Before the
CORPORATION FOR NATIONAL AND COMMUNITY SERVICE
Washington, DC 20024

In re Heal the City Free Clinic	)	OIG Report: Case File I22HQ00123

MEMORANDUM AND ORDER

This matter requires the agency[1] to interpret and apply Section 828 of the National Defense Authorization Act, 41 U.S.C. § 4712 (NDAA), to a Report of Investigation (Report) prepared by the Office of Inspector General in response to a whistleblower retaliation complaint filed by employees of an agency grantee. A whistleblower is an employee of a Federal contractor, sub-contractor, grantee, subgrantee, or personal services contractor who discloses information that the individual reasonably believes is, *inter alia*, a violation of law, rule, or regulation related to a Federal contract or grant. Retaliation against a whistleblower is prohibited by law and agency policy. As in previous reports of whistleblower retaliation, we exercise our authority under the NDAA aware of the importance Congress places on encouraging prompt disclosure by whistleblowers, including federal employees, contractor employees and grantee employees, of reasonable concerns about potential violations of federal statutes, rules, and policies.

[1] On October 15, 2020, the Corporation for National and Community Service adopted the operating name "AmeriCorps." 45 C.F.R. § 2500 *et seq*. This Memorandum Decision and Order refers interchangeably to "AmeriCorps" or "the agency."

BACKGROUND

Respondent Heal the City Free Clinic (HTC), Amarillo, TX is a service site for the Lone Star Association of Charitable Clinics (a/k/a Texas Association of Charitable Clinics or "TXACC") in the agency's Volunteers in Service to America (VISTA) Program.[2] Complainant/Employee (b)(6) is a former Patient Care Coordinator and Case Worker (Complainant 1), Complainant/Employee (b)(6) is a former Patient Care Director (Complainant 2), and Complainant/Employee (b)(6) is a former Patient Care Coordinator and Case Worker (Complainant 3) (collectively, Complainants/Employees). All three were employed by HTC during all relevant periods, prior to and during the instant investigation. OIG ROI, pp. 3-5. The AmeriCorps Office of Inspector General (OIG) has broad authority to conduct investigations and submit reports of investigations under the Inspector General Act of 1978, as amended (5a U.S.C. §§ 1-11).

This matter is an adjudication not subject to a legally required evidentiary hearing.[3] The Supreme Court discussed the balancing test to determine whether procedural due process requires an evidentiary hearing in Mathews v. Eldridge, 424 U.S. 319 (1976), formulating a multi-factor balancing test for evaluating procedural due process that accounts for the

[2] TXACC is a direct grantee of the agency, assigning AmeriCorps VISTA members to subrecipient HTC through a collaborative agreement. See OIG ROI Ex. 17-1 (VISTA Program Collaborative Agreement). The agreement between TXACC and HTC clearly sets forth the conditions of and restrictions on VISTA member service, including the prohibition on performing administrative duties and on displacing or supplanting employees. OIG ROI Ex. 17-5 and 17-6. Subrecipients of agency resources carry out agency programs as grantees. OIG ROI, p. 8. See also 2 C.F.R. §200.1 (subaward through any legal agreement authorizes performance of part of Federal award).

[3] See 5 U.S.C. § 555 (setting forth requirements for informal adjudication). *See also* Adoption of Recommendations, 81 Fed. Reg. 94,312, 94,314-94,315 (Dec. 23, 2016) (distinguishing Type A, B, and C adjudication); Michael Asimow, Adjudication Outside the Administrative Procedure Act (Sept. 16, 2016), available at https://www.acus.gov.

government's interests, the individual's interests, and the risk of error under the existing process, as well as whether and how much additional procedures would be of benefit.[4] The Court outlined the minimum requirements necessary to satisfy the Constitutional right of procedural due process in administrative cases in Brock v. Roadway Express, Inc., 481 U.S. 252 (1987). In Brock, the Court determined that an employer may be ordered by an agency to reinstate a whistle-blower employee without an opportunity for a full evidentiary hearing, but that the employer is entitled to be informed of the substance of the employee's charges, and to have an opportunity for informal rebuttal.

