



U.S. Department of Justice  
Office of the Inspector General  
Evaluation and Inspections Division

# **Review of the Drug Enforcement Administration's Disciplinary System**

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## EXECUTIVE DIGEST

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The Office of the Inspector General (OIG) conducted this review to assess the effectiveness of the Drug Enforcement Administration's (DEA's) system for investigating allegations of employee misconduct and disciplining employees who are found to have committed misconduct in a reasonable and timely manner. Specifically, we reviewed whether allegations of misconduct were properly reported to and investigated by DEA's Office of Professional Responsibility (OPR); disciplinary penalties were fair and reasonable; the overall process was conducted in a timely manner; and the system was fairly administered.

The DEA established its current disciplinary system in December 1984, in response to a Title VII class action lawsuit filed by African-American special agents. In that lawsuit, the United States District Court (Court) for the District of Columbia found that the DEA's disciplinary practices (among other personnel practices) were discriminatory, and ordered the DEA to implement a non-discriminatory disciplinary system. The resulting three-tiered, centralized system consists of the OPR, which investigates allegations of employee misconduct; the Board of Professional Conduct (Board), which determines whether misconduct occurred and proposes disciplinary action; and the Deciding Officials, who make the final disciplinary decision.

### **RESULTS IN BRIEF**

We found that the DEA's system for investigating employee misconduct generally functioned well. The investigations of alleged misconduct in general appear to be thorough and well documented, and provide a sound basis for making disciplinary decisions. We also concluded that the DEA usually imposed reasonable and relatively consistent discipline for confirmed misconduct.

However, we found problems in various cases that revealed weaknesses in DEA's disciplinary system. Weaknesses included inadequate guidance and the possible failure of the Deciding Officials to properly consider the Board's mitigation before applying additional mitigating factors which resulted in penalties that appear to be too lenient; the improper consideration of personal experience and opinion, and external factors by Board members and a Deciding Official when making disciplinary decisions; a failure to adequately document disciplinary decisions by the Board and Deciding Officials; the failure of DEA management to monitor the timeliness

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of the disciplinary process; and a lack of management oversight over the Deciding Officials.

**Weak Guidance and Mitigation by Both the Board and the Deciding Officials Leads to Lenient Penalties.** During our review, we found that the penalties imposed by the DEA for confirmed misconduct sometimes appeared overly lenient. In 9 of the 70 cases that we reviewed, involving 13 subjects, we concluded that the facts established by the OPR investigation or comments made by Board members in the supporting documentation justified a stronger penalty than was imposed by the Deciding Official.

We identified several factors that appeared to encourage the lenient penalties. The DEA's Schedule of Disciplinary Offenses and Penalties (Schedule) was last updated in 1992 and does not communicate DEA management's priorities. The defined offenses are generic and not DEA-specific, and the penalties – usually ranging from a Letter of Reprimand to Removal for each offense – are too broad to serve as effective guidance for the Board and Deciding Officials. Another factor that contributed to lenient penalties is that Deciding Official may mitigate the penalty without properly taking into consideration that mitigating factors that the Board already applied. This can result in penalties that may be reduced below the level that is appropriate for the offense.

**Board Members and a Deciding Official Sometimes Improperly Consider Personal Experiences or Opinions, or External Factors When Making Disciplinary Decisions.** In several cases we reviewed, we found comments that indicated Board members sometimes used personal experiences or opinions to influence their determinations. Also, prior to making a decision, one Deciding Official would sometimes contact employees' supervisors or others to obtain information about the employees. This was not consistent with DEA regulations that direct Deciding Officials to consider only the OPR investigative case file, the Board's proposal, and any written or oral statement by the employee.

**The Board and Deciding Officials Do Not Adequately Document All Disciplinary Decisions.** We could not determine the full extent to which imposed penalties may be too lenient and external factors were improperly considered because the documentation in many of the files was insufficient. In some cases, the Board members did not document the rationale for their disciplinary proposals. In other cases where individual Board members disagreed, the Board Chairman did not document his rationale for the final proposal. Also, in some cases the advice provided to

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the Board or the Deciding Officials by the Office of Chief Counsel was not documented. We also found that the Deciding Officials did not sufficiently document their reasoning when they deviated from the Board's proposed charges and penalties. Further, adverse action files frequently lacked documentation of the written or oral statements made by the employees in response to disciplinary proposals. In several cases, the Deciding Officials mitigated penalties based on these statements, but without documentation we were unable to determine whether the mitigations were appropriate.

**DEA Management Failed to Monitor and Ensure the Timeliness of the Disciplinary Process.** We found that during fiscal year (FY) 2001 and FY 2002, the DEA experienced excessive delays in processing disciplinary cases. During this period the delays occurred primarily at the Board, with backlogs of 60 to 110 cases from September 1999 through January 2002, resulting in processing delays of 90 to 120 days. These delays occurred because of staffing shortages at the Board and a requirement that the Board Chairman review every case file and sign all proposal letters for disciplinary action. We also found another source of delay – the requirement that the Board review field reports pertaining to routine official government vehicle (OGV) accidents and losses of government property.

According to the Board Chairman, during 2002 the DEA addressed the backlog by adding staff to the Board and permitting the Board Chairman to delegate review authority to another Board member for those cases where the proposed penalty was less than a 15-day suspension. Nonetheless, the backlog persisted for more than 29 months before the DEA took corrective action.

Moreover, we were unable to determine the current status of the DEA's disciplinary caseload because the DEA has no overall mechanism in place to track disciplinary cases as they progress through the system. Each of the three entities in the system maintains its own database. While OPR can use its database to track the timeliness of its investigations, neither the Board members nor the Deciding Officials can use their databases for that purpose. Instead, their databases are primarily repositories of prior proposals and decisions, which are used as a reference to ensure consistency when determining disciplinary penalties. In 2002 the DEA began developing a centralized disciplinary database, which should enable the DEA to better monitor timeliness.

**Lack of Management Oversight over the Deciding Officials.** We found that although the decisions of both OPR and the Board undergo review, there is no commensurate accountability for the Deciding Officials.

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Specifically, the DEA's disciplinary system lacks any mechanism to review final decisions when there is a significant discrepancy between the findings of the investigation, the Board's proposed charges and penalties, and the Deciding Official's final determination.

**Survey Finds Some DEA Employees Perceive Disparate**

**Treatment.** In a survey of 50 DEA employees, 70 percent (35 employees) stated that they believed the DEA discipline system treated employees equitably. The remaining 30 percent stated either that DEA special agents or higher-graded employees received more favorable treatment. A complete evaluation of disciplinary disparity would require comparison of similar offenses and a methodology to account for inherent differences in the number and types of offenses that different groups may commit.<sup>1</sup> This kind of comprehensive analysis was beyond the scope of this review. The data that we reviewed for indications of disparity was mixed and inconclusive as to whether a dual standard of discipline exists.

For example, we found that allegations referred to OPR appeared to be investigated thoroughly and that, in most cases, the discipline administered for confirmed misconduct was reasonable. We also found that DEA special agents are investigated and disciplined at a higher rate than they are represented in the DEA workforce. Our examination of discipline cases involving SES employees found that the penalties appeared to be appropriate. We also found that employees in all grade levels were equally likely to be disciplined. All of the above facts tend to indicate that special agents and higher graded employees are not treated more favorably than other DEA employees. However, we also found that of the 13 individuals who we found received unreasonably lenient penalties, 12 were special agents. We also found that investigations of lower-graded employees resulted in termination more often than for other employees. Because the data that was available was mixed, we cannot conclusively prove or disprove the validity of some DEA employees' perception that special agents or higher-graded employees are treated more leniently.

**Weaknesses Leave DEA Discipline System Vulnerable to Abuse.**

The problems we found with the lenient penalties, improper consideration of

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<sup>1</sup> For example, employees who do not carry guns or arrest people are unlikely to, or cannot, commit the types of serious offenses that may result from those activities. Therefore, an evaluation of disciplinary actions across groups cannot simply compare penalties imposed to assess consistency. Instead, to properly evaluate whether different groups are treated consistently, each case must be evaluated using a methodology that can account for a variety of relevant factors. Such an analysis was beyond the scope of this review.

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external factors, incomplete documentation, and lack of management oversight of the Deciding Officials leave the DEA discipline system at risk of being abused. That risk was borne out in a case that the OIG investigated and referred to the DEA for appropriate discipline. In that case, an off-duty DEA supervisory special agent detained his stepdaughter's 17-year-old boyfriend at gunpoint after they returned from a late-night rendezvous. The DEA agent also failed to inform the police when they arrived that he had detained the boy at gunpoint. The Board concluded that the agent had committed misconduct and proposed that he be suspended for seven days. However, the Deciding Official dismissed the charges, summarily declaring that the agent had not committed misconduct without any explanation or rationale for his decision.

## **RECOMMENDATIONS**

We make eight recommendations to help the DEA ensure that its disciplinary decisions are reasonable, free of inappropriate external influences, well-documented, and timely. These recommendations include better guidance for the Board and Deciding Officials in making their disciplinary determinations, establishing standards to improve the timely processing of disciplinary cases, and requiring more effective DEA management of the overall disciplinary process. We recommend that the DEA:

1. Provide better guidance to the Board and Deciding Officials on the factors that may be considered in making disciplinary determinations by: a) updating the Schedule of Disciplinary Offenses and Penalties; b) updating written procedures to guide the operations of the Board and Deciding Officials; and c) instructing the Deciding Officials to limit their disciplinary considerations to the information contained in official DEA files and information provided by employees or their authorized representative.
2. Ensure that the DEA document the Douglas factors considered in making its disciplinary decisions.
3. Require that documentation maintained by the Board and Deciding Officials regarding each disciplinary case include: a) the opinions of each Board member assigned to review a case and the rationale for the Chairman's proposal in those instances when the individual Board members disagree; b) any advice from outside sources, such as the Office of Chief Counsel; and c) all oral and written statements made by employees to Deciding Officials.

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4. Require that when the final disciplinary decisions differ from the proposed charges and penalties, the final decision letter contain a detailed explanation of the reasons for the difference.
  5. Require that the Board and the Deciding Officials establish performance measures for timeliness, and record the amount of time it takes to process each case.
  6. Designate a single office to monitor the three-tiered system and prepare reports describing disciplinary activities, including, at a minimum: a) the processing timeframes for OPR, the Board, and the Deciding Officials; b) statistics on offenses committed and disciplinary actions taken; c) trend analyses showing increases or decreases in specific offenses committed; and d) a description of disciplinary decisions where the final charges or penalties varied significantly from the Board proposal.
  7. Require that the DEA Inspection Division periodically review a sample of closed disciplinary case files to assess whether the basis for the disciplinary decisions was adequately documented.
  8. Delegate responsibility for reviewing instances of routine OGV accident and losses of government property cases that do not involve misconduct issues to the appropriate special agents in charge and office heads.

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## INTRODUCTION

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### **Purpose**

Title 5, United States Code, Chapter 75 establishes the legal framework for federal agencies to address employee misconduct through adverse actions, such as suspensions, demotions, and removals. It states that employees may be disciplined “for such cause as will promote the efficiency of the service.” In other words, an agency may take disciplinary action when an employee’s misconduct or unacceptable performance interferes with the agency’s ability to carry out its mission. In addition to the adverse actions delineated in Chapter 75, agencies also impose other discipline, such as oral and written admonishments.

The Office of the Inspector General (OIG) reviewed the DEA’s disciplinary system to assess how the DEA investigates allegations of employee misconduct, and how it imposes and enforces discipline for substantiated allegations. Specifically, we reviewed whether allegations of misconduct were properly reported and investigated; disciplinary penalties were fair and reasonable; the overall process was conducted in a timely manner; and the system was fairly administered.

### **Background**

To maintain an orderly, productive work environment, each agency should implement a disciplinary system for employees that communicates the behaviors that are unacceptable, provides penalties to deter employees from exhibiting the unacceptable behaviors, and consistently penalizes inappropriate behavior. In implementing a disciplinary system, agencies should identify standards of conduct that define the actions that interfere with the performance of the agency’s mission. Agencies also may issue a schedule of penalties that are imposed upon employees who violate the standards of conduct. The DEA’s Standard Schedule of Discipline Offenses and Penalties was last revised in 1992.

Federal agencies have leeway in determining disciplinary penalties; the only requirement is that the penalty be reasonable. To help determine reasonability, in a 1981 decision the Merit Systems Protection Board (MSPB)

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established 12 factors, known as “Douglas factors,” for agency officials to consider when determining disciplinary actions.<sup>2</sup>

The Douglas factors are used to either mitigate (reduce) or aggravate (increase) a proposed penalty when an employee commits an offense. For example, a long-term employee with no prior disciplinary history and an excellent performance record may receive a reduced penalty compared to an employee committing the same offense who has been disciplined previously and has a poor performance record.

Employees who are suspended for more than 14 days, demoted, or removed have the right to appeal to the MSPB.<sup>3</sup> In the Douglas decision, the MSPB established its authority to mitigate agency-imposed penalties that it determines are “clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable.” The MSPB also stated that it will mitigate agency-imposed penalties if the agency fails to weigh the relevant factors or clearly exceeds the limits of reasonableness.

### **History of the DEA Disciplinary System**

The DEA’s disciplinary system has changed over the years from a decentralized to a centralized system. When the DEA was created in 1973, regional field directors and headquarters office heads made all disciplinary proposals and decisions. This decentralized system resulted in complaints from DEA employees of inequitable treatment because they believed field managers in different regions were not imposing consistent penalties for similar offenses. In February 1977, African-American special agents filed a

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<sup>2</sup> The Douglas factors were established as a result of the case of Curtis Douglas v. Veterans Administration, 5 MSPR 280, 5 MSPB 313 (1981). The Douglas factors are: (1) the nature and seriousness of the offense, (2) the employee’s position, (3) the employee’s prior disciplinary history, (4) the employee’s length of service and prior work record, (5) the effect of the offense on the employee’s ability to perform the job, (6) the consistency of the penalty with those imposed upon other employees committing the same or similar offenses, (7) the consistency of the penalty with the agency’s penalty guidelines, (8) the notoriety of the offense, (9) the clarity of the employer’s rules, (10) the potential of the employee for rehabilitation, (11) mitigating circumstances, and (12) The adequacy and effectiveness of alternative sanctions. The MSPB oversees the federal government’s merit-based system of employment and adjudicates employee appeals of personnel actions, such as removals, suspensions, or demotions.

<sup>3</sup> Employees have the right to appeal lesser penalties through their agency’s administrative grievance procedures.

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Title VII class action lawsuit against the DEA alleging racial discrimination in personnel and disciplinary practices.<sup>4</sup>

In response, in 1980 the DEA created the Board of Professional Conduct (Board), consisting of two Board members and one Board Chairperson, which proposed penalties for cases involving integrity issues or official government vehicle (OGV) misuse.<sup>5</sup> Despite the creation of the Board, the disciplinary system remained largely decentralized because special agents in charge (SAC) and office heads still rendered the final disciplinary decisions. In addition, SACs and office heads were the proposing officials and the deciding officials for disciplinary cases that did not involve integrity issues or OGV misuse.

As a result of the Title VII lawsuit, on February 6, 1981, the United States District Court for the District of Columbia (Court) ordered the DEA to conduct validity studies for implementing a non-discriminatory personnel system, including a disciplinary system. Another Court order, issued on February 17, 1982, required the DEA, upon completion of the validity studies, to “proceed to develop and implement new, non-discriminatory employment systems with respect to...discipline.”

In October 1982, the DEA centralized its disciplinary system by requiring that headquarters officials make all disciplinary decisions for proposed penalties in excess of a 14-day suspension. In December 1984, the DEA required that the Deciding Officials at headquarters make decisions for all proposed disciplinary actions.

The DEA subsequently hired a contractor to review the revised disciplinary system and “determine whether punishment was being administered in a fair, equitable and non-discriminatory manner.” While the study primarily reviewed factors related to race and gender, it also reviewed other factors such as geographic location of the employee, the size of the office, and the employee’s grade. The study, issued in April 1987, concluded:

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<sup>4</sup> Segar v. Civiletti, 508 F. Supp. 690 (D.D.C. 1981), aff’d in relevant part subnom. Segar v. Smith, 738 F. 2d 1249 (D.C. Cir. 1984), cert. denied subnom. Meese v. Segar, 471 U.S. 1115 (1985).

