



U.S. OFFICE OF SPECIAL COUNSEL
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The Special Counsel

June 9, 2020

The Honorable William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

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

Dear Attorney General Barr:

Pursuant to my responsibilities as Special Counsel, I am referring to you for investigation whistleblower disclosures regarding the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). I have determined that there is a substantial likelihood that the whistleblower's allegations disclose violations of law, rule, or regulation; a gross waste of funds; and gross mismanagement. A report of your investigation, including remedial actions if warranted, is due to the U.S. Office of Special Counsel (OSC) by August 10, 2020.

The whistleblowers, [REDACTED], both of whom consented to the release of their names, are employed within subdivisions of the Office of Human Resources and Professional Development (HRPD). Both allege that ATF has a long-standing practice of systematically and intentionally misclassifying non-law-enforcement jobs as law-enforcement positions. They also allege that ATF recruits and hires only special agents or industry operations investigators for these jobs. The whistleblowers allege 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 allegations to be investigated include:

- ATF has misclassified a subset of the human resource (HR) positions within HRPD as supervisory or administrative criminal investigator positions in violation of laws on classification of positions;¹ and
- ATF is providing legally prescribed law-enforcement benefits, specifically enhanced retirement eligibility² 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.⁴

¹ 5 U.S.C. §§ 5102(4), 5106(a), 5107; 5 C.F.R. § 300.103.

² 5 U.S.C. § 8401, 8412(d), 8415; 5 C.F.R. §§ 831.902, 842.802.

³ 5 U.S.C. § 5545a; 5 C.F.R. §§ 550.181 to 550.186.

⁴ ATF O 2700.1.

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The law requires that civilian Executive agency positions, with some exceptions,⁵ be placed in an appropriate class based on the “duties and responsibilities of the position and the qualifications required by the duties and responsibilities.”⁶ Nevertheless, the whistleblowers allege that ATF is misclassifying a subset of GS-14 and -15 headquarters positions as law enforcement positions pursuant to its Special Agent Career Plan to have special agents circulate through headquarters positions to enable them to “operate knowledgeably in fields as diverse as criminal investigation, human resources, accounting and finance, policy, public affairs, politics, media relations.”⁷ Specifically, the whistleblowers allege that the agency classifies non-law-enforcement positions as within the Criminal Investigation Series, 1811, or the General Inspection, Investigation, Enforcement, and Compliance Series, 1801, and then requires significant special agent or industry operations investigator experience as a prerequisite for the jobs so only law enforcement or industry operations personnel are eligible to apply.

The whistleblowers further allege that, despite filling non-law-enforcement roles, the individuals selected for these positions are retaining the benefits specific to law-enforcement personnel, including enhanced retirement benefits and LEAP. The whistleblowers allege that, over the course of years, the agency has committed a gross waste of funds by providing law enforcement benefits and pay for time spent in positions that should be ineligible for that kind of heightened compensation. In order to obtain enhanced retirement benefits or LEAP, a form of premium pay for law enforcement officers, an individual may occupy a secondary law-enforcement position.⁸ In order to qualify as a secondary position, the position must be in a law-enforcement field, be in an organization having a law-enforcement mission, and be either a first-level supervisory position over law-enforcement officers in rigorous positions or be an administrative position for which rigorous law-enforcement experience is a mandatory prerequisite.⁹ Here, the whistleblowers allege that ATF, by misclassifying these positions as law-enforcement positions, made rigorous law-enforcement experience an artificial prerequisite for the positions, so that they would appear to qualify as “secondary law-enforcement positions,” although they are not clearly in the law-enforcement field.¹⁰

Finally, the whistleblowers allege that the agency did not appropriately comply with the annual certification requirement for payment of LEAP for individuals performing non-law-enforcement duties. An agency may only pay LEAP to those criminal investigators whom they annually certify are expected to work or be available to work an average of two hours of unscheduled

⁵ 5 U.S.C. § 5102.

⁶ 5 U.S.C. § 5106(a); *see also* OPM.gov, Handbook of Occupational Groups and Families (December 2018), <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/occupationalhandbook.pdf> (last visited May 18, 2020); *see also* OPM.gov, General Schedule Supervisory Guide, <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/functional-guides/gssg.pdf> (last visited May 18, 2020) (“Positions graded by this guide will continue to be classified in the most appropriate occupational series in accordance with instructions in OPM's Introduction to the Position Classification Standards”).

⁷ ATF O 2311.4B; *see also* ATF O 2311.5A (Industry Operations Career Plan).

⁸ 5 C.F.R. §§ 550.103, 831.902, 842.802.

⁹ *Id.*

¹⁰ *Id.* *See also* 5 U.S.C. § 5105 (classes of positions are defined in terms of their duties, responsibilities, and qualification requirements).

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duty per day.¹¹ The purpose of the law 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.”¹² Agency policy further provides that work necessitating premium pay should be ordered only when “it corresponds to the employees actual work requirements while ensuring a positive financial impact on ATF.”¹³ The whistleblowers assert that it is unlikely that the individuals performing non-law-enforcement duties for these positions are actually required to be available to work required annual hours. Further, the whistleblowers contend that LEAP was not designed to accommodate non-law-enforcement work, and that it would not be in the government’s financial interest to pay premium pay for unscheduled HR work, for instance.

Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the information provided to OSC discloses a violation of law, rule, or regulation and a gross waste of funds. Please note that specific allegations and references to specific violations of law, rule, or regulation are not intended to be exclusive. If, in the course of your investigation, you discover additional violations, please include your findings on these additional matters in the report to OSC. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the report, along with the whistleblower’s comments and any comments or recommendations I may have, to the President and congressional oversight committees, and make these documents publicly available.

Additional important requirements and guidance on the agency report are included in the Appendix, which can also be accessed online at <https://osc.gov/PublicFiles>. If your investigators have questions regarding the statutory process or the report required under section 1213, please contact Elizabeth McMurray, Chief of the Retaliation and Disclosure Unit, at (202) 804-7089 for assistance. I am also available for any questions you may have.

As discussed above, your investigative report, including any remedial actions, if warranted, is due to OSC by August 10, 2020.

Sincerely,



Henry J. Kerner
Special Counsel

Enclosure

cc: The Honorable Michael Horowitz, Inspector General, Department of Justice

¹¹ 5 U.S.C. § 5545a(d); 5 C.F.R. § 550.184; ATF Order 2700.1.

¹² 5 U.S.C. § 5545a(b); ATF Order 2700.1.

APPENDIX

AGENCY REPORTS UNDER 5 U.S.C. § 1213

GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- Should the agency head delegate the authority to review and sign the report, the delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here: <https://osc.gov/PublicFiles>. Please refer to our file number in any correspondence on this matter.

RETALIATION AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. See 5 U.S.C. §§ 1213(f), 1219(a)(1).