U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 24, 2012

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Lamar S. Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairmen:

This responds to your letters to the Attorney General requesting a copy of the investigative report by the Office of Professional Responsibility (OPR) and documents relating to the Department's disciplinary process in connection with the federal prosecution of former Senator Ted Stevens.

We recognize that the *Stevens* case is a matter of significant congressional and public interest. Members have inquired about the status of this matter during Judiciary Committee oversight hearings that have occurred since the Attorney General directed Department prosecutors to ask the court to vacate the conviction and dismiss the indictment against Senator Stevens. Under these extraordinary circumstances – and in light of the tremendous priority that the Committee has placed on this matter – we are prepared to accommodate the Committee's oversight needs by providing you with the enclosed materials. The Privacy Act permits disclosure to the Committee, 5 U.S.C. § 552a(b)(9), and we are providing the materials in response to your request.

Disciplinary Process & Factors That Govern Disciplinary Decisions

Before setting forth the particulars of the OPR report and the process that followed its issuance, we should describe briefly the process established by law that is applicable to disciplinary actions involving federal employees in the career service. The procedures are set forth generally in 5 U.S.C. §§ 7501-7504 and 7511-7514 and in 5 C.F.R. Part 752. The four primary forms of discipline for federal employees are written reprimand, suspension, demotion,

and removal. The law requires that a federal agency follow a multiple-step process if the agency seeks to discipline an employee by imposition of a suspension, demotion, or removal.

If OPR makes a finding that a Criminal Division prosecutor or Assistant United States Attorney (AUSA) engaged in professional misconduct, the matter is referred to the Department's Professional Misconduct Review Unit (PMRU). After reviewing the evidence, a "proposing official" within the PMRU makes a recommendation concerning disciplinary action, if any. An employee who is the subject of the disciplinary action is entitled to written notice of the proposing official's recommended action, including specific reason(s) for the proposed discipline, and also entitled to respond to the proposal both orally and in writing. A "deciding official" then must consider the proposal and the responses of the employee in reaching a discipline decision. The deciding official must specify in writing the reasons for the decision and advise the employee of any grievance or appeal rights. An employee who is suspended for more than 14 days, demoted, or removed may appeal the disciplinary decision to the Merit Systems Protection Board (MSPB).

In *Douglas v. Veterans Administration,* 5 M.S.P.R. 280 (1981), the MSPB set forth certain factors that the proposing and deciding officials must consider in determining the appropriate discipline. Those factors include:

1. The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3. The employee's past disciplinary record;
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. Consistency of the penalty with the applicable agency table of penalties;
8. The notoriety of the offense or its impact upon the reputation of the agency;
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10. Potential for the employee's rehabilitation;
11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

In *Hamlett v. Department of Justice*, 90 M.S.P.R. 674 (2002), the MSPB concluded that Assistant United States Attorneys are "employees" within the meaning of the civil service statutes and regulations. Therefore, they are entitled to the procedural protections described above.

OPR Findings in the Stevens Matter

During the course of OPR's investigation, OPR reviewed all relevant pleadings, trial transcripts, court orders, and discovery. In addition, OPR reviewed more than 100 boxes of documents gathered from various sources, including the Criminal Division, the Executive Office for United States Attorneys, and the Federal Bureau of Investigation (FBI). OPR also reviewed computer records, including hard drives, and conducted more than 50 interviews, including interviews of the trial team members, the Criminal Division Front Office, FBI agents, IRS agents, defense counsel, and private citizens. In addition, OPR reviewed factual information and witness interview transcripts provided by Henry Schuelke, the special prosecutor appointed by Judge Emmet Sullivan (D.D.C.).

OPR issued its 672-page final report on August 15, 2011. That report reflects that OPR thoroughly examined multiple allegations of misconduct that arose during the course of the proceedings in the *Stevens* case. OPR concluded that the government violated its obligations under constitutional *Brady* and *Giglio* principles and Department policy (United States Attorneys' Manual § 9-5.001) by failing to disclose exculpatory statements by prosecution witnesses Bill Allen and Rocky Williams from trial preparation sessions and FBI reports, by failing to disclose Bill Allen's alleged involvement in securing a false sworn statement from a woman he allegedly had a sexual relationship with while she was underage, and by failing to disclose information that contradicted evidence concerning construction costs presented at trial. OPR also found that the government violated D.C. Rule of Professional Conduct 4.1(a) by misrepresenting to the defense the facts concerning Allen's alleged involvement with the underage female in a September 9, 2008 disclosure letter.

