



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202
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REDACTED

Complainant

Docket No.: 23-11-CP

v.

Reprisal for Disclosure
Proceeding

DuPage Regional Office of Education #19

OIG# 121MID00006

Grantee

Appearances: Andrew Patton, Esq., Riley Safer Holmes & Cancila LLP,
on behalf of Complainant¹

Hailey M. Golds, Esq., Caroline K. Kane, Esq., and Jennifer A. Dunn, Esq.,
Franczek P.C., on behalf of Grantee DuPage Regional Office of Education #19

Before: Elizabeth Figueroa, Chief Administrative Law Judge²

FINAL AGENCY DECISION AND ORDER ON REMAND

I. Introduction

A. Summary of this Case

Complainant asserted that Grantee DuPage Regional Office of Education # 19 (DuPage ROE) took prohibited personnel actions against him, including termination of his employment, as reprisal for disclosing improper use of federal grant funds disbursed by the United States Department of Education (Department) to DuPage ROE, in violation of the National Defense Authorization Act (NDAA) of FY 2013, 41 U.S.C. § 4712(c)(1). Complainant requested financial compensation resulting from termination of his employment. Following a year-long investigation,

¹ Erin P. Gasparka, Esq., Riley Safer Holmes & Cancila LLP, represented Complainant in this matter until August 18, 2023, when she withdrew her appearance and Mr. Patton entered his appearance.

² On remand from the United States Court of Appeals for the Seventh Circuit, a different administrative law judge was assigned to this case. The reassignment was made for administrative reasons. Nothing in the previously assigned administrative law judge's opinion suggested any bias, favoritism, or antagonism that would make fair judgment impossible.

the Department's Office of Inspector General (OIG) issued a Report of Investigation (OIG Report or ROI) in which it determined that Complainant's allegations of whistleblower reprisal were not substantiated.

The OIG Report of Investigation was previously reviewed by the Department's Office of Hearings and Appeals (OHA) to determine whether the OIG had sufficient basis to conclude that DuPage ROE subjected Complainant to a prohibited reprisal and, based on that review, to issue an order denying or ordering the relief provided for in 41 U.S.C. §§ 4712(c)(1)(A)-(D).

On reviewing the OIG's determination, OHA found the OIG's determination was not supported, made a determination in favor of Complainant, and awarded Complainant compensation for lost wages. *Complainant v. DuPage Regional Office of Education #19*, OHA Docket (Dkt.) No. 21-36-CP (Order, Oct. 20, 2021).³

On DuPage ROE's appeal of OHA's determination to the United States Court of Appeals for the Seventh Circuit, the Seventh Circuit reversed and vacated OHA's determination, and remanded the case to the Department.

The case is now before me on remand from the Seventh Circuit and the subject of this decision.

B. Summary of this Final Agency Decision and Order on Remand

This decision is the Department's final disposition in the matter. Consistent with the United States Court of Appeals for the Seventh Circuit's instructions in *DuPage Regional Office of Education v. United States Department of Education*, Docket No. 21-3339, this tribunal has conducted further proceedings. Upon review of the OIG Report and record evidence, as well as arguments of the parties, this tribunal concludes that the OIG⁴ had sufficient bases to conclude that Complainant's alleged reprisals were either unsubstantiated or that DuPage ROE did not subject Complainant to a reprisal under 41 U.S.C. § 4712(c)(1).⁵ Therefore, this decision sustains,

³ The Seventh Circuit decision accurately reflects the docket number contained in the case caption of the final agency decision that was later the subject of the Petition for Review filed with the Seventh Circuit, OHA Dkt. No. 21-36-CP. However, due to a typographical error, that docket number was not the correct OHA docket number. The correct docket number of the case that was the subject of the Petition for Review to the Seventh Circuit was OHA Dkt. No. 21-38-CP, not Dkt. No. 21-36-CP.

⁴ For the convenience of the reader, the acronyms used throughout this decision are the same as those used in the OIG Report.

⁵ This decision is based on the record in OHA Dkt. No. 21-38-CP, as was acknowledged by the parties at the status conference held in this case on April 19, 2023, and the briefs filed by the parties in the instant case. To be clear, OHA did not conduct an evidentiary hearing in either OHA Dkt. No. 21-38-CP or in the instant proceeding on remand from the Seventh Circuit. Rather, both proceedings were conducted "on the papers."

On reviewing the OIG Report in OHA Dkt. No. 21-38-CP, the presiding Administrative Law Judge extended the opportunity for an evidentiary hearing, Docket Entry Number 5, but both parties waived the hearing. Docket Entry Numbers 8 and 10. In waiving the hearing, Complainant stated that he was doing so upon being informed that DuPage ROE would not voluntarily make its witnesses available and also because the Administrative Law Judge had informed the parties that she was not authorized to issue witness subpoenas. Docket Entry Number 8. On remand, I ruled that I would not consider new evidence but instead decide the matter based on the record in OHA Dkt. No. 21-38-CP, together with any supplemental briefs. OHA Dkt. No. 23-11-CP, Docket Entry Number 10.

with modification, the findings of the OIG Report; finds that DuPage ROE did not subject Complainant to a reprisal in violation of the protections provided by the NDAA; and, denies any relief to Complainant.

II. Jurisdiction

The Office of Administrative Law Judges (OALJ) of OHA has jurisdiction to hear this case and render a final agency decision and order pursuant to 41 U.S.C. § 4712(c); the Secretary's Memorandum of Delegation of Authority dated October 29, 2019, as authorized by 41 U.S.C. § 4701(a)(2); 20 U.S.C. § 1234(a)(4); and, the order and mandate remanding this case to the Secretary in *DuPage Regional Office of Education v. U.S. Dep't of Educ.*, Dkt. No. 21-3339, 58 F. 4th 326 (7th Cir. 2023). Jurisdiction is established.

OALJ's jurisdiction is limited to hearing Complainant's Whistleblower Reprisal Complaint for retaliation claims that Complainant has asserted under 41 U.S.C. § 4712(c). In his submissions, Complainant also claims that DuPage ROE violated its personnel procedures and practices, that a DuPage ROE official violated state law that prohibits recording of telephone conversations without prior approval of participants, and suggests that the actions DuPage ROE took against him were unlawful discrimination based on his sexual orientation and race.⁶ OALJ does not have authority to hear any claims made by Complainant except the NDAA retaliation claim made pursuant to 41 U.S.C. § 4712(c), and, therefore, this decision considers only the NDAA

There is nothing in the NDAA suggesting that a hearing or any other particular procedure is required beyond that specified. 41 U.S.C. §§ 4712(a) – (h). Section 4712 provides only that the agency head is required to review the Office of Inspector General's report to determine whether there is a sufficient basis to conclude the complainant was subjected to a prohibited reprisal for making a protected disclosure. The only court that has addressed the requirement to hold an evidentiary hearing in a similar whistleblower case appears to be the Eighth Circuit. In *Business Communications, Inc. v. U.S. Dep't of Educ.*, 739 F.3d 374 (8th Cir. 2013), the Eighth Circuit addressed the whistleblower protections in Section 1553 of the American Recovery and Reinvestment Act, Pub.L. No 111-5, (ARRA), not 41 U.S.C. § 4712. Section 4712 of 41 U.S.C., however, uses language nearly identical to Section 1553 of the ARRA. Additionally, 41 U.S.C. § 4712 was enacted in part because Section 1553 of the ARRA applied only to contracts funded by the stimulus bill and Congress wanted to expand the provisions of Section 1553 to all federal contractors and grantees in 41 U.S.C. § 4712. S. Rep. 114-270 at 2-3 (2016). In *Business Communications*, the Eighth Circuit held that the agency's order deprived the employer of due process because the agency did not provide the employer with a hearing and because the pre- and post-deprivation procedures available under the ARRA did not provide any opportunity for the employer to confront and cross-examine adverse witnesses. *Business Communications, Inc.*, 739 F.3d at 381.

The requirement in *Business Communications* to provide an opportunity for confrontation and cross-examination of adverse witnesses may or may not be an erroneous application of the ARRA and, by extension, the NDAA. The NDAA provides for a lengthy period of up to one year for the OIG to investigate a whistleblower complaint, followed by a 30-day review period for the agency head to decide whether there is a sufficient basis to conclude whether the employee was subjected to a prohibited reprisal. 41 U.S.C. § 4712. In enacting the NDAA, Congress appears to have intended that OIG investigators obtain, scrutinize, and weigh evidence to determine whether an employee had been subjected to prohibited retaliation, rather than a more elaborate hearing process before a hearing official. In any case, *Business Communications*, is non-binding on the jurisprudence of the Seventh Circuit, which was not called on to address this issue in the previous appeal and which court would hear any appeal of this order.

⁶ Complainant's Brief to the Administrative Law Judge (Compl. Brief), OHA Dkt. No. 21-38-CP, at 10; Complainant's Exhibit (Compl. Exh.) C-1 at 1 and 3, Docket Entry No. 27, OHA Dkt. No. 21-38-CP; OIG Report, Attachment 2 (Interview Report of Complainant) at 16.

retaliation claim(s) asserted in Complainant's Whistleblower Reprisal Complaint.

III. Procedural History

A. The Whistleblower Reprisal Complaint

On September 23, 2020, the Department's OIG received Complainant's Whistleblower Reprisal Complaint, which was dated September 22, 2020.⁷ In the Complaint and the OIG's interviews of Complainant that followed, Complainant asserted that DuPage ROE took five prohibited personnel actions against him as reprisal for disclosing his concerns about payment of unallowable catering expenses with federal grant funds and misallocation of contract expenses to another federal grant.⁸ Specifically, Complainant alleged that DuPage ROE removed him from his duties (First Reprisal), modified his duties (Second Reprisal), placed him on an employee performance plan (Third Reprisal), issued a disciplinary notice (Fourth Reprisal), and ultimately terminated his employment in reprisal for his two disclosures (Fifth Reprisal).⁹ Complainant requested financial compensation resulting from termination of his employment at DuPage ROE.¹⁰

B. The OIG Investigation

The OIG investigated the allegations in Complainant's complaint and assessed his allegations pursuant to the protections provided by 41 U.S.C § 4712.¹¹ As provided by the NDAA, the OIG was required to complete its investigation and submit a report of its findings within 180 days from the September 23, 2020 filing date of Complainant's complaint.¹² As allowed by the NDAA, the OIG requested an extension of that deadline. On January 19, 2021, Complainant agreed to the extension, and the deadline for the OIG's completion and submission of a report of its findings was extended to September 18, 2021.¹³

C. Issuance of OIG Report of Investigation

On September 17, 2021, the OIG issued a Report of Investigation, following completion of its investigation of Complainant's Whistleblower Reprisal Complaint. The OIG's findings, as well as documents the OIG obtained and interviews it conducted and relied on for its findings during the course of its investigation, are summarized in Section VI below.

⁷ OIG Report, Attachments 1 (Complainant's Filed Complaint) and 2 (Interview Report of Complainant). In his Complaint, Complainant acknowledged, in the Privacy Act Statement, that information he provided as part of the complaint might be disseminated outside of the Department of Education pursuant to an adjudicative proceeding. OIG Report, Attachment 1 (Complainant's Filed Complaint) at 8 - 9.

⁸ OIG Report, Attachments 1 (Complainant's Filed Complaint) and 2 (Interview Report of Complainant).

⁹ *Id.*

¹⁰ OIG Report, Attachment 1 (Complainant's Filed Complaint) at 7.

¹¹ OIG Report at 1.

¹² 41 U.S.C. § 4712(b)(2)(A).

¹³ 41 U.S.C. § 4712(b)(2)(B); OIG Report at 5, FN 1.

D. Decision Process Before OHA

On September 21, 2021, the OIG delivered its Report of Investigation to the Secretary, the Secretary transmitted the OIG Report to OHA for it to render a final agency decision, and OHA opened the matter as OHA Dkt. No. 21-38-CP for the purpose of rendering a final agency decision. On October 20, 2021, OHA issued a final agency decision.

E. Petition for Review of OHA decision to the Seventh Circuit

DuPage ROE filed a Petition for Review with the United States Court of Appeals for the Seventh Circuit, seeking review of the Department's final agency decision issued on October 20, 2021. On January 23, 2023, the Seventh Circuit vacated the Department's Final Agency Decision, upon concluding that the administrative adjudicator's decision was arbitrary and capricious because it did not provide an in-depth review and full discussion of the facts in explanation of the reasoning and remanded the matter to the Department for further proceedings consistent with its decision.¹⁴

F. Remand to the Secretary from the Seventh Circuit

On March 20, 2023, OHA received the remanded case from the Secretary and this case, OHA Dkt. No. 23-11-CP, was opened.

On March 28, 2023, a status conference was held, at which counsel for both parties appeared via TEAMS. At the request of Complainant's (new) counsel, the status conference was continued to April 4, 2023, to allow her time to file a Notice of Appearance, to register as an e-filer in OHA's electronic case management system, and to review case materials.

On April 4, 2023, counsel for both parties appeared for the re-scheduled status conference. Counsel for DuPage ROE asked that deadlines be set for supplemental briefing. Counsel for Complainant stated she was not prepared to set deadlines but required additional time to review the record. Another status conference was scheduled for April 19, 2023, to allow Complainant's counsel time to review the record.

At the April 19, 2023 status conference, counsel for both parties appeared and, with their agreement, an Order setting deadlines for filing supplemental briefs was entered. On June 5, 2023, Complainant filed a supplemental brief. On July 20, 2023, DuPage ROE filed a supplemental brief. And, on August 21, 2023, Complainant filed a reply brief. In his reply brief, Complainant requested oral argument.

At Complainant's request, oral arguments were held on November 9, 2023. The transcript of the oral arguments was received on January 17, 2024, and the parties were allowed until February 21, 2024 to request or respond to any requests for corrections to the transcript. The record closed on February 21, 2024.

¹⁴ *DuPage Regional Office of Education v. U.S. Dep't of Educ.*, 58 F. 4th 326 (7th Cir. 2023).

IV. Factual Background

A. The Parties

Complainant was initially hired at DuPage ROE as a contractor in October 2017, to assist with grant management of two newly awarded Department of Education grants, the Education Innovation and Research (EIR) Grant and the Supporting Effective Educator Development (SEED) Grant.¹⁵ Complainant indicated that he also worked as a consultant for Illinois State University (ISU) from October 1, 2017 to December 21, 2017, but ISU indicated Complainant contracted only with DuPage ROE.¹⁶ His initial duties included reviewing contracts and invoices for the EIR and SEED Grants for adherence to grant guidelines.¹⁷ According to Complainant, DuPage ROE hired him because he had expert knowledge and experience with big competitive grant projects and to ensure that grant management at DuPage ROE had the oversight it needed.¹⁸ Before going to work at DuPage ROE, Complainant worked for 20 years in grant funding development for Chicago Public Schools (CPS), where he was the Director of the Competitive Grants Department and the Executive Director of the Children First Fund.¹⁹ The CPS Grants Department was the office on the front end of applications for federal grants and was not involved with post-award grant activities or grant administration.²⁰

When Complainant was hired by DuPage ROE, Darlene Ruscitti, Superintendent of DuPage ROE, granted Complainant the flexibility to work from home four out of five workdays each week since he lived in Chicago and did not have a car, making his commute to DuPage ROE in Wheaton difficult.²¹

In late January 2018, within a few months of his initial hire as a contractor for DuPage ROE, Complainant became a full-time, grant-funded employee of DuPage ROE, in a combined position of Budget and Data Specialist.²² Complainant worked with both the EIR and SEED Grants.²³ The Data Specialist position was created to work with the Illinois State Board of Education (ISBE) to create a supply and demand tracking portal for personnel and positions in the school districts.²⁴

¹⁵ OIG Report at 3; Compl. Exh. C-14, OHA Dkt. No. 21-38-CP, Docket Entry No. 27, at 1; OIG Report, Attachment 2 (Interview Report of Complainant) at 2; OIG Report, Attachment 5 (Interview Report of Hunt) at 5.

¹⁶ OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 2; OIG Report, Attachment 5 (Interview Report of Hunt) at 5.

¹⁷ OIG Report, Attachment 6 (Interview Report of Dotson) at 3; OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 2.

¹⁸ Compl. Brief, OHA Dkt. No. 21-38-CP, at 3.

¹⁹ *Id.* at 2-3.

²⁰ OIG Report, Attachment 3 (Interview Report of Haller) at 2.

²¹ OIG Report at 3; OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 6.

²² *Id.*; Compl. Brief, OHA Dkt. No. 21-38-CP, at 3; OIG Report at 3; Compl. Exh. C-14, Docket Entry No. 27, OHA Dkt. No. 21-38-CP, at 1.

²³ OIG Report at 2 – 3; OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 6.

²⁴ OIG Report, Attachment 5 (Interview Report of Hunt) at 5 – 6.

DuPage ROE is a county-level Local Education Agency (LEA) located in Wheaton, Illinois.²⁵ It serves as an intermediary organization between the ISBE and various other LEA school districts in DuPage County and elsewhere across Illinois.²⁶ It is one of 38 Regional Offices of Education (ROE) across the state of Illinois that provide services, resources and professional development for LEAs and LEA leaders and students in their respective counties and regions.²⁷ Specifically, DuPage ROE provides professional development through various means, including research projects and programs in partnership with universities and school districts, funded by federal grant programs.²⁸

More specifically and as relevant to this case, DuPage ROE is a direct grantee of the federal EIR Grant (PR/Award #U411C170142) and a subgrantee of SEED Grant funds (PR/Award #U423A170072). The Department awarded the EIR Grant to DuPage ROE, and DuPage ROE administers the EIR Grant. The Department awarded the SEED Grant to ISU, and ISU administers the SEED grant award and subaward funds set aside for DuPage ROE.²⁹

B. The Grants

Haller and Hunt, both then at ISU, applied to the Department for the EIR and SEED Grants, one grant for DuPage ROE (the EIR Grant) and one for ISU (the SEED Grant), on the belief that it was unlikely they would be awarded two federal grants.³⁰ The stated goal of work performed under the EIR and SEED Grants was to promote sustainability in school districts by partnering with universities and other ROEs.³¹ The primary objectives of the EIR and SEED Grants were time-management, leadership development, and effective problem solving.³²

The Department awarded both the EIR and SEED Grants to DuPage ROE and ISU, respectively, in September 2017, announcing the awards only the week before the beginning of each grant's fiscal year.³³ Work on the SEED Grant had to begin immediately after the award was made to ISU and during the first year of the grant.³⁴ Commencement of work on the EIR Grant made to DuPage ROE had more flexibility as the first year of that grant was considered a pilot year.³⁵

The EIR Grant awarded to DuPage ROE was the biggest competitive grant in DuPage ROE's history.³⁶ The EIR Grant was a 4.5-million-dollar grant that involved four universities, four

²⁵ OIG Report at 2.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ OIG Report, Attachment 3 (Interview Report of Haller) at 2.

³¹ *Id.* at 4.

³² OIG Report, Attachment 2 (Interview Report of Complainant) at 4 – 5, 7.

³³ OIG Report, Attachment 3 (Interview Report of Haller) at 2.

³⁴ OIG Report, Attachment 3 (Interview Report of Haller) at 3; OIG Report, Attachment 5 (Interview Report of Hunt) at 2.

³⁵ OIG Report, Attachment 3 (Interview Report of Haller) at 3.

³⁶ Compl. Brief, OHA Dkt. No. 21-38-CP, at 3.

Illinois ROEs, 54 school districts, and two other major partners with multi-million-dollar contracts.³⁷

The SEED Grant awarded to ISU was a 17-million-dollar grant.³⁸ DuPage ROE and ISU entered into a post-award grant partnership concerning the SEED Grant.³⁹ The SEED subaward funds that DuPage ROE received through ISU were designated for other ROEs participating from other school districts.⁴⁰ Fifty-four school districts, representing approximately 150 schools, participate in SEED subaward trainings.⁴¹

The EIR Grant allowed for a planning year.⁴² However, the SEED Grant did not allow for a planning year but had to be launched right away.⁴³ As ISU was launching the SEED Grant, it did not have all the needed staff in place to administer the grant.⁴⁴ After the grant was awarded to DuPage ROE, it had to quickly identify school districts and other partners that were willing to be on the grant as the grant applications had been submitted without the typical participation of stakeholders and their supporting letters.⁴⁵

As a direct grantee of the EIR Grant, DuPage ROE is responsible for administering the EIR grant.⁴⁶ ISU administers the SEED Grant and subaward funds for DuPage ROE.⁴⁷

Over time, the two grants evolved to serve the same function, goal, and stakeholder school districts such that invoices had to be reviewed carefully for any redundancy.⁴⁸

V. Complainant's Whistleblower Reprisal Complaint

A. Complainant's Assertions

In his Whistleblower Reprisal Complaint and the OIG interviews of Complainant that followed, Complainant asserted that he was subjected to five prohibited personnel actions that he believed to be acts of reprisal against him for two disclosures he made to employees and management officials at DuPage ROE.

Complainant alleged that he disclosed his concerns about payment of unallowable catering expenses with federal grant funds and misallocation of contract expenses to another federal grant.⁴⁹

³⁷ Compl. Brief, OHA Dkt. No. 21-38-CP, at 4.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ OIG Report, Attachment 3 (Interview Report of Haller) at 4.

⁴¹ *Id.*

⁴² OIG Report, Attachment 5 (Interview Report of Hunt) at 2.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ OIG Report, Attachment 2 (Interview Report of Complainant) at 3.

⁴⁶ OIG Report at 2.

⁴⁷ *Id.*

⁴⁸ OIG Report, Attachment 2 (Interview Report of Complainant) at 4-5.

⁴⁹ OIG Report, (unnumbered) Attachment to Attachment 1 (Complainant's Filed Complaint) at 1.

Complainant further alleged that DuPage ROE retaliated against him by removing him from his duties (First Reprisal), modifying his duties (Second Reprisal), placing him on an employee performance plan (Third Reprisal), issuing him a disciplinary notice (Fourth Reprisal), and ultimately terminating his employment (Fifth Reprisal), all in reprisal for the two protected disclosures he made.⁵⁰

The remedy Complainant requested in the Complaint was financial compensation resulting from termination of his employment at DuPage ROE.⁵¹

B. DuPage ROE's Response

In response, during the OIG investigation, DuPage ROE asserted that its actions were neither prohibited employment actions nor retaliatory, but that Complainant's removal from his duties under the SEED Grant was taken for business reasons, and that the other actions were taken to address either Complainant's conduct or ongoing concerns with Complainant's job performance.⁵²

VI. The OIG Report of Investigation

A. Summary of the OIG Report of Investigation

The OIG conducted a twelve-months long investigation into Complainant's claims. It based its report on interviews of Complainant and seven individuals identified by both Complainant and DuPage ROE, as well as documents submitted by Complainant, DuPage ROE, and witnesses.

In the Report, the OIG found that Complainant was an employee of a Department grantee or subgrantee, that he made two protected disclosures, and that he experienced five personnel actions, four of which actions for which his protected disclosures may have been contributing factors. The OIG found that Complainant had satisfied his initial burden of proof with respect to four of the five personnel actions, removal of his fiscal duties for the SEED Grant, placement on an EPP, issuance of a PAR, and termination from employment. The OIG concluded that Complainant had satisfied his initial burden because those personnel actions were taken close in time to protected disclosures known to DuPage ROE officials who took the actions. However, the OIG ultimately concluded that its investigation did not substantiate Complainant's allegations of whistleblower reprisal.⁵³

⁵⁰ OIG Report at 1 and 6; OIG Report, Attachment 1 (Complainant's Filed Complaint).

⁵¹ OIG Report, Attachment 1 (Complainant's Filed Complaint) at 7.

⁵² OIG Report at 7-14.

⁵³ OIG Report at 1.

B. The Witnesses

The seven witnesses whom OIG investigators interviewed were Dr. Alicia Haller (Haller), EIR Grant Director at DuPage ROE, Co-Director for the SEED Grant, and Complainant's primary direct supervisor⁵⁴; Dr. Erika Hunt (Hunt), SEED Grant Co-Director at ISU⁵⁵; Dr. Darlene Ruscitti (Ruscitti), the elected senior official and Regional Superintendent at DuPage ROE, who has ultimate fiscal responsibility for federal grants awarded to DuPage ROE, and Complainant's hiring official and top-line, but not direct, supervisor, and also Haller's supervisor⁵⁶; Dr. Jeremy Dotson (Dotson), Assistant Regional Superintendent of Business Services and Director of Finance at DuPage ROE, who shares ultimate fiscal responsibility with Ruscitti for federal grants awarded to DuPage ROE and performs financial oversight of the grant expenditures for the EIR Grant and SEED Grant Subaward⁵⁷; Michael Robey (Robey), Assistant Superintendent of Schools and Operations at DuPage ROE, who served in a Human Resources (HR) capacity and weighed in on disciplinary and employment decisions and actions, but was not Complainant's supervisor⁵⁸; Janet Gierman (Gierman), Principal Account Clerk at DuPage ROE, who assisted Complainant with contract and invoice approval and payment and was supervised by him for a period of time⁵⁹; and, Gail Fahey (Fahey), EIR Coordinator at DuPage ROE⁶⁰

C. The documentary evidence relied on by the OIG

The following documents were obtained by and relied upon by the OIG in its Report of Investigation and included as attachments to the Report of Investigation:

Attachment # 1: Complainant's Filed Complaint

Attachment #2: Interview Report of Albert Complainant

Attachment #3: Interview Report of Dr. Alicia Haller

⁵⁴ *Id.* at 3; OIG Report, Attachment 3 (Interview Report of Haller). Haller executed a Privacy Act Waiver Authorization form. OIG Report, Attachment 17 to Attachment 3 (Interview Report of Haller).

⁵⁵ OIG Report at 3; OIG Report, Attachment 5 (Interview Report of Hunt). Hunt executed a Privacy Act Waiver Authorization form. *Id.* at (unnumbered) 33.

⁵⁶ OIG Report at 3; OIG Report, Attachment 4 (Interview Report of Ruscitti). Ruscitti executed a Privacy Act Waiver Authorization form. *Id.* at (unnumbered) 9.

⁵⁷ OIG Report at 3-4; OIG Report, Attachment 6 (Interview Report of Dotson). Dotson executed a Privacy Act Waiver Authorization form. *Id.* at (unnumbered) 65.

⁵⁸ OIG Report at 4; OIG Report, Attachment 8 (Interview Report of Robey, who was initially referred to as Witness # 5). This witness was not identified by name initially, but as Witness #5, because they declined to provide ED-OIG a signed Privacy Act Waiver Authorization form. *Id.* at 7. However, by Order issued on October 1, 2021, the presiding Administrative Law Judge granted DuPage ROE's Motion to Supplement Record with a Waiver Authorizing Disclosure Under the Privacy Act signed by Robey. OHA Dkt. No. 21-38-CP, Docket Entry Nos. 12 and 13.

⁵⁹ OIG Report at 4; OIG Report, Attachment 7 (Interview Report of Gierman) at 1 and 4. Gierman executed a Privacy Act Waiver Authorization form. *Id.* at 4 and (unnumbered) 33.

⁶⁰ OIG Report at 4; OIG Report, Attachment 9 (Interview Report of Fahey). This witness was not identified by name initially, but as Witness #7, because they declined to provide ED-OIG a signed Privacy Act Waiver Authorization form. *Id.* at 3. However, by Order issued on October 1, 2021, the presiding Administrative Law Judge granted DuPage ROE's Motion to Supplement Record with a Waiver Authorizing Disclosure Under the Privacy Act signed by Fahey. OHA Dkt. No. 21-38-CP, Docket Entry Nos. 12 and 13.

