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

Review of the Federal Bureau of Prisons' Disciplinary System

Report Number I-2004-008

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EXECUTIVE DIGEST

The Department of Justice's (Department) Office of the Inspector General (OIG) conducted this review to assess the Federal Bureau of Prisons' (BOP) disciplinary system. Specifically, we reviewed whether BOP employees properly reported misconduct; whether investigations were thorough; and whether disciplinary actions were reasonable, consistent, and timely. We examined data for BOP employee misconduct cases opened or closed in fiscal year (FY) 2003, reviewed files related to a sample of 85 randomly selected misconduct cases, interviewed BOP officials, and visited selected institutions. We also conducted e-mail surveys to collect views on the agency's disciplinary system from BOP deciding officials, investigators, and employees.

The BOP's disciplinary system is divided into two distinct phases: the investigative phase, when the BOP investigates alleged employee misconduct, and the adjudicative phase, when discipline is proposed and imposed for misconduct allegations that were sustained by the investigation. The BOP's Office of Internal Affairs (OIA) in the Executive Office of the Director oversees the investigative phase. OIA investigators, as well as investigators assigned to the institutions, conduct the investigations. The Labor Management Relations (LMR) branch in the Human Resources Management Division oversees the adjudicative phase.

RESULTS IN BRIEF

We found that the investigative phase of the disciplinary process was thorough and the case files we reviewed were well documented. We also found no significant differences in how BOP treated employees of different races, genders, job series, or grade levels during the disciplinary process.

However, we identified deficiencies in the BOP's disciplinary system that prevent it from ensuring that disciplinary decisions are reasonable, consistent, and timely. We found the following deficiencies: the BOP does not require all cases with sustained allegations to be fully adjudicated; deciding officials often fail to document their reasons for mitigating disciplinary proposals; the independence of the investigative and adjudicative phases of the disciplinary process can be compromised because the Chief Executive Officers (CEOs)[1] have a role in both phases; the BOP

[1] According to BOP Program Statement 3420.09, Standards of Employee Conduct, the CEO is defined as the Warden at institutions, the Director at staff training centers, the Community Corrections Manager at community corrections offices, the Regional (cont'd)

does not ensure that BOP employees receive similar penalties for similar infractions BOP-wide; the BOP does not have written timeliness standards for processing misconduct allegations; the BOP does not monitor the reasonableness, consistency, and timeliness of disciplinary decisions; and BOP employees do not report all employee misconduct. By correcting the issues identified above and detailed in the report, the BOP can better ensure that its disciplinary decisions are reasonable, consistent, and timely.

BOP investigations of employee misconduct appeared thorough.

In reviewing a random sample of 85 investigative case files, an OIG Special Agent concluded that the investigations appeared thorough and the files contained the information necessary to understand the actions taken and the conclusions reached during the investigative phase. Our surveys also indicated that the BOP's OIA investigators, deciding officials, and employees generally rated the investigative reports highly for their quality.

BOP disciplinary decisions sometimes did not appear to be reasonable.

Of 92 subjects with sustained allegations in our sample, the CEOs unilaterally took informal or no disciplinary action for 20 of these subjects charged with serious misconduct without fully adjudicating the cases or documenting their reasons for taking these actions. By bypassing the full adjudicative phase, the CEOs failed to involve other entities with review responsibilities. Given the serious nature of the sustained misconduct in these 20 cases, coupled with the minor penalties imposed and the absence of documented reasons for the decisions, the outcomes did not appear to be reasonable.

In their role as deciding officials, the CEOs mitigated the proposed discipline but failed to adequately explain the reasons for the mitigation in the decision letter for 36 of 92 subjects with sustained allegations. Both federal regulations and internal BOP guidelines state that deciding officials must provide reasons for mitigating penalties in the decision letter. Because of the lack of adequate documentation explaining why the proposed discipline was mitigated, the penalty imposed did not appear reasonable in relationship to the proposed discipline.

In addition, the CEOs can influence local investigative reports for cases in which they also will act as the deciding officials, thereby creating the potential for outcomes that are not reasonable. In other Department

Director at Regional Offices, and the Assistant Director of each division at the Central Office.

disciplinary systems we have reviewed, the deciding officials are not involved in the investigative phase. However, in the BOP, the CEOs have the dual responsibilities of reviewing and approving local investigations for misconduct cases in their institutions during the investigative phase and imposing discipline based on these investigations during the adjudicative phase. Because of the CEOs' dual responsibilities, the independence of the investigative and adjudicative phases, which helps to ensure that disciplinary outcomes are reasonable, can be compromised.

BOP guidance instructs CEOs to impose similar penalties for similar misconduct only at their current institution, which does not ensure that discipline is imposed consistently BOP-wide.

An equitable disciplinary system should ensure that employees receive substantially similar discipline for similar misconduct under similar circumstances. However, BOP guidance states that CEOs, when acting as deciding officials, need to be consistent only with their own prior decisions at the same facility. LMR staff also told us that imposing consistent discipline is only necessary for the current CEO at each facility because that is all that is required for imposed discipline to be deemed defensible if the subject appeals or grieves the decision to a third party. Consequently, two similarly situated subjects who committed similar misconduct under similar circumstances at the same institution could receive different penalties because the subjects had different CEOs. Under current BOP rules, the CEOs at each of the BOP's 113 institutions, 6 Regional Offices, 28 community corrections offices, 2 staff training centers, and 1 Central Office may impose different discipline for similar misconduct and circumstances.

BOP data did not indicate that the disciplinary process was affected by grade level, job series, gender, or race BOP-wide.

We analyzed BOP data to determine whether certain job and demographic characteristics of the population – job series, grade level, gender, or race – affected the disciplinary process. The data did not indicate that these characteristics were a factor in the disciplinary process. We also attempted to determine the consistency of discipline imposed BOP-wide for similar charges in our sample of 85 cases, but our sample did not include a sufficient number of cases with similar charges and circumstances to perform this type of consistency analysis.

The BOP did not consistently report, investigate, and adjudicate employee misconduct cases in a timely manner.

We found that the BOP did not report or process misconduct cases in a timely manner and that delays sometimes negatively affected the final discipline that was imposed. For example, our analysis showed that BOP management did not report 68 percent of serious misconduct allegations to the OIA within 24 hours, as required by BOP policy. The reporting time for these allegations averaged 16 days and, in one case, was 106 days. The OIA, in turn, did not report 23 percent of allegations to the OIG within the required time frames.

We also found that the BOP has not established written standards for the timely investigation and adjudication of employee misconduct. While officials in the OIA and the LMR provided us with informal time frames, they did not measure the timeliness of their respective processes against these standards even though they collected time-related data. Our analysis of the 85 case files showed that the average time for OIA investigators to complete their investigations was less than the OIA's informal time frame of 90 days. However, local investigators assigned to the institutions took an average of 103 days to complete the investigations, 43 days longer than the informal time frame of 60 days.

In those cases in our sample that were adjudicated, disciplinary action cases (suspensions of 14 days or less) exceeded the informal time frame established by the LMR by an average of 27 days and adverse action cases (suspensions of more than 14 days, demotions, or removals) exceeded the time frame by an average of 20 days. Because the BOP did not monitor the timeliness of a case as it proceeded through the disciplinary system, it was unable to identify systemic causes for these delays.

BOP employees did not report all employee misconduct as required.

In our e-mail survey of BOP employees, almost 92 percent of the respondents said that they had read the BOP's Standards of Employee Conduct and 96 percent said that they were aware of the BOP's requirements for reporting employee misconduct. However, 41 percent of the respondents who said that they had witnessed employee misconduct stated that they did not always report this misconduct to the proper authorities. Sixty-six percent of the respondents reported that they did not believe that their fellow employees always reported misconduct either.

Some BOP employees believed that the disciplinary system was not reasonable, consistent, or timely.

In our e-mail survey of a random sample of BOP employees, 74 percent of respondents who stated that they were aware of investigations that resulted in discipline believed that the discipline imposed was reasonable, while 26 percent found that the discipline imposed was not reasonable. In terms of consistency, almost 60 percent believed that employees were treated differently according to their job title or grade level. Forty-three percent believed that the gender or race of the subject affected the discipline imposed. BOP employees who commented that employees were treated differently generally stated that higher-graded staff, non-correctional officers, white staff, or males received more favorable treatment than other BOP employees. Regarding timeliness, approximately 43 percent did not believe that misconduct investigations were handled in a timely manner, and 34 percent believed that the adjudication of discipline was not timely. Several employees commented on the negative effect that untimely resolution of an allegation of misconduct has on an employee's ability to progress in his or her career, as well as on employee morale.

RECOMMENDATIONS

We make ten recommendations to help the BOP ensure that its disciplinary decisions are reasonable, consistent, and timely. The recommendations focus on ensuring that the investigative and adjudicative phases of the disciplinary system function independently and that sustained misconduct allegations are fully adjudicated; the reasons for mitigating discipline are adequately documented; BOP employees receive similar penalties for similar infractions BOP-wide; misconduct cases are investigated and adjudicated in a timely manner; and that the BOP develops controls to monitor disciplinary decisions for consistency throughout the BOP.

We recommend that the BOP:

1. Reinforce the existing policy that BOP employees report allegations of employee misconduct to the proper authorities as required.

2. Require that CEOs forward cases with sustained allegations through the full adjudicative phase.

3. Ensure that when the deciding official mitigates the proposed discipline, the decision letter contains an adequate explanation of the reasons.

4. Remove the CEOs from reviewing and approving investigative reports of employee misconduct for cases in which they will act as the deciding official by implementing an alternative review process that preserves the independence of the investigative and adjudicative phases.

5. Reinforce the existing policy that all required documents be maintained in the disciplinary files.

6. Develop procedures to ensure that discipline is imposed consistently BOP-wide, and review discipline for consistency across the agency periodically after these procedures are implemented.

7. Reinforce the existing policy that CEOs report allegations of employee misconduct to the OIA within required time frames.

8. Reinforce the existing policy that the OIA reports misconduct allegations to the OIG within required time frames.

9. Establish written time guidelines for the investigative and adjudicative phases of the disciplinary system.

10. Require that the BOP Program Review Division periodically review a sample of closed disciplinary case files to assess whether the disciplinary decisions were reasonable, consistent, and timely.

TABLE OF CONTENTS

BACKGROUND

Federal laws and regulations governing the discipline of federal employees are found in the Civil Service Reform Act of 1978; Title 5, Code of Federal Regulations, Part 752, Adverse Actions; and 5 United States Code, Chapter 75, Section 7501-7504, 7511-7514. These laws and regulations establish the legal framework for federal agencies to address employee misconduct through disciplinary actions, such as suspensions, demotions, and removals. In addition to formal disciplinary action, agencies may also impose informal discipline, such as oral reprimands. According to Title 5, agencies may discipline employees "for such cause as will promote the efficiency of the service." In other words, an agency can impose discipline when an employee's misconduct interferes with the agency's ability to carry out its mission.

Agencies establish disciplinary systems to maintain orderly and productive work environments by communicating to employees the conduct that is not acceptable. An agency's table of offenses and penalties defines the actions that violate the standards of conduct and hinder the performance of its mission. The table of offenses also defines the range of discipline that the agency may impose when an employee commits misconduct. When an agency imposes discipline, it is conveying to the employee the need to recognize, correct, or improve substandard conduct.

Independent investigative and adjudicative phases maintain checks and balances within a disciplinary system. An equitable disciplinary system provides reasonable, consistent, and timely discipline to all employees without regard to external factors such as an employee's position, race, or gender.

Federal agencies have discretion in determining disciplinary penalties; the only requirement is that the penalty be reasonable. To help determine reasonability, in a 1981 decision the Merit Systems Protection Board (MSPB) established 12 factors, known as the "Douglas factors" (see Appendix I for a description of the factors), for agency officials to consider when determining disciplinary actions.[2]

[2] The MSPB is an independent, quasijudicial 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 (CSRA), Public Law 95-454. The CSRA, which became effective January 11, 1979, replaced the Civil Service Commission with three independent agencies: the Office of Personnel Management (OPM), which manages the federal work force; the Federal Labor Relations Authority (FLRA), which oversees federal labor- (cont'd)

The Douglas factors are used to either mitigate (reduce) or aggravate (increase) a proposed penalty when an employee commits an offense. For example, a long-term employee with no prior disciplinary history and an excellent performance record may receive a mitigated penalty compared with an employee committing the same offense who has been disciplined previously and has a poor performance record.

Employees who are suspended for more than 14 days, demoted, or removed have the right to appeal to the MSPB. In the 1981 Douglas decision, the MSPB established its authority to mitigate agency-imposed penalties that it determines are "clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable."[3] The MSPB also stated that it would review penalties to determine whether the agency "exercised management discretion within tolerable limits of reasonableness" and modify penalties if it found that "the agency's judgment clearly exceeded the limits of reasonableness."[4]

Overview of BOP's Disciplinary System

The Federal Bureau of Prisons' (BOP) disciplinary system consists of two distinct phases: the investigative phase, when the BOP investigates alleged employee misconduct, and the adjudicative phase, when discipline is proposed and imposed for sustained misconduct allegations. The BOP's Office of Internal Affairs (OIA) in the Executive Office of the Director oversees the investigative phase. The Labor Management Relations (LMR) branch in the Human Resources Management Division oversees the adjudicative phase.

The primary personnel involved in the investigative phase are OIA investigators, local BOP investigators located at the institutions, and the Chief Executive Officers (CEOs). The OIA investigates allegations of employee misconduct and monitors and approves investigations conducted by local BOP investigators at the institutions. Currently, the OIA staff includes 29 positions (1 vacant) – 15 located in Washington, D.C. (the Chief of OIA, 1 Supervisory Special Agent, 8 investigators, and 5 support staff)

management relations; and the MSPB. The MSPB assumed the employee appeals function of the Civil Service Commission and was given new responsibilities to perform merit systems studies and to review the significant actions of the OPM.

[3] *Curtis Douglas v. Veterans Administration*, 5 MSPR 280, 5 MSPB 313 (1981).

