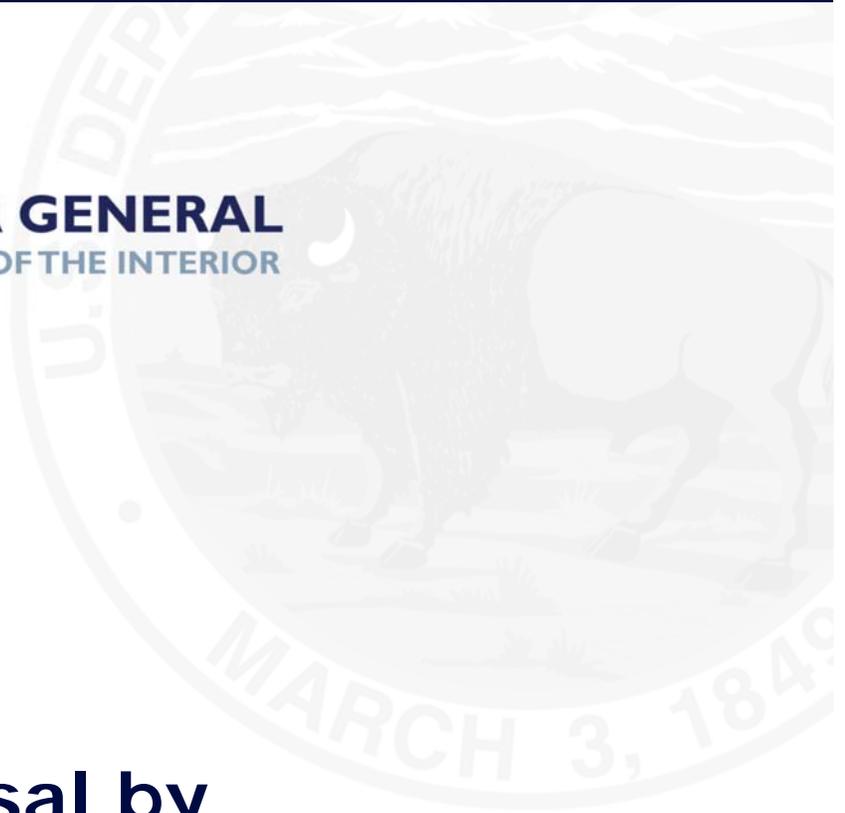




OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR



Alleged Reprisal by USGS Director

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

I. EXECUTIVE SUMMARY

We investigated an allegation that U.S. Geological Survey (USGS) Director James Reilly retaliated against a USGS whistleblower after the employee filed a complaint with our office about Reilly's conduct. We substantiated the allegation.

We presented our findings to relevant U.S. Department of the Interior (DOI) officials. At the DOI's request, we then engaged with the DOI Employment and Labor Law Unit on a variety of factual and legal issues. We resolved a number of those issues and reissued our report to the DOI, incorporating additional facts and legal analysis as warranted. The following summarizes the findings presented in our full report, which was provided to the Secretary of the Interior for any action deemed appropriate.

II. HOW WE ANALYZED THE EVIDENCE

The Whistleblower Protection Act (WPA) prohibits reprisal against Federal employees for exercising any appeal, complaint, or grievance right granted by law, rule, or regulation. The WPA specifically protects employees who cooperate with or disclose information to an Office of Inspector General (OIG) or other component that is responsible for internal investigation or review of an agency.

We applied the WPA's burden-shifting framework to our analysis of the whistleblower reprisal allegations against Reilly. Under this framework, the complainant must first meet four elements to establish a *prima facie* case of reprisal by a preponderance of the evidence; that is, the complainant must show that each element is more likely than not true. Specifically, the complainant must show that:

1. They engaged in protected activity
2. The responsible management official knew about the protected activity
3. A personnel action was taken, threatened, or not taken after the protected activity
4. The protected activity was a contributing factor in the personnel action taken, threatened, or not taken

If the complainant meets these four elements, the burden shifts to the agency to prove by clear and convincing evidence that it would have taken the same personnel action even if the protected activity had not occurred. Factors that are considered in this analysis include:

1. The strength of the agency's evidence in support of its action
2. The existence and strength of any motive to retaliate on the part of agency officials involved in the decision

3. Any evidence that the agency takes similar actions against similarly situated employees who are not whistleblowers

Our findings based on these standards are discussed below.

