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

In re Nashville Metropolitan Development and Housing Agency (MDHA)	)	OIG Report: Case File 2020-027

MEMORANDUM AND ORDER

This matter requires the agency 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 an employee 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. This is the first occasion on which the agency has exercised its authority under the Act. We do so with full awareness 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.

BACKGROUND

Respondent Metropolitan Development and Housing Agency (MDHA), Nashville is a Sponsor and Grantee in the Volunteers in Service to America (VISTA) Program of the

Corporation for National and Community Service (AmeriCorps).[1] Complainant/Employee (b)(6) is an Employee of the Respondent and was employed during all relevant periods, prior to and during the AmeriCorps Office of the Inspector General's investigation, Case Number 2020-027. The AmeriCorps Office of the 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).

OIG delivered its Report of Investigation (ROI) to the AmeriCorps Office of the Chief Executive Officer (CEO) and to Respondent on March 1, 2021. In its ROI, OIG adduced evidence that MDHA retaliated against Complainant/Employee Amanda Wood for making protected disclosures, under 41 U.S.C. § 4712, concerning VISTA project weaknesses/non-compliance, to an AmeriCorps Portfolio Manager. The copy of the OIG Report delivered to MDHA omitted attachments, and Respondent made a request for those attachments to AmeriCorps under the Freedom of Information Act (5 U.S.C. § 552 as amended) (FOIA) on or about March 2, 2021. The FOIA request was referred to the OIG for response. Respondent MDHA subsequently filed its Response to the OIG Report on March 9, 2021, prior to fulfillment of the FOIA request.[2] In its Response, MDHA contested the ROI and argued that the statements made by Complainant/Employee were not protected disclosures and that the Complainant/Employee's belief that (b)(6) was reporting unlawful or improper activity was not objectively reasonable.

[1] On October 15, 2020, the Corporation for National and Community Service adopted the operating name "AmeriCorps." 45 C.F.R. § 2500 *et seq*.

[2] OIG timely responded to the FOIA request in accordance with the requirements of 5 U.S.C. § 552, but 41 U.S.C. § 4712 imposes a separate obligation to issue this Order.

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 the case of *Mathews v. Eldridge*, 424 U.S. 319 (1976), formulating a multi-factor balancing test for evaluating procedural due process that accounts for the 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.

In the present matter, Respondent was provided with the ROI, which detailed with specificity the substance of OIG's investigation, OIG's conclusion that the Respondent violated 41 U.S.C. § 4712, and OIG's recommendations for Agency action. Represented by Counsel, MDHA filed a detailed, six-page written response. In formulating this Order, the agency has received, reviewed, and given equal and careful consideration to both the Report and MDHA's

[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.

[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.

Response. This satisfies the requirements of adequate procedural due process under current law.

LEGAL STANDARD

The relevant law and regulations applicable to this matter are the Administrative Procedure Act (5 U.S.C. ch. 5, subch. I § 500 et seq.) (APA); 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); and the Federal Acquisitions Regulations (FAR), Part 3, Subpart 3.9, Section 3.908. The APA lays out the ground rules for agency adjudication. 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]

ANALYSIS

The agency evaluates this case as a matter of initial impression, not having been previously presented with an alleged violation of the NDAA. In determining the standard of

[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.

review/standard of proof to be applied in the agency's consideration of the OIG Report and MDHA's Response, we look to 5 C.F.R. Chapter II, Subchapter A, Part 1201 (Merit Systems Board Practice and Procedure), and 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 agency is 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).

Viewing the record as a whole, the ROI paints a compelling picture. It lays out a detailed timeline of activity spanning from July 2019 through September 29, 2020. It specifically identifies each of the Complainant/Employee's actions that triggered protection under the NDAA and provides convincing evidence -- both testimonial and documentary -- of protected whistleblower activity by the Employee.

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

[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).

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, Complainant (b)(6) was an employee of MHDA, a sponsor and grantee under the AmeriCorps VISTA (VISTA) program, a federal program administered by the agency. Both Federal Regulations and VISTA program grant requirements mandate that the Grantee/Sponsor project provide oversight and supervision to the VISTA volunteers assigned.[8] Complainant (b)(6) stated (b)(6) reasonable belief, based on (b)(6) direct observation of the VISTA project at MDHA, that such oversight and supervision was insufficient or absent.

A disclosure is protected if made to a federal employee responsible for grant oversight at the agency, as it was here, when Complainant (b)(6) disclosed (b)(6) belief that the VISTA members were not adequately supervised in a series of e-mails to the AmeriCorps Program Officer dated February 3, 10, and 11, 2020. The whistleblower need not prove that the conduct was actually 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 -- contrary to Respondent's argument.

[8] 45 C.F.R. 2556.15(b) states that a "sponsor must provide supervision, workspace, service-related transportation, and any other materials necessary to operate and complete the VISTA Project and support of the VISTA". The Memorandum of Agreement between AmeriCorps and MDHA for 2019 provides that the "Sponsor shall supervise all assigned AmeriCorps VISTA members on a day-to-day basis, and as described in the Project Narrative. If AmeriCorps VISTAs are placed as Sites, the Sponsor shall ensure that each Site organization provides day-to-day supervision and support.

