

A Review of Allegations of a Continuing Double Standard of Discipline at the FBI



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I. INTRODUCTION

In November 2002, the Office of the Inspector General (OIG) released a report entitled, "A Review of Allegations of a Double Standard of Discipline at the FBI," which reviewed complaints from Federal Bureau of Investigation (FBI) employees alleging that the FBI's system of discipline was unfair because senior managers were treated more leniently than rank and file employees. One of the employees who made such allegations was John Roberts, a Unit Chief in the FBI Office of Professional Responsibility (OPR).

Our report concluded that there was insufficient evidence to conclusively establish that the FBI systemically favors senior managers in the disciplinary process. Our finding was based in part on the low number of cases involving senior managers and the difficulty in comparing individual cases. We concluded, however, that the FBI suffered from a strong, and not unreasonable, perception among employees that a double standard of discipline exists within the FBI. That perception was fostered by the discipline imposed in several highly publicized cases – particularly the Ruby Ridge case and the Potts retirement party case. In those cases, we found that high-level FBI officials received unduly lenient treatment. In addition, we found that the perception of a double standard was fostered, in large part, by the existence of a dual system of discipline that was not abolished until August 2000. We concluded that the changes made in August 2000 would help to address the perception of a double standard. In our report, we made eleven recommendations that we believed would further assist the FBI in moving towards a fairer and more consistent disciplinary system.

Just prior to the release of our report, on October 27, 2002, John Roberts appeared on the television program *60 Minutes* and made statements critical of the FBI's investigation and adjudication of employee misconduct, suggesting that there was a continuing double standard of discipline in the FBI. (A transcript of the *60 Minutes* broadcast is Attachment 1 to this report.) The following is a portion of the transcript of the *60 Minutes* interview of Roberts by Ed Bradley:

BRADLEY: Special Agent John Roberts, a chief of the FBI's Internal Affairs Department, agrees. And while he is not permitted to discuss the Sibel Edmonds case, for the last 10 years, he has been investigating misconduct by FBI employees and says he is outraged by how little is ever done about it.

ROBERTS: I don't know of another person in the FBI who has done the internal investigations that I have and has seen what I have and that knows what has occurred **and what has been glossed over and what has, frankly, just disappeared, just vaporized, and no one disciplined for it.** (Emphasis added).

BRADLEY: Despite a pledge from FBI Director Robert Mueller to overhaul the culture of the FBI in light of 9/11, and encourage bureau employees to come forward to report wrongdoing, Roberts says that in the rare instances when employees are disciplined, it's usually low-level employees like Sibel Edmonds who get punished and not their bosses.

ROBERTS: I think the double standard of discipline will continue no matter who comes in, no matter who tries to change. You - - you have a certain - - certain group that - - that will continue to protect itself. That's just how it is.

BRADLEY: No matter what happens?

ROBERTS: I would say no matter what happens.

BRADLEY: Have you found cases since 9/11 where people were involved in misconduct and were not, let alone reprimanded, but were even promoted?

ROBERTS: Oh, yes, absolutely.

BRADLEY: That's astonishing.

ROBERTS: Why?

BRADLEY: Because you - - you would think that after 9/11, that's a big slap on the face. 'Hello! This is a wake up call here.'

ROBERTS: Depends on who you are. If you're in the senior executive level, it may not hurt you. You will be promoted.

The FBI referred Roberts' allegations in the *60 Minutes* broadcast above to the OIG, and we agreed to investigate the matter.

II. OIG INVESTIGATION

At the outset of our investigation, we asked Roberts to identify the cases he was referring to in his *60 Minutes* interview. Roberts told us that his statement about cases being "glossed over and what has, frankly, just disappeared, just vaporized, and no one disciplined for it" referred to the Ruby Ridge investigation and the investigation of voucher fraud by senior executives related to a retirement party for former FBI Deputy Director Larry Potts. He stated that he was not referring to actual investigations or cases disappearing,

but was speaking of the adjudication phases of those cases. For example, Roberts said that in the Potts retirement party investigation supervisors committed voucher fraud, were investigated for voucher fraud, but then were found in the adjudication stage to have committed lesser offenses. We thoroughly reviewed the outcomes of both the Ruby Ridge and Potts retirement party cases in our November 2002 Double Standard Report, and in that report concluded that there were significant problems in the way the discipline in those cases was handled.¹

With respect to his allegation that the double standard of discipline persists, Roberts cited several cases to us. He alleged that some demonstrate a disparate treatment of Senior Executive Service (SES) and non-SES employees, and that others were inappropriately decided. He also cited several cases in which senior-level employees were promoted while under investigation or shortly after disciplinary action was taken. He asserted that lower-level employees are usually passed over for promotion under such circumstances and that the differing treatment is unfair.

We obtained and reviewed FBI documents relating to the cases that Roberts alleged were evidence of a continuing double standard and documents regarding other cases that were brought to our attention during the course of the investigation. We also interviewed FBI officials involved in the disciplinary system, including FBI Director Robert Mueller, FBI Deputy Director (DD) Bruce Gebhardt, and several members of FBI OPR, including former OPR Assistant Director (AD) Robert Jordan, an OPR Adjudication Unit Chief, an OPR Investigative Unit Chief, and OPR investigators.

This report describes the results of our investigation. After a brief discussion of the FBI disciplinary process, we evaluate the cases that were raised by Roberts and others as examples of inconsistent disciplinary action for SES employees and non-SES employees. We also review two cases that Roberts has alleged were decided inappropriately. In addition, we review the promotions cases raised by Roberts.²

¹ Roberts also asserted that the letter of censure issued to former FBI Assistant Director Van Harp as a result of the Potts retirement party case and the harsher disciplinary decisions in two subsequent matters involving agents who provided false information in FBI 302s reveals an ongoing double standard of discipline. We reviewed the Harp case in our November 2002 Double Standard Report and concluded that Harp did receive unduly lenient treatment. In this investigation, we reviewed the two subsequent cases Roberts offered for comparison and concluded that the discipline imposed in those cases was not inappropriate, either on the facts of those cases or when compared to similar cases in the OPR precedent database. We do not believe that the fact that the Harp case was improperly, and perhaps unfairly, decided should be used as an argument to mitigate the discipline in these two cases.

(continued)

III. THE FBI DISCIPLINARY PROCESS

In July 2001, the Attorney General expanded the jurisdiction of the OIG to allow it to investigate misconduct throughout the Department of Justice, including the FBI. As a result, the OIG reviews all allegations of misconduct in the FBI and determines which ones it will investigate and which ones FBI OPR should investigate. Normally, the OIG investigates allegations of misconduct against high-level FBI officials, allegations that would likely result in criminal prosecution if proved, and allegations that present the FBI with a conflict of interest or that the OIG believes should be investigated by an entity outside the FBI.

FBI OPR is responsible for investigating all other allegations of misconduct against FBI employees. OPR is comprised of seven units: two Internal Investigative Units, two Adjudication Units, one Administrative Unit, one intake unit known as the Initial Processing Office and one Law Enforcement Ethics Unit (LEEU). The Investigative Units review and investigate allegations of misconduct and send the results of their investigations to one of the two Adjudication Units. The Adjudication Units evaluate the evidence and either recommend or decide upon the disciplinary action.

In cases involving SES employees or any employee where the proposed discipline is a 15-day suspension or more, the Adjudication Unit Chief makes disciplinary recommendations to the DAD and AD of OPR. The AD reviews the recommendation and determines the proper punishment. In cases involving employees at level GS-15 or below, the Adjudicative Unit Chief may impose non-adverse disciplinary action (sanctions of 14-day suspensions or less) without approval by the AD or DAD, but that Unit Chief is required to consult with the other Adjudicative Unit Chief in reaching the disciplinary decision.³

All disciplinary matters involving a suspension or firing can be appealed to the Disciplinary Review Board (DRB). The DRB is composed of three SES members: the AD of the Inspections Division, who serves as the chair of the board; one member chosen by the appellant; and one member chosen at random from a list of SES members. Although there are no appeals beyond the DRB, the Director retains discretionary power to change disciplinary actions

² In this report, we do not include the names of the persons who were the subjects of the disciplinary cases because of their privacy interests. We have provided a full report to the FBI with the names of the subjects included.

³ The disciplinary process for some minor infractions, like loss of credentials and misuse of a Bureau car, has been delegated by OPR to the field offices.

concerning all employees except those senior executives whose discipline, by regulation, must be approved by the Deputy Attorney General.

IV. INVESTIGATIVE FINDINGS

A. Inappropriate Comments Cases

Two of the OPR cases Roberts raised as evidence of an ongoing double standard of discipline involve similar conduct by an FBI Special Agent in Charge (SAC 1) and a Special Agent (SA 1). SAC 1 and SA 1 were both charged with making inappropriate comments. On June 14, 2002, SAC 1 received non-disciplinary counseling. On September 24, 2002, SA 1 received a letter of censure. We reviewed these two cases to see whether the outcomes provided evidence of a double standard.

Roberts also raised a third case in which another SAC (SAC 2) received a letter of censure for inappropriate comments. Roberts' concern in this case was that the investigators did not adequately address the issue of SAC 2's candor during the interview. We reviewed the investigation in that case as well.

1. SAC 1

In the first case, SAC 1 made several comments in public settings that were referred for investigation to OPR. He made the first comment at a luncheon held for a retiring special agent. In a letter to OPR responding to the allegations, SAC 1 said that at the function he told a joke about golf because the retiring agent was an avid golfer. SAC 1 reported that in the joke he described a golfer who had a quick lunch during his golf game:

When it came time to pay, the golfer put his hand into his pocket and pulled out only golf tees. He had left his money at the club house. The [waitress], being a country girl... asked what the tees were for. The golfer responded, "They are to hold my balls while I'm driving." The [waitress] replied, "Gosh, you rich guys have everything."

SAC 1 added that the joke received significant laughter and no one in attendance at the luncheon told him that the joke was inappropriate.

We reviewed the videotape of the retirement luncheon. SAC 1 first did a skit in which he played "The Amazing Carnac," a fortuneteller who foresaw the punch lines to jokes about the special agent and the field office. He then told several jokes about the special agent, including the following, which are paraphrased:

- I attribute (the special agent's) greatness to 3 things: a great wife, a great family, and industrial strength ripple.
- I remember (the special agent) was asked what special interest groups were and he responded, "People with 6% mortgages."
- (The special agent's) definition of entrapment is when your wife brings you a choice of two magazines to read – Family Circle and Playboy. That's entrapment.

About halfway through the videotape, the video portion was lost and only audio remained. SAC 1 stated that he was going to conclude the "humorous portion" of his speech with a joke about golf. He added: "Or at least I think it's humorous" and commented that his wife would not attend such functions because she did not appreciate his humor. SAC 1 then told the joke about the golf tees.

The second incident occurred at a "Chili Cook-Off" held by the FBI in FBI office space at lunchtime. As entertainment for the event, SAC 1 and three other employees appeared dressed in drag in a parody of the musical group Spice Girls. In the skit, each "Spice Girl" was introduced and explained the source of her name. According to the OPR adjudication memorandum, each answer was "based on sex in some degree."⁴ SAC 1 was asked during the skit what made him qualified to be a Spice Girl and he responded that he was qualified because he could "suck the chrome off a bumper hitch." The audience at the cook-off included both FBI employees and some non-FBI employees, including two federal judges.

