

**Special Report - ICE
Should Document Its
Process for Adjudicating
Disciplinary Matters
Involving Senior Executive
Service Employees**





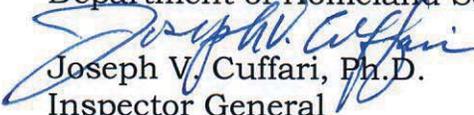
OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

July 20, 2020

MEMORANDUM FOR: The Honorable Randolph D. Alles
Senior Official Performing the Duties of the Under
Secretary for Management¹
Department of Homeland Security

FROM: 
Joseph V. Cuffari, Ph.D.
Inspector General

SUBJECT: Special Report – *ICE Should Document Its Process for
Adjudicating Disciplinary Matters Involving Senior
Executive Service Employees*

For your action is our final report, *ICE Should Document Its Process for Adjudicating Disciplinary Matters Involving Senior Executive Service Employees*. We incorporated the formal comments provided by ICE.

The report contains one recommendation aimed at enhancing fairness and integrity in ICE's disciplinary program. ICE concurred with our recommendation. Based on information provided in ICE's response to the draft report, we consider the recommendation closed and resolved. No further action is required at this time.

Consistent with our responsibility under the *Inspector General Act*, we will provide copies of our report to congressional committees with oversight and appropriation responsibility over the Department of Homeland Security. We will post the report on our website for public dissemination.

Please call me with any questions, or your staff may contact Jackson Eaton, Acting Assistant Inspector General for Special Reviews and Evaluations, at (202) 981-6000.

¹ We are sending this report to you because ICE's Deputy Director and Senior Official Performing the Duties of the Director and ICE's Executive Associate Director for Homeland Security Investigations and Senior Official Performing the Duties of the Deputy Director were both personally involved in the matters discussed in the report.



DHS OIG HIGHLIGHTS

ICE Should Document Its Process for Adjudicating Disciplinary Matters Involving Senior Executive Service Employees

July 20, 2020

Why We Did This Special Review

We conducted a review of U.S. Immigration and Customs Enforcement's (ICE) policies and procedures regarding Senior Executive Service (SES) employee discipline. We undertook this review after receiving an allegation that a former ICE SES official received favorable treatment during disciplinary proceedings.

What We Recommend

We made one recommendation aimed at enhancing fairness and integrity in ICE's disciplinary program.

For Further Information:

Contact our Office of Public Affairs at (202) 981-6000, or email us at DHS-OIG.OfficePublicAffairs@oig.dhs.gov

What We Found

We found that ICE does not follow its written policy when conducting disciplinary reviews of SES employees. This practice risks creating an appearance that SES employees receive more favorable treatment than non-SES employees.

We reviewed the disciplinary proceedings of a former ICE SES official to evaluate whether ICE's deviation from the written policy, or any other evidence, in that case indicated that the employee received favorable treatment, as alleged. We did not find evidence of actual favoritism or inappropriate influence in the employee's disciplinary or security clearance review processes.

ICE Response

ICE concurred with our recommendation. Prior to our issuing this final report, ICE took action to resolve and close our recommendation.



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

Background

Federal employees are expected to maintain high standards of conduct, and agencies are expected to discipline employees who do not meet those standards. When agencies do not effectively address misconduct, it can hurt the agency's mission and employee morale and productivity.

U.S. Immigration and Customs Enforcement (ICE) has a series of policies designed to ensure accountability among its employees. For example:

- The Employee Code of Conduct “set[s] forth general standards of conduct” that all employees are expected to follow.
- The Table of Offenses and Penalties identifies the most common types of misconduct and provides suggested ranges of penalties for each.
- The Discipline and Adverse Action Operating Procedures (DAAP) establishes “the standard process for administering all discipline and adverse actions” for ICE employees.

In combination, the Code of Conduct tells ICE employees how to “maintain the highest standards of integrity and professionalism” required of them, and the DAAP and Table of Offenses and Penalties promote “fairness and consistency” when employees do not meet those standards. With limited exceptions, all three policies expressly apply to all ICE employees.

