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Office of Professional Responsibility

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MEMORANDUM

TO: Louis DeFalaise
Director
Office of Attorney Recruitment and Management

FROM: *H. Marshall Jarett*
H. Marshall Jarett
Counsel

SUBJECT: Report of Investigation of Whistleblower Allegations by Federal Bureau of Investigation Special Agent Bassem Youssef

INTRODUCTION AND SUMMARY

In letter of February 15 and May 26, 2006, attorneys for Federal Bureau of Investigation (FBI) Supervisory Special Agent (SSA) Bassem Youssef alleged that Youssef made protected disclosures to FBI Director Robert S. Mueller, III, on June 28, 2002 and that, immediately after making the disclosures, he was retaliated against when the FBI failed to implement an approved transfer of SSA Youssef to a new position within the FBI.¹

¹ In addition, Senators Arlen Specter, Patrick Leahy and Charles E. Grassley wrote to the Office of the Inspector General about this matter. In a letter dated February 15, 2006, the

Based on these letters and the accompanying documents, we initiated an investigation into the question whether there were *reasonable grounds* to believe that a reprisal had been taken against SSA Youssef. In investigating this matter, we reviewed the letters from Youssef's attorneys, and the numerous documents provided by them. Included in these documents were transcripts of depositions taken in connection with a lawsuit filed by Youssef in July 2003. In that lawsuit, SSA Youssef alleged that he was discriminated against by the FBI because of his race and charged that he was kept out of the investigation of the Sept. 11, 2001, hijackings because of his ancestry. That lawsuit is currently pending. In connection with the lawsuit, SSA Youssef's attorneys took the depositions of Director Mueller, former FBI Director Louis J. Freeh, all supervisory personnel involved in the approval of the directed placement, and numerous other FBI personnel.²

As discussed in detail below, we found reasonable grounds to believe that SSA Youssef's disclosures to the Director were a contributing factor in the FBI's failure to implement his approved placement in the FBI's International Terrorism Operations Section (ITOS). The finding by this Office does not constitute a finding of retaliation or a finding of misconduct. In view of our finding, the FBI whistleblower regulations provide for referral of the matter to your office for determination whether a protected disclosure was a contributing factor in a personal action taken or threatened. We are therefore referring this matter to you and note that SSA Youssef has consented to the referral to your office, as required under 28 C.F.R. § 27.4(a).³

Senators expressed their concern that the FBI may have violated its whistleblower protection regulations with regard to SSA Youssef, and requested an investigation. As provided under the regulations, both the Office of the Inspector General and this Office are investigative offices involving whistleblower matters. After consultation, we determined that this Office would handle the Youssef matter.

² A copy of all documents provided to this Office is attached as Attachment A.

³ A copy of SSA Youssef's written consent is attached as Attachment B.

I. THE ALLEGATIONS

A. Background

In a detailed statement of facts submitted to this Office on May 26, 2006, SSA Youssef's attorneys alleged that SSA Youssef, who is fluent in Arabic, has been an FBI agent since 1988. According to his attorneys, Youssef is the highest ranking Arab-American and Arabic speaker in the FBI. His past positions include the FBI Legat position in Saudi Arabia for almost four years; and a detail assignment from the Counterterrorism Division as the Chief of the Executive Secretariat Office at the National Counterintelligence Center at the Central Intelligence Agency (CIA). At the time of the September 11, 2001 attacks, SSA Youssef was looking for a new position within FBI headquarters. According to Youssef, between September 11, 2001 and February 2002, he was not tasked with any responsibilities for the investigation of the attacks or any other assignments relating to Middle Eastern counterterrorism.

In February 2002, Youssef was informed that he was to be transferred to the Counterintelligence Division's Budget Unit. SSA Youssef complained about the assignment and was given a temporary duty assignment to the Document Exploitation project (DocEx), where evidence being collected in Afghanistan, Iraq and other locations was tagged, processed and catalogued. In June 2002, SSA Youssef was informed that he was being transferred into the Counterterrorism Division, but remained on detail to DocEx.

Unbeknownst to SSA Youssef, on April 30, 2002, the Counterintelligence Division requested the directed placement of SSA Youssef into ITOS. The request stated:

Given SSA Youssef's knowledge relative to overseas operations (previous assignment to a legal attache) coupled with his Arabic speaking ability it's recommended that approval be granted for directed placement of SSA Youssef from the National Counterintelligence Executive Office (NCEX) to the International Terrorism Operations Section (ITOS), effective immediately. Contact with ITOS was made prior to the preparation of this document. Both [the Counterintelligence Division and the Counterterrorism Division] executive management concur with this assignment.

