

MEMORANDUM

TO: Chairman Russell

FROM: Majority Staff, Subcommittee on National Security

DATE: January 2, 2019

SUBJECT: Independent Investigations and Employee Discipline at the Bureau of Prisons

I. INTRODUCTION

The Committee investigated the Bureau of Prisons (BOP) in response to numerous complaints from BOP employees nationwide. Committee staff spoke with whistleblowers, conducted site visits, and received briefings from representatives of three distinct offices in BOP: Office of Internal Affairs (OIA), Office of General Counsel (OGC), and Human Resources Management Division.

Based on information reviewed in thousands of pages of case files, arbitration documents, reports and emails, the Committee was able to substantiate many of the allegations of misconduct and retaliation on behalf of agency senior leadership. The Bureau's Office of Internal Affairs also reviewed, investigated, and even substantiated many of these claims of misconduct through the agency's internal complaint process.

However, a comparison of data analyzed in the OIA 2017 Annual report¹ and the BOP's responses to Committee inquiries reveal senior leadership misconduct appears to be largely tolerated or ignored altogether. The Committee reviewed cases where some individuals deemed responsible for misconduct were shuffled around, commended, awarded, promoted, or even allowed to retire with a clean record and full benefits before any disciplinary action could apply. Documents and testimony also showed disciplinary action was delayed in some cases to allow senior leaders to retire unscathed.

A lack of autonomy on the part of local internal affairs investigators may be largely to blame. Despite headquarters officials' strong claims of independence, local management officials exercise significant influence over facility disciplinary process, providing ample opportunity for misconduct to be glossed over and retaliation and intimidation to prevail.

Additionally, discipline and accountability is not equitably applied. For high ranking officers, bad behavior is ignored or covered up on a regular basis, and certain officials who should be investigated can avoid discipline. To address these findings, staff make three recommendations to improve independence and accountability in the investigative and disciplinary phases of misconduct reporting:

¹ U.S. DEPT. OF JUSTICE, FED. BUREAU OF PRISONS, OFFICE OF INTERNAL AFFAIRS, REPORT FOR FISCAL YEAR 2017 [hereinafter O.I.A. 2017 REPORT].

1. Exclude senior prison officials from the investigative process until a charge has been sustained.
2. The Office of General Counsel should be the deciding entity for any disciplinary action, to include a substantive review of the warden or regional director's recommendation.
3. Inform complainants of the status and outcome of investigations.

II. BACKGROUND

Inmates, employees, and the public may file a complaint at the BOP facility where an incident occurred; through BOP's Office of Internal Affairs; or with the Department of Justice Office of Inspector General (OIG). In accordance with the agency's own Standards of Employee Conduct,² BOP employees must report any violation of those Standards, or any rule or law within one business day of the incident to their Chief Executive Officer (CEO), OIA, or the OIG. Decisions regarding disciplinary action in cases where the allegations are sustained are managed by BOP's Human Resources Management (HRM) and BOP's Office of General Counsel.

A. BOP's Investigative process

The Office of Internal Affairs is BOP's internal unit responsible for receiving and documenting complaints and overseeing investigations into allegations of misconduct. BOP staff are obligated to report misconduct, but OIA also receives complaints from inmates, associates, union officials, other agencies, contractors, and the Office of Special Counsel.³

Upon receiving a complaint, OIA reviews the allegation and classifies the case into one of three categories:

- Class 1 cases involve possible criminal allegations, such as sexual assault, abuse, fiscal impropriety, etc.⁴
- Class 2 cases are those that are serious but do not rise to the criminal level.
- Class 3 cases are those that constitute administrative misconduct – those that would not have a large impact on institutional operations.⁵ Allegations against high level employees (GS-13, -14, -15, and SES) cannot be Class 3.⁶

Finally, if an allegation is submitted that would not rise to the level of misconduct even if completely true, it is classified as a Complaint.⁷ Approximately 75 percent of the allegations

² U.S. DEPT. OF JUSTICE, FED. BUREAU OF PRISONS, Program Statement 3420.11: Standards of Employee Conduct, Dec. 6, 2013, [hereinafter STANDARDS OF EMPLOYEE CONDUCT].

