



# FBI AGENT

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FEDERAL BUREAU OF INVESTIGATION AGENTS ASSOCIATION

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## President's Column

By SA John J. Sennett

### Leonard Peltier

In our newsletters we strive to present serious discussion and analysis of serious issues. Those issues consistently involve examinations of ways to make the FBI function better and to enhance the conditions under which we carry out our profession.

Among the specific subjects we often take on are those that, by their nature, require ongoing attention. Dealing with problems relating to compensation, the extension and refinement of due process in internal disciplinary matters, and the never-ending search for ways to achieve the best possible leadership in the FBI, are examples of our recurring efforts – efforts basic to our purposes as a professional association. You will find attention to these matters and others in the following pages of this newsletter issue as well.

As important and fundamental as these matters are to our members, we are occasionally confronted with others that transcend the day-to-day and more practical work at hand. One of those is our obligation to see that justice is not compromised for the murderer of Special Agents Jack Coler and Ron Williams. The effort in which we have shared to keep Leonard Peltier in prison is a perfect example of the kind of professional responsibility we have

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## GATHERING IN DECEMBER

In Memory of Special Agents Jack Coler and Ron Williams  
and In The Cause of Justice

By Special Agent Fred Bragg

Employees of the Federal Bureau of Investigation have always been known to possess the ability to successfully respond to a variety of challenges. Recently, those same employees, some for whom experience on the job can be measured in only months, some whose active careers are past, and most whose length of service falls somewhere in between, responded to what should have been an unthinkable prospect – clemency for the convicted, and unrepentant murderer of two FBI Agents.

When former President Clinton commented during an interview in the waning weeks of his term that he was reviewing the clemency application of Leonard Peltier, FBI people took notice. To the members of the FBI family the facts of the case are clear. Peltier took the lives of two of our own in a cold-blooded execution and justice demands that he complete his life sentences for those brutal crimes.

Numerous prosecutorial and judicial authorities over many years have reviewed the matter and agree that Peltier was lawfully convicted and sentenced. Peltier's supporters choose to ignore the stark reality of his actions. They have set aside the record with manufactured and uncorroborated allegations, and mass-produced many irrelevant arguments that do nothing but cloud the facts. When recourse to

judicial review repeatedly failed them, Peltier advocates turned to a serious long term political and propaganda campaign aimed at the American people and the Clinton White House urging his release through presidential order.

The lobbying of the White House in favor of clemency for Peltier intensified in December. FBI Agents assigned to the Washington Field Office grew worried over this and discussed how we could make a counter effort appropriate to the seriousness of the situation. They decided that a definitive response must be made, and quickly, to show not only the White

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House, but also the citizens of the United States that the murders of two FBI Agents killed in the line of duty must not be glossed over with a disinformation campaign.

Association members Susan Lloyd and Mike Rogers took the initiative to organize an event to demonstrate our position. With the immediate support of many in several field offices, it was decided that a dignified gathering of FBI employees and

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# More Changes Needed in OPR Policy

The FBI's policy revisions of rules governing Administrative Inquiries by the Office of Professional Responsibility (OPR) in the past few years have helped significantly in achieving better standards of fairness and openness for Agents. Key among those changes was the permitting of attorneys to be present during OPR interviews and for allowing them to review the OPR file for adverse action recommendations. This Association continues in its belief, however, that there is further room for improvement in attaining due process for every FBI employee. Absent full appeal rights to the Merit System Protection Board (MSPB), we offer the following changes to FBI policy to further ensure fairness for all. The recent increase in the volume of OPR investigations and the greater chance for a permanent "Giglio branding" of an employee justify the need for these overdue changes.

Approximately nine months ago, the FBIAA made two requests of Director Freeh concerning OPR policy and procedures. We requested the FBI to modify long-standing policy to include a "Sunset Clause" on the retention of records concerning adverse actions and letters of censure. We suggested that a four-year policy be adopted pertaining to records of these personnel actions. Additionally, we asked that the Bureau adopt an "innocent until proven guilty" policy for non-EDSP personnel, i.e., that promotions, transfers, etc. be unaffected by an ongoing OPR investigation. FBIHQ has still not responded to our request for the establishment of a Sunset Policy, but has indicated that they want to retain the "punished until proven innocent" policy. The Association has just recently sent a written request to Director Freeh for some additional changes in OPR policy based on the two above issues, as well as other issues set forth below that we believe are crucial to equity and fairness:

## Sunset Policy on OPR Matters

To recap this requested policy change the majority of federal agencies follow guidance contained in the Federal Personnel Manual which requires that letters of censure be removed from the Official Personnel File (OPF) after three years. The General Records Schedule, which the

FBI generally adheres to, permits the destruction of adverse action files after four years (5 CFR 752).

