

NTEU

The National Treasury Employees Union

December 4, 2006

VIA FACSIMILE (202-358-6077)
AND FIRST CLASS MAIL

Jo Anne B. Barnhart
Commissioner
Social Security Administration
International Trade Commission Building
500 E Street, SW
Washington, DC 20254

RE: Imposition of Civil Monetary Penalties on SSA ODAR
Employees by the Inspector General

Dear Commissioner Barnhart:

I am writing to you as the National President of the union that represents employees of the Office of Disability Adjudication and Review (ODAR) who are being illegally assessed enormous civil monetary penalties by the Office of Inspector General (IG) for doing their jobs as directed by ODAR's administrative law judges. The National Treasury Employees Union (NTEU) urges you to intervene immediately to stop the IG from abusing authority delegated by you to enforce Section 1129 of the Social Security Act, 42 U.S.C. § 1320a-8. See id. at 1320a-8(i); 20 C.F.R. Part 498.

NTEU represents over 800 employees of ODAR, some of whom, as detailed below, have been illegally assessed civil penalties by the IG (ranging up to \$215,000) for conduct carried out in the performance of their official quasi-judicial duties. The IG has assessed these monetary penalties based on allegedly misleading language that ODAR attorneys were directed by an administrative law judge (ALJ) to include in decisions the ALJ issued. I am calling on you to act expeditiously to protect the ODAR employees from being harassed by the IG for actions taken pursuant to their official duties.

ODAR attorneys, hearings office directors, and even ALJs across the country have been chilled in the performance of their official duties by the IG's aggressive pursuit of penalties against their colleagues. Those employees who have been

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specifically targeted are understandably distraught: they have had to retain counsel (at their own expense, in at least one instance) to represent them in a lengthy administrative review process established under regulations implementing Section 1129. That review process ends with a final determination by you as to whether the civil penalties proposed by the IG should be imposed. To spare the employees further harassment and expense and to stop the ongoing disruption of ODAR office operations, I urge you to direct the IG to withdraw the proposed penalties immediately and to cease and desist from any further efforts to apply Section 1129 to employees for work performed in their official capacities.

Section 1129 permits the Social Security Administration (SSA) to assess civil penalties of \$5,000 for each instance in which "a person . . . makes, or causes to be made, a statement or representation of a material fact for use in determining any initial or continuing right to or the amount of" benefits or payments under the Social Security Act. 42 U.S.C. § 1320a-8(a). Consistent with its intent, prior to the recent action by the IG discussed herein, the SSA has only applied this provision to penalize people or organizations seeking payments or benefits from SSA. We have not found a single SSA decision in which Section 1129 was applied to SSA employees acting in their official capacities.

Nonetheless, the IG has now proposed penalties against at least four ODAR employees. Each case concerns decisions issued by a now-deceased ALJ (Michael Johnson) who operated out of Des Moines, Iowa. The four ODAR employees were all allegedly involved to some degree in the process of writing decisions issued by the ALJ. I have enclosed the IG letters detailing the alleged wrongdoing.

The IG contends that more than 700 decisions contain false or misleading statements or omissions concerning the testimony of a vocational expert (VE). The testimony was allegedly obtained through the VE's answers to interrogatories posed in one claimant's case. Some of these interrogatories were specific to the facts of that case, but others asked for further testimony on general and hypothetical issues not specific to the case. At ALJ Johnson's direction, the ODAR attorneys then allegedly used those general and hypothetical interrogatory responses in ruling in favor of similarly situated claimants in over 700 other cases.

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The IG's Chief Counsel acknowledges in one of the letters sent to an ODAR attorney that using general interrogatories in certain cases is consistent with SSA's policy. See Aug. 29, 2006 Ltr. at 3. She is troubled, though, that the VE was allegedly not informed that the general interrogatory responses would be used in subsequent cases and that the decisions that allegedly relied on general interrogatories did not specifically state that the VE's opinion was obtained through the use of general interrogatories answered in connection with a previous case. This rationale is fundamentally flawed on many levels.

First, as mentioned above, Section 1129 was intended to be used to penalize applicants for SSA benefits and their advocates, not SSA employees. Consistent with that intent, no SSA employee has ever previously been subjected to Section 1129 penalties.

Second, even if Section 1129 could theoretically apply to SSA employees acting in their official capacities, it would not apply to ODAR employees working under the direction of an ALJ to issue benefits decisions. These individuals are entitled to quasi-judicial immunity, which, as a legal matter, is an absolute bar to civil liability. See, e.g., Butz v. Economou, 438 U.S. 478, 513-17 (1978) (extending absolute judicial immunity to the administrative adjudication arena, including to agency attorneys involved in the presentation of evidence in the course of an administrative adjudication); see also Jackson v. Houck, 181 Fed. Appx. 372, 373 (4th Cir. 2006); Moore v. Brewster, 96 F.3d 1240, 1244-45 (9th Cir. 1996); Mitchell v. McBride, 944 F.2d 229, 230 (5th Cir. 1991); Oliva v. Heller, 839 F.2d 37, 40 (2d Cir. 1988) (all applying judicial immunity to law clerks assisting adjudicators).

