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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

September 26, 2014

**VIA ELECTRONIC TRANSMISSION**

The Honorable James B. Comey, Jr.  
Director  
Federal Bureau of Investigation  
935 Pennsylvania Avenue, N.W.  
Washington, D.C. 20535

Dear Director Comey:

At a hearing on May 21, 2014, I brought your attention to three female whistleblowers at the FBI who claimed that they suffered retaliation for reporting gender discrimination.<sup>1</sup> In response, you pledged that there would be no further retaliation and that the FBI would fully cooperate with the Office of the Inspector General (OIG) in any review of these allegations.<sup>2</sup>

Following this hearing, five additional FBI whistleblowers contacted my office reporting gender discrimination and retaliation at the Bureau. All eight whistleblowers alleged that the FBI Inspection Division (INSD) uses Loss of Effectiveness orders (LOEs) to punish whistleblowers because LOEs allow retaliatory managers to circumvent the Office of Professional Responsibility (OPR) and its due process protections. So, on July 17, 2014, I wrote you and requested written responses to four questions concerning the FBI's use of LOEs by August 15, 2014. To date, I have not received a response.

Since that letter, three more FBI whistleblowers have reported to my staff that the FBI uses LOEs to punish whistleblowers and anyone whom managers dislike. One whistleblower, Richard Kiper, worked as Unit Chief of the Investigative Training Unit (ITU) in the Training Division (TD). Kiper claims that, at the behest of his supervisor, INSD issued an LOE Electronic Communication (EC) on fabricated grounds against Kiper in retaliation for Kiper's identification of inefficiencies in curriculum management and business process. Based on this EC, the Human Resources Division (HRD) demoted Kiper from a GS-15 to a GS-13 position.

If these allegations are true, the FBI's treatment of whistleblowers stands in stark contrast with how it treats agents who have been found by OIG to have committed actual, disciplinable offenses. For example, on February 26, 2014, OIG provided the FBI with a Report of Investigation (ROI) on an FBI Special Agent-in-Charge (SAC) who:

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<sup>1</sup> U.S. Senate Committee on the Judiciary, *Oversight of the Federal Bureau of Investigation*, (May 21, 2014); <http://www.judiciary.senate.gov/meetings/oversight-of-the-federal-bureau-of-investigation-2014-05-21>, at 50:00-52:00; last accessed July 14, 2014.

<sup>2</sup> *Id.*

engaged in a protracted sexual relationship with a foreign national that he deliberately concealed from the FBI; disclosed sensitive FBI information to the foreign national; and misused FBI-issued iPads and an FBI-issued Blackberry device by allowing the foreign national to use them on numerous occasions, and by using the Blackberry device to exchange sexually explicit communications with the foreign national.<sup>3</sup>

According to the Inspector General, the SAC in question admitted to “inappropriately disclosing sensitive information to the foreign national, as well as his deliberate failure to report his relationship with foreign national to the FBI.”<sup>4</sup> In addition, the Inspector General found that the SAC lied about permitting the foreign national to use the FBI-issued iPads and Blackberry; the SAC apparently did not admit the truth until a compelled polygraph examination.<sup>5</sup> In sum:

in addition to lacking candor and using poor judgment, the investigation found that the SAC's actions violated several FBI policies relating to personal conduct, ethics, security self-reporting requirements, and the provision of false or misleading information on employment and security documents.<sup>6</sup>

Despite this finding by OIG and a disciplinary action proposed by OPR, the FBI had not issued a final determination on this disciplinary action as of June 24, 2014 – four months after receiving the ROI from the Inspector General.<sup>7</sup> In fact, the only “discipline” that had been imposed on the SAC was the FBI’s approval of *the SAC’s own request* for a demotion to a GS-13 position – the same discipline that the abovementioned Kiper received.<sup>8</sup>

Curiously, the FBI apparently did *not* issue a Loss of Effectiveness order against the SAC despite all indications of a loss of effectiveness: lack of candor; poor judgment; and violation of FBI policies regarding personal conduct, ethics, and security. Rather, via the OPR adjudicative process, the FBI apparently provided the SAC with notice and an opportunity to be heard. Meanwhile, in Kiper’s case, the FBI denied these procedural safeguards by issuing an LOE.

