



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
4800 MARK CENTER DRIVE
ALEXANDRIA, VIRGINIA 22350-1500

JUN 12 2019

The Honorable Chuck Grassley
The Honorable Ron Wyden
Co-chairmen
Senate Whistleblower Protection Caucus
United States Senate
Washington, DC 20515

Dear Co-Chairmen Grassley and Wyden:

I am writing to bring to your attention three entries in the Department of Defense Office of Inspector General (DoD OIG) most recent Semiannual Report, which describe decisions by DoD officials related to three DoD OIG whistleblower reprisal investigations.¹ In each case the DoD OIG substantiated the allegation of retaliation, but DoD officials disagreed with the substantiation or declined to take corrective action.

As you know, the DoD OIG handles whistleblower reprisal investigations under several statutes. The relevant statutes in these cases are 10 U.S.C. § 2409, "Contractor employees: protection from reprisal for disclosure of certain information," and 10 U.S.C. § 1587, "Employees of nonappropriated fund instrumentalities: reprisals." Under these statutes, the DoD OIG must send substantiated reports of investigation to the appropriate agency officials for action to be taken to make the complainant whole or to discipline the company or person who retaliated against the complainant.

In the first case, on January 3, 2018, the DoD OIG substantiated a complaint filed under 10 U.S.C. § 2409 that a DoD contractor, Leidos, did not renew a subcontractor's contract in reprisal for the subcontractor disclosing alleged violations of the Defense Federal Acquisition Regulation to a contractor program manager and to the Government deputy director of the program responsible for the contract. Specifically, the subcontractor raised complaints of a hostile work environment and alleged inappropriate ethnic and sexual comments. The DoD OIG substantiated that the subcontractor's contract was not renewed in reprisal for her complaints. Among other remedies, the DoD OIG recommended that the DoD order the contractor, Leidos, to award the complainant compensatory damages.

On March 12, 2019, the Under Secretary of Defense for Acquisition and Sustainment informed the OIG that the DoD disagreed with our findings and asserted that there was not a sufficient basis to conclude that Leidos reprised against the complainant. The DoD also asserted that the that the complainant was an employee not of Leidos but of a subcontractor, and stated, in a conclusory fashion, that the law did not cover this situation. We disagree and stand by our factual and legal conclusions.

In the second case, on February 18, 2015, the DoD OIG substantiated a complaint filed under 10 U.S.C. § 1587 that a Federal civilian supervisor at an Air Force base discharged a

¹ Semiannual Report to the Congress: October 1, 2018 through March 31, 2019, page 55.

nonappropriated fund employee in reprisal for the employee reporting violations of rules and regulations to the chain of command and an Inspector General. The DoD OIG recommended that the Director of Administration, Office of the Secretary of Defense, direct agency officials to reinstate the complainant with back pay and employment benefits, and other terms and conditions of employment applicable to the complainant in that position had the reprisal not occurred. We also recommended that appropriate administrative action be taken against the management official who took the reprisal action.

We repeatedly requested updates on the DoD's action in this case. Finally, on November 29, 2018, the Director of the Office of the Chief Management Officer wrote that the report of investigation did not demonstrate by a preponderance of the evidence that reprisal occurred and declined to take further action. We disagree. We concluded that, weighed together, knowledge, timing, motive, disparate treatment, a subject lacking credibility, a witness who thought it was reprisal, and the fact that several other employees were afraid to talk to the local IG for fear of reprisal, presented a strong case of reprisal.

In the third case, on June 6, 2018, the DoD OIG substantiated a complaint under 10 U.S.C. § 1587 that three management officials at a Marine Corps base issued a warning notice and terminated a nonappropriated fund employee in reprisal for the employee making protected disclosures to senior management officials regarding alleged mismanagement and abuse of authority by one of the three management officials. The DoD OIG recommended that the Director of Administration and Management (now the Director of Management) direct the removal of the complainant's warning notice, provide the complainant the updated Notification of Personnel Action, and offer the complainant a position commensurate with his former position. On March 11, 2019, the Acting Director of Administration, Office of the Chief Management Officer, wrote that the DoD OIG's report of investigation did not demonstrate by a preponderance of the evidence that reprisal had occurred and declined to take further action. We disagree because the close proximity in timing between the protected disclosures and the personnel actions, together with the vocal, angry display of animus by the management official about whom the complainant's protected disclosures were made upon learning about the disclosures and the retaliatory motive of the other two management officials. Our conclusion was further strengthened by the disparate treatment of the complainant compared to other mechanics who had similar performance issues but were not discharged.

In sum, we disagree with these three decisions and believe that the evidence showed the allegations were substantiated and that corrective action was warranted.

Moreover, when DoD managers do not uphold or take action on substantiated findings of reprisal, it can have negative consequences not only for the individual complainant but also for the whistleblower protection program as a whole. It also may send a message to DoD managers that reprisal will be tolerated and to potential whistleblowers that the system does not protect their rights. We are therefore concerned by management's inaction in these three cases, as well as by what we believe are weak and conclusory arguments for why our findings and recommendations were not acted upon. We have shared these concerns with DoD officials, and we believe we should also share these concerns with you.

A similar letter to this one has been provided to our committees of jurisdiction in the United States Senate, with copies also provided to the Co-Chairs of the House Whistleblower Protection Caucus.

If you have any questions about this letter, please contact let us know.

Sincerely,

A handwritten signature in black ink that reads "Glenn A. Fine". The signature is written in a cursive style with a large, stylized "G" and "F".

Glenn A. Fine
Principal Deputy Inspector General
Performing the Duties of the Inspector General