[4] *Thomas v. Department of Defense*, 66 MSPR 546, 551, aff'd 64 F.3d 677 (Fed. Cir. 1995).

and 13 located in Denver, Colorado (1 Supervisory Special Agent, 8 investigators, and 4 support staff). The local investigators – 129 Special Investigative Supervisors (SIS) and 48 Special Investigative Agents (SIA) – are assigned to institutions and Regional Offices and perform employee misconduct investigations referred by the OIA, as well as inmate misconduct investigations.[5] The CEOs review and approve all investigations conducted at their institutions. According to BOP Program Statement 3420.09, Standards of Employee Conduct, the CEO is defined as the Warden at institutions, the Director at staff training centers, the Community Corrections Manager at community corrections offices, the Regional Director at Regional Offices, and the Assistant Director of each division at the Central Office. Investigations with sustained allegations generally cannot be adjudicated until the CEO and the OIA have approved the investigation.

The primary personnel involved in the adjudicative phase are the proposing officials, Human Resources (HR) staff at the institutions and the regions, LMR staff, and the deciding officials. The proposing officials propose discipline for misconduct allegations that were sustained in the investigative phase.[6] The deciding officials, who determine and impose the discipline, are normally the CEOs of the institutions and other BOP offices and facilities. The HR staff at the institutions, with assistance from the regions, drafts the proposal letters, which inform the subjects of the proposed penalty, and decision letters, which inform the subjects of the penalty that will be imposed. The LMR staff (eight employee relations specialist positions in Washington, D.C., two of which are vacant, and five positions in Phoenix, Arizona) assists HR staff at the regions and institutions by providing technical advice and guidance, and reviewing and approving all proposal and decision letters. Institutions report to either of the two LMR offices, depending on their geographic location. The LMR also

[5] In addition to its 113 institutions and 6 Regional Offices, the BOP also conducts operations from its Central Office, 2 staff training centers, and 28 community corrections offices. The Central and Regional offices provide administrative oversight and support to the institutions and community corrections offices. Community corrections offices oversee community corrections centers and home confinement programs.

[6] BOP Program Statement 3000.02, section 750.1, Processing Discipline and Adverse Actions (November 1, 1993), describes the officials who normally serve as proposing and deciding officials. Generally, the supervisor of the employee is the proposing official. For example, at institutions the department head, Associate Wardens, Assistant Superintendents, and Superintendents of Federal Prison Industries are proposing officials for subordinate staff. Deciding officials are typically the supervisors of the person who served as the proposing official. At institutions, the Warden generally acts as the deciding official for all cases proposed by a subordinate.

represents the BOP in third-party hearings (e.g., MSPB cases, arbitration, and grievance procedure cases).[7]

The Investigative Phase

BOP employees are required to report immediately to the CEO, the OIA, or the Department of Justice's (Department) Office of the Inspector General (OIG) any attempted or actual violation of the Standards of Employee Conduct, BOP regulations, or law. According to BOP Program Statement 1210.24, once a CEO becomes aware of the misconduct allegation, he or she must classify the allegation and report it to the OIA for review. This Program Statement also defines the three classifications of misconduct allegations.

- Classification I: allegations that would constitute a prosecutable offense or would be considered serious misconduct (e.g., physical or sexual abuse, bribery, extortion). According to the OIA's "Report for Fiscal Year 2003," of the 4,193 cases opened in FY 2003, 788 (18.8 percent) were Classification I cases.

- Classification II: allegations concerning violations of rules, regulations, or laws that are not likely to result in criminal prosecution but that constitute serious misconduct (e.g., threats, misuse of government materials, sexual harassment). In FY 2003, the BOP opened 1,287 (30.7 percent) Classification II cases.

- Classification III: allegations that ordinarily have less impact on institutional operations (e.g., unprofessional conduct, failure to follow instructions). In FY 2003, the BOP opened 2,118 (50.5 percent) Classification III cases.

The CEO must report Classification I or II allegations within 24 hours to the OIA on a Referral of Incident Form, along with any related documents (e.g., affidavits, photos, medical reports, memoranda). Classification III allegations are compiled and reported monthly.[8] CEOs investigate

[7] In FY 2003, BOP employees appealed 118 cases to the MSPB; the BOP won 77 (65 percent) cases, lost 5 (4 percent), settled 35 (30 percent), and had 1 case mitigated (1 percent). Of the 207 cases brought before an arbitrator, the BOP won 124 (60 percent), lost 20 (9 percent), settled 58 (28 percent), and had 5 cases mitigated (2 percent).

[8] According to Wardens we interviewed, if there is any question or concern as to the correct classification of the allegation, they contact the OIA for clarification. The (cont'd)

Classification III allegations locally, using assigned SIS or SIA staff, prior to notifying the OIA, if the subject is a bargaining unit employee or is a non-bargaining unit employee at the GS-12 level or below. CEOs must notify the OIA prior to initiating any Classification III investigation involving non-bargaining unit employees at the GS-13 level or above.

After receiving the allegation, the OIA reviews the associated documents for completeness and correct classification. The OIA then forwards the allegation to the OIG for review.[9] Classification I and II allegations must be reported to the OIG within 24 or 48 hours, respectively. Classification III allegations that are complex and may result in severe disciplinary action also must be reported to the OIG within 48 hours. All other Classification III cases must be reported to the OIG on a monthly basis.[10] Depending on the seriousness of the allegation, the OIG determines whether to investigate the allegation or refer it back to the OIA.[11] If the OIG refers the allegation back to the OIA, the OIA decides whether to conduct the investigation itself or refer it back to the institution where the allegation originated for local investigation by SIS/SIA staff.

A BOP investigation usually consists of interviewing the subject(s) of the allegation, the complainant(s), the relevant witnesses, and collecting evidence. Once the investigation is completed, the investigator prepares an investigative report that includes a determination whether the evidence sustains the allegation. For local investigations, the CEO reviews the case file and investigative report for content and completeness before forwarding it to the OIA. The OIA reviews the investigative file for completeness,

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classification can change as more information is learned prior to or during the investigation.

[9] The Inspector General Act of 1978, as amended, and Attorney General Order 1931-94, dated November 8, 1994, require misconduct allegations concerning BOP employees and contractors to be reported to the OIG for review and disposition.

[10] The OIG Assistant Inspector General for Investigations issued a memorandum to the BOP, dated July 1, 1998, which outlined guidelines for reporting misconduct allegations to the OIG. This memorandum provided a general breakdown of misconduct allegations into three separate classes, with corresponding reporting periods to the OIG depending on the severity of the allegation. The BOP cannot initiate Classification I investigations prior to receipt and classification of the allegation by the OIG. Classification II investigations can be started, but the OIG reserves the right to initiate its own investigation. Classification III investigations can begin prior to OIA or OIG notification.

[11] The OIG normally investigates allegations that involve criminal matters or non-criminal allegations involving senior BOP officials.

accuracy, and to determine whether the investigator's conclusion is supported by the evidence.[12] If the CEO or the OIA questions the completeness or accuracy of the local investigative report (e.g., whether certain questions were asked, a specific witness was interviewed, documents were missing), either can request further investigative work before approving the investigative report. If the OIA or the OIG conducted the investigation, the CEO is provided with a copy of the investigative report and the related affidavits.

If the investigation does not sustain the allegation, the disciplinary process ends and the subject is notified of the result within seven working days. If the investigation sustains the allegation, the relevant investigative case file documents are forwarded to the HR staff at the institution to begin the adjudicative phase of the disciplinary process.

The Adjudicative Phase

The institution HR staff receives the investigative file from the CEO and reviews the content to recommend appropriate discipline. This recommendation is based on the specifics of the case, the discipline previously proposed in similar cases by the current CEO at that institution, and the range of discipline described in BOP's Standard Schedule of Disciplinary Offenses and Penalties (its table of offenses).[13] The institution's HR staff, in conjunction with the proposing official, determines the appropriate proposed discipline.

Once the HR staff and proposing official agree on the proposed discipline, the HR staff prepares a draft proposal letter that describes the

[12] BOP Program Statement 1210.24, Office of Internal Affairs (May 20, 2003), requires that the OIA review and approve Classification I and II investigation reports prior to any disciplinary or adverse action being proposed. For Classification III investigations, the institution sends a one-page case summary to the OIA after it takes disciplinary or adverse action.

[13] The BOP table of offenses, which is attached as part of BOP Program Statement 3420.09, Standards of Employee Conduct, serves as a guideline when determining the appropriate level of discipline. The table was last revised in 1999. The table lists a range of suggested discipline for the first, second, and third offense. The range for most offenses is "intentionally broad," with penalties ranging from a Letter of Reprimand to removal. The table has 54 categories of offenses. Misconduct allegations can fall within one or more categories, depending on the unique factors and circumstances associated with the event. Additionally, the LMR specifies the type of misconduct through the application of approximately 204 case codes it uses to determine discipline.

charge(s); any specific details regarding the case; the proposed disciplinary or adverse action; and the rights to which the employee is entitled under applicable laws, rules, or regulations.[14] The institution forwards a draft of the proposal letter with the accompanying case file to HR staff at one of six BOP Regional Offices for review and comment.[15] The regional HR staff reviews the case file to ensure that it supports the charges. In addition, the staff reviews the proposal letter for accuracy of the charge; scrutinizes the letter's content, format, and language; and identifies necessary improvements or corrections. The institution HR staff revises the proposal letter accordingly and forwards it to LMR staff for review.

The LMR staff performs a final review of the proposal letter, also focusing on the accuracy and correctness of the stated charge, whether the evidence supports the charge, and whether the penalty proposed would be defensible in a third-party review. The LMR sends the letter back to the institution, where HR staff incorporates changes and finalizes the proposal letter. The proposing official reviews the letter, signs it, and gives it to the subject, who also reviews and signs the proposal letter. The proposal letter states that the subject has 10 calendar days to respond orally or in writing to the deciding official on proposed disciplinary actions and 15 days for proposed adverse actions. These responses become part of the case file.

After the subject reviews and signs the proposal letter, it is forwarded along with the case file to the deciding official for review. The deciding official applies the relevant Douglas factors – MSPB guidance on selecting reasonable and consistent penalties – and considers any verbal or written response provided by the subject before determining and imposing the penalty. The deciding official can only agree with or mitigate the penalty documented in the proposal letter. The institution HR staff reviews similar case histories for consistency, clarifies issues with the deciding official if necessary, and prepares the decision letter, following the same review process used for the proposal letter with the region and the LMR. The HR staff at the institution, region, and the LMR should ensure that the reasons for the imposed discipline are fully explained in the decision letter. This

[14] The term *disciplinary action* is used to describe proposed or imposed penalties ranging from a Letter of Reprimand to suspensions of 14 days or less (this does not include an oral reprimand, which is defined as informal discipline). The term *adverse action* encompasses penalties ranging from suspensions over 14 days to reductions in pay or grade to removal. An employee can only appeal *adverse actions* to the MSPB.

[15] HR staff at the local and regional level refer to a general information and guidance manual provided by the LMR known as "Paint-by-Numbers" for direction on questions, scenarios, and templates for formatting proposal and decision letters. This manual is undergoing revision, which should be completed by the fall of 2004.

explanation should include a full and complete discussion of the relevant Douglas factors. Once the review process is completed, the deciding official presents the decision letter containing the final decision, the penalty, and the date the penalty begins to the subject for review and signature. The decision letter also advises the subject of actions available if the subject believes that the proposed discipline is wrong or excessive (e.g., filing a grievance or requesting arbitration).

Once the adjudicative phase is completed, the institution provides the OIA with copies of the proposal and decision letters and the Standard Form SF-50 (Notification of Personnel Action), if required for the penalty, for its investigative files. The Chief of OIA determines when to close the case file officially and notifies the CEO when this occurs.[16]

In FY 2003, the OIA closed 2,942 misconduct investigations involving 3,715 BOP subjects.[17] In these cases, allegations for 1,859 subjects were sustained, while the allegations for the remaining 1,856 subjects were either not sustained, determined to be unfounded, or administratively closed. Table 1 shows the outcomes for subjects with sustained allegations.

