EMPOWER OVERSIGHT
Whistleblowers & Research

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June 28, 2024

VIA ELECTRONIC TRANSMISSION

Inspector General Michael Horowitz
U.S. Department of Justice
Office of the Inspector General
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

Counsel Jeffrey Ragsdale
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Avenue NW, Suite 3266
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RE: Complaint of Reprisal Against Federal Bureau of Investigation Employee in Violation of 5 U.S.C. § 2303(a), 28 C.F.R. § 27.2, and PPD-19

Dear Inspector General Horowitz and Counsel Ragsdale:

Four weeks ago I wrote to the Department of Justice ("DOJ") Office of the Inspector General ("OIG") to disclose shocking documents that appeared to demonstrate political bias in the Federal Bureau of Investigation's ("FBI's") security clearance process, with apparent use of the process to purge the FBI of employees who expressed disfavored political views or concerns

about the COVID-19 vaccine requirement.[1] This week we received a letter from DOJ OIG indicating that you welcome similar information from additional employees.[2]

Accordingly, I write today on behalf of Supervisory Special Agent ("SSA") [redacted] Client. SSA Client has previously made disclosures to DOJ OIG about several abuses of the FBI's security process he observed while assigned to the FBI's Security Division ("SecD"). We write to supplement those disclosures and request that DOJ OIG investigate them.

For making protected disclosures to his chain of command that SecD's clearance investigations, suspensions, and revocations of several FBI employees was improper, SSA Client was *himself* retaliated against. We request that you investigate whether the FBI improperly (1) transferred SSA Client and later suspended him indefinitely without pay in reprisal for protected whistleblower disclosures, in violation of 5 U.S.C. § 2303(a) and 28 C.F.R. § 27.2, and (2) suspended SSA Client's security clearance in reprisal for protected whistleblower disclosures, in violation of Presidential Policy Directive 19 ("PPD-19").

Based upon information Empower Oversight has obtained, both DOJ OIG and the Office of Professional Responsibility ("DOJ OPR") have already been made aware of reprisal by the same SecD officials for the same reasons against other SecD employees. In light of SecD's pattern of abuse of the security clearance process and retaliation against SecD employees who try to stop that abuse, I also request that the OIG conduct a full review of the FBI's security clearance process, how it has been abused—particularly by Dena Perkins and Jeffrey Veltri—and the role of FBI leadership in allowing these abuses to multiply.

I. BACKGROUND

Prior to his suspension in 2023, SSA Client served as an FBI special agent ("SA") for nineteen years, primarily conducting criminal investigations. He received multiple U.S. Attorney awards and a citation from the FBI Director for conducting a child sex trafficking investigation [redacted]. In 2018, he became an SSA at FBI headquarters. When SSA Client received an office of preference transfer in 2020, [redacted]. In 2021 he returned to FBI headquarters, [redacted]. In April 2022, SSA Client transferred to SecD at the request of Jeffrey Veltri, who was then serving as SecD's acting Deputy Assistant Director ("DAD").

As acting DAD, Veltri reported to SecD Assistant Director ("AD") Jennifer Leigh Moore. Veltri supervised several sections: the Physical Security Section, the Personnel Security Adjudication Section, and the Security Integrity and Investigations Section ("SIIS"). Because

[1] *See* Press Release, Empower Oversight, Documents Reveal Political Bias and Abuse of the FBI Security Clearance Process, June 11, 2024, https://empowr.us/documents-reveal-political-bias-and-abuse-of-the-fbi-security-clearance-process.

[2] Letter from DOJ OIG Assistant Inspector General Sean O'Neill to Empower Oversight President Tristan Leavitt, June 26, 2024, *available at* https://empowr.us/wp-content/uploads/2024/06/OIG-Letter-to-Empower-Oversight-6.26.2024.pdf.

Veltri's permanent position was as the Section Chief ("SC") of SIIS, Assistant Section Chief ("ASC") Perkins served as acting SC while Veltri was acting DAD.

On his arrival in CIU, SSA Client immediately recognized SecD was a toxic work environment. Many SIIS employees had had conflicts with Perkins, first as ASC and then as acting SC, and several had filed complaints against her.

More alarmingly, SSA Client discovered SIIS's operations for handling the FBI's security clearance program were nothing like federal standards required. In 1995, Executive Order 12968 required the development of a common set of adjudicative guidelines for determining eligibility for access to classified information.[3] The most recent National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position ("Adjudicative Guidelines" or "Guidelines") were issued December 10, 2016 and effective June 8, 2017.[4] They state:

> The following National Security Adjudicative Guidelines are established as the single common criteria for all U.S. Government civilian and military personnel, consultants, contractors, licensees, certificate holders or grantees and their employees, and other individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position, to include access to sensitive compartmented information, restricted data, and controlled or special access program information. These guidelines shall be used by all Executive Branch Agencies when rendering any final national security eligibility determination.[5]

The Adjudicative Guidelines introduce the adjudicative process as follows: "The adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the whole-person concept."[6] The Guidelines identify 13 criteria for careful consideration, "each of which is to be evaluated in the context of the whole person":

(A) Allegiance to the United States;
(B) Foreign Influence;
(C) Foreign Preference;
(D) Sexual Behavior;
(E) Personal Conduct;

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[3] *Available at* https://www.dni.gov/files/NCSC/documents/Regulations/EO_12968.pdf.

[4] Security Executive Agent Directive 4, Appendix A, *available at* https://www.dni.gov/files/NCSC/documents/Regulations/SEAD-4-Adjudicative-Guidelines-U.pdf.

[5] Adjudicative Guidelines 1(a).

[6] Adjudicative Guidelines 2(a).

