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United States Senate

COMMITTEE ON FINANCE
WASHINGTON, DC 20510-6200

JOSHUA SHEINKMAN, STAFF DIRECTOR
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July 17, 2023

The Honorable Gail S. Ennis
Inspector General
Social Security Administration
6401 Security Boulevard; Suite 300
Baltimore, MD 21235

Inspector General Ennis:

I write to express my concerns regarding your performance as Inspector General of the Social Security Administration (SSA).

The Social Security Inspector General plays a critical role in overseeing the administration of Social Security's programs and operations and is a vital resource to Congress as it evaluates legislative changes to strengthening the program. It is paramount that the Office of Inspector General cultivates and maintains a workplace free of harassment, intimidation, or retaliation.

The Finance Committee has received complaints from current and former staff of a hostile work environment, abuse of direct hiring authority, misuse of federal funds, harassment, low staff morale, and falling productivity. Many of these allegations, including your Office's policies concerning the Civil Monetary Penalty (CMP) Program, led to investigations by other federal agencies, including the Social Security Administration, Office of Special Counsel, and the Council of Inspectors General on Integrity and Efficiency (CIGIE).

These issues were highlighted in the Office of Personnel Management's (OPM) Federal Employee Viewpoint Survey (FEVS) results, in which SSA OIG was ranked 382 out of 411 agencies in 2020, 432 out of 432 in 2021, and 431 out of 432 in 2022.¹ The Federal Law Enforcement Officers Association—which represents 90 percent of SSA OIG agents—issued a vote of 'No Confidence' in your leadership in 2021. I previously raised many of these concerns with you and you committed to my staff to make substantial changes to improve morale.²

¹ Partnership for Public Service, *2022 Best Places to Work in the Federal Government Rankings*, (Apr. 12, 2023) accessible at <https://bestplacestowork.org/rankings/detail/?c=SZ05>.

² Letter from Ron Wyden, U.S. Senator, to Gail Ennis, Inspector General, Social Security Administration (Oct. 4, 2021).

I am especially concerned about evidence of retaliation against whistleblowers. Whistleblowers provide the American people an invaluable service, raising concerns of waste, fraud and abuse within the Federal Government, risking retaliation from their employer, colleagues, or other accomplices. In response to my written questions to you when you were a nominee in 2018, you committed to me that you would make it a special priority to listen to whistleblowers as they play an important role in identifying, resolving issues, waste, fraud and abuse, and stated SSA and the SSA OIG “must make whistleblowers comfortable that they will not suffer adverse treatment or retaliation by setting the appropriate tone at the top.”³

Although the Committee is continuing to receive and review allegations related to your performance, I am writing to request your response to the findings that you and your senior leadership have responded to protected whistleblower disclosures in a hostile manner and failed to disclose those instances to Congress and the public despite a statutory requirement.⁴

Below is a summary of my concerns.

Background - Civil Monetary Penalties and Assessment Policies

Following passage of the Social Security Independence Act, which established the Social Security Administration, and its Office of Inspector General, as independent agencies, then-Commissioner Shirley Chater delegated her authority to impose administrative sanctions under sections 1129 and 1140 of the Social Security Act (“the Act”), “including civil monetary penalties, assessments, and program exclusions,” and to issue rules and regulations implementing such sections to the Inspector General.⁵ In that delegation, the Commissioner retained the authority to conduct hearings and to review initial hearing decisions related to the imposition of CMPs and assessments.⁶

Historic CMP Administrative Process and Penalty Determination

Prior to 2018, when SSA OIG uncovered potential fraud in the social security programs, SSA OIG agents would open a case and proceed with an investigation. Upon completion, SSA OIG agents referred the case to the U.S. Attorney’s Office of the relevant jurisdiction for possible criminal prosecution. If the U.S. Attorney’s Office declined to prosecute, SSA OIG could refer the case for a CMP.⁷

When a case was referred to SSA OIG and the agency decided to pursue a Section 1129 CMP, OIG attorneys first sent an initial letter to the subject of the investigation advising them that the

³ *Hearing on the Nominations of Gordon Hartogensis and Gail S. Ennis before the U.S. Senate Committee on Finance*, (S. Hrg. 115-836), 36, <https://www.finance.senate.gov/imo/media/doc/40861.pdf>.

⁴ 5 U.S.C. §405 (b)(20).