³ Briefing by Beth Reese, Chief, Office of Internal Affairs, Bureau of Prisons, to staff, H. Comm. on Oversight & Gov't Reform (Aug. 13, 2018) [hereinafter O.I.A. Briefing 1].

⁴ O.I.A. Briefing, *supra* note 3.

⁵ O.I.A. Briefing, *supra* note 1.

⁶ O.I.A. Briefing, *supra* note 3.

⁷ O.I.A. Briefing, *supra* note 3.

OIA receives fall into the Complaint category.⁸ According to Department of Justice Policy, every categorized allegation is sent to the OIG, which determines whether to investigate the allegation or send it back to OIA to investigate.⁹

If OIG returns a case, OIA reviews the information to decide whether the investigation should be handled by the OIA investigators at headquarters or by field investigators located at every facility. The local investigator is an employee within the institution and receives guidance and training from OIA.¹⁰ If the allegation is especially serious or if the situation could involve bias within the institution, OIA investigates from the central headquarters location.¹¹

The investigator is responsible for generating evidence and conducting interviews with, and taking affidavits from, witnesses. If the investigation is handled by the local investigator, the headquarters component remains in regular contact until the investigation is complete.¹² Upon completion, the investigator—local or OIA—determines whether the allegation ought to be sustained or not sustained. An allegation is sustained if a preponderance of the evidence indicates the subject violated policy.¹³ The local investigator must complete the investigation and provide the packet to OIA within 120 calendar days of receipt of investigation authorization.¹⁴ A supervisor at OIA has 10 business days to review and finalize the report.¹⁵ OIA prepares a cover letter, which is sent to the Warden of the facility along with the investigation report. The Warden then sends the packet to Human Resources to determine disciplinary action.

B. BOP Disciplinary Action

If an allegation has been sustained, the investigation packet is sent to the subject's Warden (If the subject is the Warden, the packet is sent to the Regional Director).¹⁶ The Warden then sends the packet to the facility's Human Resources Manager (HRM). The HRM is responsible for drafting a proposal letter with recommended disciplinary action.¹⁷ BOP policy provides guidelines for the proper action to be taken for a particular offense.¹⁸ However, BOP's disciplinary standard is corrective, so decision makers are to consider any mitigating factors, such as the time since the incident, the attitude of the subject, the severity of the incident, etc.¹⁹

The proposal letter is then sent to the Regional Human Resources Administrator (HRA), who examines it for accuracy and to ensure that penalties proposed are consistent throughout the region based on the subject's infraction and level of seniority.²⁰ The proposal letter is returned to

⁸ O.I.A. Briefing, *supra* note 3.

⁹ O.I.A. Briefing, *supra* note 3.

¹⁰ O.I.A. Briefing, *supra* note 3.

¹¹ O.I.A. Briefing, *supra* note 3.

¹² O.I.A. Briefing, *supra* note 3.

¹³ O.I.A. Briefing, *supra* note 3.

¹⁴ O.I.A. 2017 REPORT, *supra* note **Error! Bookmark not defined.** at 6.

¹⁵ O.I.A. 2017 REPORT, *supra* note **Error! Bookmark not defined.** at 6.

¹⁶ Briefing by Chung-Hi Yoder, Assistant General Counsel, Bureau of Prisons, to staff, H. Comm. on Oversight & Gov't Reform (Sept. 13, 2018) [hereinafter General Counsel Briefing].

¹⁷ General Counsel Briefing, *supra* note 16.

¹⁸ See U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, 3420.11 STANDARDS OF EMPLOYEE CONDUCT (Dec. 6, 2013) [hereinafter STANDARDS OF EMPLOYEE CONDUCT].

¹⁹ General Counsel Briefing, *supra* note 16.

²⁰ General Counsel Briefing, *supra* note 16.

the HRM, who then sends it to the Office of General Counsel.²¹ OGC's review ensures equitable penalties (warranted and in line with past decisions), correct charges, and that the charges conform with law and policy.²² OGC then returns the proposal to HRM.