(F) Financial Considerations;
(G) Alcohol Consumption;
(H) Drug Involvement;
(I) Psychological Conditions;
(J) Criminal Conduct;
(K) Handling Protected Information;
(L) Outside Activities; and
(M) Use of Information Technology Systems.[7]

According to the Adjudicative Guidelines, a clearance adjudicator should consider the following factors in evaluating the relevance of an individual's conduct:

(1) the nature, extent, and seriousness of the conduct;
(2) the circumstances surrounding the conduct, to include knowledgeable participation;
(3) the frequency and recency of the conduct;
(4) the individual's age and maturity at the time of the conduct;
(5) the extent to which participation is voluntary;
(6) the presence or absence of rehabilitation and other permanent behavioral changes;
(7) the motivation for the conduct;
(8) the potential for pressure, coercion, exploitation, or duress; and
(9) the likelihood of continuation or recurrence.[8]

The Guidelines make clear that each case must be judged on its own merits.[9]

A. SSA Client Disclosed Improper Security Clearance Actions to His Chain of Command While Supervising Clearance Investigations

The FBI requires all employees to hold an active security clearance regardless of whether they regularly (or ever) handle classified information. Concerns about eligibility for security clearances are referred to SIIS's Clearance Referral Evaluations Unit ("CREU" or "Intake Unit"). If deemed to require investigation, they are referred to SIIS's Clearance Investigations Unit ("CIU"). In some cases, if SecD management deems the matter serious enough, CIU suspends an employee's clearance during the investigation, resulting in the employee's immediate, indefinite suspension without pay, while the employee is told they cannot obtain other employment without FBI permission. Once CIU completes its investigation, it sends the file to the Clearance Adjudications Unit ("CAU") for the file to be adjudicated by an independent decisionmaker.

SSA Client was assigned to CIU, where his supervisor was Unit Chief ("UC") [redacted]. CIU's work was split between three SSAs: SSA Client, who supervised a team of investigators working clearance investigations on the U.S. East Coast; SSA [redacted], who supervised a team conducting Central U.S. investigations; and SSA [redacted], who supervised a

[7] Adjudicative Guidelines 2(c).

[8] Adjudicative Guidelines 2(d).

[9] Adjudicative Guidelines 2(b).

team conducting West Coast investigations. As the East Coast supervisor, SSA Client supervised more cases and had more individuals reporting to him than either of the other two SSAs. (After SSA Client left CIU, the regions were realigned and the cases became more evenly distributed.)

SSA Client quickly discovered that acting SC Perkins and acting DAD Veltri were often inappropriately involved in individual clearance cases throughout those cases' time in SIIS, from referrals to investigations to adjudications and appeals. Perkins and Veltri would frequently make initial judgments about cases based on their own predjudices, then would refuse to move from their first impressions—regardless of what facts an investigation uncovered.

Acting SC Perkins would often direct SIIS staff to take particular actions, such as making specific edits to electronic communications ("ECs") on suspension or revocation before they were allowed to proceed up the chain to the Executive Assistant Director for issuance. Yet Perkins never documented in the adjudicative file the decisions she made, including when she overruled line SIIS staff. Perkins and acting DAD Veltri were so involved that even when not directed, staff often just ended up basing their actions on whatever Perkins and Veltri thought rather than risking their displeasure.

SSA Client disclosed to UC [redacted] his concerns about these issues, and eventually found that a large number of SecD employees also had concerns about its operations. Because of the influence of acting DAD Veltri and acting SC Perkins, it was very common when SSA Client arrived in SecD for investigators to ask inappropriate questions of the sort we recently referred to your office for investigation, such as whether employees under investigation had vocalized support for former President Donald Trump or whether they had vocalized objection to the COVID-19 vaccine.

SSA Client participated in many discussions in which it became clear that Veltri's and Perkins's perspective was that if an FBI employee fit a certain profile as a political conservative, they were viewed as security concerns and unworthy to work at the FBI. Despite issues like support for former President Trump or vaccine hesitancy being a common theme in discussions regarding suitability for classified information, those issues were almost never mentioned in the written clearance suspension and revocation notices SecD issued to FBI employees.

1. Marcus Allen Case

For example, one of the cases SSA Client inherited supervision of was the clearance investigation of Staff Operations Specialist ("SOS") Marcus Allen, who was assigned to the Charlotte Field Office.[10] CIU formally opened a clearance investigation into SOS Allen on

[10] Empower Oversight represented Marcus Allen in his security clearance reconsideration, litigation in the U.S. District Court for the District of South Carolina, and whistleblower reprisal complaints under 5 U.S.C. § 2303, 50 U.S.C. § 3341(j), and PPD-19. Those matters concluded on May 31, 2024 when the FBI reinstated Mr. Allen's security clearance and, pursuant to a settlement agreement, he voluntarily resigned from the FBI and withdrew his complaints and lawsuit in return for back pay and benefits. *See* Press Release, Empower Oversight, FBI Whistleblower's Security Clearance Reinstated in Full, June 4, 2024, https://empowr.us/fbi-whistleblowers-security-clearance-reinstated-in-full.

October 19, 2021 under Guideline A – Allegiance to the United States. Then on the morning of November 2, 2021, an Assistant Special Agent in Charge of the Charlotte Field Office emailed acting DAD Veltri: "[W]e have some added concerns about the employee, particularly since he is one of only two employees in Charlotte who is refusing to follow policy and attest to his current vaccination status[.]" In response, SC Perkins messaged ASC [redacted] to move Allen's case up in priority, writing: "[Charlotte] is a bit concerned he is escalating . . . ."

The CIU investigator assigned to the Allen case [redacted] began calling SOS Allen's coworkers on November 17, 2021 to interview them. Every one of the individuals interviewed stated Allen had "never given . . . cause to question his allegiance to the US." But the investigator's FD-302 of the Charlotte Assistant Special Agent in Charge ("ASAC") interview stated:

> [The ASAC] considered the matter to have been addressed once he had counseled Allen; however, a week or two later [he] learned Allen was the only [Charlotte] employee who had refused to attest to his COVID-19 vaccination status. [He] felt Allen's refusal to comply with the vaccine attestation, combined with his September 29, 2021 email, warranted an independent review by Security Division.

