



U.S. Customs and Border Protection
Securing America's Borders

U.S. Customs and Border Protection Complaints and Discipline Systems Review

Public Report of Findings and Recommendations

November 23, 2015



U.S. Customs and Border Protection employees are dedicated public servants who conduct themselves with professionalism as they protect our borders and facilitate trade and travel. They embody our core values – integrity, service to country, and vigilance – uphold the public trust, and demonstrate personal behavior that reflects positively on their peers and on CBP.

I requested a comprehensive review of CBP's misconduct review process from intake, referral, investigation and discipline to improve our handling of these situations and improve transparency. The Agency is committed to ensuring that all employees are held to the highest ethical standards of professionalism and personal conduct.

Consistent with this commitment, CBP has begun implementing the report's recommendations. I am confident these changes will strengthen public trust and assure our employees that CBP will appropriately and expeditiously address misconduct allegations.

R. Gil Kerlikowske, Commissioner

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Executive Summary

The United States Customs and Border Protection (CBP), with more than 44,000 sworn law enforcement officers and agents, is the largest law enforcement agency in the United States. As with other policing organizations, high profile incidents have led to increased scrutiny by the public in how CBP carries out its mission.

In recognition of the need for a comprehensive approach around matters of integrity, on September 18, 2014, CBP announced an Integrity and Personal Accountability Strategy (Integrity Strategy). The Integrity Strategy established a unified and comprehensive approach organized around four integrity-related mission areas: prevention, detection, investigation of, and response to corruption and misconduct.

Focused on the Integrity Strategy's objectives and consistent with the Program Evaluation Plan for the Complaints and Discipline Process Review (Program Evaluation Plan) dated November 19, 2014, Pivotal Practices Consulting (Pivotal) conducted a comprehensive, end-to-end review of CBP's process for handling allegations of employee misconduct. The review was designed to determine whether CBP's process for handling allegations of misconduct fosters accountability, transparency, and legitimacy, while reinforcing CBP's commitment to ensuring that all employees are held to the highest standards of integrity and professional conduct.

The four broad categories of issues related to CBP's handling of allegations of employee misconduct examined by the Pivotal team appear in the box to the right. Pivotal initially designed the review around eleven (11) evaluation questions aligned to these four categories of issues. These eleven (11) questions and Pivotal's responses to each, informed by the results of the review, are included in Table 1 that begins on page 3 of this report.

- **Category 1 - Investigation of the Systems:** The efficacy of CBP's misconduct allegation investigation and discipline processes, including intake, referral, tracking and documentation.
- **Category 2 - Roles and Responsibilities:** The roles and responsibilities of internal stakeholders and process owners.
- **Category 3 - Performance Metrics and Key Performance Indicators:** The use of performance metrics and key performance indicators to measure program performance and develop data-supported recommendations for process and program improvements.
- **Category 4 – Internal and External Reporting:** The process for appropriately reporting to internal and external stakeholders relevant and timely updates regarding the investigation and disposition of allegations of employee misconduct.

While developing the findings and recommendations, Pivotal structured its report to correspond with CBP's three organizational pillars - accountability, transparency and legitimacy - as this approach provided an enhanced framework for a discussion of the issues and values at the heart of law enforcement reform efforts. The findings and recommendations are summarized in Table 2, which begins on page 6. For ease in tracking, each finding is numbered, with parallel numbering for the associated recommendations. Further, each finding is annotated with the associated category from Table 1.

Overall, Pivotal found that there are significant and substantive people, process, and technology issues with CBP's handling of allegations of employee misconduct – including unnecessarily lengthy processing timeframes; incongruent and inconsistent practices and procedures among agency subcomponents and geographic locations; lack of clarity around roles and responsibilities; and lack of an integrated technology solution for case handling, processing, and tracking. This report offers 19 findings and 62 recommendations arrayed over the three organizational pillars as follows:

- Accountability - 13 findings and 48 recommendations
- Transparency - 3 findings and 9 recommendations
- Legitimacy - 3 findings and 5 recommendations

Readers of this report will find overlap and interrelationships across the pillars for many of the recommendations. This is an expected outcome, given the interconnectedness and interdependence of the people, processes, and technology involved. This overlap highlights the criticality of CBP's commitment to its desired outcomes for its complaints and discipline systems, both broadly and narrowly. It also emphasizes the criticality of undertaking a holistic approach to identifying and implementing changes to achieve the desired outcomes. While there is considerable room for improvement in CBP's handling of allegations of employee misconduct, the Agency has a competent, capable and committed workforce that is ready to rise to the challenge of implementing the necessary changes.



Table 1. Study Questions and Responses

| <i>Question</i> | <i>Response</i> |
|--|--|
| Category 1: Investigation of the Systems | |
| <p>Q1. What are the gateways for filing allegations of employee misconduct? How accessible are these gateways to individuals, both internal and external to CBP?</p> | <p>There are multiple gateways for filing complaints, and accessibility varies. The multitude of gateways makes the process for filing a complaint confusing. Further, the fact that until recently, instructions and forms were only available in English made the process less accessible to non-English speakers.</p> |
| <p>Q2. What systems are used to record and track allegations of employee misconduct?</p> | <p>There is no single system to record and track misconduct allegations. The Joint Integrity Case Management System (JICMS) is used to record all allegations filed with the Joint Intake Center (JIC). The Human Resources Business Engine (HRBE) is used to track all cases referred to the Office of Human Resources/Labor and Employee Relations (OHRM/LER) and to track cases resulting in formal discipline following investigations by fact-finders and management. The Agency uses a number of other formal and informal recording and tracking systems, making it difficult to obtain timely, accurate, and consistent case activity information, particularly volume, timeliness, and disposition.</p> |
| <p>Q3. What investigation and discipline process documentation exists for allegations of employee misconduct?</p> | <p>The Office of Internal Affairs (OIA), OHRM/LER, and the Office of Chief Counsel (OCC) have extensive documentation for their respective segments of the investigation and discipline processes. However, there is no comprehensive end-to-end process roadmap (beginning with the initial allegation and ending with final case disposition, including appeal and settlement outcomes). Further, there are incongruent processes and sub-processes across multiple offices and geographic locations. In other words, different processes exist across components and within components at different office locations.</p> |

Table 1. Study Questions and Responses, *continued*

| <i>Question</i> | <i>Response</i> |
|--|---|
| <p>Q4. How do CBP’s investigation and discipline processes compare to appropriate standards and leading practices for such systems?</p> | <p>Some of CBP’s investigation and discipline processes meet standards and leading practices, including Title 5 of USC Chapter 75 and related regulations and guidance available through the International Association of Chiefs of Police (IACP) and the Commission on Accreditation for Law Enforcement Agencies (CALEA). However, CBP would benefit from considering other processes advocated by IACP, CALEA, and other law enforcement leaders and community representatives to enhance accountability, transparency and legitimacy.</p> |
| <p>Category 2: Roles and Responsibilities</p> | |
| <p>Q5. Are the roles and responsibilities of the people involved in the investigation and discipline processes clearly defined?</p> | <p>While some roles and responsibilities appear to be clearly documented in Agency Directives and generally understood, there are differing interpretations of the guidance and inconsistency in how the roles are carried out.</p> |
| <p>Q6. Are the interrelationships of the people with a role in the misconduct allegation investigation and discipline systems clearly defined?</p> | <p>The interrelationships between the advisory (OHRM/ LER and OCC) and investigatory (OIA) functions are inconsistent and dependent upon individual relationships, which can lead to inconsistent handling of cases. In addition, the roles and responsibilities of the various operational management levels are inconsistent between components and within components across geographic boundaries.</p> |
| <p>Q7. What controls are in place for ensuring individual accountability of people with a role in the misconduct allegation investigation and discipline system?</p> | <p>While OIA, OHRM/LER, and OCC each have case monitoring procedures, there are no uniform controls in place to ensure individual accountability. The primary method of control is supervisory monitoring of case processing timelines, using HRBE capabilities, but these controls do not necessarily integrate quality assurance reviews for individual case handling. Further, some staff expressed frustration over the lack of accountability for managers involved in the process, stating that some managers do not take timely action when handling management actions or implementing proposed discipline.</p> |

Table 1. Study Questions and Responses, *continued*

| <i>Question</i> | <i>Response</i> |
|--|--|
| Category 3: Performance Metrics and Key Performance Indicators | |
| <p>Q8. How are process performance metrics and/or key performance indicators (KPIs) tracked and monitored as they relate to the misconduct allegation and discipline systems?</p> | <p>There is not a single repository of key performance data for the end-to-end process. OHRM/LER through HRBE provides fairly extensive reporting on the performance metrics associated with its segment of the process and plans to expand types and frequency of reports. OIA is able to generally provide case counts and rough processing timeframes; however, JICMIS is not able to generate timely and consistent performance analytical data.</p> |
| <p>Q9. Are the existing performance metrics/KPIs for misconduct allegation investigation and discipline systems consistent with leading practices/ benchmarks?</p> | <p>Given the nature of misconduct allegations investigation and discipline processes, it is impossible to make true process comparisons with leading practices. Further, the complexity of CBP’s mission and the size and geographic dispersion of the Agency make it impossible to find a true comparator organization for benchmarking purposes. However, this report does offer relevant leading practice standards when appropriate.</p> |
| Category 4: Internal and External Reporting | |
| <p>Q10. What reports are generated for internal and external publication about trends and recommendations concerning the misconduct allegation investigation and discipline systems?</p> | <p>Annual reports from OHRM/LER are CBP’s primary source of reporting on investigation and discipline systems. OHRM/LER plans to increase the frequency of these reports to semiannual and add more component-specific reporting metrics. Presently, these reports are not broadly disseminated internally and there are no external reporting mechanisms.</p> |
| <p>Q11. Are there ways to enhance internal and external reports about the misconduct allegation investigation and discipline systems to further foster transparency with CBP employees and the public?</p> | <p>Yes. This report includes several recommendations for enhancing CBP’s internal and external reporting.</p> |

Table 2. Summary of Findings and Recommendations Linked to Accountability, Transparency and Legitimacy Pillars

| Accountability | |
|--|--|
| <i>Findings</i> | <i>Recommendations</i> |
| <p>A.1. There are incongruent processes and sub-processes across multiple offices and in multiple geographic locations. (Issue Category 1)</p> | <ul style="list-style-type: none"> • Engage OIA, OCC, LER and operating components in a process to develop an end-to-end case processing roadmap that begins with the initial allegation and ends with case disposition. The process map should include performance benchmarks for significant case processing milestones (e.g., transfer from OIA to management, transfer from OIA to LER, and transfer from LER to OCC). This process map would increase awareness of all responsible entities, establish performance metrics against which the entire process and sub-processes could be evaluated, and enhance CBP’s ability to proactively address process efficiency issues. (A.1.R.1) • Establish regular joint strategic meetings and reporting requirements for OIA, LER, and OCC on case handling to enhance continuity and consistency in approach and process. (A.1.R.2) • Conduct an internal best practice review for case handling and identify and promulgate those practices across the Agency. Process should include a focus on case referral procedures. (A.1.R.3) • Develop standard case handling checklists and supporting job aids to enhance consistency and provide useful tools for supervisors and managers. (A.1.R.4) |

Table 2. Summary of Findings and Recommendations Linked to Accountability, Transparency and Legitimacy Pillars, *continued*

| Accountability | |
|---|--|
| Findings | Recommendations |
| <p>A.2. There is a lack of clarity and agreement on roles and relationships, including between the Office of Chief Counsel (OCC), Office of Human Resources/Labor and Employee Relations (OHRM/ LER) and Office of Internal Affairs (OIA). (Issue Category 2)</p> | <ul style="list-style-type: none"> • Convene a multi-functional working group to establish a collaborative and holistic process that supports managers in making the most informed and timely decisions about the handling of discipline matters. The working group may want to identify internal best practice models for the cooperative and collegial handling of discipline matters with full participation of all involved parties. (A.2.R.1) • Establish regular local collaborative meetings between OIA, LER and OCC to discuss case strategies and trends and implementation of Headquarters guidance. (A.2.R.2) • Deliver joint training/information sharing sessions by LER and OCC for the operational components. A local team of LER and OCC representatives should develop session content, which should be an extension of the information discussed during the regular local collaborative meetings mentioned in A.2.R.2. (A.2.R.3) • Establish role-based permissions that would allow mutual access to case processing systems. (A.2.R.4) |