⁵ Memorandum from Shirley S. Chater, Commissioner of Social Security to Inspector General, Social Security Administration Office of Inspector General, “Delegations of Authority To Implement Sections 1129 and 1140 of the Social Security Act—Action,” June 28, 1995.

⁶ *Id.* The Commissioner also retained the authority to issue rules with respect to section 1140(a)(2) which prohibits the reproduction, reprinting, or distribution of SSA forms, applications, or other publications for a fee without prior written authorization.

⁷ SSA OIG can also refer cases to a state prosecutor or refer the case for a federal civil prosecution.

SSA OIG had received information that the subject may have made false statements, misrepresentations and/or material omissions in an effort to obtain benefits to which they were not entitled. The initial letter provided a brief summary of the wrongdoing, explained the CMP authority, and advised the subject that in determining the amount of any civil monetary penalty and/or assessment proposed, the OIG would consider, as specified in Section 1129 (c) of the Act, the nature of the offense, their degree of culpability, their history of any prior offenses, their financial condition, and any other matters as justice may require (also referred to as the ‘five factors’).

This initial letter also advised the subject that the OIG had the authority to settle the matter prior to issuing a formal demand letter. Enclosed with the initial letter was a financial disclosure form which the subject was told they could voluntarily complete and return if they would like their ability to pay to be considered in determining the amount of any penalty and/or assessment. The financial disclosure form provided a means for the subjects to list in detail all of their financial assets and liabilities which were used to determine the penalty amount based on the subject’s “financial condition” as required by federal statute.⁸ The initial letter ended by inviting the subject to submit any information they wished to be considered, and provided contact information should they wish to directly call the attorney assigned to the case to discuss the case and/or settlement.

If the subject failed to respond to the initial letter within 30 days following receipt, and a determination was made that a formal CMP was appropriate, the OIG attorneys sent a Notice of Proposed Penalty (also referred to as a “penalty letter”, “demand letter”, or “notice letter”⁹) to the subject of the investigation. This notice—pursuant to Section 1129(c) of the Act¹⁰—included a more detailed description of the alleged violation(s), the time frame in which the violation(s) occurred, the overpayment (if any) that ensued, the proposed penalty and assessment amounts, and a thorough discussion of each of the five required factors considered in determining such amount(s), and the subject’s appeal rights.¹¹ Following receipt of the notice of proposed penalty, the subject could either appeal OIG’s determination and request a hearing before a Department of Health and Human Services (HHS) Administrative Law Judge at the Departmental Appeals Board (DAB), or enter into a settlement agreement with the agency.

If the subject failed to respond to the notice letter within 60 days of receipt, request a hearing, and did not enter into a settlement agreement, SSA OIG sent a third and final letter, known as a “default letter” which advised the subject that because they failed to request a hearing within 60 days of receipt of the notice of proposed penalty, the proposed penalty and assessment had become final.¹² This letter also identified the date the penalty letter was received by the subject.

CMP Process Change

⁸ 42 U.S.C. 1320a-8 (c)(2) (“In determining...the amount or scope of any penalty or assessment, or to recommend an exclusion, the Commissioner of Social Security shall take into account...[the] financial condition of the person committing the offense”).

⁹ SSA Civil Monetary Penalties, Assessments and Recommended Exclusions Rule, 20 C.F.R. §498.109 (2023).

¹⁰ 42 U.S.C. § 1320a-8 (c).

¹¹ 20 C.F.R. § 498.109(a) (2023).

¹² 20 C.F.R. § 498.110 (2023); 20 C.F.R. § 498.109(c) (2023).

In 2018, before you were appointed Inspector General, OIG made several changes to the 1129 CMP process, including eliminating the financial disclosure form used to determine the appropriate financial penalty amount, and serving the penalty letter by U.S. Postal Service (USPS) First Class Mail and United Parcel Service (UPS) rather than USPS certified mail, return receipt requested—which provides written evidence of receipt.¹³

These changes raised concerns among SSA OIG employees, including Ms. Debbie Shaw, an SSA OIG attorney in the Office of Counsel to the Inspector General (OCIG) with nearly three decades of federal experience. Ms. Shaw was on unpaid sabbatical when the policy changes took place. When she returned in December 2018 to her position as Attorney Advisor (GS-14) in OCIG, she found policy changes to the CMP program “troubling”, and believed these policies violated federal regulations. She saw cases with excessive penalties and assessments, improper service of letters, and CMPs proposed and imposed with improper (or no) consideration of the five factors.¹⁴