<sup>5</sup> Integrity issues involve violations of the DEA’s Standards of Conduct. Examples include perjury or false statements concerning official matters, unauthorized disclosures of sensitive information, narcotics use, improper use of official position, evidence tampering, and improper associations.

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In general, the centralized conduct and discipline system in use appears to be achieving its goals of providing a fair, equitable, and non-discriminatory review of serious conduct and integrity violations by DEA Special Agents. In addition, the system seems to result in fair and non-discriminatory disciplinary actions.<sup>6</sup>

In September 1988, the Court ruled that the DEA's disciplinary system met its requirements. Since then, there have been only minor modifications to the disciplinary system, such as the establishment of two full-time Deciding Official positions.

On July 11, 2001, the Attorney General signed an order giving the OIG jurisdiction to investigate allegations of misconduct against DEA employees. Accordingly, an OIG investigator reviews all allegations of DEA misconduct to determine if the OIG will conduct the investigation. The OIG normally investigates cases that involve criminal matters, non-criminal allegations against senior DEA employees, or cases where there is a particular reason for the OIG to investigate, such as if the DEA would have a conflict of interest. If the OIG declines to investigate, DEA's Office of Professional Responsibility (OPR) conducts the investigation.

### **Overview of the DEA's Disciplinary System**

The entities that implement the DEA's disciplinary system primarily include OPR, the Board, and the Deciding Officials. OPR is part of the Inspection Division; the Board and the Deciding Officials are part of the Human Resources Division. OPR investigates the misconduct. The Board determines whether the misconduct occurred, based on the OPR investigative case file, and, if so, proposes a penalty. The Deciding Officials review the investigative case file, the Board's proposal, and any written statement submitted by the employee; consider any oral testimony provided by the employee; and make the final disciplinary determination.<sup>7</sup> As shown

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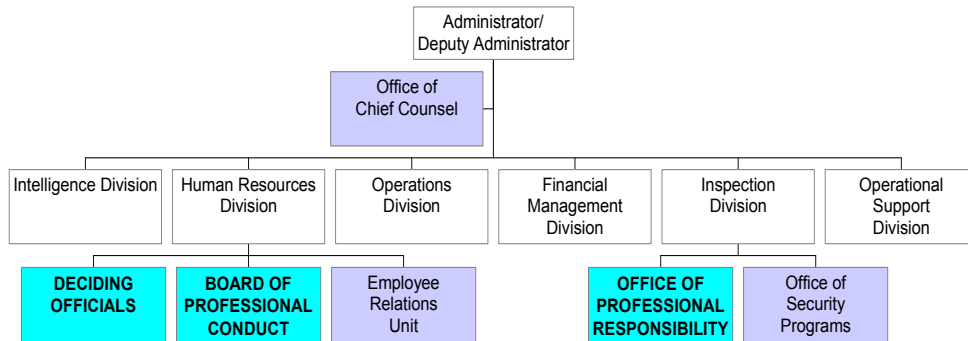
<sup>6</sup> *A Study of the Drug Enforcement Administration's Current Conduct and Disciplinary System*, Advanced Research Resources Organization, Arthur L. Korotkin, F. Mark Schemmer, and Cheryl D. Bruff (April 1987).

<sup>7</sup> All DEA misconduct cases, except for those involving SES executives and attorneys, undergo this process. SES misconduct is investigated by the DEA OPR, and SES executives within the employee's chain of command make disciplinary proposals and decisions. DEA attorney misconduct is investigated either by the OIG, DOJ OPR, or DEA OPR. Penalties for attorneys of 14-days suspension or less are handled through the normal DEA disciplinary channels. For more serious penalties, the DEA's Deputy Administrator is

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in the chart below, each of the three entities operates independently, with no single individual or entity in charge of the overall disciplinary system.

**Figure 1:  
Organizational Structure of the DEA Disciplinary Process**



The DEA’s Office of Chief Counsel and the Employee Relations Unit, in the Human Resources Division, also have roles in the disciplinary system. The Office of Chief Counsel reviews all disciplinary decisions that can be appealed to the MSPB, (i.e., those penalties in excess of a 14-day suspension); defends agency decisions before the MSPB; and provides legal advice, upon request, to OPR, the Board, and the Deciding Officials.

The Employee Relations Unit maintains the adverse action files, which contain documentation related to individual disciplinary decisions, and reviews all proposal and decision letters to ensure technical and procedural accuracy. The Employee Relations Unit also provides technical advice to the Board, the Deciding Officials, and other DEA officials regarding disciplinary actions.

The Office of Security Programs in the Inspection Division also has a role in the disciplinary system. OPR investigators provide the Office of Security Programs with information regarding investigations in which security violations occurred, or when they believe a subject’s security clearance may need to be revoked or suspended. Conversely, the Office of Security Programs notifies OPR of security issues that are pertinent to an investigation.

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the proposing official and the DOJ’s Office of Attorney Personnel Management is the Deciding Official.

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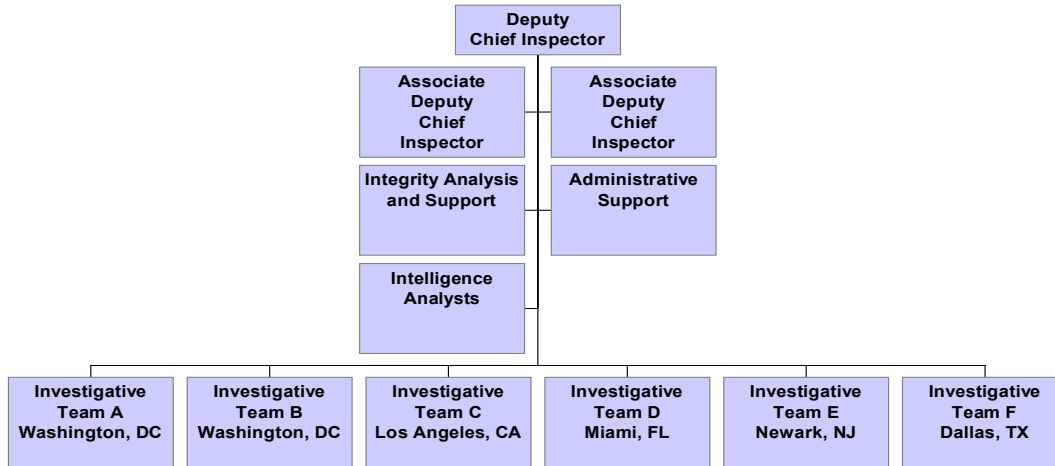
The operations of the three primary entities involved in the disciplinary system – OPR, the Board, and the Deciding Officials – are described in detail below.

### **The Office of Professional Responsibility**

OPR, managed by a deputy chief inspector and two associate deputy chief inspectors, investigates allegations of employee misconduct. As of September 16, 2003, OPR's staff included 6 senior inspectors and 28 inspectors, all at the GS-14 level or above, assigned to 6 investigative teams (2 in Washington, and 1 each in Miami, Newark, Los Angeles, and Dallas). Senior inspectors and inspectors are assigned to OPR on 2- to 3-year rotations. After completing their rotation in OPR, the inspectors typically fill management positions in the field. The inspectors generally are required to have ten years of investigative experience as DEA special agents, including supervisory field experience. The average DEA experience of the 28 OPR inspectors on staff as of September 16, 2003, was 18 years, ranging from 14 years to 23 years. The DEA experience of the six senior inspectors ranged from 16 years to 22 years.

OPR headquarters staff also includes two intelligence analysts, an Integrity Analysis and Support Staff, and an Administrative Support Unit. The intelligence analysts assist OPR inspectors by researching law enforcement databases, such as the National Crime Information Center and the Narcotics and Dangerous Drugs Information System, checking financial records, analyzing documentary evidence, and accompanying OPR inspectors to subject or witness interviews. The Analysis and Support Staff maintains OPR's statistical database and provides statistical analyses at the request of OPR management. The Administrative Support Unit provides general administrative support to OPR management.

**Figure 2:  
The DEA's Office of Professional Responsibility**



The DEA's Standards of Conduct require DEA employees to refer to OPR headquarters all cases that involve violations of the standards of conduct, criminal or civil violations of laws and departmental codes, or where public notoriety reaches a level detrimental to the DEA or the Department of Justice (DOJ). OPR also receives allegations from external sources, such as law enforcement officials, confidential informants, cooperating witnesses, governmental agencies, and the public. During fiscal years (FY) 2001 and FY 2002, OPR received 695 allegations from internal sources and 134 allegations from external sources.

As described previously, since July 11, 2001, the OIG has reviewed all allegations received by the DEA OPR. For those cases that the OIG declines to investigate, one of two OPR Associate Deputy Chief Inspectors determines if an OPR inspector will conduct the investigation, or if OPR will delegate the investigation to a SAC or headquarters office head. Less serious administrative cases are generally delegated for investigation.<sup>8</sup> An OPR inspector monitors all delegated cases for quality and timeliness. During FY 2001 and FY 2002, OPR investigated 696 cases and delegated 122 cases to SACs or office heads.<sup>9</sup>

<sup>8</sup> Administrative issues include issues that do not have an integrity or criminal component. Examples include government travel card delinquencies, insubordination, and job performance.

<sup>9</sup> Differences in totals between number of allegations received and cases investigated are due to timing issues, *e.g.*, allegations received at the end of FY 2002 may not have been assigned to be investigated until the beginning of FY 2003.

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During an investigation, the OPR inspector typically interviews the subject, complainant, witnesses, and other pertinent individuals, and gathers relevant documents and other evidence. When the investigation is complete, the inspector prepares an investigative report, without recommendations or conclusions, which is included in the investigative case file. According to the OPR Inspector's Handbook, which contains the procedures that all OPR inspectors must follow during an investigation, the investigative report "...must be factual and completely unbiased. The report should not contain any conclusions based on opinions. It should be a factual representation of events/actions." Both the senior inspector and Associate Deputy Chief Inspector review and approve the investigative case file before sending it to the Board.

### **The Board of Professional Conduct**

The Board reviews OPR investigative case files to determine whether the alleged misconduct occurred, and, if so, proposes a penalty. Currently, the Board, which reports to the Director of the Human Resources Division, is comprised of seven full-time GS-15 employees – a Chairman and six Board members. The occupational series of the Board members can vary. The Board currently consists of five special agents, one intelligence analyst, and one diversion investigator. There is no set term for assignments to the Board – members may be replaced at the DEA Deputy Administrator's direction, or at their own request. An analyst, who researches databases and performs other analytical functions, and two employee relations specialists who write proposal letters to the employees, assist the Board.

The Board does maintain a procedural handbook, but this has not been updated since June 1995. Misconduct cases generally are assigned to the Board members based on their current caseload. From one to three Board members review each case, depending on the complexity and seriousness of the issues. If the Board concludes that the OPR case file is incomplete, it returns the case to OPR for further investigation. For example, the Board may request that OPR re-interview witnesses, interview additional witnesses, or obtain additional documentation or other physical evidence.

After the Board completes its review of the case file, including any additional information gathered by OPR, each Board member assigned to the case separately prepares a written summary of his or her findings, including a determination as to whether misconduct occurred, the offense committed, and a recommended penalty. In selecting the recommended penalty, the Board members consider certain Douglas factors, particularly



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the employee's length of service, prior work record, and prior disciplinary history.<sup>10</sup> After all the summaries are completed, the Board members meet to discuss their conclusions and try to reach a consensus on the offense and penalty. If they cannot reach a consensus, the Board Chairman determines the proposed offense and penalty.

Once the Board makes a determination, it may recommend that the employee be:

- given a Letter of Clearance,<sup>11</sup>
- given a Letter of Caution,
- given a Letter of Reprimand,
- suspended without pay,
- demoted, or
- removed.

If the Board proposes formal discipline, it sends a "proposal letter" to inform the employee of its findings.<sup>12</sup> The letter lists the offense and the proposed penalty, and also includes a statement informing the employee of his or her right to review the OPR investigative case file, and to provide both a written and oral statement to the Deciding Official. The Board also sends copies of all proposal letters and the OPR investigative file to the Deciding Officials. In FY 2001 and FY 2002, the Board issued 691 proposal letters, including 231 Letters of Clearance, 169 Letters of Caution, and 291 formal disciplinary actions, and recommended that 174 investigations be administratively closed.

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<sup>10</sup> The Board does not consider all the Douglas factors. Only the Deciding Official is privy to the employee's written or oral statement, which generally contains mitigating factors. In addition, although the proposal letters we reviewed indicated that other Douglas factors were considered, we found no documentation that *all* the Douglas factors were considered.

<sup>11</sup> A Letter of Clearance is issued when it is determined that the employee did not commit misconduct. All other actions reflect that misconduct did occur; the severity of the penalty varies based on the individual factors of the case.

<sup>12</sup> Letters of Reprimand, suspensions, demotions, and removals constitute formal disciplinary action. A Letter of Caution is not formal disciplinary action and therefore does not become part of the employee's personnel record.

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In addition to proposing discipline in misconduct cases, the Board imposes final discipline in cases involving OGV accidents and lost or stolen government property. For these cases, the field (i.e., personnel assigned by the SAC or office head to conduct the investigation) conducts the investigations and sends the case directly to the Board. Typically, one Board member reviews each case. In FY 2001 and FY 2002, the Board issued final decisions for 1,134 OGV accident cases, and 564 lost or stolen property cases.

### **The Deciding Officials**

The Deciding Officials review the OPR investigative case files, the Board's proposal letters, any oral or written statements provided by the employee, and the employee's Official Personnel Folder (OPF). They determine whether the allegations of misconduct are sustained and, if so, decide penalties, taking into account both mitigating and aggravating Douglas factors.

There are two full-time Deciding Officials. Each is a GS-15 DEA employee. During our review, one Deciding Official was a special agent and one was a non-agent, but this make-up may vary. Similar to the Board, the Deciding Officials serve an indeterminate term, and may be replaced at their request or at the DEA Deputy Administrator's direction. Generally, the Career Board appoints the Deciding Officials. However, Office Heads and SACs have the authority to reassign individuals in core GS-14 and GS-15 positions within their components. The latest Deciding Official was appointed by the Director of Human Resources, in consultation with the Career Board.

Cases are assigned to the Deciding Officials based on their current caseloads. When deciding a case, DEA's personnel manual states that the Deciding Official "should consider only the reasons specified in the notice and the material in the file, and shall consider any answer of the employee and his or her representative." Similar to the Board, if the Deciding Official believes that he needs more information before making a decision, he can request OPR to investigate further. The Deciding Officials maintain a manual, however this manual has not been updated since early 1998.

After the Deciding Official reviews the investigative case file, the Board's proposal letter, written or oral statements presented by the employee, and the employee's OPF, the Deciding Official:

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- sustains the charge and penalty,
  - sustains the charge, but reduces the penalty,
  - dismisses the charge, or
  - re-proposes the case with new charges or increased penalties.<sup>13</sup>

After the Deciding Official makes a decision, he sends a letter to the employee informing him or her of the decision, the penalty, and the date the penalty will be imposed. The penalty is imposed even if the employee appeals or files a grievance. However, should the employee win the appeal or grievance, the agency must make restitution to the employee. In FY 2001 and FY 2002, the Deciding Officials made 602 decisions in OPR misconduct cases.

In addition to making final disciplinary decisions for OPR cases proposed by the Board of Professional Conduct, the Deciding Officials also make disciplinary decisions in certain misconduct and performance cases proposed by SACs, Laboratory Directors, and office heads, such as unprofessional or disrespectful conduct, inattention to duty, misuse of a government credit card, and unauthorized absences. In these cases, field personnel conduct the investigation, and the SAC, Laboratory Director, or office head proposes the discipline and forwards the case to the Deciding Officials.<sup>14</sup> In FY 2001 and FY 2002, the Deciding Officials made 43 decisions in personnel cases.