The need for accountability, fairness, and consistency is even greater when members of the Senior Executive Service (SES), the leaders of the Federal workforce, commit misconduct. Employees often follow the example of their managers and senior leadership, and if they do not believe their leaders are held accountable for misconduct, employees may engage in similar behavior. Therefore, the U.S. Department of Homeland Security Office of Inspector General (OIG) conducted a review of ICE's policies and procedures regarding SES employee discipline. We undertook this review after receiving an allegation that a former ICE SES official (the Employee) received favorable treatment during disciplinary proceedings.

Results of Review

We found that ICE does not follow its written policy when conducting disciplinary reviews of SES employees. This practice risks creating an appearance that SES employees receive more favorable treatment than non-SES employees. We reviewed the disciplinary proceedings of the Employee to evaluate whether ICE's deviation from the written policy, or any other evidence,



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

in that case indicated that the Employee received favorable treatment, as alleged. We did not find evidence of actual favoritism or inappropriate influence in the Employee's disciplinary or security clearance review processes.

ICE Does Not Follow Its Written Policy When Appointing Officials to Adjudicate SES Disciplinary Proceedings

The DAAP explicitly "applies to all ICE Programs, except for Bargaining Unit Personnel and Personnel within the Office of the Principal Legal Advisor." Despite this clear statement, attorneys in ICE's Office of the Principal Legal Advisor (OPLA) told DHS OIG the DAAP does not apply to ICE SES employees. In particular, OPLA officials noted they do not follow the DAAP when appointing the Proposing and Deciding Officials in SES disciplinary cases.² Under the DAAP, the Discipline and Adverse Action Panel (the Panel) serves as the Proposing Official. If the Panel recommends a penalty, the head of the employee's office serves as the Deciding Official. This "ensures that ultimate accountability remains within the employee's chain of command." The DAAP does not address recusals of disciplinary officials.

OPLA officials told us the Panel is not involved in SES disciplinary cases. According to a senior OPLA official, this is because the Panel typically consists of GS-14 and GS-15 employees, and ICE considers it inappropriate for those employees to evaluate potential discipline for more senior employees, who in some cases, could be in the Panel members' chain of command. Instead, an SES employee's first-line supervisor replaces the Panel as the Proposing Official, and the employee's second-line supervisor replaces the employee's office head as the Deciding Official. The chain of command can also be recused, in which case ICE will name other management officials outside of the chain of command to be the Proposing Official and Deciding Official.

A senior OPLA official told us, and ICE data appears to confirm, that ICE has followed this process for SES disciplinary cases since at least 2011. Since 2011, there have been three disciplinary reviews of SES employees that involved Proposing Officials, and all used a single Proposing Official rather than the Panel.³ In one case, the Proposing Official was a senior official in the

² The Proposing Official considers the evidence, determines potential charges of misconduct, and recommends penalties. After the Proposing Official issues a Notice of Proposal, the Deciding Official considers the proposal, the employee's reply to the proposed action, ICE's Table of Offenses and Penalties, and any mitigating or aggravating factors, and then makes the final decision on the proposed action. Additionally, an OPLA attorney provides legal guidance and advice, and ensures that charges and penalties are supported by legally sufficient evidence.

³ In the same timeframe, three additional SES employees received letters of reprimand or letters of counseling, but Proposing Officials were not appointed in those instances. The DAAP does not require a Proposing Official when such a letter is issued.



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

employee's chain of command, and proposed no action, so there was no Deciding Official. In the other two cases, including the Employee's, the chain of command was recused, so senior officials from a different ICE office were appointed as the Proposing and Deciding Officials.

The DAAP says it ensures "misconduct violations are dealt with fairly, equitably, and consistently in the ICE community," and decisions are made "regardless of rank, position, geographical assignment, or relationship with the employee involved." On their face, these statements appear to apply to SES and more junior employees alike, and to create a level disciplinary playing field for all. Carving out SES members from this policy in practice, without documenting a separate SES disciplinary policy designed to ensure fairness and consistency, creates the appearance of impropriety and special treatment, even if that is not the case.

While OPLA provided DHS OIG with a draft of a new policy that addresses SES members, that policy has not been finalized.

DHS OIG Found No Evidence of Favoritism or Undue Influence in the Employee's Disciplinary Process

Following the Employee's disciplinary proceedings, which deviated from ICE's written policy in some respects, ICE's decision not to terminate the Employee or rescind his security clearance resulted in complaints that the Employee had received favorable treatment. While diverging from the documented disciplinary policy may create the appearance that SES officials receive preferential treatment, we found no evidence of actual favoritism or undue influence in the Employee's disciplinary process or in the review of his security clearance. OPLA attorneys and others took steps to promote a fair process, and the decision makers offered legitimate and credible reasons for the outcomes.