According to Committee interviews and testimony in her subsequent Merit Systems Protection Board (MSPB) case, Ms. Shaw began expressing concerns over these changes in February 2019 to several SSA OIG officials including Ms. Joscelyn Funníé, then-Acting Assistant Inspector General for Communications and Resource Management; Michele Williamson, Senior Attorney for Personnel and Whistleblower Disclosure; and Special Advisor to the Inspector General Benjamin Alpert, who became the Acting Deputy Inspector General.¹⁵ Ms. Funníé then communicated these concerns to senior SSA OIG officials, including you, and Ms. Shaw continued to raise her concerns over the next several months.

Refusal to Reconsider Excessive Monetary Penalties

On June 3, 2019, you transferred both CMP programs from the Office of Counsel to the Inspector General to a new component, the Office of Counsel for Investigations and Enforcement (OCIE).¹⁶ You directed Ms. Funníé to lead the OCIE. Ms. Shaw was subsequently moved from the Office of Counsel to this new component and then tasked with overseeing the Section 1129 CMP program as a GS-15, Supervisory General Attorney.

Shortly after this new office was established, Ms. Shaw and OCIE held a preliminary meeting on June 7, 2019, with senior OIG leadership, including you and Deputy Inspector General Alpert, to discuss priorities for the new office and the 141 CMP cases in process. Ms. Shaw organized the CMP cases into three categories, later referred to as “buckets.” The first “bucket” included 22 cases that were pending before the DAB. The second “bucket” consisted of 36 cases in which penalty letters had been issued but the subjects had not yet requested an appeals hearing. The third “bucket” comprised of the remaining 83 cases that had been processed (i.e., penalties and assessments imposed) and closed by settlement or default between October 2018 and May 31,

¹³ Shaw, Deborah v. Soc. Sec. Admin., M.S.P.B. No. PH-1221-21-0091-W-1, 2022 WL 1448513 (May 6, 2022).

¹⁴ Shaw, M.S.P.B. No. PH-1221-21-0091-W-1.

¹⁵ Shaw, M.S.P.B. No. PH-1221-21-0091-W-1; Interview with Ms. Joscelyn Funníé and Ms. Deborah Shaw, Social Security Administration Office of Inspector General, D.C. (Dec. 12, 2022); Interview with Ms. Joscelyn Funníé and Ms. Deborah Shaw, D.C. (May 1, 2023).

¹⁶ Email from Gail Ennis, Inspector General, Social Security Administration, to “#OIG All”, SSA Office of Inspector General (May 31, 2019, 18:37 EDT).

2019, but were flagged by Ms. Shaw to have included excessive penalties and assessments, improper service of penalty and default letters, and failure to consider the five required factors in determining the penalty and assessments which denied subjects their due process rights.¹⁷

According to Ms. Shaw, you refused her and OCIE's request to reopen these 83 cases during this preliminary meeting because—even though some of these penalties were not imposed during your tenure—you did not want to tell SSA that SSA OIG had made a mistake.¹⁸ As a compromise, OCIE agreed to review a sample of the 83 cases and to present its findings to the Inspector General with a recommendation plan, and you and Mr. Alpert approved. After the preliminary meeting, Ms. Funnié emailed a summary of the meeting describing how OCIE would handle the Section 1129 CMP cases, including the compromise.¹⁹ In his reply, Deputy Inspector General Alpert instructed OCIE to not take any action on the 83 cases without “discussion/presentation of the cases (or types/groups of cases) to the [Inspector General and Deputy Inspector General].”²⁰

It is my understanding that even after OCIE attorneys' review of the sampled cases came to the same conclusion as Ms. Shaw and found most penalty amounts were excessive, you did not consider the subjects' ability to pay, and had service issues, you and your team continued to refuse to reconsider your position on not reopening the cases, not rescinding the penalties, and not notifying SSA.

As Inspector General, you are tasked with the critical role of investigating and identifying instances when SSA falls short of existing statutory, regulatory, or best practices standards, and to identify strategies to improve the agency's performance going forward. Through transparency and accountability, the OIG's work can help nurture trust toward SSA. Hiding its errors, in contrast, sows distrust. The Office of Inspector General is no different. In this situation, Ms. Shaw and Ms. Funnié identified an instance when OIG may have, at the very least, fallen short of its mission. Yet, instead of addressing the errors—even after a secondary review confirming the initial review's findings—your office chose to not notify SSA or the individuals affected.