## **Scope and Methodology of OIG Review**

We conducted the fieldwork from October 2002 through July 2003. We interviewed DEA headquarters officials from the Office of the Chief Inspector, OPR, the Office of Human Resources, the Office of Chief Counsel, and the Office of Security Programs. We interviewed the DEA Chief of Operations, each member of DEA's Board, and both of DEA's Deciding Officials. We interviewed all OPR inspectors located at the OPR's six field

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<sup>13</sup> In cases where the Deciding Official proposes new charges or increased penalties, the second Deciding Official becomes the official that makes the final disciplinary decision.

<sup>14</sup>All SAC, Laboratory Director, and office head proposals recommending clearances, administrative closures, Letters of Caution, or disciplinary action are forwarded to the Deciding Officials. SACs, Laboratory Directors, and office heads can issue oral admonishments.

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offices. We also interviewed officials from the OIG Investigations Division and from the DOJ OPR.

We analyzed FY 2001 and FY 2002 workload statistics for OPR, the Board, and the Deciding Officials. OPR provided statistics on the number of misconduct cases by employee grade level, position, work location, and by type of violation and resulting penalty. The Board provided the number of closed OGV accident and loss or theft of property cases for FY 2001 and FY 2002. The Deciding Officials provided the number of closed personnel cases for FY 2001 and FY 2002.

We also reviewed a sample of 100 closed disciplinary cases from FY 2001 and FY 2002 to assess whether the disciplinary penalties appeared to be fair and reasonable, and whether the overall process was conducted in a timely manner.<sup>15</sup> We examined the OPR investigative case files as well as documents maintained by the Board and Deciding Officials, and the official personnel file of the subject.

To assist us in assessing the quality of the OPR's investigations, an OIG investigator reviewed a sub-sample of 18 of the more complicated OPR cases to determine if OPR investigators:

- followed appropriate leads and allegations,
- interviewed subjects and documented the interviews,
- had DEA employees who were interviewed sign the appropriate warnings and assurance forms, and
- included all pertinent information in the final investigative report.

To assess the disciplinary actions taken against Senior Executive Service (SES) employees, we separately obtained and reviewed the investigative case summaries of all OPR investigations of SES employees for which a disciplinary decision was made in FY 2001 and FY 2002.<sup>16</sup>

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<sup>15</sup> The sample included 70 misconduct cases that were investigated by OPR and 30 other types of disciplinary cases (10 accidents involving government vehicles, 10 losses of government property, and 10 personnel-related incidents) for which disciplinary actions were determined by the Board or the Deciding Officials.

<sup>16</sup> These did not include those cases that were administratively closed, which are closed due to insufficient evidence or where the subject resigned or retired prior to the rendering of the disciplinary decision.

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In addition, we telephonically contacted a random sample of 50 DEA employees to obtain their perceptions and feedback on the disciplinary system relating to reporting misconduct, timeliness, the thoroughness and professionalism of OPR's investigations, and the fairness and consistency of penalties imposed by the Deciding Officials.<sup>17</sup>

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<sup>17</sup> See Appendix I for the sample demographics.

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## RESULTS OF THE REVIEW

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### Reasonableness of Disciplinary Decisions

**While we found that OPR investigations of employee misconduct were thorough and well documented, the disciplinary decisions based on these investigations were not always reasonable. The DEA sometimes levied lenient penalties due to a broad and generic schedule of penalties, a process that allows mitigation of penalties by both the Board and the Deciding Officials, and the failure by senior DEA management to adjust penalties for frequent offenses. We also found that Board Members and a Deciding Official inappropriately considered outside opinions or information when making disciplinary decisions. Finally, for some cases we were unable to assess the reasonability of imposed penalties because the Board and Deciding Officials did not document the reasons for their disciplinary decisions.**

**OPR Investigations are Thorough and Well Documented.** The first critical element of the disciplinary system is the investigation of alleged employee misconduct. Based on the OPR investigations, the Board and Deciding Officials determine whether the employee committed misconduct and should be disciplined. We found that OPR's investigations of employee misconduct provided a solid foundation for the disciplinary process. Our review of 70 OPR case files found that the OPR's investigations of alleged misconduct were thorough and well documented. The OPR generally requires its inspectors to tape record their interviews and to include a typewritten, verbatim transcript of the interview in the investigative case file. The case files also contained other evidentiary material, such as telephone call logs and database search results. Due to the quality of the documentation included in the case file, a reviewer could easily follow the progress of the investigation from the receipt of the allegation to the conclusion of the investigation.

In addition to our general review of 70 OPR investigations, an OIG criminal investigator performed a detailed assessment of the investigation conducted in 18 of the more complex cases included in our sample. That assessment confirmed that OPR investigated leads and allegations, interviewed subjects and documented these interviews; that DEA employees who were interviewed had signed the appropriate warnings and assurance

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forms; and that the final investigative report contained pertinent information.

However, we found that the discipline imposed based on these investigations was not always reasonable.

**Reasonability of DEA Penalties.** During FY 2001 and FY 2002, OPR closed 602 employee misconduct investigations. After reviewing these investigations, the Deciding Officials determined that 386 employees had committed misconduct and cleared 216 employees of the allegations. In those cases in which misconduct was substantiated, about 57 percent of the employees received either a Letter of Caution or a Letter of Reprimand, 33 percent were suspended, and 9 percent were demoted or removed (Table 1).

**Table 1: Final Disciplinary Actions for Subjects of OPR Cases Closed During FY 2001 and FY 2002**

<b>Disciplinary Action</b>	<b>Number of Subjects</b>	<b>Percent of Total Subjects</b>
Letter of Caution	151	39
Letter of Reprimand	71	18
Suspension <sup>a</sup>	129	33
Demotion	1	Less than 1 percent
Removal	34	9
<b>Totals</b>	<b>386</b>	<b>100</b> <sup>b</sup>

Source: DEA OPR

<sup>a</sup> Twenty-eight of the suspended subjects were involved in Title 31 cases, which involve willful misuse of an OGV and require, by Federal regulation, a suspension of at least 30 days.

<sup>b</sup> Total does not equal 100 percent due to rounding.

To assess whether the determinations of misconduct and penalties imposed by DEA were reasonable, we reviewed OPR investigative case files for the 105 subjects in our sample of 70 cases and the documentation prepared by the Board and the Deciding Officials in support of their determinations. Of the 105 subjects, the Board determined that 56 subjects committed misconduct, cleared 19, and closed the cases for the remaining 30 subjects without a determination.<sup>18</sup> We reviewed the case files for the 19

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<sup>18</sup> Cases are administratively closed for reasons such as the resignation or retirement of the subject, or the inability to identify a subject from the information in the complaint. Cases may be closed administratively at any point in the disciplinary process.

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subjects cleared of misconduct and found no instances where the Board's or Deciding Official's determination to clear the subject appeared to be unreasonable.

When misconduct did occur, however, we concluded that the penalties imposed were sometimes unduly lenient. We found that for 13 of the 56 subjects who committed misconduct, the facts of the case or the comments made by Board members in the supporting documentation appeared to justify a stronger penalty than was imposed by the Deciding Official. For example:

- An OPR investigation into an alcohol-related OGV accident at an overseas post found that a DEA GS-14 group supervisor submitted the accident report to DEA two months late, the report provided the wrong date and time, omitted the presence of a passenger (his supervisor, who was the Acting Attaché), and omitted the fact of alcohol use.<sup>19</sup> The OPR investigation indicated skepticism at the group supervisor's claim that the errors in the report were "accidental," because of the number and types of errors. The group supervisor received a Letter of Caution, while his supervisor (who was present in the vehicle, who also did not report the incident to his superior, and who approved the erroneous report by the employee) received a Letter of Reprimand. The Letter of Caution issued to the group supervisor stated:

I noted that you reported the vehicle damage as an incident, which is not allowed when there is alcohol usage. Additionally, I note that your memorandum was inaccurate and did not report all the facts. This failure to report the situation constitutes Inattention to Duty and you are hereby cautioned to take greater care in your writing.

- OIG analysis. The penalty imposed appears too lenient. Despite the strong indications that a DEA group supervisor falsified an OGV accident report to cover-up an alcohol-related

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<sup>19</sup> In this case, neither the group supervisor nor his supervisor reported the incident to U.S Embassy management. The incident was disclosed when someone anonymously provided the Ambassador with a copy of the Marine Security Guard Incident Report, which reported that the two subjects arrived at the Embassy in the early morning hours in an apparent intoxicated state. Although both subjects were initially charged with Unauthorized OGV Use and Violations of the DEA's Alcohol Policy, the Board dropped these charges at the advice of the DEA Office of Chief Counsel.



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incident, the employee received only a Letter of Caution informing him to take greater care in his writing. The employee's supervisor received only a Letter of Reprimand despite having approved a report that was erroneous.

- An OPR investigation found that a GS-14 DEA group supervisor interfered with a police investigation of a police officer for disability fraud by alerting the subject. According to the OPR investigation, a search warrant was issued in the police investigation, and the court sealed the affidavit of the warrant. After the warrant was served at a local firearms training school, the DEA supervisor, who was working as a firearms instructor at the school, learned of the warrant's existence and the nature of the investigation and notified the suspect officer, who was a friend. The DEA supervisor initially stated that he thought his actions were not prohibited because he believed that the search warrant pertained to an administrative, not a criminal matter, but subsequently admitted he made a poor decision. The OPR investigation also determined that the DEA supervisor did not have permission from the DEA for outside employment and that he was aware that he needed permission. The Board proposed a Letter of Reprimand, charging the supervisor with Poor Judgment and Unauthorized Employment, and questioning the supervisor's "integrity as a law enforcement officer." The Deciding Official sustained the charges and penalty.
- OIG analysis. We question that the supervisor received only a Letter of Reprimand despite the fact that he had revealed the existence of a sealed warrant and the nature of a police investigation, causing the Board to question the subject's integrity. In addition, the supervisor admitted that he had knowingly engaged in outside employment without the required approval of DEA.
- In one case, the OPR investigated allegations from a telecommunications company that provided the DEA with telephone subscriber and call detail information. The OPR investigation found that two special agents had engaged in sexually explicit telephone conversations with the company's operators and that one agent had a sexual relationship with an operator. The Board proposed that one of the special agents be given a Letter of Reprimand and the other a Letter of Caution. The Deciding Official sustained these penalties. For the special agent who received a Letter of Reprimand, the Board commented:

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He took advantage of his personal relationship with [the operator] through his official capacity to obtain phone records without a subpoena. [The operator] lost her job because of it...His behavior cast a poor light on the professionalism of DEA special agents.

The Board made the same comments pertaining to the special agent who received the Letter of Caution, and added:

He had sex with [an operator]. Through her position with [the telecommunications company], she could be considered an SOI [Source of Information]. DEA policy prohibits relationships with SOIs.

- OIG analysis. Despite its assertions that the special agents had cast a bad light on DEA's professionalism, and possibly violated DEA's policy on fraternizing with SOIs, the Board recommended only Letters of Caution or Reprimand. Nonetheless, while the Board observed that the telephone operators lost their jobs over the incident, it proposed only minimal penalties for the DEA special agents. The Deciding Official agreed with these lenient penalties.

We also identified several deficiencies in the DEA's disciplinary system that encourage decisions that are not reasonable, including a disciplinary schedule of offenses and penalties that is overly broad and generic, 2 and a failure by management to adjust penalties based on increasing misconduct trends. These deficiencies, which lead to lenient penalties, are discussed in the following sections.

Overly Broad and Generic Schedule of Disciplinary Offenses and Penalties Provides Inadequate Guidance. The DEA's schedule of disciplinary offenses and penalties includes offenses that are too generic, with few offenses related to DEA's mission, and provides an overly broad range of penalties ranging from reprimand to removal for almost every offense. As a result, the schedule gives the Board and the Deciding Officials insufficient guidance in choosing a penalty.

Other than the possession or use of drugs by employees, the disciplinary schedule contained no offenses specific to the DEA's mission.<sup>20</sup>

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<sup>20</sup> Even this offense is not entirely DEA-specific, because drug possession or use is a common offense on other federal agencies' disciplinary schedules.

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Instead the DEA's disciplinary schedule is comprised mainly of general offense categories used by many federal agencies, such as unauthorized absences, failure to honor just debts, misuse of office, and gambling. In contrast, we reviewed the disciplinary schedules of ten other federal agencies and found that they identify offenses specific to the agencies' missions and priorities.<sup>21</sup> For example:

- The United States Marshals Service's disciplinary schedule includes offenses such as prisoner escapes, failure to properly seat a prisoner or guard in a vehicle, and failure to use proper restraints when escorting a prisoner.
- The United States Customs Service's disciplinary schedule includes offenses such as improper associations with informants, former informants or persons connected with criminal activities; discourteous or unprofessional language, gestures, or conduct toward the public; and unauthorized use of law enforcement equipment, resources, or techniques.
- The Internal Revenue Service's disciplinary schedule includes offenses such as failure to file income taxes, misuse of enforcement statistics, and unauthorized disclosure of, or access to, tax return information.

Besides including agency-specific offenses, other agencies identify their priorities by subdividing offenses into different penalty categories. For example:

- The Federal Aviation Administration distinguishes between supervisory and non-supervisory offenders in relation to sexual harassment, discrimination, and reprisal offenses (with harsher penalties for supervisors) and between a Testing Designated Position (TDP) and a non-TDP for drug or alcohol offenses. In contrast, the DEA does not distinguish between supervisors and non-supervisors for the same offenses.

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<sup>21</sup> The ten other agencies were: the Internal Revenue Service, the United States Marshals Service, the Department of Justice, U.S. Customs Service, the Federal Bureau of Investigation, the National Aeronautics and Space Administration, the National Institutes of Health, the Department of the Interior, the Federal Aviation Administration, and the Department of State.

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- The United States Customs Service divides the offense of inappropriate use of a weapon into five categories, with the severity of penalties depending on intent and danger to human life. Again, the DEA does not divide this offense into categories.
  - The Internal Revenue Service divides the offense of making a false statement into five categories, depending on the circumstances under which the statement is made. In contrast, the DEA groups all misstatements “in connection with employment, promotion, travel voucher, any records, investigation or other proper proceedings” into one offense.

These schedules of penalties set a baseline to which the Deciding Officials apply the pertinent Douglas factors. Depending on the results of this application, the penalty could appropriately be lesser or greater than the baseline. It is important that management set a baseline penalty that reflects the agency’s expectations and acts as a deterrent to future misconduct.

We found that the DEA’s disciplinary schedule includes penalties that are overly broad, in that nearly all offenses are assigned a range of penalties from a Letter of Reprimand to removal.<sup>22</sup> The other federal agency disciplinary schedules we reviewed assigned penalties more reflective of the severity of the offenses. For example:

- The United States Marshals Service’s offense of negligence resulting in the attempted or successful escape of a prisoner specifies a penalty between a 7-day suspension to removal for a first offense, with a 14-day suspension to removal for a second offense.
- The United States Customs Service’s offense of improper associations with informants or criminals assigns a penalty of a 14-day suspension to removal for a first offense, with removal for the second offense.

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<sup>22</sup> DOJ authorizes (but does not require) each of its components to establish its own schedule of disciplinary offenses and penalties. According to DOJ Order 1200.1, DOJ did not establish an agency-wide schedule of disciplinary offenses and penalties because the components are so diverse that a single meaningful table would be a practical impossibility.

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- The Internal Revenue Service’s offense of unauthorized access to tax account information assigns a penalty of removal for a first offense.

The DEA Does Not Adjust Penalties to Effectively Deter Misconduct. The DEA has not changed its schedule of penalties since 1992. Further, the DEA does not routinely attempt to control misconduct by adjusting the baseline for disciplinary penalties to reflect increases in misconduct offenses. This results in penalties that are insufficient to deter specific types of misconduct.

For example, the DEA’s typical penalty for losing a weapon is a 1-day suspension.<sup>23</sup> During our review, DEA’s Chief of Operations stated that he was concerned with increased incidences of special agents losing their weapons. Although the Chief of Operations had expressed his desire to increase the penalty to a 3-day suspension, and the Board was accordingly proposing that penalty, the Deciding Officials continued to reduce the penalty for losing a weapon to a 1-day suspension to remain consistent with past practices. The Deciding Officials told us that, absent written policy, the Douglas factors required that the penalty be consistent with what was imposed in the past.<sup>24</sup>

In this instance, DEA management did not take the appropriate steps to increase the penalty in response to an increase in the offense. To do so, management must first notify employees of the increased penalties, apply the increased penalty only to future misconduct, and apply the penalty consistently. Although the Deciding Officials are correct to consider past practices when applying penalties, management can increase the baseline penalty for future offenses.

