



U.S. Department of Justice

Office of the Deputy Attorney General

Bradley Weinsheimer
Associate Deputy Attorney General

Washington, D.C. 20530

March 29, 2022

The Honorable Henry J. Kerner
Special Counsel
U.S. Office of the Special Counsel
1730 M. Street, N.W., Suite 300
Washington, D.C. 20036-4505

Re: OSC File Nos. DI-20-0696 and DI-19-4250

Dear Special Counsel Kerner:

I received your June 9, 2020, letter, in which you referred for investigation allegations raised by employees of the United States Department of Justice (Department), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) that you believe constitute a substantial likelihood of violations of law, rule, or regulation; a gross waste of funds; or gross mismanagement. Specifically, the information disclosed to your office alleged that ATF had a long-standing practice of systematically and intentionally misclassifying non-law-enforcement jobs as law-enforcement positions. It was further alleged that ATF recruits and hires only special agents or industry operations investigators for these jobs. Finally, it was alleged that, although these employees performed non-law-enforcement work, the agency grossly wasted funds by providing legal benefits and increased pay reserved for persons in primary and secondary law-enforcement positions.

Pursuant to 5 U.S.C. § 1213(c), you referred the allegations to the Department to investigate and submit a report of its findings to the Office of Special Counsel. Authority has been delegated to me to review and sign the Department's response, in accordance with 5 U.S.C. 1213(d). As reflected in the attached ATF Report of Investigation (Report), your letter was forwarded to ATF so that, in conjunction with the Department's Justice Management Division (JMD), it could investigate this matter and draft the Report. I have adopted the Report, which I am forwarding to you as an enclosure with this letter.

As reflected in the Report, while the ATF investigation was underway, ATF learned that the U.S. Office of Personnel Management ("OPM") Agency Compliance and Evaluation, Central Group, was in the process of concluding a human capital management evaluation of ATF's performance management system. Subsequently, ATF was informed that OPM had indeed made preliminary findings concerning the misclassification issues that were at the center of the

whistleblowers' complaint that OSC directed the Department to investigate. Given this development, ATF suspended its internal investigation, pending further consultation with OSC and JMD. These discussions resulted in the agencies agreeing that, given OPM's expertise and authority as the chief human resources agency and personnel policy manager for the Federal Government, the OPM evaluation of ATF, which had already resulted in the issuance of preliminary findings concerning misclassifications and the initiation of corrective actions, effectively substantiated the whistleblower allegations and obviated the need for ATF to continue with the separate, internal investigation into the substance of those allegations.

On March 1, 2021, OPM issued a final report concerning its findings, officially titled *Human Capital Management Evaluation, U.S. Department of Justice, Bureau of Alcohol, Tobacco and Firearms ("HCME")*. In large part, the *HCME* reiterated determinations first expressed as part of OPM's preliminary findings.

In summary, the *HCME* found that Criminal Investigator and Industry Operations Investigator positions within ATF's Human Resources and Professional Development directorate were misclassified in violation of laws governing the classification of positions. OPM further determined that some employees whose positions were misclassified as Criminal Investigators received enhanced benefits and Law Enforcement Availability Pay (LEAP) in violation of specific legal and policy requirements. Benefits and LEAP attributable to misclassified positions calculated over five years is at least \$9.7 million. Based on these findings, the whistleblower allegations have been substantiated, as reflected in the Report.

After receiving OPM's preliminary findings, ATF began working closely with OPM's Classification & Assessment Policy Office (CAPO) to implement corrective actions. Use of existing Career Plans was discontinued, and revised Career Plans were subsequently submitted for review and approval. In addition, ATF began the process of updating position descriptions (PDs) for identified positions to more accurately reflect duties. However, while in some instances ATF agreed with OPM that reclassification of positions was appropriate, ATF maintained that updating PDs would support the current classification for some of the positions which OPM had preliminarily identified as misclassified. In other words, ATF asserted that in some cases it was a PD issue, not a classification issue.

At the outset ATF took the view that, aside from the PD issue, many of the 91 positions identified in the *HCME* were otherwise properly classified. For example, ATF views many 1800 Series positions at the ATF National Academy (which falls under the HRPD Directorate) as administrative positions or positions which require technical law enforcement expertise, which would bring these positions within the ambit of pertinent statutes that define "Law Enforcement" positions. As is stands, 31 of the 91 positions identified in the *HCME* as being misclassified remain unresolved in a process that involves discussion between ATF, JMD and OPM (an additional 7 positions identified in ATF's internal review also remain unresolved). The agencies are working cooperatively and methodically to resolve matters as quickly as possible, as further reflected in the Report.

As noted, ATF has continually worked with CAPO to implement corrective actions. New policies are in place, and in an ongoing process, positions have been reclassified and a number of employees have been reassigned. The reclassification process and other corrective actions are ongoing, with ATF working as expeditiously as possible to complete the process in accordance with OPM standards and the ongoing discussions with OPM.

I hope the enclosed Report satisfies your concerns. If you have any questions or concerns about the Report, please do not hesitate to contact me directly or through ATF Chief Counsel Pamela J. Hicks or JMD General Counsel Morton J. Posner.

Sincerely,

Bradley Weinsheimer
Bradley Weinsheimer
Associate Deputy Attorney General

Enclosures

OFFICE OF SPECIAL COUNSEL REFERRAL

OSC File Number DI-18-1734

REPORT OF INVESTIGATION

I. Summary of Allegations Prompting Investigation

In a letter to the Attorney General dated June 9, 2020, the Office of Special Counsel (OSC) referred to the Department of Justice (DOJ) for investigation a whistleblower disclosure alleging that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has systematically and intentionally misclassified non-law-enforcement jobs as law-enforcement positions which has resulted in a gross waste of funds by providing legal benefits and increased pay reserved for persons in primary and secondary law-enforcement positions. OSC stated that “there is a substantial likelihood that the allegations disclose violations of law, rule, or regulation; a gross waste of funds; and gross mismanagement” and called for an investigation into the allegations.