The request was approved by several levels of supervisors and, ultimately, by Director Mueller on June 26, 2002.

B. The Protected Disclosure

SSA Youssef was unaware of the approval for his transfer and, in June 2002, he contacted his congressional representative, Congressman Frank Wolfe, to discuss his concerns that, despite his *qualifications*, the FBI had not placed him in a position to utilize his skills and that he believed that he was being discriminated against based on his national origin. A meeting between Wolf, Youssef, and Director Mueller took place on June 28, 2002. It appears that Director Mueller did not recall his recent approval of Youssef's directed placement at the time of the meeting. In addition, according to one witness, Director Mueller was surprised and "appalled" by Youssef complaining to him in the presence of Congressman Wolf.

Youssef reported to OPR that he told Director Mueller that his language and Middle-East expertise had not been put to use by the FBI since September 11, 2001. He outlined his fluency in Arabic; his extensive knowledge of Saudi and Egyptian cultures and terrorist groups; his expertise in terrorism investigations; his participation in the 1996 Khobar Towers bombing and 1993 World Trade Center bombing investigations; his certification as a polygrapher specializing in the debriefing of Middle Eastern subjects in their native language; his eight years of experience as a hostage

negotiator; and his award from the Director of Central Intelligence for his "efforts to neutralize the threat of the Islamic Group members on U.S. soil." Youssef said that he expressed great concern about contacting a member of Congress about his concerns and that Director Mueller assured him that there would be no retaliation against him for coming forward with this information and that he would look into his concerns.

Director Mueller stated in his deposition that he recalled that SSA Youssef complained that he was an Arabic speaker and that he was not being used to his full capacity. Mueller could not recall any additional details of the conversation. Mueller said that he believed that he talked to someone at the FBI after the meeting and asked them to follow up on the matter, but that he could not recall who he told. He added that he had a vague recollection of someone telling him that they had looked into the matter and that SSA Youssef's complaint was known and that "it was being handled in the ordinary course by the Bureau."⁴

C. The Alleged Retaliation

The ordered placement of Youssef in ITOS was never implemented and Youssef was never notified that it had been ordered. Youssef learned of the directed placement through discovery in conjunction with his federal lawsuit. Youssef remains in the DocEx unit, now serving as Unit Chief. During the course of the lawsuit, neither the FBI, nor any witnesses deposed by Youssef's attorneys, have provided any explanation for the failure to implement the directed placement.

In a May 17, 2005 deposition of Counterterrorism Division Deputy Assistant Director John Lewis, Youssef's second line supervisor, Lewis commented that Youssef's actions in complaining to the Director were inappropriate. He stated:

⁴ Mueller deposition, April 26, 2005, at 32.

To put the director of the FBI in that position, to show him that lack of courtesy, to surprise him with a member of Congress in my judgment is absolutely outrageous. It shows a tremendous disloyalty to the director. It shows me that at least at that time he was far more interested in Bassam Youssef than he was in serving this government or the FBI.⁵

He added:

I'm still amazed that he had the wherewithal, and maybe there's pieces of this I don't fully understand, so I don't know what happened exactly right[,] but the Director was truly appalled, a surprise visit and hit with questions upon his arrival not knowing why he was walking into the Congressman Wolf's office. On a scale of one to 100, the judgment factor there would be way down into the negatives as far as I'm concerned. I can't imagine anyone who would do that. It's just beyond my capacity to think someone could do something like that.⁶

II. THE OPR INVESTIGATION

The Whistleblower Protection for FBI Employees regulations, 28 C.F.R. Part 27, protect an employee from specified personnel actions, or "reprisals" by his or her superior when the employee lawfully and in good faith, reports wrongdoing. Our Office investigates allegations of reprisal to the extent necessary to determine whether there are reasonable grounds to believe that a reprisal has been or will be taken. 28 C.F.R. §27.3(d). This Office does not find whether there was retaliation or misconduct.

III. APPLICABLE STANDARDS AND OPR FINDINGS

A. Did SSA Youssef Make a Protected Disclosure?

We first analyzed whether SSA Youssef's statement to Director Mueller constituted a protected disclosure under the whistleblower regulations and concluded that it did. Under the

⁵ John Lewis deposition, May 17, 2005, at 129.

