



Office of Inspections
Office of Inspector General
U.S. General Services Administration

**Evaluation of the General Services Administration's Use
of an Ad Hoc Appraisal Process for an Executive**

**JE21-002 (Redacted)
September 14, 2021**

Introduction

On June 9, 2020, the Office of Inspector General (OIG) issued an Office of Inspections report, *GSA's Performance and Appraisal System for Senior Executives Remains Deficient* (2020 Report). The report included a finding related to a senior executive's annual performance appraisal for the fiscal year (FY) 2017 performance period. The executive, Madeline Caliendo, Associate Administrator, Office of Civil Rights (OCR), received a level 4 initial summary rating from the GSA Acting Administrator, Timothy Horne. However, after considering allegations of misconduct in disciplinary reports prepared by an outside third-party reviewer, GSA Administrator Emily Murphy assigned a level 1 final summary rating and reassigned Caliendo to a lower level Senior Executive Service (SES) position.¹ Our 2020 Report found that GSA failed to provide Caliendo with a meaningful opportunity for a higher level review of her performance rating.

This evaluation follows up on our 2020 Report by examining the circumstances that resulted in the third-party disciplinary reports used to determine Caliendo's final summary rating for FY 2017. After further interviews and document reviews, we found that then GSA Chief Human Capital Officer (CHCO) Antonia Harris and GSA Office of General Counsel (OGC) supervisory attorney [REDACTED] * violated agency policy and failed to comply with basic due process principles when they:

- Bypassed the Deputy Administrator's direction to obtain an objective review to assist Caliendo with recommendations to improve her office, and unilaterally pursued a misconduct review without his knowledge or consent;
- Failed to notify Caliendo that she was the subject of a misconduct review;
- Withheld relevant information, including potentially exculpatory evidence, from the third-party reviewer, the SES Performance Review Board (PRB), and the Administrator;
- Provided flawed reports that formed the third-party reviewer's analysis;
- Failed to notify Caliendo of all the evidence presented to the third-party reviewer;
- Failed to interview or permit the third party to interview Caliendo or otherwise provide her with a meaningful opportunity to provide a response, and;
- Failed to maintain the objectivity of the third-party reviewer.

This ad hoc process violated GSA's disciplinary policy and raises serious due process concerns

¹ Acting Administrator Timothy Horne served as Caliendo's supervisor and appraisal official in 2017, until Emily Murphy became Administrator on December 12, 2017. 2020 Report at page 5, <https://www.gsaig.gov/content/gsas-performance-and-appraisal-system-senior-executives-remains-deficient>.

*Certain names have been redacted in this report to protect the privacy interests of employees at the grade GS-15 or lower.

that taint Caliendo's FY 2017 SES performance review, rating, and reassignment. Our report makes two recommendations to address the issues identified during the evaluation.

Background

Our 2020 Report found that GSA reduced Caliendo's rating from a level 4 initial summary rating to a level 1 rating for the 2017 performance period, and that Caliendo was not provided a meaningful opportunity for a higher-level review of her rating. Consequently, Caliendo was reassigned to a non-supervisory role in the 2018 performance period. Additionally, the 2020 Report showed that Caliendo was not provided a performance plan in the 2018 performance period until less than two weeks before the end of the performance period.² Because she did not have a plan for the 2018 performance period, she was precluded from receiving a rating, which in turn resulted in her not being considered for a raise or bonus.

GSA Directive CPO 9751.1, Maintaining Discipline

GSA Directive CPO 9751.1, *Maintaining Discipline* (Directive 9751.1), Revalidated August 22, 2013, provides the policy and procedures for determining whether an employee engaged in misconduct and for implementing disciplinary actions.³ Directive 9751.1 places responsibility for disciplinary action on the supervisor:

Immediate supervisors, in all instances, have the primary responsibility for acquainting employees with the standards of conduct, maintaining discipline and morale, and initiating appropriate corrective action when it becomes necessary. This is a daily responsibility of supervisors and not merely action taken at times when the employee may deviate from acceptable forms of conduct. Supervisors must thoroughly understand the purposes of disciplinary action and the methods for taking proper corrective action [emphasis added].

Directive 9751.1 further requires that in instances of suspected misconduct, supervisors "***must*** report the matter immediately" to the OIG if a suspected instance of misconduct falls under the directive's *Appendix 1 Penalty Guides Table 2* [emphasis added]. If the OIG refers the matter back to GSA, the appropriate GSA official should conduct an inquiry that includes interviews of the employee and any witnesses "to secure the facts needed to determine what disciplinary action, if any, is warranted." If the allegations warrant official action, the employee's "supervisor ***must*** prepare a written report" [emphasis added]. Directive 9751.1 recommends that supervisors

² Caliendo's supervisor asked her to backdate the performance plan to April; she declined.