The Board and the Deciding Officials Mitigate Penalties. We found that both the Board and Deciding Officials consider the Douglas factors when choosing penalties, which could result in excessive mitigation of the penalties, if not balanced properly. The appropriate application of the

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<sup>23</sup> Although this offense is not specifically included in the DEA’s Standard Schedule of Disciplinary Offenses and Penalties, the Deciding Officials stated that the typical penalty is a 1-day suspension. This is the baseline; the imposed penalty may be increased or decreased based on the application of the Douglas factors.

<sup>24</sup> We also found that the DEA has one of the most lenient penalties among the DOJ components for this offense. Other DOJ components typically impose a 3- to 5-day suspension.

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Douglas factors requires that they be weighed against each other. The Douglas decision states:

Not all of these [Douglas] factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the appellant's favor while others may not or may even constitute aggravating factors. Selection of an appropriate penalty must thus involve a responsible balancing of the relevant factors in the individual case.

In the DEA's disciplinary process, the Board considers some of the Douglas factors in determining a proposed penalty and the Deciding Officials consider the remaining factors.<sup>25</sup> If the deciding official does not carefully consider the Board's mitigation, the potential result is an overly lenient penalty, which may no longer reasonably correspond to the offense committed.

For example, the typical penalty for an offense may be a 1-day suspension. If the Board determines that the employee who committed the offense is a long-term employee who has received excellent performance evaluations and who has never been disciplined, the Board may mitigate the typical suspension penalty to a proposed Letter of Reprimand. If the Deciding Official does not properly consider the Board's mitigation, additional mitigating factors may result in the penalty being further reduced to a Letter of Caution.

A Board member and a Deciding Official expressed concerns that the Douglas factors were not being properly considered. The Board member stated that he believed that mitigating penalties was the responsibility of the Deciding Officials, and expressed concern that if the Board reduced a penalty and then the Deciding Official further mitigated it, the penalty would be reduced too much. The Deciding Official agreed, stating that he believes some of the proposed penalties he receives are already too low. However, he believed that if, for example, he identified additional mitigating circumstances, he was required to further lower the penalty. This may result in an overly lenient penalty.

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<sup>25</sup> The Board considers some of the Douglas factors in determining a proposed penalty, particularly those factors pertaining to the employee's length of service, performance evaluations, and prior disciplinary history. Subsequent to receiving the proposal letter, the employee can submit, to the Deciding Official, a written or oral statement describing additional mitigating factors.

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**Board Members and Deciding Officials Consider Personal Experiences or Opinions, or External Information.** We found that Board members did not limit themselves to examining only the facts determined by the OPR’s investigation, but sometimes used personal experiences or opinions to influence their determinations. For example, a police department chief alleged, and the OPR investigation confirmed, that a GS-14 DEA group supervisor had interfered with a police investigation of a police officer for disability fraud by alerting the subject (who was a friend) of a sealed search warrant. One Board member sympathized with the employee, citing the employee’s rationale that he was not trying to warn his friend of the investigation, or otherwise thwart the investigation, but was acting out of concern for a friend. The Board member wrote: “I buy this. I would have done the same.” The employee received a Letter of Reprimand.

In another case, a member of the public alleged that DEA employees committed civil rights violations during the execution of a search warrant. The investigation found that when the search warrant was executed, the parents were not at home. The 18-year-old son and the 17-year-old daughter of the target were handcuffed and transported for questioning. Neither teenager was provided with shoes or a coat, even though the incident took place in a north central state during the winter. Regarding the case, a Board member wrote a list of ten “considerations” to discredit the complainant, including the fact that she was a Rastafarian, that she admitted to frequently smoking marijuana, and that her letter was written poorly and demonstrated that she had a “jail house lawyer” assist her with it. Regarding the allegations that the minor female was improperly handcuffed and brought in for questioning, the Board member wrote: “I do not see what the big deal is. I have handcuffed, detained and arrested many juveniles.” Three DEA agents were cleared of the civil rights violations, although each received a Letter of Caution pertaining to the inappropriate detainment, transportation, and questioning of the minor.

We also found that one Deciding Official sought outside opinions when deciding cases. During our discussions with this Deciding Official, he stated that, prior to making a decision, he sometimes contacts the employee’s SAC or others familiar with the employee to obtain information about the employee. While these actions may be well intended, it is improper for Deciding Officials to solicit or use such information in making their determinations. According to Section 2752 of the DEA Personnel Manual, in making a disciplinary decision the Deciding Official “should consider only the reasons specified in the notice [of proposed disciplinary

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action] and the material in the [investigative] file, and shall consider any answer of the employee and his or her representative.”

**Board Determinations Lack Supporting Rationale.** To ensure that disciplinary decisions are reasonable, the decision should be sufficiently documented so that both internal and external entities can clearly understand the rationale behind the decisions. Although in general the Board’s records sufficiently supported its disciplinary proposals, 7 of the 14 cases that we reviewed lacked adequate supporting documentation to assess the rationale of the Board’s determinations.<sup>26</sup>

We identified the following documentation deficiencies in the 14 disciplinary cases:

- Three of the 14 files contained only one Board member’s independent summary, although the file indicated that two Board members reviewed the case. In one case, the second Board member’s opinion was absent. In the other two cases, the second Board member simply read the other member’s summary and noted that he or she agreed.
- In three of four cases where the individual Board members disagreed, the files contained no rationale for the Chairman’s final decision.
- Two of the 14 files indicated that the Board’s proposed disciplinary action was made, in part, based on consultations with DEA’s Office of Chief Counsel. In one of these cases, the file did not contain the specifics of the consultation.

**Deciding Officials’ Decisions Were Not Well Documented in the Adverse Action Files.**<sup>27</sup> Agencies are required to document the basis for their disciplinary decisions according to 5 CFR, section 752.101, which states, “Copies of the notice of proposed action, the answer of the employee if written, a summary thereof if made orally, the notice of decisions and

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<sup>26</sup> We reviewed the Board’s supporting documentation for a sub-sample of 14 cases selected from our overall sample of 70 OPR cases. We initially questioned the penalties for these 14 cases based on our review of the OPR investigative file.

<sup>27</sup> According to the Deciding Officials, they do not maintain their own files, but instead include all the documentation they prepare related to the decision-making process in the “adverse action files” maintained by the Human Resources Division.



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reasons therefor, and any order affecting the suspension, together with any supporting material, shall be maintained by the agency.”<sup>28</sup> The DEA’s personnel manual further requires that, “If an oral answer is made, the individual hearing the answer must make, or cause to be made, a summary of that oral answer.”

We found that the adverse action files were incomplete and that the Deciding Officials did not sufficiently document their decision-making rationale in those cases where the final decision deviated from the Board’s proposed disciplinary action. As a result, we were unable to evaluate fully the reasonableness of the Deciding Officials’ final decisions.

Employees’ Written and Oral Statements Often Were Not Included in the File. The adverse action files should include any written statements or summaries of oral statements that the employee provided because they are critical in determining the reasonability of a decision. We often found that employee statements were missing from the adverse action files or, in the case of oral statements, not properly summarized. Specifically, we found:

- Twelve employees in our sample submitted written statements; four (33 percent) of these statements were missing from the files.<sup>29</sup>
- Nine employees in our sample provided oral statements; six (67 percent) of the statements were not summarized. Two of the three statements that were summarized consisted solely of indecipherable notes.

Deciding Officials Did Not Document the Reasons for Deviating From the Board’s Proposals. In 6 of the 70 OPR cases in our sample, the Deciding Official’s final penalty deviated from the Board’s proposed penalty. We reviewed these six cases to determine whether the adverse action files contained documentation supporting the basis for these deviations. We found that none of the files adequately documented the reasons for the deviations. Even though the Deciding Officials have a standard form on which they record the applicability of each Douglas factor, this form was not in the six files.

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<sup>28</sup> Title 5 CFR 752.101 relates to penalties involving suspensions of 14 days or less. Title 5 CFR 752.301, which relates to suspensions greater than 14 days, demotions, or removals, contains essentially the same language.

<sup>29</sup> The DEA could not locate one file.

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We also found that the final decision letters did not always explain the specific circumstances that resulted in the changed penalty. In some cases, the Deciding Official referred to the employee's written or oral statement as the basis for mitigation. However, five of the six decision letters did not contain a sufficient explanation. For example, in one case the Board proposed a 14-day suspension, but the Deciding Official's decision letter simply stated, "I find that the charge cited ... is fully supported by the evidence and is sustained. However, I have decided to mitigate the penalty based, in large measure, on your written response. Therefore, it is my decision that you are suspended for 1 calendar day..." In this instance, the Deciding Official provided no details on what elements in the written statement justified such extensive mitigation.

DEA officials told us that they did not believe that it was necessary for the decision letters to contain lengthy justifications or explanations because the proposal letters issued by the Board are very detailed. However, without the employee's written or oral statements, the Douglas factor form, and an explanation in the decision letter to the employee as to why the final decision differed from the proposed penalty, the justification for the DEA's disciplinary decisions are not apparent and appear arbitrary. The Deciding Officials told us that they are primarily concerned with documenting cases that can be appealed to the MSPB. In our opinion, it is important to document all cases, especially those cases in which the Deciding Officials change the proposed penalties or dismiss the charges.

**Example Illustrates the Inability of the System to Ensure Disciplinary Decisions are Reasonable.** We discuss in detail one case in which the Board's proposed penalty differed considerably from the Deciding Official's final decision without any explanation from the Deciding Official discussing the reasons for his decision.

Because the investigation conducted by the OIG determined that the incident had occurred, and the Board found that the incident occurred and recommended a suspension, we were troubled that the Deciding Official failed to sustain the charges. We interviewed Board members and the Board Chairman and they continued to believe that the subject had acted inappropriately and should have been suspended.

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### **Case Summary**

The OIG investigated an allegation that a DEA supervisor engaged in off-duty misconduct by pointing a handgun at a 17-year old male juvenile. The incident occurred after the DEA supervisor discovered that his 15-year-old stepdaughter had snuck out of the house during the night and the DEA supervisor and his wife suspected that the girl was with a 17-year-old boy who had previously taken her to a high school dance. The supervisor waited in his car to observe who brought her home. At 5:30 a.m., the stepdaughter returned with a 17-year-old boy. The DEA supervisor blocked the juvenile's vehicle with his own vehicle and, with his weapon pointed at the boy, ordered the boy to get out of the car and lie prone on the grass. The DEA supervisor took the boy's car keys and detained him until the police arrived. The police refused to take action against the boy because the stepdaughter had gone out with him voluntarily, so no crime was committed. The DEA supervisor did not inform the police that he had pointed his handgun at the boy. The boy's mother subsequently learned that the DEA supervisor had pointed a handgun at her son and lodged a complaint against the DEA supervisor with the local police department.

The Board reviewed the facts of the case and charged the supervisor with Poor Judgment and Conduct Unbecoming a DEA Special Agent. The Board proposed a 7-day suspension for the supervisor, stating:

Having identified [the juvenile] as the individual who had gone out with your stepdaughter previously, your conduct in forcing him to lie on the ground for approximately 15 minutes, taking away his keys, and further detaining him for the police to arrive when, in fact, you had no reason to believe a crime had been committed, constitutes Poor Judgment on your part...your action in this matter were... inappropriate and were an embarrassment to the DEA and the Department of Justice.... Your conduct in minimizing your action and in omitting the fact that you pointed a firearm at a juvenile... could have called your integrity and the integrity of the agency into question.

The supervisor provided a written response to the Board's proposal in which he did not deny the incident, but stated that he strongly believed that his actions were appropriate. The Deciding Official reviewed the case file, the Board's proposal, and the supervisor's written statement and took an oral statement from the supervisor. The Deciding Official then issued a decision letter clearing the supervisor of all charges. The Deciding Official's final decision letter did not provide details as to why the charges were dismissed, but merely stated:

Based on my review of the facts and circumstances in this matter, to include your written response [date], and your oral response [date], I do not sustain either of the charges proposed. Therefore, I am issuing this Letter of Clearance. This case is closed.

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Because the Deciding Official failed to provide an explanation in the decision letter of why he dismissed the charges, on April 15, 2003, the OIG requested that the DEA provide a written explanation from the Deciding Official of the reasons for his decision. On May 8, 2003, the DEA provided a written statement from the Deciding Official in which he explained that he believed the facts of the case demonstrated that the subject did not know for sure that his stepdaughter was with the 17-year-old, and therefore he acted to ensure his stepdaughter's safety. Furthermore, the Deciding Official stated that he believed there was no evidence to support a finding that the supervisor intentionally omitted a fact or was otherwise less than candid to the police. He added that the supervisor's written and oral response supported his interpretation.

We reviewed the documentation maintained by the Deciding Official for this case. The Deciding Official told us that because he thought his decision would be controversial, he prepared a Douglas factor checklist. In this case, however, preparing a Douglas factor checklist was unnecessary because it should only be prepared to determine a penalty if the charge is sustained, not if the subject is cleared of the charges. The checklist stated, as a mitigating factor, that the DEA supervisor "Approached situation that was perceived as potentially threatening in a professional law enforcement style." In response to the Douglas factor pertaining to the effect of the offense on the subject's ability to perform the job, the Deciding Official wrote, "None based on oral representation re: ongoing relations w/state & local officials."<sup>30</sup>

The Deciding Official defended his decision by stating that he "had almost been killed once by a 17-year-old", and that he could therefore understand the circumstances. He also stated that the incident could not have been that serious because he knew that the stepdaughter and the boyfriend continued to date after the incident.

This case is especially problematic because the conclusion drawn by the Deciding Official is so divergent from the unanimous conclusion of six Board members and the OIG investigators that a serious offense was committed. Moreover, the Deciding Official did not document any reason for his decision. And, because the employee is a GS-15 supervisory agent, the decision raises a concern that he was given special consideration.

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<sup>30</sup> We found that the case file contained no documentation of the supervisor's oral response, contrary to DEA policy.

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## RECOMMENDATIONS

**Recommendation 1:** The DEA should provide better guidance to the Board and Deciding Officials on the factors that may be considered in making disciplinary determinations by: a) updating the Schedule of Disciplinary Offenses and Penalties; b) updating written procedures to guide the operations of the Board and Deciding Officials; and c) instructing the Deciding Officials to limit their disciplinary considerations to the information contained in official DEA files and information provided by the employee or their authorized representative.

**Recommendation 2:** The DEA should document the Douglas factors considered in making its disciplinary decisions.

**Recommendation 3:** The DEA should require that documentation maintained by the Board and Deciding Officials regarding each disciplinary case include: a) the opinions of each Board member assigned to review a case and the rationale for the Chairman's proposal in those instances when the individual Board members disagree; b) any advice from outside sources, such as the Office of Chief Counsel; and c) all oral and written statements made by employees to Deciding Officials.

**Recommendation 4:** The DEA should require that when the final disciplinary decisions differ from the proposed charges and penalties, the final decision letter contain a detailed explanation of the reasons for the difference.

**Recommendation 5:** The DEA should require that the DEA Inspection Division periodically review a sample of closed disciplinary case files to assess whether the basis for the disciplinary decisions was adequately documented.

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## Timeliness of Processing Disciplinary Cases

**During FY 2001 and FY 2002, the DEA experienced excessive delays in processing disciplinary cases. We found that DEA management failed to monitor the timeliness of the disciplinary system or take timely corrective action. In addition, some DEA employees criticized the disciplinary system for its lack of timeliness, citing the potential negative effect on their careers.**

To evaluate the DEA's timeliness in processing disciplinary cases, we tracked the time it took for each of the three entities to process the 70 OPR cases in our sample.<sup>31</sup> When calculating the entity's processing time, we did not count delays that we identified through file documentation as beyond the entity's control.<sup>32</sup>

To define timeliness, we reviewed DEA performance standards or, when these were not available, determined reasonable timeframes through interviews with DEA officials. Only OPR had established written performance standards addressing timeliness. According to Chapter 8310 of DEA's Planning and Inspection Manual, OPR should complete its investigations within 180 days of receiving the allegation.<sup>33</sup> During discussions, the Board Chairman and Deciding Officials told us that their informal goal was to process cases within 60 days.

