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POLITICS & POLICY

FBI Transferred, or Even Promoted, Problem Agents

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The FBI was so unhappy with the work of Special Agent Terry Lee Rudolph that it moved him in 1985 from his sensitive crime-lab job to a teaching post at the FBI Academy at Quantico, Va.

The explosives specialist says he looked upon the new assignment, in which he taught crime-lab work to state and federal agents, as a promotion. "That was a very sought-after position," he told Justice Department investigators last year. "You got away from headquarters — a great atmosphere to work in."

Mr. Rudolph added that he wasn't told the transfer was the result of poor performance, although Federal Bureau of Investigation lawyers now say that was the reason. And no written record was kept of the bureau's dissatisfaction with the quality of some of Mr. Rudolph's crime-lab analyses, which had been put to use in more than 650 criminal cases over 10 years.

Mr. Rudolph's quiet transfer reflects what FBI officials have described as a standard practice of dealing with agents who don't measure up: They are moved elsewhere in the bureau, unaccompanied by any written reprimand that might come back to haunt the FBI or prosecutors in court cases.

Critics say the practice may affect the integrity of court cases in which agents testify. "It's the kind of practice that obstructs the truth-seeking process," says defense lawyer Barry Scheck, famous for his examination of DNA evidence in the O.J. Simpson case. "Failing to expose incompetence will, ultimately, acquit the guilty and convict the innocent."

The FBI said yesterday that Director Louis Freeh has ordered that the performance-appraisal process be redesigned, and that the agency's policy is to document performance, good and bad.

Explosives Expert Criticized

In its highly critical report on the FBI crime lab last April, the Justice Department Inspector General's office, which complained about unqualified examiners and inaccurate court testimony, saved some of its toughest words for Mr. Rudolph. Among other things, the report said Mr. Rudolph "indiscriminately disregarded appropriate scientific methods and failed to document his work." Mr. Rudolph responds that the report was unfair and that his work "was very accurate."

The report didn't explore the broader issue of how the FBI responded to internal concerns about its agents. But the bureau's practice of transferring such employees without reprimands was detailed in at least six interviews that Justice Department investigators conducted with current and former FBI officials in preparing the crime-lab report. The interviews and other materials related to the investigation were obtained by The Wall Street Journal under the Freedom of Information Act.

According to one internal memo by

Wheels of Justice

Key events in the FBI Laboratory controversy:

- **1986:** Frederic Whitehurst, an FBI Supervisory Special Agent, joins the FBI Laboratory as a chemist and soon after complains about the Lab's work in explosives and bombing cases.
- **1994:** After Whitehurst calls for an investigation into the Lab by a special counsel, the FBI General Counsel begins its own investigation.
- **August and September 1995:** Whitehurst is called by the defense to testify in the World Trade Center and O.J. Simpson trials.
- **September 1995:** Justice Department announces that the Office of the Inspector General will investigate Whitehurst allegations about the FBI Laboratory.
- **April 1997:** Inspector General issues report criticizing some of the Lab's examiners and supervisors for scientifically flawed and inaccurate testimony and for insufficient documentation of test results.

Justice Department investigators, former FBI Deputy General Counsel Stephen Robinson "explained that the FBI does not document poor work performance but transfers poor performers to other duties." The investigators added that "the transfer may even be a promotion." Two of Mr. Rudolph's former bosses spoke of concerns that written evaluations might get into the hands of defense lawyers, who might use them to impeach FBI witnesses or overturn convictions.

Mr. Robinson says he's aware that disciplinary transfers have been made for agents other than Mr. Rudolph, although he says he isn't at liberty to name them.

Subject of Monday Hearing

How the FBI managed its problematic employees — along with other investigative findings that the Justice Department didn't include in its report — are expected to be discussed at a Monday hearing of the Senate judiciary subcommittee headed by Sen. Charles Grassley (R., Iowa).

At least four current and former FBI agents are expected to testify, including Frederic Whitehurst, the FBI agent whose allegations touched off the Inspector General's investigation, and Special Agent William Tobin, a crime-lab metallurgist who told Justice Department investigators that agents sometimes provided inaccurate pro-prosecution testimony.