³ On July 9, 2018, GSA issued an updated policy, HRM 9751.1, which made no material changes to the sections discussed above.

prepare GSA Form 225, Record of Infraction, or a similar fact gathering record for this purpose.

Management Inquiry Reports

In early 2017, GSA's Office of Human Resources Management (OHRM) received two different requests for management inquiries to address ongoing personnel issues within OCR. Ultimately, OHRM produced four separate reports (Reports). The subjects of these management inquiries were employees in Caliendo's organization; notably, the allegations were not focused on Caliendo.

Caliendo's second in command, [REDACTED], Deputy Associate Administrator, OCR, confronted multiple personnel issues within the organization. On March 21, 2017, [REDACTED] requested assistance from OHRM to arrange for a contractor to conduct a management inquiry. The request resulted in three separate reports (Reports 1-3). The first two reports were written by a contractor who interviewed personnel, analyzed the information, and made several recommendations. The contractor provided Report 1, "Fact-Finding Final Report," dated May 5, 2017.

[REDACTED] expressed concern that Report 1 was based on opinion, not fact, and lacked witness statements or an evidence file. [REDACTED] asked that the contractor address these concerns and revise the report. The contractor created a new report, Report 2, dated June 5, 2017, adding specific findings and exhibits, but also recommending that GSA expand the work to perform a "full scope investigation."⁴

After review of Report 2, [REDACTED], [REDACTED], and [REDACTED] decided another report, Report 3, was needed to supplement the work the contractor performed. A GSA Labor Relations Specialist completed Report 3 on September 7, 2017. Report 3 included witness statements and exhibits, but no narrative or recommendations.

Concurrently, in April 2017, Caliendo received allegations of harassment focused on [REDACTED]. Caliendo requested that OHRM conduct a management inquiry to help address those allegations. [REDACTED] conducted the management inquiry and prepared Report 4, which she provided to Caliendo on May 18, 2017.

Report 4 outlined 31 bullet points of "facts uncovered during the course of the management

⁴ Caliendo and [REDACTED] complied with GSA policy and provided the OIG Office of Investigations copies of the management inquiry reports. After reviewing the reports, the OIG referred the reports back to GSA.

inquiry,” but contained no written recommendations for Caliendo to take action.⁵ Caliendo assumed that the report was a draft and shared her concerns with the report, as the deciding official, when she met with [REDACTED] and [REDACTED]. On June 7, 2017, Caliendo wrote to both [REDACTED] and [REDACTED] documenting her concerns with Report 4 and addressing the bullet points one by one. Caliendo explained that, after multiple careful reviews of the report, she was concerned that there was a critical need for a full and fair inquiry reflective of the facts.

Her nine-page email articulated specific concerns with the accuracy of Report 4, including that its conclusions did not reflect all the relevant and material evidence available, that it inaccurately represented what was in the record, and that it relied on interviews that failed to ask important questions.⁶ Based on personal knowledge, Caliendo also contradicted a significant finding in the report. However, [REDACTED] and [REDACTED] failed, repeatedly, to respond to Caliendo’s June 7 email, or follow-up inquiries. [REDACTED] stated that Harris told her not to respond, and that Harris would take over as the point of contact to address any of Caliendo’s concerns. However, Caliendo never received a response to her concerns.

On-going Tension between OCR and OGC

Witnesses told us that long-standing tension between the Offices of Civil Rights and General Counsel included concerns involving [REDACTED] involvement in OCR. The U.S. Equal Employment Opportunity Commission (EEOC) requires federal agencies to avoid internal conflicts of interest in processing EEO complaints:

Ensuring a clear separation between the agency’s EEO function and the agency’s defensive function is thus the essential underpinning of a fair and impartial investigation, enhancing the credibility of the EEO office and the integrity of the EEO complaints process.

There must be a firewall between the EEO function and the agency’s defensive function. The firewall will ensure that actions taken by the agency to protect itself from legal liability will not negatively influence or affect the agency’s process for determining whether discrimination has occurred and, if such discrimination did occur, for remedying it at the earliest state possible. Management Directive 110 (EEO MD-110), Part IV (D) (Revised August 5, 2015).

At the time of these events, OCR used an OGC attorney as the OCR firewall attorney. However,

⁵ [REDACTED] said she provided recommendations orally during a meeting with Caliendo but when asked, she could not provide any details.

⁶ Caliendo is an attorney with significant employment law experience.

that attorney reported to ██████, OGC's supervisory attorney responsible for defending GSA's interests in EEO actions. Caliendo believed that ██████ acted improperly in this role. GSA has since provided an attorney position to OCR to serve exclusively as firewall counsel.