- Attachment #4: Interview Report of Dr. Darlene Ruscitti
- Attachment #5: Interview Report of Dr. Erika Hunt
- Attachment #6: Interview Report of Dr. Jeremy Dotson
- Attachment #7: Interview Report of Janet Gierman
- Attachment #8: Interview Report of Michael Robey
- Attachment #9: Interview Report of Gail Fahey
- Attachment #10: Email Evidence of Complainant's Excitement to Shift Duties
- Attachment #11: Complainant-DuPage ROE EPP – Signed by Complainant
- Attachment #12: Haller Memo to Ruscitti Regarding Complainant's Performance – April 12, 2019
- Attachment #13: Haller Memos and Notes Regarding Complainant's Performance
- Attachment #14: Complainant's Job Performance Examples to Inform the EPP
- Attachment #15: DuPage ROE's Supplemental Response – July 9, 2021
- Attachment #16: Harassment Complaint Emails from ISU
- Attachment #17: Complainant's Personnel Action Report
- Attachment #18: DuPage County Employee Policy Manual
- Attachment #19: DuPage ROE 2018 Personnel Handbook
- Attachment #20: DuPage ROE 2020 Personnel Handbook
- Attachment #21: Complainant's Signed DuPage ROE Acceptable Use Policy Form
- Attachment #22: Final Performance Appraisal Aligned with EPP – Provided by Complainant
- Attachment #23: DuPage ROE Internal Emails-Scheduling Complainant's PA Meeting
- Attachment #24: Co-Mingling Concerns Talking Points for Call with Department
- Attachment #25: Haller Email to Ruscitti Regarding Complainant and Call with

Department

Attachment #26: Complainant's Text Message Screenshots

Attachment #27: DuPage ROE Internal Emails – Haller to HR

Attachment #28: Complainant's EPP Performance Activities 1-12 –
Evidence by DuPage ROE

Attachment #29: Notes from Complainant's PA Meeting – 9/30/19

Attachment #30: DuPage ROE Internal Email Signaling Ruscitti's Approval of
Termination

Attachment #31: Complainant's DuPage County Notice of Employee Separation

D. OIG's Findings

The OIG Report of Investigation made findings based on witness interviews it conducted⁶¹ and documents it obtained from witnesses, as well as Complainant, during its investigation. At the conclusion of its Report of Investigation, the OIG made eight findings:

- (i) Complainant was an employee of DuPage ROE, an ED grantee and subgrantee.
- (ii) Complainant made protected disclosures in or about April 2018 and January 29 through February 25, 2019, regarding unallowable expenses charged to a grant and the misallocation of funds charged to a federal grant.
- (iii) Complainant experienced five personnel actions including a removal of fiscal duties from the SEED grant at ISU, a modification in duties/position at DuPage ROE, placement on an EPP, issuance of a PAR, and termination from his position at DuPage ROE.
- (iv) OIG found the removal of his fiscal duties on the SEED grant was not retaliatory. Although the evidence shows by a preponderance that his disclosure regarding unallowable expenses may have been a contributing factor to this personnel action,

⁶¹ Initially, two of the seven witnesses did not execute Waivers Authorizing Disclosure Under the Privacy Act of 1974 (5 U.S.C. § 552a) and Section 828 of the NDAA. These two witnesses were referred to as Witness # 5 and Witness # 7, rather than by name, in the memoranda memorializing their statements that OIG investigators prepared, which were redacted to prevent the disclosure of personal information. OIG Report, Attachments 8 (Interview Report of Robey) and 9 (Interview Report of Fahey). However, by Order issued on October 1, 2021, the presiding Administrative Law Judge granted DuPage ROE's Motion to Supplement Record with Waivers Authorizing Disclosure Under the Privacy Act signed by Witness #5, Robey, and Witness #7, Fahey. OHA Dkt. No. 21-38-CP, Docket Entry Nos. 12 and 13.

DuPage ROE provided clear and convincing evidence that they would have taken this action regardless of his disclosure.

- (v) OIG found the modification in his duties/position was not retaliatory. Complainant did not provide evidence that showed by a preponderance that his disclosures were a contributing factor to this action. Also, DuPage ROE provided clear and convincing evidence that they would have changed his duties regardless of any protected disclosures.
- (vi) OIG found the placement of Complainant on his EPP was not retaliatory. Complainant provided evidence that showed by a preponderance that his disclosure about the vendor contract and invoice allocation issue may have been a contributing factor to this action. However, OIG found DuPage ROE provided clear and convincing evidence of Complainant's multiple job performance issues and that DuPage ROE officials would have placed him on a performance plan regardless of any protected disclosures.
- (vii) OIG found the issuance of a PAR to Complainant was not retaliatory. Complainant provided evidence that showed by a preponderance that his disclosures may have been a contributing factor to the PAR's issuance since they were known to DuPage ROE and ISU grant officials involved in issuing the PAR. However, only one Assistant Superintendent involved in the action had knowledge of the disclosures. OIG further found that DuPage ROE provided clear and convincing evidence that it would have issued the PAR regardless of the disclosure.
- (viii) OIG found Complainant's termination from DuPage ROE was not retaliatory. Complainant provided evidence that showed by a preponderance his disclosure about the vendor contract and invoice allocation issue may have been a contributing factor to his termination because it was a known disclosure to DuPage ROE and ISU officials involved in the action. However, OIG found DuPage ROE provided clear and convincing evidence that they would have terminated Complainant regardless of any protected disclosures based on the numerous, contemporaneous job performance issues.⁶²

VII. The Parties' Arguments

A. Complainant's arguments

In his Whistleblower Reprisal Complaint, Complainant asserted that he was subjected to three employment actions that he believed to be acts of reprisal. Specifically, Complainant alleged he was discriminated against in the following ways: (1) he was placed on an EPP and during the EPP period received no support to meet the EPP's objectives but that Haller and Hunt took work away from him or blocked him from performing work; (2) he was issued a PAR, wherein he was falsely accused of sexual harassment and which was issued for the purpose of supporting his

⁶² OIG Report at 15-16.

eventual termination; and (3) he was terminated for failing to meet the objectives of the EPP, all of which objectives he purports to have met except those for which work was taken away from him or those for which Haller and Hunt blocked him from doing.⁶³ During the OIG investigation process, Complainant modified the employment actions taken against him as reprisal to include his removal from fiscal duties for the SEED Grant and later modification of his duties.⁶⁴ Complainant alleged that these actions were taken to retaliate against him for two disclosures he made to employees and management officials at DuPage ROE. Complainant argues that all personnel actions were taken against him because he questioned suspect invoices and contracts presented to him for payment under the EIR Grant and was terminated to guarantee that he would not be there in the future to identify and resist further violations of the Uniform Guidance.⁶⁵ Complainant argues that he satisfied his initial burden of proof.

Complainant further argues that the DuPage ROE has not provided clear and convincing evidence that it would have taken the same actions in the absence of his protected disclosures. Complainant asserts that the evidence shows DuPage ROE's actions, including its termination of his employment, were taken in retaliation for his questioning of how SEED and EIR Grant funds were being used interchangeably between the two programs in violation of Uniform Guidance, and not for his conduct or underperformance of his duties.

B. DuPage ROE's arguments

DuPage ROE argues that record evidence does not support the OIG's finding that DuPage ROE had knowledge of Complainant's first alleged protected disclosure because Complainant did not make the first disclosure to a DuPage ROE official, but only to Hunt, who was employed by ISU.

DuPage ROE also argues that record evidence does not support the OIG's findings that Complainant's alleged protected disclosures were a contributing factor to its removal of Complainant from SEED Grant duties, to his change in duties away from data infrastructure work, to its issuance of the PAR or EPP, or to its subsequent termination of his employment with DuPage ROE. In support thereof, DuPage ROE points to the findings in the OIG Report and record evidence and asserts that Complainant only began to allege retaliation after DuPage ROE terminated his employment.

DuPage ROE further argues that the OIG's finding that DuPage ROE provided clear and convincing evidence that each employment action it took would have occurred regardless of any protected disclosures made by Complainant based on his conduct and underperformance is supported by record evidence.

VIII. Issues Presented

The issues to be addressed are:

⁶³ OIG Report, Attachment to Attachment 1 (Complainant's Filed Complaint) at 2.

⁶⁴ OIG Report, Attachment 2 (Interview Report of Complainant) at 9-14.

⁶⁵ Compl. Brief, OHA Dkt. No. 21-38-CP, at 5.

1. Did Complainant meet his initial burden of showing that (1) he was an employee of a grantee of a grant administered by the Department; (2) he made a disclosure or disclosures protected by 41 U.S.C. § 4712; and (3) the disclosure was “a contributing factor” in the employment actions taken against him by DuPage ROE?
2. For those actions for which Complainant met his initial burden, did DuPage ROE demonstrate, by clear and convincing evidence, that it would have taken the same employment actions in the absence of Complainant’s disclosures?

IX. Applicable Law

A. Prohibitions, protections, and procedures under the NDAA

To protect public funds from waste, fraud, and abuse, Congress established certain requirements, applicable to all federal contractors and grantees, to encourage the reporting of misuse of federal funds.⁶⁶ The NDAA prohibits federal contractors and grantees from discharging, demoting, or otherwise discriminating against an employee for making a “disclosure,” commonly referred to as whistleblowing.⁶⁷

Specifically, the statute prohibits a grantee from retaliating against an employee by discharging, demoting, or otherwise discriminating against the employee for disclosing “information that the employee reasonably believes is evidence of gross mismanagement of a Federal . . . grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, . . . or a violation of law, rule, or regulation related to a Federal . . . grant”.⁶⁸ The test for determining whether an employee had such a reasonable belief is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the whistleblower could reasonably conclude that the actions of the government evidenced one of the categories of wrongdoing.⁶⁹

The disclosure must be made to an individual or a body specified in the statute.⁷⁰ Among the individuals and bodies specified in the statute to whom a disclosure must be made is “a management official or other employee of the contractor, subcontractor, grantee, subgrantee, or personal services contractor who has the responsibility to investigate, discover, or address misconduct.”⁷¹

If an employee believes they have been subjected to a reprisal in violation of the statute, the employee may submit a complaint to the OIG within three years of the reprisal.⁷² If the OIG

⁶⁶ 41 U.S.C. §§ 4712(a)(1) and (a)(3); *DuPage Regional Office of Education v. U.S. Dep’t of Educ.*, 58 F. 4th at 350.

⁶⁷ 41 U.S.C. § 4712.

⁶⁸ 41 U.S.C. § 4712(a)(1).

⁶⁹ See *Lachance v. White*, 174 F.3d 1378, 1380-81 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000); *Fisher v. Environmental Protection Agency*, 108 M.S.P.R. 296, 303-304 (M.S.P.B.2008); *McCorcle v. Dep’t of Agriculture*, 98 M.S.P.R. 363, 373-74 (M.S.P.B. 2005).

⁷⁰ 41 U.S.C. §§ 4712(a)(1) and (a)(2).

⁷¹ 41 U.S.C. § 4712(a)(2)(G).

⁷² 41 U.S.C. § 4712(b).

determines that the complaint is not frivolous, that it alleges a violation of the statute, and that it has not been previously addressed in another Federal or State judicial or administrative proceeding initiated by the employee, the OIG will investigate the complaint and, upon completion of the investigation, submit a report of the findings of the investigation to the employee, the employer, and the Secretary. The OIG must either make its determination that an investigation is not warranted or submit its report of an investigation within 180 days after receiving the complaint. If the employee agrees, the OIG can extend the time to investigate and report for an additional 180 days.⁷³

After receiving the OIG report, the Secretary or his designee must decide within 30 days whether there is sufficient basis to conclude that the contractor or grantee concerned has subjected the complainant to a prohibited reprisal.⁷⁴ After weighing the evidence, the Secretary, or his designee must issue an order either denying the relief requested by the employee or requiring one or more of the following enumerated actions by the employer:

- (1) take affirmative action to abate the reprisal
- (2) reinstate the employee to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken or
- (3) pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.⁷⁵

In the normal course of issuing an order following receipt of an OIG report, the Secretary issues a decision within 30 days of the Secretary's receipt of the OIG's report.⁷⁶

B. Burdens of proof under the NDAA

The NDAA itself does not set out burdens of proof, but dictates that the legal burdens of proof provided in 5 U.S.C. § 1221(e) are controlling.⁷⁷ The legal burdens of proof specified in 5 U.S.C. § 1221(e) control for purposes of investigation, decision by the head of an executive agency, or judicial or administrative adjudication and involve a two-step burden of proof framework.⁷⁸ At step one, the employee must satisfy his initial burden of proof by demonstrating that his protected disclosure was a contributing factor in the prohibited personnel action taken against him.⁷⁹ Step two is triggered if the employee adequately meets his burden, at which point

⁷³ 41 U.S.C. § 4712(b).

⁷⁴ 41 U.S.C. § 4712(c)(1).

⁷⁵ *Id.*

⁷⁶ 41 U.S.C. § 4712(c)(1).

⁷⁷ 41 U.S.C. § 4712(c)(6).

⁷⁸ *Id.*

⁷⁹ 5 U.S.C. § 1221(e)(1).

the burden shifts to the employer to demonstrate “by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.”⁸⁰

C. Initial burden of proof

To obtain relief under the NDAA, the employee or former employee must first show (1) he made a disclosure protected by 41 U.S.C. § 4712; (2) to an individual or body specified in the statute; and, (3) he suffered a reprisal in the form of a personnel action covered by the NDAA. After establishing these three elements, the employee must demonstrate that the protected disclosure was a contributing factor in the personnel action taken against him.⁸¹

Personnel actions listed in the NDAA are “discharging, demoting, or otherwise discriminating against the employee.”⁸² Title 5 of U.S.C. § 1221(e) addresses cases “involving an alleged prohibited personnel practice as described under 5 U.S.C §§ 2302(b)(8) and 2302(b)(9)(A)(i), (B), (C), or (D).” Prohibited personnel actions are defined in 5 U.S.C § 2302 and include, among other actions, “any other significant change in duties, responsibilities, or working conditions.”⁸³

While a performance improvement plan is not one of the personnel actions enumerated under the NDAA and generally not considered to be an adverse employment action but a tool to improve performance, it may be considered a prohibited personnel action within the meaning of the NDAA.⁸⁴

After the employee establishes that he made a disclosure protected by § 4712, to an individual or body specified in § 4712, and suffered a reprisal in the form of a personnel action covered by the NDAA, the employee then bears the burden to show his protected disclosure was a contributing factor to the personnel action. The employee’s initial burden can be met through circumstantial evidence, including evidence that “the official taking the personnel action knew of the [whistleblower] activity” and that the “personnel action occurred within a period of time such that a reasonable person could conclude that the “whistleblower” activity was a contributing factor in the personnel action.”⁸⁵ The Federal Circuit has called this the “knowledge/timing” test.⁸⁶ Put another way, the “knowledge/timing” test provides that the causal connection component of the prima facie case may be established by showing that the employer had knowledge of the protected disclosure and that the personnel action took place shortly after that disclosure.

“(T)he knowledge/timing test of Section 1221(e)(1) must be taken as a whole, but no other factor may be taken into account. In other words, the combination of subsections (A) (“the official

⁸⁰ See 5 U.S.C. § 1221(e)(2).

⁸¹ 41 U.S.C. § 4712(c)(6) (adopting the burdens of proof of 5 U.S.C. § 1221(e)); 5 U.S.C. § 1221(e); *DuPage Regional Office of Education v. U.S. Dep’t of Educ.*, 58 F. 4th at 351.

⁸² 41 U.S.C. § 4712(a)(1).

⁸³ 5 U.S.C. 1221(e); 5 U.S.C § 2302(a)(2)(A)(xii).

⁸⁴ See, e.g., *Gonzales v. Dep’t of Housing and Urban Development*, 64 M.S.P.R. 314, 319 (M.S.P.B.1994); *Newcastle v. Dep’t of Treasury*, 94 M.S.P.R. 242, 245 (M.S.P.B. 2003).

⁸⁵ 5 U.S.C. § 1221(e)(1); *DuPage Regional Office of Education v. U.S. Dep’t of Educ.*, 58 F. 4th at 351; see also *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10th Cir. 2018).

⁸⁶ See *Kewley v. Dep’t of Health and Human Servs.*, 153 F.3d 1357, 1361 (Fed. Cir. 1998).

taking the personnel action knew of the (whistleblower activity”) and (B) (“the personnel action occurred within a period of time such that a reasonable person could conclude that the ‘whistleblower’ activity was a contributing factor in the personnel action”) must be weighed together to determine if the whistleblowing employee has met her burden of showing that the protected disclosure was a ‘contributing factor.’”⁸⁷

To satisfy the knowledge prong of the knowledge/timing test, the employee must show that the decisionmaker had knowledge of the disclosures before beginning the personnel action.⁸⁸ The knowledge of someone who knew of the disclosures but was not a decision maker is irrelevant to motive.⁸⁹ It is the decisionmaker’s knowledge that is crucial.⁹⁰

To satisfy the timing prong of the knowledge/timing test, the personnel action must have occurred within a period of time such that a reasonable person could conclude that the whistleblower activity was a contributing factor in the personnel action.⁹¹ A very close temporal proximity can give rise to a plausible interference of retaliation while “the lack of temporal proximity prevents the court from drawing a reasonable inference of causality when no additional factual allegations support causation.”⁹²

Although no bright line rule has been established, the Supreme Court has recognized that “[t]he cases that accept mere temporal proximity between an employer’s knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be ‘very close,’ ” citing approvingly cases where three- and four-month intervals were found insufficient to infer causality between the protected activity and the adverse employment action.⁹³ However, courts have found intervals longer than three or four months between the protected activity and the adverse employment action sufficient to infer causality.⁹⁴ In any event, “the facts and circumstances of each case necessarily must be evaluated to determine whether an interval is too long to determine rationally that an adverse employment action is linked to an employee’s earlier complaint.”⁹⁵

Satisfaction of the “knowledge/timing” test establishes, prima facie, that the disclosure was a contributing factor to the personnel action.⁹⁶ This contributing factor standard requires

⁸⁷ See *Kewley v. Dep’t of Health and Human Servs.*, 153 F.3d at 1362-63.

⁸⁸ *Armstrong v. Arcanum Group, Inc.*, 897 F.3d at 1287.

⁸⁹ *Id.* at 1289.

⁹⁰ *Id.* at 1290, citing *Halasa v. ITT Educ. Servs., Inc.* 690 F.3d 844, 848 (7th Cir. 2012).

⁹¹ See 5 U.S.C. § 1221(e)(1)(B); *Armstrong v. Arcanum Group, Inc.*, 897 F.3d at 1287.

⁹² See *Pueschel v. Chao*, 955 F. 3d 163, 167 (D.C. Cir. 2020).

⁹³ *Clark Cty. Sch. Dist. v. Breedon*, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L.Ed.2d 509 (2001) (quoting *O’Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001)).

⁹⁴ See, e.g., *Smith v. Dep’t of Agriculture*, 64 M.S.P.R. 46, 65 (M.S.P.B. 1994) (knowledge/timing test satisfied where personnel actions were taken less than 1 year after protected disclosures made); *Woodworth v. Dep’t of Navy*, 105 M.S.P.R. 456, 465 (M.S.P.B. 2007), affirmed 329 Fed. Appx. 281 (Fed. Cir. 2009), rehearing en banc denied, cert. denied, 559 U.S. 973, 130 S. Ct. 1716 (2010) (disclosure made just over eight months before agency’s personnel action was a contributing factor); *Powers v. Dep’t of Navy*, 97 M.S.P.R. 554, 561 (M.S.P.B. 2004) (disclosure was contributing factor to personnel action taken approximately nine months after disclosure made).

⁹⁵ *Carlson v. CSX Transp., Inc.*, 758 F. 3d 819, 829 (7th Cir. 2014).

⁹⁶ 5 U.S.C. §§ 1221(e)(1)(A) and (B).

“something less than a substantial or motivating” factor standard.⁹⁷ It is a lenient standard of proof and requires the Administrative Law Judge to “weigh the deciding official’s knowledge of the protected disclosure in combination with the reasonable time period, without more, to determine whether that protected closure is a contributing factor in the personnel action.”⁹⁸

D. Burden shift to the DuPage ROE

If an employee establishes a prima facie case, then the burden shifts to the employer to demonstrate “by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.”⁹⁹ An employer’s rebuttal case comes into play only once the employee has established a prima facie case and the clear and convincing standard applies to the employer’s burden because the employer usually holds all the evidentiary cards.¹⁰⁰

“Evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from the conclusion.”¹⁰¹

In determining whether the employer showed, by clear and convincing evidence, that it would have taken the same personnel action in the absence of whistleblowing, the following factors, referred to as *Carr* factors after the oft-cited case that has received wide-approval, are considered: the strength of the employer’s evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the employer’s officials who were involved in the decision; and, any evidence that the employer takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.¹⁰²

X. Review of OIG Determination and Analysis

Having reviewed the OIG’s determination, record evidence, and the parties’ arguments, I must now decide whether there is a sufficient basis to conclude that DuPage ROE subjected Complainant to one or more prohibited reprisals. 41 U.S.C. § 4712(c)(1).

The NDAA statute provides no specifics on the standard of review to be conducted by the agency head, including whether new evidence should be admitted and considered or witness examination allowed by the reviewing official, as discussed in Footnote 5 above. Rather, the NDAA expressly creates a process in which the OIG is the initial factfinder and, following conclusion of the OIG’s investigation, the agency head then reviews the OIG’s report within 30 days to decide whether there is sufficient basis to conclude the grantee subjected an employee to a prohibited reprisal. Additionally, there are no implementing regulations that address how review

⁹⁷ *Addis v. Dep’t of Lab.*, 575 F.3d 688, 691 (7th Cir. 2009).

⁹⁸ *Kewley v. Dep’t of Health and Human Servs.*, 153 F.3d 1363.

⁹⁹ 5 U.S.C. § 1221(e)(2).

¹⁰⁰ *DuPage Regional Office of Education v. U.S. Dep’t of Educ.*, 58 F. 4th at 351, citing *Whitmore v. Dep’t of Lab.*, 680 F. 3d 1353, 1367 (Fed. Cir. 2012) (quoting 135 Cong. Red. H747-48 (daily ed. Mar. 21, 1989)).

¹⁰¹ *DuPage Regional Office of Education v. U.S. Dep’t of Educ.*, 58 F. 4th at 352, quoting *Whitmore*, 680 F.3d at 1368.

¹⁰² *DuPage Regional Office of Education v. United States Dep’t of Educ.*, 58 F. 4th at 352, citing *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

of the OIG's determinations should be conducted and few courts have had the occasion to interpret the retaliation provision of the NDAA. In the absence of statutory or other authority for and direction to expand review of the OIG's determination beyond a review of the OIG's investigative findings and determination, the review here will be circumscribed to deciding whether there is a sufficient basis contained in the OIG's Report, including the witness interviews and documents contained in the Report, together with the exhibits and arguments submitted in OHA Dkt. No. 21-38-CP, and the arguments made in this case, to conclude that DuPage ROE subjected Complainant to a prohibited reprisal.¹⁰³

First, I will examine whether each of the eight conclusions reached by the OIG is supported by evidence considered by the OIG during its investigation and contained in its report. Then, I will analyze whether the OIG's findings are consistent with applicable law, first determining whether Complainant met his initial burden of proof and, if so, whether DuPage ROE provided clear and convincing evidence that it would have taken the same employment actions regardless of any protected disclosures Complainant may have made. Finally, I will determine whether there is a sufficient basis to conclude that DuPage ROE subjected Complainant to one or more prohibited reprisals.

(i) Complainant was an employee of a Department Grantee

The OIG found that Complainant was an employee of DuPage ROE, a Department grantee and subgrantee.¹⁰⁴

The parties' arguments

Neither party disagrees with the OIG's finding that Complainant was an employee of DuPage ROE and that DuPage ROE was a Department grantee and subgrantee, at all relevant times.

The evidence

Record evidence shows that Complainant was hired by DuPage ROE as a contractor in October 2017, that he transitioned into a full-time, salaried employee at DuPage ROE on January 29, 2018, and that he was continuously employed by DuPage ROE until October 4, 2019, when DuPage ROE terminated his employment.¹⁰⁵

Record evidence also establishes that DuPage ROE was a Department federal grantee and subgrantee from the time that Complainant began working at DuPage ROE in October 2017, and through October 2019, when his employment there was terminated. When interviewed by OIG investigators, all seven witnesses as well as Complainant stated that the DuPage ROE was a direct grantee of a federal EIR Grant and a subgrantee of a SEED Grant administered through ISU, both

¹⁰³ 41 U.S.C. § 4712.

¹⁰⁴ OIG Report at 15.

¹⁰⁵ OIG Report, Attachment 1 (Complainant's Filed Complaint) at 2; OIG Report, Attachment 31 (Notice of Employee Separation); OIG Report, Attachment 4 (Interview Report of Ruscitti) at 2; Compl. Exh. C-14 at 1, Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

of which grants were awarded by the Department.¹⁰⁶

Based on record evidence, both the EIR Grant and the SEED Grant were direct competitive grants awarded by the Department.¹⁰⁷ The EIR Grant was a five-year grant awarded by the Department directly to DuPage ROE in 2017, in the amount of \$4 million.¹⁰⁸ The SEED Grant was a three to five-year grant awarded to ISU in 2017, in the amount of \$12 million for the first three years, with the prospect of renewal for years four and five, for a total award of \$17 million.¹⁰⁹ Both the EIR and SEED Grants were designed to support professional development and training for LEA leaders and educators with the goal of improving the quality of education for students through research grant projects and to establish a statewide model for a professional development structure.¹¹⁰

The evidence considered by the OIG and that which is before me supports the OIG's findings that Complainant was an employee of DuPage ROE, that DuPage ROE was a Department federal grantee and subgrantee during the relevant time, and that the personnel actions forming the basis for Complainant's complaint all occurred in 2018 and 2019, while Complainant was employed at DuPage ROE. There is no evidence to the contrary. Therefore, the record supports the OIG's finding that Complainant was an employee of DuPage ROE and that DuPage ROE was a Department grantee and subgrantee.

Complainant satisfied the first requirement of his initial burden of proof required in 41 U.S.C. § 4712, by establishing he was an employee of a federal grantee and subgrantee.

(ii) Complainant made two protected disclosures

The OIG found that Complainant made two disclosures protected by 41 U.S.C. § 4712, the first in or about April 2018, regarding unallowed expenses charged to the SEED Grant, and the second between January 29 through February 25, 2019, regarding misallocation of funds charged to the EIR Grant.¹¹¹ In its finding, the OIG determined that Complainant made the first disclosure to Hunt, but not to Ruscitti or Haller or any other DuPage ROE officials.¹¹²

The parties' arguments

¹⁰⁶ OIG Report at 2; OIG Report, Attachment 2 (Interview Report of Complainant) at 3-4; OIG Report, Attachment 3 (Interview Report of Haller) at 2-3; OIG Report, Attachment 4 (Interview Report of Ruscitti) at 1-4; OIG Report, Attachment 5 (Interview Report of Hunt) at 1-2; OIG Report, Attachment 6 (Interview Report of Dotson) at 3; OIG Report, Attachment 7 (Interview Report of Gierman) at 2-4; OIG Report, Attachment 9 (Interview Report of Fahey) at 1-3.

¹⁰⁷ OIG Report, Attachment 2 (Interview Report of Complainant) at 4.

¹⁰⁸ OIG Report at 2; OIG Report, Attachment 2 (Interview Report of Complainant) at 4.

¹⁰⁹ *Id.*

¹¹⁰ OIG Report at 2; OIG Report, Attachment 2 (Interview Report of Complainant) at 4; OIG Report, Attachment 5 (Interview Report of Hunt) at 2 and 5.

¹¹¹ OIG Report at 5-6, and 15, para. (ii).

¹¹² OIG Report at 5-6, and 7.

DuPage ROE contends that Complainant's first "disclosure" was an expression of concern that was not made to a DuPage ROE official, as required by the statute, but made only to Hunt, an ISU official, and therefore, not a protected disclosure within the meaning of 41 U.S.C. § 4712. Complainant refutes the OIG's finding that he failed to show that Haller or Ruscitti had any knowledge of his protected disclosure about the catering expenses and asserts that he made the disclosure not only to Hunt but also to Ruscitti.