OIG delivered its Report of Investigation to the AmeriCorps Office of the Chief Executive Officer (CEO) and to Respondent on September 18, 2023. In its Report, OIG asserted that HTC retaliated against Complainants/Employees for making protected disclosures under 41 U.S.C. § 4712 concerning VISTA project non-compliance, to AmeriCorps official channels. In its Response through counsel, HTC did not contest the facts or the agency's jurisdiction, but argued that early acceptance of an employee's resignation is not a "discharge" under Texas law and therefore Complainant 1 and Complainant 2 were not retaliated against under 41 U.S.C. § 4712. Letter to Michael D. Smith from Allison L. Davis, Sept. 26, 2023 ("HTC Response"). In formulating this Order, the agency has received, reviewed, and given equal and careful consideration to both the Report and HTC's Response. This satisfies the requirements of adequate procedural due process under current law.

[4] The three Mathews v. Eldridge factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.

LEGAL STANDARD

The relevant law and regulations applicable to this matter are the Whistleblower Protection Provisions of the National Defense Authorization Act, Section 828 of Pub. L. 112-239, 126 Stat. 1632 (2013), codified at 41 U.S.C § 4712 (NDAA); the Federal Acquisitions Regulations (FAR), Part 3, Subpart 3.9, Section 3.908; and the Administrative Procedure Act (5 U.S.C. ch. 5, subch. I § 500 et seq.) (APA). The NDAA safeguards against retaliation targeting whistleblower activity by an employee of a Federal government contractor or grantee. The FAR outlines further procedures for investigation of certain complaints made under 41 U.S.C. § 4712.[5] And the APA lays out the ground rules for agency adjudication.

ANALYSIS

The agency evaluates this case consistent with its approach in prior matters alleging a violation of Section 828 of the NDAA. In determining the standard of review/standard of proof to be applied in the agency's consideration of the OIG Report and HTC's Response, we look to 5 C.F.R. Chapter II, Subchapter A, Part 1201 (Merit Systems Board Practice and Procedure), and

[5] FAR 3.908-5 Procedures:

(a) Investigation of complaints will be in accordance with 41 U.S.C. §4712(b).

(b) Upon completion of the investigation, the head of the agency or designee shall ensure that the Inspector General provides the report of findings to-

(1) The complainant and any person acting on the complainant's behalf;

(2) The contractor alleged to have committed the violation; and

(3) The head of the contracting activity.

(c) The complainant and contractor shall be afforded the opportunity to submit a written response to the report of findings within 30 days to the head of the agency or designee. Extensions of time to file a written response may be granted by the head of the agency or designee.

(d) At any time, the head of the agency or designee may request additional investigative work be done on the complaint.

use the Merit Systems Protection Board (MSPB) "substantial evidence" standard.[6] In the matter before us, the fact pattern and competing interests are similar to prohibited personnel practice cases heard by the MSPB, in which the substantial evidence standard is used, to warrant use of the same standard here. The substantial evidence standard defines substantial evidence as the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree.[7] Under this standard, the Complainants are not required to present evidence that is more persuasive than the evidence submitted by the respondent. Shuman v. Department of the Treasury, 23 M.S.P.R. 620, 624 (1984).

I. Coverage of the Statutory Prohibition on Retaliatory Conduct by the Employer

As a threshold matter, Respondent HTC argues that 41 U.S.C. § 4712 protects employees from "discharge", which excludes early acceptance of an employee resignation, and as a result the claims of retaliation by Complainant 1 and Complainant 2 must be dismissed because they each resigned and were not discharged (as defined under Texas law). We do not need to address the argument for purposes of adjudicating this matter because we determine that the NDAA provisions cover any employer conduct that can be construed as chilling the employee's incentive to make a protected disclosure.

The text and structure of the statute make clear Congressional intent to protect whistleblowers against any retaliation that might chill their conduct. First, the text of the statute protects grantee employees who make protected disclosures from being "discharged, demoted, **or** otherwise discriminated against as a reprisal...." § 4712(a)(1) (emphasis supplied). Any action

[6] See also 41 U.S.C. § 4712(c)(6) (setting forth controlling legal burdens of proof in any decision under the NDAA).

[7] 5 C.F.R. § 1201.4(p). See Richardson v. Perales, 402 U.S. 389, 401 (1971).

that "otherwise discriminate[s]" is unlawful. Although unlawful "discriminat[ion]" is not defined in the statute, nor is "otherwise discriminat[ing]", the statute incorporates the burdens of proof in 5 U.S.C. § 1221(e) for purposes of adjudicating claims. See 41 U.S.C. § 4712(c)(6). Under those provisions, prohibited "discriminat[ion]" includes employer action "against any employee on the basis of conduct which [sic] does not adversely affect [] performance...." 5 U.S.C. § 2302(b)(10). This understanding of "discriminat[ion]" is consistent with the structure of the NDAA provisions. Following "discharged, demoted", the term "or otherwise discriminat[ed] against" plainly refers to any action by the employer that could chill the employee's incentive to make a protected disclosure. See James v. U.S., 550 U.S. 192, 200 (2007) (broad term at the end of a list of prohibited conduct should be interpreted expansively).