According to the attached LOE EC,<sup>9</sup> INSD found Kiper ineffective on three grounds, each of which is contradicted by the FBI’s own documents.<sup>10</sup> First, INSD found Kiper

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<sup>3</sup> See “U.S. Department of Justice Office of the Inspector General Summaries of Investigations Provided Pursuant to Request by Senators Grassley and Coburn,” July 14, 2014, at 1-2 [Exhibit 1].

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See “Training Division Inspection; Managerial Deficiencies for Unit Chief J. Richard Kiper,” May 10, 2013 [Exhibit 2].

<sup>10</sup> See “319X-HQ-A1487713 Serial 26,” August 25, 2011 [Exhibit 3] [Reorganization EC]; “Critical element #7 – Achieving Results – ITU Goals and Objectives,” February 26, 2013 [Exhibit 4]; and “Correction regarding information in the Inspection EC,” December 23, 2013 [Exhibit 5].

ineffective because Kiper allegedly “did not support TD’s mission and reorganization [plan] set forth in an EC dated 8/25/2011, and documented in 319X-HQ-A1487713 Serial 26 . . . .”<sup>11</sup>

According to INSD, this Reorganization EC purportedly designated the Curriculum Management Section (CMS) as “the sole developer of curriculum.”<sup>12</sup> In the LOE EC, INSD claimed that the mission statement that Kiper drafted for ITU contravened that of CMS, because Kiper used phrases like “develop an integrated curriculum,” “develop and plan lesson plans,” and “validate and improve ITU curriculum” in defining ITU’s goals.<sup>13</sup>

However, the Reorganization EC<sup>14</sup> does not designate CMS as “the sole developer of the curriculum.” Instead, the Reorganization EC describes CMS as follows:

The Curriculum Management Section (0220), with four units, will introduce a new service to the FBI, curriculum management. Educationally sound curricula are developed, evaluated, catalogued, archived, reviewed on a defined life cycle management schedule, and updated when appropriate. It will be headed by a newly selected Section Chief. The units in this Section *support* all phases of instructional systems design.<sup>15</sup>

Far from being the sole—or even a primary—lead in instructional systems design, CMS’ mission is actually defined in a support capacity by the plain language of the Reorganization EC itself. Not surprisingly, the Reorganization EC goes on to direct at least six other, non-CMS units within TD to “develop” or “design” curriculum and training.<sup>16</sup>

Second, INSD found Kiper ineffective because Kiper allegedly failed to attach an addendum to the FY 2012 performance plans of each of his fourteen employees in ITU.<sup>17</sup> The addendum was supposed to describe ITU’s goals and objectives and was supposed to be attached to the “Achieving Results Critical Element (CE)” of each employee’s performance plan.<sup>18</sup>

However, on February 26, 2013, two months *before* INSD’s inspection of Kiper, Kiper sent the attached email<sup>19</sup> to fourteen employees. Attached to this email was a Word-document entitled, “Critical\_Element\_7\_Addendum.”<sup>20</sup> In that email, Kiper explains to the fourteen employees that “[t]his two page document contains the recently approved goals and objectives

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<sup>11</sup> Ex. 2 at 2.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.*

<sup>14</sup> *See* Exhibit 3.

<sup>15</sup> *Id.* at 4. (emphasis added).

<sup>16</sup> (1) Career Skills Development Unit; (2) International Training and Assistance Unit; (3) Physical Training Unit; (4) HUMINT Operations Training Unit; (5) Behavioral Science Unit; and (6) Targeting and Data Exploitation Training Unit [Ex. 3 at 7-13].

<sup>17</sup> Ex. 2 at 6.

<sup>18</sup> *Id.*

<sup>19</sup> Ex. 4.