DuPage ROE does not dispute that the second disclosure Complainant made was a protected disclosure under 41 U.S.C. § 4712, or that it was the sort of disclosure intended to be protected by the statute.

The evidence

Both disclosures involved the invoice review process, so it is necessary to understand the steps in that process. The invoice review process for expenses charged to the grants during Complainant's employment was as follows: Complainant completed the initial review of contracts, invoices, and receipts for adherence to grant guidelines.¹¹³ As applicable, for training invoices for vendor coaches, the invoices then went to EIR Grant Coordinator, Fahey.¹¹⁴ Then, Haller reviewed the invoices before forwarding them to Dotson and Ruscitti for final approval.¹¹⁵

The first of the two disclosures involved an invoice for food expenses. Both food and travel expenses were allowable under each grant, subject to review before invoices were charged to the respective grants and payments issued.¹¹⁶ Specific rules concerning food expenses and providing meals applied to the grants, including the requirement that meals could be provided only if training was of a certain length.¹¹⁷

The first protected disclosure OIG found concerned the SEED Grant administered by ISU. Record evidence establishes that in or around April 2018, Hunt, SEED Grant Co-Director at ISU, submitted an invoice from the National School Administration Manager (SAM) Innovation Project (NSIP) for \$10,000, to Complainant for catered meals provided at a training event for principals and district superintendents, indicating it should be charged to the SEED Grant.¹¹⁸ Complainant did not approve the invoice but instead told Hunt that it would be a violation of Uniform Guidance Principles to pay the invoice and that payment of the invoice was not permissible under federal grants.¹¹⁹

The evidence showed, as found by the OIG, that Complainant informed Hunt in April 2018 that he would not pay a catering invoice that she submitted for payment under the SEED Grant

¹¹³ OIG Report, Attachment 3 (Interview Report of Haller) at 4; OIG Report, Attachment 2 (Interview Report of Complainant) at 7.

¹¹⁴ OIG Report, Attachment 3 (Interview Report of Haller) at 4.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ OIG Report, Attachment 1 to Attachment 1 (Complainant's Filed Complaint); OIG Report, Attachment 2 (Interview Report of Complainant) at 9.

¹¹⁹ OIG Report, Attachment 2 (Interview Report of Complainant) at 9; OIG Report, Attachment 5 (Interview Report of Hunt) at 3; OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 4-6.

because it did not conform did Uniform Guidance.¹²⁰ Complainant did not notify Haller about his refusal to pay the invoice because she was on vacation and unavailable.¹²¹

Complainant purports to have made the disclosure to Ruscitti, DuPage ROE's superintendent, at one of their weekly meetings.¹²² However, Ruscitti reported to OIG investigators that it was Dotson, not Complainant, who brought the issue of the catering invoices to her attention.¹²³ Complainant's claim that he made the disclosure to Ruscitti is not supported by the record. His claim of disclosure to Ruscitti was not included in his Whistleblower Complaint or the extensive narrative that accompanied his complaint. Only later, in his brief, did Complainant assert that he made this disclosure to Ruscitti. Additionally, Complainant has not identified when he discussed the catering invoices with Ruscitti, which may well have been after Dotson informed Ruscitti of the issue with the invoices, as she reported to OIG investigators. On this record, I find that Complainant made the disclosure only to Hunt, as the OIG found.

Evidence included in the OIG Report shows that different DuPage ROE officials became aware of Complainant's refusal to pay the catering invoice at different times and that it was Hunt, SEED Co-Director at ISU, who had knowledge first because Complainant voiced his refusal to pay the invoice to her upon her request that he pay the invoice.¹²⁴

Hunt reported to the OIG that Complainant only communicated his concern about paying the full amount of the invoice with SEED Grant funds at a group meeting.¹²⁵ But Complainant's clear descriptions of his direct communications with Hunt, outside of a group meeting, together with his refusal to pay the invoices that became known to Dotson and others, show that he refused to pay invoices Hunt submitted and made clear to her that his refusal was based on his belief that doing so would be in violation of Uniform Guidance.¹²⁶

Haller became aware of Complainant's refusal to pay the invoice through Dotson.¹²⁷ Haller reported that she did not know if Complainant had specific concerns about the catering invoices or to whom he may have raised his concerns to at DuPage ROE or ISU.¹²⁸

The second of the two protected disclosures concerned alleged misallocation of a contract and a series of invoices for the Shelby Cosner consulting contract to the EIR Grant for work that

¹²⁰ OIG Report at 5-6, and 7; OIG Report, Attachment 2 (Interview Report of Complainant) at 9; OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 4-6; OIG Report, Attachment 3 (Interview Report of Haller) at 7-8; OIG Report, Attachment 4 (Interview Report of Ruscitti) at 2; OIG Report, Attachment 6 (Interview Report of Dotson) at 4-5.

¹²¹ OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 6.

¹²² Compl. Brief, OHA Dkt. No. 21-38-CP, at 7.

¹²³ OIG Report, Attachment 4 (Interview Report of Ruscitti) at 2.

¹²⁴ OIG Report at 7; OIG Report, Attachment 2 (Interview Report of Complainant) at 9; OIG Report, Attachment 5 (Interview Report of Hunt) at 3-4; OIG Report, Attachment 3 (Interview Report of Haller) at 7-8; OIG Report, Attachment 4 (Interview Report of Ruscitti) at 2; OIG Report, Attachment 6 (Interview Report of Dotson) at 4-5.

¹²⁵ OIG Report, Attachment 5 (Interview Report of Hunt) at 10; OIG Report, Attachment 3 (Interview Report of Haller) at 7-8.

¹²⁶ OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 5 – 6; OIG Report, Attachment 3 (Interview Report of Haller) at 7-8.

¹²⁷ OIG Report at 7; OIG Report, Attachment 3 (Interview Report of Haller) at 7-8.

¹²⁸ OIG Report, Attachment 3 (Interview Report of Haller) at 8.

Complainant claimed was performed solely for the SEED Grant.¹²⁹ Shelby Cosner was a vendor who produced training materials and videos used for both grants.¹³⁰ The nature of Cosner's work primarily involved the design of professional development materials to serve both grants and, therefore, according to Haller and Hunt, the costs of Cosner's design services were to be split proportionately between the EIR and SEED Grants, paid out of EIR Grant funds in the Fall and SEED Grant funds in the Spring months.¹³¹

According to Complainant, Ruscitti had expressed concerns to him prior to his refusal to approve payments for the Cosner invoice, which concerns caused him to closely scrutinize any charges to the EIR Grant. At a weekly check-in meeting with Ruscitti in late 2018, Ruscitti expressed concern to Complainant that a two-way contract had been entered into with the association of Illinois Rural and Small Schools, even though the work to be performed thereunder was not related to the EIR Grant.¹³² Ruscitti also informed Complainant that she was being left out of meetings with the Program Officer, at which meetings this sort of issue would have been addressed, prompting Complainant to more closely scrutinize costs being charged to the EIR Grant.¹³³

In January 2019, Complainant refused to approve payments for a series of invoices for Cosner under the EIR Grant for work not performed, but submitted for payment by Hunt, under the EIR Grant.¹³⁴

Evidence in the OIG Report shows that Complainant reported improprieties about the Cosner invoices to Ruscitti on January 29, 2019, followed by an e-mail to Ruscitti and Dotson on January 30, 2019.¹³⁵ In response, Dotson indicated he did not want to move forward with paying the Cosner invoices under the EIR Grant until DuPage ROE obtained approval in writing from the Department program officer.¹³⁶ Complainant, too, insisted that DuPage ROE was required to get approval in writing from the Department or else payment under the EIR Grant was not allowable.¹³⁷

When Ruscitti received Complainant's e-mail explaining why he had disapproved the Cosner invoices, Ruscitti indicated her concurrence and sent Haller an e-mail stating that Cosner

¹²⁹ OIG Report at 6.

¹³⁰ OIG Report, Attachment 2 (Interview Report of Complainant) at 9-11; OIG Report, Attachment 3 (Interview Report of Haller) at 8-9; OIG Report, Attachment 5 (Interview Report of Hunt) at 4.

¹³¹ OIG Report, Attachment 3 (Interview Report of Haller) at 8-9; OIG Report, Attachment 5 (Interview Report of Hunt) at 4.

¹³² Compl. Brief, OHA Dkt. No. 21-38-CP, at 5.

¹³³ *Id.*

¹³⁴ OIG Report, Attachment 2 (Interview Report of Complainant) at 9 – 11; Compl. Brief, OHA Dkt. No. 21-38-CP, at 5; OIG Report, Attachment 3 to Attachment 6 (Interview Report of Dotson).

¹³⁵ OIG Report, Attachment 6 (Interview Report of Dotson) at 5; OIG Report, Attachment 3 to Attachment 6 (Interview Report of Dotson); Compl. Exh. C-14 at 1, Docket Entry No. 27, OHA Dkt. No. 21-38-CP; OIG Report, Attachment 3 (Interview Report of Haller) at 9; OIG Report, Attachment 2 (Interview Report of Complainant) at 10-11.

¹³⁶ OIG Report, Attachment 3 (Interview Report of Haller) at 9.

¹³⁷ *Id.* at 10.

was not in the EIR budget and questioning why Haller had broken internal controls and sent invoices to Gierman to process after Complainant had refused to do so.¹³⁸

Complainant also reported that Haller and Hunt misused their authority, circumventing internal control protocols at DuPage ROE by rerouting the invoices he had refused to pay to another employee, Gierman, for payment processing, thereby violating Uniformed Guidance Principles for federal grants.¹³⁹ Gierman processed the invoices and payments were made to Cosner on February 7, 2019.¹⁴⁰

Haller believed that Complainant's insistence that DuPage ROE was violating federal regulations by sharing expenses with ISU, in particular concerning the Cosner invoice, was based on his misreading of federal regulations and that the Department had previously approved the sharing of expenses.¹⁴¹ Although Haller believed that a Department program officer had orally indicated the Department's approval of this sort of expense sharing to maximize grant funds for the projects in previous conversations, she agreed it was important to get the Department's approval in writing and so scheduled a meeting with the Department.¹⁴²

The evidence shows that Complainant may not have been aware that Department program officers had early on recognized that the two grants would be susceptible to Uniform Guidance violations and had recommended steps to reduce the risk of running afoul of Uniform Guidance and commingling funds. From the time the EIR and SEED Grant awards were made to DuPage ROE and ISU in September 2017, Department program officers were aware of both grant awards and the potential for overlap.¹⁴³ As early as November 2017, DuPage ROE and ISU had spoken with the Department of Education about sharing expenses between the two grants and had received oral, but not written, approval for doing so.¹⁴⁴ The Department recognized that the two grants would be susceptible to Uniform Guidance violations and to reduce the risk of comingling funds recommended that either Hunt or Haller become an employee of DuPage ROE in order to administer the EIR Grant and the other remain an employee at ISU to administer the SEED Grant.¹⁴⁵ The Department also recommended that a written set of strategies be adopted to reduce the risk of commingling.¹⁴⁶ Haller then became an employee at DuPage ROE while Hunt remained at ISU and the two served as Co-Directors of the SEED Grant.¹⁴⁷

Evidence in the OIG Report shows that once Haller onboarded at DuPage ROE she and other staff members, with input from Hunt, put together a mitigation strategy to outline internal

¹³⁸ Compl. Brief, OHA Dkt. No. 21-38-CP, at 5; OIG Report, Attachment 2 (Interview Report of Complainant) at 11.

¹³⁹ OIG Report at 6; OIG Report, Attachment 2 (Interview Report of Complainant) at 11.

¹⁴⁰ Compl. Exh. C-14 at 1, Docket Entry No. 27, OHA Dkt. No. 21-38-CP; OIG Report, Attachment 2 (Interview Report of Complainant) at 11.

¹⁴¹ OIG Report, Attachment 3 (Interview Report of Haller) at 10.

¹⁴² *Id.* at 10 -12.

¹⁴³ *Id.* at 3; OIG Report, Attachment 5 (Interview Report of Hunt) at 2.

¹⁴⁴ OIG Report, Attachment 3 (Interview Report of Haller) at 10; OIG Report, Attachment 5 (Interview Report of Hunt) at 2.

¹⁴⁵ Compl. Brief, OHA. Dkt. No. 21-38-CP, at 4-5; OIG Report, Attachment 3 (Interview Report of Haller) at 3.

¹⁴⁶ *Id.*

¹⁴⁷ OIG Report, Attachment 3 (Interview Report of Haller) at 3.

control policies for the joint work that was to occur between the EIR and SEED Grants.¹⁴⁸ The strategies grew out of conversations with the Department program officer and were drafted to provide for DuPage ROE and ISU staff to conduct coinciding reviews of contracts and invoices to ensure that each grant was absorbing their respective portion of the costs for work that jointly supported both projects and was approved by Dotson and submitted to the Department.¹⁴⁹ When interviewed, Haller stated that Complainant was not a part of developing the procedures and that he “likely received a copy of the risk mitigation procedures but was not party to their development.”¹⁵⁰ When interviewed, Complainant provided historical information on and a copy of the mitigation strategy, noting that he did not have the opportunity to contribute to its content because it was developed in 2017, before he was hired, that it heavily relied on Hunt and Haller’s experience, and that it did not list any specific control features.¹⁵¹

On February 19, 2019, Complainant submitted a memo to Ruscitti, with a copy to Dotson, that outlined his objections to the payments to Cosner, namely that the contract failed to meet Sections 200.405 (allocable costs) and 200.407 (prior written approval) of the Uniform Guidance.¹⁵²

On February 21, 2019, upon receiving a forwarded e-mail regarding “Shelby Cosner’s Contract and remaining payments” from Dotson, Haller e-mailed Complainant.¹⁵³ In her e-mail to Complainant, Haller said, “We need to talk about this. Please call me when you start your day today.”¹⁵⁴

As is reflected in an e-mail she sent to Dotson, with a copy to Complainant, Haller did not agree with Complainant and expressed to Dotson and Complainant, by e-mail sent on February 21, 2019, that the prohibition on allocating costs to other Federal grants in Section 200.407 was not applicable because shifting costs under two or more Federal awards is allowable under Section 200.407, and that Complainant’s interpretation of the prohibition had missed language in the Uniform Guidance that allows for shifting costs.¹⁵⁵ Haller noted that the language in the Uniform Guidance that Complainant had not taken into account provides that “this prohibition would not preclude the non-Federal entity from shifting costs that are allowable under two or more Federal awards in accordance with existing Federal statutes, regulations, or the terms and conditions of the Federal awards.”¹⁵⁶ In her interview with the OIG, Haller also indicated that the Uniform Guidance does not apply to DuPage ROE because it is a “non-federal entity.”¹⁵⁷

¹⁴⁸ *Id.* at 3 -5; OIG Report, Attachment 5 (Interview Report of Hunt) at 2 and Attachments 1 and 2 to Attachment 5 (Interview Report of Hunt).

¹⁴⁹ OIG Report, Attachment 3 (Interview Report of Haller) at 5; OIG Report, Attachment 5 (Interview Report of Hunt) at 2; OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 3.

¹⁵⁰ OIG Report, Attachment 3 (Interview Report of Haller) at 5.

¹⁵¹ OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 3.

¹⁵² Compl. Exh. C-14 at 1, Docket Entry No. 27, OHA Dkt. No. 21-38-CP; OIG Report, Attachment 2 (Interview Report of Complainant) at 11; OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 12 – 13.

¹⁵³ OIG Report, Attachment 4 to Attachment 6 (Interview Report of Dotson) at 1.

¹⁵⁴ *Id.*

¹⁵⁵ OIG Report, Attachment 4 to Attachment 6 (Interview Report of Dotson) at 1-2; OIG Report, Attachment 24 (Co-Mingling Concerns Talking Points for Call with Department) at 1.

¹⁵⁶ OIG Report, Attachment 24 (Co-Mingling Concerns Talking Points for Call with Department) at 1.

¹⁵⁷ OIG Report, Attachment 3 (Interview Report of Haller) at 11.

Notwithstanding her view that shifting costs between the two grants was not prohibited and that the Department had already provided approval to shifting costs orally, Haller scheduled a conference call with the Department for February 22, 2019.¹⁵⁸

Haller called Complainant the night before the scheduled meeting and an emotionally charged exchange transpired, in which Complainant claims Haller screamed and wept about how he had betrayed her and told him she was under pressure to pay the Cosner invoices.¹⁵⁹ A February 21, 2019 text message from Haller to Complainant indicates the tension between the two and also explains how Haller viewed their work relationship at that point:

I'm sorry that I upset you on our call. That was not my intent. I don't care that we don't agree on interpretations of the federal rules. I can handle disagreement and I can handle being wrong. No one's interpretation matters but our program officer. But you were not part of the original discussions with Yianni about this specific issue – so that is why I do not want you weighing in on this tomorrow. The bigger problem is that it has become clear to me that you do not respect my role as project director. And this is very disappointing professionally and problematic professional.¹⁶⁰

Haller's reference to "Yianni" was to Yianni Alepohoritis (Alepohoritis), the Department's Management and Program Analyst for the EIR Grant at DuPage ROE.¹⁶¹

Complainant also reported to OIG investigators that both Haller and Hunt called him separately after the telephone call with the Department of Education was scheduled and implied he could lose his job if he spoke on the conference call.¹⁶² Haller and Hunt denied intimating to Complainant that he could lose his job.¹⁶³

In the lead up to the telephone conference with the Department program officer, Haller called Complainant and asked that he not say anything during the telephone conference on allocability violations regarding payment to Cosner.¹⁶⁴ Complainant stated that he would lead the call, that he was overseeing the matter, and that Ruscitti had asked him to be on the call.¹⁶⁵ Haller reported to OIG investigators that she did not want Complainant to speak during the conference

¹⁵⁸ *Id.*

¹⁵⁹ Compl. Exh. C-14 at 1-2, Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

¹⁶⁰ OIG Report, Attachment 26 (Complainant's Text Message Screenshots); Compl. Exh. C-14 at 2, Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

¹⁶¹ OIG Report, Attachment 6 (Interview Report of Dotson) at 5; OIG Report, Attachment 3 (Interview Report of Haller) at 3, 10-12.

¹⁶² OIG Report, Attachment 2 (Interview Report of Complainant) at 11; Compl. Exh. C-14 at 1-2, Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

¹⁶³ OIG Report, Attachment 3 (Interview Report of Haller) at 12; OIG Report, Attachment 5 (Interview Report of Hunt) at 5.

¹⁶⁴ Compl. Exh. C-14 at 2, Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

¹⁶⁵ OIG Report, Attachment 3 (Interview Report of Haller) at 10.

call because he had not been on previous calls with Alephoritis and also because she was concerned that he would cause confusion and provide inaccurate information.¹⁶⁶

When Haller contacted Ruscitti about Complainant having told her that Ruscitti had asked him to be on the call, Ruscitti informed Haller that she had never talked with Complainant about being on the call.¹⁶⁷ Next, Ruscitti called Complainant to tell him that she had calmed Haller down by telling her it was not Complainant's style to confront his colleagues in a meeting with outsiders, referring to the upcoming meeting with the Department, and which message Complainant construed to mean that Ruscitti was no longer supporting his "efforts to stop Haller and Hunt's actions when they violated grant rules."¹⁶⁸ Haller's exchange with Ruscitti about Complainant informing Haller that he was operating at Ruscitti's direction and Ruscitti's disavowal of that direction was the catalyst that led to Haller later schedule a staff meeting to discuss who was responsible for what, who was supervising whom, and what expectations should be put in place for Complainant.¹⁶⁹

On February 22, 2019, the telephone conference with the Department proceeded as scheduled.¹⁷⁰ Haller, Hunt, Ruscitti, and Complainant participated in the telephone conference with Department Management and Program Analyst Alephoritis.¹⁷¹ Sharing costs for joint events provided by the EIR and SEED projects was discussed.¹⁷² Complainant attended but did not speak because he was muted or because of perceived threats from Haller and Hunt.¹⁷³

After the telephone conference, on February 25, 2019, Alephoritis e-mailed Haller, Hunt and Ruscitti with the Department's written approval for sharing costs for joint events provided by the EIR and SEED projects.¹⁷⁴ In his e-mail, Alephoritis specifically stated that the EIR and SEED Grants would each pay a portion of the total annual cost for joint trainings and convenings, that this approach would reduce overall costs and create effectiveness, and that the cost proportion would be achieved by a variety of methods that could include rotation of invoices between the two grants.¹⁷⁵ The Department Management and Program Analyst's e-mail went on to say that this approach did not constitute co-mingling of funds and did not violate Section 200.405(c) of the Uniform Guidance.¹⁷⁶

After receiving a copy of the e-mail Alephoritis had sent, Complainant e-mailed Ruscitti, with a copy to Dotson, saying that he had never seen that before, wanted to make sure he

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Compl. Exh. C-14 at 2, Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

¹⁶⁹ OIG Report, Attachment 3 (Interview Report of Haller) at 10.

¹⁷⁰ *Id.* at 11.

¹⁷¹ *Id.* at 11-12; OIG Report, Attachment 4 (Interview Report of Ruscitti) at 4; OIG Report, Attachment 5 (Interview Report of Hunt) at 5.

¹⁷² OIG Report, Attachment 3 (Interview Report of Haller) at 11; OIG Report, Attachment 5 (Interview Report of Hunt) at 5.

¹⁷³ OIG Report, Attachment 3 (Interview Report of Haller) at 11; OIG Report, Attachment 2 (Interview Report of Complainant) at 12.

¹⁷⁴ OIG Report, Attachment 3 to Attachment 6 (Interview Report of Dotson) at (unnumbered) 11; OIG Report, Attachment 1 to Attachment 3 (Interview Report of Haller).

¹⁷⁵ OIG Report, Attachment 1 to Attachment 3 (Interview Report of Haller).

¹⁷⁶ *Id.*; OIG Report, Attachment 3 to Attachment 5 (Interview Report of Hunt).

understood what they were proposing, and that the Department Management and Program Analyst could be wrong.¹⁷⁷ Complainant believed that the Program Analyst was lead to believe the issue was whether the EIR and SEED Grants could share proportional costs for joint events, but was not asked, as Complainant believed he should have been, whether EIR funds could be used to pay for ISU invoices.¹⁷⁸

Also after the meeting with the Department's Management and Program Analyst, Complainant sought and obtained Ruscitti's approval to prepare a written controls manual.¹⁷⁹

Analysis

At the outset, it is noted that Complainant's disclosures pertained to matters within the scope of his duties and were made in the regular course of his responsibilities. Complainant's duties included reviewing invoices to ensure their compliance with Uniform Guidance provisions. As Complainant explained, most of the time expenses invoiced to the EIR and SEED Grants were legitimate, but about five percent of the time the invoices required more documentation or else he would reject items or invoices that were inappropriate.¹⁸⁰ When he questioned the propriety of payments for the invoice for catered meals under the SEED Grant and the invoice for media production under the EIR Grant, he did so in the normal course of performing his invoice review and processing responsibilities. That his disclosures pertained to matters within the scope of his duties and were made in the regular course of his responsibilities does not preclude those disclosures from being considered protected disclosures.¹⁸¹

The evidence considered by the OIG and that which is before me supports the OIG's findings that Complainant made two disclosures protected by 41 U.S.C. § 4712, the first in or about April 2018 regarding unallowed expenses charged to the SEED Grant, and the second between January 29 through February 25, 2019, regarding misallocation of funds charged to the EIR Grant.¹⁸²

OIG's findings do not directly address whether Complainant's first disclosure regarding the SEED Grant was made to a person specified in the statute, but only conclude that Complainant made a protected disclosure. The statute specifies that a protected disclosure must be made to, among others, a "management official or other employee of the contractor, subcontractor, grantee, subgrantee, or personal services contractor who has the responsibility to investigate, discover, or address misconduct."¹⁸³ While Hunt was not an employee of DuPage ROE, she was Co-Director of the SEED Grant, together with Haller, and DuPage ROE was a sub-grantee of the SEED Grant.

DuPage ROE argues that Complainant's disclosure to Hunt did not satisfy the statute's requirement because Complainant did not make the disclosure to an official at DuPage ROE, his

¹⁷⁷ OIG Report, Attachment 1 to Attachment 3 (Interview Report of Haller).

¹⁷⁸ OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 15.

¹⁷⁹ Compl. Exh. C-14 at 2, Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

¹⁸⁰ OIG Report, Attachment 2 (Interview Report of Complainant) at 6.

¹⁸¹ See *Watson v. Dep't of Justice*, 64 F.3d 1524, 1530 (Fed. Cir. 1995).

¹⁸² OIG Report at 15, para. (ii).

¹⁸³ 41 U.S.C. § 4712(a)(2)(G).

employer and the named respondent here, but only to Hunt, who was not a DuPage ROE employee. The statute, however, requires only that the disclosure be made to a management official or other employee of the grantee or subgrantee. Hunt, as Co-Director of the SEED Grant, the same grant that DuPage ROE was a subgrantee of, was just such a person and the person who oversaw Complainant's work concerning the data infrastructure for the SEED Grant because of her position and expertise.¹⁸⁴ Thus, Hunt falls within the purview of persons responsible to investigate, discover, or address misconduct required by the statute and Complainant's disclosure to her was a protected disclosure.¹⁸⁵

Contrary to DuPage ROE's characterization of the first disclosure as an expression of concern, suggesting that it did not rise to the level of a protected disclosure, the first disclosure was a protected disclosure. It involved disclosure of information that Complainant reasonably believed to be evidence of violation of Uniform Guidance in that it involved misuse of SEED Grant monies and entailed Complainant's refusal to pay invoices for meals based on his expressed belief that payment would be in violation of Uniform Guidance.

Complainant's second disclosure concerning payment for the Cosner invoices was made to DuPage ROE officials, entailed a disclosure of information that he reasonably believed was evidence of a violation of law, rule, or regulation based on his reading of Uniform Guidance Sections 200.405, on Allocable Costs, and 200.407, on Prior Written Approval.¹⁸⁶

Record evidence supports the OIG findings that the disclosures made by Complainant were the very sort of disclosures intended to be protected by the statute. Complainant disclosed information that he reasonably believed was evidence of a gross waste of Federal funds, an abuse of authority relating to a Federal grant, or a violation of law, rule, or regulation related to federal grants. Thus, Complainant satisfied the second requirement of his initial burden of proof by establishing he made disclosures protected by 41 U.S.C. § 4712(a)(2).

(iii) Complainant established that he experienced five personnel actions

The OIG found that Complainant experienced five personnel actions, his removal from fiscal duties for the SEED grant at ISU, a modification in duties/position at DuPage ROE, placement on an EPP, issuance of a Personnel Action Report (PAR), and termination from his position at DuPage ROE.

The parties' arguments

DuPage ROE contends that not all five personnel actions were personnel actions covered by 41 U.S.C. § 4712(a)(1). DuPage ROE argues that removal of Complainant from fiscal duties for the SEED Grant and later modification of his duties away from infrastructure work to funding

¹⁸⁴ OIG Report, Attachment 5 (Interview Report of Hunt) at 6.

¹⁸⁵ 41 U.S.C. § 4712(c)(6).

¹⁸⁶ OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 12-13; OIG Report, Attachment 24 (Co-Mingling Concerns Talking Points for Call with Department) at 1.

sustainability and development work were not prohibited personnel actions under the NDAA.¹⁸⁷ In support thereof, DuPage ROE argues they were not actions that would have dissuaded Complainant from engaging in protected activity, that Complainant was not singled out and was excited about the modification of duties, and that neither the removal from nor modification of duties negatively affected the terms and conditions of his employment.¹⁸⁸ Additionally, DuPage ROE argues that placement of Complainant on an EPP was not a personnel action prohibited by 41 U.S.C. § 4712(a)(1), but a tool intended to assist him in improving his job performance.

Complainant does not disagree with the OIG's findings and argues that all five personnel actions, including his removal from fiscal duties for the SEED Grant and later modification of duties away from infrastructure work, were taken against him because he questioned suspect invoices and contracts presented to him for payment under the EIR Grant and was terminated to guarantee that he would not be at DuPage ROE in the future to identify and resist further violations of the Uniform Guidance, and that he was treated differently than other employees for doing so.

