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

In re Maryland Governor's Office of Community Initiatives (MGOCI)	)	OIG Report: Case File 2021-009

MEMORANDUM AND ORDER

This matter requires the Agency to interpret and apply the whistleblower protection provisions of the National Defense Authorization Act of 2013, Pub. L. 112-239, 126 Stat. 1632 (2013) ("NDAA"), codified at 41 U.S.C. § 4712, to a Report of Investigation ("Report") prepared by the AmeriCorps Office of Inspector General ("OIG") 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. In interpreting the NDAA, the Agency does 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 Maryland Governor's Office of Community Initiatives ("MGOCI"), Crownsville, MD is an Agency grantee.[1] The Maryland Governor's Office of Service and Volunteerism ("Commission") administers the AmeriCorps program for the State of Maryland.[2] The Commission is a subordinate office of MGOCI, which is a subordinate office of Maryland Governor's Coordinating Office ("MGCO"). All three organizations are part of the Maryland Governor's Office ("MGO"). Complainant/Employee (b)(6) was an employee of the Commission prior to the AmeriCorps Office of the Inspector General's investigation, Case Number 2021-009. 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, Pub. L. 95–452, 92 Stat. 1101 (1978), as amended ("IG Act"). 5 U.S.C. App. 3, §§ 1-11.

OIG delivered its Report on January 28, 2022. The Report details allegations of whistleblower retaliation against the Commission. The relevant factual background is articulated in the OIG Report and is incorporated by reference. The Agency must determine whether Complainant has stated a case for whistleblower retaliation and, if so, whether there is clear and convincing evidence the Commission would have deferred promoting (b)(6) absent any belief that (b)(6) disclosed information protected under the NDAA.

[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] Maryland Governor's Office on Service and Volunteerism 2020 State Service Plan https://gosv.maryland.gov/wp-content/uploads/sites/29/2020/07/2020-Maryland-State-Service-Plan-as-of-July-27.pdf

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 also 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 that case, the Court determined that an employer may be ordered by an agency to reinstate a whistleblower 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 State of Maryland ("Respondent" or "Maryland") was provided with the Report, which detailed with specificity the substance of OIG's investigation regarding the alleged violations of 41 U.S.C. § 4712. Represented by counsel, Maryland filed a

[3] *See* 5 U.S.C. § 555 (setting forth requirements for informal adjudication). *See also* Administrative Conference of the United States, Adoption of Recommendations, 81 Fed. Reg. 94,312, 94,314-94,315 (Dec. 23, 2016) (distinguishing "Type A, B, and C" adjudications); Michael Asimow, Adjudication Outside the Administrative Procedure Act (Sept. 16, 2016), available at https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-draft-report.pdf.

[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.

written response on February 7, 2022. The Complainant also filed a response on February 7, 2022. The Agency has read and considered the Report and the responses.

LEGAL STANDARD

The relevant law and regulations applicable to this matter are the Administrative Procedure Act (APA), 5 U.S.C. ch. 5, subch. I § 500 et seq, and the Whistleblower Protection Provisions of the National Defense Authorization Act (NDAA), Section 828 of Pub. L. 112-239, 126 Stat. 1632 (2013), codified at 41 U.S.C § 4712. The APA lays out the ground rules for agency adjudication. The NDAA[5] safeguards against retaliation targeting whistleblower activity by an employee of a Federal government contractor or grantee.[6]

To state a claim of unlawful retaliation under 41 U.S.C. § 4712, a Complainant must plead facts demonstrating by a preponderance of the evidence that (1) (b)(6) made a disclosure that (b)(6) "reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation

