



**U.S. Department of Justice
Office of the Inspector General
Evaluation and Inspections Division**

Review of the Federal Bureau of Investigation's Disciplinary System

May 2009

Report Number I-2009-002

EXECUTIVE DIGEST

INTRODUCTION

This review of the Federal Bureau of Investigation's (FBI) disciplinary system is the fifth in a series of Department of Justice (Department) Office of the Inspector General (OIG) reviews assessing Department components' disciplinary systems.¹

The FBI's mission is to "protect and defend the United States against terrorist and foreign intelligence threats; uphold and enforce the criminal laws of the United States; and provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners."² To meet its mission, the FBI states that it expects its more than 30,000 employees to exemplify its core values, which include:

1. Uncompromising personal integrity and institutional integrity;
2. Accountability by accepting responsibility for their actions and decisions and the consequences of their actions and decisions; and
3. Leadership, both personal and professional.

The FBI has defined the actions that violate its standards of conduct and hinder the performance of the FBI's mission. In addition, the FBI has identified the range of discipline it may impose when an employee deviates from these standards and commits misconduct.

The OIG conducted this review to examine the FBI's investigations of allegations of misconduct against FBI employees and to assess whether the FBI imposed consistent, reasonable, and timely discipline for misconduct.

In this Executive Digest, we first provide a brief overview of the FBI's disciplinary system, followed by a summary of our results and our recommendations.

¹ The four previous OIG reports are *Review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' Disciplinary System*, I-2005-009, September 2005; *Review of the Federal Bureau of Prisons' Disciplinary System*, I-2004-008, September 2004; *Review of the Drug Enforcement Administration's Disciplinary System*, I-2004-002, January 2004; and *Review of the United States Marshals Service Discipline Process*, I-2001-011, September 2001.

² www.fbi.gov/libref/historic/history/changeman.htm.

OVERVIEW OF THE FBI'S DISCIPLINARY SYSTEM

The legal framework for federal agencies to address employee misconduct through what is called *non-adverse actions* (suspensions of 14 days or less, letters of censure, and oral reprimands) and also through *adverse actions* (suspensions of greater than 14 days, demotions, and removals) is established in 5 U.S.C. Chapter 75 and 5 C.F.R. Part 752. However, the procedural protections outlined in these regulations do not apply for most FBI employees.³

For example, FBI employees cannot appeal disciplinary decisions to the Merit Systems Protection Board like most other federal employees. 5 U.S.C. § 7511(b)(8). However, the FBI has established a process that allows employees to appeal their discipline internally.⁴

The FBI's disciplinary system is divided into five phases:

- reporting of alleged misconduct,
- investigation of the alleged misconduct,
- adjudication of the misconduct investigation,
- the appellate process, and
- implementation of discipline on FBI employees.

Under FBI policy, FBI employees must report all allegations of misconduct to appropriate FBI officials – who in turn are required to report them to the OIG. As with other Department agencies, the OIG can investigate any of these allegations. Normally, the OIG investigates criminal allegations or the most serious administrative allegations involving high-level FBI employees or those that implicate systemic

³ FBI employees to whom these procedural protections apply during the disciplinary process include preference-eligible veterans. 5 U.S.C. § 7511(a)(1)(B). Veterans are preference eligible if they are disabled or served on active duty during certain specified time periods or in military campaigns. 5 U.S.C. § 2108.

⁴ The Merit Systems Protection Board (MSPB) is an independent, quasi-judicial agency in the Executive Branch that was established by Reorganization Plan No. 2 of 1978, which was codified by the *Civil Service Reform Act of 1978*, Pub. L. No. 95-454, 92 Stat. 1111. The Act authorized the MSPB to hear appeals of various agency decisions, most of which are appeals of agencies' adverse actions.

issues.⁵ Most allegations of less serious administrative misconduct are referred back to the FBI for appropriate handling.⁶

The Internal Investigations Section in the FBI's Inspection Division oversees the reporting and investigative phases of the disciplinary process. Investigations of misconduct by the FBI are handled by either personnel in the FBI's Inspection Division or designated FBI staff in field and headquarters divisions overseen by the Internal Investigations Section.

During the adjudicative phase, overseen by the FBI's Office of Professional Responsibility (FBI OPR), the FBI determines whether the allegations are substantiated and, if so, FBI OPR proposes and decides the discipline.⁷ For oral reprimands, letters of censure, and suspensions of 14 days or less (known as "non-adverse actions"), there is no formal proposal stage and FBI OPR Unit Chiefs decide the discipline that will be imposed. For suspensions greater than 14 days, demotions, and removals (known as "adverse actions"), the Unit Chiefs must propose discipline and the FBI OPR Assistant Director makes the disciplinary decision. Generally, the FBI attempts to complete the investigation and adjudication of a misconduct case within 180 days.

In the appellate phase, an FBI employee may appeal a disciplinary decision, other than an oral reprimand or letter of censure, to the Assistant Director of the FBI's Human Resources Division. The Assistant Director decides appeals of non-adverse actions, while a Disciplinary

⁵ FBI employees are not covered by the *Whistleblower Protection Act* (5 U.S.C. § 1211 *et seq.*) which applies to most other federal employees. They are covered by whistleblower regulations developed by the Department that attempt to mirror the *Whistleblower Protection Act*. The OIG and the Department's Office of Professional Responsibility share responsibility for investigating allegations of retaliation against FBI whistleblowers. 28 C.F.R. Part 27.

⁶ The percentage of misconduct investigations of FBI employees conducted by the OIG, the Department's Office of Professional Responsibility, or the Department's Public Integrity Section is smaller than the percentage handled by the FBI. During the time period of our review, the FBI conducted 90 percent of the misconduct investigations (69 percent were delegated to the divisions to complete), the OIG conducted 6 percent, and the Department's Office of Professional Responsibility or Public Integrity Section conducted 4 percent.

⁷ FBI OPR adjudicators use the "preponderance of the evidence" standard of proof when deciding whether to substantiate allegations. Preponderance of the evidence is defined as "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.56(c)(2).

Review Board, which is chaired by the Assistant Director and is made up of five FBI employees, decides appeals of adverse actions.

FBI policy states that during the appellate process, FBI OPR's findings are subject to the substantial evidence standard of review. Substantial evidence is defined as "the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree." 5 C.F.R. § 1201.56(c)(1).⁸ As explained in the Appellate section of this report, however, we found that the FBI's August 2007 Electronic Communication describing the standard of review does not clearly indicate what standard of review applies to the review of the penalty decisions.

In the implementation phase, final discipline should be imposed and documented in employees' personnel records to show that the discipline was implemented. Discipline resulting in suspension, demotion, or removal should be documented on an Office of Personnel Management Standard Form 50 (SF-50) in the employee's personnel records to confirm that discipline was implemented. Notices of oral reprimands and letters of censure should also be maintained in an employee's personnel records.

OIG METHODOLOGY

In this review, we examined the consistency, reasonableness, and timeliness of the five phases of the FBI's disciplinary system.⁹ As part of the review, we interviewed employees in the FBI Director's Office, the Inspection Division, FBI OPR, and the Human Resources Division to understand these divisions' involvement in the disciplinary system. We also interviewed employees involved in the disciplinary process in six FBI

⁸ This standard means that appellate officials should generally defer to FBI OPR's findings of fact regarding the misconduct and should not attempt to redecide the facts of the case unless the FBI OPR record "is insufficient to decide the merits of an appeal." See FBI Memorandum to All Special Agents in Charge, Standards of Conduct Disciplinary Matters – Revision of the FBI's Disciplinary Process, March 5, 1997, p. 14.

⁹ We considered consistency to be whether the disciplinary system processed similar misconduct cases using uniform standards. We defined reasonableness to be whether the record as a whole contained sufficient evidence to allow a reasonable person to support the same conclusion, even though another reasonable person might have reached a different conclusion. We also considered whether the processes for investigations and adjudications were complete and objective. We considered timeliness to be whether policies and procedures ensured timely reporting and investigation of alleged misconduct, as well as timely adjudication and implementation of discipline.

divisions across the country to understand how misconduct is reported, investigated, and adjudicated on a local level.

In addition to interviews, we analyzed FBI data related to 1,551 misconduct investigations closed from fiscal year (FY) 2005 to FY 2007 and 5,377 allegations of misconduct received during the same 3-year time period to determine the timeliness and overall outcomes of the disciplinary process. We obtained this data from the FBI's Case Management System, established in November 2004 to track the FBI's misconduct allegations, investigations, and adjudications.

We also conducted a detailed file review of misconduct investigations involving 69 FBI employees to determine if the investigations, as well as the resulting disciplinary decisions at the adjudicative and appellate stages, were consistent and reasonable. Three of the 69 employees were at the Senior Executive Service (SES) level.¹⁰ To better determine if disciplinary decisions were influenced by an employee's grade level, we also reviewed the case files for an additional 17 SES employees. In sum, we reviewed misconduct files related to 20 SES employees and 66 non-SES employees. Finally, to determine whether discipline was actually implemented, we analyzed the personnel records for 83 FBI employees to confirm that they had been suspended for the correct number of days.

To learn about the experiences and perceptions of FBI employees regarding the disciplinary system, especially whether they believed there was a double standard of discipline for higher-ranking and lower-ranking employees, we surveyed a random sample of 1,449 FBI employees, 818 of whom responded. Finally, we reviewed FBI policies and manuals regarding the disciplinary system; OIG Investigations Division data relating to the FBI's disciplinary system; previous reports about FBI discipline; and federal and Department-wide laws and regulations applicable to disciplinary systems.

RESULTS IN BRIEF

Our review found that aspects of the FBI disciplinary process work well, but there are deficiencies in the reporting, adjudicative, appellate, and implementation phases of the FBI's disciplinary system that hamper the FBI's ability to ensure reasonable and consistent discipline for its

¹⁰ The Senior Executive Service consists of the highest-ranking supervisory positions in a federal agency, with the exception of those positions that are appointed by the President. As of December 2008, the FBI had 260 employees in the Senior Executive Service.

employees. Additionally, we found that problems identified in previous reviews of the FBI's disciplinary system, such as a perception of a double standard of discipline between higher-ranking and lower-ranking employees, continue.¹¹

Our key findings for each of the phases of the disciplinary process are:

- In the reporting phase, potential misconduct was not consistently reported to FBI headquarters or to the OIG as required by FBI policy.
- In the investigative phase, the FBI's investigations of misconduct generally were thorough and conducted in a consistent manner, and the FBI had improved its timeliness.
- In the adjudicative phase, most of FBI OPR's penalty decisions for misconduct that we reviewed were reasonable. However, we found inconsistencies in the discipline imposed and a lack of adequate explanation for those inconsistencies in some cases. In addition, we found that the FBI OPR Assistant Director has at times considered unwritten information she received outside the normal disciplinary process before making disciplinary decisions. As in the investigative phase, the timeliness of the adjudicative phase had also improved.
- In the appellate phase, we found that the majority of decisions for non-SES employees appeared reasonable. However, we found that almost all SES appeals were mitigated, and we found that most of these decisions were unreasonable. We also found a lack of clear guidance about the appropriate standard of review the appellate officials should apply when reviewing penalties imposed by FBI OPR. As in the previous two phases, the timeliness of the appellate phase also had improved.
- We found that a significant percentage of FBI employees we surveyed believed that there was a double standard of discipline in

¹¹ There have been two previous OIG reviews of the FBI disciplinary system: *A Review of Allegations of a Double Standard of Discipline at the FBI* (November 2002) and *A Review of Allegations of a Continuing Double Standard of Discipline at the FBI* (November 2003). Additionally in May 2003, the FBI Director requested that former Attorney General Griffin Bell and former Associate Director of the FBI Dr. Lee Colwell lead a comprehensive study of FBI OPR. Griffin B. Bell and Lee Colwell, *Study of the FBI's Office of Professional Responsibility* (February 2004).

the FBI for higher- and lower-ranking employees. Our review of FBI disciplinary decisions found that allegations of misconduct were much more likely to be unsubstantiated against SES employees than non-SES employees. We found even more significant differences in the rates that SES employees' penalties were mitigated on appeal (5 out of 6, or 83 percent of the time) as compared to non-SES employees' penalties (44 out of 247, or 18 percent of the time). In addition, as noted in the previous finding, we concluded that the mitigation of most of these SES appeals was unreasonable.

- In the implementation phase, we found that the FBI did not ensure that disciplined employees served their suspensions. We found many examples of FBI employees whose imposed suspensions were not served at all or were served for the wrong amount of time.

The following sections of this Executive Digest describe these findings in more detail.

Reporting of Misconduct Allegations

Our survey results indicated that FBI employees were not consistently reporting incidents of potential misconduct. Of 818 survey respondents, 226 stated that they had observed or been made aware of incidents of misconduct, and 18 percent of them (40 of 226) stated that they did not report it. An additional 12 percent (27 respondents) stated that they reported less than half of the misconduct that they observed. The survey respondents' main reason for why they might not report potential misconduct was being unsure about whether what they observed was misconduct or a performance-related matter.¹²

In addition, during our site visits to field and headquarters divisions, we found that three of six FBI field divisions that we visited did not report all incidents of potential misconduct to the Internal Investigations Section. After reviewing information about 25 incidents that we believed described potential misconduct, Internal Investigations Section personnel agreed that 8 should have been forwarded to them.

We also determined that while the FBI had established appropriate procedures to ensure that misconduct allegations it receives were

¹² According to the Office of Personnel Management, misconduct involves failure to follow a workplace rule. In contrast, poor performance occurs if an employee does not do his or her job at an acceptable level.

provided to the OIG for review as required, some allegations were not shown to the OIG. We examined a random sample of 103 allegations to determine if the FBI had actually shown them to the OIG. Internal Investigations Section personnel were unable to document that they had shown eight allegations to the OIG.

Finally, we were unable to analyze the amount of time taken by field and headquarters divisions to report misconduct because the FBI's Case Management System does not track when the divisions become aware of potential misconduct.

Investigation of Misconduct Allegations

To determine whether the Internal Investigations Section succeeded in ensuring thorough investigations, 2 OIG Special Agents and 1 OIG Inspector reviewed a sample of misconduct investigations conducted by the FBI's Internal Investigations Section personnel and field investigators of misconduct allegations made against 69 FBI employees. Overall, our review found that the investigations were generally thorough, the necessary investigative steps were taken, and the investigations were well documented in the investigative reports.

To examine the timeliness of the investigative phase, we analyzed Case Management System data for all 1,551 misconduct investigations closed from FY 2005 through FY 2007. We found that the timeliness of FBI misconduct investigations improved from a median of 92 days in FY 2005 to complete an investigation after an allegation was reported to a median of 81 days in FY 2007. Additionally, we found that the percentage of investigations completed in 90 days or less after an allegation was reported increased from 49 percent in FY 2005 to 60 percent in FY 2007.

Adjudication of Misconduct Investigations

We concluded that the adjudicative decisions reached by FBI OPR generally were reasonable. However, we found that some of FBI OPR's decisions on what penalties to impose contained inconsistencies that could not be explained by the record in the case files. In cases we reviewed, we also found variations in discipline imposed among cases that appeared to be similar. Some of these cases lacked a discussion of FBI OPR's assessment of precedent cases, making it difficult to assess whether there was sufficient justification for the disparity in penalties between similar cases. In other cases, we found that FBI divisions did

not submit an assessment of Douglas Factors to FBI OPR, as required by the FBI's *Internal Investigations Supervisor's Guide*.¹³

In addition, we found that the FBI OPR Assistant Director sometimes informally solicited or received information, outside the normal disciplinary process, from the supervisors or co-workers of the subject of a misconduct investigation before making her disciplinary decision.¹⁴ We believe that the FBI OPR Assistant Director should limit disciplinary considerations to the information contained in official misconduct files and provided by the employee.

One area of significant improvement for FBI OPR was the timeliness of adjudications. The median completion time for adjudications improved from FY 2005 to FY 2007, from 94 days to 44 days. Overall, we found that the time frame for completing the investigation and adjudication of disciplinary cases has improved. When investigations and adjudications are combined, the median amount of time it took to complete both phases of the 1,551 completed cases in our review decreased from 199 days to 133 days, an improvement of 33 percent. In addition, the percentage of cases completed within the 180-day time frame increased from 44 percent in FY 2005 to 67 percent in FY 2007.

Appeals of Disciplinary Decisions

We found a lack of clear guidance about the appropriate standard of review that appellate officials should apply when reviewing penalties imposed by FBI OPR.

We also identified concerns related to how the FBI selects employees to serve on the Disciplinary Review Board. While adverse appeals by non-SES employees are decided by a Disciplinary Review Board consisting of SES and non-SES members, adverse appeals by SES employees are decided by a Disciplinary Review Board consisting of only SES members. We believe that a board composed exclusively of SES

¹³ Under civil service law, there are 12 factors, known as the Douglas Factors, that should be considered in determining the appropriateness of a disciplinary penalty. See *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981).

¹⁴ 5 C.F.R. § 752.404(f) states that in "arriving at its decision, the agency shall not consider any reasons for action other than those specified in the notice of proposed action," as well as any information presented in the employee's written and oral presentation to the agency. However, as discussed above, these regulations do not apply to most FBI employees.

employees hearing an SES employee's appeal can result in either bias or the appearance of bias. We believe that a permanent appeals decision maker or board, rather than a board composed of SES employees who rotate in and out of their board service after 6 months, could improve the quality and consistency of disciplinary decisions, and could also help address concerns about bias in individual cases or the appearance of SES board members issuing more lenient decisions for their SES colleagues.

When we reviewed the files of a selected sample of 22 cases appealed by non-SES employees, we concluded that most of the appellate decisions were reasonable. However, we identified two appeals in which we believe the Disciplinary Review Board unreasonably reversed misconduct findings or mitigated penalty findings by FBI OPR.

In addition, we conducted a file review of six appeals by SES employees. The penalties in five of those cases were mitigated on appeal. We concluded that most of these mitigation decisions were not reasonable.

Finally, we found that the timeliness of the appeals process improved.

Double Standard of Discipline

A significant percentage of FBI employees that we surveyed believed that higher-level employees were treated more leniently in the FBI's disciplinary system. In our survey, we asked FBI employees whether they agreed or disagreed with the following statement: "*There is a double standard of discipline for higher-ranking versus lower-ranking FBI employees.*" Of 717 respondents who answered this question, 33 percent agreed with the statement that a double standard of discipline exists in the FBI, 11 percent disagreed, and the rest either had a neutral opinion or responded that they did not know. When we compared the survey responses of non-SES employees with those of SES employees, we found non-SES employees were more likely to believe that there is a double standard than SES employees were.

We analyzed the FBI's Case Management System data to determine if there were different rates of substantiation of misconduct allegations among various demographic groups. We found that misconduct allegations against SES employees were much more likely to be unsubstantiated (49 percent) than those against non-SES employees (22 percent). When we compared employees at the GS-14 level and

above (including SES employees) to those at the GS-13 level and below, we again found differences, although not as significant as when we compared SES and non-SES employees. In contrast to differences in substantiation rates based on an FBI employee's SES or supervisory status, there was little variation in substantiation rates between employees in different job categories and of different genders.

When we analyzed the outcomes for those employees who appealed the discipline imposed by FBI OPR, we found that the penalties imposed on SES employees for misconduct were mitigated on appeal much more frequently than for non-SES employees. We found that 5 of 6 cases (83 percent) appealed by SES employees resulted in mitigation of the discipline originally imposed by FBI OPR, while only 44 of 247 cases (18 percent) appealed by non-SES employees resulted in mitigation.

In addition, as noted above, when we examined the appeals process we found that the appellate officials unreasonably mitigated discipline in most of the SES cases we reviewed. Our review of the six SES cases that were appealed during our time period confirmed that appellate officials often substituted their judgment for FBI OPR's decisions, even on findings of fact. We also concluded that the board's reasons for overturning FBI OPR's findings in these cases, and for mitigating punishment, were unpersuasive and unreasonable. In sum, although the number of appealed SES cases is small, we believe the evidence indicates that SES employees were treated more leniently on appeal than non-SES employees, and that this more lenient treatment was not justified.

We believe that the FBI should consider appointing a permanent appellate decision maker, rather than continuing to use a board composed of employees who rotate in and out of their board service after 6 months, to decide appeals of disciplinary decisions. This change could improve the quality and consistency of appellate decisions and could also help address concerns about bias in individual cases or the appearance of a board composed only of SES members issuing more lenient decisions for SES appeals.

Implementation of Discipline

We found that the FBI does not ensure that disciplined employees serve their suspensions. To assess whether FBI employees actually served their suspensions, we reviewed the personnel and time and attendance records for 83 suspended employees. Of the 83 employees,

15 employees (18 percent) were either not suspended at all or were suspended for an incorrect number of days.

We also found many cases in which employees' personnel files did not contain documentation showing their suspensions. We found that the personnel records for 29 of the 83 employees we sampled (35 percent) did not contain the required SF-50s to document the beginning and end of the suspension. Of the 29 employees' files, 11 were missing 1 of the SF-50s, while another 18 employees' files were missing both. We found that the time and attendance records for another 9 of 83 suspended employees (11 percent) showed the employees as being absent for reasons other than a suspension. The records for five of these employees indicated they were on "leave without pay," two were on "absence without official leave," one was on "furlough," and the last was on leave for sickness.

Finally, FBI policy states that a "period of suspension will always commence at the close of business, Friday of any given week," except for extraordinary circumstances due to an employee's work schedule. In contrast, the four other Department components whose disciplinary systems we previously reviewed – the Bureau of Alcohol, Tobacco, Firearms and Explosives; the Drug Enforcement Agency; the United States Marshals Service; and the Bureau of Prisons – begin employee suspensions on the first workday (usually Monday) of the workweek. The FBI's practice results in FBI employees effectively serving fewer days and receiving less time off without pay than employees in other Department components who are suspended for the same amount of time.

CONCLUSION AND RECOMMENDATIONS

Overall, we found that some aspects of the FBI's disciplinary system worked well, but that improvements are needed in several critical areas. To the FBI's credit, the timeliness of all phases of the FBI's disciplinary process improved since FY 2005, and the FBI's misconduct investigations are generally thorough, necessary investigative steps generally are taken, and the investigations are well documented in the investigative reports.

However, we found problems with the reporting of misconduct allegations, the adjudication of investigations, the appeals of disciplinary decisions, and the implementation of discipline that prevent us from concluding that the FBI's disciplinary system overall is consistent and reasonable.

We found that most incidents of misconduct were reported to the FBI's Inspection Division and to the OIG, as required. However, 30 percent of survey respondents who had observed misconduct said they either never reported misconduct they observed or reported less than half the misconduct they observed. Also, some divisions did not consistently report incidents of potential misconduct to FBI's Internal Investigations Section, and the FBI's process for reporting alleged misconduct to the OIG was not effective in ensuring the OIG was provided all misconduct allegations or in tracking the OIG's review of the allegations.

We concluded that the adjudicative decisions reached by FBI OPR generally were reasonable. However, for almost one-third of substantiated misconduct cases, FBI OPR did not explain how it considered precedent cases when it chose non-standard penalties or FBI divisions did not submit their assessment of the Douglas Factors, as required by the FBI's *Internal Investigations Supervisor's Guide*. We found some inconsistencies in penalties imposed between factually similar cases, and the lack of discussion of precedent or the Douglas Factors made it difficult to determine if these inconsistencies were appropriate. We also learned that the FBI OPR Assistant Director has at times considered unwritten information she received outside the normal disciplinary process before making disciplinary decisions.

In the appellate stage, we found a lack of clear guidance about what standard of review appellate officials should apply when reviewing FBI OPR's penalty determinations. Further, we are concerned that appeals of adverse actions by SES employees are decided by a Disciplinary Review Board made up only of fellow SES employees. We believe that a permanent appeals decision maker or board, rather than a board composed of SES employees who rotate in and out of their board service after 6 months, could improve the quality and consistency of disciplinary decisions, and could also help address concerns about bias in individual cases or the appearance of SES board members issuing more lenient decisions for their SES colleagues. Most of the appellate decisions for non-SES employees that we reviewed were reasonable, but the majority of appellate decisions for SES employees were not.

We found there continues to be a significant percentage of FBI employees who believe that there is a double standard of discipline for higher-ranking and lower-ranking FBI employees. In our review, we found that allegations of misconduct against SES employees were unsubstantiated at a much higher rate than allegations against non-SES employees. Even more significant, SES employees' penalties were

mitigated on appeal at a much higher rate than non-SES employees' penalties. Moreover, when we examined the appellate officials' decisions to mitigate penalties for SES employees, we found that the mitigation in most of these SES cases was unpersuasive and unreasonable.

Finally, we found that the FBI did not ensure that imposed disciplinary penalties were actually implemented and that discipline was documented in employees' personnel files. We found that 15 of the 83 suspended employees we reviewed (18 percent) either did not serve their suspension at all or were suspended for an incorrect number of days. We also determined that the personnel and pay records for an additional 38 employees (46 percent) were incomplete or reflected incorrect information regarding the suspensions. In addition, because the FBI begins its suspensions at the close of business on Fridays, FBI employees actually serve fewer days and receive less time off without pay than employees in other Department components who are suspended for the same amount of time.

In sum, we believe the FBI must take significant action to improve its disciplinary process, including ensuring that misconduct allegations are consistently reported, that its adjudicative and appellate disciplinary decisions are reasonable and well documented, that discipline is implemented and recorded in employees' personnel files, and that discipline is administered equitably across all grade levels and for all job categories. Our report makes 16 recommendations to assist the FBI in improving its disciplinary process.

As a result of our review, we recommend that the FBI:

1. Remind all employees on an annual basis that all allegations of misconduct must be promptly reported to the FBI Internal Investigations Section or to the OIG.
2. Stress to field and headquarters divisions that they must forward all allegations of potential misconduct they receive to the Internal Investigations Section.
3. Consider automating the allegation-reporting process so that allegations can be reviewed by the OIG electronically instead of in hard copy.
4. Ensure that Internal Investigations Section personnel enter information regarding the OIG's review into the FBI's Case Management System.

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5. Require field and headquarters divisions to specify, when forwarding allegations to the Internal Investigations Section, the date they became aware of the potential misconduct.
 6. Modify the FBI's Case Management System so that users can track the date that divisions become aware of potential misconduct.
 7. Require FBI OPR to document its consideration of precedent when a mitigated or aggravated penalty is imposed.
 8. Require field and headquarters divisions to submit a Douglas Factors assessment in misconduct cases, except in unsubstantiated Delegated Investigation and Adjudication cases.
 9. Clarify in policy that FBI OPR and appellate officials should not seek or consider unwritten information when making disciplinary decisions.
 10. Consider changing the adjudicative process to ensure that the proposing and deciding officials within FBI OPR are separate.
 11. Clarify FBI policies on the appellate officials' authority to modify findings of fact and penalties to resolve different interpretations of the policies by FBI OPR and appellate officials.
 12. Consider appointing a permanent appeals decision maker or board, rather than an appeals board composed of employees who rotate in and out of their board service after 6 months. In addition, if the permanent appellate decision-maker is a board rather than an individual, expand the board membership for SES appeals beyond only SES employees.
 13. Require appellate officials to fully document in writing the reasons for their decisions, including their consideration of precedent and mitigating or aggravating factors.
 14. In addition to Recommendation 12, which recommends a change in the FBI's appellate process, ensure that FBI policies are applied consistently to all levels of employees at all stages of the disciplinary process.

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15. Conduct a review of the personnel files and timekeeping records of all employees who were suspended since October 1, 2004, to verify that the suspensions were properly documented, that the employees served their suspensions, and the employees were not paid during their suspension periods.
 16. Revise FBI policy to begin suspensions on the first day of the workweek, as is done by other Department components.

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BACKGROUND

Overview of the FBI and Its Disciplinary System

The Federal Bureau of Investigation's (FBI) stated mission is "to protect and defend the United States against terrorist and foreign intelligence threats; to uphold and enforce the criminal laws of the United States; and to provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners."¹⁵

As of September 2008, the FBI had 31,244 employees, including 12,851 Special Agents and 18,393 non-agent personnel. Non-agent personnel include Intelligence Analysts, Language Specialists, scientists, Information Technology Specialists, and administrative employees. The FBI's employees work at FBI headquarters in Washington, D.C., 56 field divisions and more than 400 resident agencies throughout the United States, and 60 Legal Attachés (Legats) in U.S. Embassies around the world.

The laws and regulations contained in 5 U.S.C. Chapter 75 and 5 C.F.R. Part 752 establish the legal framework governing the discipline of most federal employees. However, the procedural protections outlined in these regulations do not apply to most FBI employees. (See, e.g., 5 U.S.C. § 7511(b)(8) (exempting most FBI employees from the right to appeal disciplinary decisions to the Merit Systems Protection Board).¹⁶) Therefore, most FBI employees are subject to disciplinary rules established by the FBI. Under the FBI's process, the types of misconduct for which an employee may be disciplined, and the penalties for such misconduct, are described in the FBI's Offense Table and Penalty Guidelines.¹⁷

¹⁵ Federal Bureau of Investigation, "About Us – Quick Facts," www.fbi.gov/quickfacts.htm.

¹⁶ FBI employees to whom these procedural protections apply during the disciplinary process include preference-eligible veterans. 5 U.S.C. § 7511(a)(1)(B). Veterans are preference eligible if they are disabled or served on active duty during certain specified time periods or in military campaigns. 5 U.S.C. § 2108.

¹⁷ The FBI's Offense Table groups misconduct into five categories. Each category of misconduct includes a specific list of offense codes, the standard penalty for each offense code, and the mitigated and aggravated penalties. We discuss the Offense Table in greater detail later in this report.

In addition, while the FBI is not required to follow civil service and Office of Personnel Management (OPM) regulations during the disciplinary process, like other federal agencies the FBI considers the 12 Douglas Factors when determining disciplinary actions.¹⁸ The Douglas Factors include information such as the employee's performance record, past disciplinary record, and the nature and seriousness of the current offense. Based on the application of these factors, the agency may mitigate (reduce) or aggravate (increase) a proposed penalty.

The FBI also considers discipline imposed on other employees for the same or similar offense. To review previous cases, the FBI uses a "precedent database," which contains final disciplinary determinations for all misconduct cases initiated after the FBI established its current Offense Table and Penalty Guidelines on November 1, 2004.

The FBI's disciplinary process consists of five phases – reporting, investigation, adjudication, appeals, and implementation. The Internal Investigations Section in the FBI's Inspection Division oversees the reporting and investigative phases of the disciplinary system. Under FBI policy, FBI employees must report all allegations of misconduct to appropriate FBI officials, such as their supervisors or the Inspection Division, who are required to forward them to the Department of Justice (Department) Office of the Inspector General (OIG). The OIG has the authority to investigate any of these allegations, but normally the OIG investigates criminal allegations, serious allegations involving high-level FBI employees, or allegations that implicate systemic issues.¹⁹ Similar to how it handles misconduct allegations in all other Department

¹⁸ The Civil Service Reform Act created the Merit Systems Protection Board (MSPB) to decide appeals of certain agency disciplinary actions. The board identified the 12 Douglas Factors as factors that it considered to be relevant for agencies to consider in determining the appropriateness of a disciplinary penalty. See *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981). See Appendix II for a full list of the Douglas Factors. While the MSPB does not have jurisdiction over FBI discipline – except in limited circumstances such as when the FBI employee is a preference-eligible veteran – the FBI uses the Douglas Factors as guidance for its disciplinary actions.

¹⁹ FBI employees are not covered by the *Whistleblower Protection Act* (5 U.S.C. § 1211 *et seq.*) which covers most other federal employees, but instead are covered by regulations developed by the Department that attempt to mirror the Act. The OIG and the Department's Office of Professional Responsibility share responsibility for investigating allegations of retaliation against FBI whistleblowers. 28 C.F.R. Part 27.

components, the OIG refers most allegations back to the FBI for appropriate handling.²⁰

FBI investigations of misconduct are conducted by personnel in the Internal Investigations Section or are delegated to FBI staff in field and headquarters divisions. When investigations are delegated, they are overseen by personnel in the Internal Investigations Section.

The adjudicative phase of the disciplinary process is overseen by the FBI's Office of Professional Responsibility (FBI OPR). FBI OPR determines whether the allegations are substantiated and, if so, proposes and decides on the discipline to be imposed.²¹ For discipline ranging from an oral reprimand to a suspension of 14 days or less – a category of discipline known as “non-adverse actions” – there is no formal proposal stage and FBI OPR Unit Chiefs decide the discipline that will be imposed. For suspensions greater than 14 days, demotions, and removals – a category of discipline known as “adverse actions” – FBI OPR Unit Chiefs propose discipline, and the FBI OPR Assistant Director makes the final decision on the penalty. Generally, the FBI attempts to complete the investigation and adjudication of misconduct cases in 180 days.

In the appellate phase, FBI employees may appeal a disciplinary decision, other than an oral reprimand or letter of censure, to the Assistant Director of the FBI's Human Resources Division. The Assistant Director decides appeals of non-adverse actions, while a Disciplinary Review Board, which is chaired by the Assistant Director and composed of five FBI employees, decides appeals of adverse actions. FBI policy states that, generally, appellate officials should defer to FBI OPR's findings of fact regarding the misconduct, but may select a penalty independent of FBI OPR's penalty decision.

²⁰ The number of misconduct investigations of FBI employees conducted by the OIG, the Department's Office of Professional Responsibility, or the Department's Public Integrity Section is small. During the time period of our review, the FBI conducted 90 percent of the misconduct investigations (including 69 percent delegated to the divisions to complete), the OIG conducted 6 percent, and the Department's Office of Professional Responsibility or Public Integrity Section conducted 4 percent.

²¹ FBI OPR adjudicators use the “preponderance of the evidence” standard of proof when deciding whether allegations have been substantiated by the investigation. Preponderance of the evidence is defined as “the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.” 5 C.F.R. § 1201.56(c)(2).

The FBI Director has the discretionary authority to review and change any disciplinary actions concerning all FBI employees, except FBI employees at the Assistant Director level or above. For those senior employees, disciplinary actions must be decided by a Department official.

The FBI Director may increase or decrease the penalty that was determined during the FBI's disciplinary process. However, the FBI Director's authority is not considered an additional level of appeal and, according to FBI policy, is exercised only on the initiative of the Director in "rare and exceptional cases" when he considers it necessary to correct an injustice or prevent harm to the FBI.

In the implementation phase, final discipline is imposed and documented in employees' personnel records. Discipline resulting in suspension, demotion, or removal is documented on an OPM Standard Form 50 (SF-50) in the employee's personnel file to confirm that discipline was implemented. Notices of oral reprimands and letters of censure are also documented in an employee's personnel records.

A more detailed description of each phase of the FBI's disciplinary system is provided below.

Reporting of Misconduct Allegations

The FBI's *Manual of Administrative Operations and Procedures* requires FBI employees to promptly report allegations of criminal or serious administrative misconduct by FBI employees. These allegations are sent to the Internal Investigations Section in written form by mail, facsimile, or e-mail, and may be sent anonymously. FBI employees may also report misconduct allegations to the OIG. The FBI receives allegations of misconduct from various other sources, such as members of the public, other federal agencies, and state and local agencies.

In fiscal years (FY) 2005 through FY 2007, the FBI's Internal Investigations Section received 5,377 misconduct allegations. The majority of these allegations were received as Electronic Communications from the heads of FBI headquarters divisions or field divisions where the misconduct allegedly occurred.²²

When allegations are received, they are reviewed by the Internal Investigations Section's Initial Processing Unit personnel. At the time of

²² An Electronic Communication is the primary type of document used by the FBI for internal communications.

our review, the Initial Processing Unit consisted of one Unit Chief, seven Conduct Review Specialists, and two Human Resources Assistants. The personnel in the Initial Processing Unit enter information regarding all new allegations into an FBI tracking database called the Case Management System.²³ If an allegation is reported to the OIG first, in most cases the OIG notifies the Internal Investigations Section of the allegation and whether the OIG intends to investigate the matter or refer it to the FBI for handling.

Personnel in the Initial Processing Unit refer to the FBI's Offense Table and Penalty Guidelines to determine the appropriate category for the alleged misconduct. The FBI Offense Table and Penalty Guidelines group misconduct into the following five major categories:

- investigative misconduct,
- integrity/ethical misconduct,
- property-related misconduct,
- illegal/criminal misconduct, and
- general misconduct.

Each category of misconduct includes a specific list of offense codes, the standard penalty for each offense code, and the range of potential mitigated and aggravated penalties. For example, Offense Code 2.2 is described as knowingly providing false or misleading information in a fiscal-related document. This includes providing false information on time and attendance records, travel vouchers, and insurance forms. The standard penalty for this offense is a 10-day suspension. However, if mitigating factors are present, the 10-day standard penalty can be reduced to a 7-day suspension or to a letter of censure. If aggravating factors are present, the penalty can be increased to a 15-day suspension or up to dismissal.

Investigation of Misconduct Allegations

Once information regarding an allegation is entered into the FBI's Case Management System, Initial Processing Unit personnel provide the allegation to the OIG for review. The OIG has the right of first refusal to investigate any allegations of potential employee misconduct. The OIG reviews all allegations to determine whether to: (1) initiate an OIG investigation; (2) refer the matter to the FBI for investigation with an

²³ The Case Management System contains data from November 1, 2004, to the present. The FBI uses the Case Management System to collect and store information related to misconduct investigations, adjudications, and appeals.

instruction to report back to the OIG upon completion of the FBI investigation; or (3) refer the matter to the FBI for it to handle as it deems appropriate.

The OIG generally investigates the following four types of allegations:

- an allegation that, if substantiated, would likely result in criminal prosecution;
- serious administrative allegations made against employees at the GS-15 level and above;
- allegations pertaining to whistleblower retaliation; and
- allegations that, for various reasons, the OIG believes should not be investigated by the FBI.

If the OIG decides to investigate an allegation, it normally conducts the investigation independently from the FBI and provides a report on the completed investigation to the FBI's Internal Investigations Section. The Internal Investigations Section then forwards the investigation to FBI OPR for adjudication.

If the OIG returns an allegation to the FBI for investigation, the Internal Investigations Section reviews the allegation and determines whether the allegation will be: (1) investigated by the Internal Investigations Section; (2) referred to a field or headquarters division for an investigation monitored by the Internal Investigations Section; or (3) classified as "no action," meaning the allegation does not warrant further investigation.

If Internal Investigations Section personnel determine that an FBI investigation should be opened, the allegation is forwarded to personnel in one of two Internal Investigations Units within the Internal Investigations Section. At the time of our review, the units were composed of 2 Unit Chiefs and 10 Supervisory Special Agents who investigate allegations of misconduct.