With respect to individual prosecutors, OPR concluded that AUSA Joseph W. Bottini of the District of Alaska and AUSA James Goeke now of the Eastern District of Washington engaged in reckless professional misconduct in violation of their disclosure obligations in the case. More specifically, OPR determined that AUSA Bottini recklessly disregarded his disclosure obligations by:

- Failing to disclose information provided by Bill Allen during an interview conducted on April 15, 2008 that was inconsistent with Allen's later interviews and his trial testimony, and failing to correct Allen's testimony at trial about when he first advised the government of a conversation with Bob Persons – a friend of Senator Stevens who was monitoring the work on the Senator's property – in which Persons had said that Senator Stevens was just "covering his ass" by sending Allen notes requesting bills for services provided by Allen's company, VECO;

- Failing to disclose information contained in a February 28, 2007 FBI 302 and a 2006 Internal Revenue Service Memorandum of Interview regarding Senator Stevens's willingness to pay bills that VECO might have provided; and
- Failing to disclose information provided by witness Robert "Rocky" Williams – a VECO employee who supervised the construction on Senator Stevens's property – during trial preparation interviews that Williams thought that VECO's costs would be added to the Christensen Builders invoices prior to those invoices being sent to Senator Stevens.

OPR likewise found that AUSA Goeke engaged in reckless professional misconduct by failing to disclose the Williams information. OPR thoroughly analyzed the evidence as to whether the misconduct by AUSA Bottini or AUSA Goeke was intentional but concluded that the evidence did not support such findings.

With respect to the other individual prosecutors, OPR made no findings of professional misconduct and, with one exception, did not conclude that any of those prosecutors had exercised poor judgment. OPR did conclude that one of the supervisors in the Public Integrity Section (PIN) exercised poor judgment by failing to supervise certain aspects of the disclosure process. OPR refrained from making any findings concerning professional misconduct or poor judgment as to one of the PIN line attorneys because that attorney passed away prior to the completion of the report. The process concerning the conduct of an FBI Special Agent is not yet complete. Therefore, we cannot report on those findings at this time. OPR's findings and the rationale that underlies them are more fully set forth in the enclosed redacted report of investigation.[1]

Disciplinary Decisions Regarding Stevens Prosecutors

Because it found that AUSAs Bottini and Goeke had engaged in reckless professional misconduct, OPR forwarded the report to the Professional Misconduct Review Unit (PMRU) for consideration of disciplinary action. Kevin Ohlson, Chief of the PMRU, determined preliminarily that the OPR findings were supported by the evidence and the law. He therefore assigned the matter to PMRU attorney Terrence Berg for issuance of a disciplinary proposal. Mr. Berg solicited *Douglas* factor information from the United States Attorneys in the AUSAs' current districts. After receiving the *Douglas* factor information and reviewing the report, Mr. Berg concluded that he disagreed substantively with OPR's conclusion that the AUSAs committed professional misconduct. Consistent with procedures in the PMRU, Berg submitted a draft memorandum to Chief Ohlson. After reviewing Berg's draft memorandum, Chief Ohlson remained convinced that the OPR findings of misconduct were supported by the evidence and the law and determined that it would be inappropriate to permit Mr. Berg to reject those findings. Therefore, Chief Ohlson sought authorization from the Deputy Attorney General (DAG) to serve as the proposing official. On December 3, 2011, the DAG authorized Chief Ohlson to serve in this capacity and also directed Chief Ohlson to provide Mr. Berg's draft to the AUSAs if he

[1] The OPR report of investigation and other enclosed documents have been redacted to address privacy, grand jury, and other confidentiality concerns. Because no professional misconduct findings were made against the individuals referenced in this paragraph, we have not included their names in this letter, although their names have been left unredacted in the enclosed documents.

(Ohlson) issued a disciplinary proposal. On December 9, 2011, after considering the OPR report and the *Douglas* factor information provided by the United States Attorneys, Chief Ohlson issued disciplinary proposals to both of the AUSAs and also provided them a copy of the draft Berg memo. Chief Ohlson proposed that AUSA Bottini be suspended without pay for 45 days and that AUSA Goeke be suspended without pay for 15 days. Chief Ohlson's proposals set forth his consideration of the *Douglas* factors that informed his determination of the appropriate discipline. In particular, Chief Ohlson noted that OPR had found that neither AUSA acted intentionally. With respect to AUSA Bottini, Chief Ohlson found in mitigation that, among other things:

- AUSA Bottini has been in public service for more than 25 years;
- AUSA Bottini has an exemplary work record and had received numerous awards for service;
- AUSA Bottini has no prior disciplinary record; and
- AUSA Bottini's United States Attorney reported that AUSA Bottini has a strong reputation for integrity, fairness, and honesty.

With respect to AUSA Goeke, Chief Ohlson noted in mitigation that, among other things:

- AUSA Goeke has been in public service for approximately 8 years;
- AUSA Goeke has an excellent work record and has received numerous awards for his service;
- AUSA Goeke has no prior disciplinary record; and
- AUSA Goeke's supervisors have confidence in his ability to perform his assigned duties in the future.

In addition, Chief Ohlson noted that the law required him to consider the consistency of the proposed penalty with penalties imposed by the Department in similar circumstances. Because he was unaware of any case within the Department of Justice where an employee with a record similar to the subject AUSAs was terminated after OPR found that the employee engaged in something less than intentional misconduct, he did not recommend removal.