III. THE COMPLAINANT MET THE FOUR ELEMENTS FOR ESTABLISHING A *PRIMA FACIE* REPRISAL CASE

A. Elements 1 and 2: Reilly Knew the Complainant Filed an OIG Complaint Against Him

As we stated above, to establish a *prima facie* case of whistleblower reprisal under the WPA, the complainant must show, in part, that they engaged in a protected activity and that the management official who took the personnel action knew about the protected activity at the time of the decision.

In this case, the complainant filed a complaint with us about Reilly's alleged retaliation against the complainant, and Reilly learned soon afterward that the complainant had done so. Therefore, a preponderance of the evidence established that the complainant satisfied the first two elements of the analysis.

B. Element 3: The Complainant Was Reassigned to a Different Position

The third element of the *prima facie* analysis requires the complainant to show that the responsible management official took or failed to take, or threatened to take or fail to take, a personnel action against them. A personnel action can include a detail, transfer, or reassignment, or any significant change in duties, responsibilities, or working conditions.

We concluded that Reilly caused USGS employees to reassign the complainant to a different position, as reflected in a Notification of Personnel Action (Standard Form 50). This position had different responsibilities and working conditions. The complainant did not request this reassignment, and no one discussed it with the complainant. Although the position was the same series, grade, and pay as the previous position, we concluded that this reassignment qualified as a personnel action under the WPA. The complainant therefore satisfied the third element of the analysis.

C. Element 4: The OIG Complaint Was a Contributing Factor in Reilly's Decision to Reassign the Complainant

As part of a *prima facie* case of reprisal, the complainant must also establish that the protected activity was a contributing factor in the responsible management official's decision to take the personnel action. Evidence of a contributing factor may be established through the so-called knowledge/timing test, which focuses on the timing between the protected activity and the action taken, on the one hand, and the responsible management official's knowledge of the protected activity, on the other.

The knowledge/timing test can be satisfied if the personnel action took place less than 2 years after the protected activity. In this case, less than a year passed between the time that Reilly learned of the complaint to us and the subsequent reassignment of the complainant. Therefore, the complainant satisfied the knowledge/timing test and the fourth element of the analysis. In addition, Reilly's own comments, which are discussed below, provided sufficient evidence that the complaint to our office was a contributing factor in the personnel action at issue.

IV. THE DOI DID NOT MEET ITS BURDEN OF ESTABLISHING BY CLEAR AND CONVINCING EVIDENCE THAT THE REASSIGNMENT WOULD HAVE OCCURRED ABSENT THE COMPLAINANT'S PROTECTED ACTIVITY

As we stated in Section II, if the complainant satisfies the elements for a *prima facie* reprisal case, the agency must provide clear and convincing evidence that it would have taken the personnel action even absent the protected activity. In determining whether the agency met its burden here, we considered factors articulated by the Federal courts and discussed below. After considering all pertinent evidence in light of these factors, we concluded that the agency did not meet its burden.

A. Factor 1: Strength of the Agency's Evidence in Support of Its Action

Reilly offered various reasons for the complainant's reassignment, but the evidence provided did not meet the clear and convincing evidence standard.

Reilly told us in an interview that one reason for the reassignment was the complainant's inability to get along with another staff member. In interviews, however, this staff member acknowledged some tensions during a particular period but also described a generally cordial working relationship with the complainant. Moreover, the staff member attributed the complainant's reassignment primarily to Reilly's distrust of the complainant. The staff member could not identify a particular reason for this distrust except that Reilly "wouldn't trust those that had complaints on him." A witness also told us that Reilly had described the complainant as "evil" without explaining why he believed this, and Reilly ultimately acknowledged that he said in front of others that the complainant had an "evil streak," or words to that effect, which he admitted "was a very poor choice of words."