Third-Party Disciplinary Reports and Performance Review Board (PRB)⁷

Horne asked Acting Deputy Administrator Anthony Costa to look into complaints in OCR. Costa met with Caliendo on September 27, 2017, and discussed the personnel issues, Caliendo's concerns regarding support from OGC and OHRM staff, and the need for resolution.⁸

Costa told us they discussed and agreed that a third-party review was needed to identify what was going on in Caliendo's organization, and provide recommendations to her on how to repair the office issues. Costa recounted that he anticipated the review would "look at all of the material, provide an assessment of specific activities/organizational culture/processes and provide associated recommendationsto help Ms. Caliendo respond to my direction to approach the issues in her office in a more holistic way." Costa reported that when he spoke with Harris and ██████, they expressed concern with the lack of response by the OCR leadership team to the information contained in the management inquiries; however, OHRM did not complete the final part of the inquiry ██████ requested until September 7, 2017, and ██████ and ██████ had not responded to Caliendo's concerns with the report she received.

GSA's then CHCO, Harris, arranged for a senior human resources specialist from another executive agency to conduct the third-party review. ██████ was the primary GSA contact point with the third-party reviewer. Harris and ██████ met with the third-party reviewer in October 2017, and provided binders containing Reports 1-4. Additional documentation was emailed subsequently, including an organizational chart and the GSA Penalty guide. Although they provided the report (Report 4) that Caliendo had requested, they did not include her nine-page email questioning the validity of Report 4.

The third-party reviewer provided two separate disciplinary reports on December 27, 2017. Disciplinary Report 1 found misconduct on the part of several employees within Caliendo's office, and made a number of recommendations, including demotions, counseling, and training.

⁷ The PRB is responsible for reviewing each executive's Initial Summary Rating and related documentation to determine whether the rating is representative of their performance. The PRB is then responsible for recommending annual summary ratings to the Administrator, whether to accept the initial ratings or adjust them up or down, and recommending SES bonuses and salary increases. The Deputy Administrator chairs the PRB. The FY 2017 PRB included Harris.

⁸ Under GSA's organizational structure, the Office of Civil Rights falls under the Deputy Administrator (<https://www.gsa.gov/about-us/gsa-organization>). However, by law, the Administrator supervised Caliendo. 29 C.F.R 1614.102 (b)(4).

Disciplinary Report 2 focused on Caliendo. The report stated that Harris requested a review “to recommend specific disciplinary/adverse or administrative action against any individual(s) based on their misconduct.” Noting that GSA had not interviewed Caliendo for any of the reports, the reviewer stated in the report that she was unable to determine if action should be taken against Caliendo. Disciplinary Report 2 recommended that Caliendo be interviewed and receive training.

After submitting Disciplinary Reports 1 and 2 to GSA, [REDACTED] communicated with the third-party reviewer and provided additional documents. Once again, the documents did not include the nine-page June 7, 2017 email to [REDACTED] and [REDACTED] that detailed Caliendo’s concerns. Although GSA still had not interviewed Caliendo, the third-party reviewer radically changed her recommendation and produced another report on January 18, 2018. Disciplinary Report 3 found that Caliendo failed to timely address the issues in her office, and recommended severe consequences: that Caliendo receive a level 1 rating of unsatisfactory for the FY 2017 performance period and/or be removed from the SES.⁹

Administrator Murphy requested the PRB to consider the third-party reviewer’s reports, the OHRM management inquiries, and other documentation along with former Acting Administrator Horne’s Initial Summary Rating of commendable (level 4) for Caliendo. In February 2018, the GSA PRB and Caliendo received the third-party reviewer’s reports, and Caliendo learned for the first time that she was the subject of a misconduct review. [REDACTED] provided counsel to the PRB and discussed the process regarding Caliendo and the additional EEO issues with the OCR staff. Neither the PRB, nor Administrator Murphy, received Caliendo’s June 7, 2017 email nor her repeated, but unanswered, emails requesting a response. The PRB also did not solicit the views of former Acting Administrator Horne or Acting Deputy Administrator Costa, who worked with Caliendo.

Instead, the PRB accepted the conclusions and recommendation that the third-party reviewer included in her second report on Caliendo. The PRB’s Executive Summary for its recommendations to the former Administrator found that Caliendo did not take corrective action to address on-going issues, a finding of misconduct.

Our report examines the processes, and incomplete and flawed information, relied on by OHRM, OGC, the third-party reviewer, the PRB, and the former Administrator.

⁹ An SES member who receives an unsatisfactory rating must be reassigned or transferred within the SES or removed from the SES. Two unsatisfactory ratings within 5 years requires removal from the SES. 5 U.S.C. § 4314 (b)(3).