The Internal Investigations Section assigns its investigations to the two units depending on geographical location. Internal Investigations Unit I conducts investigations of potential employee misconduct in 24 of the 40 headquarters divisions; FBI field divisions west of the Mississippi River; the Chicago, Milwaukee, Springfield, Indianapolis, and Memphis field divisions; and Legats in Asia, Africa, and North and South America. Internal Investigations Unit II conducts investigations of potential employee misconduct in the remaining 16 headquarters divisions; FBI

field divisions east of the Mississippi River (except for Chicago, Milwaukee, Springfield, Indianapolis, and Memphis); and Legats in Europe, Eurasia, and the Middle East.

Based on the type of alleged misconduct involved, personnel in the Internal Investigations Section designate the investigation as: (1) a Delegated Investigation and Adjudication (DIA), (2) a Delegated Investigation Only (DIO), or (3) a Non-Delegated Investigation (NDI).

DIAs are investigations into misconduct that the FBI has determined are likely to result in non-adverse disciplinary action (which can range from an oral reprimand to a suspension of 14 days or less). For example, the investigation of the loss of an employee's badge or credentials would be conducted as a DIA. Because DIAs generally involve less serious misconduct, the Internal Investigations Section normally delegates the investigation to Supervisory Special Agents in the field or headquarters division where the employee who allegedly committed the misconduct is currently assigned. There, a Supervisory Special Agent investigates the misconduct, and if the division determines that the allegation is substantiated, the division recommends a disciplinary action. The results of the investigation, including a summary of the investigation, any documents collected, and records of interviews with witnesses and the subject, are incorporated into an investigative report which is forwarded to personnel in the Internal Investigations Section. Conduct Review Specialists in the Internal Investigations Section's Initial Processing Unit monitor DIA investigations, except those involving the loss of a weapon, which are monitored by Supervisory Special Agents in one of the Internal Investigations Units. If the Conduct Review Specialists are not satisfied with an investigation, they can request that the field conduct additional investigation. Once the completed investigation is approved, the Internal Investigations Section forwards it to FBI OPR for review and approval of the division's recommendation for adjudication.

DIOs are investigations that involve allegations of mid-level misconduct matters, such as insubordination. Similar to DIAs, DIOs are typically investigated by Supervisory Special Agents in the field or headquarters division where the employee who allegedly committed the misconduct is currently assigned. When the division completes its misconduct investigation, it forwards an investigative report to the Internal Investigations Section, which approves the completed investigation and may request additional investigation if necessary. Unlike in DIAs, divisions conducting DIO investigations do not determine whether the allegations have been substantiated and make no

disciplinary recommendation. Instead, after the Internal Investigations Section completes its review and forwards the investigative file to FBI OPR, personnel there conduct the adjudication, including determining whether the allegation has been substantiated and the appropriate disciplinary action.

In contrast to DIAs and DIOs, which are investigated by FBI personnel in the field, NDIs are investigated by Supervisory Special Agents assigned to one of the Internal Investigations Units in the Internal Investigations Section. NDIs typically involve more serious misconduct than DIOs or DIAs, such as fraud or theft, or lying under oath. When the investigation is completed, the Supervisory Special Agent submits the investigative file to a Unit Chief in the Internal Investigations Section for review and approval. The Unit Chief reviews the file to determine if the investigator has completed the necessary steps and if all necessary documentation is included in the file. If so, the Unit Chief approves the investigation and forwards the investigative file to FBI OPR for adjudication.

At the conclusion of these investigations, the division where the subject is located prepares a written assessment of the Douglas Factors.²⁴ This assessment allows the subject's management to provide its perspective on various aspects of the employee's record and the alleged misconduct. The field or headquarters division is given a deadline by which it must submit the Douglas Factors assessment to FBI OPR. If FBI OPR has not received the Douglas Factors assessment by the deadline, it contacts the division to inquire about the status. FBI OPR will extend the deadline at the request of the field or headquarters division. However, if the new deadline passes and FBI OPR still has not received the Douglas Factors analysis, FBI OPR will proceed with the adjudication.

To assist FBI personnel investigating alleged employee misconduct, the Internal Investigations Section created an *Internal Investigations Supervisor's Guide* in 2005. The FBI distributed copies of the guide to each field division, headquarters division, and Legat, and also posted it on the FBI's Intranet. The guide provides an overview of the FBI's disciplinary system, including an explanation of the different types of investigations, steps for conducting investigations, the different types of forms used during an investigation, and the FBI's Offense Table and Penalty Guidelines.

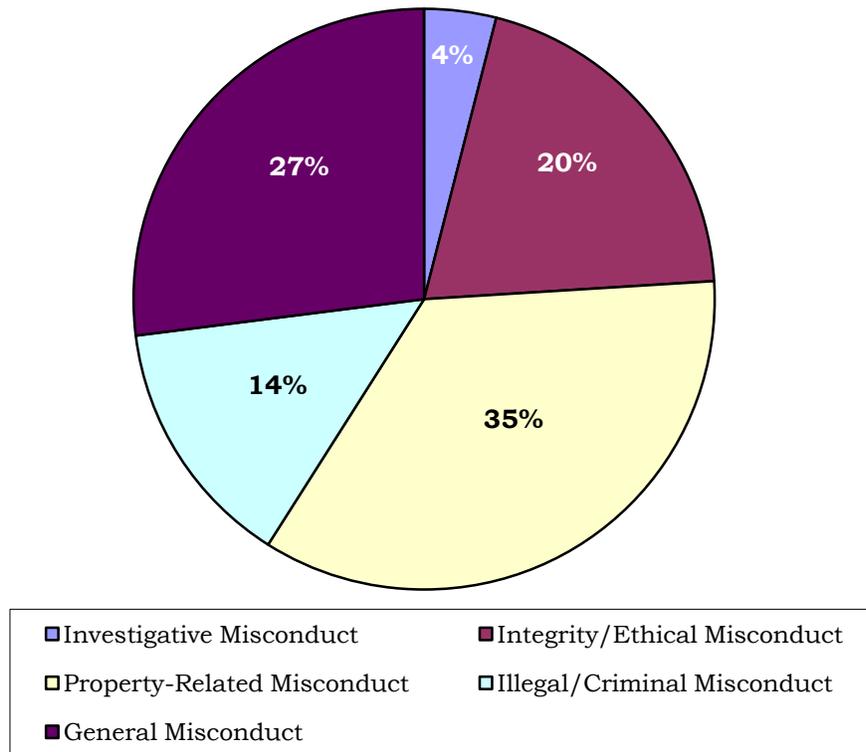
²⁴ The head of the division where the employee works submits Douglas Factors for all investigations except for DIAs when the allegations are not substantiated.

In addition to the guide, the Internal Investigations Section created an online training course to assist FBI employees who conduct misconduct investigations. Although the Internal Investigations Section strongly suggests that employees complete the online training prior to conducting a misconduct investigation, it is not required.²⁵

A misconduct investigation may involve more than one FBI employee, and an employee may be investigated for more than one type of misconduct. For example, the 1,551 closed misconduct investigations from FY 2005 to FY 2007 that we examined in this review involved 1,657 employees who were investigated for 2,777 allegations of misconduct. The breakdown of misconduct allegations during the time period we reviewed is shown in Figure 1 below.

²⁵ The online training is required for Supervisory Special Agents assigned to the Internal Investigations Section and for Assistant Inspectors-in-Place. Assistant Inspectors-in-Place are Supervisory Special Agents who seek to be promoted to the position of Assistant Special Agent in Charge and therefore must meet specific minimum requirements, including completing an inspection certification program. To complete the inspection certification program, an Assistant Inspector-in-Place must complete various tasks, such as conducting misconduct investigations. The Assistant Inspector-in-Place can conduct the required misconduct investigations in the field or participate in a 2-week assignment in the Internal Investigations Section.

Figure 1: Types of Misconduct Allegations



Source: OIG analysis of data from the FBI’s Case Management System.

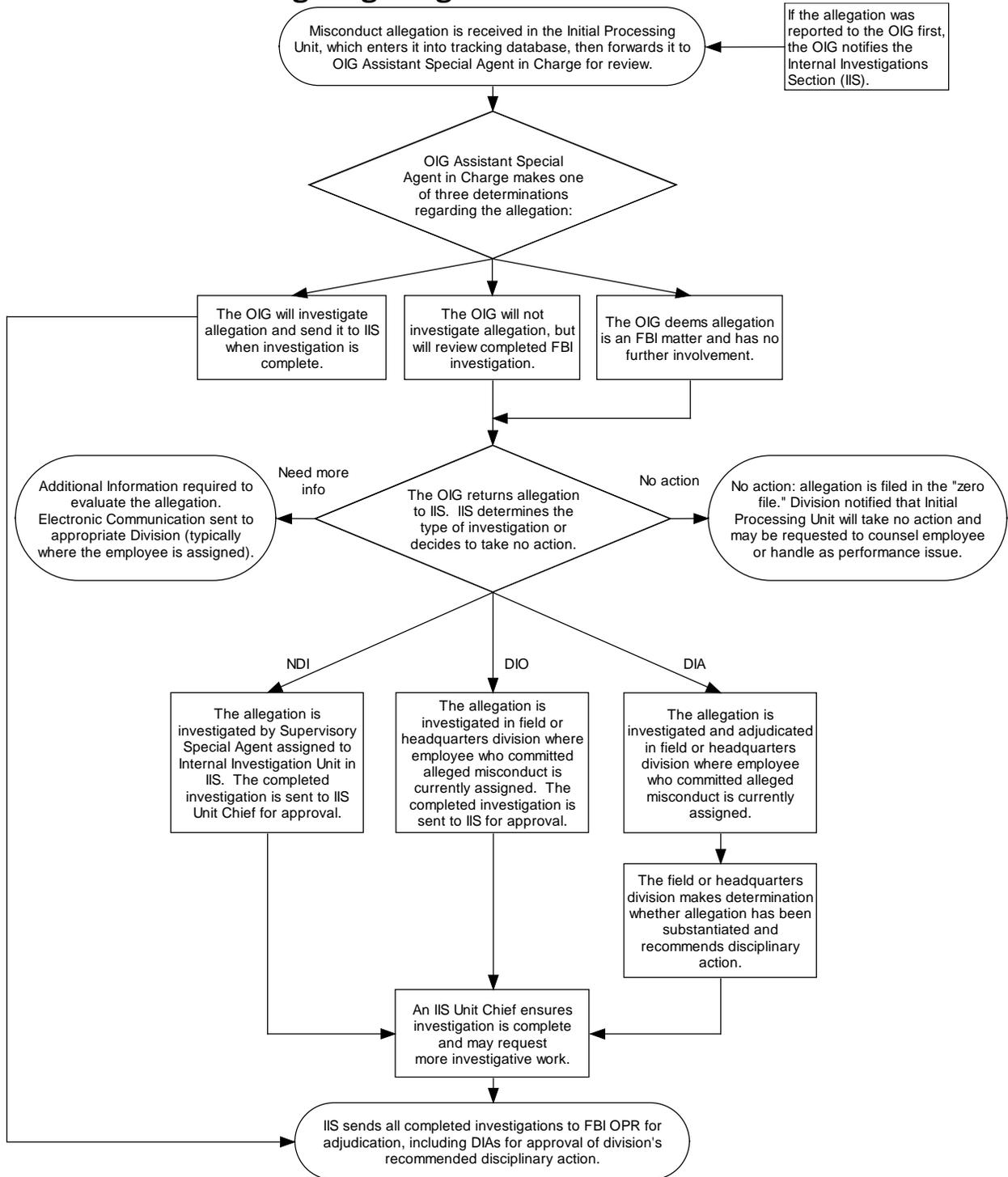
If Internal Investigations Section personnel determine that no action is required regarding an allegation, the information is placed in a “zero file” that contains all allegations that were not opened as investigations. The Internal Investigations Section also sends a written notice to whomever reported the allegation (if the identity of that person is known) stating that it will take no action. According to the FBI, common reasons for not opening a misconduct investigation include:

- the issue described in the allegation was a performance issue;
- the allegation involved a former FBI employee or a non-FBI employee, such as a local police officer who was part of an FBI task force; or
- the allegation described behavior that is not misconduct (e.g., a married employee having an affair with a consenting adult who was not in any way connected to the FBI).

Of the 5,377 misconduct allegations that were received in the Internal Investigations Section from FY 2005 through FY 2007, 74 percent were

placed in the “zero file” instead of being opened as investigations by the OIG, FBI, or the Department’s OPR. Figure 2 provides an overview of the reporting and investigation process for allegations of misconduct at the FBI.

Figure 2: FBI Process for Reporting and Investigating Allegations of Misconduct



Source: FBI documents and interviews with FBI officials.

Adjudication of Misconduct Investigations

FBI OPR oversees the adjudication of misconduct investigations. At the time of our review, FBI OPR consisted of an Assistant Director, 2 Unit Chiefs, 14 adjudicators, an Executive Assistant, 2 Special Assistants, and a Human Resources Assistant.²⁶ Adjudicators are assigned to work in either Adjudication Unit I or Unit II, which cover the same geographical areas as the two Internal Investigations Units in the Internal Investigations Section. For example, if a case was investigated by Internal Investigations Unit I, then generally the case would be adjudicated by Adjudication Unit I.

When FBI OPR receives a completed investigation from the Internal Investigations Section, the responsible Unit Chief reviews the file and assigns the case to an adjudicator. The adjudicators initially analyze the allegation using a preponderance of the evidence standard to determine if the alleged misconduct is substantiated. Preponderance of the evidence is defined as “the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.”²⁷ If FBI OPR decides that more information is needed before the adjudication can be completed, it can request that the Internal Investigations Section or the OIG, depending on who investigated the case, conduct additional investigation. The adjudicator prepares a draft memorandum (called an “addendum”) that documents why FBI OPR did or did not substantiate the offense and how it determined the disciplinary recommendation.

To determine the appropriate penalty, adjudicators in FBI OPR consider a variety of factors. According to FBI OPR managers, considerations of particular importance are:

- the FBI Offense Table and Penalty Guidelines to establish the range of penalties (standard, mitigated, or aggravated) for the misconduct;
- precedent data to ensure the penalty is consistent with discipline imposed on other employees for the same or a similar offense; and
- the field or headquarters division’s written assessment of the Douglas Factors.

²⁶ These 14 adjudicators included 3 agents, 5 lawyers, and 6 support adjudicators.

²⁷ 5 C.F.R. § 1201.56(c)(2).

A Unit Chief reviews the adjudicator's draft recommendation and finalizes the addendum. The addendum is then returned to the adjudicator, who drafts a letter to the employee based on the revised addendum. Once the adjudicator completes the letter, the complete package, including all investigative materials, the addendum, and the letter to employee, it is forwarded to FBI OPR management for review.²⁸

If FBI OPR determines that the allegation has not been substantiated, then no disciplinary action is taken against the employee. In such cases, FBI OPR sends a "no action" letter to the division head at the field or headquarters division where the employee works stating that no action will be taken against the employee.

If FBI OPR determines that the allegation is substantiated, it makes a disciplinary determination. As described previously, discipline can be a non-adverse action (a suspension of 14 days or less, a letter of censure, or an oral reprimand) or an adverse action (a suspension of more than 14 days, a demotion, or a dismissal). The processes for handling non-adverse and adverse actions differ.

If FBI OPR decides that non-adverse action is appropriate, an FBI OPR Unit Chief sends a letter to the employee outlining the findings and the final disciplinary action. In these cases, the Unit Chief is the deciding official and there is no proposal stage. The employee does not have the opportunity to review the documents that FBI OPR used to form the basis for its decision and cannot submit a written presentation or make an oral presentation to FBI OPR. Oral reprimands and letters of censure are imposed immediately. However, non-adverse suspensions (14 days and less) are not served until after the employee has had the opportunity to appeal the disciplinary decision.

If, in contrast, FBI OPR concludes that adverse action (a suspension of more than 14 days, a demotion, or a dismissal) is the appropriate discipline, the proposing official (the Unit Chief of the Adjudication Unit assigned the case) first recommends disciplinary action in a letter to the employee. The employee can then request to review the documents that FBI OPR used to form the basis for its decision. If the employee makes such a request, the FBI's Civil Discovery Review Unit redacts any information that is classified or that raises *Privacy Act* concerns before the employee reviews the redacted file. The employee may submit a written statement and make an oral presentation to the Assistant Director of FBI OPR. At the conclusion of the proposal

²⁸ FBI OPR does not prepare addenda for DIAs.

stage the Assistant Director, who acts as the deciding official, determines the disciplinary action and informs the employee in a decision letter.²⁹ The employee can appeal any adverse action, and a suspension is not imposed until after the conclusion of the appellate process. However, if the disciplinary recommendation is dismissal, the dismissal becomes effective immediately. If an appeal of a dismissal is successful, the employee is reinstated with back pay.

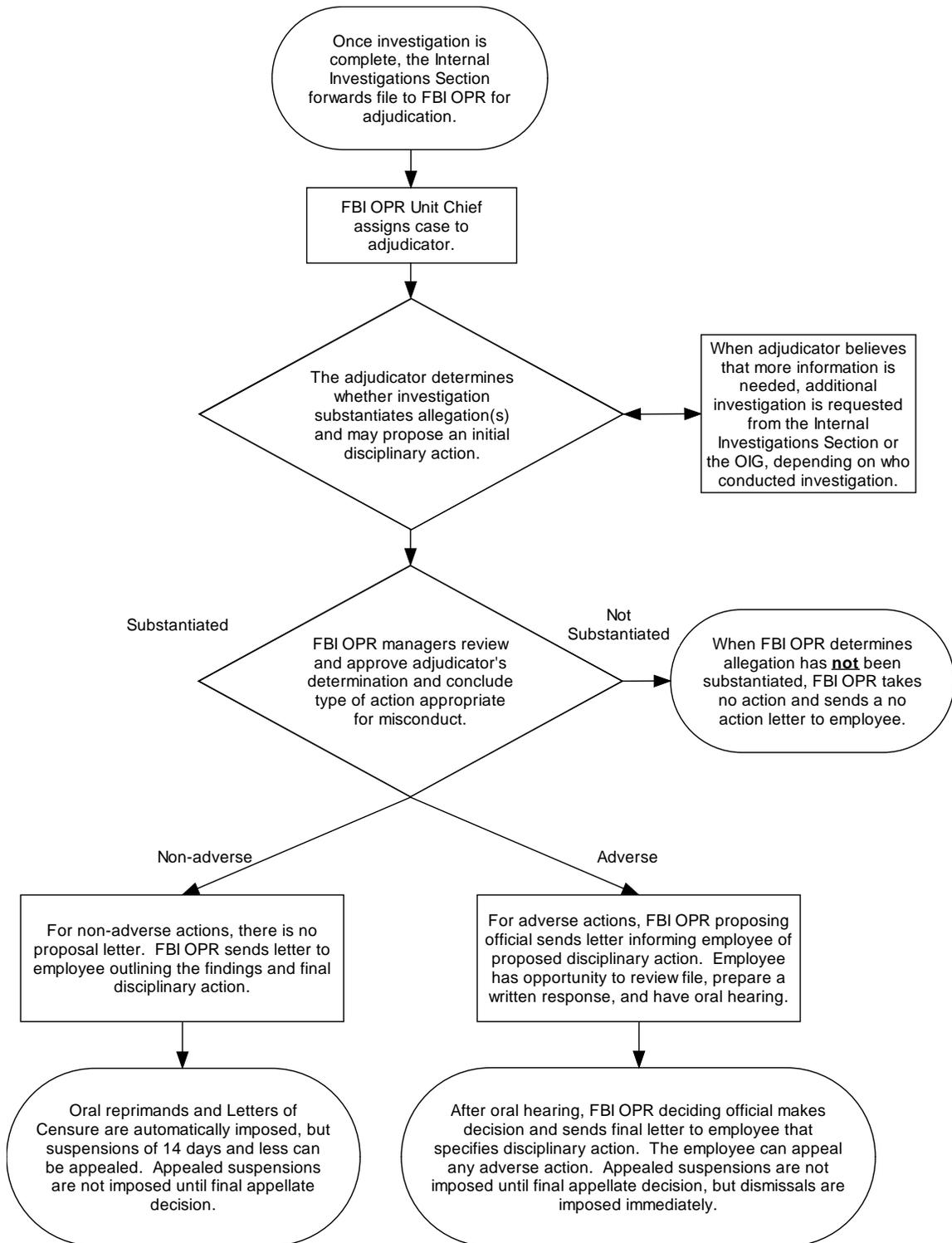
Each quarter, FBI OPR distributes to FBI employees an e-mail containing information on recent disciplinary decisions involving substantiated misconduct. The summary of each decision includes a description of the substantiated misconduct, the disciplinary action imposed, and the mitigating or aggravating factors used in FBI OPR decisions made during the preceding quarter.³⁰

Figure 3 provides an overview of the FBI's adjudicative process.

²⁹ After the oral presentation and review of the information provided in the written presentation, the Assistant Director also may determine that the allegation has not been substantiated and issue a "no action" letter.

³⁰ FBI OPR does not include the names of any employees, field divisions, or headquarters divisions in this quarterly summary.

Figure 3: FBI Process for Adjudicating Misconduct Investigations



Source: FBI documents and interviews with FBI officials.

Appeals of Disciplinary Decisions

The Appellate Unit within the FBI Human Resources Division oversees the FBI's appellate process for disciplinary matters. At the time of our review, the Appellate Unit consisted of a Unit Chief, two attorneys, and three paralegals. In FY 2007, the Appellate Unit received 68 new appeals, while the appeals for 104 employees were decided during the time period.

Most FBI employees can appeal all disciplinary actions except oral reprimands and letters of censure.³¹ However, employees who have not completed their probationary period cannot appeal any disciplinary decision.³² The Assistant Director of the Human Resources Division is the appellate deciding official for appeals of non-adverse actions. For appeals of adverse actions, the Human Resources Division convenes a Disciplinary Review Board, and the group serves as the appellate deciding official.³³

Until August 2007, the Disciplinary Review Board consisted of three voting members: the Assistant Director of the Human Resources Division, who served as the chair; one Senior Executive Service (SES) supervisor who served a 6-month term on all Disciplinary Review Boards convened during that period; and one mid-level supervisor or SES supervisor personally selected by the employee filing the appeal.

The FBI revised its appellate process in August 2007 to create a five-member Disciplinary Review Board to decide all adverse action appeals filed on or after August 31, 2007. Under the revised procedure, the Assistant Director of the Human Resources Division remains the chair, but the other four seats are held by two Special Agent supervisors and two non-agent supervisors, each of whom serves a 6-month term on

³¹ If the employee is a preference-eligible veteran, the employee can also appeal to the Merit Systems Protection Board. An employee must start the board's process within 30 days of the FBI OPR deciding official's final decision. At the same time, the employee can also appeal FBI OPR's decision internally. If an employee appeals through both the Merit Systems Protection Board and internally, typically the board will stay its decision until the FBI's internal appellate process is complete.

³² The probationary period is 1 year for most FBI employees, except for Special Agents, Forensic Examiners, and Language Specialists whose probationary period is 2 years.

³³ We use the term "appellate officials" in this report to refer to both the Assistant Director of the Human Resources Division and the Disciplinary Review Board.

all Disciplinary Review Boards convened during that period. Four additional SES-level supervisors and two additional mid-level supervisors serve as alternates for the same 6-month term.

When SES employees file appeals, the four Disciplinary Review Board members are all SES supervisors. When non-SES employees file appeals, the four members include two SES supervisors and two mid-level supervisors. At least one member of the board must be from a field division. Non-voting observers also attend all SES and non-SES board meetings, including representatives from the FBI's Office of the General Counsel, the Office of Equal Employment Opportunity Affairs, and an additional mid-level, non-SES, manager. The revised procedures also require the board to tape record its deliberation.

In selecting the Disciplinary Review Board members, the Appellate Unit forwards four computer-generated lists of all employees in each of the following categories to the FBI Associate Deputy Director:

1. Special Agents in the SES ranks,
2. Non-agent employees in the SES ranks,
3. Special Agents who are mid-level managers (GS-14/15), and
4. Non-agent mid-level managers (GS-14/15).

The lists exclude employees whose participation on the Disciplinary Review Board might raise allegations of bias or create an appearance of impropriety, including those in the Director's Office, FBI OPR, the Inspection Division, Office of Equal Employment Opportunity Affairs, the Human Resources Branch, the Office of General Counsel, and employees at the Assistant Director level or above. The lists are then forwarded to the Associate Deputy Director with a request that he "randomly select four individuals from each of the four respective lists of employees." The individuals identified by the Associate Deputy Director are those employees who will serve a 6-month term on the upcoming Disciplinary Review Board. However, we found that the Associate Deputy Director was not randomly selecting employees from these lists to serve on the Disciplinary Review Board, but was instead selecting members of the Board who he considered to be "mature and fair."

According to an August 2007 memorandum describing the changes to the Disciplinary Review Board, the process was changed in part because:

Allowing appellants to personally select a [Disciplinary Review Board] member potentially exposes the appellate process to allegations of bias or

conflicts of interest. Moreover, said selection can cause confusion by creating the misconception that the role of the [Disciplinary Review Board] member selected by the appellant is one of advocate, rather than an objective and impartial judge. In order to maintain the confidence of all Bureau employees, the FBI must ensure the internal disciplinary process is beyond reproach. With respect to the [Disciplinary Review Board] process in particular, FBI policy should foster the creation of an impartial, deliberative body before which relevant factual and/or legal issues can be appropriately analyzed and discussed.

According to a senior FBI official, the FBI also made these changes to the Disciplinary Review Board in response to two cases in which the FBI Director's Office believed that the Disciplinary Review Board had made unreasonable decisions. In one of those cases, FBI OPR dismissed a Special Agent but the Disciplinary Review Board unsubstantiated the offenses on appeal and instead issued a "no action" letter.³⁴ In the second case, FBI OPR suspended an SES official for 30 days and demoted him to a GS-13 Special Agent, but on appeal the Disciplinary Review Board revised the demotion to a GS-15 Assistant Special Agent in Charge.³⁵ The FBI Director exercised his authority to intervene in disciplinary cases, in the first case by imposing a 21-day suspension on the Special Agent and in the second case by demoting the SES official to a GS-13 Special Agent as the original decision imposed.

In addition, to address concerns of partiality or bias, the August 2007 revisions eliminated an employee's right to select one of the Disciplinary Review Board members. Instead, the employee is now given the opportunity to object to one of the randomly selected members. If the employee exercises this option, that member is removed and one of the alternates serves on the board. Finally, so that it would remain informed of the Disciplinary Review Board's decisions, the FBI Director's Office required the board to provide it with formal notification of all of its decisions.

When an employee initiates an appeal, the employee can ask to review a copy of the investigative file that FBI OPR relied on to make its decision. If the employee makes that request, the FBI's Civil Discovery Review Unit redacts any information that is classified or that raises

³⁴ The Special Agent was alleged to have disclosed to the FBI sensitive documents from a government commission to which the FBI Special Agent was detailed, in violation of the commission's non-disclosure rules.

³⁵ The SES employee was alleged to have used an FBI vehicle for personal reasons to visit relatives in another state on the weekends. This case is discussed in more detail in the Double Standard of Discipline section of this report.

Privacy Act concerns. As stated previously, during the adjudicative phase, if an employee is proposed for an adverse action, the employee has an opportunity to review the file and prepare a written and oral response to FBI OPR. For non-adverse cases, the employee does not have an opportunity to review the file during the adjudicative phase, and the appeal is the employee's first opportunity to review a redacted copy of the file. After reviewing the file, the employee can submit a written supplemental appeal, but the employee cannot make an oral presentation to the appellate deciding officials.

An Appellate Unit employee reviews the investigative and adjudicative file, as well as the supplemental appeal, and drafts an analysis of the issues presented in the appeal. The analysis is intended to address the issues included in the employee's supplemental appeal document and any other issues that the Appellate Unit employee believes are in need of analysis. The analysis also includes the Appellate Unit's recommendation to either uphold or mitigate FBI OPR's disciplinary decision. The Appellate Unit's analysis, the employee's supplemental appeal, and a copy of the investigative file that FBI OPR relied on to make its decision are then provided to the appellate deciding official, which, as explained above, could be either the Assistant Director of the Human Resources Division in non-adverse action appeals or the Disciplinary Review Board in adverse action appeals. If Appellate Unit personnel, the Assistant Director, or Disciplinary Review Board members believe that more information is needed before making a decision, they can request that the Internal Investigations Section or the OIG conduct additional investigation.

FBI policy states that, in the appellate process, FBI OPR's findings of fact are subject to the "substantial evidence" standard of review. Substantial evidence is defined as "the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree."³⁶ This is a lower standard of proof than the preponderance of evidence standard that is used in the adjudicative phase.

FBI policy prior to August 19, 2005, stated that when deciding whether a penalty is appropriate, appellate officials "may independently redetermine . . . the penalty imposed" In effect, this was a *de novo* review of FBI OPR's penalty determinations, in that the appellate officials

³⁶ 5 C.F.R. § 1201.56(c)(1).

could mitigate the penalty without deference to FBI OPR's previous determination.

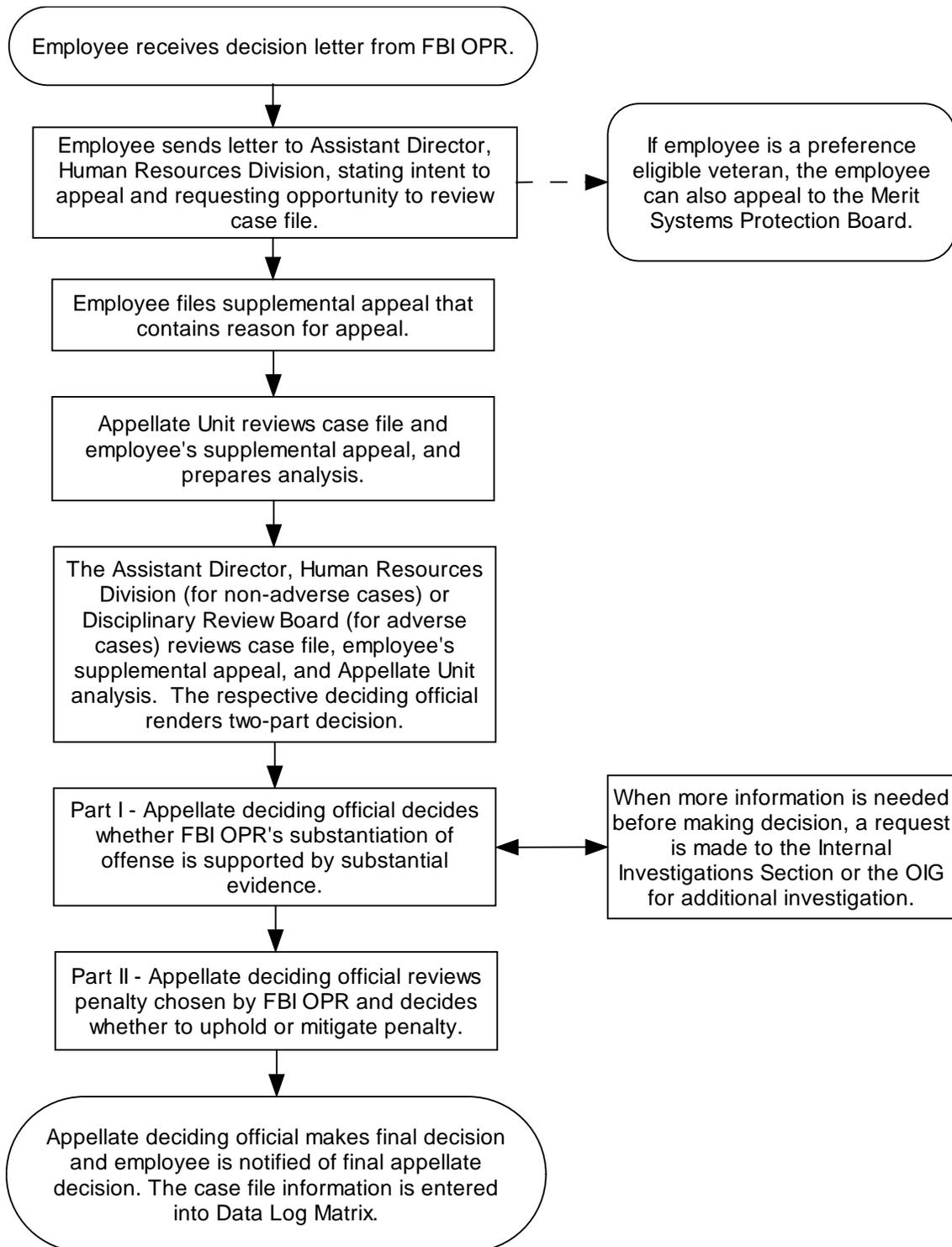
An August 19, 2005 Electronic Communication stated that appellate officials would begin applying a "substantial evidence" standard of review to FBI OPR's findings of fact, but the Electronic Communication did not address what standard of review appellate officials should use when reviewing penalty determinations by FBI OPR.

Similarly, an August 31, 2007, Electronic Communication stated that FBI OPR's findings are subject to a "substantial evidence" standard of review, without describing whether the term "findings" referred to both factual findings and penalty determinations. The Appellate Unit Chief told us that the Electronic Communication directed appellate officials to use the substantial evidence standard with respect to both the factual finding and the penalty determination. However, as we describe in more detail in the Appellate section of this report, our review found confusion among appellate officials and FBI OPR as to what standard of review the appellate officials should apply to FBI OPR's imposition of penalties.

The appellate deciding official issues a two-part decision. First, the official decides whether FBI OPR's substantiation of the offense is supported by substantial evidence. Second, the official reviews the FBI OPR penalty and decides whether to uphold it or mitigate it. FBI policy states that the appellate deciding official may not aggravate penalties on appeal.

The employee is notified of the appellate decision and the Appellate Unit enters the case file information into a spreadsheet, referred to as the Data Log Matrix, which tracks the status of appeals. The Appellate Unit uses a separate document, referred to as the Modifications Log, to identify all appeals in which the final appellate decision modified FBI OPR's original decision in some manner. Figure 4 provides an overview of the FBI's appellate process.

Figure 4: FBI Process for Appealing Disciplinary Decisions



Source: FBI documents and interviews with FBI officials.

Implementation of Discipline

Any discipline resulting in suspension, demotion, or removal must be documented on an SF-50 in the employee's Official Personnel Folder.³⁷ Information regarding an employee's suspension, demotion, or removal is also entered into the FBI's Case Management System and the Bureau Personnel Management System, which contains, among other things, data regarding employee personnel actions.

The FBI typically imposes suspensions for set amounts of time, generally 3, 5, 7, 10, 14, 15, 30, 45, or 60 days if one offense is substantiated. When there are multiple offenses, it is more likely that the suspension period will not fall within this range. While no FBI policy sets a maximum suspension length, FBI OPR's practice has been to impose suspensions no longer than 60 days for a single substantiated offense. If FBI OPR believes that a substantiated offense requires discipline more severe than 60 days, then it recommends dismissal.

The FBI's Penalty Guidelines state that when multiple offenses are substantiated against an employee, the penalties for all of the offenses will be added together and served consecutively unless the substantiated charges are essentially restatements of the same act of misconduct. In cases that involve more than one substantiated offense, the FBI OPR addendum identifies either the individual penalty imposed for each offense or the aggregate penalty for all offenses. In either case, FBI OPR identifies the final disciplinary action, whether it is the total number of days to be served on suspension or dismissal. In such cases, the Case Management System and the Appellate Unit's Data Log Matrix track only the aggregate penalty imposed.

Once a penalty of suspension has been decided, FBI policy states that the "period of suspension will always commence at the close of business, Friday of any given week" and that all suspensions are calculated using calendar days. Therefore, a 5-day suspension results in a suspension period extending from Saturday through the following Wednesday. During suspensions, employees lose pay only for those days they were normally scheduled to work. For example, in a 5-day suspension an employee on a normal Monday-through-Friday schedule loses pay for 3 days because Saturday and Sunday are counted as 2 of the 5 suspension days. The shortest suspension that an FBI employee can receive is a 3-day suspension, which generally results in a

³⁷ Two SF-50s are used to document a suspension – one documenting the beginning date of the suspension and one documenting the return date of the employee.

suspension period of Saturday, Sunday, and Monday, with the loss of pay for a single day (Monday).

Time Frames for Disciplinary System Action

FBI policy states that misconduct investigations and adjudications should be completed within 180 days. The 180-day time frame includes the time to complete both the investigation and the adjudication. If it is not possible to complete the investigation and adjudication within 180 days, extensions can be granted in 30-day increments. The Assistant Director of the Inspection Division approves extensions for investigations and the Assistant Director of FBI OPR approves extensions for adjudications. The extension request must specify the investigative or adjudicative activities conducted during the previous 30-day period and the activities that will be completed during the next 30 days.

The 180-day time frame does not include the appellate phase, and FBI policy currently does not establish any official time frames for completing the appellate process. However, Appellate Unit officials told the OIG that they have set an informal goal of completing non-adverse appeals within 90 days and adverse appeals within 120 days.

Previous Reports on the FBI's Disciplinary System

In 2002 and 2003, the OIG issued two reports examining complaints from FBI employees that a double standard of discipline existed in the FBI under which senior managers were treated more leniently than other employees.³⁸ In the 2002 review of allegations of a double standard of discipline, the OIG examined: (1) a 1999 FBI internal report that had concluded that senior FBI managers received different and more favorable treatment than other employees, (2) misconduct cases involving SES employees that occurred after the release of the FBI's 1999 internal report, and (3) the investigation and discipline in two misconduct cases that generated significant controversy inside and outside the FBI about the discipline imposed on FBI employees.³⁹ The OIG concluded that in these two misconduct cases senior managers received different and more favorable treatment than less senior

³⁸ U.S. Department of Justice Office of the Inspector General, *A Review of Allegations of a Double Standard of Discipline at the FBI* (November 2002) and U.S. Department of Justice Office of the Inspector General, *A Review of Allegations of a Continuing Double Standard of Discipline at the FBI* (November 2003).

³⁹ The two cases were misconduct allegations involving the Ruby Ridge matter and a retirement party for former FBI Deputy Director Larry Potts.

employees. Yet, due to several factors, including the low number of disciplinary cases involving SES employees, the OIG did not find sufficient evidence to conclusively establish that this disparate treatment represented a systemic problem.

However, in the 2002 report we also found that FBI employees believed that a double standard of discipline existed within the FBI. To address this perception, the OIG made five recommendations to the FBI:

- Although appellate officials were required to document their findings in writing and provide the employee with a written decision, the OIG recommended that if any changes were made to an FBI OPR decision on appeal those changes should be accompanied by a written justification explicitly describing the reasons for the changes.
- The OIG expressed a concern that if the Disciplinary Review Board consisted of only SES members there was the danger of a perception that SES employees who came before the board might be treated less harshly. The OIG recommended that the FBI consider including a non-SES member or a non-FBI employee on the board.
- The expectation within the FBI's rank and file appeared to be that an SES employee should be disciplined in the same manner as a lower-level employee who engaged in similar misconduct. The OIG recommended that the FBI consider precedent from non-SES cases when disciplining SES employees and also stated that the FBI should not allow consideration of a manager's record to routinely outweigh the equally important consideration that managers should be held to higher standards than other employees.
- Some SES officials told the OIG that they believed letters of censure had a more significant impact on the careers of higher-level employees than on the careers of lower-level employees. The OIG recommended that the FBI not allow the potential impact on the employee's career to be considered as a mitigating factor when making disciplinary decisions.
- To address the strong perception among FBI employees of the existence of a double standard and the fact that the review found evidence supporting that belief, the OIG recommended that the FBI develop a mechanism to regularly review the results of SES and non-SES misconduct cases.