The HRM sends the letter to the facility's proposing official. Department Heads are the proposing officials for subordinate staff, Associate Wardens (A/W) for Department Heads, and the Chief Executive Officer (Warden) for Associate Wardens.²³ The proposal is then sent to the deciding official. The Chief Executive Officer is the deciding official for all cases proposed by a subordinate.²⁴ The deciding official hears oral testimony from the subject of the allegation before drafting a decision letter on the chosen disciplinary action.²⁵ That decision letter then receives that same review process as the proposal letter—HRM to HRA to HRM to OGC.²⁶ Once the discipline has been administered, HRM informs OIA, and the case is closed.²⁷

III. CASE STUDIES

The multi-step disciplinary process handled across several offices is superficially independent. Upon closer examination and based on testimony from BOP employees, facility management can interfere in the investigative and disciplinary stages.

From the time the local investigator receives the packet, management can know details about allegations, including the name of an accuser and the subject of an investigation. Management can influence the investigation and the action taken. Further, knowing the identity of the accuser significantly increases the likelihood of retaliation. Documents and testimony show whistleblowers experienced retaliatory discrimination from those in authority within a week of filing with OIA. To ensure the independence of the investigation, prevent bias in discipline, and protect whistleblowers, facility employees should be removed from the process.

The Committee received multiple complaints from BOP employees asserting management officials engaged in misconduct and received extremely lenient consequences. Documents and testimony show several officials who were the subject of allegations received promotions and awards not long after the misconduct in question occurred. In one case, an official was recognized for a bonus in the same year the misconduct was substantiated.²⁸ In multiple cases, misconduct was reported, investigated and sustained, but the subjects of the investigation (who were in management positions) were permitted to retire rather than face discipline. On the other hand, rank-and-file employees tended to receive harsh consequences for somewhat minor infractions. This double standard harms agency morale and diminishes the credibility of agency management.

²¹ General Counsel Briefing, *supra* note 16.

²² General Counsel Briefing, *supra* note 16.

²³ U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, P3000.03 HUMAN RESOURCE MANAGEMENT MANUAL, §750.1.1.a (Dec. 19, 2007) [hereinafter P3000.03 MANUAL].

²⁴ P3000.03 MANUAL, *supra* note 23 at §750.1.3.a.

²⁵ General Counsel Briefing, *supra* note 16.

²⁶ General Counsel Briefing, *supra* note 16.

²⁷ O.I.A. Briefing, *supra* note 3.

²⁸ Briefing by Beth Reese, Chief, Office of Internal Affairs, Bureau of Prisons, to staff, H. Comm. on Oversight & Gov't Reform (October 18, 2018) [hereinafter O.I.A. Briefing 2]

In 2017, BOP settled a sexual harassment lawsuit brought by female officers at a southern BOP facility claiming the agency (through its officers) had allowed inmates to sexually harass them without consequence.²⁹ The 524 women were awarded \$20 million in taxpayer funds.³⁰ Several whistleblowers referenced two BOP employees who were contributing actors to the harassment during their time at the facility—for the purposes of this memorandum, they are referred to as Employee A and Employee B.

A. Employee A

After leaving that facility, Employee A was promoted from Captain to Associate Warden to Warden, transferring to several facilities before settling as Warden in a northern facility. A psychologist at the facility stated in a sworn statement that when she began at the facility in October 2016, Employee A (by this time a Warden) immediately made her uncomfortable. The psychologist testified, “he would flex his muscles and call lots of unnecessary meetings with me . . . he creeped me out but was sexually harassing me. He would ask me what kind of things I like to drink and made comments about wanting to protect me from inmates. It was just very creepy.”³¹

The psychologist reported her discomfort to her supervisor and the Associate Wardens at the facility, mainly to ask advice on how to handle the situation properly.³² In 2017, the Warden’s attention increased. The psychologist testified, “the Warden would continue to ask me for more meetings and sort of commented on my hair and how he liked it and it just kind of increased in terms of frequency.”³³

The persistent harassment finally prompted the psychologist to speak to her Captain, who reported the harassment via a memo to the Regional Director, in February 2017.³⁴