[5] As the NDAA is a relatively new authority, courts have consistently used precedent interpreting the Whistleblower Protection Act and the Whistleblower Protection Enhancement Act—5 U.S.C. § 2302— to aid in its interpretation. *See Busselman v. Battelle Mem'l Inst.,* No. 4:18-CV-05109-SMJ, 2019 WL 7763845, at *5 (E.D. Wash. Nov. 15, 2019) ("The NDAA is a relatively newer statute with scant interpretive case law. The Court therefore consults cases regarding the Whistleblower Protection Act of 1989, 5 U.S.C. § 2302, [] for guidance in interpreting the NDAA's parallel provisions."); *See also White v. Dep't of the Air Force*, 391 F.3d 1377, 1381 (Fed. Cir. 2004) (using case law interpreting 5 USC § 5302 to analyze a case brought under the NDAA). Further, courts generally use whistleblower statutes to interpret one another—including the NDAA 41 U.S.C. § 4712. *See Smolinski v. Merit Sys. Prot. Bd.*, No. 2021-1751, 2022 WL 164013, at *5 (Fed. Cir. Jan. 19, 2022) (citing the NDAA to interpret "abuse of authority" under the Whistleblower Protection Act).

[6] The Federal Acquisitions Regulations (FAR), Part 3, Subpart 3.9, Section 3.908 outline procedures for investigation of certain complaints made under 41 U.S.C. § 4712, and is instructive as well.

related to a Federal contract [] or grant; (2) [to a person] described by the statute; and (3) [which] was a contributing factor to an adverse personnel action." 41 U.S.C. § 4712; *Prichard v. Metro. Wash. Airports Auth.*, No. 1:18-cv-1432, 2019 WL 5698660, at * 12 (E.D. Va. Nov. 4, 2019) (internal quotations removed).

The NDAA incorporates a burden-shifting framework, which provides that an employee must first, by a preponderance of the evidence, "demonstrate[ ] that a [protected] disclosure... was a contributing factor in the personnel action which was taken... against such employee." *See* 5 U.S.C. § 1221(e)(1); 41 U.S.C. § 4712(c)(6) ("The legal burdens of proof specified in section 1221(e) of title 5 shall be controlling for the purposes of any... judicial... proceeding to determine whether discrimination prohibited under this section has occurred."; *see also* Johnston v. Merit Sys. Prot. Bd., 518 F.3d 905, 909 (Fed. Cir. 2008) ("To prevail on the merits, an employee must establish, by a preponderance of the evidence [more likely than not], that a protected disclosure was a contributing factor in an adverse personnel action."). Complainant may make this showing "through circumstantial evidence," including evidence that "the official taking the personnel action knew of the disclosure" or "the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure... was a contributing factor in the personnel action." *Id.* § 1221(e)(1)(A)–(B). If Complainant makes this showing, the employer must then "demonstrate[] by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure."[7] Id. § 1221(e)(2); *Busselman v. Battelle Mem'l Inst.*, No. 4:18-CV-05109-SMJ, 2019 WL 7763845, at *7 (E.D. Wash. Nov. 15, 2019).

[7] The "clear and convincing evidence" standard "has been described as that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance,

ANALYSIS

I. Sovereign Immunity

As a threshold matter, Maryland argues that sovereign immunity precludes Agency enforcement of the whistleblower protection provisions of the NDAA. Sovereign immunity, a concept that predates the Constitution, protects the states from suits by private citizens against the State and State agencies. *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today[.]"). Sovereign immunity is a complete bar to a suit unless it has been waived, either by Congress or by the State itself. *Passaro v. Virginia*, 935 F.3d 243, 247 (4th Cir. 2019).

The NDAA is a relatively new law, and judicial interpretation is developing but still limited. *See Busselman v. Battelle Mem'l Inst.*, No. 4:18-CV-05109-SMJ, 2019 WL 7763845, at *5 (E.D. Wash. Nov. 15, 2019) ("The NDAA is a relatively newer statute with scant interpretive case law.). A few courts have found that the NDAA itself does not abrogate State immunity for purposes of enforcing the NDAA's whistleblower provisions, notwithstanding the fact that enforcement is primarily entrusted to the federal government. *See Texas Educ. Agency v. United States Dep't of Educ.*, 992 F.3d 350 (5th Cir. 2021) ("*TEA*"); *Slack v. Washington Metro. Area*

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but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases[.]" *Jones v. Pitt Cty. Bd. of Ed.*, 528 F.2d 414, 417 (4th Cir. 1975) (internal citations removed).

