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**NATIONAL SECURITY AGENCY/CENTRAL SECURITY
SERVICE**



INSPECTOR GENERAL

REPORT OF INVESTIGATION

28 July 2015

IV-14-0054

Alleged Reprisal

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(U) OFFICE OF THE INSPECTOR GENERAL

(U) Chartered by the NSA Director and by statute, the Office of the Inspector General conducts audits, investigations, inspections, and special studies. Its mission is to ensure the integrity, efficiency, and effectiveness of NSA operations, provide intelligence oversight, protect against fraud, waste, and mismanagement of resources by the Agency and its affiliates, and ensure that NSA activities comply with the law. The OIG also serves as an ombudsman, assisting NSA/CSS employees, civilian and military.

(U) AUDITS

(U) The audit function provides independent assessments of programs and organizations. Performance audits evaluate the effectiveness and efficiency of entities and programs and their internal controls. Financial audits determine the accuracy of the Agency's financial statements. All audits are conducted in accordance with standards established by the Comptroller General of the United States.

(U) INVESTIGATIONS

(U) The OIG administers a system for receiving complaints (including anonymous tips) about fraud, waste, and mismanagement. Investigations may be undertaken in response to those complaints, at the request of management, as the result of irregularities that surface during inspections and audits, or at the initiative of the Inspector General.

(U) INTELLIGENCE OVERSIGHT

(U) Intelligence oversight is designed to insure that Agency intelligence functions comply with federal law, executive orders, and DoD and NSA policies. The IO mission is grounded in Executive Order 12333, which establishes broad principles under which IC components must accomplish their missions.

(U) FIELD INSPECTIONS

(U) Inspections are organizational reviews that assess the effectiveness and efficiency of Agency components. The Field Inspections Division also partners with Inspectors General of the Service Cryptologic Elements and other IC entities to jointly inspect consolidated cryptologic facilities.

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I. (U) SUMMARY

(U//FOUO) On 25 March 2014, the NSA/CSS Office of the Inspector General (OIG) received an allegation that [redacted] a target analyst reporter in [redacted] had been subjected to reprisal for her protected communications to the Office of General Counsel (OGC), the OIG, and the Office of Administrative Grievances (OAG). In emails and interviews, it was alleged that management officials had:

- 1) Removed [redacted] from the Special Projects team (and, by extension, her target set) in January 2013;
- 2) Excluded [redacted] from meetings required to perform her job;
- 3) Excluded [redacted] from an office relocation;
- 4) Negatively portrayed [redacted] performance in a 2009-2010 annual contribution evaluation (ACE); and
- 5) Failed to complete [redacted] ACE for the 2009-2010 performance cycle.

(U//FOUO) NSA/CSS Policy 1-62, Whistleblower Protection, prohibits taking, or threatening to take, an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, for making a protected communication. The OIG investigation determined that [redacted] made a total of six protected communications to OGC, OIG, and OAG. However, only one of the five alleged actions taken against [redacted] constituted a personnel action under applicable standards; namely that [redacted] her supervisor, failed to complete her ACE for the 2009-2010 performance cycle. The OIG also concluded that [redacted] complaint was a contributing factor in [redacted] failure to complete her ACE because [redacted] was aware of [redacted] 20 July 2010 protected communication to OGC prior to her departure from [redacted] in August 2010, which is when she failed to complete the document.

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(U//FOUO) However, by clear and convincing evidence, the OIG determined that [redacted] would have failed to complete [redacted] ACE, absent her protected communications. Testimony revealed that [redacted] and [redacted] the second-level approver of the document, were unaware that [redacted] ACE had not been finalized. The OIG found this to be credible because [redacted] signed the ACE (which likely indicated to him that it was finished) and because the Associate Directorate for Human Resources (ADHR) was unable to produce any evidence to show that they alerted either [redacted] or [redacted] to the incomplete status of the ACE. Additionally, the OIG found no evidence that [redacted] was motivated to retaliate against [redacted] for her complaint. Therefore, the OIG did not substantiate the allegation of reprisal.

(U//FOUO) [redacted] and [redacted] will be informed of the results of our investigation. A summary of the investigative findings will be provided to [redacted] and the Inspector General, Department of Defense.

II. (U) BACKGROUND

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(U) Introduction

(U//FOUO) [redacted] entered on duty on [redacted]. She retired effective [redacted] as a GG12-09 target analyst reporter. Target analyst reporters provide synthesized products to customers by researching, analyzing, and reporting intelligence via appropriate reporting vehicles, in response to Intelligence Community requirements in accordance with NSA missions.

(U//FOUO) [redacted] began working in [redacted] Branch of the [redacted] Office, beginning in June 2005. In approximately June 2010, the team she was working on (called the [redacted] or [redacted]) was re-subordinated to [redacted], the [redacted] Branch.

(U//FOUO) On 25 March 2014, [redacted] emailed the OIG and alleged that a former contractor in her office had been hired as a civilian without observing the mandatory cooling off period, in violation of Ethics regulations. [redacted] further alleged that she had been subjected to numerous acts of reprisal for her prior protected communications to OGC, OIG, and OAG. The OIG subsequently launched this reprisal investigation.

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(U) Scope and Authorities

(U) Section 7(c) of the Inspector General Act of 1978, as amended, states that “[a]ny employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or threaten to take any action against any employee as a reprisal for making a complaint or disclosing information to an Inspector General....”

(U//FOUO) NSA/CSS Policy 1-62, *Whistleblower Protection* (Policy 1-62), issued 6 July 2005, (App. A) provides protection to NSA employees who make a “protected communication.”² A protected communication is any lawful communication to a member of Congress or an IG, or a “lawful communication of information which the communicant reasonably believes evidences a violation of law or regulation, mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety, when such communication is made to a member of Congress, an IG, or any other person or organization

¹ (U//FOUO) This allegation is currently under investigation.

