



OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

Alleged Reprisal by an Office of Public Safety, Resources Protection, and Emergency Services Official

This is a revised version of the report prepared for public release.

I. EXECUTIVE SUMMARY

We investigated a complaint of whistleblower reprisal under Presidential Policy Directive 19 after an employee from the Office of Public Safety, Resources Protection, and Emergency Services alleged that their supervisor withdrew their national security clearance after they had filed two Equal Employment Opportunity complaints against their supervisor.

We concluded that the evidence established that the supervisor did not have the employee's Top Secret security clearance administratively withdrawn as reprisal for the protected disclosures the employee made in 2017 and 2018 with the U.S. Department of the Interior (DOI) Office of Civil Rights (OCR). We determined that while the supervisor knew about the employee's protected disclosures, there was clear and convincing evidence that the employee no longer needed access to classified information as part of their job duties and, therefore, their Top Secret clearance would have been administratively withdrawn regardless of the protected disclosures to the OCR.

The employee left the DOI in 2019, alleging a hostile work environment and retaliation by their supervisor.

We provided this report to the Secretary of the Interior for any action deemed appropriate.

II. BACKGROUND

Presidential Policy Directive 19 (PPD-19) prohibits whistleblower retaliation in the form of actions that affect an employee's eligibility for access to classified information. PPD-19 states that "[a]ny officer or employee of an executive branch agency who has authority to take, direct others to take, recommend, or approve any action affecting an employee's Eligibility for Access to Classified Information shall not, with respect to such authority, take or fail to take, or threaten to take or fail to take, any action affecting an employee's Eligibility for Access to Classified Information as a reprisal for a Protected Disclosure" (PPD-19, Section B).

As part of the review process allowing agency employees to appeal actions affecting their eligibility for access to classified information, PPD-19 requires that the Inspector General conduct a review to determine "whether an action affecting Eligibility for Access to Classified Information violated this directive." The agency head must then "carefully consider the findings of and actions recommended by the agency Inspector General."

III. DETAILS OF INVESTIGATION

A. Facts

The Office of Public Safety, Resources Protection, and Emergency Services hired the employee into a nonmanagerial position with a "Critical Sensitive" designation that required the employee to maintain a Top Secret security clearance.¹ In 2015, the supervisor realigned the office's positions, including the employee's. As a result, several months later, the supervisor requested that human resources (HR) modify the employee's position description (PD) to a managerial

¹ A Critical Sensitive position entails accessing information or performing work at a sensitive facility or working with sensitive information or systems that requires eligibility for access to Top Secret information.

position to allow the employee to manage a coworker. HR then changed the PD; the revised PD required the employee to maintain a Top Secret security clearance.

The supervisor stated that the employee managed their coworker until the coworker left the U.S. Department of the Interior (DOI) in 2016, at which time the employee no longer had managerial responsibilities. The employee resumed the nonmanagerial duties they were originally hired to perform.

1. The Employee Submitted an EEO Complaint in 2017

Several months later, in 2017, the supervisor issued the employee a Performance Deficiencies and Expectations letter because of documented performance issues in the previous year. Later that same day, the employee filed an informal Equal Employment Opportunity (EEO) complaint with the Office of Civil Rights (OCR) alleging discrimination.² In the complaint, the employee stated that their supervisor and other managers had subjected them to a pattern of harassment.

In early 2017, the supervisor said, the employee began to receive email reminders to take required annual training for managers, which caused the supervisor to realize they needed to change the employee's PD to reflect that the employee was no longer a manager. Therefore, the supervisor emailed an HR representative requesting a change to the employee's PD to reflect that the employee was no longer a manager. The supervisor told us they had forgotten to change the employee's PD from managerial to nonmanagerial after the employee resumed nonmanagerial duties in late 2016. The employee confirmed to us that they no longer had managerial responsibilities after their coworker's departure in 2016.

The supervisor told us they had not learned of the employee's EEO complaint until early 2017, when the OCR notified them. We confirmed with the OCR and the employee the date that the OCR notified the supervisor of the complaint, which was after the supervisor requested the change to the employee's PD. We found no other evidence that the supervisor knew of the EEO complaint before requesting the change to the employee's PD.