Transit Auth., 353 F. Supp. 3d 1 (D.D.C. 2019); *Williams v. Morgan State Univ*., No. CV GLR-19-5, 2021 WL 3144890 (D. Md. July 26, 2021).[8]

We need not explore the impact of these decisions any further, however, because we find that the NCSA independently abrogates Maryland's sovereign immunity for purposes of adjudicating the conduct at issue here. Specifically, the NCSA provides that "to be eligible to receive a grant... or distribution of approved national service positions" by the Agency, 42 U.S.C. §12638(a)(1), a State shall:

> agree to assume liability with respect to any claim arising out of or resulting from any act or omission by a member of the State Commission or alternative administrative entity of the State, within the scope of the service of the member on the State Commission or alternative administrative entity.

42 U.S.C. §12638(l)(3) (emphasis supplied).[9] Such language represents a prototypical "broad waiver of sovereign immunity." *See Kosak v. United States*, 465 U.S. 848, 852 (1984).[10]

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[8] None of these cases address a State grantee's obligations to comply with authorized federal investigations or administrative proceedings. Moreover, although *TEA* precludes enforcement of an agency adjudication under the whistleblower protection provisions of the NDAA in the Fifth Circuit, that decision does not supersede or restrict other authorities under the IG Act or under the National and Community Service Act of 1990, Pub. L. 101–610, 104 Stat. 3127 (1990), as amended ("NCSA") -- nor do we understand Maryland to so argue.

[9] Maryland suggests this provision only applies to the conduct of individual members of the State commission, but every other mechanism, policy, practice, or personnel by or through which the State administers the agency's grant funds is immune from oversight -- regardless of the acts or omissions of those members. We decline to read the statute to permit such an absurd result. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982). That State employees are not individually liable for their acts or omissions is not relevant, as the respondent here is the State commission itself.

[10] The Agency also has authority, independent of the NDAA, to adjudicate whistleblower claims such as the one presented here, under its enabling Act, the NCSA. The NCSA charges the Agency with administering the programs established under national service laws. 42 U.S.C. §12651. Administering grant programs such as those under national service laws, which involve federal funds, necessarily includes implicit authority to protect against waste, fraud, and abuse and whistleblower retaliation. Even before the enactment of the NDAA, the Agency

The Maryland State Service Commission ("Maryland Commission") is a State Commission on National and Community Service, pursuant to 42 U.S.C. §12638. The Maryland Commission includes the Governor's Office of Service and Voluntarism (GOSV) and the Governor's Commission on Service and Volunteerism (GCSV). The duties of State grantees are comprehensively set forth in the NCSA and include, inter alia, administering the grant program in support of national service programs that is conducted by the State. 42 U.S.C. §12638(e)(9). The GOSV and GCSV, as entities within the Maryland Commission, are treated as the State Commission for purposes of this Memorandum and Order. The manner in which Maryland has chosen to organize its administration of AmeriCorps grants through coordinating offices, councils, commissions, shared services, etc., cannot alter the State's clear assumption of liability for "any claim" relating to its implementation of the NCSA. The foregoing abrogation is sufficient for the Agency to enforce the whistleblower protection provisions of the NDAA for three reasons.[11]

First, the terms of the abrogation are broad ("assume liability" for "any claim") and would be meaningless if they did not contemplate ensuring Agency oversight of taxpayer resources, including those entrusted to State governments who are the recipients of mandatory grants from the Agency.[12] *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (courts should give

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implemented its authority under the NCSA to protect grantee whistleblowers by establishing a policy to protect whistleblowers.

