

**FEDERAL BUREAU OF INVESTIGATION**

**Precedence:** ROUTINE

**Date:** 10/22/2004

**To:** All Divisions

**Attn:** EADs

ADs

FBIHQ, Manuals Desk

All Field Offices

ADICs

All Legats

SACs

**From:** Director's Office

OPR

**Approved By:**

b6  
b7c

**Drafted By:**

**Case ID #:** 66-HQ-A1455078 (Pending)

66F-HQ-C1384970 (Pending)

**Title:** POLICY CHANGES RELATED TO  
THE DISCIPLINARY PROCESS

**Synopsis:** This communication provides all Divisions, Field Offices, and Legats with information about changes made to the disciplinary process as a result of recommendations received by the Director from the Bell/Colwell Commission (hereinafter "Commission").

**Details:** In an effort to improve the FBI's disciplinary process, on 05/23/2003, the Director commissioned a study of the Office of Professional Responsibility (OPR). The Commission was tasked with reviewing OPR policies and procedures, and presenting the Director with recommendations for improvement. In the final report delivered to the Director on 02/27/2004, the Commission set forth numerous recommendations to improve the disciplinary process. Certain structural changes were adopted and implemented immediately (e.g., the transfer of the intake processing and internal investigations units to the Inspection Division). Other recommendations required additional study and development before they could be implemented. This EC discusses the procedural changes that are being made to the disciplinary process as a

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**COMMISSION RECOMMENDATION**

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Policy Change: Non-employee interviews will continue to be recorded through the use of an FD-302 unless the nonemployee requests or is willing to provide an SSS and the investigation will otherwise benefit from the use of an SSS. The new "FBI Manual on Employee Discipline" will include this change in policy.

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Current Policy/Practice/Procedure: The current process allows for individuals to review their statements prior to signing and to make corrections, changes, and additions. See "Guidelines to Conducting OPR Investigations," pg. 9, (revised 09/10/2002), and MIOG, Part I, Section 263-4 (4). All drafts of a subject's statement are maintained in the 1A section of the file. In addition, individuals are verbally advised prior to being interviewed that, should they recall additional information or locate additional documentation, they can submit it at a later date. This is also outlined in the current "Guidelines to Conducting OPR Investigations," p. 10 (revised 09/10/2002).

Policy Change: None. A change in policy is not required because this is the current practice. Nevertheless, amendments have been made to: (1) the standard SSS pony to clarify that the witness has been given the opportunity to review his/her statement and make any changes prior to signing; and (2) the "Notification" form to state the subject may, at any time, provide documentation, information, names of witnesses, statements of admission, or explanation, to aid in the resolution of the inquiry. In addition, the new "FBI Manual on Employee Discipline" will include a discussion of this policy.

**COMMISSION RECOMMENDATION:**

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Current Policy/Practice/Procedure: SSSs are used for all FBI employees. FD-302s are used for non-FBI complainants and witnesses. Tape-recorded statements have not been taken in the past due to the backlog that would result if cases had to be held in abeyance pending the transcription of tape recordings.

Policy change: None. Tape-recorded statements will not be taken for policy considerations, including but not limited to concerns about the chilling effect on interviewees, potential inconsistencies between tape recordings and signed sworn statements, erosion of the Bureau's policy against tape recording statements of criminal defendants, and administrative burdens associated with transcription, chain of custody and storage/retention.

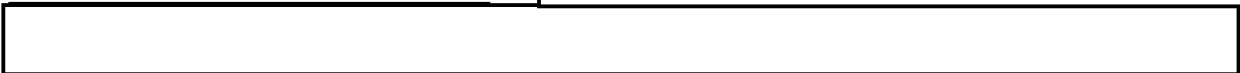


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Current Policy/Practice/Procedure: Employees are provided a "Notification" form at the outset of the internal investigation advising them of the allegations. This form provides, "[The employee] has the opportunity, prior to being interviewed, to voluntarily provide documentation, information, or explanation, that may assist in the resolution of this inquiry."

Policy Change: The "Notification" form has been revised to emphasize that employees may make a statement of admission at any time during the course of the investigation.

**COMMISSION RECOMMENDATION:**



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Current Policy/Practice/Procedure: INSD/IIS investigators include all documentation gathered or produced during the investigative phase of the internal investigation process in the completed file, which is then forwarded to OPR. This includes all incriminating and exculpatory evidence obtained during the course of the investigation.

Policy Change: None. A change in policy is not required because this is the current practice. Investigators are

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required to include all exculpatory information in the investigative file forwarded to OPR. The new "FBI Manual on Employee Discipline" will include a discussion of this policy.