Finding: GSA violated agency policy and failed to comply with basic due process principles

Harris and [REDACTED] violated Directive 9751.1 when they bypassed Costa's direction to obtain an objective review of the Office of Civil Rights issues for Caliendo's use, and instead unilaterally sought a misconduct review. Without the consent of Caliendo's supervisor, Harris independently requested a review of Caliendo's actions, framed by Harris as a "misconduct" review, based on the four management inquiry Reports compiled by OHRM to review Caliendo's subordinates.

Shortly before GSA's SES performance period ended on September 30, 2017, Caliendo met with Costa to discuss the personnel issues in her office addressed in the management inquiries. According to Costa, they discussed and agreed that a third-party review of the management inquiries (Reports 1 through 4) was needed. Costa stated that he wanted an objective review to be conducted for Caliendo's use, and that he anticipated handing the third-party reviewer's report to her to propose a set of actions to address the personnel issues.

In order to initiate the objective review, Costa requested assistance from Harris and [REDACTED]. Harris subsequently arranged for another agency to conduct the third-party review. Costa stated that he understood that the third-party reviewer would review Reports 1 through 4 and provide recommendations that Caliendo could use to address pending management issues in her office.

Costa did not ask or authorize Harris or [REDACTED] to have Caliendo evaluated for alleged misconduct. However, the third-party reviewer documented in her reports that Harris asked the third-party reviewer to recommend specific disciplinary/adverse or administrative action against any individual(s) based on their alleged misconduct described in the information and reports GSA provided. In circumventing the supervisor's authority and responsibilities, Harris and [REDACTED] also did not report Caliendo's suspected misconduct to the OIG prior to initiating their misconduct review in accordance with Directive 9751.1. More fundamentally, they did not notify Caliendo that she was the subject of a misconduct review (rather than the intended beneficiary of that review as Costa intended); did not permit the third-party reviewer to interview her or otherwise provide an opportunity for Caliendo to provide input to the reviewer; provided the reviewer reports that OHRM found deficient while withholding Caliendo's own analysis of the report she requested; and failed to maintain the objectivity of the third-party reviewer.

The deviation from the requirements of Directive 9751.1 resulted in an ad hoc process that lacked basic principles of due process and tainted the SES performance review process that used the third-party reviewer's disciplinary reports to justify rating Caliendo's performance as unsatisfactory and remove her from her position.

GSA bypassed supervisor notification to OIG and undermined the SES performance process.

Directive 9751.1 requires supervisors to immediately refer misconduct offenses to the OIG prior to initiating an inquiry.¹⁰ Neither Horne nor Costa referred misconduct issues to the OIG regarding Caliendo. Instead, Harris and ██████ initiated a review “to recommend specific disciplinary/adverse or administrative action against any individual(s) based on their misconduct.”

██████ called the OIG Office of Investigations on October 16, 2017, and discussed the management inquiries and complaints about Caliendo’s organization. ██████ subsequently obtained hotline complaints related to Caliendo’s office. Records show that ██████ stated that Costa had decided to have an independent management review conducted that would incorporate all of the hotline complaints. However, ██████ did not disclose to the OIG Office of Investigations that Harris had already asked a third-party reviewer to conduct a misconduct review that included Caliendo.

In mid-November 2017, ██████ updated Costa on the third-party review progress. It was at this point that Costa first learned that the third-party review would provide information on the overall leadership team issues in Caliendo’s organization and observations about her actions. Although the new scope of the review differed from Costa’s initial expectation for the third-party review, he remained uninformed that Harris had actually requested a misconduct review that included Caliendo. Costa stated that he never received the third-party reports which were provided to ██████ and Harris.

On December 5, 2017, having not received any additional information from the third-party reviewer, Horne determined that Caliendo had met and exceeded her performance metrics, and assigned an initial summary rating of 4, commendable. Costa stated that he advised Horne that any issues identified by the third-party reviewer should be addressed in Caliendo’s performance plan for next year.

At the time, neither Horne nor Costa knew that Harris not only had violated Directive 9751.1 by failing to refer potential misconduct to the OIG before requesting assistance from the third-party reviewer, but also that Harris had circumvented the authority and discretion of Caliendo’s supervisors, then Acting Administrator Horne and Acting Deputy Administrator Costa, who was supporting Horne in helping Caliendo resolve the personnel issues in her organization.

¹⁰ Examples of misconduct offenses are found in *Appendix 1, Penalty Guide Table 2*, of Directive 9751.1.

