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

Non-Federal Employee's Allegations of Whistleblower Retaliation Against the National Park Service Are Not Substantiated

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REPORT OF INVESTIGATION

I. EXECUTIVE SUMMARY

We investigated allegations that the National Park Service (NPS) retaliated against a Complainant after the Complainant raised concerns about alleged censorship of a report. The Complainant, who performed work pursuant to task agreements issued under cooperative agreements the NPS had with non-Federal entities, contended that NPS officials tried to remove certain references from a report. Although the NPS published the report without making the deletions to which the Complainant objected, the Complainant alleged that after reporting the allegations of attempted censorship and other related violations to the Government, the NPS retaliated against the Complainant by declining to fund a proposed task agreement, extend an internship, and accept a volunteer application that would have enabled continued work with the NPS.

We concluded that the claims fall short both legally and factually. Because the Complainant was not a Federal Government employee, the Complainant filed the complaint of whistleblower reprisal under the National Defense Authorization Act for fiscal year 2013,[1] in which Congress established a framework by which employees of non-Federal entities may seek redress for retaliation by their employers. The claims of retaliation were made against the NPS, however, rather than against the Complainant's employers, so we determined that the Complainant could not state a claim of reprisal under this statute.[2]

Although we determined that the Complainant did not have a cause of action against the Government under 41 U.S.C. § 4712, we reviewed the evidence to determine whether the NPS engaged in misconduct or otherwise acted improperly in deciding not to fund the proposed task agreement, extend the internship, or accept the volunteer application. We concluded that the weight of the evidence did not support a finding that the NPS engaged in misconduct or that its decisions were influenced by the claims of attempted censorship and other related violations. Instead, we found that, overall, the evidence showed that the NPS' decisions at issue, which were made by career employees, were based largely on an uncertainty of future funding and a lack of further need for the Complainant's services.

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

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[1] Pub. L. No. 112-239, § 828, 126 Stat. 1632, 1837-1841 (codified at 41 U.S.C. § 4712).

[2] Although the Complainant did not specifically assert claims under the Whistleblower Protection Act (WPA), 5 U.S.C. § 2302(b), we also determined that the Complainant did not have a cognizable whistleblower claim under the WPA with respect to the NPS' decision not to accept the volunteer application.

II. RESULTS OF INVESTIGATION

A. Analysis

1. The Complainant Cannot State a Claim for Reprisal Against the Government or its Employees Under 41 U.S.C. § 4712

The enactment of 41 U.S.C. § 4712 expanded whistleblower protections for employees of Federal contractors, subcontractors, grantees, and subgrantees for claims of reprisal against their employers. It did not, however, provide non-Federal employees with a cause of action against the U.S. Government or its personnel.

Specifically, 41 U.S.C. § 4712 states:

> An employee of a contractor, subcontractor, grantee, or subgrantee . . . may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body . . . information that the employee 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 related to a Federal contract . . . or grant.[3]

Section 4712's prohibition on reprisal also applies to employees of non-Federal entities that partner with the Government under cooperative agreements.[4] In this case, the Complainant worked with the NPS under two cooperative agreements held by two non-Federal entities. Thus, under § 4712, the Complainant may state a claim for reprisal against the non-Federal entities if the Complainant can show that either entity took an action in retaliation for the Complainant making a protected disclosure. As explained below, however, the statute's plain language and relevant case law lead us to conclude that the Complainant cannot state a claim under § 4712 based on allegations that Government officials—namely, specific officials within the DOI—retaliated against the Complainant.

The text of § 4712 supports the conclusion that the Complainant cannot state a claim for whistleblower reprisal based on allegedly improper actions taken by the Government. First, the statute's "Exhaustion of Remedies" clause gives the whistleblower the right to file an action against his or her employer—but not the Government—in Federal district court after exhausting all administrative remedies.[5] Moreover, although § 4712 recognizes that prohibited acts of reprisal may involve "the request of an executive branch official,"[6] the statute contemplates that the alleged improper actions must be taken by the Federal contractor, grantee, or cooperative agreement partner, not the Government. The statute's "Rules of Construction" also provide that, for purposes of stating a claim of reprisal under § 4712, "an employee who initiates or provides

[3] 41 U.S.C. § 4712(a)(1) (2020).

