

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



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I. INTRODUCTION

In November 2002, the Office of the Inspector General (OIG) released a report entitled, "A Review of Allegations of a Double Standard of Discipline at the FBI," which reviewed complaints from Federal Bureau of Investigation (FBI) employees alleging that the FBI's system of discipline was unfair because senior managers were treated more leniently than rank and file employees. One of the employees who made such allegations was John Roberts, a Unit Chief in the FBI Office of Professional Responsibility (OPR).

Our report concluded that there was insufficient evidence to conclusively establish that the FBI systemically favors senior managers in the disciplinary process. Our finding was based in part on the low number of cases involving senior managers and the difficulty in comparing individual cases. We concluded, however, that the FBI suffered from a strong, and not unreasonable, perception among employees that a double standard of discipline exists within the FBI. That perception was fostered by the discipline imposed in several highly publicized cases – particularly the Ruby Ridge case and the Potts retirement party case. In those cases, we found that high-level FBI officials received unduly lenient treatment. In addition, we found that the perception of a double standard was fostered, in large part, by the existence of a dual system of discipline that was not abolished until August 2000. We concluded that the changes made in August 2000 would help to address the perception of a double standard. In our report, we made eleven recommendations that we believed would further assist the FBI in moving towards a fairer and more consistent disciplinary system.

Just prior to the release of our report, on October 27, 2002, John Roberts appeared on the television program *60 Minutes* and made statements critical of the FBI's investigation and adjudication of employee misconduct, suggesting that there was a continuing double standard of discipline in the FBI. (A transcript of the *60 Minutes* broadcast is Attachment 1 to this report.) The following is a portion of the transcript of the *60 Minutes* interview of Roberts by Ed Bradley:

BRADLEY: Special Agent John Roberts, a chief of the FBI's Internal Affairs Department, agrees. And while he is not permitted to discuss the Sibel Edmonds case, for the last 10 years, he has been investigating misconduct by FBI employees and says he is outraged by how little is ever done about it.

ROBERTS: I don't know of another person in the FBI who has done the internal investigations that I have and has seen what I have and that knows what has occurred **and what has been glossed over and what has, frankly, just disappeared, just vaporized, and no one disciplined for it.** (Emphasis added).

BRADLEY: Despite a pledge from FBI Director Robert Mueller to overhaul the culture of the FBI in light of 9/11, and encourage bureau employees to come forward to report wrongdoing, Roberts says that in the rare instances when employees are disciplined, it's usually low-level employees like Sibel Edmonds who get punished and not their bosses.

ROBERTS: I think the double standard of discipline will continue no matter who comes in, no matter who tries to change. You - - you have a certain - - certain group that - - that will continue to protect itself. That's just how it is.

BRADLEY: No matter what happens?

ROBERTS: I would say no matter what happens.

BRADLEY: Have you found cases since 9/11 where people were involved in misconduct and were not, let alone reprimanded, but were even promoted?

ROBERTS: Oh, yes, absolutely.

BRADLEY: That's astonishing.

ROBERTS: Why?

BRADLEY: Because you - - you would think that after 9/11, that's a big slap on the face. 'Hello! This is a wake up call here.'

ROBERTS: Depends on who you are. If you're in the senior executive level, it may not hurt you. You will be promoted.

The FBI referred Roberts' allegations in the *60 Minutes* broadcast above to the OIG, and we agreed to investigate the matter.

II. OIG INVESTIGATION

At the outset of our investigation, we asked Roberts to identify the cases he was referring to in his *60 Minutes* interview. Roberts told us that his statement about cases being “glossed over and what has, frankly, just disappeared, just vaporized, and no one disciplined for it” referred to the Ruby Ridge investigation and the investigation of voucher fraud by senior executives related to a retirement party for former FBI Deputy Director Larry Potts. He stated that he was not referring to actual investigations or cases disappearing,

but was speaking of the adjudication phases of those cases. For example, Roberts said that in the Potts retirement party investigation supervisors committed voucher fraud, were investigated for voucher fraud, but then were found in the adjudication stage to have committed lesser offenses. We thoroughly reviewed the outcomes of both the Ruby Ridge and Potts retirement party cases in our November 2002 Double Standard Report, and in that report concluded that there were significant problems in the way the discipline in those cases was handled.¹

With respect to his allegation that the double standard of discipline persists, Roberts cited several cases to us. He alleged that some demonstrate a disparate treatment of Senior Executive Service (SES) and non-SES employees, and that others were inappropriately decided. He also cited several cases in which senior-level employees were promoted while under investigation or shortly after disciplinary action was taken. He asserted that lower-level employees are usually passed over for promotion under such circumstances and that the differing treatment is unfair.

We obtained and reviewed FBI documents relating to the cases that Roberts alleged were evidence of a continuing double standard and documents regarding other cases that were brought to our attention during the course of the investigation. We also interviewed FBI officials involved in the disciplinary system, including FBI Director Robert Mueller, FBI Deputy Director (DD) Bruce Gebhardt, and several members of FBI OPR, including former OPR Assistant Director (AD) Robert Jordan, an OPR Adjudication Unit Chief, an OPR Investigative Unit Chief, and OPR investigators.