Senators will also hear from Special Agent Edward Kelso, chief of the FBI's Evidence Response Team, who told department officials that he had warned FBI Director Louis Freeh long ago that some crime-lab agents "were playing golf instead of doing their jobs," and from former lab official James Corby, who spent two years before his 1995 retirement reviewing 200 of Mr. Rudolph's cases.

The subcommittee won't hear from the 55-year-old Mr. Rudolph, who retired from the FBI last year.

As the lab's senior explosives examiner

in 1983, Mr. Rudolph hosted the FBI's first international symposium on analysis and detection of explosives. Experts from all over the world received copies of his paper on the FBI's protocol for analyzing explosives. Among other things, the protocol established the requirement that the examiner use two different tests in combination to ensure accuracy.

San Francisco Case

It was a procedure, investigators said, that Mr. Rudolph didn't always follow. In a San Francisco criminal investigation in 1982, Mr. Rudolph conducted just one of the tests, according to the Inspector General's report, and concluded that powder removed from the tools of a suspected explosives smuggler was a substance commonly used in bombs.

The apparent shortcut was brought out in cross examination. The defendant ultimately was acquitted. (Mr. Rudolph defends the single test as sufficient and says he reached the correct conclusion, despite the verdict.)

In July 1989, after the trial was over, the federal prosecutor in charge of the case wrote FBI lab officials to complain that Mr. Rudolph's performance was "deficient" and was partly responsible for the loss. That letter triggered a month-long investigation into Mr. Rudolph's work. Although reviewers identified a number of problems in a handful of Mr. Rudolph's cases, including missing notes and charts and weak analytical procedures, his superiors let the investigation drop.

"There was no indication that any miscarriage of justice occurred; or that anyone was in jail that shouldn't be there," said Kenneth Nimmich, Mr. Rudolph's former boss, explaining his decision to Justice Department officials last year. Besides, Mr. Rudolph had already been transferred to Quantico as a result of earlier complaints about his work, according to Mr. Nimmich, who retired as head of

the FBI's forensic-science research and training center in 1996.

Were potentially damaging inaccuracies lurking in his testimony in past cases in which defendants may have been wrongly convicted? The FBI wouldn't find out, because it didn't order an in-depth review of all of Mr. Rudolph's cases.

Murder Conviction

If it had done such a review, it might have come upon the names Christopher Boots and Eric Proctor. The two Oregon men were convicted of murdering a convenience-store employee in the mid-1980s. Initially, local prosecutors hadn't brought charges because of insufficient evidence. But three years after the murder, in 1988, a local investigator brought in Mr. Rudolph, who confirmed that a flake found on Mr. Proctor's pants was gunpowder.

Based on this new evidence, charges were brought and the defendants were convicted. They would serve eight years in prison before someone else was identified as the killer by his accomplices. Released in November 1994, Messrs. Boots and Proctor have sued the state for \$42 million; suits of this nature against the FBI are barred under federal law. Mr. Rudolph still stands by his lab analysis.

The Inspector General's report said the crime lab should have "recognized Rudolph's incompetence in 1989 and initiated a complete file review and appropriate disciplinary measures."

Explosives experts who have examined the files in the Boots and Proctor case at the request of The Wall Street Journal say such a review would have raised several red flags. Aside from using the test deemed insufficient in the other case, the FBI normally doesn't examine evidence that was tested previously — in this case, by the local crime lab. The experts also raised questions about the way the evidence was handled.

The Inspector General's report also contained tough criticism of former explosives unit chief J. Thomas Thurman, who the report said had altered lab reports in ways that rendered them inaccurate and who hadn't adequately reviewed the erroneous work of an examiner in the Oklahoma City bomb case. The report recommended that Mr. Thurman be "reassigned to a component of the FBI outside the Laboratory." Soon after the report was issued, Mr. Thurman was transferred.

Mr. Thurman, who declines comment, is now the chief of the FBI's Bomb Data Center, a unit within the FBI Laboratory that trains state and federal agents to handle bomb scenes. The FBI says his job doesn't involve forensic analyses, writing lab reports or giving expert testimony.