Still, the FD-302 stated the ASAC "is hopeful Allen can avoid a negative clearance action by SecD, unless SecD discovers additional information not known to [Charlotte] which would warrant such a clearance action." The next week, on November 24, 2021, CIU recorded in an FD-302 that SOS Allen had received a counseling memo the previous day for failing to attest to his vaccination status, and that "Allen advised . . . he does not intend to obtain the vaccine. . . ."

On SSA Client's arrival in CIU, he learned that the investigator on the Allen case had ultimately concluded SOS Allen's "Allegiance to the United States" was not in question and that the suspension of his security clearance was not warranted. Yet acting SC Perkins and acting DAD Veltri pushed for SOS Allen's clearance to be suspended on the theory that Allen's purpose in distributing information within his field office was to absolve January 6, 2021 subjects. Neither Perkins nor Veltri could explain how passing possibly exculpatory information about investigative subjects was improper. Nevertheless, Perkins overruled the initial investigator and reassigned the case to another investigator to move forward with suspending SOS Allen's clearance.[11] In clear retaliation, Perkins transferred the initial investigator to the Intake Unit, a less prestigious assignment than CIU because of its limited investigative responsibilities.

When SSA Client joined CIU in April 2022, a CIU investigator [redacted] was working on the Allen case to determine if there was sufficient evidence to revoke SOS Allen's clearance. Because the Allen case looked problematic, SSA Client instructed the investigator that she should make sure the case was well documented. (The ultimate case file would total over 1,700 pages.) After a thorough investigation she finished the summary EC on September 23, 2022, and disclosed to SSA Client that she did not believe there was enough basis for CAU to

[11] Despite the prominent role SOS Allen's views on the COVID-19 vaccine played in the suspension, the January 10, 2022 suspension letter to SOS Allen made no mention of the vaccine.

revoke SOS Allen's clearance. Per FBI procedures, the case was forwarded to CAU for adjudication.

2. [redacted] CASE

Sometime in 2022, the Intake Unit forwarded to CIU an investigation of SA [redacted] for an allegedly improper contact with Ty Cobb, an attorney for then-President Trump, in 2017 while [redacted] was an SSA assigned to [redacted]. Not only was the conduct several years old by 2022, SSA Client's team found that DOJ OIG, FBI Office of Professional Responsibility ("FBI OPR") and the Office of Special Counsel Robert Mueller had each cleared SA [redacted] of wrongdoing. When SSA Client went into the office of CREU UC [redacted] to report that there was no basis for an investigation into SA [redacted], acting SC Perkins was in [redacted]'s office. SSA Client disclosed to both Perkins and [redacted] his view that opening an investigation of SA [redacted], particularly when the alleged conduct occurred several years prior, was improper under Adjudicative Guidelines, which state that adjudicators should consider the recency of the conduct.[12] Furthermore, SSA Client told both Perkins and [redacted] that Client had raised the topic of SA [redacted] with Deputy Special Counsel [redacted], who had formerly been an FBI SA, Assistant U.S. Attorney, Chief of Staff to former FBI Director Mueller, and a national security lawyer for DOJ. [redacted] had confirmed that SA [redacted] was cleared of any wrongdoing in his contact of Cobb. A heated discussion ensued with Perkins, but despite SSA Client's disclosures, she ordered him to assign a CIU investigator to investigate SA [redacted].

3. [redacted] CASE

In August or September 2022 CIU opened an investigation into SA [redacted], who was assigned to the [redacted]. The investigation was assigned to SSA Client's team.[13] As had become commonplace in SecD, the investigator asked SA [redacted]'s coworkers about his vaccine status and whether he had supported former President Donald Trump. SA [redacted]'s clearance was suspended on September 16, 2022. When CIU interviewed SA [redacted] in January 2023, acting SC Perkins personally reviewed the questions to be asked in his interview.

4. FURTHER MARCUS ALLEN DEVELOPMENTS

Sometime in the winter of 2022-2023, CAU transferred the Allen case back to CIU, finding there was not enough derogatory information to justify revoking SOS Allen's clearance. The CIU investigator was asked to conduct further investigation for anything that could possibly justify a revocation. She interviewed additional witnesses in January 2023, which revealed that out of the hundreds of cases SOS Allen had conducted background checks on related to January 6, 2021, he failed to spot some derogatory information in two of the cases. Acting SC Perkins pushed CIU to find that SOS Allen intentionally omitted the information in order to sabotage the

[12] Adjudicative Guidelines 2(d)(3).

[13] Empower Oversight previously represented [redacted] in making disclosures to the DOJ OIG.

January 6-related cases. SSA Client disclosed to Perkins that this theory was an insufficient basis to revoke SOS Allen's clearance under the Adjudicative Guidelines because they could only speculate why SOS Allen missed one piece of information about two subjects. SSA Client's disclosure clearly displeased Perkins.

In approximately February 2023, [redacted] departed as UC of CIU. In March 2023 acting SC Perkins named SSA [redacted] as CIU's acting UC.

5. [redacted] CASE

Sometime between March and April 2023, acting SC Perkins directed SSA Client to draft an EC to suspend SA [redacted]'s clearance. SA [redacted] was assigned to the FBI's [redacted] Office and was accused of disagreeing with certain investigations related to January 6, 2021. However, SSA Client found that the facts did not support suspension of SA [redacted]'s clearance. SSA Client asked investigator [redacted] to review the case and draft a suspension EC. However, [redacted] also determined that he could not find a factual basis to suspend SA [redacted]. When SSA Client disclosed to Perkins that the facts were insufficient to support suspension of SA [redacted] under the Adjudicative Guidelines and that drafting a suspension EC was not possible, Perkins became visibly hostile towards SSA Client. A few days later, acting SC Perkins asked SSA Client to meet with her for a performance review—despite Perkins not being SSA Client's direct supervisor. The only point of the short meeting was for Perkins to tell SSA Client his writing needed to be improved, a negative performance "check-in" she subsequently recorded in the FBI's online personnel system (HR Source). Prior to that time, none of SSA Client's supervisors in SecD had ever expressed concerns about his writing or any other element of his performance.

