

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



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# **CHAPTER ONE**

## **INTRODUCTION**

### **I. Background**

This report examines complaints from Federal Bureau of Investigation (FBI) employees alleging that the FBI's system of discipline was unfair because FBI senior managers were treated more leniently than rank and file employees. In particular, members of the Senior Executive Service (SES) were alleged to receive light or no discipline while lower-level employees were treated more harshly for similar offenses. Among the concerns was that the FBI used a separate disciplinary system for SES members in which other SES members sat in judgment of their SES colleagues.

In 1999 the FBI's Law Enforcement Ethics Unit (LEEU), a division of the FBI's Office of Professional Responsibility (OPR), conducted an analysis to determine whether the FBI had such a "double standard" of discipline. The LEEU examined statistics on misconduct investigations and the discipline imposed for SES and non-SES employees. The LEEU also examined the outcome of several cases involving investigations of senior managers for various alleged acts of misconduct. In September 1999, the LEEU issued an internal report stating that it had concluded that senior FBI managers received different and more favorable treatment than other employees.

In August 2000 FBI Director Louis Freeh made several changes to the disciplinary system, including disbanding the separate SES disciplinary process. Currently, the discipline process for managers, line agents, and support personnel is similar, although there are still a few differences.

### **II. OIG Investigation and Report**

In order to review the allegations of a double standard of discipline in the FBI, the Office of the Inspector General (OIG) first reviewed the LEEU double standard report and carefully examined the cases it put forward as examples of a double standard. We also reviewed more recent cases in which SES-level employees were disciplined. In addition, we thoroughly reviewed the investigation and discipline in the "Ruby Ridge" and "Potts retirement party" cases, two well-known cases that generated significant controversy inside and outside the FBI about the discipline imposed on FBI employees. During our review, we interviewed many FBI officials involved with the disciplinary process, including

the authors of the LEEU double standard report, and many FBI and Department of Justice (DOJ) managers.

This report describes the results of our examination. In Chapter Two of the report, we briefly describe the FBI disciplinary system, including recent changes to it. In Chapter Three, we discuss the LEEU report, including two of the examples of SES discipline cases that suggested a double standard of discipline. We also discuss our review of recent disciplinary actions involving SES employees since changes in the disciplinary process were made in August 2000. Chapter Four describes in detail the Potts retirement party case, and our analysis of the outcome of that disciplinary process. Chapter Five examines the Ruby Ridge case, including the investigations conducted in the aftermath of the Ruby Ridge matter, the discipline that was imposed at various stages of the process, and our evaluation of the ultimate discipline imposed. In Chapter Five, we also describe the bonuses and promotions that the FBI awarded to subjects of the Ruby Ridge internal investigations while those investigations were still pending. In Chapter Six, we describe our overall conclusions and recommendations as to the FBI's disciplinary process.<sup>1</sup>

### **III. Summary of OIG Conclusions**

In sum, we did not find sufficient evidence to conclusively establish that the FBI systematically favors SES members in the discipline process. Because of the low number of cases involving SES members, we could not reach such a conclusion based on a comparison of similar cases. Moreover, differences in individual facts made it difficult to fairly compare cases. Another impediment to conducting a definitive comparison is the fact that legal requirements restrict the discipline that can be imposed on members of the SES throughout the government. Federal regulation states that a member of the SES cannot be suspended for less than 15 days. The practical effect of this law is that in SES cases, FBI deciding officials must choose between a letter of censure (essentially a written reprimand) and a suspension of 15 or more days. Because it is not possible to impose a short suspension in SES discipline cases as it is in non-SES discipline cases, a true comparison of SES and non-SES disciplinary sanctions is even more difficult. In

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<sup>1</sup> This report does not discuss the allegation that an FBI employee was retaliated against for raising claims of a double standard. The OIG is investigating that allegation and will report separately on that matter.

addition, we found that senior managers are able and more likely to retire while under investigation, thereby avoiding discipline.

We did conclude, however, that the FBI suffered and still suffers from a strong, and not unreasonable, perception among employees that a double standard exists within the FBI. This perception was fostered in large part by the existence of a dual system of discipline that existed prior to August 2000, in which SES members were judged only by other SES members. Furthermore, our review describes several troubling cases in which the discipline imposed for SES employees appeared unduly lenient and less severe than discipline in similar cases involving non-SES employees. In particular, FBI senior managers were not fired or harshly disciplined in either the Ruby Ridge or Potts retirement party cases. We believe that in these cases, FBI senior managers were afforded different and more favorable treatment than less senior FBI employees would have received. These cases, which were well known within the FBI, fed the perception that senior managers were treated more favorably than subordinate employees.

We believe the August 2000 changes will help address to some extent the perception of a double standard, as well as any actual bias that existed while the dual system was in place. We also believe that the Attorney General's decision in July 2001 to expand the jurisdiction of the OIG to investigate misconduct in the FBI will help address issues relating to a double standard of discipline because the OIG will be able to review and handle most misconduct allegations against senior FBI officials.

We are still concerned, however, that to the extent the new system still provides SES members with a right of appeal of discipline to a board made up of three SES members, one of whom the appellant selects, the perception and possibly the reality may be that a double standard of discipline may continue to exist. We also believe that the FBI's legal inability to impose a suspension on SES members of less than 15 days will continue to impede its ability to discipline senior managers appropriately and will continue to foster the perception of a double standard of discipline. At the end of this report, we make 11 recommendations regarding these and other issues that we believe will assist the FBI in moving further to a disciplinary system that is fair and consistent, and that is also perceived as fair and consistent.

## **CHAPTER TWO**

### **FBI DISCIPLINARY STRUCTURE**

#### **I. FBI's Prior Disciplinary Process**

Prior to March 1997, FBI OPR, which was part of the FBI's Inspection Division, was charged with the responsibility for investigating employee misconduct matters. Adjudication was handled by a different unit, the Administrative Summary Unit, which was part of the FBI's Administrative Services Division.

In March 1997, the FBI's disciplinary process was significantly reorganized when FBI Director Freeh instituted several changes to that system. OPR became a freestanding entity, reporting directly to the FBI Deputy Director, and it was given responsibility not only for investigating misconduct but also for proposing and deciding certain disciplinary action. An Assistant Director and a Deputy Assistant Director headed the new OPR, which was divided into an investigations component and an adjudications component.

As part of the 1997 changes, the FBI developed two systems of adjudicating disciplinary matters – one for members of the SES and one for all other employees.<sup>2</sup> Under the two-tier system, allegations of serious misconduct against non-SES employees were adjudicated by OPR. The OPR Investigative Units investigated and determined the relevant facts, and then sent the results of its investigation to the OPR Adjudication Units, which evaluated the evidence and recommended discipline. As part of its analysis, the Adjudication Units considered the discipline imposed in precedent cases; that is, prior cases in similar categories of misconduct. The discipline imposed had to be approved by the Deputy Assistant Director or the Assistant Director of OPR.<sup>3</sup>

Non-SES employees had the right to appeal OPR's decision to the Assistant Director of the FBI's Inspection Division, who would convene a Disciplinary

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<sup>2</sup> The investigation of allegations of misconduct against both SES and non-SES FBI employees was handled similarly by OPR Investigative Units. However, less serious allegations of misconduct against lower-level employees were, and still are, assigned for investigation to FBI field offices or Headquarters units, although they are supervised and monitored by FBI OPR.

<sup>3</sup> Since October 1, 2002, the two Adjudication Unit chiefs can approve disciplinary actions against FBI employees below grade GS-15, if the discipline is less than a 15-day suspension.

Review Board if the employee was suspended for more than 14 days. The Disciplinary Review Board was composed of three SES members and was chaired by either the FBI's Inspection Division's Deputy Assistant Director or Assistant Director. The decisions of the Inspection Division or the Board constituted the final agency action.

The disciplinary process for SES employees was different. SES members accused of misconduct were investigated by OPR, but they were entitled to have factual findings and disciplinary decisions adjudicated by a Disciplinary Review Board comprised of other SES members. For SES members accused of misconduct, the OPR Adjudication Unit forwarded to the FBI's Deputy Director a package containing the results of the investigation and a summary of precedent cases and the disciplinary findings in those cases. The package did not contain a formal recommendation for discipline, or any final findings regarding misconduct. If the Deputy Director determined that the allegations appeared to have been substantiated by the OPR inquiry, the Deputy Director convened a Disciplinary Review Board composed of five SES members. The Deputy Director picked the five members who sat on each case. The SES Board reviewed the analysis of the Adjudication Unit with reference to prior disciplinary cases and, where it found the misconduct to be substantiated, the SES Board recommended disciplinary action to the Deputy Director. The Deputy Director made the final determination, based on the recommendation of the SES Board.<sup>4</sup>

## **II. New Disciplinary Process**

On August 15, 2000, former Director Freeh issued a memorandum changing the two-tiered disciplinary system. The memorandum addressed the difference between the adjudication of SES and non-SES cases. The memorandum noted that the SES Board made a disciplinary recommendation for SES members based upon its appraisal of the facts and precedents, with particular reference to the relatively small number of prior SES disciplinary cases, "some of which predated the strengthening of our disciplinary policies." The memorandum concluded that the difference in adjudication procedures, together with the problem of different deciding officials applying different precedent bases, permitted "a perception of a double standard which is neither warranted nor permissible, while at the same time

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<sup>4</sup> In cases involving FBI executives at the level of Assistant Director or above, however, all final decisions were reserved for the Deputy Attorney General.

denying SES members the appellate protection enjoyed by other employees.” The memorandum stated that the revisions would help to achieve the goal of giving both FBI employees and the public confidence that the FBI’s disciplinary system punishes misconduct fairly and expeditiously “without fear or favor.”

The new procedures abolished the SES Board. They required that adjudication of administrative inquiries involving SES employees would be handled by OPR and would be based on the uniform application of precedent cases, for both SES and non-SES employees, decided since March 1997. Freeh’s August 2000 memorandum stated that “[t]he same standards for evaluating evidence would be consistently applied to all employees with due regard for the increased responsibilities and obligations of a senior executive.” As required by regulation, final disciplinary authority over “key executives” was still reserved to DOJ. Moreover, by statute (5 U.S.C. § 7543(a)), SES members still cannot be suspended for less than a 15-day period.

Under the new system, an official in OPR, normally the OPR Deputy Assistant Director, proposes disciplinary action for senior executives and the OPR Assistant Director makes the disciplinary decision. Cases involving non-SES employees continued to be handled in the same manner as established by Freeh’s directive in March 1997. Appeals are permitted for all disciplinary actions, except letters of censure and oral reprimands. SES members may now appeal to the Inspection Division, which will convene the same Disciplinary Review Board to which all other employees have access. The Board consists of three SES members. The chair of the Board is the Assistant Director of the Inspection Division. The person appealing gets to select one member of the Board. The third member of the Board is chosen at random from a list of SES members.

In reviewing appeals, the Assistant Director of the Inspection Division or the Disciplinary Review Board may “independently redetermine the factual findings and/or the penalty imposed.” If a new penalty is imposed, it must be consistent with applicable precedent. Both the Assistant Director of the Inspection Division and the Board are required to document their findings in writing and provide the employee a written decision. There is no requirement, however, that the Assistant Director or the Disciplinary Review Board provide written justification for their findings or for any change that is made to the decision of the original disciplinary decision.

Although there are no further internal appeals beyond the Assistant Director or the Board, the FBI Director retains a discretionary power to change disciplinary actions concerning all employees except those senior executives whose discipline

must be approved by the Deputy Attorney General. According to Freeh's August 2000 memorandum, the FBI Director's power to change discipline, which could be both in favor of and to the disadvantage of the employee, is "not intended to be an additional level of appeal and will not be exercised routinely. It is intended to be exercised only in those rare and exceptional cases when the Director considers it necessary to correct an injustice or to prevent harm to the FBI."

According to the FBI's Manual of Administrative Operations and Procedures (MAOP), when deciding discipline the FBI should give consideration to "Bureau policy and similar incidents previously resolved, as well as any aggravating or mitigating circumstances of the case in point." The MAOP states that for discipline of SES and non-SES employees, the decision-maker should consider possible mitigating or aggravating factors in making a final disciplinary decision. These factors are commonly known as the "Douglas Factors," and stem from the Merit Systems Protection Board (MSPB) case Douglas v. Veterans' Administration, et al., 5 M.S.P.B. 313 (1981).<sup>5</sup> Despite the fact that very few FBI

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<sup>5</sup> These factors include:

- the nature and seriousness of the offense, and its relationship 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;
- the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- the employee's past disciplinary record;
- the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties;
- the notoriety of the offense or its impact upon the reputation of the agency;
- 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;
- potential for the employee's rehabilitation;
- 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;

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employees have appeal rights to the MSPB,<sup>6</sup> the FBI considers the Douglas factors in arriving at disciplinary decisions.

The FBI's MAOP also states that in most instances penalties for violations of regulations fall within a range of penalties set forth in that manual. However, a penalty outside of the range may be imposed where aggravating circumstances exist. The MAOP cites as an example the case of a supervisor or Bureau official who, because of his or her responsibility to demonstrate exemplary behavior, "may be subject to a greater penalty than is provided in the range of penalties."

Pursuant to statute, however, FBI SES employees, like all other SES employees in the federal government, cannot be suspended for fewer than 15 days. An FBI decision-maker must therefore choose between a letter of censure and a minimum 15-day suspension for SES employees, but may impose suspensions for less than 15 days on non-SES employees.

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- the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others;
- consistency of the penalty with those imposed upon other employees for the same or similar offenses; and
- consistency of the penalty with any applicable agency table of penalties.

<sup>6</sup> Only preference-eligible veterans have appeal rights to the MSPB. Veterans are preference-eligible if they are disabled or served on active duty during certain specified time periods or in military campaigns.

## **CHAPTER THREE**

### **THE LEEU REPORT**

The LEEU was established as a unit of FBI OPR in 1995. Its mission is to teach ethics to FBI personnel and to monitor the overall integrity of the FBI's components. The unit's first chief was FBI Special Agent Frank Perry. He told the OIG that as chief of the unit he began to hear frequent complaints about unaddressed misconduct by senior executives. Perry and his staff found that many rank and file employees of the FBI believed that the discipline administered to SES members was less severe than normally would be given to other employees of the FBI who had engaged in similar conduct. Perry believed that the LEEU had an obligation to look into such allegations because of the serious impact they could have on the FBI. He noted to the OIG that a belief by employees that their superiors are judged by a more lenient standard leads to morale problems and a lack of respect for senior management.

On September 1, 1999, the LEEU issued a report entitled "FBI Senior Executive Service Accountability: A Higher Standard or a Double Standard?" The report, which was written by Perry and two other FBI employees, concluded that a double standard existed and recommended systemic changes to the disciplinary process. This report was the impetus for the changes in the FBI's disciplinary system that were instituted in August 2000.

#### **I. LEEU's Statistical Analysis**

The LEEU's report first attempted to statistically compare OPR cases involving similar acts of misconduct between non-SES agents and SES managers. It presented for six years the number of SES subjects of OPR investigations versus the overall SES population in the FBI for a given year compared to the number of non-SES subjects versus the overall non-SES FBI population for the same year. According to the report, these numbers revealed that SES employees are approximately three times more likely to have an OPR case initiated against them as are non-SES employees.<sup>7</sup> The report concluded from these statistics that OPR

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<sup>7</sup> The LEEU report found that while the number of OPR cases opened on Special Agents (SA) remained fairly constant between 1994 and 1999, the number of cases opened on SES employees during that same time period fluctuated significantly. The report did not reach a conclusion as to why the number of OPR cases opened on SES employees fluctuated by comparison to SA cases, but noted that the fluctuation alone was "cause for concern." The report (continued)

did not shy away from opening misconduct cases on senior managers. The report stated that “few within our ranks would argue with the claim that the investigation of those matters is firm, fair, and thorough.”

The report then compared the discipline administered to SES and non-SES agents for similar misconduct. The report presented the data for various categories of misconduct for fiscal years 1996 through 1998, including the number of SES and non-SES subjects in several misconduct categories, the number and percentage of those subjects who were disciplined, and the number and percentage of those subjects who were suspended or dismissed. It concluded that the data showed a “clear trend” that SES employees receive fewer suspensions and dismissals than non-SES employees for the same offense. The LEEU noted, however, that the comparison was difficult because of the small sample of SES cases and because every case is factually different.

We heard several concerns about the LEEU’s statistical comparison and conclusions. First, as acknowledged in the LEEU report, comparison of cases between the two categories of employees was difficult because of the small number of SES cases. For example, in one of the categories, there were 98 non-SES employees investigated and only 4 SES employees. Second, a large number of SES employees are eligible to retire and take advantage of this option while under investigation to avoid any penalty. Third, as discussed above, the “Douglas Factors” are to be considered prior to making any disciplinary decision. These factors, which include the length of an employee’s service, the level of their responsibility, and their past work and disciplinary record, necessarily make disciplinary decisions highly individualized.

Despite these limitations, we believe the LEEU report brought justified attention to a clear problem – the widespread perception throughout the FBI of a

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presented two points of view as to why the number of SES OPR cases might be greater than non-SES cases. The first was that because of the senior position of an SES employee and the higher level of responsibility, it would be more likely that an OPR inquiry would be initiated on alleged misconduct. Likewise, the report noted, “unpopular decisions made by senior managers could prompt more allegations by disgruntled subordinates.” On the other hand, the report noted that SAs conducting investigations might be more likely to have OPR cases opened on them because of “their greater hands-on activity with arrests, searches, informants and trial.”

double standard of discipline. As an internal document that created an impetus to change, the LEEU report was extremely useful and effective.