[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 10 (explaining congressional policy).

The Complainant is not required to prove that (b)(6) assertions to the AmeriCorps Program Manager were entirely accurate, or that (b)(6) motives in communicating her concerns to AmeriCorps were "pure" -- 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 employee (in this case, feedback and communication from the VISTA members and (b)(6) personal observations) could reasonably conclude that this was evidence of violation of the terms of the Memorandum of Agreement between MDHA and AmeriCorps, and of 45 C.F.R. 2556.15(b). Having done so, OIG simply needed to establish that the disclosures were protected under the law, which it has done.

The ROI therefore clearly demonstrates a nexus between the Respondent/Employer's adverse action against the Complainant, providing convincing circumstantial and documentary evidence of reprisal by the Employer/Respondent. The allegations are proved under both the substantial evidence standard we apply here as well as the more stringent preponderance of the evidence standard.

MDHA's response places great weight on the assertion that there was no reasonable basis for its employee to object to whether or how the assigned AmeriCorps VISTA volunteers were being supervised. In its Response, MHDA asserts that they interpreted Complainant (b)(6) 's reports to (b)(6) supervisory chain of command as merely a proper documentation of interpersonal conflict matters regarding the VISTA project, and not as evidence of lack of supervision giving rise to the interpersonal conflicts. However, the subsequent actions of the Complainant's supervisory chain of command, instructing the Complainant to refrain from

communicating (b)(6) concerns outside of the chain of command within MDHA, indicate an acknowledgment that Complainant (b)(6) was in fact understood to be reporting a failure of compliance with the grant requirement of supervision of VISTA members.

MDHA also asserts that the Complainant did not have a reasonable basis to believe that there was impropriety within the VISTA project, thus demonstrating that (b)(6) communication/disclosure was not protected. Again in its own Response, MDHA asserts that Complainant (b)(6) 's supervisors did not interpret (b)(6) multiple communications to them as attempts to bring light to a grant compliance problem, and that therefore it was not reasonable to conclude that there was an underlying problem, making Complainant's communication unprotected. However, the record as a whole supports OIG's finding that Complainant communicated (b)(6) concerns regarding MHDA's non-compliance with grant requirements to both (b)(6) direct supervisors and to AmeriCorps. MDHA management's subsequent denial of having understood a subordinate employee's communications does not strip those communications of protection.

Respondent also asserts that the facts underlying the disclosures made by the Complainant were in dispute, and that the Complainant's e-mail communications, which OIG references and provides as evidence of protected disclosures, were not sufficiently specific to trigger the protections of 41 U.S.C. § 4712. Again, an election by the MDHA supervisory chain to dismiss its employee's communications or to selectively interpret them as involving mere personnel matters (interpersonal conflict) does not shield them from the statutory requirement that they refrain from retaliating against whistleblowing employees.

Finally, Respondent asserts that there were other explanations for the disciplinary actions taken against the Complainant. These post hoc rationalizations are neither persuasive nor relevant. 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.

FINDINGS

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

1) Complainant reasonably believed (b)(6) was reporting a violation of 45 C.F.R. § 2556.15(b), and of the Memorandum of Agreement between MDHA and AmeriCorps, when (b)(6) reported (b)(6) concerns to (b)(6) supervisory chain of command and to the AmeriCorps Program Officer. Complainant's communications regarding the subject violations met the requirements articulated in 41 U.S.C. § 4712 and were protected under that statute.

2) MDHA violated 41 U.S.C. § 4712(a)(1) when, on or about March 13, 2020, it suspended the Complainant without pay from March 18, 2020 – March 30, 2020, changed (b)(6) job title and areas of responsibility, and gave (b)(6) a Performance Improvement Plan (PIP).

3) With the exception of a subsequent unrelated reprimand of the Complainant, Respondent MDHA failed to demonstrate by clear and convincing evidence that it would have taken the remainder of the personnel actions but for Complainant's protected disclosure.

Wherefore,

ORDER

Pursuant to 41 U.S.C. § 4712, Respondent MDHA 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 for the eight-day unpaid suspension imposed upon (b)(6) from March 18-30, 2020 related to this matter.

2) As and when directed by AmeriCorps, reimburse Complainant (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.

3) Offer to reinstate Complainant to the position and level of responsibility that (b)(6) held prior to MDHA's reprisal.

4) Revise its September 29, 2020 reprimand of the Complainant to remove any reference to the Performance Improvement Plan (PIP) dated April 23, 2020; and

5) Expunge Employee/Complainant's record of the retaliatory adverse personnel actions, including any record of the eight-day unpaid suspension, the position to which (b)(6) was reassigned and the PIP, noted above.

REQUEST FOR LIST OF COSTS AND EXPENSES

In addition, as discussed above, the Complainant may have incurred associated costs and expenses in connection with bringing (b)(6) complaint against Respondent, in accordance with 41 USC § 4712 (c)(1)(C). Complainant is hereby given thirty (30) days from the date of this order to provide to AmeriCorps with a written list of (b)(6) costs and expenses associated with this matter (including attorney fees, if any) to the Agency for review and consideration for possible incorporation into the above Order.

SO ORDERED,

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Malcolm Coles
Acting Chief Executive Officer

Date: 3/31/2021