A few weeks after the supervisor requested the PD change, HR reissued the employee's PD to reflect a nonmanagerial status. HR classified the position as "Non-Sensitive/Low Risk" instead of "Critical Sensitive." This designation lowered the employee's eligibility for a security clearance from Top Secret to "Non-Sensitive/Low Risk," thus removing access to classified information. An HR representative explained that in 2017 the DOI changed its process for determining clearance levels and that the HR representative who had classified the employee's PD had used a U.S. Office of Personnel Management (OPM) scoring tool to determine the sensitivity designation of the 2017 nonmanagerial position. That tool identified the employee's position as "Non-Sensitive/Low Risk" thereby removing the previous "Critical Sensitive" determination. The HR representative said HR should have notified personnel security of the change because it automatically triggered an administrative withdrawal of the employee's Top Secret security clearance.

Even though the supervisor and the employee both recall seeing the revised PD, neither of them realized that the employee's clearance designation had been lowered from "Critical Sensitive" to

² The informal complaint is the first stage of the Federal EEO administrative complaints process.

“Non-Sensitive/Low Risk,” thereby requiring an administrative withdrawal of the employee’s Top Secret clearance. The employee said they had never accessed classified information or facilities.

2. The Employee Filed a Second EEO Complaint in 2018

In early 2018, the employee filed a second informal EEO complaint with the OCR. In this complaint, the employee alleged that at the end of 2017, they received a low performance appraisal rating for fiscal year 2017 as reprisal for prior EEO activity.

The OCR notified the supervisor of this complaint later in 2018, and we found no other evidence that the supervisor knew of the EEO complaint before the OCR notified them.

3. The Supervisor Reported Health Concerns Pertaining to the Employee to the Personnel Security Office

According to the employee and the supervisor, in 2018, the employee requested medical leave for a reportable issue (an issue that might impact the individual’s ability to protect classified information) for individuals who possess a security clearance.

Several days later, the supervisor emailed a security employee from the Office of Law Enforcement and Security for guidance on reporting health concerns involving a person with a Top Secret security clearance. The security employee emailed the supervisor notifying them that as the employee’s supervisor they had a duty to disclose the health issue to the personnel security office for review.

A few weeks later, the supervisor emailed a security specialist notifying them that:

I, as a covered individual am required to report on certain activities of other covered individuals, i.e., [the employee], as [they hold] an active TS [Top Secret] clearance. [The employee] has an apparent or suspected [reportable] health issue where there is reason to believe it may impact [their] ability to protect classified information or other information specifically prohibited by law from disclosure. . . . Since being granted a clearance, [they have] not handled classified materials due to overarching performance issues; however, I feel at this point that I cannot assign [them] any work related to classified documents moving forward despite the office’s need to engage [the employee] on the classified side. Please let me know what else I need to do in this matter.

The supervisor told us they wanted to make it clear to the personnel security office that the employee had not worked on classified information. The supervisor added that by the time the employee’s clearance had been adjudicated, the supervisor had identified performance issues and did not want to add handling classified information to the employee’s assigned duties.

4. Personnel Security Administratively Withdrew the Employee’s Top Secret Security Clearance in Late 2018

In late 2018, the security specialist emailed the employee and wrote,

Personnel Security has been notified that you are out on . . . leave. . . . [Y]our direct Supervisor, has notified us that you currently do not require access to classified information. As you are in a position that requires a National Security clearance but currently do not need access, Personnel Security will administratively withdraw the National Security clearance until such time that we are notified that you require access. Please note that this is not due to any adverse action. However, we must note that you received your initial training . . . and annual training . . . informing you of your responsibility to report any life changes.

The security specialist told us that because the supervisor said the employee no longer needed access to classified information, they were required to administratively withdraw the employee's Top Secret clearance. The security specialist stated the supervisor did not need to report the specific nature of the employee's health issue because it was outside the realm of the adjudicative guidelines for clearances. The security specialist also stated that personnel security should have administratively withdrawn the employee's clearance when the employee's PD changed in 2017. The security specialist explained that when the position sensitivity changed from a national security designation to a "Non-Sensitive/Low Risk" position, personnel security must debrief and remove the individual from access. The employee remained eligible for a national security clearance based on the scope of their most recent background investigation, but because the position no longer required a Top Secret clearance, the clearance would be administratively withdrawn. The security specialist said the personnel security office never received the employee's reclassified PD and added that if the office had received it at that time, it would have withdrawn the clearance and debriefed the employee in 2017.