² (U//FOUO) Policy 1-62 was re-issued 24 June 2015. Because both the alleged protected communication and personnel action in this case occurred prior to that date, the previous version of the policy was used in the conduct of the related OIG investigation.

(including any person or organization in the chain of command) designated under Agency policy or other established administrative procedures to receive such communications.”

(U//~~FOUO~~) NSA/CSS Policy I-62, paragraph 11, prohibits taking, or threatening to take, an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, for making a protected communication. Paragraph 9 defines a “personnel action” as an action that affects, or has the potential to affect, the employment opportunities, the current position, or the career of an employee.

(U//~~FOUO~~) The NSA/CSS OIG employs a two stage process in conducting whistleblower reprisal investigations.³ The first stage focuses on the alleged protected communication, personnel actions, and whether the protected communication was a contributing factor in the personnel action. The second stage focuses on whether the Agency would have taken, withheld, or threatened the personnel actions absent the protected communication. The first stage of the whistleblower reprisal analysis, determining whether a prima facie reprisal case exists, requires that findings be proven by a preponderance of the evidence. “Preponderance of the evidence” is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

(U//~~FOUO~~) To progress to the second stage of the investigative process, there must be proof by a preponderance of the evidence to make three findings:

1. (U//~~FOUO~~) The complainant made a protected communication;
2. (U//~~FOUO~~) The complainant was the subject of a personnel action; and
3. (U//~~FOUO~~) The protected communication was a contributing factor in the personnel action.⁴

(U//~~FOUO~~) If a preponderance of the evidence supports the three findings, the investigation will proceed to the second stage. At that point, the Agency is afforded the opportunity to provide evidence that establishes that the Agency would have taken, withheld, or threatened the personnel action against the complainant absent the protected communication. The second stage of analysis is governed by a clear and convincing standard. “Clear and convincing evidence” is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than preponderance of the evidence, but a lower standard than beyond a reasonable doubt.

³ (U//~~FOUO~~) 5 U.S. Code 2302(a)(2)(C)(ii)(1) exempts Intelligence Community employees from statutory whistleblower protections. However, we still use as a guide the implementing guidance found in U.S. Merit Systems Protection Board, U.S. Office of Special Counsel, and DoD decisions and regulations under that title.

⁴ (U//~~FOUO~~) This third finding may be established if the acting official had knowledge, actual or imputed, of the complainant’s communication and the personnel action took place within a period of time subsequent to the communication, such that a reasonable person could conclude that the communication was a contributing factor in the decision to take the action.

(U//~~FOUO~~) In the second stage, we consider the following three factors for presence of “clear and convincing evidence:”

1. (U//~~FOUO~~) The strength of the Agency’s evidence in support of its personnel action;
2. (U//~~FOUO~~) The existence and strength of any motive to retaliate on the part of the Agency officials involved in the decision; and
3. (U//~~FOUO~~) Evidence that the Agency has taken similar actions against employees who are not whistleblowers but are otherwise similarly situated.

(U//~~FOUO~~) In addition to interviewing [redacted] three times, we obtained sworn testimony from seven witnesses, including two of her (former) immediate supervisors. We also spoke with representatives from the Associate Directorate for Human Resources, MD21. We obtained all pertinent performance documents and copies of relevant correspondence from various sources, including [redacted].

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(U) Sequence of Events

(U//~~FOUO~~) According to her employee profile, on [redacted] joined [redacted]. In approximately 2009, a [redacted] was stood up in [redacted] to address a new requirement. [redacted] expressed an interest in the subject-matter and was assigned to the team. The team initially consisted of a government team lead, [redacted], a military member, and one other civilian. The team was also later supplemented by contractors.

(U//~~FOUO~~) On 26 April 2010, [redacted] Branch Chief [redacted] signed an Annual Contribution Evaluation (ACE) for [redacted] for 8/1/09-2/24/10. [redacted] closed out [redacted] evaluation before the end of the rating period (31 July 2010) because [redacted] left the organization for a new position. Following her departure, [redacted] became [redacted] performance rater.

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(U//~~FOUO~~) In approximately June 2010, the [redacted] shifted its mission from intelligence development to production and was re-subordinated to [redacted], a member of the [redacted] was also resubordinated to [redacted], [redacted] performance rater, also moved to [redacted] became [redacted] performance reviewer.

(U//~~FOUO~~) On 20 July 2010, [redacted] emailed the Office of General Counsel (OGC). She alleged that contractors in [redacted] were directing the work of government employees, attending meetings on behalf of government employees, and assessing the suitability of potential government hires (i.e. performing inherently governmental work). Also, she claimed that the team lead [redacted] put contractors “in charge” of government employees, as evidenced by asking one contractor to lead a staff meeting in her absence. She also alleged that the Branch Chief [redacted] accused her of causing a hostile work environment.

(U//~~FOUO~~) On 28 July 2010, [redacted] requested that [redacted] and [redacted] Deputy Branch Chief [redacted] review her draft evaluation of [redacted] for the 2009/2010 ACE cycle.

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(U//FOUO) In early August 2010, [redacted] met with [redacted] to present her with her performance evaluation. [redacted] requested that [redacted] supervisor, observe the meeting.

(U//FOUO) On 9 August 2010, [redacted] signed (as reviewer) an ACE for [redacted] for 8/1/09-7/31/10. [redacted] and [redacted] the rater for the ACE, did not sign the document.⁵

(U//FOUO) In mid-August 2010, [redacted] departed [redacted] for a new assignment in [redacted]

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(U//FOUO) On 24 August 2010, [redacted] emailed the OIG and alleged that contractors were performing inherently governmental functions, including leading the [redacted]. She attached a copy of her 20 July 2010 email to OGC.⁶

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(U//FOUO) On 24 August 2010, the Assistant IG for Investigations (AIGI) directed his staff to interview [redacted] and then refer the issues to management for resolution. Following this direction, NSA OIG investigators spoke with [redacted] management about her complaint.