Table 2. Summary of Findings and Recommendations Linked to Accountability, Transparency and Legitimacy Pillars, *continued*

| Accountability | |
|---|---|
| Findings | Recommendations |
| <p>A.3. Case processing timelines are lengthy– even for less serious offenses. (Issue Categories 1, 2, 3 and 4)</p> | <ul style="list-style-type: none"> • Develop an agreement between DHS OIG and CBP OIA on minimum case referral guidelines. Consider including in the agreement that all cases default to OIA unless the subject employee is at a senior level (i.e., GS15 or above) and/or a defined set of allegations is involved, which is consistent with the agreements DHS OIG has with other DHS components. (A.3.R.1) • Issue clarifying guidance on JIC reporting requirements to all CBP supervisors and managers. (A.3.R.2) • Develop a job aid/discussion brief that equips supervisors and managers to communicate the requirements for JIC reporting to their staff. (A.3.R.3) • Develop triage procedures and guidance for JIC staff that support more expeditious referral/closure of less serious matters. (A.3.R.4) • Establish criteria for expedited case handling procedures for less serious matters. Consider expanding expedited case handling procedures to include first offenses for less egregious offenses. (A.3.R.5) • Develop cross-functional performance metrics for the handling of allegations of employee misconduct that include processing timelines for all responsible entities (i.e., OIA, LER, OCC, and component management). (A.3.R.6) • Conduct a program review within LER to assess the impact to timelines of recent case handling changes, including those for the DRB. (A.3.R.7) • Explore use of alternative discipline options that could include lesser discipline with no appeal. (A.3.R.8) • Consider revising the policy that requires referral of all use of force (UOF) incidents for Federal Tort review. (A.3.R.9) |

Table 2. Summary of Findings and Recommendations Linked to Accountability, Transparency and Legitimacy Pillars, *continued*

| Accountability | |
|---|--|
| <i>Findings</i> | <i>Recommendations</i> |
| <p>A.3. Case processing timelines are lengthy– even for less serious offenses. (Issue Categories 1, 2, 3 and 4), continued</p> | <ul style="list-style-type: none"> • Consider revising the policy that requires all incidents involving government owned vehicles, lost equipment, and seizure discrepancies to be reported to JIC. (A.3.R.10) • Consider revising the policy that requires prosecution decline on all criminal allegations before OIA may begin an administrative investigation. (A.3.R.11) • Issue clarifying guidance on the vetting process to ensure that employees with pending matters under investigation are not adversely impacted – either due to frivolous complaints, inability to receive timely case status information, or extended case handling timelines. (A.3.R.12) |
| <p>A.4. OIA does not conduct administrative investigations related to cases involving criminal charges against an employee until the criminal matter is resolved (this also applies when less serious first-time offense criminal matters are remanded to management). (Issue Category 1)</p> | <ul style="list-style-type: none"> • Explore feasibility of parallel investigations for administrative and criminal cases. Exploration should include identifying a subset of cases that would be appropriate for parallel investigations based on historical case analysis and leading practices in other law enforcement organizations. (A.4.R.1) • Establish clear policies, procedures, and supervisory guidance for the handling of administrative and criminal matters and ensure all supervisors receive and have access to the guidance. (A.4.R.2) |

Table 2. Summary of Findings and Recommendations Linked to Accountability, Transparency and Legitimacy Pillars, *continued*

| Accountability | |
|---|--|
| <i>Findings</i> | <i>Recommendations</i> |
| <p>A.5. There was mixed feedback on the quality of OIA investigations, with concern expressed about rote questioning, failure to follow up on answers from an interviewee, and an antagonistic attitude towards subject employees. (Issue Category 1)</p> | <ul style="list-style-type: none"> • Conduct a comprehensive quality review of a random representative sample of investigation case files. The review should be guided by a set of widely recognized and acceptable standards, such as the Quality Standards for Inspection and Evaluation issued by the Council of the Inspectors General; the Standards and Guidelines for Internal Affairs: Recommendations from a Community of Practice issued by the U.S. Department of Justice; and the International Association of Chiefs of Police (IACP) National Law Enforcement Policy Center Model Policy and Concepts and Issues Paper on Investigation of Employee Misconduct. (A.5.R.1) • Identify appropriate training and/or process changes based on the quality review discussed in A.5.R.1. (A.5.R.2) • Explore the feasibility of transcription software. (A.5.R.3) |
| <p>A.6. There was mixed feedback on the responsiveness and quality of advice received from LER Specialists. (Issue Categories 1 and 2)</p> | <ul style="list-style-type: none"> • Review current training for LER Specialists, and establish minimum requirements for mandatory training that aligns to the roles and responsibilities and required competencies and provides real-time reinforcement of required knowledge, skills, and abilities. (A.6.R.1) • Institute joint training conducted with OCC and LER to enhance collaborative relationships and ensure more holistic and consistent guidance on addressing disciplinary actions. (A.6.R.2) • Administer a more comprehensive annual customer satisfaction survey for LER. (A.6.R.3) |

Table 2. Summary of Findings and Recommendations Linked to Accountability, Transparency and Legitimacy Pillars, *continued*

| Accountability | |
|--|---|
| <i>Findings</i> | <i>Recommendations</i> |
| <p>A.7. The DRB process has not historically been efficient or timely. (Issue Categories 1, 2 and 3)</p> | <p>In light of the extensive changes made to the DRB process in recent months, aligned with the findings of the Adverse Actions Working Group (AAWG), we recommend that LER conduct a program review of the DRB process. The LER review should measure the effectiveness of the changes, and identify possible additional actions to further improve the timeliness and quality of process outcomes. (A.7.R.1)</p> |
| <p>A.8. The Table of Offenses does not provide sufficient direction to deciding officials. (Issue Categories 1 and 2)</p> | <p>Revise the Table of Offenses and Penalties to provide clearer guidance on appropriate penalties and foster more consistent disciplinary practices across the Agency. This guidance should include more specific parameters, including narrower ranges and mandatory consequences for the most serious offenses. (A.8.R.1)</p> |
| <p>A.9. Supervisors and managers expressed a high degree of confidence in their ability to identify and appropriately resolve less serious offenses in the Pivotal administered online survey. However, they also indicated they did not feel empowered or supported to resolve these less serious offenses and consequently believe they must report these matters to the JIC. (Issue Categories 1, 2, and 4)</p> | <ul style="list-style-type: none"> • Develop and deliver training and on-the-job (OJT) resources for supervisors on appropriately addressing performance and conduct issues. (A.9.R.1) • Develop a delegation order that clearly empowers first-line supervisors to resolve less serious offenses. This delegation could be dependent upon creation and issuance of a revised Table of Offenses that provides clearer guidance on appropriate penalties and completion of appropriate training. (A.9.R.2) |

Table 2. Summary of Findings and Recommendations Linked to Accountability, Transparency and Legitimacy Pillars, *continued*

| Accountability | |
|---|--|
| <i>Findings</i> | <i>Recommendations</i> |
| <p>A.10. There is no uniform system of recording and tracking case activity, including the outcomes of management referrals from OIA and informal discipline. (Issue Categories 1, 2, 3, and 4)</p> | <ul style="list-style-type: none"> • Develop consistent guidance for recording and tracking informal discipline. The guidance should be responsive to any component-specific nuances, while promoting consistency in process and outcome. (A.10.R.1) • Develop a performance dashboard that supports monitoring, analyzing and reporting capabilities. (A.10.R.2) • Issue regular reports on case resolution, similar to the reports issued by the FBI’s Office of Professional Responsibility (OPR). (A.10.R.3) • Conduct an internal inventory of systems and processes to identify leading practices. (A.10.R.4) • Establish role-based permissions within each of the existing systems to enhance collaboration. (A.10.R.5) • Conduct annual quality reviews to assess consistency and thoroughness in documentation. (A.10.R.6) |
| <p>A.11. CBP does not conduct coordinated reviews with OCC, OIA, LER and operational components of third-party decisions and settlements. (Issue Categories 1 and 3)</p> | <ul style="list-style-type: none"> • Develop and issue regular (at least semiannual) reports on informal resolution of cases, third-party decisions, and settlements, and include appropriate trend analyses over time. (A.11.R.1) • Survey internal stakeholders on usefulness of reports and make appropriate revisions to enhance stakeholder satisfaction. (A.11.R.2) • Establish role-based permissions in HRBE that would allow OCC to add relevant case updates, improving the accuracy and timeliness of case data. (A.11.R.3) |

Table 2. Summary of Findings and Recommendations Linked to Accountability, Transparency and Legitimacy Pillars, *continued*

| Accountability | |
|--|---|
| <i>Findings</i> | <i>Recommendations</i> |
| <p>A.12. OIA and LER expressed workload imbalances, with LER highlighting hiring constraints for the last two fiscal years. (Issue Categories 1 and 3)</p> | <ul style="list-style-type: none"> • Assess workload implications of OIA’s new requirement to respond to use-of-force incidents. (A.12.R.1) • Conduct a workload analysis in LER based on historical geographical caseload data to assess the appropriateness of adjusting work assignments. (A.12.R.2) • Enhance regular workload review cycles within LER at the regional level. The review should provide visibility of caseloads over time for specific locations and include a trend analysis that supports workload assignments. (A.12.R.3) • Establish regular reports on performance metrics that provide more visibility on performance drivers in OIA and LER. (A.12.R.4) • Develop quantitative metrics for determining workload-based hiring determinations (e.g., average case processing time per LER Specialist and OIA investigator). (A.12.R.5) |
| <p>A.13. Technology solutions do not adequately support the process. (Issue Category 1)</p> | <ul style="list-style-type: none"> • Establish an inventory of all formal and informal case handling systems. (A.13.R.1) • Assess HRBE’s capability to serve as an integrated technology solution, including its overall responsiveness and ease of use. (A.13.R.2) |

Table 2. Summary of Findings and Recommendations Linked to Accountability, Transparency and Legitimacy Pillars, *continued*

| Transparency | |
|--|---|
| Findings | Recommendations |
| <p>T.1. There are multiple and incongruent processes for filing a complaint. Further, multilingual assistance is not readily available, such as Spanish-speaking staff to take complaints or informational materials in languages other than English. (Issue Category 1)</p> | <ul style="list-style-type: none"> • Staff intake centers with Spanish-speaking personnel or provide ready access to translators. (T.1.R.1) • Develop one centralized online complaint form with DHS/OIG and CBP points of complaint receipt. (T.1.R.2) • Create a complaint form in Spanish. (T.1.R.3) • Provide 24-hour access to a single complaint intake telephone number, preferably toll-free. (T.1.R.4) • Create a process whereby complainants can obtain information about the status of their cases. (T.1.R.5) • Establish timeframes and processes for providing confirmation of receipt of complaint and appropriate status updates to complainants. (T.1.R.6) |
| <p>T.2. There is disparate and inconsistent access to case information, with access being more relationship-dependent than process-dependent. (Issue Category 1)</p> | <ul style="list-style-type: none"> • Develop a performance dashboard that supports monitoring, analyzing and reporting at the Sector Chief/Port Director level. (T.2.R.1) • Issue regular reports on case resolution similar to the reports issued by the FBI's Office of Professional Responsibility (OPR). (T.2.R.2) |
| <p>T.3. OIA does not provide a recommendation as to a finding, nor does it participate in briefing the DRB or decision makers who may have questions about the investigation. (Issue Categories 1 and 2)</p> | <p>Establish guidance that allows OIA to serve in a consultative role to mission support and operational components. (T.3.R.1)</p> |

Table 2. Summary of Findings and Recommendations Linked to Accountability, Transparency and Legitimacy Pillars, *continued*

| Legitimacy | |
|--|--|
| <i>Findings</i> | <i>Recommendations</i> |
| <p>L.1. There is a perception that the complaint process is misused with no adverse consequence. (Issue Categories 1 and 3)</p> | <p>Conduct a review of complaints over time to determine whether the process is being misused, report findings of the review, and take any appropriate corrective action. (L.1.R.1)</p> |
| <p>L.2. Employees are routinely assigned to administrative duties for extended periods –with the final case disposition being a counseling memo or reprimand. (Issue Categories 1 and 3)</p> | <ul style="list-style-type: none"> • Develop a monthly report for all employees who are on restricted duty that includes the length of time each employee has been on restricted duty. (L.2.R.1) • Establish a policy that does not categorically adversely impact employees who are on restricted duty from consideration for promotions, awards, and/or transfers. (L.2.R.2) |
| <p>L.3. There is a lack of formal case closure with the subject of the investigation and within the various systems. (Issue Categories 1, 2, and 4)</p> | <ul style="list-style-type: none"> • Revisit practice of issuing closing letter to allow for appropriate level of communication with complainants and subjects of investigations. (L.3.R.1) • Consider revising use of “no action” for closing comments in unsubstantiated cases, and revise language that implies/suggests culpability in cases where insufficient evidence was identified. (L.3.R.2) |



Introduction

The United States Customs and Border Protection (CBP), with more than 44,000 sworn law enforcement officers and agents, is the largest law enforcement agency in the United States. As with other policing organizations, high profile incidents have led to increased scrutiny by the public in how CBP carries out its mission. To maintain public trust and confidence in the ability of CBP employees to effectively carry out their mission, it is imperative that CBP appropriately and expeditiously investigate all allegations of misconduct.