A second OIG report issued in February 2003 examined an FBI supervisor's claim that he was threatened by the official then serving as FBI OPR Assistant Director. The report also examined whether a double standard of discipline continued to exist in the FBI. The OIG did not find that the FBI OPR Assistant Director had threatened the supervisor, although the report concluded that the FBI OPR Assistant Director exhibited poor judgment in some of his actions. The OIG also reviewed several cases cited by the supervisor as indicative of a double standard. The OIG concluded that the small number of cases available for review provided an insufficient basis to conclude that the FBI systematically favored SES employees over lower-ranking employees.

In May 2003, the FBI Director requested that former Attorney General Griffin Bell and former FBI Associate Director Lee Colwell lead a commission to study the FBI's disciplinary process. In February 2004, the resulting report (the Bell-Colwell report) identified individual and anecdotal instances of disparate treatment, but the report did not conclude that a systemic disparity existed between discipline imposed on managers and non-management employees.⁴⁰ However, the report stated that the perception of a double standard of discipline had an adverse impact on morale and confidence in the FBI's disciplinary system.

The Bell-Colwell report made 15 recommendations to the FBI to improve the operation and perception of the disciplinary process, including:

- The FBI should develop a new table of offenses and punishment guidelines for use in future misconduct cases that included standard penalties, aggravating and mitigating factors, and aggravated and mitigated penalty ranges.
- The FBI should develop a computerized database to track misconduct investigations opened under the new table of offenses, as well as precedent established under these new guidelines.
- The FBI should assign the investigative, adjudicative, and appellate phases of the disciplinary process to three separate FBI divisions to maintain checks and balances in the system and to reduce the perception among FBI employees that FBI

⁴⁰ Griffin B. Bell and Lee Colwell, *Study of the FBI's Office of Professional Responsibility* (February 2004).

OPR adjudicators were prosecutors “making their case,” with the FBI OPR investigators acting as the adjudicators’ agents.

- The FBI should develop a working group to better differentiate between performance issues and misconduct.
- The FBI should clarify the appellate standard of review. The report described the “substantial evidence” standard as the most appropriate standard of review for FBI OPR’s findings of fact, and stated that the existing *de novo* standard in FBI policy was impractical and unnecessary.
- The FBI should alter the composition of the Disciplinary Review Board to include a non-SES voting member for all appeals by non-SES appellants because the commission believed that the inclusion of non-SES employees on the board would reduce a perception that the board was tilted in favor of SES appellants.
- The FBI should ensure that the final decision letter given to an employee following an appeal identifies the factors that supported the appellate decision. The commission found that while this was already required by FBI policy, it was not always done.

The FBI made significant changes to its disciplinary process as a result of the OIG and Bell-Colwell reports. Those changes are reflected in the current disciplinary system described above. Among the changes were:

- Mid-level managers now serve as voting members on the Disciplinary Review Board when non-SES employees file appeals. From August 2005 to August 2007, a non-SES employee was allowed to select either an SES manager or a mid-level manager to serve as one of three voting members on the board. When the board was expanded to five members in August 2007, the FBI required that two mid-level managers serve on the board for all non-SES appellants. This change was made to address the perception that the system was skewed in favor of SES employees.
- The FBI issued a revised Offense Table and Penalty Guidelines in November 2004. The Guidelines describe aggravating and mitigating factors that should be taken into consideration, and define both a standard penalty and aggravated and mitigated penalty ranges. The Bell-Colwell report had stated that the

previous Offense Table and Penalty Guidelines were not useful because they were too broad, they conflicted, or they suggested rather than required a particular range of punishments.

- The FBI implemented the Case Management System to track allegations, investigations, adjudications, and appeals in a database in November 2004. One section of the Case Management System tracks precedent decisions for each offense. The previous database was described as vague, incomplete, and flawed.
- The FBI reassigned the Internal Investigations Units and the Initial Processing Unit from FBI OPR to the Inspection Division in April 2004. The FBI also moved the Appellate Unit from the Inspection Division to the Human Resources Division so that the investigative, adjudicative, and appellate phases were handled by different FBI divisions. Previously, there were concerns that co-location of investigations and adjudications within one division had detracted from the credibility of the disciplinary process.
- The FBI changed the appellate standard of review for findings of fact from *de novo* to “substantial evidence” in August 2005. Although the reports had found that the substantial evidence standard was already being used in appealed cases, the reports had stated that the standard of review should be clarified and that a substantial evidence standard was more appropriate.

PURPOSE, SCOPE, AND METHODOLOGY OF THE OIG REVIEW

Purpose of OIG Review

The OIG conducted this review to assess the FBI's system for reporting and investigating allegations of employee misconduct and for disciplining employees who are found to have committed misconduct. We examined the five phases of the FBI's disciplinary system – the reporting and investigation of alleged misconduct, adjudication and appeals of misconduct cases, and implementation of the discipline imposed by the FBI. The criteria that we used to evaluate the five phases were:

- Reasonableness: Whether the factual determinations and penalties imposed were supported by substantial evidence and whether the process for investigations and adjudications were complete and thorough.⁴¹
- Timeliness: Whether policies and procedures ensured timely reporting and investigation of alleged misconduct as well as timely adjudication and implementation of discipline.
- Consistency: Whether the disciplinary system processed similar misconduct cases using uniform standards.

Scope of OIG Review

We examined data for disciplinary cases that were closed by FBI OPR in FY 2005 through FY 2007, as well as allegations of potential misconduct that the FBI received in the same 3 fiscal years. We also examined data regarding appealed disciplinary cases that were closed by the Appellate Unit from FY 2005 through the third quarter of FY 2008 in order to include information related to actions by the reconstituted Disciplinary Review Board.

⁴¹ We used the same definition of substantial evidence that the FBI directs its appellate officials to apply to FBI OPR's factual determinations – that is, substantial evidence is “the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree.”

Methodology of OIG Review

Headquarters Interviews

At FBI headquarters, we interviewed the current and former Associate Deputy Director, and the Executive Assistant Director of the Human Resources Branch.⁴² We also interviewed the Assistant Directors of the Inspection Division, FBI OPR, and Human Resources Division. In addition, we interviewed employees in the Security Division and the Corporate Policy Office.

To understand the reporting and investigative process, we interviewed the Section Chief of the Internal Investigations Section within the Inspection Division. In the Internal Investigations Section, we interviewed two Unit Chiefs and nine employees who reviewed incoming allegations of potential misconduct or investigated the misconduct. We also interviewed one employee who was responsible for the creation and maintenance of the FBI's disciplinary database, the Case Management System.

In FBI OPR, we interviewed two Unit Chiefs, six employees who adjudicated disciplinary cases, and one Human Resources Assistant to learn more about the adjudicative process. We also interviewed several individuals in the Compensation, Leave, Recognition, and Performance Unit to examine the differences in how performance issues and misconduct matters are handled and from the Records Management Division to learn how discipline is documented in Official Personnel Folders.

To understand the appellate process, we interviewed the Unit Chief and three other employees who analyze appealed decisions in the Human Resources Division's Appellate Unit, as well as five employees who served on the Disciplinary Review Board between FY 2005 and FY 2007 when the board consisted of three members. Three of these Disciplinary Review Board members served 6-month terms, and the remaining two each served on a single board. We also interviewed four employees who served on the board after it expanded to five members in January 2008.

In addition, we interviewed an attorney at Swick & Shapiro, P.C., the law firm that serves as legal counsel for the FBI's Agents Association.

⁴² The Human Resources Branch oversees both the Human Resources Division and the Training and Development Division.

Swick & Shapiro attorneys often represent FBI Special Agents and non-agent employees in the disciplinary process.

Site Visits

We conducted site visits at four FBI field divisions and two headquarters divisions. The field divisions were Baltimore, Maryland; Houston, Texas; Los Angeles, California; and Washington, D.C. The headquarters divisions were the Counterterrorism Division and the Criminal Justice Information Services Division (CJIS). CJIS is located in Clarksburg, West Virginia, but is considered a headquarters division. We chose the sites based on several factors, including the number of misconduct allegations reported from FY 2005 to FY 2007, the number of investigations conducted in the field division or headquarters division during that period, the number of Supervisory Special Agents who had investigated misconduct, the location of OPR Coordinators, and input from senior FBI personnel.⁴³

During these site visits, we interviewed either the Special Agent in Charge or Assistant Director in Charge, the Administrative Assistant Special Agent in Charge or Section Chief, the Chief Division Counsel, the OPR Coordinator, and Supervisory Special Agents, or other individuals who investigated and adjudicated misconduct. In addition, we reviewed any documentation that the six sites maintained regarding misconduct allegations that did not become investigations. In total, we interviewed 57 employees at the 6 divisions. When we report the percentage of site visit interviewees who held a particular opinion in our findings sections, we based the percentage on the number of people who answered a specific question on that topic instead of on the total number of interviewees.

Case Management System

The FBI provided us with data from its Case Management System database, maintained by the Internal Investigations Section, which contains information on the reporting and investigation of alleged employee misconduct, the results of these investigations, and discipline imposed. We reviewed data regarding 5,377 allegations that the Internal

⁴³ Within field divisions, a single employee is usually designated as the primary point of contact for the division's role in the disciplinary system. In five field divisions (New York, New York; Los Angeles, California; Washington, D.C.; Atlanta, Georgia; and Miami, Florida), one Supervisory Special Agent manages the division's disciplinary process as his or her primary duty. This person is known as an OPR Coordinator.

Investigations Section received from FY 2005 to FY 2007.⁴⁴ We also reviewed the data regarding 1,551 misconduct investigations that were closed during that period.⁴⁵ We used the data to analyze various aspects of the misconduct investigations, including the timeliness of reporting allegations to the proper authorities, confirmation that the OIG had reviewed all allegations, and disposition of the investigations. We also used the Case Management System data as the basis for analyzing what happened to misconduct investigations as they proceeded through the adjudicative and appellate phases, including the timeliness of disciplinary determinations; any changes that were made in the proposed discipline from the proposal to the decision letter; the consistency of disciplinary actions based on various factors, such as job series or grade level; and confirmation that discipline was imposed.

The Case Management System includes two fields addressing the OIG's involvement in misconduct allegations: "OIG Classification," which indicates whether the OIG will conduct an investigation into the allegation, whether the OIG will review the completed FBI investigation, or whether the OIG will have no involvement in the investigation; and "OIG Number," in which Internal Investigations Section personnel enter a reference number that the OIG assigned to the allegation. To determine whether the OIG reviewed all allegations, we randomly selected a sample of 103 allegations in the Case Management System that had blank "OIG Classification" and "OIG Number" fields. We first asked personnel in the OIG's Investigations Division to verify that they had reviewed the allegations. We then asked personnel in the FBI's Internal Investigations

⁴⁴ Our analysis regarding the timeliness of reporting of potential misconduct allegations does not include allegations of potential Intelligence Oversight Board (IOB) violations. IOB violations are defined in Executive Order 12863, President's Foreign Intelligence Advisory Board, as matters believed to be unlawful or contrary to Executive Order or Presidential Directive. We excluded these during the period of our review because the FBI Internal Investigations Section received a large number of potential IOB violations resulting from a March 2007 OIG report, *A Review of the Federal Bureau of Investigation's Use of National Security Letters*, which found that a significant number of potential IOB violations had not been reported to the Internal Investigations Section as required by the FBI. In response to the report, the FBI Director instructed FBI employees to report *all* potential IOB violations to the Internal Investigations Section, even if the violations had occurred months or years before and even if they did not include allegations of misconduct. As a result, 37 percent of all allegations that the Internal Investigations Section received during the period of our review were IOB violations. Because this was an unusual event, we did not consider IOB violations in our data analysis.

⁴⁵ The date in the Case Management System that we used to determine that an investigation was closed is the date that FBI OPR closed the investigation after issuing its final disciplinary decision.

Section to provide documentation verifying that those allegations the OIG Investigations Division had no record of having reviewed had indeed been forwarded to the OIG for review.

The Case Management System also includes a way for the FBI to record that discipline was imposed. For every employee who is suspended, demoted, or dismissed, adjudicators in FBI OPR are responsible for entering the action taken and the date the action took place into the Case Management System. In total, we examined personnel and time and attendance records for 83 FBI employees who were suspended during our time period. As discussed below, our review showed that the Case Management System contained no information recording that suspensions had been imposed for 63 employees who should have been suspended. As a result, we examined the employees' Official Personnel Folders, printouts from the Bureau Personnel Management System, and payroll records for these 63 employees to determine whether their suspensions had actually been imposed. We also examined similar documents for a select sample of 20 employees whose suspensions were recorded in the Case Management System to see if those employees had actually served their suspensions.

Appellate Unit Data Log Matrix

The FBI provided us with data from the Appellate Unit's Data Log Matrix, a spreadsheet that contains information on the status of appealed misconduct cases. As explained in the Background section of this report, the FBI changed the composition of its Disciplinary Review Board in August 2007 from three to five members. Although the time period reviewed for the rest of our data was FY 2005 to FY 2007, we requested data regarding all appeals in which the final appellate decision was made from FY 2005 through July 2008 in order to include more information related to actions by the reconstituted Disciplinary Review Board. The data from FY 2008 includes 6 months of final appellate decisions made by the new five-member Disciplinary Review Boards.⁴⁶

For our specified time period, we reviewed data for 253 appeals, including 164 appeals of non-adverse actions and 89 appeals of adverse actions. We used the Data Log Matrix data to analyze the timeliness of the appellate process, including the timeliness of non-adverse and adverse appeals, as well as timeliness within each fiscal year in our

⁴⁶ One of the SES appeals and 18 of the non-SES appeals that we reviewed were adjudicated by the Disciplinary Review Board after its composition had been reconstituted in accordance with the August 2007 memorandum.

scope. We also used the Data Log Matrix data to analyze what happened to misconduct cases as they proceeded through the appellate phase, including how many times FBI OPR's disciplinary decisions were mitigated during the appellate stage, as well as the frequency with which disciplinary decisions were mitigated for different categories of employees.

Document Review

We examined FBI policies and manuals regarding the disciplinary system; OIG Investigations Division data relating to the FBI's disciplinary system; previous OIG and FBI reports about FBI discipline; and federal and Department-wide laws and regulations applicable to disciplinary systems.

File Review

As noted above, the FBI's Offense Table describes five general categories of misconduct: (1) investigative misconduct, (2) integrity/ethical misconduct, (3) property-related misconduct, (4) illegal/criminal misconduct, and (5) general misconduct.⁴⁷ For our file review, we judgmentally selected 10 misconduct files containing the offense code that was investigated with the highest frequency from each of these 5 categories (based on our analysis of Case Management System data) and where the standard penalty (according to the Offense Table) was at least a suspension. We chose offense codes for which the standard penalty was at least a suspension because we wanted our sample to include files that could be appealed, and FBI policy does not allow employees to appeal penalties that are less severe than a suspension. In addition, we also decided to review investigations involving the offense code "Lack of Candor – Lying Under Oath" based on comments during our site visits and at FBI headquarters in which some FBI employees expressed concern with the reasonableness of FBI OPR's decisions in those cases.

The six offense codes and their descriptions from the FBI's Offense Table on which we based our sample were:

- **Investigative Deficiency – Violation of Operational Guidelines and Policies, Other:** Knowingly or recklessly failing to enforce or comply with an FBI or DOJ operational guideline or policy not

⁴⁷ Each category of misconduct includes a specific list of offense codes, the standard penalty for each offense code, and the mitigated and aggravated penalties.

specifically delineated in any of the other “Investigative Deficiency” offense codes which falls outside the parameters of performance.

- **False or Misleading Information – Fiscal Matters:** Knowingly providing false or misleading information in a fiscal-related document; or, signing or attesting to the truthfulness of the information provided in a fiscal-related document in reckless disregard of the accuracy or completeness of the pertinent information contained therein.
- **Lack of Candor – Lying Under Oath:** Knowingly providing false information in a verbal or written statement made under oath.
- **Misuse of Government Computer:** Using a government computer for personal, unofficial, or unauthorized use.
- **Fraud or Theft:** Taking, obtaining, or withholding, by any means, from the possession of the government, or another owner, any money, property, or article of value of any kind, with the intent to deprive or defraud the government, or another owner, of the use and benefit of the property or with the intent to appropriate it for personal use or for the use of another entity or person other than the owner.
- **Unprofessional Conduct – On Duty:** Engaging in conduct, while on duty, which dishonors, disgraces, or discredits the FBI; seriously calls into question the judgment or character of the employee; or, compromises the standing of the employee among his peers or the community.

From the Case Management System, we selected investigations involving employees of all grade levels and job classifications that represented all case types (DIO, DIA, NDI, OIG), and that involved only one or two employees. We did not select any investigation in which the only final action was resignation or retirement of the employee, or any investigation with an unknown subject.⁴⁸ In addition to reviewing the 60 investigations described above, we also reviewed 4 additional investigations in which an appellate official requested that more investigation be conducted. Using this methodology, we selected 64 investigative and adjudicative case files, involving 69 employees, for our review.

⁴⁸ We also did not select any investigations that were marked in the Case Management System as being classified. However, once we were able to review the case files, we determined that several were classified. We replaced these investigations with unclassified ones involving the same offense code so that we could conduct an unclassified analysis of the files.

The 69 employees included in our judgmental sample included 3 SES-level employees. To determine whether there was a double standard of discipline between higher-ranking and lower-ranking employees, we sampled an additional 17 misconduct files involving SES-level employees. These 17 case files included 12 cases in which the SES-level employee was found not to have committed misconduct at the adjudicative stage, and 5 cases during the period of our review in which the SES-level employee was found to have committed misconduct and appealed FBI OPR's decision to the FBI's Human Resources Division.⁴⁹ Overall, we reviewed investigative and adjudicative case files involving 86 employees – 20 SES-level employees and 66 non-SES employees.

We reviewed these employee misconduct files to determine if the FBI maintained specific documents in the files, such as investigative summary reports. We also reviewed the actual documents to determine if the FBI provided explanations for its decisions during the investigative, adjudicative, and appellate phases. For example, for the adjudicative phase we reviewed the FBI's explanation of its decision to substantiate or not substantiate allegations and, if it substantiated the allegations, the FBI's explanation for imposing penalties. We also reviewed documents that employees submitted during the process, including the employees' response to proposed disciplinary actions and the employees' supplemental appeals. In addition, two Special Agents with the OIG's Investigations Division and Oversight and Review Division and an OIG Inspector reviewed the investigative case files to assess whether the investigations appeared thorough and whether all relevant witnesses were interviewed and all necessary documents were collected.

Employee Survey

We also conducted a web-based survey of a stratified random sample of FBI employees to determine their experience with and perception of the FBI's disciplinary system. Using data supplied by the FBI about its employees, we assigned employees to different subsets and selected a random sample of employees within each subset.⁵⁰ The

⁴⁹ One SES-level employee was investigated on two separate occasions and found not to have committed misconduct by FBI OPR in either instance.

⁵⁰ Our sample was based on demographic data as of April 1, 2008. As of that date, the FBI had 30,341 total employees, including 12,590 Special Agents and 17,751 non-agent personnel.

subsets were defined by three demographic factors: grade level, job series, and race.⁵¹

We sent an invitation to participate in the web-based survey to the 1,449 members of the sample for whom the FBI could provide current FBI e-mail addresses. (Eleven other employees originally included in our survey did not have current valid FBI e-mail addresses.) We received 818 responses to the survey for a 56-percent response rate.⁵²

Some survey questions required respondents to choose among several potential responses, while other questions allowed respondents to respond in their own words. In choosing the respondents' comments included in the body of this report, we selected those that were most representative of the opinions expressed by the respondents.

Appendix I contains a copy of the survey and the results. Appendix III contains the confidence intervals regarding the specific results that were discussed in the body of this report.

⁵¹ Our report found no statistically significant differences in responses based on race.

⁵² When we compared the survey responses from different types of employees, such as SES employees and non-SES employees, we reported only those results that were statistically significant at the 0.05 level. In other words, the differences in responses that we report were unlikely to have occurred by chance, but rather were the results of true differences in the population from which our sample was drawn.

RESULTS OF THE REVIEW

REPORTING OF POTENTIAL MISCONDUCT

We found that potential misconduct was not consistently reported to FBI headquarters or to the OIG as required by FBI policy. We could not determine whether FBI field and headquarters divisions reported misconduct allegations in a timely fashion because the FBI's disciplinary database does not track the information needed to determine the timeliness of reporting.

FBI employees did not consistently report allegations of misconduct.

The FBI's *Manual of Administrative Operations and Procedures* states:

Each employee has the responsibility to report promptly, any indication of possible exploitation or misuse of Bureau resources; information as to violations of law, rules or regulations; personal misconduct; or improper performance of duty Reporting may be to supervisors, the Director, the Office of Professional Responsibility, Inspection Division, FBI [headquarters], or directly to the Department of Justice Office of Professional Responsibility.⁵³

FBI employees may also meet that requirement by reporting allegations of misconduct to the OIG.

However, according to our survey, FBI employees did not consistently report incidents of potential misconduct. Of 818 survey respondents, 226 stated that they had observed or been made aware of incidents of possible misconduct, and 18 percent of them (40 of 226) stated that they did not report the misconduct. An additional 12 percent (27 respondents) stated that they reported less than half of the misconduct that they observed. Table 1 below shows survey respondents' answers to questions about reporting misconduct.

⁵³ FBI's *Manual of Administrative Operations and Procedures*, Part I, Section 1-23.

Table 1: Responses to Survey Question: “Of the times that you observed or were made aware of possible FBI employee misconduct, how often did you report it to the appropriate authority?”

	Number of responses	Percentage
Every time	130	58%
Most of the time (at least half of the misconduct observed)	29	13%
Some of the time (less than half of the misconduct observed)	27	12%
Never	40	18%
Total	226	101%*

* Percentages do not add to 100 because of rounding.

Note: Only respondents who said that they had observed or been made aware of possible FBI employee misconduct between 2005 and 2007 answered this question.

Source: Analysis of the OIG’s survey of FBI employees.

The frequency of reporting varied significantly by the respondents’ grade level. We found that 28 percent of respondents at the GS-13 or below level (26 of 93) and 22 percent of GS-14 or GS-15 respondents (14 of 63) said that they “never” reported incidents of possible misconduct that they had been made aware of. By contrast, none of the 70 SES respondents stated that they had “never” reported incidents of potential misconduct.

We asked all survey respondents what reasons might cause them to choose not to report possible employee misconduct. The most common reason offered by survey respondents was being unsure whether what they observed was misconduct or a performance-related matter. However, other reasons included that they feared retaliation for reporting the misconduct, they believed that the employee would not be disciplined even if they reported the misconduct, or they believed their managers would not be supportive of their decision to report the misconduct. Table 2 shows the various reasons given by survey respondents for why they might not report misconduct.

Table 2: Responses to Survey Question: “Which of the reasons below would make you choose not to report possible misconduct by an FBI employee?”

	Number of responses	Percentage of respondents citing reason
I was not certain if it was misconduct or a performance issue.	226	29%
I feared retaliation for reporting misconduct.	120	16%
I believed that the employee would not be disciplined even if I reported the misconduct.	111	14%
I believed that management would not be supportive of my decision to report misconduct.	103	13%
Another employee also witnessed, or was aware of, the incident and told me that he/she had reported it.	93	12%
I was not familiar with the process for reporting misconduct.	58	8%
I believed it was the supervisor’s responsibility to report misconduct.	43	6%
I did not want to get a co-worker in trouble.	38	5%
I did not want to get involved.	32	4%
The employee was a good performer.	22	3%
I thought the process would be too time-consuming.	14	2%

Note: Forty-seven of 818 respondents did not answer the question. Respondents could select more than one response.

Source: Analysis of the OIG’s survey of FBI employees.

Field divisions did not forward some allegations of misconduct for investigation, as required.

The FBI’s *Manual of Administrative Operations and Procedures* requires that “any information pertaining to allegations of misconduct or improper performance of duty coming to the attention of any Bureau employee be promptly and fully reported to [the FBI Inspection Division].”⁵⁴

Although FBI employees may report allegations of misconduct through various channels, they typically report allegations to their supervisor or other managers within their division who then forward the allegation to the Internal Investigations Section. Of the 5,377 allegations

⁵⁴ FBI’s *Manual of Administrative Operations and Procedures*, Part I, Section 13-2.

received by the Internal Investigations Section during the time period covered by our review, 3,976 (74 percent) were referred from within the FBI by field and headquarters divisions.⁵⁵ Because most employees report misconduct through their division, it is important that the divisions forward these allegations to the Internal Investigations Section. However, we found that some potential misconduct reported by FBI employees to managers in their divisions was not forwarded to the Internal Investigations Section.

During our site visits, we learned that some field and headquarters divisions maintained “zero files” that contain documentation regarding incidents of possible misconduct in their divisions that had been forwarded to the Internal Investigations Section but did not lead to investigations. In addition, the “zero files” also contain documentation of incidents that did not necessarily involve misconduct but that were nonetheless reported by employees (for example, an employee reported that his personal credit card had been stolen and another employee reported being the victim of a hit-and-run accident).

We examined the six divisions’ “zero files” to determine whether all reported possible misconduct allegations had been forwarded to the Internal Investigations Section, as required by FBI policy. We found that all incidents of reported potential misconduct in the “zero files” of three of the six divisions that we visited had been forwarded to the Internal Investigations Section for review. However, in the “zero files” of the remaining 3 divisions, we identified 25 incidents from FY 2005 to FY 2007 out of the 48 “zero files” that we reviewed that were not forwarded to the Internal Investigations Section but that we considered to be reportable allegations based on our review of the FBI’s Offense Table.

⁵⁵ Of the remaining 26 percent of allegations, 10 percent were reported by the OIG, 9 percent were reported by members of the public, 4 percent were reported directly to the Internal Investigations Section by FBI employees, 2 percent were reported anonymously, and less than 1 percent were reported by another federal agency or a state or local agency.

We showed to personnel from the Internal Investigations Section the 25 potential misconduct allegations that we considered to be reportable allegations and asked whether they believed the allegations should have been reported to them. They told us that they believed that 8 of the 25 allegations should have been forwarded (see examples of these allegations in the text box), while they believed that the other 17 did not need to be reported.

Among the incidents that the Internal Investigations Section said did not need to be reported were allegations of time and

attendance abuse, instances of employees self-reporting they had accidentally accessed inappropriate websites or e-mails, an allegation that two Special Agents tried to intimidate a private investigator, an allegation that an FBI employee acted hostile and unprofessional in an encounter with an FBI police officer, and an incident in which an FBI agent received a speeding ticket.⁵⁶ Our review found that these types of allegations were routinely reported by some FBI field and headquarters divisions, indicating that the FBI is not uniformly interpreting the requirement that all allegations of misconduct be reported. In addition, the Internal Investigations Section Chief told us that the divisions should forward all allegations of potential misconduct so the Section could make

Example 1: The ex-wife of an employee called an FBI division to complain that she had begun to receive harassing phone calls one day after her ex-husband was ordered to pay her alimony. The FBI employee denied making any phone calls when first interviewed by supervisors in his office, but subsequently admitted “he had previously lied” about making the phone calls and wanted to “set the record straight.” Instead of reporting the matter to the FBI Inspection Division, the employee’s supervisors counseled the employee that “in the future he should be completely truthful when being interviewed.”

Example 2: The former boyfriend of an FBI employee stated that the employee was abusing prescription drugs without a prescription, including taking medications prescribed for her daughter and for him.

Example 3: An individual alleged that an FBI employee was having an affair with the complainant’s wife and misusing his FBI car to transport the woman to a hotel.

Source: OIG and FBI analysis of documents provided by FBI field divisions.

⁵⁶ In addition there was an allegation of potential misconduct by an FBI agent at a strip club that Internal Investigations personnel said did not need to be reported because the field office could not find an FBI agent by that name in either the FBI field office or in the FBI online phone directory. However, our review of the FBI’s Automated Case Support system indicated that there was both an FBI employee and an FBI contractor with the same name of the person alleged to have been at the strip club. We concluded that this incident should have been reported so that Internal Investigations Section personnel could determine whether the field office had done a sufficient investigation to support its conclusion that the person alleged to have engaged in misconduct was not an FBI employee.

the determination whether the behavior constituted misconduct or performance issues. We also concluded that the better practice would be to forward all allegations of potential misconduct.

We asked the personnel responsible for reporting misconduct on behalf of these three divisions why they did not forward the alleged misconduct to the Internal Investigations Section. They stated they did not do so if the allegation appeared to have no basis or if the allegation seemed more related to performance issues.⁵⁷ We also found in interviews at our site visits that many individuals (21 of 55 individuals we interviewed) told us that it was difficult to clearly distinguish between performance and misconduct issues.

Because we found that allegations of potential misconduct were not being consistently forwarded to the appropriate authorities, we believe the FBI needs to stress to field and headquarters divisions to report all allegations of potential misconduct to the Internal Investigations Section.

Most allegations of misconduct that the Internal Investigations Section received were provided to the OIG, as required.

Attorney General Order 2492-2001 states that “all evidence and non-frivolous allegations of criminal wrongdoing and serious administrative misconduct . . . shall be reported to the OIG.” We examined the FBI’s process for providing allegations to the OIG and also examined a random sample of allegations received by the FBI’s Internal Investigations Section to determine if the FBI had provided them to the OIG.

We found that the Internal Investigations Section has established appropriate procedures to ensure that misconduct allegations it receives are provided to the OIG for review as required. When an allegation is received in the Internal Investigations Section, a Conduct Review Specialist in the Initial Processing Unit enters preliminary information about it into the Case Management System and then shows the complaint to the OIG Assistant Special Agent in Charge assigned to monitor allegations of FBI misconduct. The OIG then determines whether the allegation will be investigated by the OIG, investigated by the

⁵⁷ Field division personnel told us that if the matter involved poor performance, they would address it by counseling the employee; discussing it with the Compensation, Leave, Recognition, and Performance Unit; or having the employee’s supervisor deal with it.

FBI and monitored by the OIG, or referred back to the FBI for appropriate handling.

If the OIG refers the allegation back to the Internal Investigations Section, the Section Chief decides whether the allegation will be investigated by the FBI or placed in the “zero file.” By providing incoming allegations to the OIG before providing them to the Section Chief, the Internal Investigations Section tries to ensure that the OIG Assistant Special Agent in Charge sees all allegations, not just those allegations that the Section Chief considers worthy of investigation.

When we attempted to verify from the FBI’s Case Management System that the FBI had showed all allegations to the OIG, we found data was missing from the system. Of the 5,377 allegations that we reviewed in the Case Management System, we found that 2,151 (40 percent) were missing information showing that the OIG had reviewed the allegation.⁵⁸

We therefore examined a random sample of 103 allegations that were missing information regarding the OIG’s review to determine if the FBI had actually shown them to the OIG. We first asked personnel in the OIG’s Investigations Division to verify that they had reviewed the allegations. OIG personnel were able to confirm that they had reviewed 76 of the 103 allegations. We then asked personnel in the Internal Investigations Section to provide documentation verifying that the remaining 27 allegations had been provided to the OIG for review. Internal Investigations Section personnel provided documentation demonstrating that they had shown 19 of the 27 allegations to the OIG for review, but were unable to document that they had done so with the remaining 8, including 2 allegations they could not locate at all.⁵⁹

⁵⁸ The Case Management System includes two fields addressing the OIG’s involvement in misconduct allegations: “OIG Classification,” which indicates whether the OIG will conduct an investigation into the allegation, whether the OIG will review the completed FBI investigation, or whether the OIG will have no involvement in the investigation; and “OIG Number,” in which Internal Investigations Section personnel enter a reference number that the OIG assigned to the allegation. To determine whether the OIG reviewed all allegations, we randomly selected a sample of allegations in the Case Management System that had blank “OIG Classification” and “OIG Number” fields.

⁵⁹ The OIG Assistant Special Agent in Charge assigned to monitor FBI misconduct allegations subsequently reviewed the eight allegations at our request. He told us that had he reviewed the allegations when the Internal Investigations Section first received them, he would not have recommended that the OIG investigate them, but instead would have referred them to the FBI for it to handle.

We concluded that some allegations may not have been shown to the OIG because the FBI's reporting process is not fully automated. The FBI's process requires Internal Investigations Section personnel to provide a hard copy of each allegation to the OIG Assistant Special Agent in Charge, who verifies his review by initialing the individual documents before returning them to the Internal Investigations Section. When the OIG Assistant Special Agent in Charge returns the hard copies of the allegations to the Internal Investigations Section, he also provides a letter with the corresponding OIG reference number of the allegation. The possibility of documents being misplaced during the transfer between the Internal Investigations Section and the OIG is increased by the dependence on paper instead of electronic records.

The OIG Assistant Special Agent in Charge told us that he believes the Internal Investigations Section intends to show him every allegation that it receives and that the dependence on paper records may explain why the Internal Investigations Section could not document that the eight allegations in our sample had been shown to the OIG. To ensure that the OIG receives all allegations of potential FBI misconduct, we believe the FBI should consider automating its reporting process, including requiring Internal Investigations Section personnel to enter information regarding the OIG's review into the FBI's Case Management System.

We could not determine whether field and headquarters divisions reported allegations in a timely fashion because the FBI's disciplinary database does not collect the information needed to track timeliness of reporting from divisions.

The FBI's *Manual of Administrative Operations and Procedures* requires that potential misconduct allegations be reported "promptly." In our review, we were unable to determine the amount of time taken by field and headquarters divisions to report misconduct because the FBI's Case Management System does not track when the divisions became aware of potential misconduct.

The FBI's Case Management System allows users to track the date the alleged misconduct occurred, the date on the document detailing the potential misconduct, and the date the Internal Investigations Section received that document.⁶⁰ However, division managers often do not

⁶⁰ The document detailing the potential misconduct could be an Electronic Communication, a facsimile, an e-mail, or hard copy letter. These documents may be
(Cont'd.)

become aware of misconduct until well after it occurs. Without knowing when the divisions originally learned of the potential misconduct, we could not determine whether they subsequently reported the misconduct to the Internal Investigations Section in a timely manner.

Nonetheless, we reviewed information contained in the FBI's Case Management System to determine possible reasons why allegations may not be reported promptly. The following are examples of late reporting:

- An Electronic Communication documenting the arrest of an Intelligence Analyst for public intoxication, criminal trespassing, and resisting arrest was never submitted to the Internal Investigations Section by the appropriate official in the field division. Instead, the Security Officer in the field division discovered an Electronic Communication describing the incident on someone's desk and forwarded it to the Internal Investigations Section. There was a delay of 5 months between the date of the arrest and the date the arrest was reported to the Internal Investigations Section.
- One field division delayed reporting a potential misconduct allegation for 37 days regarding an employee who wrote an inappropriate e-mail because the division decided to conduct its own internal inquiry before forwarding the allegation to the Internal Investigations Section. Internal Investigations personnel told us that the Section was going to remind the field division that it should not conduct its own inquiry until it had forwarded the allegation.
- Although an employee reported to his field division that he had lost his FBI credentials, the division never forwarded the allegation to the Internal Investigations Section and instead filed the allegation in its "zero file." The misconduct was only reported to the Internal Investigations Section after the division's "zero files" were audited during an inspection 2 years later, at which point the lost credentials were reported.
- A field division forwarded an allegation to the FBI's Security Division that an employee had outside employment without prior approval, but failed to also forward the allegation to the Internal Investigations Section.

sent from field or headquarters divisions, members of the public, other federal agencies, or state and local agencies.

Because the FBI's Case Management System does not allow Internal Investigations Section personnel to track when field and headquarters divisions originally learn of potential misconduct, the FBI is unable to determine whether the divisions are reporting in a timely manner. To ensure the timely reporting of allegations of potential misconduct, we therefore recommend that the Internal Investigations Section consider requiring that field and headquarters divisions specify when they became aware of the potential misconduct and that this date be tracked in the Case Management System.

Recommendations

We recommend that the FBI:

1. Remind all employees on an annual basis that all allegations of misconduct must be promptly reported to the FBI Internal Investigations Section or to the OIG.
2. Stress to field and headquarters divisions that they must forward all allegations of potential misconduct they receive to the Internal Investigations Section.
3. Consider automating the allegation-reporting process so that allegations can be reviewed by the OIG electronically instead of in hard copy.
4. Ensure that Internal Investigations Section personnel enter information regarding the OIG's review into the FBI's Case Management System.
5. Require field and headquarters divisions to specify, when forwarding allegations to the Internal Investigations Section, the date they became aware of the potential misconduct.
6. Modify the FBI's Case Management System so that users can track the date that divisions become aware of potential misconduct.

INVESTIGATION OF MISCONDUCT ALLEGATIONS

We found that FBI investigations of staff misconduct generally were thorough and conducted in a consistent manner. We also found that the timeliness of misconduct investigations improved during the 3-year period of our review.

FBI investigations of misconduct generally were thorough.

According to the FBI's *Internal Investigations Supervisor's Guide*, the Internal Investigations Section's mission is to "provide fair, thorough and timely review and investigation into allegations of serious misconduct." To assess whether the Internal Investigations Section was conducting thorough investigations, 2 OIG Special Agents and 1 OIG Inspector examined a sample of 64 investigations conducted by the FBI's Internal Investigations personnel or field investigators of misconduct allegations involving 69 employees.⁶¹ The OIG staff reviewed various aspects of the investigations, including whether all relevant individuals were interviewed, whether necessary documents were included in the investigative reports, and whether the investigations sufficiently addressed the allegations.

Overall, our review of the investigations involving the 69 employees found that the investigations were generally thorough, the necessary investigative steps were taken, and the investigations were well documented in the investigative reports. More specifically, we found:

- allegations were properly classified according to the FBI's Table of Offenses in the investigations for all 69 employees,
- the investigative reports for 68 of 69 employees (99 percent) contained the information necessary to thoroughly understand the actions taken during the investigation,
- the necessary documents were included in the investigative reports for 66 of 69 employees (96 percent),
- all relevant witnesses were interviewed for investigations involving 61 of 69 employees (88 percent), and

⁶¹ The investigations involved Special Agents and non-agent personnel, and employees ranging from the GS-5 level to the SES level.

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- the investigation sufficiently addressed the allegations for 60 of 69 employees (87 percent).

Our review did not find major deficiencies in these investigations. Overall we concluded that the FBI generally conducted thorough investigations and took the necessary investigative steps in the cases we reviewed.

