



**U.S. OFFICE OF SPECIAL COUNSEL**  
**1730 M Street, N.W., Suite 300**  
**Washington, D.C. 20036-4505**

**The Special Counsel**

May 2, 2023

Dear Mr. President:

I am forwarding to you a report from the U.S. Department of Justice provided to the Office of Special Counsel (OSC) in response to disclosures of wrongdoing at the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). I have reviewed the disclosure, agency report, and the whistleblower comments, and in accordance with 5 U.S.C. § 1213(e), have determined that the findings contain the information required by statute and appear reasonable.<sup>1</sup>

*Allegations*

The whistleblowers, [REDACTED], who consented to the release of their names, were employed within subdivisions of the Office of Human Resources and Professional Development (HRPD) at ATF. Both alleged violations of laws, rules, and regulations; a gross waste of funds; and gross mismanagement arising from ATF's long-standing practice and policy, in furtherance of its Career Plans for Special Agents and Industry Operations Investigators (IOI),<sup>2</sup> of systematically and intentionally misclassifying upper-level non-law-enforcement jobs as law-enforcement positions and recruiting and filling these coveted, primarily supervisory jobs with only special agents or IOIs. The whistleblowers further alleged that despite not performing law enforcement functions, the individuals selected for these positions retained the benefits specific to law-enforcement personnel, including enhanced retirement benefits<sup>3</sup> and Law Enforcement Availability Pay (LEAP).<sup>4</sup> In paying LEAP to persons not actively occupying primary or secondary law enforcement roles, the whistleblowers alleged that the agency failed to comply with the annual certification and legal and policy requirements for payment of LEAP.<sup>5</sup>

---

<sup>1</sup> The allegations were referred to Attorney General William P. Barr for investigation pursuant to 5 U.S.C. § 1213(c) and (d). Authority to sign the agency's final report was delegated to Associate Deputy Attorney General Bradley Weinsheimer.

<sup>2</sup> Positions in the Criminal Investigation Series, 1811, and the General Inspection, Investigation, Enforcement, and Compliance Series, 1801, respectively.

<sup>3</sup> 5 U.S.C. §§ 8401, 8412(d), 8415; 5 C.F.R. §§ 831.902, 842.802.

<sup>4</sup> 5 U.S.C. § 5545a; 5 C.F.R. §§ 550.181 to 550.186.

<sup>5</sup> ATF O 2700.1.

### *Investigative findings*

The agency substantiated the whistleblowers' allegations. After beginning its own internal investigation, the agency deferred to an ongoing routine Office of Personnel Management (OPM) audit for Fiscal Years 2016 to 2021 and ultimately adopted most of OPM's findings, with exceptions noted below. First, OPM found that ATF's Special Agent and IOI Career Plans, mandating 52 weeks of continuous service in permanent positions at ATF headquarters as a prerequisite to advancement, resulted in the use of standardized position descriptions (PDs) that deviated from OPM qualification standards and resulted in the misclassification of these positions. OPM identified 91 misclassified positions in four directorates<sup>6</sup> and ATF self-identified another 17 for a total of 108 affected positions. ATF conceded that 70 of these positions were misclassified but contested the designation of 38 others, arguing that some merely required updated PDs to accurately reflect job duties. ATF requested that OPM reconsider its conclusions regarding those positions and, on January 12, 2022, submitted reconsideration requests for 32 of the 91 positions OPM identified as misclassified.<sup>7</sup> Second, OPM found that the Special Agents occupying misclassified positions continued to receive enhanced retirement and LEAP in violation of law and policy. ATF agreed that this allegation was substantiated.<sup>8</sup> Overall, OPM concluded that ATF leadership demonstrated disregard for Federal human capital management law, regulations, policies, and practices.

For the five-year period audited by OPM, ATF assessed the waste attributable to the misclassification of positions by examining the increased cost incurred in filling such positions with law enforcement personnel instead of with employees qualified for the positions based on the job duties.<sup>9</sup> The agency included the costs associated with payment of LEAP, Federal Employees Retirement System benefits, federal Old-Age, Survivors, and Disability Insurance, Medicare tax, Thrift Savings Plan contributions, and Permanent Change of Station (PCS) reimbursements.<sup>10</sup> The agency has conceded excess costs of at least \$9.7 million over the five-

---

<sup>6</sup>(1) HRPD; (2) the Office of Strategic Management, Director; (3) the Office of Professional Responsibility and Security Operations; and (4) the Office of Public and Governmental Affairs.

<sup>7</sup> ATF also disputed the status of six of the 17 positions that the agency itself self-identified as misclassified. The number of contested positions appears to have remained relatively static (i.e., unresolved) in the two years since the audit.

<sup>8</sup> ATF is continuing to pay LEAP to 16 employees at ATF's National Academy who hold positions that OPM found to be misclassified but which ATF contests are correctly classified. Per ATF, these individuals are required to be available outside of their core responsibilities and are expected to perform other unscheduled overtime duties related to their respective positions.