The evidence

A review of the evidence establishes that Complainant experienced the following personnel actions:

In April 2018, Complainant was removed from his responsibilities in the invoice review process for the SEED Grant after being informed by Haller that he was being removed from those responsibilities because ISU grant officials had decided they did not want non-ISU employees to approve the ISU SEED Grant invoices.¹⁸⁹

Beginning sometime between November 2018 and January 2019, and culminating on or around March 5, 2019, DuPage ROE modified Complainant's duties when it removed him from data infrastructure work and reassigned him to funding sustainability and development work in conjunction with four other Regional Offices of Education.¹⁹⁰

Effective March 11, 2019, DuPage ROE placed Complainant on an EPP.¹⁹¹

On August 29, 2019, DuPage ROE issued a PAR to Complainant for unprofessional behavior and harassment that involved three separate incidents, the most recent of which had occurred on August 15, 2019, and in which sexually explicit material or names appeared on his computer while logging in for a webinar and opening a browser in the presence of other

¹⁸⁷ DuPage ROE Brief, OHA Dkt. No. 21-38-CP, at 10.

¹⁸⁸ *Id.* at 10 – 11.

¹⁸⁹ OIG Report, Attachment 2 (Interview Report of Complainant) at 9.

¹⁹⁰ OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 7; OIG Report, Attachment 3 (Interview Report of Haller) at 12-13; OIG Report, Attachment 4 (Interview Report of Ruscitti) at 3; OIG Report, Attachment 5 (Interview Report of Hunt) at 5-6; OIG Report, Attachments 7-9 to Attachment 5 (Interview Report of Hunt).

¹⁹¹ OIG Report, Attachment 2 (Interview Report of Complainant) at 14-15; OIG Report, Attachment 11 (Complainant-DuPage ROE EPP – Signed by Complainant).

employees.¹⁹² The PAR resulted in a Written Reprimand that included suggestions for improvement and avoiding future occurrences.¹⁹³

On October 4, 2019, DuPage ROE terminated Complainant from employment.¹⁹⁴

The OIG's finding that these five personnel actions happened as a matter of fact is supported by evidence in the OIG Report, and the parties do not dispute, that these five personnel actions occurred.¹⁹⁵

Analysis

Turning now to whether the five personnel actions were prohibited personnel actions under the NDAA, the starting point is the language of the NDAA. The NDAA broadly prohibits federal grantees from taking the following actions against an employee in retaliation for making a protected disclosure: discharging the employee, demoting the employee, or otherwise discriminating against the employee, and incorporates the legal burdens of proof in 5 U.S.C. § 1221(e)(1). In turn, 5 U.S.C. § 1221(e) incorporates the definition of prohibited personnel action found in 5 U.S.C. § 2302.¹⁹⁶ Section 2302 of Title 5, in addition to listing discharge and demotion of an employee as prohibited personnel actions, includes "significant change in duties, responsibilities, or working conditions" as a prohibited personnel action.¹⁹⁷

The termination of employment that Complainant experienced falls squarely within the prohibited personnel actions specified in the NDAA.¹⁹⁸

Additionally, based on the NDAA's incorporation of definitions found in 5 U.S.C. § 2302, issuance of the PAR, because it was a disciplinary action, falls within the personnel actions prohibited by the NDAA.¹⁹⁹

Removal of Complainant from fiscal responsibilities for the SEED Grant and modification of his duties from data infrastructure work to funding sustainability and development work also were actionable personnel actions under the NDAA, based on the NDAA's incorporation of definitions found in 5 U.S.C. § 2302, as they entailed significant changes in duties or responsibilities.²⁰⁰

However, placement on an employee performance plan is not an enumerated prohibited

¹⁹² OIG Report, Attachment 17 (Personnel Action Report).

¹⁹³ *Id.*

¹⁹⁴ OIG Report, Attachment 2 (Interview Report of Complainant) at 16-17; OIG Report, Attachment 31 (Notice of Employee Separation).

¹⁹⁵ OIG Report, Attachment 2 (Interview Report of Complainant) at 9, 12-17; OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 6-7, 17-19; OIG Report, Attachment 11 (Employee Performance Plan); OIG Report, Attachment 17 (Personnel Action Report); OIG Report, Attachment 31 (Notice of Employee Separation).

¹⁹⁶ 41 U.S.C. § 4712(a)(1).

¹⁹⁷ 5 U.S.C. § 2302(a)(2)(A)(xii).

¹⁹⁸ 41 U.S.C. § 4712(a)(1).

¹⁹⁹ 41 U.S.C. § 4712(a)(1); 5 U.S.C. § 1221(e); 5 U.S.C. § 2302(a)(2)(A)(iii).

²⁰⁰ 41 U.S.C. § 4712(a)(1), and as defined in 5 U.S.C. §§ 2302(a)(2)(A)(iii), (iv), and (xii).

personnel action under either 41 U.S.C. § 4712(a)(1), 5 U.S.C. § 1221(e)(1), or 5 U.S.C. § 2302, and whether it falls under the catch-all provision of “otherwise discriminating against the employee” under § 4712(a)(1), is unclear. Neither the NDAA nor 5 U.S.C. § 1221(e)(1) or 5 U.S.C. § 2302 define “otherwise discriminating against the employee.” Few reported cases have addressed the NDAA and no cases appear to have interpreted the meaning of this catch-all provision. But, § 4712(a)(1) mirrors the text of another federal whistleblower’s anti-retaliation provision, 5 U.S.C. § 2302(b)(8) of the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. §§ 1201 et seq., and, therefore, caselaw interpreting the WPA provides analytical guidance.²⁰¹ The Merit Systems Protection Board (MSPB), the tribunal that hears appeals of WPA decisions issued by the Office of Special Counsel, has determined on several occasions that a performance improvement plan is a “personnel action” under the WPA.²⁰² In the absence of statutory or judicial instruction and in view of the NDAA’s broad language and the intent of whistleblower protection laws, together with MSPB rulings that performance improvement plans are personnel actions under the WPA, this catch-all provision appears to cover actions, including performance improvement plans, that might dissuade a reasonable worker from engaging in protected conduct.²⁰³ Therefore, this tribunal concludes, as did the OIG, that in this case placement of Complainant on an EPP should be considered a covered personnel action.

Thus, Complainant has established that he experienced five personnel actions that the NDAA prohibits a grantee or subgrantee from taking against an employee as reprisal for making a protected disclosure.

(iv) The First Reprisal

The OIG found the first protected disclosure may have been a contributing factor to removal of Complainant from fiscal duties for the SEED Grant but concluded that removal of Complainant from fiscal duties for the SEED Grant was not retaliatory.²⁰⁴ The OIG found that the evidence showed by a preponderance that Complainant’s disclosure regarding unallowable expenses may have been a contributing factor to this personnel action.²⁰⁵ Based on evidence that Hunt had knowledge about Complainant’s disclosure and that Complainant was removed close in time (one month) from SEED Grant fiscal duties after making the disclosure, the OIG found that Complainant met his burden of proving that his disclosure about the catering expenses was a contributing factor to his removal from SEED Grant fiscal duties.²⁰⁶ However, the OIG went on to find that DuPage ROE provided clear and convincing evidence that it would have taken this

²⁰¹ See *Fuerst v. Housing Authority City of Atlanta, Georgia*, 38 F. 4th 860, 872 (11th Cir. 2022).

²⁰² See, e.g., *Gonzales v. Dep’t of Housing and Urban Development*, 64 M.S.P.R. at 319; *Newcastle v. Dep’t of Treasury*, 94 M.S.P.R. at 245. *But cf. Davis v. Time Warner Cable of Southeastern Wis., L.P.*, 651 F. 3d 664, 677 (7th Cir. 2007) (performance review plan does not rise to the level of an adverse employment action in Title VII retaliation claim); *Cole v. Illinois*, 562 F.3d 812, 816-817 (7th Cir. 2009) (performance improvement plan, particularly a minimally onerous one was not, without more, an adverse employment action in Family and Medical Leave Act retaliation claim).

²⁰³ See *Burlington Northern & Santa Fe Railway Company*, 548 U.S. 53, 67-68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006).

²⁰⁴ OIG Report at 15.

²⁰⁵ *Id.*

²⁰⁶ OIG Report at 7.

action regardless of his disclosure.²⁰⁷

The OIG based its findings on its interviews of Complainant, Haller, Ruscitti, and Hunt.²⁰⁸

The parties' arguments

DuPage ROE agrees with the OIG's finding that DuPage ROE provided clear and convincing evidence that it would have taken this action regardless of any disclosure on Complainant's part. However, DuPage ROE argues that record evidence does not support the OIG's finding that Complainant met his initial burden, but, instead, establishes that Complainant failed to satisfy the "timing/knowledge" test.²⁰⁹ In support thereof, DuPage ROE asserts that Complainant failed to establish that DuPage ROE officials had knowledge of his protected disclosure, but that he raised the catering issue only with Hunt, who was an ISU, not a DuPage ROE, employee.²¹⁰ DuPage ROE further asserts that even if the "knowledge" test was met, any reliance on the alleged timing between Complainant's disclosure to Hunt and removal of his duties on the SEED Grant is insufficient to establish retaliation.²¹¹ Finally, DuPage ROE argues that it was ISU, not DuPage ROE, that made the decision to remove all DuPage ROE employees, including Complainant, from work on the SEED Grant.

Complainant asserts that he was reprimed against by Hunt when she removed him from financial oversight duties for the SEED Grant approximately a month after his April 2018 disclosure about the catering invoice and his refusal to approve payment for the invoice over Hunt's insistence and pleas.²¹² Complainant's only evidence of a connection between his disclosure and his removal from financial duties for the SEED Grant is the timing between the two and his belief that Hunt was motivated to retaliate against him because it was she who demanded he process the invoices he refused to pay.²¹³

The evidence

According to Complainant, he was hired to set up financial systems for the management of grants and one of his duties was to ensure that grant expenses for the SEED and EIR Grants on invoices were "allowable, allocable, and reasonable."²¹⁴ According to Gierman, whom Complainant supervised for a time and worked with on a daily basis, Complainant was responsible for reviewing and approving invoices from vendors and obtaining or writing vendor contracts.²¹⁵

Sometime shortly before May 2018, officials at ISU merged ISU's Research and Sponsored Programs office with its Grant Accounting Department and the new senior official of that office issued a directive that no external grant staff outside of ISU would be involved with

²⁰⁷ *Id.* at 7-8.

²⁰⁸ *Id.*

²⁰⁹ DuPage ROE Brief, OHA Dkt. No. 21-38-CP, at 7 - 8.

²¹⁰ *Id.* at 7.

²¹¹ *Id.* at 8.

²¹² OIG Report at 6; Compl. Brief, OHA Dkt. No. 21-38-CP, at 6.

²¹³ OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 6.

²¹⁴ OIG Report at 5; Compl. Brief, OHA Dkt. No. 21-38-CP, at 6.

²¹⁵ OIG Report, Attachment 7 (Interview Report of Gierman) at 2.

grant budget, contracts or invoices related to the SEED Grant.²¹⁶ ISU had never received a grant the size of the SEED Grant before and had to work quickly to build organizational capacity.²¹⁷ Faced with budget constraints, the new head of the Research and Sponsored Programs office at ISU directed that changes be made at ISU related to grant administration, including a policy update that required that budgetary decisions related to the SEED Grant could be made only by the ISU staff.²¹⁸ As a result, ISU hired its own budget specialist to work on SEED Grant expenses.²¹⁹ It also appears, based on the Strategies for Mitigating Risks of Co-Mingling Funds and/or Duplicating Efforts Between EIR and SEED Awards prepared by Haller, with Hunt's input, before Complainant was onboarded, that ISU may have intended from the onset of the SEED Grant to handle all budgetary decisions related to the SEED Grant.²²⁰

Upon being informed of ISU's new senior official's directive, Haller informed Complainant that ISU officials were no longer permitting non-ISU personnel to process or approve vendor invoices issued toward the SEED Grant.²²¹ Haller and Hunt both informed OIG that ISU's policy change was not directed at Complainant but applied to all DuPage ROE employees.²²² DuPage ROE officials, however, did not provide any documentation to the OIG that substantiated the policy changes at ISU.²²³

In May 2018, Complainant was removed from his financial oversight role on the SEED Grant and assigned the task of Data Infrastructure.²²⁴ His pay was not changed as a result of his removal from fiscal duties related to the SEED Grant.²²⁵

Analysis

Initial Burden

Having established that he was an employee of a Department grantee, that he made a protected disclosure, and that his removal from fiscal responsibilities for the SEED Grant was a personnel action prohibited by the NDAA, Complainant now must demonstrate that his protected disclosure was a contributing factor in the personnel action taken against him in order to satisfy his burden of proof.²²⁶

Complainant's only evidence of a connection between his protected disclosure and his removal from SEED Grant fiscal duties is knowledge of his disclosure on the part of Hunt and

²¹⁶ OIG Report, Attachment 3 (Interview Report of Haller) at 6.

²¹⁷ OIG Report, Attachment 5 (Interview Report of Hunt) at 3.

²¹⁸ *Id.*; OIG Report, Attachment 2 (Interview Report of Complainant) at 10.

²¹⁹ OIG Report at 7; OIG Report, Attachment 5 (Interview Report of Hunt) at 3.

²²⁰ OIG Report, Attachment 2 to Attachment 5 (Interview Report of Hunt).

²²¹ OIG Report at 7.

²²² *Id.*; OIG Report, Attachment 3 (Interview Report of Haller) at 6; OIG Report, Attachment 5 (Interview Report of Hunt) at 3.

²²³ OIG Report at 7.

²²⁴ Compl. Brief, OHA Dkt. No. 21-38-CP, at 6.

²²⁵ OIG Report at 7.

²²⁶ 41 U.S.C. § 4712(c)(6) (adopting the burdens of proof of 5 U.S.C. § 1221(e); 5 U.S.C. § 1221(e)(1); *DuPage Regional Office of Education v. U.S. Dep't of Educ.*, 58 F. 4th at 351; *see also Armstrong v. Arcanum Group, Inc.*, 897 F.3d at 1287.

DuPage ROE officials and the timing of his removal from SEED Grant fiscal duties. Complainant easily satisfies the “timing” prong of the “knowledge/timing” test. Complainant’s disclosure was made close in time, approximately one month, from the time he was removed from SEED Grant fiscal responsibilities and DuPage ROE officials had knowledge of the disclosure before the personnel action was taken.

Even so, the causal connection between any protected disclosure and the employment action fails because it was not DuPage ROE’s decision that precipitated, by influence or otherwise, Complainant’s removal from SEED Grant fiscal responsibilities. Rather, the change in Complainant’s duties was precipitated by ISU and not attributable to DuPage ROE. On this record, DuPage ROE did not participate in or have any control or influence over ISU’s decision to have duties for the SEED Grant handled only by ISU employees. Nor, on this record, did Hunt make or influence ISU’s decision. Rather, a new senior official at ISU made the decision. DuPage ROE, Complainant’s employer, was informed by ISU of this change and, after being notified of this change, it modified Complainant’s duties. Because DuPage ROE did not play a decision-making role in removing Complainant from his duties under the SEED Grant, doing so was not a personnel action covered by the NDAA or, at least, not causally related to Complainant’s protected disclosure.

But for this fatal flaw to establishing his removal from fiscal work on the SEED Grant was a prohibited personnel action, the OIG’s finding that Complainant’s disclosure in April 2018 may have been a contributing factor to his removal from fiscal duties on the SEED Grant in May 2018, based on the “knowledge/timing” test, is supported by record evidence.²²⁷ Complainant’s disclosure was made close in time, approximately one month, from the time he was removed from SEED Grant fiscal responsibilities and DuPage ROE officials had knowledge of the disclosure before the personnel action was taken. Complainant thus satisfied both the “knowledge/timing” test sufficient to infer causal connection between the protected disclosure and the personnel action. Even so, causal connection fails because it was not DuPage ROE’s decision that precipitated, by influence or otherwise, Complainant’s removal from SEED Grant fiscal responsibilities.

Burden Shift to DuPage ROE

Even if Complainant had satisfied his initial burden of proof, DuPage ROE provided clear and convincing evidence, as the OIG found, that removal of Complainant from his fiscal duties on the SEED Grant was not retaliatory.²²⁸ Application of the *Carr* factors to DuPage ROE’s evidence as well as evidence provided by Complainant leads me to conclude that removal of Complainant from his fiscal duties on the SEED Grant was for reasons other than retaliation.

DuPage ROE provided strong evidence to show that removal of Complainant from fiscal duties on the SEED Grant was for reasons other than retaliation on its part. Record evidence shows clearly that Complainant’s removal from duties on the SEED Grant was not attributable to DuPage

²²⁷ 5 U.S.C. § 1221(e)(1)(A)-B); *DuPage Regional Office of Education v. U.S. Dep’t of Educ.*, 58 F. 4th at 351; *see Kewley v. Dep’t of Health and Human Servs.*, 153 F.3d at 1361-62.

²²⁸ OIG Report at 15.

ROE, but a decision that originated solely from ISU and that ISU's decision to have only ISU employees work on the SEED Grant was a business decision.

The SEED Grant had to be launched, without advanced planning, shortly after ISU was awarded the SEED Grant.²²⁹ That meant that as ISU was launching the SEED Grant, it did not have all the needed staff in place to administer the grant but built its grant-administration after launching and while administering the grant.²³⁰

The evidence also shows that ISU had never received a grant the size of the SEED Grant before.²³¹ It had to move quickly to build organizational capacity and along the way various changes were made to administration of the grant.²³² Among the changes was the transition from sharing budgetary administration with DuPage ROE for the SEED Grant to only ISU staff handling budgetary matters for the SEED Grant, which included ISU hiring its own budget specialist to work on SEED Grant expenses.²³³

Record evidence, including statements from Haller and Hunt, shows that ISU had separate, grant-administration-related reasons for having financial work for the SEED Grant assigned to ISU employees only and that Complainant would have been removed from his financial duties over the SEED Grant regardless of the disclosure.²³⁴

Record evidence also indicates there existed little to no motive on the part of DuPage ROE personnel, to the extent they could even be considered decision makers with respect to this personnel action, to retaliate against Complainant. Rather, evidence, including that provided by Complainant, shows that DuPage ROE officials, including Haller, Dotson, and Ruscitti, had agreed with Complainant's decision to not pay the catering expenses that were the subject of the first protected disclosure from the SEED Grant.²³⁵ Other evidence, including statements from Haller and Ruscitti, show that there were shared, voiced concerns about the invoice for the catering expenses and thus no motivation to retaliate against Complainant for the concerns he expressed and with which they agreed.²³⁶

Finally, there is no evidence that shows DuPage ROE took similar against employees who were not whistleblowers but similarly situated. To the contrary, the evidence shows that the change to having only ISU staff handle budgetary matters for the SEED Grant was not targeted at Complainant or any other individuals but made across the board by a senior ISU official, not Hunt.²³⁷

²²⁹ OIG Report, Attachment 5 (Interview Report of Hunt) at 2.

²³⁰ *Id.*

²³¹ *Id.* at 3.

²³² *Id.*

²³³ *Id.*

²³⁴ OIG Report at 7-8; OIG Report, Attachment 5 (Interview Report of Hunt) at 3.

²³⁵ OIG Report at 7; OIG Report, Attachment 3 (Interview Report of Haller) at 8; OIG Report, Attachment 4 (Interview Report of Ruscitti) at 2-3; OIG Report, Attachment 6 (Interview Report of Dotson) at 4; OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 5 - 6.

²³⁶ OIG Report at 8.

²³⁷ OIG Report, Attachment 5 (Interview Report of Hunt) at 3.

The record does not contain evidence that detracts from the conclusion that Complainant's removal from the SEED Grant was not retaliatory.

Further, evidence contradicts Complainant's assertion that he was hired only to set up financial systems for the management of grants and to ensure that grant expenses on invoices were "allowable, allocable, and reasonable."²³⁸ Record evidence shows that DuPage ROE hired Complainant, after he approached Ruscitti and indicated his interest in data development work, to collect and develop data and help build funding sustainability under the research grant projects, based on his experience in the arenas of data development, funding sustainability, and federal grants management.²³⁹ Thus when Complainant was removed from his financial role on the SEED Grant and assigned the task of Data Infrastructure, his shift to Data Infrastructure work was seemingly consistent with work he had expressed interest in and was hired to perform.

The OIG's finding that Complainant's removal from financial duties for the SEED Grant was not retaliatory is supported by the evidence. Complainant did not meet his initial burden of showing that his first disclosure was a contributing factor in this employment action. Additionally, DuPage ROE's evidence, as the OIG found, is clear and convincing in showing that Complainant would have been removed from financial duties for the SEED Grant in the absence of any disclosure.

(v) Second Reprisal

The OIG found that DuPage ROE's modification of Complainant's duties/position in January through March 2019 was not retaliatory and that Complainant did not provide evidence that showed by a preponderance that his disclosures were a contributing factor to this action. The OIG also found that DuPage ROE provided clear and convincing evidence that it would have changed Complainant's duties regardless of any protected disclosures.²⁴⁰

The OIG found that Complainant did not meet his burden of proof to show that his disclosure concerning the catering expenses in April 2018 was a contributing factor to this change of duties.²⁴¹ Specifically, the OIG found that Complainant did not show that Haller, Hunt, or Ruscitti had any knowledge of a protected disclosure made by Complainant about the catering expenses.²⁴² Additionally, the OIG found that the Complainant did not show that the disclosure Complainant made in February 2019 concerning misallocation of invoices for a vendor was a contributing factor to DuPage ROE's reassignment of duties because the reassignment occurred before Complainant made the disclosure.²⁴³

²³⁸ OIG Report, Attachment 1 (Complainant's Filed Complaint); OIG Report, Attachment 2 (Interview Report of Complainant) at 6.

²³⁹ OIG Report, Attachment 4 (Interview Report of Ruscitti) at 3.

²⁴⁰ OIG Report at 15.

²⁴¹ OIG Report at 8.

²⁴² *Id.*

²⁴³ *Id.*

The OIG also found that the change in duties was the result of Complainant's performance issues on data infrastructure work assigned to him.²⁴⁴

The OIG based its findings on interviews with and e-mail exchanges to and from Hunt, Haller, and Ruscitti, as well as Complainant.²⁴⁵

The parties' arguments

DuPage ROE agrees with the OIG's finding that Complainant did not meet his initial burden because he failed to demonstrate that any DuPage ROE officials were aware of his first disclosure and because the second disclosure was made after the change in duties occurred.²⁴⁶ DuPage ROE also agrees with the OIG's finding that Complainant's change in duties was the result of his lack of knowledge and personal connections required to effectively perform the data infrastructure work.²⁴⁷

Complainant asserts that DuPage ROE's modification of his duties from data infrastructure work to development work was because of protected disclosures he made.²⁴⁸ Complainant's duties, as modified to development work, entailed assisting each of the ROEs with the work they needed completed for both data development and sustainability.²⁴⁹ Complainant asserts that he had little knowledge, experience, or professional connections necessary to do this work and was destined to fail.²⁵⁰ According to Complainant, he was hired full-time in December 2017, to work on both the EIR and SEED grants.²⁵¹ He understood that he would be working under the supervision and management of Haller and Hunt as the grant directors/co-directors of the EIR and SEED Grants.²⁵² He asserts his duties were modified from grant oversight and related financial responsibilities to data development in retaliation for the protected disclosures he made.

He argues that this personnel action was taken against him because he questioned suspect invoices and contracts presented to EIR for payment and that modification of his duties was designed to guarantee that he would not be at DuPage ROE in the future to identify and resist further violations of the Uniform Guidance.²⁵³

The evidence

Record evidence shows that modification of Complainant's duties began in December

²⁴⁴ *Id.*

²⁴⁵ OIG Report at 8.

²⁴⁶ DuPage ROE Brief, OHA Dkt. No. 21-38-CP, at 9.

²⁴⁷ DuPage ROE Brief, OHA Dkt. No. 21-38-CP, at 9 -10.

²⁴⁸ OIG Report at 8.

²⁴⁹ *Id.*; OIG Report, Attachment 3 (Interview Report of Haller) at 12-13; OIG Report, Attachment 4 (Interview Report of Ruscitti) at 3; OIG Report, Attachment 5 (Interview Report of Hunt) at 6; OIG Report, Attachment 2 (Interview Report of Complainant) at 12-14; OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 7; Compl. Exh. C-3, Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

²⁵⁰ Compl. Brief, OHA Dkt. No. 21-38-CP, at 7.

²⁵¹ OIG Report, Attachment 2 (Interview Report of Complainant) at 6.

²⁵² *Id.*

²⁵³ Compl. Brief, OHA Dkt. No. 21-38-CP, at 5.

2018 and January 2019, and was made for several reasons. According to Haller, DuPage ROE began shifting Complainant away from data infrastructure work and toward development work on behalf of all the partnering ROEs as early as December 2018.²⁵⁴

Record evidence shows that Hunt reduced Complainant's duties on data infrastructure work in December 2018 and January 2019, as she sought to bring on an outside consultant whom she believed could better facilitate the work.²⁵⁵ In December 2018, Hunt began communicating with Ben Boer (Boer), an external consultant who was working with the governor's office to create a data launch system and whom she believed to have the reputation, experience, professional relationships, and political connections to move the data infrastructure work forward.²⁵⁶ Hunt described Boer as having the necessary established relationships to advance the project.²⁵⁷ Boer was hired "to be the face of the work to leverage his connections and professional relationships so they could direct and steer the work appropriately."²⁵⁸

Complainant reports that he was not informed by Haller or Hunt that a consultant had been hired but first learned this from a former colleague outside of DuPage ROE and ISU.²⁵⁹ He reports that he confirmed the consultant's hire with Ruscitti, who informed him that Haller and Hunt had reported to her that they had informed Complainant of the hire.²⁶⁰ In any case, on January 2, 2019, seemingly after he had already learned about it from an outside source and Ruscitti, Hunt, Haller, and Hood called Complainant to inform him that Boer was going to submit a proposal to work on the data infrastructure project and that they wanted Complainant to work on the survey but that Boer would be taking the lead on other pieces of the project.²⁶¹

The evidence shows that ISU and DuPage ROE needed to develop funding sustainability with partnering ROEs and various school districts in order to meet the Department's matching funds requirement, and that Complainant's skills were suited to meeting this need, based on experience he purported to have, including that listed on his resume.²⁶²

DuPage ROE's reasons for reducing Complainant's duties on infrastructure work included his lack of knowledge pertaining to technology aspects needed to complete the work, his lack of skills or competence including communication skills, and his lack of professional and political connections required to facilitate data infrastructure work for the SEED Grant.²⁶³ Complainant's lack of technology skills and lack of understanding of basic accounting skills had become apparent to DuPage ROE in his submissions on financial reporting spreadsheets related to the SEED

²⁵⁴ OIG Report, Attachment 3 (Interview Report of Haller) at 12.

²⁵⁵ OIG Report, OIG Report, Attachment 5 (Interview Report of Hunt) at 6.

²⁵⁶ *Id.*; OIG Report, Attachment 3 (Interview Report of Haller) at 12; OIG Report, Attachment 5 (Interview Report of Hunt), Attachment 4 to Attachment 5 (Interview Report of Hunt).

²⁵⁷ OIG Report, Attachment 5 (Interview Report of Hunt) at 6.

²⁵⁸ *Id.*

²⁵⁹ Compl. Exh. C-14 at 4, Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

²⁶⁰ *Id.*

²⁶¹ OIG Report, Attachment 5 to Attachment 5 (Interview Report of Hunt).

²⁶² OIG Report, Attachment 3 (Interview Report of Haller) at 12; OIG Report, Attachment 2 (Interview Report of Complainant) at 2; OIG Report, Attachment 4 (Interview Report of Ruscitti) at 3.