## II. OIG's Analysis

In an attempt to evaluate whether a double standard of discipline exists in the FBI, we reviewed the files of 15 SES disciplinary matters closed between August 2000 (when the new disciplinary system was implemented) and November 2001. We assessed whether the discipline imposed appeared inappropriate to the facts of the case or inconsistent with precedent. Of the 15 SES closed matters,<sup>8</sup> we found:

- one dismissal in the case of Robert Hanssen, who later pled guilty to espionage charges;
- six retirements while under investigation;
- a 15-day suspension for a variety of offenses, including furnishing beer during work hours, obtaining FBI employment for his daughter, and making inappropriate remarks at a retirement party;
- a 35-day suspension for driving while under the influence of alcohol and resisting arrest;
- a letter of censure for failure to report a matter to OPR;
- a letter of censure for making unprofessional remarks to FBI Inspectors;
- an oral reprimand for disclosure of Privacy Act-protected information to the media; and
- three “no actions” in matters involving alleged misuse of a government vehicle, improper remarks, and improper strip-search of agents.

Our review was limited by the same factors that limited the statistical review of the LEEU. Our review did not find that any of the 15 disciplinary decisions was obviously lenient or unfair, or inconsistent with the precedent of discipline imposed on non-SES employees in like cases.

Nevertheless, our review of these cases raised several troubling issues. First, out of 19 SES disciplinary matters that were closed between August 2000 and

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<sup>8</sup> We did not include the four SES matters relating to Ruby Ridge, which we describe and analyze extensively in Chapter Five of this report.

November 2001 (which includes, in addition to the 15 discussed above, the Ruby Ridge cases discussed in Chapter Five), we found that 6 SES employees, or almost one-third, retired while under investigation. The ability to retire with a pension in order to avoid disciplinary action is not as commonly available to less senior FBI employees. Also, the ability to retire while under investigation fuels the perception that SES employees can avoid discipline and receive preferential treatment. Second, because of the statutory restrictions on suspensions for SES employees, we considered only whether the SES employees who received letters of censure should have received a 15-day suspension instead – the next level of discipline available. In some cases, it appears that a shorter suspension may have been appropriate discipline, but that option was not available to the FBI.

In sum, a comparison of SES versus non-SES discipline did not yield definitive conclusions about whether a systemic double standard exists in the FBI. But there were four troubling cases of disparate discipline for SES members that the LEEU report noted, which we examined in detail: the investigation of a Special Agent in Charge (SAC) who behaved inappropriately in a hospital emergency room, an Assistant Director who lost his pager, the Potts retirement party case, and the Ruby Ridge case. These cases reveal troubling instances of light discipline for SES members. They also fostered a strong perception of a double standard within the FBI. In the rest of this chapter and in the two chapters that follow, we discuss these cases in detail.

### **III. Unprofessional Behavior of a Special Agent in Charge**

In 1997, an SAC of an FBI field office was involved in an altercation with hospital staff after he took his elderly father to the emergency room for treatment. Three doctors, two nurses, and three local police officers described the SAC as probably intoxicated and said that his behavior was loud, belligerent, inappropriate, and frightening. Several witnesses described being afraid for their safety. Because of his actions, hospital personnel asked the SAC to remove his weapon. The SAC refused to do so, and local police were called to the hospital. The SAC initially refused to produce identification, and a confrontation with the police ensued. He was sent home by the police with his fiancée. The SAC later refused to cooperate with the local chief of police who was conducting an investigation of the matter. When interviewed by OPR, the SAC admitted to having had one 12-ounce beer several hours before the incident, denied making statements about drinking beer to hospital staff, and denied making abusive statements to the police officer at the hospital.

OPR concluded that the SAC had committed misconduct. In evaluating the appropriate discipline, OPR cited five similar cases as precedent:

- A Supervisory Special Agent (SSA) received a seven-day suspension and one-year probation after he was found to have used “abusive/offensive language” toward employees at a hotel where he was staying. He was alleged to have been intoxicated. He was found to have been suffering from job-related stress and depression, which were viewed as mitigating factors.
- An SSA was suspended for 14 days and placed on probation for six months for making loud, abusive comments after hours to the FBI inspection team that was inspecting his office.
- An SAC was suspended for 21 days, put on probation for 6 months, and received a “loss of effectiveness” transfer to FBI Headquarters after he was arrested for drunk driving and then requested and obtained assistance from a colonel in the highway patrol in obtaining his release at the arrest scene.
- An FBI Section Chief was censured for engaging in a verbal altercation with an FBI employee in the parking garage because the Section Chief believed that the other employee was driving in a dangerous manner and may not have been an FBI employee.
- An SAC was censured and received a transfer to FBI Headquarters after improperly upgrading to business class during a flight to Paris while the agent accompanying him flew in tourist class and for inadequately preparing for the meetings in Paris.<sup>9</sup>

An SES Board was convened and recommended that the SAC involved in the hospital altercation be immediately removed from his position and be given a loss of effectiveness transfer to FBI Headquarters. The Board proposed that the transfer order specify that the transfer was to further the mission and needs of the FBI and “should not be considered a punitive measure.” The Board also recommended a fitness-for-duty examination in order to determine the effects of alcohol, stress, and medication on the SAC’s actions.

The SAC was placed on administrative leave pending the receipt of the fitness-for-duty report. The SAC was examined and the doctor concluded that the SAC’s depressive condition, continued use of alcohol, and recurrent need for the

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<sup>9</sup> It is not clear why this last case was considered to be comparable.

medication Prednisone “contribute to a vulnerability to recurrent inappropriate behavior, mood instability, and impaired judgment.” The doctor recommended a course of treatment and that the SAC remain in a limited-duty position until he recovered. The doctor’s report stated that the SAC had reported temper and other problems when taking Prednisone, but the report noted that the SAC was not taking Prednisone on the day in question and had not taken it for about “a month before the incident.”

The SES Board reconvened and concluded that the SAC’s behavior, while otherwise actionable, was mitigated heavily by the effects of his medication. The Board recommended that no further action, beyond the SAC’s transfer to FBI Headquarters, was necessary. The Board also noted that it was aware of the SAC’s intention to retire before the end of the year.

The FBI Deputy Director at the time, Robert Bryant, wrote the SAC a letter stating that although the Board found his conduct to be “totally unacceptable and unprofessional,” it had recommended no disciplinary action because his actions were significantly mitigated by the effects of prescription medications he was taking at the time of the incident. Bryant stated in the letter that he was “seriously disturbed by the damage which [the SAC’s] conduct caused,” noted that the negative impact of his behavior was enhanced by his status as a member of the SES, and strongly suggested that the SAC make amends with both the hospital staff and local police. Significantly, however, the file copy of the letter included specific instructions that the letter should be personally presented to the SAC and stated that the letter was for “information only and that no copy will be designated to the employee’s official personnel file.”<sup>10</sup>

This case was cited by the LEEU report as an example of a disparity between the discipline imposed on SES and non-SES employees. We agree. There was no evidence in the record about the side effects of the SAC’s medications, which the SES Board referred to as evidence to heavily mitigate discipline. But the doctor’s report was clear that the SAC had not taken Prednisone on the day of the incident and had not taken it for about one month prior to the incident.

The outcome of this case was troubling. The ultimate result – removal of the SAC from his supervisory position and a retirement – seems only minimally

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<sup>10</sup> Former Deputy Director Bryant, now retired, did not respond to our requests to interview him on this matter.

acceptable, and other aspects of the case raise questions. For example, it is unclear why the removal was described as “nonpunitive.” Most disturbing, the SES Board’s reliance on the SAC’s medication as mitigating evidence appears to have stretched the actual facts. Although the fitness-for-duty report clearly noted that the SAC had not taken medication for one month prior to the incident in question, the Board relied heavily on the SAC’s use of medication as a mitigating factor.

#### **IV. Discipline of SES Employees for Loss of FBI Property**

Another case discussed in the LEEU report was the discipline imposed when an Assistant Director lost his pager. According to the report, the discipline imposed on FBI personnel for loss of FBI property traditionally had been a letter of censure.<sup>11</sup> In July 1996, when an Assistant Director lost his pager, the Personnel Division recommended that a letter of censure was appropriate and in keeping with precedent. Deputy Director Bryant decided, however, that the Assistant Director should receive an oral reprimand “due to the minimal monetary and operational value of the lost equipment.” Later in 1996, the Deputy Director asked the Personnel Division to circulate an employee notice articulating a new position that an oral reprimand was the appropriate sanction for this type of loss. OPR internal records also noted that this case set “new precedent” for this type of loss.

This policy change was never formally distributed to the field, where most minor misconduct cases like this are resolved. The LEEU report stated that, probably through word-of-mouth or through contact with OPR, the majority of pager losses since 1996 against special agents have resulted in findings of “no action” or in oral reprimands. However, the report asserted that from the time the Assistant Director received his oral reprimand to the time of the LEEU report, five special agents had received letters of censure for loss of their pagers. The report concluded that “the disparate and favorable treatment could not be any more obvious.”

We did not find that the policy change itself necessarily reflected a double standard. We were concerned, however, by the fact that five line agents continued to be punished under the old standard. This discrepancy reflects a failure to ensure that FBI disciplinary policies are adequately communicated to the field.

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<sup>11</sup> The LEEU report noted, however, that for unexplained reasons one SAC had received only an oral reprimand for the loss of his pager in June 1995. However, in November 1995 another SAC lost his pager and received a letter of censure.

Regardless of the reasons for it, this lack of consistency should not be tolerated because it results in the perception of a double standard.

In the next two chapters of this report, we describe the Potts retirement party and Ruby Ridge cases, two well-known incidents that exacerbated the perception of a double standard of discipline in the FBI.

## **CHAPTER FOUR**

### **THE POTTS RETIREMENT PARTY**

The Potts retirement party is widely believed within and outside the FBI to be an egregious example of senior managers being excused or lightly disciplined for misconduct that would have resulted in severe sanctions if less senior employees had been involved. We interviewed numerous FBI employees, including members of the SES, who believed that the disciplinary decisions stemming from this case were fundamentally flawed. We agree. This chapter examines that case and provides our assessment of it.

#### **I. Background**

When Deputy Director Larry Potts retired from the FBI in 1997, a dinner was held in his honor in Arlington, Virginia, on October 9, 1997. The Assistant Director of the FBI's Training Division, Joseph Wolfinger, was responsible for coordinating the retirement dinner.

On October 2, 1997, seven days before the dinner, Wolfinger directed Training Division Section Chief John Loudon to send an electronic communication (EC) to the field announcing an SAC conference at the FBI Academy in Quantico, Virginia, to discuss "New Agent Curriculum and Training" on October 10, 1997, the day after the dinner. The announcement did not contain a conference schedule, a starting or concluding time, a training identification number, or travel instructions. The conference was scheduled for a Friday, normally a travel day for FBI employees following the conclusion of conferences.

The Potts retirement dinner was attended by approximately 140 people, including many SACs. The following day the conference was held at the FBI Academy. Only five people attended – Wolfinger, Loudon, two SACs, and an individual who was not an SAC. The FBI Supervisory Special Agent (SSA) who was in charge of the presentation was informed about the event on October 7. There was no formal agenda for the conference. The SSA reported that he discussed the "integrated case" – a fictional investigation for training purposes – which was to be a part of the new agents' training. The "conference" lasted no longer than 90 minutes and possibly as little as 45 minutes.

It was alleged that the conference was scheduled for October 10 to provide justification for the FBI to pay for the travel of SACs to attend the Potts retirement dinner. Under FBI policy, which was unwritten at the time but which we

understand was commonly known, travel to a retirement function was considered personal business and not reimbursable by the government. It was further alleged that seven SACs falsified travel vouchers in order to receive reimbursement for travel to the dinner. OPR and the Department of Justice Office of Professional Responsibility (DOJ OPR) jointly investigated the matter. While the investigation was ongoing, four SACs who were subjects of the investigation retired. After the investigation, OPR referred the actions of four other SACs, Wolfinger, and Loudon to the SES Board for disciplinary action.

## **II. The Evidence**

The evidence in this case was described in a memorandum dated November 18, 1998, from FBI OPR Assistant Director Michael DeFeo to FBI Deputy Director Robert Bryant. We summarize that evidence below.

### **A. Training Division Personnel**

Assistant Director Wolfinger acknowledged that he instructed Loudon to prepare the EC announcing the training. Wolfinger said that he knew that a number of SACs would be in the Washington, D.C. area for Potts' retirement party. He said he wanted to take advantage of their being in town to hold a conference on training. Wolfinger said that he would not have convened a conference like the one planned if the SACs had not been coming to Washington already. Since the SACs were going to be in the area anyway, he said he wanted them to travel to the FBI Training Academy to "talk to us about something that was very important to the Academy and [to him] and the FBI" – the curriculum and training for new agents.

Loudon told OPR that the conference was Wolfinger's idea and was organized after the Potts dinner was scheduled. When asked whether the conference was set up to legitimize travel to the Potts dinner, Loudon stated:

I would have to defer to what Mr. Wolfinger was thinking with that because when he brought it up to me, my idea was yeah, the SACs can obviously use this as a mechanism, but I looked at it as a way to take advantage of SACs being here.

Loudon admitted there was no perceived need for the conference prior to the Potts function and stated that he did not believe an objective observer would conclude this was a legitimate conference, as opposed to a cover for SAC travel. Loudon was polygraphed, and the results indicated no deception in his denial that

the purpose of the conference was to increase the number of attendees at the retirement party. However, the important issue in this matter was not whether the conference was organized to increase attendance at the dinner, but rather whether the purpose of the conference was to legitimize travel for those who were already planning to attend, something Loudon essentially admitted in his interview. OPR recommended that an SES Board determine whether Wolfinger and Loudon attempted to waste or misapply government resources or neglected their duty by inviting SACs to a conference of dubious substance to justify reimbursement for travel to the Potts retirement party.

## **B. SAC Herbert Collins**

Herbert Collins, then the SAC of the Chicago field office, filed travel documents stating that he was attending a “conference” in Washington, D.C. on October 9-10, 1997. He subsequently told OPR investigators that this reason was not correct and that the justification on the travel documents should have been to attend Potts’ retirement party. According to Collins, at a June 1997 meeting of the FBI’s SAC Advisory Committee, of which Collins was a member, then FBI Deputy Director William Esposito had authorized members of the Advisory Committee to travel to attend retirement functions for senior FBI officials.<sup>12</sup> Collins told OPR that he had traveled to another retirement function in June 1997 for the former SAC in Detroit. With respect to the Potts matter, Collins initially stated that he had indicated on the October 1997 voucher that the purpose of his travel was to attend the retirement function. When later confronted with his travel voucher, which stated that the purpose was to attend a conference, he said that it was an error on his part not to review the travel documents prior to signing them. OPR referred to the SES Board the question of whether Collins relied on the

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<sup>12</sup> OPR tried to determine the validity of this explanation. Esposito, who by then had retired, refused to be interviewed, but he informed OPR that he never changed any policy regarding who could attend a retirement function at government expense. Some individuals present at the June 1997 meeting thought that Esposito was authorizing travel of all SACs to retirement functions; others thought that he was authorizing only the travel of SACs on the Advisory Committee. As part of its investigation regarding this issue, OPR interviewed SAC Advisory Committee member Don Clark, who stated that he believed such travel was authorized and that he had attended two such retirement functions and submitted vouchers to the FBI. An examination of those vouchers revealed that Clark’s voucher did not reflect that he had traveled to attend a retirement function, but rather stated “Attend meetings at FBIHQ” on one and “Attend Meeting – Inspection Div.” on the second. Clark subsequently became a subject of the investigation.

Esposito conversation as justification for travel to retirement parties (and negligently overlooked his staff's use of the justification of "meetings" or "conferences") or whether he used the justification of attending a conference because he was concerned that attending a retirement party would be rejected as a justification.

### **C. SAC Van Harp**

Van Harp, then the SAC of the Cleveland, Ohio field office and now the Assistant Director-In-Charge of the Washington field office, filed a travel request form stating that he was traveling to attend a "Conference." However, he did not attend the October 10 training conference. Additional travel documents filed by Harp in October 1997 stated that he had traveled to Washington, D.C. for a Career Board meeting on October 9 and 10, 1997.<sup>13</sup> Although Harp was a member of the Career Board, the Career Board did not meet on either October 9 or 10.

When questioned by OPR, Harp acknowledged that the Career Board had not met on October 9 and 10. He stated that he used the term "Career Board" to mean business surrounding his role on the Career Board and not a specific meeting. Harp stated in a sworn deposition to DOJ OPR that his travel to Washington was really to attend meetings at FBI Headquarters. The evidence showed that Harp had no scheduled appointments, but he claimed to have made unscheduled visits to whoever was available at FBI Headquarters on matters relating to the Cleveland field office. He identified 11 senior-level executives with whom he "probably" or "could have" met. None of the 11 recalled specifically whether they met with Harp on that day, but several stated that they had met with him several times during that fall. One individual was on leave the day that Harp said he might have met with him. OPR referred to the SES Board the question of whether Harp's rationale for traveling to FBI Headquarters at the time of the Potts party constituted false or improper justification for official travel.

### **D. SAC Victor Gonzalez**

Victor Gonzalez, then a SAC in the New York Division, filed travel documents listing "travel to FBIHQ on Official Business" as his justification and "Management Travel" as his purpose. Gonzalez told OPR that the purpose of his

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<sup>13</sup> The Career Board is a group of SES members who meet periodically to review the applications of FBI employees for management positions in the FBI.

travel was to assist an employee seeking a hardship transfer, to meet with a specific FBI official regarding his division's pending move, and to attend the Potts dinner. The evidence showed that he had no scheduled appointments at FBI Headquarters on October 9 or 10. Gonzalez admitted never going to Headquarters to discuss the hardship transfer, but he claimed to have met with a specific employee at an FBI offsite location about the move. FBI records revealed that the specific employee that he claimed to have met with was out of the country that entire week. Gonzalez identified two other employees that he "likely" met with, but neither could recall meeting with him. OPR referred to the SES Board the question of whether Gonzalez's rationale for traveling to FBI Headquarters at the time of the Potts party constituted false or improper justification for official travel.

#### **E. SAC Jack Daulton**

Jack Daulton, then the SAC of the Atlanta Division, stated on his travel forms that his travel to Washington on October 9, 1997, was to "attend New Agent Curriculum Training Conference." Daulton never attended the conference. He told OPR that he intended to go to the conference, but the time of the conference was later than he had expected and made it impossible for him to attend because of his return flight to Atlanta.