Although there is no legislative history to further inform interpretation, a narrower reading that limits "or otherwise discriminat[ing]" would create doubt and chill potential whistleblowers contrary to the purpose contained in the title of the statute, which is to "enhance[] protections from reprisal for disclosure...." not restrict them. 41 U.S.C. § 4712 (emphasis supplied). Almendarez-Torres v. U.S., 523 U.S. 224, 234 (1998) (a statute's title is a "tool[] available for the resolution of a doubt" about its meaning). It is unclear how protection against three particularized categories of employer conduct would sufficiently protect potential whistleblowers in a modern workplace in which an employer's "techniques to harass a whistleblower are limited only by the imagination...." S. Rep. 112-155, 112th Cong., 2d Sess., April 19, 2012, at p. 20 (statement of Subcommittee Chair McCloskey on the 1994 amendments to the Whistleblower Protection Act).

We are confident such an interpretation of remedial legislation is reasonable. Tcherepnin v. Knight, 389 U.S. 332, 336 (remedial legislation should be construed broadly to effectuate its

purposes). The history of prior whistleblower protection legislation provides further support. See S. Rep. 112-155, 112th Cong., 2d Sess., April 19, 2012, at p. 20 (what matters "is whether the [employer's conduct] is discriminatory or could have a chilling effect....") (statement of Subcommittee Chair McCloskey on the 1994 amendments to the Whistleblower Protection Act) (emphasis supplied). Accordingly, we will not dismiss the claims of Complainant 1 and Complainant 2 for the reasons argued by Respondent HTC.

II. Merits

AmeriCorps VISTA members are prohibited from performing activities or duties that would otherwise be carried out by employed workers, or would supplant the hiring of, or result in the displacement of, employed workers, or would impair existing contracts for service. 45 U.S.C. § 5044(a). See also 45 C.F.R. § 2556.150 (regulations on non-displacement of employees and non-impairment of contracts); VISTA Sponsor Handbook at p. 55 ("Members are prohibited from performing activities or duties that would otherwise be carried out by employed workers or would supplant the hiring of or result in the displacement of employed workers...."); VISTA Member Handbook at pp. 15 (Members "duties cannot supplant or displace those of paid staff or existing volunteers.") and 112 (Members "prohibited from performing activities or duties that would otherwise be carried out by employed workers, or would supplant the hiring of, or result in the displacement of, employed workers, or would impair existing contracts for service."). AmeriCorps VISTA members (who are not VISTA summer associate members) are also prohibited from delivering direct service to clients except in very limited circumstances where necessary to understand the service elements of the sponsor, where direct service is incidental to the time and effort of the VISTA's primary responsibilities, or direct service is necessary for a training purpose. VISTA Member Handbook, p. 5. Moreover, numerous witnesses testified that

Respondent HTC was aware direct service and patient interaction by VISTA members violated program rules. OIG ROI, p. 5; OIG ROI Ex. 17-5 and 17-6 (agreement between TXACC and HTC setting forth prohibition on administrative duties and displacement and supplantation of employees).

In late August 2022, Complainants contacted AmeriCorps through various means to report concerns about VISTA members at HTC performing services that were prohibited by law or agency policy. On August 19, 2022, Complainant 1 reported to AmeriCorps that VISTA members at HTC were "working directly with patients...." OIG ROI, p. 3. When interviewed by the OIG, Complainant 2 indicated that (b)(6) reported to AmeriCorps OIG that VISTA members at HTC were "interact[ing] directly with patients" for the entire time (b)(6) was employed at HTC. OIG ROI, p. 4. And, between August 4 and August 18, 2022, Complainant 3 reported to AmeriCorps that "all" VISTA members at HTC were providing one-on-one patient services, including distributing medication to patients, scribing for caregivers, and scheduling and conducting fitness exams. OIG ROI, pp. 4-5. All of these concerns reasonably fall within the ambit of the prohibitions contained in 45 U.S.C. § 5044(a), 45 C.F.R. § 2556.150, the VISTA Sponsor Handbook, and the VISTA Member Handbook.