Current FBI policy uniquely requires that all disciplinary letters be maintained in the employee's OPF indefinitely. This policy also allows for indefinite retention of adverse action information. Historically, the FBI has never destroyed disciplinary action documents in the OPF, the OPR and Administrative Summary files. It should be noted that the FBI, in conjunction with the National Archives, has a destruction plan that was written specifically for the FBI. This plan was approved by U.S. District Judge Harold Green in American Friends Service Committee v. William H. Webster, et al., Civil Action Number 79-1655. This plan and thus our policy, grants the FBI the authority (but certainly not the requirement) to retain disciplinary material indefinitely. This retention policy has created a "Giglio" legal problem for Agents, even after 20 years. We see no reason for the FBI to exceed the requirements of accepted federal personnel policy with regard to the retention of disciplinary records and we have urged the Director to modify the FBI's policies to incorporate this "Sunset Clause". This highly reasonable proposal would require the destruction of adverse action files and letters of censure after four years.

The FBIAA recommendation for this change is still under study in the Office of General Counsel, and we will continue to strongly urge its adoption.

## "Innocent Until Proven Guilty"

Due to the increasing number of OPR investigations, coupled with the fact that approximately half of these investigations are later determined to be unfounded, the FBIAA has requested that policy be revised to allow non-EDSP promotions and incentive awards to proceed despite an ongoing OPR, absent egregious circumstances. All too frequently, Agents have had their grade raises and/or promotions delayed until the OPR inquiry is concluded and fully adjudicated. For many of these Agents, the OPR process results in exoneration and the complaint is determined to be unfounded. Unfortunately, these Agents are financially punished for the rest of their careers because the delay

period is never recompensed.

Current policy tolerates broad, ambiguous and unaccountable discretion on the part of both Administrative Services Division and OPR in delaying these personnel actions until the resolution of such investigations. These investigations typically take months and sometimes even more than a year before they reach a conclusion. Routine promotions and incentive awards are usually the result of years of successful work performance and their awarding (withholding should not be held hostage while a lengthy OPR process lingers on). We are mindful that current federal financial regulations do not allow for back pay provisions due to OPR generate pay/award moratoriums. It is because of that very fact that this change is being urged. Administrative Services Division has, to date, declined to make these requested policy adjustments, but based on ongoing issues in this area we will continue to push for a policy modification.

## ELSUR/Title III OPRs

Another extremely troubling OPR policy area where we have requested a change is with ELSUR/TITLE III OPRs. These

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### Scott Erskine

As many of our members are aware by this time, former FBIAA Executive Director, Scott Erskine, chose late last year to accept a comparable position with the Society of Former Special Agents of the FBI. Scott began his new duties with the Society in mid October of 2000.

We are grateful to Scott for his three years of service to the FBIAA. He was of great help to us by his successful recruitment of new members and his liaison with both FBI and DOJ officials.

Our very best wishes go to Scott. We expect the Society will be well served by his efforts on their behalf. It will be good for us to have a familiar partner in the Society, both the FBIAA and the Society share work toward a number of anticipated mutual goals in the years ahead. ★

## more Changes Needed in OPR Policy

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OPRs arise when there is a mistake made in the ELSUR procedures for checking the names of interceptees of Title III intercepts. The ELSUR procedures that the FBI is laboring under are voluminous and complex. While the ELSUR requirements for Title III affidavits are generally well known among seasoned case Agents, there have been over 200 referrals for OPRs in this area and over 60 ongoing OPR investigations.

The case Agents on these Title III cases are some of our most experienced and dedicated Agents in the Bureau. They generally give up any thought of a personal or family life for up to a year when they embark on cases of this magnitude. They invariably care profoundly that justice be done and are not seeking in any way to subvert proper procedures when errors in this regard are made. While we understand and concur with the need for the observance of every procedural legal safeguard, we wish to find an up-front solution to this apparent problem rather than an after-the fact fault finding mission.