COMMISSION RECOMMENDATION:

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Current Policy/Practice/Procedure: Currently, individuals are given the opportunity "prior to being interviewed, to voluntarily provide documentation, information, or explanation, that may assist in the resolution of this inquiry." See "Notification" form, instruction #4; "Guidelines to Conducting OPR Investigations," p. 1, (revised 09/10/2002); MIOG, Part I, Section 263-4 (4).

Policy Change: The "Notification" form has been revised to emphasize that employees may, at any time, voluntarily provide documentation, information, names of witnesses,

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statements of admission, or explanation, that may assist in the resolution of the inquiry.

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Current Policy/Practice/Procedure: Currently, absent special circumstances, employees are notified that they are the subject of an internal inquiry within 30 days of the opening of the investigation. The "Notification" form advises the employee of the specifics of the allegations against him/her. However, there are times when an employee can not be notified within 30 days (e.g., overseas deployment, hospitalization, extended leave, TDY posting), or when an employee will not be notified that he/she is under internal investigation (e.g., where the misconduct is criminal in nature or there are concerns that the subject may alter documents or collude with witnesses). All nonnotification internal inquiries must be approved by the Assistant Director of INSD.

Policy Change: None. A change in policy is not required because this is the current practice. Nevertheless, the new "FBI Manual on Employee Discipline" will include a section discussing the current policy set forth above.

COMMISSION RECOMMENDATION:

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Current Policy/Practice/Procedure: Employees are currently advised whether a matter is being handled by INSD/IIS and when the investigation has been completed and forwarded to OPR. INSD/IIS does not advise the subject when the complainant has been interviewed to avoid creating a chilling effect on employees in providing information to IIS. For that same reason (and other reasons), the subject is also not provided with the names of any employees or witnesses who are interviewed in furtherance of the investigation.

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Policy Changes: None. The new "FBI Manual on Employee Discipline" will state that employees will be notified of the date on which a matter has been: (1) assigned to INSD/IIS; and (2) completed and forwarded to OPR for adjudication.

COMMISSION RECOMMENDATION:

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Current Policy/Practice/Procedure: INSD/IIS currently provides an investigative EC delegating the investigation directly to the Division Head. In turn, the Division Head, usually acting through a DAD or Administrative ASAC, assigns the investigation to a Supervisory Special Agent (SSA). When the SSA has completed the investigation, he or she forwards the completed product to either the DAD, Administrative ASAC, or the Division Head for their review and application of the Douglas Factors. Once the Douglas Factors have been applied, the investigative package is forwarded to INSD/IIS. In those instances where the Division Head cannot oversee an internal investigation (e.g., conflict of interest, perception of favoritism), INSD/IIS handles the investigation. The completed package is then forwarded to OPR for adjudication. This policy is outlined in the "Guidelines to Conducting OPR Investigations," p. 3 (revised 09/10/2002).

Policy Change: None. The new "FBI Manual on Employee Discipline" will include a discussion of the recusal policy.

COMMISSION RECOMMENDATION:

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Current Policy/Practice/Procedure: Currently, if a SAC requests outside investigators (e.g., due to the nature of the allegations, the perception of lack of independence, the appearance of impropriety, or the fact that the subject has been involved in numerous office conflicts), INSD/IIS will conduct the investigation or have AIIPs conduct the investigation. See MIOG, Part I, Section 263-4 (3) and "Recusal Policy in Disciplinary Matter" posted on OPR's website.

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Policy Change: None. The new "FBI Manual on Employee Discipline" will include a discussion of the recusal policy, instructing Division Heads and field offices to recuse themselves from internal investigations where the circumstances mandate it, including the above-mentioned factors (the nature of the allegations, the perception of lack of independence, the appearance of impropriety, or the fact that the subject has been involved in numerous office conflicts).

COMMISSION RECOMMENDATION:

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Current Policy/Practice/Procedure: INSD/IIS currently documents all investigative actions in the main file, to include contact with the field, witnesses, and the subject of the internal investigation. All e-mail communications concerning the investigation are copied and serialized into the main file. Each month, a report is created for cases more than 180 days old, documenting the investigative activity within the past 30 days, which is also serialized into the case file.

Policy Changes: None. A change in policy is not required because this is the current practice. All INSD/IIS and OPR employees have received training and instruction on the policy of memorializing all substantive communications concerning the investigation into the main case file. In addition, the new "FBI Manual on Employee Discipline" will include a statement that all substantive communications (including telephonic and other oral communications) relating to an OPR matter must be documented, serialized and maintained as part of the 263 case file.