This report describes the results of our investigation. After a brief discussion of the FBI disciplinary process, we evaluate the cases that were raised by Roberts and others as examples of inconsistent disciplinary action for SES employees and non-SES employees. We also review two cases that Roberts has alleged were decided inappropriately. In addition, we review the promotions cases raised by Roberts.²

¹ Roberts also asserted that the letter of censure issued to former FBI Assistant Director Van Harp as a result of the Potts retirement party case and the harsher disciplinary decisions in two subsequent matters involving agents who provided false information in FBI 302s reveals an ongoing double standard of discipline. We reviewed the Harp case in our November 2002 Double Standard Report and concluded that Harp did receive unduly lenient treatment. In this investigation, we reviewed the two subsequent cases Roberts offered for comparison and concluded that the discipline imposed in those cases was not inappropriate, either on the facts of those cases or when compared to similar cases in the OPR precedent database. We do not believe that the fact that the Harp case was improperly, and perhaps unfairly, decided should be used as an argument to mitigate the discipline in these two cases.

(continued)

III. THE FBI DISCIPLINARY PROCESS

In July 2001, the Attorney General expanded the jurisdiction of the OIG to allow it to investigate misconduct throughout the Department of Justice, including the FBI. As a result, the OIG reviews all allegations of misconduct in the FBI and determines which ones it will investigate and which ones FBI OPR should investigate. Normally, the OIG investigates allegations of misconduct against high-level FBI officials, allegations that would likely result in criminal prosecution if proved, and allegations that present the FBI with a conflict of interest or that the OIG believes should be investigated by an entity outside the FBI.

FBI OPR is responsible for investigating all other allegations of misconduct against FBI employees. OPR is comprised of seven units: two Internal Investigative Units, two Adjudication Units, one Administrative Unit, one intake unit known as the Initial Processing Office and one Law Enforcement Ethics Unit (LEEU). The Investigative Units review and investigate allegations of misconduct and send the results of their investigations to one of the two Adjudication Units. The Adjudication Units evaluate the evidence and either recommend or decide upon the disciplinary action.

In cases involving SES employees or any employee where the proposed discipline is a 15-day suspension or more, the Adjudication Unit Chief makes disciplinary recommendations to the DAD and AD of OPR. The AD reviews the recommendation and determines the proper punishment. In cases involving employees at level GS-15 or below, the Adjudicative Unit Chief may impose non-adverse disciplinary action (sanctions of 14-day suspensions or less) without approval by the AD or DAD, but that Unit Chief is required to consult with the other Adjudicative Unit Chief in reaching the disciplinary decision.³

All disciplinary matters involving a suspension or firing can be appealed to the Disciplinary Review Board (DRB). The DRB is composed of three SES members: the AD of the Inspections Division, who serves as the chair of the board; one member chosen by the appellant; and one member chosen at random from a list of SES members. Although there are no appeals beyond the DRB, the Director retains discretionary power to change disciplinary actions

² In this report, we do not include the names of the persons who were the subjects of the disciplinary cases because of their privacy interests. We have provided a full report to the FBI with the names of the subjects included.

³ The disciplinary process for some minor infractions, like loss of credentials and misuse of a Bureau car, has been delegated by OPR to the field offices.

concerning all employees except those senior executives whose discipline, by regulation, must be approved by the Deputy Attorney General.

IV. INVESTIGATIVE FINDINGS

A. Inappropriate Comments Cases

Two of the OPR cases Roberts raised as evidence of an ongoing double standard of discipline involve similar conduct by an FBI Special Agent in Charge (SAC 1) and a Special Agent (SA 1). SAC 1 and SA 1 were both charged with making inappropriate comments. On June 14, 2002, SAC 1 received non-disciplinary counseling. On September 24, 2002, SA 1 received a letter of censure. We reviewed these two cases to see whether the outcomes provided evidence of a double standard.

Roberts also raised a third case in which another SAC (SAC 2) received a letter of censure for inappropriate comments. Roberts' concern in this case was that the investigators did not adequately address the issue of SAC 2's candor during the interview. We reviewed the investigation in that case as well.

1. SAC 1

In the first case, SAC 1 made several comments in public settings that were referred for investigation to OPR. He made the first comment at a luncheon held for a retiring special agent. In a letter to OPR responding to the allegations, SAC 1 said that at the function he told a joke about golf because the retiring agent was an avid golfer. SAC 1 reported that in the joke he described a golfer who had a quick lunch during his golf game:

When it came time to pay, the golfer put his hand into his pocket and pulled out only golf tees. He had left his money at the club house. The [waitress], being a country girl... asked what the tees were for. The golfer responded, "They are to hold my balls while I'm driving." The [waitress] replied, "Gosh, you rich guys have everything."

SAC 1 added that the joke received significant laughter and no one in attendance at the luncheon told him that the joke was inappropriate.