Supervisors in the Employee's chain of command were recused from the disciplinary process, and OPLA officials appointed senior management officials from a different ICE office as the Proposing and Deciding Officials.⁴ The officials who made the ultimate decisions about the Employee's discipline did not know the Employee and thus had no apparent reason to provide favorable treatment to him. The Proposing Official told us he had never met the Employee, and the Deciding Official said he did not personally know and had not worked with the Employee. We collected and reviewed emails from the Employee's chain of command, and found no communications attempting to influence the Proposing Official or Deciding Official, or any indications that

⁴ The discipline file does not indicate why the chain of command was recused, and the DAAP does not require reasons for recusals to be documented in the disciplinary record.



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

such communications may have occurred.⁵ Thus, we identified no evidence of external influence on the process.

Additionally, the disciplinary officials provided reasonable explanations for their decisions that were supported by the contemporaneous case file. The Proposing Official originally considered proposing a 60-day suspension, but the Employee would have remained an SES manager after the suspension. The Proposing Official did not think the misconduct warranted removal, but he believed the Employee should no longer be in a supervisory position. However, OPLA advised him that agencies cannot propose demotions for SES officials.⁶ As a result, the Proposing Official proposed removing the Employee because it was the only way to take him out of a supervisory role.⁷

The Deciding Official also did not believe the Employee should be removed from the agency. He said the Employee acknowledged his inappropriate behavior, was proactive in seeking help, and served for more than 25 years without being disciplined for any misconduct. However, he believed the Employee should be removed from the SES and any supervisory role.⁸ Consequently, when the Employee's attorneys proposed a settlement that would involve a demotion, the Deciding Official supported that approach.⁹ Ultimately, the Employee was demoted from a very senior SES position to a non-SES, non-supervisory

⁵ One senior official in the Employee's office recalled occasionally conversing with the Deciding Official about the status of the case because he wanted to determine whether he should find a permanent replacement for the Employee's job or if the Employee might return to the position. We found no evidence to suggest these communications tainted the disciplinary process.

⁶ Agencies may suspend SES employees for more than 14 days or remove them, but may not demote them as a form of discipline for misconduct. See 5 U.S.C. §§ 7542-7543; 5 C.F.R. §§ 752.601, 752.603.

⁷ An OPLA attorney who worked on the matter confirmed the Proposing Official considered a suspension but was concerned about the Employee remaining a supervisor. Additionally, the Notice of Proposal ICE issued to the Employee also reflects the Proposing Official's concern about the Employee's managerial role: "I was particularly concerned with your behavior as it related to your supervisory responsibilities and membership in the Senior Executive Service (SES)" and "Your actions breached the trust and responsibility placed on you as a senior leader of the organization."

⁸ The OPLA attorney who worked on this matter also told DHS OIG the Deciding Official considered the Employee's many years of positive service and his taking responsibility for his misbehavior as mitigating factors. These factors are also noted on a form memorializing the Deciding Official's analysis, which he signed as he was completing the disciplinary process. Of particular significance, the form states, "I have no concerns with [Employee's] ability to perform in a non-supervisory role, but I am concerned with his ability to hold a supervisory position. Given that his conduct involved several [people] who were in positions sometimes several levels below [him], I have doubts about his ability to conduct himself appropriately as a supervisor."

⁹ Although agencies may not demote SES employees as a form of discipline for misconduct, SES employees may voluntarily request demotions as part of a settlement or otherwise.



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

position. Following the Employee's demotion, his earnings were approximately 10.8 percent less than he earned before his misconduct came to light.¹⁰

After the Employee's office identified a potential non-SES, non-supervisory position for the Employee, ICE's Office of Professional Responsibility (OPR) conducted a review and determined the Employee was eligible to maintain the security clearance necessary for that position. The security clearance adjudicator, his supervisor, and OPR leadership all asserted the determination was made by the adjudicator, based on the appropriate criteria, and without any outside influence. Additionally, we did not find any indication of undue influence in the emails we collected from the relevant officials.