⁶ *Id.* at 181.

regulations, a protected disclosure includes disclosing information that the employee reasonably believes evidences a violation of any law, rule or regulation, or an abuse of authority, to this Office, FBI OPR, the Office of the Inspector General, the Attorney General, the Director of the FBI, or the Special Agent In Charge of an employee's field office. 28 C.F.R. §27.1(a).

1. Disclosure

Protected disclosures under the regulations include the disclosure of a violation of any law, rule or regulation; or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. In this matter, the evidence supports a finding that SSA Youssef disclosed his reasonable belief that he had been discriminated against in violation of federal law, and that the FBI harmed its mission in combating terrorism by failing to use his expertise. We concluded that these allegations fit within the definitions of "violations of law, mismanagement, and abuse of authority."

2. Disclosure to a Specified Office

A disclosure is protected under the regulations only if it was made to one of the entities listed in the whistleblower regulations. SSA Youssef made his disclosure to the FBI Director, who is one of the listed entities in Section 27.1.

3. Reasonable Belief

Whistleblower protections extend to employees who reasonably believe in the merits of their charges. *See, e.g., Special Counsel v. Starett*, 28 MSPR 60 (1985). We therefore need not determine the accuracy of SSA Youssef's allegations that his expertise was ignored by the FBI based on his race, but rather whether a reasonable person in SSA Youssef's position would believe his allegations. *Special Counsel v. Hoban*, 24 MSPR 154, 160 (1984). We found that SSA Youssef met

that threshold burden.

The evidence indicated that SSA Youssef's expertise on Middle Eastern and terrorism matters was considerable. FBI managers deposed by Youssef's attorneys stressed that Youssef had remarkable skills. Former FBI Director Freeh testified that he would give Youssef "very, very high performance" and interpersonal skills rating for his work at the Legat in Saudi Arabia.⁷ Youssef's performance review for his work in the Legat was rated as "exceptional." Youssef's former supervisor in Los Angeles, Edward Curran testified that Youssef was essential to the counterterrorism program in Los Angeles and that he did not know of anyone else in the FBI that had the knowledge, demeanor, attitude or judgment to handle counterterrorism matters.⁸

Youssef's performance review for his work in the Legat was rated "exceptional," and the Legat received an "effective and efficient" rating under his watch. Youssef was also awarded the DCI award, which an FBI supervisor acknowledged is a "prestigious award" that is presented to individuals that have been nominated for "outstanding work in terrorism or foreign counterintelligence."⁹

Youssef's supervisor in DocEx from July 2002 to April 2005 was Michael Fedarcyk. He testified in his deposition that there was no requirement of language skills for the document exploitation process and that other people could have done the job. Fedarcyk stated that "somebody at the GS-13 level could do his job."¹⁰

⁷ Freeh deposition, March 18, 2005, at 43.

⁸ Edward Curran deposition, April 21, 2005, at 24.

⁹ Ellen Knowlton deposition, May 11, 2005, at 30-31.

¹⁰ Michael R. Fedarcyk deposition, November 17, 2004, at 23.

Based on these facts, we concluded that a reasonable person in Youssef's position could believe that, at the time he complained to Director Mueller, his expertise was not being used effectively within the FBI and that discrimination was the cause for that failure.

4. Personnel Action

The regulations prohibit the taking, or failing to take, a personnel action because of whistleblower disclosures. Personnel actions include an appointment or promotion; a detail, transfer, or reassignment; and any other significant change in duties, responsibilities, or working conditions.

5 U.S.C. §2302(a)(2)(A). The failure to implement the directed placement of SSA Youssef constituted a personnel action within the meaning of the regulations.

B. Is There Reasonable Cause to Believe SSA Youssef Was Retaliated Against?

We next analyzed whether there was reasonable cause to believe that the failure to implement the directed placement of SSA Youssef into ITOS was a reprisal for his protected disclosure. To establish a whistleblower violation, an employee must show that there are reasonable grounds to believe that the protected disclosure was a contributing factor in the personnel action about which he complains. *Yunus v. Department of Veterans' Affairs*, 84 MSPR 78, 81 (1999). A contributing factor is any factor which alone or in connection with others tends to affect in any way the outcome of the personnel action at issue. The employee does not, however, have to establish a retaliatory motive or animus on the part of the decision maker in order to establish that his disclosure was a contributing factor to the personnel action. *Marano v. Department of Justice*, 2 F.3d 1137, 1140, 1143 (Fed. Cir. 1993) ("Regardless of the official's motives, personnel actions against employees should quite [simply] not be based on protected activities such as whistleblowing.") (quoting from

