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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

October 6, 2021

VIA ELECTRONIC TRANSMISSION

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice

Mr. Marvin Richardson
Acting Director
Bureau of Alcohol, Tobacco, Firearms and
Explosives

Dear Attorney General Garland and Acting Director Richardson:

I am writing regarding a serious situation that has come to my attention concerning how positions are classified on the General Schedule (GS) and how that might impact pay and benefits for certain employees at the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). Furthermore, according to information provided to my office, the issues I am raising in this letter were brought to the attention of ATF by a whistleblower who now believes they are being retaliated against. If this fact pattern is accurate it is absolutely unacceptable. I understand that the whistleblower's employment at ATF has been terminated and that their case is currently before the Merit Systems Protection Board.

This situation seems particularly egregious in that the whistleblower in question apparently came forward at ATF after attending a larger meeting where whistleblowing was praised and even featured a previous whistleblower. ATF, the Department of Justice (DOJ) and the whole government ought to celebrate whistleblowers, and not just seek to appear to celebrate whistleblowers, as the case appears in this instance. Without whistleblowers, Congress and managers in the Executive Branch of government, not to mention the public, would not find out about mismanagement and government waste of taxpayer dollars. As Attorney General and Acting Director of the ATF both of you should be appreciative of individuals who take personal risks to come forward and tell you things about your department and agency you may not already know. In that spirit, I hope you fully and completely respond to this letter.

In addition to expressing my concern over what I've been told about an alleged whistleblower reprisal, I am writing you to request information about a letter that was electronically signed by Office of Personnel Management (OPM) Associate Director Mark Lambert in November of 2020. For your reference that letter is enclosed. The purpose of that letter was to notify DOJ that "effective immediately, the position classification authority of Alcohol, Tobacco, Firearms,

and Explosives (ATF), a component of the Department of Justice (DOJ) is partially suspended.”¹ The letter goes on to note that a review of workforce data found “numerous positions misclassified [*sic*] to the General Schedule (GS) 1800 law enforcement occupational family.”² The letter notes that “DOJ will be notified when OPM has determined it is appropriate to restore ATF’s independent authority to classify positions to the 1800 job family.”³

The OPM letter notes the workers in those positions performed exclusively administrative duties and identifies that “approximately 94 ATF personnel”⁴ filled the misclassified positions. OPM’s findings, combined with other information I have recently become aware of, raise additional serious issues that merit greater scrutiny. The OPM letter to DOJ notes that “OPM will be referring ATF to the Office of Special Counsel (OSC) for investigation of prohibited personnel practices ATF may have committed in taking these actions.”⁵ I am also in possession of a letter from OSC to the whistleblower I mentioned earlier that notes that OSC has requested that the Attorney General conduct an investigation into two main issues: First, whether several ATF positions within Human Resources and Professional Development (HRPD) were misclassified in violation of federal law (an allegation that appears to be reflected in the enclosed OPM letter); and second, whether workers filling the misclassified positions were able to earn enhanced benefits to which they were not entitled, namely enhanced retirement eligibility and Law Enforcement Availability Pay (LEAP). According to information posted on OPM’s webpage, “Availability pay is a type of premium pay that is paid to Federal law enforcement officers (LEO’s) who are criminal investigators. Due to the nature of their work, criminal investigators are required to work, or be available to work, substantial amounts of ‘unscheduled duty.’”⁶

DOJ and ATF apparently took action based on the letter from OPM. I am also in possession of a memo from HRPD within ATF to certain staff informing them that “This memorandum provides notice that your current position could be converted out of the 1801 series.”⁷ The memo outlines three actions available to employees and asks for a response by May 24, 2021.

The information contained in the letter from OPM signed in November of 2020, along with the letter from OSC and the ATF memo raise many serious questions that I would appreciate your assistance in answering.