### OPR Letters

We also have requested that OPR make a wholesale review of their disciplinary letter writing process. The FBI's requirement that all Agents be held to the highest standards should not necessarily result in an indelible disciplinary record simply as a result of oversight, carelessness, or error. The fact is that overreaching and unjustifiably harsh disciplinary letters create a treasure trove of unnecessary "Giglio" material for impeachment seeking defense attorneys. One exceptional Title III case Agent, due to tremendous work exigencies, made two errors in his ELSUR checks. He admitted to it, corrected everything legally and received a letter that will remain in his personnel file forever. That letter implies that the Agent acted willfully in an improper fashion and was not truthful in his explanation. This was simply not the case. Every defense attorney in every subsequent investigation will burden this Agent with this letter. While this Association believes that each and every disciplinary letter should be truthful, there is no need to include in them injurious remarks or opinion-like comments on the part of OPR officials. These are performance issues and should be treated as such.

### Proliferation of OPRs - Need for Greater Recourse to Non-OPR Administrative Resolution

Recent years have seen a marked decrease in the use of "in-house" administrative inquiries conducted and resolved by SACs without the direct involvement of OPR. The modern tendency is for divisional management to refer virtually all misconduct allegations to OPR. Many relatively minor complaints and issues that were once routinely handled from beginning to end by divisional management are now elevated unnecessarily to OPR inquiries. This has not been a good development.

Divisional managers are understandably uncertain about the true distinctions between serious misconduct and non-serious misconduct and between issues that are only performance issues as opposed to true misconduct issues. Division heads do in fact have considerable authority to investigate and adjudicate misconduct and address poor performance. The division head may even

impose a suspension of up to 14 days. However, rather than run the risk of being second-guessed in making such decisions, SACs reach for the phone and drop the matter in the lap of OPR even when that is not necessary. Perhaps since they must report to OPR the progress and result of a misconduct inquiry, they figure they might just as well let OPR take it altogether.

The Office of Professional Responsibility should make an affirmative effort to urge SACs to exercise their proper authority to handle less serious misconduct matters without the need for full OPR participation. For such authority to be accepted and used, OPR must formulate specific and unambiguous guidance to division heads so they may carry out their responsibilities confidentially and with uniformity from division to division.

The good and effective use of a time honored disciplinary action - the chewing out by your boss - has been lost because of legal worries. An informal verbal admonition and warning, while never pleasant, can be a highly effective way to address many of the less serious offenses that have gone the OPR route far too frequently. This kind of less formalized action and resolution will avoid the danger of unnecessarily protracted anxiety in the employee and the stigma of the ever-present record of an OPR investigation and sanction.

### Request for Appeal of Letters of Censure that Present a Giglio Issue

Currently, policy does not allow employees to appeal a letter of censure. Still, these letters are often the most damaging aspect of any discipline. Defense attorneys can turn a letter of censure into an indictment of the Agent, who perhaps overwhelmed at the time, mishandled an item of evidence or the like. With these letters a permanent fixture in the personnel file, "just a letter" can become a branding for life.

### Let's Move the Real OPR Investigations from the Field Office

A suggestion with which we would like to conclude is one to establish a group of OPR regional investigators at the GS 14 level that work for the Inspection Division. These Agents would be experienced Agents, who have been relief supervisors. This cadre would operate much like EEO investigators, but would be independent of any SAC. The current in-house system is facing a spate of problems. One of the concerns is the impartiality of the investigator and the reporting back to the SAC and ASAC, who may have previous history with the subject of the investigation. Even if the investigation is conducted with total integrity there can be an appearance or perception of bias, for or against the investigated employee. Additionally, squad supervisors are the ones tasked with conducting the proliferation of OPRs. These investigations can be very time consuming and increasingly are taking supervisors away from their primary duties. At a time when we have a very young Agent staff, squad supervisors should not be tasked with conducting involved OPR investigations.

We applaud the changes made to date by OPR to improve the entire disciplinary process. The measures submitted here would serve to make that process better still. We urge their prompt implementation. ★

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