

United States Senate
WASHINGTON, DC 20510

August 18, 2023

VIA ELECTRONIC TRANSMISSION

The Honorable Alejandro Mayorkas
Secretary
Department of Homeland Security

Dear Secretary Mayorkas,

On December 2, 2021, the U.S. Office of Special Counsel (OSC) sent a letter to Mary M. Musilek, Assistant Chief Counsel of the U.S. Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), detailing a summary of their findings from their investigation into allegations of retaliation against Mr. Fred Wynn, Mr. Mike Taylor, and Mr. Mark Jones.¹ Those whistleblowers made legally protected disclosures about delays in collecting DNA from detained individuals based on the DNA Fingerprint Act of 2005 and subsequent regulations. The OSC found that CBP committed prohibited personnel practices against them as detailed by OSC file numbers MA-18-4868, MA-18-4869 and MA-18-4870.² It specifically outlines that CBP retaliated against the whistleblowers for their actual or perceived whistleblowing and disclosure to OSC, in violation of 5 U.S.C. § 2302(b)(8) and (b)(9)(C). OSC's investigation found the following retaliation occurred:

1. From February 2018 through the present (December 2, 2021, date of OSC letter), CBP officials subjected the whistleblowers to a significant change in duties, responsibilities, and working conditions.
2. CBP officials issued the whistleblowers a lower performance award for FY 2018 than the prior year. Specifically, Mr. Jones and Mr. Taylor did not receive a performance award any year thereafter for the first time in their employment history with CBP.
3. CBP officials did not select Mr. Jones for the Operational Field Testing Division (OFTD) Director position.

The December 2, 2021, OSC finding also stated that,

...from the evidence we have seen, it seems clear that the agency does not have strong evidence in support of the personnel actions against these Complainants, and that the actions were motivated by the agency's displeasure with the Complainants' perceived and actual involvement in bringing to light the agency's intentional,

¹ See attached privacy release.

² Letter from Alejandra Dove, U.S. Office of Special Counsel, to Mary M. Musilek, Attorney, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, (Dec. 2, 2021), (on file with Committee staff).

decade-long failure to implement a law designed to protect public safety.³

In addition to the OSC letter detailing the retaliatory actions, the whistleblowers provided additional examples to DHS Office of Inspector General (OIG) and DHS Office of the General Counsel (OGC) on December 20, 2022, that took place after OSC's investigation had concluded.⁴ The following are three examples of continued retaliation provided to my office:

- On March 16, 2021, during a U.S. Border Patrol (USBP) “all-hands meeting” which included Rodney Scott (Chief of the Border Patrol) and hundreds of agents and staff, George Talton IV, the acting Director of the Operational Field Testing Division (OFTD) gave a presentation about the division, focused primarily on its mission, objective, and testing methodology. After slides in the presentation discussed the history and work of the Division, under a heading titled “Challenges” the presentation included a bullet labeled “Personnel Issues.” Talton stated to the audience that there was an “issue” with whistleblowers assigned to the office which created a negative implication about their lawful and protected whistleblowing in front of their colleagues and supervisors.⁵
- On April 25, 2022, the whistleblowers were part of a Teams meeting call with Talton. The meeting focused on weapons of mass destruction (WMD) issues and related efforts after the whistleblowers were contacted by United States Central Command (CENTCOM) who inquired about the lack of CBP involvement.⁶ Talton asked Jones, “Why did they call you? That is like someone calling a Border Patrol Agent that has been retired for 10 years to ask what is currently going on inside the agency.” During the call, the whistleblowers pointed out several of the retaliatory actions taken against them. Talton responded to the whistleblowers, “Decisions regarding you and Mike are being handled above my pay grade, I have no input in all that, all I care about is OFTD.”
- On June 23, 2022, a memorandum was sent to All Employees of OFTD (10-15 employees), updating all employees to new Investigative Program Specialist titles.⁷ The memo states, in part: “This change will not have financial and professional impacts for most employees[.]”. Of the 10-15 employees who received the memo, only two suffered financial and professional impacts because of the change in title and responsibilities. Those two were the whistleblowers, Mr. Jones and Mr. Taylor. This change was also the official notice informing them that their firearms and law enforcement (LE) authority would be removed. It also meant that Mr. Taylor would have his law enforcement retirement coverage taken, which consists of an additional 14% of his salary put towards his pension payments⁸, after close to 30 years of federal service, 15 of which were under

³ *Id.*

⁴ Email from Fred Wynn, to DHS OIG Whistleblower Protection Coordinator and DHS Office of General Counsel, (Dec. 20, 2022), (on file with Committee staff).