(U//FOUO) On 24 September 2010, [redacted] Chief [redacted] recorded that she met with [redacted] to discuss a portion of [redacted] complaint to the OIG.

(U//FOUO) On 29 September 2010, an OIG investigator emailed [redacted] and inquired whether he had spoken with [redacted] about an issue she raised in her complaint to the OIG.

(U//FOUO) On 30 September 2010, [redacted] filed for informal reconsideration of her 8/1/09-7/31/10 ACE (signed by [redacted] on 9 August 2010).

(U//FOUO) On 6 October 2010, [redacted] acknowledged receipt of [redacted] request for informal reconsideration and stated that he (the reviewer) and [redacted] (the pay pool manager) would review her request. However, he caveated that [redacted] would need to resubmit the form because she did not address how she thought each objective should be scored and why. He also informed her that in the ACE tool, when she acknowledged the evaluation, there is a place/opportunity for her to provide additional comments.

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(U//FOUO) On 7 October 2010, [redacted] emailed [redacted] and confirmed that she could only request reconsideration of the ratings, not the wording of the ACE.

(U//FOUO) On 8 October 2010, [redacted] emailed [redacted] and [redacted] and related that the automated tool for the informal ACE reconsideration had closed and therefore she could not amend her input. However, she attached her revisions to the email.

⁵ (U//FOUO) [redacted] began rating [redacted] beginning 2/25/10. Her end-of-cycle evaluation, therefore, should have covered the period from 2/25/10 through 7/31/10. [redacted] erroneously back-dated the evaluation to the beginning of the cycle (8/1/09). This mistake, however, did not impact the findings of this report.

⁶ (U//FOUO) The OIG resolved this complaint through a management referral. Management agreed to ensure contractors were used appropriately in the future and put a civilian lead in charge of the [redacted]

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(U//FOUO) On 20 October 2010, [redacted] emailed [redacted] and related that he reviewed her request and saw no substantive reason to change her ACE scores. While [redacted] narrative contained more details than [redacted] none of what she included rose to the level of excellent (4).

(U//FOUO) On 21 October 2010, [redacted] emailed [redacted] and said "thank you" for his email of 20 October 2010. She wrote that her "real reason" for requesting reconsideration had nothing to do with the score but with the "negatively written" narrative. [redacted] also wrote that she did not intend to sign the ACE because she was told by HR (human resources) that she did not have to sign anything that was negatively written about her.

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(U//FOUO) On 24 January 2011, [redacted] emailed the Office of Administrative Grievances and complained that [redacted] retaliated against her for her July 2010 complaint to OIG by writing a negative (2009-2010) ACE for her.⁷ She also claimed that [redacted] was complicit because he signed the evaluation, without knowing her. [redacted] further alleged that she was excluded from meetings pertaining to her target.

(U//FOUO) On 28 January 2013, [redacted] Deputy Branch Chief [redacted] announced a new [redacted] branch structure, consisting of 5 teams. As of this date, [redacted] was placed on the [redacted]

(U//FOUO) On 30 January 2013, [redacted] emailed all personnel in [redacted] and explained that each of the 5 teams would have its own email alias. He explained that the already existing SPT email alias would be "repurposed" for the newly constituted SPT.

(U//FOUO) On 12 February 2013, [redacted] emailed OGC and alleged that contractors were continuing to perform inherently governmental functions, including being Team Leads. [redacted] alleged that since her first complaint she had been ostracized, removed from the SPT, and maligned in her 2009/2010 ACE.

(U//FOUO) On 8 March 2013, [redacted] emailed the OIG and alleged that contractors were continuing to perform inherently governmental functions, including "running the operations of the branch." She further alleged that she had been removed from the SPT to allow one of the contract employees to become team lead.⁸

(U//FOUO) On 26 July 2013, [redacted] emailed OGC and alleged that government officials in [redacted] had a personal relationship with and had given preferential treatment to a contractor. This same contractor was alleged to have performed inherently governmental functions.

(U//FOUO) On 21 August 2013, the OIG closed an inquiry into the allegation that [redacted] raised (on 8 March 2013) regarding contractors performing inherently governmental functions. The OIG did not substantiate the allegation and [redacted] was advised of the results.

⁷ (U//FOUO) [redacted] actually directed her 20 July 2010 complaint to OGC, not OIG. On 24 August 2010, she contacted the OIG.

⁸ (U//FOUO) The OIG conducted an inquiry and the allegation was unsubstantiated.

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(U//~~FOUO~~) On 25 March 2014, [] emailed the OIG and alleged that a former contractor on the [] had been hired as a civilian and was violating Ethics regulations regarding the mandatory cooling off period for contractors who transition to civilian employment. [] also alleged age discrimination and retaliation/reprisal for her protected communications.⁹

(U//~~FOUO~~) In April 2014, [] began an office relocation. Four of the five teams comprising the branch [] moved from the 6th floor of headquarters to the 1st floor. [] team, the [] remained on the 6th floor.

(U//~~FOUO~~) In January 2015, the [] team, including [], was relocated to the 1st floor of headquarters.

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⁹ (U//~~FOUO~~) [] was advised that she could bring an age discrimination complaint to EEO for review.

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III. (U) FINDINGS**1. (U//~~FOUO~~) Did [redacted] make a protected communication? Yes.**

(U//~~FOUO~~) NSA/CSS Policy 1-62 defines a protected communication as:

- a. (U) Any lawful communication of information to a Member of Congress or an IG; or
- b. (U) A lawful communication of information which the communicant reasonably believes evidences a violation of law or regulation, mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety, when such communication is made to a member of Congress, an IG, or any other person or organization (including any person or organization in the chain of command) designated under Agency policy or other established administrative procedures to receive such communications.