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<sup>31</sup> We determined the processing dates as follows: For processing by OPR, we tracked the time from the date the allegation was received by OPR through the date the completed investigative case file was sent to the Board. For processing by the Board, we tracked the time from the date the completed investigative case file was sent to the Board through the date the proposal letter was sent to the employee and the Deciding Officials. For processing by the Deciding Officials, we tracked the time from the date the copy of the proposal letter was sent to the Deciding Officials to the date the final decision letter was sent to the employee.

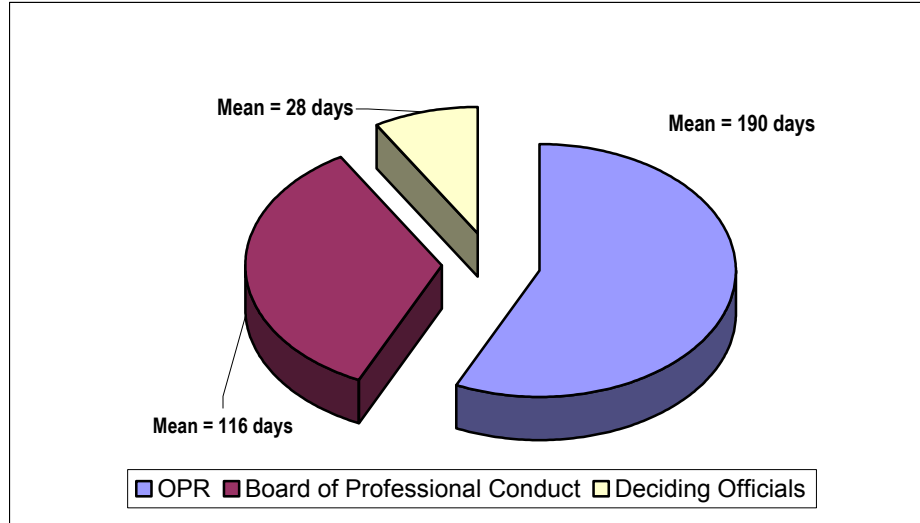
<sup>32</sup> For example, the United States Attorneys' Office (USAO) might have requested that OPR delay an investigation pending the resolution of legal matters pertaining to either the subject or a witness. Delays also might have occurred when OPR became aware that either the subject or witness was involved in an on-going investigation conducted by local or state authorities, or other federal agencies. Subject and witness availability, or delays in receiving evidence, also resulted in delays. In addition, the Board or the Deciding Officials might have requested that OPR perform additional investigative work, or that the Office of Chief Counsel provide a legal opinion.

<sup>33</sup> The Manual also requires that field personnel functioning as delegated OPR inspectors should complete their investigations within 90 days.

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The mean processing time of the cases in our sample was 334 days, with a median of 327 days. The mean processing time for each entity is shown in Chart 1.

**Chart 1: Processing Time for DEA Disciplinary Cases**



Source: OIG Sample Review of OPR Cases

**OPR Delays Were Infrequent.** We found that OPR exceeded its goal of 180 days to complete investigations in 28 of the 70 cases (40 percent) that we reviewed. However, in only 6 of these 28 cases (9 percent of the total cases) did it appear that the delays were within OPR’s control.<sup>34</sup> In these six cases, OPR took from 6.8 months to 15.5 months to conduct the investigation.

One of OPR’s Associate Deputy Chief Inspectors reviewed the investigative case files for the six cases. She was unable to determine a reason for the delays in three cases, and attributed the delays in the remaining cases to either re-interviewing a subject due to a faulty tape recorder (4-month delay) or DEA personnel taking leave during the holiday period.

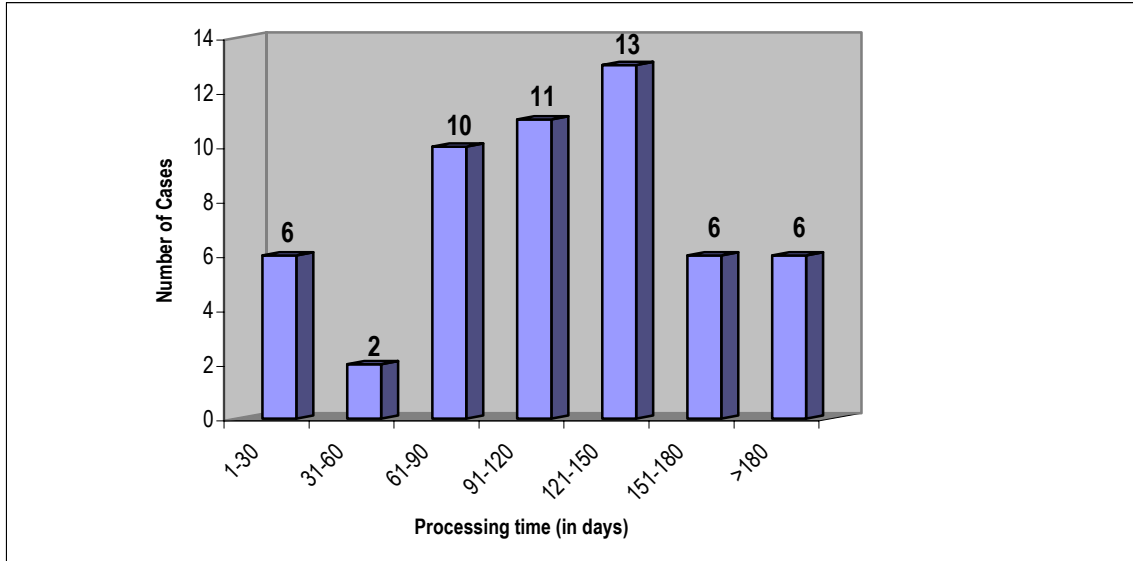
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<sup>34</sup> We considered delays to be excessive only in those cases where our review of the investigative case file showed either gaps of more than two months between interviews or other investigative actions, or one interview or less per month. Some of the cases that took in excess of 180 days to complete were complex and involved interviewing a large number of witnesses. As long as the investigation appeared to progress in a timely manner, we considered these to be completed timely.

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**Board Delays Were Frequent, But Have Diminished.** During FY 2001 and FY 2002, the Board experienced significant processing delays. Of the 70 cases in our sample, 54 had been sent to the Board.<sup>35</sup> In 46 of those 54 cases (85 percent), the Board took longer than 60 days to issue a proposal letter. The mean and median processing times for the 54 cases were 116 days. The Board's processing times for the 54 cases are shown in Chart 2.

**Chart 2: Board Processing Time for Sampled Cases**



Source: OIG Sample Review of OPR Cases

The Board Chairman acknowledged that large backlogs occurred from September 1999 through January 2002. According to the Board Chairman, during this 29-month period, the Board had a backlog of 60 to 110 cases to review, and received an additional 20 new cases each month. As a result, cases sometimes remained at the Board for 90 to 120 days before the Board Chairman assigned them to a Board member for review. According to the Board Chairman, several factors caused the backlogs:

- The Board was not fully staffed. During this 29-month period, the Board consisted of the Chairman and two or three Board members. Productivity was further reduced due to frequent turnover of Board members and the resultant learning curve.

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<sup>35</sup> Fifteen cases in our sample were administratively closed by OPR due to the resignation or retirement of the subject, or the inability of OPR to substantiate the charges or identify a subject. One of the case files included in our sample could not be located.



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- The Board Chairman reviewed each case and signed every proposal letter, which created a bottleneck.
  - There was only one employee relations specialist to prepare all of the proposal letters, which resulted in a bottleneck.

According to the Board Chairman, in late 2002 the Board was able to reduce its backlog, and is able to process accident and loss or property cases within 30 days, and most OPR cases in 30 to 60 days.<sup>36</sup> He cited several factors that have resulted in more timely processing of cases. First, after recognizing the large number of cases that the Board reviewed, the Chairman requested and received authorization for more Board member positions. As a result, three Board members were added in mid-2002 and a fourth was added in mid-2003, bringing the total number of Board members to six. In late 2000, the DEA temporarily allowed the Chairman to delegate signatory authority to another Board member for those cases in which the penalty is less than a 15-day suspension. And, in late 2001, the DEA assigned a second employee relations specialist to the Board.

In addition to the delays noted by the Chairman, we identified another source of delay – the requirement that the Board review the field reports pertaining to routine OGV accidents and losses of government property. OPR does not investigate these cases because they do not involve integrity or criminal issues. Instead, field personnel investigate these cases and send them to the Board for the final decision. We question whether these cases should be sent to the Board for the following reasons:

- During FY 2001 and FY 2002, the Board processed 1,134 routine OGV accident reports and 564 loss or theft of government property reports. Although the Board claims that reviewing these reports is not time-intensive, the volume alone is significant enough to affect the timely processing of the more important misconduct cases, which involve integrity or criminal issues.
- It is inconsistent that these types of matters, which are administrative in nature, should be handled differently from other administrative matters (e.g., travel card delinquencies) normally handled by SACs or office managers.

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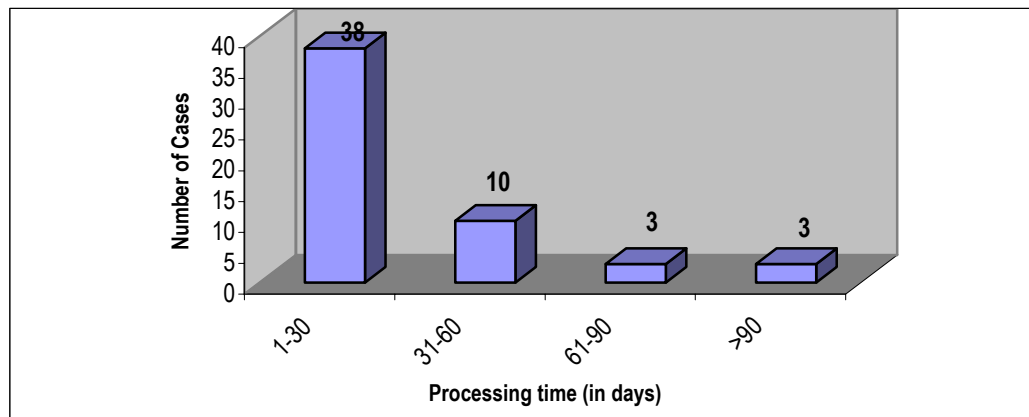
<sup>36</sup> We were unable to verify his claim because the Board's database does not track timeliness. In determining timeliness for our sample of closed cases from FY 2001 and FY 2002, we used the dates from memorandums included in OPR investigative case files.

- According to the Board, these infractions result only in either Letters of Clearance or Letters of Caution and therefore they think that SACs or office heads should issue them.

The DEA Chief of Operations, the Board, and Human Resource Division officials were unable to identify any reasons the Board needed to review these cases, other than that the Board had always done so.

**Deciding Official Delays Occurred Infrequently.** We found that, during FY 2001 and FY 2002, the Deciding Officials generally issued decision letters timely. The mean processing time was 25 days and the median was 15 days.<sup>37</sup> The Deciding Officials issued a decision within 60 days for 48 of the 54 cases (88 percent). The processing times for the 54 cases are shown in Chart 3.

**Chart 3: Deciding Officials' Processing Times for Sampled Cases**



Source: OIG Sample Review of OPR Cases

**DEA Management Does Not Monitor Timeliness.** Because the DEA did not track cases as they progressed through the disciplinary system to determine when and where delays occurred, excessive backlogs continued for more than two years before the DEA took corrective action.

Currently, OPR, the Board, and the Deciding Officials maintain separate databases. While OPR can use its database to track the timeliness of its investigations, neither the Board nor the Deciding Officials can use its database to track the timeliness of a specific case. Their databases are

<sup>37</sup> The mean processing time of 25 days differs from the mean of 28 days noted in the chart on page 31 because we excluded time delays that were not within the Deciding Officials' control. For example, if the Deciding Officials asked for advice from the Office of Chief Counsel, we did not include that time in the Deciding Officials' processing time.

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primarily repositories of prior proposals and decisions and are used as a reference to ensure consistency of disciplinary actions. The DEA is currently developing a consolidated disciplinary database for OPR, the Board, the Deciding Officials, the Human Resources Division, and the Office of Chief Counsel. The DEA's efforts to consolidate its multiple disciplinary databases began in mid-November 2002. The DEA estimates that the implementation process will take at least two years. This new system should enable DEA senior management to better monitor timeliness.

**Delays Negatively Impact DEA and its Employees.** We found that the lengthiness of disciplinary investigations negatively affects DEA employee morale. During our telephone survey, we spoke to several DEA employees who either had been or were being investigated. They complained of the stress of being placed on limited duty for a year or more. This lack of timeliness was mentioned by 40 percent of the DEA employees we contacted during our telephone survey and was the predominant complaint regarding the disciplinary system. These employees tended to blame OPR for the lack of timeliness. However, as described earlier, we found that while OPR investigations take the greatest portion of time in the disciplinary process, OPR generally conducts its investigations in a timely manner. During the period that we reviewed, only the Board incurred significant avoidable delays.

In addition to affecting morale, the lengthy disciplinary process is a productivity issue for the agency. The work activities and career opportunities of employees investigated by OPR may be severely restricted while the process is ongoing. Subjects of OPR investigations may be placed on limited duty, during which time they are not allowed to work overtime, operate an OGV, carry a firearm, or carry DEA credentials or badges. According to the DEA's Agents Manual, special agents on limited duty are prohibited from "participating in surveillance, arrests, searches, and... developing new enforcement matters." In addition, employee's promotions and transfers are delayed while they are the subjects of an OPR investigation.

During the two-year period that we reviewed, the DEA investigated 688 of its employees.<sup>38</sup> That represents a considerable portion of the agency's approximately 9,300-person workforce. During the disciplinary process, the agency may be denied the full services of these employees.

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<sup>38</sup> The 818 cases opened during FY 2001 and FY 2002 involved a total of 931 subjects, including 688 DEA employees, 90 non-DEA task force officers, 11 contractors, and 142 unknown subjects. Some of the DEA employees may have been investigated more than once.

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Therefore, more timely processing of disciplinary cases will not only minimize the negative impact on employees, but also more quickly return the services of those employees who are cleared of misconduct charges, and more promptly remove employees who are found guilty of egregious or criminal conduct.

## **RECOMMENDATIONS**

**Recommendation 6:** The DEA should require that the Board and the Deciding Officials establish performance measures for timeliness, and record the amount of time it takes to process each case.

**Recommendation 7:** The DEA should delegate to the appropriate special agents in charge and office heads responsibility for reviewing instances of routine OGV accident and losses of government property cases that do not involve misconduct issues.

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## Consistency of the Disciplinary System

**In a survey of 50 DEA employees, 70 percent stated that they believed the DEA disciplinary system treated all employees equitably. However, 30 percent of DEA employees we surveyed believed either that special agents receive preferential treatment or that higher-graded employees receive preferential treatment in the DEA's disciplinary system. The data that we were able to review was mixed and inconclusive as to whether a dual standard of discipline exists.**

An effective disciplinary system treats employees consistently. The likelihood and severity of discipline should not depend on factors such as an employee's position, grade, race, ethnicity, and gender. To examine indications of position and grade level disparity, we analyzed OPR data related to DEA disciplinary cases, reviewed individual cases during our sample review, and conducted a telephonic opinion survey of a random sample of 50 DEA employees. We also reviewed several external studies that examined racial, ethnic, and gender issues related to DEA discipline.

