] *Associated Press* it intended to respond to the oversight committee first” instead of directly addressing the data with the public.¹¹ To date, the Justice Department and FBI have failed to provide any response to my October 5, 2022, letter.

FBI employees should not have to suffer under daily abuse and misconduct by their colleagues and supervisors. Accordingly, I am requesting that you immediately open a review of the Justice Department’s and FBI’s management of sexual misconduct claims, including how many employees who separated from federal service before the resolution of an investigation received the required notice in their personnel file,¹² the apparent failure to ensure the Javelin database includes full and complete data, and the unequal application of disciplinary rules.

Sincerely,



Charles E. Grassley
Ranking Member
Committee on the Judiciary

cc:

The Honorable Richard Durbin
Chairman
Committee on the Judiciary

⁷ Inconsistent Adjudication of Non-Consensual Sexual Misconduct (January 6, 2022). Attachment.

⁸ *Id.*

⁹ *Id.*

¹⁰ The 2022 document notes that since December 2020, OPR has substantiated 12 cases related to sexual misconduct: 6 cases were adjudicated under Offense Code 5.20; all 6 employees ranged from GS-09 to GS-13, 1 GS-11 was a supervisor; 3 employees were dismissed, and 3 employees received suspensions between 14 and 30 days. Regarding the employee who received a 30-day suspension, “OPR initially imposed a 10-day suspension, which it inexplicably increased after being directed by the EAD, HRB to remove impermissible derogatory information.” The document notes that 6 cases were adjudicated under Offense Code 5.22; 5 employees ranged from GS-13 to GS-15, 1 employee was Senior Executive Service (4 employees were supervisors). All 6 employees received suspensions between 7 and 30 days; no employees were dismissed. One employee also violated Offense Code 5.21 and received a 10 day suspension that was reduced to 5 days on appeal.

¹¹ Eric Tucker and Jim Mustian, *Whistleblower: 665 left FBI over misconduct in two decades*, Associated Press (Oct. 6, 2022) <https://apnews.com/article/business-personnel-sexual-misconduct-chuck-grassley-merrick-garland-9ca9ea18036814bdf12e8c62a20e08d9>

¹² See 5 U.S.C. § 3322.

