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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

February 19, 2015

VIA ELECTRONIC TRANSMISSION

The Honorable Gene L. Dodaro
Comptroller General of the United States
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Dodaro:

The Civil Service Reform Act of 1978, as amended, prohibits retaliation against federal government employees or applicants for employment for reporting wrongdoing. The Act includes provisions that allow most federal employees to pursue whistleblower complaints with entities outside of their agency, such as the U.S. Office of Special Counsel or the U.S. Merit Systems Protection Board. However, the Federal Bureau of Investigation (FBI) and other intelligence agencies are excluded from the process established by the Civil Service Reform Act. Instead, for the FBI, the Attorney General is required to establish regulations to ensure that FBI employees are protected against retaliation for reporting wrongdoing.

At my request, the U.S. Government Accountability Office (GAO) recently completed its review of the Department of Justice's (DOJ) process for evaluating whistleblower complaints made by FBI employees. However, since GAO began that review, it has been brought to my attention that some FBI supervisors and managers may be retaliating against whistleblowers in such a way that precludes whistleblowers from obtaining relief through the process established by the Attorney General, including an investigation by DOJ's Office of the Inspector General (OIG) or Office of Professional Responsibility (OPR).

Specifically, it is my understanding that the FBI may have used Loss of Effectiveness (LOE) orders as a method of retaliation against whistleblowers. According to the FBI, an LOE order allows the agency to reassign employees to a different position or office, in part, to help maximize the efficiency and effectiveness of the workforce. The FBI also contends that an LOE order does not result in a loss of pay or a demotion in rank. Rather, "the aim is to improve the employee's performance to the fullest extent possible."¹

¹ Letter from Stephen D. Kelley, Assistant Director, Federal Bureau of Investigation, to Sen. Charles E. Grassley, Ranking Member, Sen. Comm. on the Judiciary (September 25, 2014), at 1.

However, the FBI whistleblowers who have contacted my office and have been subject to LOE orders—many of whom are women who reported gender discrimination—claim otherwise. They state that the consequences of an LOE electronic communication (EC) issued by the FBI's Inspection Division (INSD) are extensive. For example, an LOE EC can be used by the Human Resources Division (HRD) as a basis for automatic demotion or transfer and preclude the possibility of promotion for 3 years. In addition, employees against whom an LOE EC is issued may not be informed of the underlying allegations, in which case they would not be in a position to defend against them. Moreover, whistleblowers claim that LOEs are not necessary given existing personnel management tools. Specifically, whistleblowers state that investigations of employee misconduct should be handled by OPR, while matters relating to employee efficiency or performance should be addressed through Performance Improvement Plans (PIPs).

Accordingly, I would like to request that GAO conduct a review that addresses the following questions:

1. What is the FBI's policy concerning the use of LOE electronic communications (ECs) that are issued by INSD? What processes does this policy provide to ensure fair treatment of employees, such as the ability to obtain a copy of the EC, ability to appeal, and an opportunity to defend against the underlying allegations?
2. From 2011 through 2015, how many LOE ECs did INSD issue, what was the FBI's rationale for issuing these ECs, and what were the resulting actions taken against the employees?
 - a. What were the demographic characteristics, including gender and position/rank, of the employees who received LOE ECs?
 - b. Do the resulting actions taken against employees qualify as "adverse actions"?
3. Are cases involving LOE ECs (1) "investigations" of employee misconduct that should be forwarded to OPR for adjudication, (2) efficiency-maximizing managerial tools more appropriately handled through Performance Improvement Plans (PIPs), or (3) neither? What purpose do LOE ECs serve given the existence of OPR and PIPs?
4. How many FBI employees filed complaints with DOJ, DOJ-OIG, or the FBI from 2011 through 2015 citing an LOE order as a form of retaliation taken against them, and what were the outcomes?

Thank you for your attention to this request. If you have any questions, please contact Jay Lim of my Committee staff at (202) 224-5225.

Sincerely,



Charles E. Grassley
Chairman