Table 1: Outcomes for BOP Employees with Sustained Allegations

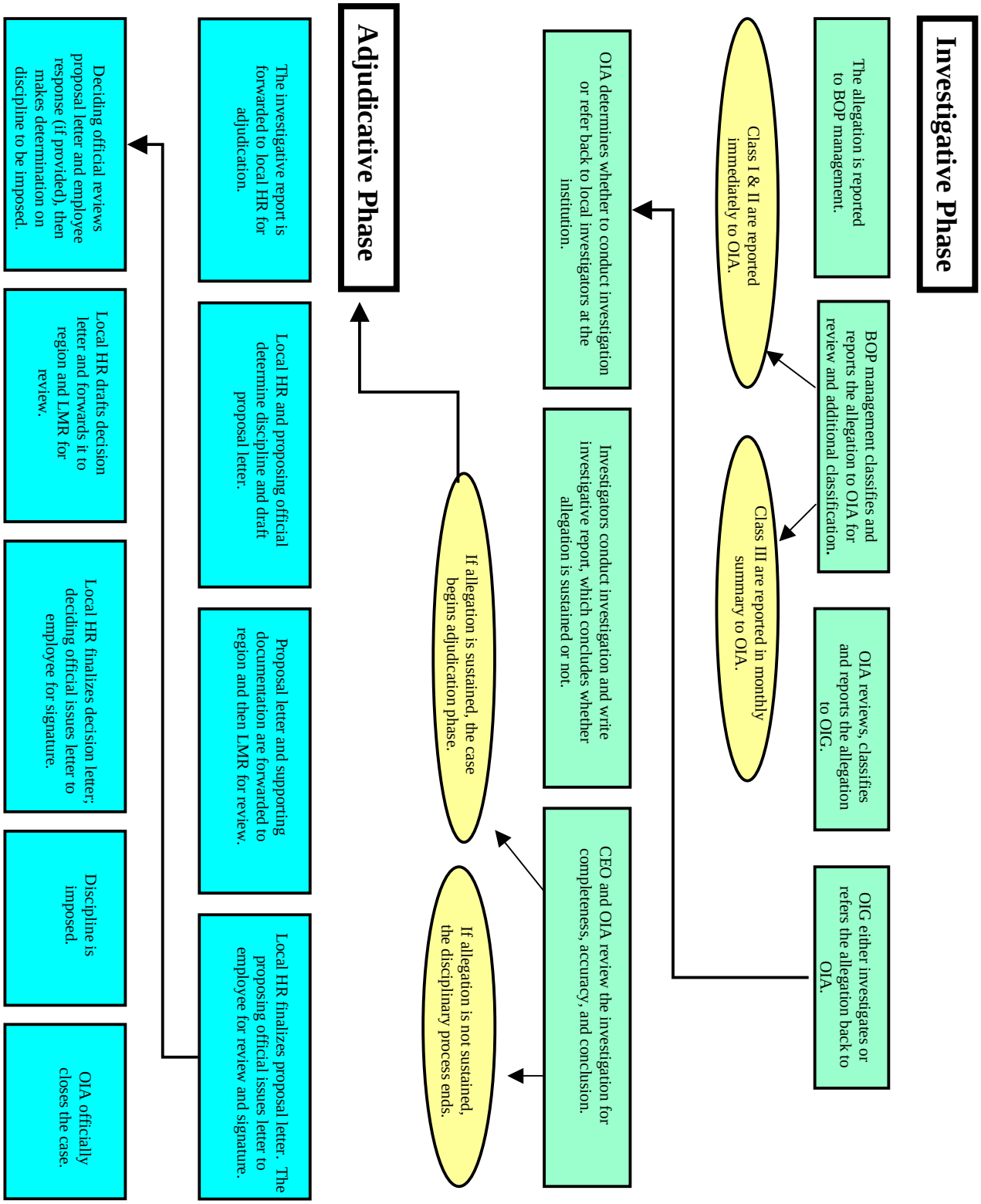
Penalty Imposed	Number of Subjects	Percentage of Total Subjects
Suspension	494	26.6
Written Reprimand	434	23.3
No Penalty – No Action Taken	399	21.5
Oral Reprimand	257	13.8
No Penalty – Subject Resigned	132	7.1
Removal	50	2.7
No Penalty – Subject Retired	27	1.5
Other Type of Penalty (e.g., Last Chance Agreement or Settlement Agreement)	23	1.2
Demotion	20	1.1
Combination of Penalties	17	0.9
No Penalty – Subject Reassigned	4	0.2
Penalty Missing	2	0.1
Totals	**1,859**	**100.0**

Source: OIG analysis of BOP data

[16] A flowchart of the BOP's disciplinary process is contained in Chart 1.

[17] Some of these subjects may have been under investigation more than once.

Chart 1: Flowchart of BOP's Disciplinary System



Workload of BOP Staff Involved in Disciplinary System

During FY 2003, according to OIA statistics, 4,193 investigations of BOP employees were opened and 3,627 were closed.[18] These statistics include cases investigated by other Department entities (e.g., the OIG, the Federal Bureau of Investigation (FBI), the Civil Rights Division). The 4,193 opened cases represented an increase of 16 percent from the 3,629 cases opened in FY 2002. Of the 4,193 cases opened in FY 2003:

- SIA/SIS investigators conducted 3,412 (81 percent) investigations;[19]

- OIA investigators conducted 516 (12 percent) investigations, an average of 32 per investigator, and also monitored an average of 213 local investigations per investigator; and

- Other Department entities investigated the remaining 265 (6 percent) cases.

In FY 2003, information involving 1,719 employees with sustained misconduct allegations was forwarded through a BOP region and the LMR for adjudication. This averaged 286 cases reviewed by HR staff at each of the six BOP regions and approximately 156 cases reviewed by each LMR Employee Relations Specialist.

[18] Of the 3,627 investigations closed in FY 2003, 2,942 involved BOP employees.

[19] Of these cases, 2,118 were Classification III, for which a one-page summary of the investigation is all that is required for the OIA file and case closure.

PURPOSE, SCOPE, AND METHODOLOGY

Purpose

The OIG conducted this review to assess the BOP's disciplinary system. Specifically, we reviewed whether BOP employees properly reported misconduct; whether investigations were thorough; and whether disciplinary actions were reasonable, consistent, and timely.

Scope

We reviewed all BOP employee misconduct cases that were opened or closed in FY 2003. We did not review cases involving contract/halfway house employees, employees at private correctional facilities under contract to the BOP, state or local employees at facilities with a BOP Intergovernmental Agreement, and Public Health Service employees working at BOP facilities.[20]

Methodology

Site Visits. We visited the Federal Correctional Institution (FCI) and Federal Medical Center (FMC) in Butner, North Carolina, and the FCI in Petersburg, Virginia. At these institutions, we interviewed CEOs (i.e., the Wardens), Employee Relations Specialists, SIS/SIA investigators, and a number of supervisors who acted as proposing officials for disciplinary actions in FY 2003.

Interviews. We conducted interviews with officials in the BOP Central Office, Regional Offices, and institutions. In the BOP Central Office, we interviewed the Director of the Human Resources Management Division (HRM), the Chief and the two Supervisory Special Agents in the OIA, and the Chief and Deputy Chief of the Labor Management Relations and Security Branch. In addition to an on-site interview with the Human Resource Administrator of the Mid-Atlantic Regional Office in Annapolis Junction, Maryland, we interviewed by telephone the Human Resource Administrators in the BOP's other five regions and members of the HR staff in 12 institutions (2 institutions from each of the 6 regions that had the highest number of allegations of employee misconduct in FY 2003). We also

[20] Intergovernmental Agreements are essentially contracts that the BOP enters into with state and local governments to house BOP inmates in their correctional facilities.

interviewed Special Agents and Program Analysts in the OIG's Investigations Division.

Sample Review. From misconduct investigations involving BOP employees closed in FY 2003, we randomly selected 100 cases for review – 50 Classification I cases, 30 Classification II cases, and 20 Classification III cases. Of these 100 cases, we were able to review the OIA or local BOP investigative reports for 85 cases.[21] These 85 cases included 206 subjects. We reviewed the investigative files for these 85 cases as well as documents in related disciplinary files of subjects with sustained allegations. An OIG Special Agent also reviewed the investigative case files to assess their thoroughness.

Data. The BOP provided us with data from the LAWPACK database, maintained by the OIA, which contained information on the reporting and investigation of alleged employee misconduct, the conclusion of these investigations, and the discipline imposed. The OIA enters and tracks misconduct allegation and related case file information in LAWPACK. LAWPACK, which the OIA has used since October 2000, contains data regarding the allegation, the subject of the allegation, and case disposition. We used LAWPACK data to analyze the investigations of employee misconduct, including the timeliness of reporting allegations to the proper authorities, the disposition of the investigations, and the consistency of disciplinary actions based on various factors, such as job series or gender.

The BOP also provided us with information regarding the misconduct cases as they proceed through the adjudicative phase. We used this information, including the charges, the case codes, and the proposed and final discipline, to analyze the adjudication of the disciplinary cases, including the timeliness of issuing proposal and decision letters and any changes that were made in the proposed discipline from the proposal to the decision letter.

We also reviewed BOP program statements and manuals regarding the disciplinary system; OIA annual reports; OIG Investigations Division data relating to the BOP's disciplinary system; previous OIG and BOP reports about discipline; and federal and departmentwide laws and regulations applicable to disciplinary systems.

[21] We did not review 13 of the 85 cases because they were investigated by the OIG or the FBI, 1 case because it was administratively closed, and 1 case because the subject was not a BOP employee.

Surveys. We conducted an e-mail survey of a random sample of BOP employees to determine their experience with and perception of the BOP's disciplinary system. Of the approximately 33,600 BOP employees, we sent surveys to 441 and received 275 responses. Appendix II contains confidence intervals regarding these responses. In choosing the respondents' comments included in the body of this report, we chose those that were the most representative of the opinions expressed by the respondents.

We also sent an e-mail survey to CEOs who served as deciding officials in FY 2003 to obtain their views of the disciplinary system. Of the 95 individuals we surveyed, 63 responded.

Finally, we surveyed all 18 OIA investigators by e-mail for their assessment of the investigative phase, including their workload, the monitoring of local investigations, and their training needs. All 18 OIA investigators responded to our survey.

RESULTS OF THE REVIEW

INVESTIGATIONS OF EMPLOYEE MISCONDUCT

We found that BOP employees did not report all employee misconduct as required. However, when alleged misconduct was reported, our review found that BOP investigations of employee misconduct were thorough.

BOP employees failed to report employee misconduct. The BOP's Standards of Employee Conduct (Program Statement 3420.09) require that employees "Immediately report to their CEOs, or other appropriate authorities, such as the Office of Internal Affairs or the Inspector General's Office, any violation or apparent violation of these standards." In our e-mail survey of BOP employees, almost 92 percent of the respondents said that they had read the Standards of Employee Conduct and 96 percent said that they were aware of the BOP's requirements for reporting employee misconduct.[22] However, of the respondents who said they had witnessed employee misconduct, 41 percent stated that they did not always report this misconduct to the proper authorities. Sixty-six percent reported that they did not believe that their fellow employees always reported misconduct.

One case in our sample of investigative files involved a Warden who did not report an allegation of misconduct. According to the BOP's Program Statement 1210.24, "Upon becoming aware of *any* [emphasis added] possible violation of the Standards of Employee Conduct, the CEO… is to report the violation to OIA." The OIA received an anonymous complaint alleging that a BOP employee was selling prescription drugs at the institution and that the Warden was aware of the allegation but never referred it to the OIA as required. Instead, the Warden directed SIS staff to make the case an "informational file." The OIA opened a Classification I investigation regarding the sale of the prescription drugs and subsequently charged the Warden with Failure to Report Misconduct. The OIA investigation revealed that the Warden had been notified of the allegation but did not refer it to the OIA. The Warden stated in his affidavit, "based on my interpretation and review of all documentation, it was my decision to refer the case back to the SIA office as an information file… I believe I was acting within the scope of my position… ." The OIA investigation found

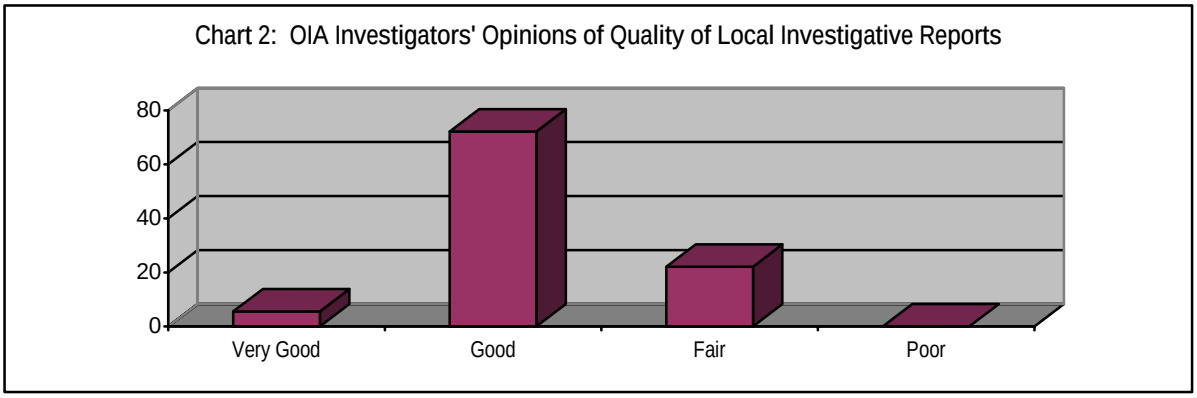
[22] BOP employees are required to sign the Standards of Employee Misconduct when they begin employment with the BOP. In addition, employees sign these standards every time that they are updated and also receive annual training on the standards.

insufficient evidence to support the allegations against the staff member or the Warden and stated that his decision not to refer the case "was a 'judgement call' on his part [and] was within the scope of the Warden's position." However, the scope of the Warden's authority to make such judgment calls is not defined in any BOP policy.

In this case, the OIA's decision that the Warden could use his judgment violated its own policy that "any possible violation" be reported to the OIA. This is illustrated by the fact that the Warden determined that this case did not meet even Classification III reporting criteria (as evidenced by his not including the case in the monthly report to OIA), while the OIA later assigned it Classification I status.

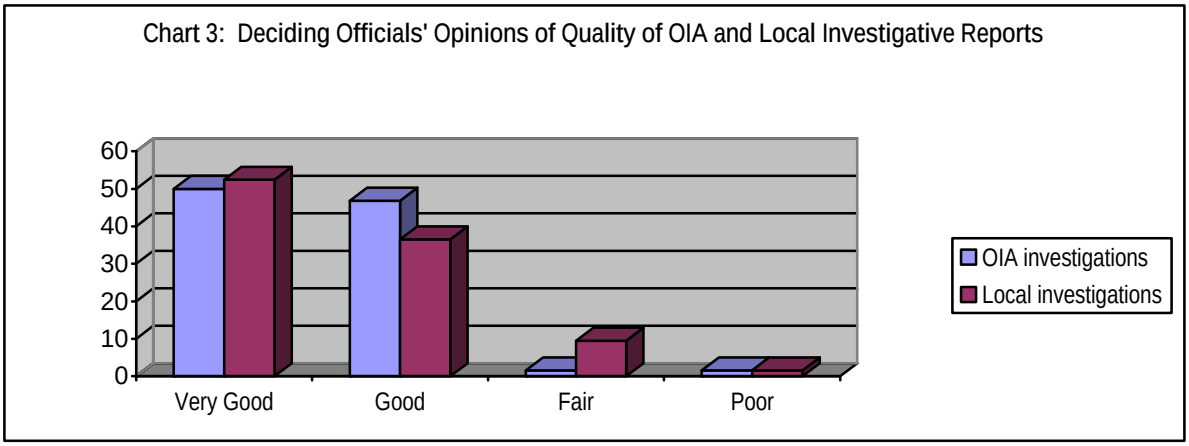
BOP investigations of employee misconduct were thorough. An OIG Special Agent reviewed a random sample of 85 investigative files and found that local investigations, which are reviewed by the CEO and the OIA before closure, and OIA investigations were thorough. The OIG Special Agent concluded that the allegations were properly classified, that the BOP investigator interviewed relevant witnesses and examined the necessary documents, and that the investigative report contained the information necessary to understand the actions taken during the investigation. The OIG Special Agent agreed with the investigators' conclusions regarding whether the allegations should or should not be sustained and rated the 85 investigations as either "very good" or "good."