²⁶³ OIG Report, Attachment 3 (Interview Report of Haller) at 12, 14; OIG Report, Attachment 5 (Interview Report of Hunt) at 6-8; OIG Report, Attachment 4 to Attachment 5 (Interview Report of Hunt).

Grant.²⁶⁴ Complainant did not update his activities in the Gantt chart or Basecamp software, the project management tools used to track SEED Grant roles, responsibilities and work tasks, but refused or, at least, resisted doing so.²⁶⁵ DuPage ROE had also learned that Complainant did not have the reputation and connections required to move the data infrastructure work forward.²⁶⁶ Additionally, Complainant did not want to schedule or participate in morning meetings and missed several weekly staff calls.²⁶⁷

Complainant attributes his inability to do the data infrastructure work to regional superintendents' unwillingness to share data with him because it involved duplicative data gathering already done by others and also because the superintendents believed Haller and Hunt had used grant monies to create teacher shortages and now were using grant monies to try to solve the problem they had created.²⁶⁸ On this record, there is no evidence to show that any superintendents ever discussed this with Complainant and it is unclear how he formed this opinion or that he ever shared it with Hunt and Haller or any other DuPage ROE officials.

DuPage Roe reassigned Complainant to funding sustainability and development work, which they believed his experience at CPS well suited him for and for which he had been hired.²⁶⁹ DuPage ROE shifted Complainant from data infrastructure work and reassigned him to sustainability development work because he had experience in this listed on his resume.²⁷⁰ Complainant had managed grant development for CPS for over 20 years.²⁷¹ Complainant's "target was not responsible for the ROE's entire funding sustainability, but they wanted to make sure he understood the funding issues and that the ROEs needed to build further capacity and secure funding sustainability."²⁷² Specifically, Haller wanted Complainant to help the ROEs build capacity through creating boilerplate grant proposals and assisting the ROEs with identifying funding sources.²⁷³

Complainant did not raise concerns or object to the reassignment, but indicated he was excited about the work to which he had been reassigned.²⁷⁴ Complainant maintained some EIR grant budget oversight duties and stayed on in his data role, on a limited basis, because there was a lot of work to be done on a related survey.²⁷⁵

By March 2019, Hunt had reduced Complainant's work on the data infrastructure aspect

²⁶⁴ OIG Report, Attachment 3 (Interview Report of Haller) at 12 and 14.

²⁶⁵ *Id.* at 14; OIG Report, Attachment 5 (Interview Report of Hunt) at 8.

²⁶⁶ OIG Report, Attachment 3 (Interview Report of Haller) at 12.

²⁶⁷ OIG Report, Attachment 5 (Interview Report of Hunt) at 8.

²⁶⁸ OIG Report, Attachment 2 (Interview Report of Complainant) at 12-13.

²⁶⁹ OIG Report, Attachment 4 (Interview Report of Ruscitti) at 3; OIG Report, Attachment 2 (Interview Report of Complainant) at 2; OIG Report, Attachment 3 (Interview Report of Haller) at 13.

²⁷⁰ OIG Report, Attachment 3 (Interview Report of Haller) at 12.

²⁷¹ *Id.* at 2.

²⁷² *Id.* at 12.

²⁷³ *Id.* at 12 – 13.

²⁷⁴ OIG Report, Attachment 10 (Email Evidence of Complainant's Excitement to Shift Duties); OIG Report, Attachment 3 (Interview Report of Haller) at 13.

²⁷⁵ OIG Report, Attachment 3 (Interview Report of Haller) at 13; OIG Report, Attachment 5 (Interview Report of Hunt) at 6; OIG Report, Attachments 4 and 5 to Attachment 5 (Interview Report of Hunt).

of his work because of his lack of technical skills, connections, and productivity.²⁷⁶

On March 3, 2019, Haller, prompted by Ruscitti and Dotson, prepared a memo titled “Documentation of Performance Expectations not met by Complainant.”²⁷⁷ When asked by OIG investigators, Haller could not recall whether the memo was sent to Ruscitti, but appeared to be a memo that would have been sent to her.²⁷⁸

As of March 8, 2019, Complainant worked 15% on the EIR and 85% on the SEED Grants.²⁷⁹ The March 8, 2019 job descriptions prepared by Haller, at Dotson’s request, listed Complainant’s positions as a Budget Specialist responsible for coordinating the management of the EIR Grant and as Development Specialist for the SEED Grant, responsible for building the capacity of partnering Regional Offices of Education to create a robust development system to sustain the project.²⁸⁰ The purpose of updating Complainant’s job duties was to provide clarity for what was needed for each of the grants and because there were concerns about his performance.²⁸¹ Additionally, no one knew what Complainant was doing on a day-to-day basis.²⁸² He was supposed to send in weekly status reports, but sent them only every four to five weeks and, as a result, Haller and Hunt did not know what he was working on from week to week.²⁸³

In his role as EIR Budget Specialist, Complainant’s duties and responsibilities included the following: prepare grant related reports and documentation in accordance with granting agency requirements and Finance Director and Project Director’s direction; review invoices to ensure compliance with local policies and federal regulations; work with Project Directors to assure appropriate communication with partners regarding financial management of the grant; ensure grant expense tracking documents are accurate and up to date and provide reports as needed; collaborate with the Grant Coordinator, Principal Account Clerk, and Grant Assistant as needed; participate in regularly scheduled DuPage ROE grant project staff meetings; and, communicate regularly with project staff and grant partners.²⁸⁴

In his role as Development Specialist for the SEED Grant, Complainant’s duties and responsibilities included the following: collaborate with partner ROEs to build staff understanding and capacity across full development cycle; support staff in each ROE in the creation of a development plan; collaborate with Grant Coordinators; assist with grant writing for proposals or letters of intent; participate in LEAD Staff meetings and contribute to LEAD Projects webinars and status update summaries; meet regularly with ROE staff to align development efforts to needs;

²⁷⁶ OIG Report, Attachment 5 (Interview Report of Hunt) at 7-8.

²⁷⁷ OIG Report, Attachment 3 (Interview Report of Haller) at 14-15; OIG Report, Attachment 5 to Attachment 3 (Interview Report of Haller).

²⁷⁸ OIG Report, Attachment 3 (Interview Report of Haller) at 15.

²⁷⁹ OIG Report, Attachments 7- 9 to Attachment 5 (Interview Report of Hunt).

²⁸⁰ *Id.*; OIG Report, Attachment 3 (Interview Report of Haller) at 13; OIG Report, Attachments 2- 4 to Attachment 3 (Interview Report of Haller).

²⁸¹ OIG Report, Attachment 3 (Interview Report of Haller) at 13; OIG Report, Attachment 5 (Interview Report of Hunt) at 7.

²⁸² OIG Report, Attachment 3 (Interview Report of Haller) at 6.

²⁸³ *Id.*

²⁸⁴ OIG Report, Attachment 8 to Attachment 5 (Interview Report of Hunt).

collaborate with partners and consultants to inform IARSS survey enhancements and development of a data infrastructure; review and track DuPage ROE area SEED participants' school-based allocations and create quarterly spending reports; and, perform other duties as assigned.²⁸⁵

Complainant admittedly made slow progress on data infrastructure and development work, which he attributes to the social aspects of how he needed to communicate and work with stakeholders in the education field.²⁸⁶ Complainant opined that neither Haller nor Hunt understood this aspect of his work because they are academics.²⁸⁷

Analysis

Initial Burden

As discussed in Section X (iii) above, modification of Complainant's duties from data infrastructure work to funding sustainability and development work was a significant change in duties and responsibilities and, therefore, a personnel action covered by the NDAA.²⁸⁸ Personnel actions covered by the NDAA include a significant change in duties, responsibilities, or working conditions.²⁸⁹

Having established that he was an employee of a Department grantee, that he made two protected disclosures, and that he experienced a prohibited personnel action covered by the NDAA, Complainant now must demonstrate that his protected disclosure was a contributing factor in the modification of his duties from data infrastructure work to funding sustainability and development work in order to satisfy his burden of proof.²⁹⁰

Turning to causation, Complainant's only evidence of a connection between his protected disclosures and modification of his duties is knowledge of his disclosures on the part of the DuPage ROE officials who decided to modify his duties and timing of that modification.

With respect to the "timing" prong of the "knowledge/timing" test, the evidence shows that that first disclosure occurred in April 2018, approximately eight months before the modification of duties began in December 2018 or January 2019. Although the first disclosure was not within immediate proximity of the modification of duties, it was close enough in time to establish sufficient temporal proximity to meet the timing test.²⁹¹

²⁸⁵ OIG Report, Attachment 9 to Attachment 5 (Interview Report of Hunt).

²⁸⁶ OIG Report, Attachment 2 (Interview Report of Complainant) at 14.

²⁸⁷ *Id.*

²⁸⁸ 41 U.S.C. § 4712(c)(6); 5 U.S.C. § 1221(e); 5 U.S.C. § 2302(a)(2)(A)(xii).

²⁸⁹ *Id.*

²⁹⁰ 41 U.S.C. § 4712(c)(6) (adopting the burdens of proof of 5 U.S.C. § 1221(e); 5 U.S.C. § 1221(e); *DuPage Regional Office of Education v. U.S. Dep't of Educ.*, 58 F. 4th at 351; *see also Armstrong v. Arcanum Group, Inc.*, 897 F.3d at 1287.

²⁹¹ *See Kewley v. Dep't of Health and Human Servs.*, 153 F.3d at 1363 (noting that in S. Rep. No. 100-413 (1988), on enacting the Whistleblower Protection Act, Congress did not state a specific time period but suggested that an action taken within the same performance evaluation period normally be considered a reasonable time and gave clear guidance to use the reasonable time standard liberally); *Smith v. Dep't of Agriculture*, 64 M.S.P.R. at 65 (knowledge/timing test satisfied where personnel actions were taken less than 1 year after protected disclosures made); *Woodworth v. Dep't of Navy*, 105 M.S.P.R. at 465 (disclosure made just over eight months before agency's personnel

For other reasons, the second disclosure was not a contributing factor. It was not made until January 29, 2019 (through February 25, 2019), after DuPage ROE modified Complainant's duties. An employer cannot retaliate against an employee for conduct in which the employee has not yet engaged.²⁹² The second disclosure could not have been a contributing factor to employer's modification of Complainant's duties as the modification of duties happened first in time, between December 2018 and January 2019, before the second disclosure was made between January 29, 2019 and February 25, 2019. Because the employer actions occurred first in time, *i.e.*, before the second protected disclosure, there was no temporal proximity of Complainant's disclosure(s) to DuPage ROE's modification of duties and thus they could not have been a contributing factor in the personnel action. Nor, for the same temporal reasons, has Complainant demonstrated that DuPage ROE had knowledge of the second disclosure before beginning the purported employment action.

With respect to the "knowledge" prong of the "knowledge/timing" test and the first protected disclosure, the OIG's finding that Haller, Hunt, and Ruscitti had no knowledge of the protected disclosure is not supported. Record evidence establishes that Hunt had first-hand knowledge of the disclosure as it was her request for payment of the invoice that Complainant refused and to her that he complained about violation of Uniform Practice.²⁹³ More importantly, Haller and Ruscitti, both of whom were Complainant's supervisors at DuPage ROE and involved in the decision to modify Complainant's duties, knew of the protected disclosure, albeit not through Complainant, as they had voiced agreement with Complainant's decision to not pay the invoice submitted by Hunt that was the subject of the first protected disclosure.²⁹⁴

The evidence does not support the OIG's finding that Complainant did not establish, *prima facie*, that his protected disclosures may have been a contributing factor to DuPage ROE's modification of his duties. Complainant established, *prima facie*, that his first protected disclosure was a contributing factor to DuPage ROE's modification of his duties.

Burden Shift to DuPage ROE

However, DuPage ROE provided clear and convincing evidence, as the OIG found, that modification of Complainant's duties was not retaliatory.²⁹⁵ Application of the *Carr* factors to DuPage ROE's evidence leads me to conclude that modification of Complainant's duties from data infrastructure work to development work was for reasons other than retaliation.

action was a contributing factor); *Powers v. Dep't of Navy*, 97 M.S.P.R. at 561 (disclosure was contributing factor to personnel action taken approximately nine months after disclosure made).

²⁹² *Giese v. City of Kankakee*, 71 F.4th 582, 591 (7th Cir. 2023); *Nishan v. Stratosphere Quality, LLC*, 865 F.3d 922, 933 (7th Cir. 2017).

²⁹³ Compl. Exh. C-5, Docket Entry No. 27, OHA Dkt. No. 21-38-CP; OIG Report, Attachment 1 to Attachment 5 (Interview Report of Complainant) at 5.

²⁹⁴ OIG Report at 7; OIG Report, Attachment 3 (Interview Report of Haller) at 8; OIG Report, Attachment 4 (Interview Report of Ruscitti) at 2-3; OIG Report, Attachment 6 (Interview Report of Dotson) at 4; OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 5 - 6.

²⁹⁵ OIG Report at 15.

DuPage ROE provided strong evidence to show that modification of Complainant's duties from data infrastructure work to development work was for reasons other than retaliation on its part. Record evidence shows clearly that the SEED Grant had to be launched, without advanced planning, shortly after ISU was awarded the SEED Grant.²⁹⁶ That meant that as ISU was launching the SEED Grant, it did not have all the needed staff in place to administer the grant but built its grant-administration after launching and while administering the grant.²⁹⁷

The evidence shows that ISU had never received a grant of the size of the SEED Grant before.²⁹⁸ It had to move quickly to build organizational capacity and along the way various changes were made to administration of the grant.²⁹⁹ Among the changes was the transition from sharing budgetary administration with DuPage ROE for the SEED Grant to only ISU staff handling budgetary matters for the SEED Grant, which included ISU hiring its own budget specialist to work on SEED Grant expenses.³⁰⁰

In short, record evidence, including statements from Haller and Hunt, shows that ISU had separate, grant-administration-related reasons for having financial work for the SEED Grant assigned to ISU employees only and that Complainant would have been removed from his financial duties over the SEED Grant regardless of the disclosure.³⁰¹

Record evidence also indicates there existed little to no motive on the part of DuPage ROE personnel to retaliate against Complainant. The protected disclosure was made approximately eight months before the modification of duties began and therefore, not indicative of motivation based on that disclosure. Closer in time to the modification and the clear motive behind the modification to Complainant's duties was Complainant's poor performance on the data infrastructure work and the SEED Grant's needs as they had developed over the eight-month period that Complainant worked on infrastructure work. Additionally, the evidence shows that DuPage ROE officials, including Haller, Dotson, and Ruscitti, had agreed with Complainant's decision to not pay the catering expenses that were the subject of the first protected disclosure from the SEED Grant.³⁰² Other evidence, including statements from Haller and Ruscitti, show that there were shared, voiced concerns about the invoice for the catering expenses and thus no motivation to retaliate against Complainant for the concerns he expressed and with which they agreed.³⁰³

Finally, there is no evidence that shows DuPage ROE took similar employment actions

²⁹⁶ OIG Report, Attachment 5 (Interview Report of Hunt) at 2.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 3.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ OIG Report at 7-8; OIG Report, Attachment 5 (Interview Report of Hunt) at 3.

³⁰² OIG Report at 7-8; OIG Report, Attachment 3 (Interview Report of Haller) at 8; OIG Report, Attachment 4 (Interview Report of Ruscitti) at 2-3; OIG Report, Attachment 6 (Interview Report of Dotson) at 4; OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 5 - 6.

³⁰³ OIG Report at 7-8; OIG Report, Attachment 3 (Interview Report of Haller) at 8; OIG Report, Attachment 4 (Interview Report of Ruscitti) at 2-3; OIG Report, Attachment 6 (Interview Report of Dotson) at 4; OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 5 - 6.

against employees who were not whistleblowers but similarly situated.

The record does not contain evidence that detracts from the conclusion that modification of Complainant's duties from infrastructure work to development work was not retaliatory.

In fact, record evidence shows that DuPage ROE hired Complainant to collect and develop data and help build funding sustainability under the research grant projects.³⁰⁴ Thus, when Complainant's duties were modified from infrastructure work to development work, the shift in duties was seemingly consistent with work he was hired to perform. Complainant's assertion that modification of his duties from grant oversight and related financial responsibilities to data development was designed to make him fail as he had little knowledge of data development does not support his position that the modification of duties was retaliatory. Rather, Complainant's professing that he had little knowledge of data development lends support to DuPage ROE's position that Complainant was not competent to perform the data development work he was hired to do and that which was assigned to him.

The OIG's finding that DuPage ROE's modification of Complainant's duties was not retaliatory is supported by the evidence. Complainant met his initial burden of showing that his first disclosure was a contributing factor in this employment action. However, DuPage ROE's evidence, as the OIG found, is clear and convincing in showing that it would have modified Complainant's duties in the absence of any disclosure.

(vi) The Third Reprisal

The OIG found that Complainant established that the protected disclosures he made may have been a contributing factor to DuPage's placement of him on an EPP, but concluded the action was not retaliatory. While the OIG found that Complainant provided evidence that showed by a preponderance of the evidence that his disclosures about the vendor contract and invoice allocation issues may have been a contributing factor to this action, the OIG went on to find that DuPage ROE provided clear and convincing evidence of Complainant's multiple job performance issues and that DuPage ROE officials would have placed him on a performance plan based on those performance issues regardless of any protected disclosures.³⁰⁵

The OIG based its finding on a review of the EPP, witness statements from Ruscitti, Haller, Hunt, Dotson, Robey, and Complainant, as well as documents, including e-mails, from 2018 through 2019, reflecting incidents of poor performance by Complainant.³⁰⁶

³⁰⁴ OIG Report, Attachment 4 (Interview Report of Ruscitti) at 3.

³⁰⁵ OIG Report at 15.

³⁰⁶ OIG Report at 9 – 11.

The parties' arguments

Complainant argues generally that DuPage ROE's placement of him on an EPP was retaliatory, a sham, and was designed to ensure his failure so that DuPage ROE could have a basis to terminate his employment.³⁰⁷ Complainant asserts that the narrative spun by DuPage ROE that he was incompetent is not credible on its face given his professional background and because he was a seasoned professional who was considered an expert on government and foundation grants.³⁰⁸ Complainant alleges that no issues concerning his performance were raised during the entire year of 2018, or until he raised issues on mischarging of a contract invoice.³⁰⁹ Complainant argues that he was placed on the EPP in retaliation for his refusal to go along with illegalities and to guarantee that he would not be there in the future to resist further violations of the Uniform Guidance after he demonstrated that he would push back on directives he felt were in violation of grant terms.³¹⁰ Complainant points to the timing of the EPP and the retroactive documentation he purports DuPage ROE contrived to support placing him on the EPP.³¹¹

DuPage ROE agrees with the OIG's finding that DuPage ROE provided clear and convincing evidence of Complainant's multiple job performance issues and that DuPage ROE officials would have placed him on a performance plan due to those performance issues regardless of any protected disclosures.³¹² DuPage ROE asserts that it placed Complainant on the EPP in order to assist him in improving his performance.³¹³ DuPage ROE contends that as early as mid-2018 Complainant had persistent and well-documented performance deficiencies that continued through his termination from employment in October 2019.³¹⁴ Those deficiencies included confusion with grant responsibilities, lack of understanding of basic accounting principles, lack of follow through on deliverables and sloppy deliverables, and, difficulties with basic technological requirements (such as electronic schedules and project management software).³¹⁵

Complainant argues that it was only after he raised issues on mischarging of a contract invoice that issues with his performance were raised.³¹⁶ He points to having not received any indication that his supervisors believed he had performance issues during the entire year of 2018, and that he was not given a performance review at the end of 2018, but awarded a salary increase.³¹⁷

³⁰⁷ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 2.

³⁰⁸ *Id.* at 3-4.

³⁰⁹ *Id.* at 4.

³¹⁰ *Id.* at 2 and 4; Compl. Brief, OHA Dkt. No. 21-38-CP, at 7.

³¹¹ Complainant Reply Brief in Support of His Supplemental Brief (Compl. Reply Brief), OHA Dkt. No. 23-11-CP, at 2 and 4.

³¹² DuPage ROE Brief, OHA Dkt. No. 21-38-CP, at 12.

³¹³ *Id.* at 4.

³¹⁴ *Id.* at 3.

³¹⁵ *Id.* at 3 – 4.

³¹⁶ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP at 4.

³¹⁷ *Id.*

Complainant contends the March 2019 meeting was set up at his request, not by supervisors in order to discuss his performance.³¹⁸ He further contends that it was only following this meeting and after he had raised concerns about contracting improprieties that Haller drafted a job description and a document retroactively recounting performance expectations he purportedly did not meet and, relatedly, that any confusion about his job responsibilities originated with DuPage ROE because his supervisors did not develop a job description for him until March 2019.³¹⁹

Complainant asserts that documentary evidence used to support the EPP was contrived to depict him as incompetent and the poor performance described therein was not rightly attributed to him.³²⁰ Complainant points to a delay in contract execution attributed to him but that was the fault of a different employee.³²¹ Additionally, Complainant points to financial responsibilities set out in the EPP, even though he had been removed from those responsibilities or, at best, those responsibilities were unclear to him and other staff.

Complainant argues that the EPP was entered into in bad faith by DuPage ROE and not intended to support him but designed to ensure that DuPage ROE had grounds to fire him. In support of this argument, Complainant points to DuPage ROE not having presented the EPP to him until April 26, 2019, even though the stated start date of the EPP was March 11, 2019, and the April 12, 2019 incident contained in the EPP, a date more than a month after the EPP's start date and a date by which he had been removed from responsibilities in the financial area.³²²

Complainant also points to DuPage ROE's distortion of advice from the Department regarding commingling between the EIR and SEED Grants where DuPage ROE proffered an incomplete e-mail as proof of the Department's approval of the use of EIR Grant funds to pay SEED Grant bills, omitting the final line of the Department's e-mail that instructed "continue to clearly document and delineate how these expenses are (sic) be applied to each respective grant so that the funding streams remain distinct."³²³

The evidence

Record evidence demonstrates that Complainant's overall job performance had raised serious concerns. Evidence shows there were continuing performance deficiencies by Complainant prior to his placement on the EPP, including his confusion regarding his grant responsibilities, his lack of understanding of basic accounting principles, his lack of follow through on deliverables and sloppy deliverables, communication problems when he worked on data infrastructure work, and difficulties with basic technological requirements for the SEED team projects, all of which supported DuPage ROE's reasons to seek substantial improvement in Complainant's performance.³²⁴ Haller and Hunt detailed concerns about Complainant's

³¹⁸ *Id.*

³¹⁹ *Id.* at 3-4; Compl. Reply Brief, OHA Dkt. No. 23-11-CP, at 1-3.

³²⁰ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 5-6; Compl. Reply Brief, OHA Dkt. No. 23-11-CP, at 4-5.

³²¹ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 5-6.

³²² Compl. Brief, OHA Dkt. No. 21-38-CP, at 7-9.

³²³ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 6, citing to OIG Report, Attachment 3 to Attachment 5 (Interview Report of Hunt).

³²⁴ OIG Report at 10-11; OIG Report, Attachment 13 (Haller Memos and Notes Regarding Complainant's Performance); OIG Report, Attachment 14 (Complainant's Job Performance Examples to Inform the EPP); OIG

performance, including his lack of accountability on work activities and failure to produce work, in their statements to the OIG.³²⁵ Those concerns included Complainant's failure to identify and contact coordinators in other organizations to get baseline data on information they had collected despite being asked several times to do so;³²⁶ his lack of organization and failure to adopt work habits that permitted smooth communication with other staff members³²⁷; and, an expense tracking spreadsheet that was off by hundreds of thousands of dollars.³²⁸

Contrary to Complainant's assertion that DuPage ROE had not brought any performance issues to his attention in 2018, the evidence shows that Haller had discussed work duties, setting priorities, keeping normal business hours, creating templates, Complainant's technology challenges, and other work responsibilities with Complainant as early as April 17, 2018.³²⁹ DuPage ROE provided notes by Haller of her telephone call with Complainant on April 17, 2018, in which she voiced concerns to him about a number of performance issues, including his having not distributed invoice templates, not getting out agreements to participating districts, not cc'ing her on messages to partners, not taking the initiative to set up regular coordination on billing and processes with others, not working normal working hours, not providing lists of work done and priorities for the coming week, not setting up and using a DuPage ROE e-mail account, not sending e-mails with strings as previously instructed, not setting up a physical file system, and not maintaining an electronic file system.³³⁰

The evidence also shows that Haller documented Complainant's performance issues in a series of memos or internal notes between 2018 and 2019.³³¹ Those memos and internal notes, as well as e-mails Haller sent to Complainant, show that Haller had continuing concerns about Complainant's performance over a period of time that spanned from April 2018 through March 2019, and that she expressed those concerns to Complainant multiple times in telephone conversations and e-mails.³³² Haller's concerns included Complainant's confusion about grant responsibilities; his work not being adequately organized; the majority of his work not being performed during regular business hours; lack of understanding concerning basic accounting principles; lack of follow-through on deliverables and sloppy deliverables; lack of professionalism with external communications; refusal to acknowledge the leadership role of project directors; and, difficulties with basic technological capability.³³³

Report, Attachment 5 (Interview Report of Hunt) at 6-8.

³²⁵ OIG Report, Attachment 3 (Interview Report of Haller) at 12-14; OIG Report, Attachment 5 (Interview Report of Hunt) at 6-8.

³²⁶ OIG Report, Attachment 13 (Haller Memos and Notes Regarding Complainant's Performance).

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ OIG Report, Attachment 9 to Attachment 3 (Interview Report of Haller).

³³⁰ OIG Report, Attachment 13 (Haller Memos and Notes Regarding Complainant's Performance).

³³¹ OIG Report at 14-16; OIG Report, Attachment 13 (Haller Memos and Notes Regarding Complainant's Performance); OIG Report, Attachment 14 (Complainant's Job Performance Examples to Inform the EPP); OIG Report, Attachment 5 to Attachment 3 (Interview Report of Haller).

³³² OIG Report, Attachment 14 (Complainant's Job Performance Examples to Inform the EPP).

³³³ OIG Report at 14-16; OIG Report, Attachment 5 to Attachment 3 (Interview Report of Haller); Attachment 13 (Haller Memos and Notes Regarding Complainant's Performance); OIG Report, Attachment 14 (Complainant's Job Performance Examples to Inform the EPP).

At the end of 2018, notwithstanding the running performance shortcomings that Haller had tracked, Complainant had no performance review, but was awarded an increase in salary.³³⁴ In fact, no performance evaluations (oral or written) were completed for any grant staff, including Complainant, for 2018.³³⁵

Based on record evidence, a meeting with Complainant occurred on March 4, 2019. During the OIG investigation, three different views were expressed as to whom requested the meeting and why the meeting was scheduled. According to Complainant, he had requested the meeting because he had concerns about the hostile work environment he was experiencing by grant management staff.³³⁶ According to Ruscitti, she scheduled the meeting because Complainant had come to her and told her that he felt harassed, which she construed to mean he felt overwhelmed by the demands of his job and wanted to clarify his role and responsibilities.³³⁷ When Complainant met with Ruscitti, he never expressed that Haller or Hunt were treating him in a hostile manner.³³⁸ Ruscitti interpreted Complainant's comments to her to mean he felt overwhelmed at work with all the various requests being made of him regarding his work tasks.³³⁹ According to Haller, the meeting's purpose was to discuss the grants, Complainant's responsibilities, and related performance concerns,³⁴⁰ to "establish clarity about role definitions, responsibilities, and communication methods, and to clearly delineate Complainant's supervisory chain."³⁴¹

Complainant had told Haller many times that Ruscitti was his supervisor.³⁴² But Ruscitti assumed the Grant directors, not she, were his supervisors since Complainant's work was related to the EIR and SEED Grants.³⁴³ According to Haller, it had become clear that Complainant was not following his chain of supervision and seemed to be playing Haller and Ruscitti against each other.³⁴⁴ According to Complainant, as of January 2019, it had become clear to Ruscitti that Haller was manipulating the content and flow of information to Ruscitti to avoid scrutiny of her instructions and actions.³⁴⁵

The evidence also shows there was similar confusion on what work Complainant was doing on a day to day basis and that the March 4, 2019 meeting to clearly delineate Complainant's supervisory chain was also to clarify Complainant's role and responsibilities.³⁴⁶ Record evidence shows that Complainant's responsibilities, as Budget and Development Specialist, were listed, together with the names of his supervisors (Ruscitti and Haller), in a document entitled, "Roles

³³⁴ OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 7.