OFFICE OF DISCIPLINARY APPEALS



Retirements and Resignations during Unwelcome Sexual Conduct Adjudications

EXECUTIVE ASSISTANT DIRECTOR JEFFREY S. SALLET

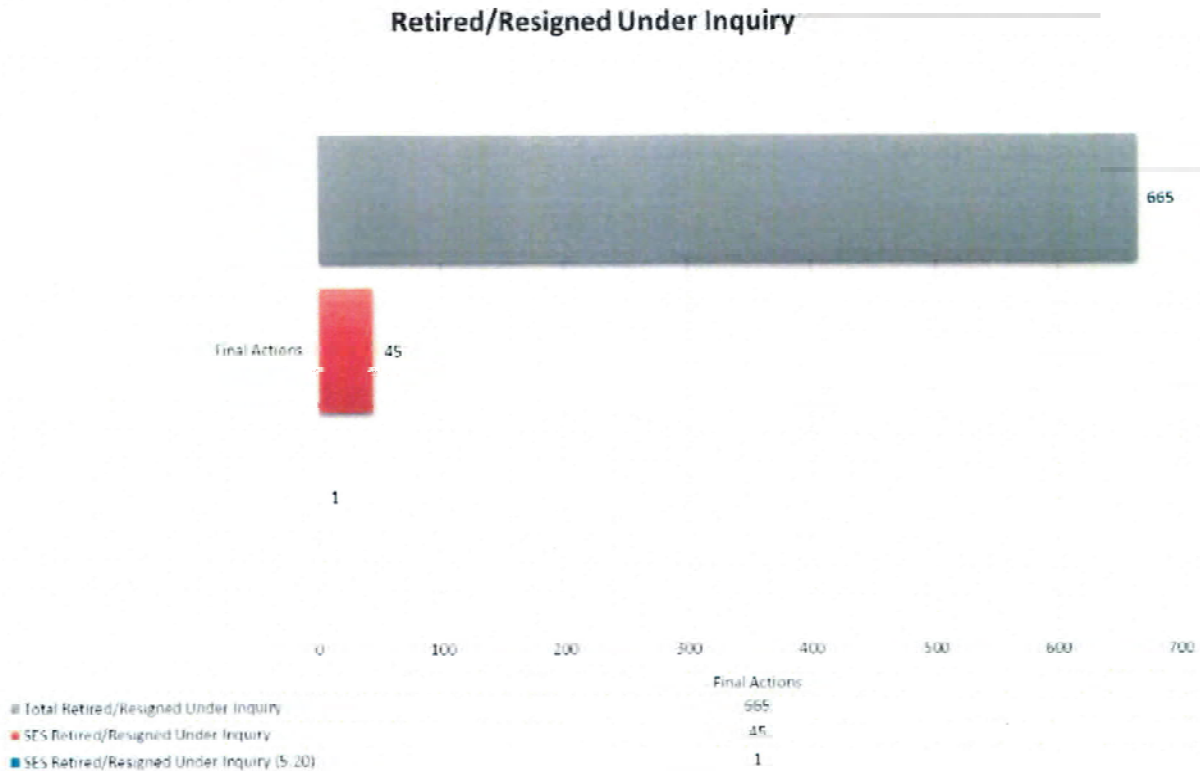
DATE: 23 DEC 2020

At the request of EAD Sallet, the Office of Disciplinary Appeals (ODA) reviewed the FBI's disciplinary case precedent database, Javelin, to observe patterns and offer recommendations in light of the recent Associated Press (AP) news article, "*'Under the rug: Sexual Misconduct shakes the FBI's senior ranks.'*" Javelin contains approximately sixteen years of FBI disciplinary case precedent, from the establishment of the FBI's *Offense Codes and Penalty Guidelines* in 2004 through the present.

- I. **According to internal and external reporting, there is a documented perception amongst the public and throughout the FBI workforce that senior FBI managers are uniquely positioned to "avoid" discipline through retirement or resignation.**
 - On December 10, 2020, the AP published a news article titled, "*'Under the rug: Sexual misconduct shakes the FBI's senior ranks,'*" stating:

"An [AP] investigation has identified at least six sexual misconduct allegations involving senior FBI officials over the past five years Each of the accused FBI officials appears to have avoided discipline, the AP found, and several were quietly transferred or retired, keeping their full pensions and benefits even when probes substantiated the sexual misconduct claims against them."
 - In the February 2004 *Study of the FBI's Office of Professional Responsibility [OPR]*, (commissioned by former FBI Director Robert S. Mueller, III), former AG Griffin B. Bell and former FBI Associate Director Dr. Lee Colwell stated:

"... 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."
- II. **A review of the FBI's disciplinary case precedent database shows, there is only one instance where a Senior Executive Service (SES) employee retired or resigned after the FBI or the Department of Justice, Office of the Inspector General (DOJ-OIG) completed an investigation into an alleged violation of Offense Code 5.20, *Unwelcome Sexual Conduct*, but before OPR issued a final decision letter.**



- A review of all 8,686 precedent summaries contained in the Javelin database shows that a total of 665 FBI employees, including 45 SES-level employees, have retired or resigned following an FBI or DOJ-OIG investigation into alleged misconduct, but prior to OPR's issuance of a final disciplinary letter.
- Of those 45 SES-level employees, there is only one instance where an SES-level employee retired or resigned after the FBI or DOJ-OIG completed an investigation into an alleged violation of Offense Code 5.20, *Unwelcome Sexual Conduct*, but before OPR issued a final decision letter, (former SAC James Hendricks).¹

¹ Former SAC James Hendricks was discussed in the referenced AP article concerning sexual misconduct by SES officials. The following information concerning his inquiry is derived from Javelin and HR Source:

James Hendricks (2020-0101): "SES employee: (1) inappropriately touched numerous female employees in a sexual manner and made inappropriate comments of a sexual nature to multiple employees (5.20); (2) engaged in an intimate relationship with a subordinate employee (5.10); (3) failed to report the development of an intimate relationship with a subordinate employee (5.7); and (4) lacked candor, while under oath, during this administrative inquiry (2.6). AFTER BEING PROPOSED FOR DISMISSAL, EMPLOYEE [RETIRED] PRIOR TO COMPLETION OF THIS ADMINISTRATIVE INQUIRY."