An employee of a government grantee makes a protected disclosure if the individual believes the disclosed conduct constitutes a violation of law, rule or regulation related to a federal grant. See U.S. ex rel. Cody v. ManTech Int'l Corp., 207 F.Supp. 3d 610, 621 (E.D.Va. 2016). In the matter before us, throughout the relevant period, Complainants were employees of HTC, a sponsor and grantee under the AmeriCorps VISTA program, a federal program administered by the agency. Both Federal Regulations and VISTA program grant requirements forbid displacement or supplantation of employees, and VISTA policy generally prohibits the

provision of direct service by VISTA volunteers.[8] A disclosure is protected if made to a responsible federal employee, as they were here. The whistleblower need not prove that the conduct alleged actually was unlawful, merely that a person standing in the employee's shoes could reasonably believe, given the information available to the employee, that the information evidences wrongdoing.[9] The reasonableness inquiry focuses on the whistleblower, not the audience.

The Complainants also do not have the burden of proving that their assertions were entirely accurate, that their motives in communicating their concerns were "pure", or even that their conduct was entirely blameless -- these considerations are absent from the statutory language. Applying the standards in 41 U.S.C. § 4712, a "reasonable-belief" test, a disinterested observer with knowledge of the facts known to and readily ascertainable by the whistleblowers could reasonably conclude that the reports were evidence of legal violations. Having done so, the Complainants simply needed to establish that the disclosures were protected under the law, which they have each done. The OIG Report clearly demonstrates a nexus between HTC's adverse action against the Complainants, providing convincing circumstantial and documentary evidence of reprisal. The allegations are proved under both the substantial evidence standard we apply here as well as the more stringent preponderance of the evidence standard under 5 U.S.C. § 1221(e).

[8] See supra pp. 7-8.

[9] See Report Whistleblower Protection Enhancement Act of 2012 of the Committee on Homeland Security and Governmental Affairs of the United States Senate, S. Rept. 112-155 (April 19, 2012) at p. 10 (explaining congressional policy).

The record reflects that Respondent took adverse action against the reporting employees after becoming aware of the complaints.[10] Complainant 1 was removed from service seven days earlier than the date of (b)(6) pending resignation. OIG ROI, p. 10. Complainant 2 was removed from service fourteen days earlier than the date of (b)(6) pending resignation. Id. Both steps were taken one day after their supervisor learned they had reported their concerns to AmeriCorps. Id. at p. 11. Moreover, numerous witnesses testified that the HTC Executive Director told staff publicly that she fired Complainants 1 and 2 for "making a complaint about violations of program rules." OIG ROI, p. 2. See also id. at p. 6 (HTC Executive Director told staff at a meeting that employees had been fired for sending information to the government); p. 11 (same); p. 12 (same); p. 13 (same). According to one witness, the messages made Complainant 1 and 2 "sound like criminals" who would be legally sanctioned. Id. at p. 13. We find that the combination of early removal with associated denial of pay and public disparagement of their character are sufficient to constitute adverse action against Complainant 1 and Complainant 2 by their employer under 41 U.S.C. § 4712(a)(1). Complainant 3 was terminated the day after discussing (b)(6) concerns with AmeriCorps staff. OIG ROI at pp. 5, 10. This squarely fits within the parameters of unlawful retaliation under § 4712(a)(1) ("discharge[]").

Finally, the NDAA forbids retaliation against a whistleblower unless the employer can prove by clear and convincing evidence that the protected disclosure was not a contributing factor to the personnel action. Carr v. Social Security Administration, 185 F.3d 1318, 1322 (Fed. Cir. 1999). Respondent has failed to do so. HTC's Executive Director claims to have terminated Complainant 1 and 2 due to performance concerns. OIG ROI, pp. 2, 11. However, extensive

[10] In mitigation, HTC through counsel represented that it terminated employment of its Executive Director once it learned of her retaliatory conduct. See HTC Response.

testimony points to the Executive Director's admission at a staff meeting that the terminations were in retaliation for the complainants reporting violations of program rules. Id. at pp. 2, 12, 13. No information in the complainants' personnel files refers to performance concerns. Id. at p. 2. Indeed, their personnel files contained no information regarding the terminations. Id. at p. 5. In fact, Complainant 1 and 2 report receiving positive performance reviews and bonuses and not being disciplined or given warnings prior to their terminations. OIG ROI, p. 5. See also id. at p. 3 (complainants each terminated one day after providing documents supporting their allegations to agency staff). As the OIG ROI concludes, weighing the evidence provided, the lack of documentation in the Complainant's personnel files, and the extensive testimony from employee colleagues, HTC did not meet its burden to support an alternative rationale for the adverse personnel actions taken against Complainants 1 and 2. OIG ROI, at p. 19.

