Before the
CORPORATION FOR NATIONAL AND COMMUNITY SERVICE
Washington, DC 20525

Residential Youth Care - Ketchikan Afterschool Program, Revilla Island Corps, Ketchikan, Alaska	)	OIG Report of Investigation: I23HQ00065

MEMORANDUM AND ORDER

This matter requires the Agency, the Corporation for National and Community Service, 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[1] Office of Inspector General ("the OIG") in response to a whistleblower retaliation complaint filed by an employee of an Agency subgrantee. 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.

[1] The Corporation for National and Community Service (CNCS) operates under the name "AmeriCorps." However, CNCS remains the federal agency's legal name. 45 C.F.R. § 2500.2.

BACKGROUND

Respondent Residential Youth Care-Ketchikan Afterschool Program, Revilla Island Corps (RYC) is an AmeriCorps subgrantee, with the primary AmeriCorps State and National grant awarded through Serve Alaska, Alaska's state service commission. During the relevant period, RYC's CEO was (b)(6), who was named in the original Complaint.

Complainant/Employee (b)(6) was the director of RYC's AmeriCorps program and was an employee of RYC during the relevant period, and prior to the AmeriCorps Office of the Inspector General's investigation, Case Number I23HQ00065. The AmeriCorps Office of the Inspector General (the 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. §§ 401-424.

The OIG delivered its Report and accompanying Exhibits (OIG Report) to the agency on October 2, 2024. The Report details allegations of a complaint of whistleblower retaliation against the CEO of RYC. The relevant factual background is articulated in the OIG Report. The OIG Report is incorporated by reference. Complainant's Response, while arguing against some conclusions reached by the OIG, does not materially dispute the factual background contained in the OIG report.

The Agency must determine whether Complainant has stated a claim for whistleblower retaliation and, if so, whether there is clear and convincing evidence that the Respondent RYC would have terminated Complainant's employment absent any belief that he disclosed information protected under the NDAA.

This matter is an adjudication not subject to a legally required evidentiary hearing.[2] 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.[3]

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 RYC ("Respondent" or "RYC") was provided with the OIG Report, which detailed with specificity the substance of OIG's investigation regarding the alleged violations of 41 U.S.C. § 4712. The Agency notified all parties of their right to submit a response to the OIG Report. The Agency also delivered to the parties (via e-mail on October 3, 2024) specific instructions regarding how and with whom parties should file their responses (via e-mail to the AmeriCorps Office of General Counsel), and a deadline of October 9, 2024. Represented by counsel, Respondent RYC elected not to file a response to the OIG Report.

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[2] *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.

[3] 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.

Complainant filed a response but sent that response to the AmeriCorps Office of Inspector General rather than the AmeriCorps Office of General Counsel. The Office of Inspector General subsequently forwarded the response to the AmeriCorps Office of General Counsel, which received it a day after the October 9 deadline. Nonetheless, the Agency exercised reasonable discretion and accepted Complainant's Response as timely. The Agency has reviewed and fully and fairly considered the OIG Report and Complainant's Response.

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[4] safeguards against retaliation targeting whistleblower activity by an employee of a federal government contractor or grantee.[5]

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) they made a protected disclosure that she "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

[4] As the NDAA is a relatively recent 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).

[5] 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.

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; (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 statutory 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."[6]

[6] 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, 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).

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).

ANALYSIS

I. Complainant Has Not Shown [redacted] is a Protected Whistleblower Under the NDAA

The first matter to be determined on the merits is whether Complainant has provided sufficient evidence to support [redacted] assertion that [redacted] is protected under the NDAA/41 U.S.C. § 4712. To establish standing as a protected whistleblower, a complainant must show by a preponderance of the evidence that they made a protected disclosure regarding "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.

In its Report, the OIG identified as a protected disclosure Complainant's statements to the CEO and Human Resources Director of RYC, made on or about February 8, 2023, as alleging a violation of a law, rule or regulation related to RYC's AmeriCorps grant. However, in [redacted] Response, Complainant asserts that the protected disclosure was [redacted] notification to the former AmeriCorps Members of their status via e-mail on/about February 8, 2023, and that AmeriCorps regulations, RYC policy, and the Member Service Agreements (MSAs) required him to notify the former AmeriCorps Members (identified in the OIG Report) that they were exited for cause so they could file a grievance, notwithstanding instructions from the CEO to refrain from further contact with them.

41 U.S.C. § 4712 (a)(2) clearly lists the persons/bodies to which a whistleblower may make a disclosure (while maintaining the disclosure's status as protected), as follows:

(2) Persons and bodies covered. — The persons and bodies described in this paragraph are the persons and bodies as follows:

(A) A Member of Congress or a representative of a committee of Congress.

(B) An Inspector General.

(C) The Government Accountability Office.

(D) A Federal employee responsible for contract or grant oversight or management at the relevant agency.

(E) An authorized official of the Department of Justice or other law enforcement agency.

(F) A court or grand jury.

(G) A management official or other employee of the contractor, subcontractor, grantee, subgrantee, or personal services contractor who has the responsibility to investigate, discover, or address misconduct.

If we accept that certain of Complainant's February 8, 2023 communications to the CEO and Human Resources Director of RYC constituted a protected disclosure, that communication would be within the realm of § 4712 (a)(2)(G) above, and would be sufficient to satisfy the statutory requirement. However, evidence in the record, and Complainant's own Response suggests that Complainant's exchanges with the CEO and Human Resources Director were intended as Complainant's expression of disagreement over interpretation of the contractual requirements of the Member Service Agreement, rather than as a disclosure of a violation of a law, rule or regulation.

