AmeriCorps

CONFIDENTIAL

TO: Mal Coles, Acting Chief Executive Officer

FROM: Fernando Laguarda, General Counsel
Blake Fetrow, Associate General Counsel
Jana Maser, Associate General Counsel

RE: Response to OIG Report of Investigation and
Administrative Recommendations for Case File 2020-025

DATE: June 14, 2021

On April 7, 2021, the AmeriCorps Office of Inspector General (OIG) transmitted a Report of Investigation ("April 7th Report") and Administrative Recommendations ("Recommendations") (both captioned OIG Case File 2020-025) (collectively, the "referrals").[1] The facts are thoroughly summarized in the April 7th Report and Recommendations and their attachments and we need not repeat them in detail. To the extent there are conflicts or inconsistencies or credibility issues, we interpret them in the light most favorable to the individuals whose conduct is being challenged. This memorandum and its attachments comprise the agency's response to the referrals.

Overview and Background

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") protect federal grantee and contractor employees from being discharged, demoted, or otherwise being discriminated against by their employers as a reprisal for disclosing, inter alia, waste, fraud, and abuse to, among others, federal employees responsible for contract or grant oversight or management unless such actions are taken pursuant to a non-discretionary

[1] The referrals arise from the same set of facts as a Whistleblower Investigative Report transmitted by the OIG, dated March 8, 2021 ("March 8th Report"), which concluded that no remedy was available to the complainant. The OIG is authorized under the Inspector General Act of 1978, as amended, Pub. L. 95–452, Oct. 12, 1978, codified at 5 U.S.C. App., to investigate waste, fraud, and abuse, promote efficiency and integrity, and keep Congress and the agency head fully informed of its efforts. The agency depends on the OIG to provide independent, candid, and professional oversight of its operations. OIG counsel asked to review a draft of this report on June 3, 2021. After we provided a draft, they gave us oral feedback on June 4 and written comments on June 7 ("June feedback"), which we have considered in finalizing this memorandum and attachments.

directive by an authorized agency official.[2] Whistleblowers are an important source of information about potential misconduct, and Congress has repeatedly and comprehensively reinforced the value they provide.[3] AmeriCorps Policy 102 ("Policy 102") reflects the protections for whistleblowers in federal law and requires all personnel and contractor and grantee staff to report to the OIG "without delay" any "reasonable... suspicion of, or information or evidence that suggests, waste, fraud, or abuse...." The referrals require us to make a determination as to the applicability of law and agency policy to circumstances that were uniquely difficult for the contractor employee, who from all accounts acted in good faith. We are sensitive to the impact he suffered and in no way wish to trivialize the difficulty of those circumstances.

In light of the foregoing, there are three questions at issue in response to the referrals. First, did actions taken by any agency employee amount to unlawful whistleblower reprisal or retaliation? To answer that requires carefully assessing applicable law and agency policy. We conclude that they did not.[4] Second, did any agency employee violate Policy 102 by not reporting to OIG "without delay"? We conclude that the supervisor who received information from a contractor employee should have reported it sooner to the OIG, but there is no clear standard to apply because of the way Policy 102 is currently drafted. And third, was Policy 102 breached by any lapse of confidentiality? We conclude that it was not.

The remainder of this memorandum provides the legal conclusions that inform four attachments: (1) a proposal for enhanced whistleblower protection training, including training directed specifically to supervisors and support for contractors and grantees, along with compliance monitoring and certification; (2) a proposed revision to AmeriCorps Policy 102 that clarifies the protections available to contractor and grantee employees, the process for reporting to OIG, and the importance of protecting confidentiality; (3) a memorandum addressing potential personnel action; and (4) a proposed personnel action.

1) Whistleblower reprisal or retaliation

The NDAA sets forth a comprehensive framework to protect federal grantee and contractor employees from reprisal for disclosing, inter alia, waste, fraud, and abuse to, among others, federal employees responsible for contract or grant oversight or management. 41 U.S.C. §4712(a). The framework is so comprehensive that the specific conduct carved out from

[2] There is no statutory history or caselaw to provide context for interpreting this provision, but the plain language seems clear and the OIG interpretation in this case obviates the need to parse the words further. See infra.

[3] At least eighteen statutes govern whistleblower protection under federal law. See "Whistleblower Protections Under Federal Law: An Overview," CRS-R42727, Sept. 13, 2012.

[4] In the absence of a definitive interpretation of the NDAA by the General Services Administration, which would presumably be entitled to deference, we analyze the statute as a matter of first impression for the agency. Accord Skidmore v. Swift & Co., 323 U.S. 134 (1944).

protection appears in striking contrast. Specifically, action taken against a contractor or grantee employee pursuant to a non-discretionary directive by an authorized agency official is not within the scope of a prohibited reprisal. 41 U.S.C. §4712(a)(3)(B).