Third, there can be no dispute that the employees are being charged for wrongdoing that occurred while performing their official duties. Federal employees enjoy qualified immunity for acts taken in their official capacities and cannot be personally liable for any such acts of omissions. See, e.g., 28 U.S.C. § 2679.

Fourth, the SSA has endorsed and ratified the very conduct objected to by the IG. ODAR attorneys have informed NTEU that they received training from SSA that approved the use of general interrogatories obtained in a previous case to resolve subsequent cases. They do not recall receiving any instruction that the decision contain an explanation that the expert opinion

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was derived from answers to general interrogatories obtained in another case, nor have ODAR attorneys received any communications from SSA disavowing the approach used in ALJ Johnson's cases. Indeed, to NTEU's knowledge, SSA has not proposed any discipline whatsoever on any ODAR employee who is alleged to have participated in writing decisions containing what the IG considers to be false or misleading information or omissions concerning the VE's testimony.

Finally, the IG has failed to appreciate the limited amount of discretion that ODAR employees have in assisting ALJs with their decisions. The decisions were issued by the ALJ, not by the employees charged with violating Section 1129. The ALJ instructs the ODAR attorneys on the facts, evidence, and legal conclusions that are to be included in the decision, and the ODAR attorneys carry out those instructions to the best of their abilities. To the extent there was any violation of Section 1129, then, the violation would have been committed by ALJ Johnson. My understanding is that the IG attempted to convince law enforcement authorities in two states to prosecute ALJ Johnson for criminal violations arising from the issuance of these decisions, and both jurisdictions declined to do so. To my knowledge, the IG has never proposed assessing civil penalties on ALJ Johnson or his estate. Moreover, I further understand that the IG has reviewed the 700-plus cases in which he alleges that a violation of Section 1129 occurred and has not found that the decisions issued in any of those cases were incorrect. Thus, no improper payment of benefits occurred as a result of ALJ Johnson's reliance on answers provided in response to general interrogatories obtained in a previous case.

The employees against whom the IG has proposed assessing these civil penalties are at various stages of the administrative review proceedings. One employee has requested a hearing before an ALJ, obtained private counsel, and is incurring substantial legal fees in pursuing a favorable ruling from the ALJ. The prospect of extensive discovery awaits, if the ALJ does not dispose of the matter on preliminary motions. The other employees are not yet at the stage where they can request a hearing, as they first have been given an opportunity to submit a financial disclosure form for the IG's consideration in determining the amount of the civil penalties to be assessed. We expect that those employees will shortly be at the hearing stage. NTEU counsel will represent some or all of these other employees in the administrative process.

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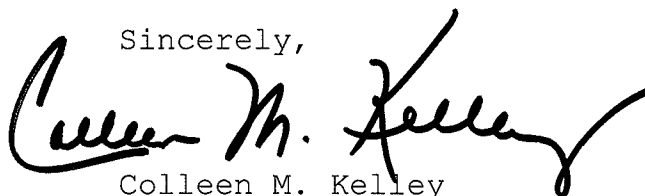
Under the regulatory administrative review provisions, "any party" (including the IG) may appeal the ALJ's decision on the propriety of the penalties to the Departmental Appeals Board (DAB). See 20 C.F.R. § 498.221(a). This would trigger a brand new round of briefing, with additional, substantial legal fees incurred. The DAB's decision then becomes the final decision, subject to review in the court of appeals, unless you reverse or modify it within 60 days of service. See id. at § 498.222(a).

Because the IG is acting pursuant to a delegation from you, you ultimately have the power to dismiss these absurd penalties. I urge you to do so now in order to spare the ODAR employees from incurring substantial legal expenses in an administrative process that can carry out for many months. In addition, your prompt action to rectify this situation could limit SSA's exposure to liability, including its liability for attorney fees to the employees being pursued by the IG. Finally, prompt action is necessary to remove ODAR employees from their current untenable state of limbo. They cannot continue to function in the best interests of SSA, taking on difficult cases, if they remain under a cloud of baseless IG investigations. It is this cloud of civil liability that judicial immunity is intended to eliminate, as those involved in adjudicating judicial and administrative matters are supposed to be free from fear that they will be subject to personal liability for the manner in which they carry out those responsibilities.

I also urge you to explore any avenues you may have for disciplining the IG and any of his staff who are responsible for these arbitrary and malicious prosecutions. I assure you that NTEU is considering its legal options against the IG.

Thank you in advance for your attention to this matter. I would appreciate your prompt response, in light of the ongoing harm being suffered by the targeted ODAR employees.

Sincerely,



Colleen M. Kelley
National President

Enclosures (sent via regular mail only)