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March 27, 2009

CB-7521-09-0012-T-1

Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

Re: *Social Security Administration v. Dan R. Hyatt*

Dear Clerk of the Board:

Pursuant to 5 C.F.R. §§ 1201.137, 1201.138, enclosed please find two copies of the Agency's Statement of Charges and Specifications in the above-captioned case for filing with the Board. As noted on the enclosed Certificate of Service, a copy of the same has been transmitted to the Respondent.

Should you have any questions regarding this matter, please do not hesitate to contact me as the Agency Representative in this matter. My contact information is noted below.

Sincerely,

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cc with enclosure via certified and regular mail:
Dan R. Hyatt

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CLERK OF THE BOARD

SOCIAL SECURITY ADMINISTRATION BALTIMORE MD 21235-0001

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

SOCIAL SECURITY ADMINISTRATION,

Agency,

v.

DAN R. HYATT,

Respondent.

Docket No.

Date:

STATEMENT OF THE CHARGES AND SPECIFICATIONS

The Social Security Administration ("SSA" or "Agency") proposes to suspend Dan R. Hyatt ("Respondent") for 30 days from his position as an SSA administrative law judge ("ALJ") appointed pursuant to 5 U.S.C. § 3105, as the Agency believes that good cause supports Respondent's suspension. In accordance with 5 U.S.C. § 7521 and corresponding regulations, the Agency refers this matter to the Merit Systems Protection Board ("MSPB" or "Board") to determine if there is good cause to suspend Respondent.

General Background

Respondent is an ALJ assigned to the Portland, Oregon Hearing Office of SSA's Office of Disability Adjudication and Review ("ODAR"). The Portland Hearing Office is one of approximately 140 hearing offices throughout the nation under the umbrella of ODAR, which administers the nationwide hearings and appeals program for SSA. ALJs employed by SSA,

including Respondent, are responsible for holding hearings and issuing decisions in accordance with the Social Security Act, its implementing regulations, and Agency policy. The Charges against Respondent are as follows:

CHARGE I: Unauthorized Release of Personally Identifiable Information

Specification: In or around February 2008, Respondent provided a compact disc digital recording of a Social Security hearing ("Hearing CD") to an investigator of the Oregon State Bar ("OSB"); the Hearing CD contained personally identifiable information about a claimant who had appeared before Respondent.

Narrative

On February 21, 2007, Respondent started a hearing regarding a claimant's claim for Social Security benefits, but ended it shortly thereafter. A digital recording was made of the truncated hearing. The claimant was represented at the hearing by an attorney representative. In or around February 2008, nearly a year after the hearing, Respondent provided a copy of the Hearing CD made of the February 21, 2007 hearing to an investigator with the OSB. The Hearing CD was annotated with the claimant's name and Social Security number, and the recording content contained personally identifiable information about the claimant, such as his disability application history and one of his doctor's names. On February 22, 2008, the Portland, Oregon, Hearing Office received a copy of an undated letter from the claimant addressed to the OSB complaining that Respondent had improperly given the OSB a copy of the digital recording made of his hearing. The claimant noted that the Hearing CD provided to the OSB contained the claimant's name, Social Security Number, and information about his February 2007 hearing. The claimant provided copies of his letter to the City of Tigard Police Department, SSA, the U.S. Attorney in Portland, and the FBI in Portland.

On February 22, 2008, Sue Leise, the Portland Hearing Office Director, discussed the letter with Respondent, and Respondent admitted that he had provided the Hearing CD in question to the OSB. On February 25, 2008, Ms. Leise again spoke with Respondent and informed him that she would have to alert ODAR management in the ODAR Regional Office in Seattle about the claimant's complaints and the Respondent's unauthorized release of personally identifiable information. Respondent indicated that he understood but suggested that Ms. Leise did not have to inform the Region that Respondent was the individual who had actually provided the Hearing CD to the OSB. Ms. Leise informed Respondent that she could not withhold information regarding Respondent's involvement, and Respondent indicated that he understood her position.

On March 17, 2008, Regional Chief Administrative Law Judge David DeLaitre questioned Respondent about his role in disclosing the Hearing CD to the OSB. Respondent stated, among other things, that he had made several copies of the Hearing CD at the time of the hearing, and he was not aware of the Agency's policy against referring complaints against representatives directly to state bars; however, he also stated that he was careful not to file a complaint, but only responded to the bar's request for information. Respondent stated that the representative in question was incompetent, and that he had no confidence that management would take any action on his complaint against the representative. He also stated that he did not consult with Agency management before disclosing the Hearing CD because either management would do nothing or perhaps try to advise him not to disclose the Hearing CD, which he wanted to do. He also stated that in his opinion, state agency requests are exempt from the Privacy and Freedom of Information Acts. Finally, Respondent stated that as an ALJ, he is required to be an active member of the bar, and the bar requires him to disclose complaints against other attorneys.