The employee left the DOI in 2019, claiming their supervisor subjected them to a hostile work environment and retaliation.

5. No Evidence That the Supervisor Knew the Status of the Employee's Clearance After the Supervisor's Initial Report of the Employee's Health Condition

In 2019, the supervisor emailed the security specialist and the security employee stating, "[The employee left their] position at DOI . . . [They] held a clearance, so I don't know the process you all follow when someone leaves without being debriefed?"

A few days later, the security specialist responded, "We have already debriefed [the employee] on your earlier recommendation that [the employee's] position no longer required a National Security clearance."

B. Analysis

Legal Standards

As noted above, PPD-19 prohibits whistleblower retaliation in the form of actions that affect an employee's eligibility for access to classified information. While PPD-19 does not set a specific framework for analyzing whistleblower reprisal cases, there is well-established case law on the

requirements to prove reprisal under the Whistleblower Protection Act (WPA) of 1989, as amended.

Under the WPA, the complainant must establish a *prima facie* case of reprisal by a preponderance of the evidence. Specifically, the complainant must show that 1) they made a protected disclosure; 2) the responsible management official knew about the protected disclosure; 3) a personnel action was taken, threatened, or not taken after the protected disclosure (denying or revoking a security clearance is not considered a “personnel action” under the WPA); and 4) the protected disclosure was a contributing factor in the personnel action taken, threatened, or not taken.

Title 5 U.S.C. § 2302(b)(8) and § 1221(e)(1) state that if the complainant makes a *prima facie* case, the burden then shifts to the agency to prove by clear and convincing evidence that it would have taken the same personnel action absent the protected disclosure. In accordance with 5 U.S.C. § 1214(b)(4)(B)(ii) and *Whitmore v. Dep’t of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012), we applied a modified WPA burden-shifting framework to this report for purposes of analyzing the PPD-19 whistleblower reprisal allegations.

1. Elements 1 and 2: The Supervisor Knew the Employee Made Two Protected Disclosures

As noted above, to establish a *prima facie* case of whistleblower reprisal under PPD-19, a complainant must show, in part, that they made one or more protected disclosures and that the management official who made the decision concerning the complainant’s eligibility for access to classified information knew of the protected disclosure or disclosures at the time of the decision.

A protected disclosure under PPD-19 means a disclosure of information by an employee that the employee reasonably believes evidences a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety (PPD-19, Section F(5)(a)). The employee may disclose this information to, among others, 1) a supervisor in the employee’s direct chain of command, up to and including the head of the employing agency; 2) the Inspector General of the employing agency; or 3) an employee designated by any of the above officials to receive such disclosures.

In this case, in 2017 and 2018, the employee filed informal EEO complaints with the OCR against their supervisor, alleging violations of law under Title VII of the Civil Rights Act of 1964. The OCR notified the supervisor of the first EEO complaint in early 2017, and of the second complaint in early 2018. The supervisor knew about the disclosures before they notified the personnel security office about the employee’s medical condition as it related to the employee’s Top Secret security clearance.

Therefore, a preponderance of the evidence established that the employee satisfied the first two elements of the *prima facie* analysis.

2. Element 3: Administrative Withdrawal of the Employee’s Top Secret Clearance Affected the Employee’s Eligibility To Access Classified Information

The third element of the *prima facie* analysis is that the complainant must show by a preponderance of the evidence that the responsible management official took or failed to take, or

threatened to take or failed to take, an action that affected the complainant's eligibility for access to classified information (PPD-19, Section B).³

In this case, the personnel security office lowered the employee's eligibility for a Top Secret security clearance to "Non-Sensitive/Low Risk" after the supervisor reported the employee's health concern to the office. As discussed above, the supervisor also notified the personnel security office at that time that the employee no longer needed access to classified information. The supervisor told us they wanted to make it clear to the personnel security office that the employee had not worked on classified information. While the personnel security office said the employee's medical condition did not rise to the level of downgrading the employee's security clearance to "Non-Sensitive/Low Risk," the personnel security office administratively withdrew the employee's Top Secret security clearance based on the supervisor's statement that the employee did not need access to classified information. The security specialist later noted that the employee's Top Secret security clearance should have been administratively withdrawn when the employee's PD changed in 2017. As a result of this administrative withdrawal in late 2018, the employee could no longer access classified information.

