

EXHIBIT 1



U.S. OFFICE OF SPECIAL COUNSEL
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December 2, 2021

VIA ELECTRONIC MAIL: [REDACTED]

Ms. Mary M. Musilek
Attorney, Office of Assistant Chief Counsel
U.S. Customs and Border Protection

Re: OSC File Nos. MA-18-4868 (Fred Wynn), MA-18-4869 (Mike Taylor), and MA-18-4870 (Mark Jones)

Dear Ms. Musilek,

The U.S. Office of Special Counsel (OSC) is nearing completion of its investigation¹ into allegations that the U.S. Department of Homeland Security (DHS), Customs and Border Patrol (CBP) committed prohibited personnel practices against Mr. Fred Wynn, Mr. Mike Taylor, and Mr. Mark Jones (the Complainants); namely, that it took, or failed to take, personnel actions against the Complainants in retaliation for the Complainants' perceived whistleblowing and disclosure to OSC, in violation of 5 U.S.C. § 2302(b)(8) and (b)(9)(C).

I. Summary

OSC's investigation supports a conclusion that the agency's actions constituted both a violation of section 2302(b)(8) and (b)(9)(c). Specifically, the agency retaliated against the Complainants for actual or perceived disclosures of wrongdoing. The evidence shows that officials knew about a February 15, 2018, e-mail sent to DHS Headquarters employees; identified the email as a report of wrongdoing against CBP involving DNA collection; perceived that the Complainants, as members of the Weapons of Mass Destruction Division (WMDD), intended to disclose the wrongdoing; and lost trust in the WMDD team because of the perceived disclosure. The evidence also shows that officials knew that the Complainants reported allegations of wrongdoing to OSC.

In addition, the evidence shows that, from February 2018 through the present, officials subjected the Complainants to a significant change in duties, responsibilities, and working conditions; issued the Complainants a lower performance award for FY 2018 than the prior year; issued Mr. Taylor and Mr. Jones no performance award any year thereafter for the first time in their employment history with CBP; and did not select Mr. Jones for the Operational Field Testing Division (OFTD) Director position. Given that these actions against the Complainants were taken in close temporal proximity to the perceived whistleblowing, they satisfy the knowledge/timing test. Having established a prima facie case through the knowledge/time test, the burden now shifts to the agency to prove by clear and convincing evidence that it would have

¹ OSC is finalizing its investigation into several new personnel actions that were recently raised; this letter addresses those personnel actions for which OSC has completed its investigation.

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taken the same actions in the absence of the perceived whistleblowing and disclosure to OSC. In our view, it is unlikely that the agency will be able to meet this burden. Rather, from the evidence we have seen, it seems clear that the agency does not have strong evidence in support of the personnel actions against these Complainants, and that the actions were motivated by the agency's displeasure with the Complainants' perceived and actual involvement in bringing to light the agency's intentional, decade-long failure to implement a law designed to protect public safety.

In light of our investigative findings, we are approaching the agency for corrective action. Below is a more-detailed summary of our preliminary findings.

II. Background

Pursuant to multiple Presidential Policy Directives (PPD),² CBP is required to provide detection equipment and weapons of mass destruction (WMD) and counterproliferation training to personnel stationed at the numerous ports of entry, U.S. Border Patrol (USBP) stations, and immigration checkpoints. The Office of the Commissioner, Joint Operations Directorate (JOD) was tasked with implementing a WMD division for this mission and, in early 2016, the division informally moved from the JOD to CBP's Office of Intelligence (OI).³ The Assistant Commissioner for OI, David Glawe, requested the division's transfer. The WMDD's focus, either under OI or the JOD, was on the CBP law enforcement mission and to protect the nation from the use and introduction of chemical, biological, radiological, nuclear and explosive (CBRNE) weapons to include their pre-cursors, components, materials, and operational weapons systems. Additionally, the WMDD focused on counterproliferation in concert with the Departments of Energy (DOE), Commerce, State, Defense, Federal Bureau of Investigation (FBI), Homeland Security Investigations, and other classified partners. Thus, the WMDD was comprised of a small group of individuals who worked together with different offices and agencies on all matters related to WMD, and on multiple projects assigned by management.

Mr. Jones was an Operations Manager, GS-1801-14, and the Acting Director (a GS-15 level position) of the WMDD for approximately two years—from the time of its informal move to OI until February 2018.⁴ In 2012, CBP had specifically requested that Mr. Jones join the JOD as the WMD Branch Chief, based on his specialized education and experience.⁵ OI management

² PPDs 17, 22, 25, 35 and 42 promulgate Presidential decisions on national security matters covering improvised explosive devices, national special security events, government response to terrorist threats or incidents in the United States and overseas, control and safety of nuclear weapons, and preventing and countering weapons of mass destruction.

³ In May 2016, the agency issued its final approval to add the WMDD to OI's organizational chart under the Intelligence Operations Directorate (IOD).

⁴ While Mr. Jones is not in a law enforcement position that entitles him to enhanced retirement benefits, his position grants him law enforcement authorities under Title 19 of the U.S. Code, such as the authority to bear a firearm. He maintains his firearms certification quarterly.

⁵ Mr. Jones has a master's degree in Criminology and WMD and was a member of the FBI's WMD Directorate Executive Staff. He has received in-depth training in CBRNE weapons; ballistic missiles; and investigative and case

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recognized Mr. Jones as a GS-15 leader and behaved as if he was already in the role in that he was able to carry out the full load of division head responsibilities and was sent to Senior Executive Service (SES) interview trainings and Senior Leader Off-Sites during the years 2016 to 2018.

Mr. Taylor was an Operations Manager, GS-1801-14, with the WMDD and the Acting Deputy Director from its informal move to OI through February 2018. CBP had also previously specifically requested that Mr. Taylor join the JOD based on his specialized education and experience.⁶

Mr. Wynn was an Operations Manager, GS-1801-14, with the WMDD since August 2016. Mr. Jones requested that Mr. Wynn be laterally reassigned to the WMDD from the CBP JOD Incident Management Division based on his relevant training and experience.⁷

The evidence shows that, when the WMDD became an official OI division, it was management's goal to assign permanent supervisory slots, when personnel and budgetary limitations allowed. All divisions within OI had a designated director and deputy director. As such, Mr. Jones and Mr. Taylor believed they were on a management career track given their experience and seniority within the division, the expansion of their duties and supervisory roles over time, and the WMDD's prospects within OI.

During Mr. Wynn's time with the WMDD, he was focused on building professional relationships and developing promising initiatives in counterproliferation, in coordination with outside agencies or offices internal or external to DHS. He took trainings related to radiological-nuclear weapons, which he had the opportunity to attend, as one of the few individuals in CBP with a Q clearance. His career trajectory was taking him down a few narrow but critical paths, each requiring specialized knowledge and training.

In October 2016, Commissioner Gil Kerlikowske asked OI to discuss with the FBI Terrorist Explosive Device Analytical Center their interest in collaborating with CBP to match DNA collected from Special Interest Aliens with DNA collected from improvised explosive devices. OI, in turn, asked the WMDD to initiate the discussion. In their endeavor, the WMDD team soon learned that, pursuant to the DNA Fingerprint Act of 2005, CBP was required to collect DNA from arrested or detained individuals and identified the need to develop a DNA collection pilot project that would get CBP on track to comply with the law and submit DNA data to the FBI's Combined DNA Index System (CODIS). OI Acting Deputy Assistant

management. He has also attended various courses at DOE related to nuclear weapons. Mr. Jones holds clearances and access through DOE to programs and information related to WMD, CBRNE, and counterintelligence activities.