“The next decade will be a time of reckoning. CBP should begin thinking now about how to best position future leaders, as many current leaders become retirement eligible under the enhanced retirement option. An important part of that positioning is ensuring they have the resources and support to effectively and appropriately deal with allegations of misconduct.”

Leader Interviewee, OFO

Unsubstantiated allegations should be dismissed and appropriate disciplinary action should be taken against those employees whose conduct falls short of the expectations outlined in the CBP Standards of Conduct¹ and reaffirmed in the Integrity and Personal Accountability Strategy.² Appropriately and expediently addressing allegations of misconduct fosters a climate of fairness and accountability in which an employee is either removed from a cloud of suspicion or disciplined when warranted.

In considering how to ensure the integrity and professionalism of CBP’s workforce, it is important to consider context, most notably the Agency’s rapid growth over the last ten years. For example, Border Patrol Agent staffing nearly doubled, from approximately 11,000 agents in 2004 to more than 21,000 in 2014. While CBP’s growth has been vital in responding to the increasingly complex demands of maintaining national security, it has presented challenges in ensuring consistency in processes and practices that support employees in meeting the Agency’s high standards of professional conduct.

Given the size and complexity of the Agency and the multiple components and agencies that were combined to create it, CBP has multiple processes for addressing allegations of misconduct, ranging from relatively minor performance issues to the most serious complaints of corruption or misuse of force. Because CBP’s mission is so critical, it is imperative that it has a strong, integrated system to respond to employee misconduct concerns and mechanisms to provide information about the process to stakeholders.

Background

From September 2014 through May 2015, Pivotal Practices Consulting (Pivotal) conducted a comprehensive review of CBP’s handling of allegations of employee misconduct, to include its intake, referral, investigation and processes.³

1 U.S. Customs and Border Protection Standards of Conduct, CBP Directive No. 51735-013A, March 13, 2012.

2 See email from Commissioner R. Gil Kerlikowske, dated September 18, 2014, announcing the CBP Integrity and Personal Accountability Strategy (Integrity Strategy) and CBP’s newly delegated authority to conduct criminal investigations of CBP employees through the OIA. Available from <http://www.cbp.gov/document/report/cbp-integrity-and-personal-accountability-strategy>.

3 The initial scope of the review excluded the Equal Employment Opportunity (EEO) Office of Privacy and Diversity (PDO) complaint processing and other CBP systems of complaint processing.

The overarching goal of the review was to assess whether CBP's handling of allegations of employee misconduct fosters accountability, transparency, and legitimacy and reinforces CBP's commitment to ensuring that all employees are held to the highest standards of integrity and professional conduct. CBP earlier had commissioned a study by the Homeland Security Studies and Analysis Institute (Institute) to evaluate CBP's integrity and counter-corruption programs and to recommend best practices for improving or replacing existing programs.⁴ Key recommendations made by the Institute in its 2012 report included that CBP develop a Workforce Integrity Strategy and that the CBP Office of Internal Affairs (OIA) be given authority to conduct criminal investigations of CBP employees. CBP adopted both recommendations in 2014.⁵ While recognizing that further study was necessary, the Institute also recommended changes in CBP's discipline system to improve timeliness, better support managers, and enhance workforce integrity and employee morale.⁶

In response to the Institute's study, CBP convened a cross-organization Adverse Action Working Group (AAWG) to assess what changes could be made to allow for greater efficiencies and reduced processing times.⁷ The AAWG's June 2013 report outlined the various steps involved with adverse actions and average processing times for each. Numerous recommendations were made for improving CBP's handling of adverse actions, including changes to the Discipline Review Board (DRB). Processes related to informal discipline or non-adverse actions (written reprimand and suspensions lasting fewer than 14 days) were not addressed in the AAWG study.

Following these studies, and others that considered aspects of CBP's misconduct complaint and discipline systems, the Commissioner recognized the need for an independent holistic evaluation of the Agency's processes for documenting, investigating, taking corrective action, and reporting allegations of misconduct. With these former studies in mind, Pivotal developed a Program Evaluation Plan (PEP) that supported a maximally inclusive engagement of internal and external stakeholders.

The PEP was organized around the following four broad issues categories, which are discussed in the Approach section of this report:

- Investigation of the Systems
- Roles and Responsibilities
- Performance Metrics and Key Performance Indicators
- Internal and External Reporting

Pivotal developed a set of questions and responses aligned to these four categories and a summary of the Findings and Recommendations are included as Tables 1 and 2, respectively, in the Executive Summary.

Organization of the Report

The remainder of this report is organized into the following six sections, which are described on the following page:

- Approach
- Process Overview for Handling
- Allegations of Employee Misconduct
- The Accountability, Legitimacy, and Transparency Pillars
- Findings and Recommendations by Pillar
- Conclusion
- Appendices

4 U.S. Customs and Border Protection Workforce Integrity Study (Workforce Integrity Study); Homeland Security Studies and Analysis Institute (December 15, 2011). See also, Border Security – Additional Actions Needed to Strengthen CBP Efforts to Mitigate Risk of Employee Corruptions and Misconduct (GAO-13-59; December 2012). Available from <http://www.gao.gov/products/GAO-13-59>.

5 Integrity Strategy.

6 Workforce Integrity Study, p. 65.

7 Adverse Action Working Group Report (AAWG Report) (June 2013).

- **Approach.** This section details the methodology used for this evaluation, including the data collection and data analysis methodologies.
- **Process Overview for Handling Allegations of Employee Misconduct.** This section offers a general overview of CBP's current processes for handling allegations of employee misconduct. Because CBP does not have a comprehensive roadmap of the end-to-end process, this section is presented with the caveat that the process is handled differently among subcomponents and within the same subcomponent in different geographic locations.
- **The Accountability, Transparency and Legitimacy Pillars.** The evaluation of CBP's misconduct investigation and discipline systems was conducted using a framework designed to assess whether the underlying processes associated with these systems foster three overarching values, or pillars: accountability, transparency, and legitimacy. This section discusses this assessment and how these pillars could be strengthened with changes to CBP's misconduct investigation and discipline systems.
- **Findings and Recommendations by Individual Pillar.** Organized by the three pillars mentioned above, this section provides a contextual discussion of the evaluation's findings and recommendations.
- **Conclusion.** The Conclusion section is a brief restatement of the high-level findings of the evaluation.
- **Appendices.** This section includes a comprehensive list of references and resources that informed the evaluation and brief biographical summaries for the study team members.



Approach

The purpose of the evaluation as described in the Statement of Work called for Pivotal to complete the following activities:

- Assess the efficacy of the processes and systems currently in place for documenting, tracking, investigating, and reporting on allegations of misconduct made against CBP employees and make recommendations for improvement;
- Assess the efficacy of processes and systems for documenting, tracking and reporting on disciplinary actions, with particular focus on alignment with the allegation processes and systems and make recommendations for improvement;
- Review CBP's current disciplinary processes and program, including compliance with established policies and procedures for adjudicating employee misconduct; and
- Review CBP's current disciplinary reports, both public and those deemed confidential for use by management/supervisory personnel, for alignment with leading practices in fostering individual accountability and taking appropriate corrective and/or disciplinary action, and make recommendations for improvement.

Pivotal's approach included robust stakeholder identification and engagement and combined quantitative and qualitative methods to provide the most complete review of CBP's processes for addressing allegations of employee misconduct. As a federal government agency, CBP must adhere to 5 USC Chapter 75 and regulations promulgated thereto, including 5 CFR Part 752 et seq. Further, many CBP employees belong to one of two unions - the National Border Protection Council (NBPC) or the National Treasury Employees Union (NTEU).

Some matters related to misconduct complaints and discipline involving unionized employees are subject to the applicable collective bargaining contracts. Pivotal was mindful of these constraints in conducting its evaluation and formulating findings and recommendations.

Stakeholder Concerns

Pivotal's review was informed by previously expressed and identified stakeholder concerns, which included among others CBP's need to:

- Improve timeliness of all aspects of the process.
- Better define roles and responsibilities of everyone involved in the process, and ensure accountability in fulfilling these roles and responsibilities.
- Improve consistency in case handling, to include consistency in the process and process outcomes.
- Address the appropriateness of current resource allocations based on workload considerations.
- Foster better communication, integration, and coordination, to include compatibility of technology solutions that support the process at Headquarters and in the field.
- Assess effectiveness of checks and balances, with consideration given to the impact on accountability, timelines, and other objectives.
- Assess effectiveness of the tracking of misconduct cases that are resolved outside of the standard complaints and discipline processes (e.g., those resolved through settlement at any stage in the process and by third parties).⁸

⁸ The Program Evaluation Plan noted some stakeholder interests that ultimately fell outside the scope of this review, including assessment of any perception of a double standard in how discipline is meted out to managerial staff, and access implications for the Privacy Act and personal identifiable information.

Issues Categories and Evaluation Questions

To effectively address these stakeholder concerns and to be responsive to the Commissioner's desired outcomes for this review of CBP's process for addressing allegations of employee misconduct, Pivotal identified four (4) overarching issue categories and eleven (11) supporting questions to frame the program evaluation, which are described in the box below. The eleven (11) questions and Pivotal's responses to each, based on the results of the review, are included in Table 1 of the Executive Summary on pages 3 through 5.

- **Category 1 – Investigation of the Systems:** The efficacy of CBP's misconduct allegation investigation and discipline processes, including intake, referral, tracking and documentation.
 - > **Q1.** What are the gateways for filing allegations of employee misconduct? How accessible are these gateways to individuals, both internal and external to CBP?
 - > **Q2.** What systems are used to record and track allegations of employee misconduct?
 - > **Q3.** What investigation and discipline process documentation exists for allegations of employee misconduct?
 - > **Q4.** How do CBP's investigation and discipline processes compare to appropriate standards and leading practices for such systems?
- **Category 2 – Roles and Responsibilities:** The roles and responsibilities of internal stakeholders and process owners.
 - > **Q5.** Are the roles and responsibilities of the people involved in the misconduct allegation investigation and discipline systems clearly defined?
 - > **Q6.** Are the interrelationships of the people with a role in the misconduct allegation investigation and discipline systems clearly defined?
 - > **Q7.** What controls are in place for ensuring individual accountability of people with a role in the misconduct allegation investigation and discipline system?
- **Category 3 – Performance Metrics and Key Performance Indicators:** The use of performance metrics and key performance indicators to measure program performance and develop data-supported recommendations for process and program improvements.
 - > **Q8.** How are process performance metrics and/or key performance indicators (KPIs) tracked and monitored, as they relate to the misconduct allegation and discipline systems?
 - > **Q9.** Are the existing performance metrics/ KPIs, as they relate to the misconduct allegation and discipline systems consistent with leading practices/ benchmarks?
- **Category 4 – Internal and External Reporting:** The process for appropriately reporting to internal and external stakeholders relevant and timely updates regarding the investigation and disposition of allegations of employee misconduct.
 - > **Q10.** What reports are generated for internal and external publication about trends and recommendations concerning the misconduct allegation investigation and discipline systems?
 - > **Q11.** Are there ways to enhance internal and external reports about the misconduct allegation investigation and discipline systems to further foster transparency with CBP employees and the public?

Table 3, which begins below, provides a comprehensive overview of the activities Pivotal conducted during its review. The table is followed by more detailed descriptions of select activities, including document reviews, interviews, meetings, focus groups, and a survey of CBP leaders.