We also surveyed OIA investigators, deciding officials, and BOP employees for their opinions of misconduct investigations. We surveyed OIA investigators to obtain their opinions of the quality of local investigative reports because they monitor and review local investigations completed at the institutions. Seventy-eight percent of OIA investigators responded that local investigative reports were of "very good" or "good" quality (Chart 2).



Source: OIG analysis of OIA Investigator Survey

We surveyed deciding officials to obtain their opinions on the quality of both OIA and local investigative reports. The majority of the respondents rated the quality of the investigative reports as either "very good" or "good," as shown in Chart 3. More than 96 percent thought the quality of OIA reports was either "very good" or "good," while 89 percent believed that local reports were "very good" or "good."



Source: OIG analysis of Deciding Official Survey

We also surveyed BOP employees to obtain their perceptions regarding the quality of investigations and found that their perceptions were slightly less positive than the OIA investigators' and deciding officials' opinions. Seventy-four percent (100 of 136) of the respondents who stated that they were involved in or aware of an investigation believed that the investigations were thorough. The 26 percent (36 of 136) who did not believe that the investigations were thorough included such responses as:

- "Some employees who should be interviewed are not interviewed; each investigator has his/her own idea of what is and what is not important."

- "[Investigators] don't always investigate all pertinent areas and/or question employees that were involved and have a lot of input."

- "Now it appears [the investigators] just get what information they need for a quick completion instead of being thorough without regard to the factual outcome of the investigation."

- "Personnel are required to fill out affidavits in some investigations while memo's [sic] will suffice in others. Paperwork is not filled out correctly, leaving loopholes."

We partly attribute the high ratings of the quality of BOP investigations to the OIA's monitoring of local investigations, which provides a centralized level of review. We found that this monitoring helped to ensure that the investigations were thorough and supported the investigators' conclusions. For example, 17 of the 18 OIA investigators stated that they had disagreed with a local investigator's conclusion at one time or another. When this occurred, the OIA investigators said that they asked the local investigators to interview additional witnesses, review pertinent BOP policies, or gather more information until the OIA investigator believed that the investigation strongly supported the conclusion.

REASONABLENESS OF THE DISCIPLINARY SYSTEM

BOP disciplinary decisions sometimes did not appear reasonable. For some cases with serious sustained allegations, the CEOs unilaterally took no disciplinary action or imposed informal discipline without fully adjudicating the cases or documenting their reasons for taking these actions. In other cases, in their role as deciding officials, CEOs mitigated proposed discipline without adequately explaining their reasons in the decision letter as required. Further, the CEOs can influence local investigative reports for cases in which they also will act as the deciding officials, creating the potential for outcomes that are not reasonable. We also found that disciplinary files lacked the required documentation and that the BOP's table of offenses, while specific to the mission of the BOP, provided a range of penalties too broad to be useful.

Disciplinary decisions sometimes did not appear reasonable. Disciplinary penalties should be commensurate with the level and type of misconduct committed, while considering the relevant factors involved in the case. To assess whether the BOP imposed reasonable penalties, we reviewed case files for the 206 subjects in our sample of 85 cases. Of the 206 subjects, the investigations sustained allegations for 92 subjects (45 percent), did not sustain the allegations for 111 subjects (54 percent), and found that allegations for 3 subjects (1 percent) were unfounded.[23]

We reviewed the case files for the 114 subjects for whom the allegations either were not sustained or were unfounded and determined that the investigations' conclusions were reasonable. For the 92 subjects for whom the allegations were sustained, we determined that the outcomes for 36 (39 percent) of the subjects also were reasonable, based on our review of the documentation in the case files.

The outcomes did not appear reasonable for the remaining 56 of 92 (61 percent) subjects. First, the CEOs imposed either informal or no discipline for 20 subjects with sustained Classification I or II allegations without formally adjudicating the cases. Classification I and II allegations are generally serious and therefore we would expect formal discipline to be

[23] According to the OIA Chief, an allegation is *not sustained* if there is not a preponderance of evidence to support the allegation. An allegation is *unfounded* if there is no evidence to support the allegation and either the evidence contradicts the allegation or the allegation is preposterous.

imposed. Further, the CEOs did not document their reasons for their decisions in these cases. For the remaining 36 subjects, the disciplinary proposal appeared commensurate with the sustained charges. However, the deciding officials mitigated the proposed discipline without adequately documenting their reasons. The mitigated discipline no longer appeared commensurate with the sustained allegations. We discuss these two reasons in greater detail in the following paragraphs.

CEOs either imposed informal discipline or took no disciplinary action for some subjects charged with serious allegations. Our sample identified 20 subjects with sustained allegations in the more serious Classification I and II categories for whom the CEO either imposed informal discipline or took no action without fully adjudicating the case or documenting the reasons for their decisions (see Table 2). Therefore, the CEOs' decisions to impose informal discipline or take no action in these serious cases did not appear to be reasonable outcomes.

Table 2: Subjects Whose Cases Did Not Go Through the Full Adjudicative Phase

Subject	Classification	Sustained Charges	Discipline
1	1	Failure to Follow Policy	No Action
2	1	Falsification of Government Documents	Oral Reprimand
3	1	Falsification of Government Documents	Oral Reprimand
4	1	Falsification of Government Documents	Oral Reprimand
5	1	Falsification of Government Documents	Oral Reprimand
6	1	Falsification of Government Documents	Oral Reprimand
7	1	Falsification of Government Documents	Oral Reprimand
8	1	Falsification of Government Documents	Oral Reprimand
9	1	Falsification of Government Documents	Oral Reprimand
10	1	Falsification of Government Documents	Oral Reprimand
11	1	Falsification of Government Documents	Oral Reprimand
12	1	Unprofessional Conduct of a Sexual Nature; Theft/Misuse of Government Property	No Action
13	2	Accepting Anything of Value from an Inmate	No Action
14	2	Accepting Anything of Value from an Inmate	No Action
15	2	Breach of Security; Failure to Follow Policy	Oral Reprimand
16	2	Breach of Security; Failure to Follow Policy	Oral Reprimand
17	2	Breach of Security; Failure to Follow Policy	Oral Reprimand
18	2	Endangering the Safety of Others; Unprofessional Conduct	Oral Reprimand
19	2	Inattention to Duty	No Action
20	2	Unprofessional Conduct	Oral Reprimand

Source: OIG Analysis of BOP Investigative Files

The cases for these 20 subjects were not fully adjudicated. We found no proposal letters to indicate that the cases for these 20 subjects were reviewed and approved by proposing officials, and institutional, regional, and LMR staff. Moreover, we found decision letters for only four subjects. These decision letters did not indicate that the subject received a proposal letter, and did not include the CEO's rationale for imposing informal discipline or taking no action.[24] These elements of the adjudicative phase are necessary as they collectively serve as checks and balances to ensure that imposed discipline is reasonable. Below are two case examples from our sample.

> *Case Example 1:* An OIA investigation into a Classification I allegation found that a BOP Correctional Treatment Specialist had made comments of a sexual nature to a department head and had removed government property from the institution for her personal use. Charges of Unprofessional Conduct of a Sexual Nature and Unauthorized Removal of Government Property for Personal Use were sustained against the employee. Neither the investigative file nor the disciplinary file contained a proposal or decision letter to document that this case was properly adjudicated. In addition, the investigative file stated that "The warden elected not to take any disciplinary action against [the employee]" without any explanation. Given the serious nature of the charges, the decision on the part of the Warden not to take action without fully adjudicating the case does not appear reasonable.
>
> *Case Example 2:* A local investigation of a Classification II allegation found that a BOP correctional officer gave his knife to an inmate in the institution. After a supervisor confiscated the knife from the inmate, he returned it to the correctional officer rather than holding it as evidence for an investigation. A 5-day suspension for Introduction of Contraband and Giving an Inmate an Unauthorized Item was proposed, and the correctional officer received a Letter of Reprimand, which seemed reasonable according to the mitigating factors discussed in the decision letter. With regard to the supervisor, investigators sustained an allegation of Inattention to Duty. However, no proposal or decision letter was in the investigative or disciplinary file to document that the supervisor's case was properly adjudicated. Instead, documentation in the investigative file showed that "the

[24] According to guidance from the LMR, a decision letter stating that the deciding official has chosen to take no action should read, "This is to notify you that I will not take any action on the notice of **proposed disciplinary action** [emphasis added] which you received on [date]."

Warden elected to take no action against [the supervisor]" without any explanation for his reasons.

In our discussions with HR staff at the institutions, the HR staff stated that the CEOs sometimes took no disciplinary action or imposed informal discipline without forwarding the case through the full adjudicative phase because they believed the misconduct was not serious enough to impose formal discipline. When we asked an LMR official about whether the CEOs could bypass the adjudicative phase, she stated that she would not know if this occurred because LMR only reviewed cases when the institution wanted to take disciplinary action. She further stated that there is no BOP policy stating that all sustained allegations must go through the adjudicative phase, and that deciding officials should have some latitude in making disciplinary decisions.

In other Department disciplinary systems reviewed by the OIG, deciding officials were not involved in the disciplinary process until the proposing official had issued the proposal letter to the subject.[25] However, in the BOP, this is not the case. The deciding officials, in their capacity as the CEOs, review the investigative report before the proposing official and therefore have the opportunity not to forward the investigative case file to HR for adjudication. Under the BOP's procedures, the CEO can impose informal discipline or take no action after reading an investigative report with sustained allegations, bypassing the proposing official and the full adjudicative phase, as evidenced by the 20 subjects in our sample. In effect, the CEO acts unilaterally and without the formal recommendations of the proposing official, and institutional, regional, or LMR staff. When the CEO determines that certain cases should not be fully adjudicated, these cases are not subjected to the checks and balances to ensure reasonableness that are inherent in having independent investigative and adjudicative phases.

Deciding officials mitigated the proposed penalties without adequately explaining their reasons for the mitigation in the decision letters. We determined that deciding officials mitigated penalties for 36 subjects in our sample without adequate explanation in the decision letters. Based on the documentation in the investigative files and the proposal letters, the proposed penalties seemed reasonable. However, the mitigated imposed penalties did not appear reasonable because they lacked adequate explanation in the decision letters. The lack of documentation in the

[25] See *Review of the United States Marshals Service Discipline Process*, Report No. I-2001-011, September 2001, and *Review of the Drug Enforcement Administration's Disciplinary System*, Report Number I-2004-002, January 2004.

decision letters is not in compliance with Title 5, Code of Federal Regulations, Part 752, which states that agencies must maintain "the notice of decision and reasons therefore." In addition, according to guidance from the BOP's LMR:

> In all decision letters, always include a full and complete discussion of all relevant Douglas factors… If the penalty in the proposal is mitigated (lessened), you must make some indication in the decision of the reasons why. **In all cases, provide a full discussion of all of the relevant Douglas factors in the decision letter.**

Below are two case examples from our sample in which the deciding official mitigated the proposed discipline without sufficiently explaining the reason in the decision letter.

> *Case Example 1:* An OIA investigation found that a BOP employee hit an inmate and failed to disclose this information during his initial interview with OIA investigators. Therefore, allegations of Physical Abuse of an Inmate and Providing a False Statement were sustained against the employee. The proposing official proposed that the employee be removed. Based on information contained in the investigative file and the proposal letter, the proposed penalty seemed reasonable. However, the deciding official chose instead to demote the employee. A review of the deciding official's consideration of the Douglas factors in the decision letter did not explain why he mitigated the penalty. For each Douglas factor mentioned in the decision letter, the deciding official described reasons *not* to mitigate the penalty. The deciding official wrote:
>
> > When considering what penalty was appropriate, I considered, among other factors: (a) charges of Physical Abuse of an Inmate and Providing Conflicting Information are very serious charges in light of your current position as a supervisor who commonly needs to work with a great amount of autonomy and who has management oversight and guidance responsibilities to subordinate correctional services staff and inmates, (b) your position as a federal law enforcement officer requires that your actions be above reproach and that you forthrightly answer questions presented to you by agency officials, (c) while your past work record has been acceptable, it does not shield your very serious breach of trust, (d) while you have no prior disciplinary record and have demonstrated some degree of

> remorse, your misconduct is so serious as to warrant a substantial penalty, (e) your misconduct has caused serious damage to your superior's confidence in your ability to do your current job, (f) the penalty is consistent with the agency's table of penalties, (g) you were aware of the applicable policy and procedures as we train staff in the Employee Code of Conduct and the Use of Force policies immediately upon entrance on duty and annually thereafter, (h) while you may or may not have been first provoked by the inmate's spitting upon you, you had the staffing resources immediately available to you to use a lesser degree and form of force (e.g., you could have simply turned the inmate's face away from you), (i) alternative sanctions were considered, but I concluded that they would not have had the desired corrective effect.

In fact, the deciding official wrote, "I believe that either of the [two] sustained charges would normally warrant removal by themselves." The deciding official did not explain the decision to demote, rather than remove, the employee. In this case, the decision to demote the employee did not appear reasonable, given the seriousness of the charges.

> *Case Example 2:* In another OIA investigation, an employee was found to have committed misconduct when he used physical force on an inmate but did not report it, and later provided a false statement about the incident to investigators. The OIA investigation sustained charges of Failure to Follow Policy and Providing a False Statement. The proposing official proposed a 5-day suspension, but the deciding official took no disciplinary action. The decision letter contained no reason for the decision. It read in total, "This is to notify you that I will not take any action on the notice of proposed disciplinary action which you received."