In addition, Reilly asserted that the complainant was a "negative influence" in their office. He named two USGS staff members who, he said, corroborated his assertions about the complainant's conduct. Although these staff members expressed the belief that the complainant's supervisor unduly favored the complainant, they did not state that the complainant's own conduct disrupted the workplace, and we found no evidence that any concerns by these employees prompted the reassignment. Two other employees we interviewed described the complainant as "friendly" and "professional," respectively.

Reilly also told us that he preferred to address employee issues directly but acknowledged that he never spoke with the complainant about his concerns or asked anyone else to do so. This undermines Reilly's contention that the complainant's workplace conduct was the motivation for

the reassignment. Moreover, a review of the complainant's personnel files revealed no history of conduct or performance issues. In fact, the complainant consistently received high performance ratings.

Other explanations offered by the agency—for example, that the complainant's position had been filled or that the complainant had requested the reassignment—were not supported by the evidence.

B. Factor 2: Motive To Retaliate by Agency Official Involved in the Decision

In determining whether a deciding official had a motive to retaliate, case law permits consideration of any motive to retaliate on the part of the agency official who ordered the action. Relevant factors in assessing motive include whether the deciding official was the subject of the whistleblower complaint, whether the complaint reflected poorly on the deciding official, and whether the deciding official had knowledge of the complaint.

Reilly's motive to retaliate was particularly strong. Reilly was the Director of the USGS, he was the subject of the complainant's complaint, and he knew about the complaint. Reilly also expressed displeasure about the fact that the complaint had been filed. During his interview, Reilly was asked about any issues he had with the complainant. He answered, "Well, there's one very large one that's sitting in this room. It's this investigation, to be perfectly honest."

One witness described a meeting in which Reilly said that the complainant had "weaponized the IG process" against him, and the witness' contemporaneous notes corroborate that statement. This witness also recalled Reilly asking whether certain actions could be taken against the complainant, such as giving the complainant assignments or deadlines that could not be met so the complainant could be fired, or transferring the complainant to an office that was farther away.

USGS personnel also confirmed that Reilly asked whether employees had filed complaints against him with the Equal Employment Opportunity Commission, the Office of Special Counsel, our office, or Congress. The USGS personnel said Reilly wanted to know of anyone filing such complaints so that he could "move them."

Reilly acknowledged that he "probably did" ask about employees filing complaints, although he told us he did so because he wanted to address employee problems directly rather than have the employees go to our office. Moreover, while Reilly said he did not specifically recall stating that the complainant had "weaponized the IG process," he told us that "there is an element of filing complaints where it's a death by 1,000 cuts." Reilly stated, "I would have made the comment to the fact that it can be weaponized . . . and that when it's weaponized, there's no consequence."

This evidence, taken together, including Reilly's own statements, strongly indicates that he had a motive to retaliate against the complainant.

C. Factor 3: Evidence the Agency Takes Similar Actions Against Similarly Situated Employees Who Are Not Whistleblowers

We neither found nor were provided with evidence that there were other “similarly situated” employees, that is, employees who were not whistleblowers who were involuntarily reassigned. A USGS staff member gave us a list of employees who had been reassigned during Reilly’s time at the USGS, but the staff member was not able to provide comparators because, as the staff member explained, the USGS does not track whether management-directed reassignments are voluntary or involuntary.

Although the DOI eventually asserted that one employee was “similarly situated,” this employee requested to be reassigned, and thus we determined that this person was not comparable to the complainant.

V. CONCLUSION

Based on all the evidence, we concluded that (1) the complainant met the elements needed to establish a *prima facie* reprisal case against Reilly and (2) the agency did not meet its burden of establishing by clear and convincing evidence that it would have reassigned the complainant to a different position even if the complainant had not engaged in a protected activity. We came to these conclusions after analyzing the factors discussed above and considering all the evidence in the aggregate. While the DOI provided some evidence of other motivations that may have played a role in its personnel decision, it failed to disentangle those motivations from the evidence of impermissible, retaliatory motive found during our investigation.

We therefore substantiated the allegation of reprisal under the WPA. We have submitted our full report of this investigation to the Secretary of the Interior for any action deemed appropriate.

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