We reviewed the video of the Chili Cook-Off. During the cook-off, four men came into the room dressed in drag. The audience reacted with much laughter. The four were introduced as the Spice Girls. SAC 1 had on a blond wig and was dressed in a gold lamé top. The master of ceremonies (MC) asked each man his name and what qualified him to be a Spice Girl. The first man stated that his name was Jalapeno Spice and that taking a bite of him would blow your head off. The MC made a joke about him needing to wax more. The second man stated that his name was Hot Stuff. His reason for being a Spice Girl was inaudible. He pushed his artificial breasts up at one point and the MC commented that they could be used as flotation devices. The third man said his name was Chili Pepper and that he was "touring South of the Border, if you know what I mean," when he was discovered. The MC asked if he had previously worked with livestock and he responded: "You know who I would like to ride?" Finally, SAC 1 said that his name was Salsa and he was asked if he was related to the Vikings. He responded: "I like Vikings...." He was asked

⁴ SAC 1 was the only participant in the skit who was referred to OPR for investigation.

what qualified him to be a Spice Girl and he responded: "Because I can suck the chrome off a bumper hitch." The MC stated: "No one leaves here until I get everyone's name."

The four men then started to dance and lip-sync to a song that was inaudible on the videotape. The dance included shimmying and hip shaking. During the dance, someone from the audience stuffed money into the second man's top. The show concluded when the music stopped and SAC 1 took off his wig. He stated that his wife had retained an attorney. He then took a more serious tone and thanked the people who had arranged the event.

SAC 1 admitted in his letter to OPR that he said that he was qualified to be a Spice Girl because he could "suck the chrome off a bumper hitch," but stated that the comment was not intended to refer to oral sex but to kissing. He stated that the comment had received significant laughter and that anyone who thought it referred to oral sex had his mind "in the gutter." According to SAC 1, the two federal judges who were present did not tell him that they were offended and "personally expressed their delight with the event and requested to be included at the next Chili Cook-Off."

In a third incident, SAC 1 spoke during a briefing regarding a large drug case. Several law enforcement agencies, including local sheriffs and police, attended the briefing. According to witnesses, SAC 1 made a comment about people sharing rooms because of budget limitations and stated that the FBI was actually "paying people to sleep together." Witnesses reported that he also stated, "You're in [a particular geographic region] now, and a lot of the sheriffs can't even read."

The final incident occurred when SAC 1 spoke at a retirement luncheon for an agent. During his speech, SAC 1 made two attempts at humor, both of which had sexual content. SAC 1 recounted the first joke in his letter to OPR. He stated that he was trying to make a joke about the retiring agent's strong Christian ethics. He stated that he joked that the retiring agent had talked to a 90-year-old man who was entering his church on a Sunday just as the agent and the congregation were leaving Sunday services. The agent asked if he could help the older man. SAC 1 wrote:

The man replied that en route to his summer cottage, he had stopped two hitchhikers. The hitchhikers were 23 year old, good looking, women. The 90-year-old man related that one thing led to another and he ended up spending two days with these women engaged in a sexual orgy. [The agent] asked if the man was sorry for his sins and was now at church to confess. The man replied, "No, I don't even believe in God." [The agent] asked, "Why are you telling me?" The man replied, "I'm telling any one who will listen."

During his luncheon remarks, SAC 1 also stated that the agent was so strict as a father that when the Disney movie The Black Hole came out, the agent would not let his children see it because he thought it was a pornographic movie.

The OPR adjudication memorandum, dated June 12, 2002, stated that the audience apparently fell silent after the comments, but that the retiree and his family did not find the comments personally offensive. The Assistant Special Agent in Charge (ASAC) of SAC 1's field office told OPR that two people who were present at the retirement luncheon contacted him after the luncheon and told him that they were offended by the comments and that others who attended also had been offended. According to the ASAC, when he informed SAC 1 that people had been offended by his remarks, SAC 1 was shocked. SAC 1 then circulated an e-mail apologizing for his comments and asserting that he would be more guarded in his comments in the future. The adjudication memorandum stated that the retiree had told OPR that he found the administrative inquiry to be "petty" and refused to provide a copy of the videotape of the luncheon.

A Unit Chief of one of OPR's Adjudication Units wrote the OPR adjudication memorandum. In the memorandum, the Unit Chief summarized the case and recommended non-disciplinary counseling as punishment. The Unit Chief wrote that the FBI Manual of Administrative Operations and Procedures (MAOP) provided the appropriate disciplinary standard. He cited the sections which require employees to conduct themselves in a manner that creates and maintains respect for the Department of Justice, to avoid any activity or situation which could be misinterpreted or misunderstood to the detriment of the FBI, and to comport one's self in a way that will not discredit one's self or the Bureau.

Despite the evidence and admissions by SAC 1, the Unit Chief's adjudication memorandum concluded that the allegations that SAC 1 had made inappropriate comments at the two retirement functions and the Chili Cook-Off were not substantiated. The Unit Chief added, however, that while his comments did not warrant formal discipline, SAC 1 "did make incautious remarks susceptible to offensive interpretation." The memorandum therefore recommended that SAC 1 "be afforded non-disciplinary counseling to make every attempt to avoid making similar comments in the future which would reflect negatively upon him and, by extension, the FBI and its mission."

We interviewed the Unit Chief who wrote the OPR adjudication memorandum in SAC 1's case about his proposal to give SAC 1 non-disciplinary counseling. The Unit Chief told us that his finding that the allegation of inappropriate comments was unsubstantiated meant that he did not find that the comments themselves were inappropriate. In reaching this decision, the Unit Chief said that he looked at the totality of the circumstances, which is his normal practice in cases involving inappropriate behavior. In this

case, he said he considered the jokes SAC 1 made, the intent behind the jokes, the audience, and how the jokes were received.

The Unit Chief stated that in reaching his decision he considered only the two retirement luncheons and the Chili Cook-Off.⁵ The Unit Chief said that because one of the retirees had told OPR that the matter was petty and refused to provide the videotape of the retirement luncheon to OPR, the Unit Chief put that matter “on the backburner” and looked at the other two incidents.

In reviewing the other two incidents, the Unit Chief stated that, “on paper” the incidents “sounded really bad.” The Unit Chief said, however, that he viewed the videotapes of the incidents with other staff from his unit and that everyone agreed that the jokes did not merit discipline. The Unit Chief stated that some of the harshest critics in his office viewed the tapes and agreed that SAC 1’s behavior was not significant. One staff member who viewed the videotapes with the Unit Chief told us that he did not agree with the Unit Chief and that he told the Unit Chief that he thought that SAC 1’s comments were inappropriate. This staff member considered his position to be a difference of opinion with the Unit Chief, however, and did not think that the Unit Chief was necessarily incorrect in his assessment of the case.

The Unit Chief said he believed that it was significant that SAC 1’s comments were made in social situations. He said that the Chili Cook-Off was a lighthearted, voluntary event; and that the “roasts” of the retirees at the retirement luncheons were in keeping with the division’s past practices. The Unit Chief also said that he looked at each comment individually and found that none of them rose to the level of being “inappropriate.” He said the fact that SAC 1 made such comments on three different occasions did not change his opinion of whether any of the individual comments was inappropriate.

The Unit Chief said that John Roberts “lobbied” him on the SAC 1 case and argued that discipline should be imposed. The Unit Chief said that he and Roberts simply disagreed about the matter.

According to a handwritten note on the OPR adjudication memorandum, Deputy Director Gebhardt called SAC 1 on June 14, 2002, and counseled him

⁵ The Unit Chief told us that he did not consider the comments SAC 1 made at the briefing on the drug case because SAC 1 had not been given notice that he was under investigation for those comments. The Unit Chief stated that under FBI procedures, SAC 1 could not be punished unless he was given notice that he was under investigation for those comments. The Unit Chief stated that he could have given notice to SAC 1 and asked the investigative unit to look into those comments, but he did not think they rose to the level requiring an investigation. The Unit Chief also stated that when the investigative unit learned of the comments, it could have provided notice to SAC 1 and conducted an investigation, but chose not to do so.

about his comments. The note states that Gebhardt “advised him to stop” and to “ensure professional” behavior in the future.

Ten months later, on April 15, 2003, SAC 1 sat on a Career Board that promoted the Unit Chief to an ASAC position. The Unit Chief told the OIG that he did not know that SAC 1 was on his Career Board until we told him, and that at the time of the disciplinary decision in SAC 1’s case, he had not yet made up his mind that he was going to seek promotion. The Unit Chief said that he did not put his name on the list for promotion to an ASAC position until November 2002, 5 months after issuing his adjudication memorandum.

2. SA 1

In the second case referred to by Roberts as similar, SA 1 made an inappropriate remark during a presentation on evidence that he gave as part of a “Back to Basics” class. During that presentation, SA 1 stated: “Did you all hear what happened to Oprah coming back from [sic] Chicago from Paris? She got stopped at Customs and they lifted up her skirt and found forty pounds of crack.”

During the OPR inquiry, SA 1’s SAC provided OPR with a memorandum responding to OPR’s request for information relevant to the disciplinary decision. The SAC stated in the memorandum that SA 1’s telling of the “off-color” joke had not diminished management’s confidence in his ability to perform his assigned duties, that SA 1 had a good performance record, and that he had not been disciplined before. The SAC added that the matter was not known outside of the FBI and had not negatively impacted the reputation of the FBI. He also stated that the feelings of the office employees were mixed: many felt that the comment was inappropriate but did not rise to the level of an OPR inquiry, although one employee reported being “slightly offended.” The SAC also reported that SA 1 acknowledged that his comment was inappropriate and stated that he regretted making it. In his own defense, SA 1 raised the issue that the FBI has numerous training videos which contain off-color remarks by lecturers. The SAC concluded that he believed that SA 1 was “totally rehabilitated.”

On September 24, 2002, the adjudicator in SA 1’s case issued a letter of censure to SA 1. The letter stated that nearly half of the audience in the training class was female, and that the joke was inappropriate because of its “sexual coarseness and consequent and predictable capacity to appall others.” The letter also stated that “crude, sexual humor has no place in any Bureau activity.”

On October 17, 2002, John Roberts called the SA 1 and SAC 1 cases to OPR AD Robert Jordan’s attention. In a routing slip to Jordan accompanying the letter of censure in the SA 1 case, Roberts wrote: “Bob, I think we are

causing OPR unnecessary problems. If you check the [SAC 1] case you will find his actions more egregious than the attached SA's actions. [SAC 1] gets counseling and the SA gets a letter. It just does not make sense and we are leaving OPR open to criticism. We have to fix this. Your thoughts?"

Jordan did not take any action regarding the SAC 1 and SA 1 cases in response to Roberts' note. Jordan told the OIG that he recalled the routing slip Roberts sent him about the cases. Jordan said that by the time the routing slip was delivered, the SA 1 case had already been completed. He also stated that he believed SA 1's comments were more egregious than SAC 1's. He asserted that OPR adjudicates over 700 cases a year, and that fine differences in the facts of each case can sway the outcomes.

The Unit Chief who wrote the adjudication memorandum in SAC 1's case also told us that he believed SA 1's comments were more serious than SAC 1's. That Unit Chief said that he had discussed the SA 1 case prior to the final decision with the Adjudication Unit Chief who handled it. The Unit Chief in SAC 1's case told us that with regard to SA 1's case, he thought it was significant that SA 1 was acting as an instructor in an official training situation. He said he also believed that the joke was extremely offensive and racist, and that he believed that it was a slur against a prominent African American. He added that it also referred to the racial stereotype that African Americans are largely involved in the use of "crack" cocaine.

3. SAC 2

In a third case raised by Roberts, OPR investigated allegations of inappropriate comments by SAC 2. Several witnesses told OPR that SAC 2 had made insensitive and unprofessional comments during a SWAT operation in March 2000. Specifically, witnesses stated that SAC 2 made a comment about "eating some local pussy" in the context of an upcoming visit he was planning to an FBI Resident Agency (RA). SAC 2 admitted to OPR that he used the term "pussy," but described the location and context of his remark differently. SAC 2 said that he used the word "pussy" at a SWAT firearms session that he attended in the summer of 2000, after the RA visit, in the context of recounting a conversation he had with the Senior Resident Agent (SRA) at the RA. According to SAC 2, he said that he had just completed a successful trip to the RA and that the SRA had taken care of him by lining up liaison contacts. SAC 2 said that the SRA asked him "if there was anything else he could do for me and jokingly I replied Pussy."