GSA restricted the third-party review to flawed reports while withholding relevant information and an opportunity to interview Caliendo

The third-party reviewer told us that GSA only permitted her to review the documents that Harris and [REDACTED] provided, and the review was limited to this “sandbox.” The third-party reviewer stated that she relied on no other information in making her disciplinary reports and the objective of her review was to assess whether one or more individuals should be reprimanded or disciplined. The third-party reviewer initially raised concerns internally with her own agency’s CHCO for what the reviewer considered an abnormal process; however, the reviewer stated she did not feel she could decline performing the review for GSA.

The third-party reviewer stated she was not satisfied with a lot of the information that Harris and [REDACTED] provided. She also recalled that, in the initial meeting with Harris and [REDACTED], they informed her that the management inquiry reports were “not great.” Mirroring the assessment by GSA, the third-party reviewer concluded that Reports 1 and 2, which OHRM and its contractor prepared for [REDACTED], were not very good. The third-party reviewer stated that Report 3 was not much better than Reports 1 and 2, and did not answer all of the questions, and that Reports 3 and 4 were not even signed or dated.

In order to produce Reports 1 through 4, OHRM and its contractor conducted 11 interviews and obtained 14 witness statements. None of those interviews or statements came from Caliendo. The third-party reviewer stated that GSA should have interviewed Caliendo for the Reports.

The third-party reviewer told us that the biggest obstacle to her review was that the information GSA provided was not comprehensive, and particularly highlighted the absence of an interview of Caliendo. Nonetheless, the parameters of the review Harris and [REDACTED] set required the third-party reviewer to prepare her disciplinary reports based solely on the Reports, despite the known shortcomings which GSA acknowledged.

However, [REDACTED] withheld information they received from Caliendo that included potentially exculpatory evidence. Importantly, [REDACTED] omitted from the information shared with the third-party reviewer Caliendo’s nine-page June 7, 2017, email correspondence to [REDACTED] and [REDACTED] cataloging 23 specific concerns as to the accuracy, lack of sufficient evidence, and unresolved questions in Report 4. The two follow-up emails from Caliendo to [REDACTED] and [REDACTED] regarding their non-response to Caliendo’s concerns also were excluded from the documentation provided to the third-party reviewer, although both Harris and [REDACTED] were aware of Caliendo’s June 7, 2017 email.

[REDACTED] stated that Caliendo could have asked for the email to be included in the review and that nothing prevented Caliendo from providing documents to Costa to give to the third-party

reviewer. However, ██████ acknowledged that she personally did not converse with Caliendo about the review and did not consult Caliendo for documents. Additionally, neither Costa nor Caliendo were told that the reviews that focused on the conduct of her subordinates were going to be used to assess misconduct and recommend disciplinary action against Caliendo. Throughout the process, Caliendo remained unaware of information given, or withheld, from the third-party reviewer.

Disciplinary Report 3 Lacks Objectivity

The third-party reviewer documented in both Disciplinary Reports 2 and 3 that Caliendo was not interviewed in any of the four management inquiry Reports. The reviewer's first report on Caliendo (Disciplinary Report 2), issued on December 27, 2017, determined that the absence of an interview left an incomplete record for assessing possible misconduct: "Based on the lack of information regarding her role, it is unable to be determined if action should be taken against Ms. Caliendo."

The third-party reviewer recommended that GSA inquire into Caliendo's knowledge of the events before considering any further action and that she receive training. However, by the time Disciplinary Report 2 was issued, Costa was no longer the Acting Deputy Administrator. Harris and ██████ could have arranged for Caliendo to be interviewed, but did not.

Instead, ██████ sought a revised report. On January 11, 2018, ██████ provided the third-party reviewer email correspondence that Caliendo had sent Costa on September 22, 2017. ██████ explained that providing the emails would be sufficient to satisfy the third-party reviewer's recommendation that GSA interview Caliendo, because the emails documented Costa's knowledge of concerns with OCR and his conversations with Caliendo. Despite this additional opportunity, ██████ continued to withhold Caliendo's June 7, 2017 email. That email to ██████ and ██████ provided Caliendo's specific concerns with the accuracy of Report 4, including that its conclusions did not reflect all the relevant and material evidence available, that it inaccurately represented what was in the record, and that it relied on interviews that failed to ask important questions.

██████ also discussed Disciplinary Report 2 in a phone call with the third-party reviewer. The third-party reviewer said it was clear from the information GSA provided that Caliendo did not correct blatant problems that were ongoing in OCR. But she also expressed to ██████ that the report she had prepared was "not a normal thing to be done," and that "I don't have all of the information." The third-party reviewer stated that ██████ response was essentially, "this is what we have." Yet in fact, ██████ had withheld information from the third-party reviewer.