Table 3. Summary of Activities

| Evaluation Question | Activities Completed |
|---|--|
| <i>Issue Category 1: Investigation and Discipline Processes</i> | |
| <p>Q1. What are the gateways for filing misconduct allegations against a CBP employee and how accessible are these gateways to individuals both internal and external to CBP?</p> | <ul style="list-style-type: none"> • Visited CBP website portals. • Reviewed extensive archival data provided by CBP. • Held interviews and focus groups with OIA and LER staff at Headquarters and in the field. • Held interviews and focus groups with personnel from USBP, OFO, AMO, OIT and OTD. • Held focus group with representatives from Non-Governmental Agencies experienced in using CBP’s misconduct allegation system. |
| <p>Q2. What system(s) are used to record and track misconduct allegations after they are filed?</p> | <ul style="list-style-type: none"> • Toured JIC and received orientation to JICMS. • Received orientation to HRBE. • Reviewed various field approaches to capturing complaints, including Excel spreadsheets. |
| <p>Q3. What process documentation exists for the misconduct allegation investigation and discipline systems?</p> | <ul style="list-style-type: none"> • Received orientation to JICMS. • Received orientation to HRBE. • Reviewed sample case files. |
| <p>Q4. How do the misconduct allegation investigation and discipline systems compare to appropriate standards and leading practices for such systems?</p> | <ul style="list-style-type: none"> • Reviewed extensive archival data provided by CBP. • Reviewed prior studies of CBP’s employee misconduct allegation investigation and discipline systems. • Reviewed studies of process for addressing allegations of employee misconduct used in other federal law enforcement agencies. • Reviewed leading practices for law enforcement employee misconduct complaint investigations and discipline, including IACP Model Policy and Concepts and Issues Paper and CALEA Standards. |



| Evaluation Question | Activities Completed |
|--|---|
| <i>Issue Category 2: Roles and Responsibilities</i> | |
| <p>Q5. Are the roles and responsibilities of the people involved in the misconduct allegation investigation and discipline process, including documentation and tracking, clearly defined?</p> | <ul style="list-style-type: none"> • Reviewed extensive archival data provided by CBP. • Held interviews and focus groups with OIA, LER, and OCC staff at Headquarters and in the field. • Held interviews and focus groups with personnel from USBP, OFO, AMO, OIT, OTD. • Held interviews with NBPC and NTEU. • Conducted online survey of executives, managers and supervisors. |
| <p>Q6. Are the interrelationships of the people with a role in the misconduct allegation investigation and discipline process clearly defined?</p> | <ul style="list-style-type: none"> • Reviewed extensive archival data provided by CBP. • Held interviews and focus groups with OIA, LER, and OCC staff at Headquarters and in the field. • Held interviews and focus groups with personnel from USBP, OFO, AMO, OIT and OTD. • Held interviews with NBPC and NTEU. • Conducted online survey of executives, managers, and supervisors. |
| <p>Q7. What controls does the agency have in place for ensuring individual accountability of people with a role in the misconduct allegation and discipline process?</p> | <ul style="list-style-type: none"> • Reviewed extensive archival data provided by CBP. • Held interviews and focus groups with OIA, LER, and OCC staff at Headquarters and in the field. • Held interviews and focus groups with personnel from USBP, OFO, AMO, OIT and OTD. • Held interviews with NBPC and NTEU. • Conducted online survey of executives, managers and supervisors. • Received orientation to JICMS and HRBE. |

Table 3. Summary of Activities, *continued*

| Evaluation Question | Activities Completed |
|--|---|
| <i>Issue Category 3: Process Performance Metrics and Key Performance Indicators</i> | |
| <p>Q8. How are process performance metrics and/or key performance indicators (KPIs) tracked and monitored as they relate to the misconduct allegation investigation and discipline process?</p> | <ul style="list-style-type: none"> • Reviewed annual disciplinary reports provided by OHRM/LER. • Reviewed case processing data provided by OIA and OCC. • Reviewed CBP’s annual Performance and Accountability Report for FY 2013. • Reviewed HRM/LER February 26, 2015 Case Processing Methodology and Metrics Memo. |
| <p>Q9. Are the existing performance metrics/ KPIs, as they relate to the misconduct allegation and discipline processes consistent with leading practices/ benchmarks?</p> | <ul style="list-style-type: none"> • Identified potential comparator organizations and performance metric approaches. (However, given the nature of misconduct allegations and discipline processes, the complexity of CBP’s mission, and the size and geographic dispersion of the Agency, it was not possible to find a true comparator organization for benchmarking purposes.) |
| <i>Issue Category 4: Internal and External Reporting</i> | |
| <p>Q10. What reports are generated for internal and external publication about trends and recommendations concerning the misconduct allegation investigation and discipline systems?</p> | <ul style="list-style-type: none"> • Reviewed extensive archival data provided by CBP. • Interviewed LER personnel. • Interviewed operational managers concerning their receipt of information on trends and other analysis of the investigation and discipline systems. |
| <p>Q11. Are there ways to enhance internal and external reports about the misconduct allegation investigation and discipline systems to further foster transparency with CBP employees and the public?</p> | <ul style="list-style-type: none"> • Reviewed extensive archival data provided by CBP. • Interviewed LER personnel. • Interviewed NGO representatives. • Reviewed leading practices for law enforcement reporting on employee misconduct complaint investigations and discipline. |



Quantitative and Qualitative Methods

Pivotal collected and analyzed the following types of data:

- **Archival and documental data, including laws, regulations, directives, memoranda, reports.**
- **Internal and external stakeholder data collected via on-site tours, interviews, and focus groups.**
- **Online survey data collected from 1,761 CBP executives, managers and supervisors.**
- **Leading practices in law enforcement employee misconduct complaint investigations and discipline.**

Further, Pivotal attended meetings of and presented to the DHS Homeland Security Advisory Council's CBP Integrity Advisory Panel. This included joining the Panel for an orientation to changes to CBP's use of force policy, review and training, and a tour of CBP's Advanced Training Center (ATC).

Document Review

The evaluation began with an in-depth review of publicly available reports from previous studies of aspects of CBP's processes and systems for addressing allegations of employee misconduct, most notably the investigation and discipline processes.

No report provided an end-to-end process analysis, though several pointed to common issues of concern.

This initial review of publicly available reports was supplemented by the provision of a variety of internal documents, including relevant CBP directives, process flow charts, sample complaint files, and internal discipline reports.

Pivotal also collected and reviewed reports and protocols from other law enforcement agencies and associations to identify leading practices in complaint investigation and discipline. A list of the documents and other materials reviewed is included as Appendix A – References.

Emerging themes from the document review were highlighted and explored in-depth during individual and focus group interviews as a way of validating and enhancing Pivotal's understanding of the issues involved.

Meetings, Interviews, and Focus Groups

With the goal to collect data from a broad geographic and functional representation of internal stakeholders, Pivotal participated in several internal meetings and interviewed more than 200 individuals beginning in October 2014 using a standard interview protocol.

This protocol included a common set of open-ended questions for consistency in data collection efforts, with appropriately tailored follow-up questions based on individual or group demographics. A Project Summary and PowerPoint briefing that provided a high-level project overview, sample questions, and team member contact information was developed for and shared with stakeholders.

Following are the general questions presented to interview respondents and focus group participants. The first question always generated the highest levels of passion and energy during interviews and focus groups.

- **What are the key issues around timely and effective resolution of allegations of employee misconduct?**
- **Are there any constraints or obstacles that limit the ability to promptly and effectively address allegations of employee misconduct? If yes, what are the key constraints and obstacles?**
- **With whom do you most closely collaborate and exchange information to address allegations of employee misconduct and how would you describe the relationships?**
- **What best practices for addressing allegations of employee misconduct should CBP consider implementing?**

Pivotal was fortunate to have the opportunity to be a part of the agenda for the following two previously scheduled leadership meetings:

- **OFO Executive Strategic and Operational Planning Meeting in Harpers Ferry on December 10, 2014. During this meeting, Pivotal delivered a project briefing and engaged meeting participants in a robust discussion of key issues.**
- **U.S. Border Patrol Chiefs Strategic Leadership Meeting in San Diego on December 17, 2014. During this meeting, Pivotal delivered a project briefing and then divided the group into two focus groups for a facilitated discussion of the key issues.**

Following are the organizations that were represented in Pivotal's interviews and focus groups:

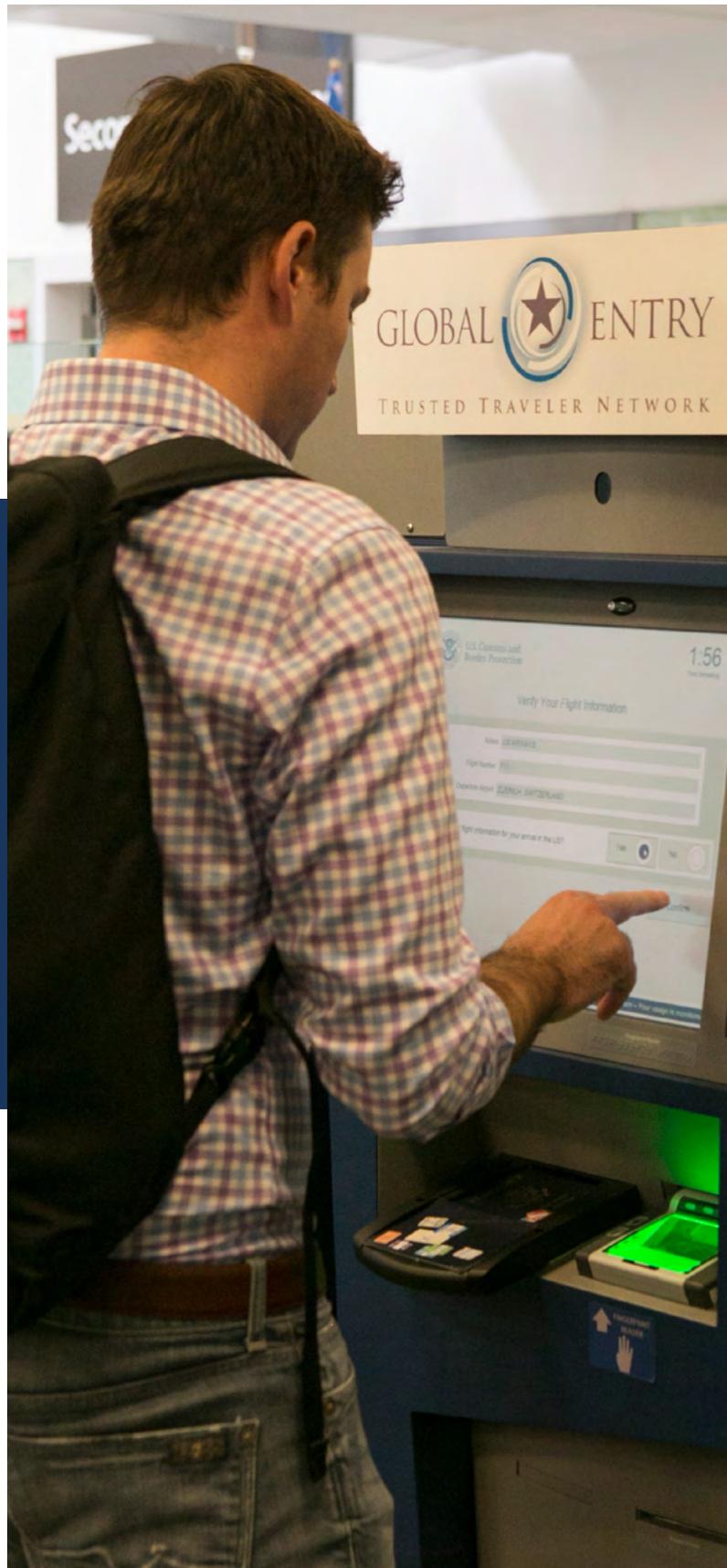
- **Office of the Commissioner, including the Office of Non-Government Organization (NGO) Liaison who helped arrange input from representative NGOs**
- **Office of Human Resources Management, including Labor and Employee Relations (OHRM/LER)**
- **Office of Chief Counsel (OCC)**
- **Office of Internal Affairs (OIA)**
- **U.S. Border Patrol (USBP)**
- **Office of Field Operations (OFO)**
- **Office of Information Technology (OIT)**
- **Air and Marine Operations (AMO)**
- **Office of Training and Development (OTD)**
- **National Treasury Employees Union (NTEU)**
- **National Border Patrol Council (NBPC)**
- **Joint Field Command**
- **Privacy and Diversity Office**

Almost all interviews and focus groups were conducted in person, with a limited number conducted by telephone. Meetings typically lasted between 60 and 90 minutes, and participants were provided with assurances of confidentiality and anonymity to foster full and open exchanges.