⁶ In addition to Mr. Taylor's customs law enforcement experience, he had a radiological-nuclear background. He attended several radiological-based schools and assisted in the development of CBP's Radiological Covert Testing Program, which was mandated by the SAFE Port Act of 2006, and had a Q clearance, which gave him access to nuclear weapons-related data that would otherwise be restricted.

⁷ During Mr. Wynn's time as a Supervisory Investigative Program Specialist with the Office of Internal Affairs (now the Office of Professional Responsibility) he received training and became familiar with CBP's radiological-nuclear detection and interdiction architecture.

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Commissioner Timothy Jennings testified that he supported the group's efforts on the CODIS DNA collection project that he believed could lead to a pilot program. The DNA collection project was a division-wide project led by Mr. Jones, who was involved in numerous internal and external meetings, briefings, and discussions related to the effort.

In addition, in early 2017, Mr. Jennings assigned the team to develop an MS-13 Working Group for DHS, which was part of the federal government's efforts to disrupt and dismantle the MS-13 gang and prosecute and deport its members. For all intents and purposes, the MS-13 project was also a WMDD project. Mr. Jones, as Acting Director, had direct oversight over the project.⁸ Moreover, Mr. Jennings did not distinguish any particular employee's involvement in the project from that of the entire team. He testified that he assigned the team to complete the task and that they immediately took charge of the project and that they did an excellent job. Mr. Jennings further testified that he assigned the MS-13 project to the WMDD because he believed that, as OI, they were one office, not different kingdoms, and he thought the WMDD could support CBP with the project. On October 26, 2017, in response to an e-mail from Mr. Jones discussing the Secretary's request for a briefing on the MS-13 Working Group successes, Mr. Jennings wrote: "That is awesome and is a tribute to the hard work of you, your team, and all the partners." In addition, in August 2017, both Mr. Jennings and OI Assistant Commissioner Jennifer Ley recognized the work of the WMDD team on the MS-13 project during the Office of Intelligence Town Hall. Mr. Jennings testified that the main assignments the WMDD team members were working on were the DNA and MS-13 projects.

The WMDD was also responsible for executing, on behalf of OI and/or CBP, approximately forty other activities, programs, and initiatives related to WMD and counterproliferation threats. These were summarized in a February 23, 2018 e-mail that Mr. Jones sent to Ms. Ley, Mr. Jennings, OI Chief of Staff Ty Eanes, and then Acting Executive Director of Intelligence Operations in OI Juan Fernandez.⁹

On February 15, 2018, Chad Wood, a DHS employee who was detailed to the WMDD at the time, sent an e-mail to DHS Headquarters employees, including Miles Taylor, the Principal Advisor to Secretary Kirstjen Nielsen, discussing the WMDD's DNA collection project. The e-mail triggered a series of phone calls between executive level CBP officials and the Secretary's Office, which put CBP on notice that the White House and the Department of Justice (DOJ) were now inquiring into CBP's compliance with the relevant DNA law and regulations.

Within days after Mr. Wood sent the February 15, 2018 e-mail, OI canceled Mr. Wood's detail and instructed that he be escorted out of the building. Mr. Jennings testified to OSC that he made the decision to end Mr. Wood's detail after he communicated with Ms. Ley and the Commissioner's Office, and that the decision was a direct result of the February 15, 2018 e-

⁸ Mr. Jones's role as head of the division necessitated that he be consulted on MS-13 related matters, and kept informed of developments, as was confirmed through witness testimony. He was responsible for briefing the chain of command on the status of this very high-profile project, which not only involved OI leadership, but CBP and DHS leadership as well, and included oral and written briefings.

⁹ Mr. Fernandez is currently the Deputy Executive Director of the IOD.

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mail. Mr. Jennings testified that Mr. Wood's act was "very unprofessional," that he never should have gone to the Secretary's Office, and that he ended Mr. Wood's detail based on his lack of trust in his professionalism and his inability to act within CBP.

In May 2018, the Complainants reported allegations of wrongdoing to OSC. Specifically, they reported CBP's delay in collecting DNA from detained individuals based on the DNA Fingerprint Act of 2005 and subsequent regulations.

III. Factual and Legal Analysis

A. Preponderant evidence establishes a prima facie case that CBP violated 5 U.S.C. § 2302(b)(8) and (b)(9)(c).

As relevant here, section 2302(b)(8)(A) prohibits federal agencies from threatening to take or taking personnel actions because federal employees make disclosures of information that they reasonably believe evidence gross mismanagement or a violation of any law, rule, or regulation. Section 2302(b)(9)(c) prohibits federal agencies from threatening to take or taking personnel actions because federal employees cooperate with or disclose information to the Special Counsel. To establish a prima facie violation of these provisions, OSC must demonstrate two elements by preponderant evidence: 1) the complainants made a protected disclosure and participated in a protected activity, and 2) the disclosure and participation in the protected activity was a contributing factor in the personnel actions in question.¹⁰

Moreover, a person perceived as a whistleblower is entitled to section 2302(b)(8) protection even if that individual did not actually make a protected disclosure.¹¹ In perceived whistleblower cases, the analysis is focused on the agency's perceptions, i.e., whether the agency officials involved in the personnel actions at issue believed that the person made or intended to make disclosures that evidenced the type of wrongdoing listed under section 2302(b)(8).¹²

1. Preponderant evidence establishes that CBP perceived the February 15, 2018 e-mail to have disclosed wrongdoing protected under 5 U.S.C. § 2302(b)(8).

Multiple management officials within OI testified to OSC that it was their belief that the February 15, 2018 e-mail reported wrongdoing. Particularly, Mr. Jennings stated in his testimony that, as he understood it, the email explained the WMDD's efforts related to DNA sampling, stated CBP was intentionally slow-rolling the process to avoid complying with the relevant DNA sampling law, and requested that DHS step in to encourage compliance. Therefore, the facts evidence that Mr. Jennings perceived that the e-mail to DHS reported, at a minimum, a violation of law, the disclosure of which is protected under section 2302(b)(8).

¹⁰ See *Chavez v. Dep't of Veterans Aff.*, 120 M.S.P.R. 285, 294 (2013).

¹¹ See *Schaeffer v. Dep't of the Navy*, 86 M.S.P.R. 606, 617 (2000).

¹² *King v. Dep't of the Army*, 116 M.S.P.R. 689, ¶ 8 (2011).

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2. Preponderant evidence establishes that CBP perceived the Complainants as whistleblowers.

During Mr. Jennings's testimony to OSC, he stopped referring to Mr. Wood, specifically, and, instead, began speaking about the WMDD as a whole. He stated it was unprofessional and unwarranted for the *division* to go to the Secretary when the team members determined that the DNA project was not progressing according to their expectations. Mr. Jennings testified that he believed the group shared Mr. Wood's views that CBP was setting obstacles in place to prevent implementation of a DNA collection pilot, and that it was his impression that Mr. Jones and the team, which included Mr. Taylor and Mr. Wynn, had encouraged the e-mail based on their insistence to move the project forward despite continuing to receive questions from OI officials about the viability of the project.