1. If you have it in your possession, please provide a copy of the human capital management evaluation of ATF’s performance management system conducted by OPM’s Agency Compliance and Evaluation, Central Group, that concluded on September 18, 2020.
2. Is the partial suspension of ATF’s position classification authority still in effect? If not, when did OPM determine it was appropriate to lift the suspension?

¹ OPM to ATF, November 2, 2020, Suspension of ATF Classification Authority

² Id.

³ Id.

⁴ Id.

⁵ Id.

⁶ <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/availability-pay/>.

⁷ May 15, 2021, DOJ ATF Memo to 1801s and 1811s.

3. Please describe in detail how the skills of workers in misclassified positions diverged from the skills necessary to fill these positions once properly classified.
 - a. Is the misclassification solely due to the nature of the positions the employees were filling?
 - b. Do the employees meet background or qualification requirements to fill LEO positions that earn LEAP?
 - c. What specific knowledge, skills, and abilities were the employees lacking?
 - d. What is your rationale for those employees filling positions within HRPD?
4. The OPM letter appears to identify 94 misclassified positions. Are these the total number of misclassified positions within all of ATF, or was the audit limited in scope?
5. In the past 10 years, has OPM suspended classification authority in any other instance for ATF or within any other component of DOJ regarding any type of position?
6. Has OSC contacted either DOJ or ATF to request an investigation into the issues described in their letter? How did DOJ respond to that request? What is the status of any investigation and what agency or personnel are conducting it?
7. In the letter from OSC to the whistleblower, OSC tells the whistleblower “we requested that the agency interview you at the beginning of the investigation.”⁸ Has the whistleblower been interviewed as part of any investigation request by OSC?
8. What is the total value of benefits such as LEAP and enhanced retirement eligibility that were inappropriately provided to misclassified employees? Please provide an itemization of your response broken down by individual position and type of benefit.
9. The letter from OSC to the whistleblower also notes that the whistleblower disclosed the allegation “that the agency is violating the specific legal and policy requirements for creditable LEAP hours and the annual certification requirement for payment of LEAP.”⁹ Please describe in detail the process by which employees in the misclassified positions were certified for LEAP and how it was determined they met the criteria for LEAP, if they received LEAP pay.
10. According to information posted on OPM’s webpage, “a criminal investigator is also entitled to availability pay if he or she holds a supervisory or administrative position that has been officially approved as a ‘secondary position’ under the LEO retirement provisions, even if the criminal investigator is not personally covered by those provisions.”¹⁰ Were the misclassified positions officially approved as secondary positions under LEO retirement provisions?

⁸ June 9, 2020, Notice of OSC Referral to Attorney General

⁹ Id.

¹⁰ <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/availability-pay/>.

11. ATF provided certain employees with a memo dated May 15, 2021, informing them that ATF was required by OPM to reassign those workers to properly classified positions. Attachments to that memo asked employees to rank their choices to remain in 1800 series or law-enforcement positions, be reassigned out of 1800 series positions, or to retire in their current positions pending OPM approval. That memo and attachments are enclosed.
- a. How many employees received this memo?
 - b. Did OPM grant approval for any misclassified workers to be reassigned to or allowed to retire in their current positions?
 - c. If OPM allowed any misclassified workers to retire in their positions, did they retire with pay and benefits reflecting an 1800 series worker or with the pay and benefits of the role they retired from, once properly classified?
 - d. Please provide the complete results of the surveys provided to 1801's and 1811's along with all actions taken by ATF as a result of the surveys.
12. The ATF memo is dated May 15, 2021, which is more than 6 months after November 2, 2020, which is the date the letter from OPM to ATF was electronically signed. What deliberations or actions did DOJ or ATF take in that 6 months before taking action regarding the misclassified positions?
13. Did the employees filling the misclassified positions have any expectation of rotating or returning to a properly classified 1800 series position, or of being available to perform any law-enforcement function while serving in the misclassified position?
14. How long have positions been misclassified by ATF as identified by OPM? Over the period of time positions have been misclassified, how many positions and staff have been impacted in total?