The reporting Captain was removed from the Administrative Duty Officer roster on March 14, 2017, and his duties as Captain were removed June 8, 2017.³⁵ Concerned about his job, the Captain sent the Regional Director a letter informing her of the Warden’s action.³⁶ On June 12, 2017, the Regional Director flew the Captain to her office, and according to the Captain, berated him and defended the Warden over the course of a two hour meeting. According to the Captain, the Regional Director stated:³⁷

²⁹ Order on Motion for Preliminary Approval of Settlement, *White, et al. v. Lynch*, EEOC Case No. 510-2012-00077X (Jan. 17, 2017), available at https://colemansh-production.s3.amazonaws.com/complaints/bda6aa044eef2f4e0b49ace12e3a2ddc/2017_1_17_white_et_al_order_on_prelim_settlement_approval.pdf.

³⁰ Order on Motion for Preliminary Approval of Settlement, *White, et al. v. Lynch*, *supra* note 29.

³¹ Affidavit of Chelsea Brieman, Clinical Psychologist, *Perkins v. U.S. Dep’t of Justice, Fed. Bureau of Prisons*, Agency Case No. BOP-2018-0041 5 (Mar. 5, 2018) (on file with the Committee) [hereinafter Brieman Affidavit].

³² Brieman Affidavit, *supra* note 31 at 5.

³³ Brieman Affidavit, *supra* note 31 at 5.

³⁴ Case Summary, *supra* note 35 at 6.

³⁵ Case Summary, *Perkins v. U.S. Dep’t of Justice, Fed. Bureau of Prisons*, Agency Case No. BOP-2018-0041 3 (Mar. 5, 2018) (on file with the Committee).

³⁶ Case Summary, *supra* note 35 at 7.

³⁷ Case Summary, *supra* note 35 at 7.

*Do not bullshit me! I know everything, I see everything! . . . [I am] aware that [A] has allegations of sexual harassment at all of the other institutions that he has been to, and he is still sitting in the Warden's chair! People need to realize that and get over it!*³⁸

The Regional Director suggested the Captain apologize to the Warden if he wanted his position back.³⁹ The Captain followed her advice and was returned to his duty as captain.⁴⁰ However, he continued to experience retaliation. In August 2017, the Captain was accused of violating policy, once again stripped of his duties as captain, and referred to OIA.⁴¹ After the investigation, the OIA agent informed the Captain the investigation was complete, and the case was not sustained.⁴² However, the Associate Warden told the Captain the investigation was in “standby mode,” so he was not returned to his position as Captain.⁴³ He filed a complaint in November 2017 detailing the bullying, intimidation, harassment, and threats he endured from the Warden, an Associate Warden, and the Regional Director.⁴⁴ He transferred to another facility in January 2018 and is now a Lieutenant, a demotion.⁴⁵

B. Employee B

Employee B was an Associate Warden at the same southern facility. He was promoted to Warden and transferred in 2013.⁴⁶ An arbitration decision documents that one of the Warden's Lieutenants sexually harassed an officer over the course of several years. The Arbitrator indicated that it seemed Employee B protected the Lieutenant.

Employee B testified the Lieutenant received a 3-day suspension in November 2013 for harassing the officer.⁴⁷ However, when the officer sent a memo to Employee B complaining about the harassment in February 2014, she received an order to cease and desist and to refrain from disruptive behavior.⁴⁸ On February 11, 2014, the officer complained she was forced to work near the Lieutenant, and Employee B again told her to refrain from disruptive behavior and to try not to make contact with the Lieutenant.⁴⁹ On May 19, 2014, the officer informed the Employee B she was afraid of harassment and retaliation from the Lieutenant, requesting the Warden move him to another shift.⁵⁰ At the time of the arbitration over a year later, that request had not been honored.⁵¹ The arbitrator commented that the information in this case “leads this Arbitrator to believe in a grand cover-up.”⁵²

³⁸ Case Summary, *supra* note 35 at 34.

³⁹ Case Summary, *supra* note 35 at 7.

⁴⁰ Case Summary, *supra* note 35 at 7.

⁴¹ Case Summary, *supra* note 35 at 8.

⁴² Case Summary, *supra* note 35 at 8.