To be clear, those who commit fraud should be held accountable, which is why Congress provided SSA the CMP authority. However, Congress also explicitly instructed SSA to protect each individual's due process rights, and to carefully consider the circumstances of the offense and the individual—including his or her financial condition—when determining the appropriate penalty amount.²¹

Whistleblower Retaliation and MSPB Ruling

¹⁷ Interview with Ms. Joscelyn Funnié and Ms. Deborah Shaw, D.C. (Dec. 12, 2022).

¹⁸ *Id.*

¹⁹ Email from Joscelyn Funnié to Benjamin Albert, Steve Schaeffer, Debbie Shaw, David Rodriguez, Peter W. Johnson, and Alex Rzasa, Social Security Administration Office of Inspector General, “Initial Activities of the Division of CMP Enforcement,” (June 7, 2019, 10:45 EST).

²⁰ Email from Benjamin Alpert to Joscelyn Funnié, Steve Schaeffer, Debbie Shaw, David Rodriguez, Peter Johnson, and Alex Rzasa, (June 7, 2019, 18:44 EDT).

²¹ *See* 42 U.S.C. § 1320a-8 (c).

As discussions concerning the third “bucket” 83 cases were ongoing, Ms. Shaw, then the Deputy Counsel for Section 1129 CMP Enforcement cases at OCIE, Ms. Funnié, and others were setting up the new office and processing the “bucket” one 22 cases that were pending before the DAB.

In July 2019, Ms. Shaw filed a routine motion for extension to file pre-hearing brief for a pending case before the DAB. In the filing, Ms. Shaw explained that SSA OIG had recently established OCIE, but only had two attorneys on staff at the time making it difficult to meet the pending case deadline. In addition to the staffing constraints, the air conditioning in their new office failed on the date of the case’s filing deadline, and management sent all employees home,²² including Ms. Funnié, who had been working the case, resulting in additional challenges to comply with the deadline.²³ Ms. Shaw, the lead attorney in the case, asked for an additional 4 days to submit the agency’s written brief, witness list, exhibit list, and exhibits.

Shortly thereafter, an OIG staffer made a confidential disclosure alleging that Ms. Shaw’s request for an extension had been less than candid and/or misleading. On July 24, you referred the allegation to the Office of Investigations to investigate the claims and take further actions, if appropriate. According to Ms. Funnié, SSA OIG presented an investigation against her and Ms. Shaw to the U.S. Attorney’s Office for criminal prosecution for alleged misleading statements in the July 22 motion but was ultimately declined.²⁴ You also delegated to Michael Robinson, an SSA OIG Senior Executive Service (SES) official, who at the time was detailed to CIGIE, the authority to review and take further action, if appropriate.²⁵

On September 23, Mr. Robinson placed Ms. Funnié and Ms. Shaw on administrative leave, then investigative leave, on October 4. On December 21, Robinson issued Ms. Funnié a proposal for removal and issued Ms. Shaw a proposal to suspend her for 45 days for lack of candor and neglect of duties. When Ms. Shaw returned in January 2020, she was demoted to a non-supervisory attorney position within OIG, and for 16 months was not permitted to perform any legal or other work or given responsibilities commensurate with her skills and experience.

In November 2020, Ms. Shaw filed a complaint with the U.S. Merit Systems Protection Board (MSPB) alleging that SSA OIG had retaliated against her for 1) “reporting improper procedures being followed in the CMP program”²⁶ and 2) recommending to senior SSA OIG leadership, including you, to reopen a number of cases to address potential issues where improper procedures were used.

In May 2022, the MSPB Administrative Law Judge ruled that Ms. Shaw’s disclosures were protected disclosures, the agency’s evidence in support of administrative actions taken against Ms. Shaw were “not strong,” that individuals with knowledge of her disclosures “influenced [the

²² Email from Benjamin Alpert, Deputy Inspector General, to Gail Ennis, Andrew Cannarsa, “Meadows East AC Issue” (July 22, 2019 13:25:12 EDT) (“Andrew [Cannarsa] further reports only a few spaces on the second floor appear to be significantly affected by the heat (OCIE, QAR, and Mike Arbucio’s office). Andrew can do temperature checks in all of the spaces, and allow these three, and any other affected office spaces, the option for immediate telework.”). Inspector General Ennis responded via email, “Great. Thank you. Sounds like a plan.” See Email from Gail Ennis to Benjamin Alpert (July 22, 2019 13:26 EDT).