**Some DEA Employees Perceive Favoritism in DEA's Disciplinary System.** In our telephone survey of 50 DEA employees, we found that 30 percent of the respondents believed that either special agents or higher-graded employees receive more favorable treatment than non-agents and lower-graded employees. Regarding disparate treatment according to occupational position, 4 of 50 (8 percent) of the employees we surveyed stated that they believed special agents are treated more leniently than those in other positions. Regarding disparate treatment by grade level, 11 of 50 (22 percent) of the employees we surveyed stated that they believed that managers were less likely to be charged with misconduct and, when charged, are more likely to receive lenient penalties. None of the respondents provided specific examples of the favorable treatment that they believed existed. Comments from DEA employees included:

- Those involved in the disciplinary system are managers and managers tend to take care of their own and cover up for each other;
- Managers are generally given the benefit of the doubt;
- People at the top tend to know each other;

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- Because OPR inspectors eventually rotate back to the field, they are less inclined to be harsh with managers who may become the inspectors' future supervisors; and
  - People at the top found guilty of misconduct tend to be transferred, while people at the bottom tend to be removed or otherwise receive harsher discipline.

The remaining 35 respondents to our telephone survey (70 percent) stated that they did not perceive any disparity in the DEA's disciplinary system related to grade level or position. In fact, six of the employees cited recent cases in which a SAC or an Assistant SAC was disciplined as evidence of the lack of favoritism in the system.

While an evaluation of gross numbers of disciplinary actions across groups cannot confirm consistent treatment, we examined the available data related to disciplinary actions by employee occupational category and by grade level to determine if any clear trends were evident. As described below, the data that we were able to review was mixed and inconclusive as to whether a dual standard of discipline exists. A complete evaluation of allegations of disciplinary disparity would require the comparison of similar offenses and a methodology to account for inherent differences in the number and types of offenses that different groups may commit. Such a detailed analysis was beyond the scope of this review.

**Data Regarding DEA Special Agents.** We compared the number of investigations conducted in FY 2001 and FY 2002, and how many of those investigations resulted in discipline, for special agents, chemists, diversion investigators, intelligence analysts, and support/other staff.<sup>39</sup> We found that, as compared to their representation in the DEA workforce, DEA special agents were more likely to be investigated for alleged misconduct. While special agents constitute 49 percent of the DEA workforce, they are the subjects of 73 percent of DEA's misconduct investigations (Table 2).

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<sup>39</sup> Support/other staff includes employees in job categories such as personnel specialists, program analysts, and budget, legal, and clerical staff. It does not include special agents, diversion investigators, intelligence analysts, or chemists.

**Table 2: Subjects Investigated by the DEA OPR (by Position)  
All Cases Opened During FY 2001 and FY 2002**

<b>Position</b>	<b>Number of Subjects Investigated</b>	<b>Percent of Subjects Investigated</b>	<b>Percent of the DEA's Workforce</b>
Special Agents	502	73.0	49.3
Diversion Investigators	31	4.5	5.6
Intelligence Analysts	25	3.6	7.6
Chemists	13	1.9	3.3
Support/Other	117	17.0	34.3
<b>Totals</b>	<b>688</b>	<b>100</b>	<b>100</b>

Source: DEA OPR

While special agents were more likely to be investigated, we found that a slightly lower percentage of those investigations resulted in discipline (as opposed to clearance) than did investigations of employees in other occupational categories. For closed investigations, 62 percent of the investigations of special agents resulted in discipline.<sup>40</sup> In contrast, from 65 percent to 82 percent of the investigations of employees in other occupations resulted in discipline (Table 3).

**Table 3: Subjects Disciplined by the DEA  
All Closed Cases (other than Administrative Closure)  
FY 2001 and FY 2002**

<b>Position</b>	<b>Percent of Subjects Disciplined</b>	<b>Percent of Subjects Cleared</b>
Special Agents	62	38
Diversion Investigators	65	35
Intelligence Analysts	68	32
Chemists	70	30
Support/Other	82	18

Source: DEA OPR

In reviewing the closed cases that resulted in discipline, we found that despite a slightly higher clearance rate, special agents were still more likely to be disciplined than other occupations, given their proportions in the DEA workforce. Specifically, special agents made up 49 percent of the DEA workforce, but were 67 percent of the subjects disciplined (Table 4).

<sup>40</sup> These did not include those cases that were administratively closed, which are closed due to insufficient evidence or where the subject resigned or retired prior to the rendering of the disciplinary decision.

**Table 4: Subjects Disciplined by the DEA (by position)  
All Closed Cases Resulting in Discipline  
FY 2001 and FY 2002**

<b>Position</b>	<b>Number of Subjects Disciplined</b>	<b>Percent of Subjects Disciplined</b>	<b>Percent of the DEA Workforce</b>
Special Agents	256	67.0	49.3
Diversions Investigators	20	5.2	5.6
Intelligence Analysts	13	3.4	3.6
Chemists	7	1.8	3.3
Support/Other	86	22.5	34.3
<b>Totals</b>	<b>382</b>	<b>100</b>	<b>100</b>

Source: DEA OPR

The greater percentage of special agents investigated for alleged misconduct may be attributable to a number of factors. For example, the nature of the work of special agents requires them to carry weapons, participate in raids, have access to seized drugs and cash, and have more contact with the public. Further, many of their activities require judgments – for example, the amount of force necessary when arresting a suspect – that may be subject to review. Consequently, they are exposed to more situations that could lead to misconduct investigations than are non-agents. Therefore, despite the higher investigation, clearance, and discipline rates for special agents, the above data do not necessarily mean that special agents are treated more harshly than other employees.

In addition to the above data, we noted that in our sample of 70 cases, of the 13 investigation subjects whom we found to have received penalties that appeared too lenient, 12 were special agents. However, the small number of cases does not support a systemic finding of favorable treatment for special agents.

**Data Regarding Discipline of Higher Graded Employees.** We compared the investigations and penalties imposed in FY 2001 and FY 2002 for employees at each grade level. We also identified the distribution of employees at each grade level in the DEA population. In reviewing cases opened in FY 2001 and FY 2002, we found that, given their relative proportions in the DEA workforce, higher-graded employees (*i.e.*, SES, GS-15, and GS-14 employees) were slightly more likely to be investigated than lower-graded employees. For example, SES employees comprised 0.8 percent of the DEA workforce, but made up 2.5 percent of subjects investigated. In contrast, employees at the GS-8 level and below comprised



16.3 percent of the workforce, but were 8.5 percent of the subjects investigated. Possible reasons for this variance are that higher-graded employees are more likely to be involved in making decisions or taking actions that can lead to charges of misconduct. Employees in the middle grades (GS-9 to GS-13) were investigated in about the same proportion that they appear in the DEA population (Table 5).

**Table 5: Subjects Investigated by OPR (by Grade Level)  
All Cases Opened During FY 2001 and FY 2002**

<b>Grade Level</b>	<b>Number of Subjects Investigated</b>	<b>Percent of Subjects Investigated</b>	<b>Percent of the DEA Workforce</b>
SES	17	2.5	0.8
GS-15	28	4.1	3.7
GS-14	136	19.8	14.0
GS-13	239	34.8	34.0
GS-12	141	20.6	19.3
GS-11	29	4.2	5.4
GS-10	2	0.3	0.2
GS-9	36	5.2	6.3
GS-8 and below	58	8.5	16.3
<b>Totals</b>	<b>686<sup>a</sup></b>	<b>100</b>	<b>100</b>

Source: DEA OPR

<sup>a</sup> Total does not equal 688 as in Table 2 because several subjects had unknown grade levels.

When we examined the closed cases that resulted in discipline, the variance between higher-graded employees and lower-graded employees decreased, and the distribution of disciplined employees at each grade level reflected the distribution of employees by grade level in the DEA population. In particular, the percentage of disciplined SES employees (0.8 percent) exactly matched the percentage of SES employees in the DEA population (also 0.8 percent). Disciplined employees at the GS-08 level and below (13.1 percent) more closely matched the 16.3 percent proportion these employees represent in the DEA population (Table 6).

**Table 6: Subjects Disciplined by DEA (by Grade Level)  
All Closed Cases Resulting in Discipline  
FY 2001 and FY 2002**

<b>Grade Level</b>	<b>Number of Subjects Disciplined</b>	<b>Percent of Subjects Disciplined</b>	<b>Percent of the DEA Workforce</b>
SES	3	0.8	0.8
GS-15	12	3.1	3.7
GS-14	72	18.8	14.0
GS-13	115	30.1	34.0
GS-12	69	18.1	19.3
GS-11	30	7.9	5.4
GS-10	2	0.5	0.2
GS-9	29	7.6	6.3
GS-8 and below	50	13.1	16.3
<b>Totals</b>	<b>382</b>	<b>100</b>	<b>100</b>

Source: DEA OPR

We also examined how higher-graded employees were disciplined as compared to lower-graded employees. We found that employees at higher grade levels received a higher percent of clearances while employees at lower grade levels received a higher percentage of removals. Specifically, we found that two-thirds of SES employees received a Letter of Clearance, while less than one-third of employees at the GS-9 level or below received a Letter of Clearance. Further, no SES or GS-15 employees were removed, while 22 percent of employees at the GS-8 level or below were removed. The distribution of penalties by grade level is shown in Table 7.

**Table 7: Percentage of Penalties by Grade Level  
OPR Closed Cases (FY 2001 and 2002)**

<b>Number of Cases</b>	<b>9</b>	<b>21</b>	<b>107</b>	<b>193</b>	<b>104</b>	<b>45</b>	<b>2</b>	<b>40</b>	<b>59</b>
<b>Disciplinary Action</b>	<b>SES</b>	<b>GS-15</b>	<b>GS-14</b>	<b>GS-13</b>	<b>GS-12</b>	<b>GS-11</b>	<b>GS-10</b>	<b>GS-9</b>	<b>GS-8 - lower</b>
Letter of Clearance	67	43	33	40	34	33	0	28	15
Letter of Caution	11	14	34	24	28	13	0	33	22
Letter of Reprimand	11	14	11	10	13	20	0	5	19
Suspension	11	29	20	22	23	29	50	20	22
Grade Reduction	0	0	0	0	0	2	0	0	0
Removal	0	0	3	4	3	2	50	15	22
<b>TOTAL <sup>a</sup></b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

Source: DEA OPR

<sup>a</sup> Totals may not equal 100 due to rounding.

We examined the variance between the discipline imposed for SES employees and the discipline imposed for lower-graded employees and concluded that it did not appear to be due to a systemic disparity in treatment. For the SES employees, we reviewed 9 cases in which the OPR concluded its investigation in FY 2001 and FY 2002.<sup>41</sup> We concluded that the facts established in the investigations fully supported the determinations in these cases, and that the SES employees were disciplined appropriately. We also examined the penalties imposed on higher-graded employees in our sample of 70 discipline cases. The one SES employee included in our sample received a 33-day suspension for Unauthorized Use of an OGV and Misuse of Office. Of the remaining DEA management personnel, 50 percent of the GS-15 employees and more than a quarter of the GS-14 employees received penalties (Table 8).

<sup>41</sup> The OPR investigated 16 SES employees for misconduct. The remaining seven SES employees' cases were administratively closed. The DEA administratively closes cases when either the employee resigns or retires, or when a preliminary investigation determines that there is insufficient evidence to either identify a subject or determine that misconduct has occurred. Because the OPR database does not provide more specific information, we were unable to determine the reasons for the administrative closures of the seven SES cases.

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**Table 8: Discipline Imposed in Sample Review, By Grade Level**

<b>Grade Level</b>	<b>Number of Subjects in Sample</b>	<b>Number of Subjects Who Received Discipline</b>	<b>Percentage of Subjects Who Received Discipline</b>
SES	1	1	100
GS-15	4	2	50
GS-14	18	5	28
GS-13	25	3	12
GS-12	16	6	38
GS-11	8	4	50
GS-9	9	2	22
GS-8 and below	5	3	60
Unknown	19	0	0
<b>Totals</b>	<b>105</b>	<b>26</b>	<b>N/A</b>

Source: OIG Sample Review of OPR Cases

Note: Unknown subjects include those cases where a subject could not be identified or cases involving non-DEA employees, such as contractors or other law enforcement officers assigned to a task force.

In our sample review of 70 OPR cases, employees at all grade levels received discipline, including 3 employees at GS-8 or below. We concluded that the penalties imposed in these sample cases were appropriate. Because we found that the discipline imposed on SES employees and on lower-graded employees was appropriate in all the cases that we reviewed, we concluded that the variance in the discipline imposed was not based on a systemic disparity.

In discussions, DEA officials offered one explanation for the removal rates of lower-graded employees. They explained that it may be because lower-graded employees are more likely to be in a probationary status. During probation, new employees can be removed expeditiously should they exhibit behavior, such as committing misconduct, which demonstrates unsuitability for permanent career status. Employees in a probationary status have no right to appeal to the MSPB. This could be a contributing factor to the variance we observed.

We also noted that some of the higher-graded employees in our sample resigned or retired during the disciplinary process. Of the 105 subjects in our sample, four cases were administratively closed because the employee resigned, and five cases were administratively closed because the employee retired. Of the retirees, two were GS-13s, two were GS-14s, and

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one was a GS-15. We were unable to determine whether these employees retired to avoid disciplinary action – one retired during the investigation, two retired before the Board proposed disciplinary action, and two retired after the proposal letter was issued but before the penalty was imposed.<sup>42</sup>

As with our review of the data regarding special agents, because a detailed analysis that would compare penalties assigned in each case was not feasible, and because the data that was available was mixed, we cannot conclusively determine whether higher-graded employees are treated more leniently than lower-graded employees.

**External Reviews Found No Disparity By Race, Ethnicity, and Gender.** Our review examined disciplinary action taken by position and grade level for all DEA employees. Three external reviews examined the influence of other factors, such as race, ethnicity, and gender, on the treatment of the DEA special agent workforce. These reviews concluded that there was no disparate treatment by the DEA. For example:

- An April 1987 contractor study examined disparity related to race, gender, DEA office size, and geographic region.<sup>43</sup> Although the study found some statistical differences in certain categories, the study concluded that the DEA's disciplinary system was fair and that the expected disciplinary proposals and decisions were the same for all races who were charged with similar offenses or offenses of the same level of severity.<sup>44</sup>
- An August 2001 contractor study focused on the disparity in the discipline administered to Caucasian versus African-American

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<sup>42</sup> The Board proposed that one subject receive a Letter of Reprimand and the other a 3-day suspension.

<sup>43</sup> *A Study of the Drug Enforcement Administration's Current Conduct and Discipline System*, Advanced Research Resources Organization, Arthur L. Korotkin, F. Mark Schemmer, and Cheryl D. Bruff.

<sup>44</sup> The authors of the report attributed the statistical differences to other factors. For example, the study found that a higher proportion of GS-12 employees and a lower proportion of GS-13 employees were disciplined. The study surmised that this occurred because GS-12 employees are more independent and given more latitude, thereby providing them with more opportunity for discretionary behavior. On the other hand, the report concluded that because GS-13 employees represent the first level of supervision, this may result in a more rigid adherence to the rules.

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special agents.<sup>45</sup> This study, which analyzed disciplinary actions imposed from 1994 to 2000, found no differences between Caucasian and African-American special agents in terms of the severity of the punishment issued.

- A July 2003 study conducted by the General Accounting Office (GAO) included a review of racial, ethnic, and gender differences in the DEA's disciplining of special agents.<sup>46</sup> This study found that the proportion of African-American, Hispanic, and female special agents disciplined for misconduct was substantially higher than their representation in the DEA special agent workforce. The study did not offer reasons for this, but cited the 1987 and 2001 studies noted previously in concluding that the DEA's disciplinary process was fair and nondiscriminatory, despite the higher proportion of African-American, Hispanic, and female special agents disciplined.<sup>47</sup>

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<sup>45</sup> *Drug Enforcement Administration Discipline System Study*, SHL Landy Jacobs: Litigation Support Group.

<sup>46</sup> *Equal Employment Opportunity: Hiring, Promotion, and Discipline Processes at DEA*, GAO-03-413.

<sup>47</sup> The GAO study also found an overall perception among DEA minority special agents that minorities were disproportionately investigated for misconduct and received harsher disciplinary penalties. To address this, the GAO study recommended that the DEA make its disciplinary statistics available to the DEA workforce. In its response to the GAO report, the DEA agreed to provide data to the general DEA workforce at least annually on the types of misconduct sustained.