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(U//~~FOUO~~) The OIG identified six protected communications made by [redacted]¹⁰

1. (U//~~FOUO~~) On 20 July 2010, [redacted] emailed the Office of General Counsel (OGC). She alleged that contractors in [redacted] were directing the work of government employees, attending meetings on behalf of government employees, and assessing the suitability of potential government hires. Specifically, she claimed that the team lead [redacted] put contractors "in charge" of government employees, as evidenced by asking one contractor to lead a staff meeting in her absence.

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(U//~~FOUO~~) [redacted] communicated what she reasonably believed to be an ethics violation on the part of Agency management officials to OGC. Under NSA/CSS Policy 1-62, OGC would be considered an organization established under administrative procedures to receive such communications. Therefore, this communication was protected.

2. (U//~~FOUO~~) On 24 August 2010, [redacted] emailed the OIG and alleged that contractors were performing inherently governmental functions, including leading the SPT. She attached a copy of her 20 July 2010 email to OGC.

(U//~~FOUO~~) This communication, which was essentially a reiteration of her 20 July 2010 email to OGC, was made to the OIG, an entity specifically designated by Policy 1-62 to receive such communications. Therefore, this communication was protected.

¹⁰ (U//~~FOUO~~) These are the communications that occurred prior to her 25 March 2014 communication with the OIG that launched this investigation.

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3. (U//FOUO) On 24 January 2011, [redacted] emailed the Office of Administrative Grievances (OAG) and complained that [redacted] retaliated against her for her complaint to OIG by writing a negative (2009-2010) ACE for her. She also claimed that [redacted] was complicit because he signed the evaluation, without knowing her.

(U//FOUO) [redacted] communicated what she reasonably believed to a violation of policies protecting whistleblowers. Under NSA/CSS Policy 1-62, OAG would be considered an organization established under administrative procedures to receive such communications. Therefore, this communication was protected.

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4. (U//FOUO) On 12 February 2013, [redacted] emailed OGC and alleged that contractors were continuing to perform inherently governmental functions, including being Team Leads. [redacted] alleged that since her first complaint she had been ostracized, removed from the SPT, and maligned in her 2009/2010 ACE.

(U//FOUO) This communication, which was essentially a reiteration of her 20 July 2010 email to OGC and her 24 August email to the OIG, was made to the OIG, an entity specifically designated by Policy 1-62 to receive such communications. Therefore, this communication was protected.

5. (U//FOUO) On 8 March 2013, [redacted] emailed the OIG and alleged that contractors were continuing to perform inherently governmental functions, including "running the operations of the branch." She further alleged that she had been removed from the SPT to allow one of the contract employees to become team lead.

(U//FOUO) This communication, which was essentially a reiteration of her 20 July 2010 email to OGC, her 24 August email to the OIG, and her 12 February 2013 email to OGC, was made to the OIG, an entity specifically designated by Policy 1-62 to receive such communications. Therefore, this communication was protected.

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6. (U//FOUO) On 26 July 2013, [redacted] emailed OGC and alleged that government officials in [redacted] had a personal relationship with and had given preferential treatment to a contractor. This same contractor was alleged to have performed inherently governmental functions. Therefore, this communication was protected.

(U//FOUO) [redacted] communicated what she reasonably believed to be an ethics violation on the part of government officials to OGC. Under NSA/CSS Policy 1-62, OGC would be considered an organization established under administrative procedures to receive such communications. Therefore, this communication was protected.

2. (U//FOUO) Was an unfavorable personnel action taken or threatened, or was a favorable action withheld or threatened to be withheld following the protected communication? Yes.

(U//FOUO) NSA/CSS Policy 1-62 defines a personnel action as "any action that affects or has the potential to affect the employment opportunities, the current position or the career of any employee of the NSA/CSS.... Such actions include a promotion; a disciplinary or corrective

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action; a transfer or reassignment; a performance evaluation; a decision on pay, benefits, awards or training; and any other significant change in duties or responsibilities inconsistent with the employee's salary or grade level." [redacted] alleged that she was subjected to five adverse actions:¹¹

- 1) Removal from the [redacted] (and, by extension, her target set) in January 2013;
- 2) Exclusion from meetings required to perform her job;
- 3) An office relocation from which she was excluded;
- 4) A 2009-2010 annual contribution evaluation (ACE), in which [redacted] performance was negatively portrayed; and
- 5) An incomplete annual contribution evaluation (ACE) for the 2009-2010 performance cycle.

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(U//FOUO) The OIG determined that one of these five actions constituted a personnel action (#5 above and below).

- 1) (U//FOUO) Removal from the [redacted] (and, by extension, her target set) in January 2013

(U//FOUO) [redacted] alleged that [redacted] and [redacted] removed her from the [redacted] in January 2013 against her wishes. According to [redacted], she had worked [redacted] which was much "higher profile" than her new target on the [redacted].

(U//FOUO) [redacted] testified that up until January 2013, all of the [redacted] personnel were on the "amorphous" [redacted] had been growing in personnel and lacked structure. Therefore, he and [redacted] discussed with their Division management dividing the branch into five teams. [redacted] herself testified that she was not the only person from the original [redacted] who was placed on a new team.

(TS//SI//REL) According to [redacted], [redacted] was placed on the [redacted] because it was most closely aligned with the targets she was already working. For instance, she had been working on [redacted] which fit well into the newly constituted [redacted]. To [redacted] [redacted] move was just a "name change" and did not affect her.