We also found that LMR staff involved in the disciplinary process believed that in certain cases the proposed discipline should not have been mitigated. In one case involving the failure of the subject to respond to an emergency, the deciding official mitigated the proposed discipline from a 7-day suspension to a Letter of Reprimand. The LMR staff member reviewing the case wrote the following comments:

> I will approve the letter but I have concerns… [The subject] did not express remorse, did not apologize and didn't offer written response. He's also been disciplined before. Why would it be mitigated? This is a serious problem.

Another case involved a subject charged with being Absent Without Leave. The proposing official proposed a 3-day suspension, but the deciding official gave the subject a Letter of Reprimand. Information obtained from LMR showed that the LMR staff member noted "concerns on why they went from three day suspension to a letter of reprimand, [but] was told that was what the Warden wanted."

Overall, in FY 2003, 63 percent of all discipline was mitigated from what the proposing official proposed. While a reduction in the proposed discipline may be reasonable based on other evidence or mitigating circumstances described in the employee's oral or written statement (if supplied), it is essential that the deciding official document the reasons for mitigation in the decision letter, as required.

The CEOs can influence local investigative reports for cases in which they also will act as the deciding officials, creating the potential for outcomes that are not reasonable. The BOP's disciplinary system requires the CEOs, in their role as administrators, to review and approve local investigations before they are forwarded to the OIA for its review. The CEOs whom we surveyed stated that if a report did not contain the necessary information or if they disagreed with an investigation's conclusion, they would ask the investigators to investigate further. Further, some CEOs stated that when they disagreed with an investigation's conclusion, they changed the investigator's findings or took no disciplinary action. Because the CEOs review and have the opportunity to influence the content and conclusions of the investigative reports during the investigative phase and then act as the deciding official in the adjudicative phase, the independence of the investigative and adjudicative phases, which helps to ensure that disciplinary outcomes are reasonable, can be compromised.

Disciplinary files lacked required documentation. As mentioned earlier, our sample included 20 subjects for whom the deciding official either imposed informal discipline or took no action and the disciplinary file was missing the proposal letter, the decision letter, or both. We reviewed the disciplinary files for the remaining 72 subjects in our sample with sustained allegations and found that some of these files also did not contain the required documentation. According to Title 5, Code of Federal Regulations, Part 752:

> Copies of the notice of proposed action, the answer of the employee if written, a summary thereof if made orally, the notice of decision and reasons therefore, and any order affecting

the suspension, together with any supporting material, shall be maintained by the agency… .[26]

During our review, we asked the BOP to provide us with the following documents from the disciplinary file for the 92 subjects with sustained allegations: 1) proposal letter; 2) employee's written response, if applicable; 3) summary of employee's oral response, if applicable; 4) decision letter; and 5) documentation of imposed discipline.[27] We found that the proposal letter was missing for 28 (30 percent) subjects, and the decision letter was missing for 20 (22 percent) subjects. Documentation of imposed discipline was missing in four cases (Table 3).

Table 3: Documentation Missing from Disciplinary Files

Discipline Imposed (Number of Subjects)	Proposal Letters Missing	Decision Letters Missing	Documentation of Imposed Discipline Missing
Removal (4)	0	0	0
Suspension (12)	1	1	3
Demotion (2)	0	0	0
Letter of Reprimand (41)	4	1	1
Oral Reprimand (17)	16	11	N/A
No Action Taken (12)	7	7	N/A
Not Applicable Because Subject Resigned or Retired before Adjudication (4)	N/A	N/A	N/A
Total (92)	**28**	**20**	**4**

Source: OIG analysis of BOP investigative files

We also examined whether the written or oral response of the subject was maintained in the files, as these typically contain the reasons why a deciding official would choose to mitigate the proposed penalty. Fifty-six subjects chose to give an oral response; 8 (14 percent) of the oral summaries were missing from the case file. Fourteen subjects chose to give a written response; 4 (29 percent) were missing. When required documentation explaining the reasons for the discipline imposed is not included in the case file, it is not possible to determine if the discipline is reasonable.

[26] The statutory requirements for documentation of disciplinary actions are found in Section 7503(c) and for adverse actions in Section 7513(e).

[27] For our review, documentation of imposed discipline included either the SF-50 or the Letter of Reprimand. The SF-50 is used to document disciplinary or adverse actions imposed as a result of sustained misconduct. While federal policy requires that the SF-50 be maintained, in cases of Letters of Reprimand the only proof that the employee was disciplined is the actual letter. Therefore, for this analysis we included the Letter of Reprimand as documentation of imposed discipline.

The table of offenses does not provide enough guidance to determine reasonable discipline. The table of offenses, while specific to the mission of the BOP, included a broad range of penalties that do not provide enough guidance for proposing and deciding officials to determine reasonable discipline. The BOP's table of offenses was last revised in 1999 and currently is being updated. It contains 54 offense categories that are specific to the BOP's mission of protecting society by confining offenders in appropriate facilities. These offense categories include:

- Physical abuse of an inmate;
- Acceptance of any gift or favor from an inmate or former inmate;
- Preferential treatment of inmates;
- Loss of temper in the presence of inmates, former inmates, their families or friends; and
- Improper relationship with inmates, former inmates, their families or friends.

The penalty range for a first offense for 41 of these 54 (76 percent) offense categories is "official reprimand to removal." This range essentially encompasses every type of formal discipline possible and is so broad that it gives the proposing and deciding officials no guidance in determining a reasonable penalty.

Survey of BOP employees on discipline. Our e-mail survey of a random sample of 275 BOP employees indicated that 74 percent of respondents who stated that they were aware of employee misconduct investigations that resulted in discipline believed that the discipline was appropriate, while 26 percent believed it was not appropriate. We found that 17 percent of the respondents stated that the discipline imposed was too lenient.

CONSISTENCY OF THE DISCIPLINARY SYSTEM

We found that the BOP does not ensure that discipline is imposed consistently BOP-wide because BOP guidance instructs that similar penalties be imposed for similar misconduct only by the current CEOs within their institutions. Consequently, employees at different institutions, or at the same institution with different CEOs, can receive different discipline for similar misconduct and circumstances. We were unable to measure the consistency of discipline imposed when comparing similar misconduct BOP-wide. Finally, although our survey found that many BOP employees believed that an employee's grade level, job series, gender, or race affected the imposed discipline, our analysis of BOP data did not substantiate that the disciplinary process was affected by these characteristics.

An equitable disciplinary system should ensure that employees receive substantially similar discipline for similar misconduct under similar circumstances. However, BOP guidance states that CEOs, when acting as deciding officials, should be consistent with their own prior decisions at the same institution. This guidance advises BOP managers on how to select appropriate discipline, avoid the appearance of disparate treatment, and impose consistent penalties:

> Naturally, the law does not require rigid, mathematical application of penalties. However, it is presumed that like penalties will be imposed in like cases. Accordingly, for purposes of disparate treatment and consistency of the penalty analysis, the mere [fact] that employees were involved in similar misconduct yet received different penalties is insufficient to prove disparate treatment. The charges and circumstances surrounding the misconduct should be substantially similar. Generally, this means that: the offenses must occur within the same component of the agency that initiated the action e.g., look to offenses within the same institution or within the same regional office; the offenses should be compared among those occupying relatively similar positions of trust and responsibility, e.g., where the wrongdoer is a supervisor, look at other supervisors' misconduct; *the penalties were imposed by the same decision maker, e.g., the same CEO, not the former vs. current CEO* [emphasis added].

Therefore, the BOP does not require consistency of disciplinary decisions BOP-wide or even between a current and former CEO at the same institution.

LMR staff told us that imposing consistent discipline is only required of the current CEO at each facility because that is what is necessary for imposed discipline to be deemed defensible if the subject appeals or grieves the decision to a third party. According to the MSPB:

> To prove a disparate treatment claim with regard to the penalty of an act of misconduct, an appellant must show that a similarly situated employee received a different penalty… . The comparator employee must be in the same work unit… must have the same supervisors… and the misconduct must be substantially similar.[28]

Because the MSPB only requires consistency if "comparison employees were similarly situated within the same supervisory unit," BOP management stated that consistency of disciplinary decisions is only necessary for each CEO and not for the entire BOP. Consequently, two similarly situated subjects who committed similar misconduct under similar circumstances at different institutions of the same security level could receive different penalties because the subjects had different CEOs. Therefore, the CEOs at each of the BOP's 113 institutions, 6 Regional Offices, 28 community corrections offices, 2 staff training centers, and 1 Central Office may impose different discipline for similar misconduct and circumstances, as long as their disciplinary decisions are consistent with their prior decisions at the same institution.

We found that BOP Wardens are assigned to an institution for an average of 29 months. Consequently, when a new CEO is assigned to an institution, a new standard is adopted for determining consistent discipline. Several of the HR staff we interviewed stated that when a newly appointed CEO did not have an established disciplinary record, they reviewed discipline imposed by former CEOs at the institution to ensure some level of consistency, although such reviews are not required by the BOP.

Some regional HR staff stated that they reviewed disciplinary cases across the region in an attempt to ensure consistency and continuity. However, the regions did not have a systematic process for such reviews and did not always use reliable information to check for consistency. While

[28] *Wentz v. United States Postal Service*, 91 MSPR 176, 187 (March 13, 2002).

some regions reviewed logbooks or databases, other regions relied on the historical knowledge of the HR staff. One region did not check for consistency across the region at all. In addition, although the LMR reviewed and approved all disciplinary and adverse action case files and related letters, it did not specifically review the penalties for consistency BOP-wide. Therefore, even though the regions and the LMR review all disciplinary cases and could check for consistency by region and BOP-wide, they do not.

We attempted to determine the consistency of discipline imposed BOP-wide for similar charges in our sample of 85 cases.[29] However, our sample did not include a sufficient number of cases with similar charges and circumstances to perform this type of consistency analysis.

One case from our sample did raise questions about the consistency of the penalties imposed. The case involved an OIA investigation into the escape of an inmate from a hospital and included 24 subjects, the majority of whom were correctional officers investigated for the same charges – Failure to Follow Policy and Breach of Security.[30] The OIA sustained the charges for all 24 subjects. The proposing official proposed discipline ranging from a 4-day suspension to an 18-day suspension. Based on the explanations provided in each proposal letter, the range of proposals appeared reasonable.

We expected that the discipline imposed by the deciding official similarly would vary. First, each subject had a different number of specifications for each charge of misconduct, which was reflected in the range of days of suspension described in the proposal letter. Second, three subjects had prior discipline, which the proposing official asked the deciding official to consider when making a decision. Finally, the decision letters for the 24 subjects mentioned four different mitigating factors that should have affected the penalty.[31] Nine decision letters mentioned two mitigating

[29] In this review we examined two dimensions of consistency: 1) consistency of disciplinary outcomes by type of misconduct, and 2) consistency of the disciplinary process by selected job demographic and job characteristics. Our analysis of the second type of consistency is found on page 33.

[30] The investigation had a total of 27 subjects, but 2 of the subjects were charged with different offenses and 1 subject's disciplinary file could not be located. These three subjects were not included in our analysis.

[31] The mitigating factors mentioned in the decision letters included the subject's commitment to following post orders, the subject's acknowledgment of the seriousness of his or her behavior, the subject's length of employment with the BOP, and whether it was the subject's first disciplinary offense.

factors, while the remaining 15 letters cited three mitigating factors. However, the deciding official issued a Letter of Reprimand to all 24 subjects, and the decision letters did not clearly explain why proposed suspensions of varied lengths were mitigated to the same penalty. Absent any explanation, we concluded that the deciding official did not apply consistent discipline in this case.

Many BOP employees believed that discipline was not consistent. We found that approximately 60 percent of the respondents to our e-mail survey believed that employees did not receive similar treatment in the disciplinary process based on their job title or grade level. Approximately 43 percent of respondents believed that employees did not receive similar treatment based on gender or race. Table 4 shows the percentage of respondents who believed that BOP employees were treated differently according to certain demographic and job characteristics.

Table 4: Percentage of Employee Responses

Do you believe that BOP employees receive similar treatment throughout the discipline process, regardless of their:	**Yes**	**No**
Job title	40.4	59.6
Grade level	40.4	59.6
Gender	57.0	43.0
Race	56.6	43.4

Source: OIG survey of BOP employees

We asked respondents to explain why they believed employees were not treated consistently by job title, grade level, gender, or race. Generally, respondents believed that employees who were higher-graded, non-correctional officers, white, or male received more favorable treatment than other BOP employees. Employees specifically stated that Wardens were not consistent in how they imposed discipline:

- "I think there is a lot of inconsistencies within the CEO ranks. Some are harsh, some are just too lenient."
- "The Warden does not follow a fair pattern."
- "Each Warden works differently: Some are too harsh and others too lenient."
- "There [sic] has been a couple [of cases] where there wasn't discipline, and I felt should have been. Therefore, the discipline imposed does not seem consistent."

- "There is no consistency with penalties to offenses. One person will get a slap on the hand while another will get fired for the same offense."

Twenty-five employees also stated that favoritism on the part of management influenced discipline and that deciding officials used their discretion to impose discipline improperly. Examples of their comments are:

- "The Warden at this institution picks and chooses who will or will not be disciplined."

- "There is rampant favortism [sic] throughout the BOP. This is still the 'Good Ole Boy' system."

- "If you play golf with the Warden, your treatment will be different. If you are one of the good ole boys, your treatment will be different."

- "I think that it depends on who the person is and how well that person is liked by the people in… higher positions."

Seventeen employees said that discipline is inconsistently imposed because higher-level employees are able to transfer or retire rather than receive discipline, and several respondents stated that some subjects are actually promoted after they commit misconduct. A phrase several respondents cited was, "If you mess up, you move up." Some responses included:

- "Supervisors or executives are often reassigned or promoted instead of being disciplined."