Witnesses also told OPR that SAC 2 had made a sexual comment about a female support employee while doing sexually suggestive pushups during a training operation. SAC 2 initially denied that he ever commented about the female employee or made sexual movements while executing his pushups. He later clarified his statement to admit that he may have made a joke that

connected sex and pushups while he was executing pushups on another occasion. He also stated that he recalled saying that the female support employee was attractive, but that he did not make that statement in connection with any pushups.

OPR found that the evidence regarding these allegations demonstrated that “there was some precipitating acts of unprofessional and sexually suggestive conduct on [SAC 2’s] part which caused substantial comment and criticism among your subordinates.” In addition, based on the information provided by SAC 2, OPR found that he had utilized inappropriate language and acted in an unprofessional manner on two additional occasions. SAC 2 told OPR that he had commented on his secretary’s breasts, possibly referring to them as “tits,” to a fellow employee “in the context of remarking that she is an attractive woman for her age.” He also told OPR that he had told another secretary that his secretary would be shocked if they had sex in his office. SAC 2 stated that he realized that both comments were inappropriate and that he regretted them.

OPR concluded that SAC 2 had engaged in unprofessional conduct by using crude and sexually offensive language on several occasions and that this behavior was inconsistent with expectations of a manager in his position. The adjudication memorandum stated:

It is obvious that [SAC 2] has acted in an unprofessional manner on- and off-duty. A particular concern is his lack of self-control to behave in a manner befitting of an individual placed in an FBI executive position. However, based upon the precedent, [SAC 2’s] behavior does not rise to the level of a fifteen calendar day suspension, without pay.⁶ Therefore, it is recommended that [SAC 2] be issued a letter of censure and attend sensitivity training.

4. FBI Precedent Database

The FBI keeps a precedent database for disciplinary matters. This database provides a synopsis of the facts of each case and the disciplinary outcome in the case. The cases are organized by allegation. When we reviewed the database, it contained 161 cases involving general allegations of unprofessional conduct on the part of 184 employees, with penalties ranging from no action to dismissal. In the cases involving inappropriate comments, letters of censure were the most common penalty. For example, letters of censure were issued in the following matters:

⁶ Title 5 dictates that an agency may not take a suspension action of 14 calendar days or less against an SES employee. Thus, there were no disciplinary options available in the SAC 2 case greater than a letter of censure, but less than a 15-day suspension.

- an agent made a profane comment about a mayor to the mayor's aide;
- an agent made unflattering remarks on a bus about a racial group which were overheard by an agent of that racial group;
- a Supervisory Special Agent (SSA) made an inappropriate joke, which included a reference to pubic hair, at an in-service awards dinner;
- a support employee used profanity in the presence of other employees, causing a disruption in the office;
- a support employee used vulgar language in speaking to his supervisor;
- an agent contacted a co-worker and left an unprofessional and insensitive message when he learned that the co-worker was able to avoid an undesirable temporary duty assignment on the basis of a medical condition;
- an agent repeated to co-workers a private conversation he had with a co-worker regarding that co-worker's personal life and sexual orientation; and
- an agent made a comment to a female agent that he hoped she was not getting a "boob job" after she mentioned that she had minor surgery scheduled; the agent also searched through the personal items of another agent.

The database contained far fewer instances of counseling or oral reprimand for inappropriate comments. For example:

- Two support employees repeated a rumor about a fellow employee that the employee had slept with a local police officer on the first and second dates, had oral sex, and was "wild."
- A supervisory support employee lifted his shirt to allow exposure of his underclothes in an "ill-conceived attempt at levity toward a subordinate employee." There was no evidence that the action was sexually suggestive.
- An agent engaged in a conversation with a prisoner. Although it was found that the agent's comments were not meant to have been

racially insensitive, OPR found that the agent should have realized the risks inherent in extraneous conversation with a prisoner and avoided such contact.

We found suspensions in only a few such cases. For example:

- An ASAC was suspended for 14 days for using crude and sexist terms in the workplace, actions that were found to have undermined the office's command structure; and
- A support employee received a 3-day suspension for making 25 successive telephone calls to an employee and leaving messages that were replete with abusive and vulgar language.

5. OIG Analysis

a. The SAC 1 and SA 1 Cases

We found the differing outcomes in the SAC 1 and SA 1 cases to be of concern. We recognize that several factors make an exact comparison between the two difficult. First, there were different decision makers in the SA 1 and SAC 1 cases. In reviewing specific allegations of misconduct, an adjudicator necessarily will bring his or her own sensibilities and opinions to bear, and different decision makers may perceive mitigating circumstances differently. The precedent database is somewhat helpful to ensure that decisions are in keeping with other similar cases, but each case has its own mitigating and aggravating factors.⁷

Second, while the facts of both cases involved similar inappropriate behavior - jokes with crude sexual content - the circumstances were not identical. The Unit Chief who adjudicated SAC 1's case stated that he found it significant that SAC 1's behavior occurred in voluntary social situations. He argued that SAC 1 made his jokes during events in which he was expected to raise morale or honor retirees by making funny and perhaps sarcastic comments, while SA 1's statement was made during a mandatory all-office training course.

Third, the difference between the outcomes of the two cases (non-disciplinary counseling versus a letter of censure) is not great and neither outcome is inconsistent with the precedent database.

⁷ The precedent database is a rough guide at best. Most of the conduct in the inappropriate behavior cases in the database is described in conclusory terms, such as "crude," "vulgar," or "unprofessional."

Nevertheless, we believe that SAC 1's repeated instances of offensive comments weighed in favor of disciplinary action, especially given his leadership position in the FBI. We also find it difficult to reconcile the written admonition to SA 1 that "crude, sexual humor has no place in any Bureau activity," with the decision that SAC 1's comments – especially the crude oral sex joke he made in FBI offices in the presence of lower-level FBI employees and federal judges – were not inappropriate and did not merit discipline.

Finally, we also were troubled by SAC 1's participation in the Career Board that promoted the OPR Adjudication Unit Chief who handled his disciplinary case just 10 months after that Unit Chief recommended against discipline of SAC 1. We believe that the conflict of interest and appearance of impropriety inherent in allowing the subject of an OPR investigation to vote on the promotion of the OPR adjudicator who decided his case should have precluded SAC 1's participation in the Unit Chief's Career Board.

b. The SAC 2 Case and the Candor Issue

Roberts told us that he believes that OPR failed to address a "candor issue" in the SAC 2 case. As described above, the OPR report reflects that SAC 2 admitted using the term "pussy," although he described the context of his use of that term differently than did other witnesses. In addition, SAC 2 initially denied that he ever commented about a female support employee or made sexual movements while executing his pushups. He later clarified his statement to admit that he may have made a joke that connected sex and pushups while he was executing pushups. He also stated that he recalled saying that the female support employee in question was attractive, but that he did not make that statement in connection with any pushups.

OPR did not decide whether SAC 2 had been untruthful in his responses regarding those comments. The OPR adjudication memorandum stated that the witnesses to the pushups comment differed regarding the time frame and details of that incident. The memorandum stated that it was unnecessary to determine if SAC 2 had made the exact comments alleged because although the evidence was in conflict, it established that SAC 2 had acted in an unprofessional manner. The report stated that SAC 2 admitted to unprofessional conduct on two other occasions and concluded that his efforts to be "one of the boys" were common enough that he might not recall the details of each such event.

Roberts asserted that the adjudicator simply "sidestepped" the candor issue. We agree. Several witnesses unequivocally stated that SAC 2 made a comment about a specific female support employee while doing sexually suggestive pushups. SAC 2 ultimately denied using the support employee's name in connection with the pushups, but gave shifting explanations of the incident. Only one witness, who described himself as the person physically

closest to SAC 2 at the time of the alleged remark, stated that SAC 2 did not make the remark. Under these circumstances, we believe the adjudicator should have addressed the issue of whether SAC 2 lied to OPR investigators.

B. Candor Issues Cases

Two cases brought to our attention by other FBI employees during the course of this investigation also involve candor issues, one by a Deputy Assistant Director (DAD 1) and another by a Supervisory Special Agent (SSA 1). Both DAD 1 and SSA 1 were found, among other things, to have been less than candid during their OPR interviews. SSA 1 was dismissed from the FBI for his misconduct. OPR initially proposed that DAD 1 be dismissed, but changed the sanction to a suspension and reduction in grade.

1. SSA 1

OPR investigated an allegation that SSA 1 directed subordinates to enter false, misleading, or erroneous information in a report that was to be submitted to Congress. The specific information at issue was an explanation of why the FBI had failed to spend \$10 million appropriated to it by Congress to purchase equipment for state and local agencies. Two of SSA 1's subordinates alleged that he directed them to state that the money had not been spent because the states had failed to complete their law enforcement plans. In fact, the money had not been spent because FBI officials were unaware of the appropriation until the issue arose during the preparation of the report.

In a signed sworn statement, SSA 1 stated that he did not tell anyone to falsify a document. On June 20, 2001, SSA 1 submitted to a polygraph examination during which he was asked the following questions and gave the following answers:

QUESTION: Did you instruct [employee #1] or [employee #2] to falsify that report?

ANSWER: No

QUESTION: Did you know that linking the [FBI's] failure to spend the \$10 million to a lack of state plans would be false?

ANSWER: No

The polygraph examiner concluded that SSA 1 was deceptive on both of these questions. During the post-test interview, SSA 1 ultimately stated that he should have answered yes to the second question.

OPR found that SSA 1 directed his subordinates to incorporate false statements in a report to Congress and that he was not truthful in his signed sworn statement to OPR investigators. Citing FBI policy, including the Director's January 3, 1994, so-called "bright-line" memorandum giving employees notice that they could expect to be dismissed for lying under oath in an administrative inquiry, SSA 1 was dismissed from the FBI.

2. DAD 1

The subject matter of OPR's investigation of DAD 1 included allegations that he had sexual relationships with two subordinate employees, showed favoritism toward one of those employees, and had sexual contact with the other on government premises; that he contacted witnesses in an attempt to obstruct the OPR investigation; and that he acted improperly by allowing prostitutes to accompany him from a nightclub to his hotel during a training trip.

During the OPR investigation, DAD 1 made three signed sworn statements that formed the basis of a finding that he failed to be forthright with OPR investigators regarding the allegation that he had sex with one of his subordinates on government premises. In his first statement, dated October 22, 2001, DAD 1 stated that he had a personal relationship with a woman who was a police officer (PO) of another law enforcement agency, but over whom he had some supervisory responsibilities. In the second statement, dated November 30, 2001, DAD 1 stated that the relationship was physical, but denied that he had sexual encounters with her or anyone on government-owned premises. Finally, in his third statement on December 14, 2001, DAD 1 admitted having sexual encounters with the PO in office space that was at least partially funded by the government.

Based on the OPR investigation, on February 3, 2003, AD Jordan sent DAD 1 a letter proposing his dismissal from the FBI. The letter stated that the investigation had substantiated the following allegations:

- that DAD 1 had an inappropriate personal relationship with his Administrative Assistant (AA), and that he had exhibited favoritism toward the AA, and created the appearance of favoritism, by nominating her for cash awards;⁸

⁸ The OPR file reveals that the AA had been hired as DAD 1's Administrative Assistant in October 1995. She moved into the basement apartment of DAD 1's residence in January 1996. That prompted an OPR investigation, which was resolved without disciplinary action. DAD 1 and his wife divorced in 1999, the AA resigned her position in July 2000, and she and DAD 1 were married in June 2001. During the OPR investigation, DAD 1 admitted having a physical relationship with the AA, but stated that it began after he and his wife separated in the summer of 1999. Several witnesses, however, stated that the inappropriate relationship (continued)

- that DAD 1 was involved in an inappropriate personal relationship with the PO, and that he had engaged in inappropriate conduct on government-funded property by having sexual encounters with the PO in government-funded office space;
- that DAD 1 had contacted two witnesses during the OPR investigation, including the PO, in an attempt to obstruct the investigation;
- that DAD 1 had failed to be forthright and cooperative about his inappropriate conduct with the PO on government-funded premises; and
- that DAD 1 created the appearance of impropriety when he caused a prostitute to accompany him from a nightclub to his hotel in a police vehicle belonging to a foreign country.