[4] 2 C.F.R. §§ 200.1, 1402.207(b) (2021).

[5] 41 U.S.C. § 4712(c)(2).

[6] *Id.* § 4712(a)(3)(B).

evidence *of contractor, subcontractor, or grantee misconduct* in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract or grant shall be deemed to have made a disclosure" covered by 41 U.S.C. § 4712.[7] Thus, the statute protects employees who "blow the whistle" on their employers in order to protect the Government from waste, fraud, or abuse. The statute does not create a private cause of action for non-Federal employees against the Government for alleged Government misconduct, which is what the Complainant is alleging here.[8]

Moreover, while we identified no cases construing the relevant provisions of 41 U.S.C. § 4712, we found several cases construing an analogous statute, 10 U.S.C. § 2409, which addresses whistleblower reprisal against U.S. Department of Defense and National Aeronautics and Space Administration contractors and grantees. The text of this statute is virtually identical to § 4712,[9] and the courts have repeatedly interpreted this language to conclude that employees of Federal contractors raising analogous whistleblower claims have no cause of action against the Government. For example, in *Labranche v. DoD*, the court stated that, while § 2409 "does protect whistleblowing employees of [F]ederal contractors from retaliation, *it does not afford such employees with a cause of action against the United States*." [10] The court explained that § 2409 instead "affords a whistleblowing employee who has exhausted administrative remedies with a cause of action *against the retaliating [F]ederal contractor.*" [11] Similarly, in *Grost v. United States*, the district court held that the statute "allows for suit only 'against the contractor' that carried out the prohibited reprisal."[12]

Here, the Complainant asserts that the NPS, not the two cooperative agreement partners that employed the Complainant, retaliated against the Complainant for disclosing the NPS' alleged censorship. Specifically, the Complainant claims that the NPS—not the cooperative agreement partners—retaliated against the Complainant by declining to approve the proposed task agreement, extend the internship, and accept the volunteer application. Because § 4712 does not

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[7] *Id.* § 4712(a)(3)(A) (emphasis added).

[8] The "Remedy and Enforcement Authority" section of 41 U.S.C. § 4712 also supports this interpretation. Section 4712(c)(1) specifies the types of actions the DOI can order if it agrees reprisal has occurred, all of which entail ordering "the contractor or grantee"—but not the Government—to take remedial action. These actions include (1) ordering "the contractor or grantee to take affirmative action to abate the reprisal"; (2) ordering "the contractor or grantee to reinstate the person to the position that the person held before the reprisal," including paying the complainant compensatory damages (such as back pay) and other employee benefits the complainant may have lost due to the reprisal; and (3) ordering the contractor or grantee to pay the costs and expenses the complainant incurred by bringing the action against their employer. This remedial provision does not contemplate a remedy for the complainant with respect to the Government itself.

[9] 10 U.S.C. § 2409 states in pertinent part that "[a]n employee of a contractor, subcontractor, grantee, or subgrantee . . . may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body . . . information that the employee reasonably believes is evidence of . . . [g]ross mismanagement of a Department of Defense contract or grant, a gross waste of Department funds, an abuse of authority relating to a Department contract or grant, or a violation of law, rule, or regulation related to a Department contract . . . or grant." The statute includes the same prohibition with respect to National Aeronautics and Space Administration contracts and grants. 10 U.S.C. § 2409(a)(1)(A) and (B), respectively.

[10] No. 15-2280, 2016 WL 614682, at *4, n.2 (E.D. La. Feb. 16, 2016) (emphasis added).

[11] *Id.* (emphasis added).