[11] We do not need to determine whether the abrogation is sufficient for the Complainant *personally* to enforce the whistleblower protection provisions of the NDAA because that is not necessary to resolve the matter before us. *See infra.*

[12] We do not need to define the limits of State liability for "any claim" under the NCSA because doing so is not necessary to resolve the question of whether such claims include *agency enforcement of the whistleblower protection provisions of the NDAA*. That they do so is the only conclusion we reach here.

effect to every word of a statute). To the extent there is any ambiguity in the language, we interpret it to ensure adequate supervision of federal grant funds administered by the agency. *Accord City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013) (agency afforded deference in jurisdictional determinations).

Second, protecting whistleblowers is essential to the Agency's administration of the National Service Laws, including the NCSA. For that reason, Agency policy and grant terms protect federal employees and federal contractor and grantee employees from reprisal or retaliation for engaging in whistleblowing.[13] Section 178 of the NCSA sets forth a comprehensive framework regulating State grants in furtherance of national and community service. 42 U.S.C. §12638. Altering that delicate balance of obligations and authorities -- or providing additional special protections for State grantees beyond those set forth in the statute -- is a matter for Congress alone to decide.

And third, whistleblowers provide valuable information to the Agency's Office of Inspector General ("OIG"),[14] which strengthens Agency operations through independent and effective audits, investigations, and evaluations that prevent and detect inefficiencies and wrongdoing. The OIG is independently authorized under the IG Act and shares with the Agency the responsibility to promote the economy, efficiency, and effectiveness of federal programs and to prevent and detect waste, fraud, and abuse therein as well. Accordingly, we do not doubt that

[13] *See* https://americorps.gov/sites/default/files/document/2021_08_25_Whistleblower_Rights_and_Remedies_Contractors_Grantees_OGC.pdf

[14] 42 U.S.C. §12651e(b) (establishing Office of Inspector General inside the agency). *See* https://www.americorpsoig.gov/whistleblower-protection.

Congress has given the Agency authority to investigate and jurisdiction to adjudicate this conduct at issue in the Report.

II. Merits

The first matter to be determined on the merits is whether Complainant has provided evidence to support (b)(6) assertion that she is protected by the NDAA. As detailed by the OIG in the Report, the Complainant does not claim that (b)(6) has made a disclosure protected by the NDAA and is entitled to protection as an "actual" whistleblower. Rather, (b)(6) asserts that the Commission may have "perceived" (b)(6) to be the whistleblower that led to the September 2019, OIG audit. Specifically, Complainant asserts that (b)(6) previous complaints to Maryland Office of Legislative Audit ("MOLA") led management at the Commission to suspect that (b)(6) had reported issues to the OIG that led to the audit and investigation.

Whether a perceived whistleblower is protected by the NDAA has not been discussed by the courts and is an issue of first impression. However, this issue has been discussed and interpreted at length by courts interpreting the WPA, and it is well settled under that statute that a person who is *perceived* as a whistleblower is protected from retaliation based on that *perception*. *See, e.g., Harvey v. Merit Systems Protection Board,* 802 F.2d 537, 547 (D.C.Cir.,1986); *King v. Dep't of Army*, No. AT-1221-11-0037-W-1, 2011 WL 4089812 (M.S.P.B. Sept. 14, 2011); *Jensen v. Dep't of Agric.*, No. CH1221050844 W1, 2007 WL 137829 (M.S.P.B. Jan. 10, 2007). As such -- and considering the courts' reliance on the interpretations of the WPA generally to inform the legal analysis of the NDAA -- the Agency will analyze this matter through the perceived whistleblower lens.[15]

[15] *Accord* n.5, *supra*.