Procedural History of the Hendricks Case:

- 1/30/2020: Case opened;
- 2/26/2020: The Department of Justice, Office of the Inspector General (DOJ-OIG) took the investigation from the FBI's Inspection Division (INSD);
- 3/29/2020: Hendricks reassigned, yet retained SES status;

- This dataset does not include retirements or resignations which occurred during an on-going misconduct investigation² or prior to the initiation of a formal investigation.³

III. The FBI Director does not have the authority to impose disciplinary action on former employees.

- In accordance with the delegation of authority set forth in CFR § 0.138, “[t]he Director of the Federal Bureau of Investigation ... [is] ... authorized to exercise the power and authority vested in the Attorney General [AG] by law to take final action in matters pertaining to the employment ... of personnel in General Schedule grades GS-1 through GS-15” Further, pursuant to DOJ Order 1202, the Director exercises disciplinary authority over the FBI’s SES employees, other than “key officials.”⁴
- However, the Director’s authority to exercise disciplinary action through the imposition of adverse or non-adverse disciplinary sanctions does not extend to former employees.⁵

IV. ODA recommends the FBI consider taking the following actionable steps to ensure all allegations of unwanted sexual conduct are fully addressed in a timely manner, even in cases when the subject-employee may be positioned to retire or resign during a pending inquiry:

- 5/14/2020: OPR received the case file containing DOJ-OIG’s investigative findings;
- 5/24/2020: Hendricks retired (on his retirement eligibility date); and,
- 6/25/2020: OPR closed the file.

² INSD’s Internal Affairs Section (IAS) may be able to provide data concerning the number of retirements and resignations which occurred during an on-going misconduct investigation.

³ ODA surmises at least one of the cases referenced in the AP article may fall into this category. For example, although the AP article asserted Stanton “retired in late 2018 after the investigation determined he sexually harassed [a] woman and sought an improper relationship,” Stanton’s case is not referenced in the FBI’s disciplinary case precedent database, suggesting the FBI/DOJ-OIG did not launch a formal administrative inquiry prior to Stanton’s retirement. INSD may have access to additional information.

Procedural History of the Stanton Case:

- 10/1/2015: Stanton’s retirement eligibility date;
- 12/31/2018: Stanton retired;
- NOTE: There is no data concerning the initiation of an administrative inquiry; and,
- NOTE: Stanton received an SES bonus approximately one month before retiring and was still on a three-year service agreement (CSA) for relocation bonuses when he retired on 12/31/2018. HR Source reflects a remaining balance of approximately \$22,000.

⁴ “Key officials” excluded from this delegation of authority include the Deputy Director, the Associate Deputy Director, the Executive Assistant Directors, the General Counsel, and any other SES-employee who reports directly to the FBI Director.

⁵ Title 5 United States Code § 301 provides: “The head of an Executive department...may prescribe regulations for...the conduct of its employees[.]” As the AG has not been granted statutory authority to address conduct (outside a criminal prosecution) for those who are no longer DOJ employees, such authority is not delegable to the FBI Director.