In addition to our investigative file review, we asked Internal Investigations Section personnel about the quality of investigations delegated to field and headquarters personnel. The Internal Investigations Section delegates the investigation of minor and mid-level misconduct matters to Supervisory Special Agents in the field or headquarters divisions where the employees under investigation work.⁶² Internal Investigations Section personnel monitor the progress of these delegated investigations. The Internal Investigations Section must also approve the delegated investigations before they can be adjudicated.

Internal Investigations Section personnel reported to us that their overall opinion was that the delegated investigations were “thorough” and that the investigators in the field “did a good job” at producing quality investigations. Seven Internal Investigations Section personnel we interviewed stated that they rarely sent investigations back to the field for more work before approving them.

In addition, because FBI OPR personnel rely on the thoroughness of the investigations when adjudicating the misconduct allegations, we also interviewed them about the quality of FBI misconduct investigations they received. Overall, their general opinion regarding the quality of the investigations was positive. They said they noted little difference between investigations completed by field personnel and investigations completed by personnel from the Internal Investigations Section. Our own analysis of Case Management System data found that FBI OPR returned few investigations – 112 of 1,551 investigations (7 percent) from FY 2005 through FY 2007 – to the Internal Investigations Section for further investigation. In addition, our own review of the investigations of 69 employees (which included 34 conducted by the Internal

⁶² Of the investigations conducted by the FBI during the time period of our review, the Internal Investigations Section conducted 24 percent and delegated the remaining 76 percent to the divisions.

Investigations Section and 32 conducted by the field) showed no difference in the thoroughness of the investigations.⁶³

In our survey, we asked FBI employees about their perception of the thoroughness of misconduct investigations. As reflected in Table 3, 23 percent of survey respondents (165 of 718) agreed, and 13 percent (95 of 718) disagreed. The remaining 64 percent (458 of 718) were either neutral or said they did not know.

Table 3: Responses to Survey Question: “Please indicate how much you agree or disagree with the following statement: *Misconduct investigations adequately address the relevant issues.*”

	Number of responses	Percentage
Agree	165	23%
Neutral	138	19%
Disagree	95	13%
Don't Know	320	45%
Total	718	100%

Note: 100 of 818 respondents did not answer the question.

Source: Analysis of the OIG's survey of FBI employees.

The timeliness of investigations improved during the 3-year period that we reviewed.

The FBI's *Internal Investigations Supervisor's Guide* states that misconduct investigations and adjudications should be completed within 180 days, although this time frame can be extended if necessary. The 180-day time frame includes the time to complete both the investigation and adjudication.

To determine whether timeliness of the investigative phase improved during the period we reviewed, we analyzed Case Management System data for all 1,551 misconduct investigations closed from FY 2005 through FY 2007.⁶⁴ We found that the timeliness of FBI misconduct investigations improved from a median of 92 days in FY 2005 to a median of 81 days in FY 2007. Additionally, we found that

⁶³ The investigations for the remaining three employees were completed by the OIG or by the Department's Office of Professional Responsibility.

⁶⁴ For our analysis of the timeliness of the investigative and adjudicative phases combined, please see the Adjudication of Misconduct Investigations section.

the percentage of investigations completed in 90 days or less increased from 49 percent in FY 2005 to 60 percent in FY 2007 (see Table 4).

Table 4: Number of Days to Complete Investigative Phase, FY 2005 – FY 2007

Number of days	Percentage completed		
	FY 2005	FY 2006	FY 2007
90 days or less	49%	58%	60%
91 to 180 days	26%	28%	26%
181 to 270 days	14%	6%	7%
271 to 365 days	6%	3%	3%
More than 365 days	6%	5%	4%
Total number of investigations	353	618	507

Note: Seventy-three of 1,551 investigations were missing dates either for when the investigation began or when the investigation ended and so are not included here.

Source: OIG analysis of data from the FBI's Case Management System.

We also reviewed the timeliness of the investigative phase by type of investigation and found differences by type. Non-Delegated Investigations (NDI) were completed most quickly, with a median completion time of 57 days. According to an Internal Investigations Unit Chief, NDIs are completed quickly because they are more important investigations, either because of the nature of the misconduct or the rank of the subject. In addition, NDIs are conducted by investigators in the Internal Investigations Section or by Assistant Inspectors-in-Place, personnel who are able to make conducting these investigations a priority.

Investigations delegated to the field took longer to complete. Delegated Investigation and Adjudication cases had a median completion time of 77 days, while Delegated Investigation Only cases had a median completion time of 90 days. Two factors can cause delegated investigations to take longer to complete. First, delegated investigations conducted by Special Agents in the field still must be reviewed and approved by Internal Investigations Section personnel. Second, unlike with NDIs, the Special Agents in the field who conduct delegated investigations have other investigative responsibilities and conduct misconduct investigations as a collateral duty.

Through our discussions with Internal Investigations Section managers, we identified two changes that we believe contributed to the improvement in timeliness from FY 2005 to FY 2007. First, the investigative function was transferred from FBI OPR to the Inspection Division in mid-2004, resulting in longer times to complete investigations as the unit dealt with administrative matters related to the transfer. Once the transition was completed, however, more Internal Investigations Section resources could be devoted to investigations and, consequently, in FY 2006 and FY 2007 the timeliness of the investigations improved.

Second, since 2007, the Unit Chiefs of the two Internal Investigations Units have been taking a more active role in managing ongoing investigations when the Supervisory Special Agents in their units have been out of the office conducting NDIs. Internal Investigations Section managers told us that issues related to ongoing investigations often come up when Supervisory Special Agents are out of the office. The Unit Chiefs said they are also monitoring the incoming mail of Supervisory Special Agents who are traveling so that issues in their other ongoing investigations can be addressed even before they return to the office.

ADJUDICATION OF MISCONDUCT INVESTIGATIONS

Our review concluded that most of FBI OPR's decisions were reasonable, both in factual determinations and imposition of penalties. However, we found that in a significant number of cases where FBI OPR imposed non-standard penalties, it did not explain how those decisions were justified by precedent cases or did not include an assessment of the Douglas Factors, which could make it more difficult for the appellate officials to review these decisions on appeal. Moreover, we found inconsistencies in the discipline imposed in some of these cases. We also found that the FBI OPR Assistant Director has at times considered unwritten information she received outside the normal disciplinary process before making disciplinary decisions. Finally, the number of cases that met FBI timeliness standards improved during our 3-year review period.

Survey responses regarding FBI OPR's disciplinary decisions.

We asked survey respondents if they believed that the discipline imposed by FBI OPR was generally appropriate, too harsh, or too lenient. We found that 36 percent of survey respondents believed that the penalties imposed were appropriate. Of the remaining respondents, 11 percent believed FBI OPR's penalties were too harsh, 7 percent thought the penalties were too lenient, and 45 percent said they did not know. Table 5 contains the results of this survey question.

Table 5: Responses to Survey Question: “Do you believe that the discipline the FBI imposes is generally appropriate, is generally too harsh, or is generally too lenient?”

	All respondents
Penalties are too lenient	53 (7 percent)
Penalties are appropriate	262 (36 percent)
Penalties are too harsh	82 (11 percent)
Don't Know	323 (45 percent)
Total	720 (100 percent)*

Note: 98 of 818 respondents did not answer the question.

Source: Analysis of the OIG's survey of FBI employees.

* Percentages do not add to 100 because of rounding.

FBI OPR's decisions to substantiate or not substantiate misconduct allegations were reasonable in most cases.

In reviewing FBI OPR substantiation decisions to determine reasonableness, we first examined the case files for 69 employees from our selected sample, which included 66 non-SES and 3 SES employees. FBI OPR substantiated misconduct allegations against 52 of these employees and did not substantiate allegations against 16 employees.⁶⁵ In assessing whether the decisions reached by FBI OPR were reasonable, we analyzed whether the files contained “the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree.” 5 C.F.R. § 1201.56(c)(1). We concluded that two of the investigations were not thorough enough for us to reach a determination as to whether the substantiation or non-substantiation decisions were reasonable. However, we concluded that the substantiation or non-substantiation decisions in the remaining files were reasonable under the broad 5 C.F.R. standard identified above.

We next reviewed additional case files of 17 SES employees. In five of these cases, FBI OPR had found misconduct and imposed discipline that the SES employees appealed. In the remaining 12 cases, FBI OPR had not found misconduct. We concluded that one of the case files did not contain enough information for us to reach a determination as to

⁶⁵ One FBI employee retired during the adjudicative process.

whether the non-substantiation decision in that case was reasonable. For the remaining 16 SES employee cases we reviewed, we concluded that the substantiation or non-substantiation findings were reasonable.⁶⁶

We then examined whether the penalties imposed in the substantiated cases were reasonable, which we discuss next.

FBI OPR’s disciplinary decisions generally were reasonable, although we found some inconsistencies that could not be explained by the record in its files.

In imposing discipline, FBI OPR uses the Penalty Guidelines, which outline standard penalties for various offenses as well as factors that can be used to either mitigate or aggravate the penalty. The FBI’s *Manual of Administrative Operations and Procedures* states that “consideration is given to [FBI] policy and similar incidents previously resolved, as well as any aggravating or mitigating circumstances of the case in point.”⁶⁷ The FBI policy mirrors a Merit Systems Protection Board ruling, which states that it “will consider whether a penalty is clearly excessive in proportion to the sustained charges, violates the principle of like penalties for like offenses, or is otherwise unreasonable under all the relevant circumstances.”⁶⁸

⁶⁶ We note that our review in this selected sample was limited to whether the files contained “the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree.” This standard of review would allow for different fact finders to reach differing conclusions based on the same set of facts. We did not attempt to review the substantiation decisions to determine if cases with similar fact patterns were decided consistently because there were not enough cases in our file review with similar fact patterns, including aggravating and mitigating factors, to allow this comparison. However, as discussed in the Double Standard section, when we examined the outcomes in the universe of adjudicated cases from FY 2005 to FY 2007, we did find that allegations of misconduct against higher-level employees are substantiated at a lower rate than allegations against lower-level employees.

⁶⁷ FBI’s *Manual of Administrative Operations and Procedures*, Part I, Section 13-13.

⁶⁸ See *Douglas v. Veterans Administration*. 5 M.S.P.B. 313, 329 (1981). The Merit Systems Protection Board is an independent, quasi-judicial agency in the executive branch that was established by Reorganization Plan No. 2 of 1978, which was codified by the *Civil Service Reform Act of 1978*, Pub. L. No. 95-454, 92 Stat. 1111. The Act authorized the board to hear appeals of various agency actions, most of which are appeals of agencies’ adverse personnel actions.

In February 2004, the Bell-Colwell report described the database of precedent cases the FBI used at the time when determining penalties as “vague, incomplete, and deeply flawed” and stated that it was “largely unhelpful because of enormous variance in decisions over the years and infirmities in automation.” The report recommended that the FBI “develop and maintain a [new] comprehensive, computerized database of decisions.”

An April 2004 memorandum from the FBI Director stated that the new precedent database would “guide adjudicators and field executive management in determining appropriate and consistent levels of discipline, regardless of the employee’s geographic location or grade level.”⁶⁹ As a result, in November 2004 the FBI began tracking precedent cases through the Case Management System, which allows adjudicators to search for and compare previous cases that are similar to the current case being adjudicated.

In addition to considering precedent from the database when determining penalties, FBI OPR also relies on the Douglas Factors assessment from the field or headquarters division where the employee works.⁷⁰ These analyses can provide information about issues known to the employee’s manager that may be important to the penalty determination. For example, the managers would know about Douglas Factors such as the employee’s ability to get along with fellow workers, dependability, and performance on the job, as well as the supervisor’s confidence in the employee’s ability to perform assigned duties. However, under FBI policy, if the division does not submit its assessment of the Douglas Factors in a timely manner, FBI OPR will proceed to adjudication without this information.

To assess whether the FBI imposed reasonable and consistent penalties for substantiated misconduct, we reviewed the penalties imposed in the 52 instances in our file sample of 69 employees where FBI OPR sustained the allegations. For these 52 employees with substantiated allegations, we concluded that discipline imposed generally was reasonable under a substantial evidence standard, based on our review of the FBI OPR addendum and the proposal and decision letters in

⁶⁹ FBI, The Director’s Office, Reorganization of The Office of Professional Responsibility, April 8, 2004, p. 3.

⁷⁰ FBI OPR personnel told us that they expect to see the Douglas Factors assessment from the field or headquarters division for every case, except unsubstantiated Delegated Investigation and Adjudication cases.

the case files.⁷¹ However, we found some inconsistencies among cases in the discipline imposed that could not be explained by the record in the files because the files lacked a discussion of case precedent or an assessment of the Douglas Factors.

In 28 of the 44 (64 percent) cases we analyzed, we found no documentation in the file showing that FBI OPR reviewed precedent when determining the appropriate penalty.⁷² Of the 28 employees whose files lacked a discussion of precedent, 17 received a standard penalty according to the Penalty Guidelines, but the other 11 received either a mitigated or aggravated penalty.⁷³ In addition, for six employees, field and headquarters divisions did not submit their assessment of the Douglas Factors to FBI OPR, even though they are required by the FBI's *Internal Investigations Supervisor's Guide* to do so.

This lack of documentation in the case files made it difficult in some cases to compare the penalties with discipline imposed in similar cases decided by FBI OPR. However, in the cases we reviewed, we found variations in discipline imposed among cases that appeared to be similar, without explanation for the differences.

For example, FBI OPR imposed a 30-day suspension in one case in which a GS-07 Intelligence Analyst was found to have used his FBI car on several occasions to run personal errands during the workday. However, in another case where a GS-13 Special Agent used her car to drive home on two occasions to engage in a romantic affair during the workday with a local law enforcement officer she worked with on a joint task force, the FBI OPR Assistant Director imposed a 3-day suspension. While there were factors unique to each of these cases, it appeared to us

⁷¹ The adjudicator prepares a memorandum called an "addendum" that documents the reasons FBI OPR did or did not substantiate the offense and how it determined the disciplinary recommendation.

⁷² Eight of the 52 employees with substantiated misconduct were subjects of Delegated Investigation and Adjudication cases. Because the FBI divisions that proposed discipline for these 8 employees did not have access to precedent data in the FBI's Case Management System, we excluded them from this analysis and analyzed the remaining 44 employees for consideration of precedent.

⁷³ Even though the investigative files for most of these 11 employees contained a printout of precedent cases, neither the decision letter nor addendum explained whether or how FBI OPR considered these cases, and whether the cases contributed to the decision to impose a mitigated or aggravated penalty.

from the limited record in the case files we reviewed that the disparity in penalties between these two cases was not justified.⁷⁴

In another example, a GS-11 employee was given a letter of censure for claiming 3 hours of overtime she did not work. In a similar case, a GS-07 employee was suspended for 3 days for claiming 5.5 hours of overtime he did not work. In both cases, FBI OPR found that the employees had previously unblemished work records and that they submitted the inaccurate overtime claims due to sloppiness. The case files in these two instances lacked a discussion of FBI OPR's assessment of case precedent. One of the case files also lacked an assessment of the Douglas Factors from the field division where the employee worked. This made it difficult to assess whether there was sufficient justification for the disparity in penalties between these two cases.

FBI OPR managers told us they did not always document their use of precedent because the precedent database was "unwieldy" and could result in delays in adjudication. They also said that they wanted to avoid bad precedent from prior decisions that were poorly decided and that precedent cases were not useful with offenses such as unprofessional conduct where the factors of each case were unique.

However, when we spoke to FBI employees during our site visits, as well as to staff in the Internal Investigations Section, the Appellate Unit, and even non-supervisors within FBI OPR, many disagreed with FBI OPR managers regarding the use of precedent cases in determining the appropriate discipline. These employees said that the precedent database was not unwieldy, was useful in ensuring consistency in decisions, and helped to ensure a perception that discipline was being fairly imposed among employees.

The purpose of the precedent database, and the reason the Bell-Colwell report recommended the database be revised, is to help guide adjudicators in ensuring that the appropriate penalty is consistent with past decisions that contained similar factors. We believe that FBI OPR should consider precedent in its decisions, particularly when it intends to deviate from the standard penalty and impose harsher or more lenient punishment. FBI OPR should also document its consideration of

⁷⁴ In the case of the GS-13 Special Agent, the FBI OPR Assistant Director reasoned that because the agent had approval from her supervisor to drive her car home for lunch, it was not a misuse of the agent's FBI vehicle to use it to drive home mid-day during her duty hours. We believe it was a misuse because the agent then stayed there for three to four hours in order to engage in an affair.

precedent in either the addendum or proposal and decision letters to the employee. In addition, because the assessment of Douglas Factors provides FBI OPR with information important to the disciplinary decision, we believe the FBI should enforce its requirement that field and headquarters divisions submit this assessment.

The FBI OPR Assistant Director considered information beyond the facts determined by the investigation.

We found that the FBI OPR Assistant Director sometimes informally solicited or received information, outside the normal disciplinary process, from the supervisors or co-workers of the subject of the misconduct investigation before making her disciplinary decision.

We asked the FBI OPR Assistant Director what type of information she considered when determining appropriate disciplinary action and whether she could contact an employee's supervisor or co-workers during the adjudicative process. She stated that no FBI policy prohibited her from accepting letters or telephone calls from an FBI employee who wished to contact her. In addition, she provided one example in a pending case in which she solicited unwritten information regarding what discipline should be imposed.

The FBI OPR Assistant Director also said that to the extent she spoke with FBI managers regarding disciplinary cases about their employees, it was to return telephone calls from FBI managers, request that Douglas Factors be submitted or to clarify comments in the Douglas Factors that they submitted. She said that while she would request the managers put their information in writing, she also acknowledged that at times she would have an oral discussion with the managers on substantive issues relating to the disciplinary case.

In previous OIG reviews of the disciplinary systems in the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Federal Bureau of Prisons (BOP), and United States Marshals Service (USMS), we did not find that the deciding officials in those agencies considered information beyond that in the investigative file when adjudicating cases, in accord with federal regulations.⁷⁵ However, our review of the Drug Enforcement Administration (DEA) disciplinary system found that the DEA did not limit itself to examining only the information developed during the investigation and sometimes used personal experiences or opinions to

⁷⁵ 5 C.F.R. § 752.404(f). These regulations do not apply for most FBI employees because they are in the excepted service.

influence disciplinary decisions. We recommended that the DEA instruct its deciding officials to limit their disciplinary considerations to the information contained in official investigative files and the information provided by the employee. The DEA concurred with the recommendation and, in a December 2003 memorandum, reinforced instructions regarding the information that deciding officials could consider.

We believe that the FBI OPR Assistant Director should similarly limit disciplinary considerations to the information contained in official misconduct files and provided by the employee. Obtaining or considering information beyond these sources may improperly influence the deciding official to make a decision that is not based on the record of the misconduct investigation, management's assessment of the Douglas Factors, and the employee's reply. Moreover, if FBI OPR considers in its penalty decisions information that is not contained in the investigative file and the case is appealed, neither the employee who filed the appeal nor the appellate officials have an opportunity to review all of the information FBI OPR relied on to reach its decision. Finally, a practice of seeking or receiving additional unwritten information from FBI managers could lead to inconsistent decisions for similar cases.

The FBI OPR Assistant Director controls both the proposal and the decision stages in disciplinary cases.

In the four other Department law enforcement components we previously reviewed, the proposal and decision stages in a disciplinary proceeding are separated during the adjudicative phase. In the DEA, BOP, and USMS the proposing official is separate from the deciding official.⁷⁶ Our review of ATF found that it sometimes allowed the same employee to serve as both the proposing and deciding official for non-adverse cases. We recommended that ATF prohibit the same individual from serving as both the proposing and deciding official in a misconduct case. ATF concurred with the recommendation and in February 2007 issued an order prohibiting the practice.⁷⁷

According to interviews with FBI OPR personnel, the two FBI OPR Unit Chiefs serve as the proposing officials in adverse actions, while the

⁷⁶ DEA procedures require that when a dismissal is proposed, an official different from the official who proposed the dismissal must serve as the deciding official. *Adams v. Department of Justice*, 251 F.3d 170 (Fed. Cir. 2000).

⁷⁷ However, there is no statute or regulation requiring that the proposing and deciding officials make their disciplinary decisions independent of one another.

FBI OPR Assistant Director – the supervisor of the two Unit Chiefs – serves as the deciding official. Even though the proposing and deciding officials are different individuals, we determined that the two stages of the adjudicative process are not independent of each other. We found that the deciding official, the FBI OPR Assistant Director, had reviewed and approved the proposed discipline for each of the 28 employees in our file review sample who had been proposed for an adverse action, and later in the process had also made the final disciplinary decision in these 28 cases. Through her review and approval of the Unit Chiefs’ disciplinary proposals, the Assistant Director can influence the content of the proposed discipline before making the final decision and imposing discipline.

We asked the FBI OPR Assistant Director why she reviewed and approved the proposed discipline in adverse cases in which she would also make the final disciplinary decision. She stated that, according to the FBI Office of General Counsel and research conducted by FBI OPR personnel, once a disciplinary action was proposed she could not increase the penalty above that recommended in the proposal. Therefore, she said she reviewed all proposals to ensure none were more lenient than what she was likely to ultimately decide.⁷⁸

In addition, the FBI OPR Assistant Director stated that the FBI has a policy of immediately suspending an employee’s clearance and suspending the employee when an employee is proposed for dismissal, and it therefore serves an important function for the Assistant Director to be consulted on all dismissals. She also stated that her involvement in all levels of adjudications ensures that cases are appropriately decided.

While we acknowledge that these arguments have some merit, we also believe that independent proposal and decision authorities can provide essential checks and balances in the disciplinary process. We also believe that the FBI is not so different from other Department law enforcement components, all of which have separate proposing and deciding officials. Moreover, if the concern is that, unlike other Department law enforcement components, the FBI immediately suspends an employee who is proposed for dismissal, additional review can be built into the system specifically for those cases.

⁷⁸ As the deciding official, however, the FBI OPR Assistant Director can increase a proposed disciplinary action as long as the employee is re-proposed for the increased penalty and the employee has an opportunity to respond orally and in writing to the new proposal.

In sum, we recommend that the FBI carefully consider whether it should change its disciplinary process to ensure that the proposing and deciding officials within FBI OPR are separate, like all other Department law enforcement components.

The timeliness of adjudications and the entire disciplinary process improved from FY 2005 to FY 2007.

One area of significant improvement for FBI OPR was the timeliness of adjudications. The median completion time for adjudications improved from FY 2005 to FY 2007, from 94 days to 44 days. The timeliness of the adjudicative phase by type of investigation also improved (see Table 6 below).

Table 6: Timeliness of Adjudicative Phase by Type of Investigation, FY 2005 – FY 2007

Type of investigation	Median Number of Days to Complete		
	FY 2005	FY 2006	FY 2007
DIA	73	56	31
NDI	85	105	72
DIO	121	104	49

Source: OIG analysis of data from the FBI's Case Management System.

For the 1,551 completed cases in our file review, the percentage of adjudications completed in 90 days or less increased from 48 percent in FY 2005 to 77 percent in FY 2007 (see Table 7 below).

Table 7: Timeliness of Adjudicative Phase, FY 2005 – FY 2007

Number of days	Percentage completed		
	FY 2005	FY 2006	FY 2007
90 days or less	48%	56%	77%
91 to 180 days	31%	25%	14%
181 to 270 days	12%	12%	6%
271 to 365 days	5%	5%	2%
More than 365 days	2%	3%	2%

Note: 73 of 1,551 investigations were missing dates either for the beginning of the adjudicative phase or the end of adjudicative phase, and so are not included here.

Percentages do not add to 100 because of rounding.

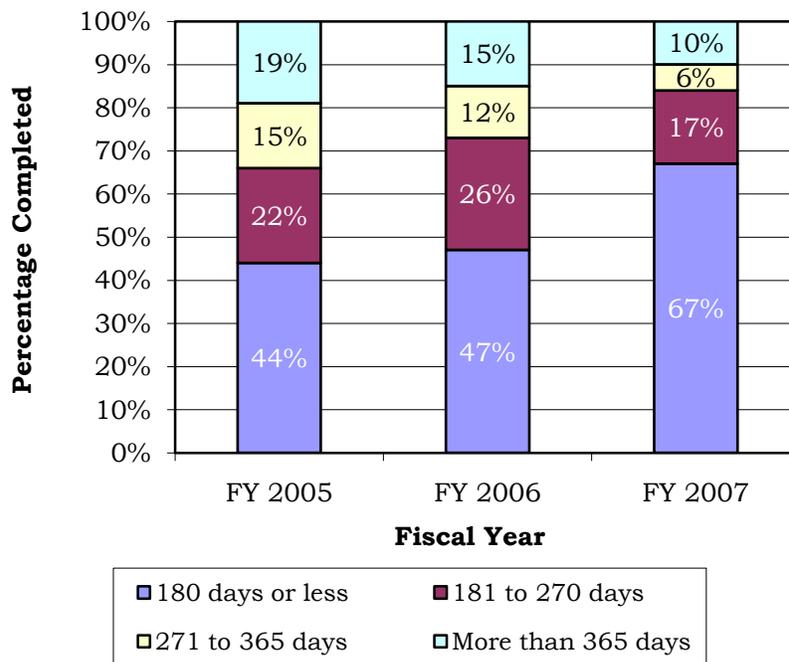
Source: OIG analysis of data from the FBI's Case Management System.

According to FBI OPR managers, the timeliness of adjudications improved because of a change in the way cases were assigned to adjudicators. Previously, when FBI OPR received investigations for adjudication they would be assigned immediately to adjudicators. As a result, each adjudicator would have a caseload of between 10 to 12 cases awaiting adjudication. In mid-2006, the FBI OPR Unit Chiefs changed the process so that adjudicators work on only one case at a time. Supervisors assign a new case only when an adjudicator has completed a previous case. One FBI OPR manager explained that it was easier to hold an adjudicator accountable for delays in completing a single case than multiple cases and that adjudicators could better manage their work when they are assigned only one case at a time. FBI OPR Unit Chiefs also told us that they began to adjudicate cases themselves to help improve overall timeliness. Finally, FBI OPR Unit Chiefs said that assigning cases one at a time made it easier to identify cases that could be closed administratively.⁷⁹

Overall, we found that the amount of time needed to complete the investigation and adjudication of disciplinary cases has improved. The *Internal Investigations Supervisor's Guide* states that misconduct investigations and adjudications should be completed within 180 days. When the timeliness of investigations and adjudications are combined, we found that the median amount of time it took to complete both phases for the 1,551 completed cases in our review decreased from 199 days to 133 days, an improvement of 33 percent. In addition, the percentage of cases completed within the 180-day time frame increased from 44 percent in FY 2005 to 67 percent in FY 2007 (see Figure 5).

⁷⁹ One reason a case may need to be closed administratively is if an employee resigns or retires before a misconduct investigation is adjudicated since the FBI can impose discipline only on current employees. Previously, cases for employees who resigned or retired might remain in an individual adjudicator's backlog.

Figure 5: Timeliness of FBI's Disciplinary Process, FY 2005 - FY 2007



Source: OIG analysis of data from the FBI's Case Management System.

Recommendations

We recommend that the FBI:

7. Require FBI OPR to document its consideration of precedent when a mitigated or aggravated penalty is imposed.
8. Require field and headquarters divisions to submit a Douglas Factors assessment in misconduct cases, except in unsubstantiated Delegated Investigation and Adjudication cases.
9. Clarify in policy that FBI OPR and appellate officials should not seek or consider unwritten information when making disciplinary decisions.
10. Consider changing the adjudicative process to ensure that the proposing and deciding officials within FBI OPR are separate.

APPEALS OF DISCIPLINARY DECISIONS

We found a lack of clear guidance about the appropriate standard of review that appellate officials should apply when reviewing penalties imposed by FBI OPR. We also identified concerns related to how the FBI selects employees to serve on the Disciplinary Review Board. While adverse appeals by non-SES employees are decided by a Disciplinary Review Board consisting of SES and non-SES members, adverse appeals by SES employees are decided by a Disciplinary Review Board consisting entirely of SES members. From FY 2005 through the third quarter of FY 2008, 247 non-SES and 6 SES appeals were decided. Of the non-SES appeals, 44 of the penalty decisions were mitigated on appeal (18 percent). We reviewed a sample of the non-SES cases that were mitigated on appeal and found that the mitigation generally appeared reasonable. By contrast, five of the six SES disciplinary decisions (83 percent) appealed during our review period were mitigated. We reviewed all of the SES cases that were mitigated and concluded that most of these decisions were unreasonable. Finally, we found that the timeliness of the appeals process improved from FY 2005 through the third quarter of FY 2008.

We found a lack of clear guidance, and confusion among some appellate officials, regarding the appropriate standard of review to apply when reviewing penalties imposed by FBI OPR.

As noted previously, FBI policy prior to August 19, 2005, was that appellate officials could “independently redetermine the factual findings and/or the penalty imposed when exercising appellate authority.”⁸⁰ In effect, this was a *de novo* review of FBI OPR’s factual findings and penalty determinations, and appellate officials could make new factual findings or mitigate the penalty without deference to FBI OPR’s previous determinations.

In response to recommendations in the Bell-Colwell report, the FBI announced a change in policy through an August 19, 2005, Electronic Communication which required appellate officials to review findings of

⁸⁰ FBI Electronic Communication, Policy Changes Related to the Disciplinary Appeals Process, August 19, 2005, p. 4.

fact under the “substantial evidence” standard of review. Although the August 2005 Electronic Communication recognized that the standard of review for penalty determinations had been a *de novo* standard, it did not address what standard of review appellate officials should use when reviewing penalty determinations by FBI OPR.

Disagreements subsequently arose between FBI OPR and the Appellate Unit as to which standard of review – the substantial evidence standard or the *de novo* standard – appellate officials should apply to FBI OPR’s penalty determinations. The FBI General Counsel acknowledged in 2006 that the policies addressing the appellate officials’ authority to modify penalties were vague and open to interpretation. In an August 31, 2007, Electronic Communication, the FBI stated that appellate officials would apply the substantial evidence standard to “findings” by FBI OPR, but the Electronic Communication did not specify whether “findings” included both factual findings and penalty determinations.⁸¹

The Appellate Unit Chief told us in response to our questions during this review that he believed that his unit has interpreted the August 2007 Electronic Communication as directing the unit to apply the substantial evidence standard to both factual findings and penalty determinations by FBI OPR.⁸² However, two officials who served on the Disciplinary Review Board in 2007 and 2008 told us that they were applying the *de novo* standard of review to FBI OPR’s penalty determinations, as we will discuss in the next section.

We concluded that the FBI standard of review for penalty determinations needs clarification. We believe, and the FBI has concurred, that the standard of review should be a substantial evidence standard, for both factual findings and penalty determinations, and that appellate officials should not be substituting their judgment, *de novo*, for FBI OPR’s factual findings or penalty determinations. We believe that

⁸¹ FBI Electronic Communication, Policy Change Related to the Disciplinary Appeals Process, Disciplinary Review Boards, August 31, 2007, p. 5.

⁸² The August 2007 Electronic Communication also required that all newly-selected members of the Disciplinary Review Board receive training regarding the appellate standard of review and the role of the Disciplinary Review Board. We observed the July 2008 training session at the invitation of the FBI. We found that the slide show presentation provided during this 4-hour training stated in one slide that the standard of review for both factual findings and penalty determinations was the substantial evidence standard. However, none of the written materials, or the written guidance regarding the work of the Disciplinary Review Board, clarified this point.

the substantial evidence standard should be made clear to all FBI appellate officials, and should be included in written descriptions describing the work of the Disciplinary Review Board.

Appellate officials do not uniformly understand and apply FBI policy regarding their authority to modify findings of fact on appeal.

While FBI policy does not clearly state what standard of review applies to FBI OPR's penalty determinations, it does clearly state that appellate officials are required to review FBI OPR's findings of fact using a substantial evidence standard of review.⁸³ The FBI's former Associate Deputy Director told us that, under this standard, appellate officials should assess whether the adjudicative process was followed correctly, but should not redecide the facts of the case. However, we found that appellate officials do not uniformly understand and apply the substantial evidence standard of review when reviewing FBI OPR's findings of fact.

We asked 10 FBI employees who had served as voting members on one or more Disciplinary Review Boards since 2006 about their understanding of the substantial evidence standard of review and their authority to overturn the factual findings supporting disciplinary decisions. Two of these Disciplinary Review Board members, each of whom participated in more than 10 appellate decisions, told us that they did not give any deference to FBI OPR decisions. This practice is contrary to the requirements of the substantial evidence standard, in which appellate officials are expected to confine their review to whether the record as a whole contains sufficient evidence that a reasonable person might accept as adequate to support a conclusion, even though the appellate reviewer might disagree.

Moreover, as explained below on pages 71 and 72 we found several examples in our own review of appellate decisions where the appellate officials did not apply the substantial evidence standard of review to FBI OPR's factual determinations.

⁸³ See FBI Electronic Communication, Policy Changes Related to the Disciplinary Appeals Process, August 19, 2005, p. 4.

The Disciplinary Review Board selects members differently for SES and non-SES appeals, which can contribute to either bias or an appearance of bias.

In the 2002 OIG report, entitled *A Review of Allegations of a Double Standard of Discipline at the FBI*, we noted that a Disciplinary Review Board consisting of only SES members may foster the perception that SES employees might be treated less harshly than non-SES employees. At that time, we recommended that the FBI consider including a non-SES member or a non-FBI employee on the board in all appeals. The Bell-Colwell commission addressed a similar issue in 2004, recommending that the FBI include a non-SES voting member on the board for all appeals by non-SES employees to reduce the perception that the board was skewed in favor of SES employees. However, the commission did not recommend changing the composition of the board for appeals by SES employees.

In August 2005, the FBI changed its policy to allow non-SES employees to select either an SES or mid-level manager (at the GS-14 or GS-15 level) to serve as the third voting member on the Disciplinary Review Board. In August 2007, the FBI expanded the Disciplinary Review Board to five members.⁸⁴ These procedures also require the board to include two mid-level non-SES managers as voting members when hearing appeals from non-SES employees. However, only SES employees may serve as voting members on a Disciplinary Review Board hearing an appeal of an SES employee.

We believe that a board composed exclusively of SES employees hearing an SES employee's appeal can result in either bias or the appearance of bias. Less than 1 percent of FBI employees are at the SES level (260 of 31,244 employees). Because the population of eligible SES Board members is small, many SES members throughout the FBI know and work with each other on a regular basis. We recommend the FBI change the composition of the Disciplinary Review Board for SES appeals to include non-SES employees.

⁸⁴ As discussed previously in the Background section to this report, under the revised procedures the Assistant Director of the Human Resources Division remains the chair of the Board. The FBI Associate Deputy Director selects the additional four members of the Board from computer-generated lists of categories of FBI employees to serve a 6-month term. The revised procedures require the Board to tape record its deliberation. Non-voting observers attend Board meetings, including representatives from the FBI's Office of the General Counsel, the Office of Equal Employment Opportunity Affairs, and an additional mid-level, non-SES, manager.

In addition, we recommend the FBI consider changing the membership of its Disciplinary Review Board so that it is composed of permanently assigned SES and non-SES officials who are well-trained on the disciplinary process and the board's role in reviewing appeals. When the FBI last made changes to the membership of its Disciplinary Review Board in August 2007, all positions on the board, with the exception of the chair, were given a 6-month term. We believe that a permanent appeals decision maker or board, rather than a board composed of SES employees who rotate in and out of their board service after 6 months, could improve the quality and consistency of disciplinary decisions, and could also help address concerns about bias in individual cases or the appearance of SES board members issuing more lenient decisions for their SES colleagues. In addition, appointing permanent decision makers could help improve the quality of decisions by a Disciplinary Review Board where members currently rotate on and off the board in temporary assignments that do not allow them to develop an expertise in the disciplinary process.

We also note that the FBI process for reviewing disciplinary decisions – with appeals heard by a group of FBI colleagues who rotate in and out of this assignment frequently – is unique in the Department of Justice. We recognize that the appellate process at the FBI was created in part because most FBI employees cannot appeal the agency's disciplinary decisions to the Merit Systems Protection Board (MSPB), like most other federal employees.⁸⁵ However, the current Disciplinary Review Board process is not similar to an independent MSPB or judicial review, with more permanent, trained decision makers. Moreover, unlike the MSPB process, the FBI appeals process relies on FBI employees judging their colleagues. In addition, the pool of potential SES board members is limited to the 260 FBI employees who have SES status, thereby increasing the chance that the board members will know the appellant whose case they are deciding or will work with the appellant in the future.⁸⁶

⁸⁵ See the Background section of this report for a discussion of the laws and regulations governing the discipline of FBI employees.

⁸⁶ In addition, SES employees at the Assistant Director level or above (with the exception of the Assistant Director of Human Resources Division), and all SES employees assigned to a Division that plays a direct role in the disciplinary process, are excluded from participating on a Disciplinary Review Board. The FBI calculated that this eliminates approximately 60 SES employees from consideration, leaving only about 200 SES employees eligible for participation on a Disciplinary Review Board.

In sum, we believe that expanding the Disciplinary Review Board for SES appeals beyond SES employees and creating permanent positions for the members of the Disciplinary Review Board will help reduce any bias in the system, as well as the perception that SES employees are treated more leniently than non-SES employees.⁸⁷ We recommend that the FBI carefully consider such a change.

Most non-SES appellate decisions we reviewed were reasonable and the case files contained sufficient documentation to explain the board's decisions.

Overall, 247 non-SES employees appealed FBI OPR's findings between FY 2005 and the third quarter of FY 2008, and 44 of these cases (18 percent) were mitigated by appellate officials.

We sampled a portion of the non-SES cases that were appealed. Of the 69 employees whose misconduct investigations we reviewed in our judgmental sample, 22 non-SES employees appealed FBI OPR's findings, and 6 were mitigated. We reviewed the case files for all 22 to determine whether the appellate officials used the correct standard of review for the factual determinations, whether the appellate officials clearly explained their reasons for their decisions, whether the discipline imposed following an appeal was reasonable, and whether the decision letters explained how precedent and aggravating or mitigating factors influenced the appeal's decisions when applicable.

Both the 2002 OIG report and the 2004 Bell-Colwell report noted that FBI policy requires appellate officials to document the reasons for their decisions. The 2002 OIG report recommended that the FBI require the appellate officials to provide a written justification if their final decision changed the discipline that had been imposed by FBI OPR. The Bell-Colwell report stated that employees generally received "a boilerplate letter describing the ultimate decision on appeal without any articulation of the specific reasons (e.g., findings) justifying that outcome" and recommended that all subjects receive "a brief written explanation of the appellate officials' findings and decision."⁸⁸

⁸⁷ We discuss in more detail the issue of a double standard of discipline in the next section of this report.

⁸⁸ Griffin B. Bell and Lee Colwell, *Study of the FBI's Office of Professional Responsibility* (February 2004), p. 63.