²³ SSA OIG v. Weans, C-19-452.

²⁴ Interview with Ms. Joscelyn Funnié and Ms. Deborah Shaw, D.C. (Dec. 12, 2022).

²⁵ *Shaw*, M.S.P.B. No. PH-1221-21-0091-W-1, at *3.

²⁶ *Shaw*, M.S.P.B. No. PH-1221-21-0091-W-1, at *4.

outside management official’s] decision to take or threaten to take” personnel actions against her,” and “almost all the officials involved in referring the allegations against [Ms. Shaw] for investigation and taking actions against her had motive to retaliate against her.”²⁷

Ms. Funníé filed a petition for appeal of the agency’s action removing her from her position of Counsel for OCIE on September 24, 2020.²⁸ The case was ultimately dismissed following a settlement between Ms. Funníé and SSA in December 2021 and she returned to work shortly thereafter.²⁹ Ms. Funníé’s experience at SSA OIG during your tenure is discussed below.

Appointment of a political executive to a career executive position

Shortly after being sworn in as Inspector General in January 2019, you communicated to Ms. Funníé—who was then serving as the chief human resources officer at OIG—your desire to hire Benjamin Alpert, then serving as a GS-15 Senior Advisor in SSA’s Office of Analytics, Review and Oversight, as a Senior Executive in OIG.³⁰ Ms. Funníé later advised you, via email³¹ that Alpert could only be appointed to a general Senior Executive Service position, as opposed to a career-reserved SES, pursuant to federal regulations.³² To bring on Mr. Alpert in accordance with federal hiring rules, Ms. Funníé and others worked to finalize Alpert’s position as a Senior Advisor to the Inspector General, a 3-year limited term, political SES position, as allowed by your limited appointment authority under 5 C.F.R. § 317.601(c)(1)³³, effective March 31, 2019.

On May 24, 2019, you were appointed by the President to serve as Acting Inspector General for the Department of the Interior while continuing to serve as the IG for SSA until a permanent Inspector General for the Department of the Interior was confirmed by the Senate.³⁴ At that time, the position of Deputy Inspector General at SSA, the individual who typically serves as Acting Inspector General in the absence or incapacity of the Inspector General,³⁵ had been vacant since April 2019. About a week before the May 24 announcement, you assigned Ms. Funníé and other Senior Executives to figure out a way to appoint Mr. Alpert as Deputy Inspector General.³⁶ As

²⁷ *Shaw*, M.S.P.B. No. PH-1221-21-0091-W-1, at *14, 25-26.

²⁸ *Funníé, Joscelyn v. Soc. Sec. Admin.*, M.S.P.B. No. PH-0752-20-0478-I-1, 2021 WL 1081692 (Mar. 19, 2021).

²⁹ *Funníé, Joscelyn v. Soc. Sec. Admin.*, M.S.P.B. No. PH-0752-20-0478-I-2, 2021 WL 6199987 (Dec 27, 2021).

³⁰ Aff. from Gail S. Ennis, Nov. 20, 2019.

³¹ Email from Joscelyn Funníé to Gail Ennis, Gale Stone, Steve Schaeffer, Brian Karpe, Keith Ewancio (Feb. 7, 2019).

³² 5 C.F.R. § 317.601(a) (2023) (“An agency may make a noncareer or limited appointment only to a general position”).

³³ “Agencies are provided a pool of limited appointment authorities equal to 3 percent of their Senior Executive Service (SES) position allocation, or one authority, whichever is greater. An agency may use the pool to make a limited appointment only of an individual who has a career or career-conditional appointment (or an appointment of equivalent tenure) in a permanent civil service position outside the SES. If necessary, the Office of Personnel Management may suspend use of the pool authority.”

³⁴ Miranda Green, “Trump appoints Social Security Administration watchdog to also oversee Interior,” *The Hill* (June 10, 2019), <https://thehill.com/policy/energy-environment/447713-trump-appoints-social-security-administration-watchdog-to-also/> (Accessed Dec. 23, 2022); Email from Gail Ennis to #OIG All, “Inspector General Announcement”, (May 24, 2019, 18:37 EDT).