⁵ *Id.*

⁶ *Id.*

⁷ Memorandum from George Talton, Acting Director, Operational Field Testing Division, CBP to All Employees, Operational Field Testing Division, (June 23, 2022), (on file with Committee staff).

⁸ *LEO Special Retirement Coverage*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/employee-resources/benefits/retirement/leo-ecbpo/leo-special-retirement-coverage>, (last visited Aug. 15, 2023).

the LE capacity.⁹ The removal of their LE authority was effective February 26, 2023, as evidenced in letters to Mr. Jones and Mr. Taylor from Ms. Lissette Blanks, Director of OFTD, on February 7, 2023.¹⁰

The actions taken by CBP senior leadership are unacceptable and sends exactly the wrong message. Patriotic whistleblowers should be praised for stepping forward to report wrongdoing, not face retaliation and the destruction of their careers. Federal government employees have a responsibility to report evidence of wrongdoing and misconduct and the law protects them when they do so.

Accordingly, based on the allegations received by my office, DHS and CBP should immediately institute corrective action for these whistleblowers. The government's apparently illegal and unwarranted actions only serve to chill other employees from reporting wrongdoing and demonstrate a complete failure by CBP leadership to obey the letter and intent of federal whistleblower protection laws.¹¹

Based on the OSC investigation and statements made by the whistleblowers, please answer the following questions no later than September 1, 2023.

1. What is CBP's response to the letter from U.S. Office of Special Counsel (OSC) dated December 2, 2021? Please provide supporting documentation.
2. What has DHS done to correct the retaliatory actions against the whistleblowers identified in the OSC letter? Please describe the steps you have taken to ensure that the whistleblowers are reinstated to their previous roles as law enforcement, compensated for their lost pay and retirement and also that all other forms of reprisal against them for their protected whistleblowing activity are immediately stopped. Provide all records.
3. With respect to DHS and CBP disciplinary policy and its associated table of penalties, what disciplinary action has DHS/CBP applied to the officials identified in the OSC letter and communications from the whistleblowers to the DHS OIG and DHS General Counsel? If none, please explain why not?
4. Please provide a list of the policies and procedures that DHS and CBP currently have in place to ensure that referrals to the DHS Whistleblower Protection Coordinator are kept confidential to protect whistleblowers.

⁹ *Id.* In order to qualify for Law Enforcement retirement, a total of twenty (20) years of law enforcement service must be completed. Therefore removing this designation effectively erases fifteen (15) years of LEO services and disqualifies Mr. Taylor from an increased retirement payment.

¹⁰ Memorandums from Lissette Blanks, Director Operational Field Testing Division, CBP to Mark Jones, Operations Manager – Operational Field Testing Division, and Michael Taylor, Operations Manager – Operational Field Testing Division, (Feb. 7, 2023), (on file with Committee staff).

¹¹ See 5 U.S.C. § 2302(b)(8)(A), (B) and (9)(C).

5. What is DHS's policy on the length of time the Whistleblower Protection Coordinator should make contact with a whistleblower upon receipt of a claim?
6. Mr. Jones and Mr. Taylor were removed from leadership roles on February 21, 2018. As supported by the OSC investigation, since their removal and for the last five years they have been left without meaningful duties and involuntarily transferred numerous times. Most recently on February 22, 2023, they both had their law enforcement credentials, badge, firearms, law enforcement authorities and law enforcement retirement removed further demoting them from prior leadership and law enforcement positions to Analysts/Specialists. Please explain in detail and with justification why this took place.
7. At what point did DHS become aware that CBP/Office of Intelligence (OI) had instructed its WMD Division to cease almost all WMD-related activities? Were you aware that there were no mechanisms in place that would allow this highly specialized work to continue elsewhere within DHS/CBP? When were changes made to the organizational structure that eliminated the Weapons of Mass Destruction Division within CBP/OI?
8. Please describe the steps you are taking to ensure that other DHS and/or CBP supervisors honor whistleblower protections and adhere to the law.
9. How much taxpayer money does DHS and CBP spend each year on training and educating personnel with respect to whistleblower rights and protections? Provide all whistleblower training and education records.

If you have any questions, please contact Julian Wilson at (202) 224-0642.

Sincerely,



Charles E. Grassley
Ranking Member
Committee on the Budget

cc: The Honorable Joseph V. Cuffari
Inspector General
Department of Homeland Security