- Fast-track all investigations and adjudications of unwanted sexual conduct in order to minimize the likelihood of subject-employees reaching retirement eligibility during a pending disciplinary inquiry;
- Conduct an independent audit of all unwanted sexual conduct complaints received by INSD vs. inquiries actually opened to demonstrate the FBI does not tolerate unwanted sexual conduct. If discrepancies are discovered, immediately open the unresolved matters and address the failure to initially open the complaints;
- Conduct an independent audit of all unwanted sexual conduct investigations opened by INSD to compare the timeliness of investigations in SES-subject vs. non-SES-subject cases;
- Emphasize the enforcement of policy prohibiting “ex parte” communications to alleviate the perception that OPR matters involving SES employees are influenced by off-the-record discussions;
- Increase training to ensure employees are aware of the FBI’s zero tolerance toward unwelcome sexual conduct, and understand their obligation to report any instances of alleged unwanted sexual conduct;
- Create a working-group to consider options for deterring unwanted sexual conduct amongst FBI senior management, including the imposition of a contractual obligation requiring all SES bonuses be repaid to the FBI should an SES employee voluntarily depart service during a pending disciplinary inquiry involving allegations of unwanted sexual conduct; and,
- Engage an outside auditor well-versed in sexual harassment cultural assessments to determine if the FBI can take additional actionable steps to model supportive practices of world-class institutions.

OFFICE OF DISCIPLINARY APPEALS



Inconsistent Adjudication of Non-Consensual Sexual Misconduct

ACTING EXECUTIVE ASSISTANT DIRECTOR JENNIFER L. MOORE

DATE: 6 JAN 2022

Predication:

On December 11, 2020, FBI Director Christopher A. Wray sent a Bureau-wide email iterating the FBI's stance on sexual harassment and sexual misconduct, advising all employees that the FBI "has zero tolerance for any form of sexual harassment or sexual misconduct" and "won't hesitate to impose severe sanctions where misconduct is substantiated, including revocation of security clearances and dismissal from duty." On March 4, 2021, Deputy Director Paul M. Abbate echoed the Director's remarks, warning all FBI employees: "Regardless of your rank or title, every one of us has the responsibility to treat each other with dignity, respect, and professionalism. We each have the duty to report misconduct and to look out for and protect one another. Harassment of any kind will not be tolerated."¹

Issue:

Recent sexual misconduct cases appear to show OPR's application of this directive has resulted in seemingly random penalties and disparate treatment, potentially compromising the consistency, fairness, and due process of the FBI's disciplinary system.

Discussion:

The FBI's stance regarding the appropriate penalty for sexual harassment and sexual misconduct has been continuously evolving since OPR first established the FBI Offense Codes and Penalty Guidelines in 2004. At that time, the standard penalty for Offense Code 5.20, *Sexual Misconduct – Non-consensual*, was a 7-day suspension. In 2012, OPR renamed the offense as *Sexual Harassment*, and doubled the standard penalty to a 14-day suspension. In 2017, with the implementation of the current iteration of Offense Code 5.20, *Unwelcome Sexual Conduct*, OPR again significantly increased the standard penalty to a 30-day suspension. While necessary to reflect the FBI's evolving position, these changes have caused systemic inconsistency in sanctions.

Further adding to the inconsistency, Offense Code definitions are often broad and overlapping, allowing OPR some latitude in selecting the offense under which it adjudicates a matter involving sexual misconduct. Specifically, OPR may elect to adjudicate sexual misconduct under Offense Code 5.22, *Unprofessional Conduct – On Duty*, which has maintained the same 7-day standard penalty across all iterations. Equally concerning, OPR may also adjudicate an employee's disciplinary matter under Offense Code 5.20, even if more appropriately adjudicated under 5.22, thus subjecting the employee to a higher penalty. This discretion may result in employees with nearly identical misconduct receiving substantially different penalties, without sufficient explanation for the discrepancy.