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¹¹ (U//FOUO) In addition, [redacted] reported four other actions that she considered to be reprisal: 1) one individual made a derogatory comment to her, 2) a second individual told a co-worker not to associate with [redacted], 3) a third individual started a chatroom to exclude her, and 4) she was involuntarily removed from an email alias/distribution list. None of these actions could reasonably be considered to meet the definition of a personnel action, nor were they evidence of any other misconduct. Therefore, these four allegations are not further analyzed in this report.

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targets. The [] became a much smaller, focused group consisting of contractors [] They did work that NSA would

(U//FOUO) To constitute a personnel action, the action must be a "significant change in duties or responsibilities inconsistent with the employee's salary or grade level." Both before and after the January 2013 reorganization, [] was a target analyst reporter. The OIG found no evidence that [] performance objectives were changed in any way following her move to the []. Additionally, [] remained in her branch, [] and her rater and reviewer were unchanged. While there is some evidence that [] acquired new targets when she moved to the [], a comparison of her performance expectations before and after the move reveals that she kept several of her targets that predated the move.

(U//FOUO) Consequently, the OIG determined that [] placement on the [] was not significant change in her duties or responsibilities and therefore did not constitute a personnel action.

2) (U//FOUO) Exclusion from Meetings Required to Perform her Job

(U//FOUO) [] alleged that she was denied the opportunity to attend meetings required by her ACE objectives. The OIG requested that [] identify specific meetings that she was excluded from. [] could not identify a particular meeting or date on which the meeting was to have taken place. She provided no correspondence or other documentation to show that she should have attended, but was denied, the opportunity to go to a meeting. According to [], other [] personnel were going to "CIA, FBI, Pentagon, State Department, etc."

(U//FOUO) Not being permitted to attend a meeting or a conference, by itself, is not a personnel action. An "action must have practical consequences" to the employee for it to constitute a personnel action. *See Ayers v. NASA, 79 MSPR 19 (1998)*. [] non-attendance at a meeting had no practical consequence. The OIG found no evidence that [] performance expectations included the requirement to attend any particular meeting. At most, she was expected to "keep in contact with customers... on a regular basis" (in the "Customer Focus" objective of her ACE). However, the objective stated that she could maintain this contact via phone, email, VTC, or in-person.

(U//FOUO) Additionally, her non-attendance (at unidentified meetings) had no impact on her performance rating. The OIG found no reference to a failure to attend meetings in her ACE evaluations; she also never received less than a "Successful" (3) performance evaluation. *See, e.g., Wagner v. EPA, 51 MSPR 326 (1991)*.¹²

¹² (U//FOUO) The argument that non-attendance at a conference could have an effect on a future performance rating was considered "tenuous."

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(U//FOUO) Thus, the OIG has no evidence that [redacted] was prevented from attending any particular meeting and even if she had been, it lacked a practical consequence. For these reasons, exclusion from meetings did not constitute a personnel action under NSA/CSS Policy 1-62.

3) (U//FOUO) An Office Relocation from which she was excluded

(U//FOUO) [redacted] alleged that, in an act of reprisal, the branch moved physical spaces, leaving her behind. [redacted] explained that there was insufficient space on the 1st floor for the entire branch, pending the expected departure of the former residents. Therefore, he decided to move the teams of a higher operational priority first, leaving the [redacted] to follow later. Once space became available in January 2015, the [redacted] joined the rest of the branch. [redacted] was moved together with her team at that time.¹³

(U//FOUO) An office relocation from one floor to another does not constitute a personnel action. It was not a change in [redacted] status as an employee, performance objectives, or payment.

4) A 2009-2010 annual contribution evaluation (ACE), in which [redacted] performance was negatively portrayed,

(U//FOUO) NSA/CSS Policy 1-62 lists a "performance evaluation" as a type of action that has the potential to affect the career of an employee. Within the Agency, ACEs of record are used to determine performance bonuses for civilian employees. Additionally, the most recent three ACEs of record are part of the promotion review package an employee submits when seeking promotion to the next higher grade and the ratings received are a consideration in the decision whether or not to promote. Further, when applying for another position within NSA, an employee must submit their computer-generated employment history profile, which includes the overall rating of the employee's ACEs of record for the last several performance appraisal cycles. However, in [redacted] case, the OIG determined that [redacted] 08/01/09-07/31/10 ACE was not a personnel action because it was an accurate indication of [redacted] performance and the appropriate performance standard was applied.¹⁴

(U//FOUO) [redacted] alleged that [redacted] reprised against her by writing, "the worst ACE I've ever read in my life" with "not one single good thing about me." However, [redacted] gave [redacted] a rating of "3" which equates to

¹³ (U//FOUO) [redacted] also asserted that there were additional military personnel assigned to the branch who also could not be moved contemporaneously with the bulk of the branch. Those military personnel still inhabit a different floor (5th) from the rest of the branch.

¹⁴ (U//FOUO) See, e.g., *Ireland v. Dep't of Health and Human Serv.*, 1987 M.S.P.B. 36 at 6-7, which found that there was no reprisal because the standard against which the Agency measured the appellant's performance permitted an accurate evaluation of his job performance.

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“Successful.” According to NSA/CSS Policy Manual 4-16A “NSA/CSS Annual Contribution Evaluation Policy,” a rating of 3 means that “the employee fully demonstrated effective, capable performance of key behaviors for the performance element.” Additionally, a score of 3 indicates that “the employee’s overall contribution, both in terms of results achieved and the manner in which those results were achieved, has made a positive impact on mission objectives.”

(b) (3) - P.L. 86-36
(b) (6)

(S//REL) [redacted] assessed that her rating was more than fair; in fact generous. According to [redacted] [redacted] target development was limited as evidenced by her limited reporting. [redacted] concerned that [redacted] targets were fruitless, performed limited development of [redacted] targets herself; and in just a few hours, [redacted] Additionally, [redacted] needed help [redacted] a basic and fundamental skill she should have been able to accomplish unaided.