Daulton told OPR that he had been told originally that the conference would start between 9 and 10 a.m. and that he had scheduled his return flight to Atlanta for 1:25 p.m. He said that he learned at the Potts retirement party that the conference would not start until 11 or 11:30 a.m. because of a new agent class graduation at the Academy. Daulton said that he started to go to Quantico the next morning, but then decided that he would not be able to make his flight. He stated that it was not his fault that he could not attend the conference because of the time change. He also said that he did not attempt to change the time of his flight because he felt he should get back to Atlanta. Daulton said that he arrived in Atlanta after 3 p.m. and went home.

Daulton was later reinterviewed by OPR and was asked about the fact that his rental car was returned to the Washington airport at 8:21 a.m. and his car in Atlanta was taken out of the Atlanta airport parking lot at 12:12 p.m. He responded that he did not recall returning to Atlanta that early but that he must have decided that he would not be able to attend the conference and make his 1:25 p.m. flight, so he took an earlier flight.

OPR recommended that the SES Board consider whether Daulton had intended to travel to the conference at Quantico and was deterred from attending

because of an unexpected change in schedule, or whether he used the conference as justification for travel to Washington without any intention of attending the conference and lied under oath to OPR investigators. The SES Board later requested that Daulton be polygraphed regarding whether, on the morning of October 10, he actually intended to attend the conference. Daulton passed the polygraph test.

## **F. Precedent**

As disciplinary precedent, OPR provided two categories of cases to be considered by the SES Board. The first was “False voucher, misuse of government property/position.” It cited 11 cases as precedent, including:

- A former FBI Director was criticized for, among other things, abusing government travel for personal reasons and ordered to reimburse the government for the cost of the personal travel. He eventually was removed as the FBI Director.
- An SAC was censured for transporting an unauthorized passenger in an FBI vehicle and using that vehicle for personal travel.
- An SAC was found to have used poor judgment in traveling to deliver a brief speech to a criminal justice class in which his son was a student. The Deputy Director found that while FBI regulations were followed with respect to reporting the travel, a nearby executive could have delivered the speech and the SAC's trip constituted poor judgment because it created the impression that government funds were expended for travel primarily for a personal reason. The SAC was not found to have lacked candor when he omitted the fact that his son was a student in the class, but was found to have used poor judgment.
- An SAC was censured and received a transfer to FBI Headquarters after improperly upgrading to business class during a flight to Paris while the agent accompanying him flew in tourist class and for inadequately preparing for the meetings in Paris.
- No action was taken against a supervisory agent who claimed travel expenses to attend a “Tech. Conference” which appeared to have been scheduled to justify travel to a retirement dinner in New York. The employee had inquired about whether there would be an official function in New York to justify the travel as official business when he

called to say he would attend the dinner. The technical conference had been scheduled to discuss issues relating to the technical investigative program. The employee stated that while there was no structured conference with a prepared syllabus, course outline, or designated meeting place, he toured a two-story structure in New Jersey called the Northeast Regional Technical Training Center and he had technical discussions with other attendees. OPR found no misconduct because the employee acted in reliance on a teletype providing a number for official travel and announcing a “facially valid conference,” had his travel approved by his Assistant Special Agent in Charge, and engaged in activities and discussions on technical matters. The employee’s travel documents were found to be truthful, and he was found to be completely candid when interviewed.

- An agent was censured after he provided a voucher with receipts from a taxi service that did not do business in the area that he visited. OPR determined that the agent had incurred the expenses and there was no intent to defraud.
- A probationary agent was suspended for three days and placed on six months’ probation after he claimed reimbursement for a travel day when he actually returned a day earlier.
- A support employee was suspended for 14 days and placed on probation for six months after she was found to have falsified documents by indicating that she had attended a computer training class when, in fact, she had not.
- A GS-14 in the Personnel Division was suspended for 30 days for participating in the misuse of an FBI-leased vehicle. The employee accompanied a detective working with the FBI on two vacation trips and unauthorized local travel in the leased vehicle.
- A Unit Chief resigned after being proposed for dismissal for having lied about the purpose of a trip to Los Angeles and his personal relationship with the secretary who accompanied him. Voucher fraud also was involved because the voucher misstated the purpose of his trip.

The second category of cases concerned “Lying under oath/lack of candor.” The memorandum cited the following cases:

- An agent was suspended for 30 days for a misdemeanor battery conviction for striking his wife. He was found to have lacked candor in his sworn statement when he denied that he had hit her.
- A Language Specialist was dismissed for unauthorized contacts with foreign officials and intelligence officers, receipt of things of value from them, and a lack of candor in his “convoluted and contradictory responses” to questions about his contacts.
- Two agents were proposed for dismissal, the first for lying under oath during an administrative inquiry, falsification of Bureau forms, misappropriation and conversion of Bureau ammunition and unauthorized disclosure. The second was proposed for dismissal as a result of her unauthorized disclosure and lying under oath during the administrative inquiry.
- An agent was dismissed for failing to assist law enforcement in locating her boyfriend, associating with that individual, improper disposition of evidence and lack of candor by lying during the administrative inquiry about the boyfriend’s use of drugs.
- An agent was dismissed for lying under oath about the circumstances of an accident in which he was arrested for driving under the influence of alcohol after leaving the scene.
- A supervisory agent resigned after he was proposed for dismissal for converting Bureau property for his personal use, misappropriation of funds, and a lack of candor during the administrative inquiry.
- A supervisory agent was proposed for a demotion, a 50-day suspension, and one-year probation after he misused his Bureau car, committed time and attendance violations, misused his Bureau calling card, and conducted an affair with his neighbor while on duty. At his hearing, the employee lacked candor and was informed that his lack of candor would be investigated. The employee resigned prior to the inquiry into his lack of candor.
- An agent was dismissed for lying under oath after he misused his Bureau car to transport his daughter from day care, committed time and attendance violations, used poor judgment when he conducted an unauthorized traffic stop, and falsely stated the number of times he had improperly transported his daughter.

- An agent was dismissed for repeated falsehoods after he falsely implicated a former Bureau employee and a local police officer for possessing an MP-5 shoulder weapon, which resulted in a theft case being opened against the former employee.
- A Unit Chief resigned after being advised that he would be proposed for dismissal as a result of his lying under oath about the circumstances of his arrest for masturbating in a national park.
- An agent resigned after being advised she would be proposed for dismissal regarding false statements she made at a National Transportation Safety Board hearing and for lying under oath during the administrative inquiry.
- A probationary agent was dismissed when she lied to a staff counselor and misled two class counselors about her involvement with another married agent in her New Agent's Class. Her actions were determined to have violated the FBI Academy Honor Code.
- An agent resigned after being advised he would be proposed for dismissal after he lied about the second misuse of his government credit card while on probation for the first misuse.

### **III. The Disciplinary Decisions**

#### **A. The SES Board**

The initial SES Board met regarding the Potts party cases on December 14, 1998. The Board consisted of five SES members from FBI Headquarters. According to notes of the December 14 meeting, the five SES Board members and six non-Board observers, including OPR Assistant Director DeFeo, were present.

DeFeo began the SES Board meeting by making a presentation to the Board about the investigation of the Potts party issues. DeFeo noted in his presentation that this investigation was conducted jointly with DOJ OPR and that as a result DOJ OPR would be "watching" what they did. According to observers, Thomas Coyle, the Assistant Director of the Inspection Division and a member of the Board, stated during the meeting that he did not care what the Department thought and then went on to note that he would not rely on the forms (meaning form 540

(request for travel authorization) and form 1012 (travel reimbursement voucher)).<sup>14</sup> Coyle later told the OIG that he was sympathetic to the fact that SACs are extremely busy and cannot give their personal attention to administrative details.

Notes taken by observers of the meeting indicate that the Board initially discussed whether the October 10 training conference was a sham. The Board concluded that the conference was not a sham, but that the planners exercised poor judgment in not properly preparing for it. The notes indicate that one Board member stated that he believed that a preponderance of the evidence showed that the conference was organized solely to justify travel to the party and that a letter of censure was insufficient for misconduct.

According to notes of the meeting, the Board discussed the unclear facts surrounding former Deputy Director Esposito's encouragement to attend retirement events. This was viewed as a mitigating factor for the SACs who attended the Potts party.<sup>15</sup> The notes from the Board meeting indicate that the Board felt there was "no harm, no foul" with respect to Collins' trip, and that he did conduct some business during his trip. With respect to Gonzalez, the notes stated that the Board concluded it was a "bad practice," and for Harp and Clark the notes state, "seems clear he did some business." For Daulton, the notes state "reluctance to find lack of candor on a marginal fact." It appears from the notes that there was some discussion as to whether the SACs used poor judgment, but the consensus of the Board was that the policies on SAC travel were "too unclear for culpability."<sup>16</sup>

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<sup>14</sup> At the time, Coyle, like Potts, was a subject of the Ruby Ridge investigation, which was ongoing at the time of the Potts party SES Board. Allegedly, Coyle had selected one of the FBI investigators who reviewed the original Ruby Ridge incident and that investigator was later found by DOJ OPR to have had a potential conflict of interest. See discussion of the Ruby Ridge case in Chapter Five.

<sup>15</sup> The OPR memorandum summarizing the evidence in the Potts case was unclear regarding the strength of the evidence on this issue. Esposito apparently indicated that he had not changed the policy to allow such travel, and certainly no written change had ever been issued. Officials in the FBI's Finance Division also stated that the government-wide policy clearly prohibited such reimbursement, and that they would have advised Esposito, if they had been asked or had known about a purported change, that no such change was possible.

<sup>16</sup> While the SES Board may have thought the policy was unclear, an FBI Finance Division official told FBI OPR that memoranda issued by the Department prohibited reimbursement for retirement parties unless an employee had been designated as an official representative of the  
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Two observers' notes indicate that the Board voted for a letter of censure for Wolfinger, an oral reprimand for Louden, no action for Clark, Collins, Gonzalez, and Harp except restitution of their travel expenses, and a polygraph for Daulton.

The Board met two days later, on December 16, 1998. Several witnesses told us that they believed that the Board met again because it had not finished its deliberations on the matter. Notes from this meeting indicate otherwise, and we were told by one observer that Board Chair Rubin Garcia, who at the time was Assistant Director of the Personnel Division, reconvened the Board because he believed that the initial decisions were inappropriate. Garcia told the OIG that he could not recall why the second Board meeting was convened.

Notes from the December 16 meeting show that the issue of whether the October 10 conference was a sham was discussed again. The notes state that there was a "strong presentation" by OPR Assistant Director DeFeo citing statements of several witnesses that the conference was a sham. One of the observers told the OIG that although he could not recall specifically, he believed that the Board did not change its initial finding that the conference had the appearance of impropriety but was not a sham. The notes show that the Board was unanimous in its finding that some adverse action was appropriate for Wolfinger and that a letter of censure was appropriate for Louden in light of his subordinate position to Wolfinger.

According to notes of the meeting, the Board also discussed whether there should be any changes to the recommendation of no discipline for Clark and Collins. The Board decided that Clark and Collins reasonably relied on Esposito's encouragement to attend FBI retirement events, but the Board was concerned that their travel vouchers did not reflect that they had traveled for that purpose. The Board voted four to one in favor of a letter of censure for both Clark and Collins for "inattention to detail" in filling out the travel vouchers. The notes reflect that in discussing Harp, the Board felt that it could not disprove his assertion that he talked with someone about the Cleveland Field Office during his visit to Washington, so there was no "candor issue." The notes indicate that the Board concluded that Harp "did (probably) visit people" at FBI Headquarters, but that the

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agency, such as when presenting a plaque. All of the subjects interviewed by FBI OPR indicated that they understood that obtaining reimbursement for attending a retirement party was impermissible, although Clark and Collins argued that Esposito's comments had at least changed the rules for the SAC Advisory Committee.

meetings were not necessary. The Board voted unanimously to censure both Harp and Gonzalez for unauthorized and inappropriate travel.

On December 24, 1998, the SES Board issued a memorandum reporting its recommendations. The Board recommended that Louden be suspended for 15 days for neglect of duty resulting in a perception of impropriety. We were unable to determine how it came about that Louden's punishment changed from the letter of censure agreed to during the previous Board meeting. The memorandum recommended that Clark and Collins be issued letters of censure for inattention to detail because they misstated the purpose of their travel on the FBI travel forms.<sup>17</sup> It also recommended that Gonzalez and Harp be issued letters of censure for travel without adequate justification, in violation of the Federal Travel Regulations. The Board requested a polygraph for Daulton. The December 24 memorandum also indicated that a separate recommendation was to be issued as to Wolfinger. We were told by DeFeo that no recommendation as to Wolfinger was ultimately made, primarily because he was expected to retire but also because it was well known that his wife was very ill.

Former FBI Deputy Director Thomas Pickard and former Assistant Director Garcia, two members of the Board, told us that the Board took the Potts retirement party matter very seriously. They said that the Board believed most of the responsibility for the problems lay with the conference planners – Wolfinger and Louden. Both Pickard and Garcia also said that, as senior executives, the Board members were sensitive to the explanations offered by Clark and Collins that they had signed forms without really looking at them. Garcia said that all of the Board members were busy and knew what it was like to be in that position. Garcia stated that “inattention to detail” is different for a senior executive than it is for a line agent because of the amount of matters on a senior executive's agenda each day.

Garcia stated that the Board also was sensitive to the situation of Harp and Gonzalez because SES-level employees frequently do not have a written or planned agenda when they travel to FBI Headquarters, and it is possible to get a lot of work done just “walking the corridors.” He said that the Board believed it was possible that Harp and Gonzalez might not recall exactly with whom they met at Headquarters because there is no requirement that they document what they did there. Pickard said that to the extent that the SACs got work done while in Washington for the party, it was not a waste of government money. Garcia said

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<sup>17</sup> Collins retired on December 31, 1998, so his letter of censure was never issued.

that the Board ended up concluding that Harp and Gonzalez should have had clearer agendas and that, without more structured plans, their travel was inappropriate. Garcia also said that both Harp and Gonzalez might have received a short suspension if that had been an option.<sup>18</sup>

### **B. The Deputy Director's Decision**

Deputy Director Bryant issued the letters of censure as recommended by the Board. However, he decided that the recommendation of a 15-day suspension for Loudon was “unnecessarily harsh,” because he believed that Loudon neglected his duty but did not engage in willful misconduct. Instead, Bryant decided that a letter of censure to Loudon was sufficient. Bryant has retired from the FBI, and he did not respond to our requests to interview him on this matter.

### **C. Oversight By DOJ OPR**

On September 12, 2000, DOJ OPR wrote a memorandum to FBI OPR suggesting that the evidence supported findings of serious misconduct by Gonzalez, Harp, and Loudon and warranted consideration of more significant discipline. DOJ OPR stated in its memorandum that the fact that the three received only letters of censure raised concerns that certain evidence in the file was not given sufficient consideration. FBI OPR Assistant Director DeFeo responded on November 9, 2000, that the matter had been decided by an FBI SES Board and, although the system of convening an SES Board to make disciplinary decision on SES members had been disbanded in the summer of 2000, he did not believe that FBI OPR had the authority to review the SES Board's decisions.

## **IV. OIG Analysis**

A review of the Potts retirement party discipline matter four years after the events is difficult because the facts were not entirely clear, and the findings in many instances rested on an assessment of the credibility of statements made by the subjects. Moreover, the fact that an important witness, Esposito, retired and

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<sup>18</sup> On December 21, 2001, the General Accounting Office (GAO) issued a four-page letter describing the results of its review of OPR's investigation of the Potts party incident. The GAO concluded that the investigation of the matter by OPR had been thorough. In its letter, the GAO set forth the discipline that the subjects received, but it did not comment on the appropriateness of the discipline.

refused to be interviewed made credibility assessments of certain subjects' statements more difficult.

Nonetheless, given the strong evidence against the subjects, we believe that the SES Board came to the result that it did because it gave undue weight to the subjects' explanations that at a minimum were uncorroborated and in many instances were refuted. The Board also appeared to accept some of the subjects' contentions that meeting with officials while walking the hallways of FBI Headquarters was sufficient to support a claim that they had accomplished business while in Washington. We do not believe that non-SES employees would have received a similar "benefit of the doubt," or that their punishment would have been the same given similar circumstances.

In addition, because of Wolfinger's impending retirement, Louden was the only Training Division official recommended for discipline by the Board. We did not find the Board's recommendation for a 15-day suspension of Louden to be unreasonable, and we believe the Deputy Director's decision to reduce the penalty to a letter of censure is highly questionable. Several officials we spoke to felt that this reduction was appropriate because Wolfinger, Louden's supervisor, had retired and would not be disciplined at all. Others felt that such a light sanction for Louden was inappropriate because he should not have followed orders to do something improper. These officials believed that reporting questionable orders to OPR or an FBI official was the appropriate course of action, and Louden's failure to do that merited serious discipline. We agree with the position that an employee at the level of a section chief could have and should have refused to follow Wolfinger's orders or reported the matter to OPR. In addition, we believe the discipline ultimately imposed on Louden was unduly lenient.

One of the allegations we reviewed was whether Coyle's participation on the SES Board was inappropriate because of a conflict of interest. We concluded that Coyle should not have participated because, at a minimum, an appearance of a conflict of interest existed, if not an actual conflict of interest. At the time of the Board decisions, Coyle and Potts were subjects in the Ruby Ridge investigation. The significant controversy about Ruby Ridge and the fact that many FBI managers believed that Potts was treated unfairly because of the Ruby Ridge allegations cannot be ignored. It was well known that many people wanted to attend the Potts retirement party to show support for him because of the Ruby Ridge investigation. That attitude was likely to be especially strong for someone like Coyle who also was a Ruby Ridge subject. We believe that Coyle should have recused himself or been removed from these Board proceedings.

It is also clear that the decisions in the Potts party cases exacerbated the perception of a double standard throughout the FBI. First, it was widely believed that agents in the field would have been summarily fired for voucher fraud and false statements under the Director's "bright line" rule. While it is difficult to directly compare one case to another, we note that in a precedent case that appears on point, a Unit Chief resigned after being proposed for dismissal for having lied about the purpose of a trip to Los Angeles and his personal relationship with the secretary who accompanied him. Voucher fraud also was involved because the Unit Chief's voucher misstated the purpose of his trip.