³³⁵ *Id.*

³³⁶ OIG Report at 9-10; OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 15.

³³⁷ OIG Report at 9-10; OIG Report, Attachment 4 (Interview Report of Ruscitti) at 6.

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ OIG Report, Attachment 3 (Interview Report of Haller) at 5 and 14.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.* at 14.

³⁴⁴ *Id.* at 14 and 17.

³⁴⁵ OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 8.

³⁴⁶ OIG Report, Attachment 3 (Interview Report of Haller) at 6.

and Responsibilities for the Management(sic) of the LEAD Projects.”³⁴⁷ Included in the list of responsibilities was building capacity of partnering ROEs to create development plans, including working with them to identify potential donors and submit grant proposals; supporting the project directors and ROEs to develop data infrastructure; assisting in developing annual amended agreements; reviewing invoices and documents from partners and vendors; and, drawing down grant funds on a monthly basis.³⁴⁸ The evidence also shows that there were numerous e-mails from Haller to Complainant in November 2018, December 2018, and January 2019, concerning the status of his completion of work related to his responsibilities as Budget and Development Specialist.³⁴⁹

Complainant, Ruscitti, Haller, Hunt, and Dotson attended the March 4, 2019 meeting.³⁵⁰ Gierman may also have attended that meeting.³⁵¹ When interviewed, Gierman recalled attending a 2019 meeting that included Complainant, Haller, Ruscitti, Hunt, and Lisa Hood (Hood) from ISU, and at which some people were upset and listed off things that Complainant had either done wrong or tasks and deliverables he had failed to complete.³⁵² The meeting Gierman attended may have been the March 4th meeting for at the meeting DuPage ROE grant staff provided feedback to Complainant about his work products and deliverables, performance, and his communication issues.³⁵³

Complainant reported to the OIG that at the meeting Ruscitti told Haller and Hunt to stop their bullying and hostile behavior toward him and others, at which they became enraged³⁵⁴ and stated he was a “showman.”³⁵⁵ Complainant believed the reference to him as a “showman” stemmed from a February 2019 stakeholder meeting at which Hunt said Complainant was speaking with regional superintendents when he was supposed to be staffing the registration table, and that he had spoken with superintendents after the conference about poverty’s impact on education in downstate Illinois and similar challenges in Chicago schools, suggesting this commonality might be used to start conversations with potential funders in Chicago.³⁵⁶ Hunt had cut him off and instructed him never to talk about Chicago again.³⁵⁷

After Complainant left the meeting on March 4th, the staff who remained in the meeting discussed the need to develop a performance monitoring plan for Complainant.³⁵⁸ It was here the EPP was first discussed.³⁵⁹ When interviewed, Ruscitti could not provide clarification as to

³⁴⁷ OIG Report, Attachment 14 (Complainant’s Job Performance Examples to Inform the EPP).

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ OIG Report, Attachment 3 (Interview Report of Haller) at 6 and 14; OIG Report, Attachment 6 (Interview Report of Dotson) at 6.

³⁵¹ OIG Report, Attachment 7 (Interview Report of Gierman) at 4.

³⁵² *Id.*

³⁵³ OIG Report, Attachment 6 (Interview Report of Dotson) at 6.

³⁵⁴ OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 16.

³⁵⁵ *Id.*

³⁵⁶ OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 16 - 17.

³⁵⁷ *Id.*

³⁵⁸ OIG Report, Attachment 6 (Interview Report of Dotson) at 6.

³⁵⁹ *Id.*

whether the EPP process was discussed during the March 2019 meeting or if the EPP was a subsequent initiative instituted for other reasons after the meeting.³⁶⁰

In any case, after the meeting, Haller drafted a revised job description for Complainant and simultaneously began drafting a document that recounted retroactive performance expectations not met by Complainant, as well as an EPP.³⁶¹ When drafting the EPP, Haller obtained input from Hunt related to Complainant’s SEED Grant responsibilities.³⁶² Additionally, Hunt and Hood weighed in on the development work aspect of the EPP to ensure it included SEED activities and related aspects on which Complainant would be monitored for the SEED Grant.³⁶³

Ruscitti approved implementation of the EPP.³⁶⁴ Robey and Dotson were otherwise part of the EPP process³⁶⁵ Haller was tasked with documenting Complainant’s performance issues to inform the EPP.³⁶⁶

The EPP is dated March 9, 2019, lists an effective date of March 11, 2019,³⁶⁷ states that it is for the period March 11, 2019 through September 30, 2019, and contains the following goals, activities, and performance expectations:

Goal, Activity, or Performance Expectation
Goal: Align time and effort appropriately to funding sources
Goal: complete all tasks assigned
Goal: consistently provide accurate financial records and data spreadsheets
Goal: represents DuPage ROE and the LEAD projects with professionalism and adds value to the projects and partnering ROEs
Goal: collaborates in problem-solving and decision-making when appropriate and request by Reg. Supt. And/or Project Directors
Activity #1: Create and execute four plans for ROE development support
Activity #2: Establish and maintain a formalized communication plan
Activity #3: Participate in discussions with partners every other month
Activity #4: Actively participate in every other week LEAD staff meetings
Activity #5: Actively participate in ether other week LEAD Project progress webinars or summaries
Activity #6: Collaborate with Project Director and IARSS on survey enhancements

³⁶⁰ OIG Report, Attachment 4 (Interview Report of Ruscitti) at 6.

³⁶¹ OIG Report, Attachments 3, 4, 5, and 6 to Attachment 3 (Interview Report of Haller).

³⁶² OIG Report at 9-10; OIG Report, Attachment 4 (Interview Report of Ruscitti) at 5; OIG Report, Attachment 5 (Interview Report of Hunt) at 8.

³⁶³ OIG Report, Attachment 5 (Interview Report of Hunt) at 8.

³⁶⁴ OIG Report at 10; OIG Report, Attachment 4 (Interview Report of Ruscitti) at 5.

³⁶⁵ OIG Report at 10.

³⁶⁶ OIG Report at 10.

³⁶⁷ OIG Report, Attachment 11 (Complainant-DuPage ROE – Signed by Complainant).

Activity #7: Review all EIR invoices for alignment to approved budget, ensure they include allowable costs and are properly documented
Activity #8: Communicate regularly with staff from grant partners
Activity #9: Keep project leaders informed of on-going communication
Activity #10: Participate in other meetings as needed and determined by Regional Superintendent and/or Project Directors
Activity #11: Completion of other project tasks as requested by Regional Superintendent, Finance Director, or Project Directors
Activity #12: Each Monday, send an e-mail to the Project Directors that provides a list of work tasks accomplished in previous week, identify work still outstanding, and list tasks anticipate for current week
Expectation: Organize electronic files
Expectation: Follow through on tasks assigned or promised
Expectation: Respond in timely and professional matter to requested communications
Expectation: Demonstrate strong attention to detail
Expectation: Effectively use technology
Expectation: Thoroughly proofread all communications
Expectation: Effectively collaborate with Reg. Supt., Finance Director, Project Directors, and Regional Coordinators

The March 11, 2019 through September 30, 2019 dates on the EPP indicate the start and end dates of the EPP process time-period, and the EPP elements indicate what expectations and goals Complainant needed to meet by September 30, 2019.³⁶⁸

The stated purpose of Complainant’s EPP was “to define the scope of work, timeline, deliverables, and expectations for the performance of (Complainant’s) position and allow (Complainant) the opportunity to demonstrate competency and commitment to the project.”³⁶⁹ Robey understood that the EPP for Complainant was created with the intent to guide his performance to meet the expectations for his position.³⁷⁰

In the EPP, Complainant’s position was listed as a Budget/Development Specialist, and the Position Funding as 15% EIR (Partners to Lead Project) and 85% SEED (TEAM Lead Project).³⁷¹

The EPP identified Areas of Demonstrated Strength, Areas for Further Development, Performance Goals, Expected Activities to reach those goals, resources available to complete activities, Performance Expectations, and a schedule for providing status updates and receiving feedback.³⁷² Areas identified for further development in the EPP included adequately allocating time according to funding source; organizing electronic files to ensure appropriate documents were being distributed; following through on tasks assigned to him by project directors; being

³⁶⁸ OIG Report, Attachment 8 (Interview Report of Robey) at 5.

³⁶⁹ OIG Report, Attachment 11 (Complainant-DuPage ROE EPP – Signed by Complainant) at 1.

³⁷⁰ OIG Report, Attachment 8 (Interview Report of Robey) at 4.

³⁷¹ OIG Report, Attachment 11 (Complainant-DuPage ROE EPP – Signed by Complainant) at 1.

³⁷² OIG Report, Attachment 11 (Complainant-DuPage ROE EPP – Signed by Complainant).

accountable for a timely response with assigned tasks; greater attention to detail with financial responsibilities; effectively utilizing technology; and, adequately proofreading external communications and presenting a professional image.³⁷³

DuPage ROE uses Employee Performance Plans to assist employees in understanding job expectations and improving their performance.³⁷⁴ Information on past disciplinary measures taken by DuPage Roe provided to the OIG listed 10 disciplinary measures, four of which were written reprimands, three of which were verbal reprimands, one of which was a verbal warning, one of which was a suspension, and one of which was a written reprimand and placement on a Personal Action Report.³⁷⁵ According to Robey, he was involved in disciplinary actions of various employees that included three teachers who were put on similar performance plans, a secretary, a custodian, and Complainant.³⁷⁶

Complainant's EPP was meant to be a monitoring process or performance tool and was not intended to be a disciplinary measure.³⁷⁷ The goal of the EPP process was to try to give Complainant feedback and support so that Complainant could succeed.³⁷⁸ Robey understood that the EPP for Complainant was created with the intent to guide his performance to meet the expectations for his position.³⁷⁹ Haller and Hunt communicated to the OIG that the EPP process was not meant to be a disciplinary tool but implemented to establish clarity about expectations and designed to play to Complainant's strengths and experience and to set him up for success.³⁸⁰

Although DuPage ROE, not Hunt or ISU, drafted and executed the EPP, DuPage ROE shared the EPP with Hunt as the Complainant's duties included work for the SEED Grant administered by ISU.³⁸¹

The EPP stated that Complainant was being placed on the EPP effective immediately and that he was expected to make regular progress on the EPP.³⁸² The EPP also stated that failure to meet the EPP's expectations, to keep accurate records of work completed, or violation of any DuPage ROE policy would result in disciplinary action, up to and including termination.³⁸³

The EPP contains signature lines for two supervisors, but both signature lines are blank.³⁸⁴ Complainant signed the EPP on April 26, 2019.³⁸⁵ On this record, it is not clear why Complainant did not sign the EPP until April 26, 2019. Robey did not know why it was signed nearly two

³⁷³ *Id.* at 1.

³⁷⁴ OIG Report, Attachment 8 (Interview Report of Robey) at 4.

³⁷⁵ OIG Report, Attachment 15 (DuPage ROE's Supplemental Response – July 9, 2021).

³⁷⁶ OIG Report, Attachment 8 (Interview Report of Robey) at 6.

³⁷⁷ OIG Report, Attachment 5 (Interview Report of Hunt) at 8.

³⁷⁸ *Id.* at 8–9.

³⁷⁹ OIG Report, Attachment 8 (Interview Report of Robey) at 4.

³⁸⁰ OIG Report at 10; OIG Report, Attachment 3 (Interview Report of Haller) at 17; OIG Report, Attachment 5 (Interview Report of Hunt) at 8.

³⁸¹ OIG Report, Attachment 5 (Interview Report of Hunt) at 8.

³⁸² OIG Report, Attachment 11 (Complainant-DuPage ROE EPP – Signed by Complainant) at 4.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ *Id.*

months after it was issued.³⁸⁶ Haller also reported that she did not know when Complainant signed the EPP, why it was signed so long after its March 11th issue date but speculated that Ruscitti may have followed up with Complainant to have him sign it.³⁸⁷

However, the evidence shows that Haller and Ruscitti held a meeting with Complainant on or about March 11, 2019, at which meeting they went over the EPP with Complainant.³⁸⁸ According to Haller, Complainant's response to the EPP was that it looked reasonable and that the EPP helped him to better understand his role.³⁸⁹ Apparently Complainant did not sign the EPP at the March 11th meeting as Haller recalled talking by telephone with Complainant sometime after the meeting, at which time he said he wanted more time to review the EPP.³⁹⁰

The evidence also shows that on April 24, 2019, Ruscitti, Haller, Dotson, and Complainant participated in a call to discuss the Performance Plan, which call was requested by Complainant.³⁹¹

Analysis

Initial Burden

As discussed in Section X (iii) above, while a performance improvement plan is not one of the personnel actions enumerated under the NDAA and generally not considered to be an adverse employment action but a tool to improve performance, it may be considered a prohibited personnel action within the meaning of the NDAA.³⁹² Here, where Complainant contends that DuPage ROE contrived evidence of his poor performance for the purpose of placing him on an EPP to orchestrate his termination³⁹³, I will consider the EPP to be a personnel action within the meaning of the NDAA.³⁹⁴

Having established that he was an employee of a Department grantee, that he made a protected disclosure, and that he experienced a prohibited personnel action covered by the NDAA, Complainant now must establish that his protected disclosure was a contributing factor in the personnel action taken against him in order to satisfy his burden of proof.³⁹⁵

There is no direct evidence to support Complainant's contention that his protected

³⁸⁶ OIG Report, Attachment 8 (Interview Report of Robey) at 5.

³⁸⁷ OIG Report, Attachment 3 (Interview Report of Haller) at 16-17.

³⁸⁸ *Id.* at 16.

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ OIG Report, Attachment 28 (Complainant's EPP Performance Activities 1-12 – Evidence by DuPage ROE), Activity # 8 and Activity #9, April 24, 2019 e-mail to Complainant from Haller.

³⁹² See, e.g., *Gonzales v. Dep't of Housing and Urban Development*, 64 M.S.P.R. at 319; *Newcastle v. Dep't of Treasury*, 94 M.S.P.R. at 245.

³⁹³ OIG Report, Attachment 2 (Interview Report of Complainant) at 14-15; Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 5-6.

³⁹⁴ See *Gonzales v. Dep't of Housing and Urban Development*, 64 M.S.P.R. at 319; *Newcastle v. Dep't of Treasury*, 94 M.S.P.R. at 245.

³⁹⁵ 41 U.S.C. § 4712(c)(6) (adopting the burdens of proof of 5 U.S.C. § 1221(e); 5 U.S.C. § 1221(e); *DuPage Regional Office of Education v. U.S. Dep't of Educ.*, 58 F. 4th at 351.

disclosures were contributing factors to his placement on the EPP and so he relies on circumstantial evidence, namely that DuPage ROE decisionmakers had knowledge of his disclosures and that the disclosures were made before he was placed on the EPP.

With respect to the “knowledge” prong of the “knowledge/timing” test, the OIG’s determination that Complainant’s protected disclosures regarding the catering invoice and the Cosner contract may have been a contributing factor to DuPage ROE’s placement of Complainant on the EPP is supported by record evidence. Record evidence shows that several DuPage ROE officials responsible for Complainant’s EPP, including Haller, Ruscitti, and Dotson, were aware of both of Complainant’s disclosures by the time the EPP was initiated.³⁹⁶

With respect to the “timing” prong of the “knowledge/timing” test, the OIG’s finding that Complainant’s disclosures may have been a contributing factor to his placement on the EPP is supported by record evidence with respect to both disclosures. The first disclosure occurred in April 2018, less than a year before Complainant was placed on the EPP, and, therefore within a time frame to infer causation, particularly where the work performance issues provided by DuPage ROE for placing Complainant on the EPP stretched back in time to when the disclosure was made.³⁹⁷ Complainant’s second disclosure was made close in time, within approximately one month, before he was placed on the EPP and, therefore, easily establishes sufficient temporal proximity to meet the timing test.³⁹⁸

Complainant satisfied the “knowledge/timing” test sufficient to infer causal connection between his first and second protected disclosures and the personnel action. Thus, record evidence shows that Complainant established by a preponderance of evidence that both disclosures, not just the second disclosure as the OIG found, were a contributing factor to his placement on the EPP.³⁹⁹

Burden Shift to DuPage ROE

However, as the OIG also found, DuPage ROE provided clear and convincing evidence of Complainant’s significant job performance issues and that DuPage ROE officials would have

³⁹⁶ OIG Report at 7 and 11; OIG Report, Attachment 2 (Interview Report of Complainant) at 9; OIG Report, Attachment 5 (Interview Report of Hunt) at 3-4; OIG Report, Attachment 3 (Interview Report of Haller) at 7-8; OIG Report, Attachment 4 (Interview Report of Ruscitti) at 2; OIG Report, Attachment 6 (Interview Report of Dotson) at 4-5.

³⁹⁷ See *Kewley v. Dep’t of Health and Human Servs.*, 153 F.3d at 1363 (noting that in S. Rep. No. 100-413 (1988), on enacting the Whistleblower Protection Act, Congress did not state a specific time period but suggested that an action taken within the same performance evaluation period normally be considered a reasonable time and gave clear guidance to use the reasonable time standard liberally); see also, e.g., *Smith v. Dep’t of Agriculture*, 64 M.S.P.R. at 65 (knowledge/timing test satisfied where personnel actions were taken less than 1 year after protected disclosures made); *Woodworth v. Dep’t of Navy*, 105 M.S.P.R. 456 (M.S.P.B. 2007), affirmed 329 Fed. Appx. 281, rehearing en banc denied, cert. denied, 130 S.Ct. 1716 (disclosure made just over eight months before agency’s personnel action was a contributing factor).

³⁹⁸ See, e.g., *Smith v. Dep’t of Agriculture*, 64 M.S.P.R. at 65 (knowledge/timing test satisfied where personnel actions were taken less than 1 year after protected disclosures made); *Woodworth v. Dep’t of Navy*, 105 M.S.P.R. 456 (M.S.P.B. 2007), affirmed 329 Fed. Appx. 281, rehearing en banc denied, cert. denied, 130 S.Ct. 1716 (disclosure made just over eight months before agency’s personnel action was a contributing factor).

³⁹⁹ OIG Report at 11.

placed him on a performance plan regardless of any protected disclosures.⁴⁰⁰ The OIG found that evidence provided by DuPage ROE showed that Complainant had significant performance issues that outweighed any circumstantial evidence that the EPP was retaliatory.⁴⁰¹ The OIG concluded that the evidence supported DuPage ROE's position that it would have put Complainant on an EPP regardless of his disclosure.

Application of the *Carr* factors to DuPage ROE's evidence leads me to conclude that DuPage ROE's placement of Complainant on an EPP was for reasons other than retaliation and his disclosure was not a contributing factor.

DuPage ROE's evidence in support of its placement of Complainant on an EPP is strong. Contrary to Complainant's assertions that DuPage ROE had not brought any performance issues to his attention in 2018, Haller raised numerous performance issues with him in 2018. She had discussed work duties, setting priorities, keeping normal business hours, creating templates, technology challenges, and other work responsibilities with Complainant as early as April 17, 2018.⁴⁰² DuPage ROE provided notes by Haller of her telephone call with Complainant on April 17, 2018, in which she voiced concerns to him about a number of performance issues, including his having not distributed invoice templates, not having worked on getting out agreements to participating districts, not cc'ing her on messages to partners, not taking the initiative to set up regular coordination on billing and processes with others, not working normal working hours, not providing lists of work done and priorities for each coming week, not setting up and using a DuPage ROE e-mail account, not sending e-mails with strings as previously instructed, not setting up a physical file system, and not maintaining an electronic file system.⁴⁰³

The evidence also shows that Haller documented Complainant's performance issues in a series of memos or internal notes and emails between 2018 and 2019, and that those performance issues were significant.⁴⁰⁴ The emails showed continuing concerns about Complainant's performance over a period of time that spanned from February 2018 to March 2019.⁴⁰⁵ Those concerns included his confusion about his grant responsibilities; his work not being adequately organized; the majority of his work not being performed during regular business hours; his lack of understanding concerning basic accounting principles; his lack of follow through on deliverables and sloppy deliverables; his lack of professionalism with external communications; his refusal to acknowledge the leadership role of project directors; and, his difficulties with basic technological capability.⁴⁰⁶

The fact that Complainant had no performance review but was given a salary increase in 2018 is not, without more, an indicator of good job performance or the absence of performance problems. Rather, this evidence merely shows that DuPage ROE did not conduct a performance

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² OIG Report, Attachment 9 to Attachment 3 (Interview Report of Haller).

⁴⁰³ OIG Report, Attachment 13 (Haller Memos and Notes Regarding Complainant's Performance).

⁴⁰⁴ OIG Report at 10; OIG Report, Attachment 13 (Haller Memos and Notes Regarding Complainant's Performance – April 12, 2019); OIG Report, Attachment 14 (Complainant's Job Performance Examples to Inform the EPP); OIG Report, Attachment 5 to Attachment 3 (Interview Report of Haller).

⁴⁰⁵ OIG Report, Attachment 14 (Complainant's Job Performance Examples to Inform the EPP).

⁴⁰⁶ *Id.*; OIG Report, Attachment 5 to Attachment 3 (Interview Report of Haller).

review of Complainant, or of any other grant staff, in 2018. The evidence clearly shows that performance problems had been raised with Complainant in 2018, despite the fact that no performance review was conducted and he had been given a raise.

Additionally, the evidence shows that the Goals, Activities, and Expectations of the EPP were succinctly set out in the EPP and aligned to the Budget and Development Specialist duties and responsibilities of Complainant's job, as it had evolved and as was known by Complainant as of March 2019.⁴⁰⁷ The Goals of the EPP, aligning time and effort appropriately to funding sources, completing all tasks assigned, consistently providing accurate financial records and data spreadsheets, representing DuPage ROE with professionalism, and collaborating in problem-solving and decision making were all goals commonly identified for professionals and necessarily achieved to accomplish their work. Equally, the Expectations set out in the EPP of organizing electronic files, following through on assigned tasks, responding to communications, demonstrating strong attention to detail, thoroughly proofreading all communications, and effectively collaborating with the Regional Superintendent, Finance Director, Project Directors and Regional Coordinators were expectations consistent with and necessary for achieving the Goals. Finally, the 12 Activities of the EPP were aligned to the Budget Specialist and Development Specialist duties and responsibilities assigned to Complainant.

While the evidence may indicate that DuPage ROE officials were possibly motivated to retaliate against Complainant in their decision to place him on an EPP because his disclosures may have placed its grant funding in jeopardy, that evidence is weak and pales in comparison to the evidence on significant performance problems on Complainant's part. Of the four decision-makers involved in the EPP process, only Haller, Ruscitti, and Dotson, had knowledge of Complainant's disclosures; Robey did not. As to the first disclosure, any motivation of the part of Haller, Ruscitti, and Dotson is tenuous as they had agreed with Complainant that the catering invoice should not be paid. As to the second disclosure, Ruscitti and Dotson's motivation was, at best, very weak as they had both concurred with Complainant that written approval from the Department should be obtained before the Cosner invoices were approved. On the other hand, Haller could have fomented greater motivation to retaliate as, the evidence shows, she had disagreed with Complainant's disapproval of the Cosner invoices, expressed a different view of their legitimacy, and resisted seeking Department approval. However, the evidence establishes that Haller believed the EPP was not meant to be a disciplinary tool, but to establish clarity about expectations for Complainant's performance and work duties, to establish accountability, and to set out his priorities and play to his strengths, and she drafted an EPP that did just that.⁴⁰⁸

As DuPage ROE points out, generally performance plans are part of the supervision process that outline goals for the supervisor and help employees improve their performance.⁴⁰⁹ An EPP is used as a tool for employees who encounter performance issues to help them with clarity

⁴⁰⁷ OIG Report, Attachment 11 (Complainant-DuPage ROE EPP – Signed by Complainant); OIG Report, Attachments 8 and 9 to Attachment 5 (Interview Report of Hunt); OIG Report, Attachment 14 (Complainant's Job Performance Examples to Inform the EPP).

⁴⁰⁸ OIG Report, Attachment 3 (Interview Report of Haller) at 16.

⁴⁰⁹ OIG Report, Attachment 8 (Interview Report of Robey) at 4.

and accountability for meeting performance expectations.⁴¹⁰ They are more about helping an employee meet expectations rather than being used as a disciplinary tool.⁴¹¹

Haller reported to investigators that the EPP was not meant to be a disciplinary tool, but to establish clarity about expectations for Complainant's performance and work duties, to establish accountability, and to set out that his priorities were to create boilerplate development templates for the ROEs and to consistently attending team meetings.⁴¹² Haller and Hunt communicated to the OIG that the EPP process was designed to play to Complainant's strengths and experience and to set him up for success.⁴¹³

The contents of the EPP itself are consist with the EPP not being meant as a disciplinary tool, but to clarify expectations, establish accountability, and set priorities. The evidence shows that the Goals, Activities, and Expectations of the EPP were succinctly set out in the EPP and aligned to the Budget Specialist and Development Specialist duties and responsibilities of Complainant's job, as it had evolved as of March 2019.⁴¹⁴ The Goals of the EPP, aligning time and effort appropriately to funding sources, completing all tasks assigned, consistently providing accurate financial records and data spreadsheets, representing DuPage ROE with professionalism, and collaborating in problem-solving and decision making were all goals commonly identified for professionals and necessarily achieved to accomplish their work. Equally, the Expectations set out in the EPP of organizing electronic files, following through on assigned tasks, responding to communications, demonstrating strong attention to detail, thoroughly proofreading all communications, and effectively collaborating with the Regional Superintendent, Finance Director, Project Directors and Regional Coordinators were expectations consistent with and necessary for achieving the Goals. Finally, the 12 Activities of the EPP were aligned to the Budget Specialist and Development Specialist duties and responsibilities assigned to Complainant.

Finally, there is not any evidence that DuPage ROE has taken similar action against employees who are not whistleblowers but who are otherwise similarly situated.⁴¹⁵

In his brief, Complainant states the EPP started on March 11, 2019, but he was not made aware of it until April 26, 2019, suggesting that the EPP's later execution date is suspicious and evidence of its bad faith design for his failure.⁴¹⁶ However, the evidence shows that Haller and Ruscitti held a meeting with Complainant on or about March 11, 2019, at which meeting they went over the EPP with Complainant.⁴¹⁷ Haller told OIG investigators that Complainant's response to the EPP was that it looked reasonable and that the EPP helped him to better understand his role.⁴¹⁸ Apparently Complainant did not sign the EPP at that meeting as Haller recalled talking by

⁴¹⁰ OIG Report at 9; OIG Report, Attachment 3 (Interview Report of Haller) at 17; OIG Report, Attachment 5 (Interview Report of Hunt) at 8-9; OIG Report, Attachment 8 (Interview Report of Robey) at 4.

⁴¹¹ OIG Report, Attachment 8 (Interview Report of Robey) at 4.

⁴¹² OIG Report, Attachment 3 (Interview Report of Haller) at 17.

⁴¹³ OIG Report at 10; OIG Report, Attachment 3 (Interview Report of Haller) at 17; OIG Report, Attachment 5 (Interview Report of Hunt) at 8-9.

⁴¹⁴ OIG Report, Attachments 8 and 9 to Attachment 5 (Interview Report of Hunt).

⁴¹⁵ OIG Report, Attachment 15 (DuPage ROE's Supplemental Response – July 9, 2021).

⁴¹⁶ Compl. Brief, OHA Dkt. No. 21-38-CP, at 7.

⁴¹⁷ OIG Report, Attachment 3 (Interview Report of Haller) at 16.