On February 20, 2018, OI management sent an e-mail to Mr. Jones, instructing that neither he nor any division member communicate with DHS or DOJ in any manner concerning DNA collection unless otherwise directed, and described the February 15 e-mail as "totally inappropriate." On February 21, 2018, OI management, including Mr. Jennings and Mr. Fernandez, met with Mr. Jones. During the meeting, Mr. Jennings told Mr. Jones that he had lost confidence in him. Mr. Jennings testified to OSC that he made the statement to Mr. Jones as a direct result of the e-mail.¹³ Mr. Jennings also stated in a February 21, 2018 e-mail to Ms. Ley that he had lost confidence in the team and their efforts. Thus, the facts evidence that OI leadership perceived that the Complainants, who were part of the WMDD team, disclosed wrongdoing.

3. Preponderant evidence establishes that the Complainants disclosed wrongdoing to OSC, which is protected under 5 U.S.C. § 2302(b)(8) and (b)(9)(c).

In May 2018, the Complainants reported allegations of wrongdoing to OSC, which OSC referred to the DHS Secretary on July 23, 2018, under 5 U.S.C. § 1213. The allegations involved the same subject matter at issue in the February 15, 2018 e-mail: namely, CBP's delay in collecting DNA from arrested or detained individuals based on the DNA Fingerprint Act of 2005. The Secretary delegated to CBP Deputy Commissioner Robert Perez the authority to review and sign the report and CBP's Office of Professional Responsibility conducted the investigation. The agency determined that Mr. Taylor's allegations were not substantiated, based on its assertion that a 2010 DNA collection exception granted by Attorney General Eric Holder to DHS Secretary Janet Napolitano still applied, although there was no indication that the exception was intended to be permanent. On August 21, 2019, the Special Counsel informed the President and multiple congressional committees that he determined that the agency's findings were unreasonable and that CBP's failure to collect DNA as mandated by law "has allowed

¹³ OSC obtained testimony from separate witnesses who: confirmed Mr. Jennings's statement to Mr. Jones on February 21, 2018; described Mr. Jennings's conversation with Mr. Jones as a "serious dressing down"; indicated there was an appearance that Mr. Jennings had lost trust or confidence in the team; and believed that Mr. Jennings's frustration was directed at the whole division.

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subjects subsequently accused of violent crimes, including homicide and sexual assault, to elude detection” and is an “unacceptable dereliction of the agency’s law enforcement mandate.”

OSC published its findings, which garnered media attention at the time and continued to do so as the agency faced additional pressures to comply with the law, undoubtedly due to the Complainants’ disclosure. Throughout this process, the Complainants were identified by name and are, therefore, known whistleblowers.

After OSC published its finding, the DHS Office of Inspector General (OIG) initiated an investigation regarding DHS’s compliance with the DNA Fingerprint Act of 2005. On May 19, 2021, the OIG published a report that echoed OSC’s finding regarding CBP’s decade-long failure to comply with the Act. According to the OIG report, OSC’s finding served as the impetus for DOJ to reach out to DHS to finally have CBP, in January 2020, begin the process of implementing DNA collection.

4. Preponderant evidence establishes that the Complainants’ perceived whistleblowing and protected activity contributed to the personnel actions.

Whether a disclosure is a contributing factor to the personnel action is typically demonstrated through the “knowledge/timing test,” which shows that the agency knew of the whistleblower’s protected disclosures or activities and took personnel actions within a period of time such that a reasonable person could conclude that the disclosures or activities were a contributing factor in the personnel actions.¹⁴ The preponderance of the evidence establishes each of these elements.

Under this test, we found that the Complainants’ perceived and actual whistleblowing activity contributed to the following personnel actions:

a. Significant change in duties, responsibilities, and working conditions

The Merit Systems Protection Board (Board) has held that a significant change in duties, responsibilities, or working conditions is a personnel action and one that “should be interpreted broadly. [It] is intended to include any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system, and should be determined on a case-by-case basis.”¹⁵ Rep. McCloskey explained that the 1994 amendment to the Whistleblower Protection Act expanded the definition of personnel actions that could have a

¹⁴ 5 U.S.C. § 1221(e)(1); *Redschlag v. Dep’t of the Army*, 89 M.S.P.R. 589, ¶ 70 (2001).

¹⁵ *Shivae v. Department of the Navy*, 74 M.S.P.R. 383, 388 (1997), quoting 140 CONG. REC. H11,421 (1994) (statement of Rep. Frank McCloskey) (internal quotations marks omitted); *Covarrubias v. Social Security Administration*, 113 M.S.P.R. 583, ¶ 15 n. 4 (2010).

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debilitating effect on an employee's career. Further, the Board has recognized that a “change” can occur through the failure to assign work, in addition to the removal of duties.¹⁶

i. Removal of high-profile projects and other tasks

In February 2018, the WMDD was heavily invested in developing the DNA collection project and was continuing its work on the MS-13 project. These projects were a large focus for the team and they stood apart from the team’s other responsibilities in that they were high-profile matters that gave the team an opportunity to address current and pressing national issues, have a more significant and lasting impact on CBP’s mission, and maximize the use of their skills and expertise, all while gaining greater visibility within CBP and DHS more broadly.

After the February 15, 2018 e-mail, Mr. Jennings immediately removed from the team both the DNA collection and MS-13 projects, which had consumed much of the team’s time and had earned the group high praise and performance awards.¹⁷ Multiple witnesses testified as to the high quality of work the team produced on the DNA collection project. Mr. Jennings also testified that the WMDD jumped on the MS-13 project and successfully created a group that was rolled out into a DHS-wide working group. The removal of these duties alone was noteworthy and had the potential to hurt the Complainants’ ability for career development and advancement. The actions isolated the WMDD from interaction with upper-level agency officials and minimized its role within OI. A witness testified to the stark contrast in communication between OI management and the WMDD team members before and after the February 15, 2018 e-mail.

In light of the agency’s immediate reaction to the e-mail and the disclosure’s implications for the agency, these factors together suggest that the disclosure contributed to the removal of the DNA collection project. As for the removal of the MS-13 project, the evidence shows the perceived whistleblowing activity was also a contributing factor. We note that within the same February 21, 2018 e-mail chain between Mr. Jennings and Ms. Ley, in which the officials discuss loss of trust and other consequences related to the team’s outside communications, Mr. Jennings indicates that he is removing the MS-13 project from the WMDD, thereby connecting the perceived disclosure to the change in duty.

Additionally, following the February 15, 2018 email, the Complainants no longer received support to carry out the majority of the approximately forty activities, programs, and initiatives addressing WMD and counterproliferation threats, as summarized in the aforementioned February 23, 2018 email, that the WMDD had been responsible for executing on

¹⁶ In *Ingram v. Department of the Army*, the Board found that an employee, who was no longer assigned work by a Project Manager who was outside his chain of command, experienced a significant change in duties, responsibilities, or working conditions. 116 M.S.P.R. 525, 531 (2011).