⁴³ Case Summary, *supra* note 35 at 8.

⁴⁴ Case Summary, *supra* note 35.

⁴⁵ Case Summary, *supra* note 35 at 8.

⁴⁶ *Am. Fed'n of Gov't Emp. v. Dep't of Justice* FMCS No. 13-57265-3 12 (May 27, 2015) (Paci, Arb.) [hereinafter *AFGE v. Dep't of Justice*] (on file with the Committee).

⁴⁷ *AFGE v. Dep't of Justice*, *supra* note **Error! Bookmark not defined.** at 24.

⁴⁸ *AFGE v. Dep't of Justice*, *supra* note **Error! Bookmark not defined.** at 7.

⁴⁹ *AFGE v. Dep't of Justice*, *supra* note **Error! Bookmark not defined.** at 7.

⁵⁰ *AFGE v. Dep't of Justice*, *supra* note **Error! Bookmark not defined.** at 8.

⁵¹ *AFGE v. Dep't of Justice*, *supra* note **Error! Bookmark not defined.** at 8.

⁵² *AFGE v. Dep't of Justice*, *supra* note **Error! Bookmark not defined.** at 24.

This finding may have been based on the fact that the Lieutenant was the facility's local investigator.⁵³ Employee B had not been a party to the arbitration and thus faced no consequences.

IV. IMPACT ASSESSMENT

BOP misconduct case files show more than twelve complaints against five Wardens which were opened and closed within a single day. The types of complaints included assault on an inmate, falsifying records, hostile work environment, embezzlement, harassment and retaliation. None of the complainants in those cases received notification of the disposition of their complaints.

Testimony shows rank-and-file employees, whether they are aware of the misconduct or not, distrust management when they perceive disparate treatment between the favored and the unfavored. The lack of independence and accountability breeds distrust and puts BOP employees at risk. Inmates can easily recognize a rift between employees and attempt to exploit it for their own benefit or entertainment. If they know that an employee will get little support from management if harassed, that employee becomes a target. This disparate treatment and targeting then decreases an employee's desire to work at BOP.

Further, if facilities create different disciplinary and hierarchical systems based on the people in upper management rather than the policies and procedures of the BOP, each facility becomes its own island within BOP. Consequently, employees who transfer to a new facility must acclimate to an entirely different culture from the previous location. This creates unnecessary confusion for law enforcement officers, even though the agency created standardized policies to prevent such confusion.

Federal law enforcement officers are the lifeblood of our national criminal justice system. Denying them an equitable, independent disciplinary system and exposing them to risks inherent in the inevitable disparities created by siloed BOP facilities does them a great disservice. Security incidents increase, staff morale declines, and BOP hemorrhages otherwise dedicated and trained employees.

V. RECOMMENDATIONS

Based on the observations outlined above, staff make the following recommendations:

- 1. Ensure the independence of investigations into misconduct, keeping prison hierarchy out of the process until a charge has been sustained.**

Although OIA may attempt to ensure that investigators within a facility do not have bias in an investigation, regular interactions make bias almost inevitable. Whistleblowers have

⁵³ Email to majority staff, H. Comm. on Oversight & Gov't Reform (Mar. 12, 2018, 11:07 AM) (on file with the Committee).

repeatedly expressed concern to the Committee that the person investigating them is likely to be biased due to other allegations or the investigator's friendship with other officers.

This lack of oversight and control by a central independent office can also cause a culture of fear of retaliation. According to Officers who provided information to the Committee, when a Warden learns of a misconduct report, employees are fearful of being isolated or retaliated against.

The local investigator is typically a lieutenant chosen by the warden, subordinate to captains, associate wardens, and the warden. At a minimum, it is questionable whether this appointment is inherently at risk of bias; at worst, it may influence the volume and nature of investigations conducted at the facility. OIA simply takes the word of the investigator or warden to determine whether bias might affect the investigation process.

The lieutenant's position within the facility and within the chain of command undermines the notion of an insulated investigation. The lieutenant has three levels of supervisors with the power to threaten his employment if the findings do not reflect their wishes. If the captain, associate warden, or warden requests details of the allegations or the investigator's findings, it is difficult to refuse. Consequently, very early in the investigation process, officials within the facility can learn of a complaint against a subordinate or against management, opening the door for retaliatory actions against a complainant.