Under the FBI disciplinary system in place at the time of the Potts party, FBI OPR did not make final conclusions as to whether there had been misconduct and the nature of that misconduct. The SES Board made the findings of fact using OPR's factual record, including making disciplinary recommendations. It appears to us that the SES Board was unduly lenient and uncritical in its analysis of the facts available to it, and that the Board recommended very mild disciplinary action for the misconduct involved. In the face of what was perceived as a flagrant abuse of FBI travel vouchers, the punishment was only a letter of censure for a few of the FBI managers involved. We believe, based on our review of the facts and the FBI precedent, that this result was too lenient.

## **CHAPTER FIVE**

### **RUBY RIDGE**

“Ruby Ridge” is a shorthand phrase for events that occurred in 1992 in Ruby Ridge, Idaho, after an attempt by U.S. Marshals to arrest Randall Weaver on a fugitive warrant. Deputy United States Marshals became involved in a shootout with Weaver, members of his family, and a family friend. A Deputy Marshal and Weaver’s teenage son were killed during the gunfire. A specialized FBI unit was then called in to capture Weaver and the others. During the resulting standoff, an FBI sharpshooter shot and killed Weaver’s wife. Weaver and his family ultimately surrendered. In a federal trial of Weaver, he was acquitted of murder and other serious federal charges.

The conduct of the Deputy Marshals and the FBI in the Ruby Ridge matter also came under close scrutiny, and several internal FBI and DOJ investigations ensued. These internal investigations also came under scrutiny, including questions whether there was an effort in the FBI internal investigations to cover up the original misdeeds.

In January 2001, nearly nine years after the original Ruby Ridge events, the final disciplinary decisions pertaining to the allegations were made by Assistant Attorney General Stephen Colgate, then the head of the DOJ’s Justice Management Division (JMD). Colgate decided, against the recommendations of DOJ OPR and the JMD Assistant Director for Human Resources who was asked to review the matter, that the evidence did not support additional discipline against anyone.

The disciplinary decision in the Ruby Ridge incident has been cited as an example of a double standard in the FBI. We believe that substantial problems marred the original investigation of the Ruby Ridge incident and the disciplinary process that took almost nine years to come to an end. Allegations arose that the FBI investigators who looked into what happened at Ruby Ridge intentionally or negligently conducted poor investigations resulting in a cover-up of misconduct by FBI officials. Although the motivation of the FBI investigators has never been clearly resolved, the evidence brought forth by later investigations showed that the original investigations conducted by the FBI were significantly flawed, perhaps to protect senior officials. These flawed investigations affected the disciplinary decisions.

Following years of subsequent investigations and retirements, only a few officials who were under investigation for the cover-up portion of the case were left to have their cases adjudicated. These final disciplinary decisions were assigned to and decided by JMD, and therefore the final decisions, to the extent that there is disagreement with them, cannot be blamed on the FBI's protection of senior officials. Although we disagree with the ultimate JMD decision, we do not believe that the JMD officials involved were part of a systemic effort to protect senior FBI officials. Rather, we believe that JMD used an incorrect standard in evaluating the evidence. We also believe that the disciplinary actions in Ruby Ridge contributed to the continued perception of a double standard of discipline in the FBI.

Although the original Ruby Ridge incident has been well documented and discussed, the tortured aftermath has not been disclosed previously in one report. We believe that a recitation of the internal investigations and disciplinary process can shed light on what has, up to now, been a process shrouded in secrecy. Accordingly, we explain in some detail the events from Ruby Ridge to the final disciplinary decisions.

### **Chronology of Events in the Ruby Ridge Investigations**

1986	ATF begins to investigate Randall Weaver
June 1990	Weaver indicted, fails to appear in court, arrest warrant issued
August 1992	Standoff begins; FBI activates Strategic Information and Operations Center and Hostage Rescue Team; Rules of Engagement drafted; FBI sharpshooter Horiuchi wounds Weaver and Harris, kills Vicki Weaver
September 30, 1992	FBI Shooting Incident Review Team finds shooting justified
November 2, 1992	FBI holds routine after-action conference; Kahoe later destroys report
November 9, 1992	FBI Shooting Incident Review Group finds no FBI misconduct
April 1993	Weaver and Harris acquitted of murder charges. Weaver convicted of failure to appear and committing an offense on release; Coulson promoted
July 1993	Deputy Attorney General forms special inquiry team headed by Barbara Berman; FBI forms team for investigative support to Berman team
September 1993	Inspectors Robert E. Walsh and Van Harp appointed to lead FBI team assisting Berman
November 1993	Coulson and Kahoe receive cash awards
January 16, 1994	FBI team issues Walsh Report; finds no FBI misconduct

June 10, 1994	Berman inquiry report; concludes rules of engagement were defective and Horiuchi first shot justified, second shot not justified
June 1994	FBI forms Mathews team to review Walsh and Berman reports
June 30, 1994	DOJ OPR issues separate opinion finding both Horiuchi shots were justified
Summer 1994	DOJ Civil Rights Division declines to prosecute Horiuchi for lack of evidence; concludes rules of engagement were unconstitutional
September 1994	Coulson promoted
December 6, 1994	Freeh promotes Potts to Acting Deputy Director
December 16, 1994	Mathews team recommends discipline for Glenn, Rogers, and Kahoe, but not Potts or Coulson
December 29, 1994	FBI Assistant Director Coyle sends letter to Freeh recommending disciplinary action for Coulson and Potts
December 29, 1994	Freeh recommends to DAG Gorelick that Potts be issued a letter of censure
January 6, 1995	Freeh announces proposed discipline of FBI employees
March 7, 1995	Freeh urges Gorelick to censure Potts instead of suspending him
April 5, 1995	Gorelick decides to censure Potts
May 2, 1995	Potts promoted to Deputy Director of FBI
May 3, 1995	Glenn sends letter to DOJ OPR alleging cover up by Mathews team
May 1995	DOJ OPR begins investigation into alleged FBI cover up
July 1995	DOJ OPR refers Ruby Ridge matter for criminal investigation; reports preliminary findings to the DAG; Mathews promoted
August 1995	Criminal investigation begins, headed by Michael R. Stiles, the U.S. Attorney for the Eastern District of Pennsylvania
August 11, 1995	Freeh places Potts and Coulson on administrative leave
December 1995	Harp promoted to SAC, Cleveland
October 1996	Kahoe pleads guilty to obstruction of justice and is sentenced to serve 18 months in prison; Walsh receives bonus
December 1996	Walsh promoted to SAC, San Francisco; Kahoe retires
June 1997	Mathews promoted to SAC, New Orleans
August 12, 1997	Stiles criminal investigation concludes with no further criminal charges, refers matter back to DOJ OPR for further administrative investigation
August 1997	DOJ OPR starts administrative investigation; Coulson retires

November 1997	Harp receives cash award
March 1998	Walsh retires
October 1998	Harp receives cash award
January 1999	DOJ OPR provides copies of its draft report to FBI OPR
April 8, 1999	FBI OPR responds to DOJ OPR's report
June 30, 1999	DOJ OPR issues final report; concludes Potts, Coulson, Walsh, Harp, and Mathews committed misconduct; report sent to AAG Colgate for disciplinary decisions; Colgate assigns JMD Assistant Director Jarcho to review matter
December 1999	Jarcho completes review; concludes Freeh, Potts, Coulson, Harp, and Mathews should be disciplined; recommends rescission of discipline for certain FBI employees, including Glenn and Rogers  Colgate asks JMD Deputy AAGs Vail and Sposato to review Jarcho's report
April 17, 2000	Vail and Sposato complete their review; conclude no misconduct or evidence of bad intent
October 5, 2000	DOJ OPR responds to Vail and Sposato; objects to no misconduct conclusions
November 29, 2000	FBI OPR responds
January 3, 2001	Colgate issues decision, concludes no further disciplinary action should be imposed and no prior disciplinary decisions should be changed or rescinded

## I. Background

The underlying events that comprise the Ruby Ridge incident are well known, so we will only briefly summarize them below. Beginning in 1986, Randall Weaver was the subject of an investigation by the Bureau of Alcohol, Tobacco and Firearms. Weaver lived on a mountain in Ruby Ridge, Idaho, and was believed to be associated with a white supremacist group and to traffic in illegal firearms. In June 1990, Weaver was indicted by a federal grand jury on weapons offenses. Weaver was arrested and released pending trial. Due in part to a clerical error notifying him of the trial date, he did not appear for trial and an arrest warrant was issued for him. According to law enforcement sources, Weaver retreated to his cabin and threatened to shoot any law enforcement officers who tried to arrest him.

In August 1992, Weaver's family discovered three Deputy U.S. Marshals who were surveilling Weaver to prepare for his arrest. Kevin Harris, a Weaver family friend, shot and killed Deputy Marshal William Degan, and Weaver's teenage son Samuel was killed during the gunfire.

The FBI was called into the matter. The FBI activated its Strategic Information and Operations Center (SIOC), an FBI Headquarters post used for the management of crises. It also activated its Hostage Rescue Team (HRT), a tactical unit of agents trained in handling high-risk situations. The FBI Assistant Director for Criminal Investigative Division, Larry Potts, and his deputy, Danny Coulson, discussed the need for an operations plan containing rules of engagement that would provide guidance for the HRT's actions. Rules of engagement were drafted which provided that if any adult male was observed with a weapon, deadly force "can and should be employed" if the shot could be taken without endangering any children.

On August 26, 1992, the HRT was deployed to the site and surrounded Weaver's cabin. When an HRT helicopter took off and flew near the cabin, Weaver, his sixteen-year-old daughter Sarah, and Kevin Harris came out of the cabin, all armed with rifles. HRT sharpshooter Lon Horiuchi fired one shot, wounding Weaver. Weaver, his daughter, and Harris began running back to the cabin, and Horiuchi fired a second shot that penetrated the open door of the cabin. The shot killed Weaver's wife, Vicki Weaver, who was behind the door, and seriously wounded Harris.

The standoff ended on August 31, when the remaining occupants voluntarily left the cabin. Weaver and Harris were charged with various federal offenses, including murder. They were both acquitted of the most serious charges following a trial. Weaver was convicted of failure to appear for trial and committing an offense while on release.

## **II. Initial Internal Inquiries**

The FBI and the Department of Justice conducted several internal inquiries to determine what had occurred at Ruby Ridge and whether there had been any improper actions taken by law enforcement personnel.

The first review of the Ruby Ridge incident was conducted by an FBI Shooting Incident Review Team (SIRT). FBI procedures call for an administrative review of all shooting incidents. The SIRT review of the Ruby Ridge shootings, which began even before the standoff at Ruby Ridge had ended, was headed by an

FBI Inspector and included seven other FBI employees. This team was responsible for reviewing the propriety of the use of deadly force by Horiuchi and the adequacy of the command, control, and operational planning of the entire Ruby Ridge operation.

The report issued by the SIRT team on September 30, 1992, concluded that Horiuchi had been justified in taking both shots and that the FBI had responded appropriately at Ruby Ridge. It noted that the rules of engagement that were in effect at the time of the shooting had been approved by SAC Eugene Glenn, who was the on-scene commander, HRT SAC Richard Rogers, “and FBIHQ personnel, to include Assistant Director Larry A. Potts. . . .”

After the SIRT report was issued, the Shooting Incident Review Group, headed by Michael Kahoe, the Section Chief of the FBI’s Violent Crimes and Major Offenders Section, reviewed the report and the FBI’s use of force at Ruby Ridge. According to FBI procedures, a Shooting Incident Review Group reviews the report and conclusions of the SIRT team. Kahoe’s Review Group issued its own conclusions in a memorandum dated November 9, 1992. Kahoe’s Review Group concluded that no FBI personnel had engaged in misconduct. It also concluded that the rules of engagement used at the scene had been approved by FBI Headquarters personnel.

In addition, on November 2, 1992, the FBI held a routine after-action conference, which the FBI typically uses to critique an emergency response and to determine how the FBI can improve its response in the future. A report prepared by FBI employees under Kahoe’s direction summarized the conclusions of the conference. A subsequent criminal investigation, which we describe below, found that Kahoe failed to disclose the conference report during discovery in the trial of Weaver and Harris, and in fact had destroyed his copy of the report and ordered his subordinate to destroy his copies. As we describe below, for these actions, Kahoe later pled guilty to obstruction of justice and was sentenced to eighteen months in prison.

### **III. Department’s “Berman” Inquiry and FBI’s “Walsh” Inquiry**

In July 1993, DOJ OPR initiated an investigation into the allegations of misconduct by the government in the Ruby Ridge matter. The allegations were raised by several sources, including defense counsel for Weaver and Harris, the U.S. Attorney’s office in Idaho (which had prosecuted the cases against Weaver and Harris), and FBI personnel. Shortly thereafter, Deputy Attorney General Philip Heymann assigned the allegations to a DOJ task force for review. Four

attorneys from the Department's Criminal Division were assigned to work with OPR Assistant Counsel Barbara Berman to investigate the allegations. This review became known as the "Berman Inquiry." The FBI was asked to provide investigative support for the inquiry. The FBI assigned an investigative team, led by two FBI inspectors, to assist the DOJ task force. These two inspectors were replaced by FBI Inspectors Robert Walsh and Van Harp in September 1993.<sup>19</sup>

After a contentious decision was made by Deputy Attorney General Heymann to exclude FBI agents from some of the interviews, the FBI withdrew from the investigation and produced its own report, dated January 16, 1994, which came to be known as the Walsh Report. This report was issued several months prior to the Berman Inquiry's final report. DOJ OPR later found that it was "understood that Berman was in charge of the inquiry and would be issuing a formal report on behalf of the DOJ task force." A later JMD review also concluded that the FBI investigators had been instructed to assist the DOJ task force and not to reach their own conclusions regarding the Ruby Ridge incident. Yet, the Walsh report included conclusions and legal analysis, including the propriety of the rules of engagement and the shots fired by Horiuchi. The Walsh Report concluded that the rules of engagement as written could have been misunderstood, but it found that they were not misunderstood by Horiuchi and added that Horiuchi's use of deadly force at Ruby Ridge was "reasonable under constitutional standards."

Berman and her team produced a different report, dated June 10, 1994. The Berman report found serious failings by the FBI and the U.S. Attorney's office in their handling of the Ruby Ridge matter and subsequent events. The Berman report concluded that the rules of engagement were defective because of the inclusion of the word "should" in the phrase deadly force "can and should be employed," which deviated from the standard deadly force policy that requires agents to assess the level of danger before using deadly force and to give warnings if feasible. The report was unable to reach a conclusion as to whether FBI Headquarters had approved the "can and should" language, but stated that it was "inconceivable" that FBI Headquarters remained ignorant of the rules of engagement throughout the entire incident. The report concluded that Horiuchi's

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<sup>19</sup> According to a later report issued by DOJ OPR, it was widely known that Walsh was a close friend of Potts, who was a subject of the investigation for his alleged approval of the rules of engagement.

first shot was justified, but that his second shot was not because the immediacy of the threat had dissipated when the subjects retreated into the cabin.

DOJ OPR Counsel Michael Shaheen transmitted the Berman report to Deputy Attorney General Jamie Gorelick on June 30, 1994, together with DOJ OPR's separate views on the issue of Horiuchi's second shot. In a report signed by Shaheen, DOJ OPR disagreed with the Berman report's conclusion that the second shot was not justified. DOJ OPR argued that the second shot was justified in view of the totality of the circumstances. Based on its review of the reports, in the summer of 1994 the DOJ Civil Rights Division concluded that while the rules of engagement were probably unconstitutional, the evidence was insufficient to justify a prosecution of Horiuchi.

#### **IV. The FBI's "Mathews" Review**

After the issuance of the Walsh and Berman reports, the FBI conducted an administrative review of the Berman findings to determine what, if any, disciplinary action should be taken against FBI personnel. The FBI's General Counsel asked Thomas Coyle, Assistant Director for the Personnel Division, to assemble a team to determine what administrative action should be taken by the FBI. Coyle picked Charles Mathews, who was the Associate SAC (ASAC) in San Francisco, to conduct the review. Mathews had worked as an ASAC under Coulson for two and a half years, from 1988 to 1990, when Coulson was the SAC in Portland, Oregon.

On December 6, 1994, ten days prior to the issuance of the Mathews report, Freeh elevated Potts to the position of FBI Acting Deputy Director. The Mathews team issued its report on December 16, 1994. It recommended discipline for several agents related to mishandling of the crime scene or laboratory issues. It also recommended a censure for on-scene commander Glenn for "approval of flawed rules of engagement that could reasonably be interpreted to direct FBI employees to act contrary to policy and law"; a censure for HRT SAC Richard Rogers for "creating and documenting flawed [rules of engagement] that could reasonably be interpreted to direct FBI employees to act contrary to policy and law"; a censure for Michael Kahoe for "failures in supervising the SIRG [Shooting Incident Review Group's] review" of the incident; and a censure for the ASAC who prepared the Shooting Incident Review Team's report on the incident for failures in preparing the team's report. The Mathews report did not contain any recommendations for discipline against Potts or Coulson. The Mathew's report suggested that it was not recommending discipline for Potts or Coulson in part

because of the Mathews team's conclusion that rules of engagement are generally approved at the level of the on-scene commander and not at FBI Headquarters. The report stated that because there was no requirement for the rules of engagement to be approved at the Headquarters level, there was no need to pursue whether the rules of engagement had actually been approved at the Headquarters level.

## **V. FBI Disciplinary Decisions**

Following the Mathews report, on December 29, 1994, Coyle sent a memorandum to FBI Director Freeh containing amended recommendations for disciplinary action. Coyle suggested amending the Mathews recommendations so that Coulson and Potts would receive a censure for "failing to review the finalized [rules of engagement] after involving [themselves] in discussions leading to the promulgation of the [rules of engagement]"; that Glenn and Kahoe be referred to the SES Board for consideration of appropriate action rather than "merely censure"; and that Rogers be censured and suspended rather than "merely censure."