DAD 1 responded to his proposed dismissal in writing and made an oral presentation to OPR in Jordan's office.⁹ Jordan, the Adjudication Unit Chief assigned to the case, and two members of that Unit Chief's Adjudication Unit attended the presentation, which was audiotaped. OPR conducted no additional investigation on the DAD 1 case after the presentation. After the presentation, Jordan reduced DAD 1's punishment from dismissal to a 45-day suspension without pay and a demotion to a grade GS-13 Special Agent.

In a letter to DAD 1 dated May 6, 2003, Jordan made the following changes to his previous findings. First, he found that although DAD 1 was involved in a personal relationship with the AA, "which created the appearance of impropriety," it did not result in acts of favoritism. Second, Jordan found that the allegations that DAD 1 contacted two witnesses in an attempt to obstruct an OPR investigation, and that he created the appearance of impropriety when he knowingly allowed prostitutes to accompany him from a nightclub to his hotel in a foreign country's police vehicle, were unsubstantiated.

started before that. One witness testified that the AA told her that she had been dating DAD 1 for 7 years.

⁹ In FBI disciplinary cases involving a potential punishment of a 15-day suspension or more, subjects have the right to review with their attorneys a redacted version of the OPR file and to respond both in writing and orally. If the proposed adverse action is anything short of dismissal, the oral presentation is made telephonically to the AD and other OPR employees, usually including the adjudicator. If the proposed discipline is dismissal, the subject and his attorney may make a presentation to OPR in person.

In his May 6 letter, Jordan suggested the change in the favoritism finding was premised on an assertion by DAD 1's attorney that the responsibility for issuing awards was "shared." In his February 3 letter proposing DAD 1's dismissal, however, Jordan stated that during the time DAD 1 supervised his AA, DAD 1 nominated her for, and she received, several cash awards.¹⁰ The February 3 letter also stated that there was no evidence that the person DAD 1 claimed shared the responsibility for issuing the awards had participated in the selection of the AA for the cash awards. Indeed, several witnesses stated that DAD 1 alone made that determination. Jordan told us that he did not remember why he changed this finding and suggested that we listen to the tape recording of the presentation. We reviewed the recording of the presentation provided to us by the FBI. The portion dealing with the favoritism issue appears to have been erased.¹¹

Jordan also told us he did not remember why he had changed his finding on the obstruction of justice allegation and that we would have to listen to the tape of DAD 1's presentation to find out. According to his February 3 letter, Jordan's initial finding that DAD 1 "attempted to either influence or obtain information from two OPR witnesses" was based on the testimony of the PO and another witness. Both witnesses testified that DAD 1 had called them shortly after they were interviewed by OPR investigators – and before DAD 1 was interviewed – and asked them what he should expect to be asked in the investigation. The witnesses reported the contacts to OPR, but then refused to make further written or oral statements about the conversations. One of the witnesses stated that she and the other witness understood from DAD 1's calls that he knew about the investigation and the identity of witnesses. She stated that they would not make any additional statements in order to protect their careers. DAD 1 admitted to OPR that he contacted the witnesses. He said that he "recall[ed] some conversation about the OPR investigation," but denied asking them what he should expect to be questioned about. DAD 1 claimed that he called both women concerning an upcoming conference and that both women told him that they were upset about his relationship with the AA. DAD 1 stated that with regard to the OPR investigation, he told the women "not to tell me anything, not [to] listen to rumors, and [to] just tell the truth."

In the February 3 letter, Jordan concluded that DAD 1 was apparently attempting to find out if the PO had admitted their sexual relationship to OPR;

¹⁰ The OPR file reveals that the AA received over twice as much in award monies as the three other awardees combined during the relevant period of time.

¹¹ In the relevant portion of the tape, DAD 1's attorney states: "I think with regard to favoritism, the important thing is there is a..." At that point the recording is interrupted by other voices. After some unintelligible conversation, a female voice asks: "What did you do, did you erase my tape?" A male voice responds: "You can't erase it." There is some other unintelligible conversation and then the tape of the hearing resumes. Less than a minute and a half of the recording appears to have been erased.

and that his persistent efforts to talk to the witnesses had in fact chilled their further cooperation in the investigation. The recording of the presentation reveals that DAD 1's attorney denied these charges, saying only that both women were not credible and that his client was credible. Jordan's May 6, 2003, letter does not explain why the finding was reversed.

Nor does the May 6 letter explain why the charge of creating the appearance of impropriety was dropped. These allegations centered around a trip to a nightclub DAD 1 and other witnesses took while in another city for training. According to four other FBI employees at the nightclub, several prostitutes at the nightclub propositioned DAD 1 and some of the other men. When the men left the bar, two of the women from the club asked for a ride to the hotel. According to DAD 1 and one of the witnesses who was in the car with DAD 1, the driver of the car, a police official from a foreign country, allowed them in. One of the witnesses said it was "obvious" the women were seeking a ride to the hotel so they could "hustle business" there. In his February 3 letter, Jordan stated that as the senior FBI official on the scene, DAD 1 should have prevented the women from entering the car and that his failure to do so created the appearance of impropriety by giving the impression that FBI employees were associating with prostitutes. Jordan told the OIG that he changed the finding because DAD 1 was a stranger in that city and had not been in that city or that club before. Although Jordan told the OIG that the nightclub was a notorious hangout for prostitutes, and although other FBI witnesses stated it was apparent that the women were prostitutes, Jordan stated that he was not personally sure the women were prostitutes.

We asked Jordan why DAD 1, unlike SSA 1, was given a sanction short of dismissal although his misconduct included a candor violation. As discussed earlier, DAD 1 was found to have withheld information in his first statement to OPR about the sexual nature of his relationship with the PO, and to have falsely denied in his second statement that he had sexual contact with her on government premises. Jordan said that he did not think the DAD 1 and SSA 1 cases were similar. Jordan said that SSA 1 directed two subordinates to lie to Congress while DAD 1 lied about the physical location of his sexual activities. The Adjudication Unit Chief also said there was a "clear difference" between these cases. He described SSA 1's behavior as "lacking candor," while he described DAD 1's behavior as a "failure to be forthright." The Unit Chief said the difference between these two allegations is that intent is not necessary to substantiate an allegation of failure to be forthright and therefore it is not as serious as a finding of lack of candor.

Several OPR employees told us that that the Adjudication Unit Chief appeared to take a personal interest in the outcome of the DAD 1 case and that he engaged in detailed negotiations with DAD 1's attorneys in an attempt to settle the case. These witnesses told us that OPR does not usually negotiate settlements of disciplinary cases. Witnesses also told us that a member of the

SES who is a former supervisor of DAD 1 is a friend of both DAD 1 and the Unit Chief and that she spoke to the Unit Chief on DAD 1's behalf. The SES employee was DAD 1's supervisor at the time of his alleged misconduct and it is OPR practice for supervisors to provide their views regarding the appropriate disciplinary outcome of OPR investigations of their subordinates. Accordingly, the SES employee would have been expected to provide her views regarding the disciplinary outcome in DAD 1's case.

The Adjudication Unit Chief denied that he took a special interest in this case because of DAD 1's rank or friendship with the SES employee. The Unit Chief said that he understood from a discussion he had with Jordan shortly after Jordan became the AD of OPR that he was permitted to engage in settlement negotiations in order to reduce the backlog of cases in OPR. Jordan told the OIG that he admonished the Unit Chief for attempting to negotiate a settlement in the DAD 1 case and told him not to do it again. Jordan said that the disciplinary decision was his to make, not the Adjudication Unit Chief's. Jordan denied that DAD 1's rank or friendships influenced his decision in the case. He also said that he did not discuss the case with the SES employee.

DAD 1 resigned from the FBI on September 2, 2003, while his appeal to the Disciplinary Review Board (DRB) was pending. Because DAD 1 is no longer an FBI employee, his appeal is considered moot and will not be decided by the DRB.

3. OIG Analysis

We were troubled by the outcome in the DAD 1 case. First, the initial proposal to dismiss DAD 1 appears to have been justified by the OPR investigation. Jordan was largely unable to explain his rationale for changing the disposition of the case, and the reasons he did offer are not persuasive. As described above, the changes appear to be based largely on representations from DAD 1's counsel that are not supported by the evidence developed in the OPR investigation.

Second, it is difficult to reconcile the treatment of the candor violations in the DAD 1 and SSA 1 cases. According to a memorandum from the Director dated January 3, 1994, known as the "bright-line policy," FBI employees should expect to be dismissed for lying under oath in an administrative inquiry. According to an internal Inspection Division memorandum dated February 16, 2001, the bright line policy requires that "[a]s a general rule, an employee who lies during an administrative inquiry should be dismissed if the lie is (1) made under oath; (2) following notice; (3) documented in a [signed sworn statement]; (4) intentional; and (5) material." That memorandum also states that approximately 86 percent of employees charged with candor violations in the last 5 years whose lies met the above criteria were dismissed. This policy was cited in the OPR letter proposing SSA 1's dismissal.

Jordan's explanation that DAD 1's lies were different from SSA 1's because they were merely about the physical location of his activities is not persuasive: the physical location of DAD 1's sexual activities with the PO was material to the allegation that he misused government premises. Moreover, DAD 1 also initially understated the nature of his relationship with the PO, which was material to the charge that his relationship with her was inappropriate. The Adjudication Unit Chief's explanation that DAD 1's conduct was not intentional is also unpersuasive in light of DAD 1's admission, cited in the February 3 letter, that he understood that he was being asked whether he had sexual contact with the PO on government premises.

These cases were brought to our attention by several FBI employees who questioned their different outcomes. These employees also cited the highly unusual settlement negotiations in the DAD 1 case and the SES employee's comments on his behalf as cause for concern about the fairness of the outcome. Given the lack of a persuasive explanation for the reversal of the proposed dismissal of DAD 1 and the treatment of the candor issues in his case, we believe that the different outcomes suggest that DAD 1 was given preferential treatment.

C. Allegations of Improper Adjudication

1. SSA 2

Roberts raised concerns about OPR's adjudication of a case involving another Supervisory Special Agent (SSA 2). In that case, OPR considered allegations that SSA 2 had filed a false, misleading, or erroneous travel voucher, and that he had misused his government credit card for personal purchases. OPR sustained the misuse of credit card allegation and issued SSA 2 a letter of censure. OPR found that the allegation regarding the false, misleading, or erroneous travel voucher was unsubstantiated. Roberts questioned this finding. He alleged that it was improperly based on a desire to avoid creating Giglio (impeachment) problems for SSA 2.¹²

The OPR file reveals that in June 2001 SSA 2 traveled from Athens, Greece, to London, England, on official business. His family traveled with him. While in London, SSA 2 and his family stayed with friends. Upon his return, SSA 2 claimed the flat rate lodging allowance – \$211 per night – for himself for

¹² The term "Giglio" refers to the decision of the United States Supreme Court in Giglio v. United States, 405 U.S. 150 (1972), one of a line of cases governing the prosecution's duty under the U.S. Constitution to disclose to the defense in criminal cases potential impeachment information concerning government witnesses.

five nights, a practice known as “flatlining.” This was the basis of the false voucher claim.