Respondent's conduct is particularly egregious given that he was on specific notice that the Agency has strict rules about maintaining the confidentiality of personally identifiable information, and prohibits this type of unauthorized release. In 2004, a Social Security claimant's representative filed a complaint against Respondent with the OSB. In an effort to defend himself, Respondent gathered over 200 pages of exhibits and documents pertaining to hearings involving the claimant and the claimant's representative. On June 7, 2004, SSA Regional Chief Counsel Lucille Meis advised Respondent via email that he could not release any documents protected by the Privacy Act, and that the Agency's Annual Personnel Reminders "reinforced" this advice. On July 23, 2004, SSA Regional Chief Administrative Law Judge DeLaitre sent an email to SSA Chief Administrative Law Judge David Washington stating that Respondent's actions were "extremely disconcerting" because the Respondent continued to contemplate submitting the documents he had gathered despite having been advised by SSA Regional Chief Counsel Meis not to submit any materials in violation of the Privacy Act. After discussing the matter with SSA Regional Chief Counsel Meis on July 26, 2004, Respondent finally agreed not to submit the material because of Privacy Act concerns.

In addition, on December 14, 2007, approximately 2 months before Respondent released the personally identifiable information on the Hearing CD to the OSB, Respondent signed a statement acknowledging that he had read and understood SSA's Annual Reminder on Safeguarding Personally Identifiable Information (PII) for SSA Employees. See Exhibit A. Respondent further acknowledged that he understood his responsibility to protect personally identifiable information, to maintain appropriate security controls, and to report the loss or suspected loss of personally identifiable information. Id. The Annual Reminder provides that "[e]ach SSA employee is responsible for properly safeguarding PII from loss, theft or improper

disclosure, including inadvertent disclosure, and to immediately notify his/her supervisor of any breach, loss or potential loss of PII in any form." Id. The Annual Reminder also provides that "[e]mployees who fail to adequately safeguard PII or who violate Agency policies for safeguarding PII may be subject to disciplinary action up to and including removal from Federal service or other actions in accordance with applicable law and Agency policy." Id.

Respondent was clearly on notice that providing to the OSB a Hearing CD containing personally identifiable information violated SSA policy and raised significant Privacy Act concerns. As SSA Regional Chief Administrative Law Judge DeLaitre indicated to SSA Chief Administrative Law Judge Washington in 2004, SSA Regional Chief Counsel Meis had previously advised Respondent that he could not provide material containing personally identifiable information to the OSB because of Privacy Act concerns, and Respondent subsequently agreed that he would not submit the material containing personally identifiable information that he had gathered, due to those Privacy Act concerns. Respondent also acknowledged in December 2007 that he had read and understood the Agency's Annual Reminder on employee duties regarding personally identifiable information. Nevertheless, around February 2008, Respondent provided a copy of a claimant's Hearing CD, which contained personally identifiable information, to the OSB. Respondent, therefore, failed to adequately safeguard personally identifiable information and violated Agency policies for safeguarding personally identifiable information.

CHARGE II: Failure to Follow Agency Policy Regarding Reporting Allegations of Representative Misconduct

Specification: In or about February 2008, Respondent violated Agency policy when he filed a complaint against a Social Security representative with the OSB.

Narrative

In or about February 2008, Respondent provided to an investigator of the OSB a Hearing CD that contained personally identifiable information about a claimant who had appeared at a hearing before Respondent. Respondent provided this Hearing CD to the OSB because Respondent believed that the Hearing CD contained information demonstrating that the claimant's representative had engaged in misconduct before SSA. The transcript of the hearing, which was included on the Hearing CD, reveals that Respondent aggressively challenged the competency of the claimant's representative and denigrated the claimant's representative in front of his client (the claimant) while officially on the record, rather than focusing on the merits of the claimant's claim for Social Security benefits, which was the purpose of the hearing. See Exhibit B. Respondent's actions violated Agency policy regarding complaints to state bars about representatives who appear before SSA. Social Security regulations provide a process for addressing representatives' violations of SSA requirements, rules, and standards for representatives. SSA procedures require ODAR employees, including ALJs, to process alleged representative conduct violations in a very specific manner: they must refer such violations to the Office of the General Counsel ("OGC") and "take no further action on the suspected violation unless requested to do so by the Office of General Law, OGC." See HALLEX I-1-1-50A., Exhibit C. The process also gives representatives charged with violation of SSA's regulations notice and an opportunity to respond and other procedural rights. See 20 C.F.R. §§ 404.1740-1799, 416.1540-1599.