We reviewed the videotape of the retirement luncheon. SAC 1 first did a skit in which he played "The Amazing Carnac," a fortuneteller who foresaw the punch lines to jokes about the special agent and the field office. He then told several jokes about the special agent, including the following, which are paraphrased:

- I attribute (the special agent's) greatness to 3 things: a great wife, a great family, and industrial strength ripple.
- I remember (the special agent) was asked what special interest groups were and he responded, "People with 6% mortgages."
- (The special agent's) definition of entrapment is when your wife brings you a choice of two magazines to read – Family Circle and Playboy. That's entrapment.

About halfway through the videotape, the video portion was lost and only audio remained. SAC 1 stated that he was going to conclude the "humorous portion" of his speech with a joke about golf. He added: "Or at least I think it's humorous" and commented that his wife would not attend such functions because she did not appreciate his humor. SAC 1 then told the joke about the golf tees.

The second incident occurred at a "Chili Cook-Off" held by the FBI in FBI office space at lunchtime. As entertainment for the event, SAC 1 and three other employees appeared dressed in drag in a parody of the musical group Spice Girls. In the skit, each "Spice Girl" was introduced and explained the source of her name. According to the OPR adjudication memorandum, each answer was "based on sex in some degree."⁴ SAC 1 was asked during the skit what made him qualified to be a Spice Girl and he responded that he was qualified because he could "suck the chrome off a bumper hitch." The audience at the cook-off included both FBI employees and some non-FBI employees, including two federal judges.

We reviewed the video of the Chili Cook-Off. During the cook-off, four men came into the room dressed in drag. The audience reacted with much laughter. The four were introduced as the Spice Girls. SAC 1 had on a blond wig and was dressed in a gold lamé top. The master of ceremonies (MC) asked each man his name and what qualified him to be a Spice Girl. The first man stated that his name was Jalapeno Spice and that taking a bite of him would blow your head off. The MC made a joke about him needing to wax more. The second man stated that his name was Hot Stuff. His reason for being a Spice Girl was inaudible. He pushed his artificial breasts up at one point and the MC commented that they could be used as flotation devices. The third man said his name was Chili Pepper and that he was "touring South of the Border, if you know what I mean," when he was discovered. The MC asked if he had previously worked with livestock and he responded: "You know who I would like to ride?" Finally, SAC 1 said that his name was Salsa and he was asked if he was related to the Vikings. He responded: "I like Vikings...." He was asked

⁴ SAC 1 was the only participant in the skit who was referred to OPR for investigation.

what qualified him to be a Spice Girl and he responded: "Because I can suck the chrome off a bumper hitch." The MC stated: "No one leaves here until I get everyone's name."

The four men then started to dance and lip-sync to a song that was inaudible on the videotape. The dance included shimmying and hip shaking. During the dance, someone from the audience stuffed money into the second man's top. The show concluded when the music stopped and SAC 1 took off his wig. He stated that his wife had retained an attorney. He then took a more serious tone and thanked the people who had arranged the event.

SAC 1 admitted in his letter to OPR that he said that he was qualified to be a Spice Girl because he could "suck the chrome off a bumper hitch," but stated that the comment was not intended to refer to oral sex but to kissing. He stated that the comment had received significant laughter and that anyone who thought it referred to oral sex had his mind "in the gutter." According to SAC 1, the two federal judges who were present did not tell him that they were offended and "personally expressed their delight with the event and requested to be included at the next Chili Cook-Off."

In a third incident, SAC 1 spoke during a briefing regarding a large drug case. Several law enforcement agencies, including local sheriffs and police, attended the briefing. According to witnesses, SAC 1 made a comment about people sharing rooms because of budget limitations and stated that the FBI was actually "paying people to sleep together." Witnesses reported that he also stated, "You're in [a particular geographic region] now, and a lot of the sheriffs can't even read."

The final incident occurred when SAC 1 spoke at a retirement luncheon for an agent. During his speech, SAC 1 made two attempts at humor, both of which had sexual content. SAC 1 recounted the first joke in his letter to OPR. He stated that he was trying to make a joke about the retiring agent's strong Christian ethics. He stated that he joked that the retiring agent had talked to a 90-year-old man who was entering his church on a Sunday just as the agent and the congregation were leaving Sunday services. The agent asked if he could help the older man. SAC 1 wrote:

The man replied that en route to his summer cottage, he had stopped two hitchhikers. The hitchhikers were 23 year old, good looking, women. The 90-year-old man related that one thing led to another and he ended up spending two days with these women engaged in a sexual orgy. [The agent] asked if the man was sorry for his sins and was now at church to confess. The man replied, "No, I don't even believe in God." [The agent] asked, "Why are you telling me?" The man replied, "I'm telling any one who will listen."

During his luncheon remarks, SAC 1 also stated that the agent was so strict as a father that when the Disney movie The Black Hole came out, the agent would not let his children see it because he thought it was a pornographic movie.