Before 1997, FBI policy allowed agents to claim flat rate lodging allowance expenses while on government travel, even when they stayed with friends or relatives. That policy was eliminated in June 1997 and the change was communicated to employees by a memorandum sent to all divisions. SSA 2 told the OPR investigators that he was unaware of the policy change. After OPR initiated its investigation, SSA 2 reimbursed the FBI for the London trip and for two other trips he voluntarily identified as trips for which he had claimed “flatline” expenses, discussed voucher reporting requirements with his staff, and disseminated copies of the FBI’s Travel Voucher Preparation Guide to his staff.

A Unit Chief from the Commercial Payments Unit told OPR that he had briefed SSA 2 about voucher matters in August 2000 and told him that lodging expenses could not be claimed if they had not in fact been incurred. The other person present at the meeting testified that she did not recall whether the Unit Chief addressed lodging expenses in that briefing. Because of the conflict between his and the Unit Chief’s testimony, SSA 2 took a voluntary polygraph examination. During the examination, he asserted that he was unaware of the policy change. The polygrapher concluded that SSA 2 had not indicated deception in his answer to that question.

The Adjudication Unit concluded that the false voucher allegation was unsubstantiated. It concluded that SSA 2 had violated FBI policy, but that his violation was inadvertent and he did not attempt to defraud the government. Accordingly, because the error was inadvertent and because SSA 2 had voluntarily taken steps to correct the error, the Adjudication Unit recommended against administrative action on that issue.

Roberts told us that he raised concerns about the outcome of the SSA 2 case with the Adjudication Unit Chief assigned to the case and with Jordan. Roberts told us that he asked the Unit Chief why he had found the false voucher allegation unsubstantiated and the Unit Chief responded that he did not want to create a Giglio problem for SSA 2.

The Unit Chief told us that he, Jordan, Roberts, and others met about the SSA 2 case after it was decided. The Unit Chief said he was asked to explain his rationale in deciding the case and he said he considered the “reasonableness” of SSA 2’s actions.¹³ He stated that SSA 2 had the original

¹³ The Adjudication Unit Chief said that Jordan agreed that an assessment of reasonableness is necessary, but that Roberts did not. The Unit Chief stated that Roberts tends to “view things (continued)

policy memorandum that approved the practice of flatlining and that he passed a polygraph on the issue whether he knew about the change in policy. Under these circumstances, the Unit Chief stated that he believed SSA 2 had met his burden of proving that he was unaware of the change in policy and therefore did not knowingly commit misconduct.

The precedent database reveals that OPR has considered intent in other voucher fraud cases, including one case of alleged improper flatlining.

We asked the Unit Chief if he discussed with Roberts and Jordan whether a negative finding would have created a Giglio problem for SSA 2. The Unit Chief said he could not recall discussing that issue. He added that the creation of a Giglio problem is the “last fact on his mind” when he makes a disciplinary decision. He also stated, however, that Giglio concerns are considered in crafting letters of censure. He said OPR generally does not include unsubstantiated allegations in letters of censure. Accordingly, the letter of censure to SSA 2 for misuse of his government credit card does not recount the voucher fraud allegations.¹⁴ Jordan also said he did not recall discussing with the Unit Chief and Roberts whether a negative finding could create a Giglio problem for SSA 2. Jordan stated, “we don’t think that way in OPR.”

Based on the foregoing, we found insufficient evidence to conclude that the decision regarding the false voucher allegation was motivated by a desire to avoid a Giglio problem for SSA 2 rather than by the evidence that SSA 2 did not intentionally violate the flatlining policy.

2. SAC 3 and ASAC 1 Preliminary Inquiry

OPR opened a preliminary inquiry into an agent’s allegation that he was passed over for promotion because of improper conduct by his SAC (SAC 3), and ASAC (ASAC 1). The complainant had been ranked number one by the local Career Board for a squad supervisor position, but SAC 3 recommended to the FBI headquarters Career Board that the number two-ranked candidate be selected. In making that recommendation, SAC 3 stated that the complainant had not actively participated in investigations since his arrival in the office. SAC 3 also stated that the complainant had originally been assigned to the squad that the successful candidate would supervise, but that he had

in black and white,” and believes that absolute rules need to be enforced. The Unit Chief stated that in contrast he sees things in “shades of gray.”

¹⁴ The letter was issued because SSA 2 improperly used his credit card to purchase his family’s tickets to London. The family’s tickets were purchased at the commercial, not government, rate, and SSA 2 asserted that he mistakenly paid for them with the same credit card he used to purchase his own ticket.

requested a reassignment due to differences in investigative opinions with the squad. SAC 3 concluded that the complainant lacked the credibility to lead that squad.

The complainant asserted that SAC 3 provided inaccurate information to the Career Board, and that he received the information from ASAC 1 who wanted his “friend and protégé” the second-ranked candidate, to get the promotion. The complainant asserted that the conduct of SAC 3 and ASAC 1 violated the FBI’s “Personal Relationships Policy,” which states, among other things, that an FBI employee “who votes in a career board or whose personal and substantial participation in any organizational decision is provably based upon friendship, hostility, a desire to do someone a favor, or on any reason other than the candidates’ ability, knowledge, and skills... may be subject to discipline.”

OPR closed the preliminary inquiry after concluding that the FBI’s Personal Relationships Policy had not been violated. Roberts questioned whether the case should have been closed absent further investigation of the complainant’s allegations that SAC 3 gave false information to the Career Board. Roberts stated that he had recused himself from the matter because he had attended new agent training with the complainant. He suggested that we talk to another OPR employee because he thought the other OPR employee had concerns about the matter. That employee told us that he thought the Career Board process is faulty and unduly subjective. He stated that he did not, however, have a concern about closing the OPR inquiry because he did not view the facts as raising a potential OPR violation.

The OPR file reveals that SAC 3’s recommendation to the Career Board was an evaluation of the respective merits and performance of the complainant and the candidate who received the position. The complainant’s allegations indicate that he disagreed with SAC 3’s evaluation of his performance and believed he was the more qualified candidate. We do not believe it was unreasonable for OPR to close this matter after determining it did not raise a violation of the personal relationships policy.

D. Promotions

Roberts alleged that several SES employees were recently promoted while they were under investigation by OPR or shortly after they were disciplined. He suggested that we compare those cases to that of a lower-level employee who was not promoted because of a pending disciplinary matter. Roberts also alleged that in several of the cases the high-level employees received light discipline in comparison to line agents charged with similar misconduct. All of these cases were decided prior to the release of our November 2002 report.

1. The FBI's Promotion System

The promotions process generally begins when an FBI division reports a vacancy to the Executive Development Selection Program (EDSP). EDSP runs the Special Agent Middle Management Selection System (SAMMS) Board and the SES Board, both known as "Career Boards," which operate from FBI Headquarters and participate in the selection of candidates. The SAMMS Board selects candidates for GS-14 and GS-15 positions, and the SES Board selects candidates for SES positions.

If EDSP agrees that the division has a position to fill, it will post the job vacancy announcement for 14 days. At the end of the 14 days, EDSP sends a list of all of the candidates who have applied for the position and been deemed qualified by EDSP to the local Career Board, which is a group composed of FBI employees in the division where the vacancy occurs, or to the division head. EDSP sends the list to the local Career Board in the case of GS-14 and -15 positions, and to the division head in the case of SES positions. The local Career Board or division head ranks the candidates and then justifies those selections to either the SAMMS board or the SES Board, whichever is applicable.

After making their rankings, the local Career Board or division head sends the names of the top three candidates to EDSP. EDSP contacts the Security Division, the Equal Employment Opportunity Office (EEO), and OPR to determine if the candidates have any matters pending in those offices. These three offices then search their records for matters involving the candidates. Record searches for candidates for SAC and ADIC positions cover their entire careers. Record searches for all other candidates go back 3 years.

During the course of this investigation, the FBI Director told us that he had just learned that the FBI had not been taking steps to determine whether candidates for promotion were under investigation by the OIG. He stated that he would change that practice immediately and that candidates would be screened for pending OIG investigations in the future. Officials in the FBI Inspection Division told us that FBI OPR is now responsible for ascertaining and reporting to EDSP whether a candidate has any pending OIG matters. OPR officials, however, were initially unable to tell us what procedures were in place to screen candidates for pending OIG matters. After checking into the matter, J.P. Weis, OPR's Deputy Assistant Director, told us that he believed the Career Boards screen some senior-level candidates by contacting the OIG's liaison to OPR. The OIG liaison, however, stated that he has received only 4 or 5 requests for such checks to date and that it does not appear that a routine policy has been established for screening all candidates for promotion.

The FBI also told us that the current practice is that after the candidates are ranked locally and the top three candidates screened for pending matters,

the SAMMS or SES Board is given the rankings and information about any pending matters. If any of the top three candidates has a pending matter, the matter is described anonymously and the board is asked to determine whether that matter should preclude a selection. The FBI was unable to tell us when this practice started, and it appears not to have been followed in some of the cases we examined in this review. The SAMMS or SES Board then selects the top three candidates and ranks them in order of the board's preference.

The Director chooses all SES positions. To assist in these selections, the SES Board prepares a memorandum to the Director regarding each posting. The memorandum lists the top three candidates recommended by the board. The memorandum also describes any pending matters regarding any of the top three candidates. The Director also chooses all GS-15 ASACs and Legal Attaché (Legat) positions and all GS-14 Assistant Legat positions with input from the SAMMS Board.

2. Specific Cases

a. SES 1

SES 1, formerly an ASAC, was promoted to the SES position of Deputy Assistant Director. SES 1 was the number one choice of the SES Career Board for the DAD position. The Board notified the Director of its recommendation in a memorandum that stated that SES 1 had experience in managing a very large program that was relevant to the promotion.

The SES Board's memorandum included information about two pending matters involving SES 1. The first matter was described as a preliminary inquiry into whether SES 1 and four other agents were involved in the improper use of a cooperating witness, the mishandling or theft of informant payments, and the failure to report this misconduct. The memorandum stated that this matter was under review by the OIG for a determination whether the OIG or FBI OPR would investigate. The second matter was described as a preliminary inquiry into an allegation that SES 1 committed voucher fraud in connection with attending an international conference. The source of the allegation was not revealed, but the memorandum stated that all vouchers submitted by SES 1 would be reviewed and relevant witnesses would be interviewed to see if the allegation appeared credible.

A handwritten note by Deputy Director Gebhardt accompanying the SES Board's memorandum stated:

Director – You have already called [SES 1] to advise [SES 1 of the promotion to] the DAD job. You are aware of the two preliminary inquiries (1) SES 1 had knowledge of improprieties of others and

failed to act and (2) alleged voucher fraud. One is under investigation, the other under review. – G

Gebhardt's note reflects that the Director notified SES 1 in July 2002 that he had selected SES 1 for the DAD position. SES 1 was not actually promoted until October 2002. By October, the OPR voucher fraud investigation had been closed after a determination that a full investigation was unwarranted. The OIG, however, had opened an investigation regarding the allegations of misuse of a cooperating witness and mishandling of informant payments. The FBI did not seek the OIG's assessment of the nature or status of our investigation before promoting SES 1.

FBI Director Mueller told us that he did not know how it happened that he called SES 1 and offered SES 1 the promotion before he saw Gebhardt's note. The Director said he remembered asking Gebhardt for more information about the OPR and OIG matters, but he did not remember if he made that request before or after he called SES 1 with the job offer. The Director told us that if he had to do it over again, he would have looked into the allegations against SES 2 before offering the promotion to SES 1. The Director stated, however, that at the time of the promotion, very few people at the leadership levels in the FBI had the same experience as SES 1. The Director said that where there is a need that few people can fill, he would probably not wait for an OPR matter to be resolved. The Director said he was sensitive to the perception this might create with lower level employees, but stressed the need to quickly fill this position in light of the FBI's law enforcement responsibilities.