Therefore, a preponderance of the evidence established that the employee's eligibility for access to classified information was affected when the personnel security office administratively withdrew the employee's Top Secret security clearance, and therefore the employee satisfied the third element of the *prima facie* analysis.

3. Element 4: The Employee's Protected Disclosures to the OCR Were a Contributing Factor in the Withdrawal of Their Top Secret Security Clearance

As part of the *prima facie* case of reprisal, the complainant must also establish by a preponderance of the evidence that one or more of their protected disclosures was a contributing factor in the responsible management official's decision to take an action affecting their eligibility for access to classified information.⁴ Evidence of a contributing factor may be established through the so-called knowledge/timing test, which focuses on the timing between the protected disclosure and the action taken, as well as knowledge of the protected disclosure by the responsible management official (5 U.S.C. § 1221(e)(1)). The Merit Systems Protection Board found that the knowledge/timing test can establish a contributing factor if a personnel action took place less than 2 years after the protected disclosure (*Mastrullo v. Dep't of Labor*, 123 M.S.P.R. 110, 120 (2015); see also *Salinas v. Department of the Army*, 94 M.S.P.R. 54, 59 (2003)).

In this case, approximately 1½ years passed between the supervisor learning of the employee's first EEO complaint in early 2017 and the administrative withdrawal of the employee's Top Secret security clearance in late 2018. The proximity in time between the supervisor's knowledge of the employee's second EEO complaint in early 2018 and the withdrawal of the employee's clearance was approximately 6 months. As mentioned above, the decision to

³ PPD-19 defines "Eligibility for Access to Classified Information" as "the result of the determination whether an employee (a) is eligible for access to classified information in accordance with Executive Order 12968 . . . and Executive Order 10865 . . . and (b) possesses a need to know under such orders."

⁴ To establish that a protected disclosure was a contributing factor in taking a personnel action, the Merit Systems Protection Board has clarified that the complainant need only show that the disclosure "tended to affect the personnel action in any way." *Carey v. Dep't of Veterans Aff.*, 93 M.S.P.R. 676, 680 (2003).

administratively withdraw the employee's Top Secret security clearance was based on information that the supervisor provided to the personnel security office that the employee no longer needed access to classified information as part of the employee's job duties.

Therefore, the employee satisfied the knowledge/timing test, which in turn means that the employee satisfied the fourth element of the *prima facie* analysis.

4. *The Employee's Top Secret Security Clearance Would Have Been Administratively Withdrawn Absent the Protected Disclosures*

If the complainant establishes a *prima facie* case of reprisal by a preponderance of the evidence, the agency must then show by clear and convincing evidence that it would have taken the same action even in the absence of the protected disclosure. Factors that are considered in this analysis include a) the strength of the agency's evidence in support of its action; b) the existence and strength of any motive to retaliate on the part of agency officials involved in the decision, including evidence of retaliatory animus; and c) any evidence that the agency takes similar actions against similarly situated employees who are not whistleblowers. See *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). See also *Gonzales v. Department of the Navy*, 101 M.S.P.R. 248, 253 (2006).

a. Strength of Agency's Evidence

The agency provided evidence that the employee's Top Secret security clearance should have been removed in 2017 when HR reclassified the employee's PD to a nonmanagerial position. As noted above, the coworker whom the employee managed left the DOI in 2016, which resulted in reclassifying the employee's position in early 2017. The HR officials who wrote the PD used an OPM scoring tool to determine the sensitivity level for the position and deemed it "Non-Sensitive/Low Risk."