On December 29, 1994, Director Freeh sent a letter to Deputy Attorney General Gorelick recommending that Potts be issued a letter of censure.<sup>20</sup> The letter stated that Freeh had found that Potts had discussed and approved the rules of engagement with ASAC Rogers prior to Rogers' arrival at Ruby Ridge. But Freeh's letter stated that he found the rules of engagement as subsequently drafted, approved, and disseminated on site, and which had been found to be improper, had not been approved by Potts. Freeh concluded that although Potts' approval of the rules of engagement was not required by FBI policy at that time, Potts was remiss in failing to review the finalized rules after involving himself in discussions leading to their promulgation.

On January 6, 1995, Director Freeh held a press conference and announced the proposed discipline of the FBI employees, as listed in the December 1994 Coyle memorandum.

On March 7, 1995, Freeh wrote a memorandum to Deputy Attorney General Gorelick urging her to approve his recommendation of a censure for Potts for

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<sup>20</sup> As noted above, by regulation all final decisions on discipline for FBI executives at the level of Assistant Director or above must be approved by the Deputy Attorney General.

“failing to follow through on his discussion concerning the rules of engagement to be recommended to the on-scene commander.” Freeh stated in the memorandum that Gorelick had advised him that she was “preliminarily inclined to recommend the discipline be increased to a thirty-day suspension.” Freeh wrote that he strongly disagreed on the grounds that Potts’ actions were deficient only to the extent that he did not follow through on earlier discussions about the rules of engagement and that a thirty-day suspension would be disproportionate to Potts’ conduct. Freeh argued that the suspension would send “a wrong message to both the public and the employees of the FBI,” would signal that there was culpability among FBI employees for the accidental shooting of Vicki Weaver, and would harm the credibility of Potts and other FBI employees involved in the creation and implementation of the rules of engagement. Freeh also stated that the increased discipline was “so divergent from my recommendation that it is likely to do profound damage to the relationship between the Department and the FBI.” Freeh expressed concern about the impact that the suspension would have personally on Potts and about the impact it would have on Freeh’s credibility as Director. Freeh urged Gorelick to censure Potts, but recommended that if she was still persuaded to the contrary, that she consider reducing Potts in grade for six months and place him on probation for one year.

On April 5, 1995, Gorelick approved Freeh’s recommendation that Potts be issued a letter of censure for his role in Ruby Ridge, and the letter of censure was issued. On May 2, 1995, the Attorney General approved Director Freeh’s recommendation that Potts be named as Deputy Director of the FBI.

## **VI. Investigation of Alleged Cover Up**

On May 3, 1995, while the FBI’s final disciplinary actions against him were pending, Glenn sent a letter to DOJ OPR alleging that the disciplinary review conducted by Mathews had been faulty and requesting that DOJ OPR conduct its own investigation. Glenn alleged that the deficiencies in Mathews’ investigation “reveal a purpose to create scapegoats and false impressions, rather than uncovering or reinforcing the reality of what happened at Ruby Ridge.” Glenn stated that the DOJ and FBI investigations (referring to the Berman and Walsh Reports) had determined that the rules of engagement had been approved at the level of Headquarters, but that the Mathews report blamed Glenn alone for approving them. He also alleged that the Mathews investigation was incomplete and resulted in discipline for agents without faulting those who had supervised them. Glenn also alleged that Mathews had a close relationship with Coulson and

that this association caused Mathews “to avoid the development of the necessary facts, and caused him to cover up facts germane to the central issues.”

Glenn’s allegations led to several subsequent investigations. In the spring of 1995, DOJ OPR began an investigation into allegations that some of the FBI agents involved in the earlier inquiries had intentionally withheld or covered up information in order to protect the FBI, Potts, and Coulson from criticism. As a result of the new investigation, DOJ OPR concluded that Kahoe had lied under oath to the Berman team about the destruction of the after-action report, that Potts and Coulson had been closely involved in the drafting of the rules of engagement, that Potts had approved the rules of engagement, and that the decision to destroy the after-action report had been made “above Kahoe.”

In July 1995, DOJ OPR reported its preliminary conclusions to Deputy Attorney General Gorelick, and the matter was referred for criminal investigation. As a result, on August 11, 1995, Director Freeh placed Potts, Coulson, and two other officials on administrative leave with pay.

The criminal investigation was supervised by Michael Stiles, the U.S. Attorney for the Eastern District of Pennsylvania. That two-year investigation resulted in the conviction of Kahoe for obstruction of justice in connection with his destruction of the after-action report. Stiles recommended no further prosecutions, but he referred several matters back to DOJ OPR for investigation of administrative misconduct. In a letter dated August 12, 1997, Stiles referred to DOJ OPR several issues that he believed required further administrative review.<sup>21</sup>

DOJ OPR investigated these matters, together with the broader questions of (1) how did the rules of engagement that were in effect at Ruby Ridge come to be formulated and approved, and (2) to what extent did misconduct by FBI personnel contribute to the failure of the internal inquiries to uncover the full story of FBI actions in connection with Ruby Ridge. With respect to this second issue, DOJ OPR investigated several key points, including:

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<sup>21</sup> Among the issues he suggested should be investigated further were a communication by Harp to subordinates concerning changes to FD-302 reports during the Berman investigation; an alleged improper statement by a special agent during an interview with DOJ OPR investigators; an alleged improper comment by an FBI deputy general counsel to a criminal investigator; an alleged written instruction to an HRT sharpshooter not to provide information that conflicted with Horiuchi’s version of events; and other alleged improper actions by FBI employees during the investigations of Ruby Ridge.

- Walsh’s and Harp’s failure to interview key witnesses who had been in the SIOC during the Ruby Ridge incident and their failure to uncover the truth about the after-action report;
- Walsh’s and Harp’s editing of other agents’ FD-302s;
- Walsh’s failure to recuse himself in light of his close friendship with Potts, a subject of the investigation;
- Walsh’s and Harp’s drafting performance evaluations for team members that appeared to reward agents for “correctly” concluding that FBI officials had acted properly;
- Mathews’ failure to interview key witnesses in the SIOC;
- Mathews’ use of an unsupported conclusion that FBI Headquarters officials were not required to approve rules of engagement as justification for his team not investigating to determine whether Headquarters officials had in fact approved the rules of engagement; and
- Mathews’ failure to recuse himself given his friendship with Coulson, a subject of the investigation.

In analyzing the conduct of FBI employees, DOJ OPR considered whether a given act or failure to act constituted misconduct, demonstrated poor judgment, or did not present any problems. DOJ OPR found misconduct in instances where it determined that the subject had intentionally violated his duty or had acted in reckless disregard of a generally accepted duty. It found poor judgment in instances where it determined that the conduct amounted to a less serious failure to carry out responsibilities properly.

#### **A. DOJ OPR Draft Report and FBI OPR Comments**

In January 1999, DOJ OPR provided copies of its draft report describing the results of its investigation to FBI OPR for review and comment. This was done pursuant to an agreement that FBI OPR would provide DOJ decision-makers with information on what policy provisions it thought should be applied to the disciplinary decision and what discipline it thought would have been taken if the Rudy Ridge decisions were handled within the FBI. In a memorandum dated April 8, 1999, FBI OPR Assistant Director DeFeo responded to the draft report. DeFeo’s memorandum included information about what policy provisions would apply and what disciplinary action the FBI believed would be taken if the Ruby

Ridge inquiry were being handled within the FBI. The memorandum addressed only those employees about whom adverse findings had been made and those who still worked for the FBI.

The FBI OPR memorandum discussed the proposed discipline of Harp at length. It agreed with DOJ OPR's conclusion that Harp used poor judgment in writing the agent evaluations, which made it appear that agents were being rewarded for "correctly" deciding that the HRT had acted properly. However, the FBI OPR memorandum stated that poor judgment would not provide a basis for discipline of an FBI SES member unless it rose to the level of misconduct, malfeasance, or neglect of duty. FBI OPR concluded that it would not recommend to the Deputy Director that poor judgment of that nature be referred to an SES Disciplinary Review Board. On the issue of whether FD-302s had been improperly edited, FBI OPR did not agree that Harp's actions constituted misconduct or neglect of duty and stated that it would not recommend that the incident be referred to an SES Board. The memorandum asserted that "all Harp did was question the interviewer if certain language was accurate, and neither pressured nor instructed the interviewer to make any changes. . . ." The memorandum disagreed with DOJ OPR's statement that it was a serious dereliction of duty for a supervisor who did not participate in an interview to direct or request changes in the substance of an FD-302. FBI OPR asserted that DOJ OPR had not defined "what is substance and what is style," and that the final version of the FD-302 was accurate.

The OPR memorandum also considered the allegation against Harp that he failed to conduct a complete investigation. It concluded that, in the absence of any direct evidence of wrongful intent, OPR would not recommend that Harp's failure to ensure interviews of every person on the after-action conference list or to ascertain that Kahoe had lied be referred to an SES Disciplinary Review Board as misconduct or neglect of duty. OPR concluded that the facts did not establish that Harp was responsible for either FBI management or Berman being deceived or ignorant as to the completeness of the Walsh inquiry. OPR stated that it would not consider the FBI's decision to withdraw from the Berman Inquiry, which was approved at much higher levels than Harp, or the lack of a disclaimer that the Walsh report was incomplete, to be misconduct attributable to Harp. The memorandum also rejected DOJ OPR's conclusion that Harp had tried to counterbalance the perceived bias of Berman, and "thereby to protect some of the subjects of the investigation."

With respect to Mathews, FBI OPR agreed with DOJ OPR that Mathews used “extremely poor judgment in failing to recuse himself from the inquiry.” FBI OPR stated that it would have recommended that Mathews’ creation of the foreseeable appearance of impropriety in a case as significant as Ruby Ridge be referred to an SES Disciplinary Board for a review of whether misconduct or neglect of duty were present and for disciplinary consideration. FBI OPR disagreed with DOJ OPR’s assertion that Mathews relied on unsupported statements about who bore the responsibility for the approval of the rules of engagement. But FBI OPR concluded that Mathews should have been aware of the investigative holes in prior Ruby Ridge investigations and that it would have referred what is “arguably a marked departure from professional standards of thoroughness and impartiality to the SES Board for disciplinary consideration, particularly given the recusal issue.”

### **B. Memorandum to DOJ OPR from FBI OPR Investigators**

The disciplinary issues became even more complicated when investigators within FBI OPR made clear that they did not agree with the official FBI OPR position as reflected in Assistant Director DeFeo’s April 8, 1999, memorandum to DOJ OPR. Three FBI OPR investigators who had worked on the DOJ OPR investigation – FBI OPR Unit Chief John Roberts, FBI OPR Unit Chief Frank Perry, and Supervisory Senior Resident Agent John Werner – sent a memorandum to DOJ OPR commenting on the draft DOJ OPR report. The memorandum stated that the authors had been advised by Assistant Director DeFeo that their observations and recommendations did not represent the official opinion of FBI OPR, so they wanted to provide their comments to DOJ OPR directly.

In their memorandum, the FBI investigators were more critical of many of the FBI officials than FBI OPR’s memorandum was. The most significant difference was the investigators’ criticism of FBI Director Freeh. The investigators stated that they believed that Freeh should receive “direct criticism for his role in the Ruby Ridge adjudication.” The memorandum stated that Freeh’s actions in creating a deadline for the Mathews report and his elevation of Potts during the investigation of him “at least lend the appearance of implied influence on as of then an unfinished investigation and adjudication of the Ruby Ridge matter.” It stated that Freeh also deserved criticism for his elevation of Potts given the information that had been provided to him about Potts’ exposure in the Ruby Ridge matter. The memorandum also stated that the investigators believed Freeh inadequately reviewed the Mathews report, or he would have realized that it was a significantly flawed investigation. It stated that “at a minimum, we have an

appearance of an attempt on the part of Walsh, Harp, Mathews, Coyle and Director Freeh not to disclose the FBI's improper conduct during and following the Ruby Ridge crisis, or inattention to detail on the part of these individuals in conducting a thorough and objective investigation and adjudication." The memorandum also criticized Freeh for failing to remove Walsh from the investigation despite knowledge of Walsh's relationship with Potts, for promoting Harp and Mathews while the investigation was pending, and for authorizing cash bonuses to several subjects of the investigation while the investigation was pending.

### **C. DOJ OPR Final Report**

On June 30, 1999, after considering the comments of FBI OPR and the FBI investigators, DOJ OPR issued a 571-page final report describing the findings of its review. In an undated memo to FBI OPR, DOJ OPR stated that it disagreed with FBI OPR's comments and would not change its conclusions.<sup>22</sup>

On the issue of approval of the rules of engagement, the DOJ OPR final report found by a preponderance of the evidence that Coulson approved the "can and should" language in the rules. It did not find, however, that there was sufficient evidence to show that Potts had approved the language. But the report concluded that both Potts and Coulson committed misconduct by knowingly approving rules of engagement that improperly deviated from the FBI's standard deadly force policy, regardless of whether they had approved the actual "can and should" language. It also concluded that Potts and Coulson later committed misconduct by making false statements about their approval of the rules of engagement.

DOJ OPR also discussed the adequacy of the Walsh investigation and determined that both Walsh and Harp committed misconduct by failing to ensure that their inquiry was complete. DOJ OPR concluded that this failure was motivated in part by a desire to counterbalance what they perceived as the bias of Berman's review. DOJ OPR also found that it was unwise to have Walsh conduct the investigation given his friendship with Potts, but it found no evidence of overt favoritism during the inquiry or evidence that Walsh was selected in order to protect Potts. Walsh and Harp were also found to have committed misconduct in

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<sup>22</sup> DOJ OPR's one substantive change based on FBI OPR's comments was that DOJ OPR increased its finding of poor judgment to one of misconduct based on Mathews' failure to recuse himself.

failing to supervise properly the production of interview reports in order to ensure their integrity. In addition, DOJ OPR concluded that Walsh and Harp used poor judgment in drafting performance appraisals for agents who worked on the inquiry when they stated that the agents had “correctly determined that the HRT acted effectively and that the [rules of engagement] were formulated and modified within parameters of FBI policy.”

The DOJ OPR report found that the Walsh team did not take sufficiently aggressive steps to investigate various areas and that the lack of diligence was evidence that the Walsh team avoided uncovering the full truth about Ruby Ridge. The report stated that Walsh and Harp reached conclusions in their report despite orders from DOJ not to, and that this was further evidence showing that the inquiry was slanted to protect Potts and Coulson. DOJ OPR recommended discipline for Harp ranging from censure to suspension for 30 days. DOJ OPR did not recommend any range of discipline for Walsh because he had already left the FBI.

The DOJ OPR report examined the adequacy of the administrative review by Mathews. It concluded that Mathews committed misconduct by failing to recuse himself in light of his relationship with Coulson, and that Mathews’ supervisor, Thomas Coyle, used poor judgment in permitting him to work on the inquiry. It also concluded that Mathews committed misconduct in conducting an inquiry that was incomplete or inadequate by failing to interview key witnesses who had been in the SIOC and by using unsupported conclusions that FBI Headquarters did not need to approve rules of engagement as justification for not investigating Headquarters personnel’s actions. DOJ OPR recommended suspension of Mathews for 15 to 60 days.

The DOJ OPR report discussed the adjudication of discipline following the issuance of the Mathews report. It concluded that, while those on the SES Disciplinary Board acted in good faith in making the disciplinary decisions, they relied on the unsupported conclusion that on-scene commanders were responsible for approving the rules of engagement. Based on DOJ OPR’s finding that the rules of engagement were approved at the FBI Headquarters level, DOJ OPR concluded that the FBI should consider whether Glenn should have his record cleared or modified with respect to discipline.

The DOJ OPR report criticized numerous other agents and FBI officials for their roles in the investigations of the original Ruby Ridge incident. DOJ OPR also criticized Director Freeh by stating that he used poor judgment in promoting Potts to Deputy Director while investigations of Potts were ongoing. DOJ OPR concluded that this promotion, together with his earlier promotion to Acting

Deputy Director, could be viewed as a signal to the FBI investigators that Potts should not be criticized for his conduct in Ruby Ridge. However, FBI OPR did not make any recommendation for discipline of Freeh.

#### **D. DOJ OPR Report Forwarded to the Justice Management Division**

On June 30, 1999, the Department of Justice referred the final DOJ OPR report to Assistant Attorney General (AAG) for Administration Stephen Colgate, who was the head of the Department's Justice Management Division (JMD), for him to make the disciplinary decisions. Director Freeh had recused himself from the decisions and the Department believed that the decision on disciplinary matters should be handled outside the FBI. Colgate was assigned because many of the other high-level Department officials had worked closely with Potts and also were recused.

In a July 23, 1999, memorandum from Assistant Director DeFeo to Colgate and DOJ OPR, DeFeo urged that an "in-depth pre-decisional reexamination of several issues be made by a deciding authority detached from the DOJ investigation." He stated that the "intensity of feeling reflected in DOJ OPR's final report's findings compel[led]" him to make this recommendation. The first such issue was DOJ OPR's finding that the failures to conduct further interviews of SIOC witnesses and to locate the after-action report gave rise to the inference that Walsh and Harp were motivated by a desire to skew its results in order to counterbalance the perceived bias of Berman. DeFeo noted that no such adverse inference was drawn as to the motives of the DOJ attorneys who were in charge of the Berman inquiry, who consulted with the FBI about who to interview, and who had the ability to participate in interviews and to conduct separate interviews. DeFeo argued that if the attorneys were entitled to a presumption of regularity in the performance of their duties, no inference of bad faith was warranted as to the agents whose work was supervised by those attorneys.

DeFeo also argued that punishment of Harp for terminating an incomplete investigation appeared to be "punishment for an institutional FBI decision, proposed against Harp because he is the only remaining on-board manager who was involved in that aspect of the inquiry." DeFeo contended that the evidence demonstrated that the withdrawal from the investigation was decided well above Harp's level. DeFeo also argued that the penalty proposed against Mathews was unduly severe and not in keeping with FBI precedent. He stated that the absence of evidence of intentional misconduct "would militate against a suspension as

severe as that recommended,” and that Mathews’ actions were more akin to neglect of duty than to intentional misconduct.