<sup>9</sup> The whistleblowers argue that because employees were holding positions for which they were wholly unqualified, their entire salaries should have been—but were not—included in calculating the amount of wasted of funds caused by misclassifying positions.

<sup>10</sup> The agency only included the relocation costs for employees moving to fill the misclassified positions and not the relocation costs associated with the movement of these employees back into properly classified positions. The

year period<sup>11</sup> (which accounts for the 70 positions which the agency and OPM agreed were misclassified) but acknowledged that the figure could be as high as \$19.7 million for the same period in the event all 108 positions are conclusively found to be misclassified.<sup>12</sup>

### *Corrective Actions*

In response to these findings, OPM suspended ATF's authority to classify positions within the General Schedule (GS) 1800 law enforcement occupational family, effective November 2, 2020, until matters are resolved to OPM's satisfaction. OPM, DOJ, and AFT have been in ongoing discussions about what is required to address the wrongdoing. Thus far, ATF has discontinued existing career plans for positions in the 1801 and 1811 job series and submitted revised career plans for review and approval. ATF has begun the process of updating PDs to accurately reflect job duties. In May 2021, the agency gave the incumbents in the 70 positions the agencies agree are misclassified three options: (1) reassignment; (2) remaining in the position following reclassification as a non-law-enforcement officer, contingent on the ability to qualify for the position; or (3) retirement that calendar year. As of March 2023, 15 positions were unencumbered and 36 employees had been reassigned to properly classified PDs, 14 had retired, three had been promoted, and two had transferred.

ATF has also taken the following actions: 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; launched a new Human Resources 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 Human Resources Policy and Quality Control Branches. DOJ's Justice Management Division has also hired a 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.<sup>13</sup>

---

agency justified its calculations by arguing that relocation as an extra expense due to misclassification of positions is speculative, particularly as the return relocation costs would, in most if not all instances, have been incurred regardless, as field division positions would have been filled from somewhere else within the organization and, thus, would have required PCS expenditures.

<sup>11</sup> While the OPM audit only covered the period beginning in 2016, the evidence suggests that the illegal practices identified here have been ongoing since at least 2003-2004; thus, the actual waste associated with these practices is much greater than reported.

<sup>12</sup> While the agency may seek recoupment of any overpayments associated with the misclassified positions, it has made the determination to waive the debt owed by the employees occupying misclassified positions, as permitted by 5 U.S.C. § 5584, in light of their good faith reliance on institutional policies.

<sup>13</sup> OPM expressed legitimate concerns regarding the speed and completeness with which ATF is taking such corrective actions; it is within OPM's authority to continue to oversee the corrective action process and it has stated that it will continue the suspension of ATF's GS-1800 classification authority until matters are resolved to OPM's satisfaction. See 5 U.S.C. § 1104(c).

Additionally, to ensure individual accountability for the wrongdoing identified, ATF's Internal Affairs Division is currently investigating the circumstances surrounding the implementation of the illegal policies and practices.

*Whistleblowers' comments*

In their comments, the whistleblowers expressed their views that the report did not adequately capture the extent of ATF's illegal practices or the full impact of the harm. Specifically, the whistleblowers believed that there were many more misclassified positions than were captured in the audit and that the agency significantly underreported the waste directly and tangentially associated with the widespread practice of misclassifying positions. Moreover, they pointed out that the agency did not account for the impact of the wrongdoing on the agency's non-law enforcement employees. Finally, the whistleblowers indicated that ATF has not adequately corrected the wrongdoing, asserting that employees continue to hold positions for which they are unqualified and that it is legally unsupportable to waive the debts incurred by employees who improperly received LEAP.

I have determined that the report contains the information required by statute and that its findings appear reasonable. The whistleblowers' allegations were wholly substantiated, and, under OPM's oversight, the agency has initiated corrective measures. Yet, the agency's findings regarding the full impact and import of the wrongdoing on the functioning of the agency appears incomplete and progress toward full resolution of the problems has been slow. This may be attributable, in part, to the long-standing nature of the problems and the entrenched culture reinforcing the problematic practices. Therefore, I am pleased that OPM continues to monitor ATF's progress in implementing required corrective actions.

As required by 5 U.S.C. § 1213(e)(3), OSC has sent copies of the agency report, this letter, and the whistleblowers' comments to the Chairs and Ranking Members of the Senate and House Judiciary Committees. OSC has also filed redacted copies of these documents and the redacted referral letter in our public file, which is available online at <https://osc.gov/>. This matter is now closed.

Respectfully,

A handwritten signature in black ink, appearing to read "Henry J. Kerner". The signature is fluid and cursive, with a prominent initial "H" and "K".

Henry J. Kerner  
Special Counsel

Enclosures