The OPR adjudication memorandum, dated June 12, 2002, stated that the audience apparently fell silent after the comments, but that the retiree and his family did not find the comments personally offensive. The Assistant Special Agent in Charge (ASAC) of SAC 1's field office told OPR that two people who were present at the retirement luncheon contacted him after the luncheon and told him that they were offended by the comments and that others who attended also had been offended. According to the ASAC, when he informed SAC 1 that people had been offended by his remarks, SAC 1 was shocked. SAC 1 then circulated an e-mail apologizing for his comments and asserting that he would be more guarded in his comments in the future. The adjudication memorandum stated that the retiree had told OPR that he found the administrative inquiry to be "petty" and refused to provide a copy of the videotape of the luncheon.

A Unit Chief of one of OPR's Adjudication Units wrote the OPR adjudication memorandum. In the memorandum, the Unit Chief summarized the case and recommended non-disciplinary counseling as punishment. The Unit Chief wrote that the FBI Manual of Administrative Operations and Procedures (MAOP) provided the appropriate disciplinary standard. He cited the sections which require employees to conduct themselves in a manner that creates and maintains respect for the Department of Justice, to avoid any activity or situation which could be misinterpreted or misunderstood to the detriment of the FBI, and to comport one's self in a way that will not discredit one's self or the Bureau.

Despite the evidence and admissions by SAC 1, the Unit Chief's adjudication memorandum concluded that the allegations that SAC 1 had made inappropriate comments at the two retirement functions and the Chili Cook-Off were not substantiated. The Unit Chief added, however, that while his comments did not warrant formal discipline, SAC 1 "did make incautious remarks susceptible to offensive interpretation." The memorandum therefore recommended that SAC 1 "be afforded non-disciplinary counseling to make every attempt to avoid making similar comments in the future which would reflect negatively upon him and, by extension, the FBI and its mission."

We interviewed the Unit Chief who wrote the OPR adjudication memorandum in SAC 1's case about his proposal to give SAC 1 non-disciplinary counseling. The Unit Chief told us that his finding that the allegation of inappropriate comments was unsubstantiated meant that he did not find that the comments themselves were inappropriate. In reaching this decision, the Unit Chief said that he looked at the totality of the circumstances, which is his normal practice in cases involving inappropriate behavior. In this

case, he said he considered the jokes SAC 1 made, the intent behind the jokes, the audience, and how the jokes were received.

The Unit Chief stated that in reaching his decision he considered only the two retirement luncheons and the Chili Cook-Off.⁵ The Unit Chief said that because one of the retirees had told OPR that the matter was petty and refused to provide the videotape of the retirement luncheon to OPR, the Unit Chief put that matter “on the backburner” and looked at the other two incidents.

In reviewing the other two incidents, the Unit Chief stated that, “on paper” the incidents “sounded really bad.” The Unit Chief said, however, that he viewed the videotapes of the incidents with other staff from his unit and that everyone agreed that the jokes did not merit discipline. The Unit Chief stated that some of the harshest critics in his office viewed the tapes and agreed that SAC 1’s behavior was not significant. One staff member who viewed the videotapes with the Unit Chief told us that he did not agree with the Unit Chief and that he told the Unit Chief that he thought that SAC 1’s comments were inappropriate. This staff member considered his position to be a difference of opinion with the Unit Chief, however, and did not think that the Unit Chief was necessarily incorrect in his assessment of the case.

The Unit Chief said he believed that it was significant that SAC 1’s comments were made in social situations. He said that the Chili Cook-Off was a lighthearted, voluntary event; and that the “roasts” of the retirees at the retirement luncheons were in keeping with the division’s past practices. The Unit Chief also said that he looked at each comment individually and found that none of them rose to the level of being “inappropriate.” He said the fact that SAC 1 made such comments on three different occasions did not change his opinion of whether any of the individual comments was inappropriate.

The Unit Chief said that John Roberts “lobbied” him on the SAC 1 case and argued that discipline should be imposed. The Unit Chief said that he and Roberts simply disagreed about the matter.

According to a handwritten note on the OPR adjudication memorandum, Deputy Director Gebhardt called SAC 1 on June 14, 2002, and counseled him

⁵ The Unit Chief told us that he did not consider the comments SAC 1 made at the briefing on the drug case because SAC 1 had not been given notice that he was under investigation for those comments. The Unit Chief stated that under FBI procedures, SAC 1 could not be punished unless he was given notice that he was under investigation for those comments. The Unit Chief stated that he could have given notice to SAC 1 and asked the investigative unit to look into those comments, but he did not think they rose to the level requiring an investigation. The Unit Chief also stated that when the investigative unit learned of the comments, it could have provided notice to SAC 1 and conducted an investigation, but chose not to do so.

about his comments. The note states that Gebhardt “advised him to stop” and to “ensure professional” behavior in the future.

Ten months later, on April 15, 2003, SAC 1 sat on a Career Board that promoted the Unit Chief to an ASAC position. The Unit Chief told the OIG that he did not know that SAC 1 was on his Career Board until we told him, and that at the time of the disciplinary decision in SAC 1’s case, he had not yet made up his mind that he was going to seek promotion. The Unit Chief said that he did not put his name on the list for promotion to an ASAC position until November 2002, 5 months after issuing his adjudication memorandum.