HTC's Executive Director claims to have terminated Complainant 3 based on advice from an HTC Board of Directors Representative because of safety concerns. OIG ROI, p. 2. However, the board member disclaimed giving such advice and the OIG found no evidence of safety concerns regarding Complainant 3. Id. And HTC in its written response does not attempt to excuse or justify that decision. The Executive Director's post hoc rationalizations are neither persuasive nor relevant. As the OIG ROI concludes, weighing the evidence provided, the lack of documentation in the Complainant's personnel files, and the extensive testimony from employee colleagues, HTC did not meet its burden to support an alternative rationale for the adverse personnel actions taken against Complainant 3. OIG ROI, at p. 19.

Moreover, as the OIG ROI concludes, the evidence shows that the HTC Executive Director was aware she was directing others to violate AmeriCorps regulations and there could be adverse consequences if those violations were disclosed. OIG ROI, at p. 20. This supports her

motive to retaliate against the Complainants for disclosing the violations. Id. Nor could HTC establish by clear and convincing evidence that the actions taken against the Complainants was consistent with action taken against similarly situated individuals who were not whistleblowers. Id. at p. 21.

FINDINGS

Based on the foregoing, the agency makes the following findings:

1. Complainant 1 reasonably believed (b)(6) was reporting a violation of law and program policy when (b)(6) reported (b)(6) concerns to the agency. Complainant 1's communications regarding the subject violations met the requirements articulated in 41 U.S.C. § 4712 and were protected under that statute.

2. Complainant 2 reasonably believed (b)(6) was reporting a violation of law and program policy when (b)(6) reported (b)(6) concerns to the agency. Complainant 2's communications regarding the subject violations met the requirements articulated in 41 U.S.C. § 4712 and were protected under that statute.

3. Complainant 3 reasonably believed (b)(6) was reporting a violation of law and program policy when (b)(6) reported (b)(6) concerns to the agency. Complainant 3's communications regarding the subject violations met the requirements articulated in 41 U.S.C. § 4712 and were protected under that statute.

4. HTC violated 41 U.S.C. § 4712(a)(1) when it took adverse action against Complainant 1 through early removal from service and public disparagement of (b)(6) character.

5. HTC violated 41 U.S.C. § 4712(a)(1) when it took adverse action against Complainant 2 through early removal from service and public disparagement of (b)(6) character.

6. HTC violated 41 U.S.C. § 4712(a)(1) when it terminated Complainant 3 from employment.

7. HTC failed to demonstrate by clear and convincing evidence that it would have taken any of these actions but for the protected disclosures.

WHEREFORE,

ORDER

Pursuant to 41 U.S.C. § 4712, Respondent HTC is hereby ordered to effect the following remedial actions no later than thirty (30) calendar days from the date of this Order:

1. Provide backpay to Complainant 1 for eight (8) days;

2. Provide backpay to Complainant 2 for 14 (fourteen) days;

3. Provide backpay to Complainant 3 from the date of removal through the effective date of this Order;

4. As and when directed by AmeriCorps, reimburse Complainant 1 (b)(6) associated costs and expenses incurred in connection with bringing (b)(6) complaint regarding Respondent's reprisal against (b)(6) including attorney's fees;

5. As and when directed by AmeriCorps, reimburse Complainant 2 (b)(6) associated costs and expenses incurred in connection with bringing (b)(6) complaint regarding Respondent's reprisal against (b)(6) including attorney's fees;

6. As and when directed by AmeriCorps, reimburse Complainant 3 (b)(6) associated costs and expenses incurred in connection with bringing (b)(6) complaint regarding Respondent's reprisal against (b)(6) including attorney's fees;

7. Offer to reinstate Complainant 3 to the position and level of responsibility that (b)(6) held on September 5, 2022; and

8. Amend its personnel records to remove any reference to performance or conduct factors related to the events underlying the protected disclosures.

REQUEST FOR LIST OF COSTS AND EXPENSES

In addition, as discussed above, the Complainants may have incurred associated costs and expenses in connection with bringing their complaint against Respondent, in accordance with 41 USC § 4712 (c)(1)(C). Complainants are each hereby given thirty (30) days from the date of this order to provide AmeriCorps with a written list of their costs and expenses associated with this matter (including attorney fees, if any) to the Agency for review and consideration for possible incorporation into the Order.

SO ORDERED,

MICHAEL SMITH

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Date: 2023.10.16 16:05:01 -04'00'

Michael D. Smith
Chief Executive Officer

Date:_____