OSC informed ATF that two whistleblowers, [REDACTED] and [REDACTED], and consented to the release of their names, alleged that ATF has a long-standing practice of systematically and intentionally misclassifying non-law-enforcement jobs as law-enforcement positions. They also alleged that ATF recruits and hires only special agents or industry operations investigators for these jobs. The whistleblowers alleged that, although these employees perform non-law enforcement work, the agency has grossly wasted funds by providing legal benefits and increased pay reserved for persons in primary and secondary law-enforcement positions. The specific allegations to be investigated by DOJ included whether:

- ATF has misclassified a subset of the human resource (HR) positions within HRPD as supervisory or administrative criminal investigator² positions in violation of laws on classification of positions; and
- ATF is providing legally prescribed law-enforcement benefits, including enhanced retirement eligibility and Law Enforcement Availability Pay (LEAP)³, to persons in non-primary or non-secondary law-enforcement positions. Further, there is evidence that the agency is violating the specific legal and policy requirements for creditable LEAP hours and the annual certification requirement for payment of LEAP.

The letter to the Attorney General further directed that DOJ submit a written report of its findings to OSC at the conclusion of the investigation, to include any remedial actions instituted as a result. Legal counsel for both ATF and the Department’s Justice Management Division (“JMD”) worked together to develop this report.

II. Description of Investigation

To facilitate the Department’s response to OSC’s referral, ATF selected a team of attorneys and

[REDACTED] is one of nine directorates within ATF that fall under the direct management of the ATF Director and Deputy Director.

² According to the Office of Personnel Management (“OPM”) Handbook of Occupational Groups and Families, Criminal Investigators are classified as GS 1811 Criminal Investigation Series employees within the 1800 Inspection, Investigation, Enforcement, and Compliance Occupational Group.

³ The purpose of LEAP is to provide premium pay to criminal investigators to ensure the availability of criminal investigators for unscheduled duty in excess of a 40 hour work week based on the needs of the employing agency. LEAP is paid to the criminal investigator in addition to basic pay, at a rate of 25 percent of the basic pay for the position. 5 U.S.C. §§ 5545a(b) and (h)(1).

investigators (“the team”) which began an independent inquiry into the allegations by conducting witness interviews and document review. However, as this independent inquiry was underway, an ATF Human Resource management official informed the team while being interviewed as part of the investigation, that the U.S. Office of Personnel Management (“OPM”)⁴ Agency Compliance and Evaluation, Central Group, was in the process of concluding a human capital management evaluation of ATF’s performance management system.⁵

Around this same late-September 2020 time frame, OSC, having learned independently of OPM’s involvement, contacted ATF, and requested that the team contact OPM to determine the scope of any overlap of the OPM evaluation onto those issues that OSC had directed DOJ to investigate. During the subsequent conversation, ATF was informed that OPM had indeed made preliminary findings concerning the misclassification issues that were at the center of the whistleblowers’ complaint which OSC had directed ATF to investigate. In this regard, at the conclusion of their evaluation in September 2020, OPM evaluators had met with and provided ATF personnel managers with Preliminary Findings.⁶

Given this development, ATF suspended its internal investigation, pending further consultation with OSC and JMD. These discussions resulted in the agencies agreeing that, given OPM’s expertise and authority as the chief human resources agency and personnel policy manager for the Federal Government, the OPM evaluation of ATF which had already resulted in the issuance of preliminary findings concerning misclassifications and the initiation of corrective actions, effectively substantiated the whistleblower allegations and obviated the need for ATF to continue with the separate, internal investigation into the substance of those allegations.

On March 1, 2021, OPM issued a final report concerning its findings, officially titled *Human Capital Management Evaluation, U.S. Department of Justice, Bureau of Alcohol, Tobacco and Firearms (“HCME”)*. In large part, the *HCME* reiterated determinations first expressed as part of OPM’s Preliminary Findings. Substantive analysis contained in this report is taken from relevant portions of the *HCME*.

⁴ According to their official government website, “The U.S. Office of Personnel Management serves as the chief human resources agency and personnel policy manager for the Federal Government. OPM provides human resources leadership and support to Federal agencies and helps the Federal workforce achieve their aspirations as they serve the American people.”

As part of their mission, OPM publishes a number of official U.S. Government manuals designed to assist government agencies in classifying work and making decisions on the proper Occupational Series and Grade for a position, including:

- [Introduction to Position Classification Standards](#);
- [The Classifier’s Handbook](#), which provides general classification guidance;
- [Handbook of Occupational Groups and Families](#), which provides the full occupational structure established by OPM for the General Schedule. It lists and defines each occupational group and series in the classification system;
- [Digest of Significant Classification Decisions and Opinions](#), which contains summaries of recent OPM decisions and opinions which may have Government wide impact; and,
- [Qualification Standards](#), which sets forth the minimum experience or education that individuals must have to qualify for a position.

⁵ OPM assigns a “lead evaluator” to conduct an evaluation of a agency activity approximately every 3 to 4 years. Prior to 2020, the last evaluation of ATF occurred in 2015. At the beginning of fiscal year 2020, OPM notified ATF of their intention to conduct a periodic evaluation during the upcoming year. On January 29, 2020, OPM sent ATF a scheduling letter, and thereafter began the evaluation. The investigative phase concluded on September 18, 2020.

⁶ The Preliminary Findings involved an analysis of workforce data from OPM’s Enterprise Human Resources Integration Data Warehouse (EHRI), a review of a sample of ATF’s performance records, as well as a review of Position Descriptions to determine the alignment between strategic goals, performance standards, and other pertinent factors.