We concluded that the outcomes for 20 of 22 appeals were reasonable. It appeared that the correct standard of review was used, and we believe that the discipline imposed was reasonable for the severity of the misconduct. Also, in these 20 cases the Appellate Unit's analysis explained the reasons supporting the final appellate decision, including an explanation of how precedent, as well as aggravating and mitigating factors, influenced the decision.

While we found that the final discipline imposed in 20 of the 22 appeals was reasonable, we identified 2 cases in which appellate officials appear to us to have acted unreasonably when they reduced FBI OPR's penalties. In these two cases the Appellate Unit's analysis, which included an explanation of precedent as well as aggravating and mitigating factors, recommended that the appellate officials uphold FBI OPR's original decision. The final decisions of the Disciplinary Review Board, which did not follow the Appellate Unit's recommendations, did not include sufficient explanation of why FBI OPR's penalties were changed.

Case Example 1: In 2007, FBI OPR dismissed an FBI headquarters employee for using an FBI vehicle and gas bought with an FBI credit card to commute back and forth to work on a daily basis when he was not authorized to do so.⁸⁹ FBI OPR found that the employee drove over 8,000 miles over the 7-month period that he misused the FBI car. FBI OPR also found that the employee lied under oath when questioned about the allegations. The Appellate Unit confirmed FBI OPR's findings of fact and recommended dismissal.

The Disciplinary Review Board partially vacated the findings by FBI OPR and the Appellate Unit when it overturned three of the five charges against the employee without explanation: that the employee had misused his government credit card and lied, both under oath and not under oath. Rather, the board found only that the employee had misused a government vehicle and behaved unprofessionally while on duty. Instead of termination, the board imposed a 37-day suspension on the employee for the remaining two charges. The Disciplinary Review Board did not explain in its written decision why it changed the findings of fact or did not find lack of candor.

We concluded after our review of this case that FBI OPR's factual findings were supported by substantial evidence, the standard that the

⁸⁹ Employees who work at FBI headquarters are not permitted to use FBI vehicles for their daily commutes.

Disciplinary Review Board should have applied, and we found no reason for the Disciplinary Review Board to overturn these findings. We also found that the agent's misuse of the vehicle was egregious and thus were troubled by the Disciplinary Review Board's decision to overturn FBI OPR's imposition of an aggravated penalty for misuse of a government vehicle and instead impose a standard penalty.

Case Example 2: In 2007, FBI OPR dismissed a Special Agent for knowingly providing false affidavits to a local law enforcement agency to avoid paying six parking tickets. FBI OPR found that the agent had submitted sworn affidavits to a traffic court falsely claiming that he received the parking tickets while performing law enforcement duties, when he had received some of the tickets while off-duty. FBI OPR concluded that dismissal was warranted because the agent had intentionally fabricated the sworn affidavits. The Appellate Unit recommended the Disciplinary Review Board sustain the dismissal.

The Disciplinary Review Board confirmed FBI OPR's findings that the agent's false statements were intentional, but nevertheless mitigated the penalty from dismissal to a 120-day suspension without explanation in its written decision for the penalty. The Assistant Director of the Human Resources Division told us that the penalty imposed by the Disciplinary Review Board in this case was also inconsistent with past precedent.

We concluded after our review of this case that FBI OPR's factual findings were supported by substantial evidence, the standard that the Disciplinary Review Board should have applied, and we found no reason for the Disciplinary Review Board to overturn these findings.

As discussed in more detail in the next section of this report, our review also examined whether there is a double standard of discipline for higher-ranking FBI employees compared to lower-ranking FBI employees. We therefore conducted a second file review examining all six appeals by SES employees that were decided from FY 2005 through the third quarter of FY 2008. We found that five of them were mitigated (83 percent). As discussed in the next section, we concluded that the mitigation of most of these SES cases was unreasonable, and it appears that the appellate officials failed to follow the substantial evidence standard of review and instead substituted their own judgment for that of FBI OPR. We discuss all six of the SES appeals in greater detail in the Double Standard of Discipline section of this report on pages 97 through 103.

The timeliness of appeals improved from FY 2005 through the third quarter of FY 2008.

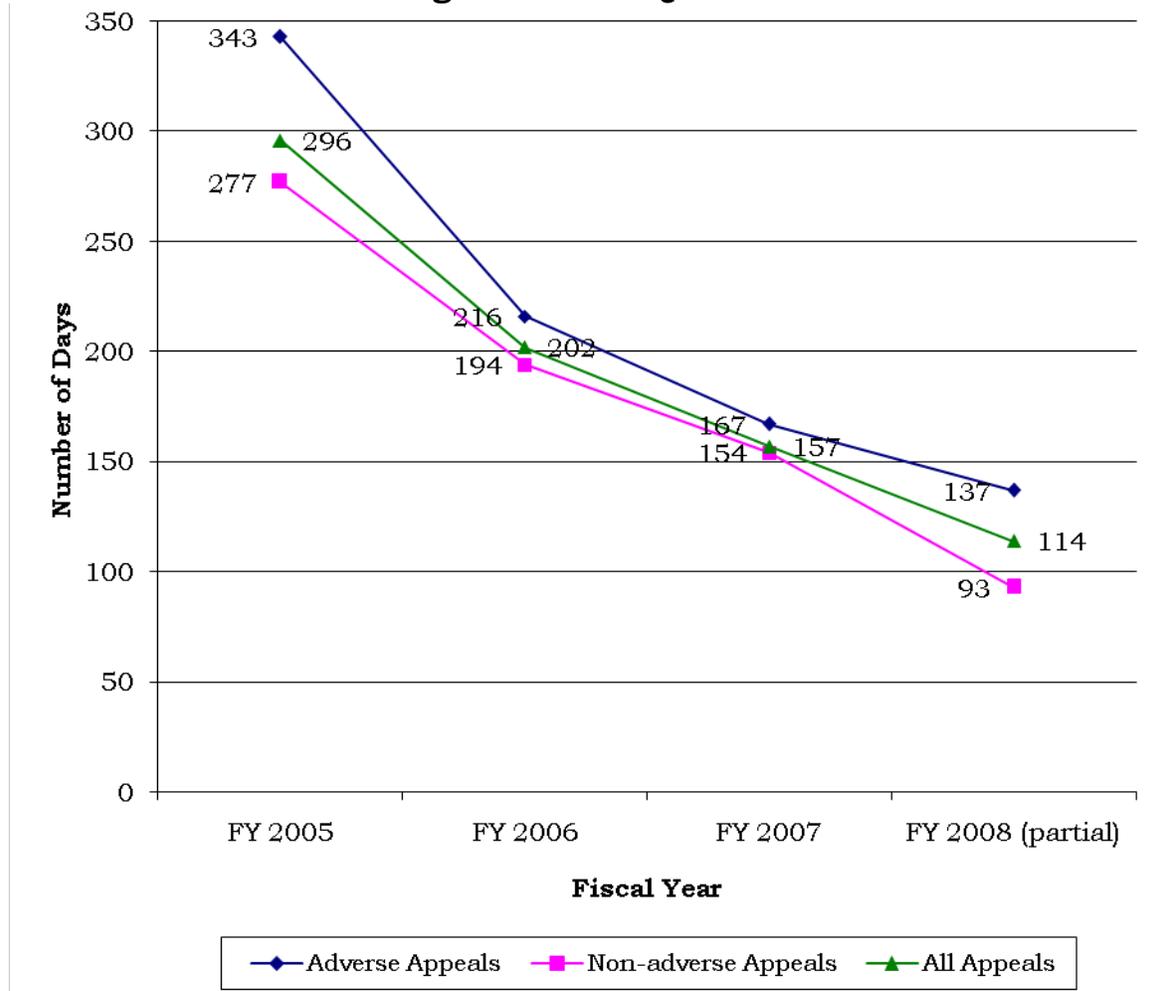
We found that the timeliness of the appeals process improved between FY 2005 and the third quarter of FY 2008. The FBI's 180-day time frame for completing misconduct investigations applies only to the investigative and adjudicative phases. However, the Appellate Unit has set its own informal case completion standards that call for non-adverse appeals to be completed within 90 days and adverse appeals to be completed within 120 days.

We found improvement from FY 2005 to FY 2008 in the time the FBI took to complete appeals. For all appeals that were decided between FY 2005 and the third quarter of FY 2008, the median time dropped from 296 days in FY 2005 to 114 days in the first three quarters of FY 2008. This was an improvement of 182 days, or 61 percent. The median time to decide non-adverse appeals dropped from 277 days in FY 2005 to 93 days in the first three quarters of FY 2008. The median time to decide adverse appeals dropped from 343 days in FY 2005 to 137 days in the first three quarters of FY 2008. The FBI also increased the percentage of cases that met its informal time frames from zero in FY 2005 to 42 percent (30 of 71) in the first three quarters of FY 2008. Finally, the FBI made these improvements at a time when the number of appeals decided increased 235 percent, from 31 in FY 2005 to 104 in FY 2007.⁹⁰

Figure 6 below shows the median amount of time to complete non-adverse and adverse appeals from FY 2005 through the third quarter of FY 2008.

⁹⁰ FY 2007 was the last year for which we had a full year's worth of data to review.

Figure 6: Median Number of Days to Decide Appealed Cases, FY 2005 Through the Third Quarter of FY 2008



Source: Appellate Unit Data Log Matrix.

However, while timeliness has improved, the majority of appeals (58 percent in the first three quarters of FY 2008) are not completed within the time frames established by FBI officials. Appellate Unit officials pointed to the amount of time it takes for the FBI’s Civil Discovery Review Unit to redact an appeal’s investigative file to provide it to the employee as a major reason for delays in the process. Civil Discovery Review Unit officials cited investigative files that contain classified information and projects with court-imposed deadlines as reasons for delays in meeting request from the Appellate Unit. Appellate Unit officials also pointed out that appellants are given a minimum of 20 days to review the redacted investigative files and write their supplemental appeal arguments, which also can affect the timeliness of the completed appeal.

Recommendations

We recommend that the FBI:

11. Clarify FBI policies on the appellate officials' authority to modify findings of fact and penalties to resolve different interpretations of the policies by FBI OPR and appellate officials.
12. Consider appointing a permanent appeals decision maker or board, rather than an appeals board composed of employees who rotate in and out of their board service after 6 months. In addition, if the permanent appellate decision-maker is a board rather than an individual, expand the board membership for SES appeals beyond only SES employees.
13. Require appellate officials to fully document in writing the reasons for their decisions, including their consideration of precedent and mitigating or aggravating factors.

DOUBLE STANDARD OF DISCIPLINE

We found that a significant percentage of FBI employees we surveyed believed that there was a double standard of discipline in the FBI for higher- and lower-ranking employees. Our analysis of disciplinary results found significant differences in the rate of substantiation of allegations between higher- and lower-ranking employees. We also found a significant difference in mitigation of discipline on appeal. Specifically, we found that 5 of 6 appeals by SES employees (83 percent) resulted in mitigation of the discipline originally imposed by FBI OPR, while only 44 of 247 appeals by non-SES employees (18 percent) resulted in mitigation. In addition, when we examined the appeals process, we found that four of the five decisions mitigating discipline of SES employees were unreasonable. In sum, although the number of appealed SES cases is small, we believe the evidence indicates that SES employees were treated more leniently on appeal than non-SES employees, and that this more lenient treatment was not justified.

In 2002 and 2003, two OIG reports examined complaints from FBI employees who alleged that the FBI's system of discipline was unfair because senior managers were treated more leniently than other employees.⁹¹ Because of the low number of disciplinary cases involving SES employees at the time, the OIG did not find sufficient evidence to either conclusively establish or refute the allegation that the FBI systematically favored senior managers and, in particular, SES employees. However, the OIG report stated that many FBI employees believed that a double standard of discipline existed.

The 2004 Bell-Colwell report also found that FBI employees believed that a double standard existed in the FBI. The report stated that although the Bell-Colwell interviews and document reviews did not confirm actual, systemic disparate treatment, the perception of a double standard adversely affected morale of FBI employees and their confidence in the FBI's disciplinary system.

⁹¹ See U.S. Department of Justice Office of the Inspector General, *A Review of Allegations of a Double Standard of Discipline at the FBI* (November 2002) and U.S. Department of Justice Office of the Inspector General, *A Review of Allegations of a Continuing Double Standard of Discipline at the FBI* (November 2003).

As discussed below, our current review found a significant percentage of FBI employees believe that there is a double standard of discipline favoring higher-ranking over lower-ranking employees. Moreover, as discussed in the following sections, our review found that the discipline of SES employees was mitigated more often on appeal than non-SES employees, and that this mitigation in most of the SES cases was not reasonable.

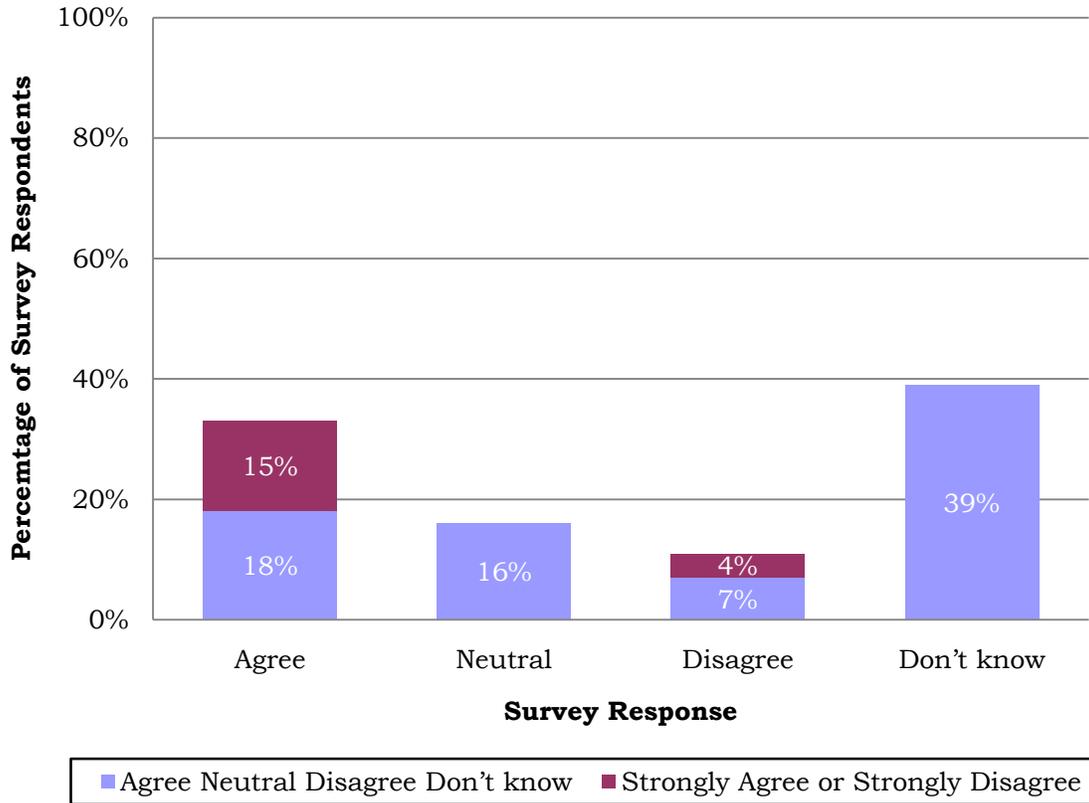
Many survey respondents believed there is a double standard of discipline in the FBI.

In our survey, we questioned a random, nationwide sample of FBI employees about their perceptions of the FBI's disciplinary system, including whether they agreed or disagreed with the following statement: "*There is a double standard of discipline for higher-ranking versus lower-ranking FBI employees.*" Of 818 survey respondents, 717 answered this question.

As shown in Figure 7, 33 percent of FBI employees agreed or strongly agreed that there was a double standard of discipline in the FBI. Only 11 percent disagreed or strongly disagreed. Sixteen percent had a neutral opinion, and 39 percent stated they did not know.⁹² In our survey, a large number of respondents answered "did not know" to many of the questions. When we looked at just the 436 respondents who expressed an opinion (either agree, disagree, or neutral) when answering the question about a double standard of discipline, we found that a majority of them (239 of 436, or 55 percent) agreed that a double standard existed.

⁹² Based on these survey results, we can project that between 29 and 37 percent of the FBI population as a whole believes there is a double standard of discipline for higher-ranking and lower-ranking employees. This range is known as the confidence interval. Appendix III lists the confidence intervals for our survey results.

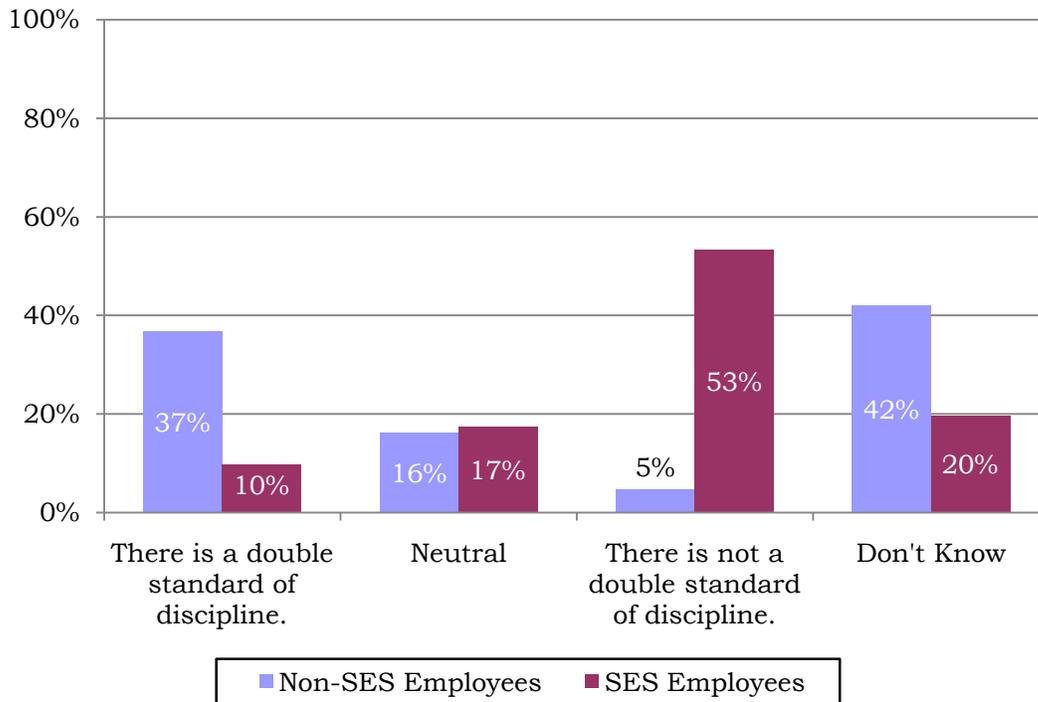
Figure 7: Responses to Survey Question: “Please indicate how much you agree or disagree with the following statement: *There is a double standard of discipline for higher-ranking versus lower-ranking FBI employees.*”



Source: Analysis of the OIG’s survey of FBI employees.

We also compared the survey responses of non-SES employees with those of SES employees, and found that non-SES employees were more likely to believe that there is a double standard than SES employees. As shown in Figure 8, 37 percent of non-SES respondents (230 of 625) believed there is a double standard of discipline for higher- and lower-ranking FBI employees, 5 percent (30 of 625) believed there is not a double standard, and 16 percent (102 of 625) held a neutral opinion. Conversely, only 10 percent of SES respondents (9 of 92) believed there is a double standard, while 53 percent (49 of 92) believed there is not a double standard, and 17 percent (16 of 92) held a neutral opinion. Figure 8 presents FBI employees’ perceptions of a double standard by SES versus non-SES status. When we looked at just the 436 respondents who expressed an opinion, we found that about two-thirds of non-SES employees believed there was a double standard of discipline, while about two-thirds of SES employees believed there was not.

Figure 8: FBI Employees' Perception of a Double Standard of Discipline for Higher-Ranking versus Lower-Ranking Employees by SES Status



Source: Analysis of the OIG's survey of FBI employees.

In our survey, we also asked FBI employees whether they believed they would be treated fairly and objectively in the disciplinary process. The responses were as follows:

Table 8: Responses to Survey Question: "Based on your time working in the FBI, do you believe you would be treated fairly and objectively in the following situations?"

If I became the subject of a misconduct investigation

	Number of responses	Percentage
I believe I would be treated fairly and objectively	291	41%
I do not have an opinion one way or the other	313	44%
I believe I would not be treated fairly and objectively	108	15%

Note: 106 of 818 respondents did not answer the question.

If OPR was deciding whether to discipline me following a misconduct investigation

	Number of responses	Percentage
I believe I would be treated fairly and objectively	287	41%
I do not have an opinion one way or the other	318	45%
I believe I would not be treated fairly and objectively	102	14%

Note: 111 of 818 respondents did not answer the question.

If I used the FBI's internal appeals process to appeal a disciplinary decision made by OPR⁹³

	Number of responses	Percentage
I believe I would be treated fairly and objectively	271	38%
I do not have an opinion one way or the other	358	51%
I believe I would not be treated fairly and objectively	80	11%

Note: 109 of 818 respondents did not answer the question.

In addition, we asked all survey respondents to explain why they believed there is or is not a double standard of discipline between higher- and lower-ranking employees. Among the responses we received from the 116 individuals who believed a double standard of discipline exists were these comments:

[Special Agent] In reviewing the OPR quarterly report it appears that some incidents of minor misconduct receive harsh penalties, while major misconduct receives minor penalties. On outward appearances, it seems other factors such as seniority of the employee, whether they are an Agent or not, and other factors besides the underlying misconduct are the determining factors in the harshness of the penalty.

[Supervisory Special Agent] Past history demonstrates that GS-15 and SES Level personnel receive lesser penalties than rank and file personnel. This may only be a perception, but it seems like the FBI and DOJ do little to defeat this perception/reality.

[Special Agent] Higher level management who have gone through a disciplinary investigation seem to never be disciplined at the same level

⁹³ As described on pp. 14-15, FBI employees who have been proposed for a suspension of at least 15 days, demotion, or dismissal have the right to make a written and oral presentation to the Assistant Director of FBI OPR before a final disciplinary decision is made. Based on some survey responses we received, as well as information we collected during our site visit interviews, we believe that some FBI employees confuse this portion of the adjudicative phase with the appellate phase managed by the Human Resources Division.

as non-managerial employees. Even if their acts are egregious, they are ignored, or at the conclusion of the investigation, are “allowed” to retire without any consequences.

[SES-level non-agent] SES employees seem to get more lenient discipline because OPR does not want to impose the standard 15 day suspension against that SES person. The discipline gets reduced to a “letter of censure” for the SES person, who, in fact, should be held to a higher standard of conduct being an Executive of the organization.

Responses from the 36 individuals who stated they did not believe there is a double standard of discipline between higher- and lower-ranking employees included the following comments:

[Supervisory Special Agent] I think this has more to do with the rules set by OPM and not the FBI. Those in the SES ranks are in another category and are under different rules so it gives the impression of being unfair. This is not a problem the FBI can fix.

[SES-level Special Agent] I feel that for the most part, the discipline which is imposed on individuals, whether they are higher-ranking or lower-ranking employees, is fair, equal and impartial to the rank. However, I believe that fewer instances of misconduct are reported, on the front end, on higher-ranking individuals due to fear of retaliation, reprisal, or the thought that “nothing will be done about it anyway.” In other words, it is “easier” for higher-ranking individuals to report the possible misconduct of lower-ranking individuals, than it is the other way around, and the perception is that higher-ranking individuals will not “dime” out their peers.

In addition, 27 individuals told us that they believed there is a double standard because Special Agents receive more lenient discipline than non-agent personnel for similar misconduct. Among these comments were:

[Non-agent] I am a support employee. This is a Special Agent driven organization. Agents take care of Agents, many times a support person would be bounced off the sidewalk (dismissed) for an act that goes unreported if an SA does it. That’s just my perception. I see it changing and it has come a long way in the past few years . . . but deep down inside the perception still exists.

[Supervisory non-agent] There seems to be a disparity between the penalties given to support personnel versus agents. The penalties for support employees seem much more harsh. There seems to be a different standard based on whether or not you’re in the 1811 job series [i.e., Special Agents]. Additionally, I believe people think there are differences based on grade level. The higher you are the more lenient the penalty or the more likely to consider mitigating circumstances. It is something firmly believed by support employees and has a negative impact on morale. If this is truly not the case, then actions need to be

taken to dispel that belief because it is very prevalent. If it is not the case, the lack of information dissemination is likely the cause.

We also asked survey respondents if they believed the FBI considered appropriate factors when imposing discipline (see Table 9 below). Although a majority of survey respondents told us that they did not know enough about the factors FBI considers before imposing discipline, respondents who had an opinion were most likely to say the FBI gave too much consideration to an employee’s job level (such as the grade level of the employee).

Table 9: FBI Employees’ Perceptions of Whether the FBI Appropriately Considered Various Factors When Choosing Discipline

	Percentage Who Believed the FBI...			
	Gives too little consideration	Gives proper consideration	Gives too much consideration	Don’t know
An employee’s past disciplinary history	11	27	1	61
Past discipline imposed against other individuals for similar misconduct	9	25	2	64
An employee’s job level and type of employment, including prominence of position	4	20	21	55
An employee’s tenure and overall job performance	15	23	3	60
Notoriety of the offense or its impact upon the reputation of the agency	5	27	10	59
Nature and seriousness of the offense and its relationship to an employee’s duties, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated	12	30	1	57

	Percentage Who Believed the FBI...			
	Gives too little consideration	Gives proper consideration	Gives too much consideration	Don't know
Mitigating circumstances surrounding the offense, such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter	15	23	2	61

Source: Analysis of the OIG's survey of FBI employees.

The information we developed during our interviews of FBI employees during our site visits to FBI divisions generally was consistent with the survey responses. In these interviews, several Supervisory Special Agents expressed the opinion that a double standard of discipline exists in the FBI based on an employee's grade level.

We then examined FBI disciplinary decisions to determine whether there were differences in the substantiation and mitigation rates in the disciplinary process for higher- and lower-ranking employees.

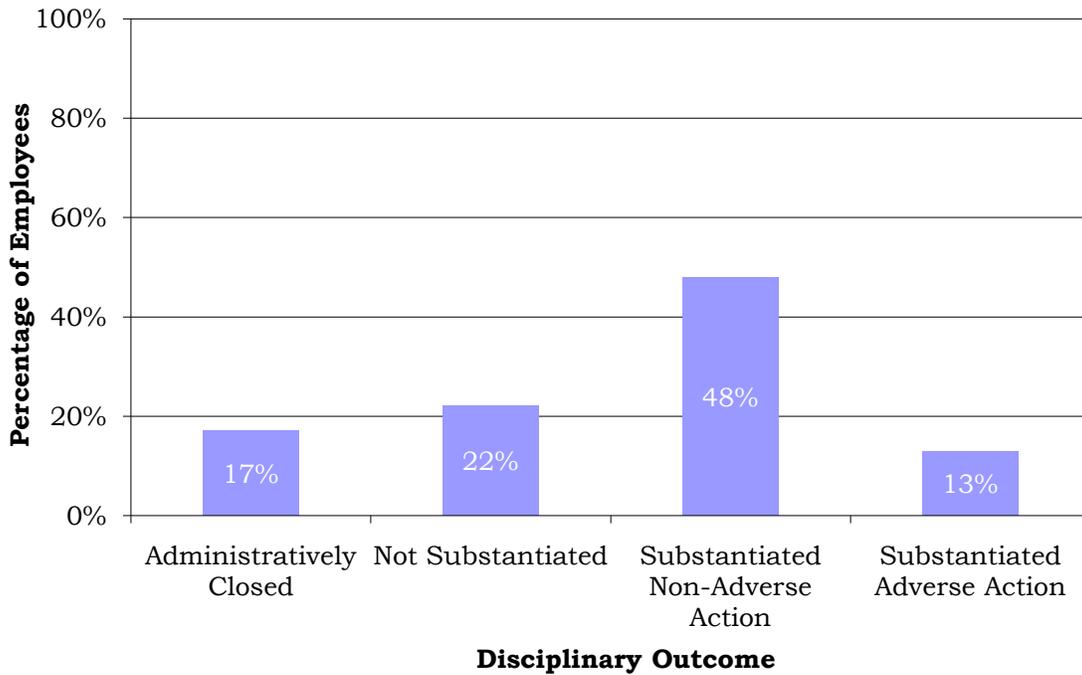
We found that allegations of misconduct were substantiated at different rates for higher- and lower-ranking employees.

We reviewed FBI OPR's disciplinary decisions for higher- and lower-ranking employees and found different rates of substantiation of misconduct. In conducting this review, we analyzed the FBI's Case Management System data for the 1,551 closed misconduct investigations of 1,657 employees from FY 2005 to FY 2007. We analyzed whether FBI OPR substantiated the allegations and whether substantiated allegations resulted in non-adverse or adverse action for the employee.

Overall, we determined that at least one allegation was substantiated for 61 percent of employees resulting in either non-adverse or adverse action; allegations for 22 percent of employees were not substantiated; and the cases against 17 percent of employees were

administratively closed.⁹⁴ Figure 9 shows the percentage of disciplinary decisions in each category.

Figure 9: Disciplinary Outcomes for Employees in All Closed Misconduct Investigations, FY 2005 – FY 2007



Source: OIG analysis of data from the FBI’s Case Management System.

We then examined FBI OPR’s disciplinary decisions to determine if there were different rates of substantiation among various demographic groups, including:

- The employee’s SES or non-SES status,
- The employee’s supervisory status,⁹⁵
- The employee’s job category (Special Agents versus non-agent positions), and

⁹⁴ Administratively closed cases are closed before FBI OPR makes a substantiation decision, such as cases where the employee resigns while under investigation.

⁹⁵ We included employees at the GS-14 level and above in the supervisory category and employees at the GS-13 level and below in the non-supervisory category.

-
- The employee's gender.⁹⁶

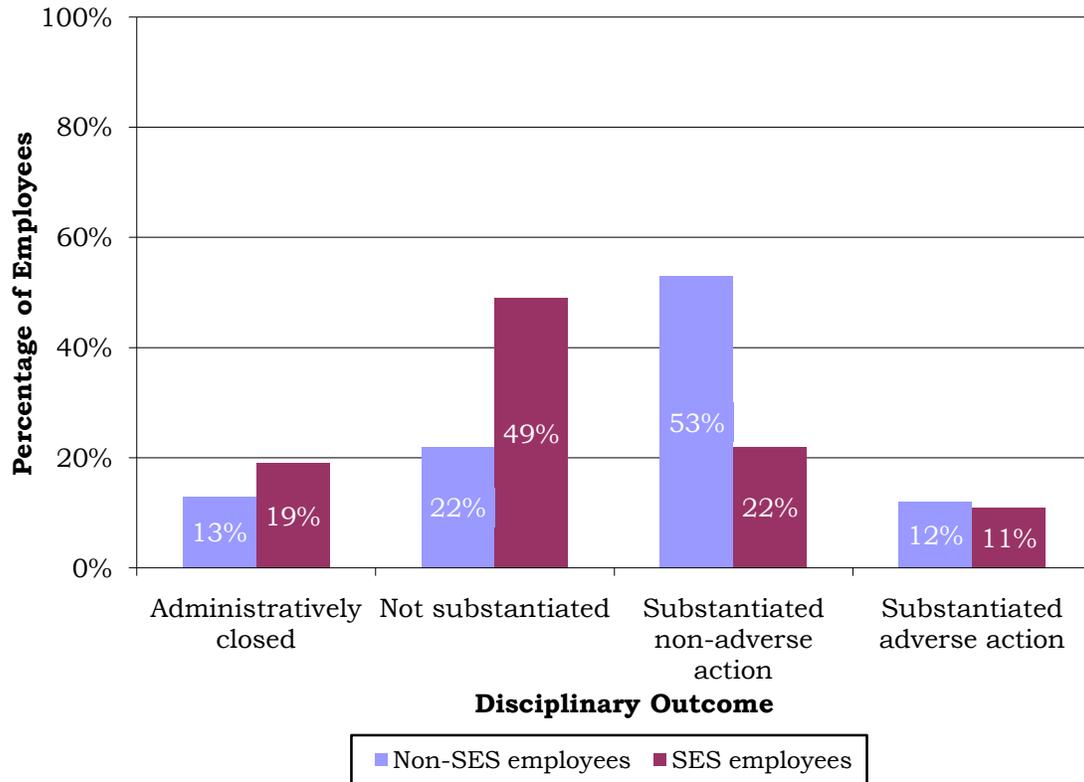
As illustrated in Figure 10, our review found that disciplinary outcomes at the adjudicative stage differed significantly based on an employee's SES/non-SES status.⁹⁷ For example, we found that disciplinary cases on SES employees were much more likely to be unsubstantiated (49 percent) than for non-SES employees (22 percent), and disciplinary cases were more likely to be administratively closed for SES employees (19 percent) than for non-SES employees (13 percent).

However, as illustrated in Figure 10, SES employees are less likely to receive non-adverse actions for misconduct than non-SES employees. Under federal regulations, SES employees cannot be suspended for a period of fewer than 15 days (an adverse action), so non-adverse actions against SES employees consist of letters of censure or oral reprimands.

⁹⁶ FBI OPR does not track the race of the employee investigated for misconduct, so we could not conduct this comparison.

⁹⁷ Our analysis examined investigations that were closed by the FBI from FY 2005 through FY 2007. It did not include allegations of potential misconduct that the FBI determined should not be pursued as misconduct investigations.

Figure 10: FBI OPR’s Disciplinary Decisions by SES Status

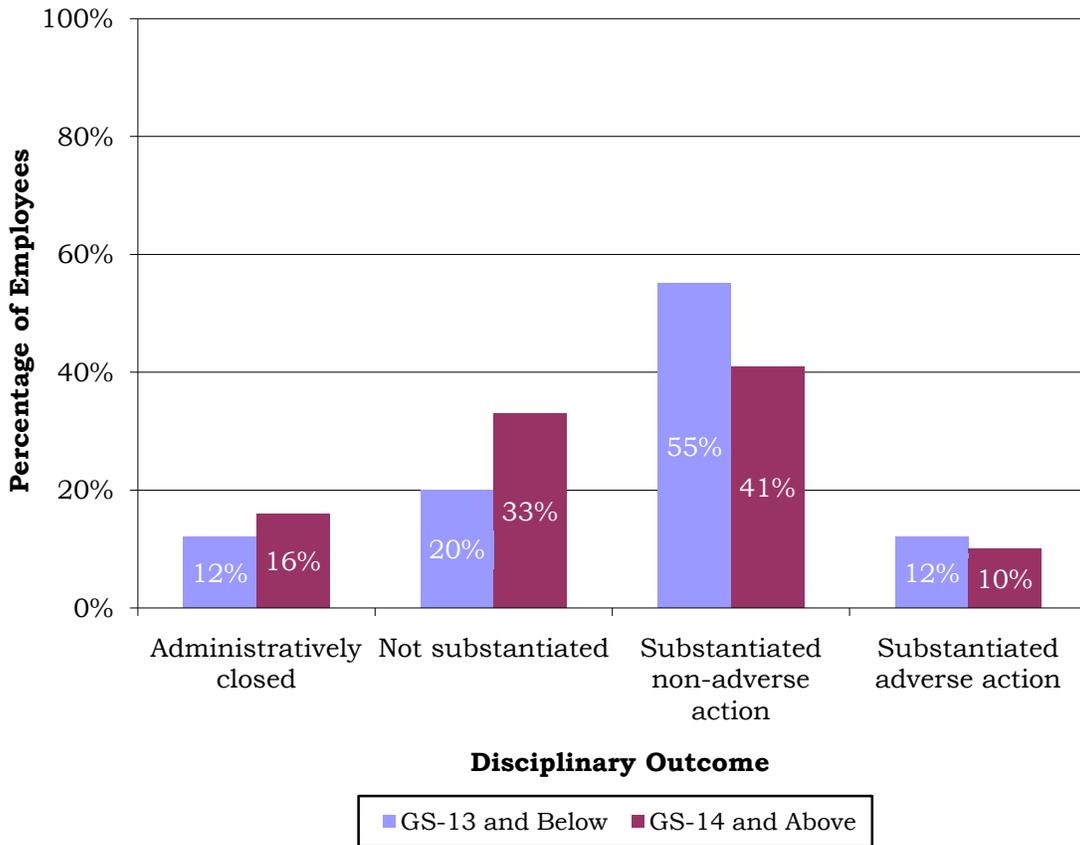


Source: OIG analysis of data from the FBI’s Case Management System. Percentages do not add to 100 because of rounding.

In addition to analyzing FBI OPR’s disciplinary decisions based on the employees’ SES status, we also assessed whether there were differences in FBI OPR’s substantiation rates based on an employee’s supervisory status. In comparing employees at the GS-14 level and above (including SES employees) to those at the GS-13 level and below, we again found differences, although not as significant as when we compared SES and non-SES employees. As shown in Figure 11, while the offenses for 33 percent (86 of 263) of employees at the GS-14 level and above were not substantiated, 20 percent (201 of 996) of employees at the GS-13 level and below were not substantiated.⁹⁸

⁹⁸ There were 398 of 1,657 subjects for whom the final penalty determination or grade level was missing from the FBI’s records.

Figure 11: FBI OPR’s Disciplinary Decisions by Grade Level



Source: OIG analysis of data from the FBI’s Case Management System.

We asked FBI officials why they believed these substantiation rates varied. They stated it would be difficult to explain the differences without looking at specific examples of individual cases. However, some FBI OPR managers speculated that it was possible that investigations were more likely to be opened against higher-level employees to be on the “safe side,” even if the allegations might be frivolous, because of the higher visibility and responsibility of these positions.