¹⁷ In FY 2017, Mr. Jones received a \$3,500 performance award and Mr. Wynn and Mr. Taylor each received a \$3,000 award. Approximately, only 17 percent of OI employees who received a performance cash award for FY 2017, received a \$3,000 performance award or higher.

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behalf of OI and/or CBP. Mr. Jones has been removed of meaningful job duties and assignments. The only WMDD program Mr. Jones continues to support is the FBI's Weapons of Mass Destruction Strategic Group (WMDSG). Currently, Mr. Taylor only has permission to participate in three of the programs. Mr. Taylor believes CBP has allowed him to continue working on these specific programs due to a lack of personnel with the requisite security clearances, experience, and personal relationships to effectively engage in these classified programs. Specifically, the programs that Mr. Taylor continues to support, which are all led by the FBI, are the Dust Demon program, the FBI Critical Incident Response Group (CIRG), and the FBI's WMDSG.¹⁸

Moreover, Mr. Taylor had been tasked with leading CBP's participation in National Special Security Events (NSSEs), which are responsible for procuring and assigning CBP law enforcement personnel and aircraft and marine assets to support events, such as the 2013 and 2017 U.S. Presidential Inaugurations. Mr. Taylor last participated in an event planning in January 2018.

Mr. Taylor had also been on the Commissioner's Active Shooter Response Team, which meant that if the CBP Commissioner or DHS Secretary were in the Reagan building and an attack occurred, Mr. Taylor, who had electronic access into the "bullet proof" safe room, was to respond heavily armed to the Commissioner's Office. In March 2018, Mr. Jennings questioned the WMDD's firearms inventory and Mr. Taylor's frequent firearms training. He reached out to outside individuals and units and inquired about these matters, which, previously, he had never looked into. Shortly after, Mr. Taylor's electronic access to secondary areas like service elevators and secure hallways was terminated and he was never again asked to assist in any executive personnel movements or Commissioner's Office Active Shooter Response drills. Mr. Taylor is one of the original firearms coordinators/instructors/responders for the CBP Active Shooter Response Team.

CBP, and specifically the WMDD team members who represented the agency, stopped attending training and collaborative events despite multiple invitations. Management began disapproving travel to these events, claiming that it was not necessary, although funding had been designated to support these programs. The Complainants allege that CBP's "no-show" status was noted and reported out. The team was invited less often to meetings and training and finally was perceived as having abandoned the WMD and counterproliferation programs, which led to isolation from the classified interagency WMD community.

The change in Mr. Jones's and Mr. Taylor's duties is also reflected in the decrease in frequency of work travel and a reduction in their pay. In 2016 and 2017, Mr. Taylor reported that he took twelve separate trips to various government bases and facilities that were directly related to counterproliferation, missile and nuclear weapon technology smuggling/interdiction,

¹⁸ According to Mr. Taylor, the support has been limited to no-cost travel or telephonic/face-to-face engagement due to the removal of travel funding.

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and WMD mitigation efforts. By comparison, in 2018 and 2019, he reported that he traveled a total of five times for similar purposes. Of the five trips, CBP had committed to three trips prior to February 2018 and only one trip took place in 2019. Given that Mr. Taylor no longer had the duties that necessitated that he work fifty plus hours a week, as before, he received less compensation in overtime and premium pay. In 2019, according to his calculations, he received \$15,000 less than in 2017. Similarly, Mr. Jones reported that he took thirteen trips in 2016 and 2017. However, since 2018, the number of trips also reduced. In 2019, Mr. Jones took three trips and he has not taken any other work-related trips since then. Moreover, since 2018, Mr. Jones reports that he has lost approximately \$30,000 in overtime.

In addition, while DHS Headquarters authorized Mr. Taylor and Mr. Jones Home-To-Work vehicles to support the CIRG and WMDSG programs, Mr. Taylor and Mr. Jones reported that OI later opted to use the vehicles for other purposes.

Together, these actions, which also had a chilling effect on whistleblowing, rise to the level of a significant change in duties, responsibilities, or working conditions. They are so closely tied to the perceived whistleblowing activity (the duties began to be removed within days after the February 15, 2018 e-mail, which was widely discussed among OI staff and regarded as a disclosure of wrongdoing), that they satisfy the knowledge/timing test.

ii. Decision not to assign additional projects

The evidence suggests that management made the deliberate decision to no longer assign or allow the WMDD to work on projects similar to the DNA collection and MS-13 projects as a result of the team's perceived whistleblowing activity. In a February 21, 2018 e-mail, Mr. Jennings stated to Ms. Ley that because of his loss of confidence in Mr. Jones, he would have the team focus on nothing other than their pre-established duties. Whether or not additional similar project opportunities became available is irrelevant. The evidence establishes that, even if other opportunities were to exist, management would not be willing to assign these projects to the WMDD.

iii. Reputational harm

The facts evidence that OI leadership's view of the WMDD changed after they perceived the team had engaged in whistleblowing. Officials—specifically, Mr. Jennings—made statements to offices and officials internal and external to CBP and DHS that, by reasonable standards, would cause harm to the WMDD team members' solid professional reputations. In response to the sudden surge of DNA collection-related calls from the Secretary's office and DOJ, and in defense of CBP's position on DNA collection, OI and CBP presented a narrative that spoke generally about the WMDD and highlighted the team's alleged missteps. Multiple witnesses testified that, based on the narrative presented by leadership, the general consensus was that, in working the DNA collection project, the WMDD had acted without OI and CBP management authority, without input from the operators, and for self-recognition, all of which

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the Complainants adamantly deny. The evidence suggests that the WMDD continuously kept management informed of their developments on the project, that they collaborated with the other CBP offices that had an interest in the effort, and that they did so to advance the agency's mission and satisfy its legal obligations. The Complainants are now associated with the alleged unprofessional actions attributed to the division as a whole. The narrative expressed by management officials, as previously outlined, was that the agency had lost trust in the WMDD. Together with the removal of high-profile projects and their other responsibilities, these statements greatly harmed each team member's reputation throughout CBP.

Specifically, the apparent reputational harm has caused Mr. Jones and Mr. Taylor to be sidelined. They allege that they directly felt the loss of management's support, altering the clear path they each saw for their career within OI and discouraging any other prospects. And while Mr. Jones was detailed to the White House from July 2020 to January 2021, and was recently requested by name to be detailed to the U.S. Senate's Homeland Security and Governmental Affairs Committee's Permanent Subcommittee on Investigations, this does not refute his claim of reputational harm or evidence that Mr. Jones has not suffered reputational harm within CBP or DHS in the over three years that have transpired since he was first perceived as a whistleblower. Mr. Jones was presented with the detail opportunities particularly because of his strenuous efforts to defend his professional reputation and duty to uphold the law after he became a public whistleblower and was subjected to career exile.

As for Mr. Wynn, the agency's actions led him to leave OI and take a position with USBP, doing Management/Program Analyst work that is more generalist in nature. After the February 15, 2018 e-mail, Mr. Wynn found himself for months not working on any WMD-related responsibilities and unable to use his clearance or the subject matter expertise he had accumulated. He came to the realization that OI would never again give him substantive assignments, essentially ending his envisioned career path. He made the difficult decision to leave an office that at one time had offered him highly specialized career options rather than endure a prolonged period of doing nothing. And while it may be that Mr. Wynn continued to be employed, this does not negate that his departure from a position, for which he was specifically recruited because of his specialized experience, has impacted his professional growth opportunities and the vision he had for his career.