III. Analysis of Allegations of Violations of Law, Rule, or Regulation and of Gross Waste of Funds

The *HCME* found that ATF used standardized criminal investigator (GS 1811) and IOI (GS 1801)⁷ Position Descriptions (PDs)⁸, intended for use by any ATF Directorate Division Chief, to reassign individuals to administrative work. PDs specified that the position would manage a specific division responsible for law enforcement programs, functions or operations encompassing the overall law enforcement mission of the organization to which assigned. However, OPM determined that individuals in these positions were not managing law enforcement programs but were managing administrative programs in HRPD⁹ and elsewhere. As a result, OPM found Criminal Investigator (GS 1811) and Industry Operations Investigator (GS 1801) positions in HRPD and three other ATF Directorates to be misclassified in violation of laws governing classification of positions.

The *HCME* included findings that ATF's "Career Plans" for Special Agents (1811 Series) and Industry Operations Investigators (1801 Series) which occasioned ATF's use of the standardized PDs, were created outside of the HR Operations Division, and deviated substantially from OPM qualifications standards.¹⁰ In particular, OPM determined that the requirement that Special Agents complete 52 weeks of continuous service in permanent positions at ATF headquarters as a pre-requisite to supervisory advancement, was problematic.¹¹

Based on these findings, the WB allegations at issue here have been substantiated, to the extent OPM has determined that:

- Criminal Investigator (GS 1811) and Industry Operations Investigator (GS 1801) positions within ATF HRPD¹² were misclassified in violation of laws¹³ governing the classification of positions;¹⁴ and

⁷ Within ATF, GS 1811 employees are Special Agents ("SA") as described in Title 18 United States Code, Section 3051, who are responsible for enforcing criminal laws of the United States. GS 1801 Series employees are Industry Operations Investigators ("IOI") who are responsible for oversight of the various industries that fall under ATF's regulatory authority. IOIs are not law enforcement officers and thus are not eligible for LEAP.

⁸ Official OPM publications describe a Position Description or "PD" as a statement of the major duties, responsibilities, and supervisory relationships of a position. The purpose of a PD is to document the major duties and responsibilities of a position, not to spell out in detail every possible activity during the workday. The PD contains the job title, Series classification, and Grade.

⁹ The *HCME* noted that roughly one third of employees in ATF's HRPD occupy positions classified in the Inspection, Investigation, Enforcement, and Compliance Group (GS 1800), which includes the 1801 and 1811 job series.

¹⁰ "Career Plans" are included in ATF General Orders and contain specific qualification requirements for supervisory career progression for both Special Agents (ATF O2311.4B) and IOIs (ATF O2311.5A). The purpose of these plans, as it pertains to Special Agents in ATF O2311.4B, is to "outline the leadership competencies that are critical to Special Agents throughout their careers to enable them to successfully prepare for and succeed in GS-1811-13, GS-1811-14 and GS-1811-15 positions." ATF O2311.5A mirrors this language for IOIs.

¹¹ OPM opined that the use of short-term rotations for developmental purposes would be allowable, but that the practice of requiring indefinite assignments at HQ that remove LEOs from enforcement work for prolonged periods of time is not permissible.

¹² OPM found that a smaller number of positions were misclassified in three other ATF Directorates: Office of Public and Governmental Affairs; Office of Professional Responsibility and Security Operations; and Office of Strategic Management.

¹³ See, 5 U.S.C. §§ 5106(a), 5107, and 5 C.F.R. § 300.103.

¹⁴ The *HCME* identified 91 positions as being misclassified. In addition, during the post-evaluation remediation process, ATF self-identified 17 additional potentially misclassified positions in the Office of Management, Office of Strategic Intelligence and Information, and Office of Enforcement Programs and Services. Accordingly, a total of 108 positions are identified in Appendix A of this report by Position Title, Series, Grade, ATF Directorate and PD Number. Highlighted rows in Appendix A delineate the 17 self-identified positions.

- employees whose positions were misclassified as Criminal Investigators (GS 1811) improperly received enhanced retirement eligibility and Law Enforcement Availability Pay (LEAP)¹⁵ in violation of specific legal and policy requirements.¹⁶

The *HCME* went on to conclude that ATF leadership had acted outside of merit system principles and demonstrated disregard for the rule of law and regulations that implement Federal human capital management policies and practices.¹⁷ Specifically, it was found that ATF established several merit promotion policies that violate OPM regulations and merit system principles. In OPM’s view, actions taken under these policies resulted in the improper classification of administrative positions to the law enforcement job family (1800 Series).¹⁸

In connection with the issuance of Preliminary Findings in September 2020, as pertinent here, OPM directed ATF to revise SA and IOI career plan policies to align with OPM qualifications standards for those occupations and discontinue the use of seniority-based requirements. See, 5 CFR 338.301. In addition, ATF was directed to reclassify positions and submit for review, properly classified PDs, based upon the duties being performed for each position identified as misclassified, in accordance with 5 U.S. Code § 5106. OPM further directed incumbents in misclassified positions either be placed on PDs that were properly classified or be reassigned to new positions. OPM also required ATF to provide OPM’s Agency Compliance and Evaluation Central Group, evidence of the classifications and reassignments, including new PDs, position evaluation statements, results of any desk audits performed, SF-50s, signed performance work plans, or any other documentation supporting the corrective action.¹⁹

Finally, OPM temporarily suspended ATF’s GS-1800 classification authority effective November 2, 2020 and directed ATF to submit all classification actions for GS-1800 job family PDs to OPM for approval.²⁰

¹⁵ “Law enforcement officer” for LEAP eligibility purposes, is defined in 5 U.S.C. § 8331(20) as “an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position.” 5 C.F.R. § 842.802 uses substantially similar language for purposes of law enforcement retirement eligibility.