## **VII. The Justice Management Division Review**

Colgate assigned JMD Assistant Director Vivian Jarcho to completely review DOJ OPR’s and FBI OPR’s analyses and provide recommendations as to the appropriate discipline. Jarcho was the Assistant Director for Workforce Relations Group at that time and had handled personnel matters for the Department for almost 15 years.<sup>23</sup> Prior to handling the Ruby Ridge matter, she had reviewed and made disciplinary recommendations in two other sensitive Department matters – an OIG investigation into the Miami Immigration and Naturalization Service’s alleged deception of Congress when a congressional delegation came on a fact-finding visit to the Miami District, and the OIG’s investigation about deficiencies in the FBI laboratory.

### **A. Jarcho’s Analysis**

In June 1999, Jarcho began her review of DOJ OPR’s report, the responses to it, and the underlying materials. In December 1999, she completed a 216-page report that described the results of her review, contained her analysis of the underlying materials, and made recommendations for discipline. Jarcho told the OIG that even though FBI employees do not have appeal rights to the Merit System Protection Board (MSPB), she applied MSPB criteria for disciplinary action in her review “for the sake of equity.” Jarcho’s report stated that she also considered the criteria applied by DOJ OPR, conducted a “Douglas Factor analysis” in order to make recommendations regarding reasonable penalties, evaluated possible mitigating and aggravating factors, and applied FBI disciplinary precedent for similar deficiencies or misconduct.

Jarcho’s report concluded that Potts and Coulson were directly involved in formulating and approving the rules of engagement and impeding official investigations by making false and misleading statements to investigators. It also concluded that they blamed more junior FBI members for their actions and let them be harshly judged and disciplined in their place. It stated that if Potts and

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<sup>23</sup> The Work Force Relations Group was responsible for representing the Department in appeals to the Merit Systems Protection Board and the Federal Labor Relations Authority, and for providing advice and guidance throughout the Department on disciplinary matters.

Coulson were still employed by the FBI, they could be subject to disciplinary action.

Jarcho's report also agreed with the DOJ OPR finding that Walsh and Harp committed misconduct by failing to ensure that the Walsh inquiry was complete with respect to the after-action report and the interview of SIOC personnel, and that this failure was motivated in part by a desire to counterbalance the perceived bias of Berman. The report agreed with DOJ OPR that it was unwise to have Walsh conduct the investigation given his friendship with Potts. It did not agree entirely, however, with DOJ OPR's finding that there was no evidence of overt favoritism during the inquiry or evidence that he was selected in order to protect Potts. The report stated that Walsh's independent decision to issue the findings and conclusions of his team in a separate report was troubling conduct. Jarcho found that this action was evidence that Walsh was trying to protect Potts and Coulson and deliberately sought to present findings that he believed would be more favorable to the FBI than the findings he anticipated would be included in Berman's report. The report also stated that it was troubling that Walsh and Harp were unable to provide a satisfactory explanation for why SIOC personnel were not interviewed and why Walsh's teams failed to thoroughly investigate the entire matter.

In addition, Jarcho's report agreed with DOJ OPR that Walsh and Harp committed misconduct in failing to supervise properly the production of interview reports in order to ensure their integrity. Jarcho also agreed that Walsh and Harp used poor judgment in drafting performance appraisals for agents who worked on the inquiry saying that they had "correctly determined that the HRT acted effectively and that the rules of engagement were formulated and modified within parameters of FBI policy." The report recommended that Harp receive a 15-day suspension and found that it was an aggravating factor that Harp claimed to investigators that he did not know that the FBI was not to include conclusions in its fact-finding, "despite extensive documentation that proves otherwise."

On the issue of the adequacy of the Mathews review, the Jarcho report disagreed with the DOJ OPR finding that Mathews committed misconduct by failing to recuse himself in light of his relationship with Coulson. Jarcho stated that Mathews' history with Coulson was well known at the FBI and that other agents who raised potential conflicts during their participation on the Walsh and Mathews inquiry teams were directed to remain members if they believed they could be objective. Jarcho found that it was likely that Mathews would have stated that he could have been objective and would have been allowed to conduct the

inquiry regardless. Jarcho's report stated that it is well-established FBI practice not to disqualify agents because they have worked for or have a personal relationship with the person under investigation. It noted that FBI OPR has expressed the opinion that any FBI official is expected to be able to investigate virtually any other FBI official, regardless of professional friendships that develop between senior employees over the years. However, the report recommended that the FBI review its policies regarding conflicts of interest and ensure that all FBI personnel understand the importance of avoiding both actual and apparent conflicts.

The Jarcho report found that Mathews committed "egregious" misconduct in conducting an inquiry that was incomplete or inadequate in failing to interview SIOC personnel and in using unsupported statements about approval of the rules of engagement to conclude that the rules were not approved at FBI Headquarters. The report recommended that Mathews be suspended for 30 days for this misconduct.

The Jarcho report questioned whether earlier disciplinary decisions in the Ruby Ridge matter were equitable, given the failures of the Mathews report. Jarcho found "procedural deficiencies and flawed analysis in the Mathews report which resulted in non-supportable disciplinary actions being taken against FBI employees." Jarcho's report reviewed the disciplinary decisions made in 1994 relating to the rules of engagement and concluded that Glenn's and Rogers' discipline should be rescinded based both on earlier procedural problems and on the grounds that discipline had been imposed on the unsupported proposition that on-scene commanders were responsible for approving rules of engagement. Jarcho agreed with DOJ OPR that FBI Headquarters was responsible for approving the rules of engagement and that disciplinary action against Glenn and Rogers was unwarranted and unreasonably harsh.

Jarcho, like the three FBI investigators who had commented on the DOJ OPR report, believed that Freeh's conduct deserved significant criticism. Jarcho's report stated that the Department had devoted considerable funding and staff to thoroughly review the events surrounding Ruby Ridge, which culminated in the Berman report. Despite this effort, Director Freeh dismissed the Department's findings in favor of the Mathews report, which was conducted in two months, as

being more credible and accurate.<sup>24</sup> Jarcho's report stated that the fact that the Mathews report was less critical of the FBI than the Berman report and made conclusions that insulated FBI leadership from culpability damaged the FBI's credibility. Jarcho stated that the "Director's support for [the Mathews report] also ensured that Ruby Ridge would remain a problematic public relations and FBI employee morale issue."

Jarcho's report concluded that Director Freeh bore significant responsibility for much of the adverse publicity surrounding Ruby Ridge and for the appearance of FBI bias. Jarcho concluded that Freeh's actions undermined the integrity of the Department-led investigation and led to disciplinary actions being taken against FBI employees based on faulty analysis and incomplete fact-finding. The Jarcho report stated:

Director Freeh's admitted bias towards Larry Potts caused him to strong-arm the Department about approving his recommendation for Potts to receive censure rather than a 30 day suspension. These actions constitute misconduct and warrant disciplinary action. Therefore, we recommend that Director Freeh be censured for his actions and admitted demonstrated poor judgment.

#### **B. Consideration of Matter by Deputy Assistant Attorney Generals Sposato and Vail**

AAG Colgate told the OIG that Deputy Assistant Attorney General John Vail and Deputy Assistant Attorney General Janis Sposato acted as his counsel on the Ruby Ridge disciplinary matter and that he asked them to fully review the work of Jarcho and DOJ OPR. Jarcho gave her report to Vail in December 1999 and briefed Vail and Sposato several times about her conclusions.

After their review, Vail and Sposato rejected DOJ OPR's and Jarcho's conclusions and disciplinary recommendations. In a memorandum to Colgate dated April 17, 2000, Vail and Sposato began by stating that the actual events of Ruby Ridge were long past. They stated that it also appeared to have been a "tale of the search for someone to blame for an operation that went so horribly wrong,"

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<sup>24</sup> In a January 1995 press conference, Freeh had announced the results of the Mathews review and the disciplinary actions he was taking, stating that he supported Mathews' finding that the rules of engagement were the responsibility of the on-scene commanders.

and that “there has been a desperate need to hold someone to account for an outcome that no one wanted and which no one finds satisfactory.”

With respect to Harp, Vail and Sposato stated in the memorandum that they believed that, “absent some evidence of volition on his part in producing an ‘incomplete’ report, he should not be held to task on this basis.” They stated that this was especially true in light of the fact that Harp’s superiors had left the FBI and were never disciplined for their alleged roles in the matter. They stated that to focus responsibility for the inadequacies of the Walsh report on Harp, six years after the fact, “does not serve any apparent equitable or institutional purpose.” They added that Berman could also be said to have issued a report without the benefit of the same interviews but that no recommendation of discipline had been made in that case. Finally, they stated that any action against Harp on the basis of inadequacies of the Walsh report seemed more appropriate for the realm of performance evaluations than of discipline:

That is, if there were any shortcomings in the report which Harp helped to produce, absent any evidence of improper motive on Harp’s part – and we have not been convinced of any – such deficiencies as “incompleteness” of work are matters for which an employee may be counseled, may suffer in his or her rating, or may not be rewarded when bonuses are handed out – but not, typically, disciplined. (Emphasis in original.)

In addition, Vail and Sposato did not view the changes to the FBI 302s as seriously as Jarcho did. Their memorandum stated that, since there appeared to have been an acceptance of the editing process generally, they would not recommend discipline for Harp on that basis. Sposato told the OIG that, while she believed that editing 302s should be kept to a minimum because the 302s should remain as faithful as possible to the original interview, she did not believe that discipline was appropriate when such a practice was not prohibited by the FBI and where she did not believe there were significant, material alterations.

Regarding Mathews’ conduct, Vail and Sposato concurred with Jarcho that Mathews did not commit misconduct when he failed to recuse himself from the investigation because of his relationship with Coulson. They disagreed, however, with Jarcho’s (and DOJ OPR’s) conclusion that Mathews should be disciplined for conducting an inquiry that was incomplete and inadequate. The Vail and Sposato memorandum stated that, as with Harp, there was no evidence that Mathews intentionally slanted his report to further a “cover-up” of wrongdoing by senior FBI officials. They again concluded that, absent evidence of intent or of gross

negligence or dereliction, deficiencies in work product are typically dealt with through the performance management process.

Vail and Sposato also disagreed with Jarcho's recommendation of a letter of censure for Freeh. Their memorandum to Colgate stated:

Even assuming it would be in your purview to recommend it (given that Mr. Freeh is a Presidential appointee), we do not believe that censure is appropriate in this case. From our perspective, Director Freeh at all times used his own best judgment about matters that were hotly debated both within and without the Department. His judgments should not be the subject of discipline, no matter what others may think of them.

Vail and Sposato's memorandum also reviewed the issue of whether the earlier discipline against Glenn and Rogers was justified. The memorandum discussed the propriety of whether rules of engagement should ever be developed, given the Department's overarching deadly force policy. In the end, Vail and Sposato concluded that, with respect to discipline, they were "inclined to leave in place the discipline that has been proposed and/or taken by others, and to recommend no further disciplinary action based upon the promulgation of the rules of engagement."

Their memorandum stated:

It is our intention that these recommendations should put the Ruby Ridge incident in perspective. While there has been much written and said about the "Rules of Engagement," we believe most of that discussion has been misplaced, focusing on the niceties of a phrase (i.e. "could" v. "should" v. "can") rather [than] on the real question of the appropriate role for such rules in a crisis. Most of the individuals responsible for the Ruby Ridge [rules of engagement] have either left the FBI voluntarily or been disciplined.

This is not an outcome that many will find satisfying; indeed, some will be very dissatisfied with it. However, we are willing to accept that there are as many views of human events as there are viewers, and that it is rarely possible to reconcile them all.

Their memorandum concluded with three brief recommendations: (1) that the FBI should clarify the role of the FD-302 and undertake a vigorous training effort to ensure that all agents prepare them in the same way; (2) that Department

leadership needed to be mindful of the unsatisfactory conduct of the Berman/Walsh investigation<sup>25</sup> and to consider whether the FBI can investigate itself when the conduct of top leadership is a potential subject of the investigation; and (3) that the Department should undertake a study of the proper role of rules of engagement in crisis management and then clearly articulate its policy in this area.

Jarcho told the OIG that she felt that Vail and Sposato respected her work, but were “viewing things differently at a different time.” She added that Vail and Sposato were very “immersed” in considering the matter and that they were not cavalier about any aspect of it. She said that she believes they made considered decisions in this matter, but that they did not review the voluminous materials as thoroughly as she had. Jarcho told the OIG that she did not agree with Vail and Sposato’s analysis, and Jarcho remains convinced that her recommendations were appropriate.

Vail and Sposato both told the OIG that they had concerns about Jarcho’s conclusions. Sposato stated that she thought Jarcho’s report was professional and thorough in its analysis, and that Sposato had high regard for Jarcho’s work, but Sposato disagreed with the conclusions. Sposato told the OIG that her major concern was that employees should not be disciplined for mistakes. She stated that she did not believe that discipline was appropriate in these cases without evidence of bad intent. She stated that, in the case of both Harp and Mathews, the investigations were not complete, but that there had been no attempt to hide this fact and no evidence that they had been ordered to take actions and had refused to do so. She stated that the criticisms made against Harp and Mathews also could have been made against Berman because she was the supervising attorney on the original Department investigation and Sposato believed that investigation had been flawed as well. Sposato also stated that she felt that many of the characterizations by DOJ OPR were unfair. She said that her review of the facts did not support a conclusion that the performance by Harp or Mathews was “terrible.”

Vail said that he was very concerned that many of the subjects had left the FBI and that he did not find the DOJ OPR analysis of the insufficiency of the Walsh and Mathews investigations to be persuasive. He felt that DOJ OPR had made too many inferences and that there was “no evidence” of intent. Vail added that he was “not even convinced the work had been all that shoddy.” Vail said that “absent some evidence of motive,” he did not see the matter as appropriate for

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<sup>25</sup> The memorandum did not explain this conclusion.

disciplinary action. Vail agreed that evidence of intent is not always necessary in order to discipline an employee, but stated that negligence must reach a certain level in order for discipline to be appropriate.

Vail and Sposato both said that they were also concerned that the matter was very old. They said they viewed it as unfair to discipline people who were still at the FBI when so many others who were equally or more culpable had left. They told the OIG that they were concerned that Harp had generally followed the orders of Walsh, who was gone and could not be disciplined.

### **C. DOJ OPR Disagrees with Vail and Sposato's Recommendations**

On July 21, 2000, representatives from DOJ OPR met with Sposato and Vail to discuss the appropriate levels of discipline in the Ruby Ridge matter. At that meeting, Sposato and Vail provided DOJ OPR with their April 17, 2000, memorandum to Colgate. In a memorandum dated October 5, 2000, DOJ OPR responded and strongly objected to Vail and Sposato's conclusion that discipline should not be proposed without clear evidence of a bad motive:

JMD apparently would conclude that a subject (Harp or Mathews, in this case) engaged in misconduct warranting discipline only if it found sufficient evidence to conclude that the subject failed to carry out his assigned duties (in this case, to conduct a complete and thorough inquiry) for an improper purpose (in this case, to cover-up wrong-doing of high level FBI managers). Absent evidence of such an improper purpose, JMD apparently could conclude that the subject's failure to perform his duties constituted a management rather than a misconduct issue.

DOJ OPR stated that, under its analytical framework, an employee commits misconduct if he intentionally violates or acts in reckless disregard of an obligation or standard imposed by law, applicable rule of professional conduct, or Departmental regulation or policy. It stated that, in this case, both Harp and Mathews each had a professional obligation to conduct a thorough, complete inquiry into the Ruby Ridge matters assigned to him or to document that the inquiry was incomplete. DOJ OPR concluded that each of them breached that obligation. DOJ OPR stated that, under both its and FBI OPR's frameworks, "it is not necessary to find that the employee's breach of a duty was motivated by an improper purpose; rather, it is necessary only to find that the employee engaged in conduct while knowing that the natural consequence of that conduct would result in the breach of an obligation or standard." DOJ OPR argued that JMD was

substituting a narrower definition of misconduct than that used by DOJ OPR, the investigators, or the FBI.

DOJ OPR also argued that Vail and Sposato had failed to consider the evidence in DOJ OPR's report of an improper purpose on the part of Harp and Mathews. With respect to Harp, DOJ OPR set forth its view of the evidence regarding Harp's explanations and the evidence indicating bias in favor of the subjects of the investigation and bias against Berman. Specifically, DOJ OPR stated that Harp had admitted that the Walsh inquiry was incomplete. DOJ OPR concluded that Harp, as a highly experienced supervisor, had a professional duty to document clearly or notify people orally that the investigation was not complete. DOJ OPR also disagreed with the conclusion that Department attorneys could be equally faulted for conducting an incomplete inquiry. It stated that the Department attorneys were not familiar with the workings of the SIOC and justifiably relied on the agents of the Walsh group to guide them to the pertinent evidence.

In addition, DOJ OPR stated that there was evidence of Harp's intent to skew the inquiry based on his conduct with respect to the editing of the FBI 302's. It cited an example of what it considered an attempt to "cleanse a 302 of language harmful to the FBI." In this example, Harp admitted that he questioned the agent who was the author of a 302 about the accuracy of the 302. This inquiry by Harp resulted in the agent changing the 302 describing the rules of engagement from "free to fire and justified in doing so," to a "cleaned-up" version which stated "authorized to apply deadly force, if appropriate." DOJ OPR concluded that it was significant that Harp singled out this statement for his inquiry and that the 302 was then changed to a more innocuous formulation of the rules of engagement.

With respect to Mathews, DOJ OPR asserted that Mathews had been instructed to make sure the investigation was complete, that it was clear that the investigation was not complete, and that Mathews should have been aware of that fact because there were a number of pieces of important information missing. DOJ OPR also stated that it had not found direct evidence of intent on the part of Mathews, but that it had found statements that, when taken together, suggested Mathews' intent to skew the inquiry. For example, Mathews said to an agent that he wanted to see "an arrow pointing to Glenn," and criticized an agent who commented that Potts and Coulson were likely to be disciplined. DOJ OPR found that Mathews also changed the report's finding that there was "little evidence" to "no evidence" in the discussion of the evidence against Headquarters officials. DOJ OPR found that these actions, together with the "clearly unreasonable discussions in his report of the approval of the [rules of engagement]," led DOJ

OPR to conclude, by a preponderance of the evidence, that Mathews had conducted an inadequate investigation in order to skew the results of his inquiry to protect Coulson, Potts, and others at FBI Headquarters.