[12] No. EP–13–CV–158–KC, 2014 WL 1783947, at *14 (W.D. Tex. May 5, 2014). *See also Manion v. Spectrum Healthcare Resources*, 966 F. Supp. 2d. 561, 566 (E.D. N.C. 2013) (stating that "[t]he Navy is not a permitted defendant under [10 U.S.C. § 2409] and is therefore not a necessary party under [Federal Rules of Civil Procedure] Rule 19").

recognize claims of reprisal by non-Federal employees against the Government, the claims against the NPS are insufficient as a matter of law.[13]

2. The Evidence Does Not Support a Finding that NPS Officials Engaged in Misconduct

Although the Complainant failed to state a claim of reprisal under 41 U.S.C. § 4712, we also reviewed the evidence to determine whether NPS officials engaged in misconduct when they decided not to fund the proposed task agreement, extend the internship, or accept the volunteer application.[14] After doing so, we concluded that the weight of the evidence showed that the NPS made its decisions because of uncertainty surrounding the Government's funding and a lack of further need for the Complainant's services.

a. The Proposed Task Agreement

The evidence did not support a finding that the NPS engaged in misconduct or otherwise acted improperly when it decided not to fund the proposed task agreement. Instead, the evidence showed that the NPS would not commit to funding the proposed task agreement because the bureau lacked funds for new projects and relevant officials did not know how much money would be in the budget.

NPS Employee 1 told us repeatedly and consistently that the NPS did not fund the proposed task agreement because, from the time the proposal was submitted through the time when the Complainant asked NPS Employee 1 about the status of funding, the NPS was operating under a continuing resolution—a short-term funding measure passed by Congress—and thus did not have funding available for new projects—not just the proposed task agreement. Other evidence corroborated NPS Employee 1's statements. Several witnesses told us the NPS office in question did not have funds available for new projects until spring or summer that year, months after the proposed task agreement was submitted and the Complainant inquired about it. Moreover, we confirmed that the NPS office declined to fund multiple other proposals during the first half of that fiscal year. These rejected proposals included the NPS office's list of high-priority unfunded needs from the fiscal year—none of which received funding until the end of the fiscal year and none of which involved the Complainant. In addition, two other employees in the NPS office in question submitted numerous proposals during this period, most of which received no funding. Even after funds became available for new projects at the end of the fiscal year, the evidence showed that the amounts requested for new projects exceeded available funds, and more than

[13] We note that the evidence makes clear that the Complainant was not a Federal employee (and, in fact, the Complainant acknowledged this point). The Complainant's suggestion that the working relationship with the NPS made the Complainant essentially a full-time employee is not relevant to our legal analysis. The statute and relevant case law establish that only Federal employees may bring reprisal claims against the Government and its personnel; there is no support for any assertion that employees of contractors, grantees, or others who have non-employment relationships with the Government somehow qualify as Federal employees for purposes of alleging a claim of reprisal under the statute.

[14] Although the complaint did not cite particular standards on these issues, the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. part 2635, govern executive branch employee conduct and include provisions requiring employees to act impartially, protect and conserve Federal property, act in good faith, adhere to all laws, and endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards. *See* 5 C.F.R. § 2635.101.

half of the proposals on the list of the NPS office's high-priority unfunded needs received no funding in that fiscal year.

The only evidence we received that directly drew a connection between the Complainant's involvement in the task agreement and the decision not to fund it was NPS Employee 2's statement that NPS Employee 1 "effectively affirm[ed]" that the proposed task agreement was not approved because the Complainant was associated with it; on a related point, NPS Employee 2 said repeatedly that NPS Employee 2 believed the NPS office had funds available for the proposed task agreement. We did not find these statements convincing because, overall, the evidence showed that NPS Employee 2 was not in a position to have detailed knowledge of budget policy, the budget choices NPS Employee 1 had to make, and the availability of funding overall. In addition, other documentary materials make us disinclined to rely on NPS Employee 2's statements. First, NPS Employee 1 denied telling NPS Employee 2 that the Complainant's affiliation with the project played any role in the decision not to provide funding for the proposed task agreement. NPS Employee 1 consistently explained that the decision was based on a lack of funding, not the Complainant. NPS Employee 1 also stated that NPS Employee 1 did not work with the Complainant, had limited to no personal interactions with the Complainant, and that, as far as NPS Employee 1 knew, the Complainant "was doing a good job" on the project. Other witnesses with whom we spoke confirmed that there was overall uncertainty regarding the budget and that funding for new projects was not available during that time. Moreover, multiple witnesses—including NPS Employee 2—provided us with lists of numerous projects not involving the Complainant that were also not funded during this time period. We recognize that NPS Employee 1 did have knowledge of the complaint that the NPS censored the report and was also aware of complaints that the Complainant was disruptive and that some personnel had concerns about the Complainant's continued access to certain NPS systems. NPS Employee 1's mere knowledge of these issues, without more, is not enough to substantiate a finding that NPS Employee 1 acted improperly or for an improper purpose.