S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1988)).¹¹

Whether a protected disclosure is a contributing factor can be established by circumstantial evidence. For example, under 5 U.S.C. § 1221(e), an employee may demonstrate that a disclosure was a contributing factor to a personnel action through circumstantial evidence such as evidence that the official taking the personnel action knew of the disclosure; and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Caddell v. Department of Justice*, 52 MSPR 529, 533-34 (1992). Other circumstantial evidence, such as the strength or weakness of the agency's reason for taking the personnel action; whether the whistleblowing was directed at one of the deciding or proposing officials of the personnel action; and the deciding officials motive to retaliate, are also considerations. *Powers v. Department of the Navy*, 69 MSPR 150, 156 (1995); *Yunus v. Department of Veterans' Affairs*, 84 MSPR 78, 82 (1999).

Based on the results of our review of this matter, we found reasonable cause to believe that the failure to implement the directed placement of SSA Youssef in ITOS constituted a prohibited

¹¹ It should be noted that *Marano* and other cases holding that no retaliatory motive is required were decided under 5 U.S.C. §2302, which governs federal employees, but not FBI employees, who are covered by 5 U.S.C. § 2303. Section 2302 was amended from requiring that an employee establish that the personnel action was taken *as a reprisal for* a protected disclosure, to prohibiting any such actions *because of* a protected disclosure. Furthermore, Congress enacted language in conjunction with this section stating that Section 2302's "because of" language will be satisfied even if the disclosure was only a "contributing factor" in the personnel decision. 5 U.S.C. §1221(e)(1). Section 2303 was not amended at the time that Section 2302 was amended, and therefore still prohibits personnel actions taken *as a reprisal for* a protected disclosure. Despite the difference in language, Section 2303 requires that the enforcement of the section should be "in a manner consistent with" the whistleblower provisions for other federal employees, including 5 U.S.C. § 1221. 5 U.S.C. § 2303(c). In light of these provisions, the Department's whistleblower regulations adopt the "contributing factor" standard and we apply it here.

reprisal for his protected disclosure.

1. Knowledge and Timing

In this case, it is clear that Director Mueller and other FBI personnel were aware of SSA Youssef's complaint to the Director. Director Mueller testified that he recalled the complaint and told others in the FBI about it. Moreover, the timing of the failure to implement the directed placement of Youssef was relatively close in time to when SSA Youssef complained to Director Mueller. Youssef met with the Director on June 28, 2002, and the directed placement, approved by Director Mueller on June 26 should have been implemented shortly after that time. We found both the awareness of senior management and the timing of the failure to implement the placement to be circumstantial evidence of retaliation.

2. Inadequate Agency Justification

The directed placement request was signed by all required levels of FBI management, including Director Mueller, and yet was never implemented. No documentation or explanation has been provided by the FBI during the federal litigation as to why the placement was not implemented. We found the fact that the FBI has provided no rationale for the reasons it filed to implement the placement to be circumstantial evidence of a retaliatory motive by the FBI.

3. Motive to Retaliate

Finally, we found the comments of Youssef's second line supervisor, DAD John Lewis, provides some evidence in support of our finding that there was reasonable cause to believe that the FBI's actions in this matter were retaliatory. Lewis emphasized that Youssef's actions were inappropriate and that the "Director was appalled" by Youssef's actions. Lewis also stated that Youssef's actions were disloyal and showed extremely poor judgment.

4. OPR Conclusion

Based on the results of our investigation, we found sufficient circumstantial evidence to establish reasonable cause to believe that the FBI's failure to implement the directed placement into ITOS was retaliatory. We based our finding on DAD Lewis' report of the Director's comments and his negative reaction to Youssef's actions; the timing of the failure to implement the recently approved directed placement; and the lack of any explanation as to why the approved placement was not implemented.

CONCLUSION AND RECOMMENDATION

Under the whistleblower regulations, this Office's finding is a preliminary one which is referred to your office for a final finding. It is OARM's role to determine, based upon all the evidence, whether a protected disclosure was a contributing factor in a personnel action taken or to be taken.

Because we found that reasonable cause to believe that the failure to implement the directed placement of Youssef into ITOS violated the whistleblower regulations, we are reporting our findings to your office with Youssef's consent for further action, as required by 28 C.F.R. § 27.4. We recommend that the directed placement be implemented and that SSA Youssef be placed in the position for which he was approved on June 26, 2002. No evidence has been presented to us on the issue of damages and, as such, we make no recommendation on that issue.