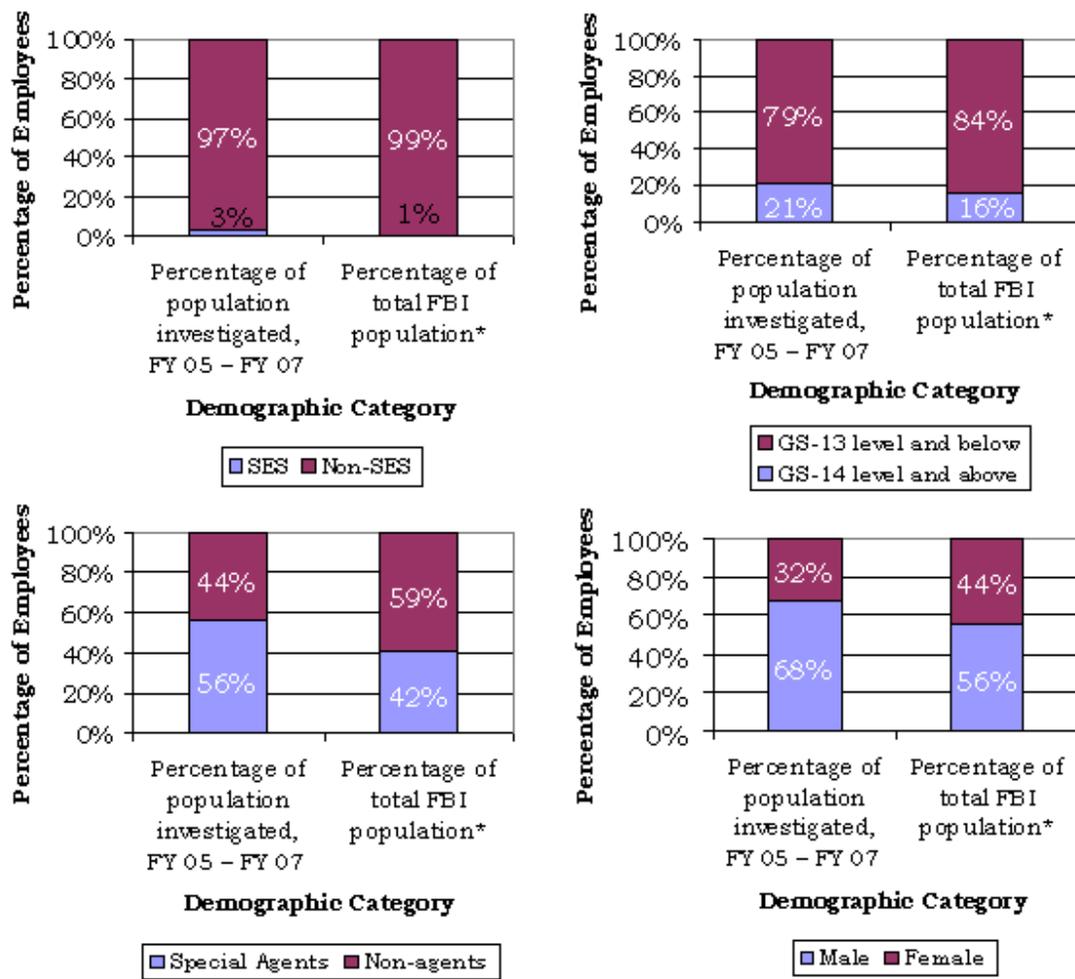
We therefore asked Internal Investigations Section personnel whether they were more likely to open an investigation if the allegation was against higher-ranking employees (thus leading to the higher non-substantiation rate). They replied that neither the grade level nor the position of the employee affected their decision to open an investigation. Instead, Internal Investigations Section personnel said they considered only the behavior described in the allegation when deciding whether to open an investigation. In addition, the Internal Investigations Section

Chief stated that while many frivolous allegations may be made against higher-level employees, these allegations were screened out and did not result in investigations.

We also analyzed demographic data provided by the FBI to determine if higher-level employees were investigated more often than employees at lower grade levels. Our analysis showed that employees at higher grade levels were, in fact, investigated at a higher rate than lower-grade employees. For example, SES employees made up less than 1 percent of FBI employees, but represented 3 percent of employees investigated during our review period. Further, Special Agents and employees at the GS-14 level and above are investigated at a higher rate than they appear in the employee population.

Figure 12 shows the percentage of employees investigated compared with their representation in the FBI population by various demographic factors.

Figure 12: Employees Investigated for Misconduct Compared with All FBI Employees



* As of April 1, 2008.

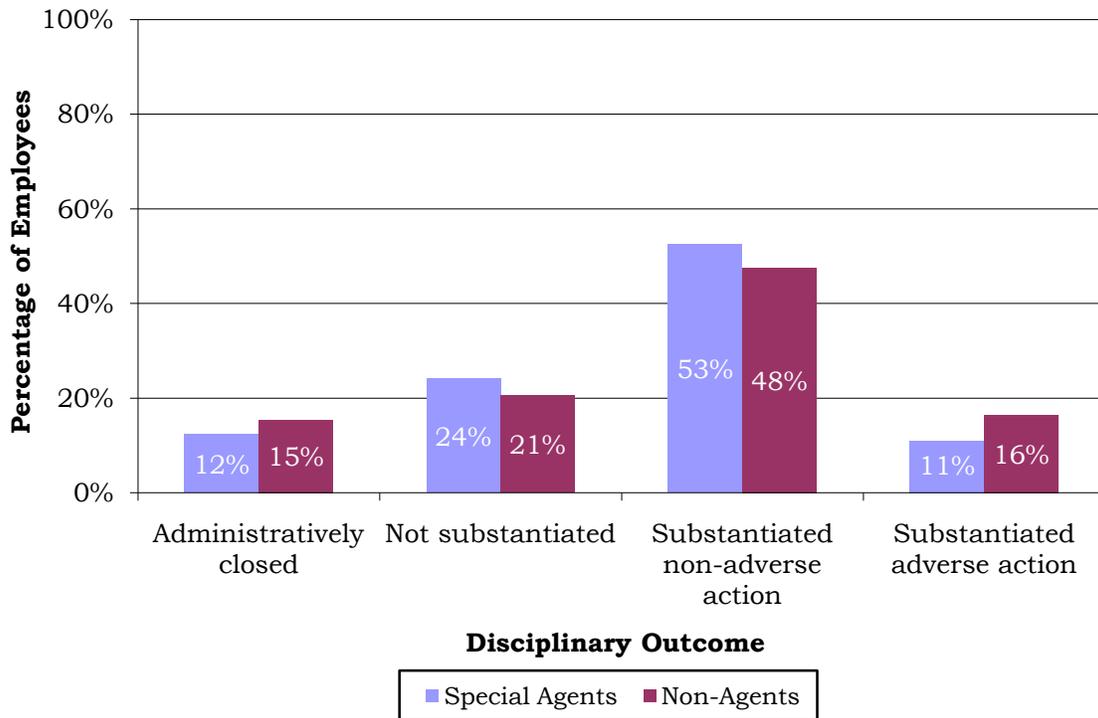
Percentages do not add to 100 because of rounding.

Source: OIG analysis of FBI data and employee population data.

In addition to examining differences in the likelihood of being investigated, we also examined differences in the outcomes of investigations for the different demographic groups. In contrast to the large difference in substantiation rates we found between SES and non-SES employees, we found little variation in substantiation rates between employees in different job categories and of different genders.

Figure 13 shows the differences in outcomes of discipline investigations for Special Agents and non-agents.

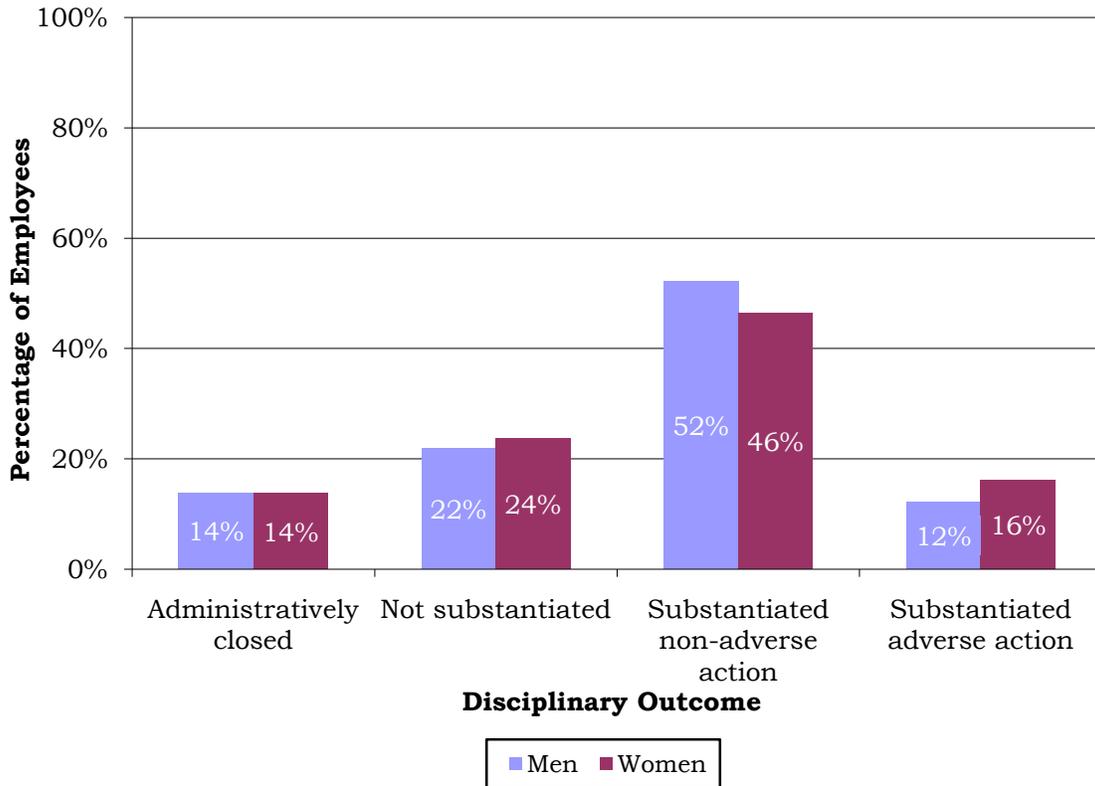
Figure 13: FBI OPR’s Disciplinary Decisions by Job Category



Source: OIG analysis of data from the FBI’s Case Management System.

Although twice as many investigations were against males than females, their disciplinary outcomes were similar, as shown in Figure 14.

Figure 14: FBI OPR’s Disciplinary Decisions by Gender



Source: OIG analysis of data from the FBI’s Case Management System.

Disciplinary decisions were mitigated in the appellate phase at a much higher rate for SES employees than for non-SES employees.

In addition to analyzing the outcomes of misconduct investigations, we also analyzed the outcomes for those employees who appealed the discipline imposed by FBI OPR.⁹⁹

Similar to our analysis of investigation outcomes, we analyzed the appellate outcomes by two demographic factors:

- The employee’s SES or non-SES status, and

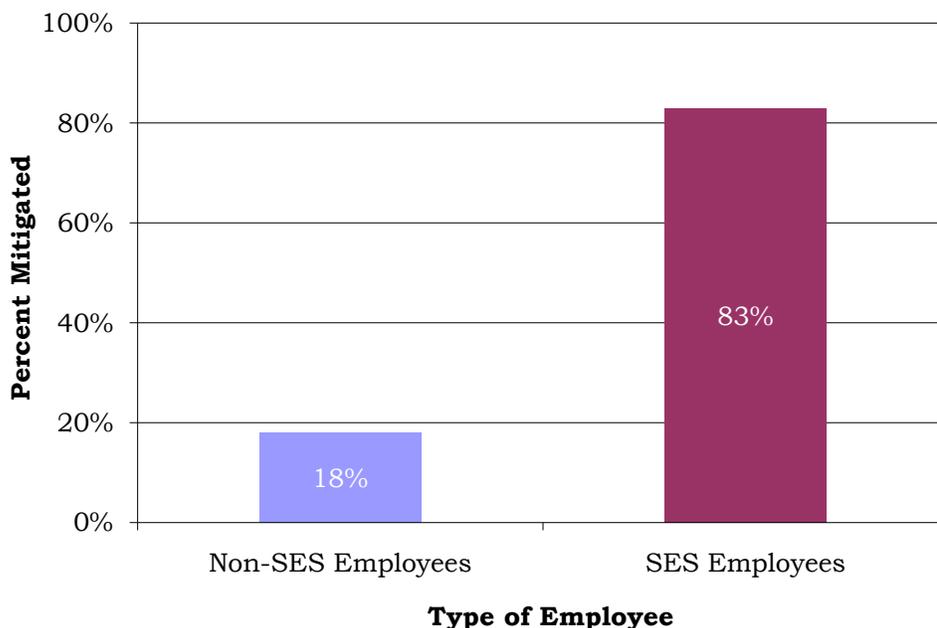
⁹⁹ We examined appellate outcomes in the Appellate Unit’s Data Log Matrix for the 253 employees who appealed FBI OPR’s disciplinary decisions from FY 2005 through the third quarter of FY 2008.

- The employee’s job category (Special Agents versus non-agent positions).¹⁰⁰

SES employees had their appeals mitigated at a substantially higher rate than non-SES employees.

The overall mitigation rate by the FBI’s appellate officials for FBI OPR’s disciplinary decisions was 19 percent. However, we found that SES employees had their appeals mitigated at a dramatically higher rate than non-SES employees. As shown in Figure 15, 5 of 6 (83 percent) appeals by SES employees decided from FY 2005 through the third quarter of FY 2008 resulted in mitigation of the discipline originally imposed by FBI OPR. In contrast, during the same time period only 44 of 247 (18 percent) appeals by non-SES employees resulted in mitigation.

Figure 15: Mitigation Rate of Appeals for SES and Non-SES employees



Source: OIG analysis of the Appellate Unit Data Log Matrix.

To assess the reasons for the appellate officials’ mitigation of the SES cases, we therefore examined all six SES appeals closely. We

¹⁰⁰ The Appellate Unit does not track the race or gender of the employee who is appealing, so we could not conduct these comparisons.

determined that two cases were mitigated because the appellate officials overturned FBI OPR's factual findings substantiating at least one offense. The remaining three cases were mitigated because the appellate officials upheld the substantiation decisions but reduced the penalties (see Table 10 below for a summary of the results of all six cases appealed by SES employees).

Table 10: Results of SES Appeals, FY 2005 – FY 2008

Misconduct Substantiated by FBI OPR	Imposed Discipline	Misconduct Substantiated by Appellate Officials	Discipline Imposed Following Appeal
<i>Appeal unchanged</i>			
<ul style="list-style-type: none"> • Providing false or misleading information on fiscal documents by submitting inaccurate travel vouchers 	15-day suspension	<ul style="list-style-type: none"> • Providing false or misleading information on fiscal documents by submitting inaccurate travel vouchers 	15-day suspension
<i>Appeals where all substantiation decisions were upheld, but penalties were mitigated</i>			
<ul style="list-style-type: none"> • Violation of federal laws and FBI policy related to conflicts of interest and nepotism for involvement in the promotion of a relative 	Demotion to GS-13	<ul style="list-style-type: none"> • Violation of federal laws and FBI policy related to conflicts of interest and nepotism for involvement in the promotion of a relative 	15-day suspension
<ul style="list-style-type: none"> • Unprofessional conduct on duty for engaging in an argument with a police officer 	5-day suspension	<ul style="list-style-type: none"> • Unprofessional conduct on duty for engaging in an argument with a police officer 	Letter of censure
<ul style="list-style-type: none"> • Misuse of a government vehicle for personal trips • Misuse of a government credit card to purchase gasoline for personal use 	30-day suspension Demotion to GS-13	<ul style="list-style-type: none"> • Misuse of a government vehicle for personal trips • Misuse of a government credit card to purchase gasoline for personal use 	30-day suspension Demotion to GS-15
<i>Appeals where at least one substantiation decision was overturned</i>			
<ul style="list-style-type: none"> • Dereliction of supervisory responsibility for mishandling a personnel situation involving two subordinate employees 	7-day suspension	<ul style="list-style-type: none"> • None 	No action

Misconduct Substantiated by FBI OPR	Imposed Discipline	Misconduct Substantiated by Appellate Officials	Discipline Imposed Following Appeal
<ul style="list-style-type: none"> • Lying under oath during an administrative inquiry • Improper sexual relationship with an informant • Misuse of a government vehicle to further the improper relationship 	Dismissal	<ul style="list-style-type: none"> • Improper sexual relationship with an informant • Misuse of a government vehicle to further the improper relationship 	105-day suspension Demotion to GS-13

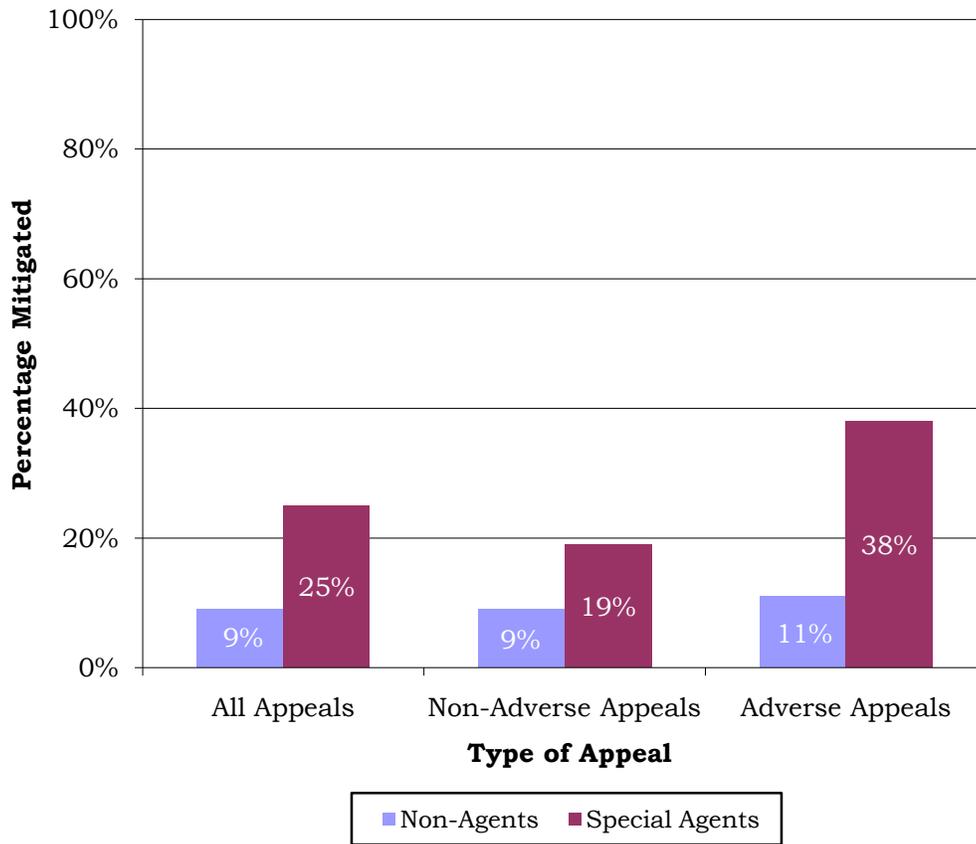
Source: OIG review of SES appeals.

Appeals by Special Agents were mitigated at a higher rate than appeals by non-agent personnel.

We also examined the mitigation rates of appeals of Special Agents versus non-agent personnel. We found that disciplinary decisions for Special Agents were more likely to be mitigated on appeal than decisions for non-agent personnel. We found that 25 percent (40 of 158) of appeals by Special Agents resulted in mitigation of FBI OPR’s disciplinary decisions, while only 9 percent (9 of 95) of appeals by non-agent personnel resulted in mitigation.

Figure 16 summarizes the different mitigation rates for Special Agents and non-agents for non-adverse and adverse appeals.

Figure 16: Mitigation Rates of Special Agents and Non-Agents for Non-Adverse and Adverse Appeals



Source: Appellate Unit Data Log Matrix.

We asked the Appellate Unit Chief about the differing rates of mitigation between higher-level and lower-level employees, as well as Special Agents and non-agent personnel. He said that it would be impossible to identify concrete reasons for the differences without reviewing the files associated with all of the appeals because the particular offenses substantiated in each case were likely to have a major influence on the final outcome. However, the Unit Chief offered several theories that he believed might explain the differences, including:

- Higher-level employees may be better able to afford an attorney than lower-level employees, and attorneys may be better equipped to frame an argument in a way that persuades the appellate deciding officials.

-
- Special Agents who are members of the FBI Agents Association have access to free legal representation as a membership benefit. Non-agents may not have similar access to free legal representation.

Our review of the decisions in the six appealed SES cases showed that the decisions in four of the five cases that were mitigated were unreasonable.

As discussed earlier in this report, FBI policies require that in the appellate process FBI OPR's findings of fact are subject to the "substantial evidence" standard of review. Substantial evidence is defined as "the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree."¹⁰¹ As explained in the previous section of this report, Appeals of Disciplinary Decisions, the FBI does not provide clear guidance about the appropriate standard of review that appellate officials should apply when review the penalty imposed by FBI OPR.

As also discussed in the Appeals of Disciplinary Decisions section of this report, we found evidence that the Disciplinary Review Board was not appropriately applying this appellate standard, particularly with regard to its analysis of FBI OPR's findings of fact. Two former Disciplinary Review Board members acknowledged to us that they did not give any deference to FBI OPR decisions.

Moreover, as discussed above the appellate officials mitigated five of the six SES cases on appeal (83 percent), but mitigated only 18 percent of non-SES cases.¹⁰²

Our review of the six SES cases confirmed that the appellate officials often substituted their judgment for FBI OPR's decisions, even on findings of fact. As discussed in the next section, we concluded that many of the reasons proffered for overturning FBI OPR's findings in these cases, and for mitigating punishment, were unpersuasive, contrary to the appropriate standard of review, and unreasonable on their face.

¹⁰¹ 5 CFR § 1201.56(c)(1).

¹⁰² Only one of the five mitigated cases was based on new evidence. Moreover, as discussed below, the only appeal that the board did not mitigate was a case where the discipline imposed was the minimum suspension allowed for SES employees – 15 days. The board specifically noted in its decision letter that federal law prevented the board from imposing a suspension of less than 15 days.

Case 1: A female FBI informant alleged that an FBI SES employee sexually assaulted her many years earlier. During the investigation of the allegations, which were conducted by OIG investigators, the informant passed a polygraph examination regarding the allegations.

In its disciplinary decision, FBI OPR concluded that the evidence was not sufficient to show that the SES employee sexually assaulted the informant, but it concluded that the evidence did show that the SES employee pressured the informant to have sex with him. FBI OPR also found that the SES employee had reason to know that the informant was vulnerable because he was aware that previously she had been sexually assaulted by drug dealers and that she was cooperating with the FBI to stay out of prison.

According to FBI OPR's findings, when the SES employee was first interviewed under oath regarding these allegations, he said that he and the informant had consensual oral sex on two occasions in his FBI vehicle. When asked who initiated the idea of having oral sex, he said the idea came from the informant. He denied the informant's allegation that they had intercourse on another occasion in her office.¹⁰³

The next day the SES employee took a polygraph examination administered by the OIG. Before the examination, he again discussed the complainant's allegation that they had sexual intercourse. This time he stated that he had tried to have intercourse with the informant and "maybe the genitals touched" and he could not perform physically because of her odor. He also said before the polygraph that although the informant was "not too keen" on the idea of having oral sex the second time, she did not tell him "no" or resist in any way.

During the polygraph examination, the SES employee was asked whether he had intercourse with the informant and whether the informant in any way asked him to stop. The polygraph examiner concluded that the SES employee was deceptive when he answered "no" to both questions.

¹⁰³ As recounted in FBI OPR's findings, the SES employee said there was the opportunity to have sexual intercourse in her office, and that "it was going to happen." However, according to the SES employee's initial statement to the investigators, the informant took off her clothes and said we can have sex, but he "couldn't do that and didn't do that" because of her odor.

During the post-polygraph interview, the SES employee admitted that the informant did say words to him such as “Oh no, not again” prior to engaging in oral sex with him the second time.

In its decision, FBI OPR concluded that the SES employee had an improper relationship with the informant, misused an FBI vehicle by engaging in oral sex in the vehicle, and lacked candor when questioned about the allegations. FBI OPR dismissed the employee, stating that the FBI employee’s conduct “was and is wholly inconsistent with his continued employment.”

On appeal, the Disciplinary Review Board vacated the SES employee’s dismissal, reinstated him, and imposed a suspension of 105 days. The board agreed with FBI OPR’s finding that the employee twice used his FBI vehicle to engage in sexual activity, but the board asserted that the record did not support a lack of candor finding. According to the Appellate Unit’s write-up of the case for the board, the SES employee’s statements in his first interview with investigators about sexual intercourse with the informant were not deceptive, and the fact that “he did not disclose that he did not engage in sex with the informant because he was physically unable to perform does not rise to a finding of lack of candor.” The Appellate Unit also contended that the investigation was deficient and that FBI OPR and the OIG accepted the SES employee’s admissions but “did not seek additional immaterial details regarding these incidents.”

However, our review of this case concluded that FBI OPR’s finding of a lack of candor was fully supported by substantial evidence, which is the standard of review the Board is required to use when an employee appeals FBI OPR’s misconduct and penalty determination.¹⁰⁴ After reviewing this case we also determined that the evidence showed that FBI OPR reasonably concluded that the SES employee was not candid or forthright, that he had provided misleading information to OIG investigators, and that FBI OPR’s finding that the employee should be dismissed was reasonable. We further concluded that the Disciplinary Review Board’s reasons for overturning FBI OPR’s lack of candor finding,

¹⁰⁴ As discussed previously, the substantial evidence standard is defined as “the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree.”

and for deciding not to dismiss the SES employee for his conduct, were unpersuasive and extremely troubling.¹⁰⁵

Case 2: The Assistant Director of the Human Resources Division, acting in his capacity as the deciding official for non-adverse appeals, mitigated an SES employee's suspension for unprofessional conduct during a traffic accident from a 5-day suspension to a letter of censure.¹⁰⁶ Again, we found FBI OPR's decision to be fully supported, and we questioned the reasonableness and the logic of the Assistant Director's decision to mitigate discipline.

In this case, an FBI Special Agent was involved in a traffic accident with a woman in another vehicle. The FBI agent called her supervisor, the SES employee, who came to the scene. At the scene, a local police officer was talking to the agent and the woman whose car the agent had hit. The police officer concluded that the FBI agent was at fault for the accident.

According to FBI OPR's findings, the FBI agent who caused the accident was unprofessional when arguing with the police officer, and the FBI SES employee also became unprofessional at the scene. According to the police officer, the SES employee stated that, "They [the police officer and the woman whose car was hit] must be meeting for dinner tonight. She [the police officer] looks like a dyke anyway." The police officer was upset by the FBI SES employee's actions and comments, and contemporaneously reported the specific comment to another FBI supervisor who also came to the scene.

According to FBI OPR, the SES employee acknowledged saying to the police officer something to the effect of "go over and stand with your new friend" and "it's obvious you're getting along very well with her," but the SES employee denied calling the woman a "dyke." In addition, the FBI agent involved in the traffic accident stated that the SES employee commented to the police officer something to the effect of "you guys must be going out tonight."

¹⁰⁵ Of the six SES cases we review in this section, this is the only case that was decided after the composition of the Disciplinary Review Board was changed in accordance with the Human Resources Division's August 2007 memorandum.

¹⁰⁶ As noted previously, SES employees may not receive a suspension of less than 15 days. However, as noted in the FBI OPR addendum, although the employee was an SES at the time of the appeal, he "was not a member of the SES on the date of the offense. He [was] adjudicated based on his GS-15 status on the date of the offense."

With regard to the SES employee, FBI OPR imposed a 5-day suspension after concluding that the preponderance of the evidence substantiated the allegation of unprofessional conduct.

On appeal, the Appellate Unit concluded that substantial evidence existed to show that the SES employee acted unprofessionally, but it also concluded that the evidence did not support the finding that the employee had called the police officer a “dyke.” The Assistant Director of the Human Resources Division mitigated the punishment from a 5-day suspension to a letter of censure. As part of the rationale for mitigation, the Appellate Unit wrote, “[FBI] OPR has apparently chosen to take the word of this [police officer] over that of [the SES employee] and the other SA [Special Agent] at the scene. The [Appellate Unit] finds this deplorable. . . . [FBI] OPR should have taken the word of the FBI employees at the scene rather than choosing to believe the [police officer] whose veracity and motivations are not known.”

In fact, the appropriate standard of review for FBI OPR’s factual findings should have been whether there was substantial evidence in the record to support the finding. In FBI OPR’s view, and in our view, there clearly was substantial evidence to support the finding. That evidence included the police officer’s statement about what the FBI SES employee had said to her, her contemporaneous report at the scene to another FBI supervisor, the SES employee’s acknowledgement of several unprofessional comments, and the corroboration by the FBI agent involved in the accident that the SES employee had made a statement implying a relationship between the police officer and the other driver. Instead, the Appellate Unit and the Assistant Director discounted this evidence, substituted their own judgment regarding the evidence, and wrote that it was “deplorable” that FBI OPR accepted the statements of a police officer rather than an FBI employee.

Case 3: FBI OPR found that the Special Agent in Charge (SAC) of an FBI field office had manipulated the promotion process within his office to ensure that his wife, an FBI Special Agent in the office, would receive a promotion to a supervisory position.

In this case, the SAC’s wife had applied to be a Supervisory Special Agent on a counterterrorism squad. The position was designated as a non-stationary position, which means that the position would be filled from the pool of qualified candidates from FBI headquarters. This non-stationary designation was consistent with the normal practice in that office and with the SAC’s previously stated policy that all Supervisory Special Agent positions would be non-stationary.

The field office received a pool of qualified candidates. However, before a selection of a candidate could be made, the SAC terminated the process for filling the position, reorganized the counterterrorism squad into two squads, and arranged for one of the supervisory positions to be announced as a stationary position with a preferred qualification of inspection experience. As a stationary position the position had to be filled by the pool of qualified candidates currently assigned to the field office where the vacancy existed. This change from non-stationary to stationary made only the SAC's wife and one other candidate eligible for the supervisory position, and the SAC's wife was selected.

FBI OPR concluded that by his role in the process that led to his wife's selection, the SAC had violated various FBI policies, ethical guidelines, and federal statutes, including 18 U.S.C. § 208, which prohibits government employees from participating in certain matters affecting their financial interest. The Department's Public Integrity Section declined prosecution of the SAC, but stated that the matter was serious and that its declination was based on the assumption that the FBI would impose on the SAC the most severe administrative sanction available under the circumstances.

FBI OPR decided to demote the SAC from an SES position to a GS-13 Special Agent. On appeal, the Disciplinary Review Board concluded that the offense was substantiated, but it mitigated the discipline from the demotion proposed by FBI OPR to a 15-day suspension. We believe such extreme mitigation was unwarranted and not in accord with the severity of the offense.

Case 4: In this case an FBI SAC used his government vehicle for personal trips and also used his government credit card to pay for gas for these trips. FBI OPR found that the SAC used the government vehicle to drive to his home in another state on weekends, a distance of 600 miles roundtrip.

FBI OPR found that this was an improper use of an FBI vehicle and that the SAC had not received permission to use the government car in this manner. FBI OPR also concluded that the SAC's justifications for these trips were shifting and unsupported. FBI OPR suspended the SAC, who was an SES employee, for 30 days and demoted him to a GS-13 Special Agent.

On appeal, the Disciplinary Review Board upheld FBI OPR's findings of fact, stating that the SAC's explanations for his action lacked

credibility. However, with little explanation the board mitigated the demotion to a GS-15 rather than a GS-13 Special Agent.

Eventually, the FBI Director's Office intervened and re-imposed a penalty of a 30-day suspension, demotion to a GS-13 Special Agent, and a "loss of effectiveness" transfer, similar to what FBI OPR had originally decided.¹⁰⁷

We found that the mitigation by the Disciplinary Review Board was unwarranted and the FBI Director's Office took appropriate action with its intervention in this case.

Case 5: In this case, FBI OPR concluded that an SES employee failed to reassign an Intelligence Analyst from a supervisor who had been investigated for possibly retaliating against the analyst and suspended the SES employee for 7 days.¹⁰⁸ On appeal, the Deputy Assistant Director of the Human Resources Division concluded that the finding was not substantiated because new evidence was provided that the SES employee's supervisor had concurred with his decision not to reassign the analyst.

In this case, we found the mitigation was not a substitution of the appellate official's judgment for FBI OPR's because it was based on new evidence not available to FBI OPR when it made the initial disciplinary decision.

Case 6: In the only SES case on appeal that the Disciplinary Review Board did not mitigate, an FBI Inspector had double billed lodging expenses for over \$8,000. He submitted a claim for lodging per diem expenses while on temporary duty in Washington, D.C., and he also submitted claims for expenses for lodging per diem while traveling to other locations during the same period. The Inspector claimed he was confused about the FBI rules for lodging reimbursement.

¹⁰⁷ This is one of two cases that in part prompted the FBI to make changes to the composition of the Disciplinary Review Board to address complaints of partiality and bias. Our discussion of these changes is contained in the Background section of this report.

¹⁰⁸ According to the FBI OPR addendum, the employee "was not a member of the SES on the date of the offense. Accordingly, he [was] adjudicated based on his non-SES status."

FBI OPR found that the Inspector had committed misconduct and imposed a 15-day suspension.¹⁰⁹ The Disciplinary Review Board upheld the decision on appeal. However, the board also noted that by law it could not mitigate the period of suspension, stating that “Federal Law does not permit suspension of a Senior Executive for any period less than fifteen-calendar days. Therefore, the sanction imposed by [FBI] OPR is sustained.”¹¹⁰

Conclusion

In sum, our review found there continues to be a significant percentage of FBI employees who believe that there is a double standard of discipline in the FBI. Based on our analysis of FBI data, we determined that allegations of misconduct against higher-level employees are substantiated at a lower rate than allegations against lower-level employees. We also found that higher-level employees have their disciplinary penalties mitigated on appeal at a significantly higher rate than lower-level employees (83 percent for SES employees versus 18 percent for non-SES employees). We concluded that although the number of appealed SES cases is small, SES employees were treated more leniently on appeal than non-SES employees, and that this more lenient treatment was not justified.

We believe the FBI needs to examine the findings in this report to ensure that FBI policies are applied consistently to all levels of employees at all stages of the disciplinary process.

¹⁰⁹ We note that the original penalty of 15 days suspension imposed by FBI OPR was a *de minimus* penalty considering the severity of the misconduct. It was our conclusion that the factual circumstances of this case – double billing thousands of dollars in expenses – warranted the imposition of a more severe penalty by FBI OPR.

¹¹⁰ Like other FBI employees for whom the decided discipline was not actually imposed (see the next section of this report), this SES employee mistakenly received pay during his suspension period. FBI OPR managers told us that, “For a variety of factors, including his SES status, [FBI OPR officials] did not believe the mistake was inadvertent. In consultation with [the SES employee’s] Division, the matter was referred to the Inspection Division (for investigation) and the Finance Division (for recoupment of monies). [The SES employee] retired during the subsequent administrative inquiry.”

Recommendation

We recommend that the FBI:

14. In addition to Recommendation 12, which recommends a change in the FBI's appellate process, ensure that FBI policies are applied consistently to all levels of employees at all stages of the disciplinary process.

IMPLEMENTATION OF DISCIPLINE

The FBI does not ensure that disciplined employees serve their suspensions. We found cases where FBI employees either did not serve their suspensions at all or were suspended for the wrong amount of time. We also found cases where employees' personnel files did not contain documentation showing their suspensions. Other employees' records showed them as being on leave when, in fact, they were supposed to be serving a suspension. Further, we found that the FBI's unique practice of beginning suspensions at the close of business on Fridays results in FBI employees effectively serving fewer days and receiving less time off without pay than employees in other Department components serve for the same discipline.

Many suspended employees do not serve their suspension or lose pay for an incorrect number of days.

FBI policy requires that employees serve the suspension periods stated in decision letters.¹¹¹ To assess whether FBI employees actually served their suspensions, we reviewed Case Management System data for 579 FBI employees who were supposedly suspended from FY 2005 to FY 2007.¹¹²

The records for 63 of these employees did not contain entries in the Case Management System for the disciplinary action taken or the date the action took place. We then asked the FBI to provide the time and attendance records for these 63 employees to confirm that they served their suspensions. These records showed that two employees never served their suspensions. In addition, the time and attendance records for seven other employees show that they were suspended for an incorrect number of days.

¹¹¹ A suspension is defined as "the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay."

¹¹² The Case Management System contains information on the reporting and investigation of alleged employee misconduct, the results of these investigations, and the discipline imposed. For every FBI employee who is suspended, FBI OPR adjudicators are responsible for entering the action taken and the date the action took place into the Case Management System.

We also reviewed a sample of 20 FBI employees who did have entries in the Case Management System that indicated the disciplinary action taken and the date the action took place. However, our analysis of the personnel and pay records for these employees found that 6 of the 20 were either not suspended at all or were suspended for an incorrect number of days.

Thus, in total, we reviewed the personnel and time and attendance records for 83 suspended employees. Of the 83 employees, 15 employees (18 percent) were either not suspended at all or were suspended for an incorrect number of days.

We asked personnel in the FBI's Human Resources Division how it could happen that employees who were suspended still received pay. They stated that a suspension does not automatically translate to loss of pay because the data system used to record personnel actions like suspensions – the FBI's Bureau Personnel Management System (BPMS) – is not linked to the data system used to record time and attendance. The time and attendance system determines whether an employee receives pay. Therefore, even though employees may be suspended, they are still able to receive pay unless their work status is entered accurately into the FBI timekeeping system.

Our findings regarding the specific problems regarding the 15 employees whose suspension was not imposed or imposed for the incorrect number of days are shown in Table 11.

Table 11: Description of Employees Who Were Not Suspended or Were Suspended for the Incorrect Number of Days

Position and grade level	Penalty	Results
The following are the nine individuals whose suspensions were not confirmed in the FBI's Case Management System.		
Supervisory Special Agent, SES	15 days	<p>The employee was suspended for 15 days for knowingly providing false information on fiscal-related documents. Under the FBI's practice of beginning suspensions at the close of business on Friday, a 15-day suspension normally results in a loss of pay for 10 workdays. Time and attendance records show the employee lost pay for 2 workdays, not 10 workdays.</p> <p>Note: This case was not confirmed in the FBI's Case Management System because the employee had not yet exhausted his MSPB appeal rights as of the date that the FBI provided us with the Case Management System data. Subsequent to providing us the data, FBI OPR tried to confirm the suspension and also discovered this discrepancy. FBI OPR referred an allegation of potential misconduct to the Internal Investigations Section, and the employee subsequently retired.</p>
Supervisory Special Agent, GS-15-05	14 days	The employee was suspended for 14 days for using his government computer to access pornography. A 14-day suspension normally results in a loss of pay for 10 workdays. Time and attendance records show the employee was not suspended and was paid for all 10 workdays.
Office Services Supervisor, GS-10-03	3 days	The employee was suspended for 3 days for using her government credit card for personal use. A 3-day suspension normally results in a loss of pay for 1 workday. Time and attendance records show the employee was not suspended and was paid.
Evidence Technician, GS-07-06	45 days	The employee was suspended for 45 days for operating a vehicle while under the influence of alcohol. A 45-day suspension normally results in a loss of pay for 31 workdays. Time and attendance records show the employee lost pay for 29 workdays.
Electronics Technician, GS-12-08	45 days	The employee was suspended for 45 days for providing false information on his employment application and subsequent security-related forms. A 45-day suspension normally results in a loss of pay for 31 workdays. Time and attendance records show the employee lost pay for 30 workdays.
Special Agent, GS-13-09	10 days	The employee was suspended for 10 days for failing to report his marriage to a foreign national and for providing false information on security-related forms. A 10-day suspension normally results in a loss of pay for 6 workdays. Time and attendance records show the employee lost pay for 5 workdays.