2. SA 1

In the second case referred to by Roberts as similar, SA 1 made an inappropriate remark during a presentation on evidence that he gave as part of a “Back to Basics” class. During that presentation, SA 1 stated: “Did you all hear what happened to Oprah coming back from [sic] Chicago from Paris? She got stopped at Customs and they lifted up her skirt and found forty pounds of crack.”

During the OPR inquiry, SA 1’s SAC provided OPR with a memorandum responding to OPR’s request for information relevant to the disciplinary decision. The SAC stated in the memorandum that SA 1’s telling of the “off-color” joke had not diminished management’s confidence in his ability to perform his assigned duties, that SA 1 had a good performance record, and that he had not been disciplined before. The SAC added that the matter was not known outside of the FBI and had not negatively impacted the reputation of the FBI. He also stated that the feelings of the office employees were mixed: many felt that the comment was inappropriate but did not rise to the level of an OPR inquiry, although one employee reported being “slightly offended.” The SAC also reported that SA 1 acknowledged that his comment was inappropriate and stated that he regretted making it. In his own defense, SA 1 raised the issue that the FBI has numerous training videos which contain off-color remarks by lecturers. The SAC concluded that he believed that SA 1 was “totally rehabilitated.”

On September 24, 2002, the adjudicator in SA 1’s case issued a letter of censure to SA 1. The letter stated that nearly half of the audience in the training class was female, and that the joke was inappropriate because of its “sexual coarseness and consequent and predictable capacity to appall others.” The letter also stated that “crude, sexual humor has no place in any Bureau activity.”

On October 17, 2002, John Roberts called the SA 1 and SAC 1 cases to OPR AD Robert Jordan’s attention. In a routing slip to Jordan accompanying the letter of censure in the SA 1 case, Roberts wrote: “Bob, I think we are

causing OPR unnecessary problems. If you check the [SAC 1] case you will find his actions more egregious than the attached SA's actions. [SAC 1] gets counseling and the SA gets a letter. It just does not make sense and we are leaving OPR open to criticism. We have to fix this. Your thoughts?"

Jordan did not take any action regarding the SAC 1 and SA 1 cases in response to Roberts' note. Jordan told the OIG that he recalled the routing slip Roberts sent him about the cases. Jordan said that by the time the routing slip was delivered, the SA 1 case had already been completed. He also stated that he believed SA 1's comments were more egregious than SAC 1's. He asserted that OPR adjudicates over 700 cases a year, and that fine differences in the facts of each case can sway the outcomes.

The Unit Chief who wrote the adjudication memorandum in SAC 1's case also told us that he believed SA 1's comments were more serious than SAC 1's. That Unit Chief said that he had discussed the SA 1 case prior to the final decision with the Adjudication Unit Chief who handled it. The Unit Chief in SAC 1's case told us that with regard to SA 1's case, he thought it was significant that SA 1 was acting as an instructor in an official training situation. He said he also believed that the joke was extremely offensive and racist, and that he believed that it was a slur against a prominent African American. He added that it also referred to the racial stereotype that African Americans are largely involved in the use of "crack" cocaine.

3. SAC 2

In a third case raised by Roberts, OPR investigated allegations of inappropriate comments by SAC 2. Several witnesses told OPR that SAC 2 had made insensitive and unprofessional comments during a SWAT operation in March 2000. Specifically, witnesses stated that SAC 2 made a comment about "eating some local pussy" in the context of an upcoming visit he was planning to an FBI Resident Agency (RA). SAC 2 admitted to OPR that he used the term "pussy," but described the location and context of his remark differently. SAC 2 said that he used the word "pussy" at a SWAT firearms session that he attended in the summer of 2000, after the RA visit, in the context of recounting a conversation he had with the Senior Resident Agent (SRA) at the RA. According to SAC 2, he said that he had just completed a successful trip to the RA and that the SRA had taken care of him by lining up liaison contacts. SAC 2 said that the SRA asked him "if there was anything else he could do for me and jokingly I replied Pussy."

Witnesses also told OPR that SAC 2 had made a sexual comment about a female support employee while doing sexually suggestive pushups during a training operation. SAC 2 initially denied that he ever commented about the female employee or made sexual movements while executing his pushups. He later clarified his statement to admit that he may have made a joke that

connected sex and pushups while he was executing pushups on another occasion. He also stated that he recalled saying that the female support employee was attractive, but that he did not make that statement in connection with any pushups.

OPR found that the evidence regarding these allegations demonstrated that “there was some precipitating acts of unprofessional and sexually suggestive conduct on [SAC 2’s] part which caused substantial comment and criticism among your subordinates.” In addition, based on the information provided by SAC 2, OPR found that he had utilized inappropriate language and acted in an unprofessional manner on two additional occasions. SAC 2 told OPR that he had commented on his secretary’s breasts, possibly referring to them as “tits,” to a fellow employee “in the context of remarking that she is an attractive woman for her age.” He also told OPR that he had told another secretary that his secretary would be shocked if they had sex in his office. SAC 2 stated that he realized that both comments were inappropriate and that he regretted them.