To establish standing as a "perceived whistleblower," a complainant must show by a preponderance of the evidence that the respondent believed the complainant made or intended to make disclosures that evidenced the type of wrongdoing contemplated by the NDAA. *King v. Dep't of Army*, No. AT-1221-11-0037-W-1, 2011 WL 4089812 (M.S.P.B. Sept. 14, 2011). Therefore, the issue of whether the appellant *actually made* protected disclosures is irrelevant, and the issue of whether the employer *perceived* the appellant as a whistleblower becomes dispositive. *Id.; Thompson v. Farm Credit Admin.*, No. DC04328810407, 1991 WL 255873 (M.S.P.B. Dec. 3, 1991). It follows that the question we must answer is whether there is a preponderance of the evidence that management at the Commission *believed* Complainant had made, or intended to make, disclosures regarding a matter (b)(6) reasonably believed was "evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract [] or grant." 41 U.S.C. § 4712.

The first step in this analysis is to identify all the evidence provided in the Report to support a conclusion that Commission Director Steven McAdams and MCGO Senior Executive Director Patrick Lally perceived Complainant as a whistleblower:[16]

- On December 17, 2017, Complainant informed Mr. McAdams there were problems reporting indirect cost rates to AmeriCorps.

[16] As gleaned from the OIG Report and Complainant's allegations, Mr. McAdams and Mr. Lally were the management officials responsible for the alleged personnel action at issue, viz., the delay in the promotion.

- On July 25, 2018, reported to both MGOCI leadership and to MOLA (separately as a hotline complaint) that an MGOCI employee altered an e-mail to conceal the failure to deposit sub-grantee reimbursement checks in a timely manner,
- On December 18, 2018, Complainant submitted Hotline complaints to MOLA, and reported that (1) (b)(6), was absent for an extended period of time, and (2) administrative fees/indirect cost rates were improperly being used to pay for staff fringe benefits covered by other grants.[17]
- On June 19, 2018, Van Brooks, former Director, Commission, and Complainant told gubernatorially-appointed Commissioners about difficulties the Commission had with financial reporting because of staff absences at MGOCI.
- On October 30, 2019, AmeriCorps OIG investigators and auditors served a subpoena on Mr. McAdams in support of an AmeriCorps OIG investigation. A few days after AmeriCorps OIG served the subpoena, Mr. McAdams was in the breakroom with Complainant, and asked (b)(6) whether (b)(6) spoke "very often" to (b)(6), (b)(7)(c), an auditor with the AmeriCorps OIG who was working on the Commission audit.
- Follow this, (b)(6), Deputy Director, America's Service Commission (ASC), Washington, DC informed Complainant that Mr. McAdams had told (b)(6) (b)(6) that he believed that his subpoena was the result of a whistleblower complaint. Complainant alleges that (b)(6) told Mr. McAdams to be careful not to retaliate.

[17] MOLA dismissed the first complaint and found that the second complaint was not credible. Report at 11.

Report at 4, 10. Based upon these assertions, Complainant argues that (b)(6) history of complaints, as described above, led Mr. McAdams and Mr. Lally to suspect that (b)(6) was a whistleblower and responsible for the AmeriCorps OIG inquiries.[18]

In determining whether the above is sufficient to find that Complainant was a perceived whistleblower by a preponderance of the evidence, we look to the previous cases in which employees were found to be perceived whistleblowers under the WPA for guidance. In these cases, in order to establish that an employee is a perceived whistleblower, the employer must have had either (a) knowledge or (b) reasonable notice that a protected disclosure was, or was intended to be, made.

In *Mausser v. Department of the Army*, 63 M.S.P.R. 41, 44 (1994), the appellant compiled a list of "waste, fraud, and abuse," "safety issues," and violations of "government regulations," with the intent of disclosing the list to the Inspector General. Although the appellant never actually disclosed the list when the agency terminated him, the Board found that the agency may have perceived the appellant as a whistleblower *to the extent that the agency knew about the list* and the appellant's intention to disclose it. *Mausser*, 63 M.S.P.R. at 44 (emphasis added). In *Thompson v. Farm Credit Administration*, 51 M.S.P.R. 569, 581 (1991), the appellant took issue with the agency Chairman's public position on the agency's financial condition, and expressed his concerns to agency officials, including the Chairman. Although the Appellant did not disclose the information, the Chairman perceived the appellant as a whistleblower, as he believed the appellant to be "a dangerous proponent of a view that could