- "With regard to staff in higher positions or grade levels, many staff get alternatives to discipline like retire or reassignment rather than face sanctions."

- "I believe that at the higher title or grade levels, an employee gets off much easier by a job move or dismissing the charge."

- Wardens, A[ssociate] W[arden]s, and other exec[utive] staff may be moved because of misconduct but they are not fired. I have known them to move to different 'made up' jobs and retain their pay."

BOP data did not substantiate that the disciplinary process was affected by grade level, job series, gender, or race. Although respondents to our survey believed that BOP employees were treated differently in the disciplinary process by job series, grade level, gender or race, our analysis of the BOP data did not support this belief. We compared LAWPACK data to BOP population data to determine whether job series, grade level, gender, or race affected the disciplinary process.[32] To determine whether differences existed for the four characteristics, we compared the proportion of employees who were investigated, the proportion of employees with sustained allegations, and the proportion of employees who were disciplined. Our analysis did not substantiate that the four characteristics affected the disciplinary process.

Data regarding grade level. The data did not show that grade level was a factor in the disciplinary process. We found that approximately the same proportion of employees at lower grade levels (2 through 12) were subjects of investigations as employees at higher grade levels (13 and above). For closed investigations in FY 2003, 11.0 percent of employees at grade levels 2 through 8, 10.7 percent of employees at grade levels 9 through 12, and 8.9 percent of employees at grade levels 13 and above were subjects of investigations. We also found that nearly the same proportion of employees in the three segments of grade levels had allegations that were sustained, and had sustained allegations that resulted in discipline (Table 5).[33] This data did not indicate to us that grade level affected the disciplinary process.

Table 5: Effect of Grade Level on the Disciplinary Process

GRADE LEVEL	Employees in BOP Population	Employees That Were Investigated		Employees with Sustained Allegations		Employees That Were Disciplined	
		Number	Percent	Number	Percent	Number	Percent
Grade 2 - 8	19,822	2,173	**11.0**	1,120	**51.5**	784	**70.0**
Grade 9 - 12	11,703	1,248	**10.7**	628	**50.3**	439	**69.9**
Grade 13 and above	2515	225	**8.9**	108	**48.0**	71	**65.7**

Source: OIG analysis of BOP data

[32] BOP grade level and job series population data was provided by the BOP. BOP gender and racial population data comes from the "BOP Quick Facts," September 2003.

[33] In all tables, the percentage of "Employees with Sustained Allegations" is of those employees who were investigated. The percentage of "Employees That Were Disciplined" is of those employees with sustained allegations.

Data regarding job series. The data also did not show that job series was a factor in the disciplinary process. For closed investigations in FY 2003, a higher percentage of correctional officers (14 percent) were investigated compared with non-correctional officers (9 percent).[34] However, this could be because correctional officers have significantly more contact with inmates, who can make more allegations than other employees. In contrast, a smaller percentage of correctional officers had allegations sustained (45 percent for correctional officers compared with 55 percent for non-correctional officers), which may also be consistent with the greater likelihood of specious allegations by inmates. Finally, a higher percentage of correctional officers with sustained allegations were disciplined (Table 6). This data did not indicate to us that job series affected the disciplinary process.

Table 6: Effect of Job Series on the Disciplinary Process

JOB SERIES	Employees in BOP Population	Employees That Were Investigated		Employees with Sustained Allegations		Employees That Were Disciplined	
		Number	Percent	Number	Percent	Number	Percent
Correctional Officer	13,844	1,974	**14.3**	936	**47.4**	680	**72.6**
Other	18,148	1,672	**9.2**	920	**55.0**	614	**66.7**

Source: OIG analysis of BOP data

Data regarding race. The data did not show that race was a factor in the disciplinary process. For investigations closed in FY 2003, slightly higher proportions of Hispanic and black employees were the subjects of investigations than white employees. Approximately 13 percent of both Hispanic and black employees were subjects of misconduct investigations, compared with 9 percent of white employees. However, a smaller proportion of black employees had allegations that were sustained, and approximately the same proportion (70 percent) of employees in all three races had sustained allegations that resulted in discipline (Table 7). This data did not indicate to us that race affected the disciplinary process.

[34] The Correctional Officer Series includes positions involving the correctional treatment, custody, and supervision of criminal offenders. We included all other job series in the "Other" category.

Table 7: Effect of Race on the Disciplinary Process

RACE	Employees in BOP Population	Employees That Were Investigated		Employees with Sustained Allegations		Employees That Were Disciplined	
		Number	Percent	Number	Percent	Number	Percent
Black	7,162	952	**13.3**	469	**49.3**	329	**70.1**
Hispanic	3,725	503	**13.5**	269	**53.5**	187	**69.5**
White	21,937	2,045	**9.3**	1,036	**50.7**	729	**70.4**

Source: OIG analysis of BOP data

Data regarding gender. The data did not show that gender was a factor in the disciplinary process. As a percentage of their appearance in the BOP population, female employees were investigated at a lower rate (8.0 percent) than male employees (11.8 percent). However, a smaller proportion of male employees (49.8 percent) had allegations that were sustained, compared with female employees (55.2 percent). Finally, approximately 10 percent more male employees had sustained allegations that resulted in discipline, as compared with female employees (Table 8). This data did not indicate to us that gender affected the disciplinary process.

Table 8: Effect of Gender on the Disciplinary Process

GENDER	Employees in BOP Population	Employees That Were Investigated		Employees with Sustained Allegations		Employees That Were Disciplined	
		Number	Percent	Number	Percent	Number	Percent
Female	9,584	765	**8.0**	422	**55.2**	263	**62.3**
Male	24,438	2,881	**11.8**	1,434	**49.8**	1,034	**72.1**

Source: OIG analysis of BOP data

TIMELINESS OF THE DISCIPLINARY SYSTEM

The BOP did not consistently report, investigate, and adjudicate employee misconduct cases in a timely manner. BOP management did not report allegations of employee misconduct to the OIA within the required time frames. In addition, the OIA failed to report allegations to the OIG within the required time frames. The BOP has not established written standards for measuring the timeliness of either the investigative or adjudicative phases of the disciplinary system. Using the informal time frames reported by BOP management, we found that OIA investigations of employee misconduct were completed in a timely manner, but local investigations were not. The BOP also did not adjudicate disciplinary cases in a timely manner. BOP employees criticized the timeliness of the disciplinary process. Finally, our review revealed instances in which the delays in the disciplinary system negatively affected the final discipline imposed.

We examined data from our sample of 85 investigative files to determine the BOP's timeliness in referring misconduct allegations to the OIA. We found that management did not refer misconduct allegations to the OIA within required time frames.

- Sixty-eight percent (45 of the 66) of Classification I and II cases were not reported to the OIA within 24 hours after management became aware of the misconduct allegation as BOP policy requires. The average reporting time for these 45 cases was 16 days, and one case was not reported for 106 days.

- BOP management was more consistent in reporting Classification III cases to the OIA within the required 30 days. Only 1 of 19 Classification III cases was not reported to the OIA within the required 30 days.

We examined the OIA's LAWPACK database to evaluate OIA's timeliness in referring Classification I and II allegations to the OIG in FY 2003. For those cases involving BOP employees, we found that:

- Twenty-five percent (160 of 628) of Classification I allegations were not reported to the OIG within 24 hours as required. The OIA took an

average of 3.6 days to refer Classification I allegations to the OIG.[35] Table 9 shows the number of days it took for the OIA to report Classification I allegations to the OIG.

Table 9: OIA Reporting of Classification I Cases to the OIG

Number of days for OIA to report Classification I allegation to OIG	Number of allegations reported	Percentage of allegations reported
1 day or less	357	56.8
2 – 7 days	145	23.1
8 – 14 days	8	1.3
More than 14 days	7	1.1
Unknown	111	17.7

Source: OIG analysis of BOP data

- Twenty-two percent (226 of 1,047) of Classification II cases were not reported within the required 48 hours. The OIA took an average of 4.5 days to refer Classification II cases to the OIG. Table 10 shows the number of days it took for the OIA to report Classification I allegations to the OIG.

Table 10: OIA Reporting of Classification II Cases to the OIG

Number of days for OIA to report Classification I allegation to OIG	Number of allegations reported	Percentage of allegations reported
2 days or less	675	64.5
3 – 7 days	159	15.2
8 – 14 days	25	2.4
More than 14 days	42	4.0
Unknown	146	13.9

Source: OIG analysis of BOP data

An OIA official asserted that the delays in reporting to the OIG could be partially attributed to an influx of cases during certain time frames, which may affect overall workload, or a recent change in OIA review and referral procedures.

The BOP has not established written time frames for the investigation and adjudication of misconduct allegations. Because there are no written time frames, we asked BOP officials what they considered to be appropriate time frames for the investigation and the

[35] According to the "OIA Report for Fiscal Year 2003," of the 4,193 cases opened, 788 were Classification I and 1,287 were Classification II cases. The difference between these numbers and the total reported in the text above occurred because we analyzed only cases opened in FY 2003 involving BOP subjects for whom data was available. We did not analyze Classification III cases because of a lack of data.

adjudication of misconduct cases. We based our analysis of timeliness on these informal time frames provided by BOP management. While OIA investigators generally completed investigations of employee misconduct within the informal time frames set by OIA management, local investigators did not. In addition, the adjudication of misconduct cases exceeded the informal time frames provided by LMR officials. While the OIA and LMR record some date information, they do not use this information to analyze or measure timeliness.

According to the OIA Chief, investigations conducted by OIA investigators should be completed within 90 days and local investigations conducted at the institutions should be completed within 60 days.[36] Our analysis of the 85 case files in our sample found that the average time it took for OIA investigators to complete their investigations was 84 days, less than the informal time frame of 90 days. However, the average time it took local investigators at the institutions to complete an investigation was 103 days, 43 days longer than the OIA's informal 60-day time frame (Table 11).[37]

Table 11: Average Number of Days to Complete Investigations

Type and Number of Investigations	Informal Time Frame	Average Number of Days to Complete Investigation
OIA (17)	90 days	84
Local (68)	60 days	103

Source: OIG analysis of BOP data

It should be noted that the averages above exclude the additional investigative work of external law enforcement entities that were required in certain cases. In our sample of 85 cases, Federal Bureau of Investigation (FBI), OIG, or local law enforcement were involved in 10 cases (e.g., OIG assistance with polygraphs). We did not determine how much external law enforcement activity extended the total time spent on each investigation.

[36] In the OIG's previous reviews of Department disciplinary systems, we noted that the U.S. Marshals Service has a standard of 90 days for completing its investigations of employee misconduct, and the Drug Enforcement Administration has a standard of 180 days.

[37] For investigations completed by the OIA, the process began when the OIG referred the case back to the OIA and ended when the OIA Chief signed the completed investigation. Data was available for 12 of the 17 investigations conducted by the OIA. For investigations completed by local investigators, this process began when the OIA (cont'd) authorized a local investigation and ended when the Warden signed the completed investigative report. Data was available for 39 of the 68 investigations conducted by local investigators. We did not include any of the 17 Classification III cases in this analysis because the local investigators do not need authorization from the OIA before beginning these investigations.

In addition, the BOP had no written standards for assessing whether institutions, Regional Offices, or the LMR adjudicated misconduct cases in a timely manner. According to the Assistant Chief of LMR, a range of 60 to 70 days to adjudicate a disciplinary action case and a range of 75 to 90 days to adjudicate an adverse action case are acceptable time frames.

For the 92 subjects with sustained allegations in our sample, the adjudicative phase took an average of 97 days for disciplinary actions and 110 days for adverse actions (Table 12).

Table 12: Average Number of Days to Complete Adjudication

Segment of Adjudicative Process*	Days to Adjudicate Adverse Actions	Days to Adjudicate Disciplinary Actions
Date the investigative report was signed to date the proposal letter was signed	53	69
Date the proposal letter was signed to date the decision letter was signed	57	28
Average Number of Days to Complete Adjudication	**110**	**97**

Source: OIG analysis of BOP data

*Seventy subjects in our sample received disciplinary actions and six subjects in our sample received adverse actions. (Because of the small number of subjects in our sample who received adverse actions, we cannot conclude that the observed delays for adverse actions were typical.) Our analysis does not include data for 12 subjects for whom no disciplinary action was taken and 4 subjects who either retired or resigned.

The averages resulting from our sample reveal that adverse action cases exceeded the informal time frame established by the LMR by an average of 20 days. Disciplinary cases exceeded LMR's time frame by an average of 27 days. We asked an LMR official why these delays might have occurred. The LMR official stated that delays in the first part of the process could be due to time needed to make revisions to the proposal letter at the Regional Office or LMR or to resolve disagreements among the institution, Regional Office, and LMR regarding the type of penalty to be imposed. Delays in the second part of the process may have resulted from the subject requesting extensions in providing an oral or written response to the deciding official.

BOP employees we surveyed were critical of the delays in the disciplinary process. Approximately 43 percent of the BOP employees who stated that they were involved in or aware of misconduct investigations believed that these investigations were not timely. Approximately

34 percent who stated they were aware of investigations that resulted in discipline believed that the adjudication of discipline was not timely. Employees cited cases that lasted one to two years, including some cases that continued for four or five years. They acknowledged that some lengthy investigations were justified, given the complexity or number of allegations involved. However, the BOP employees could not understand why relatively minor offenses extended beyond what they perceived to be a reasonable amount of time.

Employees commented on how lengthy disciplinary decisions adversely affected employee morale and career progression. They referred to instances in which subjects of an investigation were assigned to "home duty" status for one to two years while waiting for a decision.[38] They also cited examples of employees under investigation who were denied promotions or declared ineligible for awards. The following were representative employee comments on the effect of lengthy disciplinary decisions on morale:

- "Because I know employees who have been under investigation for YEARS, yes that is plural, years for one allegation… In my opinion, that is not only absolutely ridiculous, but it hurts morale worse than just about any situation that I can think of… . Furthermore, employees who are under investigation, are not allowed to transfer, or be promoted."