¹⁶ See, 5 U.S.C. §§ 8401, 8412(d), 8415; 5 C.F.R. §§ 831.902, 842.802 (retirement), and 5 U.S.C. § 5545a, and 5 C.F.R. §§ 550.181 to 550.186 (LEAP).

¹⁷ The *HCME* did not include a specific finding that violation of OPM regulations constituted “gross mismanagement” as referenced in OSC’s letter to the Attorney General dated June 9, 2020. At an institutional level, viewed in isolation, the systematic practice of misclassifying primarily GS-14 and GS-15 positions to facilitate the insertion of Special Agents and Industry Operations Investigators into leadership positions in Directorates such as HRPD, where they were routinely managing programs in areas in which they often had little to no subject matter expertise and were supervising individuals who were in many instances more knowledgeable and experienced in their fields, might be considered such a practice.

It is not clear, however, that this practice affected the individual employees’ overall performance as managers. In fact, there is nothing in the Executive Summary that indicates a particular subdivision or program was impacted on other than a structural basis or calls into question the managers’ otherwise conscientious discharge of their assignments. See *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14 (1926) (“The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”)

¹⁸ The *HCME* did not state how long these policies and practices had been in place. While it has been difficult to determine their origin, it is apparent that they go back many years and predate current ATF leadership. In January 2021, ATF Internal Affairs Division (“IAD”) was tasked with investigating the circumstances surrounding the implementation of these policies and practices. IAD functions as one part of a larger disciplinary system within ATF and is responsible for handling allegations of professional misconduct. The investigation is ongoing.

¹⁹ These directives are authorized by 5 CFR 250.209, which provides: “If OPM finds that an agency has taken an action contrary to a law, rule, regulation, or standard that OPM administers, OPM may require the agency to take corrective action.”

²⁰ The suspension was originally imposed for a minimum of six months, which given the many unresolved matters described in this report, has now been exceeded. The suspension will remain in place until these matters are resolved to OPM’s satisfaction.

After receiving OPM’s Preliminary Findings, ATF began working closely with OPM’s Classification & Assessment Policy Office (CAPO) to implement corrective actions. Use of existing Career Plans was discontinued, and revised Career Plans were subsequently submitted for review and approval. In addition, ATF began the process of updating PDs for identified positions to more accurately reflect duties. However, while in some instances ATF agreed with OPM that reclassification of positions was appropriate, ATF maintained that updating PDs would support the current classification for many of the positions which OPM had preliminarily identified as misclassified. In other words, ATF asserted that in some cases it was a PD issue, not a classification issue.

In addition, while ATF acknowledged that the PDs at issue were generally inaccurate and needed to be updated to reflect the incumbents’ actual duties, ATF also took the view that many of the 91 positions identified in the *HCME* were otherwise properly classified. For example, ATF views many 1800 Series positions at the ATF National Academy (which falls under the HRPD Directorate) as administrative LEO positions and/or positions which require technical law enforcement expertise, which would bring these positions within the ambit of pertinent statutes that define “Law Enforcement” positions.²¹

As it stands, 31 of the 91 positions identified in the *HCME* as being misclassified remain unresolved in a process that involves discussion between ATF, JMD and OPM.²² The Agencies are working cooperatively and methodically to resolve matters as quickly as possible.²³

To assess potential waste attributable to misclassified positions, ATF conducted a 5-year review of positions that were identified as misclassified in the *HCME* or self-identified by ATF. The review examined the increased cost incurred in filling identified positions with GS 1811 employees rather than non-1811 employees. In addition to LEAP, attributable impact on Federal Employees Retirement System (“FERS”) benefits,

²¹ See e.g., 5 U.S.C. § 8401(17); 5 C.F.R. § 842.802

²² A total of 38 positions are unresolved, which includes seven that were self-identified by ATF. These 38 positions are identified in Appendix A as “pending resolution.” Four of these positions are currently unencumbered.

²³ In a February 15, 2022, letter to the Deputy Assistant Attorney General for Human Resources and Administration (“DAAG/HRA”), OPM expressed concern over ATF’s progress toward reclassifying or reassigning the misclassified positions. OPM acknowledged that ATF had reassigned multiple employees and was planning to reassign additional employees, while noting delays due to PCS issues and associated funding needed to complete the moves. Also in this letter, OPM responded to DOJ’s request to reconsider its findings regarding 32 of the positions that OPM found were misclassified. OPM stated that the documentation and analysis submitted by DOJ in support of its request for reconsideration were not sufficiently detailed to warrant reconsideration.

On March 21, 2022, the DAAG/HRA responded to OPM, describing the status of progress made toward addressing all of OPM’s required and recommended actions. DOJ’s response included documenting a plan of action and milestones, numerous additional documents, and information regarding the unresolved positions. DOJ’s response further observed that ATF has implemented a variety of new programs and processes in response to the required and recommended actions in the OPM evaluation, finalized the new Job Analysis and Quality Review Process Standard Operating Procedures (SOPs), launched a new Human Resources (HR) Liaison Program, implemented a new Strategic Recruitment Form, staffed and implemented a quality review process, and reorganized the Human Resources Operations Division to include new Performance Management and HR Policy and Quality Control Branches. The Department also noted the recent recruitment of a highly respected classification expert, who will collaborate with OPM and ATF to develop and implement a strategy to reassess the duties and ensure proper classification of the unresolved positions.

OASDI²⁴ and Medicare tax, Thrift Savings Plan²⁵ (“TSP”) contributions, and Permanent Change of Station²⁶ reimbursements were considered.²⁷

Since a final resolution of the overall number of misclassified positions is yet to be determined, potential loss dating back to 2016 is presented in a range. The low end of the range is presented in Appendix B and reflects approximate²⁸ cost discrepancy for 70 positions which have been conceded by ATF to be misclassified.²⁹ This number includes 60 positions identified in the *HCME* and 10 positions self-identified by ATF. The high end of the range is presented in Appendix C which reflects the projected approximate cost discrepancy if all 108 positions identified in the *HCME* and self-identified by ATF are ultimately determined to be misclassified. Appendix B and C each present total cost, and cost broken down by category.³⁰

²⁴ The federal Old-Age, Survivors, and Disability Insurance (OASDI) program is the official name for Social Security in the United States. Payments are calculated based upon people's wages earned while they were of working age.