This inconsistency has compounded since Director Wray's December 2020 email. Since December 2020, OPR has substantiated 12 cases related to sexual misconduct. Of note:

- 6 cases were adjudicated under Offense Code 5.20
 - All 6 employees ranged from GS-09 to GS-13
 - 1 GS-11 Employee was a supervisor

¹ ODA notes that federal courts have held, "[a] zero-tolerance policy means just that: there is zero tolerance for the activity sought to be regulated" and where an "agency indicated an employee could receive a range of penalties" for the misconduct it is "inconsistent with a zero-tolerance policy." *Torres v. Department of Justice*, 343 Fed. Appx. 610, 614 (2009); See, *Tucker v. Veterans Admin.*, 10 MSPB 112, 11 M.S.P.R. 131, 133-34 (1982). These Director and Deputy Director communications notify the workforce that the FBI takes non-consensual sexual misconduct seriously, but do not institute an actual "zero-tolerance" policy, as they allow for penalties less than dismissal.

- 3 employees were dismissed, and 3 employees received suspensions between 14 and 30 days
 - Regarding the employee who received a 30-day suspension, OPR initially imposed a 10-day suspension, which it inexplicably increased after being directed by the EAD, HRB to remove impermissible derogatory information
- 6 cases were adjudicated under Offense Code 5.22²
 - 5 employees ranged from GS-13 to GS-15, 1 employee was Senior Executive Service (SES)
 - 4 employees were supervisors
 - All 6 employees received suspensions between 7 and 30 days; no employees were dismissed

Though the sample size during the relevant period is limited, OPR's penalties for analogous employee misconduct appear random, ranging from a 7-day suspension to dismissal, with little or no explanation. The only discernable pattern appears to be that higher-graded employees, especially supervisors, are more likely to have their sexual misconduct cases adjudicated under Offense Code 5.22, and therefore subjected to lesser penalties; whereas, lower-graded employees are seemingly more likely to be adjudicated under Offense Code 5.20, and have a statistically greater likelihood of being dismissed for their sexual misconduct. This may give the appearance the FBI is not holding its supervisors accountable for unwelcome sexual conduct.

Other Concerns:

The Director and Deputy Director statements may be insufficient notification to employees that they intend for increased standard penalties for non-consensual sexual misconduct. In Merit Systems Protection Board case *Parker v. Department of Navy*, 50 M.S.P.R. 343 (1991), the court held, "where an agency has consistently imposed a certain range of penalties for a certain type of offense, the agency may not start enforcing a more stringent penalty without giving its employees fair notice of its change in policy." *Id.* at 354-355. Although the standard penalty for Offense Code 5.20 has increased over time, the maximum penalty range has always included dismissal. These Director-level communications may not be viewed as "fair notice" where they state that severe sanctions, including dismissal, may be imposed but do not describe an actual increase in the standard penalty for substantiated 5.20 offenses.

Recommendations:

- 1) The FBI Offense Codes and Penalty Guidelines should be updated to comport with the statements made by Director Wray and Deputy Director Abbate, thereby serving as proper notification to all FBI employees. Specifically, the definition for Offense Code 5.20 should be modified to include the particular criteria OPR applies to determine what conduct is considered "unwelcome sexual conduct" instead of "unprofessional conduct" under a different offense. Moreover, the 5.20 Penalty Guidelines should be updated to reflect the FBI's heightened stance on sexual misconduct, including modification to the associated penalty ranges if deemed necessary. Adding detailed, enumerated mitigating and aggravating factors to the Penalty Guidelines may alleviate inconsistency, and may lessen the appearance of disparate treatment between supervisors and subordinates (i.e. "Supervisory employees will necessarily receive a penalty in the aggravated range"; "multiple instance of unwanted sexual touching may be grounds for dismissal").
- 2) Regardless of the charged offense, if an employee's misconduct involves an element of non-consensual sexual conduct, it should be considered as an aggravating factor.
- 3) The FBI should develop sexual harassment training and require all FBI employees to complete the course annually in Virtual Academy. This training should include a module on Offense Code 5.20, the associated penalties, and examples.

² One employee was also found to have violated Offense Code 5.21, *Unprofessional Conduct – Off Duty*, when he made inappropriate comments of a sexual nature to his fellow coworkers while off-duty at a conference and during a happy hour. OPR imposed a 10-day suspension for his 5.21 misconduct, which was reduced to a 5-day suspension on appeal.