In addition to the interviews and focus groups, Pivotal conducted a range of field visits to provide additional context and to foster better understanding of the challenges and environmental factors associated with mission accomplishment for the various CBP components. Site visits were conducted in the following locations:

- Washington DC Headquarters – December 11, 2014, March 13, 2015
- California (San Diego) – December 17 – 18, 2014
- Arizona (Tucson and Nogales) – January 26 – 30, 2015
- Texas (Houston, McAllen and Laredo) – February 22 – 27, 2015
- New York (JFK and Buffalo), New Jersey (Newark), and Washington DC – March 9 – 13, 2015
- Washington State (Blaine, Bellingham, and Seattle) – April 1 – 2 and May 14, 2015

Finally, because of some of the thematic overlaps with the review being conducted by the DHS Homeland Security Advisory Council's CBP Integrity Advisory Panel, Pivotal was afforded the opportunity to brief the Panel on May 6, 2015.





Leader Survey

Continuing with its intention to be broadly inclusive, Pivotal administered an online survey that was made available to all supervisors, managers, and executives from February 9 through 20, 2015. The survey was designed to solicit feedback about respondents' understanding and perception of CBP's process for handling allegations of employee misconduct, including respondents' understanding of their role in the process.

The survey was divided into four parts:

- **Part I: Your Experience in Addressing Allegations of Employee Misconduct**
- **Part II: Your Role in Addressing Allegations of Employee Misconduct**
- **Part III: CBP's Process for Addressing Allegations of Employee Misconduct**
- **Part IV: Your View of CBP's Discipline Process**

The following role descriptions were developed for the survey:

- **Executive:** member of the Senior Executive Service (SES).
- **Manager:** management position that is not part of the SES and supervises one or more supervisors.
- **Supervisor:** responsible for employees' performance appraisals and leave approval.

Pivotal received 1,761 survey responses from the different leadership levels as follows:

- **Executives – 36, or 2 %**
- **Managers – 843, or 48%**
- **Supervisors – 882, or 50%**

Respondents represented 15 offices, with the majority of responses from the Office of Field Operations (52%), U.S. Border Patrol (33%), and Air and Marine Operations (2%). These response levels are generally consistent with the Agency's overall staffing levels within each of these components.

Conclusion

Pivotal's approach allowed for broad functional and geographical representation and was designed to ensure that the resultant findings and recommendations would be as representative as possible of CBP's most significant challenges and barriers. The next section of the report provides an overview of the process for handling allegations of misconduct. This overview is helpful for establishing the context for the findings and recommendations presented later in the report.

Process Overview for Handling Allegations of Employee Misconduct

This section offers a general overview of CBP's process for handling allegations of misconduct.⁹ The overview is necessarily very general for reasons that will be clearer in the Findings and Recommendations section of this report. Most noteworthy among the reasons is Pivotal's finding that the process varies greatly among and within CBP subcomponents.

Allegations of misconduct can be made in a variety of ways. While there is no single intake process for these allegations, the Joint Intake Center (JIC) serves as a primary clearing house for allegations that are not initially resolved at the local level. Misconduct allegations referred to the JIC are tracked through the Joint Integrity Case Management System (JICMS).

Roles and Relationships

The Department of Homeland Security (DHS) Office of Inspector General (OIG) has first right of refusal to investigate misconduct reported to the JIC. When the DHS OIG refers a misconduct allegation to CBP, the case is routed to the Office of Internal Affairs (OIA) and then to the appropriate office for investigation, fact-finding, or management action.

OIA prepares a Report of Investigation (ROI) when it concludes its investigation. The ROI is then routed to the Office of Human Resources Management (OHRM), where a Labor and Employee Relations (LER) Specialist determines whether the employee misconduct is substantiated. The LER Specialist is responsible for entering the case into the Human Resources Business Engine (HRBE), where it is tracked through closure.¹⁰

OHRM uses a Table of Offenses and Penalties to guide its recommendations to deciding officials for appropriate disciplinary action based on the facts of the individual case.

It is important to note that the Table of Offenses and Penalties provides a range of disciplinary action based on the totality of the circumstances of the individual case.

Discipline

Discipline can involve formal or informal non-adverse actions, including verbal or written counseling, memorandum of instruction, written reprimand, disciplinary suspension between one (1) and fourteen (14) days. It can also involve adverse actions, which include suspensions of fifteen (15) days or more, demotions, and removals. Discipline is administered in accordance with procedures set forth in 5 C.F.R. Part 752 and 5 U.S.C. Chapter 75, collective bargaining agreements, and CBP policies. Adverse and disciplinary actions are considered to be "formal" discipline, while "informal" discipline typically refers to a verbal or written counseling or memorandum of instruction.

The authority to propose or decide specific actions is delegated to supervisors and managers at the lowest organizational level, appropriate to the severity of the misconduct, pursuant to CBP's Delegation of Authority. The Deciding Official in the employee's chain of command makes a final disposition of discipline, taking into account the Douglas Factors that could impact the severity of discipline for the subject employee.¹¹

Cases that warrant less severe discipline (i.e., non-adverse actions) are remanded to local management for appropriate action. Cases that warrant more severe discipline (i.e., adverse actions) are presented to CBP's Discipline Review Board (DRB).

9 This overview relies heavily on the description provided in the 2014 Fiscal Year CBP Discipline Analysis Report produced by the Office of Human Resources Management.

10 When a case is closed in HRBE, the case is also closed in JICMS. Low-level misconduct allegations that are not sent to the JIC may or may not be tracked by the local field office and are not tracked centrally through the JIC or otherwise.

11 *Douglas v. Veterans Administration*, 5 MSPR 280 (MSPB 1981), established criteria that Deciding Officials must consider when determining the appropriate penalty to impose in disciplinary cases.

The DRB is a 3-member panel of senior executives from different organizational components that confer to establish a proposed disciplinary action that is consistent with like and similar cases. Generally speaking, the Office of Chief Counsel (OCC) is only engaged for the most serious cases.

Once a Deciding Official has determined disciplinary action, the employee may appeal the decision through a variety of channels, including the negotiated grievance procedure. The appeal process is beyond the scope of this study.

Conclusion

This section has described the general process for handling allegations of employee misconduct. As previously mentioned, there are process variances both within and among components, generally attributable to legacy processes and geographic variations. The next section of the report is a foundational discussion for the values of accountability, transparency and legitimacy and provides context for these pillars as a framework for Pivotal's findings and recommendations.



The Accountability, Transparency and Legitimacy Pillars

As mentioned in the Introduction, the overarching goal of Pivotal’s review was to assess whether CBP’s handling of allegations of employee misconduct fosters accountability, transparency, and legitimacy while reinforcing CBP’s commitment to ensuring that all employees are held to the highest standards of integrity and professional conduct.

Key Characteristics of the Three Pillars

Key characteristics associated with the three pillars, all of which will be discussed more fully as they relate to Pivotal’s findings and recommendations, include:

- **“Accountability”** refers to the performance of individuals and organizations in carrying out their mission in ways that meet stakeholders’ expectations. From the perspective of CBP’s misconduct allegation investigation and discipline systems, accountability is assessed by asking if there are clear roles and responsibilities for everyone involved and if there are means to ensure that allegations are handled in an effective and timely manner.
- **“Transparency”** is concerned with the openness of a process to stakeholders. In the case of CBP’s misconduct allegation investigation and discipline systems, transparency is assessed by asking whether complainants have access to the complaint system and if information is shared with all stakeholders in a way that they can understand and trust.

- **“Legitimacy”** focuses on whether affected stakeholders perceive the process to be fair, reasonable and impartial. Legitimacy is assessed by asking such questions as whether those affected have an opportunity for explanation before decisions are made; whether decisions are explained; and, whether all involved are treated with courtesy and respect.

Significance

Ultimately, CBP’s mission to safeguard America’s borders while enabling legitimate trade and travel is impacted by whether the values of accountability, transparency and legitimacy are realized in addressing allegations of employee misconduct. CBP’s mission makes it vulnerable to corruption within its workforce and, as with other law enforcement agencies, CBP must ensure its officers and agents avoid using unnecessary or excessive force or engage in other misconduct. It is essential that CBP be capable of effectively investigating and addressing employee behavior that undermines the Agency’s mission and that it has processes to efficiently and effectively handle less serious administrative and performance issues.

To this end, in September 2014, Commissioner Kerlikowske issued the CBP Integrity and Personal Accountability Strategy (Integrity Strategy), stating in part, “All employees must maintain high standards of honesty, integrity, impartiality, character, and professionalism to ensure the proper performance of government business and the continued trust and confidence of the public”¹² The Integrity Strategy outlines a set of goals and objectives to support CBP in reinforcing its culture of integrity and accountability by, among other activities, improving the Agency’s investigatory and disciplinary processes for allegations of employee misconduct.

12 Integrity Strategy, p.5.



Law enforcement misconduct investigation and discipline systems impact the interests of a variety of internal and external stakeholders, including employees and individuals in the communities served. These systems also impact the efficacy of the organization itself.¹³ Investigation and discipline processes that enhance accountability, transparency and legitimacy help ensure an effective and equitable system that better enables the organization to meet its mission, goals, and objectives.

CBP's Integrity Strategy includes accountability, transparency and legitimacy as the three foundational pillars, acknowledging the need to make its "disciplinary process efficient yet fair, consistent in both the process and the result, and transparent to both the workforce and the public."¹⁴ Following through on its commitment to evaluate its disciplinary process to find "ways to increase the efficiency, accountability, fairness and consistency of its adjudication of allegations of misconduct,"¹⁵ the Agency engaged Pivotal in conducting this review.

CBP also acknowledged in the Integrity Strategy that reports on disciplinary action statistics and structural and procedural improvements made to CBP's disciplinary systems would improve transparency.¹⁶

The goals and objectives outlined in the Integrity Strategy, as well as specific and overlapping processes involving accountability, transparency and legitimacy, guided Pivotal's evaluation of CBP's investigation and discipline systems.

Conclusion

As discussed in the Approach section, Pivotal used four (4) overarching issue categories and eleven (11) supporting questions to guide the program evaluation. While these issue categories and questions were invaluable in conducting the evaluation, the three pillars of accountability, transparency and legitimacy serve as a highly relatable framework for Pivotal's findings and recommendations. The following sections provide a discussion of the findings and recommendations aligned to each of the three pillars.

13 Stephens, Darrel W. *Police Discipline: A Case for Change*, Washington D.C.: U.S. Department of Justice, National Institute of Justice, 2011; p.5.

14 Integrity Strategy, p.12.

15 Ibid.

16 Ibid.

Accountability Pillar

The core meaning of police accountability is captured in Sir Robert Peel's 1829 declaration that, "The police are the public and the public are the police." Law enforcement agencies are accountable, often through the political process, to control crime, maintain order and provide other community services, while officers are responsible for how they treat individual community members in performing law enforcement duties.¹⁷ Accountability can be assessed in a myriad of ways, from consideration of organizational structure to an agency's public response following a critical incident. However, one vital means of ensuring law enforcement accountability is the appropriate handling of misconduct allegations against agency employees, including matters touching upon policy, training, supervision, and review.¹⁸

Characteristics contributing to an effective investigation and discipline process include:

- (1) early intervention at the lowest level possible;
- (2) fair and consistent application of discipline;
- (3) a focus on the most effective and fair means for changing unacceptable behavior through a range of interventions, such as counseling, training, and sanctions;
- (4) timely investigations and discipline protocols with a monitoring component to track case progress; and,
- (5) a process that is as transparent as possible for employees and the communities served.¹⁹

Early intervention at the lowest level possible contributes to an "environment that encourages employees and supervisors to take corrective action on minor mistakes [and] helps to create a culture in which everyone takes responsibility for

their own behavior and for the behavior of others who may need guidance from time to time."²⁰ At the same time, employees should understand that serious misconduct will be handled through the formal investigation and discipline process.

Law enforcement agencies must ensure both real and perceived consistency in the discipline process.²¹ The law enforcement agency and union leadership must invest time to explain the complaint investigation and discipline processes to employees and the community and must provide an appropriate and permissible level of detail about decisions on individual misconduct allegations.

"The primary focus of discipline should be on changing unacceptable behavior."²² This requires that supervisors and management consider whether an employee has made a mistake, a judgmental error due to lack of knowledge or understanding, or engaged in intentional misconduct. Based on their determination, they should then seek the most effective response, such as counseling, training, or formal discipline.

Both the investigation and discipline stages must have established deadlines. "To ensure these deadlines are met, a monitoring component that tracks progress on the case from the initial complaint to its resolution is an important piece of the process."²³

Pivotal's findings and recommendations aligned to the Accountability pillar are included in Table 2 on pages 6 through 13 and in Table 4 on the following pages.

17 Walker, Samuel and Archbold, Carol A., *The New World of Police Accountability*, 2nd ed. (Los Angeles: Sage, 2014); p. 8.