³⁵ As an example, Patrick P. O’Carroll Jr.’s retired as Inspector General of SSA in May 2016. Following his retirement, Gale Stallworth Stone, then the Deputy Inspector General at the time, began serving as Acting Inspector General of SSA OIG and remained in that position until you were sworn in.

³⁶ Interview with Joscelyn Funníé and Deborah Shaw, D.C. (May 1, 2023).

they reviewed, you went ahead and appointed Benjamin Alpert to serve as Acting Deputy Inspector General of SSA, a career-reserved SES position, on May 24.³⁷

On May 30, Ms. Funnié, relying on the Office of Personnel Management (OPM) 2016 SES Desk Guide,³⁸ suggested that Mr. Alpert could serve as Deputy Inspector General in an acting capacity on a “short term basis,” and “would need to reevaluate if [Mr. Alpert’s appointment] continued say past the 30-day mark[.]”³⁹ Benjamin Alpert agreed with Ms. Funnié’s interpretation, as did Joseph Gangloff, the then-Chief Counsel to the Inspector General.⁴⁰ After Mr. Alpert became Ms. Funnié’s immediate supervisor in June 2019, she learned that Mr. Alpert was not acting as the Acting Deputy in compliance with the OPM Desk Guide, but was, in fact, serving as the full-time Deputy. Ms. Funnié then advised you, Mr. Alpert, and others on your team that this was a violation of law. Ms. Funnié repeatedly advised you and other senior SSA OIG officials that Mr. Alpert’s position needed to be transmitted to OPM pursuant to federal regulations.⁴¹ If SSA OIG did not notify OPM of Mr. Alpert’s position, SSA OIG would risk its SES program certification.

Between May 30, 2019 and September 9, 2019, Ms. Funnié advised several senior OIG staff, including you, Acting Deputy Inspector General Benjamin Alpert; Acting Assistant Inspector General of Resource Management Andrew Cannarsa; Deputy Executive Officer, Kelly Stankus; Director of Human Resources, Keith Ewancio; and acting Senior Advisor to the Inspector General Michelle Murray, that Alpert’s position needed to be updated. It is my understanding Ms. Funnié advised you and other senior OIG leadership to notify OPM at least three times: June 17,⁴² June 18,⁴³ June 26.⁴⁴ However, it is not clear if OPM was ever notified. In fact, as late as SSA OIG’s June 2020 report to OPM on the status of SSA OIG’s SES program for fiscal year

³⁷ Email from Gail Ennis, Inspector General, Social Security Administration to “#OIG All”, SSA Office of Inspector General (May 24, 2019, 18:37 EDT); in 2019, ‘Deputy Inspector General’ was listed as a career-reserved position. *See* SES Positions That Were Career Reserved During CY 2019, 87 FR 53137 (Aug. 30, 2022).

³⁸ Email from Joscelyn Funnié to Benjamin Alpert, “Limited Term Appointment” (May 30, 2019 21:48 EDT) (“Details of Limited SES Employees

An agency may detail an SES limited term appointee to a different SES general position the duties of which will expire at the end of 3 years or less.

An agency may detail an SES limited emergency appointee to a different SES general position established to meet an urgent, unanticipated, bona-fide need.

An agency may not detail an SES limited appointee to a position that does not meet the same conditions that supported OPM approval of the limited term or limited emergency appointment authority, as applicable. In that event, the statutory basis for the SES limited appointment would disappear and the appointment would need to be terminated. This does not preclude a reasonable, temporary “acting” assignment, e.g., during the short-term absence of another executive, that does not become the individual’s new continuing assignment or prevent his or her timely return to the SES position and completion of the tasks for which SES limited appointment was approved”).

³⁹ Email from Benjamin Alpert to Joscelyn Funnié, “Limited Term Appointment” (May 31, 2019, 08:12 EDT).

⁴⁰ Email from Joseph Gangloff to Joscelyn Funnié and Benjamin Alpert, “Limited Term Appointment” (May 31, 2019, 11:35:14 EDT).

⁴¹ *See* 5 C.F.R. § 317.604(b) (“An agency may make the following reassignments of limited appointees to positions for which qualified without the prior approval of the Office of Personnel Management. The Office must be notified of the reassignment, however.”).

⁴² Email from Joscelyn Funnié to Benjamin Alpert, “FW: SES Staffing Spreadsheet” (June 17, 2019, 10:52 EDT).