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## DEA Management of the Disciplinary System

**The DEA does not adequately monitor the overall disciplinary system to ensure that it functions properly. While the three-tiered system comprised of OPR, the Board, and the Deciding Officials provides for oversight over OPR and the Board, DEA management does not systemically review the Deciding Officials' actions to ensure that decisions are consistent and reasonable. The DEA also does not ensure that disciplinary actions are properly documented in employees' official personnel files.**

The DEA's three-tiered disciplinary system provides some oversight of OPR and Board activities to ensure that they are independent. OPR conducts fact-based investigations that do not draw any conclusions. To ensure objectivity, senior OPR inspectors closely monitor the investigations; the final investigative product is reviewed and approved by both the senior inspector and one of OPR's Associate Deputy Chief Inspectors. The Board and the Deciding Officials also provide a quality check: if they believe that the OPR investigation is incomplete they can request further investigation.

There also is oversight over the Board. The Board does not make any final decisions, but only proposes disciplinary action. The Deciding Officials make the final penalty determinations and may or may not accept the Board's proposed charges and penalties.

However, there is no oversight over the Deciding Officials. If the Deciding Official assigned to a case does not agree with the Board's proposals, the Deciding Official can – without explanation – dismiss the charge or decrease the penalty. In addition, DEA management does not routinely review cases in which the Deciding Officials' final decisions varied significantly from the charges and penalties proposed by the Board to determine the factors responsible for the variance and make systemic corrections for future disciplinary decisions. This lack of management oversight allows potential abuses in the system in that a Deciding Official could inappropriately dismiss charges or mitigate penalties. For example, in the case cited on page 27 in which a DEA supervisor pointed a gun at a 17-year old boy, five of the Board members familiar with the case and the Board Chairman told us that they believed that the supervisor had acted inappropriately and should have been suspended for his misconduct. Based on their review of the case, none could identify a plausible reason why the Deciding Official did not sustain the charges.

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Because the Board and the Deciding Officials rely on the same investigative reports in making penalty determinations, instances of significant variances in the interpretation of these reports by the Board, the Deciding Officials, or both should alert management that there is a systemic problem, or a problem with the Board or the Deciding Official relating to a particular case. And, although management should not interfere with an on-going investigation or attempt to influence a Deciding Official to change a particular decision, it is appropriate for management to require the Board and the Deciding Officials to justify their determinations.

Each Board member we interviewed stated that significant variances in Deciding Officials' decisions occur infrequently, approximately two or three cases a year. We were unable to specifically identify how often a Deciding Official's decision varied from the Board's proposed penalty because neither the Board nor the Deciding Officials track this information. In our sample review of 70 OPR cases, the Deciding Officials varied from the proposed penalty in six cases. In only one of the six cases did we conclude that the variance was significant. In that case, a proposed 14-day suspension was reduced to 1 day, but based on the information in the file we were unable to determine the Deciding Official's reason for mitigating the penalty.

**Deciding Officials Allege Management Influence and Retaliation.**

While conducting our review, we received an allegation that DEA management had attempted to influence a Deciding Official.<sup>48</sup> The DEA has strict policies against this, as stated in a May 28, 1996, memorandum from the Chief Inspector to all DEA employees:

To maintain the integrity of the disciplinary process, no person is authorized to contact the Deciding Officials or the Board of Professional Conduct during the pendency of a disciplinary or performance based action, other than the employee concerned and his/her designated representative.

During our review, the Deciding Officials told us that a DEA manager from the Office of Inspection approached them in July 2002 regarding a specific case in which the Deciding Official had not yet made a final decision. The manager expressed displeasure at the leniency of the penalty proposed by the Board and suggested that the penalty should be harsher. (We interviewed the manager who allegedly approached the Deciding

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<sup>48</sup> The Deciding Officials also told us that in the past a previous DEA Administrator had interfered in the decision-making process by telling them what penalty he wanted imposed, but that this did not occur under subsequent Administrators.



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Officials and he denied that the incident occurred.) In the final decision made in November 2002, the Deciding Official further mitigated the proposed penalty based on the application of the Douglas factors. The Deciding Official told us that in December 2002 DEA management informed him that he had been a Deciding Official too long (five years) and that he should start looking for another position within the DEA. He viewed this action as retaliatory.

Five months after the Deciding Official was told to look for another position, the Acting DEA Administrator retired. The week following his retirement, the Human Resources Director transferred the Deciding Official to another position, acting on the request of the former Acting DEA Administrator who had retired. The timing of the DEA management actions, at best, gives the appearance of reprisal against the Deciding Official, although the conflicting statements prevent us from conclusively determining whether the incident occurred.

**Discipline Was Not Always Documented in Employees' Official Personnel Files.** It is important that the official personnel files contain the appropriate documentation to ensure that the imposed disciplinary actions were taken and to serve as permanent records of employees' disciplinary histories. These files are used in a variety of personnel actions, such as promotions, security clearances, and transfers. According to the DEA personnel manual:

All reprimands and adverse actions must be reflected in the affected employee's official personnel folder. Official reprimands will be retained in the official personnel folder for a period not to exceed two years, at which time they will be removed and destroyed...[A reprimand] may be removed and destroyed sooner if a grievance over a reprimand is sustained, or if it is determined upon request from the employee after one year that the reprimand should be removed. In the latter case, a reprimand may be removed only by the official who issued the reprimand or someone organizationally superior to that official.

Documentation of adverse actions, other than a Letter of Reprimand (i.e., suspensions, grade reductions, and removals), becomes a permanent part of the employee's personnel file unless the penalties are overturned on appeal or grievance.

In our review of 70 OPR cases, we identified 23 employees who received formal disciplinary decisions that should have been documented in

their official personnel files. Among those 23 employees, 12 received written reprimands, 7 received suspensions from 1 to 33 days, 1 received a grade reduction from GS-11 to GS-9, and 3 were removed. We reviewed the personnel files of the above individuals and specifically looked for either the letter of reprimand or, in the case of adverse actions, the SF-50 (Notification of Personnel Action). The result of our review is summarized in Table 9.

**Table 9: Personnel File Documentation of Discipline Imposed**

<b>Penalties</b>	<b>Support Found For:</b>	<b>Support Missing For:</b>
12 Letters of Reprimand	6 Letters of Reprimand	6 Letters of Reprimand
7 Suspensions	5 Suspensions	2 Suspensions
1 Grade Reduction	1 Grade Reduction	None Missing
3 Removals	3 Removals	None Missing
<b>23 Actions</b>	<b>15 Actions</b>	<b>8 Actions</b>

Source: OIG Review of Official Personnel Files

Of the six missing Letters of Reprimand, three were issued more than a year before we conducted our review. Therefore, it was possible that they had been removed at the request of the employee. When asked why there was no documentation regarding the remaining three Letters of Reprimand and two suspensions, DEA officials were unable to provide an explanation. During our review, we also found that one of the files contained a Letter of Reprimand more than two years old that should have been removed.

**The DEA Informs its Employees of the Requirement for Reporting Misconduct and Penalizes Those Who Fail to Report Misconduct.** The DEA’s standards of conduct require its employees to promptly report to their supervisor, or to OPR, any activity or situation the employee believes to be improper, illegal, or otherwise in violation of any of the DEA’s standards of conduct. The DEA informs its employees of this requirement in several ways. OPR inspectors routinely make presentations at the DEA Training Academy in which they describe common misconduct and explain the consequences. In addition, the DEA requires all of its employees to certify annually that they have read and understand the standards of conduct. This precludes those employees who are charged with misconduct from claiming that they were unaware of the standards.

Our survey of 50 DEA employees indicated that the DEA’s actions to educate its employees were successful. Each of the 50 employees we contacted were aware of the standards of conduct and of the DEA’s requirement that they report misconduct. Even employees who stated that they sometimes did not report misconduct acknowledged that they were aware of the requirement and the potential consequences of failing to do so.

We also found that the DEA investigated and penalized employees who failed to report misconduct. If an OPR investigation determined that an employee (who was not the subject of the original allegation) knew about misconduct but failed to report it, OPR would charge that employee with Failure to Report OPR Matters. We found that of the total 1,392 charges in cases opened during FY 2001 and FY 2002, Failure to Report OPR Matters was the fourth most frequent charge, as shown in Table 10.<sup>49</sup>

**Table 10: Top Five Offense Codes Charged by OPR Cases Opened During FY 2001 and FY 2002**

<b>Offense</b>	<b>Number of Offenses</b>	<b>Percent of Total Offenses</b>
Poor Judgment	143	10
Failure to Follow Written Instructions	120	9
Conduct Unbecoming an Agent	77	6
→ Failure to Report OPR Matters	64	5
Loss or Theft of a Defendant's Property or Funds	58	4
All other charges	930	67
<b>Totals<sup>a</sup></b>	<b>1,392</b>	<b>100</b>

Source: DEA OPR

<sup>a</sup> Totals may not equal 100 percent due to rounding.

Our sample review of OPR cases included eight employees who were charged with Failure to Report OPR Matters. For example, while investigating a complaint that a SAC had misused his OGV by transporting his son in it, OPR learned that a DEA supervisor also was in the vehicle and did not report the misconduct. OPR then charged the supervisor with Failure to Report OPR Matters.

Although the DEA encourages employees to report all misconduct, 11 of the 50 DEA employees we surveyed stated that they did not believe that DEA employees reported all misconduct. Three stated that they had personally observed misconduct and not reported it. These individuals made a distinction between “minor” misconduct (such as using an OGV to run errands) which they would not report, and “major” misconduct (such as

<sup>49</sup> In FY 2001 and FY 2002, OPR used a total of 79 different offense codes to categorize charges. Some OPR cases include multiple subjects or single subjects who have committed multiple offenses.

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criminal activity) which they would report. In addition, they believed that employees who report misconduct become known and are mistrusted and ostracized. The survey respondents also stated that misconduct is not reported because the interpretation of misconduct varies, and that everyone commits minor misconduct at some point in their career.

Our survey also found that when employees did report misconduct, the DEA acted on the report. Seven of the surveyed employees stated that they had reported misconduct. Six of the seven stated that the DEA investigated their allegations. The remaining employee stated that her second-line supervisor did not agree that misconduct had occurred, and did not forward the allegation to OPR, an outcome that was acceptable to the employee. In addition, 48 of the surveyed employees believed that their managers properly reported misconduct to OPR.

**The DEA is reporting allegations of misconduct to the OIG, as required.** On July 11, 2001, the Attorney General expanded the jurisdiction of the OIG and permitted it to investigate allegations of misconduct against DEA employees. Therefore, the OIG has the option to investigate any allegation and an OIG investigator reviews all new allegations to make this decision. In addition, OPR has developed a standard form that indicates the date that the OIG reviewed the allegation, whether the OIG accepted or declined the case, and the name of the OIG investigator who made the determination. This form is incorporated into every OPR investigative case file. We determined that 9 of the 70 OPR cases in our sample occurred after July 11, 2001, and that the DEA reported these allegations to the OIG as required.

## **RECOMMENDATIONS**

**Recommendation 8:** The DEA should designate a single office to monitor the three-tiered system and prepare reports describing disciplinary activities, including, at a minimum: a) the processing timeframes for OPR, the Board, and the Deciding Officials; b) statistics on offenses committed and disciplinary actions taken; c) trend analyses showing increases or decreases in specific offenses committed; and d) a description of disciplinary decisions where the final charges or penalties varied significantly from the Board proposal.

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## CONCLUSIONS

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While the DEA disciplinary system appears appropriately structured and the OPR investigations of employee misconduct are thorough and generally timely, deficiencies in certain areas hinder the effectiveness of the system.

We found that the penalties imposed by the DEA for confirmed misconduct were sometimes overly lenient. In our sample, we found 9 cases involving 13 subjects in which the facts of the case or comments made by Board members in the supporting documentation appeared to justify a stiffer penalty than was ultimately imposed by the Deciding Official. We identified several factors that appear to encourage the lenient penalties. The DEA's Schedule of Disciplinary Offenses and Penalties does not communicate DEA management's priorities. The defined offenses are generic and not DEA-specific, and the penalties – usually ranging from a Letter of Reprimand to Removal for each offense – are too broad to serve as effective guidance for the Board and Deciding Officials. We also found that the DEA continues to impose the same penalty even when increases in specific misconduct indicate that more stringent punishment is needed to provide an effective deterrent. Another factor that contributed to lenient penalties is that both the Board and the Deciding Officials apply mitigating factors in making their determinations. The result of this dual mitigation is that penalties can be reduced below the level that is appropriate for the offense.

In a sample of 70 closed disciplinary case files, we also found that Board members did not always document their independent reviews of a case. Written and oral statements provided by employees in response to the disciplinary proposal were often missing from the files or, in the case of oral statements, were not properly documented. Final decision letters sent to the employee generally did not sufficiently explain the reasons for increasing or decreasing proposed penalties, or dismissing charges. Because of the deficient documentation, we could not always determine whether the individual disciplinary decisions were reasonable.

In addition, we found excessive delays occurred during FY 2001 and FY 2002, primarily with the Board. The delays continued for almost 29 months because DEA management did not take action. At the time of our review, only OPR had established standards against which to measure timeliness, and the DEA did not have a centralized database to track cases as they progress through the entire disciplinary system. Nearly half of the

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DEA employees that we surveyed complained that discipline cases took too long to resolve, resulting in career disruptions.

Although some DEA employees perceive that special agents and higher-graded employees were disciplined inconsistently from non-agents and lower graded employees, we found insufficient evidence to conclude that a double standard of discipline exists.

We also found that the DEA's disciplinary system lacks any mechanism to review final decisions when there is a significant discrepancy between the findings of the investigation, the Board's proposed charges and penalties, and the Deciding Official's final determination. Although the decisions of both OPR and the Board undergo review, there is no accountability for the Deciding Officials.

We make eight recommendations to help the DEA ensure that its disciplinary decisions are reasonable, fair, free of inappropriate external influences, well documented, and timely. These recommendations include better guidance for the Board and Deciding Officials in making their disciplinary determinations, the establishment of standards to improve the timely processing of disciplinary cases, and more effective DEA management of the overall disciplinary process.

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**APPENDIX I: DEMOGRAPHICS OF EMPLOYEES IN TELEPHONE SURVEY**

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<b>By Position:</b>	<b>Number of Employees</b>	<b>Percent of Total</b>
HQ Management	1	2%
Resident Agent in Charge	4	8%
Special Agent	24	48%
Diversion Investigator	2	4%
Intelligence Personnel	6	12%
Laboratory Personnel	3	6%
Technical/Clerical Personnel	10	20%
<b>TOTAL</b>	<b>50</b>	<b>100%</b>

<b>By Grade Level:</b>	<b>Number of Employees</b>	<b>Percent of Total</b>
GS-15	2	4%
GS-14	11	22%
GS-13	16	32%
GS-12	10	20%
GS-11	3	6%
GS-8	2	4%
GS-7	6	12%
<b>TOTAL</b>	<b>50</b>	<b>100%</b>

<b>By Length of Service with DEA:</b>	<b>Number of Employees</b>	<b>Percent of Total</b>
Less than 5 years	13	26%
5 to 9 years	11	22%
10 to 14 years	7	14%
15 to 19 years	8	16%
20 to 24 years	8	16%
25 to 29 years	0	0%
30 or more years	3	6%
<b>TOTAL</b>	<b>50</b>	<b>100%</b>

<b>By Type of Exposure to OPR: <sup>a</sup></b>	<b>Number of Employees</b>	<b>Percent of Total</b>
As a subject	10	20%
As a witness	18	36%
As a delegated inspector	4	8%
Knows of others investigated	38	76%
Unspecified role	3	6%
No exposure	8	16%
<b>TOTAL</b>	<b>81</b>	<b>N/A</b>

Source: OIG Survey of DEA Employees

<sup>a</sup> Some respondents listed more than one type.

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## APPENDIX II: THE DRUG ENFORCEMENT ADMINISTRATION'S RESPONSE

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U. S. Department of Justice  
Drug Enforcement Administration


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[www.dea.gov](http://www.dea.gov)

December 17, 2003

### MEMORANDUM FOR THE INSPECTOR GENERAL

TO: Glenn A. Fine  
Inspector General

FROM: Karen P. Tandy   
Administrator

SUBJECT: Comments on OIG Draft Report: Review of the DEA's Disciplinary System  
(A-2002-014)

The Drug Enforcement Administration (DEA) has reviewed the Inspector General's (OIG) draft report titled, *Review of the DEA's Disciplinary System*, and the subsequent revisions made by the OIG that were provided to DEA on November 21, 2003.