(b) (1)
(b) (3) - P.L. 86-36

(U//FOUO) According to [redacted] [redacted] reporting also needed development; she had difficulty thinking analytically and produced reports with little appreciable content. [redacted] performance expectations required her to produce 4 reports during the cycle; which was an extremely low number for a target analyst reporter.¹⁵ Although she finished 4, only 3 were published. The fourth report “didn’t make sense” and contained little of foreign intelligence value. [redacted] also did not collaborate with her analytic counterparts in other parts of the Agency (i.e. [redacted] program office) or outside the Agency. Nevertheless, [redacted] still gave [redacted] a “successful” rating.

(U//FOUO) Following are samples of the language in the ACE that [redacted] objected to:

(U//FOUO) While progress on target development has been made, and some degree of success accomplished, there is great potential for increased success in the future.

(b) (3) - P.L. 86-36

(U//FOUO) If [redacted] focuses on additional coordination and communication in the future, her target development successes would likely increase.

(U//FOUO) Though meeting the objective to produce at least four reports in this evaluation period, in the future, she should make every effort to increase report production, despite team resource constraints.

(U//FOUO) [redacted] may also benefit by enrolling in some courses she has already taken, as many analysts do this from time to time to refresh their skills.

¹⁵ (U//FOUO) Compared with 25 reports produced by a SIGINT development analyst, whose primary job was not reporting.

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(U//FOUO) [redacted] attributed her difficulty publishing reports to a lack of linguist support, the low priority of her targets, and the fact that she was "restricted" to certain targets. She argued that she was never told to take classes and never told to . . . collaborate with others. However, she did not dispute the accuracy of what [redacted] wrote in her ACE.

(b) (3) - P.L. 86-36

(U//FOUO) [redacted] testimony concerning [redacted] performance is consistent with that of two of [redacted] former team leads, [redacted] and [redacted] stated that [redacted] was "just learning" the analytic tradecraft. [redacted] testified that [redacted] was a weak performer and a slow-learner. [redacted] reviewed [redacted] evaluation of [redacted] and stated that [redacted] comments were "not off the mark." [redacted] did not "have the greatest skills." Although [redacted] gave [redacted] a 3.2 when she rated her, [redacted] attributed the slight difference to different rater styles and the fact that [redacted] had a more technical background.

(U//FOUO) [redacted] the reviewer, concurred with [redacted] application of the performance standard when he undertook a review of [redacted] ACE at her request.¹⁶ [redacted] wrote:

(U//FOUO) After carefully reviewing you[r] input and comparing it to the ACE written by [redacted] I see no substantive reason to change the scores at this time. While your narrative contains more details than [redacted] none of what you included rises to the level of excellent (4), but is in fact successful (3). . . Please bear in mind that under the ACE rating system the burden of proof for ratings above successful is very exacting and requires the demonstration of a level of performance that consistently exceeds the objectives. What you have written here is an example of successful performance in accordance with your objectives, not excellent performance.

(b) (3) - P.L. 86-36
(b) (6)

(U//FOUO) According to documentary and testimonial evidence, [redacted] requested input on her evaluation of [redacted] before she finalized it. She solicited input from her rater (and [redacted] reviewer) [redacted] and [redacted] Deputy Branch Chief, [redacted]. She also incorporated [redacted] suggested revisions into the final document. By undertaking this voluntary review of her evaluation of [redacted] [redacted] took steps to ensure that she accurately characterized [redacted] performance and applied the appropriate performance standards.

(b) (3) - P.L. 86-36

¹⁶ (U//FOUO) [redacted] filed for an informal reconsideration of her ACE which [redacted] undertook. She supplied additional information that she believed supported an increased score.

(U//FOUO) Therefore, by a preponderance of the evidence, the OIG concluded that [REDACTED] 08/01/09-07/31/10 ACE was not a personnel action because it was an accurate indication of [REDACTED] performance and the appropriate performance standard was applied.

- 5) An incomplete annual contribution evaluation (ACE) for the 2009-2010 performance cycle.

(U//FOUO) During the investigation, the OIG discovered the ACE in question (dated 01 August 2009- 24 February 2010); was not finalized. According to the Associate Directorate for Human Resources, MD24, [REDACTED] performance evaluation for 2009/2010 was "not in a completed status" as of 1 June 2015. The evaluation is incomplete because [REDACTED] never acknowledged the document and her rater, [REDACTED] never signed it. [REDACTED] informed the OIG that she declined to acknowledge the document because she disagreed with its contents.

(b) (3) - P.L. 86-36
(b) (6)

(U//FOUO) According to NSA/CSS Policy Manual 4-16A, Chapter 2, "NSA/CSS Annual Contribution Evaluation," Raters are required to "ensure that eligible employees are assigned a rating of record as prescribed by this chapter." When employees refuse to acknowledge a performance evaluation, there is a mechanism by which a rater can enter the Human Resources Management System (HRMS) and acknowledge on the employee's behalf.¹⁷ Had [REDACTED] acknowledged the document on [REDACTED] behalf, the system would have permitted her to sign and finalize the document. She neglected to do so.

(U//FOUO) As stated earlier, ACE scores may be used to determine performance bonuses, are considered in promotion decisions, and are included application packages for reassignment. [REDACTED] testified that her lack of an approved ACE harmed her in two ways: 1) it limited her ability to apply for a job elsewhere in the Agency and 2) it limited her ability to apply for promotion. The failure on the part of [REDACTED] to complete [REDACTED] ACE and provide her with an Evaluation of Record, therefore, was an action that affected [REDACTED] employment opportunities and promotion potential, constituting a personnel action.

(b) (3) - P.L. 86-36

3. (U//FOUO) Was the protected communication a contributing factor in the personnel action? Yes

(U//FOUO) A "contributing factor" exists when the RMO had knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosures were a contributing factor in the personnel action.

