



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

March 13, 2015

The President  
The White House  
Washington, D.C. 20510

Re: OSC File No. DI-13-4045

Dear Mr. President:

Pursuant to my duties as Special Counsel, enclosed please find the Social Security Administration's (SSA) investigative report based on disclosures of wrongdoing at the National Hearing Center (NHC), Office of the Chief Administrative Law Judge and Office of Disability Adjudication and Review (ODAR), Baltimore, Maryland, made to the U.S. Office of Special Counsel (OSC). OSC has reviewed the report and in accordance with 5 U.S.C. § 1213(e), provides the following summary of the allegations and our findings.

The whistleblower, Scott Wiltrout, a former legal assistant at NHC, who consented to the disclosure of his name, alleged that agency officials engaged in conduct that may constitute a violation of law, rule, or regulation, and gross mismanagement. In brief, Mr. Wiltrout disclosed that NHC administrative law judges (ALJs) directed legal assistants to process disability cases incorrectly using what was referred to internally as a "simplified method" and that NHC employees failed to properly manage claimants' files. Mr. Wiltrout asserted that as a result, disability claimants were not provided with proper notice of their hearings.

**The agency substantiated Mr. Wiltrout's allegations in part. The investigation found that NHC employees directed legal assistants to process cases in a manner inconsistent with agency policy and that legal assistants were also directed to destroy mail in a manner that contravened agency regulations and policies. In response to these findings, the agency directed an evaluation of relevant policies and required training on document management processes. However, the SSA's report noted that due to several levels of redundant case review and available appellate procedures, no claimant's rights were denied. In addition, the report explained that the employees responsible for these violations have since left the agency or are deceased. With respect to the allegation concerning negligent management of claimants' files, an audit of NHC case processing indicated that employees properly managed claimants' files, and the agency has taken measures to improve customer service. Based on my review, I have determined that the report meets all statutory requirements and that the findings appear to be reasonable.**

Mr. Wiltrout's allegations were referred to Acting Commissioner of the SSA Carolyn W. Colvin to conduct an investigation pursuant to 5 U.S.C. §1213(c) and (d). Investigation of the matter was delegated to the SSA Office of the Inspector General (OIG) to complete an

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independent investigation into the matter. On October 10, 2014, Acting Commissioner Colvin submitted the agency's report to OSC. Pursuant to 5 U.S.C. § 1213(e)(1), Mr. Wiltrout provided comments to the report on February 6, 2015. As required by 5 U.S.C. § 1213(e)(3), I am now transmitting the report and whistleblower comments to you.<sup>1</sup>

***Mr. Wiltrout's Disclosures***

NHC is responsible for conducting video and in-person appeal hearings for claimants who have been denied disability benefits. These hearings are conducted by ALJs who are responsible for reviewing cases and making determinations based on the relevant evidence. In preparation for these hearings, claimants or their representatives can submit information such as change of address updates, forms detailing hearing representative appointments, medical evidence, and video hearing declination letters, through the mail or via fax.

NHC legal assistants are responsible for creating Certified Electronic Folders (CEFs) which contain content such as claimants' medical evidence, appointments of representatives, and address information. Legal assistants are required to generate CEFs in a manner consistent with procedures detailed in the SSA Hearings, Appeals and Litigation Law (HALLEX) Manual and Chief Judge Bulletins (CJBs) issued by management.

Pursuant to these policies, employees must open and review each page of every indexed claimant document during case work ups, examining them for content and importance, before organizing them in chronological order, and checking that address information is current. If this is not performed, ALJs could view incorrect or incomplete information when making disability appeals and adjudications. In addition, if legal assistants do not properly review documents when assembling CEFs, or if address information is not current, claimants or their legal representatives may not receive hearing notices or exhibition lists and CDs containing the evidentiary content which ALJs will use in making disability determinations. A denial of the right to a hearing also constitutes a possible violation of the Social Security Act (the Act). *See* 42 U.S.C. § 1383(c)(1)(A). The Act requires SSA to "provide reasonable notice and opportunity for a hearing" for individuals making benefit eligibility claims. In addition, SSA regulations require that claimants be provided with proper notices of their hearings. *See* 20 § C.F.R 404.929 and 416.1429.