6. LUNCH, COLORING, AND YOGA

During late March or April 2023, SSA Client received an email regarding lunchtime health and wellness activities for SecD employees that included "Lunch and Coloring" and "Office Yoga." SSA Client sent a picture of the email to a fellow FBI employee. The next day, former FBI SA [redacted], who had resigned from the FBI on February 15, 2023, tweeted a similar image. Because the image appeared to have been provided to [redacted] by someone else within the FBI, SSA Client sent the image for analysis to determine where it originated from.

In approximately April 2023 Matthew Nagle became the SC of the SIIS, with Perkins remaining as ASC. Around this time, Perkins informed SSA Client she was transferring him from CIU to CAU. As a CIU SSA, he had successfully supervised more employees and more cases than the other CIU SSAs. SSA Client's transfer appears to have been in reprisal for his disclosures to Perkins and acting UC [redacted] of abuses of authority, gross mismanagement, and improper application of the Adjudicative Guidelines resulting in violations of law, rule, or regulation.

B. SSA Client DISCLOSED IMPROPER SECURITY CLEARANCE ACTIONS WHILE SUPERVISING CLEARANCE ADJUDICATIONS

When SSA Client was transferred to CAU in April 2023, he reported to UC [redacted] who was supervised by acting SC Perkins. CAU already had one other SSA, [redacted], who oversaw clearance adjudications referred from CIU. SSA Client was assigned as the first-level supervisor for the team adjudicating reconsideration requests of clearance revocations, and as a second-level supervisor for the team processing all requests for SCI access and the team conducting financial audits of all employees.

SSA Client observed that acting SC Perkins put pressure on CAU for SSA [redacted]'s adjudicative team to revoke SA [redacted]s and SOS Allen's clearances prior to them testifying before the House Subcommittee on Weaponization on May 18, 2023. Accordingly, SOS Allen's clearance was revoked on May 9, 2023, and SA [redacted]'s was revoked May 17, 2023.

SSA [redacted] was injured and out of the office after June 20, 2023, so for the next several months SSA Client had supervision of CAU referral clearance adjudications in addition to his existing responsibilities.

1. [redacted] CASE

One of the other clearance adjudications SSA Client was assigned to supervise was that of SA [redacted]. Acting SC Perkins directed the investigation and revocation of [redacted]'s clearance. SA [redacted] who was accused by his supervisor in [redacted] of being a terrorist with no supporting evidence. Perkins directed a computer audit of SA [redacted]'s activity which resulted in a number of false leads, including an inaccurate accusation that he had altered a [redacted] report. This allegation was used as the basis for SA [redacted]'s clearance revocation. However, the evidence developed by SecD during its investigation showed that SA [redacted] did not alter the [redacted] report. The adjudicator on the reconsideration of SA [redacted]'s clearance revocation [redacted] determined that the revocation was improper—including that the original basis for opening the investigation into SA [redacted] had been discriminatory—and he should be reinstated. Nevertheless, Perkins was opposed to reinstating SA [redacted]'s clearance. SSA Client and UC [redacted] both supported the adjudicator's determination, and met with Perkins about it in June or July 2023. During one of those meetings, SSA Client disclosed to Perkins that he believed the action against SA [redacted] was improper discrimination, which violates not only the Fifth Amendment to the U.S. Constitution but also Adjudicative Guidelines Appendix A.1(c). (In fact, in written materials about the [redacted] case, the three CAU personnel marked them as "protected disclosures" because they sought whistleblower protections for disclosing the improprieties in the case.) The day after that meeting, Perkins entered negative performance "check-ins" for SSA Client and UC [redacted] in the FBI's online personnel system. Contemporaneously, Perkins also started asking SSA Client and UC [redacted] why the adjudicator on the [redacted] case had been permitted to telework for a limited period.

Ultimately, the adjudicator, SSA Client, and UC [redacted] successfully advocated for the reinstatement of SA [redacted]'s clearance and receipt of back pay. However, SSA Client does not

know if the reinstatement and back payment have taken place, or if other administrative matters have delayed it. Around the time of their disclosure of the improper suspension and revocation of [redacted]'s clearance, UC [redacted] was notified that she would not be renewed in her position.[14] (UC [redacted] was a retired FBI agent and served under a program that allows retirees to return to FBI employment.) She was forced out of FBI employment around September 2023.

2. PROTECTED DISCLOSURES OUTSIDE THE FBI

Sometime in the summer of 2023, SSA Client made protected disclosures to DOJ regarding acting UC Perkins's abuses.[15]

On September 19, 2023, SSA Client also made a protected disclosure to DOJ OIG regarding acting SC Perkins.[16] In sum, SSA Client disclosed Perkins's abuse of authority related to the security clearance investigations and/or adjudications of SOS Allen, SA [redacted], SA [redacted], SA [redacted], SSA [redacted], SSA [redacted], SA [redacted], and SA [redacted]. SSA Client also emailed this information to OIG Special Agent [redacted] on the same day.