- "Staff members are removed from their regular posts and remain in 'special' posts for extended periods of time, months until a decision is made on their disposition."

- "It does not appear to be a priority of the investigators to complete a misconduct investigation in a timely manner. This lack of timeliness gives the staff involved in an investigation (either as witnesses or subjects) the impression that their value as workers, their reputation, their dignity are not important enough to BOP management to facilitate the process."

[38] Home duty is a temporary duty status of a staff member at his or her residence. It generally occurs when the agency has a need to have the employee away from the institution or facility for security or other reasons. It is similar to administrative leave, with the exception that the employee on home duty must remain in an approved location during his/her regular duty hours. Department officials must approve home duty lasting more than 10 days.

- "I recently witnessed a supervisor go for approximately 6 months between the time he was accused of misconduct until he was placed back into his position. During that time he was assigned to work the phone room, helped in the welding shop, etc. The whole process was an extremely humiliating time for him."

Deciding officials, in responding to a separate survey, also commented on the negative effect of delays in completing discipline cases. When asked how they would improve the disciplinary system, the deciding officials identified improving timeliness as the first priority. Their suggestions included:

- Removing a step from the adjudicative phase (regional review);
- Addressing the delays at the Regional and Central Offices due to the "many reviews" performed;
- Requiring time frames for completion of investigations;
- Implementing "due dates" for regional and LMR review of proposal and decision letters;
- Addressing the delays in OIA investigations and subsequent reports, as well as delays encountered with OIA and OIG referrals; and
- Implementing training for deciding officials six months prior to their appointment.

Delays negatively affected the discipline imposed. In addition to the other negative effects associated with untimely disciplinary decisions, we identified at least three cases in which the proposed discipline was mitigated because of the extended time spent processing the cases.

The first case involved a charge of Unprofessional Conduct in which a staff member was overheard using profane and threatening language toward another BOP employee. The discipline was mitigated from a proposed 5-day suspension to a Letter of Reprimand. According to written comments obtained from LMR, "Because of… the length of time it took to complete the investigation of [the employee's] work record, a letter of reprimand was issued in lieu of the proposed 5 day sanction."

The second case involved a Health Services Administrator investigated for Unacceptable Performance of Assigned Duties. The BOP sought removal

in a December 2002 proposal letter, and the employee was subsequently assigned to work escort duty while the case was adjudicated. The employee provided an oral response to the proposal letter in March 2003, but no additional action was taken in the case until October 2003. The LMR did not approve the decision letter because, according to written comments obtained from LMR, "there is no justification for the delay." No disciplinary action was taken as a result.

The third case involved an arbitration hearing in which the imposed discipline was overturned because of the length of time between the date of the incident and the date when discipline was imposed. The following text box details the case's history.

CASE STUDY: The Need for Timely Case Disposition

This local investigation involved a correctional officer who failed to lock an inner door in the Special Housing Unit at a Federal Correctional Institution. The investigation consisted primarily of taking brief statements from four employees, all at the same site, with the facts largely uncontested. The subject immediately took responsibility and acknowledged that he violated post orders. However, the investigators did not formally interview the subject until three months after taking affidavits from the relevant witnesses. The following is a chronology of the events in the case:

- December 1, 2000 – The misconduct occurred.
- March 12, 2001 – Investigators completed the investigation and sustained the charge.
- December 21, 2001 – Proposing official proposed one-day suspension.
- January 17, 2002 – Deciding official imposed one-day suspension.
- February 5, 2002 – Subject served one-day suspension.

On March 1, 2002, the subject grieved the suspension. The BOP's position was that the Master Agreement between BOP and the employee union did not establish a specific time frame for conducting investigations and that a more pressing investigation took priority.* The union countered that the language in the Master Agreement stated "the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions," and that nothing could "adequately explain the extraordinary delay."

According to the arbitrator who handled this case, because the employee was "being categorically bypassed for positions for which he is best qualified precisely because the charges are pending, then clearly he is being prejudiced by a delay in the disposition of those charges." The arbitrator stated that while the Master Agreement "does not provide a specific definition of 'timely disposition,' in the abstract no reasonable construction of that phrase can characterize a disposition after fourteen months as timely." The arbitrator determined that the BOP violated the Master Agreement by suspending the subject in January 2002 for an event that occurred in December 2000 and rescinded the one-day suspension. The officer was reimbursed for lost wages resulting from the suspension.

* The Master Agreement is a collective agreement between the BOP and its employee representative, the Council of Prison Locals and the American Federation of Government Employees.

CONCLUSION AND RECOMMENDATIONS

CONCLUSION

An equitable disciplinary system provides reasonable, consistent, and timely discipline for all employees. By addressing the issues identified in this report, we believe that the BOP can better ensure that its disciplinary decisions meet these basic goals.

BOP disciplinary decisions sometimes did not appear to be reasonable. First, for some cases with serious sustained allegations, the CEOs unilaterally took no disciplinary action or imposed informal discipline without fully adjudicating the cases or documenting their reasons for taking these actions. Second, some penalties did not appear reasonable when the CEOs, in their role as deciding officials, mitigated proposed discipline without adequately explaining their reasons in the decision letter as required. Third, CEOs review and have the opportunity to influence investigation reports for cases in which they also act as the deciding officials. This can compromise the independence of the investigative and adjudicative phases of the BOP disciplinary process and create the potential for unreasonable outcomes.

In addition, BOP guidance instructs CEOs to impose similar penalties for similar misconduct and circumstances at each institution. However, the BOP does not require that employees in comparable facilities receive similar penalties for similar infractions. Instead, the BOP requires only that the CEOs, as deciding officials in each of its facilities, be consistent with their own prior decisions, because that is the level of consistency that is required for the MSPB to sustain the agency's disciplinary decisions if the employee appeals. Notwithstanding the MSPB requirements, an equitable disciplinary system should ensure that all BOP employees receive substantially similar discipline for similar infractions.

Finally, the BOP did not consistently process employee misconduct cases in a timely manner. The BOP did not report allegations of employee misconduct to the proper authorities within the required time frames. In addition, the BOP has not established written standards for measuring the timeliness of the investigative or adjudicative phases of its disciplinary system.

RECOMMENDATIONS

We make ten recommendations to help the BOP ensure that its disciplinary decisions are reasonable, consistent, and timely. The recommendations focus on ensuring that the investigative and adjudicative phases of the disciplinary system function independently and that sustained misconduct allegations are fully adjudicated; the reasons for mitigating discipline are adequately documented; BOP employees receive similar penalties for similar infractions BOP-wide; misconduct cases are investigated and adjudicated in a timely manner; and that the BOP develops controls to monitor disciplinary decisions for consistency throughout the BOP.

We recommend that the BOP:

1. Reinforce the existing policy that BOP employees report allegations of employee misconduct to the proper authorities as required.

2. Require that CEOs forward cases with sustained allegations through the full adjudicative phase.

3. Ensure that when the deciding official mitigates the proposed discipline, the decision letter contains an adequate explanation of the reasons.

4. Remove the CEOs from reviewing and approving investigative reports of employee misconduct for cases in which they will act as the deciding official by implementing an alternative review process that preserves the independence of the investigative and adjudicative phases.

5. Reinforce the existing policy that all required documents be maintained in the disciplinary files.

6. Develop procedures to ensure that discipline is imposed consistently BOP-wide, and review discipline for consistency across the agency periodically after these procedures are implemented.

7. Reinforce the existing policy that CEOs report allegations of employee misconduct to the OIA within required time frames.

8. Reinforce the existing policy that the OIA reports misconduct allegations to the OIG within required time frames.

9. Establish written time guidelines for the investigative and adjudicative phases of the disciplinary system.

10. Require that the BOP Program Review Division periodically review a sample of closed disciplinary case files to assess whether the disciplinary decisions were reasonable, consistent, and timely.

APPENDIX I: THE DOUGLAS FACTORS

In *Douglas v. Veterans Administration* (1981), the Merit Systems Protection Board (MSPB) identified 12 relevant factors that agency management needs to consider and weigh in deciding an appropriate disciplinary penalty. The 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 II: CONFIDENCE INTERVALS FOR EMPLOYEE SURVEY

As mentioned in the "Purpose, Scope, and Methodology" section, we surveyed a sample of 441 BOP employees out of a population of approximately 33,600. Sixty-two percent (275 of 441) responded. In our findings sections, we cite the percentage of employees having certain opinions. The precision of our estimates about these opinions, based on a 95 percent confidence level, is shown below. The calculations were computed using standard statistical formulas for a simple random sample.

Table 13: Investigations of Employee Misconduct

Page Where Statement Is Located	Survey Statement	Percentage	95% Confidence Interval
14	Employees have read the Standards of Employee Conduct.	91.64	±3.26
14	Employees are aware of the BOP's requirements for reporting employee misconduct.	96.36	±2.20
14	Employees who witnessed employee misconduct did not always report it to proper authorities.	41.18	±11.69
14	Employees do not believe their fellow employees always report misconduct.	66.05	±5.62
16	Investigations are thorough.	73.53	±7.40
16	Investigations are not thorough.	26.47	±3.26

Source: OIG analysis of BOP data

Table 14: Reasonableness of Disciplinary System

Page Where Statement Is Located	Survey Statement	Percentage	95% Confidence Interval
27	Discipline is not appropriate.	26.15	±7.54
27	Discipline is too lenient.	16.92	±6.43

Source: OIG analysis of BOP data

Table 15: Consistency of Disciplinary System

Page Where Statement Is Located	Survey Statement	Percentage	95% Confidence Interval
31	Employees are treated differently according to their job title.	59.63	±7.56
31	Employees are treated differently according to their grade level.	59.62	±7.68
31	Employees are treated differently according to their gender.	43.05	±7.88
31	Employees are treated differently according to their race.	43.42	±7.86

Source: OIG analysis of BOP data

Table 16: Timeliness of Disciplinary System

Page Where Statement Is Located	Survey Statement	Percentage	95% Confidence Interval
39	Misconduct investigations are not handled in a timely manner.	42.57	±7.95
40	Adjudication of discipline is not timely.	33.59	±8.07

Source: OIG analysis of BOP data

APPENDIX III: BOP'S RESPONSE TO THE DRAFT REPORT

U.S. Department of Justice

Federal Bureau of Prisons

Office of the Director *Washington, DC 20534*

September 15, 2004

MEMORANDUM FOR PAUL A. PRICE
ASSISTANT INSPECTOR GENERAL FOR EVALUATIONS AND INSPECTIONS
OFFICE OF THE INSPECTOR GENERAL

FROM: Harley G. Lappin, Director

SUBJECT: Response to the Office of Inspector General's (OIG) Report: Review of the Federal Bureau of Prisons' Disciplinary System

The Bureau of Prisons (BOP) appreciates the opportunity to respond to the recommendations from the OIG's report entitled Review of the Federal Bureau of Prisons' Disciplinary System.

Please find the Bureau's response to the recommendations below:

Recommendation #1: Reinforce the existing policy that BOP employees report allegations of employee misconduct to the proper authorities as required.

Response: We concur with this recommendation. The Bureau plans to incorporate the OIG's finding and recommendation in this regard in the next annual training cycle and other training programs that discuss ethics and the standards of conduct. Furthermore, our Office of Internal Affairs (OIA) already has a training video in development in which this and other issues are addressed. It is anticipated the video and all training will be completed before the end of FY 2005.

Recommendation #2: Require that CEOs forward cases with sustained allegations through the full adjudicative phase.

Response: We concur with this recommendation. It is our plan to publish instructions to all CEOs which require each sustained case be fully adjudicated. After reading the findings of an investigation, if a CEO does not wish to take formal disciplinary or adverse action based upon sustained charges, he/she will prepare a complete justification to our Labor Management Relations Branch. This Branch will consider the nature of the sustained charge(s), as well as the circumstances and available evidence surrounding the sustained charges in question, and make a recommendation to Bureau management as to whether or not formal disciplinary or adverse action is warranted, or if the sustained charges should be adjudicated/resolved through the performance evaluation procedures. The target date established for implementation is December 31, 2004.

Recommendation #3: Ensure that when the deciding official mitigates the proposed discipline, the decision letter contains an adequate explanation of the reasons.

Response: We concur with this recommendation. We will issue a reminder to CEOs, as well as those involved in the preparation and technical approval of disciplinary and adverse action letters, that any decision letter which mitigates the proposed penalty contains an adequate explanation of the reasons for such mitigation. The reminder will be issued no later than October 31, 2004.

Recommendation #4: Remove the CEO from reviewing and approving investigative reports of employee misconduct for cases in which they will act as the deciding official by implementing an alternative review process that preserves the independence of the investigative and adjudicative phases.

Response: We concur this recommendation needs to be explored, but have strong reservations as to its implementation. As indicated at the OIG exit conference, we would like to explore and possibly pilot alternative review processes. Any meaningful alternative to the current practice of having CEOs review and approve local investigations will require: 1) a major realignment of existing functions; 2) a concomitant investment in additional staff resources at a time when the Bureau is facing serious funding deficits and downsizing in foreseeable fiscal years; and 3) a significant paradigm/organizational culture shift in terms of centralizing authority over local investigations. Consequently, any proposal to accommodate this recommendation will require much additional research and thought. Therefore, I ask that the OIG's recommendation be reworded as such: "Explore

alternative review processes that preserve the independence of the investigative and adjudicative phases."

Recommendation #5: Reinforce the existing policy that all required documents be maintained in the disciplinary files.

Response: We concur with this recommendation. We will publish a memorandum to the field which reinforces the requirement to maintain all documents used to support disciplinary action in the respective file. Furthermore, we will ensure this item is reviewed when conducting program reviews of institution human resource management operations. The target date established for implementation is October 31, 2004.

Recommendation #6: Develop procedures to ensure that discipline is imposed consistently BOP-wide, and review discipline for consistency across the agency periodically after these procedures are implemented.