Gebhardt said that the Career Board voted unanimously to approve SES 1 and that in his experience ASACs "are accused of everything" and those accusations usually "wash out." He explained that is why he would tend to give someone in SES 1's situation the benefit of the doubt. Gebhardt said he told the Director that they had "a very competent [employee] with excellent skills" and that they had an opening "now." According to Gebhardt, he recommended to the Director that SES 1 be approved and added that if SES 1 did something wrong, SES 1 would be disciplined for it.

We believe that the FBI should not have promoted SES 1 without first seeking information from the OIG regarding the nature and status of the OIG's investigation of SES 1. When we interviewed Director Mueller in June 2003, he stated that he had just learned that the FBI had not been taking steps to determine whether candidates for promotion were under investigation by the OIG. The Director told us that he would change that practice and that candidates would be screened for pending OIG investigations in the future.

b. SES 2

SES 2 was promoted to the position of SAC for the field office where he had been serving as ASAC. SES 2's supervisor reported to the SES Career Board that SES 2's supervisory skills were excellent and that he had won the Director's Award and the Attorney General's Award for investigation. He also stated that SES 2 was his preferred candidate because of his knowledge of the investigations under way in the field office. In a memorandum to the Director dated June 21, 2002, the SES Board ranked SES 2 as its first choice for the position.

The SES Board's memorandum to the Director included the information that OPR had initiated an investigation based on an allegation that SES 2 "engaged in investigative dereliction resulting in a violation of the Intelligence Oversight Board (IOB) requirements." It stated that OPR had requested that SES 2's supervisor interview SES 2 and conduct any other logical investigation. The memorandum also reported that SES 2 had been interviewed and his field office recommended that the matter be closed. The matter was still pending at the time of the promotion because a second subject of the inquiry had not yet been interviewed.

The OPR matter was resolved in December 2002. OPR found that a Foreign Intelligence Surveillance Act court order was issued on February 27, 1998, which did not authorize the continued surveillance of a particular area that had previously been under surveillance. Due to an administrative oversight made by an agent under SES 2's supervision, however, the surveillance of that area continued for approximately 40 days. OPR concluded that the inquiry revealed potential performance-related issues, but failed to substantiate any significant disciplinary issues.

We do not believe that the decision to promote SES 2 while the OPR matter was pending was improper. The Director had information about the nature and status of the investigation when he made his decision to promote SES 2. The field office had already recommended that the matter be closed but the matter had not yet been finally adjudicated. In addition, while SES 2's performance may have been an issue, the allegations against him did not involve serious ethical violations. We do not believe that the decision to go forward with the promotion under these circumstances was unreasonable.

c. SES 3

SES 3 was promoted to a DAD position. Roberts alleged that SES 3 had been promoted while an investigation against him was pending. We reviewed SES 3's disciplinary file and found that he had received a letter of censure for the accidental discharge of his weapon 3 months before he was promoted. The matter was therefore no longer pending at the time that SES 3 was promoted.

Moreover, the Career Board's memorandum to the Director contained the information about the nature of the allegations against SES 3 and SES 3's discipline.

We did not find the promotion of SES 3 shortly after he received a letter of censure to be improper. The facts of the matter were straightforward. SES 3 apparently improperly installed a trigger lock on his weapon and then tested it by firing it under his desk. The weapon accidentally discharged. No one was injured.

SES 3 was the only applicant for the DAD position. Other candidates were considered, but none of the other candidates had the background that SES 3 possesses. SES 3 was the number one choice of the six members of the Career Board who considered this promotion. Given the absence of other suitable candidates and the accidental nature of the misconduct, we do not believe the Director's decision to promote SES 3 was unreasonable.¹⁵

d. SES 4

SES 4 was promoted to a DAD position from the position of Section Chief in the same Division. The Career Board found that SES 4's extensive and outstanding experience in the Division, familiarity with the Division's issues, length of tenure in the Division, and other relevant experience in the FBI made him the preferred candidate for the position.

The Career Board made its recommendation to the Director in a memorandum dated September 24, 2002. The memorandum also contained information that in March 2002 OPR opened an investigation of an allegation that SES 4, while serving as an ASAC in another Division, failed to report to OPR allegations that another employee took FBI property without authorization. According to the memorandum, SES 4 told OPR that he had not reported the matter because he viewed the incident as an inappropriate storage of FBI property in non-FBI space, rather than as a theft of government

¹⁵ Roberts also alleged that the disciplinary action in the SES 3 matter was below the minimum standard set by the Director. In 1997, the Director mandated that, absent definitive mitigation, an accidental discharge of a firearm as a result of the disregard of established safety procedures would result in a minimum of a three-calendar day suspension. As discussed in note 5, *supra*, an agency may not take a suspension action of 14 calendar days or less against an SES employee. OPR found that SES 3's actions did not warrant a suspension of 15 days or more and therefore issued a letter of censure.

We do not find it unreasonable to issue a letter of censure rather than to impose a suspension for longer than the usual minimum period. As we discussed in our November 2002 Double Standard Report, one of the reasons that discipline for SES employees often falls outside of the normal range is the restriction on suspensions for SES employees. Accordingly, we recommended in that report that the law be changed to allow the full range of disciplinary options with which to discipline SES officials.

property. SES 4 explained that the employee had transported FBI refrigerators and SWAT equipment to his father-in-law's house in conjunction with the Division's move to new office space. SES 4 also said he viewed the incident as poor judgment by the employee rather than misconduct requiring reporting. The memorandum to the Director stated that the matter (SES 4's failure to report) was currently being adjudicated.

On October 28, 2002, OPR issued a letter of censure to SES 4 for his failure to report the employee's misconduct. The letter reflects that SES 4 explained that he did not believe the employee was trying to steal the refrigerators because he had used two FBI employees to help him move it. SES 4 also explained that the refrigerators and the SWAT equipment (a rappelling rope) were returned to FBI space immediately, and that the employee was given an oral reprimand and a memorandum documenting the incident was placed in his file. OPR concluded that SES 4's explanation was insufficient to override the reporting policy, and that his failure to report was aggravated by his supervisory position, which gave him a heightened responsibility to report such conduct.

The FBI Director announced SES 4's promotion to the DAD position by memorandum issued to all divisions on October 28, 2002.

We do not believe that the decision to promote SES 4 was inappropriate. Before the promotion, the Director received information about the nature of the allegations being investigated by OPR and SES 4's response to them. The promotion itself was contemporaneous with the resolution of the OPR investigation. That investigation revealed that although SES 4 did not report the employee's conduct to OPR, he retrieved the property and admonished the employee. There was no evidence that SES 4 attempted to cover up improper conduct.

We also considered Roberts' allegations that SES 4 was treated more leniently than two agents who were suspended for failing to report misconduct. We reviewed the OPR investigations of the two agents, who were alleged to have failed to report information about a sexual relationship between another FBI agent and the wife of an organized crime figure. OPR concluded that the agents had failed to report their knowledge of the relationship.

OPR suspended one of the agents for 10 calendar days without pay. The OPR report regarding that agent stated that, given the agent's 17 years of FBI experience, including 15 years in a city with a significant organized crime presence, he should have recognized the risks posed by an FBI agent having an affair with the wife of an organized crime figure. OPR also found that his failure to report the information was aggravated by his position as a supervisor, and by the fact that when his SAC asked him about the agent's relationship with another female thought to be associated with criminals, he failed to report

any information about the agent's affair with the wife of the organized crime figure. OPR suspended for 5 days the second agent who failed to report. This lighter penalty was apparently based on the lack of aggravating factors.

The OPR precedent database does not indicate that lower level agents are generally treated more severely than SES employees based on findings of failure to report misconduct. We found that a letter of censure was the most common discipline imposed for failure to report misconduct. For example, letters of censure were issued in the following cases:

- an agent failed to report that another agent was misusing his government vehicle;
- a supervisory agent failed to report mishandling of evidence by his subordinates;
- a supervisory agent failed to report allegations of misconduct made by a private attorney against an FBI employee, which included allegations of misuse of position; and
- a support employee failed to report the gambling activities of his co-workers on FBI property.

The case involving the two agents who failed to report the sexual relationship between another agent and the wife of an organized crime figure is an extreme one and potentially had very serious consequences. We do not believe that SES 4's failure to report the misuse of FBI refrigerators, after taking steps to retrieve the refrigerators and admonish the employee, is comparable.

e. SES 5

SES 5 was promoted from an ASAC position to a Section Chief position in the same Division. The SES Board considered him to be the most qualified candidate for the position. The Board's memorandum to the Director stated that OPR had opened an administrative inquiry in July 2002 into whether SES 5 had engaged in an inappropriate relationship with a non-agent subordinate, which resulted in acts of favoritism. The inquiry examined specific allegations that SES 5 approved travel for the subordinate when similar travel for other employees was cancelled; intervened to extend the deadline on a job posting to allow the subordinate to apply; and provided training opportunities for the subordinate that were not provided to other employees in the same grade and position. A handwritten note on the memorandum from Deputy Director Gebhardt, who was the Chairman of SES 5's Career Board, stated: "opened OPR on [SES 5] 7/24/02.... But I think he

should be approved.” Gebhardt told the OIG that he, on the Director’s behalf, subsequently approved SES 5’s promotion while the OPR investigation was still pending.

A review of the OPR case file reveals that the case was designated as “serious,” and that there was strong evidence at the start of the investigation that SES 5 was involved in an improper relationship with the subordinate.

We asked Gebhardt why he recommended that SES 5 be promoted without looking further into the OPR investigation. Gebhardt stated that at the time of SES 5’s promotion he maintained a philosophy that FBI employees are innocent until proven guilty. He said he also believed that if the investigation of a candidate for promotion was substantiated, that employee would be disciplined for the misconduct. Gebhardt stated that now he would most likely recommend delaying a promotion pending an OPR investigation.

When we interviewed the FBI Director about the matter, he questioned whether he should hold up a promotion because of allegations of favoritism. Director Mueller said that if an SES employee was found to have committed misconduct, he was prepared to take “harsh action” against him. By way of example, he said that in another case involving favoritism allegations against an SES employee - the DAD 1 case discussed earlier in this report – DAD 1 had been fired. (The Director was unaware that although OPR initially proposed to fire DAD 1, former OPR AD Jordan reversed that decision.¹⁶) Nevertheless, the Director told us that if the allegations in the SES 5 matter were proven, appropriate action would be taken against SES 5.

We believe that given the serious nature of the charges against SES 5, his promotion should have been delayed pending the conclusion of the OPR investigation. As we stated in our November 2002 Double Standard Report, FBI management should be mindful of the message it sends both to investigators in a particular case and the rest of the FBI when subjects of significant investigations, particularly senior level managers, are promoted while under investigation for serious allegations of misconduct.

¹⁶ Jordan told us that when he proposed DAD 1’s dismissal, he told only the Security Division. After DAD 1 received the letter proposing dismissal, DAD 1 walked through the halls at FBI Headquarters complaining loudly. As a result, Gebhardt called Jordan and asked him why he had not told the Director or Gebhardt that he was planning to dismiss a senior-level employee. According to Jordan, Gebhardt told him that in the future he should notify him or the Director when such decisions were being made. Jordan said he did not notify the Director or Deputy Director when he later decided not to fire DAD 1. He said that the direction he received from Gebhardt was to inform him or the Director when he was going to dismiss someone, not when he was going to impose a lesser punishment than dismissal.

f. SES 6

SES 6 was promoted from an Inspector position to a DAD position. At the time of his promotion, he had been the Acting DAD in that Division for 5 months. There were five applicants for the position, but only two were deemed to be competitive. The Career Board ranked SES 6 as the number one candidate. SES 6's promotion came only 9 months after he was suspended from duty without pay for 15 calendar days based on allegations that he had used his former position as an ASAC to create a job in the FBI for his daughter so she could have employment while attending college; and that he furnished beer to FBI employees during working hours in FBI office space.