The third-party reviewer further recalled commenting to ██████ that Caliendo should have been

more engaged as a leader when the issues cited in the management inquiries occurred, and that Caliendo's lack of involvement was "significant and improper." She said that ██████ stated, "If she was absent, isn't that a problem?" ██████ asked her to revise Disciplinary Report 2 and "put more of that in the document." In providing this direction to the third-party reviewer and requesting a revised report, ██████ interjected herself in the misconduct review of Caliendo and improperly influenced the objectivity of the reviewer.

On January 17, 2018, the third-party reviewer provided GSA a revised report, Disciplinary Report 3. This time, the third-party reviewer recommended that Caliendo receive a level 1 performance rating of unsatisfactory for the FY 2017 performance period and/or be removed from the SES.¹¹ The third-party reviewer did not explain the sharp discrepancy between Disciplinary Report 2's conclusion – that she could not find misconduct without an interview of Caliendo and additional information – and Disciplinary Report 3's finding of misconduct that justified Caliendo's removal from the SES.

Moreover, the third-party reviewer told us that neither Disciplinary Report followed her typical practice. Both Disciplinary Report 2 and Disciplinary Report 3 lacked a Summary of Significant Facts, found in Disciplinary Report 1's analysis of Caliendo's subordinates. The third-party reviewer stated that she did not include a "fact pattern" about Caliendo in either Disciplinary Report 2 or 3, and explained that a fact pattern was normally used to support any disciplinary recommendations. When asked why the fact pattern was missing, the third-party reviewer stated that there was insufficient information or not "good information." The third-party reviewer told us that the absence of a fact pattern meant the recommendations were not supported.

The third-party reviewer stated she did not have enough information to establish a fact pattern in either Disciplinary Report 2 or 3. Nonetheless, she was told to look only at the information provided, identify misconduct, and make recommendations relating to discipline. That is what she did. She told us she only made a misconduct determination and did not look at performance.

GSA tainted Caliendo's performance review by using the flawed disciplinary report to justify a level 1 unsatisfactory rating that required her transfer.

Horne's initial summary rating of Caliendo determined that she had met or exceeded all her metrics, and rated her FY 2017 performance as commendable, level 4. Horne no longer supervised Caliendo by the time the third-party reviewer submitted disciplinary reports to GSA in December and January; Administrator Murphy supervised Caliendo and requested the PRB to review the third-party-reviewer reports and related materials.

¹¹ Disciplinary Report 3 also recommended training for Caliendo.

The PRB was the first to evaluate Caliendo's alleged misconduct for GSA. Harris told us that she was not aware that anyone other than a supervisor could provide the information needed to find misconduct relative to a performance review. The PRB could have sought input from Caliendo's supervisors, Horne and Costa; if they had, they would have learned that neither requested a misconduct report. The PRB could have interviewed Caliendo to understand her perspective and consider information she might offer, but did not. Instead, the PRB limited its review to the materials provided. Notably, neither the PRB nor Caliendo were provided the full body of evidence submitted by Harris and [REDACTED] to the third-party reviewer.¹² Nor did the PRB receive the information Harris and [REDACTED] withheld from the third-party reviewer.

On February 9, 2018, then GSA Administrator Murphy provided Disciplinary Reports 1 through 3 to Caliendo, who learned for the first time that she was the subject of a misconduct review. According to contemporaneous emails, Murphy met with Caliendo to discuss the disciplinary reports, and provided her five days to provide a response to the reports for the PRB to consider, which was later extended to February 20, 2018. Murphy provided Caliendo only seven business days to address a report that took three months to produce and recommended either removal from the SES or a performance rating of level 1, unacceptable. On February 12, 2018, Caliendo sent an email directly to members of the PRB asking the PRB not to consider the new information until she was provided a proper higher level review. The PRB did not accept Caliendo's request.

On March 16, 2018, the PRB found misconduct and accepted the third-party reviewer's Disciplinary Report 3 recommendation that the former Administrator should reduce Caliendo's performance rating from a level 4 to a level 1. The misconduct attributed to Caliendo was her failure to take "corrective action."¹³

Murphy accepted the PRB's recommendation and reassigned Caliendo to a nonsupervisory SES position in the GSA Office of Administrative Services (OAS) in April 2018. Because she did not receive a performance plan for FY 2018, Caliendo became ineligible for a performance rating,

¹² OHRM provided the PRB the third-party Disciplinary Reports 1-3; the management inquiry Reports 1, 2, and 4 and other related supporting documentation; and Caliendo's FY 2017 Initial Summary Rating provided by Horne. Report 3 was not provided to the PRB or Caliendo.