Moreover, CBP officials have continued harming the Complainants' reputations. Shortly after OSC published its finding that CBP's explanation regarding its noncompliance with the DNA Fingerprint Act of 2005 was unreasonable, Acting CBP Commissioner Mark Morgan stated that he would not comment on or confirm current employment of the whistleblowers in a General Leadership Messaging statement that was issued in September 2019, under the heading "DNA Collection Program / Whistleblower." The statement, which was made available to all CBP employees, was accompanied by the same claim OSC found unreasonable; namely, the denial that CBP was in violation of the law and the rejection of the whistleblowers' claims. By putting into question the Complainants' continued employment with the agency, the statement not only suggests that their disclosures could lead to their removal, but arguably indicates an intent to chill the speech of any potential future whistleblowers.

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Further, we note that, as previously mentioned, this year the DHS OIG issued and published a report that echoed OSC's findings regarding CBP's decade-long failure to comply with the DNA Fingerprint Act of 2005. OSC's whistleblowers (though not identified by name) were mentioned in the report. Again, we note that the Complainants' identity as whistleblowers is well-known. Thus, as we have seen for over three years, the disclosure at issue in this case has continuously re-surfaced, each time affirming the Complainants' role as whistleblowers on this important issue and continuing to expose them to additional retaliation.

Mr. Jones and Mr. Taylor assert that prior to February 2018, they were consistently treated exceptionally well by CBP leadership and staff. Mr. Taylor alleges that after the disclosure, front office staff, in any CBP office, stopped acknowledging him. As an example, the former Deputy Commissioner Perez, whom he has known for 20 years and would always affectionately greet him, stopped recognizing Mr. Taylor after the February 2018 email.

iv. WMDD's move under the Operational Field Testing Division and subsequent standing within OI

Ms. Ley became the Acting Assistant Commissioner of OI in January 2017. Shortly thereafter, Ms. Ley ordered a Deloitte study to evaluate OI's structure, divisions, and processes. Although the study recognized the WMDD's important function, it questioned its fit and placement within OI. When Ms. Ley officially assumed the OI Assistant Commissioner role in January 2018, she elected to merge the WMDD and the Operational Field Testing Division (OFTD). However, while it appears OI leadership still intended to grow the WMDD's program, the evidence suggests that the February 15, 2018 e-mail caused management to change the division's plan for growth, handle the merger haphazardly, to the team's detriment, and begin taking actions that led to the program's ultimate dissolution.

There is no indication that, prior to February 15, 2018, management had taken any formal administrative action to eliminate WMDD as a separate division within OI's organizational structure. Moreover, the evidence shows that, at the time, OI had not yet clarified to the WMDD and OFTD management officials what the merger would look like operationally or how everyone's roles would be defined. It appears that the WMDD and OFTD employees were in the very early stages of that process. Yet, on February 21, 2018, Mr. Jennings suddenly ordered the merger to immediately take place. That was the same day that Mr. Jennings expressed he had lost trust in the WMDD because of the February 15, 2018 e-mail. This suggests a causal connection between the disclosure of wrongdoing and the sped-up merger, which led to confusion and a misunderstanding about the different programs' roles, as well as continuous tension and conflict among the two former independent divisions that may have been avoided with a gradual and open process.

As to the WMDD's standing in OI before the February 15, 2018 e-mail, the evidence suggests that OI leadership wanted the program to grow. Prior to the February 15, 2018 e-mail, the team submitted a management-approved budget for FY 2020-2024, which projected the group would grow to 25 full-time positions by FY 2024. Mr. Jennings testified that he

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successfully pushed for Mr. Jones to get a 120-day temporary promotion to the Acting Director, GS-15, position in order to grow the WMDD's program. He also testified that he believed Ms. Ley wanted WMDD to continue growing as well. Moreover, the Complainants allege that, prior to the e-mail, Mr. Jennings spoke to the team about the prominent and collaborative role WMDD would have with OFTD upon the merger of the two divisions. OI staffing tables showed OFTD and WMDD as equals under one same director. However, following the February 15, 2018 email, all discussions about the division's growth stopped and Mr. Jennings and Mr. Fernandez's communications focused instead on reminding the group of its place as a branch under OFTD. Almost immediately, officials reduced the WMDD's size by two employees. Specifically, the agency ended Mr. Wood's detail and Mr. Jennings reassigned Robert Pennese to the Confidential Human Source Division (CHSD).

Management did not give the team an opportunity to have a prominent and collaborative role following the move. First, Mr. Jones did not receive even an interview for the OFTD director position in June 2018, although OI officials had told Mr. Jones to apply for the position allegedly as a way to make the WMDD assume a lead role within OFTD. Second, management did not name Mr. Jones Acting Deputy Director of OFTD, as Mr. Fernandez had previously stated in an e-mail would happen.¹⁹ Third, management did not create or announce an OFTD WMD supervisory position, as indicated in OI's hiring priorities submission for FY 2018. Thus, while Mr. Jones was head of the WMDD and Mr. Taylor operationally and administratively supervised three employees before the WMDD's move to OFTD, there was no indication that they would be able to have a similar opportunity in the future based on OI's apparent intent to keep the program's growth at bay.

It is also noteworthy that the team members were made to leave the office space that had been specifically built for the division. However, that was not the only move for Mr. Jones and Mr. Taylor with the WMD program. As previously mentioned, Mr. Wynn left the WMDD due to the agency's actions, which suggested he would no longer have career growth potential within OI. However, the employees who remained with the program have been bounced around from place to place since then. A few short months after leadership decided to merge WMDD with OFTD, it moved the group again. In June 2018, they were placed under CBP's Laboratories and Scientific Services (LSS). During the transition process, LSS would oversee the team's operations while OI would be responsible on the administrative side. For nearly two years, the team was left idling, with no budget, clear direction, or official activities/duties, as the agency never formally transitioned the former WMDD team members to LSS. On January 23, 2020, the agency decided not to finalize the move and returned the team to OI.

The decision to move the group a third time occurred shortly after OSC published its finding regarding CBP's failure to collect DNA based on the DNA Fingerprint Act of 2005, which garnered media attention and included the Complainants' vocal and public opposition to CBP's failure to substantiate their allegations. Witness testimony provided by an LSS

¹⁹ In a March 6, 2018 e-mail to the Acting Director of OFTD, Mr. Fernandez stated, "I suggest you have Mark as the acting Deputy for OFTD so that the division is always on top of both subjects."

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management official suggests that the Complainants' disclosure to OSC and the related activity that followed contributed to the agency's decision to move the group out of LSS.