Clearly OPM believed this to be a serious matter given the referral to OSC and the fact that the agency chose to copy the DOJ Inspector General on the letter. The fact that DOJ and ATF took action in response to that letter further shows that DOJ agreed that a problem existed. Please provide answers to these questions and work with my staff to schedule a briefing on this matter by Wednesday, October 20, 2021.

Thank you for your attention to this important matter.

Sincerely,



Charles E. Grassley
Ranking Member

Enclosures: OPM to ATF, November 2, 2020, Suspension of ATF Classification Authority
June 9, 2020, Notice of OSC Referral to Attorney General
May 15, 2021, DOJ ATF Memo to 1801s and 1811s



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Merit System
Accountability and
Compliance

Mr. Monty Wilkinson
Deputy Assistant Attorney General
Human Resources and Administration
and Chief Human Capital Officer
U.S. Department of Justice
10th and Constitution Ave., NW
Main Justice, Room 1112
Washington, DC 20530

Dear Mr. Wilkinson:

This is to notify you that, effective immediately, the position classification authority of Alcohol, Tobacco, Firearms, and Explosives (ATF), a component of the Department of Justice (DOJ) is partially suspended. This action is taken in accordance with title 5, United States Code, section 5111. This decision is based on the results of a human capital management evaluation of ATF's performance management system conducted by OPM's Agency Compliance and Evaluation, Central Group, that concluded on September 18, 2020. During the review of workforce data and performance records, the evaluation team identified numerous positions missclassified to the General Schedule (GS) 1800 law enforcement occupational family. These individuals were assigned to and performing administrative duties, exclusively and, thus, their positions should have been classified to non-law enforcement occupational series, including human resources (GS 200), public affairs (GS 1000), and other administrative job families.

The evaluation team's fact-finding concluded that individuals in ATF with delegated authority to conduct and approve position classification activities on behalf of DOJ established these position descriptions to assign approximately 94 ATF personnel to GS 1800 positions. These actions were taken without regard for the 1800 classification standards for law enforcement officers, and without consideration of the qualifications requirements of the administrative positions. OPM will be referring ATF to the Office of Special Counsel (OSC) for investigation of prohibited personnel practices ATF may have committed in taking these actions.

In order to re-establish a merit-based position classification system within ATF, OPM is working with your staff to take appropriate required corrective actions and provide ongoing oversight to ATF. In addition, ATF's authority to classify any positions to the GS 1800 job family is

suspended, effective the date of this letter. ATF may continue to draft position descriptions and recommend classification designations, but must obtain prior OPM approval before any action is taken. The suspension of ATF's classification authority will be reassessed after a period of no less than six months from the date of this letter. DOJ will be notified when OPM has determined it is appropriate to restore ATF's independent authority to classify positions to the 1800 job family. Until then, and until further notice, all position classification requests must be submitted for approval to OPM, Employee Services, Talent Acquisition and Workforce Shaping, Attention: [REDACTED] Deputy Associate Director.

We appreciate DOJ's commitment to addressing these issues. Any questions related to this matter may be directed to [REDACTED] Principal Deputy Associate Director, Merit System Accountability and Compliance, at [REDACTED] or [REDACTED]

Sincerely,

MARK

LAMBERT

Digitally signed by
MARK LAMBERT
Date: 2020.11.02
17:05:50 -05'00'

Mark W. Lambert
Associate Director

Emailed to: [REDACTED]

No hardcopy to follow.

cc: Ms. Theresa Toll
Special Assistant to Deputy Assistant Attorney General
Human Resources and Administration
and Chief Human Capital Officer
U.S. Department of Justice
Justice Management Division
[REDACTED]

Mr. Shawn Flinn
Deputy Chief Human Capital Officer and
Human Resources Director
U.S. Department of Justice
Justice Management Division
[REDACTED]

Ms. Valarie Mulcahy
Deputy Human Resources Director
U.S. Department of Justice
Justice Management Division
[REDACTED]