C. SSA [redacted] WAS RETALIATED AGAINST BECAUSE OF HIS DISCLOSURES

The next day, on September 20, 2023, SSA Client was summoned to a meeting with two CIU investigators under the supervision of Perkins. There, SSA Client was confronted with the image of health and wellness activities that had been publicized by former SA [redacted], and told the image had originated with SSA Client. While SSA Client readily acknowledged that he had sent an image of the health and wellness email to a friend within the FBI, he denied sharing it with [redacted]. He could not recall the manner in which he transmitted the image to his own friend within the FBI, such as whether he took a photo of the email or whether it was a screenshot. Regardless, the CIU investigators told SSA Client his clearance was being suspended not just for the photo's release, but also for "performance" issues and for his "attitude."

Immediately after the interview, SSA Client was administered a polygraph.[17] The polygraph indicated no deception when SSA Client denied that he had sent the image to [redacted], intended it to be sent to him, or intended to embarrass the FBI. After a security debrief from the security office, SSA Client was provided with a clearance suspension letter and

[14] The retaliatory personnel action may have been the result of protected disclosures prior to the xxxxx matter.

[15] SSA Client had recalled making the disclosures to DOJ OIG, but did not save a copy, and now believes the disclosures may have been to DOJ OPR.

[16] Attached as Exhibit A. SSA Client has also made several additional protected disclosures to DOJ OIG, attached as Exhibits B – D.

[17] Typically a polygrapher from another FBI division or another agency would administer the polygraph to avoid an appearance of impropriety, but SecD used its own polygraph examiner. Either way, SSA Client believes an Executive Assistant Director must give approval for an FBI employee to be polygraphed.

escorted out of the building.[18] Contrary to the CIU investigators' representation that SSA Client's clearance was being suspended for "performance" issues and for his "attitude," the suspension letter stated the clearance action was based on "security concerns related to Adjudicative Guideline K – Handling Protected Information" because SecD "recently learned of allegations you may have released FBI information without authorization." SSA Client also learned that shortly after his suspension, SC Matthew Nagle informed employees that SSA Client was being judged by a "higher standard" under the Adjudicative Guidelines. SSA [redacted] has heard that acting SC Perkins personally investigated him, or at least directed the investigation.

Since his suspension, SSA Client learned that one of the CAU adjudicators he had supervised [redacted] had suffered retaliation for recommending the reinstatement of former SOS Allen's clearance. Allen's clearance was ultimately reinstated on May 31, 2024.[19]

II. Applicable Law and Regulations

A. FBI Whistleblower Protections

Under 5 U.S.C. § 2303:

> (a) Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to an employee in, or applicant for, a position in the Bureau as a reprisal for a disclosure of information—
>
> > (1) made—
> >
> > > (A) in the case of an employee, to a supervisor in the direct chain of command of the employee, up to and including the head of the employing agency;
> >
> > > . . .
> >
> > (2) which the employee or applicant reasonably believes evidences—
> >
> > > (A) any violation of any law, rule, or regulation; or
> >
> > > (B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

[18] Because of the suspension of his security clearance, SSA Client was also suspended from duty indefinitely without pay.

[19] Press Release, Empower Oversight, FBI Whistleblower's Security Clearance Reinstated in Full, June 4, 2024, https://empowr.us/fbi-whistleblowers-security-clearance-reinstated-in-full.

Under § 2303(a), a "personnel action" means any action described in clauses (i) through (x) of 5 U.S.C. § 2302(a)(2)(A), which includes "an action under chapter 75 of this title or other disciplinary or corrective action," "a detail, transfer, or reassignment," and "a decision concerning pay, benefits, or awards . . . ."

These statutory protections are implemented in the Code of Federal Regulations at 28 C.F.R. § 27.2(a):

> Any employee of the FBI, or of any other component of the Department [of Justice ("DOJ")], who has authority to take, direct others to take, recommend, or approve any personnel action shall not, with respect to such authority, take or fail to take, or threaten to take or fail to take, a personnel action, as defined below, with respect to any FBI employee as a reprisal for a protected disclosure.

Under 28 C.F.R. § 27.2(b), a "personnel action" means any action described in clauses (i) through (xii) of 5 U.S.C. 2302(a)(2)(A).

B. PROTECTION FROM SECURITY CLEARANCE ACTIONS AS REPRISAL FOR A PROTECTED DISCLOSURE

Under Presidential Policy Directive/PPD-19 ("PPD-19) § B:

> Any officer or employee of an executive branch agency who has authority to take, direct others to take, recommend, or approve any action affecting an employee's Eligibility for Access to Classified Information shall not, with respect to such authority, take or fail to take, or threaten to take or fail to take, any action affecting an employee's Eligibility for Access to Classified Information as a reprisal for a Protected Disclosure.

In relevant part, PPD-19 § F(5) defines a "protected disclosure" as:

> [A] disclosure of information by the employee to a supervisor in the employee's direct chain of command up to and including the head of the employing agency, to the Inspector General of the employing agency . . . that the employee reasonably believes evidences (i) a violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety . . . , lawfully participating in an investigation or proceeding regarding a violation of Section A or B of this directive; or . . . cooperating with or disclosing information to an Inspector General . . . .

Title 50 U.S.C. § 3341(j) also provides protections to employees against whom security clearance actions have been taken in reprisal for protected disclosures. However, under this statute, an employee may only challenge the suspension of a clearance or access if that

suspension lasts longer than a year.[20] Since SSA Client's suspension took place on September 20, 2023, it has lasted less than one year. However, in this retaliation complaint, SSA Client asserts his right to make a reprisal claim under § 3341(j) effective September 21, 2024.

III. Application of Law and Regulations

A. Protected Disclosures

SSA Client'sdisclosures during his time in SecD about the abuse of the security clearance process meet several of the required definitions for protection under both 5 U.S.C. § 2303/28 C.F.R. § 27 and PPD-19.