Position and grade level	Penalty	Results
Special Agent, GS-13-04	17 days	The employee was suspended for 17 days for paying a source without authorization, failing to comply with operational guidelines regarding the use of the source, and having an improper personal relationship with the source. A 17-day suspension normally results in a loss of pay for 11 workdays. Time and attendance records show the employee lost pay for 10 workdays.
Special Agent, GS-13-05	30 days	The employee was suspended for 30 days for operating his personally owned vehicle while impaired by alcohol. A 30-day suspension normally results in a loss of pay for 20 workdays. Time and attendance records show the employee lost pay for 21 workdays.
Language Specialist, GS-12-08	45 days	The employee was suspended for 45 days for investigative deficiencies. A 45-day suspension normally results in a loss of pay for 31 workdays. Time and attendance records show the employee lost pay for 33 workdays.
The following are the six individuals whose suspensions were confirmed in the FBI's Case Management System but were not confirmed by time and attendance records.		
Supervisory Special Agent, GS-15-02	5 days	The employee was suspended for 5 days for failing to notify the FBI that he had lost his government-issued cellular telephone. As a result of his failure to notify anyone, an unknown individual found and used the cellular telephone, making almost \$9,000 in unauthorized calls over a 7-month period. A 5-day suspension normally results in a loss of pay for 3 workdays. Time and attendance records show the employee was paid during the entire suspension period.
Intelligence Assistant, GS-07-09	3 days	The employee was suspended for 3 days for committing time and attendance fraud. A 3-day suspension normally results in a loss of pay for 1 workday. Time and attendance records show the employee was paid during the entire period.
Supervisory Special Agent, GS-15-06	5 days	The employee was suspended for 5 days for losing his FBI badge and credentials. A 5-day suspension normally results in a loss of pay for 3 workdays. Time and attendance records show the employee lost pay for 2 workdays.
Special Agent, GS-12-01	5 days	The employee was suspended for 5 days for viewing pornography on a government-owned computer. A 5-day suspension normally results in a loss of pay for 3 workdays. Time and attendance records show the employee lost pay for 2 workdays.
Evidence Technician, GS-09-04	27 days	The employee was suspended for 27 days for unprofessional conduct, insubordination, and misuse of position. A 27-day suspension normally results in a loss of pay for 19 workdays. Time and attendance records show the employee lost pay for 18 workdays.

Position and grade level	Penalty	Results
Special Agent, GS-13-07	5 days	The employee was suspended for 5 days for failing to safeguard an FBI-authorized weapon when checking out of a hotel room. A 5-day suspension normally results in a loss of pay for 3 workdays. Time and attendance records and Statement of Earnings and Leave show the employee lost pay for 5 workdays.

Source: OIG and FBI analysis of FBI documents.

For those cases in which employees' time and attendance records indicate they were paid while their BPMS records indicate they were on suspension, we cannot determine from the available records whether the employee was actually at work.

In summary, the extent of the discrepancies we found between imposed and served suspensions indicates that the FBI's process for ensuring that employees properly serve their suspensions is not effective. Further, our findings show that entries in BPMS are not a reliable indicator that a suspension has actually been carried out. As a result, we recommend that the FBI check the BPMS, time and attendance records, and Statements of Earnings and Leave for FBI employees suspended since October 1, 2004, to ensure that they served their suspension as imposed and that they did not receive pay if they were not at work.

Suspended employees' personnel and pay records are often incomplete or reflect incorrect information regarding employee suspensions.

Incomplete Employee Personnel Records. For each suspension, there should be two Standard Forms 50 (SF-50), Notices of Personnel Action, in the FBI employee's Official Personnel Folder to document the suspension period. One form documents the beginning date of the suspension and another documents the employee's return to duty date.¹¹³ During our review, we examined the Official Personnel Folders

¹¹³ According to the FBI's Records Management Division, employees' Official Personnel Folders should include all Notices of Personnel Action, including those related to suspensions as a result of disciplinary action. This practice follows the Office of Personnel Management's *Guide to Processing Personnel Actions*, which states that these Notices of Personnel Action should "be documented for long-term retention in the Official Personnel Folder," typically with an SF-50. 5 U.S.C. § 7503 and § 7513 also state that "any order effecting the suspension, together with any supporting material, shall be maintained by the agency."

for the 83 employees we sampled to see if they contained the required SF-50s implementing suspensions.

In addition to the employees described above who either were not suspended or were suspended for the incorrect number of days, we found that the personnel records for another 29 of the 83 employees we sampled (35 percent) did not contain the required SF-50s to document the beginning and end of the suspension.¹¹⁴ Of the 29 employees' files, 11 were missing 1 of the SF-50s, while another 18 employees' files were missing both.

We asked FBI personnel why the SF-50s were missing. They stated that one reason may be a backlog of SF-50s that have yet to be filed. They estimated that roughly 100,000 SF-50s covering the last 2 years had not been filed. Therefore, even if discipline had been implemented, it would not be evident from a review of the Official Personnel Folders.

However, we reviewed the files of the 29 employees who were missing at least 1 of the SF-50s recording their suspension and found that 15 of these employees were suspended before January 2007. Therefore, the backlog of SF-50s does not explain why their SF-50s were missing from their files.

For a variety of management reasons, the FBI needs to ensure that its employees' Official Personnel Folders contain all appropriate documentation showing imposition of any discipline. Among other things, the folders are relied on by agency personnel and managers to make decisions about whether an employee is qualified for promotion. They also contain relevant information for responding to Giglio inquiries from prosecutors.¹¹⁵

¹¹⁴ We also reviewed the time and attendance records for these employees with incomplete documentation to support their suspensions. Three of the employees retired or were removed for other reasons before serving their suspensions, and the time and attendance records for the remainder showed that they lost pay for the correct number of days corresponding to their suspensions.

¹¹⁵ Pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), the government has an obligation to provide the defense with information that affects a government witness's credibility. In order to meet this obligation, Department policy requires the FBI, as well as other Department components, to receive inquiries from federal prosecutors regarding their employees and advise the prosecutors of any finding of misconduct that reflects upon the truthfulness or possible bias of an employee, any past or pending criminal charge, and any credible allegation of misconduct that reflects

(Cont'd.)

Incorrect Time and Attendance Records. We found that the time and attendance records for 9 of 83 suspended employees (11 percent) showed the employees as being absent for reasons other than a suspension. According to the FBI, the time and attendance records should reflect that a suspended employee was on “leave without pay due to a suspension,” which is denoted with a unique code. When properly entered, the Statements of Earnings and Leave that are mailed to the employee also show the employee as being on “suspension.” However, our review revealed that although suspensions had been imposed on these nine employees, their records showed them on leave for the following reasons:

- The Statements of Earnings and Leave for five employees indicated they were on “leave without pay.” Leave without pay is a separate code that the Office of Personnel Management describes as being “granted at the employee’s request,” which is contrary to the definition of a suspension.
- The records for two employees indicated they were on “absence without official leave.” The Office of Personnel Management describes absence without official leave as “[a]bsence without prior approval, a nonpay status resulting from an Agency determination that it will not grant any type of leave (not even leave without pay) for a period of absence for which the employee did not obtain advance authorization or for which a request for leave has been denied.”
- The records for one employee indicated he was on “furlough.” The Office of Personnel Management describes furlough as unpaid absence due to “lack of work or funds, or for other non-disciplinary reasons,” which again is contrary to the definition of a suspension.
- The time and attendance records for one employee stated that the employee was on “leave without pay” due to sickness for a hospital visit or surgery during the suspension period.

We asked personnel in the FBI’s Human Resources Division why employee time and attendance records did not accurately show that the employees had been suspended. They stated that time and attendance records are completed by field and headquarters division personnel and

upon the truthfulness or possible bias of the employee that is the subject of a pending investigation. See United States Attorneys Manual § 9-5.100.

the errors were probably due to clerical data entry errors in the divisions. They said that the FBI's process leaves it up to the employees and their supervisors to ensure that time and attendance records accurately reflect suspensions.

The FBI's suspension periods for employees begin at the close of business on Friday, which is unique among the Department's law enforcement components and results in FBI employees serving shorter suspensions for comparable discipline.

FBI policy states that a "period of suspension will always commence at the close of business, Friday of any given week," except for extraordinary circumstances due to an employee's work schedule. This means that FBI employees who are suspended for 3 days actually serve a 1-day suspension and lose only 1 day's pay because the first 2 days of the suspension are Saturday and Sunday, which are normally non-paid days.

In contrast, the four other Department components whose disciplinary systems we previously reviewed – ATF, DEA, USMS, and BOP – begin employee suspensions on the first workday (usually Monday) of the workweek. As a result, because FBI suspension periods begin on the weekend, FBI employees who are suspended for the same length of time lose less pay than other Department employees.¹¹⁶

We asked the FBI why the agency begins its suspensions at the close of business on Fridays when other Department components begin their suspensions on the first workday (usually Monday) of the workweek. According to FBI OPR officials, this practice has been in place since at least 1996, but the FBI could not locate any specific written policy explaining why it was implemented.

Conclusion

For a disciplinary system to be fair and effective, discipline must be correctly recorded in personnel records and actually implemented. However, as noted in this section, we found that the FBI did not ensure that discipline decided for FBI employees was actually imposed. We also found that the FBI did not ensure that the discipline that was imposed

¹¹⁶ For example, for discipline that must be implemented Department-wide, such as a 30-day suspension for misuse of a government vehicle, FBI employees would lose 20 days of pay, while their counterparts in other Department components would lose 22 days of pay.

was accurately recorded in the employee's personnel file. Finally, we found that, unlike other Department components, the FBI begins suspensions at the close of business on Friday, resulting in less punishment for the same discipline.

We recommend that the FBI review the personnel records and time and attendance records of FBI employees who have been disciplined since October 1, 2004, to ensure that the employees actually served the appropriate suspension, and that the employees' Official Personnel Folders contain the appropriate documentation supporting the disciplinary action and noting that the employee was in a non-pay, suspended status for the entire suspension period. Moreover, we believe the FBI should change its disciplinary practice to bring it in line with the rest of the Department and start discipline at the beginning of the workweek, which is typically a Monday.

Recommendations

We recommend that the FBI:

15. Conduct a review of the personnel files and timekeeping records of all employees who were suspended since October 1, 2004, to verify that the suspensions were properly documented, that the employees served their suspensions, and the employees were not paid during their suspension periods.
16. Revise FBI policy to begin suspensions on the first day of the workweek, as is done by other Department components.

CONCLUSION AND RECOMMENDATIONS

Overall, we found that some aspects of the FBI's disciplinary system worked well, but that improvements are needed in several critical areas. To the FBI's credit, the timeliness of all phases of the FBI's disciplinary process improved since FY 2005. The FBI's misconduct investigations are generally thorough, necessary investigative steps generally are taken, and the investigations are well documented in the investigative reports.

However, we found problems with the reporting of misconduct allegations, the adjudication of investigations, the appeals of disciplinary decisions, and the implementation of discipline that prevent us from concluding that the FBI's disciplinary system overall is consistent and reasonable.

We found that most incidents of misconduct were reported to the FBI's Inspection Division and to the OIG, as required. However, 30 percent of survey respondents who had observed misconduct said they either never reported misconduct they observed or reported less than half the misconduct they observed. Also, some divisions did not consistently report incidents of potential misconduct to the Internal Investigations Section, and the FBI's process for reporting alleged misconduct to the OIG was not effective in ensuring the OIG was provided all misconduct allegations or for tracking the OIG's reviews of allegations.

We concluded that the adjudicative decisions reached by FBI OPR generally were reasonable. However, for almost one-third of substantiated misconduct cases, FBI OPR did not explain how it considered precedent cases when it chose non-standard penalties or FBI divisions did not submit their assessments of the Douglas Factors. We found some inconsistencies in penalties imposed between factually similar cases, and the lack of discussion of precedent or the Douglas Factors made it difficult to determine if these inconsistencies were appropriate. We also learned that the FBI OPR Assistant Director has at times considered unwritten information she received outside the normal disciplinary process before making disciplinary decisions.

In the appellate stage, we found a lack of clear guidance about what standard of review appellate officials should apply when reviewing FBI OPR's penalty determinations. Further, we are concerned that appeals of adverse actions by SES employees are decided by a

Disciplinary Review Board made up only of fellow SES employees. We believe that a permanent appeals decision maker or board, rather than a board composed of SES employees who rotate in and out of their board service after 6 months, could improve the quality and consistency of disciplinary decisions, and could also help address concerns about bias in individual cases or the appearance of SES board members issuing more lenient decisions for their SES colleagues. Most of the appellate decisions for non-SES employees that we reviewed were reasonable, but the majority of appellate decisions for SES employees were not.

We found there continues to be a significant percentage of FBI employees who believed that there is a double standard of discipline for higher-ranking and lower-ranking FBI employees. Our review found that allegations of misconduct against SES employees were unsubstantiated at a much higher rate than allegations against non-SES employees. Even more significant, SES employees' penalties were mitigated on appeal at a much higher rate than non-SES employees' penalties. Moreover, when we examined the appellate officials' decisions to mitigate penalties for SES employees, we found that the mitigation in most of these SES cases was unpersuasive and unreasonable.

Finally, we found that the FBI did not ensure that imposed disciplinary penalties were actually implemented and that discipline was documented in employees' personnel files. We found that 15 of the 83 suspended employees we reviewed (18 percent) either did not serve their suspension at all or were suspended for an incorrect number of days. We also determined that the personnel and pay records for an additional 38 employees (46 percent) were incomplete or reflected incorrect information regarding the suspensions. In addition, because the FBI begins its suspensions at the close of business on Fridays, FBI employees actually serve fewer days and receive less time off without pay than employees in other Department components who are suspended for the same amount of time.

In sum, we believe the FBI must take significant action to improve its disciplinary process, including ensuring that misconduct allegations are consistently reported, that its adjudicative and appellate disciplinary decisions are reasonable and well-documented, that discipline is implemented and recorded in employees' personnel files, and that discipline is administered equitably across all grade levels and for all job categories. Our report makes 16 recommendations to assist the FBI in improving its disciplinary process. As a result of our review, we recommend that the FBI:

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1. Remind all employees on an annual basis that all allegations of misconduct must be promptly reported to the FBI Internal Investigations Section or to the OIG.
 2. Stress to field and headquarters divisions that they must forward all allegations of potential misconduct they receive to the Internal Investigations Section.
 3. Consider automating the allegation-reporting process so that allegations can be reviewed by the OIG electronically instead of in hard copy.
 4. Ensure that Internal Investigations Section personnel enter information regarding the OIG's review into the FBI's Case Management System.
 5. Require field and headquarters divisions to specify, when forwarding allegations to the Internal Investigations Section, the date they became aware of the potential misconduct.
 6. Modify the FBI's Case Management System so that users can track the date that divisions become aware of potential misconduct.
 7. Require FBI OPR to document its consideration of precedent when a mitigated or aggravated penalty is imposed.
 8. Require field and headquarters divisions to submit a Douglas Factors assessment in misconduct cases, except in unsubstantiated Delegated Investigation and Adjudication cases.
 9. Clarify in policy that FBI OPR and appellate officials should not seek or consider unwritten information when making disciplinary decisions.
 10. Consider changing the adjudicative process to ensure that the proposing and deciding officials within FBI OPR are separate.
 11. Clarify FBI policies on the appellate officials' authority to modify findings of fact and penalties to resolve different interpretations of the policies by FBI OPR and appellate officials.

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12. Consider appointing a permanent appeals decision maker or board, rather than an appeals board composed of employees who rotate in and out of their board service after 6 months. In addition, if the permanent appellate decision-maker is a board rather than an individual, expand the board membership for SES appeals beyond only SES employees.
 13. Require appellate officials to fully document in writing the reasons for their decisions, including their consideration of precedent and mitigating or aggravating factors.
 14. In addition to Recommendation 12, which recommends a change in the FBI's appellate process, ensure that FBI policies are applied consistently to all levels of employees at all stages of the disciplinary process.
 15. Conduct a review of the personnel files and timekeeping records of all employees who were suspended since October 1, 2004, to verify that the suspensions were properly documented, that the employees served their suspensions, and the employees were not paid during their suspension periods.
 16. Revise FBI policy to begin suspensions on the first day of the workweek, as is done by other Department components.

APPENDIX I: RESULTS OF OIG SURVEY TO FBI EMPLOYEES

Reporting Misconduct

This section includes questions about your knowledge of FBI guidelines and policies for reporting employee misconduct and whether you have witnessed employee misconduct.

- 1. What document do you rely on for a definition of what constitutes employee misconduct? (Select all that apply.)**

	Number of responses	Percentage
Offense Table	174	22%
Employee Handbook	392	49%
Manual of Investigative Operations and Guidelines	229	29%
Manual of Administrative Operations and Procedures	372	47%
Don't rely on a formal document	232	29%

N = 795

Respondents could select more than one response.

- 2. Have you personally observed, or been made aware of, possible misconduct by an FBI employee at any time between January 2005 and December 2007? (Select one.) [If "No," skip to Question 4.]**

	Number of responses	Percentage
Yes	228	29%
No	564	71%

N = 792

- 3. [If "Yes" to Question 2.] Of the times that you observed or were made aware of possible FBI employee misconduct, how often did you report it to the appropriate authority? (Select one.)**

	Number of responses	Percentage
Every time	130	58%
Most of the time	29	13%
Some of the time	27	12%
Never	40	18%

N = 226

Percentages do not add to 100 because of rounding.

4. If you personally observed or were made aware of possible FBI employee misconduct, to whom would you report it? (Select all that apply.)

	Number of responses	Percentage
My immediate supervisor	622	84%
The immediate supervisor of the individual whom I believed had committed misconduct	177	24%
My field office's OPR Coordinator	88	12%
Upper management in my division	172	23%
Inspection Division	79	11%
FBI Office of Professional Responsibility	117	16%
Security Division	117	16%
Equal Employment Opportunity Office	32	4%
Department of Justice Office of Professional Responsibility	17	2%
Office of the Inspector General	17	2%

N = 742

Respondents could select more than one response.

In addition to these responses, 51 respondents chose "other" and provided answers in their own words. The OIG categorized information within their answers as follows:

	Number of responses
My field office's Security Officer	24
The employee suspected of having committed misconduct	11
A supervisor in general	8
It would depend on the situation	7
Employee Assistance Program	3

N = 51

Number of responses adds to more than 51 because some responses fit into more than one category.

5. Which of the reasons below would make you choose not to report possible misconduct by an FBI employee? (Select all that apply.)

	Number of responses	Percentage
I was not familiar with the process for reporting misconduct.	58	8%
I was not certain if it was misconduct or a performance issue.	226	29%

	Number of responses	Percentage
I did not want to get involved.	32	4%
I thought the process would be too time-consuming.	14	2%
I believed it was the supervisor's responsibility to report misconduct.	43	6%
I did not want to get a co-worker in trouble.	38	5%
The employee was a good performer.	22	3%
I believed that management would not be supportive of my decision to report misconduct.	103	13%
I believed that the employee would not be disciplined even if I reported the misconduct.	111	14%
I feared retaliation for reporting misconduct.	120	16%
Another employee also witnessed, or was aware of, the incident and told me that he/she had reported it.	93	12%
None of the reasons above would make me choose not to report possible misconduct.	404	52%

N = 771

Respondents could select more than one response.

In addition to these responses, 16 respondents chose "other" and provided answers in their own words. The OIG categorized information within their answers as follows:

	Number of responses
Not aware of the details of an incident.	4
Incident was minor or was a technical violation.	3
Lack of accountability within the disciplinary process.	3
Experienced retaliation for reporting a past incident.	3
It would depend on the specific violation.	2
Punishments for misconduct are too harsh.	1
The OIG is not impartial.	1

N = 16

Number of responses adds to more than 16 because some responses fit into more than one category.

6. Would you report possible FBI employee misconduct directly to appropriate authorities in FBI headquarters if you did not wish to report it to anyone in your field office or division?

	Number of responses	Percentage
Yes	641	82%

	Number of responses	Percentage
No	144	18%

N = 785

Personal Experience With the FBI's Disciplinary Process

This section includes questions about your knowledge of how the FBI's disciplinary process is structured and your specific knowledge of any misconduct investigations that were conducted within the last 3 years.

7. What is your understanding of which entity within the FBI conducts misconduct investigations? (Select all that apply.)

	Number of responses	Percentage
The FBI's Inspection Division, Internal Investigations Section	271	35%
The FBI's Office of Professional Responsibility	612	79%
The FBI's Human Resources Division	27	4%
The FBI field office or headquarters division where the employee who is alleged to have committed misconduct works	193	25%
I don't know	27	4%

N = 771

Respondents could select more than one response.

8. What is your understanding of which entity within the FBI decides the discipline that will be imposed in cases involving employee misconduct? (Select all that apply.)

	Number of responses	Percentage
The FBI's Inspection Division, Internal Investigations Section	106	14%
The FBI's Office of Professional Responsibility	688	89%
The FBI's Human Resources Division	34	4%
The FBI field office or headquarters division where the employee who is alleged to have committed misconduct works	121	16%
I don't know	41	5%

N = 770

Respondents could select more than one response.

9. Have you, or someone you know personally, been the subject of an employee misconduct investigation that was active at any time between January 2005 and December 2007? (Select all that apply.)

	Number of responses	Percentage
Yes – I have been the subject of an investigation	54	7%
Yes – I know someone personally who has been the subject of an investigation	309	40%
No	427	56%

N = 767

Respondents could select more than one response.

10. (IF “YES” TO 9) Which entity conducted the investigation(s)? (Select all that apply.)

	Number of responses	Percentage
I have not been, nor do I know anyone personally who has been, the subject of a misconduct investigation.	5	2%
The FBI’s Inspection Division	104	30%
The FBI field office or headquarters division where the employee alleged to have committed misconduct worked	98	29%
The Department of Justice’s Office of the Inspector General	70	20%
The Department of Justice’s Office of Professional Responsibility	122	36%
The Department of Justice’s Public Integrity Section	4	1%
Don’t know	57	17%

N = 344

Respondents could select more than one response.

11. Have you, or someone you know personally, been disciplined by OPR between January 2005 and December 2007 as the result of an employee misconduct investigation? (Select all that apply.)

	Number of responses	Percentage
Yes – I have been disciplined	28	4%
Yes – I know someone personally who has been disciplined	293	38%
No	460	60%

N = 766

Respondents could select more than one response.

12. Have you, or someone you know personally, appealed a disciplinary decision through the FBI's internal appeals process between January 2005 and December 2007? (Select all that apply.)

	Number of responses	Percentage
Yes – I have appealed a disciplinary decision	12	2%
Yes – I know someone personally who has appealed a disciplinary decision	187	24%
No	570	74%

N = 766

Respondents could select more than one response.

13. Please indicate if you have ever performed any of the following assignments: (Select all that apply.)

	Number of responses	Percentage
I have conducted a misconduct investigation, either in a field office or in the Internal Investigations Section in headquarters.	98	13%
I have adjudicated a misconduct investigation.	19	3%
I have reviewed appeals as an employee in the Appellate Unit.	1	0%
I have served as a non-voting member of a Disciplinary Review Board.	3	0%
I have served as a voting member of a Disciplinary Review Board.	13	2%
I have not performed any of these assignments.	648	85%

N = 761

Respondents could select more than one response.

Perception of the FBI's Disciplinary Process

This section includes questions about your general perceptions of the FBI's disciplinary process, regardless of whether you have specific knowledge of misconduct investigations that were conducted between January 2005 and December 2007.

14. If you have been the subject of a misconduct investigation, please indicate how much you agree or disagree with the following statement: *When I was the subject of a misconduct investigation, my case was handled in a timely manner.*

	Number of responses	Percentage
Strongly Agree	9	6%
Agree	23	16%

	Number of responses	Percentage
Neutral	11	8%
Disagree	16	11%
Strongly Disagree	36	25%
Don't Know	50	35%

N = 145

Percentages do not add to 100 because of rounding.

	Number of responses
I have not been the subject of a misconduct investigation.	517

15. Please indicate how much you agree or disagree with the following statement: *The disciplinary process is generally timely.* (Select one.)

	Number of responses	Percentage
Strongly Agree	16	2%
Agree	71	10%
Neutral	83	12%
Disagree	110	15%
Strongly Disagree	99	14%
Don't Know	339	47%

N = 718

16. (IF "DISAGREE" OR "STRONGLY DISAGREE" TO EITHER 14 OR 15) Which part(s) of the process do you consider not to be timely? (Select all that apply.)

	Number of responses	Percentage
The investigation of employee misconduct	131	30%
The deciding of discipline (adjudication) by OPR	165	38%
The FBI's internal appeals process	70	16%
Don't know	222	51%

N = 432

Respondents could select more than one response.

17. Please indicate how much you agree or disagree with the following statement: *Misconduct investigations adequately address the relevant issues.* (Select one.)

	Number of responses	Percentage
Strongly Agree	21	3%

	Number of responses	Percentage
Agree	144	20%
Neutral	138	19%
Disagree	61	9%
Strongly Disagree	34	5%
Don't Know	320	45%

N = 718

Percentages do not add to 100 because of rounding.

18. (IF “DISAGREE” OR “STRONGLY DISAGREE” TO 17) Why do you believe the investigations do not adequately address the relevant issues? (Select all that apply.)

	Number of responses	Percentage
The investigation did not address all allegations.	23	15%
The investigation addressed some allegations more thoroughly than others.	29	19%
Relevant witnesses were not interviewed.	40	26%
The witness interviews were not adequate, in that relevant questions were not asked.	36	24%
The interview of the employee under investigation was not adequate, in that relevant questions were not asked.	23	15%
More documentary evidence (e.g., phone, computer, or travel records) should have been obtained during the investigation.	24	16%
It is unclear why the investigations did not adequately address the relevant issues.	41	27%
Other.	66	43%

N = 152

Respondents could select more than one response.

19. (IF “DISAGREE” OR “STRONGLY DISAGREE” TO 17) Please explain your response to Question 18 in more detail.

Seventy-three respondents provided answers in their own words. The OIG categorized information within their answers as follows:

	Number of responses
Misconduct investigations are biased against the employee under investigation.	15
Investigations do not result in consistent or reasonable penalties.	14

	Number of responses
Nothing happened to the employee under investigation as a result of the investigation.	12
Individuals with relevant information were not interviewed during the investigation.	10
Investigators would not consider other issues that were relevant to the investigation.	9
Investigations were incomplete.	6
Investigations take too long.	5
Investigations expanded to consider issues that were not relevant to the investigation.	5
Employees are investigated for behavior that should not be considered misconduct.	4
Employees are investigated for allegations that prove to be unfounded.	3
Investigations show favoritism toward some employees.	2
Investigator not sufficiently independent from employee being investigated.	2

N = 73

Number of responses adds to more than 73 because some responses fit into more than 1 category.

20. In imposing discipline, do you believe the FBI appropriately considers the following factors? (Select one for each row in the table.)

An employee's past disciplinary history

	Number of responses	Percentage
Gives too little consideration	77	11%
Gives proper consideration	194	27%
Gives too much consideration	10	1%
Don't know	440	61%

N = 721

Past discipline imposed against other individuals for similar misconduct

	Number of responses	Percentage
Gives too little consideration	64	9%
Gives proper consideration	178	25%
Gives too much consideration	17	2%
Don't know	460	64%

N = 719

**An employee's job level and type of employment,
including prominence of position**

	Number of responses	Percentage
Gives too little consideration	31	4%
Gives proper consideration	141	20%
Gives too much consideration	152	21%
Don't know	395	55%

N = 719

An employee's tenure and overall job performance

	Number of responses	Percentage
Gives too little consideration	104	15%
Gives proper consideration	163	23%
Gives too much consideration	21	3%
Don't know	429	60%

N = 717

Percentages do not add to 100 because of rounding.

Notoriety of the offense or its impact upon the reputation of the agency

	Number of responses	Percentage
Gives too little consideration	33	5%
Gives proper consideration	192	27%
Gives too much consideration	71	10%
Don't know	422	59%

N = 718

Percentages do not add to 100 because of rounding.

**Nature and seriousness of the offense, and its relationship to an employee's
duties, including whether the offense was intentional or technical or inadvertent,
or was committed maliciously or for gain, or was frequently repeated**

	Number of responses	Percentage
Gives too little consideration	86	12%
Gives proper consideration	212	30%
Gives too much consideration	6	1%
Don't know	407	57%

N = 711

Mitigating circumstances surrounding the offense, such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter

	Number of responses	Percentage
Gives too little consideration	105	15%
Gives proper consideration	164	23%
Gives too much consideration	11	2%
Don't know	435	61%

N = 715

Percentages do not add to 100 because of rounding.

- 21. Do you believe that the discipline the FBI imposes is generally appropriate, is generally too harsh, or is generally too lenient?**
(Select one.)

	Number of responses	Percentage
Too lenient	53	7%
Appropriate	262	36%
Too harsh	82	11%
Don't know	323	45%

N = 720

Percentages do not add to 100 because of rounding.

- 22. (IF "TOO HARSH" OR "TOO LENIENT" TO 21) Why do you believe the discipline imposed is not generally appropriate?** (Select all that apply.)

	Number of responses	Percentage
The Table of Penalties does not contain an appropriate range of penalties for various types of misconduct.	23	12%
Mitigating circumstances are not always appropriately considered.	61	33%
Aggravating circumstances are not always appropriately considered.	30	16%
Employees seem to receive very harsh penalties for minor misconduct.	78	42%
Employees seem to receive very lenient penalties for major misconduct.	67	36%
Other.	62	33%

N = 186

Respondents could select more than one response.

23. (IF “TOO HARSH” OR “TOO LENIENT” TO 21) Please explain your response to Question 22 in more detail.

Sixty-nine respondents provided answers in their own words. The OIG categorized information within their answers as follows:

	Number of responses
There is a double standard of discipline.	35
The discipline imposed is unreasonable for the misconduct that was committed.	18
The discipline imposed is inconsistent from case to case.	16
Employees are allowed to retire rather than be disciplined.	4
The disciplinary process takes too long.	2
The FBI is afraid of being sued.	2
The FBI doesn't impose discipline that is in line with past precedent.	2

N = 69

Number of responses adds to more than 69 because some responses fit into more than 1 category.

24. Do you believe that the discipline imposed following an appeal through the FBI's internal appeals process is generally appropriate, is generally too harsh, or is generally too lenient? (Select one.)

	Number of responses	Percentage
Too lenient	21	3%
Appropriate	125	18%
Too harsh	26	4%
Don't know	543	76%

N = 715

Percentages do not add to 100 because of rounding.

25. (IF “TOO HARSH” OR “TOO LENIENT” TO 24) Why do you believe the discipline imposed is not generally appropriate? (Select all that apply.)

	Number of responses	Percentage
The Table of Penalties does not contain an appropriate range of penalties for various types of misconduct.	11	10%
Mitigating circumstances are not always appropriately considered.	27	24%

	Number of responses	Percentage
Aggravating circumstances are not always appropriately considered.	12	10%
Employees seem to receive very harsh penalties for minor misconduct.	31	27%
Employees seem to receive very lenient penalties for major misconduct.	22	19%
OPR imposes appropriate discipline, but the appeals process changes it to discipline that is too lenient.	11	10%
OPR imposes discipline that is too harsh, but the appeals process changes it to discipline that is too lenient.	6	5%
Other.	62	54%

N = 115

Respondents could select more than one response.

26. (IF “TOO HARSH” OR “TOO LENIENT” TO 24) Please explain your response to Question 25 in more detail.

Thirty-two respondents provided answers in their own words. The OIG categorized information within their answers as follows:

	Number of Responses
The discipline imposed is inconsistent from case to case.	7
There is a double standard of discipline.	7
The appeals process is a rubber stamp of what FBI OPR already decided.	6
FBI OPR imposed discipline that was too harsh, but the appeal reduced it to a level that was appropriate.	4
FBI OPR imposed discipline that was appropriate, but the appeal reduced it to a level that was too lenient	4
The discipline imposed is unreasonable for the misconduct that was committed.	3
The FBI is afraid of being sued.	2
The FBI does not apply the correct standard of review during the appellate process.	1

N = 32

Number of responses adds to more than 32 because some responses fit into more than 1 category.

27. Please indicate how much you agree or disagree with the following statement: *There is a double standard of discipline for higher-ranking versus lower-ranking FBI employees.* (Select one.)

	Number of responses	Percentage
Strongly Agree	111	16%
Agree	128	18%
Neutral	118	17%
Disagree	50	7%
Strongly Disagree	29	4%
Don't know	281	39%

N = 717

Percentages do not add to 100 because of rounding.

28. Please explain in more detail why you agree or disagree with the statement in Question 27.

One hundred ninety-nine respondents provided answers in their own words. The OIG categorized information within their answers as follows:

	Number of responses
Higher-ranking employees are disciplined more leniently than lower-ranking employees.	116
There is not a double standard of discipline.	36
Special Agents are disciplined more leniently than non-agent personnel.	27
Employees are allowed to retire rather than be disciplined.	20
Lower-ranking employees are disciplined more leniently than higher-ranking employees.	12
Lower-ranking employees fear retaliation.	6
Misconduct by higher-ranking employees isn't always reported.	6
There is a double standard of discipline based on an employee's race.	5
The disciplinary process shows favoritism toward some employees.	3
There is a double standard of discipline based on an employee's gender.	1
Non-agent personnel are disciplined more leniently than Special Agents.	1

N = 199

Number of responses adds to more than 199 because some responses fit into more than 1 category.

29. Please indicate how much you agree or disagree with each of the following statements: *Disciplinary decisions should be influenced by . . .* (Select one for each row in the table.)

An employee's grade level

	Number of responses	Percentage
Strongly Agree	12	2%
Agree	77	11%
Neutral	78	11%
Disagree	274	38%
Strongly Disagree	213	30%
Don't know	65	9%

N = 719

Percentages do not add to 100 because of rounding.

An employee's job series (e.g., Special Agent, Analyst, Clerical)

	Number of responses	Percentage
Strongly Agree	12	2%
Agree	73	10%
Neutral	77	11%
Disagree	278	39%
Strongly Disagree	215	30%
Don't know	64	9%

N = 719

Percentages do not add to 100 because of rounding.

Whether an employee is perceived as a "whistleblower"

	Number of responses	Percentage
Strongly Agree	15	2%
Agree	45	6%
Neutral	89	12%
Disagree	254	35%
Strongly Disagree	234	33%
Don't know	81	11%

N = 718

Percentages do not add to 100 because of rounding.

An employee's gender

	Number of responses	Percentage
Strongly Agree	0	0%

	Number of responses	Percentage
Agree	5	1%
Neutral	55	8%
Disagree	260	36%
Strongly Disagree	342	48%
Don't know	56	8%

N = 718

Percentages do not add to 100 because of rounding.

An employee's race

	Number of responses	Percentage
Strongly Agree	2	0%
Agree	5	1%
Neutral	51	7%
Disagree	251	35%
Strongly Disagree	351	49%
Don't know	56	8%

N = 716

An employee's geographical location

	Number of responses	Percentage
Strongly Agree	0	0%
Agree	7	1%
Neutral	63	9%
Disagree	279	39%
Strongly Disagree	303	42%
Don't know	63	9%

N = 715

30. If any other factors were not mentioned above that you believe causes some employees to be disciplined differently, please describe them briefly.

Sixty-two respondents provided answers in their own words. The OIG categorized information within their answers as follows:

	Number of responses
No factor should influence discipline.	16
Who an employee knows.	15

	Number of responses
An employee's tenure, including whether an employee is nearing retirement.	10
An employee's past disciplinary history.	6
An employee's disability status.	4
An employee's age.	3
The FBI is afraid of being sued.	3
Politics.	3
Publicity of misconduct.	2
Prior military or law enforcement experience.	2
An employee's religion	1

N = 62

Number of responses adds to more than 62 because some responses fit into more than 1 category.

- 31. If you answered "Disagree" or "Strongly Disagree" to any of the questions in the table in Question 29, why do you believe that some employees are disciplined differently?** If you can provide **specific** information regarding a case in which you believe an employee received different discipline as a result of any factor in the table above, please do so in the space below.

One hundred twenty respondents provided answers in their own words. The OIG categorized information within their answers as follows:

	Number of responses
No factor should influence discipline.	71
Higher-ranking employees are disciplined more leniently than low-ranking employees.	17
The disciplinary process shows favoritism toward some employees.	15
There is a double standard of discipline based on an employee's race.	13
There is a double standard of discipline based on an employee's gender.	6
Low-ranking employees are disciplined more leniently than high-ranking employees.	3
Employees fear retaliation for reporting misconduct.	2

	Number of responses
There is a double standard based on whether the employee who reports misconduct is considered a whistleblower.	1

N = 120

- 32. If you have been the subject of a misconduct investigation, were you treated fairly and objectively in the following situations? If you have never been the subject of a misconduct investigation, please skip to Question 34. (Select one for each row in the table.)**

As the subject of a misconduct investigation

	Number of responses	Percentage
I was treated fairly and objectively	34	51%
I do not have an opinion one way or the other	9	13%
I was not treated fairly and objectively	24	36%

N = 67

	Number of responses
Not applicable.	465

When OPR was deciding whether to discipline me following a misconduct investigation

	Number of responses	Percentage
I was treated fairly and objectively	29	45%
I do not have an opinion one way or the other	12	19%
I was not treated fairly and objectively	23	36%

N = 64

	Number of responses
Not applicable.	431

When I used the FBI's internal appeals process to appeal a disciplinary decision made by OPR

	Number of responses	Percentage
I was treated fairly and objectively	2	18%
I do not have an opinion one way or the other	3	27%
I was not treated fairly and objectively	6	55%

N = 11

	Number of responses
Not applicable.	485

33. Please explain why you do or do not believe you were treated fairly and objectively as the subject of a misconduct investigation, when OPR was deciding whether to discipline you following a misconduct investigation, or when you used the FBI's internal appeals process to appeal a disciplinary decision made by OPR.

Fifty respondents provided answers in their own words. The OIG categorized information within their answers as follows:

	Number of responses
Reasons why respondents believed they had not been treated fairly.	35
Reasons why respondents believed they had been treated fairly.	15

N = 50

34. Based on your time working in the FBI, do you believe you would be treated fairly and objectively in the following situations? (Select one for each row in the table.)

If I became the subject of a misconduct investigation

	Number of responses	Percentage
I believe I would be treated fairly and objectively	291	41%
I do not have an opinion one way or the other	313	44%
I believe I would not be treated fairly and objectively	108	15%

N = 712

If OPR was deciding whether to discipline me following a misconduct investigation

	Number of responses	Percentage
I believe I would be treated fairly and objectively	287	41%
I do not have an opinion one way or the other	318	45%
I believe I would not be treated fairly and objectively	102	14%

N = 707

If I used the FBI's internal appeals process to appeal a disciplinary decision made by OPR

	Number of responses	Percentage
I believe I would be treated fairly and objectively	271	38%

	Number of responses	Percentage
I do not have an opinion one way or the other	358	51%
I believe I would not be treated fairly and objectively	80	11%

N = 709

35. Please explain why you do or do not believe you would be treated fairly and objectively if you were the subject of a misconduct investigation, if OPR was deciding whether to discipline you following a misconduct investigation, or if you used the FBI's internal appeals process to appeal a disciplinary decision made by OPR.

