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

February 24, 2015

VIA ELECTRONIC TRANSMISSION

The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Inspector General Horowitz:

I am writing concerning allegations that the Federal Bureau of Investigation (FBI), Office of Professional Responsibility (OPR) routinely violates the terms of a 1993 settlement agreement that was reached in a class action lawsuit filed by the Black Special Agents of the Federal Bureau of Investigation (“BADGE Settlement”).¹ According to standard language that is provided by OPR to subjects of investigation:

As a result of the [BADGE settlement], when an investigation or adjudication of an allegation of misconduct made against any employee (not just members of the class) cannot be completed within 180 days, notification of the same will be provided to the employee. Investigations of employee misconduct are conducted by the Inspection Division’s Internal Investigations Section (IIS), the Department of Justice’s Office of Inspector General (OIG), or in certain cases, by the field under the delegated investigation program. When the investigation is concluded, the matter is referred to the FBI’s Office of Professional Responsibility for adjudication.

As part of the notification that is provided to employees whose cases have been pending OPR adjudication for more than 180 days, OPR also explains, “Pursuant to the BADGE[] settlement, you will receive this notification every 30 days until the adjudication has been completed.”

However, my office has received information indicating that the FBI may be violating these requirements on a regular basis. If true, this is unacceptable.

In addition, the OPR language quoted above suggests that all investigations of employee misconduct, once completed, are forwarded to OPR for adjudication—regardless of whether

¹ Eric Lichtblau, “FBI Settles Black Agents’ Discrimination Lawsuit,” *Los Angeles Times*, May 1, 2001, <http://articles.latimes.com/print/2001/may/01/news/mn-57894>, last accessed December 16, 2014.

those investigations are conducted by IIS, OIG, or the field. However, my staff is aware of cases in which the Inspection Division's "investigations of employee misconduct" are forwarded directly to the Human Resources Division (HRD) for demotion or transfer without OPR adjudication, through the use of Loss of Effectiveness Electronic Communications (LOE ECs).

According to the FBI, an LOE allows the Bureau to reassign employees to a different position or office, in part, to help maximize the efficiency and effectiveness of the workforce.² The FBI also contends that an LOE order does not result in a loss of pay or a demotion in rank.³ Rather, "the aim is to improve the employee's performance to the fullest extent possible."⁴

However, as noted in my July 17, 2014 and September 26, 2014 letters to the FBI on which you were copied, whistleblowers allege that the FBI uses LOE ECs as a tool for retaliation, and also for gender discrimination. Information obtained since those letters suggests that LOE ECs may not serve any legitimate purpose given existing tools that are designed to address personnel matters at the FBI.

On the one hand, as explained by the FBI, investigations of employee *misconduct* should be forwarded to OPR for adjudication – which affords employees with the due process protections of notice and ability to appeal. On the other hand, according to whistleblowers, matters relating to employee *performance* or *efficiency* should be handled through Performance Improvement Plans (PIPs), which provide employees notice of any perceived performance deficiency and an opportunity to improve performance in that area. Yet, because LOE ECs are forwarded directly to HRD without the benefit of the due process provided by OPR or PIPs, LOE ECs can result in immediate and automatic demotion or transfer, according to whistleblowers.

Accordingly, please investigate the following:

1. In practice, what function do LOE ECs serve at the FBI?
 - a. Are LOE ECs "investigations" of employee misconduct that should be forwarded to OPR for adjudication? If not, why are investigators from the Inspection Division involved in the LOE process?
 - b. Are LOE ECs performance and efficiency maximizing tools that should be handled through PIPs and not by investigators in the Inspection Division?
 - c. Or, are LOE ECs being used as a retaliatory tool, as whistleblowers allege?
2. Since January 1, 2010, how many investigations of an FBI employee's alleged misconduct were conducted by IIS?
 - a. How many of these were completed within 180 days?
 - b. How many of these were not completed within 180 days? In what number of these cases did the FBI provide the 180-day notification as required under the BADGE settlement?

² 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.

³ *Id.*

⁴ *Id.*

- c. How many of these were not completed within 210 days? In what number of these cases did the FBI provide 30-day notifications as required under the BADGE settlement?
3. Since January 1, 2010, how many investigations of an FBI employee's alleged misconduct were conducted "by the field under the delegated investigations program?"
 - a. How many of these were completed within 180 days?
 - b. How many of these were not completed within 180 days? In what number of these cases did the FBI provide the 180-day notification as required under the BADGE settlement?
 - c. How many of these were not completed within 210 days? In what number of these cases did the FBI provide 30-day notifications as required under the BADGE settlement?
4. Since January 1, 2010, how many adjudications of an FBI employee's alleged misconduct were completed by OPR?
 - a. How many of these were completed within 180 days?
 - b. How many of these were not completed within 180 days? In what number of these cases did the FBI provide the 180-day notification as required under the BADGE settlement?
 - c. How many of these were not completed within 210 days? In what number of these cases did the FBI provide 30-day notifications as required under the BADGE settlement?
 - d. How many of these adjudications were completed upon the conclusion of an investigation by OIG?

If you have any questions, please contact Jay Lim of my Committee staff at (202) 224-5225. Thank you for your cooperation in this important matter.

Sincerely,



Charles E. Grassley
Chairman
Senate Committee on the Judiciary