3. Violation of Law, Rule, or Regulation

SSA Client disclosed to his chain of command in several cases that the actions SIIS leadership were pushing were not supported by the evidence. Specifically:

- The investigation of SA [redacted] was improper because the conduct took place six years earlier and SA [redacted] had been cleared of any misconduct.
- There was insufficient evidence to suspend SA [redacted]'s clearance.
- There was insufficient evidence to revoke SOS Allen's clearance.
- There was insufficient evidence to suspend or revoke SA [redacted]'s clearance.

The Adjudicative Guidelines rely heavily on an "individual's conduct." That conduct must be proved, and without sufficient evidence that an individual engaged in the conduct alleged, there is no basis for the FBI to take a security clearance action against them. Taking such an action anyway is not in compliance with the Adjudicative Guidelines. The Adjudicative Guidelines were established by executive order and have the force of law, rule, or regulation.

Not only does discrimination in the security clearance process violate the Adjudicative Guidelines,[21] it is also a violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution, which states: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

4. Abuse of Authority

SSA Client's disclosures to his chain of command also described an abuse of authority. The Merit Systems Protection Board has defined abuse of authority as "an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *Wheeler v. Dep't of Veterans Affs.*, 88 M.S.P.R. 236, 241 (2001) (internal quotation marks omitted)
(citing *Ramos v. Dep't of Treasury*, 72 M.S.P.R. 235, 241 (1996)).

[20] *See* § 3341(j)(4).

[21] Adjudicative Guidelines 1(c).

Here, SecD arbitrarily suspending employees' security clearances without proper basis was an arbitrary or capricious exercise of the FBI's authority over security clearances. It adversely affected their rights, resulted in the affected employees being placed on unpaid leave by the FBI for months at a time, and affected their future employment prospects.

5. GROSS MISMANAGEMENT

In a non-precedential decision, the U.S. Court of Appeals for the Federal Circuit has defined gross mismanagement as "a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." *Kavanagh v. Merit Sys. Prot. Bd.*, 176 F. App'x 133, 135 (Fed. Cir. 2006).

By arbitrarily suspending and revoking security clearances, SecD has brought the FBI under significant scrutiny in the past two and a half years, including from DOJ OIG and from Congress. That scrutiny is significant enough some have called for the FBI's budget to be cut, or even for the FBI to be abolished as an agency. SecD's improper actions have unquestionably had an adverse impact upon the FBI's ability to accomplish it mission.

B. REASONABLE BELIEF

The proper test for determining whether an employee's belief that his disclosures revealed misconduct (so as to be protected) is "reasonable" is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence wrongdoing as defined by the WPA. *LaChance v. White,* 174 F.3d 1378, 1381 (Fed. Cir. 1999); *Downing v. Department of Labor*, 98 M.S.P.R. 64, 69-70 (2004).

SSA Client was not alone within the FBI, or even within SecD, in believing SecD's actions in these various cases were improper. In SA Allen's and SA [redacted]s cases, SSA Client's belief was not only reasonable, but has been proven correct, since both of those individuals have had their clearances reinstated.

IV. RETALIATION AGAINST SSA Client

A. TRANSFER FROM CIU TO CAU

SSA Client's transfer from CIU to CAU in April 2023 was a personnel action under 5 U.S.C. § 2302(a)(2)(A)(iv), which covers "a detail, transfer, or reassignment." That the personnel action was taken "as a reprisal for a [protected] disclosure of information," and therefore prohibited under 5 U.S.C. § 2303, is demonstrated by several factors.

First, the transfer occurred close in time after SSA Client disclosed improprieties in the [redacted], [redacted], and Allen clearance matters.

Second, SSA Client's transfer also came even more shortly after acting SC Perkins gave him a negative "check-in" regarding his writing abilities. Although this performance review does not have the same personnel ramifications as "a performance evaluation under chapter 43" (5 U.S.C. § 2302(a)(2)(A)(vii)), it does demonstrate acting SC Perkins's retaliatory intent, clearly coming in response to his disclosure that he could not draft an appropriate suspension EC for SA [redacted].

Given the totality of circumstances, it is extremely likely that SSA Client's transfer from CIU to CAU was taken in retaliation for his protected disclosures.

B. SUSPENSION OF SSA Client's SECURITY CLEARANCE

Under PPD-19, the suspension of SSA Client's security clearance on September 20, 2023, also constituted a personnel action. That it was retaliatory is demonstrated by several factors.

First, it occurred closely in time after SSA Client and UC [redacted] disclosed to acting SC Perkins the impropriety of the security clearance action and unlawful discrimination against SA [redacted]. Shortly after UC [redacted] participated in those disclosures, she learned her contract would not be renewed, and her employment ceased shortly after SSA Client's suspension began.

Second, acting SC Perkins's retaliatory intent is confirmed by the fact that she gave both UC [redacted] and SSA Client negative "check-ins" the day after their protected disclosure to Perkins.

Third, although the written reason for the suspension of his clearance was that he released FBI information without authorization, a violation of Adjudicative Guideline K – Handling Protected Information, the only FBI information SSA Client may have been suspected of releasing was SecD's lunchtime wellness activities that included "Coloring and Lunch" and "Office Yoga." SSA Client passed a polygraph showing no deception to his response that he had never sent the information to any non-FBI employee.

Fourth, CIU staff admitted to SSA Client that the suspension was for "performance issues" and for his "attitude." FBI OPR had issued SSA Client a seven-day suspension on May 8, 2023 as a result of a confrontation at an office elevator on October 28, 2022. However, the the OPR suspension related neither to "performance issues" nor to his "attitude"—either about his CAU work or about the criteria for which eligibility for a security clearance should be determined. Furthermore, the OPR suspension was not referenced in the clearance suspension, and thus cannot properly be considered as a basis for the suspension.

Fifth, other SecD employees have not been treated in a similar fashion. The suspension of SSA Client's security clearance stands in contrast with acting SC Perkins's treatment of SSA [redacted], who was given a 14-day suspension in 2023 but suffered no ultimate clearance action. SSA Client is also aware of other mishandling of unclassified information cases, similar to his, where the employees' clearances were not suspended.