¹³ Chapter 8 of the Office of Personnel Management's 2016 SES Desk Guide distinguishes between performance and misconduct:

Unacceptable performance results when the employee cannot perform acceptably in their job because they lack the skill, specific knowledge, or the ability to meet the performance standard of an element or elements in their performance plan. Misconduct, neglect of duty, and malfeasance, on the other hand, denote a wrongful act on the part of the employee. Corrective action of Senior Executive Services employees does not require a finding of intent.

Harris confirmed that GSA follows the Desk Guide.

pay raise, or performance bonus.¹⁴

The third-party reviewer and the PRB did not know that Caliendo had not received a response to her written concerns about Report 4, despite her repeated requests, and that OHRM did not provide [REDACTED] with Report 3 until September 7, 2017 - 23 days before the end of the FY 2017 performance period. (The PRB did not receive Report 3 at all, and the third-party reviewer's copy was unsigned and undated.) Nor did they know that on September 27, 2017, Costa and Caliendo agreed to have a third party review the management inquiry reports and provide recommendations to assist Caliendo in addressing the issues in OCR.

The PRB also did not have the benefit of [REDACTED] judgment that the contractor's Report 1 "was based on opinion versus fact" and that Report 2 "still lacked substance." They lacked the third-party reviewer's judgment that the four Reports Harris and [REDACTED] provided were "not very good," and her understanding that Harris and [REDACTED] recognized that the Reports were "not great." Additionally, Caliendo had documented significant concerns with Report 4 that [REDACTED] and [REDACTED] repeatedly failed to address and that [REDACTED] withheld from the third-party reviewer. Like the PRB, the former Administrator did not have this additional information when she accepted the PRB's recommendation to reduce Caliendo's performance rating to a level 1, and transferred her to a lower level SES position.

Conclusion

GSA failed to comply with basic due process principles and its own Directive 9751.1 when evaluating whether Caliendo should be penalized for alleged misconduct. Specifically, the GSA Chief Human Capital Officer, Antonia Harris, and Office of General Counsel supervisory attorney, [REDACTED], without authority or approval, inappropriately bypassed established standards.

Harris and [REDACTED] circumvented the supervisor's role and responsibilities when they unilaterally pursued a misconduct review without the consent of Caliendo's supervisor, failed to permit the third-party reviewer to interview Caliendo, withheld exculpatory evidence from the third-party reviewer, PRB, and Administrator, and failed to maintain the objectivity of the third-party reviewer. Further, Caliendo was not notified of the entirety of the evidence provided to the third-party reviewer, and was not permitted a meaningful opportunity to respond to the disciplinary reports when the PRB found misconduct based on a third-party agency's recommendation that did not comply with GSA's policy.

¹⁴ Agencies are required to provide annual performance plans for SES members. 5 U.S.C. § 4312 (b)(1); 5 CFR § 430.306 (a).

As a result, the former Administrator's final performance rating for Caliendo was based on an improper process, flawed reports, and incomplete information that tainted Caliendo's annual summary rating of unacceptable and her reassignment to a lower level SES position, and precluded her the opportunity to receive a salary adjustment and subsequent ineligibility to receive a bonus.

Response to Management Comments

In response to our draft report, GSA's General Counsel stated that the Agency "respectfully disagree[s] with some of the facts as presented and the corresponding inferences in the report." GSA did not identify which facts and inferences the Agency disputes, nor provide any evidence that might support their statement.

The General Counsel also stated that the Agency "believe[s] that the report at times conflates the standards and processes for the SES performance appraisal system with misconduct procedures." This statement disregards the overlap between performance and misconduct discussed in the Office of Personnel Management's Desk Guide, cited in the report. That Guide also recognizes that agencies may use performance procedures to address "misconduct, neglect of duty, or malfeasance."¹⁵

The Agency's apparent belief that the action to remove Ms. Caliendo from her Associate Administrator position did not involve alleged misconduct also ignores the facts. GSA personnel initiated a third-party misconduct review by specifically requesting a misconduct report, received and rejected a report that lacked a misconduct finding, then received a revised report containing a misconduct finding and used it to justify taking personnel action.

Finally, the response states the Agency had "referred allegations of misconduct in the Office of Civil Rights to the OIG in June 2017." This statement fails to acknowledge that GSA never referred allegations of misconduct against Caliendo to the OIG.

GSA has agreed to consider our report recommendations and pursue resolutions as appropriate. Management's response can be found in its entirety in Appendix B.

Recommendations

- (1) The Administrator should take appropriate action to remedy the harm caused Ms. Caliendo by a tainted performance review process that resulted in an unsatisfactory rating

¹⁵ Chapter 8 of the Office of Personnel Management's 2016 SES Desk Guide, citing decisions from the U.S Court of Appeals for the Federal Circuit and the Merit System Protection Board.

and in her removal from the Associate Administrator position, as well as the loss of any opportunity for a FY 2017 performance period pay increase or bonus.