18 *Ibid.* p. 16.

19 Stephens, p. 19 - 22.

20 *Ibid.* p. 20.

21 *Ibid.*

22 *Ibid.* p. 21.

23 *Ibid.*

Table 4. Summary of Findings and Recommendations Linked to Accountability

| Accountability | |
|--|--|
| <i>Findings</i> | <i>Recommendations</i> |
| <p>A.1. There are incongruent processes and sub-processes across multiple offices and in multiple geographic locations. (Issue Category 1)</p> | <ul style="list-style-type: none"> • Engage OIA, OCC, LER and operating components in a process to develop an end-to-end case processing roadmap that begins with the initial allegation and ends with case disposition. The process map should include performance benchmarks for significant case processing milestones (e.g., transfer from OIA to management, transfer from OIA to LER, and transfer from LER to OCC). This process map would increase awareness of all responsible entities, establish performance metrics against which the entire process and sub-processes could be evaluated, and enhance CBP’s ability to proactively address process efficiency issues. (A.1.R.1) • Establish regular joint strategic meetings and reporting requirements for OIA, LER, and OCC on case handling to enhance continuity and consistency in approach and process. (A.1.R.2) • Conduct an internal best practice review for case handling and identify and promulgate those practices across the Agency. Process should include a focus on case referral procedures. (A.1.R.3) • Develop standard case handling checklists and supporting job aids to enhance consistency and provide useful tools for supervisors and managers. (A.1.R.4) |

Table 4. Summary of Findings and Recommendations Linked to Accountability, *continued*

| Accountability | |
|---|--|
| Findings | Recommendations |
| <p>A.2. There is a lack of clarity and agreement on roles and relationships, including between the Office of Chief Counsel (OCC), Office of Human Resources/Labor and Employee Relations (OHRM/ LER) and Office of Internal Affairs (OIA). (Issue Category 2)</p> | <ul style="list-style-type: none"> • Convene a multi-functional working group to establish a collaborative and holistic process that supports managers in making the most informed and timely decisions about the handling of discipline matters. The working group may want to identify internal best practice models for the cooperative and collegial handling of discipline matters with full participation of all involved parties. (A.2.R.1) • Establish regular local collaborative meetings between OIA, LER and OCC to discuss case strategies and trends and implementation of Headquarters guidance. (A.2.R.2) • Deliver joint training/information sharing sessions by LER and OCC for the operational components. A local team of LER and OCC representatives should develop session content, which should be an extension of the information discussed during the regular local collaborative meetings mentioned in A.2.R.2. (A.2.R.3) • Establish role-based permissions that would allow mutual access to case processing systems. (A.2.R.4) |



Table 4. Summary of Findings and Recommendations Linked to Accountability, *continued*

| Accountability | |
|---|---|
| <i>Findings</i> | <i>Recommendations</i> |
| <p>A.3. Case processing timelines are lengthy– even for less serious offenses. (Issue Categories 1, 2, 3 and 4)</p> | <ul style="list-style-type: none"> • Develop an agreement between DHS OIG and CBP OIA on minimum case referral guidelines. Consider including in the agreement that all cases default to OIA unless subject employee is at a senior level (i.e., GS15 or above) and/or a defined set of allegations is involved, which is consistent with the agreements DHS OIG has with other DHS components. (A.3.R.1) • Issue clarifying guidance on JIC reporting requirements to all CBP supervisors and managers. (A.3.R.2) • Develop a job aid/discussion brief that equips supervisors and managers to communicate the requirements for JIC reporting to their staff. (A.3.R.3) • Develop triage procedures and guidance for JIC staff that support more expeditious referral/closure of less serious matters. (A.3.R.4) • Establish criteria for expedited case handling procedures for less serious matters. Consider expanding expedited case handling procedures to include first offenses for less egregious offenses. (A.3.R.5) • Develop cross-functional performance metrics for the handling of allegations of employee misconduct that include processing timelines for all responsible entities (i.e., OIA, LER, OCC, and component management). (A.3.R.6) • Conduct a program review within LER to assess the impact to timelines of recent case handling changes, including those for the DRB. (A.3.R.7) • Explore use of alternative discipline options that could include lesser discipline with no appeal. (A.3.R.8) • Consider revising the policy that requires referral of all use of force (UOF) incidents for Federal Tort review. (A.3.R.9) |

Table 4. Summary of Findings and Recommendations Linked to Accountability, *continued*

| Accountability | |
|---|--|
| <i>Findings</i> | <i>Recommendations</i> |
| <p>A.3. Case processing timelines are lengthy– even for less serious offenses. (Issue Categories 1, 2, 3 and 4), continued</p> | <ul style="list-style-type: none"> Consider revising the policy that requires all incidents involving government owned vehicles, lost equipment, and seizure discrepancies to be reported to JIC. (A.3.R.10) Consider revising the policy that requires prosecution decline on all criminal allegations before OIA may begin an administrative investigation. (A.3.R.11) Issue clarifying guidance on the vetting process to ensure that employees with pending matters under investigation are not adversely impacted – either due to frivolous complaints, inability to receive timely case status information, or extended case handling timelines. (A.3.R.12) |
| <p>A.4. OIA does not conduct administrative investigations related to cases involving criminal charges against an employee until the criminal matter is resolved (this also applies when less serious first-time offense criminal matters are remanded to management). (Issue Category 1)</p> | <ul style="list-style-type: none"> Explore feasibility of parallel investigations for administrative and criminal cases. Exploration should include identifying a subset of cases that would be appropriate for parallel investigations based on historical case analysis and leading practices in other law enforcement organizations. (A.4.R.1) Establish clear policies, procedures, and supervisory guidance for the handling of administrative and criminal matters and ensure all supervisors receive and have access to the guidance. (A.4.R.2) |

Table 4. Summary of Findings and Recommendations Linked to Accountability, *continued*

| Accountability | |
|---|--|
| <i>Findings</i> | <i>Recommendations</i> |
| <p>A.5. There was mixed feedback on the quality of OIA investigations, with concern expressed about rote questioning, failure to follow up on answers from an interviewee, and an antagonistic attitude towards subject employees. (Issue Category 1)</p> | <ul style="list-style-type: none"> • Conduct a comprehensive quality review of a random representative sample of investigation case files. The review should be guided by a set of widely recognized and acceptable standards, such as the Quality Standards for Inspection and Evaluation issued by the Council of the Inspectors General; the Standards and Guidelines for Internal Affairs: Recommendations from a Community of Practice issued by the U.S. Department of Justice; and the International Association of Chiefs of Police (IACP) National Law Enforcement Policy Center Model Policy and Concepts and Issues Paper on Investigation of Employee Misconduct. (A.5.R.1) • Identify appropriate training and/or process changes based on the quality review discussed in A.5.R.1. (A.5.R.2) • Explore the feasibility of transcription software. (A.5.R.3) |
| <p>A.6. There was mixed feedback on the responsiveness and quality of advice received from LER Specialists. (Issue Categories 1 and 2)</p> | <ul style="list-style-type: none"> • Review current training for LER Specialists, and establish minimum requirements for mandatory training that aligns to the roles and responsibilities and required competencies and provides real-time reinforcement of required knowledge, skills, and abilities. (A.6.R.1) • Institute joint training conducted with OCC and LER to enhance collaborative relationships and ensure more holistic and consistent guidance on addressing disciplinary actions. (A.6.R.2) • Administer a more comprehensive annual customer satisfaction survey for LER. (A.6.R.3) |

Table 4. Summary of Findings and Recommendations Linked to Accountability, *continued*

| Accountability | |
|--|---|
| <i>Findings</i> | <i>Recommendations</i> |
| <p>A.7. The DRB process has not historically been efficient or timely. (Issue Categories 1, 2 and 3)</p> | <p>In light of the extensive changes made to the DRB process in recent months, aligned with the findings of the Adverse Actions Working Group (AAWG), we recommend that LER conduct a program review of the DRB process. The LER review should measure the effectiveness of the changes, and identify possible additional actions to further improve the timeliness and quality of process outcomes. (A.7.R.1)</p> |
| <p>A.8. The Table of Offenses does not provide sufficient direction to deciding officials. (Issue Categories 1 and 2)</p> | <p>Revise the Table of Offenses and Penalties to provide clearer guidance on appropriate penalties and foster more consistent disciplinary practices across the Agency. This guidance should include more specific parameters, including narrower ranges and mandatory consequences for the most serious offenses. (A.8.R.1)</p> |
| <p>A.9. Supervisors and managers expressed a high degree of confidence in their ability to identify and appropriately resolve less serious offenses in the Pivotal administered online survey. However, they also indicated they did not feel empowered or supported to resolve these less serious offenses and consequently believe they must report these matters to the JIC. (Issue Categories 1, 2, and 4)</p> | <ul style="list-style-type: none"> • Develop and deliver training and on-the-job (OJT) resources for supervisors on appropriately addressing performance and conduct issues. (A.9.R.1) • Develop a delegation order that clearly empowers first-line supervisors to resolve less serious offenses. This delegation could be dependent upon creation and issuance of a revised Table of Offenses that provides clearer guidance on appropriate penalties and completion of appropriate training. (A.9.R.2) |

Table 4. Summary of Findings and Recommendations Linked to Accountability, *continued*

| Accountability | |
|---|--|
| <i>Findings</i> | <i>Recommendations</i> |
| <p>A.10. There is no uniform system of recording and tracking case activity, including the outcomes of management referrals from OIA and informal discipline. (Issue Categories 1, 2, 3, and 4)</p> | <ul style="list-style-type: none"> Develop consistent guidance for recording and tracking informal discipline. The guidance should be responsive to any component-specific nuances, while promoting consistency in process and outcome. (A.10.R.1) Develop a performance dashboard that supports monitoring, analyzing and reporting capabilities. (A.10.R.2) Issue regular reports on case resolution, similar to the reports issued by the FBI’s Office of Professional Responsibility (OPR). (A.10.R.3) Conduct an internal inventory of systems and processes to identify leading practices. (A.10.R.4) Establish role-based permissions within each of the existing systems to enhance collaboration. (A.10.R.5) Conduct annual quality reviews to assess consistency and thoroughness in documentation. (A.10.R.6) |
| <p>A.11. CBP does not conduct coordinated reviews with OCC, OIA, LER and operational components of third-party decisions and settlements. (Issue Categories 1 and 3)</p> | <ul style="list-style-type: none"> Develop and issue regular (at least semiannual) reports on informal resolution of cases, third-party decisions, and settlements, and include appropriate trend analyses over time. (A.11.R.1) Survey internal stakeholders on usefulness of reports and make appropriate revisions to enhance stakeholder satisfaction. (A.11.R.2) Establish role-based permissions in HRBE that would allow OCC to add relevant case updates, improving the accuracy and timeliness of case data. (A.11.R.3) |

Table 4. Summary of Findings and Recommendations Linked to Accountability, *continued*

| Accountability | |
|--|---|
| <i>Findings</i> | <i>Recommendations</i> |
| <p>A.12. OIA and LER expressed workload imbalances, with LER highlighting hiring constraints for the last two fiscal years. (Issue Categories 1 and 3)</p> | <ul style="list-style-type: none"> • Assess workload implications of OIA’s new requirement to respond to use-of-force incidents. (A.12.R.1) • Conduct a workload analysis in LER based on historical geographical caseload data to assess the appropriateness of adjusting work assignments. (A.12.R.2) • Enhance regular workload review cycles within LER at the regional level. The review should provide visibility of caseloads over time for specific locations and include a trend analysis that supports workload assignments. (A.12.R.3) • Establish regular reports on performance metrics that provide more visibility on performance drivers in OIA and LER. (A.12.R.4) • Develop quantitative metrics for determining workload-based hiring determinations (e.g., average case processing time per LER Specialist and OIA investigator). (A.12.R.5) |
| <p>A.13. Technology solutions do not adequately support the process. (Issue Category 1)</p> | <ul style="list-style-type: none"> • Establish an inventory of all formal and informal case handling systems. (A.13.R.1) • Assess HRBE’s capability to serve as an integrated technology solution, including its overall responsiveness and ease of use. (A.13.R.2) |

Transparency Pillar

Law enforcement misconduct investigations and discipline often occur in a closed system, with the public having limited access to information about conduct policies and training, the likely punishment for specific acts of misconduct, or the actual discipline imposed in a misconduct incident.²⁴ This lack of transparency contributes to public distrust about policing.