The OIG does not argue that the NDAA protects contractor employees against actions taken by their employers pursuant to the non-discretionary direction of authorized agency personnel, and we agree. See March 8th Report at 10 (complainant under the same operative facts "not entitled to relief" because his removal from an assignment resulted from "the nondiscretionary directive" of an authorized contracting official at the agency); April 7th Report at 1 n.4 (actions taken as a result of a nondiscretionary directive by an authorized agency official cannot give rise to liability under the NDAA). It follows ineluctably that the law does not protect contractor employees against the nondiscretionary directives of authorized agency personnel. See April 7th Report at 2.[5] Where the plain language of the statute is clear, appeals to the "spirit" of the statute are unavailing.[6] Plain language is arguably even more important where sanctions may be imposed for violations.[7] None of this is to say that whistleblowers do not play an essential role in holding government accountable for waste, fraud, and abuse. Or that the exception to the NDAA's broad policy is extremely narrow. Simply stated, the law does not proscribe the specific conduct at issue here.[8]

Accordingly, the OIG's argument rests entirely upon advancing an interpretation of Policy 102 that prohibits what Congress has permitted (or, at most, left unregulated). It does so in three ways. First, the OIG asserts that Policy 102 "expressly prohibits retaliation against contractor personnel who report possible misconduct." April 7th Report at 1-2 (emphasis supplied). See also Recommendations at 1 (Policy 102 "prohibit[s] retaliation against contractor

[5] The OIG's June feedback appears to backtrack from the conclusion (in its March 8 Report, reaffirmed in the April 7th Report) that the agency official's directive was "authorized" and therefore lawful. We decline to reexamine the OIG's earlier, twice-affirmed conclusion.

[6] See Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 794 (2014) (courts have "no roving license" to disregard statutory text even if it would make their jobs easier); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 126 (1989) (the job of the court "is to apply the text, not to improve upon it.").

[7] Cf. Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (rule of lenity constrains courts "to interpret any ambiguity in [a penal] statute in [the defendant's] favor."). While that interpretive canon does not technically apply here, notions of fairness and due process caution against expansive interpretation where the remedy would be imposed in an adjudication involving agency personnel.

[8] Moreover, it would be absurd to penalize authorized agency employees for directing actions that Congress permits contractor employers to follow, and statutes should be construed to avoid absurd results. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982). See also infra n.13 and accompanying text.

employees....”). But nowhere does the language of Policy 102 say what the OIG purports it to say, and -- even if it did -- the question would remain: whether such a prohibition would govern conduct the statute expressly immunizes or conduct the statute expressly condemns. Either reading is plausible; reading the policy consistently with the statute seems eminently more reasonable.[9]

Second, the OIG asserts that “contractor employees are entitled to whistleblower protections as a matter of law.” April 7th Report at 2. See also Recommendations at 2. Again, while true to the extent provided by the NDAA, this is beside the point. The NDAA extends extensive legal protections to contractor employees, just not the protection claimed here. Absent the OIG’s finding that the employee’s directives were authorized and non-discretionary -- which is not the situation here -- there might have been grounds to find a violation of the NDAA and agency policy. Policy 102 can protect whistleblowers consistently with the law and not condemn what the law does not condemn.[10]

Finally, the OIG cites Policy 102’s admonition that the agency “does not tolerate whistleblower retaliation.” April 7th Report at 3. Again, “whistleblower retaliation” implies the application of the whistleblower protection provisions of the statute, but it is undisputed that the NDAA does not protect contractor employees from actions taken by their employers pursuant to the authorized and nondiscretionary directives of agency officials. 41 U.S.C. §4712(a)(3)(B). The agency strongly supports whistleblowers and strongly condemns retaliation against whistleblowers. But if there can be unlawful whistleblower retaliation where there is no lawful whistleblower protection, the words of the statute cease to have meaning.

In fact, Policy 102 does not forbid what the statute does not proscribe, which is eminently reasonable since it is Congress and not the agency that has comprehensively regulated this conduct. The overall purpose of Policy 102 is to protect the integrity of agency programs, activities, and operations by requiring waste, fraud, and abuse to be timely reported to the appropriate authorities. With respect to whistleblowers, Policy 102 cites to the Whistleblower Protection Act of 1989, Pub. L. 101-12, as amended, which is codified at 5 U.S.C. §2302(b)(8)-(9) (“Whistleblower Protection Act”), and protects federal employees and job applicants from retaliation. Policy 102 refers broadly to “whistleblowers” as “individual[s] who disclose[]” waste, fraud, or abuse, but the Whistleblower Protection Act does not apply to contractor or grantee employees (or to AmeriCorps members or volunteers).