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<sup>1</sup> The Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 1213(a) and (b). OSC does not have the authority to investigate a whistleblower's disclosure; rather, if the Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, she is required to advise the appropriate agency head of her determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c). Upon receipt, the Special Counsel reviews the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). The Special Counsel will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

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Mr. Wiltrout alleged that in late 2009, Chief ALJ Augustus Martin verbally directed employees to work up cases using what Judge Martin referred to as a “simplified method,” which violated agency policies. Specifically, Mr. Wiltrout explained that employees were directed not to open or review any documents in preparing CEFs. Instead, they were told to select and display all the available electronic files in CEFs, a process referred to as “exhibiting.” Mr. Wiltrout asserted that this method contravened agency policy established via the HALLEX Manual and CJBs. Mr. Wiltrout noted that beginning in 2010, he personally observed thousands of cases processed in this improper manner. In addition, Mr. Wiltrout asserted that on May 19, 2010, a training session was conducted where all clerical employees were directed by David Hash, paralegal specialist, to process CEFs in this improper fashion. Mr. Wiltrout further noted that managers placed a heavy emphasis on employee workup numbers to the exclusion of case quality, and stated that managers encouraged employees to use “shortcuts” to meet case number objectives that were major components of employee performance evaluations.

Mr. Wiltrout also alleged that employees were negligent in managing cases and processing claimant correspondence transmitted to the NHC. He contended that he observed numerous instances in which employees failed to transmit scanned claimant information into associated case indexes or CEFs and failed to open mail or respond to phone inquiries in a timely manner. Mr. Wiltrout explained that he also observed legal assistants, like Michael Joyner in March 2010, with large volumes of unopened mail in their workspaces, accumulated over weeks. Mr. Wiltrout alerted management and was assigned with three other coworkers to process this correspondence. He noted that a significant amount of the unopened mail was associated with disability appeals that had already concluded. Mr. Wiltrout also stated that prior to transferring from NHC to another SSA facility in late 2013, he experienced a similar situation with unopened mail, in which his manager requested assistance in processing a large amount of unopened correspondence which was found in a coworker’s desk, indicating that this is an ongoing issue at the center and not an isolated incident.

In addition, Mr. Wiltrout alleged pervasive employee negligence with respect to NHC document management. Mr. Wiltrout stated he frequently discovered documents that were improperly routed by coworkers into the wrong claimant files. In addition, in July 2013, Mr. Wiltrout observed that one facility scanner had more than 200 documents awaiting employee review that had not been routed to a CEF or case index. He stated that some of these documents were more than nine months old, and pertained to cases on which ALJs had already ruled. Further, in late 2013, Mr. Wiltrout received complaints from several claimants regarding hearings for which they did not receive notice. He cross referenced their CEFs with the SSA address database and discovered that address information in the database was not updated.

Mr. Wiltrout also asserted that his coworkers failed to respond to phone messages or answer phone calls. He explained that employees were assigned days when they are responsible for answering phones and in order to do so, they must log into the public phone system from their work station. When employees signed on, their phones lit up indicating

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their active status. Mr. Wiltout observed that on numerous occasions, employees who were assigned to answer phones were not logged into the system. In addition, when he was tasked with answering phones, he observed that there were hundreds of unheard voice messages stored in the voice mail box.

### *The Agency's Report*

The report substantiated Mr. Wiltout's allegation that employees processed cases in a manner inconsistent with agency policy. The report confirmed Mr. Wiltout's assertion that Mr. Hash conducted training where employees were instructed to exhibit all documents in particular sections of the CEF and conduct an abbreviated review of documents for relevant information without properly reviewing evidence for accuracy. However, the report was unable to fully substantiate the allegations concerning ALJ Martin's "simplified method" of case processing. The report noted that ALJ Martin passed away in February 2013, and employees who recalled his simplified method had differing recollections. Despite this, employees at NHC did confirm that ALJ Martin instructed staff members to "exhibit" all documents in the CEF.

The report explained that on May 19, 2010, Mr. Hash provided training to NHC staff advising them to exhibit all documents in specific sections of a CEF, then conduct an abbreviated review. The report stated this is a violation of HALLEX I-2-1-15's requirement that proposed exhibits be reviewed for materiality to the case and the CJB 10-03 requirement that every page must be reviewed for comingled documents and PII. In an interview with investigators, Mr. Hash asserted that the training he provided was consistent with ALJ Martin's simplified method and was approved by ALJ Martin and the NHC administrative officer, Michael Polvino. The report noted that both Mr. Hash and Mr. Polvino have since left the agency.