<sup>20</sup> *Id.*

for ITU. Everyone needs to print, sign, and date the first page . . . so that it can added to your Performance Plan.”<sup>21</sup> Kiper also instructs a specific employee to “coordinate the collection of the signed CE #7 Addenda for the Performance Plans.”<sup>22</sup>

Third, INSD found Kiper ineffective because of his alleged attempt to mislead INSD into believing that Kiper had removed from his unit Special Agent (SA) Alan Vanderploeg whose performance as instructor was purportedly deficient.<sup>23</sup> Specifically, according to INSD:

UC Kiper stated he removed Instructor Alan Vanderploeg from teaching based on performance issues noted through peer reviews, evaluation results, and personal observations. UC Kiper verbally counseled Instructor Vanderploeg and provided suggestions for improvement. UC Kiper claimed Instructor Vanderploeg was rated "Minimally Successful" in instructing with an overall rating of "Successful" because "he was a good collaborator." INSD review of SSA Vanderploeg's PAR revealed he did not receive a "Minimally Successful" rating in any element and had an overall rating of "Excellent." UC Kiper failed to document the instruction deficiency in the PAR. At the time of inspection, Instructor Vanderploeg was still assigned to ITU.<sup>24</sup>

However, on December 23, 2013, five months after Kiper’s LOE EC was issued, INSD sent the attached email<sup>25</sup> to SA Vanderploeg in which INSD *admitted* that they “inaccurately identified [SA Vanderploeg] as the . . . instructor who was relieved of his instruction duties.”<sup>26</sup> Significantly, the INSD Inspector who wrote this exculpatory email, and the two INSD Inspectors who are carbon copied to the email, are the three INSD Inspectors who are listed on the first page of Kiper’s May 10, 2013 LOE EC as having approved the contents of that EC.<sup>27</sup>

In light of this evidence clearly contradicting the assertions in the LOE in this case, there is serious cause for concern that the FBI’s use of LOEs may be similarly arbitrary and capricious in other cases as well as a tool of whistleblower retaliation.

Apparently, the FBI’s Office of Integrity and Compliance (OIC) shares these concerns. According to whistleblowers, OIC will soon be issuing a report to Deputy Director Mark Giuliano that calls for transparency in the LOE process and recommends enterprise-level changes at INSD and HRD. In addition, the OIC report allegedly corroborates the assertions of eight whistleblowers who approached my staff after suffering retaliation through LOEs.

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Ex. 2 at 6-7.

<sup>24</sup> *Id.*

<sup>25</sup> Ex. 5.

<sup>26</sup> *Id.*

<sup>27</sup> *Compare* Ex. 2 at 1 *with* Ex. 5.

In order to understand the role of LOEs and what safeguards, if any, exist to ensure their accuracy, please respond in writing to the following:

1. Will you review this OIC report and implement corrective actions as necessary? If not, why not? If so, please describe the corrective actions you will implement. In either case, please provide a copy of the OIC report to the Committee.
2. Will you meet with Kiper? As detailed above, the “management deficiencies” cited in his LOE EC appear to be contradicted by the FBI’s own documents.
3. Has the FBI issued a final disciplinary action against the former-SAC referenced above? If yes, please describe the disciplinary action. If not, why not? Was an LOE ever considered? If not, why not?
4. What is the FBI’s policy concerning the use of LOEs and LOE ECs? Does the FBI consider an LOE or an LOE EC to be an adverse action? If not, why not? Please provide documentation of the FBI’s written policy on these matters.
5. Before an LOE EC is issued, does the FBI provide the subject employee basic due process, including notice and an opportunity to defend against the underlying allegations? If not, why not? After an LOE EC is issued, does the FBI provide that employee notice and an opportunity to appeal? If not, why not?
6. How many LOE ECs have been issued by INSD since January 1, 2009?
  - a. How many of those ECs did *not* result in removal, suspension for more than 14 days, reductions in grade or pay, or a furlough of 30 days or less?
  - b. How many of those ECs were issued against an employee following that employee’s providing notice of a potential EEO claim?
  - c. How many of those ECs were issued against an employee following that employee’s alleging waste, fraud, abuse, or mismanagement?
  - d. Were those ECs issued against females in higher proportions than their representation among all agents? Please provide documentation and data.
7. Will you meet with the whistleblowers referenced at the May 2014 hearing who allege continuing retaliation?

Please provide your reply in writing no later than October 17, 2014. If you have any questions, please contact Jay Lim of my Committee staff at (202) 224-5225. Thank you.

Sincerely,



Charles E. Grassley  
Ranking Member

cc: Michael E. Horowitz  
Inspector General  
U.S. Department of Justice  
Washington, D.C. 20530

Patrick J. Leahy  
Chairman  
Senate Committee on the Judiciary  
Washington, D.C. 20510