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[9] See Pub. Serv. Elec. & Gas Co. v. Fed. Energy Regul. Comm'n, 989 F.3d 10, 19 (D.C. Cir. 2021) (“a regulation can never ‘trump the plain meaning of a statute.’”) (quoting Atl. City Elec. Co. v. Fed. Energy Regul. Comm'n, 295 F.3d 1, 11 (D.C. Cir. 2002)).

[10] Indeed, the preface to Policy 102 clearly reads: “Contractor and grantee staff are covered by this reporting requirements and the whistleblower protections discussed in this policy as provided for by law and the applicable contract or grant terms.” (emphasis supplied). Policy 102 does not say that it extends protections supplementing, augmenting or expanding those provided by law.

Policy 102 goes on to state that contractor and grantee employees are protected against retaliation for reporting covered misconduct, which is true but doesn't change the fact that such protection is afforded to the extent Congress provided it under the NDAA. The thrust of the whistleblower section in Policy 102 is on whistleblower protection as provided to agency employees.[11] Indeed, readers of Policy 102 are directed to the website for the Office of Special Counsel, whose authorities come from the Civil Service Reform Act, the Whistleblower Protection Act of 1989, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act, but not the NDAA. OSC does not protect contractor and grantee whistleblowers; Congress provided those protections under a separate statutory scheme. Any vagueness in Policy 102 should be corrected, but the vagueness does not provide purchase for the argument made by the OIG.[12]

This adjudication is not the place to speculate on whether the agency could or should seek through rules or policy to provide protection or extend a remedy to contractor or grantee employees beyond that afforded by Congress in the NDAA, or to craft policy beyond the sanction or remedy Congress provided to condemn an agency employee whose conduct is otherwise authorized by the NDAA. The fact is the plain language of Policy 102 can be read consistently with the law, and there is no basis to expand it here.[13] The agency is a creature of Congress and filling gaps to proscribe conduct that Congress expressly left unprotected as part of a comprehensive regulatory scheme would at the very least require a more robust record. Indeed, even via notice and comment rulemaking, the agency would have to demonstrate that prohibiting what is expressly permitted under the statute would be consistent with the

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[11] "Contractors" are mentioned five times in the thirteen hundred words of Policy 102: (1) to state that they are "covered" by the policy, which does not necessarily mean the policy extends beyond the terms of the NDAA; (2) to indicate that their illegal conduct should be reported, which is again not inconsistent with the terms of the NDAA; (3) to encourage them to report waste, fraud, and abuse "directly to the OIG or [through] their [agency] point-of-contact", which is relevant but not illuminating as to whether their disclosures are protected against retaliation beyond the terms of the NDAA; (4) indirectly related to the requirement to report without delay, which is relevant, infra but not to the question of whether Policy 102 extends beyond the terms of the NDAA; and (5) to say they are "also protected against retaliation" but not that they are afforded more protection than what is provided under the NDAA.

[12] The OIG's June feedback seeks to extend the legal requirements of the NDAA and Policy 102 into a general obligation to impose accountability. See supra n.1. For the reasons set forth herein, we decline to do so. See also supra n.8 and accompanying text.

[13] Indeed, where Congress enacts a specific remedy when none was previously provided, that new remedy is typically regarded as exclusive. Hinck v. United States, 550 U.S. 501, 506 (2007). To be sure, conduct undertaken by a government employee may be lawful but still undermine public trust. Cf. 5 C.F.R. §2635.201(b) (considerations for declining otherwise permissible gifts). The recommendations we make in response to the referral are absolutely intended to address that concern. At the same time, public trust is undermined when administrative processes are used contrary to law. Our recommendation has to strike the right balance.

requirements of the Administrative Procedure Act, Pub. L. 89-554, codified at 5 U.S.C. §§551-559, 701-706, et seq. For the foregoing reasons, we conclude, for purposes of the instant referrals, that Policy 102 must be read consistent with -- and not more expansively than -- the statute Congress expressly enacted to protect contractor employee whistleblowers. Congress did not provide a remedy against reprisal here, and we cannot infer a broader sanction where no remedy exists.

2) Reporting to the OIG

Policy 102 requires agency personnel to report "without delay" (a) any "reasonable or actual suspicion of" or (b) "information or evidence that suggests" (c) waste, fraud, or abuse. Although we only have the words of the policy, those words were carefully and extensively negotiated between the OIG and agency representatives and should not be read out of the document. The words (especially "reasonable... suspicion" and "evidence that suggests") imply some (admittedly not extensive) discretion on the part of the recipient of the information to process and determine whether there is a suspicion or information or evidence. On the other hand, Policy 102 unambiguously requires reporting "without delay". Those words do not mean "immediately" or "urgently" but they obviously do not contemplate more time than would be considered as simple "delay" of the report. This is something the drafters of the policy must have intended to describe with some amount of flexibility, because in any specific application, there may be facts to consider as to whether more or less time is required to process and determine the level of suspicion or information or evidence at issue.