OPR concluded that SAC 2 had engaged in unprofessional conduct by using crude and sexually offensive language on several occasions and that this behavior was inconsistent with expectations of a manager in his position. The adjudication memorandum stated:

It is obvious that [SAC 2] has acted in an unprofessional manner on- and off-duty. A particular concern is his lack of self-control to behave in a manner befitting of an individual placed in an FBI executive position. However, based upon the precedent, [SAC 2’s] behavior does not rise to the level of a fifteen calendar day suspension, without pay.⁶ Therefore, it is recommended that [SAC 2] be issued a letter of censure and attend sensitivity training.

4. FBI Precedent Database

The FBI keeps a precedent database for disciplinary matters. This database provides a synopsis of the facts of each case and the disciplinary outcome in the case. The cases are organized by allegation. When we reviewed the database, it contained 161 cases involving general allegations of unprofessional conduct on the part of 184 employees, with penalties ranging from no action to dismissal. In the cases involving inappropriate comments, letters of censure were the most common penalty. For example, letters of censure were issued in the following matters:

⁶ Title 5 dictates that an agency may not take a suspension action of 14 calendar days or less against an SES employee. Thus, there were no disciplinary options available in the SAC 2 case greater than a letter of censure, but less than a 15-day suspension.

- an agent made a profane comment about a mayor to the mayor's aide;
- an agent made unflattering remarks on a bus about a racial group which were overheard by an agent of that racial group;
- a Supervisory Special Agent (SSA) made an inappropriate joke, which included a reference to pubic hair, at an in-service awards dinner;
- a support employee used profanity in the presence of other employees, causing a disruption in the office;
- a support employee used vulgar language in speaking to his supervisor;
- an agent contacted a co-worker and left an unprofessional and insensitive message when he learned that the co-worker was able to avoid an undesirable temporary duty assignment on the basis of a medical condition;
- an agent repeated to co-workers a private conversation he had with a co-worker regarding that co-worker's personal life and sexual orientation; and
- an agent made a comment to a female agent that he hoped she was not getting a "boob job" after she mentioned that she had minor surgery scheduled; the agent also searched through the personal items of another agent.

The database contained far fewer instances of counseling or oral reprimand for inappropriate comments. For example:

- Two support employees repeated a rumor about a fellow employee that the employee had slept with a local police officer on the first and second dates, had oral sex, and was "wild."
- A supervisory support employee lifted his shirt to allow exposure of his underclothes in an "ill-conceived attempt at levity toward a subordinate employee." There was no evidence that the action was sexually suggestive.
- An agent engaged in a conversation with a prisoner. Although it was found that the agent's comments were not meant to have been

racially insensitive, OPR found that the agent should have realized the risks inherent in extraneous conversation with a prisoner and avoided such contact.

We found suspensions in only a few such cases. For example:

- An ASAC was suspended for 14 days for using crude and sexist terms in the workplace, actions that were found to have undermined the office's command structure; and
- A support employee received a 3-day suspension for making 25 successive telephone calls to an employee and leaving messages that were replete with abusive and vulgar language.

5. OIG Analysis

a. The SAC 1 and SA 1 Cases

We found the differing outcomes in the SAC 1 and SA 1 cases to be of concern. We recognize that several factors make an exact comparison between the two difficult. First, there were different decision makers in the SA 1 and SAC 1 cases. In reviewing specific allegations of misconduct, an adjudicator necessarily will bring his or her own sensibilities and opinions to bear, and different decision makers may perceive mitigating circumstances differently. The precedent database is somewhat helpful to ensure that decisions are in keeping with other similar cases, but each case has its own mitigating and aggravating factors.⁷

Second, while the facts of both cases involved similar inappropriate behavior - jokes with crude sexual content - the circumstances were not identical. The Unit Chief who adjudicated SAC 1's case stated that he found it significant that SAC 1's behavior occurred in voluntary social situations. He argued that SAC 1 made his jokes during events in which he was expected to raise morale or honor retirees by making funny and perhaps sarcastic comments, while SA 1's statement was made during a mandatory all-office training course.

Third, the difference between the outcomes of the two cases (non-disciplinary counseling versus a letter of censure) is not great and neither outcome is inconsistent with the precedent database.

⁷ The precedent database is a rough guide at best. Most of the conduct in the inappropriate behavior cases in the database is described in conclusory terms, such as "crude," "vulgar," or "unprofessional."

Nevertheless, we believe that SAC 1's repeated instances of offensive comments weighed in favor of disciplinary action, especially given his leadership position in the FBI. We also find it difficult to reconcile the written admonition to SA 1 that "crude, sexual humor has no place in any Bureau activity," with the decision that SAC 1's comments – especially the crude oral sex joke he made in FBI offices in the presence of lower-level FBI employees and federal judges – were not inappropriate and did not merit discipline.