b. The Internship

With respect to the NPS' decision not to fund an extension of the Complainant's internship, we note at the outset that the Complainant was not terminated by the NPS and that the internship, which was funded under a cooperative agreement between the NPS and a cooperative agreement partner, ended in accordance with the terms of that agreement. Moreover, notwithstanding NPS Employee 2's claim that NPS Employee 2 believed the NPS office had money available to fund an extension, several witnesses told us that the same budgetary uncertainty discussed above applied to this request for funding as well. In addition, both NPS Employee 1's supervisor and a cooperative agreement partner employee told us that the internships of the type at issue—including the Complainant's—do not last for more than 1 year. According to the cooperative agreement partner, to fund an extension, the NPS would have had to request that the cooperative agreement partner create a new position; the NPS, however, made no such request. Finally, we did not identify evidence suggesting that the NPS' decision constituted misconduct or was motivated by an improper purpose.

c. The Volunteer Application

Similar to the other allegations, we found that the Complainant did not have an actionable claim under potentially relevant law,[15] nor did we find evidence that the NPS' decision to reject the Complainant's application to provide volunteer services constituted misconduct. The evidence showed that the Complainant's work on the project had ended, that NPS Employee 1 determined that the Complainant's continued support was no longer needed, and that the work proposed would not typically be performed by someone with the Complainant's credentials. The evidence also showed that the NPS ultimately used Federal employees to perform this work.[16] Moreover, while we recognize that NPS Employee 3 expressed concern about the Complainant becoming a volunteer and having continued access to NPS systems and that NPS Employee 1 expressed awareness of these issues, the evidence did not show that NPS Employee 1 considered these issues when making the decision. We therefore did not conclude that the NPS' failure to use the Complainant as a volunteer constituted misconduct.

III. CONCLUSION

The Complainant's claims of reprisal under 41 U.S.C. § 4712 are insufficient as a matter of law because § 4712 does not provide non-Federal employees with a cause of action against the Government for retaliation. We also did not conclude that the weight of the evidence substantiated that the NPS engaged in misconduct when it declined to fund the proposed task agreement, extend the internship, and accept the volunteer application.

IV. DISPOSITION

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

[15] Although the Complainant did not raise claims under 54 U.S.C. § 102301(c), volunteers do not qualify for whistleblower protections under Federal law. 54 U.S.C. § 102301(c) (2016) (stating that "a volunteer shall not be deemed a Federal employee and shall not be subject to the provisions of law relating to Federal employment" except as provided in the statute, which does not include a provision for whistleblower protections). Consistent with this approach, the Director's Order that implements the NPS' volunteer policy specifically states that it "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person." Nat'l Park Serv., Director's Order #7, "Volunteers-In-Parks," at § II (Mar. 15, 2016). In addition, the Complainant's claim that the Complainant was a "de facto" employee is not relevant to our analysis here.

[16] While not raised as a justification by the NPS, we note that the NPS' decision to use Federal employees to perform this work as opposed to a volunteer is consistent with Federal policy. *See* 54 U.S.C. § 102301(a) (stating that "the Secretary shall not permit the use of volunteers in hazardous duty or law enforcement work or in policymaking processes, or to displace any employee").

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