DOJ OPR also disagreed with JMD's conclusion that Mathews did not commit misconduct when he failed to recuse himself because of his relationship with Coulson. DOJ OPR concluded that Mathews alone knew of his deep sense of loyalty to Coulson and that it was incumbent upon Mathews to remove himself from the inquiry. DOJ OPR cited statements by Mathews that "[his] friend Danny is not going to get hurt in this," and Mathews' notes to Coulson and Freeh after the inquiry had ended enclosing press articles that were complimentary to Coulson and expressing satisfaction that Coulson was being remembered for his good work at the FBI.

DOJ OPR also objected to JMD's assertion that Director Freeh's judgments should not be the subject of discipline. DOJ OPR stated that JMD's conclusion was an "extremely broad approach [that] would amount to granting the Director blanket immunity for any decision he makes, no matter how lacking in judgment." DOJ OPR stated that it rejected that view and affirmed its conclusion that Freeh should be criticized for using poor judgment.

JMD did not respond formally to DOJ OPR's memorandum. In interviews with the OIG, Sposato, Vail, and Colgate stated that they did not write any additional internal memoranda or keep any notes justifying or analyzing their decision to depart from DOJ OPR's findings.

#### **D. FBI OPR's Response to DOJ OPR**

FBI OPR responded to DOJ OPR's memorandum on November 29, 2000, in a memorandum signed by Assistant Director DeFeo. In that memorandum, FBI OPR clarified that, while its standard for misconduct was the same as that utilized by DOJ OPR, it did not agree with DOJ OPR's finding of misconduct with respect to Harp. It also stated that, while it had recommended that the issue of whether Mathews had committed misconduct by failing to conduct a full review of the evidence with respect to the approval of the rules of engagement should be reviewed, this recommendation indicated only that the evidence had reached a threshold at which it should be subject to disciplinary consideration and did not equate to a finding that Mathews had committed misconduct. Finally, FBI OPR disagreed with DOJ OPR's assertion that the editing of the 302s by Walsh and Harp was well beyond the bounds of acceptable FBI practice. It stated that absent

evidence establishing bad motive “by a clear preponderance,” FBI OPR would not impose discipline for such editing.

### **E. Colgate’s Decision**

Colgate told the OIG that he reviewed the materials in this matter, including the DOJ OPR report, Jarcho’s report, the Sposato/Vail memorandum, DOJ OPR’s response, and FBI OPR’s response, and he concluded that he agreed with Vail and Sposato that no further discipline was appropriate. He told us that he did this for two reasons. First, he said he was concerned that the lower-level employees might be punished for the deeds of their retired superiors. He stated that his “gut” told him that there was a lot of “angst” over the fact that Potts and Coulson left the FBI without any punishment and that there was a sense that those who were still at the FBI should “pay for the sins of those who got away.” Second, he believed that many of the issues were performance rather than misconduct matters. He said that there was no question that serious discipline was appropriate for Potts and Coulson because they were the leaders of what took place at Ruby Ridge. But he did not believe that Harp and Mathews had committed misconduct.

Colgate said that he tried to view the issue of intent as he thought the MSPB would view it. He said he believed that the management and culture at the FBI did not place an emphasis on internal investigations and that senior management was well aware that the investigations were sloppy and that there were conflicts of interest involved. He stated that he saw the whole matter as sloppiness rather than as a conspiracy to “throw” an investigation. Colgate said that he saw his role as sorting through the evidence and taking a critical look at some of the conclusions. He said that, in deciding disciplinary matters, he generally defers to the assessments of the investigators who conducted the original inquiry, but that he is a “check point” to ensure a fair outcome. He said that he did not have any dispute with DOJ OPR’s factual findings, just with the conclusions that they drew from them.

Colgate stated that he never seriously considered disciplining Freeh. He said that Freeh was a Presidential appointee and could have been removed at any time by the President. Colgate said that since Freeh had publicly admitted he made mistakes in the aftermath of Ruby Ridge, the President had all the information he needed to remove Freeh if he so chose. Colgate stated that he also was aware of the stormy relationship between Director Freeh and Attorney General Reno over the campaign finance investigation, and Colgate felt that a recommendation for

discipline of Freeh by the Department would be seen as retaliation by Reno against Freeh.

Colgate told the OIG that he made his decision independently, knowing that it would make many people unhappy. He said he was never pressured by any entity and that he tried to make the decision process an open one in which all parties had input. Colgate added that he has no bias for or against the FBI, but that he is sure that the FBI has viewed him as a “thorn in its side” over the years.

Under Department procedures in matters involving a Department attorney, the deciding official must notify Associate Deputy Attorney General Margolis if he or she intends to depart from DOJ OPR’s recommended range of discipline.<sup>26</sup> Margolis met with Jarcho, Sposato, Vail, and DOJ OPR, and reviewed their submissions and a draft of Colgate’s decision. Margolis also met separately with Colgate about his draft decision. Margolis said he reviewed the decision using an “abuse of discretion” standard. Margolis said he does not substitute his own judgment of what would constitute an appropriate result; rather, he determines only whether the deciding official’s conclusions are unreasonable in light of the evidence.

Margolis told the OIG that he told Colgate that he did not agree with his decision and could not endorse it. Margolis said he believed that it would have been better to have followed DOJ OPR’s practice of not requiring proof of intent in order to find misconduct. However, Margolis said he was satisfied that Colgate had looked at the matter carefully, and Margolis also believed that Colgate had not abused his discretion in reaching the decisions he did. Therefore, Margolis did not have the case reassigned from Colgate to a new official to make the final disciplinary decisions.

As a result, in a memorandum issued on January 3, 2001, Colgate reported his final decision. In the memorandum, Colgate stated that his staff thoroughly reviewed the DOJ OPR report and briefed him on the results. He stated that it was his conclusion at the end of that process that he did not concur with the DOJ OPR

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<sup>26</sup> The applicable memorandum only mandates notification of Margolis when the official intends to depart from DOJ OPR’s recommended range of discipline for a DOJ attorney, not any other Department employee. No attorneys were involved in this matter. However, Margolis said that he became involved in reviewing the matter at Vail’s request and did not focus on the fact that the order did not apply. By the time he did realize it, he said that he was already deeply involved and decided to see the matter through.

findings of misconduct and the resulting disciplinary recommendations. He stated that he consulted with both DOJ OPR and FBI OPR about his conclusions and received additional input from both. He stated that, because his recommendations were not consistent with those of DOJ OPR, he had notified Associate Deputy Attorney General Margolis of his decision. Colgate's memorandum stated that, for the reasons outlined in the April 17, 2000, memorandum from Sposato and Vail, he had decided discipline was not warranted, and he declined to adopt the OPR findings of misconduct. He stated:

My conclusion is based, in major part, upon my belief that, absent evidence of improper motive on the part of these individuals, shortcomings in their work products (if any) are typically dealt with through the performance management process, not through the application of discipline. In these cases, I am unwilling to ascribe improper motive to the employees, who in my view simply saw the issues differently from their [DOJ] OPR counterparts and therefore do not believe discipline is warranted.

As a result, no disciplinary action was taken against Harp for the allegations that he failed to ensure that the Walsh inquiry was complete and to supervise the production of accurate reports of interview. Similarly, no action was taken against Mathews for the allegation that he failed to properly recuse himself, for conducting an incomplete inquiry, and for making unsupported conclusions regarding the rules of engagement in his report in an attempt to insulate FBI leadership. Finally, the previously imposed discipline against Glenn and Rogers for their role in the promulgation of the rules of engagement was not rescinded.

Finally, Colgate's memorandum did not discuss Freeh or DOJ OPR's recommendation that Freeh be criticized for poor judgment. Margolis told us that, after discussions with Vail and Sposato, he told Colgate that he should consider formalizing his implicit decision not to recommend discipline for Freeh. Colgate told us that he thought that was unnecessary and did not do so because Freeh had admitted his mistakes and because Colgate did not believe that he had jurisdiction over a Presidential appointee.

On January 3, 2001, Margolis notified JMD and DOJ OPR that he had reviewed the material supplied to him by JMD and DOJ OPR and had concluded that the disposition proposed by Colgate "falls within [his] legitimate discretion."

Margolis stated that JMD could therefore proceed to resolve the pending matters along the lines proposed in Colgate's memorandum.

### **VIII. OIG Analysis**

We recognize that, at this point, there are well documented and strong disagreements about the disciplinary decisions ultimately reached in Ruby Ridge and that our independent assessment is unlikely to end the disagreements about the ultimate outcome. Numerous entities and individuals who were much closer to the events than we have weighed in with analysis and opinions, often reaching different conclusions. Nonetheless, we believe that there are important lessons to be learned from a review of the response to Ruby Ridge.

First, there is almost nothing about Ruby Ridge that worked well. The incident itself was replete with poor performance, poor judgment, misconduct, and acts of clear obstruction to cover up the problems. The FBI's initial investigation of the incident was at best grossly deficient and at worst intentionally slanted to protect the FBI and senior FBI officials. Subsequent investigations were more thorough, but the discipline process took so long and was so flawed that in the end, it is hard to say that a fair result was reached.

The ultimate disciplinary decision for the subjects of the second round of investigations was removed to the Department specifically to avoid any further allegations that the FBI was covering up the misconduct of its senior officials. Nonetheless, in the end, because of what we believe to be flawed analysis on the part of JMD, the appearance that culpable senior officials had "gotten off" remains.

There are no standards or internal Departmental regulations guiding a deciding official's actions in discipline matters. In this case, JMD used a different standard to evaluate the evidence than did DOJ OPR and FBI OPR. As Colgate's final memorandum made clear, JMD viewed the deficiencies as performance issues, not misconduct that required adverse action. DOJ OPR strongly objected, arguing that it is not necessary to find that the employee's breach of duty was motivated by an improper purpose; rather, it is necessary only to find that the employee engaged in conduct while knowing that the natural consequences of that conduct would result in the breach of an obligation or standard.

We, like DOJ OPR and FBI OPR, believe that it is not necessary to find a bad intent in order to impose discipline. Intent is a factor that may be considered when determining the appropriate discipline. Indeed, one of the factors relevant in determining a penalty, as outlined in the seminal case of Douglas v. Veteran's

Administration, et al., 5 M.S.P.B.313 (April 10, 1981), is “whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain.” The fact that inadvertence could be a factor to be considered in determining a penalty is a clear indication that discipline, not just a poor performance evaluation, may be appropriate in cases where bad intent has not been proven. Also, the Department has imposed discipline in other cases where intentional misconduct was not shown.

We also believe proof of intent should not be required because of the difficulty in proving the bad motive of any individual. Such proof is rarely direct and depends upon putting together circumstantial evidence. Where other credible evidence of misconduct exists, proof of intent should not be a requirement to impose discipline. In addition, treating poor performance only as a performance issue often means that significant neglect of duty will go unaddressed. By the time the misconduct investigation has been completed, the rating period will have passed and the employee’s neglect of duty will not be accounted for. Therefore, we believe that future cases should be based on a standard that does not require proof of a bad motive.

Of course, even if JMD had used what we believe to be the appropriate standard, it is likely it would not have recommended discipline against Harp or Mathews. As expressed in JMD’s report, JMD was heavily influenced by the passage of time and the inability of the Department to discipline the individuals who many believed were the more culpable individuals. This factor – the disciplining official’s discomfort at imposing punishment on some individuals but not others – is present in other cases as well and can present a significant obstacle toward imposing discipline on mid-level managers. In general, senior officials are eligible for retirement and many escape punishment by retiring before the investigation is concluded. The appearance of a double standard is exacerbated when disciplining officials consider the absence of punishment for others as a mitigating factor when considering whether to discipline managers. We believe this should only be a significant factor when considering whether to discipline rank and file employees after more culpable managers have retired.

In at least one other complex matter in which JMD officials were the deciding officials for discipline, JMD argued that the passage of time was a mitigating factor. We believe that this view creates problems for investigative entities, which are obligated to conduct thorough and complete investigations. Ruby Ridge, in particular, was delayed by actions of the subjects that arguably impeded the initial investigation and by a criminal investigation. If the efforts of

the investigators are in the end going to be wasted unless the investigation is completed within a specific time frame, then investigating entities need to be informed of the time frame and given sufficient resources to meet it.

We, like DOJ OPR, believe that Harp and Mathews should have been disciplined for failure to carry out their assigned duties – completing thorough and impartial inquiries – regardless of whether there was evidence of improper motivation. Moreover, like DOJ OPR, we believe that there was sufficient evidence in the record to sustain a finding that both men acted with an improper purpose. Harp acknowledged that the Walsh inquiry was incomplete but offered an explanation that DOJ OPR found lacked credibility. Moreover, Harp failed to notify anyone of the incompleteness of the inquiry. In our view, this fact, together with Harp's conduct with respect to the editing of the 302's, suggested, by a preponderance of the evidence, an improper purpose on Harp's part. We also believe that Mathews' failure to recuse himself despite his relationship with Coulson, taken together with his statements and the unsubstantiated findings in his report regarding approval of the rules of engagement, established by a preponderance of the evidence that Mathews conducted an inadequate investigation.

With respect to changing previously imposed discipline, we believe that Colgate should have cleared Glenn's record, as recommended by DOJ OPR. DOJ OPR investigated the process by which the FBI made disciplinary decisions after the issuance of the Mathews report and found that those decisions were made based on the unsupported assertion that on-scene commanders were responsible for approving the rules of engagement. Given DOJ OPR's findings that the rules of engagement were approved at the Headquarters level, we believe that the preferable course was for JMD to have taken action to correct a prior error in imposing discipline, regardless of the benefits of finality in the disciplinary process and the significant passage of time since the discipline had been imposed.

However, while we do not agree with Colgate's ultimate decisions, we believe they were made in good faith, after a careful review of the record. He had a difficult task that was unlikely to please everyone. Although we would have come out differently on the ultimate decisions he made, we do not believe he abused his discretion. Yet, we disagree with the basis for his decisions.

We also believe that Colgate should have addressed the issue of Freeh's conduct in Ruby Ridge. The issue was raised by both DOJ OPR and Jarcho and warranted explanation in Colgate's final decision, even if the explanation was why Colgate did not believe that discipline was appropriate. Like DOJ OPR, we do not

agree with the opinion in the Vail/Sposato memorandum that Freeh's "judgments should not be the subject of discipline, no matter what others may think of them." We agree with DOJ OPR that such a statement creates a type of immunity for the Director of the FBI and suggests that his decisions cannot be reviewed for either misconduct or poor judgment. We therefore believe that Colgate should have explicitly addressed Freeh's role in the matter and explained his decision not to recommend any action regarding him.

Finally, although the ultimate decision in Ruby Ridge was made by JMD and not the FBI, we believe the effect of Colgate's decision was to exacerbate further the perception of a double standard in discipline for senior FBI officials. This was likely worsened by the fact that Colgate's decision rejected the lengthy and complex analyses in two separate reports by DOJ OPR and Jarcho with only a short, conclusory memorandum. In the end, the effect of his decision, particularly without sufficient explanation as to the reasoning and the evidence supporting it, was to feed the perception that several lower-level FBI employees were harshly disciplined and upper-level employees either retired or received no or light discipline. We believe this result contributed to the perception of a double standard of discipline in the FBI.

## **IX. Bonuses and Promotions**

One aspect of Ruby Ridge and the Potts party investigation that has not been reviewed by the Department or FBI OPR was the promotions and bonuses given to FBI employees who were the subjects of internal Ruby Ridge investigations while the investigations were pending. While a presumption of innocence is usually appropriate while a subject is under investigation, rewarding a subject who is later found to have committed misconduct can result in adverse consequences. We believe the FBI should be mindful of the message it sends to both the investigators in a particular case and the rest of the FBI when subjects of investigation are promoted or receive bonuses or awards while under investigation. This is especially true where high-level officials are under investigation, because investigators may interpret the giving of an award as an indication that senior management has already judged the merits of the investigation.

A number of FBI officials under investigation for the Ruby Ridge matter received promotions and bonuses while the investigation was pending. The most well known of these promotions was of Potts to Deputy Director – a promotion that Freeh later acknowledged was poor judgment on his part. Our review of other promotions and bonuses reveal additional issues of concern.

Harp, Walsh, Mathews, Coulson, Kahoe, and Potts received either promotions or bonuses while under investigation for Ruby Ridge:

- Harp was promoted to SAC in Cleveland in December 1995 after DOJ OPR had commenced its investigation into the inadequacy of earlier internal Ruby Ridge inquiries. The memorandum to the Director presenting the qualifications of the candidates for the Cleveland SAC position does not mention the ongoing investigation, although Freeh told us that he was aware of the investigation and its scope. In addition, Harp was given a cash award of \$8,099 in November 1997 while still under investigation for Ruby Ridge and an award of \$14,208 in October 1998 while under investigation for Ruby Ridge and for attendance at the Potts retirement party.
- Walsh received a cash award of five percent of his salary while under investigation by DOJ OPR for Ruby Ridge. While under investigation by DOJ OPR and under criminal investigation by Stiles, he was promoted to SAC in San Francisco in December 1996. Freeh asked FBI OPR to check with DOJ OPR and Stiles regarding the promotion. DOJ OPR did not object, and Stiles would not comment. The memorandum to the Attorney General requesting approval for Walsh's move to San Francisco did not indicate that Walsh was under investigation.
- Mathews was promoted to an SES position in July 1995 after commencement of the DOJ OPR investigation into allegations that the internal inquiries of the original Ruby Ridge matter were inadequate. Mathews was promoted to SAC in New Orleans in June 1997 while still under investigation.
- Kahoe was given a cash award of \$7,126 in November 1993 during the initial Ruby Ridge investigation. He was promoted to SAC in Jacksonville, Florida, in June 1994 while under investigation. The FBI later proposed a 15-day suspension for Kahoe. He was removed from the SAC position in October 1995 and pled guilty to obstruction of justice in October 1996.
- Coulson was promoted to SAC in Baltimore in April 1993 while under FBI's internal investigation of Ruby Ridge. He was given a cash award of \$5,590 in November 1993 while still under internal investigation. Coulson was promoted to SAC in Dallas in September

1994 before the Mathews report recommending discipline in the Ruby Ridge matter was complete. He was ultimately issued a letter of censure following issuance of the Mathews report.