Here, the information at issue was reported in an email on February 28th, but it did not get to OIG (as part of a much more robust report by the same contractor employee to a different agency employee) until March 9th, or ten calendar days later.[14] The information in the initial email consisted of a request for reassignment and a list of issues that reasonably could have required some processing by the receiving agency employee (who was new to the position, in an acting management role, and operating under challenging circumstances). As the OIG makes clear, depending on the facts, ten days can be enough time to delay an investigation and spoil evidence. Spoiled evidence undermines the OIG's investigations and the agency's interest in robust oversight and accountability. And the agency employee to whom the initial report was made did not make the report to the OIG, which further undermines the policy of encouraging reporting without delay. On the other hand, the intervening ten calendar days amounted to just one work week, including consultation with [redacted], plus a

[14] The OIG's June feedback highlights the obligation under Policy 102 to "take no further steps to investigate any suspected misconduct, except as directed by the OIG or to prevent the destruction of evidence of information." See supra n.1. But this obligation applies to a "reporting person" upon turning the matter over to the OIG, which leaves open the possibility of inquiries prior to reporting (consistent with the terms of the policy itself). Which is not to say that Policy 102 could not be clarified, and we recommend revisions below.

meeting delayed by a sick day and again by an agency-wide telework trial. See March 8th Report at 4-6.

Still, regardless of the source of the information, Policy 102 requires reporting "without delay" to the OIG when an agency employee receives information about conduct that could reasonably be considered waste, fraud, or abuse. Here, according to the OIG, whom we have no reason to doubt, the receiving employee's delay did have a material impact on an ongoing investigation. OIG does not say whether one day sooner, or two days sooner, or three days sooner, etc. would have not had the same impact. Under the totality of circumstances, however, the time that elapsed between the initial report and the information reaching the OIG was too long under the facts of this case. That does not mean Policy 102 couldn't be clearer. We believe the policy should be amended to stress the urgency of the OIG's interest in prompt notice, the process for handling doubts, and the importance of cooperatively de-conflicting any management and oversight equities after making the report.[15]

Agency employees who reach out to counsel for advice -- and agency counsel themselves -- should have a clearer sense of the urgency of communicating reasonable or actual suspicion of, or information or evidence that suggests, waste, fraud, or abuse to the OIG. Policy 102 should be clarified to provide that the time to de-conflict the potential overlap between oversight and management equities is after reporting and not before. In the instant case, the agency employee who received the contractor's initial disclosure should have reported sooner, but it is impossible to say with certainty how much sooner, and therefore how to fairly recommend formal discipline in this instance. Some sort of administrative action is appropriate, consistent with due process and the agency's interests in sound administration and adherence to policies.

3) Confidentiality

Policy 102 mentions confidentiality once, providing that "[m]aintaining the confidentiality of communications with the OIG in connection with an investigation, if requested to do so, is an element of "full cooperation" with the OIG. It also requires the OIG to protect the identity of reporting individuals. Nowhere are agency employees outside the OIG required to maintain confidentiality of reports they receive. Arguing that confidentiality was "denied," April 7th Report at 1, "breached", April 7th Report at 2, or "den[ied]" in a manner that "violated Policy 102" is an overstatement. Nowhere does that obligation exist in Policy 102, and the OIG representatives have confirmed as much in subsequent conversations about the referral. Therefore, we do not believe any violation of Policy 102 occurred in this regard.

We nevertheless conclude that Policy 102 should be amended to make clear that a request for confidentiality in connection with the disclosure of potential waste, fraud, or abuse should be presumptively honored. As set forth above, the same interests the agency has in the

[15] The March 30, 2021 joint statement "Cooperating with the Office of the Inspector General," from Acting CEO Mal Coles and Inspector General Deb Jeffrey, references just such a process.

efficient operation of the OIG are at issue in this regard. Disclosure of reports or the identity of those making them (whether or not protected whistleblowers) could impede or spoil investigative efforts. With adequate provisions for consulting with counsel if appropriate, Policy 102 should be amended to emphasize the importance of protecting the identity of a reporting party and the substance of any report made to agency personnel that may appropriately be turned over to the OIG.[16]

Enclosures: Whistleblower protection training and certification proposal
Proposed revisions to AmeriCorps Policy 102
Legal analysis supporting administrative action (Confidential)
Recommendations for administrative action (Confidential)

[16] See id.