In this instance, Respondent did not comply with Agency regulations and procedures. Instead, contrary to Agency policy, Respondent sent information directly to the OSB in his attempt to provide evidence of a representative's conduct. Respondent's behavior is particularly

egregious given that he knew that he was required to process any alleged violations of the rules of representative conduct pursuant to the Agency policy set forth in HALLEX. Respondent revealed that he understood SSA's policy regarding this issue when he twice admitted in a July 23, 2004, letter addressed to the OSB that "Administrative Law Judges are prohibited from making bar complaints against practicing attorneys." See Exhibit D.

CHARGE III: Conduct Unbecoming an Administrative Law Judge

Specification: Respondent engaged in conduct unbecoming an Administrative Law Judge in March 2008 when he was not fully candid when responding to questions about his actions regarding the disclosure of PII and a complaint against a representative to the state bar, and when he provided inaccurate information to OSB investigators.

Narrative

The narratives to Charge I and Charge II are incorporated herein by reference.

After Respondent provided to the OSB a Hearing CD that contained a claimant's personally identifiable information, the claimant filed a complaint against Respondent with the OSB. Respondent then provided a written statement to OSB investigators on March 18, 2008. See Exhibit E. In that statement, Respondent asserted that membership in a state bar was not a requirement of his position as an ALJ, and that he was a member of the OSB by choice. This statement to the OSB was inaccurate¹ and inconsistent with the statement he provided to his supervisor on March 17, 2008, in which he stated that membership in the OSB was a condition of his employment. Thus Respondent provided inconsistent statements, just one day apart, to two investigating bodies. Each statement purported to justify his actions for each examining authority's different purposes.

¹ Effective April 19, 2007, OPM implemented as regulation its previously announced policy that ALJs were required to maintain an active bar membership status. On July 18, 2008, OPM published notice that effective immediately pending a final rule, incumbent ALJs need not comply with the bar membership requirements.

Respondent also asserted in the March 18, 2008, statement that the Social Security claimant's signature on a Form SSA-827 (Authorization for Source to Release Information to SSA) waived the claimant's rights under the Privacy Act and authorized Respondent to disclose the claimant's personally identifiable information to the OSB. See Exhibit E. It is clear that by signing Form SSA-827, a claimant does not waive his or her privacy rights or consent to the release of personally identifiable information. Form SSA-827 specifically authorizes disclosure of information to SSA for the purpose of determining "eligibility for benefits, including looking at the combined effect of any impairments that by themselves would not meet SSA's definition of disability; and whether [the claimant] can manage such benefits." See Exhibit F, pp. 5-6. Signatories of Form SSA-827 do not authorize the kind of personally identifiable information release that Respondent perpetrated.

By his above actions, Respondent failed to comply with generally accepted standards of judicial conduct by not being fully candid, honest, or accurate in his responses to administrative inquiries.

CONCLUSION

Respondent's decision to provide to an investigator of the OSB a Hearing CD containing a claimant's personally identifiable information, and the fact that he submitted the Hearing CD to address alleged violations of the rules of conduct for representatives, demonstrate Respondent's flagrant disregard for SSA's rules and policies regarding the safeguarding of personally identifiable information and reporting allegations of representative misconduct. Furthermore, Respondent engaged in conduct unbecoming an administrative law judge when he improperly released information gained as a result of his judicial duties and when, during the investigation

that resulted from his behavior discussed above, Respondent provided inaccurate information to investigators from the OSB. As an administrative law judge, Respondent "occupies a high and prominent federal office, one requiring that its incumbents conduct themselves in a fitting manner." *Social Security Admin. v. Manion*, 19 M.S.P.R. 298, 319 (1984), *aff'd sub nom. Manion v. Department of Health and Human Servs.*, 746 F.2d 1491 (Fed. Cir. 1984)(unpublished opinion). SSA has made the safeguarding of personally identifiable information an important priority for all SSA employees. This is demonstrated by the fact that every SSA employee must acknowledge that he or she has read and understood SSA's Annual Reminder on Safeguarding Personally Identifiable Information (PII) for SSA Employees. Since Respondent intentionally released personally identifiable information knowing that such release was against SSA policy, and has refused to acknowledge or take responsibility for the behavior described above, a 30-day suspension is necessary to ensure that Respondent does not repeat his improper and unbecoming behavior.

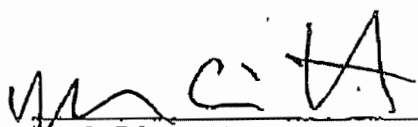
PRAYER FOR RELIEF

Accordingly, for the reasons specified, the Agency seeks authorization to suspend Respondent, Dan R. Hyatt, from his position as an ALJ for 30 days.

Respectfully submitted,

Date

03/27/09


Frank Cristaudo
Chief Administrative Law Judge
Office of Disability Adjudication
and Review
Social Security Administration