Finally, we also were troubled by SAC 1's participation in the Career Board that promoted the OPR Adjudication Unit Chief who handled his disciplinary case just 10 months after that Unit Chief recommended against discipline of SAC 1. We believe that the conflict of interest and appearance of impropriety inherent in allowing the subject of an OPR investigation to vote on the promotion of the OPR adjudicator who decided his case should have precluded SAC 1's participation in the Unit Chief's Career Board.

b. The SAC 2 Case and the Candor Issue

Roberts told us that he believes that OPR failed to address a "candor issue" in the SAC 2 case. As described above, the OPR report reflects that SAC 2 admitted using the term "pussy," although he described the context of his use of that term differently than did other witnesses. In addition, SAC 2 initially denied that he ever commented about a female support employee or made sexual movements while executing his pushups. He later clarified his statement to admit that he may have made a joke that connected sex and pushups while he was executing pushups. He also stated that he recalled saying that the female support employee in question was attractive, but that he did not make that statement in connection with any pushups.

OPR did not decide whether SAC 2 had been untruthful in his responses regarding those comments. The OPR adjudication memorandum stated that the witnesses to the pushups comment differed regarding the time frame and details of that incident. The memorandum stated that it was unnecessary to determine if SAC 2 had made the exact comments alleged because although the evidence was in conflict, it established that SAC 2 had acted in an unprofessional manner. The report stated that SAC 2 admitted to unprofessional conduct on two other occasions and concluded that his efforts to be "one of the boys" were common enough that he might not recall the details of each such event.

Roberts asserted that the adjudicator simply "sidestepped" the candor issue. We agree. Several witnesses unequivocally stated that SAC 2 made a comment about a specific female support employee while doing sexually suggestive pushups. SAC 2 ultimately denied using the support employee's name in connection with the pushups, but gave shifting explanations of the incident. Only one witness, who described himself as the person physically

closest to SAC 2 at the time of the alleged remark, stated that SAC 2 did not make the remark. Under these circumstances, we believe the adjudicator should have addressed the issue of whether SAC 2 lied to OPR investigators.

B. Candor Issues Cases

Two cases brought to our attention by other FBI employees during the course of this investigation also involve candor issues, one by a Deputy Assistant Director (DAD 1) and another by a Supervisory Special Agent (SSA 1). Both DAD 1 and SSA 1 were found, among other things, to have been less than candid during their OPR interviews. SSA 1 was dismissed from the FBI for his misconduct. OPR initially proposed that DAD 1 be dismissed, but changed the sanction to a suspension and reduction in grade.

1. SSA 1

OPR investigated an allegation that SSA 1 directed subordinates to enter false, misleading, or erroneous information in a report that was to be submitted to Congress. The specific information at issue was an explanation of why the FBI had failed to spend \$10 million appropriated to it by Congress to purchase equipment for state and local agencies. Two of SSA 1's subordinates alleged that he directed them to state that the money had not been spent because the states had failed to complete their law enforcement plans. In fact, the money had not been spent because FBI officials were unaware of the appropriation until the issue arose during the preparation of the report.

In a signed sworn statement, SSA 1 stated that he did not tell anyone to falsify a document. On June 20, 2001, SSA 1 submitted to a polygraph examination during which he was asked the following questions and gave the following answers:

QUESTION: Did you instruct [employee #1] or [employee #2] to falsify that report?

ANSWER: No

QUESTION: Did you know that linking the [FBI's] failure to spend the \$10 million to a lack of state plans would be false?

ANSWER: No

The polygraph examiner concluded that SSA 1 was deceptive on both of these questions. During the post-test interview, SSA 1 ultimately stated that he should have answered yes to the second question.

OPR found that SSA 1 directed his subordinates to incorporate false statements in a report to Congress and that he was not truthful in his signed sworn statement to OPR investigators. Citing FBI policy, including the Director's January 3, 1994, so-called "bright-line" memorandum giving employees notice that they could expect to be dismissed for lying under oath in an administrative inquiry, SSA 1 was dismissed from the FBI.

2. DAD 1

The subject matter of OPR's investigation of DAD 1 included allegations that he had sexual relationships with two subordinate employees, showed favoritism toward one of those employees, and had sexual contact with the other on government premises; that he contacted witnesses in an attempt to obstruct the OPR investigation; and that he acted improperly by allowing prostitutes to accompany him from a nightclub to his hotel during a training trip.

During the OPR investigation, DAD 1 made three signed sworn statements that formed the basis of a finding that he failed to be forthright with OPR investigators regarding the allegation that he had sex with one of his subordinates on government premises. In his first statement, dated October 22, 2001, DAD 1 stated that he had a personal relationship with a woman who was a police officer (PO) of another law enforcement agency, but over whom he had some supervisory responsibilities. In the second statement, dated November 30, 2001, DAD 1 stated that the relationship was physical, but denied that he had sexual encounters with her or anyone on government-owned premises. Finally, in his third statement on December 14, 2001, DAD 1 admitted having sexual encounters with the PO in office space that was at least partially funded by the government.