Some witnesses did raise that, for the first time they could recall, OPR leadership prevented the security clearance adjudicator from requesting information from the Employee that the adjudicator believed was necessary to determine the Employee's eligibility. However, this appears to be the result of miscommunication among OPR leadership rather than an attempt to give the Employee preferential treatment.¹¹

The adjudicator ultimately determined he had enough information to find the Employee eligible for the security clearance without sending the request to the Employee. The request sought information about whether the Employee was trying to keep his misbehavior secret, because the adjudicator was concerned about the potential for blackmail or coercion. In the intervening months, the Employee's misconduct and discipline became more publicly known, and so the adjudicator believed the risk of blackmail was mitigated.¹² His supervisor confirmed to DHS OIG the adjudicator would not have reached this determination if there were any remaining concerns.

¹⁰ DHS OIG also analyzed other non-public information related to actions ICE took with respect to the Employee. This information, coupled with the Employee's demotion and reduction in salary, further indicated that the Employee was not the beneficiary of preferential treatment.

¹¹ The OPR Associate Director instructed ICE's Chief Security Officer (CSO) to coordinate the security clearance adjudication with OPLA's disciplinary process. The CSO believed she should temporarily put the information request on hold while she coordinated with OPLA, but the OPR Associate Director did not believe he specifically told her to hold it. It is unclear if the CSO ever spoke with OPLA, and she never provided any further instructions to the security clearance adjudicator.

¹² An email dated a few weeks before the information request was going to be sent indicates that OPR's only remaining concern was the potential for blackmail. Additionally, when the adjudicator made his decision, he signed a memorandum documenting why he no longer had that concern.



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

Conclusion

By failing to document how it handles SES disciplinary matters, ICE makes itself vulnerable to the appearance of favoritism in its disciplinary reviews of SES employees. While ICE's handling of the Employee's disciplinary proceedings deviated from the written policy, our review of the matter did not reveal evidence of actual favoritism or undue influence in the Employee's disciplinary or security clearance review processes.

Recommendations

We recommend the Deputy Director and Senior Official Performing the Duties of the Director of ICE:

Recommendation 1: Finalize and issue its draft policy documenting the process for disciplining SES members.

Management Comments and OIG Analysis

ICE provided technical comments and formal management comments in response to our draft report and concurred with our recommendation. We addressed the technical comments throughout our report as appropriate and included a copy of ICE's management comments in their entirety in Appendix B. A summary of ICE's response and our analysis follows.

Response to Recommendation 1: ICE concurred with the recommendation. On December 3, 2019, the ICE Deputy Director and Senior Official Performing the Duties of the Director signed ICE Directive 30012.2, *Disciplinary and Adverse Action*.

OIG Analysis of ICE's Response: We reviewed ICE's new directive and confirmed it specifies the Proposing and Deciding Officials in SES disciplinary cases. This corrective action is sufficient to resolve and close the recommendation. No further action is required.



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

Appendix A **Objective, Scope, and Methodology**

The U.S. Department of Homeland Security Office of Inspector General (OIG) was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*.

The objective of this special report was to evaluate U.S. Immigration and Customs Enforcement (ICE) policies and procedures regarding Senior Executive Service (SES) employee discipline after complaints were raised that a former ICE SES official received favorable treatment during disciplinary proceedings. We conducted fieldwork for this review between May 2018 and September 2018. We interviewed employees from ICE Enforcement and Removal Operations, Homeland Security Investigations, Office of Principal Legal Advisor, and Office of Professional Responsibility. We also reviewed relevant DHS and ICE directives, guidance, policies, and procedures; documents and communications related to disciplinary processes and security clearance eligibility; individual disciplinary and security clearance review files; and emails from six relevant individuals.

We conducted this special review in accordance with the DHS OIG Special Reviews Group's quality control standards and the *Quality Standards for Federal Offices of Inspector General* issued by the Council of the Inspectors General on Integrity and Efficiency. These standards require that we carry out work with integrity, objectivity, and independence, and provide information that is factually accurate and reliable. This report reflects work performed by the DHS OIG Special Reviews Group pursuant to Section 2 of the *Inspector General Act of 1978*, as amended. Specifically, this report provides information about ICE's handling of SES employee discipline for the purpose of keeping the Secretary of DHS and Congress fully and currently informed about problems and deficiencies relating to the administration of DHS programs and operations and the necessity for and progress of corrective action. This report is designed to promote the efficient and effective administration of, and to prevent and detect fraud, waste, and abuse in, the programs and operations of DHS.