Moreover, we note that, when leadership transferred the team back to OI, it placed Mr. Jones and Mr. Taylor back under the supervision of, and in physical proximity to, the same officials they were alleging had retaliated against them. At that time, OSC had already put the agency on notice of the Complainants' prohibited personnel practice complaint and was in the middle of facilitating a resolution of the matter via mediation. In addition, after the group's return to OI, the idling continued. Management failed to clarify where the team fell within the organization or to define its mission. In March 2020, OI leadership informed the team that they had no role in CBP WMD matters, which was now the responsibility of the Office of Field Operations. In May 2020, the team received a notification from OI leadership that the WMDD had been officially dissolved, without any mention of how the agency would be allocating the funding purportedly dedicated to the WMD and counter proliferation mission. However, despite receiving instruction from OI leadership that Mr. Jones and Mr. Taylor could no longer speak for CBP on WMD matters, there were numerous instances in which OI leadership demanded that they respond to certain related inquiries and taskings, particularly from DHS Headquarters and/or Congress. In one instance, Mr. Fernandez instructed Mr. Taylor that he brief Mr. Fernandez and the new Assistant Commissioner on the exact same programs that Mr. Fernandez and other OI managers had essentially ended and defunded almost two years prior. This caused confusion for Mr. Jones and Mr. Taylor regarding OI's actual oversight role regarding WMD-related matters, as well as fear that they could be accused of insubordination if they did or did not comply with the requests.

Six months after transferring out of LSS, on June 19, 2020, OI leadership informed the team members that they would move a fourth time and return to OFTD, though no longer under even a WMD branch. However, OI officials omitted referencing OFTD's pending transfer out of OI, which the team learned about from other sources. Mr. Jones and Mr. Taylor were more in the dark about their mission and place within OI or CBP than before, causing them to be greatly concerned about their potential career growth, as they had been rendered unable to perform meaningful work for an extended period. And while it may be that Mr. Jones and Mr. Taylor continued to have a job and have been incorporated into the OFTD team in the same way as any other employee, this does not negate that the multiple moves and changes to their duties, for which they were specifically recruited because of their specialized experience, have impacted their professional potential. By continuing to sporadically assign Mr. Jones and Mr. Taylor certain WMD-related tasks, CBP has demonstrated that it clearly understands the expertise that Mr. Jones and Mr. Taylor have, yet CBP refuses to allow that expertise to be reflected in regular work duties or promotions.

v. Hostile work environment

In addition to the above-referenced actions and statements made by agency officials, Mr. Jones and Mr. Taylor also allege that they were subjected to a hostile work environment based on a series of other behavior, which—when taken together and considered as a whole—further

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evidence that they experienced a significant change in duties, responsibilities, and working conditions as a result of their perceived whistleblowing and protected activity. The alleged behavior includes, but is not limited to, the following instances:

- After the team's return to OI from LSS, OI leadership accused the team of being AWOL, although the team was on their Regular Day Off (RDO) based on a 4-day a week work schedule in place for multiple years.
- During Mr. Jones's White House detail, OI leadership instructed Mr. Jones to move out of his assigned office and into a cubicle and relocate expensive equipment for which he is liable with little notice, in order to assign the office to another employee. This occurred when staff presence in the office was minimal and officials could have easily made other arrangements.

b. Non-selection of Mr. Jones for the OFTD Director position

With regard to Mr. Jones's non-selection for the OFTD Director position, we find it qualifies as a covered personnel action. The position was announced from April 23, 2018, through May 4, 2018, as an 1801 series position, which covers positions that supervise, lead, or perform inspection, investigation, enforcement, or compliance work. Mr. Jones applied for the position and human resources personnel referred his name to OI management officials on the certificate of eligible candidates. Mr. Fernandez reviewed the resumes of all the applicants listed on the certificate of eligible candidates and selected six candidates to interview. He then presented the list of six candidates, with their corresponding resumes, to Ronald Ocker, who approved the selection.²⁰ On May 31, 2018, Mr. Fernandez officially notified human resources personnel of the six candidates selected for an interview. Mr. Jones was not selected for an interview. The interviews for the OFTD Director position occurred in June 2018. The agency selected Sarah Deutschmann for the OFTD Director position.

Although Mr. Ocker was new to OI, Mr. Fernandez had been with the agency for many years and was aware of the whistleblowing activity attributed, in part, to Mr. Jones. Mr. Fernandez confirmed to OSC that he was present during the February 21, 2018 meeting in which Mr. Jennings informed Mr. Jones that he had lost confidence in him as a result of the perceived whistleblowing. He also testified to OSC that he believed something of trust/confidence in Mr. Jones had been lost after that meeting. In an e-mail that Mr. Fernandez sent Mr. Jones on February 21, 2018, after the meeting, Mr. Fernandez wrote, "This has been an unfortunate turn of events, however I am confident your team will bounce back and make CBP's WMD program the pinnacle of DHS," appearing to recognize the gravity of the situation and the impact it was having on the WMDD team members. On February 23, 2018, Mr. Fernandez directed Mr. Jones to collect Mr. Wood's building badge, suspend his computer access, and walk him out, as a direct result of the February 15 e-mail that Mr. Wood sent, which Mr. Fernandez identified as a report of wrongdoing against CBP that "sparked outrage." In addition, we note that Mr. Jennings was

²⁰ Mr. Ocker, who was the selecting official for the OFTD Director position, became the Executive Director of OI's IOD on May 7, 2018, and was new to the agency.

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still the Deputy Assistant Commissioner of OI at the time that Mr. Fernandez made the decision not to interview Mr. Jones for the position, which occurred a short time after Mr. Jones's perceived whistleblowing (about three months). We also note that the effects of the perceived whistleblowing activity lingered and officials continued to suspect the WMDD team of trying to advance DNA sampling within CBP, which OI now opposed. On April 18, 2018, Mr. Fernandez sent an e-mail to Ms. Ley regarding a request from the Commissioner's office for assistance with the development of a concept of operations for a DNA collection pilot.²¹ In the e-mail, he states he will find out how the issue "bubbled up to ensure it wasn't our folks pushing it."

On approximately May 21, 2018, Mr. Ocker met with Mr. Jones, who put Mr. Ocker on notice of the whistleblowing activity and the actions the agency had taken that he perceived to be retaliatory. Mr. Fernandez, who was also present, told OSC that, during the meeting, Mr. Ocker told Mr. Jones that CBP had decided the direction the agency wanted to go in (with regard to not collecting DNA samples) and that he had to respect the decision.

While non-selections are, generally, difficult to establish as retaliatory, what is particularly telling in Mr. Jones's case is that he did not even receive an interview for the OFTD Director position in June 2018, despite management's prior willingness to temporarily promote him while OI attempted to secure higher-graded, permanent positions for the WMDD and prior conversations about the prominent and collaborative role the WMDD would have upon the merger of the two divisions. It is also telling that, in attempting to explain the agency's failure to interview Mr. Jones, the agency has provided shifting explanations, as further discussed below. Thus, we believe the evidence suggests that Mr. Jones's perceived whistleblowing activity contributed to his non-selection for the OFTD Director position.

c. Lower or no performance awards

Decisions concerning pay, benefits, or awards are personnel actions under 5 U.S.C. § 2302(a)(2)(A). During FY 2017, Mr. Jones received a \$3,500 performance award, which was significantly reduced in FY 2018 to \$1,500. Mr. Taylor received a \$3,000 performance award in FY 2017, which was also significantly reduced to \$1,500 in FY 2018.

According to CBP's data, in FY 2017, 176 OI employees received a cash award. Of those, 30 employees received a cash award that was between \$3,000 to \$5,000 (the maximum amount issued), which represents about 17 percent of employees. In FY 2018, 165 OI employees received a cash award. Of those, 47 employees received a cash award within the same range, or about 28 percent of employees. Therefore, Mr. Jones and Mr. Taylor went from being among the relatively few employees to receive a high award to among the few who received a lower award. Of the employees who received a cash award in FY 2018, 68 percent received a cash award higher than Mr. Jones and Mr. Taylor.