“An accessible, fair, and transparent complaint process is the hallmark of police responsiveness to the community.”²⁵ Law enforcement agencies must educate their constituents and employees about the complaint process.²⁶ “While respecting individual privacy rights and staying within the framework of the law, police agencies must be as open as they can possibly be to their employees and the community they serve.”²⁷

The recent report from the President’s Task Force on Policing in the 21st Century (“Task Force”) recommended that law enforcement agencies ensure reasonable and equitable language access for all persons encountering the police.²⁸ The Task Force directed its recommendations to federal law enforcement agencies to the extent practicable.²⁹

CBP’s Integrity Strategy provides a specific objective related to transparency in requiring that the Agency, “Prepare a report with the intention to improve the overall transparency of the discipline system. In addition to statistical disciplinary action information, the report would also incorporate any structural or procedural changes made that year to achieve improvements.”³⁰

Transparency contributes to an environment in which accountability is recognized as an important individual and organizational value.³¹ At a minimum, making statistical data about misconduct trends public internally and externally and giving complainants timely feedback on the outcome of their complaints will help ensure accountability and transparency in the process.³²

Pivotal’s findings and recommendations aligned to the Transparency pillar are included in Table 2 on page 14 and in Table 5 that begins on the following page.

24 Walker and Archbold, p. 181 – 185.

25 *Protecting Civil Rights: A Leadership Guide for State, Local, and Tribal Law Enforcement*, International Association of Chiefs of Police, U.S. Department of Justice Office of Community Oriented Policing Services (2006); p. 81. Available at http://www.theiacp.org/portals/0/pdfs/PCR_LdrshpGde_Part1.pdf.

26 *Building Trust Between the Police and the Citizens They Serve; An Internal Affairs Promising Practices Guide for Local Law Enforcement*, International Association of Chiefs of Police, U.S. Department of Justice Office of Community Oriented Policing Services (2009). Available at <http://www.theiacp.org/portals/0/pdfs/BuildingTrust.pdf>.

27 Stephens, p. 21.

28 President’s Task Force on 21st Century Policing. 2015. Final Report of the President’s Task Force on 21st Century Policing (President’s Task Force on Policing Report). Washington, DC: Office of Community Oriented Policing Services; 1.9.2 Action Item, p. 18.

29 Ibid. p. 4.

30 Integrity Strategy.

31 Stephens, p. 21.

32 Ibid.

Table 5. Summary of Findings and Recommendations Linked to Transparency

| Transparency | |
|--|---|
| Findings | Recommendations |
| <p>T.1. There are multiple and incongruent processes for filing a complaint. Further, multilingual assistance is not readily available, such as Spanish-speaking staff to take complaints or informational materials in languages other than English. (Issue Category 1)</p> | <ul style="list-style-type: none"> • Staff intake centers with Spanish-speaking personnel or provide ready access to translators. (T.1.R.1) • Develop one centralized online complaint form with DHS/OIG and CBP points of complaint receipt. (T.1.R.2) • Create a complaint form in Spanish. (T.1.R.3) • Provide 24-hour access to a single complaint intake telephone number, preferably toll-free. (T.1.R.4) • Create a process whereby complainants can obtain information about the status of their cases. (T.1.R.5) • Establish timeframes and processes for providing confirmation of receipt of complaint and appropriate status updates to complainants. (T.1.R.6) |
| <p>T.2. There is disparate and inconsistent access to case information, with access being more relationship-dependent than process-dependent. (Issue Category 1)</p> | <ul style="list-style-type: none"> • Develop a performance dashboard that supports monitoring, analyzing and reporting at the Sector Chief/Port Director level. (T.2.R.1) • Issue regular reports on case resolution similar to the reports issued by the FBI's Office of Professional Responsibility (OPR). (T.2.R.2) |
| <p>T.3. OIA does not provide a recommendation as to a finding, nor does it participate in briefing the DRB or decision makers who may have questions about the investigation. (Issue Categories 1 and 2)</p> | <p>Establish guidance that allows OIA to serve in a consultative role to mission support and operational components. (T.3.R.1)</p> |

Legitimacy Pillar

A law enforcement culture of accountability and transparency builds public trust and legitimacy, as recognized in the recent report from the President’s Task Force on Policing in the 21st Century (Task Force).³³ Research indicates that, “people are more likely to obey the law when they believe that those who are enforcing it have the legitimate authority to tell them what to do. But the public confers legitimacy only on those they believe are acting in procedurally just ways.”³⁴ Procedurally just actions include treating people with dignity and respect, giving individuals “voice” during encounters, making neutral and transparent decisions, and conveying trustworthy motives.³⁵

While much of the Task Force report focused on improving police/community relationships, it also emphasized that law enforcement should promote internal legitimacy by applying procedural justice principles in their organizations.³⁶ “Internal procedural justice refers to practices within an agency and the relationships officers have with their colleagues and leaders.”³⁷ Officers who feel respected by their organizations, supervisors, and peers are more likely to accept departmental policies, understand and voluntarily comply with decisions, and bring this respect into their work with the community.³⁸

A policy paper by the International Association of Chiefs of Police (IACP) noted that, “Where there are widespread perceptions that the investigation and administration of discipline is handled unfairly, capriciously, inconsistently, or unprofessionally, ramifications can be widespread and extremely damaging to department morale and operations.”³⁹

If discipline is seen as unfair or unnecessarily harsh or officers are treated as guilty until proven innocent, such treatment can discourage cooperation in the investigative process and negatively impact the entire organization by lowering morale and estranging management and line officers.⁴⁰

The IACP notes the need for law enforcement investigation and discipline processes to be based on “fair play” and that officers should be “treated fairly, impartially, and respectfully.”⁴¹ This theme of incorporating procedural justice principles into internal discipline processes was echoed in the President’s Task Force on Policing Report.⁴²

One study defined a procedurally just internal complaint system as “a fair decision-making process and respectful treatment of employees and their concerns.”⁴³ If employees are confident that they will be treated fairly through an effective complaint resolution system, this confidence can enhance employee loyalty and morale and result in greater employee-reported satisfaction with the process.⁴⁴ This study also found that using a procedurally just process to address workplace complaints and possible misconduct “substantially increases the chances that [complainants] will accept the outcome.”⁴⁵

33 President’s Task Force on Policing Report.

34 Ibid. p. 10 (citations omitted).

35 Ibid. Also see references to work of Dr. Tom Tyler and his colleagues cited throughout the President’s Task Force on Policing Report.

36 Ibid.

37 Ibid. p. 14.

38 Ibid. p. 10.

39 *Investigation of Employee Misconduct, – Concepts and Issues Paper and Model Policy*; International Association of Chiefs of Police, National Law Enforcement Policy Center (originally published 1990, revised October 2001, January 2007), p. 2.

40 Ibid.

41 Ibid.

42 President’s Task Force on Policing Report, 1.4.2 Action Item.

43 *Encouraging Employee Reporting Through Procedural Justice*. Arlington, VA : Ethics Resource Center. p. 6.

44 Ibid. p.5 – 8 (citations omitted).

45 Ibid. p.6. The researchers note that in cases of violence, harassment and discrimination, employees put more weight on the outcome than the procedure.

Elements of an internal complaint system that fosters procedural justice include the following:

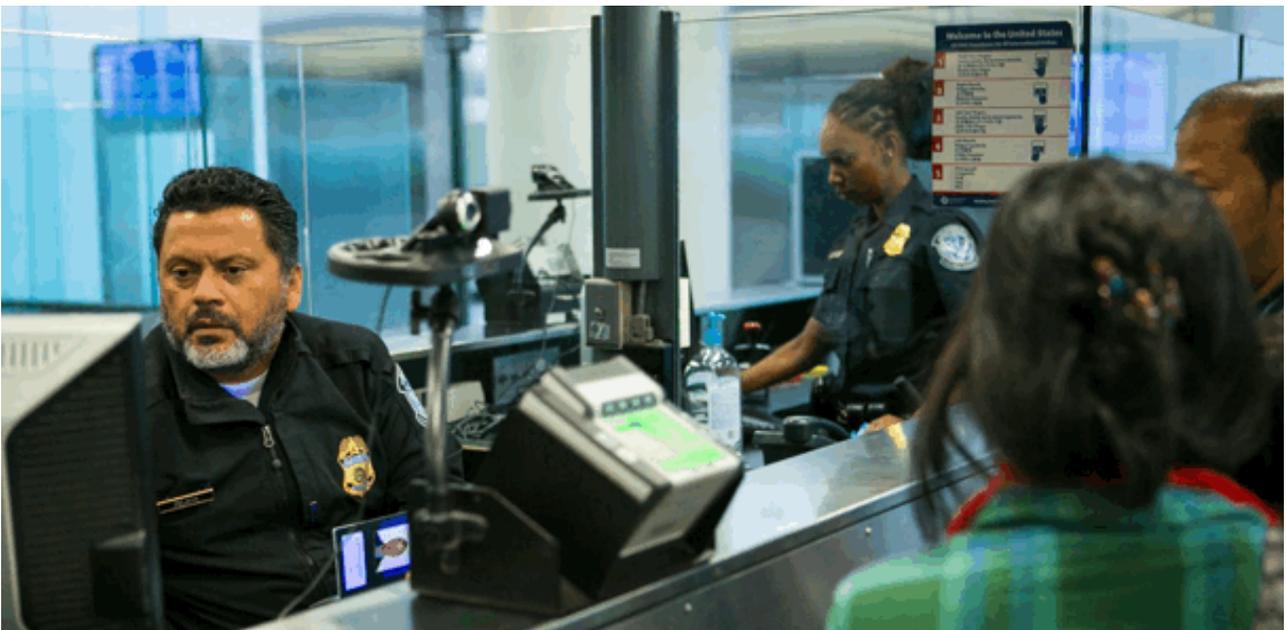
- **Clearly explaining the procedures for investigation and resolution of allegations of misconduct.**
- **Consistently following those stated procedures.**
- **Treating all parties with dignity, respect, and concern.**
- **Taking into account the issues raised by all parties.**
- **Conducting investigations in a neutral and unbiased manner.**
- **Explaining the resolution of the case based on facts.**

Pivotal's findings and recommendations aligned to the Legitimacy pillar are included in Table 2 on page 15 and in Table 6 on the following page.



Table 6. Summary of Findings and Recommendations Linked to Legitimacy

| Legitimacy | |
|--|--|
| Findings | Recommendations |
| <p>L.1. There is a perception that the complaint process is misused with no adverse consequence. (Issue Categories 1 and 3)</p> | <p>Conduct a review of complaints over time to determine whether the process is being misused, report findings of the review, and take any appropriate corrective action. (L.1.R.1)</p> |
| <p>L.2. Employees are routinely assigned to administrative duties for extended periods –with the final case disposition being a counseling memo or reprimand. (Issue Categories 1 and 3)</p> | <ul style="list-style-type: none"> • Develop a monthly report for all employees who are on restricted duty that includes the length of time each employee has been on restricted duty. (L.2.R.1) • Establish a policy that does not categorically adversely impact employees who are on restricted duty from consideration for promotions, awards, and/or transfers. (L.2.R.2) |
| <p>L.3. There is a lack of formal case closure with the subject of the investigation and within the various systems. (Issue Categories 1, 2, and 4)</p> | <ul style="list-style-type: none"> • Revisit practice of issuing closing letter to allow for appropriate level of communication with complainants and subjects of investigations. (L.3.R.1) • Consider revising use of “no action” for closing comments in unsubstantiated cases, and revise language that implies/suggests culpability in cases where insufficient evidence was identified. (L.3.R.2) |



Conclusion

Fair and impartial handling of allegations of employee misconduct is integral to the overarching efficacy of a law enforcement organization. The President’s Task Force on Policing in the 21st Century recently recommended that law enforcement agencies establish a culture of transparency and accountability in order to build public trust and legitimacy. Based on the findings of this study, CBP’s process for handling allegations of misconduct is not meeting the objectives called out in its Integrity Strategy to be efficient, fair, consistent in process and result, and transparent. This report highlights some of the more significant challenges facing CBP in improving its misconduct complaint and discipline processes to achieve those objectives, with specific recommendations to enhance all aspects of the system. Within the context of the four Issues Categories that guided this study, Figure 1 on the following page describes the high-level challenges and Pivotal’s key recommendations.

CBP has a competent, capable and committed workforce that is ready to rise to the challenge of continued service excellence. To promote accountability, transparency and legitimacy in CBP’s process for handling misconduct allegations, the Agency is encouraged to leverage the momentum established through this evaluation to fully engage CBP employees in making critical changes.