[18] The record also contains some evidence that (b)(6) told former Grants Officer Brianne Young that (b)(6) would find out the identity of the person that caused the audit and investigation. Report at 5. However, there is no evidence that relates this statement to either Mr. McAdams or Mr. Lally, the alleged decisionmakers in the promotional delay.

prove embarrassing—possibly evidencing mismanagement and abuse of discretion." *Thompson*, 51 M.S.P.R. at 581–82. These cases have a common thread—agency officials appeared to believe that the appellants engaged or intended to engage in whistleblowing activity.

It is important to note that an employer's knowledge that an employee has made a report to an OIG or other sources does not confer perceived whistleblower status where there is no evidence to suggest that the *employer believed* the report constituted a protected disclosure under the relevant statute. In *Jensen v. Dep't of Agric*., No. CH1221050844 W1, 2007 WL 137829, at *4 (M.S.P.B. Jan. 10, 2007), the appellant claimed she was a whistleblower because she had informed her manager of issues regarding the neglect of fiscal responsibilities of a contractor and had subsequently informed her OIG about these concerns, as well as her belief that her manager had pressured her to sign invoices on the contract which the appellant felt were "incorrect and perhaps fraudulent." *Id.* The MSPB found that the appellant's disclosures were not protected because she could not reasonably believe that they amounted to disclosures regarding fraud, waste, or abuse and because she failed to present evidence that management perceived her as a whistleblower. *Id.*

Likewise, in *Montgomery v. MSPB*, the Court of Appeals for the Federal Circuit held that appellant could not be a perceived whistleblower when the management officials responsible for the personnel action at issue were aware of her disclosures, but did not believe the disclosures related evidence of fraud, waste, or abuse. 382 F. App'x 942, 947 (Fed. Cir. 2010) ("[the managers] concede knowledge of Ms. Montgomery's allegations, but neither concedes the legitimacy of her allegations. . . rather they perceived her allegations as frivolous. . . [b]ecause her allegations were frivolous, it would be unreasonable for OIG to perceive her as a whistleblower and retaliate against her.").

Applying the above WPA caselaw to the instant circumstances, there is insufficient evidence to establish by a preponderance of the evidence that Complainant was a perceived whistleblower. The essence of Complainant's claims is that (b)(6) was retaliated against because she was suspected of whistleblowing to the OIG due to (b)(6) history of complaints. However, there is no evidence that Mr. McAdams or Mr. Lally knew of Complainant's reports to MOLA.[19] Report; Ex. 15. Additionally, there is evidence to suggest that even if Mr. McAdams had known of the complaints, he would not have considered the substance of the complaints to amount to a disclosure protected under the NDAA. Ex. 15. Rather, the Report, as a whole, suggests that, while Mr. McAdams may have been aware of Complainant's concerns regarding the administrative fee and (b)(6) attendance in contexts other than the MOLA complaints, he was not concerned about the legality of the fee, as he believed that the fee was well within the authority of the State, or (b)(6) attendance, as he was aware that (b)(6) was out on leave under the Family Medical Leave Act.[20] In short, there is no evidence that Mr. McAdams believed that Complainant had a history of disclosing, intended to disclose, or was in possession of, information of the sort that would be protected under the NDAA. *Montgomery*, 382 F. App'x at 947 (appellant could not be a perceived whistleblower when the management officials responsible for the personnel action at issue were aware of (b)(6) disclosures, but did not believe they were evidence of fraud, waste, or abuse.).

[19] Mr. McAdams stated that, though he was aware that Complainant did not agree with the administrative costs due to their conversations, he was not aware that (b)(6) had filed any complaints until the present OIG investigation. Ex. 15. Although Complainant state that Mr. Lally would be partly responsible for the personnel action at issue, (b)(6) does not explicitly allege that Mr. Lally was aware of her complaints.