The retaliatory intent of SSA Client's clearance suspension is further confirmed by the fact that it was handled personally, or at least directed, by acting SC Perkins.

SC Matthew Nagle reportedly told employees that SSA Client was being held to a higher standard. However, according to Security Executive Agent Directive 4.B, the directive "establishes the single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information...." The Adjudicative Guidelines, Appendix A.1, "are established as the single common criteria for all U.S. Government civilian and military personnel . . . ." By holding SSA Client to a "higher standard," SC Nagle *per se* violated the Adjudicative Guidelines and abused his authority.

The totality of circumstances strongly indicates that the suspension of SSA Client's clearance was taken as a reprisal for his protected disclosures.

C. Suspension of SSA Client After His Clearance Suspension

As discussed in Section III above, SSA Client's clearance suspension is in reprisal for his protected disclosures in violation of PPD-19. The FBI has used the suspension of his clearance as the sole basis to suspend him indefinitely from duty without pay. However, the FBI did not have to suspend him from duty without pay simply because his clearance was suspended. The FBI's decision to suspend SSA Client without pay in reprisal for his protected disclosures is in violation of the FBI whistleblower protections in 5 U.S.C. § 2303 and 28 C.F.R. § 27.2. Court precedent regarding the review of security clearance determinations is no basis to preclude review of his suspension from duty without pay under those provisions.

1. Court Precedent Does Not Preclude Review of SSA Client's Suspension from Duty Without Pay Merely Because the FBI Also Suspended his Security Clearance

Although the Supreme Court has held that security clearance determinations are not directly reviewable in appeals to the Merit Systems Protection Board ("MSPB"), *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988), that case does not preclude review of the FBI's constructive termination of his employment in retaliation for protected whistleblowing. The FBI achieved the functional equivalent of a retaliatory termination through (a) the *ultra vires* suspension of his security clearance, (b) the FBI's *ultra vires* claim that all employees must maintain a security clearance, and (c) the FBI's failure to reassign SSA Client to duties that did not require access to classified material.

Although the FBI referenced its security clearance process as a pretext for these actions, they were actually in reprisal for his protected disclosure and constitute prohibited personnel practices in violation of 5 U.S.C. § 2303 and 28 C.F.R. § 27.2.

2. The FBI Has No Authority to Suspend a Security Clearance

Under Executive Order No. 12,968 § 1.2(a), in order to access classified information, an employee must be "eligible" or have a clearance, and he/she must "possess a need-to-know."

While Executive Order No. 12,968 § 5.1 provides that a determination "that an employee does not have, or no longer has, a need for access is a discretionary determination and shall be conclusive," § 5.2 provides mandatory review proceedings before an employee's eligibility, or clearance, to access classified material is revoked. There is no procedure to "suspend" an employee's eligibility to access classified material under the Executive Order.

The applicability of Executive Orders regarding classified material to DOJ personnel is codified in the C.F.R. "All employees, contractors, grantees, and others granted access to classified information by the [DOJ] are governed by this part, and by the standards in Executive Order 12958, Executive Order 12968, and directives promulgated under those Executive Orders. If any portion of this part conflicts with any portion of Executive Order 12958, Executive Order 12968, or any successor Executive Order, the Executive Order shall apply. This part supersedes the former rule and any [DOJ] internal operating policy or directive that conflicts with any portion of this part." 28 C.F.R. § 17.2(a).

Under 28 C.F.R. § 17.11(c), "[t]he [DOJ] Security Officer may grant, deny, suspend, or revoke employee access to classified information pursuant to and in accordance with Executive Order 12968. The [DOJ] Security Officer may delegate the authority under this paragraph to qualified Security Programs Managers when the operational need justifies the delegation and when the [DOJ[Security Officer is assured that such officials will apply all access criteria in a uniform and correct manner in accord with the provisions of Executive Order 12968 and subpart C of this part."

Thus, although DOJ may suspend an employee's access to classified material, nothing in the C.F.R. or Executive Orders authorizes DOJ to suspend a security clearance—an employee's eligibility to access classified material—without going through the required revocation procedures. Obviously, DOJ cannot delegate to the FBI any authority that it does not have itself.

Under the FBI Employment Agreement[22], its "provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information…." So, although the FBI may have authority to suspend an employee's access to classified information, it has no authority to suspend an employee's clearance. That action may only be taken through the procedures in Executive Order 12,968 and the C.F.R.

The FBI was acting *ultra vires* when it suspended SSA Client's security clearance. Thus, the personnel actions that FBI chose to take based on this unlawful action are reviewable under 5 U.S.C. § 2303 and 28 C.F.R. § 27.2.

[22] https://www.fbi.gov/file-repository/fd-291.pdf/view.

3. THE FBI HAS NO AUTHORITY TO MAKE A SECURITY CLEARANCE A REQUIRED CONDITION IN ITS EMPLOYMENT AGREEMENTS

The FBI Employment Agreement does not require employees to maintain a security clearance. The FBI has no authority to impose that condition of employment after-the-fact when it has been omitted from the agreement.

Even if the FBI could do so, the FBI Employment Agreement states that it does not supersede, conflict with, or otherwise alter employee obligations, rights, or liabilities created by Executive Orders relating to classified information. As discussed above, under Executive Order, an employee shall not be granted access to classified information unless they have a need-to-know. Executive Order No. 12,968 § 1.1(h) defines "need-to-know" as "a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function."

Also, under Executive Order No. 12,968 § 2.1(b), "The number of employees that each agency determines are eligible for access to classified information shall be kept to the minimum required for the conduct of agency functions." Under § 2.1(b)(1), "Eligibility for access to classified information shall not be requested or granted solely to permit entry to, or ease of movement within, controlled areas when the employee has no need for access and access to classified information may reasonably be prevented." Section 2.1(b)(2) provides an exception "where eligibility for access is a mandatory condition of employment," but as discussed above, the FBI Employment Agreement does not require employees to maintain a security clearance. Furthermore, because the FBI is a joint intelligence and law enforcement agency, many FBI employees have no need to access classified material in order to perform FBI duties.