Moreover, even after having had the opportunity to read and review the OIG's Report, Complainant clearly stated that (b)(6) protected disclosure was (b)(6) subsequent February 8, 2023 communications to the former AmeriCorps members, in which (b)(6) notified each of them that they were being exited for cause. We examine this disclosure first.

The plain language of 41 U.S.C. § 4712 (a)(2) is clear. Even if well intended, the types of disclosures made to parties, persons or bodies not expressly listed in the statute do not receive protected status. Complainant's February 8, 2023 notification to two former AmeriCorps members of their status clearly does not fall within the statute, and therefore was not a protected disclosure.

Because Complainant has not shown by a preponderance of evidence that (b)(6) s protected by the NDAA/41 U.S.C. § 4712, we need not analyze whether the disclosure was a contributing

factor in the personnel action or whether the employer can show by clear and convincing evidence that it would have taken the action regardless of any disclosure. Discussion of the merits of this matter may end here and the matter may be dismissed.

II. RYC Has Shown By Clear and Convincing Evidence That It Would Have Terminated Complainant Absent His Disclosure

However, in the interest of fully examining this matter, and viewing it in a light most favorable to Complainant, the Agency notes that (b)(6) did assert in certain February 8, 2023 communications to the RYC CEO and Human Resources Director that a law, rule, or regulation related to a federal grant would be violated if (b)(6) did not exit the members for cause and then notify the members of the actions.

In that light, even if we take Complainant's February 8, 2023 communications to constitute Complainant's disclosure for purposes of the NDAA (b)(6) still fails to state a claim of unlawful retaliation because RYC has demonstrated by clear and convincing evidence that it would have terminated Complainant absent his protected disclosure.

As an initial matter, it is reasonable to conclude that the CEO and Human Resources Director of any organization have a "responsibility to investigate, discover, or address misconduct". We next turn to whether the employer had knowledge. Here, the record is clear that Complainant directly informed his employer's CEO and Director of Human Resources, both via e-mail and verbal communication, that a law, rule, or regulation related to a federal grant would be violated. Hence, the requirement of employer knowledge is satisfied.

The analysis next proceeds to whether an adverse personnel action was taken as a result of the disclosure. Termination of employment is clearly an adverse personnel action, and the timing of Complainant's termination, which was executed within days of the disclosure, satisfies the preponderance of evidence standard required by statute to link the personnel action to the protected disclosure.

If we assume *arguendo* that Complainant has met [redacted] burden, we turn to whether RYC demonstrated by clear and convincing evidence that it would have terminated Complainant absent [redacted] disclosure. Complainant does not dispute that [redacted] disregarded the RYC CEO's instructions to refrain from direct contact with the former Members after they were exited for cause. Complainant's justification for [redacted] disregard of the CEO's instructions as stated in [redacted] Response is a belief that [redacted] was contractually obligated to communicate directly with those former Members under the Member Service Agreements (MSAs). The record is not clear as to exactly which party is responsible for performing the Member exit steps required by the MSA. Looking at the matter in the light most favorable to Complainant [redacted] may have had a sincere concern that the leadership of RYC, or Serve Alaska, would not follow through and notify the members of their status. If we accept this proposition, and the possibility that RYC may have eventually faced repercussions in some form for violation of the MSAs, instructing Complainant to refrain from communicating with the former Members was still within the CEO's authority as Complainant's supervisor and as the head of RYC. Ultimately, any repercussions regarding MSAs would have been fallen to the CEO as head of RYC.

With this in mind, the Employer/Respondent RYC met its burden by showing by clear and convincing evidence that Complainant was insubordinate in failing to follow the CEO's instructions, and that there was a legitimate basis to terminate Complainant for insubordination, wholly unrelated to Complainant's alleged whistleblower activities. Indeed, the record is devoid of any evidence that Complainant's February 8, 2023 communications with RYC played a part in their decision to terminate [redacted] employment. Complainant does not dispute the number of times that [redacted] eceived and disregarded instructions from RYC senior leadership regarding communication with the members.

(b)(6) further asserts, and the evidence supports, an otherwise exemplary employment record prior to the series of events that led to this case. However, for an employer to justify terminating an employee, subordination need not occur repeatedly. Nor is termination for insubordination a remedy that an employer may use only when dealing with a less than stellar employee. Complainant was expressly instructed not to go forward with (b)(6) intended plan to contact the former members. Complainant ignored this request and emailed the members on February 8, 2023. These undisputed facts satisfy the Employer/Respondent's burden, and conclude the statutory analysis on the merits in favor of the Respondent.

Finally, the Agency takes note that the policy behind the NDAA is to protect employees of contractors and employees of grantees from whistleblower reprisal. With that in mind, all agency grantees and subgrantees should ensure they maintain an environment that encourages employees and contractors to speak freely about concerns of fraud, waste, abuse, or violations of law, rule or regulations -- whether or not those disclosures are protected under federal law.

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 employees of contractor and grantee employees pursuant to 41 U.S.C. § 4712;

3) Complainant has failed to show by a preponderance of evidence that (b)(6) s a protected whistleblower under the NDAA; and

4) Complainant has failed to state a claim of unlawful retaliation under the NDAA because RYC demonstrated by clear and convincing evidence that it would have terminated Complainant absent (b)(6) protected disclosure.

ORDER

For the foregoing reasons, the Complaint is DISMISSED.

MICHAEL SMITH

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CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

By: Michael Smith
Chief Executive Officer

Date:_____