²⁵ The Thrift Savings Plan (“TSP”) is a tax-deferred retirement savings and investment plan that offers Federal employees the same type of savings and tax benefits that many private corporations offer their employees under 401(k) plans. As a participating agency, ATF will automatically contribute an amount equal to 1% of basic pay each pay period to an employee's TSP account. Employees also receive matching contributions on the first 5% of pay that they voluntarily contribute each pay period.

²⁶ Under federal law, ATF is authorized to provide relocation expense allowances and services to employees with the objective of minimizing the financial burden and personal disruption to an employee's life that is associated with relocating to a new duty station. This policy is referred to as Permanent Change of Station (“PCS”) and applies to the permanent transfer of an employee from one official duty station to another. See 5 U.S.C. § 5753 and § 5754, and 5 CFR part 575, subparts A, B, and C.

PCS reimbursement is authorized where the transfer is: more than 50 miles from the current duty station; in the best interest of the Government; not primarily for the convenience or benefit of the employee; and, not at the employee's request. Covered expenses must include: sale of residence at old official duty station; purchase of residence at new official duty station; settlement of unexpired lease - lease break expenses; transportation and storage of household goods or shipment of mobile home in lieu of transportation and storage of household goods; transportation and per diem for an employee and his/her immediate family members; travel between the old and new official station; miscellaneous expense allowance; and, Relocation Income Tax Allowance; Covered expenses may include: house hunting trip; temporary quarters; shipment of privately owned vehicle; home marketing incentive program; use of relocation service companies; property management services; and Voluntary Relocation Program.

²⁷ Because only GS 1811 employees receive enhanced law enforcement benefits, the only potential financial consequence associated with GS 1801 misclassification is PCS cost.

²⁸ For purposes of these comparisons, non-1811 steps within Grade were approximated using the median Step 5.

²⁹ 14 of the 70 positions acknowledged as misclassified are currently unencumbered.

³⁰ While the United States may seek recoupment of any overpayment associated with the misclassified positions, 5 U.S.C. § 5584 provides that the Department may waive a claim (i.e., forbear collection of a debt), in whole or in part, against an employee arising out of erroneous payments of pay and allowances, travel, transportation, and relocation expenses and allowances. The Department may consider a waiver when collection of the claim would be "against equity and good conscience and not in the best interests of the United States" and may only waive an employment-related debt when, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith does not exist on the part of the employee or any other person having an interest in obtaining a waiver of the claim. 5 U.S.C. § 5584(1). In this regard, the Attorney General has delegated the authority to waive employment related debt to bureau heads with respect to their bureaus. See DOJ 2120.4F.

As pertinent here, GS-1811 employees in misclassified positions received benefits in good faith reliance on institutional policies which they had no basis to question, in exchange for their good faith labors. As such, and as judged against similar instances where waivers have historically been authorized, there is ample support for the granting of a waiver in the interest of “equity and good conscience.” See *United States v. Royer*, 268 U.S. 394, 398 (1925) (When military officer appointed at incorrect higher rank, “the money having been paid for services actually rendered in an office held *de facto*, and the government presumably having benefited to the extent of the payment, in equity and good conscience he should not be required to refund it.”) Once the final number of misclassified positions is determined, and the class of similarly situated employees is settled, ATF, in consultation with JMD, will begin the waiver process.

IV. Conclusion and Description of Actions Taken or Planned as a Result of the Investigation

ATF has acknowledged that 70 Criminal Investigator (GS 1811) and Industry Operations Investigator (GS 1801) positions were misclassified. ATF has submitted for OPM review or is in the process of submitting for OPM review, properly classified PDs, based upon the duties being performed, in accordance with 5 U.S. Code § 5106.

In May 2021, incumbents received a memo giving them three options:

1. Remain in their current series with the understanding that they could be reassigned to another 1801 or 1811 position where they might retain their series, grade, and step, and that they might or might not remain in the National Capital Region. This also included the ability to list their preferred reassignment position and/or location with the understanding that ATF could not guarantee that they would be reassigned to their preferred position and/or location; or
2. Request to remain in their current position following its reclassification as a non-1801 or non-1811 position with the understanding that this would be contingent upon a determination by HRPD that they continue to qualify for the position as reclassified; or
3. Remain in their current positions until their retirement subject to the retirement occurring prior to the end of the calendar year and subject to OPM authorization.

Notwithstanding the complexities involved, reassignments are presently occurring as expeditiously as possible, with ATF Chief Counsel's Management Division overseeing the internal process in coordination with OPM and JMD. In her March 21, 2022, communication with OPM, the Deputy Assistant Attorney General for Human Resources and Administration reported that ATF had successfully reassigned 26 employees to properly classified PDs as directed by OPM. An additional four employees are pending reassignment into properly classified positions, 12 employees have retired, and three positions have been abolished.