(U//FOUO) [REDACTED] testified that, prior to her departure from [REDACTED] in mid-August 2010, and therefore prior to her drafting of [REDACTED] ACE, she was not aware of a "formal

¹⁷ (U//FOUO) HRMS is the Agency's electronic system for inputting, sharing, and storing information related to individual employees and their careers. Policy Manual 4-16A, section H.5. discusses acknowledging a performance document on an employee's behalf.

complaint" made by [redacted]. However, [redacted] also testified that [redacted] made accusations to her that she was "favoring the contractors." In fact, the allegation that [redacted] was "favoring the contractors" was essentially the same as [redacted] 20 July 2010 protected communication to OGC, wherein she alleged that [redacted] had violated ethics policies governing government/contractor relations. Therefore, while [redacted] may not have had explicit knowledge of the 20 July 2010 protected communication to OGC, she was aware of [redacted] complaint and was unsurprised to learn (in July 2015) that [redacted] had communicated that same message to OGC. Therefore, a reasonable person could conclude that [redacted] had knowledge of the protected communication prior to the personnel action.

4. (U//FOUO) Does the evidence establish that the personnel action would have been taken absent the protected communication? Yes

(U//FOUO) The OIG determined that [redacted] would have failed to complete [redacted] ACE (thus providing her with an Evaluation of Record), absent her protected communications.

(U//FOUO) According to [redacted] she did not know that [redacted] evaluation was not completed. She thought it had been finalized and did not realize [redacted] did not have a rating of record for that performance cycle. [redacted] recalled that [redacted] told her she would not sign the document when they met to discuss [redacted] evaluation of her performance.

[redacted] departed the organization (for an overseas assignment) shortly after this meeting and thought it was possible that she asked [redacted] to finalize it for her. [redacted] also testified that he did not know that [redacted] evaluation was incomplete. He signed the ACE as the reviewer on 9 August 2010. Given that HRMS allowed [redacted] to sign the document without the rater's signature, the OIG finds it credible that he did not know it was not in a completed status and did not become an ACE of record. Furthermore, the Associate Directorate for Human Resources was unable to produce any evidence to show that they alerted either [redacted] or [redacted] to its incomplete status.

(U//FOUO) [redacted] also testified that she was not aware that there was a mechanism by which she could and should enter HRMS and acknowledge the document on [redacted] behalf, thus allowing [redacted] to complete the document.

(U//FOUO) [redacted] testified that she did not know that [redacted] had lodged any formal complaints against her. (The OIG determined she had knowledge of a protected communication because of a similar complaint she made to [redacted] personally.) Therefore, she had no reason to retaliate for claims made against her personally. More significantly, the method of retaliation does not make sense. If in fact, this was a terrible performance evaluation, as [redacted] characterized it, and [redacted] wished to reprise against her, the logical course of action would be to make absolutely certain that it became a rating of record. What is far more likely is that [redacted] in her haste to depart the organization for her new assignment, simply failed to do due diligence to ensure that the "successful" ACE was finalized before her departure.

(b) (3) - P.L. 86-36
(b) (6)

(b) (3) - P.L. 86-36

(U//FOUO) [redacted] testified that she rated two individuals that performance cycle, [redacted] and another individual. [redacted] was the only target analyst reporter that she rated and the only GS-11. The performance objectives between the two differed significantly, as the other individual was a linguist. Thus, the OIG concluded that there were no [redacted] employees similarly situated to her during the 2009-2010 appraisal cycle.

(U//FOUO) By clear and convincing evidence, the OIG assessed that [redacted] would have failed to finalize the ACE irrespective of [redacted] protected communication.

(b) (3) - P.L. 86-36

(b) (3) - P.L. 86-36
(b) (6)

IV. (U) CONCLUSION

(U//~~FOUO~~) Conclusion

(U//~~FOUO~~) We concluded that [redacted] did not reprise against [redacted] for reporting to OGG that contractors were conducting inherently governmental work.

(b) (3) -P.L. 86-36
(b) (6)

(U) Distribution of Results

(U//~~FOUO~~) [redacted] and [redacted] will be informed of the results of our inquiry in this matter. A summary of the investigative findings will be provided to [redacted] and the DoDIG.

(b) (3) -P.L. 86-36

[redacted]

Senior Investigator

[redacted]

Assistant Inspector General
for
Investigations

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APPENDIX A

NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE
NSA/CSS POLICY 1-62

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IV-14-0054

NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE
NSA/CSS POLICY 1-62

Issue Date: 6 July 2005

Content Verified Current on 02 August 2010

(U) WHISTLEBLOWER PROTECTION

(U) PURPOSE AND SCOPE

(U) This policy implements References a-p and establishes the responsibilities and rights of individuals employed, assigned, or detailed to the NSA/CSS, or *applicants for employment*, who disclose information they reasonably believe is evidence of unlawful or improper conduct. This policy does not affect the Equal Employment Opportunity (EEO) rights and responsibilities of *NSA/CSS employees*.

(U) This policy applies to any *employee of the NSA/CSS*, any qualified applicant for employment, members of the Armed Forces assigned, attached, or detailed to the NSA/CSS, and Nonappropriated Fund Instrumentality (NAFI) employees and applicants.

WILLIAM B. BLACK, JR.
Acting Director

Endorsed by
Associate Director for Policy
DISTRIBUTION
D14
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DJP6 (VR)
DJP6 (Archives)

(U) This Policy supersedes NSA/CSS Regulation 30-3, dated 1 April 1996.

(U) OPI: Office of the Inspector General, D14, 963-0925s).

(U) The compilation of the information contained in this document is UNCLASSIFIED//FOR OFFICIAL USE ONLY. No section of this document shall be released without approval from the Office of Policy and Records (DJP).