Two hundred eighteen respondents provided answers in their own words. The OIG categorized information within their answers as follows:

	Number of responses
Reasons why respondents believed they would be treated fairly.	115
Reasons why respondents believed they would not be treated fairly.	103

N = 218

Training and Guidance

This section includes questions about the training you have received regarding the FBI's disciplinary process. This section also provides you with an opportunity to identify any other issues related to the FBI's disciplinary process that you believe are significant.

36. How would you characterize the FBI's training in the following areas? (select one for each row in the table)

Types of behavior that are considered misconduct

	Number of responses	Percentage
Sufficient	339	52%
No Opinion	156	24%
Not Sufficient	162	25%

N = 657

Percentages do not add to 100 because of rounding.

How to report allegations of misconduct

	Number of responses	Percentage
Sufficient	320	49%
No Opinion	169	26%

	Number of responses	Percentage
Not Sufficient	168	26%

N = 657

Percentages do not add to 100 because of rounding.

Who to report allegations of misconduct to

	Number of responses	Percentage
Sufficient	328	50%
No Opinion	162	25%
Not Sufficient	163	25%

N = 653

Time frame for reporting allegations of misconduct

	Number of responses	Percentage
Sufficient	261	40%
No Opinion	204	31%
Not Sufficient	186	29%

N = 651

How to distinguish between performance issues and misconduct

	Number of responses	Percentage
Sufficient	210	33%
No Opinion	204	32%
Not Sufficient	233	36%

N = 647

Percentages do not add to 100 because of rounding.

Potential range of discipline for different types of misconduct

	Number of responses	Percentage
Sufficient	209	32%
No Opinion	219	34%
Not Sufficient	221	34%

N = 649

Factors that are considered when deciding discipline

	Number of responses	Percentage
Sufficient	176	27%
No Opinion	218	34%

	Number of responses	Percentage
Not Sufficient	249	39%

N = 643

How the FBI's internal appeals process works

	Number of responses	Percentage
Sufficient	166	26%
No Opinion	228	35%
Not Sufficient	255	39%

N = 649

The disciplinary process overall

	Number of responses	Percentage
Sufficient	197	30%
No Opinion	216	33%
Not Sufficient	235	36%

N = 648

Percentages do not add to 100 because of rounding.

- 37. Were you ever given any written policies that explained which divisions, sections, or units within the FBI were responsible for different aspects of the disciplinary process?**

	Number of responses	Percentage
Yes	285	43%
No	375	57%

N = 660

- 38. How would you characterize the FBI's written policies in the following areas? (Select one for each row in the table.)**

Types of behavior that are considered misconduct

	Number of responses	Percentage
Sufficient	277	42%
No Opinion	269	41%
Not Sufficient	113	17%

N = 659

How to report allegations of misconduct

	Number of responses	Percentage
Sufficient	278	42%

	Number of responses	Percentage
No Opinion	268	41%
Not Sufficient	114	17%

N = 660

Who to report allegations of misconduct to

	Number of responses	Percentage
Sufficient	283	43%
No Opinion	263	40%
Not Sufficient	110	17%

N = 656

Time frame for reporting allegations of misconduct

	Number of responses	Percentage
Sufficient	232	36%
No Opinion	294	45%
Not Sufficient	127	19%

N = 653

How to distinguish between performance issues and misconduct

	Number of responses	Percentage
Sufficient	185	28%
No Opinion	301	46%
Not Sufficient	166	26%

N = 652

Potential range of discipline for different types of misconduct

	Number of responses	Percentage
Sufficient	212	33%
No Opinion	299	46%
Not Sufficient	139	21%

N = 650

Factors that are considered when deciding discipline

	Number of responses	Percentage
Sufficient	184	28%
No Opinion	306	47%

	Number of responses	Percentage
Not Sufficient	166	25%

N = 656

How the FBI's internal appeals process works

	Number of responses	Percentage
Sufficient	170	26%
No Opinion	314	49%
Not Sufficient	163	25%

N = 647

The disciplinary process overall

	Number of responses	Percentage
Sufficient	204	31%
No Opinion	303	46%
Not Sufficient	148	23%

N = 655

39. (IF YOU ANSWERED "NOT SUFFICIENT" TO ANY ITEM IN 36 or 38) What changes would you recommend to improve the training or written policies FBI employees receive? (Select all that apply.)

	Number of responses	Percentage
Include additional training during new employee orientation	166	51%
Include additional training for supervisors on how to differentiate between misconduct and performance	194	59%
Include additional information during annual training	201	62%
Provide more frequent training on the guidance	131	40%
Improve existing written policies and guidance	115	35%
Make written policies and guidance more easily available	211	65%

N = 327

Respondents could select more than one response.

40. How beneficial do you find the disciplinary summaries that are included in the OPR Quarterly Reports? (Select one.)

	Number of responses	Percentage
Very Beneficial	276	41%
Somewhat Beneficial	238	35%
Neutral	91	13%

	Number of responses	Percentage
Not Too Beneficial	15	2%
Not At All Beneficial	14	2%
I don't read the OPR Quarterly Reports	46	7%

N = 680

41. Please explain why you do or do not believe the OPR Quarterly Reports are beneficial.

One hundred fifty-seven respondents provided answers in their own words. The OIG categorized information within their answers as follows:

	Number of responses
The OPR Quarterly Reports serve as a deterrent because employees learn what they should not do.	101
The OPR Quarterly Reports are entertaining to read.	21
The information in the OPR Quarterly Reports is not comprehensive enough.	21
The OPR Quarterly Reports show that the penalties are inconsistent from case to case.	16
The OPR Quarterly Reports show cases where the punishment is unreasonable for the misconduct.	8
The OPR Quarterly Reports show that the disciplinary process takes too long.	2
The OPR Quarterly Reports illustrate the difference between performance issues and misconduct.	1
The OPR Quarterly Reports show that the penalties are consistent from case to case.	1

N = 157

Number of responses adds to more than 157 because some responses fit into more than 1 category.

42. Please provide any additional comments or opinions you believe would aid or improve our review of the FBI's disciplinary process. If you would like to expand on any of your responses to earlier questions, please include the question number in your comment.

One hundred respondents provided answers in their own words. The OIG categorized information within their answers as follows:

	Number of responses
Provide more training	36

	Number of responses
Other assorted suggestions	25
Compliments for the FBI	8
Needs to be more timely	7
Make existing policies more easily available	6
Reevaluate levels of discipline imposed for various misconduct	5
Concerns about differentiating between performance issues and misconduct	4
Eliminate the double standard between higher-ranking and lower-ranking employees	4
Misconduct investigations should be performed by a neutral entity	3
The process is unreasonable	3
The process is inconsistent	3
The process needs to be more confidential	2
Concerns with following the chain of command in misconduct situations	2
Eliminate the double standard between Special Agents and non-agent personnel	2
Inform the victim of the final result of a misconduct investigation	2
Process can never be made completely fair	1

N = 100

Number of responses adds to more than 100 because some responses fit into more than 1 category.

APPENDIX II: DOUGLAS FACTORS

In *Douglas v. Veterans Administration* (1981), the Merit Systems Protection Board identified 12 relevant factors that agency management needs to consider and weigh in deciding an appropriate disciplinary penalty. The 12 Douglas Factors are:

1. The nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3. The employee's past disciplinary record;
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. Consistency of the penalty with the applicable agency table of penalties (which are not to be applied mechanically so that other factors are ignored);
8. The notoriety of the offense or its impact upon the reputation of the agency;
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

-
10. The potential for employee's rehabilitation;
 11. Mitigating circumstances surrounding the offense, such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
 12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

APPENDIX III: CONFIDENCE INTERVALS FOR EMPLOYEE SURVEY

As mentioned in the “Purpose, Scope, and Methodology” section, we surveyed a stratified sample of 1,449 FBI employees out of a population of approximately 30,300. Fifty-six percent (818 of 1,449) responded. In our “Results of the Review” section, we cite the percentages of employees having certain opinions; their 95% confidence intervals are presented below.¹¹⁷

Table 3: Responses to Survey Question: “Please indicate how much you agree or disagree with the following statement: *Misconduct investigations adequately address the relevant issues.*” (page 50)

	Percentage	95% Confidence Interval
Agree	22.98%	19.83% - 26.13%
Neutral	19.22%	15.99% - 22.45%
Disagree	13.23%	10.52% - 15.94%
Don’t Know	44.57%	40.52% - 48.61%

Table 5: Responses to Survey Question: “Do you believe that the discipline the FBI imposes is generally appropriate, is generally too harsh, or is generally too lenient?” (pp. 53-54)

	Percentage	95% Confidence Interval
Penalties are too lenient	7.36%	5.20% - 9.52%
Penalties are appropriate	36.39%	32.56% - 40.22%
Penalties are too harsh	11.39%	8.95% - 13.82%
Don’t Know	44.86%	40.74% - 48.98%

¹¹⁷ We could not calculate confidence intervals for all survey results in this report for three reasons. First, confidence intervals cannot be calculated for questions that are not asked of everyone who takes the survey. In this survey, for example, we only asked respondents how often they reported misconduct if their answer to a previous question indicated they had observed misconduct. Second, confidence intervals cannot be calculated for questions in which the respondents are allowed to identify more than one response. For example, respondents were allowed to identify more than one reason why they might not report misconduct. Third, confidence intervals cannot be calculated when the survey was sent to more than half of a subgroup’s population. In this survey, for example, we included more than half of the FBI’s SES employees in our stratified sample.

Figure 7: FBI Employees' Perception of a Double Standard (pp. 77-78)

	Percentage	95% Confidence Interval
There is a double standard of discipline for higher- and lower-ranking employees (employees who answered "strongly agree" or "agree")	33.33%	29.39% - 37.27%
There is not a double standard of discipline for higher- and lower-ranking employees (employees who answered "strongly disagree" or "disagree")	11.02%	9.28% - 12.75%
Neutral opinion regarding whether there is a double standard of discipline for higher- and lower-ranking employees	16.46%	13.48% - 19.44%
Employees who do not know whether there is a double standard of discipline for higher- and lower-ranking employees	39.19%	35.09% - 43.30%
Among employees who had an opinion, those who agreed that there is a double standard of discipline for higher- and lower-ranking employees	54.82%	49.46% - 60.17%
Employees who strongly agree that there is a double standard of discipline for higher- and lower-ranking employees	15.48%	12.42% - 18.54%
Employees who agree that there is a double standard of discipline for higher- and lower-ranking employees	17.85%	14.55% - 21.15%
Employees who disagree that there is a double standard of discipline for higher- and lower-ranking employees	6.97%	5.47% - 8.48%
Employees who strongly disagree that there is a double standard of discipline for higher- and lower-ranking employees	4.04%	3.14% - 4.95%

Figure 8: FBI Employees' Perception of a Double Standard of Discipline for Higher-Ranking versus Lower-Ranking Employees (pp. 78-79)

Survey statement	Percentage	95% Confidence Interval
Non-SES employees who believe there is a double standard of discipline for higher- and lower-ranking employees (non-SES employees who answered "strongly agree" or "agree")	36.80%	32.84% - 40.76%
Non-SES employees who are neutral as to whether there was a double standard of discipline for higher- and lower-ranking employees	16.32%	13.33% - 19.31%

Survey statement	Percentage	95% Confidence Interval
Non-SES employees who believe there is not a double standard of discipline for higher- and lower-ranking employees (non-SES employees who answered “strongly disagree” or “disagree”)	4.80%	3.06% - 6.54%
Among non-SES employees who had an opinion, those who agreed that there is a double standard of discipline for higher- and lower-ranking employees	63.54%	58.16% - 68.92%

Table 8: Responses to Survey Question: *Based on your time working in the FBI, do you believe you would be treated fairly and objectively in the following situation:*

If I became the subject of a misconduct investigation. (p. 79)

	Percentage	95% Confidence Interval
I believe I would be treated fairly and objectively	40.87%	36.92% - 44.82%
I do not have an opinion one way or the other	43.96%	39.77% - 48.15%
I believe I would not be treated fairly and objectively	15.17%	12.07% - 18.27%

If FBI OPR was deciding whether to discipline me following a misconduct investigation. (p. 80)

	Percentage	95% Confidence Interval
I believe I would be treated fairly and objectively	40.59%	36.60% - 44.59%
I do not have an opinion one way or the other	44.98%	40.76% - 49.20%
I believe I would not be treated fairly and objectively	14.43%	11.41% - 17.44%

If I used the FBI’s internal appeals process to appeal a disciplinary decision made by OPR (p. 80)

	Percentage	95% Confidence Interval
I believe I would be treated fairly and objectively	38.22%	34.33% - 42.11%
I do not have an opinion one way or the other	50.49%	46.31% - 54.68%
I believe I would not be treated fairly and objectively	11.28%	8.46% - 14.11%

Table 9: FBI Employees’ Perceptions of Whether the FBI Appropriately Considered Various Factors When Choosing Discipline (pp. 82-83)

	Percentage (Confidence Interval)			
	The FBI gives too little consideration	The FBI gives proper consideration	The FBI gives too much consideration	Don’t Know
An employee’s past disciplinary history	10.68% (8.11% - 13.25%)	26.91% (23.61% - 30.21%)	1.39% (0.29% - 2.48%)	61.03% (57.20% - 64.85%)
Past discipline imposed against other individuals for similar misconduct	8.90% (6.61% - 11.19%)	24.76% (21.63% - 27.88%)	2.36% (1.22% - 3.51%)	63.98% (60.28% - 67.67%)
An employee’s job level and type of employment, including prominence of position	4.31% (2.61% - 6.02%)	19.61% (16.78% - 22.45%)	21.14% (17.77% - 24.51%)	54.94% (50.89% - 58.99%)
An employee’s tenure and overall job performance	14.50% (11.67% - 17.34%)	22.73% (19.65% - 25.81%)	2.93% (1.48% - 4.38%)	59.83% (55.96% - 63.71%)
Notoriety of the offense or its impact upon the reputation of the agency	4.60% (2.85% - 6.35%)	26.74% (23.52% - 29.97%)	9.89% (7.34% - 12.43%)	58.77% (54.91% - 62.64%)
Nature and seriousness of the offense, and its relationship to an employee’s duties, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated	12.10% (9.32% - 14.87%)	29.82% (26.41% - 33.22%)	0.84% (0.04% - 1.65%)	57.24% (53.31% - 61.18%)
Mitigating circumstances surrounding the offense, such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter	14.69% (11.85% - 17.52%)	22.94% (19.79% - 26.09%)	1.54% (0.50% - 2.57%)	60.84% (56.97% - 64.71%)

APPENDIX IV: FBI RESPONSE

U.S. Department of Justice
Federal Bureau of Investigation

Washington, D. C. 20535-0001
May 1, 2009

Honorable Glenn A. Fine
Office of the Inspector General
U.S. Department of
Justice 950 Pennsylvania
Avenue, NW Washington,
D.C. 20530

Dear Mr. Fine:

The Federal Bureau of Investigation (FBI) appreciates the opportunity to review and respond to your report entitled, "A Review of the Federal Bureau of Investigation's Disciplinary System" (hereinafter, "Report").

The Report documents the consistency, reasonableness, and timeliness of the FBI's disciplinary system. As the Report notes to the FBI's credit, the timeliness of all phases of the FBI's disciplinary process improved since Fiscal Year 2005, and the FBI's misconduct investigations were generally thorough, conducted in a consistent manner, and well documented in investigative reports. Likewise, the Report found most penalty and appellate decisions reviewed were reasonable.

Consistent with the Report's findings that most disciplinary investigations and the Office of Professional Responsibility (OPR) penalty decisions are reasonable, the Report's survey response shows that only 11 % to 15% of the FBI's workforce believed they would not be treated fairly and objectively if they were subject to the disciplinary process. We are heartened to learn that so few of our employees have concerns about the process. We commend OPR and the Inspections Division for their work.

We have made great strides in the disciplinary process over the

years and we remain committed to making the FBI's disciplinary process completely fair for all employees in all cases. In that regard, the Report finds that the investigations and penalty decisions for Senior Executive Service (SES) employees were reasonable and notes that during the more than three year period examined in the audit, there were only six SES appeals. While your report disagrees with the ultimate outcome in three of the six SES cases, we note that: 1) the appeals process has been changed; and 2) so few cases present an insufficient sample to draw conclusions regarding the overall fairness of the process.

In conclusion, based upon a review of the Report, the FBI concurs with all 16 recommendations directed to the FBI and has already implemented measures to resolve many of the identified issues. The FBI appreciates the professionalism exhibited by your staff in working jointly with our representatives to complete this audit. Enclosed herein is the FBI's response to the report. Please feel free to contact me should you have any questions.

Sincerely yours,

John S. Pistole
Deputy Director

Enclosure

**RE: REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S
DISCIPLINARY SYSTEM**

Recommendation 1: "Remind all employees on an annual basis that all allegations of misconduct must be promptly reported to the FBI Internal Investigations Section or to the OIG."

FBI Response: RESOLVED - The Federal Bureau of Investigation (FBI) concurs with this recommendation. Language will be inserted in all future Office of Professional Responsibility (OPR) Quarterly All Employee E-Mails to remind all employees to promptly report allegations of misconduct to the FBI Internal Investigations Section (IIS) or the Department of Justice (DOJ) Office of the Inspector General (OIG).

Recommendation 2: "Stress to field and headquarters divisions that they must forward all allegations of potential misconduct they receive to the Internal Investigations Section."

FBI Response: RESOLVED - The FBI concurs with this recommendation. The FBI will remind field and headquarters divisions of their duty to forward all allegations of potential misconduct to the FBI's IIS by including such a reminder in OPR's Quarterly All Employee E-Mails.

Recommendation 3: "Consider automating the allegation-reporting process so that allegations can be reviewed by the OIG electronically instead of in hard copy."

FBI Response: RESOLVED - The FBI concurs with this recommendation. The FBI will consider the effectiveness of automating the allegation-reporting process. Additionally, it remains the FBI's practice that upon receipt of each allegation, a summary is entered into the FBI's Case Management System (CMS) for electronic viewing by the DOJ/OIG. DOJ/OIG representative with access to CMS have the ability to view these summaries online at their discretion.

Recommendation 4: "Ensure that Internal Investigations Section personnel enter information regarding the OIG's review into FBI's Case Management System."

FBI Response: RESOLVED - The FBI concurs with this recommendation. The FBI will ensure that information regarding the OIG's review has been entered into CMS. The FBI will also upgrade the CMS program to build in a report mechanism which can query for any case(s) pending over 30 days which lacks information confirming the

OIG has reviewed the allegation.

Recommendation 5: "Require field and headquarters divisions to specify, when forwarding allegations to the Internal Investigations Section, the date they became aware of the potential misconduct. "

FBI Response: RESOLVED - The FBI concurs with this recommendation. The FBI will instruct both field and headquarters divisions to specify the date on which they became aware of potential misconduct. To accomplish this, the FBI will issue an All Office EC instructing that this information be provided. In addition, the FBI will include such a reminder in OPR's Quarterly All Employee E-Mails.

Recommendation 6: "Modify the FBI's Case Management System so that users can track the date that divisions become aware of potential misconduct."

FBI Response: RESOLVED - The FBI concurs with this recommendation. The CMS has been modified to include a field for entry of the date when the reporting entity first became aware of the potential misconduct. Based upon the foregoing, this recommendation can be closed.

Recommendation 7: "Require FBI OPR to document its consideration of precedent when a mitigated or aggravated penalty is imposed."

FBI Response: RESOLVED - The FBI concurs with this recommendation. FBI OPR will document its consideration of precedent in all cases, even those in which a standard penalty is imposed. OPR already serializes relevant cases from the precedent database into the Bureau's official disciplinary file for the AD's consideration. In the future, OPR will document, under Douglas Factor #6 of the addendum, its already thorough consideration of precedent in all substantiated cases.

Recommendation 8: "Require field and headquarters divisions to submit a Douglas Factors assessment in misconduct cases, except in unsubstantiated Delegated Investigation and Adjudication cases."

FBI Response: RESOLVED - The FBI concurs with this recommendation. The FBI will require field and headquarters divisions to submit a Douglas Factors assessment in misconduct cases, except in unsubstantiated Delegated Investigation and Adjudication cases.

Recommendation 9: "Clarify in policy that FBI OPR and appellate officials should not seek or consider unwritten information when making disciplinary decisions."

FBI Response: RESOLVED - The FBI concurs with this recommendation. The FBI will clarify in policy that FBI OPR and appellate officials should not seek or consider unwritten information when making disciplinary decisions. This policy is in keeping with current practice whereby anyone who wishes his/her views to be considered is required to submit them in writing for serializing into the Bureau's official disciplinary file (e.g., character references). Also in keeping with current practice, communications relating to matters other than disciplinary decision-making (e.g., responding to inquiries about process), are not serialized into the Bureau's official disciplinary files.

Recommendation 10: "Consider changing the adjudicative process to ensure that the proposing and deciding officials within FBI OPR are separate."

FBI Response: RESOLVED - The FBI concurs with this recommendation. The FBI will evaluate changing the adjudicative process to ensure that the proposing and deciding officials within FBI OPR are separate.

Recommendation 11: "Clarify FBI policies on the appellate officials' authority to modify findings of fact and penalties to resolve different interpretations of the policies by FBI OPR and appellate officials."

FBI Response: RESOLVED - The FBI concurs with this recommendation. The FBI will issue a policy clarification document to clarify that the Substantial Evidence Standard is the only appellate standard of review used in the FBI's internal appellate process. The policy clarification will emphasize that all aspects of the appellate review of OPR's decisions, including the appellate review of OPR's underlying findings of misconduct, as well as the sanctions assessed by OPR, will be reviewed using the Substantial Evidence Standard.

Recommendation 12: "Consider appointing a permanent appeals decision maker or board, rather than an appeals board composed of employees who rotate in and out of their board service after six months. In addition, if the permanent appellate decision-maker is a board rather than an individual, expand the board membership for SES appeals beyond only SES employees."

FBI Response: RESOLVED - The FBI concurs with this

recommendation. The FBI will begin to utilize one Disciplinary Review Board (DRB) to analyze both Senior Executive Service (SES) and non-SES appeals comprised of five voting members; one non-voting mid-level manager observer; one non-voting observer from the Office of Equal Employment Opportunity Affairs; and one non-voting observer from the Office of the General Counsel. Additionally, the FBI's IIS and OPR will each have the opportunity to delegate a non-voting representative to observe DRBs should either entity choose to do so.

The five voting members of the DRB will be comprised of the following individuals: 1) The AD, HRD, as the permanent voting SES chair; two voting SES employees selected by the Associate Deputy Director (ADD) or designee; and two voting non-SES mid-level managers selected by the ADD or designee.

The FBI will increase the term of service for the DRB from the current six month term to a term of one year to increase DRB members' experience and expertise. A finite term of one year will allow for members' promotions, transfers, lateral movements, or separation from management ranks without unduly disrupting the DRB process. The FBI will continue to evaluate the ability to create permanent positions for members of the DRB, given the nature of the FBI's management ranks where transfers, reassignments, promotions and even separations from management responsibilities occur with regular frequency.

Policy documentation reflecting these changes will be completed shortly.

Recommendation 13: "Require appellate officials to fully document in writing the reasons for their decisions, including their consideration of precedent and mitigating or aggravating factors."

FBI Response: RESOLVED - The FBI concurs with this recommendation. In conjunction with the policy clarification document which will be issued for Recommendations #11 and #12, discussed above, the FBI will reiterate what current FBI policy already requires; namely, that appellate officials fully document in writing the reasons for their decisions, including their consideration of precedent and mitigating or aggravating factors.

Recommendation 14: "In addition to recommendation 12, which recommends a change in the FBI's appellate process, ensure that FBI policies are applied consistently to all levels of employees at all stages of the disciplinary process."

FBI Response: RESOLVED - The FBI concurs with this

recommendation. In keeping with current practice, the FBI will continue to ensure that FBI policies are applied consistently to all levels of employees at all stages of the disciplinary process.

Recommendation 15: "Conduct a review of the personnel files and timekeeping records of all employees who were suspended since October 1, 2004, to verify that the suspensions were properly documented, that the employees served their suspensions, and the employees were not paid during their suspension periods."

FBI Response: RESOLVED - The FBI concurs with this recommendation. The FBI agrees to conduct a review of the personnel files and timekeeping records of all employees who were suspended since October 1, 2004, to verify that the suspensions were properly documented, that the employees served their suspensions, and that the employees were not paid during their suspension periods. In addition, the FBI will continue this practice hereinafter, to ensure that suspensions are properly served.

Recommendation 16: "Revise FBI policy to begin suspensions on the first day of the workweek, as is done by other Department components."

FBI Response: RESOLVED - The FBI concurs with this recommendation. A policy document will be issued revising FBI policy and informing all employees that the FBI will begin suspensions on the first day of the workweek. This revision will be implemented to ensure that the FBI, although an excepted service, has a suspension policy consistent with other Department of Justice components.

APPENDIX V: OIG ANALYSIS OF FBI RESPONSE

The Office of the Inspector General (OIG) provided a draft of this report to the Federal Bureau of Investigation (FBI) for its comments. The FBI's response is included in Appendix IV of this report. The OIG's analysis of the FBI's response and the actions necessary to close the recommendations are discussed below.

Recommendation 1. Remind all employees on an annual basis that all allegations of misconduct must be promptly reported to the FBI Internal Investigations Section or to the OIG.

Status. Resolved – open.

Summary of FBI Response. The FBI concurred with this recommendation and stated that it would insert language into FBI OPR's quarterly e-mails to all employees to remind them to promptly report allegations of misconduct to the FBI Internal Investigations Section or to the OIG.

OIG Analysis. The action planned by the FBI is responsive to our recommendation. Please provide the OIG with a copy of the first FBI OPR quarterly e-mail to include this language.

Recommendation 2. Stress to field and headquarters divisions that they must forward all allegations of potential misconduct they receive to the Internal Investigations Section.

Status. Resolved – open.

Summary of FBI Response. The FBI concurred with this recommendation and stated that it would remind field and headquarters divisions of their duty to forward all allegations of potential misconduct to the FBI's Internal Investigations Section by including such a reminder in FBI OPR's quarterly e-mails to all employees.

OIG Analysis. The action planned by the FBI is partially responsive to our recommendation. We believe it is important for the FBI to provide this reminder directly to field and headquarters division officials through an annual electronic communication to all offices, in addition to including a reminder in the quarterly e-mails distributed to all employees, since FBI OPR e-mails are not directive in nature and may not be read by all field and headquarters managers. Please provide the

OIG with a copy of the first FBI OPR quarterly e-mail to include this language and a copy of the first annual electronic communication to all offices reflecting this reminder.

Recommendation 3. Consider automating the allegation-reporting process so that allegations can be reviewed by the OIG electronically instead of in hard copy.

Status. Resolved – open.

Summary of FBI Response. The FBI concurred with this recommendation and stated that it would consider the effectiveness of automating the allegation-reporting process. The FBI further stated that it remains FBI practice that upon receipt of each allegation a summary is entered into the FBI's Case Management System, and that the Case Management System is accessible to the OIG Assistant Special Agent in Charge assigned to monitor allegations of FBI misconduct.

OIG Analysis. The action planned by the FBI is responsive to our recommendation. Please provide the OIG with a statement describing what options the FBI considered to automate the allegation-reporting process and the reasons supporting the option it chose.

Recommendation 4. Ensure that Internal Investigations Section personnel enter information regarding the OIG's review into the FBI's Case Management System.

Status. Resolved – open.

Summary of FBI Response. The FBI concurred with this recommendation and stated that it would ensure that information regarding the OIG's review has been entered into the FBI's Case Management System. The FBI also stated that it would upgrade the Case Management System by creating a query that identifies cases pending over 30 days that lack information confirming the OIG's review of the allegations.

OIG Analysis. The actions planned by the FBI are responsive to our recommendation. Please provide the OIG with a copy of a report that was generated using this query. Please also provide the OIG with a screen shot of the Case Management System showing that the fields that document the OIG's review of allegations have been filled in.

Recommendation 5. Require field and headquarters divisions to specify, when forwarding allegations to the Internal Investigations Section, the date they became aware of the potential misconduct.

Status. Resolved – open.

Summary of FBI Response. The FBI concurred with this recommendation and stated that it would issue an electronic communication to all offices instructing that this information be provided. The FBI also stated that it would include this instruction in FBI OPR’s quarterly e-mails to all employees.

OIG Analysis. The actions planned by the FBI are responsive to our recommendation. Please provide the OIG with a copy of the electronic communication, as well as a copy of the first FBI OPR quarterly e-mail including this language. Please also provide the OIG with a screen shot of the Case Management System showing records where this information has been provided and tracked.

Recommendation 6. Modify the FBI’s Case Management System so that users can track the date that divisions became aware of potential misconduct.

Status. Resolved – open.

Summary of FBI Response. The FBI concurred with this recommendation and stated that it has already modified the Case Management System to include a field that tracks the date that divisions first become aware of potential misconduct.

OIG Analysis. The action undertaken by the FBI is responsive to our recommendation. Please provide the OIG with screen shots to show how the FBI’s Case Management System was modified to track this information.

Recommendation 7. Require FBI OPR to document its consideration of precedent when a mitigated or aggravated penalty is imposed.

Status. Resolved – open.

Summary of FBI Response. The FBI concurred with this recommendation and stated that it will document its consideration of

precedent in all substantiated cases by including this information under its discussion of Douglas Factor number 6 in the FBI OPR addendum.

OIG Analysis. The action planned by the FBI is responsive to our recommendation. Please provide the OIG with a revised policy that includes this requirement for FBI OPR to document its consideration of precedent in all cases, including those in which a standard penalty is imposed. Please also provide the OIG with a copy of the first five FBI OPR addendums in cases in which a standard penalty was imposed that include this discussion of precedent under Douglas Factor number 6.

Recommendation 8. Require field and headquarters divisions to submit a Douglas Factors assessment in misconduct cases, except in unsubstantiated Delegated Investigation and Adjudication cases.

Status. Resolved – open.

Summary of FBI Response. The FBI concurred with this recommendation and stated that it would require field and headquarters divisions to submit a Douglas Factors assessment in misconduct cases, except in unsubstantiated Delegated Investigation and Adjudication cases.

OIG Analysis. The action planned by the FBI is partially responsive to our recommendation. We believe it also is important for the FBI to identify the steps it will take if a field or headquarters division fails to submit a Douglas Factors assessment. Please provide the OIG with a copy of an electronic communication to all offices reminding them of this requirement, as well as written procedures explaining how FBI OPR intends to respond if a division fails to submit a Douglas Factors assessment.

Recommendation 9. Clarify in policy that FBI OPR and appellate officials should not seek or consider unwritten information when making disciplinary decisions.

Status. Resolved – open.

Summary of FBI Response. The FBI concurred with this recommendation and stated that it would clarify in policy that FBI OPR and appellate officials should not seek or consider unwritten information when making disciplinary decisions. The FBI noted that its current practice is to require individuals who want to have their views considered to submit those views in writing. The FBI also noted that under its

current practice, communications that are not related to disciplinary decision-making are not included in disciplinary files.

OIG Analysis. The action planned by the FBI is partially responsive to our recommendation. We believe the FBI also should clarify how FBI OPR or appellate officials should respond to any attempts to provide them unwritten information related to disciplinary decision-making. Please provide the OIG with a copy of revised policies for the adjudicative and appellate phases of the disciplinary process that clearly state that FBI OPR and appellate officials should not seek or consider unwritten information when making disciplinary decisions. Please also provide the OIG with written procedures describing how FBI OPR or appellate officials should respond if anyone attempts to provide unwritten information that could be relevant to disciplinary decision-making.

Recommendation 10. Consider changing the adjudicative process to ensure that the proposing and deciding officials within FBI OPR are separate.

Status. Resolved – open.

Summary of FBI Response. The FBI concurred with this recommendation and stated that it would evaluate changing the adjudicative process to ensure that the proposing and deciding officials within FBI OPR are separate.

OIG Analysis. The action planned by the FBI is responsive to our recommendation. Please provide the OIG with a written response describing what options the FBI considered in evaluating whether to separate the proposing and deciding officials within FBI OPR are separate and the reasons supporting the option it chose.

Recommendation 11. Clarify FBI policies on the appellate officials' authority to modify findings of fact and penalties to resolve different interpretations of the policies by FBI OPR and appellate officials.

Status. Resolved – open.

Summary of FBI Response. The FBI concurred with this recommendation and stated that it would clarify its policies to state that the substantial evidence standard is the only standard of review used in the FBI's internal appellate process. The clarification will emphasize that

all aspects of the appellate review of FBI OPR's decisions, including both the review of FBI OPR's factual findings and the review of FBI OPR's penalty decisions, will be reviewed under the substantial evidence standard.

OIG Analysis. The action planned by the FBI is responsive to our recommendation. We believe the policy clarification also should be incorporated into the training materials provided to new members of the Disciplinary Review Board. Please provide the OIG with a copy of the policy clarification, as well as a copy of any training materials for new members of the Disciplinary Review Board that discuss this policy clarification.

Recommendation 12. Consider appointing a permanent appeals decision maker or board, rather than an appeals board composed of employees who rotate in and out of their board service after 6 months. In addition, if the permanent appellate decision-maker is a board rather than an individual, expand the board membership for SES appeals beyond only SES employees.

Status. Resolved – open.

Summary of FBI Response. The FBI concurred with this recommendation and stated that it would eliminate the use of an all-SES Disciplinary Review Board to hear SES appeals. Instead, all adverse appeals will now be decided by one Disciplinary Review Board consisting of the Assistant Director of the Human Resources Division as the permanent chair, two SES managers selected by the Associate Deputy Director or designee, and two non-SES mid-level managers selected by the Associate Deputy Director or designee. The FBI said that it would also extend the term of service on the Disciplinary Review Board from 6 months to 1 year. The FBI agreed to evaluate whether to make service on the Disciplinary Review Board a permanent assignment.

OIG Analysis. The actions planned by the FBI are partially responsive to our recommendation. We agree that the FBI should not have separate Disciplinary Review Boards for SES and non-SES employees, and that non-SES employees should serve on the Board deciding appeals for SES employees. However, we also believe that the FBI should consider appointing a permanent decision maker or Board, rather than having FBI employees rotate on and off the appellate board. We believe that a permanent appeals decision maker or board, rather than a board composed of SES employees who rotate in and out of their board service after 6 months, could improve the quality and consistency

of disciplinary decisions and could also help address concerns about bias in individual cases or the appearance of SES board members issuing more lenient decisions for their SES colleagues. In addition, appointing permanent decision makers could help improve the appellate process, in contrast to the current practice in which members rotate on and off the Disciplinary Review Board in temporary assignments that do not allow them to develop expertise in the disciplinary process.

To respond to this recommendation please provide the OIG with a copy of the revised policy reflecting any changes to the appellate process. Please also provide the OIG with a statement summarizing the steps the FBI is taking to evaluate whether to make service as an appellate decision maker a permanent assignment and the timeframe for completing that evaluation.

Recommendation 13. Require appellate officials to fully document in writing the reasons for their decisions, including their consideration of precedent and mitigating or aggravating factors.

Status. Resolved – open.

Summary of FBI Response. The FBI concurred with this recommendation and stated that when it issues the revised appellate policies in response to Recommendations 11 and 12, it will reiterate that FBI policy already requires appellate officials to fully document in writing the reasons for their decisions, including their consideration of precedent and mitigating or aggravating factors.

OIG Analysis. The action planned by the FBI is responsive to our recommendation. Please provide the OIG with a copy of the revised appellate policies reflecting this language, as well as a copy of training materials for new members of the Disciplinary Review Board that reiterate this requirement.

Recommendation 14. In addition to Recommendation 12, which recommends a change in the FBI’s appellate process, ensure that FBI policies are applied consistently to all levels of employees at all stages of the disciplinary process.

Status. Resolved – open.

Summary of FBI Response. The FBI concurred with this recommendation and stated that it would ensure that FBI policies are

applied consistently to all levels of employees at all stages of the disciplinary process.

OIG Analysis. The action planned by the FBI is partially responsive to our recommendation. In its response, the FBI did not state how it plans to ensure that FBI policies are applied consistently to all levels of employees at all stages of the disciplinary process. In light of our findings, please provide the OIG with a written description of the process the FBI intends to undertake that, at a minimum, identifies:

- the number of cases the FBI intends to review to ensure that its disciplinary policies are applied consistently,
- how the FBI will select the cases it reviews,
- the standards the FBI will use to determine whether policies were applied consistently in all cases reviewed, and
- the frequency with which the FBI intends to repeat the review.

Recommendation 15. Conduct a review of the personnel files and timekeeping records of all employees who were suspended since October 1, 2004, to verify that the suspensions were properly documented, that the employees served their suspensions, and the employees were not paid during their suspension periods.

Status. Resolved – open.

Summary of FBI Response. The FBI concurred with the recommendation and stated that it would review the personnel files and timekeeping records of all employees who were suspended since October 1, 2004. The FBI also said that it would continue the practice hereinafter to ensure that suspensions are properly served.

OIG Analysis. The actions planned by the FBI are responsive to our recommendation. Please provide the OIG with a spreadsheet containing the following information for each suspended employee:

- the employee's name;
- the file number of the investigative file (the 263 number);
- the total number of days in the employee's suspension, as stated in the final decision letter from FBI OPR or, in appealed cases, the final appellate decision letter;
- calculation of the number of workdays in the employee's suspension;
- the start date of the suspension, as reflected on the SF-50 in the employee's file or in BPMS;

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- the end date of the suspension, as reflected on the SF-50 in the employee's file or in BPMS;
 - confirmation that the total number of days in the suspension as reflected in the SF-50s or BPMS matches the final decision letter; and
 - confirmation that the employee's National Finance Center records reflect that the employee was in a suspended status for the correct number of workdays.

Please note that to close this recommendation, the FBI should confirm the accuracy of the National Finance Center records to establish that employees were not paid during their suspension periods, because the FBI considers the National Finance Center to be the official system of record for payroll and personnel actions.

Recommendation 16. Revise FBI policy to begin suspensions on the first day of the workweek, as is done by other Department components.

Status. Resolved – open.

Summary of FBI Response. The FBI concurred with this recommendation and stated that it would revise FBI policy to begin all suspensions on the first day of the workweek.

OIG Analysis. The action planned by the FBI is responsive to our recommendation. Please provide the OIG with a copy of the revised policy.

Please provide the OIG with the information described above before October 1, 2009.