⁴³ Email from Joscelyn Funnié to Gail Ennis and Benjamin Alpert, “Stone FY19 Performance Agreement” (June 18, 2019, 11:40 EDT).

⁴⁴ Email from Joscelyn Funnié to Benjamin Alpert, “A few items” (June 26, 2019, 07:29 EDT).

2019, Mr. Alpert was not listed as a Senior Executive.⁴⁵ In addition, SSA OIG’s servicing personnel office at SSA was not formally notified and directed to correct Mr. Alpert’s appointment until September 9, 2019⁴⁶, approximately 4 months later.

Toward the end of June 2019, you turned to your Office of Chief Counsel to figure out a legal rationale to appoint Mr. Alpert as Deputy Inspector General and instructed Ms. Funníé to hand off her work to the office. In a July 3 email to Mr. Alpert, Mr. Gangloff, Ms. Murray, and Ms. Williamson, Ms. Funníé advised that, pursuant to 5 C.F.R. § 317.903, OPM needs to approve a non-SES employee who is detailed to a SES position that supervises SES positions, and that competitive procedures (email solicitation of interested employees) must be used to detail non-SES to SES position for more than 240 days.⁴⁷ On July 17, 2019, when Ms. Murray reached out to OPM to determine whether a limited-term SES could serve in a career-reserved SES position, OPM’s SES policy expert affirmed Ms. Funníé’s determination that a limited term employee serving as Deputy Inspector General—a “career reserved position”⁴⁸—is impermissible based on federal statute and OPM regulations.⁴⁹

However, despite this determination, Mr. Alpert was still given the position. On September 9, Ms. Murray sent an email notifying SSA of Mr. Alpert’s appointment as Acting Deputy Inspector General.⁵⁰ The email also stated that after discussing with OPM, “it was revealed that that the advice was not correct.” To continue serving as Acting DIG, Murray requested SSA retroactively place Alpert into his initial position of record with OIG, Senior Advisor, as of May 26, 2019, and to detail him to the position of Deputy Inspector General for a period not to exceed 240 days.⁵¹ Ms. Funníé alleges this incident also contributed to the retaliation made against her.

Whistleblowers Continue to Experience Harassment after Protected Disclosures

Both Ms. Funníé and Ms. Shaw allege to work in a hostile environment as retaliation for their whistleblower disclosures continued after their reinstatements.

In May 2022, Ms. Funníé filed a formal complaint to the OIG’s harassment reporting official, alleging a hostile workplace. Among her complaints, Ms. Funníé’s supervisor, Chad Bungard, provided her fiscal year 2022 SES performance plan on May 17, 2022, six months after Ms. Funníé returned to work. As you know, senior executive performance plans are written

⁴⁵ Social Security Administration, Office of the Inspector General, “FY 2019 SES Data for Performance Appraisal System Certification” (June 5, 2020).

⁴⁶ Email from Michelle Murray to Sara Rohde, Social Security Administration, “Request for FPPS action” (Sept. 9, 2019, 18:02 EDT).

⁴⁷ Email from Joscelyn Funníé to Benjamin Alpert, Joseph Gangloff, Michele Williamson, Kristen Fredricks, Michelle Murray, Joe Aiosa, Keith Ewancio, “Detail of non-SES employee to an SES position” (July 3, 2019, 07:33:18 EDT).

⁴⁸ 5 U.S.C. § 3132(a)(8) (a “[career reserved position] means a position which is required to be filled by a career appointee...”).

⁴⁹ Email from Bill Collins, Executive Recourses and Performance Management Policy, Office of Personnel Management, to Michelle Murray, Social Security Administration Office of Inspector General, (July 18, 2019, 13:34:00 EDT).

⁵⁰ Email from Michelle Murray to Sarah Rohde, Social Security Administration, “Request for FPPS action” (Sept. 9, 2019, 18:02 EDT).

⁵¹ *Id.*

documents that include “requirements against which performance will be evaluated during the appraisal period[,]”⁵² and act as the basis for adjustments to the senior executive’s pay, granting awards, or even removal. However, the performance expectations listed in her performance plan were not adjusted to reflect the abbreviated performance period, making them virtually “unattainable.”⁵³ Her complaint also notes that Mr. Bungard directed her to not contact anyone—including internally with other OIG components—in completing her assignments without prior approval from him, and that he altered the performance plan after Ms. Funníé signed it and before he submitted it to the SSA’s Performance Review Board.⁵⁴

For 16 months after her January 2020 reinstatement at SSA OIG, Ms. Shaw alleges that she was not permitted to perform any CMP casework or other legal work. She also alleges that she was not allowed to sign any CMP letters, even the initial letters, restrictions suggesting that she had engaged in wrongdoing that prohibited her from practicing law. When she inquired why her conditions of employment had been altered, she alleges she was told that the instruction came from upper-level management, and later learned that the instruction came from your office.