In January and March 2012, the two AUSAs contested the proposed discipline and responded in writing and orally to the proposals to Associate Deputy Attorney General (ADAG) Scott Schools, the career Department official who had been designated the deciding official. On May 23, 2012, ADAG Schools issued his decisions regarding the disciplinary proposals. In short, ADAG Schools determined that AUSA Bottini should be suspended for 40 days without pay and that AUSA Goeke should be suspended for 15 days without pay. In particular, ADAG Schools sustained the OPR findings of misconduct against both AUSAs that were the basis of Chief Ohlson's proposal. However, ADAG Schools rejected an additional OPR finding that AUSA Bottini exercised poor judgment by failing to inform his supervisors that the representations in a *Brady* letter regarding the underage female and Bill Allen were inaccurate and misleading. Chief Ohlson had relied on that poor judgment finding as an aggravating *Douglas* factor in his analysis. Because ADAG Schools rejected that finding, he reduced the proposed discipline against AUSA Bottini by five days. ADAG Schools likewise conducted, as

required by law, a full *Douglas* factor analysis. Among other things, he noted that AUSA Bottini's United States Attorney advised that over the last twenty-five years AUSA Bottini had never received a performance evaluation at other than the highest level. ADAG Schools also referenced letters of support submitted by AUSA Bottini from former United States Attorneys, colleagues, and defense counsel who had handled cases prosecuted by AUSA Bottini over his twenty-five year career. With respect to AUSA Goeke, ADAG Schools noted that both of the United States Attorneys for whom he had most recently worked praised his work ethic and described his work record as exemplary over the past eight years.

Despite the mitigation cited by both Chief Ohlson and ADAG Schools, both agreed that OPR's findings of reckless professional misconduct were supported by the law and the facts and were serious. Therefore, Chief Ohlson recommended the discipline as noted above, and ADAG Schools concurred but for the five-day reduction in AUSA Bottini's suspension that resulted from the rejection of the poor judgment finding.

In order to enhance the Committee's understanding of OPR's findings and the process that followed them, enclosed are a number of documents relevant to the Department's review of the matter. As noted above, the documents have been redacted to address privacy, grand jury, and other confidentiality concerns. Enclosed are:

1. OPR Report, August 15, 2011;
2. Disciplinary proposal, Joseph Bottini, December 9, 2011;
3. Disciplinary proposal, James Goeke, December 9, 2011;
4. Response of AUSA James Goeke, January 23, 2012;
5. Response of AUSA Joseph Bottini, January 25, 2012;
6. Decision regarding AUSA Bottini, May 23, 2012; and
7. Decision regarding AUSA Goeke, May 23, 2012.

Although ADAG Schools's decisions represent the Department's final actions in this matter, the AUSAs are entitled to appeal his decisions to the MSPB.

Steps the Department Has Taken Since Stevens

Long before the discipline process was complete, the Attorney General took action to enhance the Department's compliance with its discovery and disclosure obligations. Starting in 2009, all 6,300 federal prosecutors – regardless of experience level – have been required to attend extensive, annual discovery training and re-training sessions, ensuring that every attorney keeps abreast of the latest developments. Since October 2010, the Department's newest prosecutors have been able to fulfill their mandatory training requirements through attendance at rigorous discovery "boot camps," designed to provide a comprehensive overview of their obligations. Significantly, these training requirements have been added to the U.S. Attorneys' Manual, ensuring that they will remain a part of the Department's culture.

In January 2010, the Department issued detailed written guidance to all federal prosecutors on discovery practices. The Department also provided prosecutors with key

discovery tools, such as online manuals and checklists, and has greatly expanded discovery training for federal law enforcement agents and other investigative personnel – 26,000 of whom participated in 2011 alone. These training efforts have continued throughout 2012, and the Department will continue to train prosecution support personnel, including paralegals and victim-witness coordinators.

The discovery failures in the *Stevens* case were not typical and must be considered in their proper context. Over the past 10 years, the Department has filed over 800,000 cases involving more than one million defendants. In the same time period, only one-third of one percent (.33 percent) of these cases warranted inquiries and investigations of professional misconduct by OPR. Less than three-hundredths of one percent (.03 percent) related to alleged discovery violations, and just a fraction of these resulted in actual findings of misconduct. Department regulations require DOJ attorneys to report any judicial finding of misconduct to OPR, and OPR conducts computer searches to identify court opinions that reach such findings in order to confirm that it examines any judicial findings of misconduct, reported or not. In addition, defense attorneys are not reticent to raise allegations of discovery failures when they do occur.

Our prosecutors and agents work hard to keep our country and communities safe and to ensure that defendants are brought to justice honorably and ethically. Nonetheless, when there is even a single lapse, we must, and we do, take it seriously.

We hope that this information is helpful. Please do not hesitate to contact this office if you would like additional assistance regarding this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosures

cc: The Honorable Charles Grassley
Ranking Minority Member
Senate Committee on the Judiciary

The Honorable John Conyers, Jr.
Ranking Minority Member
House Committee on the Judiciary