To maintain the integrity of an investigation, the investigator must be completely independent of the facility. The investigator's employment should not be dependent on anyone connected to the subject of his investigation. The practice of using an internal investigator, chosen by the warden of a facility, risks tainting the record and revealing the identity of a whistleblower.

2. The Office of General Counsel should be the ultimate deciding entity for disciplinary actions, doing more than a technical review of the warden or regional director's decision.

For BOP facilities, department heads are proposing officials for disciplinary action and wardens are deciding officials. The Committee obtained documents and testimony that show multiple examples of abuse of this step. Though BOP's Standards of Employee Conduct provides a Standard Schedule of Disciplinary Offenses and Penalties, "[t]he range of penalties provided for most offenses is intentionally broad," allowing management the opportunity to impose weaker disciplinary measures should they so choose.⁵⁴ The Office of General Counsel only conducts a technical review of the decision letter, deferring to the judgement of the deciding official on mitigating factors.⁵⁵ These measures of protection have given management at many BOP facilities a disturbing level of impunity.

The Regional Director for Employee A told the Captain she had been aware of allegations against Employee A at all the facilities where he worked. Similarly, the Lieutenant

⁵⁴ STANDARDS OF EMPLOYEE CONDUCT, *supra* note 2

⁵⁵ General Counsel Briefing, *supra* note 16.

under Employee B remains with BOP, and whistleblowers believe he is protected by management despite complaints. The Office of General Counsel would be a more neutral decision maker in these matters.

3. Inform complainants of the outcome of an investigation.

A common complaint from whistleblowers is that nothing is being done about their allegations. Both OIA and the OGC informed the Committee that only the subject of an inquiry and the warden are informed of the outcome of an investigation. In the interest of transparency, the Committee recommends OIA inform the complainant whether the complaint was sustained, along with general reasoning for the decision. Additionally, if a complaint is sustained, the OGC or HRM should inform the complainant, at a minimum, of the disposition, and better yet, the disciplinary action and the reasoning behind the decision.

VI. CONCLUSION

BOP's disciplinary process has the subject of concerns for years. In 2004, Department of Justice's OIG completed a review, and they found similar deficiencies.⁵⁶ The report found discipline was not equitably imposed,⁵⁷ wardens had too much influence in the process,⁵⁸ and BOP was not properly monitoring the reasonableness and consistency of disciplinary decisions.⁵⁹ OIG's Report found 20 of the 92 subjects with sustained allegation received little to no discipline (oral reprimand or no action) despite egregious misconduct, including falsification of government documents, unprofessional conduct of a sexual nature, and endangering the safety of others.⁶⁰ Although small differences between the process in 2004 and the present show BOP made some improvements, the culture apparently remains. Wardens continue to enjoy too much influence over the disciplinary process; the investigation or disciplinary phase can be thwarted entirely; and discipline remains inconsistent.

Like the Inspector General's findings from nearly 15 years prior, the recommendations contained herein are intended to safeguard an independent investigatory and disciplinary process and to ensure equitable consequences for all BOP employees. Ideally, there would be no misconduct or unprofessional behavior in our federal prison system; however, should there be incidents that require the attention of the agency's internal affairs, whistleblowers should not be afraid to speak up, and employees must be able to trust that the process is followed and the outcome fair.

⁵⁶ U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, REVIEW OF THE FEDERAL BUREAU OF PRISONS' DISCIPLINARY SYSTEM, No. I-2004-008 (2004) [hereinafter 2004 O.I.G. Review].

⁵⁷ O.I.G. Review, *supra* note **Error! Bookmark not defined.** at 18 & 28.

⁵⁸ O.I.G. Review, *supra* note **Error! Bookmark not defined.** at 25.

⁵⁹ O.I.G. Review, *supra* note **Error! Bookmark not defined.** at 28.

⁶⁰ O.I.G. Review, *supra* note **Error! Bookmark not defined.** at 20.