- Potts was promoted to Acting Deputy Director in 1994, prior to completion of the final internal FBI decisions about discipline in Ruby Ridge. He received a letter of censure in January 1995. Despite this censure, he was made Deputy Director in May 1995.

We asked former Director Freeh about these promotions and bonuses. He told us that the fact that someone is under investigation was not necessarily enough for him to disapprove a bonus. He stated that in many cases he would approve a bonus and leave it to the Department of Justice to disapprove it if they wanted. Freeh stated that the Department was free to disapprove any of his recommendations and had access to the information that might cause them to do so. Freeh also stated that the various Ruby Ridge investigations dragged on far too long, and he believed that he could not “leave people hanging” in terms of career advancement. Freeh told us that he is a “strong believer in the presumption of innocence even as applied in an administrative process.” Freeh said that he spoke at length with FBI OPR Assistant Director DeFeo and felt that, given the facts developed by DOJ OPR to that point, it was not inappropriate to make personnel decisions regarding the subjects. Freeh stated that he repeatedly pushed the Attorney General to resolve Ruby Ridge one way or another. He also stated that he believed there had been insufficient diligence by the Department in resolving the matter. He told us that this delay put FBI employees in an intolerable position, especially employees like Harp and Mathews who were ultimately not disciplined by Colgate. Freeh added that he attempted to obtain relevant information about the facts of the investigation in making his decisions, but that the Department was reluctant to provide such information. Finally, he stated that there were many instances in which he did not make otherwise merited promotions because of a pending disciplinary inquiry.

It is true that the investigations of Ruby Ridge were lengthy and that the disciplinary process was extraordinarily slow. However, Freeh testified before a Senate subcommittee in October 1995 about the wisdom of his promotion of Potts to Deputy Director despite the finding that Potts had mishandled the crisis. He stated at that time: “Looking back, I recognize that I was not sufficiently sensitive to the appearance created by my decision to discipline and simultaneously promote Mr. Potts.” See Hearing before the Senate Judiciary Committee, Subcommittee on

Terrorism, Technology and Government Information, October 19, 1995. The DOJ OPR Ruby Ridge report put the problem more strongly:

We agree with the Director's own statement that he exhibited poor judgment in promoting Potts, not just because he failed to balance all the positive and negative factors, but because the promotions (both to Acting Deputy Director and to the full position) and their timing inevitably had the effect of sending a signal to the persons investigating the Ruby Ridge matter, that the Director had full confidence in Potts and that he might not be receptive to a report that strongly criticized the conduct of Potts. This action also sent a message to employees throughout the FBI, telling them that the Bureau was willing to overlook serious allegations of misconduct and even reward the subject of the allegations with a major promotion. Such a message inevitably had a damaging effect on the morale of the great majority of FBI personnel who take great pride in their integrity and in their adherence to high standards of professional conduct.

We agree with DOJ OPR that the promotions of individuals while under investigation for serious misconduct were troubling. In 1993 it should have been obvious that there were significant issues involving FBI personnel and by 1995 an ongoing criminal investigation should have made it even clearer that the allegations against certain individuals were serious. Despite Freeh's comment to the Senate subcommittee in October 1995 that he had not been sufficiently sensitive to appearances, he promoted Harp only two months later, followed by promotions for Walsh and Mathews. We believe that the FBI and Department components need to carefully consider whether to promote or grant awards to individuals who are under investigation. The Department should consider whether a Department official should approve awards and promotions for high-level individuals who are under investigation.<sup>27</sup>

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<sup>27</sup> FBI and Department officials are more sensitive to this issue now, since the Department routinely requests information from the OIG and OPR about whether senior FBI and other Department officials who are being considered for promotions and significant awards are under investigation.

In addition, we have serious concerns about various conflicts of interest surrounding these promotions. First, Potts sat on the Career Board that made recommendations to the Director on the promotions of Kahoe and Coulson. Given that the Ruby Ridge investigation still was ongoing at the time, it is shocking that neither Potts nor the FBI thought it improper for Potts to be involved in considering the promotions of individuals who were also subjects of the investigation. In addition, Potts sat on the Career Board considering Walsh for promotion just six months after Walsh completed his report on Potts' and others' actions at Ruby Ridge. Potts also sat on the Career Board that considered the promotion of Harp to the SES level just five months after Walsh's report, with great input from Harp, was completed. The appearance of a conflict should have been obvious. We asked Freeh about some of these conflicts. He responded that, in retrospect, Potts should not have been on those Career Boards.

Indeed, we found that the FBI's insensitivity to possible conflict issues was a common thread running through many cases. As noted previously, the FBI assigned Walsh and Mathews to investigate their friends. Also, Coyle was on the SES Board for the Potts party disciplinary matter. Although the FBI may believe that all personnel will attempt to act objectively even with respect to their close friends, we believe this view is not realistic and, in any case, such conflicts at a minimum feed the appearance of favoritism.

## **CHAPTER SIX**

### **OIG RECOMMENDATIONS AND CONCLUSIONS**

We believe that the evidence showed that in several FBI disciplinary matters, including several important and well-known cases, senior managers were afforded different and more favorable treatment than less senior employees. Various factors contributed to this difference in treatment.

First, by law SES members cannot be suspended for less than 15 days. As a result, we believe that many SES managers at the FBI receive letters of censure when lower-level employees would receive short suspensions for similar conduct

Second, during the FBI adjudication process, significant weight is given to the long and outstanding records of senior FBI managers when considering the Douglas factors. Because less senior employees may not have such lengthy records, this benefit may be weighted heavily in the favor of senior managers.

Third, we believe that some of the specific cases that we examined indicate that SES Board members gave undue weight to the explanations of SES members who were subjects of investigations, possibly because of a reluctance to find that a fellow SES member “lacked candor.”

Fourth, we were told that the former SES disciplinary system may have fostered a double standard because different decision-makers were on each disciplinary board that was convened, and the Board members had different levels of experience in handling personnel matters. As a result, the Board members’ approach often deviated from the strict precedential approach used by FBI OPR for non-SES employees. This problem was exacerbated by the fact that, prior to the changes in August 2000, FBI OPR did not submit factual findings or conclusions about misconduct to the SES Disciplinary Boards. The Boards therefore had considerable flexibility in interpreting the evidence presented to it. This led to the perception that in several cases, such as in the Potts retirement party matter, the Board manipulated the facts to achieve a lenient disciplinary result.

Fifth, several individuals who sat on SES Disciplinary Boards told us that they believed that a letter of censure for a senior manager is, in fact, a significant punishment that could effectively end a manager’s career. They did not believe that a letter of censure had the same effect on lower-level employees’ careers. We were unable to validate this perception or determine whether a letter of censure had a more serious impact on the career of a senior manager than a less senior FBI employee. However, we believe that the existence of this belief led some SES

Board members to conclude that a letter of censure was an appropriate punishment for FBI managers, even though a harsher punishment would normally be given to lower-level FBI employees.

Sixth, the ability of FBI employees to resign or retire during an investigation or at any time prior to having discipline imposed fed the perception that certain managers escaped punishment. This problem is exacerbated when the disciplining official factors in a pending retirement when determining punishment, as we saw in several cases of SES discipline that we reviewed.

We believe that the August 2000 reforms to the FBI disciplinary system that abolished the two-track system will correct some of the problems with the former FBI SES disciplinary system. Discipline for SES and non-SES employees is now handled according to the same system. We believe this should help to alleviate some of the perception of a double standard of punishment.

Moreover, in July 2001 the authority to investigate misconduct of FBI employees was changed. Prior to that time, the FBI investigated its own misconduct. Unlike in other DOJ components, the OIG could not investigate allegations of misconduct in the FBI or the Drug Enforcement Administration (DEA) absent specific permission from the Attorney General. In July 2001, the Attorney General expanded the OIG's jurisdiction to investigate misconduct throughout the Department, including in the FBI and the DEA.<sup>28</sup> This change was codified in statute in the DOJ Reauthorization legislation that was signed by the President on November 2, 2002.

As a result, the OIG now investigates most allegations of misconduct against high-level FBI officials. We believe that the OIG's involvement and oversight of the FBI will help ensure that misconduct by high-level FBI officials is not dismissed or treated more leniently than allegations against lower-level FBI employees.

However, we believe that several additional issues should be considered by the FBI and the Congress to help reduce the reality or the perception of a double standard of discipline in the FBI. First, the current system of discipline provides for SES employees to have appeal rights to the FBI's Inspection Division or a

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<sup>28</sup> The one exception is that DOJ OPR continues to investigate allegations of misconduct involving Department attorneys or investigators where the allegations relate to the exercise of the authority of the attorney to investigate, litigate, or provide legal advice.

Disciplinary Review Board. The Assistant Director of the Inspection Division or the Board may “independently redetermine the factual findings and/or the penalty imposed.” If a new penalty is imposed, however, it must be consistent with applicable precedent. Both the Assistant Director of the Inspection Division and the Board are required to document their findings in writing and provide the employee a written decision. But there is no requirement that the Assistant Director or the Board must provide written justification for their findings or explain why they are altering the disciplinary decision made by FBI OPR.

We believe that a clear written justification explaining why the Assistant Director or the Disciplinary Review Board changed the disciplinary decision on appeal should be required. Also, any changes regarding factual findings or penalties should be accompanied by a written justification that explicitly describes the reasons for the changes. This would ensure that the judgment of the Assistant Director or the Board is not simply substituted for that of the decision-maker.

Second we continue to have some concerns about the composition of the Disciplinary Review Boards because they still include only SES members. In August 2000, the separate SES Disciplinary Review Boards for SES employees were eliminated, and discipline in all cases is now appealed to Boards that are composed of the Assistant Director of the Investigation Division, an SES member chosen by the subject, and an SES member chosen by lot. While this is a marked improvement on the previous system, it still results in all discipline being decided by Boards consisting solely of SES members. Because of this makeup, there is still the danger of a perception that SES employees who come before the Boards may be treated less harshly. We believe the FBI should consider options to alleviate this perception, such as including a non-SES member on the Boards or including someone from outside of the FBI, such as an official from the Department.<sup>29</sup>

Third, we believe that the FBI should have a full range of disciplinary options with which to discipline SES officials. The current legal restriction on the suspension of SES employees – that they can only be suspended for 15 days or

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<sup>29</sup> In a response to a draft of this report, the FBI noted that one SES member of the Disciplinary Review Board is chosen by the employee appealing the discipline. The FBI also stated that the process would have some random observers from the non-SES ranks. We believe that this response does not go far enough, and that the Disciplinary Review Boards should not be limited solely to SES members and non-SES observers.

more – ties the hands of deciding officials. The outcome is that SES employees often receive lesser punishments than deserved because the deciding official must choose between a letter of censure and a 15-day suspension. We think Congress should change this limitation. We note that such a revision is part of an FBI Reform Bill introduced by Senators Leahy and Grassley in February 2002.<sup>30</sup>

Fourth, the FBI needs to ensure that any policy changes that are made with regard to appropriate discipline are properly disseminated to its employees and consistently applied. As we mentioned on page 15 of this report, in a 1996 SES case the FBI instituted a change in the standard discipline for the offense of losing a pager. However, this changed precedent was not consistently applied, and in several cases lower-level FBI employees received greater discipline than FBI managers for this offense. If there is a change of precedent, it needs to be uniformly enforced by the FBI.

Fifth, the FBI must attempt to resolve the conflict between applying the Douglas factors and the “bright line” policy. In January 1994, Director Freeh issued a bulletin to all supervisors in the FBI about its standards of conduct and discipline. He stated that he had determined that the FBI had been too tolerant of certain types of behavior that are fundamentally inconsistent with continued FBI employment. He stated that he was drawing a “bright line” which would serve to put all employees on notice that he believed in the “simple truth that lying, cheating, or stealing is wholly inconsistent with everything the FBI stands for and cannot be tolerated.” He then set forward several examples of behavior for which employees could expect to be dismissed. These included lying under oath, voucher fraud, theft, and material falsification of investigative activity or reporting.

However, the uneven application of this bright line policy seems to have increased the perception of a double standard. Some FBI senior managers involved in conduct that seemingly violated this policy, such as in the Potts party case, were only given letters of censure. A lack of uniformity in applying the bright line policy necessarily creates a suspicion that favoritism or “cronyism” is the reason that it is not being followed. We found, however, that managers were not the only FBI employees who benefited from a deviation from the strict requirements of the bright line policy. We found cases in which non-SES employees were punished but not terminated even when they had violated one of the bright line categories. We believe the FBI should determine whether it wants

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<sup>30</sup> In its response to the draft of this report, the FBI stated that it also supports this change.

to maintain a “bright line” policy or consider the employee’s history and mitigating and aggravating circumstances, as outlined in the Douglas factors. If the FBI chooses to follow its current bright line policy, it is important that it do so consistently.<sup>31</sup>

Sixth, the FBI should consistently apply precedent from non-SES cases to SES disciplinary matters. FBI policy instituted in August 2000 states that “[t]he same standards for evaluating evidence will be consistently applied to all employees with due regard for the increased responsibilities and obligations of a senior executive.” We believe this should be interpreted as meaning that the discipline that is appropriate in non-SES cases not only be considered but in most cases should act as the minimum punishment that should be imposed in SES cases. Greater punishment may be warranted because a senior official presumably should exercise even stricter adherence to duty and ethical regulations.<sup>32</sup> Lesser punishment may be warranted, but if so the reasons should be carefully documented.

The expectation within the FBI’s rank and file appears to be that an SES employee should be disciplined in the same manner as a lower-level employee who engaged in similar conduct. If this expectation is not met, the suspicion of favoritism and cronyism arises. We recognize that in many cases, an SES employee will have had a long and successful history with the FBI, a factor that can be considered pursuant to the Douglas factors. Furthermore, the FBI’s investment in senior FBI executives in terms of training and experience is substantial. However, the FBI should not allow consideration of a manager’s record to routinely outweigh the equally important consideration that managers should be held to higher standards than other employees.

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<sup>31</sup> In its response to the draft of this report, the FBI acknowledged that not all employees who violated the bright line policy are dismissed. It stated that it has established a working group on candor issues that will submit a final recommendation on this issue within six months.

<sup>32</sup> FBI policy states that in most instances penalties for violations of regulations will fall within a range of penalties set forth in the FBI’s Manual of Administrative Operations and Procedures. It states, however, that in an aggravated case a penalty outside of the range may be imposed. It cites as an example the case of a supervisor or FBI official who, because of his or her responsibility to demonstrate exemplary behavior, “may be subject to a greater penalty than is provided in the range of penalties.”

Seventh, while the FBI manual clearly anticipates that an SES employee may be the subject of a greater penalty because of the employee's leadership position, FBI decision-makers seemed to believe that a lesser penalty is acceptable because of the effect any penalty will have on the individual's career. We have concerns about this justification because, in part, we had difficulty substantiating the claim that a letter of censure would have a significant impact on the career of a senior-level FBI employee. Furthermore, we believe that this rationale can be easily abused and could inevitably lead to managers being treated more leniently than other employees. We believe that it is better to discipline FBI employees based on the merits of the case and precedent, rather than using speculation regarding the impact on an individual's career as a mitigating factor.

Eighth, we encountered many instances where senior FBI employees retired while under investigation for misconduct, and the disciplinary process ceased. We believe the FBI should consider continuing the disciplinary process in certain cases, even when an FBI employee retires while under investigation, so that a final disciplinary decision is reflected in the employee's personnel file.

We recognize that retirement or resignation while the disciplinary process is ongoing is not limited to senior FBI employees. However, they are more likely to be in a position to retire, and we saw many instances where they did so to avoid discipline. Although we do not believe that FBI resources should be expended in all misconduct cases to reach a final disciplinary decision when the subject has retired, we believe that the FBI should consider doing so in some cases, particularly when some FBI employees have received discipline for their actions while others retired or resigned to avoid discipline in the same case.

Ninth, we saw cases where individuals had received significant promotions or bonuses despite the fact that they were the subject of an ongoing investigation. This was especially pronounced in the Ruby Ridge case, where Potts was promoted to Deputy Director while under investigation and many other subjects received bonuses and promotions while under investigation. We believe that promotions and bonuses for individuals while under investigation for serious allegations of misconduct should be carefully considered, particularly when the allegations appear to be supported by significant evidence.

Tenth, it is critical that the FBI establish guidelines for when FBI employees should be recused from participating in investigations or disciplinary decisions regarding other FBI employees. FBI policies do not provide clear guidance on this issue. Our interviews with FBI officials indicated that the FBI normally leaves it to individual employees to decide when to recuse themselves if they believe there

is a reason why they cannot be impartial. We believe there should be a clearer approach to the question of conflicts and a recognition that the appearance of a conflict can be as damaging as an actual conflict of interest. We think it useful for the FBI to formulate a policy, available to all employees, describing guidance on this issue.<sup>33</sup>

Eleventh, given the strong perception among FBI employees of the existence of a double standard and the fact that our review found evidence supporting that belief, we recommend that the FBI establish a mechanism to regularly review SES and non-SES discipline. For example, the FBI's Inspection Division or the Justice Management Division could analyze samples of cases of senior managers compared to non-managers, with the results being reported to the OIG for an independent review.

Finally, we recognize the difficulty in eliminating completely the perception that upper-level managers in the FBI are treated more favorably than their non-SES counterparts, particularly given the recent and well-known cases that we have described in this report. We believe the elimination of the SES Board should assist in the effort to equalize the treatment of all FBI employees, as should the OIG's expanded jurisdiction in the FBI. But the FBI should continue to be mindful of the damage that is done when employees believe that the disciplinary system is unequal or unfair. We believe that the FBI should strive to reduce that concern, and we believe that full implementation of these recommendations will help the FBI address this serious issue.

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Glenn A. Fine  
Inspector General

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<sup>33</sup> In response to the draft of this report, the FBI stated that it will develop a written recusal policy within six months.