The SES Board's memorandum to the Director stated that SES 6 recently was the subject of an investigation and attached the suspension letter describing OPR's findings in the matter.

The Director told us that he did not recall seeing the promotion package for SES 6, but that his failure to recollect did not mean that he did not see it or discuss the promotion with his then Chief of Staff. The Director stated that since he did not sign the memorandum approving SES 6's promotion, he was most likely out of town, but that he would have discussed the promotion with his chief of staff, who signed for him. Director Mueller said he recalled that SES 6 was already working in the position in an acting capacity and that he was thought to be doing "a very good job." The Director stated that because SES 6 was already a member of the SES, the move to the DAD position was lateral and not a promotion in grade. The Director said that he was concerned with the perception that the move was a promotion. He emphasized, however, that SES 6 had already been punished and that the move was lateral in grade.

We do not think that the Director's decision regarding SES 6 was unreasonable under the circumstances. The fact that someone has been disciplined by OPR should not become a permanent bar to career advancement in the FBI. How long and to what extent a closed disciplinary proceeding should affect someone's career advancement is within the discretion of the Director, and we do not believe his decision in this case was unreasonable under the circumstances.

g. SSA 3

Roberts alleged that in August 2002 SSA3, who was then a level GS-14 employee, was denied a promotion because of a preliminary inquiry into allegations that he had accessed an adult website while on duty. Roberts suggested that SSA 3's case, compared with the cases described above in which senior managers were promoted despite pending investigations of their conduct, illustrates a continuing double standard.

In January 2002, OPR opened a preliminary inquiry into an anonymous allegation that SSA 3 was seen viewing pornography on the Internet during working hours. Roberts told us that he did not believe there was sufficient evidence to open a full inquiry, but that he took steps to have the computers to which SSA 3 had access analyzed for evidence of access to pornographic sites. The FBI's computer analysis section analyzed one of the computers to which SSA 3 had access and did not find any evidence to show it had been used to view pornography. By August 2002, when SSA 3 was considered for the promotion to a GS-14 position, the other six computers to which SSA 3 had access had not yet been analyzed.

On August 20, 2002, the SAMMS Board met to consider candidates for several different positions. SSA 3 was among those being considered for GS-14 supervisory positions in the Counterintelligence Division. The audio recording of the SAMMS Board meeting reflects that after the initial ranking of candidates, the Board was presented with EEO and OPR cases related to the candidates. The Board was given a brief description of outstanding allegations or investigative findings of completed cases, related to the candidates without being told which candidate was the subject of which investigation. During the discussion of the allegations against SSA 3, the Board questioned whether the misuse of the computer was a one-time incident or an ongoing problem. Someone on the Board mentioned that the Director had previously barred the career advancement of an employee who had a continuing problem with pornography.

The Board made its recommendations to the Director in a memorandum dated September 3, 2002. The Board recommended that SSA 3 and another SSA be chosen for two of the supervisory positions. The memorandum provided information about the pornography allegations against SSA 3, but stated that it was the unanimous recommendation of the SAMMS Board that the OPR inquiry "should not preclude" SSA 3 from being selected for the position. An attachment to the memorandum describing the OPR inquiry included a handwritten note to the Director which stated that OPR still did not know, as of August 21, 2002, whether SSA 3's alleged viewing of pornography was a "one-time vs. multiple occurrence." The note stated that the Board made its recommendation on the basis that it appeared to be a one-time event, but that the Board would have voted otherwise if it had been a recurring problem. The note stated that the Board was reluctant to hold up SSA 3 for promotion based on an investigation that had been in the preliminary inquiry stage for over 8 months.

Ultimately, the Director did not approve SSA 3 for the position. A handwritten note from Deputy Director Gebhardt dated September 23, 2002, stated "SSA 3 not approved at this time until OPR resolved." Gebhardt explained to the OIG that in writing this note to the Director he concluded that

the nature of the allegations against SSA 3 warranted the delay of SSA 3's promotion until the investigation was concluded.

The Director stated that he did not recall the specifics of this matter. After reviewing the promotion file, he said he believed that he wanted to know if SSA 3's behavior was a one-time occurrence and what the recommendation of the Career Board would be in light of that information. The Director said that he believed he asked Gebhardt to find out more details about SSA 3's OPR investigation. The Director said that the decision was not based on SSA 3's lack of seniority. He said that he has approved promotions to GS-14 and GS-15 positions for "a lot" of other candidates who had pending OPR matters.

We do not believe the Director's decision to withhold SSA 3's promotion until the resolution of the serious charges against him was inappropriate. There were other qualified candidates for the position, and we do not believe it was unreasonable for the Director to want to know before promoting SSA 3 the outcome of OPR's inquiry into whether SSA 3 had on one or more occasions accessed pornographic web sites.

h. OIG Analysis

Of these promotions, SES 5's and SES 1's caused us concern. As discussed above, we believe the SES 1 promotion should not have gone forward without information from the OIG about the nature and status of our investigation of the allegations against SES 1. We also believe that, given the strength of the evidence supporting the favoritism allegations against SES 5, his promotion should have been postponed pending the conclusion of the OPR investigation.

Gebhardt told us that at the time he recommended SES 1's promotion and approved SES 5's promotion for the Director, his prevailing philosophy was that employees are "innocent until proven guilty" of misconduct allegations and thus promotions should proceed without regard to pending investigations. That philosophy appears not to have been consistently applied, however, as illustrated by the SSA 3 case, which was decided close in time to SES 5's promotion. Nor should it be, since the nature of some charges and the strength of the evidence may counsel strongly in favor of withholding promotions pending the completion of some misconduct investigations. We believe that the better practice is to consider these matters on a case-by-case basis and to seek relevant information about the nature of the allegations and status of the inquiry from the OIG and from internal FBI investigative components. The Director has stated that the FBI will follow that practice when considering future promotions.

V. CONCLUSION

In sum, our review did not find any examples of a case “disappearing” or “vaporizing,” as Roberts suggested on *60 Minutes*. Moreover, the small number of cases we reviewed in this report provides an insufficient basis to conclude that the FBI systematically favors SES employees over less senior employees.

In addition, the FBI appears to be taking seriously the concerns about a double standard of discipline. It specifically requested our investigation of the allegations we reviewed in this report, and it also independently sought another review, led by former Attorney General Griffin Bell, of the operations of FBI OPR. The FBI also supports, as do we, a legislative change that would allow SES employees to be punished similarly to non-SES employees.¹⁷

Moreover, the allegations raised in this review concern a small number of the total cases handled by the FBI, and the cases reviewed do not involve the egregious type of allegations of a double standard that we examined in our November 2002 Double Standard Report, such as the Ruby Ridge matter and the Potts retirement party case. We concluded that the cases in that report – widely known throughout the FBI and, in our view, clear instances of disparate treatment – led to the strong perception of a double standard of discipline throughout the FBI.

Yet, while the cases in the current review involve fewer and less serious allegations of a double standard, they reinforce some of the concerns we expressed in our November 2002 report.

First, we believe that Roberts’ concern about the discrepancy in discipline in the SAC 1 and SA 1 cases is valid. We believe that the decision not to discipline an SES member despite repeated complaints that he made jokes with crude sexual content at FBI functions is difficult to reconcile with the decision to discipline a special agent for one incident of similar misconduct.

Second, we believe that SAC 1 should have been recused from the Career Board that selected for promotion the OPR Adjudication Unit Chief who handled his disciplinary case. That Adjudication Unit Chief proposed that SAC 1 receive non-disciplinary counseling as a result of the OPR investigation of him. At a minimum, SAC 1’s participation in the Unit Chief’s Career Board created an appearance of impropriety, if not an actual conflict of interest. It also may help foster a perception that some OPR employees could be

¹⁷ As described earlier in this report, currently, by statute, SES employees may only be suspended for 15 days or more. Non-SES employees may be suspended for any period of days. This disparity results in SES employees receiving lesser punishments than non-SES employees because deciding officials must choose between a letter of censure and a 15-day suspension, and they sometimes choose the lesser punishment.

influenced by the prospect that SES subjects of OPR investigations may participate in Career Boards deciding OPR employees' promotions. As in our November 2002 Double Standard Report, we found the FBI to be insufficiently sensitive to conflict-of-interest issues in promotion decisions.¹⁸

Third, the DAD 1, SSA 1, and SAC 2 cases reinforce the conclusion stated in our original Double Standard Report that the uneven application of the Director's "bright line" policy against lying, cheating, or stealing can affect the perception of a double standard of discipline in the FBI. OPR adjudicators concluded that both DAD 1 and SSA 1 were not candid with OPR investigators, and an objective comparison of the facts in those cases reveals that both violated the "bright line" policy. SSA 1, a non-SES member, was dismissed for his violation. DAD 1, a member of the SES, was given a lesser sanction. As we stated in our November 2002 Double Standard Report, a lack of uniformity in applying the "bright line" policy necessarily creates a suspicion that favoritism or cronyism is the reason that the "bright line" policy is not being followed. That suspicion was exacerbated in the DAD 1 case where DAD 1's proposed dismissal for lack of candor and other violations was downgraded to a lesser sanction for reasons that are not clear or persuasive. The SAC 2 case, in which the candor issue was inappropriately left unresolved, is another example of the uneven application of the bright line test, which can result in a perception of favoritism.

Finally, the SES 1 and SES 5 cases reinforce our earlier conclusion that promotions of individuals who are under investigation for serious allegations of misconduct should be carefully considered, especially when the allegations appear to be supported by significant evidence. Director Mueller has stated that the FBI will seek from the OIG and internal FBI components information about the nature and status of investigations of future candidates for promotion, but the FBI has not yet fully implemented procedures to accomplish the Director's stated intention. During this investigation FBI officials either were unable to tell us what screening procedures were in place or provided inconsistent descriptions of the procedures. At the time of this review, the OIG was not receiving referrals routinely regarding promotion candidates other than for the most senior positions in the FBI. In response to a draft of this report, officials in the Inspection Division stated that the FBI had begun referring

¹⁸ In response to a draft of this report, the FBI acknowledged that "there is no specific provision within the MAOP dealing directly with SAMMS Board members recusing themselves from deliberations based upon prior OPR involvement." The FBI nevertheless maintained that there is "no evidence" that the FBI is insufficiently sensitive to conflict-of-interest issues in promotion decisions. The case described in this report indicates the contrary. Moreover, the lack of a written recusal policy reinforces our concern about the FBI's insensitivity to conflict-of-interest issues.

additional promotion candidates to the OIG in July and October 2003.¹⁹ We were told, however, that there are no written procedures in place for those referrals. Given the confusion expressed by FBI officials during the course of this investigation about the referral process, we believe that the FBI should establish clear written procedures in order to ensure that it routinely and consistently seeks information about pending investigations from the OIG, as well as from internal FBI investigative components, for consideration in promotion decisions.

¹⁹ In a letter dated October 20, 2003, to the Inspector General in response to the draft report, the Assistant Director for the Inspection Division stated that in July 2003 the FBI began forwarding to the OIG the names of candidates being considered for all SES, ASAC, and Legal Attaché positions. Before then, the FBI was forwarding only the names of candidates for Executive Assistant Director (EAD), AD, ADIC, and SAC candidates. The AD for the Inspection Division also stated in his October 20 letter that the policy was expanded in October 2003 to forward names of all special agents being considered for promotion to GS-14 and GS-15 supervisory positions. We were told that the procedure for the GS-14 and GS-15 promotions would be implemented for the first time in connection with the October 29 SAMMS Board.