Response: We concur with the position that discipline imposed should be consistent assuming all facts are the same, including position and security level of the institution. However, it is impossible to have exact consistency as individual factors should be considered and case law requires the consideration of the Douglas factors in every disciplinary action. Accordingly, we concur that all penalties will be consistent with the latitude to utilize the Douglas factors as required by case law.

The Bureau will review case law and actions taken in recent years to assess an appropriate range of penalties for a specific charge. By necessity, the ranges for some charges will have to remain broader than others (e.g., Unprofessional Conduct vs. Absent Without Leave) as the variety of issues in certain charges warrant broader ranges. We will review the need to modify our Table of Penalties in our Standards of Employee Conduct to ensure that all penalties fall within the national range. Procedures will be developed to ensure that each sanction is checked for consistency by the Labor Management Relations Branch, as well as Regional Office staff. Staff in the Labor Relations Branch have already been instructed as to these new requirements. A formal review of past cases, in order to determine an appropriate range of penalties for a given charge, will be completed no later than September 30, 2005.

Recommendation #7: Reinforce the existing policy that CEOs report allegations of employee misconduct to OIA within required time frames.

Response: We concur with this recommendation. I will issue a Blue Letter reinforcing the existing policy that CEOs report allegations to OIA within required time frames. In addition, we plan to incorporate the OIG's finding and recommendation in this regard in subsequent wardens' conferences and New Wardens' Training. The target date established for completion is December 31, 2004.

Recommendation #8: Reinforce the existing policy that the OIA reports misconduct allegations to the OIG within required time frames.

Response: We concur with this recommendation. Functions within the OIA have been realigned to address this issue, and improvements have been realized. OIA administrative staff, instead of special agents, are now referring matters to the OIG. As administrative staff do not typically travel, this has improved the timeliness of referrals to the OIG. Based on this realignment of function and the resulting improvements, we have completed this recommendation, and it should be closed.

Recommendation #9: Establish written time guidelines for the investigative and adjudicative phases of the disciplinary process.

Response: We generally concur with this recommendation with reservations and propose an alternative.

While we agree that investigative staff need to adhere to general time guidelines, three issues need to be considered before accepting the recommendation as stated. First, it is impossible to anticipate in every case the unique factors which may impede the timely investigation of an allegation, and we will never compromise the integrity of an investigation in order to meet time deadlines. Secondly, formally establishing time guidelines in either the investigative or adjudicative phase poses potential risks and "land mines" in terms of defending any disciplinary action taken in staff misconduct cases. Third, untimeliness on the part of outside law enforcement agencies and the courts, both in terms of deferring administrative matters back to the OIA and conducting their own investigations, are factors over which we have no control and which affect our own timeliness. For example, on August 26, 2004, we sent a memorandum to the OIG Investigations Division identifying 116 cases upon which we are awaiting a deferment decision; 63 of those are more than 1 month old, and 12 were referred in calendar year 2003.

We propose as an alternative our own internally-communicated time expectations for staff conducting investigations (120 days for local investigations and 180 days for OIA on-site investigations as upper-limit parameters). Failure to do so, barring unforeseen circumstances, will be dealt with as a performance issue.

We generally concur there should be time guidelines for the adjudication phase of the investigative process. However, as with time lines for conducting an investigation, it is difficult to always adhere to such guidelines, as there are times when a proposal letter is received raising questions that must be resolved prior to making good, sound, and defendable decisions. On occasion these questions are only resolved by reopening the investigation to gather more information. We will establish a general guideline of 120 days as the upper level parameter for completing the adjudication phase of the process. The target date established for implementation is October 31, 2004.

Recommendation #10: Require that the BOP Program Review Division periodically review a sample of closed disciplinary case files to assess whether the disciplinary decisions were reasonable, consistent, and timely.

Response: We concur with this recommendation. We will revise our Program Review Guidelines to include review of closed disciplinary case files to ensure disciplinary decisions were both reasonable, consistent, and timely. The target date established for implementation is December 31, 2004.

If you have any questions regarding this response, please contact Michael W. Garrett, Senior Deputy Assistant Director, Program Review Division, at (202) 616-2099.

APPENDIX IV: OIG ANALYSIS OF BOP'S RESPONSE

On August 17, 2004, the Office of the Inspector General (OIG) sent copies of the draft report to the Director of the Federal Bureau of Prisons (BOP) with a request for written comments. The Director provided the final written comments to us in a memorandum dated September 15, 2004.

The BOP fully concurred with seven of the ten recommendations and generally concurred with two other recommendations, but expressed "strong reservations as to [the] implementation" of the remaining recommendation. This recommendation called for the removal of the Chief Executive Officer (CEO) from reviewing and approving investigative reports of employee misconduct for cases in which the CEO also would act as the deciding official. The OIG made this recommendation to help ensure the independence of the investigative and adjudicative phases of the disciplinary process and to reduce the potential for unreasonable disciplinary decisions. The BOP stated that it would prefer to "explore and possibly pilot alternative review processes." However, it remains the OIG's position that independent investigative and adjudicative phases are crucial to maintaining the checks and balances essential to an effective disciplinary system. The BOP needs to implement an alternative review process in which the CEOs do not both review and approve investigations as well as act as the deciding official.

Following is an analysis of each BOP response to the report's ten recommendations.

RECOMMENDATIONS

Recommendation 1: Reinforce the existing policy that BOP employees report allegations of employee misconduct to the proper authorities as required.

Status: Resolved - Open

Summary of BOP's Response: The BOP concurred with this recommendation. The BOP will incorporate this finding and recommendation in the next annual training cycle and other training programs that discuss ethics and standards of conduct. In addition, the Office of Internal Affairs (OIA) is developing a training video that will address this finding.

OIG's Analysis: The actions described by the BOP are responsive to our recommendation. By December 1, 2004, provide the training materials

that show how the finding and recommendation will be incorporated into future training sessions or a status report on when the materials will be completed. In addition, by December 1, 2004, provide a copy of the OIA training video or a status report on when it will be completed.

Recommendation 2: Require that CEOs forward cases with sustained allegations through the full adjudicative phase.

Status: Resolved - Open

Summary of BOP's Response: The BOP concurred with this recommendation. The BOP plans to publish instructions for all CEOs requiring each sustained misconduct case to be fully adjudicated. However, the BOP is allowing an exception to this requirement. The CEOs will have the option of selecting sustained cases that, in their opinion, do not warrant disciplinary or adverse action. These cases, along with the CEO's justification for this action, will be submitted to the Labor Management Relations Branch (LMR) for its review. The BOP response also indicated that the LMR, after completing its case review, will recommend to "Bureau management" whether disciplinary or adverse action is warranted or will recommend that the case be resolved through performance evaluation procedures.

OIG's Analysis: The actions described by the BOP are responsive to our recommendation. However, we believe that the instructions to the CEOs implementing this recommendation must be comprehensive. For example, the instructions should identify by position the "Bureau management" official(s) who will review the LMR recommendations. Further, the instructions should specify that the "Bureau management" official(s), and not the CEO who initiated the review, will make the final decision on whether or not a case will be fully adjudicated. Finally, similar instructions need to be issued to the LMR, given its expanded role in this revised review process. By December 1, 2004, provide copies of the CEO and LMR instructions or a status report on the progress of their completion.

Recommendation 3: Ensure that when the deciding official mitigates the proposed discipline, the decision letter contains an adequate explanation of the reasons.

Status: Resolved - Open

Summary of BOP's Response: The BOP concurred with this recommendation. The BOP will issue a reminder to all parties involved with the preparation and technical approval of disciplinary and adverse action

letters that adequate explanations involving mitigation must be documented.

OIG's Analysis: The actions described by the BOP are responsive to our recommendation. By December 1, 2004, provide a copy of the formal reminder or a status report on when it will be completed.

Recommendation 4: Remove the CEOs from reviewing and approving investigative reports of employee misconduct for cases in which they will act as the deciding official by implementing an alternative review process that preserves the independence of the investigative and adjudicative phases.

Status: Unresolved

Summary of BOP's Response: The BOP stated that while this recommendation needed to be explored, it had strong reservations as to its implementation. The BOP also asked that the OIG consider rewording the recommendation to state: *Explore alternative review processes that preserve the independence of the investigative and adjudicative phases.* The BOP response further stated that it wants to "explore and possibly test alternative processes" because any meaningful departure from the current method would require: 1) a major realignment of existing functions, 2) a concurrent investment in staffing numbers when the BOP is facing potential downsizing issues, and 3) a significant shift in the authority structure over local investigations. The BOP stated that any attempt to implement this recommendation will require "much additional research and thought."

OIG's Analysis: The actions described by the BOP are partially responsive to our recommendation. The OIG has taken into account the concerns that the BOP presented above. However, the CEOs' involvement in both the investigative and adjudicative phases of a disciplinary system can affect the independence of the two phases and the overall disciplinary system. The OIG does not believe it is appropriate to change the recommendation, and the recommendation is unresolved. By November 1, 2004, provide a plan and schedule for how the BOP will explore and test an alternative investigative review process that leads to final implementation of a policy for ensuring the independence of the investigative and adjudicative phases.

Recommendation 5: Reinforce the existing policy that all required documents be maintained in the disciplinary files.

Status: Resolved - Open

Summary of BOP's Response: The BOP concurred with this recommendation. The BOP will provide a memorandum to the field reinforcing the requirement that all documents used to support disciplinary actions be maintained in the appropriate files. Also, the BOP stated that this issue will be reviewed when program reviews are conducted at institutions and facilities.

OIG's Analysis: The actions planned by the BOP are responsive to our recommendation. By December 1, 2004, provide a copy of the memorandum and the instructions developed to assess this issue during internal program reviews or a status report on when the memorandum and the instructions will be completed.

Recommendation 6: Develop procedures to ensure that discipline is imposed consistently BOP-wide, and review discipline for consistency across the agency periodically after these procedures are implemented.

Status: Resolved - Open

Summary of BOP's Response: The BOP concurred "with the position that discipline imposed should be consistent assuming all facts are the same, including position and security level of the institution."
The BOP stated it would take the following actions to address the recommendation. The BOP will: 1) review prior case law and actions taken to assess the appropriate range of penalties for specific charges, 2) review the need to modify its Table of Penalties to ensure that penalties fall within the national range, 3) complete a formal review of past misconduct cases to determine the appropriate range of penalties for a given charge, and 4) develop procedures to ensure that each sanction is reviewed for consistency by LMR and Regional Human Resources staff.

OIG's Analysis: The actions planned by the BOP are responsive to our recommendation. The OIG does not suggest that "exact consistency" should be the goal or can ever be achieved, because of unique factors that apply to each case. In our report, we describe consistency as being attained when similar discipline is imposed for similar misconduct and circumstances on a BOP-wide basis. By December 1, 2004, provide: 1) the results of the review of prior case law and actions to assess the appropriate range of penalties for specific charges, 2) the review of the need to modify the Table of Penalties, 3) a copy of the formal review of past misconduct cases for determining the appropriate range of penalties for a given charge, and 4) a copy of the procedures ensuring that each sanction is reviewed for consistency by LMR and Regional Human Resources staff, or a status report on when each of the documents will be completed.

Recommendation 7: Reinforce the existing policy that CEOs report allegations of employee misconduct to the OIA within required time frames.

Status: Resolved - Open

Summary of BOP's Response: The BOP concurred with this recommendation. The BOP will issue a "Blue Letter" reinforcing existing policy. In addition, the BOP will incorporate this finding and recommendation in future Wardens' conferences and New Wardens' Training.

OIG's Analysis: The actions planned by the BOP are responsive to our recommendation. By December 1, 2004, provide a copy of the Director's Blue Letter or a status report on when it will be issued.

Recommendation 8: Reinforce the existing policy that the OIA report misconduct allegations to the OIG within required time frames.

Status: Resolved - Open

Summary of BOP's Response: The BOP concurred with this recommendation. The BOP stated that it has completed a realignment of staff functions resulting in the improved timeliness of referrals to the OIG.

OIG's Analysis: The actions taken by the BOP are responsive to our recommendation. By December 1, 2004, provide documentation detailing the realignment of functions and how it has improved timeliness.

Recommendation 9: Establish written time guidelines for the investigative and adjudicative phases of the disciplinary system.

Status: Resolved - Open

Summary of BOP's Response: The BOP generally concurred with this recommendation. However the BOP had reservations and proposed an alternative. The BOP stated that three issues need to be considered before it would accept the recommendation as stated. The first issue is the impossibility of anticipating the unique factors that can occur in a case and impede the case's progress. The second issue is the "potential risks" and "land mines" posed by the formal establishment of time guidelines when defending disciplinary actions. The third issue is the role that participating outside law enforcement entities and courts can have on the timeliness of a case. As a result of these issues, the BOP proposed its own internal time

"expectations" for investigative work. The upper limits would be 120 days for local investigations and 180 days for OIA investigations. The BOP also said that it would establish an upper limit for completing the adjudication of misconduct cases at 120 days.

OIG's Analysis: The actions planned by the BOP are responsive to our recommendation. The upper limits proposed appear reasonable as a starting point to measure and evaluate its current capacity to investigate and adjudicate misconduct cases more efficiently. Other Department entities reviewed by the OIG either had in place or as a result of OIG recommendations implemented similar time frames. By December 1, 2004, the BOP should provide the guidance it will issue to local investigators and Human Resources staff at institutions and facilities, the Human Resources staff at Region offices, and OIA and LMR staff that details the establishment and application of these time frames, or a status report on when the guidance will be completed.

Recommendation 10: Require that the BOP Program Review Division periodically review a sample of closed disciplinary case files to assess whether the disciplinary decisions were reasonable, consistent, and timely.

Status: Resolved - Open

Summary of BOP's Response: The BOP concurred with this recommendation. The BOP stated that it will revise its Program Review Guidelines to include a review of closed disciplinary case files. The target date for implementation is December 31, 2004.

OIG's Analysis: The actions taken by the BOP are responsive to our recommendation. By December 1, 2004, provide a copy of the revised Program Review Guidelines or a status report on when the revision will be completed.