At this point—in early 2017—the personnel security office should have administratively withdrawn the employee's Top Secret security clearance. The HR office, however, did not convey this information to the employee's supervisor or the personnel security office, as evidenced by the fact that the supervisor believed the employee still had a Top Secret security clearance when the supervisor consulted with the Office of Law Enforcement and Security about their duty to report the employee's medical condition approximately 1½ years later in late 2018. Based on the guidance by the Office of Law Enforcement and Security, the supervisor reported the employee's health information. At this time, the supervisor also informed the personnel security office that the employee did not need to access classified information as part of the employee's job duties. As a result, the personnel security office decided to administratively withdraw the employee's Top Secret security clearance. The personnel security office also determined that the employee's Top Secret security clearance should have been administratively withdrawn in 2017 when HR reclassified the employee's PD.

b. Motive To Retaliate and Evidence of Animus by Agency Officials Involved in the Decision

While the supervisor knew about the employee's two EEO complaints, our witness interviews and document reviews did not uncover any evidence of animus. For example, the supervisor

contacted the Office of Law Enforcement and Security to confirm the supervisor had a duty to disclose the employee's medical issue before reporting the condition. After making the report to the personnel security office, the supervisor never followed up on the status of the employee's clearance, which indicated that the supervisor was not concerned with the outcome. The supervisor's lack of follow-up undermines a suggestion that the supervisor was motivated by animus. In addition, we determined the supervisor did not know that the employee no longer held a Top Secret security clearance until early 2019, more than 2 weeks after the employee left the DOI. In sum, the evidence suggested that this was not a significant issue in the supervisor's mind and therefore was insufficient to establish that the supervisor had animus or a motive to retaliate.

c. Evidence the Agency Takes Similar Action Against Similarly Situated Employees Who Are Not Whistleblowers

As stated above, another factor to consider is whether the agency has taken similar action against similarly situated employees who are not whistleblowers. While we did not find evidence that the agency has taken similar action against similarly situated employees who are not whistleblowers, we did find that the agency has protocols in place for handling security clearances and acted in accordance with those protocols. For example, as discussed above, an HR representative explained that the agency uses an OPM scoring tool to determine the sensitivity designation for nonmanagerial positions. In addition, a representative from the personnel security office said that if an employee no longer needs access to classified information, the personnel security office is required to administratively withdraw a Top Secret clearance.

In this instance, HR used the OPM scoring tool to reclassify the employee's position as "Non-Sensitive/Low Risk," thereby removing the employee's previous "Critical Sensitive" determination. The personnel security office, upon learning that the employee no longer needed access to classified information, followed its protocol and administratively withdrew the employee's Top Secret clearance.

After analyzing these three *Carr* factors, we concluded that there was clear and convincing evidence that the agency would have withdrawn the employee's security clearance regardless of the protected disclosures. In making this assessment, we note that the supervisor's actions that initiated the chain of events that led to the change in the employee's security clearance occurred in early 2017, which the evidence established was roughly 1 week before the supervisor learned of the employee's first protected disclosure. The evidence established that due to an administrative error, a different unit—neither under the supervisor's control nor acting at the supervisor's behest—did not make the required change until after the supervisor learned of the protected disclosures. That, however, does not undermine a finding that the agency would have taken the action regardless of the protected disclosures.

Moreover, the fact that the supervisor notified the personnel security officials regarding the employee's health issue after the supervisor learned of the protected disclosures also does not undermine this finding. First, personnel security officials told the supervisor about the supervisor's requirement to make such a notification. Second, the supervisor's notification of the health issue was irrelevant, according to personnel security officials, because the employee's clearance was not withdrawn because of the employee's health issue. Officials stated they withdrew the clearance because of the change to the employee's PD, which, as noted above,

resulted from a change in status that occurred before the supervisor learned of the employee's complaints.

As such, we concluded that the agency satisfied its burden of establishing that it would have withdrawn the employee's clearance in the absence of the protected disclosures. Therefore, we did not substantiate the allegation of reprisal under PPD-19.

IV. SUBJECT

Supervisor, Office of Public Safety, Resources Protection, and Emergency Services

V. DISPOSITION

We provided this report to the Secretary of the Interior for any action deemed appropriate.