While the report determined that the training provided by Mr. Hash was inconsistent with agency policy, interviews conducted with NHC employees during the investigation did not substantiate its widespread use and implementation. In addition, an audit of cases during the time period at issue was conducted. Investigators sampled 50 cases from 2009 and 50 cases from 2010, which were assigned to either ALJ Martin, or ALJ David Pang, the judge presiding over Mr. Hash's unit. The audit determined that in 2009, 45 out of 50 cases were processed properly, and only one case featured an incomplete electronic folder. In 2010, 50 out of 50 cases were processed properly.

The report indicated that the audit supported the conclusion that employees were not negligent with respect to case management prior to hearings. Under policies established in the HALLEX manual, several redundant reviews are required to ensure that dispositions are rendered based upon a complete evidentiary analysis of the disability claim. For example, case managers perform quality review checks to ensure documents are processed and exhibited according to agency regulations. In addition, the ALJ must provide a claimant with the opportunity to review the proposed exhibits before and on the day of the hearing. As a

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result, there are multiple opportunities exist to address any information potentially overlooked during the initial workup.

In addition, the report noted that ODAR policy instructs employees to use sources other than the claim folder to obtain the claimant's last known address. If mail is returned as undeliverable, staff is required to identify the address through the U.S. Postal Service and other sources. Further, hearing notices are sent out with acknowledgement forms, which the claimant or their representative returns to the hearing location. The agency is required to contact the claimant if the form is not returned within seven days. The report also noted an ALJ cannot dismiss a case just because a claimant failed to appear at a scheduled hearing, as Mr. Wiltout alleged. The report further stated that claimants have the right to appeal any dismissal orders or denial at the hearing level to the ODAR Office of Appellate Operations.

The report noted that since the incidents alleged by Mr. Wiltout occurred, ODAR has taken steps to improve its customer service and quality assurance. For example, NHC relocated and replaced its dated telephone system, with added functionality allowing for greater management oversight. In addition, in 2010, the agency launched Quality Review Branches responsible for quality assurance reviews of decisions and the identification of deficiencies in policy and procedures.

Despite these efforts to assure ALJ decisions were made upon fair evidentiary hearings, the report determined that Sonya Napier, a supervisory paralegal specialist, instructed Mr. Wiltout to go through mail and destroy any documents that were associated with closed cases which received a fully favorable decision, as she believed it would have no impact on the decision. The report explained that ODAR has the authority to reopen closed cases under certain circumstances such as fraud or similar fault. ODAR policy requires that all documents received on closed case be included in CEFs. As a result of this determination, it was recommended that ODAR evaluate its policies and training related to the appropriate processing and handling of mail, and retrain employees on these processes.

#### ***Mr. Wiltout's Comments***

Mr. Wiltout provided extensive comments on the agency's report. He questioned the findings contained in the report, stating repeatedly that the investigators failed to ask appropriate questions of employees and that the deficiencies in the report were too numerous to be accidental. He asserted that statements given by employees indicated that the problems were not limited to ALJ Martin, but extended to other ALJs at the NHC. Mr. Wiltout also called into question the methodology of the SSA's audit of cases worked up at the NHC during FY 2009 and 2010.

He noted the agency did not provide its methodology for this review, and suggested that comparing NHC against other hearing centers was not relevant because there was no verification that these other centers processed cases correctly. Mr. Wiltout further disputed the report's conclusion that he mischaracterized agency policy. In addition, he asserted that the report did not properly address his allegations that NHC employees failed to manage

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claimant's files. He suggested that the report emphasized the redundancies in the hearing process to intentionally minimize the fact that employees did not perform routine work tasks in a timely manner.

***The Special Counsel's Findings***

I have reviewed the original disclosure, the agency report, and Mr. Wiltrot's objections and comments. For several reasons the agency's report appears reasonable and the report meets all statutory requirements. The officials at issue have departed the agency or are deceased, employees have been retrained, the agency audit determined cases were properly processed, and the agency has taken measures to improve quality assurance, accordingly I am satisfied that the agency's investigation and corrective actions were sufficient. For these reasons, the findings of

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the report and the whistleblower's comments to the Chairmen and Ranking members of the Senate Committee on Aging and House Committees on Ways and Means. I have also filed copies of the redacted report and whistleblower comments in our public file, which is available at [www.osc.gov](http://www.osc.gov). OSC has now closed this file.

Respectfully,



Carolyn N. Lerner

Enclosures