Ms. Kamaron Kellum-Cloman
Assistant Director
Human Capital IT and Accountability
U.S. Department of Justice
Justice Management Division
[REDACTED]

Mr. Mike Sena
Assistant Director
Human Resources Policy and Advisory Services
U.S. Department of Justice
Justice Management Division
[REDACTED]

Mr. Arthur Gary
General Counsel
U.S. Department of Justice
Justice Management Division
[REDACTED]

Mr. Ralph G. Bittelari
Division Chief
Human Resources Operations Division
U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives
[REDACTED]

Ms. Kathryn A. Greene
Deputy Chief
Human Resources Operations Division
U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives
[REDACTED]

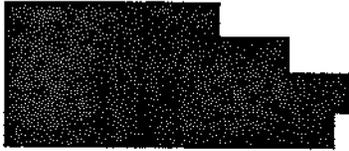
Mr. Michael E. Horowitz
Inspector General
U.S. Department of Justice
Office of the Inspector General
[REDACTED]



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-804-7122

June 9, 2020

VIA ELECTRONIC MAIL



Re: OSC File No. DI-19-4250

Dear 

The Office of Special Counsel (OSC) has completed its review of the information you submitted to the Retaliation and Disclosure Unit. You alleged that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), within the Department of Justice (DOJ), headquartered in Washington, D.C., engaged in conduct that may constitute violations of law, rule, or regulation; a gross waste of funds; and gross mismanagement. You consented to the disclosure of your name.

OSC is authorized to determine whether disclosures should be referred to the involved agency for investigation, or review, and a report; however, OSC does not have the authority to investigate disclosures. OSC may refer allegations of violations of law, rule or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. Disclosures referred to the agency for investigation and a report must include information sufficient for OSC to determine whether there is a substantial likelihood of wrongdoing.

You disclosed the following:

- ATF has misclassified a subset of the human resource (HR) positions within HRPD as supervisory or administrative criminal investigator positions in violation of laws on classification of positions;¹ and
- ATF is providing legally prescribed law-enforcement benefits, specifically enhanced retirement eligibility² and Law Enforcement Availability Pay (LEAP).³

¹ 5 U.S.C. §§ 5102(4), 5106(a), 5107; 5 C.F.R. § 300.103.

² 5 U.S.C. § 8401, 8412(d), 8415; 5 C.F.R. §§ 831.902, 842.802.

³ 5 U.S.C. § 5545a; 5 C.F.R. §§ 550.181 to 550.186.

to persons in non-primary or non-secondary law-enforcement positions. Further, there is evidence that the agency is violating the specific legal and policy requirements for creditable LEAP hours and the annual certification requirement for payment of LEAP.⁴

After reviewing the information you submitted, we have requested that the Attorney General conduct an investigation into these allegations and report back to OSC pursuant to 5 U.S.C. § 1213(c). We have provided the Attorney General 60 days to conduct the investigation and submit the report to OSC. However, you should be aware that these investigations usually take longer, and agencies frequently request and receive extensions of the due date. Should the DOJ request an extension in this case, we will advise you of the new due date for the report.

Because you consented to the disclosure of your name, we requested that the agency interview you at the beginning of the investigation. Although the referral for investigation generally describes your allegations, we rely on you, as the originator of the disclosure, to provide the agency additional information and an explanation of your allegations, thereby streamlining the investigation.

Unless the report is classified or otherwise not releasable by law, we will send you a copy after our review so that you may comment on the report, if you wish. When the matter is closed, the Special Counsel will transmit the report and your comments to the President and the appropriate congressional oversight committees. Copies of these documents will be maintained by OSC in a public file, which is posted on OSC's website at www.osc.gov.

We emphasize that, while OSC has found a substantial likelihood of wrongdoing based on the information you submitted in support of your allegations, our referral to the Attorney General for investigation is not a final determination that the allegations are substantiated. This remains an open matter under investigation until the agency's final report is forwarded to the President and Congress.