COMMISSION RECOMMENDATION:

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Current Policy/Practice/Procedure: Currently, the subject, witnesses, and complainant are given the necessary information to allow them to adequately address the allegations. The nature of the misconduct often controls the extent of the information that can be provided to subjects and/or witnesses. INSD/IIS and OPR are bound by



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the Privacy Act and must respond accordingly when subjects and/or witnesses request information about the investigation. In addition, subjects and witnesses are advised that they must receive approval from INSD/IIS prior to sharing information concerning an ongoing internal investigation. As outlined in the current "Guidelines to Conducting OPR Investigations," p. 11 (revised 09/10/2002), employees are advised that they are restricted from discussing an ongoing investigation and statements they have made or will make to OPR because of the possible effect such discussions may have on potential witnesses and/or the subject.

Policy Change: None. A change in policy is not required because this is the current practice. Nevertheless, the new "FBI Manual on Employee Discipline" will include a section discussing this policy.

**COMMISSION RECOMMENDATION:**

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Current Policy/Practice/Procedure: Currently, if an investigator develops information regarding additional issues of misconduct, he/she must seek guidance from INSD/IIS concerning how to proceed. Any determination involving expansion or re-notification is made by the Section Chief or Unit Chiefs of the IIS. If the additional information is similar to or a minor expansion of the original allegations, a new "Notification" form will not typically be required. However, if the additional information pertains to a new violation, then the subject will be re-noticed. It is incumbent upon an IIS investigator, AIIP, or field investigator to report additional information regarding misconduct to the Section Chief or Unit Chiefs, IIS.

Policy Changes: None. A change in policy is not required because this is the current practice. Nevertheless, the new "FBI Manual on Employee Discipline" will address an investigator's responsibility to seek a determination from the Section Chief or Unit Chief of IIS as to whether the

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scope of the investigation should be expanded and whether a new "Notification" form is needed.

**COMMISSION RECOMMENDATION:**

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Current Policy/Practice/Procedure: These acts are currently addressed as misconduct, although they are not identified by specific offense codes.

Policy Change: The new Offense Table and Penalty Guidelines address these offenses. For example, Section 5.16 ("Retaliation") provides that an employee can be suspended or dismissed for engaging (or threatening to engage) in conduct, directly or indirectly, to "get even" with another person for taking action that adversely affected the employee or that the employee perceived as having an adverse effect. Section 2.5 ("Lack of Candor") states that an employee will be suspended or dismissed for "[k]nowingly providing false information when making a verbal or written statement, not under oath, to a supervisor, another Bureau employee in an authoritative position, or another government agency, when the employee is questioned about his conduct or the conduct of another person." In addition, under Section 2.11 ("OPR Matter - Obstruction"), an employee can be suspended or dismissed for "[t]aking any action to influence, intimidate, impede or otherwise obstruct the OPR process."

**COMMISSION RECOMMENDATION:**

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Current Policy/Practice/Procedure: Currently, internal investigations are discontinued and closed when subjects retire or resign during the pendency of the investigation. Upon closing the internal inquiry, the FBI may open a substantive criminal investigation where the allegation involves alleged criminal conduct within the investigative jurisdiction of the FBI.

Policy Change: Notwithstanding the resignation or retirement of an employee, an OPR matter will be completed

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where necessary to protect the institutional interests of the FBI, or to complete an investigation of alleged criminal conduct.

**COMMISSION RECOMMENDATION:**

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Current Policy/Practice/Procedure: There is currently no policy addressing this particular matter.

Policy change: Hereafter, Security Division will advise employees who retire or resign while under administrative inquiry that they will be barred from re-employment with the FBI, or from working as an FBI consultant or contractor,

unless the OPR process has been completed and they have been cleared of serious wrongdoing.

**COMMISSION RECOMMENDATION:**

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Current Policy/Practice/Procedure: Currently, employees appealing adverse actions (i.e., suspensions of more than 14 days, demotions or dismissals) may review the documents relied upon by OPR prior to submitting a response.

Policy change: Hereafter, in all cases where a suspension has been issued by OPR, after the employee files an appeal with the Appellate Unit, he/she will have the right to review the documents relied upon by OPR. The procedural protections discussed above that apply to demotions and dismissals will remain the same.

**COMMISSION RECOMMENDATION:**

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Current Policy/Practice/Procedure: OPR's current practice is to routinely cite the "bright line" policy in cases involving lying, cheating, or stealing.

Policy Change: The new Offense Table and Penalty Guidelines do not allude to the "bright line" policy, but nevertheless address the types of behavior that will not be tolerated by the FBI, such as dishonesty, lying, cheating, and stealing.

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**COMMISSION RECOMMENDATION:**

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Current Policy/Practice/Procedure: OPR provides employees cleared of wrongdoing in multiple-subject inquiries with notification that they have been cleared as soon as possible and does not delay notification solely because the adjudication process for all other subjects in the same inquiry has not been finalized.