²¹ In an April 19, 2018 e-mail to Ms. Ley, Mr. Fernandez explains that the Commissioner's office's request is the result of the Attorney General pressing the DHS Secretary to have CBP collect DNA.

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Moreover, Mr. Jones reports that he has not received any merit awards thereafter. Likewise, since 2018, Mr. Taylor reports that he has not received any cash award or other acknowledgement for his performance and that these are the only two years in almost 28 years of federal service that Mr. Taylor has not been recognized for his consistent performance.

OI management also reduced Mr. Wynn's performance award during FY 2018. Mr. Wynn, who received a \$3,000 performance award in FY 2017, received a \$2,000 award in FY 2018. Unlike Mr. Jones and Mr. Taylor, whose roles and positions remained tied to the WMDD and the path CBP chose for the team after the February 15, 2018 e-mail, Mr. Wynn did not stay with the WMDD team, or under OI, after FY 2018. Any awards Mr. Wynn may have received after FY 2018 were not linked to any WMD-related work and were issued by USBP officials under an entirely different chain of command.

It is telling that, in addition to the three Complainants, at least one other employee who was with the WMDD during the February 15, 2018 disclosure of wrongdoing also received a lower cash award in FY 2018.

B. CBP cannot sustain a defense under the clear and convincing evidence standard.

Once a complainant establishes a prima facie case of retaliation, the agency has the burden of rebutting the case by showing by clear and convincing evidence that it would have taken the same personnel actions against him in the absence of his protected disclosures.²² In evaluating whether clear and convincing evidence exists, the Board examines a number of factors, including the strength of the agency's evidence in support of its personnel action and the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision.²³

1. Strength of evidence in support of the personnel actions

a. Significant change in duties, responsibilities, and working conditions

The agency does not appear to have strong evidence in support of its decision to remove the DNA collection project from the WMDD. Mr. Jennings testified that the project was removed to combine different DNA collection efforts throughout CBP and coordinate agency-wide next steps. However, the evidence suggests that, at the time OI management removed the project from the team, officials knew CBP had no intention to pursue the team's specific DNA collection project, which would supply the FBI-run CODIS system with the detainees' DNA in order to aid in the identification of criminals and the resolution of cold cases. In an e-mail chain between Ms. Ley and Mr. Jennings on February 21, 2018, Ms. Ley indicated that she spoke to CBP Commissioner Kevin McAleenan, who expressed adamant opposition to CODIS DNA collection. Shortly thereafter, management removed the project from the team, and then CBP

²² 5 U.S.C. § 1214(b)(4)(B)(ii).

²³ *Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

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effectively shut it down. Thus, the evidence does not support OI's stated reason for removing the project from the WMD team.

Instead, the evidence suggests that the project was removed from the team in response to the perceived whistleblowing activity. In the same February 21, 2018 e-mail chain, Ms. Ley indicated that, whereas OI management may have tried to find a way to compromise with CBP leadership and pursue the CODIS DNA collection project, this was no longer an option because of the team's "little stunt," which refers to the team's communications within and outside of the Department—including the February 15, 2018 e-mail—that elevated the CODIS DNA collection matter. As such, the evidence suggests the WMDD would have likely continued with the CODIS DNA collection project if not for the perceived whistleblowing.

As for the removal of the MS-13 project from the WMDD team, it does not appear the agency could definitively show it would have taken that action if not for the perceived whistleblowing activity. We considered that within the same February 21, 2018 e-mail chain that Mr. Jennings and Ms. Ley discussed loss of trust related to the February 15, 2018 e-mail, Mr. Jennings indicated that he was removing the MS-13 project from the WMDD; that the decision came to a surprise to the team; that WMDD team member Mr. Pennese, who was mainly associated with the MS-13 project, had previously requested to move to the WMDD from the CHSD because of personality conflicts with management, yet was sent back to work under the same CHSD officials along with the MS-13 project; that Mr. Pennese had a very good working relationship with the WMDD team; that the WMDD had consistently received high praise for the work on the project; and that, while there were benefits to having the project under CHSD, there is no indication it could not have continued successfully under WMDD.

Moreover, the agency does not appear to have strong evidence in support of its decision to drastically reduce the team's other functions and essentially eliminate the WMD program that was six years in the making. Mr. Jennings testified that the WMDD represented OI well in various meetings with different offices and agencies to keep up with all matters related to WMD. Moreover, the team had the allocated funding to carry out these duties and there was still an apparent need for the team's involvement in these topics, as evidenced by the numerous instances in which OI leadership later instructed Mr. Jones and Mr. Taylor to respond to certain related inquiries and taskings.

b. Non-selection of Mr. Jones for the OFTD Director position

The agency does not appear to have strong evidence in support of its decision not to interview Mr. Jones for the OFTD Director position and the agency has provided shifting explanations for the non-selection. More specifically, the agency represented to OSC that it wanted someone in the position who had experience in producing intelligence analysis reports, and that Mr. Jones lacked that experience, particularly compared to the selectee's experience. Based on Ms. Deutschmann's resume, however, it is unclear what experience she had in producing intelligence analysis reports. While Ms. Deutschmann appears to have had policy analyst experience, her intelligence-related experience appears limited to the position she held as

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the Branch Chief of the Commissioner's Briefing Team (CBT) for under a year, in which she supervised the production of and delivered intelligence and special-interest briefings to the Commissioner, as well as the 12-month temporary duty assignment she had on the DHS Secretary's Briefing Staff. If the agency views the briefings as intelligence analysis reports, we question why the agency does not view Mr. Jones's experience in the same light. In his various roles, such as WMD Branch Chief at JOD and Supervisory Chief Security Officer for the FBI's WMD Directorate, Mr. Jones's resume reflects that he produced, managed the production of, and delivered briefings to high level officials on WMD-related matters.

Moreover, while the agency highlights Mr. Jones's lack of experience producing intelligence analysis reports, Mr. Fernandez testified to OSC that intelligence analysis experience was not the only factor considered and stated he did not think it would have been heavily weighed. A factor Mr. Fernandez stressed as important was supervisory experience in light of the demands of a GS-15 role. He indicated that, because the GS-15 grade level is the highest level before an employee can become a member of the SES, the applicant's leadership qualities and capabilities are more important given that an SES official needs to be able to perform well, regardless of where they are placed. Mr. Jones's resume reflects that, at the time he applied for the position, he had been head of the WMDD for six years (since its time in the Office of the Commissioner, JOD) and had other supervisory experience prior to that. According to the selectee's resume, the CBT Branch Chief position is the only supervisory role listed other than a previous 60-day acting deputy director role.