Figure 1. Summary of High-Level Challenges and Recommendations Aligned to Four Issues Categories

- **Issue Category 1:** Investigation of the System. The system is significantly flawed, in large part because there is not a comprehensive map that clearly shows the interrelationships and interdependencies of the various system components. Developing this end-to-end map is critical as a foundational first step from which informed system improvements can be identified and effectively implemented.
- **Issue Category 2:** Roles and Responsibilities. The roles and responsibilities are not consistently carried out, and this is interfering with appropriate and effective cooperation and collaboration. Establishing and reinforcing the appropriate roles and responsibilities from a holistic process perspective would result in better process outcomes and improve the support provided to CBP's managers.
- **Issue Category 3:** Performance Metrics and Key Performance Indicators. The lack of key performance metrics tied to specific outcomes contributes to disjointed and incongruent practices and processes. Establishing a set of meaningful measures tied to desired process outcomes would enhance the Agency's ability to more appropriately focus resources and respond proactively rather than reactively to systemic issues.
- **Issue Category 4:** Internal and External Reporting. The lack of regular and meaningful reporting contributes to a culture of internal and external mistrust and negatively impacts cooperation and collaboration. By enhancing reporting formats for employees, managers and other stakeholders, the Agency would invite healthy and constructive dialogue.

Appendix A – References

(Documents and Other Materials Reviewed)¹

Department of Homeland Security (DHS) and Customs and Border Protection (CBP) Orientation Materials

- 2002 Memorandum from President Bush to Federal Employees regarding Creation of DHS and Overview Materials related to DHS.
- CBP Air and Marine Operations (AMO) Materials related to their Mission.
- CBP Office of Field Operations (OFO) Organizational Chart and Materials related to OFO Mission.
- CBP Office of Training and Development Materials.
- CBP U.S. Border Patrol Organizational Chart and Materials related to the USBP’s Mission.
- Documents related to Creation of CBP, Organizational Chart, Operational Overview, and 2013 Operational Priorities.
- Materials related to CBP Trade Operations.
- U.S. Customs Organizational Chart.

CBP Integrity, Transparency, and Accountability

- CBP Integrity and Personal Accountability Strategy (September 18, 2014).
- Email from Commissioner Kerlikowske to CBP employees – “CBP Continues Progress on Integrity, Transparency, and Accountability” (September 18, 2014).
- Fact Sheet on CBP Integrity and Personal Accountability Strategy (September 2014).

CBP Office of Internal Affairs (OIA)

- CBP Internal Affairs Investigative Operations Division (October 1, 2013).
- CBP Office of Internal Affairs Organizational Chart.
- Delegation of Authority to the Assistant Secretary for U.S. Immigration and Customs Enforcement (DHS Delegation Order 7030.2, March 2003).

¹ This list of References is not all-inclusive, but provides an extensive overview of documents and other materials reviewed by Pivotal during its evaluation of Customs and Border Protection’s misconduct complaints and discipline systems.

- Flow Charts for Processing Allegations of CBP Employee Misconduct (before and after 1811 designation and delegated authority).
- IOD HQ Reorganization Project - Final Report (1811 Transition Scheme – Phase 1 Project); Memorandum from SAIC (November 24, 2014).
- JIC Statistics for Pending Cases, Closing Reports and Blue Books.
- JICMS Complaint Classification Categories.
- Memorandum of Understanding between the Under Secretary for Border and Transportation Security and the Inspector General (March 2003).
- Memorandum of Understanding between U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection for the Formation and Operations of a Joint Intake Center (March 2004).
- New Guidance on Reporting Employee Misconduct (July 2004).
- The Joint Intake Center (JIC): The Joint Integrity Case Management System (JICMS) – PowerPoint Overview (November 13, 2014).
- The Office of Inspector General (DHS Management Directive 0810.1, June 2004).

CBP Office of Human Resource Management (HRM) and Labor and Employee Relations (LER) Directorate Authority and Structure

- Authorities and Responsibilities of HRM (Directive 2130-013, December 2008).
- Building for the Future: The Reorganization of LER Part II: LER's Realigned Operations (July 2014).
- CBP Office of Human Resources Management Briefing for the CBP Integrity Advisory Panel, OHRM Assistant Commissioner.
- Employee Relations – Headquarters Servicing.
- Field LER Case Audit SOP (January 2013).
- HRM Organizational Chart (2014).
- LER Current State – Functional Chart.
- LER Field Services – LER Supervisors: Foundational Performance Expectations (January 2013).
- LER Field Staff Locations Map.
- LER Reorganization Talking Points.

- LER Servicing Assignments.
- LER Organizational Chart (June 2014).
- LER Strategic Plan: 2011 – 2016 (2011).
- LER Team Directories (Central, East, West).
- LER Team Directory (Team 1).
- LER Team Directory (Team 2).
- LER Team Directory (Team 3).
- LER Team Directory (Team 4).

Selected CBP HRM/LER Reports and Memoranda

- 2009 CBP Discipline Summary.
- 2010 CBP Discipline Report.
- 2011 – 2013 Discipline Analysis Report.
- 2014 Discipline Analysis Report.
- CBP Arrest Data: 2013, 2014, and First Quarter 2015.
- Drug-Free Workplace Program (2013).
- Employee Relations Dashboard Overview (11/17/2014).
- HRM/LER Case Processing Methodology and Metrics Memorandum (February 26, 2015).
- OHRM Customer Satisfaction Survey (2012).
- OHRM Customer Satisfaction Survey (2013).
- Reference Checks; Memorandum from A/C HRM on “Vetting” Process (01/23/2009).

CBP Local Office Complaint and Discipline Documents

- Sample Complaint Tracking at OFO Port or Border Patrol Section Level.
- Sample OCC Feedback on LER Discipline Proposal and Decision Letters.

- Sample Documents from Misconduct Complaint Investigation Files.
- Sample Local Misconduct Case Processing Timelines (provided by NBPC).
- Traveler Comment Card addressed to Professional Standards Office.

CBP Supervisor Related Materials

- CBP Supervisory Positions by Job Series.
- First-Line Supervisor Training Models.
- Supervisor’s Desk Reference Guide – Administrative Grievances.
- Supervisor’s Desk Reference Guide – Performance Management.
- Supervisor’s Desk Reference Guide – Professionalism.
- Supervisor Training Knowledge Checks.

CBP Use of Force

- CBP Use of Force Policy Handbook.
- *CBP Use of Force Review: Cases and Policies*; Police Executive Research Forum (February 2013).
- *CBP Use of Force Training and Actions to Address Use of Force Incidents (Redacted)*; DHS, Office of Inspector General (OIG-13-114/Revised, September 2013).
- Concept Paper on the CBP Use of Force Incident Working Group.
- Use of Force Center for Excellence Overview.
- Use of Force Incident Team Process Executive Summary.

Collective Bargaining Agreements

- National Border Patrol Council and INS (1995).
- National Treasury Employees Union (2011; revised 2013).
- NTEU Grievance Process Flowchart per Article 17.

Discipline Review Board (DRB) Materials

- Discipline Review Board Coordinator Guidance (February 10, 2014).
- DRB Members and Nominees as of April 2011.
- DRB Members as of May 2013.
- DRB Members as of November 2014.
- ER Division Discipline Review Board Case Metrics Guide (October 2014).
- FY 2015 DRB Calendar.
- Memorandum Soliciting DRB Nominees (July 2006).
- Memorandum Soliciting DRB Nominees (July 2011).
- Standard Operating Procedure: Discipline Review Board (September 2014).
- Sample Language Provided by OCC Used When OCC Disagrees with the DRB's Proposed Discipline.
- U.S. Customs and Border Protection Directive 51751-002(A), CBP Discipline Review Board (June 21, 2004).

Nexus and Criminal Misconduct Related Materials

- Chapter 7, Nexus and Mitigation, LRP Publications (2014).
- Delegation of Authority for Discipline as the Result of Employee Arrests Related to Domestic Violence or Alcohol; Memorandum from Border Patrol Chief to All Chief Patrol Agents, All Directorate Chiefs, and U.S. Border Patrol (March 6, 2015), with attached SPEAR Internal Operating Procedure (effective March 9, 2015).
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Appendix B - Biographies of Team Members

Patrina M. Clark

Executive Project Manager and Executive Technical Advisor

Patrina Clark is a thought leader and executive practitioner in public sector organizational excellence. Before launching Pivotal Practices Consulting (Pivotal) in 2011, Patrina served with distinction for 25 years in the federal government, holding leadership positions at the U.S. Government Accountability Office (GAO), Federal Election Commission (FEC), Department of Navy, and Internal Revenue Service (IRS). Her last position as Chief Human Capital Officer (CHCO) for GAO secured her status as a career member of the Senior Executive Service (SES). It also afforded a unique vantage from which to lead in designing and implementing human capital solutions for sustainable individual and organizational performance excellence.

Patrina received numerous awards and commendations during her highly accomplished career, including the Navy's Meritorious Civilian Service Medal and a Hammer Award from the Partnership for Reinventing Government. She remains active in federal talent management practitioner circles. For example, she is a contributing author to ATD's (formerly ASTD) Public Manager Journal and was a member of President Obama's 2014 and 2015 Presidential Rank Award Councils.

As the president and founder of an emerging woman owned small business, Patrina remains deeply committed to the foundational pillars of public service excellence – accountability, commitment, and professionalism. She ensures that all of the firm's engagements are aligned to these pillars as she supports her clients with enhancing their strategic focus, operational efficacy, and leader efficacy. Pivotal's Leadership Academy serves as an international center of excellence for leadership and learning for public organizations.

Patrina is a doctoral student at The George Washington University's Graduate School of Education and Human Development with a focus in public sector organizational efficacy.

Charlie T. Deane

Executive Technical Advisor

Chief (retired) Deane led a major county police department for 24 years, serving a fast growing and diverse population of more than 400,000 residents. Leveraging Chief Deane's leadership, investigative, and program management skills, the department established a nationwide reputation for integrity and service while maintaining high public approval, low crime rates, and high staff morale.

Throughout his career, he has been an active leader at the state, regional and national levels, including having served as President of the Virginia Association of Chiefs of Police, Vice President of the Police Executive Research Forum (PERF), and Executive Board Member for the International Association of Chiefs of Police (IACP).

He has received numerous awards and commendations for excellence in policing, including the Police Leadership Award by the Police Executive Research Forum, George Mason University Award for Distinguished Public Service, and Civil Rights Award from Virginia Hispanic Chamber of Commerce.

Kathryn Olson

Executive Technical Project Lead

Kathryn Olson is a leading advocate for police accountability, with broad experience in overseeing complaint investigations. She understands that the police misconduct complaint process must be integrated into policy and training reviews, efforts to build community relations, and risk management strategies. She is particularly interested in the role of civilian input as one means of increasing trust and respect between police and the communities they serve.

After twenty years of managing individual and systemic employment discrimination investigations and litigation, Kathryn has spent the past eight years bringing investigative best practices to police misconduct complaints. She has directed complex, sensitive misconduct reviews and is well versed in distinct issues associated with police misconduct allegations, including the potential for criminal and civil rights violations. She co-authored a police misconduct investigations manual to be published in 2015 and provides consulting and training on the importance of qualitative and timely investigations through Change Integration Consulting LLC.

Kathryn is attuned to the importance of involving all stakeholders to increase law enforcement accountability, transparency, and legitimacy. She recently codirected the first academic symposium sponsored by the National Association for Civilian Oversight of Law Enforcement (NACOLE), along with the Seattle University School of Law and Criminal Justice Department. The event brought together criminal justice scholars, law enforcement leaders, oversight practitioners, and community representatives to collaborate on ways to enhance fair and effective policing at a time when the country is witnessing great divisiveness about police practices.

At Sanford, Olson and Scales LLC, Kathryn assists law enforcement agencies in conducting robust internal reviews of officers' use of force to identify trends and policy/training enhancements through its Force Analysis System™ (FAS). In addition to providing an early intervention tool and cross-agency benchmarking, the FAS interactive dashboards created for each user agency provide a tool to engage and educate the community about police use of force. The FAS approach also can be used to analyze other police data, such as stops and detentions or misconduct complaints.

Kathryn is active in NACOLE, having served as president for two years, is on the President's Advisory Committee, frequently contributes to the NACOLE newsletter, and regularly presents at the annual conference. Kathryn's involvement with civilian oversight is especially relevant as law enforcement organizations explore ways to enhance their relationships with the communities they serve.



Patrina Clark, Kathryn Olson, and Charlie Deane during their site visit in Nogales, Arizona.

Photo credit Jorge E. Morales, Border Patrol Agent



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