End of Report
March 29, 2022

Appendix A

Position Title	Series	Grade	Organization	Organization, Cont.	PD Number	ATF Decision
Division Chief	1811	15	HRPD/ SA/IOI Recruitment	HRPD	6041	conceded
Project Officer	1801	13	HRPD/ SA/IOI Recruitment	HRPD	13271	conceded
Project Officer	1811	13	HRPD/ SA/IOI Recruitment	HRPD	17017	conceded
Branch Chief	1811	14	HRPD/ SA/IOI Recruitment	HRPD	19089	conceded
Program Manager	1801	14	HRPD/LPDD	HRPD	6110	conceded
Program Manager	1801	14	HRPD/LPDD	HRPD	6110	conceded
Program Manager	1801	14	HRPD/LPDD	HRPD	6110	conceded
Program Manager	1801	14	HRPD/LPDD	HRPD	6110	conceded
Project Officer	1811	13	HRPD/LPDD	HRPD	6176	conceded
Project Officer	1811	13	HRPD/LPDD	HRPD	6176	conceded
Program Manager	1811	14	HRPD/LPDD	HRPD	12024	conceded
Program Manager	1811	14	HRPD/LPDD	HRPD	12024	conceded
Program Manager	1811	14	HRPD/LPDD	HRPD	12024	conceded
Deputy Division Chief	1801	15	HRPD/LPDD	HRPD	15006	conceded
Program Manager (IOI)	1801	14	HRPD/LPDD	HRPD	18075	conceded
Branch Chief	1811	14	HRPD/LPDD	HRPD	19089	conceded
Branch Chief	1811	14	HRPD/LPDD	HRPD	19089	conceded
Branch Chief	1811	14	HRPD/LPDD	HRPD	19089	conceded
Program Manager	1811	14	HRPD/LPDD	HRPD	A93024	conceded
Program Manager	1811	14	HRPD/LPDD	HRPD	A93024	conceded
Division Chief	1801	15	HRPD/WWSD	HRPD	20057	conceded
Deputy Division Chief	1811	15	HRPD/WWSD	HRPD	UNK – New Position, No incumbent	conceded
Peer Response Program Manager-LEAD	1811	14	HRPD/WWSD	HRPD	UNK – New Position, No incumbent	conceded
Industry Operations Program Manager	1801	14	Office of Strategic Management	Director	6110	conceded
Deputy Division Chief	1801	15	Office of Strategic Management	Director	15186	conceded
Industry Operations Program Manager	1801	14	Office of Strategic Management	Director	16084	conceded
Industry Operations Program Manager	1801	14	Office of Strategic Management	Director	16084	conceded
Industry Operations Program Manager	1801	14	Office of Strategic Management	Director	16084	conceded
Industry Operations Program Manager	1801	14	Office of Strategic Management	Director	16084	conceded
Criminal Investigator	1811	14	OM/AFSPD	OM	A93024	conceded
Criminal Investigator	1811	14	OM/Facilities Management Branch	OM	A93024	conceded
Criminal Investigator	1811	14	OM	AFSPD	A93024	conceded
Criminal Investigator	1811	14	OM/Resources Management Branch	OM	19089	conceded
Criminal Investigator	1811	14	OM/Resources Management Branch	OM	UNKNOWN	conceded
Criminal Investigator	1811	15	PGA	PGA	6041	conceded
Program Manager	1801	14	PGA	PGA	16084	conceded
Program Manager	1811	14	PGA	PGA	16084	conceded
Criminal Investigator	1811	13	PGA	PGA	17017	conceded
Chief Of Staff	1801	15	PGA	PGA	20065	conceded
Criminal Investigator	1811	14	PGA/Intergovernmental Affairs Division	PGA	A93024	conceded
Criminal Investigator	1811	14	PGA/Intergovernmental Affairs Division	PGA	A93024	conceded

Appendix A

Position Title	Series	Grade	Organization	Organization, Cont.	PD Number	ATF Decision
Criminal Investigator	1811	14	PGA/Intergovernmental Affairs Division	PGA	A93024	conceded
Industry Operations Specialist	1801	14	PGA/Office of Legislative Affairs	PGA	5129	conceded
Criminal Investigator	1811	15	PGA/Office of Legislative Affairs	PGA	6041	conceded
Deputy Chief Legislative Affairs Division	1801	15	PGA/Office of Legislative Affairs	PGA	14060	conceded
Criminal Investigator	1811	14	PGA/Intergovernmental Affairs Division	PGA	A93024	conceded
Criminal Investigator	1811	14	PGA/Intergovernmental Affairs Division	PGA	A93024	conceded
Criminal Investigator	1811	14	PGA/Office of Legislative Affairs	PGA	A93024	conceded
Criminal Investigator	1811	14	PGA/Office of Legislative Affairs	PGA	A93024	conceded
Criminal Investigator	1811	14	PGA/Office of Public Affairs	PGA	A93024	conceded
Division Chief	1811	15	HRPD/ATF National Academy	HRPD	1155	pending resolution
Deputy Division Chief	1811	15	HRPD/ATF National Academy	HRPD	5131	pending resolution
Training Manager (IOI)	1801	13	HRPD/ATF National Academy/BTPB	HRPD	6096	pending resolution
Training Manager	1811	13	HRPD/ATF National Academy/FOPB	HRPD	6176	pending resolution
Training Manager	1811	13	HRPD/ATF National Academy/AEPB	HRPD	6176	pending resolution
Training Manager	1811	13	HRPD/ATF National Academy/TAPB	HRPD	6176	pending resolution
Training Manager	1811	13	HRPD/ATF National Academy/AEPB	HRPD	6176	pending resolution
Training Manager	1811	13	HRPD/ATF National Academy/TAPB	HRPD	6176	pending resolution
Training Manager	1811	13	HRPD/ATF National Academy/FOPB	HRPD	6176	pending resolution
Training Manager	1811	13	HRPD/ATF National Academy/BTPB	HRPD	6176	pending resolution
Training Manager	1811	14	HRPD/ATF National Academy/BTPB	HRPD	7104	pending resolution
Arson & Explosives Training Specialist	1801	13	HRPD/ATF National Academy/AEPB	HRPD	18086	conceded
Branch Chief	1801	14	HRPD/ATF National Academy/LCDB	HRPD	18123	conceded
Training Manager	1811	13	HRPD/ATF National Academy/AEPB	HRPD	6176	pending resolution
Training Manager	1811	13	HRPD/ATF National Academy/AEPB	HRPD	6176	pending resolution
Training Manager	1811	13	HRPD/ATF National Academy/AEPB	HRPD	6176	pending resolution
LE Training Specialist	1801	13	HRPD/ATF National Academy/AEPB	HRPD	10078	conceded
LE Training Specialist	1801	13	HRPD/ATF National Academy/AEPB	HRPD	10078	conceded
Branch Chief	1811	14	HRPD/ATF National Academy/AEPB	HRPD	19089	pending resolution
LE Training Specialist	1801	13	HRPD/ATF National Academy/AEPB	HRPD	20110	pending resolution
Training Manager	1811	13	HRPD/ATF National Academy/BTPB	HRPD	6176	pending resolution
Program Manager	1811	14	HRPD/ATF National Academy/BTPB	HRPD	7104	pending resolution
Program Manager	1811	14	HRPD/ATF National Academy/BTPB	HRPD	7104	pending resolution
Project Officer	1811	13	HRPD/ATF National Academy/TAPB	HRPD	17017	pending resolution
Branch Chief	1811	14	HRPD/ATF National Academy/BTPB	HRPD	19089	pending resolution
Training Manager	1811	13	HRPD/ATF National Academy/FOPB	HRPD	6176	pending resolution
Branch Chief	1811	14	HRPD/ATF National Academy/FOPB	HRPD	19089	pending resolution
Training Manager	1811	13	HRPD/ATF National Academy/TAPB	HRPD	6176	pending resolution
Training Manager	1811	13	HRPD/ATF National Academy/TAPB	HRPD	6176	pending resolution
Training Manager	1811	13	HRPD/ATF National Academy/TAPB	HRPD	6176	pending resolution
Branch Chief	1811	14	HRPD/ATF National Academy/TAPB	HRPD	19089	pending resolution
Branch Chief	1811	14	HRPD/ATF National Academy/TAPB	HRPD	19089	pending resolution