Based on the OPR investigation, on February 3, 2003, AD Jordan sent DAD 1 a letter proposing his dismissal from the FBI. The letter stated that the investigation had substantiated the following allegations:

- that DAD 1 had an inappropriate personal relationship with his Administrative Assistant (AA), and that he had exhibited favoritism toward the AA, and created the appearance of favoritism, by nominating her for cash awards;⁸

⁸ The OPR file reveals that the AA had been hired as DAD 1's Administrative Assistant in October 1995. She moved into the basement apartment of DAD 1's residence in January 1996. That prompted an OPR investigation, which was resolved without disciplinary action. DAD 1 and his wife divorced in 1999, the AA resigned her position in July 2000, and she and DAD 1 were married in June 2001. During the OPR investigation, DAD 1 admitted having a physical relationship with the AA, but stated that it began after he and his wife separated in the summer of 1999. Several witnesses, however, stated that the inappropriate relationship (continued)

- that DAD 1 was involved in an inappropriate personal relationship with the PO, and that he had engaged in inappropriate conduct on government-funded property by having sexual encounters with the PO in government-funded office space;
- that DAD 1 had contacted two witnesses during the OPR investigation, including the PO, in an attempt to obstruct the investigation;
- that DAD 1 had failed to be forthright and cooperative about his inappropriate conduct with the PO on government-funded premises; and
- that DAD 1 created the appearance of impropriety when he caused a prostitute to accompany him from a nightclub to his hotel in a police vehicle belonging to a foreign country.

DAD 1 responded to his proposed dismissal in writing and made an oral presentation to OPR in Jordan's office.⁹ Jordan, the Adjudication Unit Chief assigned to the case, and two members of that Unit Chief's Adjudication Unit attended the presentation, which was audiotaped. OPR conducted no additional investigation on the DAD 1 case after the presentation. After the presentation, Jordan reduced DAD 1's punishment from dismissal to a 45-day suspension without pay and a demotion to a grade GS-13 Special Agent.

In a letter to DAD 1 dated May 6, 2003, Jordan made the following changes to his previous findings. First, he found that although DAD 1 was involved in a personal relationship with the AA, "which created the appearance of impropriety," it did not result in acts of favoritism. Second, Jordan found that the allegations that DAD 1 contacted two witnesses in an attempt to obstruct an OPR investigation, and that he created the appearance of impropriety when he knowingly allowed prostitutes to accompany him from a nightclub to his hotel in a foreign country's police vehicle, were unsubstantiated.

started before that. One witness testified that the AA told her that she had been dating DAD 1 for 7 years.

⁹ In FBI disciplinary cases involving a potential punishment of a 15-day suspension or more, subjects have the right to review with their attorneys a redacted version of the OPR file and to respond both in writing and orally. If the proposed adverse action is anything short of dismissal, the oral presentation is made telephonically to the AD and other OPR employees, usually including the adjudicator. If the proposed discipline is dismissal, the subject and his attorney may make a presentation to OPR in person.

In his May 6 letter, Jordan suggested the change in the favoritism finding was premised on an assertion by DAD 1's attorney that the responsibility for issuing awards was "shared." In his February 3 letter proposing DAD 1's dismissal, however, Jordan stated that during the time DAD 1 supervised his AA, DAD 1 nominated her for, and she received, several cash awards.¹⁰ The February 3 letter also stated that there was no evidence that the person DAD 1 claimed shared the responsibility for issuing the awards had participated in the selection of the AA for the cash awards. Indeed, several witnesses stated that DAD 1 alone made that determination. Jordan told us that he did not remember why he changed this finding and suggested that we listen to the tape recording of the presentation. We reviewed the recording of the presentation provided to us by the FBI. The portion dealing with the favoritism issue appears to have been erased.¹¹

Jordan also told us he did not remember why he had changed his finding on the obstruction of justice allegation and that we would have to listen to the tape of DAD 1's presentation to find out. According to his February 3 letter, Jordan's initial finding that DAD 1 "attempted to either influence or obtain information from two OPR witnesses" was based on the testimony of the PO and another witness. Both witnesses testified that DAD 1 had called them shortly after they were interviewed by OPR investigators – and before DAD 1 was interviewed – and asked them what he should expect to be asked in the investigation. The witnesses reported the contacts to OPR, but then refused to make further written or oral statements about the conversations. One of the witnesses stated that she and the other witness understood from DAD 1's calls that he knew about the investigation and the identity of witnesses. She stated that they would not make any additional statements in order to protect their careers. DAD 1 admitted to OPR that he contacted the witnesses. He said that he "recall[ed] some conversation about the OPR investigation," but denied asking them what he should expect to be questioned about. DAD 1 claimed that he called both women concerning an upcoming conference and that both women told him that they were upset about his relationship with the AA. DAD 1 stated that with regard to the OPR investigation, he told the women "not to tell me anything, not [to] listen to rumors, and [to] just tell the truth."

In the February 3 letter, Jordan concluded that DAD 1 was apparently attempting to find out if the PO had admitted their sexual relationship to OPR;

¹⁰ The OPR file reveals that the AA received over twice as much in award monies as the three other awardees combined during the relevant period of time.

¹¹ In the relevant portion of the tape, DAD 1's attorney states: "I think with regard to favoritism, the important thing is there is a..." At that point the recording is interrupted by other voices. After some unintelligible conversation, a female voice asks: "What did you do, did you erase my tape?" A male voice responds: "You can't erase it." There is some other unintelligible conversation and then the tape of the hearing resumes. Less than a minute and a half of the recording appears to have been erased.