In April 2021, Ms. Shaw was advised she was to resume CMP casework, yet she alleges that the retaliation against her continued. Following the MSPB decision the following year, she was reinstated as a GS-15 attorney in OCIG, but not to a supervisory position. With the CMP program on hold pending an investigation by the Acting Commissioner, she is assigned general law work. However, the work assigned is not commensurate with her skills or experience. For instance, she was asked to perform a legal analysis on SSA OIG employees creating a book club.⁵⁵ As of the date of this letter, SSA OIG has not made a decision on the proposed 45-day suspension. She has also been instructed to not talk with SSA OIG agents directly, that all her communications must go through management. Ms. Shaw also alleges that her performance plan has “ballooned” to make it difficult to complete and easier for her managers to penalize her.⁵⁶

Failing to Notify Congress of Instances of Whistleblower Retaliation

Pursuant to Section 5(a)(2) of the Inspector General Act of 1978,⁵⁷ SSA OIG is required to provide “a detailed description of any instance of whistleblower retaliation, including information about the official found to have engaged in retaliation” and any consequences imposed to the Commissioner of Social Security and Congress. In SSA OIG’s recent Semiannual Report to Congress, for the period April 1, 2022 through September 30, 2022, your office stated that “[t]here are no known instances of retaliation to report for this reporting period.”⁵⁸ However, the MSPB case concerning Ms. Shaw’s appeal—in which the ALJ ruled Ms. Shaw was in fact retaliated against—was issued during this reporting period yet was omitted from the Semiannual Report. These omissions also appeared to have occurred in the Spring 2021 Semiannual Report

⁵² 5 C.F.R. § 430.303 (2023).

⁵³ Email from Joscelyn Funníé to Michele Williamson, “Formal Complaint based on HWE due to continued retaliation” (May 17, 2022, 18:01 EDT).

⁵⁴ Email from Chad Bungard to Joscelyn Funníé, “Bray WIFLE Nomination” (Apr 13, 2022 15:44 EDT).

⁵⁵ Interview with Ms. Joscelyn Funníé and Ms. Deborah Shaw, D.C. (Dec. 12, 2022).; Interview with Ms. Joscelyn Funníé and Deborah Shaw, D.C. (May 1, 2023).

⁵⁶ Interview with Ms. Joscelyn Funníé and Deborah Shaw, D.C. (May 1, 2023).

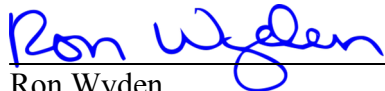
⁵⁷ 5 U.S.C. § 405(b)(20).

⁵⁸ SSA Office of Inspector General, *2022 Fall Semiannual Report to Congress, April 1, 2022 to September 30, 2022*, <https://oig.ssa.gov/assets/uploads/ssa-oig-semiannual-report-to-congress-fall-2022-final.pdf>.

to Congress⁵⁹ when it did not disclose a case of whistleblower retaliation despite a reported settlement between SSA OIG and a senior OIG official following her termination.⁶⁰ Your office's actions of omitting information regarding whistleblower retaliation suggests that your office is willfully misleading SSA and Congress on your ability to protect whistleblowers and hold those who retaliate against them responsible. At the least, these omissions—even if done inadvertently—damage the trust Congress instilled in you and your ability to serve as Inspector General.

Please respond to these findings in writing no later than two weeks from receipt of this letter. Should you have any questions, please contact my Committee staff at (202) 224-4515.

Sincerely,


Ron Wyden
United States Senator
Chairman, Committee on
Finance

⁵⁹ SSA Office of Inspector General, *2021 Spring Semiannual Report to Congress, October 1, 2020 to March 31, 2021*, https://oig-files.ssa.gov/semiannual/SPRING%202021%20SAR_FINAL_1.pdf.

⁶⁰ *Funné*, M.S.P.B. No. PH-0752-20-0478-I-1 (Mar. 19, 2021).