Appendix A

Position Title	Series	Grade	Organization	Organization, Cont.	PD Number	ATF Decision
Branch Chief	1811	14	HRPD/ATF National Academy/TAPB	HRPD	A93024	conceded
Program Manager	1811	14	HRPD/LPDD	HRPD	12024	conceded
Division Chief	1811	15	HRPD/LPDD	HRPD	6041	conceded
Deputy Assistant Director	1811	SES	HRPD/Office of AD	HRPD	OES018	pending resolution
Assistant Director	1811	SES	HRPD/Office of AD	HRPD	OES031	conceded
Program Manager (West)	1801	14	HRPD/WWSD	HRPD	16084	conceded
Project Officer	1811	13	HRPD/WWSD	HRPD	17017	conceded
Peer Response Branch Chief	1811	14	HRPD/WWSD	HRPD	19089	conceded
Program Manager (East)	1811	14	HRPD/WWSD	HRPD	A93024	conceded
Program Manager (Cent)	1811	14	HRPD/WWSD	HRPD	A93024	conceded
Criminal Investigator	1811	14	OM/AFSPD	OM	19089	conceded
Criminal Investigator	1811	14	OM/AFSPD	OM	A93024	conceded
Criminal Investigator	1801	13	OM	AFSPD	13271	pending resolution
Criminal Investigator	1811	14	OM	AFSPD	A93024	pending resolution
Criminal Investigator	1811	13	OM	AFSPD	17017	pending resolution
Criminal Investigator	1811	13	OM	AFSPD	17017	pending resolution
Criminal Investigator	1811	13	OM	AFSPD	17017	pending resolution
Deputy Assistant Director	1811	SES	OPRSO	OPRSO	OES008	pending resolution
Assistant Director	1811	SES	OPRSO	OPRSO	OES044	pending resolution
Criminal Investigator	1811	15	OPRSO/Personnel Security Division	OPRSO	6041	conceded
Assistant Director	1811	SES	PGA	PGA	OES001	conceded
Deputy Assistant Director	1801	SES	PGA	PGA	OES141	conceded
Program Manager	1811	14	HRPD/ATF National Academy/FOPB	HRPD	7104	pending resolution
Program Manager	1811	14	HRPD/LPDD	HRPD	12024	conceded
Branch Chief	1811	14	HRPD/LPDD	HRPD	19089	conceded
Program Manager (IOI)	1801	14	HRPD/ATF National Academy	HRPD	6110	pending resolution

Appendix B

CONCEDED 1811s & non-1811s COST ANALYSIS & EXCESS COST BY FISCAL YEAR

Details	FY2021			FY2020			FY2019			FY2018			FY2017			FY2016		
	1811	non-1811	Excess Cost	1811	non-1811	Excess Cost	1811	non-1811	Excess Cost	1811	non-1811	Excess Cost	1811	non-1811	Excess Cost	1811	non-1811	Excess Cost
Salary	\$6,538,924	\$6,374,275	\$164,649	\$5,296,303	\$4,626,993	\$669,310	\$4,433,017	\$3,820,531	\$612,486	\$3,179,274	\$3,342,292	-\$163,019	\$2,633,634	\$2,266,812	\$366,822	\$2,103,940	\$1,696,576	\$407,364
LEAP	\$691,368	\$0	\$691,368	\$479,097	\$0	\$479,097	\$433,064	\$0	\$433,064	\$353,717	\$0	\$353,717	\$314,762	\$0	\$314,762	\$276,383	\$0	\$276,383
Retirement - FERS	\$2,012,220	\$1,102,750	\$909,470	\$1,454,035	\$800,470	\$653,565	\$1,110,791	\$660,952	\$449,839	\$822,353	\$578,217	\$244,136	\$666,402	\$392,158	\$274,243	\$547,030	\$293,508	\$253,522
OASDI & Medicare Tax	\$483,970	\$487,632	-\$3,662	\$387,344	\$344,473	\$42,871	\$316,351	\$283,988	\$32,363	\$233,554	\$190,531	\$43,023	\$195,483	\$170,294	\$25,189	\$161,281	\$127,584	\$33,697
TSP Contribution (ATF's share)	\$344,394	\$318,714	\$25,680	\$275,447	\$231,350	\$44,097	\$233,184	\$191,027	\$42,157	\$172,004	\$167,115	\$4,890	\$145,393	\$113,341	\$32,052	\$117,133	\$84,829	\$32,304
Relocation Cost	\$0	\$0	\$0	\$1,021,609	\$0	\$1,021,609	\$424,556	\$0	\$424,556	\$345,343	\$0	\$345,343	\$83,133	\$0	\$83,133	\$86,807	\$0	\$86,807
Total ATF Cost	\$10,070,876	\$8,283,371	\$1,787,505	\$8,913,834	\$6,003,286	\$2,910,548	\$6,950,964	\$4,956,498	\$1,994,466	\$5,106,245	\$4,278,155	\$828,090	\$4,038,807	\$2,942,605	\$1,096,201	\$3,292,574	\$2,202,496	\$1,090,078