[20] Mr. McAdams stated that he discussed the administrative fee with Complainant on numerous occasions and that he felt Complainant failed to understand the State processes. Ex. 15.

Likewise, there is a lack of evidence to support Complainant's contention that the Commission believed (b)(6) was the instigator of the OIG audit. Complainant has supplied only a short, passing conversation in the breakroom as evidence of (b)(6) assertion. Even if the conversation in the breakroom took place as Complainant has stated, it does not establish by a preponderance of the evidence that Mr. McAdams perceived (b)(6) as a whistleblower. First, as outlined above, there is no evidence that Mr. McAdams believed that Complainant was in possession of information that would constitute a protected disclosure under the NDAA. Without any evidence of such a belief, a conversation in which Mr. McAdams asked Complainant if she recently spoke to (b)(6), (b)(7)(C), without more, is not enough to establish that he perceived her as a whistleblower. While Complainant's allegation that Mr. McAdams told (b)(6) , Deputy Director, ASC, that he believed the subpoena might be the result of a whistleblower complaint might give some support to this assertion, (b)(6) has definitively stated that there was no discussion about whether an audit or investigation initiated from a complaint. Ex. 23. Without more evidence to show that the Mr. McAdams or Mr. Lally perceived Complainant as a whistleblower, Complainant cannot show that (b)(6) was a perceived whistleblower protected by the NDAA. *King*, 2011 WL 4089812.

As Complainant cannot show that (b)(6) is a protected by the NDAA, we need not analyze whether a disclosure was a contributing factor in a personnel action or whether the State can show by clear and convincing evidence that it would have taken the action regardless of any disclosure.[21] Our discussion of the merits of this matter end here. However, we take note that the

[21] We do, however, note, that there are substantial, evidentiary problems with any assertion that a disclosure was a contributing factor in the delay in Complainant's promotion. In the absence of direct evidence, a Complainant may show that a disclosure was a contributing factor in a

policy behind the NDAA is to protect contractors and employees of grantees from whistleblower reprisal. All of our grantees should ensure they maintain an environment that encourages employees and contractors to speak freely about concerns of fraud, waste, or abuse, whether or not disclosures are protected under federal law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

1) There is jurisdiction to adjudicate the Complaint and order relief if necessary;

2) The NDAA protects "perceived whistleblowers" as informed by the WPA; and

3) Complainant has failed to show by a preponderance of evidence that (b)(6) is protected as a "perceived whistleblower" under the NDAA.

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personnel action through the "knowledge/timing test," which requires circumstantial evidence of knowledge of the protected disclosure and a "reasonable relationship between the time of the protected disclosure and the time of the personnel action." *Kewley v. Dep't of Health & Hum. Servs.*, 153 F.3d 1357, 1362 (Fed. Cir. 1998). We have discussed above the issue of knowledge of a protected disclosure, but there is also evidence in the Report that suggests problems with the relationship between the alleged disclosure and the timing of the delay in the promotion. Complainant suggests that Mr. McAdams became suspicious that (b)(6) made a disclosure around approximately the end of October 2019. Report at 4. However, (b)(6) also notes that Mr. McAdams announced to Commission Staff that (b)(6) would be promoted and approved a press release noting the same in November or December of 2019. *Id.* at 4. The announcement and press release regarding the promotion were made after the date on which Complainant alleges suspicions regarding (b)(6) whistleblower status arose, making it difficult to conclude that Complainant can meet the evidentiary burden on the knowledge/timing test. We need not conduct a more searching inquiry, as the perceived whistleblower analysis is dispositive.

ORDER

For the foregoing reasons, the Complaint is DISMISSED.

CORPORATION FOR NATIONAL AND
COMMUNITY SERVICE

by Michael D. Smith
Chief Executive Officer

Date: February 23, 2022