ATTACHMENT 1

SHOW: 60 Minutes

DATE: October 27, 2002

LOST IN TRANSLATION

ED BRADLEY, host:

Lost in Translation is the story of hundreds, if not thousands, of foreign language documents that the FBI neglected to translate before and after September 11th because of problems in its language department, documents that detailed what the FBI heard on wiretaps and learned during interrogations of suspected terrorists. Sibel Edmonds, a translator who worked at the FBI's language division, says the documents weren't translated because the division is riddled with incompetence and corruption. Edmonds was fired after reporting her concerns to FBI officials. She recently told her story behind closed doors to investigators in Congress and to the Justice Department. Tonight she tells her story to us.

(Footage of Edmonds and Bradley; FBI agents carrying boxes out of house; Edmonds and Bradley)

BRADLEY: (Voiceover) Because she is fluent in Turkish and other Middle Eastern languages, Edmonds, a 32-year-old Turkish-American, was hired by the FBI soon after September 11th and given top-secret security clearance to translate some of the reams of documents seized by FBI agents who, for the past year, have been rounding up suspected terrorists across the United States and abroad.

Ms. SIBEL EDMONDS: The first two months after the September 11 event, we--the agents out there in--in--in New York, LA, other field offices, they were working around the clock. And I would receive calls from these people saying, 'Would you please prioritize this and--and translate it?'

(Footage of Edmonds sitting at desk; Edmonds and Bradley)

BRADLEY: (Voiceover) But Edmonds says that to her amazement, from the day she started the job, she was told repeatedly by one of her supervisors that there was no urgency; that she should take longer to translate documents so that the department would appear overworked and understaffed. That way, it would receive a larger budget for the next year.

Ms. EDMONDS: We were told by our supervisors that this was the great

opportunity for asking for increased budget and asking for more translators. And in order to do that, don't do the work and let the documents pile up so we can show it and say that we need more translators and expand the department.

BRADLEY: So you--you have FBI agents who are in the field relying on your translation work in order to move their cases forward, and your supervisor is saying, 'Slow down. Let the cases pile up'?

Ms. EDMONDS: Correct.

BRADLEY: I mean, how is it possible that the focus wasn't on terrorism, particularly after 9/11?

Ms. EDMONDS: It was not. At least in that department, it was not.

(Footage of Bradley and Edmonds)

BRADLEY: (Voiceover) Edmonds says that the supervisor, in an effort to slow her down, went so far as to erase completed translations from her FBI computer after she'd left work for the day.

Ms. EDMONDS: The next day, I would come to work, turn on my computer and the work would be gone. The translation would be gone. Then I had to start all over again and retranslate the same document. And I went to my supervisor and he said, 'Consider it a lesson and don't talk about it to anybody else and don't mention it.'

BRADLEY: What's the lesson?

Ms. EDMONDS: The lesson was don't work, don't do the translations. Go out and spend two hours lunch breaks, you know. Go and--don't go and get coffee downstairs. Go eight blocks away. Just chat with your friends. But don't do the work because--and this is our chance to increase the number of people here in this department.

(Footage of Edmonds sitting at desk; Grassley speaking at podium; Grassley and Bradley)

BRADLEY: (Voiceover) Sibel Edmonds put her concerns about the FBI's language department in writing to her immediate superiors and to a top official at the FBI. Edmonds says for months, she got no response. She then turned for help to the Justice Department's inspector general, which is investigating her claims, and to Senator Charles Grassley because his committee, the Judiciary Committee, has direct oversight of the FBI.

Did she seem credible to you? Did her story seem credible?

Senator CHARLES GRASSLEY (Republican, Iowa): Absolutely, she's credible. And the reason I feel she's very credible is because people within the FBI have corroborated a lot of her story.

(Footage of woman working at computer; Kevin Taskasen speaking with woman; prisoners at Guantanamo Bay; Taskasen; Edmonds and Bradley)

BRADLEY: (Voiceover) The FBI has conceded that some people in the language department are unable to adequately speak English or the language they're

supposed to be translating. Kevin Taskasen was assigned to Guantanamo Bay in Cuba to translate interrogations of Turkish-speaking al-Qaida members who had been captured after September 11th. The FBI admits that he was not fully qualified to do the job.

Ms. EDMONDS: He neither passed the English nor the Turkish side of this language proficiency test.

BRADLEY: So that means if, for example, you had a--a terrorist detained at--at Guantanamo who had information about an attack being planned in the future against the United States, that person would not have been in a position to translate that?

Ms. EDMONDS: Correct. He wouldn't.

BRADLEY: mean, that's hard to imagine.

Ms. EDMONDS: But that's the case.

(Footage of exterior of J. Edgar Hoover FBI Building; recovery effort at World Trade Center bombing in 1993; exterior of FBI Building; recovery effort at World Trade Center bombing in 2001; GAO documents on foreign languages; Grassley and Bradley)

BRADLEY: (Voiceover) Critical shortages of experienced Middle Eastern language translators have plagued the FBI and the rest of the US intelligence community for years. Months before the first World Trade Center bombing in 1993, one of the plotters of the attack was heard on tape having a discussion in Arabic that no one at the time knew was about how to make explosives, and he had a manual that no one at the time knew was about how to blow up buildings. None of it was translated until well after the bombing, and while the FBI has hired more translators since then, officials concede that problems in the language division have hampered the country's efforts to battle terrorism, and according to congressional investigators, may have played a role in the inability to prevent the September 11th attacks. Earlier this year, the General Accounting Office reported that the FBI had expressed concern over the thousands of hours of audiotapes and pages of written material that have not been reviewed or translated because of a lack of qualified linguists.

Sen. GRASSLEY: If--if they got word today that within--in a little while, the Hoover Dam was going to be blown up, and it takes a week or two to get it translated, as was one of the problems in this department, you know, you couldn't intervene to prevent that from happening.

BRADLEY: So you think that this place does need an overhaul essentially?

Sen. GRASSLEY: It needs to be turned upside down. -

(Footage of exterior of FBI Building; FBI agent; foreign flags; Bradley)

BRADLEY: (Voiceover) In its rush to hire more foreign language translators after September 11th, the FBI admits it has had difficulty performing background checks to detect translators who may have loyalties to other governments, which could pose a threat to US national security.

Take the case of Jan Dickerson, a Turkish translator who worked with Sibel

Edmonds. The FBI has admitted that when Dickerson was hired last November, the bureau didn't know that she had worked for a Turkish organization being investigated by the FBI's own counterintelligence unit, and they didn't know...

(Footage of Turkish Embassy; Edmonds and Bradley)

BRADLEY: (Voiceover) ...she'd had a relationship with a Turkish intelligence officer stationed in Washington who was the target of that investigation. According to Sibel Edmonds, Jan Dickerson tried to recruit her into that organization, and insisted that Dickerson be the only one to translate the FBI's wiretaps of that Turkish official.

What was her reaction when you didn't go along with--with her plan?

Ms. EDMONDS: She got very angry, and later she threatened me and my family's life.

BRADLEY: Threatened you?

Ms. EDMONDS: Correct.

BRADLEY: Did--did you take her threat seriously?

Ms. EDMONDS: Oh, yes. She said, 'Why would you want to place your life and your family's life in danger by translating these tapes?'

(Footage of Edmonds working at desk; State Department building; aerial view of the Pentagon; Edmonds and Bradley)

BRADLEY: (Voiceover) Edmonds says that when she reviewed Dickerson's translations of those tapes, she found that Dickerson had left out information crucial to the FBI's investigation; information that Edmonds says would have revealed that the Turkish intelligence officer had spies working for him inside the US State Department and at the Pentagon.

Ms. EDMONDS: We came across at least 17, 18 translations, communications that were extremely important for--for the ongoing investigations of these indivi--individuals.

BRADLEY: And she had not translated these--these--this information?

Ms. EDMONDS: No, she had marked it as 'not important to be translated.'

BRADLEY: Specifically, what kind of information did she leave out of her translation?

Ms. EDMONDS: Activities to obtain the United States military and intelligence secrets.

(Edmonds working; Edmonds and Bradley)

BRADLEY: (Voiceover) Edmonds says she complained repeatedly to her bosses about what she'd found on the wiretaps and about Jan Dickerson's conduct, but that nobody at the FBI wanted to hear about it. She says not even the assistant special agent in charge.

Ms. EDMONDS: He said, 'Do you realize what you are saying here in your allegations? Are you telling me that our security people are not doing their jobs? Is that what you're telling me? If you insist on this investigation, I'll make sure in no time it will turn around and become an investigation about you.' These were his exact words.

(Footage of FBI letter to Edmonds; Bradley)

BRADLEY: (Voiceover) Sibel Edmonds was fired this past March. The FBI offered no explanation, saying in the letter only that her contract was terminated completely for the government's convenience.

But three months later, the FBI conceded that on at least two occasions, Jan Dickerson had, in fact, left out significant information from her translations. They say it was due to a lack of experience and was not malicious.

(Footage of exterior of home; Chicago Tribune article; Grassley and Bradley)

BRADLEY: (Voiceover) Dickerson recently quit the FBI and now lives in Belgium. She declined to be interviewed, but two months ago, she told the Chicago Tribune that the allegations against her are preposterous and ludicrous. Senator Charles Grassley says he's disturbed by what the Dickerson incident says about internal security at the FBI.

Sen. GRASSLEY: You shouldn't have somebody in your organization that's compromising our national security by not doing the job right, whether it's a lack of skills or whether it's intentional.

BRADLEY: Based on your experience, does the Sibel Edmonds case fall into any pattern of behavior, pattern of conduct on--on the part of the FBI?

Sen. GRASSLEY: The usual pattern. Let me tell you, first of all, the embarrassing information comes out, the FBI reaction is to sweep it under the rug, and then eventually they shoot the messenger.

(Footage of John Roberts leaving building; Roberts and Bradley)

BRADLEY: (Voiceover) Special agent John Roberts, a chief of the FBI's Internal Affairs Department, agrees. And while he is not permitted to discuss the Sibel Edmonds case, for the last 10 years, he has been investigating misconduct by FBI employees and says he is outraged by how little is ever done about it.

Mr. JOHN ROBERTS: I don't know of another person in the FBI who has done the internal investigations that I have and has seen what I have and that knows what has occurred and what has been glossed over and what has, frankly, just disappeared, just vaporized, and no one disciplined for it.

(Footage of Robert Mueller speaking at podium; Roberts; Edmonds working; Roberts and Bradley)

BRADLEY: (Voiceover) Despite a pledge from FBI director Robert Mueller to overhaul the culture of the FBI in light of 9/11, and encourage bureau employees to come forward to report wrongdoing, Roberts says that in the rare instances when employees are disciplined, it's usually low-level employees like Sibel Edmonds who get punished and not their bosses.

Mr. ROBERTS: I think the double standard of discipline will continue no matter who comes in, no matter who tries to change. You--you have a certain--certain group that--that will continue to protect itself. That's just how it is.

BRADLEY: No matter what happens?

Mr. ROBERTS: I would say no matter what happens.

BRADLEY: Have you found cases since 9/11 where people were involved in misconduct and were not, let alone reprimanded, but were even promoted?

Mr. ROBERTS: Oh, yes. Absolutely.

BRADLEY: That's astonishing.

Mr. ROBERTS: Why?

BRADLEY: Because you--you would think that after 9/11, that's a big slap on the face. 'Hello! This is a wake-up call here.'

Mr. ROBERTS: Depends on who you are. If you're in the senior executive level, it may not hurt you. You will be promoted.

BRADLEY: In fact, the supervisor who Sibel Edmonds says told her to slow down her translations was recently promoted. Edmonds has filed a whistle-blower suit to get her job back, but last week, US Attorney General Ashcroft asked the court to dismiss it on grounds it would compromise national security. And also on the grounds of national security, the FBI declined to discuss the specifics of her charges, but it says it takes all such charges seriously and investigates them.

(Announcements)