Policy Change: None. A change in policy is not required because this is the current practice. Nevertheless, a discussion of the current practice (discussed above) will be included in the new "FBI Manual on Employee Discipline."

**COMMISSION RECOMMENDATION:**

[Redacted]

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Current Policy/Practice/Procedure: Currently, the appellate official handling a particular case is supposed to document his/her findings and provide the employee with a written decision. See MAOP, Part I, Section 13-13(5) (d).

Policy change: The Appellate Unit in ASD will provide employees with an explanation of the appellate official's findings and decision.

**COMMISSION RECOMMENDATION:**

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Current Policy/Practice/Procedure: Pursuant to current policy, any suspension imposed by OPR is appealable to the Appellate Unit in ASD, and the suspension is held in abeyance pending the Appellate Unit's final decision. If termination is proposed by OPR, the employee is thereafter placed on indefinite suspension without pay. In the event the employee ultimately receives (after the exhaustion of appellate remedies) a sanction of less than termination, under current policy the employee is not entitled to restoration of lost salary or other employee benefits unless

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the AD of ASD decides otherwise (which decision is made on a case by case basis).

Policy Changes: A subject who receives an initial letter proposing termination that is later amended to something less than termination, will be returned to his/her previous position with full privileges, including restoration of any lost salary and routine grade advancements resulting from a non-duty and/or non-pay status. Annual and sick leave taken as a voluntary election cannot be restored. Restoration of any lost salary will be offset by income earned from secondary employment for the period the employee is in a non-duty and/or non-pay status, in accordance with Title 5, Code of Federal Regulations, Part 550.805(e)(1).

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Current Policy/Practice/Procedure: Currently, OPR provides only cases which result in disciplinary action to the Director and Career Boards for consideration in making promotion decisions. Also, when an employee receives a "no action" letter, the office is instructed to notify the employee that a copy of the letter will not be placed in his/her personnel file, and the office is further instructed not to place a copy of either the letter or the EC in the employee's personnel file.

Policy Change: None. A change in policy is not required because this is the current practice. The new "FBI Manual on Employee Discipline" will include a section discussing this policy.

**COMMISSION RECOMMENDATION:**

[REDACTED]

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Current Policy/Practice/Procedure: Allegations of misconduct are reported to the Initial Processing Unit (IPU), Internal Investigations Section, INSD. IPU reviews the allegations and assigns them to the appropriate Internal Investigations Unit (IIU).

Policy Change: OPR will not respond to intake questions and/or make intake determinations, but will forward any allegations of misconduct (verbal or written) to INSD. INSD, in turn, will no longer administratively close cases after they are opened, but will forward them to OPR for final adjudication. The new "FBI Manual on Employee Discipline" will include a discussion of this policy.

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**LEAD(s) :**

**Set Lead 1: (Info)**

ALL RECEIVING OFFICES Please disseminate  
to all personnel.

**Set Lead 2: (Action)**

OPR AND INSPECTION

AT WASHINGTON, DC

Draft "FBI Manual on Employee Discipline."

**Set Lead 3: (Action)**

ADMINISTRATIVE SERVICES

AT WASHINGTON, DC Take  
appropriate action.

**Set Lead 4: (Action)**

SECURITY

AT WASHINGTON, DC Take  
appropriate action.

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Current Policy/Practice/Procedure: Currently, all employee interviews are documented in the form of a signed, sworn statement (SSS), except in the case of Delegated Investigations/Adjudications (DIAs). In routine DIAs, the investigator has the option of documenting the employee's statement in an FD-302. Also, non-employees are interviewed with the results of the interview documented in an FD-302.

Policy Change: Hereinafter, the results of all FBI employee interviews will be documented in the form of an SSS. Each employee will be provided an opportunity to review his/her SSS and make necessary changes, corrections, or additions prior to signing. However, in situations where: (1) an employee refuses or is unable to execute an SSS; (2) the conduct in question is or may be criminal in nature; or (3) the SSS does not mirror the content of the preceding interview due to the witness' changes, an FD-302 may be used in place of or in addition to an SSS. This policy change will create consistency throughout the FBI in all OPR investigations and result in a fair process to all employees regardless of the allegations. The new "FBI Manual on Employee Discipline" will include this change in policy.

**COMMISSION RECOMMENDATION:**

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Current Policy/Practice/Procedure: Currently, non-employee interviews are reported using an FD-302. In most cases, non-employee interviews are conducted in person, but may be conducted telephonically if necessary. See "Guidelines to Conducting OPR Investigations," pg. 8 (revised 09/10/2002).