If you have questions or would like to discuss this matter, please contact me at ()

Sincerely,

⁴ ATF O 2700.1.



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Human Resources and Professional Development

www.atf.gov

May 15, 2021

MEMORANDUM TO: [REDACTED]

Training Manager (IOI), ATF National Academy
Human Resources and Professional Development

FROM: Human Resources and Professional Development

SUBJECT: Office of Personnel Management ATF Audit - 1801

As you know, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) underwent an Office of Personnel Management (OPM) human capital management evaluation in FY2020. One of the OPM findings was that ATF reassign 1801s and 1811s in Headquarters administrative positions, to properly classified positions.

This memorandum provides notice that your current position could be converted out of the 1801 series. As we work with OPM and the Department to address the audit, we would like to solicit your input on the best course of action. Please indicate your preference by ranking the three options on the attachment by Monday, May 24, 2021, and emailing the attachment to

[REDACTED] If you have any questions, please contact [REDACTED] Deputy Chief, Human Resources Operations Division at [REDACTED]

You are encouraged to speak with [REDACTED] Chief, Benefits and Workforce Flexibilities Branch, regarding any potential changes to your pay, retirement, and other benefits before you make your final decision. [REDACTED] can be reached at [REDACTED]

We understand the impact this change may have on you and/or your family members. Therefore, we are encouraging you to seek support through the Employee Assistance Program (EAP) at 800-327-2251. You and your household members can call the EAP Helpline 24/7 for immediate access to a Care Coordinator (professional counselor).

Attachment

1801 Attachment to OPM ATF Audit Letter

Last Name, First Name and Grade: _____

Rank the three options using "1" for first choice, "2" for second choice, and "3" for third choice.

1. I would like to remain in the 1801 series. By selecting this option, I understand that I could be reassigned to another 1801 position where I may retain my series, grade, and step, and that I may or may not remain in the National Capital Region.

Rank: _____

My preference is to be reassigned to the below positions and/or locations. My reassignment preferences are listed below with "a" for first choice, "b" for second choice, and "c" for third choice. I understand that ATF cannot guarantee that I will be reassigned to one of the below positions and/or locations.

a. _____

b. _____

c. _____

2. I would like to be reassigned out of the 1801 series. I understand that this would be contingent upon a determination by HRPD that I qualify for my current position should it be reclassified in a different series. I understand that if I do not qualify for my current position, I will be reassigned to another 1801 position, where I may retain my series, grade, and step, and that I may or may not remain in the National Capital Region.

Rank: _____

3. I will retire on the following date: _____. I am requesting to remain in my current position until my retirement date. I understand that my request to remain in my current position until retirement is contingent upon OPM authorizing ATF to allow employees to remain in their current positions until they retire.

Rank: _____

Digital Signature: _____

1811 Attachment to OPM ATF Audit Letter

Last Name, First Name and Grade: _____

Rank the three options using "1" for first choice, "2" for second choice, and "3" for third choice.

1. I would like to remain in the 1811 series. By selecting this option, I understand that I could be reassigned to another 1811 position where I may retain my series, grade, and step, and that I may or may not remain in the National Capital Region.

Rank: _____

My preference is to be reassigned to the below positions and/or locations, listed in order of preference with "a" for first choice, "b" for second choice, and "c" for third choice. I understand that ATF cannot guarantee that I will be reassigned to one of the below positions and/or locations.

a. _____

b. _____

c. _____

2. I would like to be reassigned out of the 1811 series. I understand that this would be contingent upon a determination by HRPD that I qualify for my current position should it be reclassified in a different series. I understand that if I do not qualify for my current position, I will be reassigned to another 1811 position, where I may retain my series, grade, and step, and that I may or may not remain in the National Capital Region.

Rank: _____

3. I will retire on the following date: _____. I am requesting to remain in my current position until my retirement date. I understand that my request to remain in my current position until retirement is contingent upon OPM authorizing ATF to allow employees to remain in their current positions until they retire.

Rank: _____

Digital Signature: _____