EXCESS COST BY FISCAL YEAR

	1811	non-1811	Excess Cost
FY 2021	\$10,070,876	\$8,283,371	\$1,787,505
FY 2020	\$8,913,834	\$6,003,286	\$2,910,548
FY 2019	\$6,950,964	\$4,956,498	\$1,994,466
FY 2018	\$5,106,245	\$4,278,155	\$828,090
FY 2017	\$4,038,807	\$2,942,605	\$1,096,201
FY 2016	\$3,292,574	\$2,202,496	\$1,090,078
TOTAL EXCESS COST BY FISCAL YEAR			\$9,706,887

EXCESS COST DETAIL FOR ALL YEARS

Details	EXCESS COST DETAIL
Salary	\$2,057,613
LEAP	\$2,548,391
Retirement - FERS	\$2,784,775
OASDI & Medicare Tax	\$173,481
TSP Contribution (ATF's share)	\$181,180
Relocation Cost	\$1,961,447
TOTAL EXCESS COST	\$9,706,887

Appendix C

OPM IDENTIFIED (Condeded & Contested) 1811s & non-1811s COST ANALYSIS & EXCESS COST BY FISCAL YEAR

Details	FY2021			FY2020			FY2019			FY2018			FY2017			FY2016		
	1811	non-1811	Excess Cost	1811	non-1811	Excess Cost	1811	non-1811	Excess Cost	1811	non-1811	Excess Cost	1811	non-1811	Excess Cost	1811	non-1811	Excess Cost
Salary	\$11,075,846	\$10,173,450	\$902,396	\$8,961,539	\$7,036,731	\$1,924,808	\$6,626,537	\$5,987,432	\$639,105	\$4,345,127	\$4,544,108	-\$198,981	\$3,540,693	\$3,175,589	\$365,104	\$2,809,160	\$2,299,341	\$509,819
LEAP	\$1,495,982	\$0	\$1,495,982	\$1,082,784	\$0	\$1,082,784	\$777,703	\$0	\$777,703	\$579,363	\$0	\$579,363	\$490,220	\$0	\$490,220	\$425,405	\$0	\$425,405
Retirement - FERS	\$3,772,206	\$1,760,007	\$2,012,199	\$2,741,486	\$1,217,355	\$1,524,131	\$1,804,864	\$1,035,826	\$769,038	\$1,203,275	\$792,288	\$410,987	\$955,694	\$549,377	\$406,317	\$784,744	\$397,786	\$386,958
OASDI & Medicare	\$846,843	\$778,269	\$68,574	\$678,797	\$526,117	\$152,680	\$489,638	\$441,780	\$47,858	\$331,491	\$285,193	\$46,298	\$271,618	\$239,816	\$31,803	\$222,459	\$173,696	\$48,763
TSP Contribution (ATF's share)	\$599,475	\$508,673	\$90,803	\$475,558	\$351,837	\$123,721	\$352,011	\$299,372	\$52,639	\$240,501	\$228,985	\$11,516	\$197,556	\$158,779	\$38,776	\$159,757	\$114,967	\$44,790
Relocation Cost	\$0	\$0	\$0	\$1,727,768	\$0	\$1,727,768	\$1,655,409	\$0	\$1,655,409	\$583,980	\$0	\$583,980	\$397,564	\$0	\$397,564	\$86,807	\$0	\$86,807
Total ATF Cost	\$17,790,353	\$13,220,399	\$4,569,954	\$15,667,931	\$9,132,039	\$6,535,892	\$11,706,162	\$7,764,410	\$3,941,752	\$7,283,736	\$5,850,573	\$1,433,163	\$5,853,345	\$4,123,561	\$1,729,784	\$4,488,332	\$2,985,790	\$1,502,543

EXCESS COST BY FISCAL YEAR

	1811	non-1811	Excess Cost
FY 2021	\$17,790,353	\$13,220,399	\$4,569,954
FY 2020	\$15,667,931	\$9,132,039	\$6,535,892
FY 2019	\$11,706,162	\$7,764,410	\$3,941,752
FY 2018	\$7,283,736	\$5,850,573	\$1,433,163
FY 2017	\$5,853,345	\$4,123,561	\$1,729,784
FY 2016	\$4,488,332	\$2,985,790	\$1,502,543
TOTAL EXCESS COST BY FISCAL YEAR			\$19,713,088

EXCESS COST DETAIL FOR ALL YEARS

Details	EXCESS COST DETAIL
Salary	\$4,142,251
LEAP	\$4,851,457
Retirement - FERS	\$5,509,631
OASDI & Medicare Tax	\$395,977
TSP Contribution (ATF's share)	\$362,245
Relocation Cost	\$4,451,527
TOTAL EXCESS COST	\$19,713,088