⁴¹⁸ *Id.*

telephone with Complainant sometime after the meeting, at which time he said he wanted more time to review the EPP.⁴¹⁹ Haller also reported that she did not know when Complainant signed the EPP, why it was signed so long after its March 11th issue date, but speculated that Ruscitti may have followed up with Complainant to have him sign it.⁴²⁰ Complainant's execution of the EPP on April 26, 2019 does not raise the suspicions that Complainant attaches to it. Rather, the evidence is clear that Complainant had the EPP in hand and was aware of its terms as of its start date but delayed in returning it to Haller.

Evidence in the OIG's Report and other evidence before me for review leads me to conclude that while Complainant satisfied his initial burden by establishing his protected disclosure was a contributing factor in DuPage ROE's placing him on the EPP. However, the evidence supports the OIG's finding that DuPage ROE provided clear and convincing evidence that it had reasons to seek improvements in Complainant's performance and would have placed Complainant on the EPP regardless of any protected disclosures and does not support that issuance of the EPP was an act of retaliation.

(vii) The Fourth Reprisal

The OIG found that Complainant provided evidence that showed by a preponderance that his disclosures may have been a contributing factor to the PAR's issuance since they were known to DuPage ROE and ISU grant officials involved in issuing the PAR.⁴²¹ However, the OIG went on to find that DuPage ROE provided clear and convincing evidence that it would have issued the PAR regardless of any protected disclosures.

Specifically, the OIG found that Complainant showed by a preponderance of evidence that one of the two DuPage ROE management officials, Dotson, a participant in the PAR proceeding, knew that Complainant had made protected disclosures about the SEED Grant catering and invoice misallocation issues.⁴²² The OIG found there was no evidence to show that Robey, to whom Dotson referred the sexual harassment complaint for investigation and who led the PAR disciplinary meetings, had knowledge of either of Complainant's protected disclosures in proximity to the issuance of the PAR that would have been a contributing factor to its issuance.⁴²³

The OIG next determined that although Complainant showed by a preponderance that his disclosures may have been a contributing factor to the PAR's issuance, DuPage ROE showed by clear and convincing evidence that the PAR was issued based on multiple, repeated incidents of inappropriate conduct and Complainant's violation of the Acceptable Use Policy he signed with DuPage ROE, and in accord with DuPage ROE's policy regarding disciplinary guidelines for employees who commit offenses related to sexual harassment.⁴²⁴ The OIG also considered

⁴¹⁹ *Id.*

⁴²⁰ *Id.* at 17.

⁴²¹ OIG Report at 15.

⁴²² OIG Report at 11-12.

⁴²³ *Id.*; OIG Report, Attachment 6 (Interview Report of Dotson) at 6.

⁴²⁴ OIG Report at 12.

evidence that the PAR was issued shortly after the complaint concerning the conduct was received and that DuPage ROE had used PARs in past instances to other similarly situated employees.⁴²⁵

The OIG based its finding on its review of the PAR, an email complaint DuPage ROE received, the DuPage County Personnel Policy Manual description of a PAR and policies concerning sexual harassment and acceptable uses of agency-issued equipment and media services, the “Acceptable Use Policy,” and Employee Personnel Policy Acknowledgement forms signed by Complainant, its interviews with Complainant, Robey, and Dotson, and documents provided by DuPage ROE showing previous instances when DuPage ROE had issued written reprimands for employee misconduct and other forms of unprofessional behavior.⁴²⁶

The parties’ arguments

DuPage ROE argues that Complainant failed to present evidence that issuance of the PAR was connected to his disclosures but agrees with the OIG’s finding that DuPage ROE presented clear and convincing evidence demonstrating that DuPage ROE would have issued the PAR regardless of the disclosures.⁴²⁷

Conversely, Complainant agrees with the OIG’s finding that he made a prima facie showing that his disclosures may have been a contributing factor to issuance of the PAR but disagrees with the OIG’s findings that he failed to present evidence that the PAR was connected to his disclosures or that DuPage ROE presented clear and convincing evidence that it would have issued the PAR regardless of his disclosures.

Complainant generally argues that all personnel actions, including the PAR, were taken against him in retaliation for his questioning suspect invoices and contracts presented for payment under the EIR Grant and to guarantee that DuPage ROE could terminate him so he would not be there in the future to identify and resist further violations of the Uniform Guidance.⁴²⁸

Specific to the PAR, Complainant argues that DuPage ROE created the PAR as a final straw to ensure it could terminate him, as evidenced by the timing of the PAR’s issuance shortly before the end of his EPP and his performance review, even though incidents alleged in the PAR occurred much earlier than August 2019, and the final performance review’s reference to the PAR to support a finding that he failed to effectively use technology.⁴²⁹ Complainant also argues that DuPage ROE has not shown with clear and convincing evidence that his protected disclosures were not contributing factors to its issuance of the PAR. In support of this argument, Complainant

⁴²⁵ *Id.*

⁴²⁶ OIG Report at 11-12; OIG Report, Attachment 8 (Interview Report of Robey); OIG Report, Attachment 15 (DuPage ROE’s Supplemental Response – July 9, 2021); OIG Report, Attachment 16 (Harassment Complaint Emails from ISU); OIG Report, Attachment 17 (Complainant’s Personnel Action Report); OIG Report, Attachment 18 (DuPage County Employee Policy Manual); OIG Report, Attachment 19 (DuPage ROE 2018 Personnel Handbook); OIG Report, Attachment 20 (DuPage ROE 2020 Personnel Handbook); and, OIG Report, Attachment 21 (Complainant’s Signed DuPage ROE Acceptable Use Policy Form).

⁴²⁷ DuPage ROE Brief, OHA Dkt. No. 21-38-CP, at 11.

⁴²⁸ Compl. Brief, OHA Dkt. No. 21-38-CP, at 5, 12-13.

⁴²⁹ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 7; Compl. Reply Brief, OHA Dkt. No. 23-11-CP, at 5.

asserts that inconsistencies and misreporting for the PAR render it incredible; that one of the three incidents that gave rise to the PAR did not occur; that he did not admit to all three incidents as DuPage ROE states, but acknowledged only the first incident; that the alleged incidents did not constitute sexual harassment; that none of the incidents occurred on his work-issued laptop, but on his personal laptop; that DuPage ROE's issuance of a PAR to him ran afoul of how DuPage ROE regularly handles disciplinary actions, including not providing for an investigation and allowing him an opportunity to respond, and the process required by the DuPage County Harassment Policy; and, timing of the PAR's issuance close in time to the end of his EPP when two of the three incidents allegedly occurred many months earlier, without action having been taken surrounding the time they occurred.⁴³⁰

The evidence

Record evidence shows that the PAR issued to Complainant on August 29, 2019 was a written reprimand for unprofessional behavior and harassment based on three separate incidents, each of which occurred during work time.⁴³¹ The PAR cited three instances of Complainant displaying sexually explicit work on his laptop that others saw, and stated that all the events violated DuPage ROE's Acceptable Use policy.⁴³²

The first incident was when Complainant logged onto a ZOOM webinar and the website "Hot Sex Puma" appeared in the login.⁴³³ An ISU employee with whom Complainant worked, Emily Shoop (Shoop), notified Complainant about the login name and he logged off to correct the login name.⁴³⁴ Complainant attributes the login name to a friend who had used his computer.⁴³⁵ Other employees, including Hunt, knew of the incident, but it was not reported until August 2019.⁴³⁶

The second incident occurred when Complainant logged on and the website "Sex Panther" appeared in the login.⁴³⁷ No one ever said anything about this incident to Complainant and it was not reported until August 2019.⁴³⁸ Complainant does not recollect the incident.⁴³⁹

The third incident, which happened at a meeting at ISU on August 13, 2019, occurred when Complainant opened a browser to find a website while trying to access the ISU Wi-Fi and his browser autofilled to "Disturbing Men Masturbating."⁴⁴⁰ Shoop saw the autofill, at which point

⁴³⁰ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 2 and 8; Compl. Brief, OHA Dkt. No. 21-38-CP, at 8; Compl. Reply Brief, OHA Dkt. No. 23-11-CP, at 2, 3, 7-8.

⁴³¹ OIG Report, Attachment 17 (Complainant's Personnel Action Report).

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ OIG Report, Attachment 2 (Interview Report of Complainant) at 15.

⁴³⁵ *Id.*

⁴³⁶ OIG Report, Attachment 5 (Interview Report of Hunt) at 9.

⁴³⁷ *Id.*

⁴³⁸ OIG Report, Attachment 2 (Interview Report of Complainant) at 16; OIG Report, Attachment 16 (Harassment Complaint Emails from ISU); OIG Report, Attachment 5 (Interview Report of Hunt) at 9; OIG Report, Attachment 10 to Attachment 5 (Interview Report of Hunt).

⁴³⁹ OIG Report, Attachment 2 (Interview Report of Complainant) at 16.

⁴⁴⁰ OIG Report, Attachment 16 (Harassment Complaint Emails from ISU); OIG Report, Attachment 5 (Interview Report of Hunt) at 9; OIG Report, Attachment 10 to Attachment 5 (Interview Report of Hunt).

Complainant moved his laptop away from her.⁴⁴¹ A number of other individuals attending the meeting may have witnessed the third incident, although whether they observed the browser autofill is unclear.⁴⁴²

No images or videos were displayed in the three incidents, only text.⁴⁴³

In all three instances, Complainant was using his personal computer for work-related business, while at the work site, because he did not know how to use some of the technology on the computer DuPage ROE had issued to him.⁴⁴⁴

Record evidence also establishes that on August 14, 2019, Shoop sent an e-mail to Hunt reporting incidents involving displays she had either witnessed or been told about concerning Complainant and logins observed on his laptop.⁴⁴⁵ The e-mail to Hunt described three incidents: The first incident occurred when Complainant first joined the team while she was helping him with a ZOOM conference and the login showed as “Hot Sex Puma.”⁴⁴⁶ The second incident was similar, with a login of something like “Sex Panther,” but one she had not observed but only been told about by another employee.⁴⁴⁷ The third incident occurred on August 13, 2019, while she was helping him log on to ISU Wi-Fi when “Disturbing Men Masturbating” came up in the autofill.⁴⁴⁸ Shoop reported that she did not know if Complainant was using a personal laptop or not, and that “(i)t made me very uncomfortable, as a woman, to see that.”⁴⁴⁹

Hunt forwarded the e-mail to Haller, who replied that an investigation would be conducted in accordance with DuPage ROE policies and procedures.⁴⁵⁰ In turn, Haller forwarded the e-mail to Ruscitti and Dotson.⁴⁵¹ On August 15, 2019, Dotson replied that the incidents may have been in violation of the Sexual Harassment Policy on page 29 of the handbook or the computer usage or acceptable use policy.⁴⁵² (Complainant had signed the Acceptable Use Policy, indicating that he had read, understood and agreed to the policy, on January 24, 2018.⁴⁵³) Dotson suggested that they require Complainant to report to work for a meeting that Tuesday and ask him to turn in his computer for an update, which suggestion Haller endorsed.⁴⁵⁴

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ *Id.*; OIG Report, Attachment 2 (Interview Report of Complainant) at 16.

⁴⁴⁴ OIG Report, Attachment 16 (Harassment Complaint Emails from ISU); OIG Report, Attachment 5 (Interview Report of Hunt) at 9; OIG Report, Attachment 10 to Attachment 5 (Interview Report of Hunt); OIG Report, Attachment 2 (Interview Report of Complainant) at 16; OIG Report, Attachment 8 (Interview Report of Robey) at 3.

⁴⁴⁵ OIG Report, Attachment 16 (Harassment Complaint Emails from ISU); OIG Report, Attachment 5 (Interview Report of Hunt) at 9; OIG Report, Attachment 10 to Attachment 5 (Interview Report of Hunt).

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ OIG Report, Attachment 16 (Harassment Complaint Emails from ISU); OIG Report, Attachment 5 (Interview Report of Hunt) at 9; OIG Report, Attachment 10 to Attachment 5 (Interview Report of Hunt); OIG Report, Attachment 5 (Interview Report of Hunt) at 9; OIG Report, Attachment 3 (Interview Report of Haller) at 18.

⁴⁵¹ OIG Report, Attachment 5 to Attachment 6 (Interview Report of Dotson) at (unnumbered) 5-6; OIG Report, Attachment 3 (Interview Report of Haller) at 18.

⁴⁵² *Id.*; OIG Report, Attachment 5 to Attachment 6 (Interview Report of Dotson).

⁴⁵³ OIG Report, Attachment 21 (Complainant’s Signed DuPage ROE Acceptable Use Policy Form).

⁴⁵⁴ *Id.*; OIG Report, Attachment 5 to Attachment 6 (Interview Report of Dotson).

Section 7.4 of DuPage County’s Employee Policy Manual contains guidelines on sexual harassment and defines sexual conduct to include physical or verbal conduct that creates an intimidating, hostile or offensive work environment.⁴⁵⁵ Such conduct may include a range of subtle to obvious behaviors and includes, among other things, sexual innuendo or suggestive comments, sending, forwarding or soliciting sexually suggestive letters, notes, emails, or images and includes, but is not limited to, nicknames.⁴⁵⁶ Section 7.4 specifically instructs employees to end or avoid any conduct that could be interpreted as harassment under the policy, even if it was not intended as offensive.⁴⁵⁷ “Conversely, employees are expected and encouraged to inform others in the workplace whenever conduct is unwelcome, offensive or in poor taste.”⁴⁵⁸ Section 7.4 also states that DuPage County expects employees to immediately report all perceived incidents of harassment and sets out procedures for submitting a written statement concerning the incident. Additionally, Section 7.4 provides for investigation of such reports, followed by appropriate action, which may include disciplinary action, not to exclude termination.⁴⁵⁹ DuPage ROE’s 2018 and 2020 Personnel Handbooks set out the same guidelines on sexual harassment, instructions on reporting perceived incidents of harassment, and provide for investigation of such reports, which may be followed by disciplinary action, not to exclude termination.⁴⁶⁰

DuPage ROE’s Acceptable Use Policy and Policy 8.1 on Technology Resources Acceptable Use in the 2018 Personnel Handbook covers employees’ use of technology resources and the Internet. They provide, among other things, that sensitive and confidential information must be maintained on DuPage County encrypted software; that others cannot have access to that information; and, that employees may not access or engage in electronic media for any purpose that is contrary to DuPage ROE policy.⁴⁶¹ The Acceptable Use Policy states that any employee who violates the Use Policy will be subject to corrective action, including possible termination of employment.⁴⁶²

Record evidence shows that DuPage ROE uses progressive discipline.⁴⁶³ DuPage County’s Employee Policy Manual provides Disciplinary Guidelines, which guidelines include procedures for issuance of PARs.⁴⁶⁴ Written reprimands may be issued if the employee continues to have difficulties in the same area(s) or if the violation is more severe.⁴⁶⁵ DuPage ROE’s 2018 and 2020 Personnel Handbooks set out the same procedures for issuance of PARs.⁴⁶⁶

⁴⁵⁵ OIG Report, Attachment 19 (DuPage ROE 2018 Personnel Handbook), Sec. 7.4.

⁴⁵⁶ OIG Report, Attachment 19 (DuPage ROE 2018 Personnel Handbook), Sec. 7.4, Sections A and B.

⁴⁵⁷ OIG Report, Attachment 19 (DuPage ROE 2018 Personnel Handbook), Sec. 7.4, Procedures, Sec. A.

⁴⁵⁸ *Id.*, Sec. B.

⁴⁵⁹ *Id.*, Sec. C.

⁴⁶⁰ OIG Report, Attachment 19 (DuPage ROE 2018 Personnel Handbook) at 26-27; OIG Report, Attachment 20 (DuPage ROE 2020 Personnel Handbook) at 24-25.

⁴⁶¹ OIG Report, Attachment 19 (DuPage ROE 2018 Personnel Handbook), Policy 8.1; OIG Report, Attachment 21 (Complainant’s Signed DuPage ROE Acceptable Use Policy Form) at 1.

⁴⁶² OIG Report, Attachment 21 (Complainant’s Signed DuPage ROE Acceptable Use Policy Form) at 4.

⁴⁶³ OIG Report, Attachment 15 (DuPage ROE’s Supplemental Response – July 9, 2021) at 2.

⁴⁶⁴ OIG Report, Attachment 19 (DuPage ROE 2018 Personnel Handbook), Sec. 10.1; ; OIG Report, Attachment 20 (DuPage ROE 2020 Personnel Handbook) at 22-23.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

Information on past disciplinary measures taken by DuPage ROE provided to the OIG listed 10 disciplinary measures, four of which were written reprimands, three of which were verbal reprimands, one of which was a verbal warning, one of which was a suspension, and one of which was a written reprimand and issuance of a Personnel Action Report.⁴⁶⁷

Two meetings with Complainant were held before the PAR was issued, one on August 20, 2019, the other on August 29, 2019. The two DuPage ROE management officials who participated in issuance of the PAR were Dotson and Robey, the latter of whom lead the two PAR disciplinary meetings.⁴⁶⁸

During the first meeting, Complainant denied anything questionable had appeared on his computer.⁴⁶⁹ However, according to Robey, at the second meeting, Complainant admitted that all three incidents involving the explicit materials on his computer had occurred and no further investigation was conducted because Complainant had admitted the incidents.⁴⁷⁰ On acknowledging the first incident, Complainant attributed it to a friend whom he had let use his computer, and said he was not aware that the website would appear.⁴⁷¹ At the conclusion of the second conference on August 29, 2019, the PAR was issued by Robey and Dotson, and signed and dated by Robey, and signed as having been received by Complainant.⁴⁷² The PAR states that Complainant acknowledged the first incident; did not recall the second incident; and, states, without indicating denial or acknowledgement by Complainant, that the third incident was witnessed by a number of individuals.⁴⁷³

The PAR states that the incidents violated DuPage ROE's Acceptable Use Policy and made other individuals working with Complainant uncomfortable and "could be considered sexual harassment."⁴⁷⁴ The PAR lists suggestions for improvement to avoid recurrences and states that future occurrences could result in additional discipline up to and including dismissal.⁴⁷⁵

The PAR contains the following excerpt from the Employee Handbook:

Sexual Harassment may include a range of subtle and not so subtle behaviors and may involve individuals of the same or different gender. Depending on the circumstances, these behaviors may include, but are not limited to: unwanted sexual advances or requests for sexual favors; sexual jokes and innuendo; verbal abuse of a sexual nature; commentary about an individual's body, sexual prowess or sexual deficiencies; leering, whistling or touching; insulting or obscene comments or gestures; **display in the workplace of sexually suggestive objects or pictures**; and other physical, verbal or visual displays or conduct of a sexual

⁴⁶⁷ OIG Report, Attachment 15 (DuPage ROE's Supplemental Response – July 9, 2021).

⁴⁶⁸ OIG Report at 11; OIG Report, Attachment 17 (Complainant's Personnel Action Report).

⁴⁶⁹ OIG Report, Attachment 8 (Interview Report of Robey) at 3.

⁴⁷⁰ *Id.*

⁴⁷¹ OIG Report, Attachment 17 (Complainant's Personnel Action Report) at (unnumbered) 1.

⁴⁷² OIG Report, Attachment 8 (Interview Report of Robey) at 3; OIG Report, Attachment 17 (Complainant's Personnel Action Report).

⁴⁷³ OIG Report, Attachment 17 (Complainant's Personnel Action Report) at (unnumbered) 1.

⁴⁷⁴ OIG Report, Attachment 17 (Complainant's Personnel Action Report).

⁴⁷⁵ *Id.*

nature. (bold in original).⁴⁷⁶

The PAR contains four suggestions for improvement and to avoid future occurrences:

1. Only use your ROE issued laptop(s) or equipment and network folders for storage of ROE work. Do not allow “friends” or non-ROE employees to use this equipment for personal use.
2. Transfer all work related documents from your personal computer or storage devices (e.g. DropBox) to your ROE network folder.
3. Only use your ROE issued email for work related business and check your email daily.
4. Disengaging from any sexually related material on devices used for ROE work and any related activity that would violate accepted practices or make your coworkers uncomfortable.⁴⁷⁷

The PAR states, “Future occurrences may result in additional discipline up to and including dismissal.”⁴⁷⁸

Analysis

Initial Burden

Having established that he was an employee of a Department grantee, that he made a protected disclosure, and that issuance of the PAR was a disciplinary or corrective personnel action covered by the NDAA,⁴⁷⁹ Complainant now must demonstrate that his protected disclosure was a contributing factor in issuance of the PAR to him in order to satisfy his burden of proof.

Complainant’s only evidence of a connection between his disclosures and issuance of the PAR is knowledge of his disclosures on the part of the DuPage ROE officials who decided to issue the PAR and timing of the PAR’s issuance.

The evidence supports the OIG’s finding that Complainant satisfied the “knowledge” prong of the “knowledge/timing” test. The two DuPage ROE management officials who participated in issuance of the PAR were Dotson and Robey.⁴⁸⁰ The evidence supports the OIG’s finding that there was no evidence to show that Robey, to whom Dotson referred the sexual harassment complaint for investigation and who lead the PAR disciplinary meetings, had knowledge of either of Complainant’s protected disclosures in proximity to the issuance of the PAR that would have been a contributing factor to issuance of the PAR.⁴⁸¹ However, the evidence establishes that

⁴⁷⁶ *Id.* at (unnumbered) 2 (highlight in original text).

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.*

⁴⁷⁹ 41 U.S.C. § 4712(c)(6); 5 U.S.C. § 1221(e); 5 U.S.C. § 2302(iii).

⁴⁸⁰ OIG Report at 11; OIG Report, Attachment 17 (Complainant’s Personnel Action Report).

⁴⁸¹ OIG Report at 11-12; OIG Report, Attachment 6 (Interview Report of Dotson) at 6; OIG Report, Attachment 8

Dotson, who scheduled and participated in the PAR proceeding, was aware prior to issuance of the PAR that Complainant had made protected disclosures about the SEED Grant catering invoice and Cosner invoice misallocation issues.⁴⁸²

For reasons other than those argued by Complainant, the evidence satisfies the “timing” factor for causation with respect to the second disclosure. Complainant’s argument that the PAR’s issuance shortly before expiration of the EPP does not provide a causal connection, by inference or otherwise. Rather, it is the timing between when the protected disclosure was made and when the PAR was issued that must be considered to determine whether there is an inferred causal link between the disclosure and the personnel action.⁴⁸³ The PAR was issued 18 months after Complainant’s first disclosure and eight months after his second disclosure. Only the shorter of the two-time gaps, eight months, between disclosure and issuance of the PAR is sufficiently temporally proximate to demonstrate a causal link by inference between disclosure and discipline.⁴⁸⁴

Therefore, consistent with the OIG’s finding, Complainant has established, *prima facie*, that his second protected disclosure may have been a contributing factor to issuance of the PAR.

Burden Shift to DuPage ROE

However, application of the *Carr* factors to the evidence supports the OIG’s finding that DuPage ROE showed by clear and convincing evidence that the PAR was issued based on inappropriate conduct and not in retaliation for Complainant’s disclosure.⁴⁸⁵

The strength of DuPage ROE’s evidence supports its issuance of the PAR. Evidence shows that DuPage ROE received a complaint notifying it of repeated incidents of inappropriate conduct by Complainant in the workplace. DuPage ROE received a written complaint from an ISU employee that detailed three incidents of Complainant displaying sexually inappropriate material on his laptop. In her complaint, the employee described what she had seen on Complainant’s laptop, when and where she had seen or heard about it, and also explained that what she had seen made her feel uncomfortable. The evidence shows that the PAR was issued shortly after DuPage ROE received the complaint. Unrefuted evidence shows that Complainant’s conduct was in violation of the Acceptable Use policy he signed with DuPage ROE.

There is no evidence that indicates motive to retaliate on the part of either of the two DuPage ROE officials who handled the PAR, Dotson and Robey. Undisputed evidence shows that

(Interview Report of Robey).

⁴⁸² OIG Report at 12; OIG Report, Attachment 6 (Interview Report of Dotson) at 4-6.

⁴⁸³ 5 U.S.C. § 1221(e)(1); *see Armstrong v. Arcanum Group, Inc.*, 897 F.3d at 1287.

⁴⁸⁴ *See Kewley v. Dep’t of Health and Human Servs.*, 153 F.3d at 1363 (noting that in S. Rep. No. 100-413 (1988), on enacting the Whistleblower Protection Act, Congress did not state a specific time period but suggested that an action taken within the same performance evaluation period normally be considered a reasonable time and gave clear guidance to use the reasonable time standard liberally); *Smith v. Dep’t of Agriculture*, 64 M.S.P.R. at 65 (knowledge/timing test satisfied where personnel actions were taken less than 1 year after protected disclosures made); *Woodworth v. Dep’t of Navy*, 105 M.S.P.R. at 465 (disclosure made just over eight months before agency’s personnel action was a contributing factor); *Powers v. Dep’t of Navy*, 97 M.S.P.R. at 561 (disclosure was contributing factor to personnel action taken approximately nine months after disclosure made).

⁴⁸⁵ OIG Report at 12.

Robey had no knowledge of Complainant's protected disclosures. The evidence shows, without more, that although Dotson had knowledge of the protected disclosures, his involvement with the PAR process was in accord with DuPage ROE policy and in response to an employee complaint.

Finally, the evidence shows that DuPage ROE had used written reprimands and a PAR in a previous instance with a similarly situated employee and there is no evidence that shows Complainant was singled out for issuance of a PAR because he was a whistleblower.⁴⁸⁶

Evidence that Complainant points to does not detract from DuPage ROE's clear and convincing evidence that it would have issued the PAR regardless of Complainant's disclosures. Complainant was provided two opportunities to respond to the allegations. He initially denied all three incidents, but later admitted to the first incident while purporting to have no recollection of the second incident. Complainant correctly points out that Robey stated in his interview with OIG investigators that Complainant had admitted to all three incidents although the PAR establishes that Complainant admitted only the first incident.⁴⁸⁷ While Robey's statement to OIG investigators that Complainant admitted to all three incidents is not supported by the PAR or any other evidence, all evidence, including the PAR and interview reports of Complainant, Robey, and Dotson, clearly establishes that Complainant was in violation of the Acceptable Use Policy, as DuPage ROE officials believed and the PAR concluded.⁴⁸⁸

Complainant complains that he was not counseled, did not receive additional training, and was not suspended for the incidents.⁴⁸⁹ But, the PAR was an admonishment, a form of remedial discipline less than suspension, that provided counseling appropriate to the offense(s). It contained four suggestions for improvement and specific directions on how to avoid future occurrences, including not using his personal laptop for work-related business and disengaging from any sexually related material on devices used for work and any related activity that would violate accepted practices or make co-workers uncomfortable.

Complainant argues, without explanation, that he did not sexually harass anyone and no victims were identified. Here, Complainant misses the focus of the PAR's conclusion. The PAR did not conclude that Complainant sexually harassed any individuals, but only that the events made other individuals he was working with very uncomfortable and that they could have been considered sexual harassment. Rather, the PAR's conclusion was that Complainant had violated DuPage ROE's Acceptable Use Policy and the suggestions for improvement enumerated in the PAR, which included using employer's issued laptop, not allowing friends to use that equipment for personal use, transferring work-related documents from his personal laptop to the DuPage ROE network folder, and using employer's issued email for work-related business, focused on acceptable use.

⁴⁸⁶ OIG Report at 12; OIG Report, Attachment 15 (DuPage ROE's Supplemental Response – July 9, 2021).

⁴⁸⁷ OIG Report at 12; OIG Report, Attachment 8 (Interview Report of Robey) at 3; OIG Report, Attachment 17 (Complainant's Personnel Action Report).

⁴⁸⁸ OIG Report at 11; OIG Report, Attachment 21 (Complainant's Signed DuPage ROE Acceptable Use Policy Form) at 1; OIG Report, Attachment 17 (Complainant's Personnel Action Report); OIG Report, Attachment 2 (Interview Report of Complainant) at 15-16; OIG Report, Attachment 6 (Interview Report of Dotson) at 6; OIG Report, Attachment 8 (Interview Report of Robey) at 3.