- (2) The GSA General Counsel and Chief Human Capital Officer should review current processes and procedures to ensure sufficient oversight of employee misconduct and disciplinary reviews, including timely referral to the OIG.

Appendix A: Objectives, Scope, and Methodology

On December 26, 2018, the Office of Inspections initiated an evaluation of management actions taken to address key issues and recommendations regarding executive performance evaluation practices identified in our May 16, 2013 report, *GSA Practices for Executive Performance Recognition and Awards*. Based on our review, we issued report JE20-001 *GSA's Performance and Appraisal System for Senior Executives Remains Deficient* on June 9, 2020. During the review, we identified instances that warranted a separate report to provide additional analysis on the events leading to Caliendo's 2017 performance appraisal. To accomplish our objectives, we:

- Researched laws, rules, regulations, and other federal guidance on the SES performance plan and appraisal process and handling disciplinary actions including misconduct;
- Researched and reviewed relevant audits and inspections conducted by GSA OIG, Government Accountability Office, and other federal agencies;
- Interviewed agency management and staff from the Office of Administrative Services, Office of Human Resources Management, Office of General Counsel, Public Buildings Service, and Federal Acquisition Service;
- Interviewed former GSA leadership;
- Interviewed third-party reviewer from external agency;
- Reviewed email documentation from OHRM and other GSA officials; and
- Reviewed Performance Review Board (PRB) documentation.

This evaluation was conducted in accordance with the *Quality Standards for Inspection and Evaluation* (January 2012), issued by the Council of the Inspectors General on Integrity and Efficiency.

Appendix B: Management Comments



U.S. General Services Administration

September 7, 2021

MEMORANDUM FOR: PATRICIA D. SHEEHAN
ASSISTANT INSPECTOR GENERAL FOR INSPECTIONS

FROM: NITIN SHAH
GSA GENERAL COUNSEL

SUBJECT: Response to the Office of Inspector General Draft Report,
*Evaluation of the General Services Administration's Use of
an Ad Hoc Appraisal Process for an Executive (JEF18-012-001)*

Thank you for the opportunity to comment on the subject audit report, which follows up on a June 2020 Office of Inspector General (OIG) report on GSA's Performance and Appraisal System for Senior Executives.

In 2020, GSA implemented *USA Performance (USAP)*, OPM's web-based automated system, to further streamline the efficient and effective management of all three phases of the annual Senior Executive Service (SES) performance management and appraisal system, including planning, monitoring, and rating senior executive performance. Rating officials and their SES direct reports electronically sign performance plans and ratings in this automated system, as well as certify mandatory progress reviews at mid-year. The USAP system also automates the Performance Review Board's review of executives' initial summary ratings, including any higher level review if requested by the executive, and final approval by GSA's appointing authority, the GSA Administrator. In addition, GSA is in the process of leveraging the USAP system to electronically transfer annual summary ratings into SES employees' electronic Official Personnel Folder (eOPF) beginning with FY 2021 ratings. Through USAP, 100% of executives had a fully executed performance plan, signed by both rating officials and executives, on or before the beginning of the FY 2021 appraisal cycle. In addition, GSA also updated agency policies for the SES Performance Management and Appraisal System on December 16, 2020, as well as the SES Pay and Performance Awards policy on December 14, 2020. GSA's performance management and appraisal system has been certified by the U.S. Office of Personnel Management since February 2014, and we are confident that these improvements will result in an even stronger and more efficient tool for the agency and its senior executives.

GSA will consider the OIG's recommendations in this audit report and pursue resolutions as appropriate. While we share the important goal of ensuring that the GSA

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SES performance and appraisal system complies with the law and provides a fair and accurate means to assess senior executive performance, we respectfully disagree with some of the facts as presented and the corresponding inferences in the report. As we discussed with the OIG, GSA continues to believe that the report at times conflates the standards and processes for the SES performance appraisal system with misconduct procedures. We also recognize the OIG's position that Directive 9751.1 required GSA to refer the matter in question to the OIG, even after the agency had already referred allegations of misconduct in the Office of Civil Rights to the OIG in June 2017. We respectfully disagree with the assertion that the agency or agency employees intentionally and unilaterally attempted to circumvent an OIG review of the matter or to purposefully deny an employee due process.

In conclusion, GSA appreciates the OIG's assistance in improving the agency's performance and appraisal system and ensuring that all employees, including employees in the Senior Executive Service, are properly held accountable. We look forward to working with the OIG on this and future matters.

If you have any questions, please contact Daniel Hall, Associate General Counsel, General Law at 202-213-7774 or daniel.hall@gsa.gov.



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