The DEA appreciates that the OIG report was complimentary of the overall effectiveness and fairness of DEA's discipline process. The report notes that DEA's "investigations of alleged misconduct in general appear to be thorough and well documented, and provide a sound basis for making disciplinary decisions." The OIG report also concluded "that the DEA usually imposed reasonable and relatively consistent discipline for confirmed conduct." DEA concurs that, as a whole, the system is functioning well; however, improvements need to be made. The DEA has provided an Action Plan (attached) to address each of the report's eight recommendations. The DEA will provide documentation of corrective actions to the OIG upon completion. In addition, DEA would like to comment on the following assessment in the report.

#### Consideration of Outside Information

The draft report concludes that DEA Board of Professional Conduct personnel and Deciding Officials sometimes consider "external information" in their deliberations (Draft Report, pp. 21-22).

Federal employees are entitled to review the information relied on by the agency in proposing and sustaining disciplinary action. The Merit Systems Protection Board (MSPB) in *Appling v. Social Security Administration*, 30 M.S.P.R. 375, 381 (1986), set forth the criteria governing when consideration of external information can invalidate an agency disciplinary action. In that case, the MSPB, ruled that disciplinary action is invalid if (1) a Deciding Official considered a new allegation or information that the appellant did not have the opportunity to review and respond to, (2) the Deciding Official was influenced by the new allegations or information, and (3) the consideration of the new allegations or information likely influenced the outcome of the proposed discipline. As a



result, DEA strives to ensure that all information that comes to the attention of the Board of Professional Conduct or the Deciding Officials does so through formal channels, and that all such information is provided to the affected employee for review and response. Indeed, as the draft report points out, under DEA procedures, Deciding Officials are instructed to “consider only the reasons specified in the notice [of proposed disciplinary action] and the material in the [investigative] file, and ...any answer of the employee and his or her representative.” (Draft Report, p. 22)

We believe, however, that the second example cited on page 22 of the report may reflect an overly broad definition of the phrase, "outside information." We agree that, in that example, consideration of the complainant's status as a Rastafarian was, without more information, improper. We also view the fact that the complainant's letter was "written poorly" as irrelevant. We do not, however, share the same view with respect to the other factors whose consideration the draft report questions -- for example, that the complainant admitted frequently smoking marijuana and appeared to have had her complaint prepared in part by a "jailhouse lawyer." We view these facts as legitimately reflecting upon the credibility of the complaint, and note that they appear to be matters discussed in the investigative file, and thus cannot be viewed as “outside information.”

The DEA will continue to keep the OIG apprised of its actions to implement the report's recommendations to improve its discipline process. If you have any questions regarding this response, please contact Sheldon Shoemaker, Audit Liaison at 202-307-4205.

## Action Plan

### Review of the Drug Enforcement Administration's (DEA) Disciplinary System

Recommendations	Actions Planned	Projected Completion Date
<p>1. Provide better guidance to the Board &amp; Deciding Officials on the factors that may be considered in making disciplinary determinations by:</p> <ul style="list-style-type: none"> <li>(a) updating the Schedule of Disciplinary Offenses &amp; Penalties;</li> <li>(b) updating written procedures to guide the operations of the Board &amp; Deciding Officials; &amp;</li> <li>(c) Instructing the Deciding Officials to limit their disciplinary considerations to the information contained in official DEA files &amp; information provided by the employee or their authorized representative.</li> </ul>	<p>DEA will:</p> <ul style="list-style-type: none"> <li>a) Convene working group to determine revisions to the current table of penalties; Provide draft to DEA Deputy Administrator for approval. Implement approved new Schedule of Disciplinary Offenses &amp; Penalties</li> <li>b) Review and Update written Handbooks for the Board and the Deciding Officials.</li> <li>c) Reinforce its instructions regarding the parameters of information that deciding officials may consider. Instruction document will be officially issued to the deciding officials.</li> </ul>	<p>6/04</p> <p>9/04</p> <p>1/04</p>
<p>2. The DEA Administrator should require that the DEA document the Douglas factors considered in making its disciplinary decisions.</p>	<p>DEA will reinforce its policy to document information on the Douglas factors considered in making disciplinary decisions.</p>	<p>3/04</p>
<p>3. Require that documentation maintained by the Board &amp; Deciding Officials regarding each disciplinary case include: (a) the opinions of each Board member assigned to review a case &amp; the rationale for the Chairman's proposal in those instances when the individual Board members disagree; (b) any advice from outside sources, such as the Office of Chief Counsel; &amp; (c) all oral &amp; written statements made by employees to Deciding Officials.</p>	<p>DEA will take under advisement and review the merits of this recommendation and any potential alternatives to ensure that:</p> <ul style="list-style-type: none"> <li>a) The rationale for the Chairman's proposal is clearly articulated in the Board's proposal;</li> <li>b) Documentation from outside sources is maintained in accordance with legal and DOJ guidance; and</li> <li>c) Employees' oral &amp; written statements are documented, as required.</li> </ul>	<p>1/04</p>
<p>4. Require that when the final disciplinary decisions differ from the proposed charges &amp; penalties, the final decision letter contain a detailed explanation of the reasons for the difference.</p>	<p>DEA will issue guidance to the Deciding Officials to ensure that when final decisions differ from the proposed charges and penalties, the decision letter will contain a detailed explanation of the reasons for the differences.</p>	<p>1/04</p>
<p>5. Require that the Board &amp; the Deciding Officials establish performance measures for timeliness, &amp; record the amount of time it takes to process each case.</p>	<p>HR is currently collecting data to establish performance measures for timeliness. Once HR has analyzed at least 6 months of data, it will establish a baseline for performance measures. HR is working to develop or acquire a database that will track all cases, including OPR investigations, from start to finish. For the interim, an Access database system is being implemented for this purpose. Data analyzed. Develop requirements analysis for database.</p>	<p>5/04</p> <p>8/04</p>

Recommendations	Actions Planned	Projected Completion Date
<p>6. Designate a single office to monitor the three-tiered system &amp; prepare reports describing disciplinary activities, including, at a minimum: (a) the processing timeframes for OPR, the Board, &amp; the Deciding Officials; (b) statistics on offenses committed &amp; disciplinary actions taken; (c) trend analyses showing increases or decreases in specific offenses committed; &amp; (d) a description of disciplinary decisions where the final charges or penalties varied significantly from the Board proposal.</p>	<p>The Deputy Administrator's office will monitor the activities of all facets of the discipline process. The automated database will provide the Assistant Administrator for Human Resources the ability to continuously review the progress of cases, including the information required in Recommendation 5, a-d. HR and OPR will institute routine reporting for the Deputy's office.</p>	<p>3/04</p>
<p>7. Require that the DEA conduct inspections that periodically review a sample of closed disciplinary case files to assess whether the basis for the disciplinary decisions was adequately documented.</p>	<p>DEA HR will conduct an annual self inspection of closed disciplinary case files and report its results to the Deputy Administrator as the oversight office. The first self inspection is scheduled to be completed by 3/04.</p>	<p>3/04</p>
<p>8. Delegate responsibility for reviewing instances of routine OGV accident &amp; losses of government property cases that do not involve misconduct issues to the appropriate special agents in charge (SAC) &amp; office heads.</p>	<p>DEA will conduct a review of the impact of this change on the SACs and submit a proposal to the Deputy Administrator to address the realignment of this responsibility.</p>	<p>6/04</p>

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**APPENDIX III: THE OIG'S ANALYSIS OF THE DRUG ENFORCEMENT  
ADMINISTRATION'S RESPONSE**

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On October 17, 2003, the Office of the Inspector General (OIG) sent a copy of the draft report to the Administrator for the Drug Enforcement Administration (DEA) with a request for written comments. The Administrator responded to us in a memorandum dated December 17, 2003. The DEA fully concurred with six of the eight recommendations and is assessing the feasibility of implementing the remaining two recommendations. The DEA also provided comments on one of the report sections. Our analysis of the DEA's response follows.

**DEA RESPONSE**

The DEA concurred with the OIG that the DEA's disciplinary system as a whole was functioning well but that improvements were needed. The DEA's specific comments on the report pertained to the section describing the Board members' and Deciding Officials' use of their personal experiences or opinions, or external information, in making disciplinary determinations. Specifically, -the DEA: 1) contended that two of the factors cited in the report as being used by a Board member to discredit a complainant were legitimate, and not inappropriate as the report concluded, and 2) stated that the report's characterization of these two factors as "outside information" was incorrect because the information was contained in the investigative file. Both of these issues are discussed below.

**Legitimacy of Factors Used by a Board Member to Assess the  
Credibility of a Complainant**

The disputed section of the report pertains to a case in which a member of the public alleged that DEA employees committed civil rights violations during the execution of a search warrant. The report concluded that some of the comments made by a Board member in evaluating the credibility of the complainant appeared to be inappropriately subjective. The DEA agreed that some of the comments made by a DEA official cited in the report, such as the fact that the complainant was a Rastafarian and that her letter was poorly written, did appear to be improper or irrelevant. However, the DEA stated that other comments, such as the complainant admitting to frequently smoking marijuana and having her complaint prepared by a "jailhouse lawyer," were legitimate factors to be considered in assessing her credibility.

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In this case, the DEA's rationale for citing frequent drug use and use of a "jailhouse lawyer" as discrediting factors is not clear. If the complainant had been present and under the influence of marijuana while the search warrant was being executed, the DEA could argue that she was not credible because her perceptions were distorted. This, however, was not the case as only the complainant's children were present when the search warrant was being executed. It also is not clear how using a "jailhouse lawyer" to prepare a complaint would necessarily make the complaint less valid.

### **Inappropriate Use of the Term "Outside Information"**

DEA is correct in stating that the factors cited by the Board member in this case are not "outside information." This section of the report encompasses both the use of personal experiences or opinions by the Board, and the use of external information by the Deciding Officials, and was incorrectly titled in the draft report. We have revised the title to appropriately reflect the contents of the section.

## **RECOMMENDATIONS**

**Recommendation 1:** The DEA should provide better guidance to the Board and Deciding Officials on the factors that may be considered in making disciplinary determinations by: a) updating the Schedule of Disciplinary Offenses and Penalties; b) updating written procedures to guide the operations of the Board and Deciding Officials; and c) instructing the Deciding Officials to limit their disciplinary considerations to the information contained in official DEA files and information provided by employees or their authorized representatives.

**Status:** Resolved – Open.

**Summary of DEA's Response:** The DEA concurred with the recommendation and agreed to: a) convene a working group to determine revisions to the Schedule of Disciplinary Offenses and Penalties; b) review and update the Board's and the Deciding Officials' handbooks; and c) reinforce its instructions to the Deciding Officials regarding the parameters of information that they may consider. The projected completion dates are January 2004 for reinforcing its instructions, June 2004 for revising the Schedule of Disciplinary

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Offenses and Penalties, and September 2004 for updating the handbooks.

**OIG's Analysis:** We consider the recommendation resolved, but will keep it open until the DEA provides to us: a) a copy of the revised Schedule of Disciplinary Offenses and Penalties; b) documentation that the Board's and the Deciding Officials' handbooks have been revised; and c) a copy of the instructions issued to the Deciding Officials regarding the parameters of information that they may consider in making disciplinary determinations.

**Recommendation 2:** The DEA should document the Douglas factors considered in making its disciplinary decisions.

**Status:** Resolved – Open.

**Summary of DEA's Response:** The DEA concurred with the recommendation and agreed to reinforce its policy to document information on the Douglas factors considered in making disciplinary decisions. The projected completion date is March 2004.

**OIG's Analysis:** We consider the recommendation resolved, but will keep it open until the DEA provides to us documentation of the reinforcement of its policy.

**Recommendation 3:** The DEA should require that documentation maintained by the Board and Deciding Officials regarding each disciplinary case include: a) the opinions of each Board member assigned to review a case and the rationale for the Chairman's proposal in those instances when the individual Board members disagree; b) any advice from outside sources, such as the Office of Chief Counsel; and c) all oral and written statements made by employees to Deciding Officials.

**Status:** Unresolved – Open

**Summary of DEA's Response:** The DEA stated that it will take under advisement and review the merits of this recommendation and any potential alternatives. The projected completion date is January 2004.

**OIG's Analysis:** Because the DEA has not yet addressed the recommendation, we consider it unresolved. We will keep the

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recommendation open until the DEA provides to us an appropriate response as to how it will implement the recommendation.

**Recommendation 4:** The DEA should require that when the final disciplinary decisions differ from the proposed charges and penalties, the final decision letter contains a detailed explanation of the reasons for the difference.

**Status:** Resolved – Open

**Summary of DEA’s Response:** The DEA concurred with the recommendation and agreed to issue guidance to the Deciding Officials to ensure that when final decisions differ from the proposed charges and penalties, the decision letter contains a detailed explanation of the reasons for the differences. The projected completion date is January 2004.

**OIG’s Analysis:** We consider the recommendation resolved, but will keep it open until the DEA provides to us a copy of the guidance issued to the Deciding Officials.

**Recommendation 5:** The DEA should require that the DEA Inspection Division periodically review a sample of closed disciplinary case files to assess whether the basis for the disciplinary decisions was adequately documented.

**Status:** Resolved – Open

**Summary of DEA’s Response:** The DEA concurred with the recommendation and stated that it will require the DEA’s Human Resources Division to conduct annual inspections of closed disciplinary case files and to report the inspection results to the Deputy Administrator. According to the DEA, the first inspection is scheduled to be completed by March 2004.

**OIG’s Analysis:** Although we recommended that the DEA Inspection Division conduct the inspections, the DEA’s decision to have its Human Resources Division conduct the inspections is an acceptable alternative. We therefore consider the recommendation resolved, but will keep it open until the DEA provides to us the results of the first inspection.

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**Recommendation 6:** The DEA should require that the Board and the Deciding Officials establish performance measures for timeliness, and record the amount of time it takes to process each case.

**Status:** Resolved – Open

**Summary of DEA’s Response:** The DEA concurred with the recommendation and agreed to establish performance measures for timeliness. The DEA also stated that it intends to develop or acquire a database to track all disciplinary cases, and agreed in the interim to implement an Access database system for tracking purposes. The projected completion date for establishing performance measures is May 2004 and August 2004 for developing requirements analyses for the database.

**OIG’s Analysis:** We consider the recommendation resolved, but will keep it open until the DEA provides to us documentation that performance measures have been established and a tracking system has been implemented.

**Recommendation 7:** The DEA should delegate to the appropriate special agents in charge and office heads responsibility for reviewing instances of routine OGV accident and losses of government property cases that do not involve misconduct issues.

**Status:** Unresolved – Open

**Summary of DEA’s Response:** The DEA stated that it will conduct a review of the impact of this change on the special agents in charge and submit a proposal to the Deputy Administrator to address the realignment of this responsibility. The projected completion date is June 2004.

**OIG’s Analysis:** Because the DEA has not yet made a determination to delegate this responsibility, we consider the recommendation unresolved. We will keep the recommendation open until the DEA provides to us an appropriate response as to how it will implement the recommendation.

**Recommendation 8:** The DEA should designate a single office to monitor the three-tiered system and prepare reports describing disciplinary activities, including, at a minimum: a) the processing time frames for OPR, the Board, and the Deciding Officials; b) statistics on



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offenses committed and disciplinary actions taken; c) trend analyses showing increases or decreases in specific offenses committed; and d) a description of disciplinary decisions where the final charges or penalties varied significantly from the Board proposal.

**Status:** Resolved – Open

**Summary of DEA’s Response:** The DEA concurred with the recommendation and stated that the Deputy Administrator’s office would be designated as the single office having overall responsibility for monitoring the disciplinary system. The DEA further stated that the Deputy Administrator’s office will monitor the disciplinary system using reports provided by the HR Division and the Office of Professional Responsibility. The projected completion date is March 2004.

**OIG’s Analysis:** We consider the recommendation resolved, but will keep it open until the DEA provides to us documentation officially designating this authority to the Deputy Administrator’s office, and documentation showing the specific types of information and reports to be used by the Deputy Administrator’s office for monitoring purposes.