Furthermore, the C.F.R. specifically bars DOJ agencies from requiring employees to have clearances when it is not necessary for DOJ functions. *See* 28 C.F.R. § 17.44(b). ("The number of employees eligible for access to classified information shall be kept to the minimum required for the conduct of [DOJ] functions.") Also, the C.F.R. mandates that "[e]ligibility for access to classified information shall be limited to classification levels for which there is a need for access. No person shall be granted eligibility higher than his or her need." 28 C.F.R. § 17.44(c).

Thus, the FBI is acting *ultra vires*, outside of its own employment agreement and contrary to Executive Orders and the C.F.R. when it requires SSA Client to maintain a security clearance as a condition of employment. So, even if it could suspend SSA Client's clearance, the FBI cannot suspend him indefinitely without pay based on the clearance suspension alone.

4. SSA Client COULD PERFORM DUTIES NOT REQUIRING ACCESS TO CLASSIFIED INFORMATION

Notwithstanding the FBI's *ultra vires* actions, in *Egan*, the Supreme Court opined that the Civil Service Reform Act authorized review of "whether transfer to a nonsensitive position was feasible" when an employee was denied access to classified material. 484 U.S. at 530. Here, although SSA Client may have needed access to classified information as a member of SecD at

FBI Headquarters, there are many duties involving criminal investigations, such as drugs, gangs, violent crime, white collar crime, and public corruption that do not require access to classified information for the conduct of DOJ functions.[23] Although SSA Client worked at an FBI Headquarters division in Washington, DC, he could easily have transferred to the FBI's Washington Field Office to perform a criminal investigative function. The FBI's suspension of SSA Client from duty without pay was in reprisal for his protected disclosure because it could have easily reassigned him to other duties if it had a legitimate reason to suspend his access to classified material. Under *Egan*, this personnel action is reviewable under statutory civil service protections including 5 U.S.C. § 2303.

Thus, because the FBI has no authority to suspend clearances or make them a condition of employment, and the FBI could have reassigned SSA Client to duties that did not require access to classified material, there was no basis for the FBI to suspend SSA Client from duty without pay while it was investigating his security clearance. The decision regarding pay, benefits, and awards is reviewable under *Egan*. Since the sole basis for this personnel action was actually his protected disclosures, it violated 5 U.S.C. § 2303 and 28 C.F.R. § 27.2.

5. ALTERNATIVELY, THE FBI COULD HAVE PLACED SSA Client ON PAID ADMINISTRATIVE OR INVESTIGATIVE LEAVE

Even if the FBI had the authority to take the actions it did and all FBI employees needed access to classified material to perform their duties, the FBI has placed others on paid administrative leave and has specific statutory authority to place employees on paid investigative leave pending the outcome various types of inquiries. Its failure to do so here as reprisal for SSA Client's protected disclosure is reviewable under *Egan* and violates statutory FBI whistleblower protections.

Under 5 U.S.C. § 6329b, agencies can place employees on investigative leave where they continue to receive pay but do not perform duties during the course of an investigation. Through different levels of internal approval, the agency can approve 130 work days of investigative leave. *Id.* § 6329b(b)(1),(b)(3)(A),(c). After that 130-work day period, the agency can approve additional 30-day periods of leave, as long as it notifies two congressional committees of those extensions. *Id.* § 6329b(d)(1).

Thus, the FBI has the authority to place individuals like SSA Client on investigative leave, but—by suspending those employees indefinitely without pay instead—it can cause them severe financial distress and attempt to force them to resign while simultaneously avoiding reporting its abuse of the security clearance process to Congress.

Under § 6329b, a nonsensitive position, investigative leave, was, and still is, available for SSA Client. In *Egan*, the Court observed that the Civil Service Reform Act authorized the review of whether an employee without a clearance could be transferred to a nonsensitive

[23] According to the FBI's website, it investigates terrorism (including "domestic extremists" and "terrorist networks worldwide"), counterintelligence, cyber crime, public corruption, civil rights, organized crime, white-collar crime, violent crime, and weapons of mass destruction. FBI, *What We Investigate*, https://www.fbi.gov/investigate (last visited Jun. 25, 2024).

position. 484 U.S. at 530. So, the FBI's failure to assign him to this nonsensitive position is reviewable. Considering the sole basis for the FBI's failure to place SSA Client on investigative leave—a decision affecting his pay, benefits, and awards—was his protected disclosures, the personnel action violated 5 U.S.C. § 2303 and 28 C.F.R. § 27.2.

V. CONCLUSION

As described above, SSA Client made protected disclosures that he reasonably believed—and subsequent actions have confirmed that in some cases he correctly believed—evidenced violations of law, rule, or regulation as well as gross mismanagement and abuse of authority.

SSA Client suffered various personnel actions as a result of his protected disclosures, including the suspension of his security clearance, which resulted in his immediate, indefinite suspension without pay approximately a year before SSA Client would be eligible for retirement. This improper suspension of his security clearance violates PPD-19.

Also, even though the FBI used a security clearance decision to engage in this reprisal, the action is also reviewable under 5 U.S.C. § 2303 and 28 C.F.R. § 27.2, because the FBI has no authority to suspend security clearances, no authority to require employees to maintain a security clearance, and no basis for not transferring SSA Client to duties not requiring access to classified information or placing him on paid investigative leave.

SSA Client should be immediately returned to duty and provided back pay and benefits for his time on unpaid leave.

Cordially,

/Tristan Leavitt/
Tristan Leavitt
President

Attachments