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(U) POLICY

1. (U) All employees of the NSA/CSS and applicants for employment, members of the Armed Forces assigned, attached, or detailed to the NSA/CSS, and NAFI employees and applicants shall be free from *reprisal* for making or preparing to make a *protected communication*. Contractors shall not discriminate against or discharge an employee for disclosing to an appropriate government official information relating to a substantial violation of a law related to a contract (References a, b, c and e-j).

2. (U) No person shall restrict or intimidate another NSA/CSS employee or applicant, NAFI employee or applicant, or member of the Armed Forces assigned, attached, or detailed to the NSA/CSS, who wishes to make or prepare a protected communication in accordance with References b, and d-j.

3. (U) The NSA/CSS IG shall investigate and report, or refer allegations of reprisal against individuals to the appropriate Inspector General organization or other government entity, in accordance with this policy and Reference k.

(U) RESPONSIBILITIES

4. (U) The Office of the Inspector General (OIG) shall:

a. (U) Receive all allegations and evidence of reprisal consistent with the provisions of this policy and in accordance with Reference k;

b. (U) Conduct an investigation of the allegation (unless obviously frivolous) and prepare a Report of the Investigation (ROI) within 180 days of receipt of the allegation. The ROI shall include a thorough review of the facts and circumstances surrounding the allegation, the relevant documents acquired during the investigation and summaries of interviews conducted;

c. (U) If the ROI cannot be issued within 180 days of receipt of the allegation, notify the complainant and all management parties concerned of the reason(s) why the ROI will not be issued within that time period, and provide an estimate as to when the ROI will be issued;

d. (U) Obtain legal review of the ROI. In cases of substantiated reprisal, forward the ROI to the Associate Directorate for Human Resource Services, Employee Relations (MR) office for disciplinary action;

g. (U) Refer to the DoD IG any allegations of reprisal submitted by NAFI employees or applicants in accordance with References g and h;

h. (U) Refer to the DoD IG any complainants who seek to submit a complaint to Congress under the provisions of the Intelligence Community Whistleblower Protection Act in accordance with References l, m, n and o; and

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i. (U) In accordance with Reference p, report to the DoD IG any allegations that an NSA senior official has engaged in reprisal.

5. (U) The Office of General Counsel (OGC) shall provide legal review of investigative findings and recommendations, if requested to do so by the IG.

(U) REFERENCES

6. (U) References:

a. (U) DoD Inspector General Memorandum, "Policy on Whistleblower Protection for DoD Employees, Standards Applied to Complaints," dated 7 January 2005.

b. (U) IG Act of 1978, Section 7, DoD IG Guidance Memorandum, dated 05 October 2009.

c. (U) Title 5, United States Code, Section 2301(c)(2).

d. (U) Title 5, United States Code, Section 2302, "Prohibited Personnel Practices."

e. (U) Title 10, United States Code, Section 1034, "Protected Communications: Prohibition of Retaliatory Personnel Actions."

f. (U) DoD Directive 7050.6, "Military Whistleblower Protection," dated 23 July 2007.

g. (U) Title 10, United States Code, Section 1587, "Employees of Nonappropriated Fund Instrumentalities: Reprisals."

h. (U) Department of Defense Directive 1401.03, "DoD Nonappropriated Fund Instrumentality Employee Whistleblower Protection," dated 23 April 2008

i. (U) Title 10, United States Code, Section 2409, "Contractor Employees: Protection From Reprisal for Disclosure of Certain Information."

j. (U) Federal Acquisition Regulation, Subpart 3.9, "Whistleblower Protections for Contractor Employees."

k. (U) NSA/CSS Policy I-60, "NSA/CSS Office of the Inspector General," dated 6 July 2005

l. (U) The IG Act of 1978, Title 5, United States Code, Appendix III, as amended by the Intelligence Community Whistleblower Protection Act of 1998.

m. (U) DOD Inspector General Memorandum, "Implementation of the Intelligence Community Whistleblower Protection Act of 1998," dated 11 March 1999.

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- n. (U) DOD Inspector General Memorandum, "Change to the Intelligence Community Whistleblower Protection Act of 1998," dated 5 March 2002.
- o. (U) DOD Inspector General Memorandum, "Inspector General Implementation of the Intelligence Community Whistleblower Protection Act of 1998," dated 27 February 2004.
- p. (U) DoD Directive 5505.06, "Investigations of Allegations Against Senior Officials of the Department of Defense," dated 10 April 2006.

(U) DEFINITIONS

7. (U) Applicant for Employment: Any person who is applying for employment with, or who is seeking assignment or detail to the NSA/CSS, other than an applicant who is a member of the Armed Forces or an applicant for a NAFI position.

8. (U) Employee of the NSA/CSS: Any civilian who is an assignee, detailee, or employee with the NSA/CSS.

9. (U) Personnel Action: Any action that affects or has the potential to affect the employment opportunities, the current position or the career of any employee of the NSA/CSS, any qualified applicant for employment, members of the Armed Forces assigned, attached, or detailed to the NSA/CSS, and NAFI employees and applicants. Such actions include a promotion; a disciplinary or corrective action; a transfer or reassignment; a performance evaluation; a decision on pay, benefits, awards or training; and any other significant change in duties or responsibilities inconsistent with the employee's salary or grade level.

10. (U) Protected Communication:

- 6) (U) Any lawful communication of information to a Member of Congress or an IG; or
- 7) (U) A lawful communication of information which the communicant reasonably believes evidences a violation of law or regulation, mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety, when such communication is made to a member of Congress, an IG, or any other person or organization (including any person or organization in the chain of command) designated under Agency policy or other established administrative procedures to receive such communications.

11. (U) Reprisal: Taking or threatening to take an unfavorable *personnel action*, or withholding or threatening to withhold a favorable personnel action, for making or preparing a protected communication.

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