We note that, in his testimony, Mr. Fernandez stressed that it was important for the candidate to have fully held the supervisory role, rather than acting in it, appearing to disparage the experience Mr. Jones gained while serving as the acting director. However, it appears that Mr. Jones took on the full role and responsibilities of the WMDD Director position during the nearly two years he held the role. We also note that, during that time, he received a 120-day temporary promotion to the GS-15 grade level while OI attempted to secure higher-graded, permanent positions for the division. It is unclear why Mr. Jones's two-year acting role would be less meaningful, have less value, or was less demanding than if he had held the role in a permanent and official capacity. (We surmise that Mr. Fernandez would want management to give the extended experience Mr. Fernandez gained from his roles as Acting Executive Director and Acting Deputy Executive Director the consideration it is due when determining his qualification for higher management positions.)

Further, Mr. Fernandez told OSC that Mr. Jones's resume needed to describe his supervisory experience, including dealing with difficult situations and dealing with problematic employees. The level of detail that Mr. Fernandez stated he expected to find on the resume, with regard to supervisory experience, is not typical, as far as OSC is aware. Rather, it is generally during the interview process that such specificity of supervisory experience is usually addressed, which makes Mr. Fernandez's expectation appear, at the very least, unreasonable and questionable. Moreover, we note that no such reference to specific supervisory experience was included on Ms. Deutschmann's resume.

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We would also like to highlight as concerning management's alleged refusal to consider any knowledge that officials may have had of Mr. Jones's experience outside of what he included on his resume. Mr. Fernandez and Mr. Ocker stressed to OSC that they focused exclusively on the candidates' resumes when deciding which candidates to interview. Specifically, Mr. Fernandez told OSC that, although he was familiar with Mr. Jones's experience, he did not select to interview him because Mr. Jones had likely failed to fully describe on his resume the experience that was most relevant to the position. However, given that Ms. Deutschmann's resume does not appear to have a high level of detail, we question whether Mr. Jones's application received differential treatment. Moreover, we question the agency's stated approach on focusing exclusively on the four corners of the resume given that in-house experience and management's familiarity with an applicant's work are often the benefits of being an internal applicant and consideration of those factors does not necessarily signify that the candidate is being granted an unauthorized advantage.

Lastly, we note management believed Mr. Jones was qualified to hold a high-level management role, as evidenced by the agency's approval of a 120-day temporary promotion for Mr. Jones to the Acting Director, GS-15, position in 2016, and his two-year role as division head. Due to the foregoing, the agency does not have strong evidence in support of its stated reason or decision not to interview Mr. Jones or fairly consider him for the OFTD Director position.

c. Lower or no performance awards

The agency does not appear to have strong evidence in support of its decision to lower the Complainants' performance award or to fail to later issue Mr. Jones and Mr. Taylor an award. There is no indication that budgetary limitations are to blame for the reduction. As previously mentioned, 17 percent of employees received a cash award that was between \$3,000 to \$5,000 in FY 2017, versus 28 percent in FY 2018. Therefore, the data demonstrates that even more employees received a high cash award the year that CBP reduced the Complainants' award. There is also no indication that Mr. Jones or Mr. Taylor have not successfully carried out the tasks that have been assigned to them.

2. Motive to retaliate

The evidence suggests management had a strong motive to retaliate against the WMD team. Based on testimony OSC obtained from OI officials, the February 15, 2018 e-mail was not received well by CBP officials. Numerous witnesses testified that it "sparked outrage" and "caused a lot of backlash" because it escalated allegations related to CBP's DNA collection requirements to the Secretary's office. Mr. Jennings, too, indicated to OSC that the e-mail caused a "huge issue." He stated it led to many phone calls between executive level officials and the Secretary's Office and that these conversations put CBP on notice that the White House and DOJ were inquiring into CBP's compliance with the relevant DNA law and regulations. Mr. Jennings also stated that the e-mail caused him to apologize to the Commissioner's Office for the way the situation evolved. Ms. Ley's February 21, 2021 e-mail describes that the Commissioner

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became upset with the developing situation and that it cast OI in a negative light. Both Ms. Ley and Mr. Jennings expressed how they had lost trust and confidence in the team and highlighted their displeasure with the team's decision to go outside of CBP, which they felt put pressure on CBP to act against its will. Ms. Ley indicates in the e-mail chain that she explicitly told the team not to go outside CBP.

While we acknowledge that elevating matters up the chain of command can promote the efficient management of government matters, the law is clear that channeling communications through a chain of command does not apply to disclosures of wrongdoing, whether actual or perceived.

We also note that, notwithstanding determinations by both OSC and DHS OIG on CBP's failure to comply with the law, CBP still takes the position that it need not comply. This suggests CBP's stance is fostered by the agency's strong opposition against DNA collection. Indeed, to avoid complying with its legal obligations, CBP down-played the WMDD's efforts in the development of the DNA sampling project and spoke ill of them. This response demonstrates that CBP had—and continues to have—a strong motive to retaliate against the Complainants for setting the actions in motion that have ultimately led the agency to collect DNA, in compliance with the law.

IV. Conclusion

The agency's actions, which evidence violations of sections 2302(b)(8) and (b)(9)(c), harmed the Complainants. Mr. Jones and Mr. Taylor went from leading a division within OI with a growing program and entrusted with high-profile projects, to performing standard duties of regular staff members within a unit that does a minimal amount of work related to WMD. Their career goals and trajectory, which were to firmly establish the WMDD as a stand-out division, full of capable staff and always available to fully address the agency's WMD detection and mitigation needs, drastically changed. The progress that was six years in the making abruptly came to a halt and the WMDD is now non-existent. The Complainants strongly felt a loss of management's support, altering the clear path that they saw for their own careers within OI and discouraging them from seeking any other WMD-related prospects or career advancement opportunities within CBP. The narrative expressed by management officials, as previously outlined, was that the agency had lost trust in the team. Together with the removal of high-profile projects, these statements greatly harmed the team members' reputation throughout CBP. It is reasonable to see how Mr. Jones and Mr. Taylor felt any other effort they made to advance their career within CBP would be fruitless.

Mr. Jones and Mr. Taylor were on a management career track. However, after the February 2018 perceived whistleblowing incident, the agency no longer showed any support for their career advancement. The agency specifically denied Mr. Jones supervisory opportunities within OI and in his field of expertise. Given Mr. Jones's and Mr. Taylor's level of experience and unblemished disciplinary record, it seems likely that the agency would have supported their

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professional development or used their skillset to the agency's greater benefit, as it had previously done, if not for the perceived and actual whistleblowing activity. Yet, despite their level of experience, CBP allowed Mr. Jones and Mr. Taylor to float from unit to unit with no clear purpose or career path for over three years. All of these actions have led witnesses, who are aware of management's strong reaction to the February 15, 2018 e-mail and know about the team's whistleblowing activity, to describe the team as having been "taken off the table" or "pushed down." Further, Mr. Jones and Mr. Taylor allege that, on a personal level, these actions have impacted almost every facet of their lives, leaving an indelible mark on them and on those around them as well. Additionally, the agency's treatment of the Complainants is particularly pernicious because it has a potential chilling effect on other agency employees, as it sends the clear message that whistleblowing will derail one's career.

Mr. Wynn's career goal and trajectory also drastically changed. It is reasonable to see how Mr. Wynn felt he had no prospects within OI or that any effort he made to advance his career in his field of expertise would not yield any results. Mr. Wynn alleges that, on a personal level, he has suffered for being wrongfully accused of unethical behavior after spending years building a reputation on hard work and dedication to CBP's mission.

[REDACTED]

Sincerely,



Alejandra Dove