The Office of Special Reviews and Evaluations major contributors to this report are Matthew Neuburger, Director; Gregory Flatow, Senior Program Analyst; Jonathan Parnes, Investigative Counsel; and Hilary Ervin, Data Analyst.



OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

Appendix B
ICE's Response to the Draft Report

Office of the Chief Financial Officer

U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536



**U.S. Immigration
and Customs
Enforcement**

April 30, 2020

MEMORANDUM FOR: Joseph V. Cuffari, Ph.D.
Inspector General

FROM: Stephen A. Roncone STEPHEN A. Roncone
Chief Financial Officer and Digitally signed by
Senior Component Accountable Official STEPHEN A. RONCONE
Date: 2020.04.30
07:39:25 -0400

SUBJECT: Management Response to Draft Report: "ICE Should Document its Process for Adjudicating Disciplinary Matters Involving Senior Executive Service" (Project No. 18-SRG-8)

Thank you for the opportunity to comment on this draft report. U.S. Immigration and Customs Enforcement (ICE) appreciates the work of the Office of Inspector General (OIG) in planning and conducting its review and issuing this report.

ICE is pleased to note OIG's positive recognition that auditors found no evidence of favoritism or inappropriate influence in the disciplinary or security clearance processes of the former ICE official who was the subject of this review. ICE also notes OIG's reporting that ICE has policies in place designed to ensure accountability, maintain the highest standards of integrity and professionalism, and promote fairness and consistency.

ICE is committed to abiding by standards of conduct that promote integrity and professionalism, conforming to established ethical principles, and advancing efficiency within the Federal Government in a manner that merits the respect of the public we serve.

The draft report contained one recommendation, with which ICE concurs. Attached find our detailed response to the recommendation. ICE previously submitted technical comments under a separate cover for OIG's consideration.

Again, thank you for the opportunity to review and comment on this draft report. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

Attachment

www.ice.gov



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

Attachment: Management Response to Recommendations Contained in Project No. 18-SRG-8

OIG recommended that the Deputy Director and Senior Official Performing the Duties of the Director of ICE:

Recommendation: Finalize and issue its draft policy documenting the process for disciplining SES members.

Response: Concur. On December 3, 2019, the ICE Deputy Director and Senior Official Performing the Duties of the Director signed ICE Directive 30012.2, "Disciplinary and Adverse Action." In Appendix A, the revised directive specifically documents the process ICE consistently follows for SES disciplinary cases. The directive was also announced by the Deputy Director and Senior Official Performing the Duties of the Director to all ICE employees in a broadcast message on December 10, 2019. ICE previously submitted this revised directive and the broadcast message to the OIG under a separate cover.

We request that the OIG consider the recommendation resolved and closed, as implemented.



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

Appendix C **Report Distribution**

Department of Homeland Security

Secretary
Deputy Secretary
Chief of Staff
Deputy Chiefs of Staff
General Counsel
Executive Secretary
Director, GAO/OIG Liaison Office
Under Secretary, Office of Strategy, Policy, and Plans
Assistant Secretary for Office of Public Affairs
Assistant Secretary for Office of Legislative Affairs
ICE Audit Liaison

Office of Management and Budget

Chief, Homeland Security Branch
DHS OIG Budget Examiner

Congress

Congressional Oversight and Appropriations Committees

Additional Information and Copies

To view this and any of our other reports, please visit our website at:
www.oig.dhs.gov.

For further information or questions, please contact Office of Inspector General
Public Affairs at: DHS-OIG.OfficePublicAffairs@oig.dhs.gov.
Follow us on Twitter at: @dhsoig.



OIG Hotline

To report fraud, waste, or abuse, visit our website at www.oig.dhs.gov and click on the red "Hotline" tab. If you cannot access our website, call our hotline at (800) 323-8603, fax our hotline at (202) 254-4297, or write to us at:

Department of Homeland Security
Office of Inspector General, Mail Stop 0305
Attention: Hotline
245 Murray Drive, SW
Washington, DC 20528-0305