⁴⁸⁹ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 10.

Complainant's argument that none of the incidents occurred on his work-issued laptop, but on his personal laptop, does not serve to detract from DuPage ROE's clear and convincing evidence with respect to its conclusion that Complainant violated its Acceptable Use Policy and its reason for issuing the PAR. DuPage ROE's Acceptable Use Policy covers employees' use of the Internet and prohibits engagement in electronic media for any purpose that is contrary to DuPage ROE policy.⁴⁹⁰ While Complainant may have been using his personal laptop when the incidents occurred, he was accessing the school's Wi-Fi, situated in the workplace, and in the company of other employees, and, therefore, in DuPage ROE's view, failed to adhere to its use policy.

Nor is Complainant's argument that the timing of the complaints of sexual harassment, including the delay in reporting the earlier incidents, was suspicious and contrived to evaluate his performance as his EPP reached its end persuasive. Complainant points to the gap in time from when the first incident occurred in 2017 and its report date in August 2019, even though the incident was broadly known. There is nothing out of the ordinary in including earlier incidents for the first time when a fresh incident is reported. And, the most recent of the three purported incidents was reported within a day of its occurrence, following which DuPage ROE promptly took action after receiving the report.

That the August 2019 incident occurred close in time to conclusion of the EPP is attributable only to Complainant and whatever may have been displayed on his personal laptop and his use of his personal laptop rather than his work-issued laptop, and not, by any stretch of the imagination, an incident attributable to DuPage ROE when any offending material contained on his personal laptop and use of his personal laptop in a workplace meeting was strictly under the control of Complainant. In short, there is no evidence that DuPage ROE supervisors' alleged desire to see Complainant disciplined after he made protected disclosures the motivation for or cause for issuing the PAR. Rather, the evidence shows Complainant's own conduct was the cause of issuance of the PAR, the consequences for which he was not shielded by virtue of any protected disclosures he made.⁴⁹¹

Evidence in the OIG's Report and other evidence before me for review leads me to conclude that Complainant established, prima facie, that his second protected disclosure was a contributing factor to issuance of the PAR. However, DuPage ROE provided clear and convincing evidence that it would have issued the PAR to Complainant regardless of any protected disclosures.

(viii) The Fifth Reprisal

The OIG found that Complainant established that the protected disclosures he made may have been a contributing factor to his termination, but that DuPage provided clear and convincing evidence that Complainant's termination was based ultimately on his job performance, for numerous, contemporaneously documented performance issues that began in mid-2018, prior to

⁴⁹⁰ OIG Report, Attachment 21 (Complainant's Signed DuPage ROE Acceptable Use Policy Form) at 1.

⁴⁹¹ See *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-86, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977); *Lachance v. White*, 174 F. 3d at 1381.

his disclosures, and continued through September 2019, for which DuPage ROE would have terminated Complainant regardless of the protected disclosures.⁴⁹² The OIG concluded that Complainant's termination from DuPage ROE was not retaliatory.

Specifically, the OIG found that Complainant met his burden of showing that his disclosures were a contributing factor to his termination as to Haller and Ruscitti, both of whom had knowledge of the disclosures, but that Complainant did not show by a preponderance of the evidence that Robey had knowledge of the disclosures.⁴⁹³

The OIG based its finding on information and documents provided by Complainant and DuPage ROE, including the Notice of Employee Separation effective October 4, 2019, and e-mails and memos concerning performance issues that included the period March through September 2019.⁴⁹⁴

The parties' arguments

DuPage ROE agrees with the OIG's conclusion that it provided clear and convincing evidence that its termination of Complainant was due to his poor job performance and not retaliatory. It contends that the evidence shows that as early as mid-2018 Complainant had persistent and well-documented performance deficiencies that continued through his termination from employment in October 2019.⁴⁹⁵ Those deficiencies included confusion with grant responsibilities, lack of understanding of basic accounting principles, lack of follow through on deliverables and sloppy deliverables, and difficulties with basic technological requirements (such as electronic schedules and project management software).⁴⁹⁶ DuPage ROE further contends that despite its clear directive and explicit notice to Complainant about his deficiencies, as well as consistent communication with Complainant during the EPP period, his performance issues persisted and resulted in his termination from employment.⁴⁹⁷

Complainant asserts that DuPage ROE terminated his employment in retaliation for the two protected disclosures he made.⁴⁹⁸ Complainant contends that the EPP was designed to ensure his failure so that DuPage ROE could have a basis to terminate him and that DuPage ROE has not shown by clear and convincing evidence that it fired him for good cause and not, at least in part, because of his whistleblowing.⁴⁹⁹

Complainant generally argues that he was pretextually terminated on the grounds of poor

⁴⁹² *Id.*

⁴⁹³ OIG Report at 14.

⁴⁹⁴ OIG Report at 14; OIG Report, Attachment 14 (Complainant's Job Performance Examples to Inform the EPP); OIG Report, Attachment 28 (Complainant's EPP Performance Activities 1-12 – Evidence by DuPage ROE); OIG Report, Attachment 31 (Complainant's DuPage County Notice of Employee Separation).

⁴⁹⁵ DuPage ROE Brief, OHA Dkt. No. 21-38-CP, at 3.

⁴⁹⁶ *Id.* at 3 – 4.

⁴⁹⁷ *Id.* at 4 – 5.

⁴⁹⁸ Compl. Brief, OHA Dkt. No. 21-38-CP, at 4; Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 1; Compl. Reply Brief, OHA Dkt. No. 23-11-CP, at 1.

⁴⁹⁹ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 2 and 6.

performance, but was actually terminated because he was unafraid of standing up to supervisors and to guarantee that he would not be there in the future to identify and resist further violations of the Uniform Guidance.⁵⁰⁰ He describes himself as a seasoned professional, a conscientious member of the grant leadership team, and a problem solver who made numerous contributions to the improvement of grant operations at DuPage ROE and tried to meet grant project goals when initial plans proved untenable, and was fired, not for poor work performance, but in retaliation for his attempts to stop Hunt and Haller's violations of the Uniform Guidance, which violations included falsified contracts and invoices.⁵⁰¹

Complainant advances multiple other arguments. He contends that he was uncertain about who his supervisor was throughout his tenure as a consultant and then an employee at DuPage ROE and so had to make political calculations when maneuvering between three supervisors. Ruscitti hired him to work as a consultant from October through December 2017 on oversight of the grant just awarded to DuPage ROE.⁵⁰² In January 2018, DuPage ROE hired him for a regular grant-funded job, in which he says his mission was to ensure that the grant staff would not violate grant regulations or rules, and if he found areas of special risk or violation, he was to report them to Ruscitti.⁵⁰³ Ruscitti was the Regional District Superintendent who had sought him out for full-time employment on the grant. But Haller and Hunt were co-directors of the grant project and both assigned him tasks, although Haller was employed by DuPage ROE and Hunt by ISU.

Complainant argues that changes to his job responsibilities were designed to result in his termination. He asserts that he was hired for his grant management/financial oversight experience, but as his job responsibilities were modified, he was tasked with data infrastructure work, in which field he did not have acknowledge, experience, or professional connections and in which job assignment he was intentionally placed to ensure his failure.⁵⁰⁴

Complainant alleges that documentary evidence used to support the performance measures was contrived to depict him as incompetent and the poor performance described therein was not rightly attributed to him.⁵⁰⁵ As to DuPage ROE's depiction of him as incompetent, Complainant asserts that DuPage ROE would not have reached out to and hired him on a permanent basis if he were incompetent. Before joining DuPage ROE as a consultant, he was the Director of the Competitive Grants Unit for CPS and had experience in federal education grant submissions and the administration of grant projects in the post-award phase.⁵⁰⁶ As to work wrongly attributed to him, Complainant points to a delay in contract execution attributed to him but that was the fault of a different employee.⁵⁰⁷ Complainant also points to DuPage ROE's distortion of advice from the Department regarding commingling between the EIR and SEED Grants where DuPage ROE proffered an incomplete e-mail as proof of the Department's approval of the use of EIR Grant

⁵⁰⁰ Comp. Brief, OHA Dkt. No. 21-38-CP, at 5; Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 1-2, 10.

⁵⁰¹ Compl. Brief, OHA Dkt. No. 21-38-CP, at 4; Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 3-6, 10; Compl. Reply Brief, OHA Dkt. No. 23-11-CP, at 2, 3-5.

⁵⁰² Compl. Brief, OHA Dkt. No. 21-38-CP, at 3.

⁵⁰³ Id.

⁵⁰⁴ Compl. Brief, OHA Dkt. No. 21-38-CP, at 7; Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 1-2.

⁵⁰⁵ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 5-6.

⁵⁰⁶ Compl. Brief, OHA Dkt. No. 21-38-CP, at 3.

⁵⁰⁷ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 5-6.

funds to pay SEED Grant bills, omitting the final line of the Department’s e-mail that instructed “continue to clearly document and delineate how these expenses are (sic) be applied to each respective grant so that the funding streams remain distinct.”⁵⁰⁸

Complainant asserts that during the EPP period there were no regular performance check-ins or evaluations between Haller or Ruscitti and himself as there should have been, that he had less, not more, interaction with his supervisors during the EPP period, and argues that Haller and Ruscitti set him up to fail by isolating him.⁵⁰⁹ Complainant asserts that Haller and Hunt refused to engage with him throughout the Summer of 2019 regarding his deliverables under the EPP, in violation of DuPage Policy, and a departure from how EPPs are supposed to work.⁵¹⁰

Complainant also asserts that DuPage ROE mischaracterized his work in the evaluation, that the outcomes were selective, exaggerated, and presented entirely out of context, and did not allow him an opportunity to respond.⁵¹¹ Specifically, Complainant asserts that the only evidence of his poor performance for “use of technology” was the PAR, that he did not submit poor written meeting notes as stated in the evaluation, and that the contract cited was only in draft form.⁵¹² He asserts that he met every objective of the EPP aside from those that were taken away from him or those which Haller and Hunt blocked him from doing.⁵¹³

Finally, Complainant asserts that he was not notified in advance that the purpose of the September 30, 2019 meeting was to appraise his performance so he was unprepared to defend himself, he was not given an opportunity to review the emails and memos cited in support of the performance ratings, and he was provided no opportunity to offer contrary evidence, even though it was DuPage ROE’s practice to provide employees who received final performance appraisals with an opportunity to respond.⁵¹⁴ Complainant asserts that if he had been provided an opportunity to offer contrary evidence he would have provided evidence of his drafting of the DuPage Grant Internal Controls Manual, his weekly organization of grant staff meetings, and the strategy he developed to raise awareness about the principal grant project.⁵¹⁵

Although Complainant makes arguments specifically responsive to the OIG findings and to the performance review, he also asserts that upon his termination he was no longer able to access e-mails that would support his assertions and that OIG did not seek such e-mails, but, instead, accepted only those e-mails offered by DuPage ROE witnesses.⁵¹⁶

⁵⁰⁸ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 6, citing to OIG Report, Attachment 3 to Attachment 5, (Interview Report of Hunt); Compl. Reply Brief, OHA Dkt. No. 23-11-CP, at 6.

⁵⁰⁹ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 5; Compl. Reply Brief, OHA Dkt. No. 23-11-CP, at 6; Compl. Brief, OHA Dkt. No. 21-38-CP, at 8; Compl. Exh. C-14 at 2-3, Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

⁵¹⁰ Compl. Brief, OHA Dkt. No. 21-38-CP, at 8; Compl. Exh. C-14, at 2-3, Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

⁵¹¹ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 6.

⁵¹² Compl. Brief, OHA Dkt. No. 21-38-CP, at 8.

⁵¹³ *Id.*

⁵¹⁴ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 7; Compl. Exh. C-14 at 2-3, Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

⁵¹⁵ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 7; OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 14 and 18.

⁵¹⁶ Compl. Brief, OHA Dkt. No. 21-38-CP, at 6 and 8; Compl. Reply Brief, OHA Dkt. No. 23-11-CP, at 6.

Complainant also argues that the OIG did not connect the dots in the evidence, that everything he submitted to the OIG was not included in the OIG Report but that the OIG accepted DuPage ROE's representations at face value and did not compare documents he submitted to those provided by DuPage ROE's witnesses.⁵¹⁷

In short, Complainant argues that DuPage ROE has not shown and cannot show by clear and convincing evidence that he was fired for good cause and not, at least in part, because of his whistleblowing. In support of this argument, Complainant asserts that there is no evidence to show how he was performing or how his supervisors were communicating with him, and that the evidence submitted by DuPage ROE in support of the performance review inaccurately attributes errors to him.⁵¹⁸

The evidence

The DuPage County Employee Policy Manual provides that employees who fail to obtain and maintain satisfactory productivity and quality of work performance may be subjected to disciplinary action, including termination.⁵¹⁹

Information on past disciplinary measures taken by DuPage Roe provided to the OIG listed 10 disciplinary measures taken against employees, four of which were written reprimands, three of which were verbal reprimands, one of which was a verbal warning, one of which was a suspension, and one of which was a written reprimand and issuance of a Personnel Action Report.⁵²⁰

The evidence shows that Haller and Hunt communicated with Complainant during the EPP period, both during meetings and after meetings, sometimes reiterating what had been said at meetings.⁵²¹

Haller prepared a memo dated April 12, 2019 titled "Performance Issues with Albert Complainant since Meeting at DuPage ROE on 3/14/19," which she sent to Ruscitti.⁵²² One of the performance issues listed in the memo was Complainant's failure to submit invoices for the period October 2018 through March 2019 to ISU for payment immediately upon execution of an amended contract related to the SEED subaward for DuPage ROE.⁵²³ Complainant claimed to have sent the invoices by e-mail to ISU, but ISU did not receive them, which may have been attributable to his attachment being too large to transmit. Complainant did not follow-up to ensure ISU had received the e-mail. Ultimately the invoices were not provided to ISU until April 2019. In the meantime, Dotson issued a stop payment order on reimbursements to partners and Ruscitti

⁵¹⁷ Compl. Brief, OHA Dkt. No. 21-38-CP, at 6.

⁵¹⁸ Compl. Reply Brief, OHA Dkt. No. 23-11-CP, at 2-7.

⁵¹⁹ OIG Report, Attachment 19 (DuPage ROE 2018 Personnel Handbook) at 6.

⁵²⁰ OIG Report, Attachment 15 (DuPage ROE's Supplemental Response – July 9, 2021).

⁵²¹ OIG Report, Attachments 8 and 10 to Attachment 3 (Interview Report of Haller).

⁵²² OIG Report, Attachment 3 (Interview Report of Haller) at 15; OIG Report, Attachment 6 to Attachment 3 (Interview Report of Haller).

⁵²³ OIG Report, Attachment 3 (Interview Report of Haller) at 15.

issued a letter to grant partners indicating the hold up on payments was the result of issues at ISU.⁵²⁴

Record evidence shows that Haller informed Complainant in advance that the purpose of the September 30, 2019 meeting was to conduct a performance review.⁵²⁵ The September 30th meeting was scheduled by Haller, by e-mail sent to Complainant on September 24, 2019, at Ruscitti's request.⁵²⁶ In her e-mail to Complainant, Haller stated, "As project year 2 of the LEAD Projects draws to a close it is time to conduct performance reviews for each of the grant-funded positions."⁵²⁷

Haller requested that Robey handle Complainant's performance evaluation meeting. In response to Haller's request, Robey replied that based on documents Haller had provided that it appeared Complainant had not met goals, but that he would not be a good judge of Complainant's performance as he had very limited knowledge regarding Complainant's performance and rarely had contact with him.⁵²⁸ Robey told OIG investigators that he had no direct knowledge of Complainant's work performance either before or after he was placed on the EPP.⁵²⁹ Robey also told OIG investigators that he thought that Complainant did not appear to have a thorough understanding of his work and performance expectations based on his observations of Complainant's behavior and facial expressions when in the office and conversations he overheard between Complainant and others.⁵³⁰ Robey asked Haller, among other things, what supports Complainant had received.⁵³¹ In that same e-mail, he also responded to Haller that he believed the team had already decided to terminate Complainant pending attorney approval.⁵³²

In preparation for the September 30th meeting, Haller prepared an EPP review with ratings that showed an overall performance rating of "Does Not Meet Expectations," documents in support of the EPP ratings of "Does Not Meet Expectations," and a script for Robey to use at the meeting.⁵³³ The script included a review of the EPP ratings and evidence in support of the ratings and concluded, under "Next Steps," with "Termination?"⁵³⁴

On September 26, 2019, after reviewing the documents from Haller, Robey replied to Haller, with a copy to Ruscitti, that his "suggestion is that we need to give Albert an opportunity to respond to your comments. I would remove the statement about termination. If he has no

⁵²⁴ *Id.* at 15-16; OIG Report, Attachment 7 to Attachment 3 (Interview Report of Haller).

⁵²⁵ OIG Report, Attachment 27 (DuPage ROE Internal Emails - Haller to HR); OIG Report, Attachment 23 (DuPage ROE Internal Emails – Scheduling Complainant's PA Meeting) at (unnumbered) 4.

⁵²⁶ OIG Report, Attachment 27 (DuPage ROE Internal Emails – Haller to HR); OIG Report, Attachment 23 (DuPage ROE Internal Emails – Scheduling Complainant's PA Meeting) at (unnumbered) 2 and 4.

⁵²⁷ OIG Report, Attachment 23 (DuPage ROE Internal Emails – Scheduling Complainant's PA Meeting) at (unnumbered) 4.

⁵²⁸ OIG Report, Attachment 3 (Interview Report of Haller) at 18-19; OIG Report, Attachment 27 (DuPage ROE Internal Emails – Haller to HR).

⁵²⁹ OIG Report, Attachment 8 (Interview Report of Robey) at 2.

⁵³⁰ *Id.*

⁵³¹ OIG Report, Attachment 23 (DuPage ROE Internal Emails – Scheduling Complainant's PA Meeting) at (unnumbered) 1.

⁵³² *Id.* at (unnumbered) 5.

⁵³³ *Id.* at (unnumbered) 5 - 11.

⁵³⁴ *Id.* at (unnumbered) 11.

response, we can move for termination later in the week. If he does, we need to see what he has. Just rate him unsatisfactory and we will see what he says.”⁵³⁵ When interviewed by OIG investigators, Robey did not know if Complainant was provided an opportunity to respond to the Performance Appraisal or whether he did respond to it.⁵³⁶

Record evidence shows that Haller and Robey met with Complainant on September 30, 2019, for a performance review meeting, at which the Performance Appraisal was discussed and signed.⁵³⁷ The Performance Appraisal was aligned to the EPP and assessed Complainant’s performance of the goals, activities, and performance expectations listed in the EPP as of September 30, 2019.⁵³⁸ The appraisal was completed by Haller and Robey.⁵³⁹ Hunt did not participate in completing the appraisal but was a part of monitoring the EPP.⁵⁴⁰ The appraisal assessed the five performance goals, 12 corresponding activities that included deliverables, and seven general performance expectations established in the EPP. Haller and Robey rated Complainant as follows⁵⁴¹:

Goal, Activity, or Performance Expectation	Rating
Goal: Align time and effort appropriately to funding sources	Unable to score – Complainant not compliant with required reporting on weekly activities
Goal: complete all tasks assigned	Does Not Meet Expectations
Goal: consistently provide accurate financial records and data spreadsheets	Does Not Meet Expectations
Goal: represents DuPage ROE and the LEAD projects with professionalism and adds value to the projects and partnering ROEs	Does Not Meet Expectations
Goal: collaborates in problem-solving and decision-making when appropriate and request by Reg. Supt. And/or Project Directors	Does Not Meet Expectations
Activity #1: Create and execute four plans for ROE development support	Does Not Meet Expectations
Activity #2: Establish and maintain a formalized communication plan	Does Not Meet Expectations
Activity #3: Participate in discussions with partners every other month	Does Not Meet Expectations

⁵³⁵ *Id.* at (unnumbered) 10.

⁵³⁶ OIG Report Attachment 8 (Interview Report of Robey) at 6.

⁵³⁷ OIG Report at 6; OIG Report, Attachment 29 (Notes from Complainant’s PA Meeting-9/30/19); OIG Report, Attachment 3 (Interview Report of Haller) at 18–19.

⁵³⁸ OIG Report, Attachment 22 (Final Performance Appraisal Aligned with EPP – Provided by Complainant).

⁵³⁹ OIG Report at 12; OIG Report, Attachment 3 (Interview Report of Haller) at 18 - 19.

⁵⁴⁰ OIG Report, Attachment 5 (Interview Report of Hunt) at 9.

⁵⁴¹ OIG Report, Attachment 22 (Final Performance Appraisal Aligned with EPP – Provided by Complainant).

Activity #4: Actively participate in every other week LEAD staff meetings	Somewhat Meets Expectations
Activity #5: Actively participate in every other week LEAD Project progress webinars or summaries	Somewhat Meets Expectations
Activity #6: Collaborate with Project Director and IARSS on survey enhancements	Does Not Meet Expectations
Activity #7: Review all EIR invoices for alignment to approved budget, ensure they include allowable costs and are properly documented	Does Not Meet Expectations
Activity #8: Communicate regularly with staff from grant partners	Does Not Meet Expectations
Activity #9: Keep project leaders informed of on-going communication	Does Not Meet Expectations
Activity #10: Participate in other meetings as needed and determined by Regional Superintendent and/or Project Directors	Somewhat Meets Expectations
Activity #11: Completion of other project tasks as requested by Regional Superintendent, Finance Director, or Project Directors	Does Not Meet Expectations
Activity #12: Each Monday, send an e-mail to the Project Directors that provides a list of work tasks accomplished in previous week, identify work still outstanding, and list tasks anticipated for current week	Does Not Meet Expectations
Expectation: Organize electronic files	Unable to score – Complainant has not provided evidence this has been completed
Expectation: Follow through on tasks assigned or promised	Does Not Meet Expectations
Expectation: Respond in timely and professional matter to requested communications	Does Not Meet Expectations
Expectation: Demonstrate strong attention to detail	Does Not Meet Expectations
Expectation: Effectively use technology	Does Not Meet Expectations
Expectation: Thoroughly proofread all communications	Unable to score – Despite being directed to do so, Complainant does not routinely cc Directors on communication with partners.

Expectation: Effectively collaborate with Reg. Supt., Finance Director, Project Directors, and Regional Coordinators	Does Not Meet Expectations
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Each rating for the activities and performance expectations included an explanation for the rating.⁵⁴²

For Activity #1, the record contains e-mails with reminders and explanations sent to Complainant, between April 24, 2019 and September 20, 2019, about deliverables and deadlines for a boilerplate proposal for each ROE.⁵⁴³

For Activity #3, the record contains e-mails to Complainant concerning errors with financial reporting and review.⁵⁴⁴

For Activity #4, the record contains e-mails with Complainant concerning attempts to gather information for a chart he was to develop.⁵⁴⁵

For Activity #5, the record contains documents reflecting problems with meeting minutes drafted by Complainant.⁵⁴⁶

For Activity #7, the record contains a summary of a delay in invoicing ISU and e-mails concerning financial error.⁵⁴⁷

For Activity #8, the record contains evidence of information from ROEs that conflicted with what Complainant reported.⁵⁴⁸

For Activity #9, the record contains summaries of discussions with Complainant concerning work he was performing.

For Activity #10, the record contains listings of deliverables to be produced by Complainant, together with deadlines, and the results.⁵⁴⁹

For Activity #11, the record contains drafts written by Complainant, with commentary and edits, which drafts were described as of “poor quality” and indicated he had ignored feedback.⁵⁵⁰

For Activity #12, the record contains e-mail reminders sent to Complainant regarding

⁵⁴² *Id.*

⁵⁴³ OIG Report, Attachment 28 (Complainant’s EPP Performance Activities 1-12 – Evidence by DuPage ROE).

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.*

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.*

weekly activity reports.⁵⁵¹

DuPage ROE did not provide Complainant with either the Performance Appraisal or the emails and memoranda cited in the Performance Appraisal before the meeting.⁵⁵²

The Performance Appraisal did not mention work that Complainant had performed; it did not mention that Complainant had drafted the DuPage Internal Controls Manual, organized weekly grant staff meetings, or developed a strategy to raise awareness about the principal grant project.⁵⁵³

At the meeting, Complainant was allowed an opportunity to respond, but did not do so as he did not feel prepared to address the Performance Appraisal.⁵⁵⁴ Robey asked Complainant if he had any countering information he wanted to submit for a rebuttal to the EPP ratings.⁵⁵⁵ Complainant did not say much at the meeting.⁵⁵⁶ Robey suggested to Complainant that he could resign or would otherwise be terminated from his position and gave Complainant until the end of the week to make that decision.⁵⁵⁷

DuPage ROE did not provide Complainant with an opportunity to respond to the Performance Appraisal following the meeting, although DuPage ROE employee Robey had assumed that DuPage ROE would have given Complainant an opportunity to respond.⁵⁵⁸

Immediately after the meeting, Complainant asked Robey and Haller whether it would be better to resign or be terminated.⁵⁵⁹ Again later that week, when Haller reached out to Complainant to collect his assigned office equipment and supplies, Complainant asked Haller whether it would be better to resign or be terminated and also asked whether they could talk about his performance issues.⁵⁶⁰ Haller responded that she was not at liberty to have those discussions.⁵⁶¹

When Complainant did not resign, DuPage ROE fired him and his last day at work was on October 4, 2019.⁵⁶² In its Notice of Employee Separation, DuPage ROE stated that it separated Complainant from employment on October 4, 2019 because “(h)e was rated unsatisfactory with no defense given for lack of performance.”⁵⁶³ Ruscitti signed the Notice of Employee Separation.⁵⁶⁴ At the LEAD Grants Coordinator Call on October 7, 2019, Haller announced that

⁵⁵¹ *Id.*

⁵⁵² Compl. Brief, OHA Dkt. No. 21-38-CP, at 9.

⁵⁵³ OIG Report, Attachment 22 (Final Performance Appraisal Aligned with EPP – Provided by Complainant).

⁵⁵⁴ Compl. Brief, OHA Dkt. No. 21-38-CP, at 9.

⁵⁵⁵ OIG Report, Attachment 3 (Interview Report of Haller) at 19.

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.*

⁵⁵⁸ Compl. Brief, OHA Dkt. No. 21-38-CP, at 9; OIG Report, Attachment 3 (Interview Report of Haller) at 19; OIG Report, Attachment 8 (Interview Report of Robey) at 6.

⁵⁵⁹ OIG Report, Attachment 3 (Interview Report of Haller) at 19.

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.*

⁵⁶² *Id.*; Compl. Brief, OHA Dkt. No. 21-38-CP, at 10.

⁵⁶³ OIG Report, Attachment 31 (Complainant’s DuPage County Notice of Employee Separation).

⁵⁶⁴ *Id.*

Complainant had left the project and that his last day was Friday.⁵⁶⁵

Haller expressed surprise that the EPP process did not work to help Complainant perform in his position.⁵⁶⁶

Analysis

Initial Burden

Having established that he was an employee of a Department grantee, that he made two protected disclosures, and that DuPage ROE's termination of his employment was a personnel action squarely within the prohibited personnel actions specified in the NDAA,⁵⁶⁷ Complainant now must demonstrate that his protected disclosures were a contributing factor in the personnel action taken against him in order to satisfy his burden of proof.⁵⁶⁸

There is no direct evidence to support Complainant's contention that his protected disclosures were a contributing factor in his termination and so he relies on circumstantial evidence, namely that Page ROE decisionmakers had knowledge of his disclosures before his employment was terminated and that his termination was predicated on unsuccessful completion of the EPP, which he contends was put in place in reprisal for his disclosures.

Because I have found that the evidence does not support a finding that the EPP was an act of retaliation and its unsuccessful completion served as the basis for Complainant's termination, placement of Complainant on the EPP, without more, cannot transitively extend causation to his termination and, therefore, the "timing" prong of the "knowledge/timing" test is not satisfied vis-à-vis retaliatory placement of him on the EPP.

However, the OIG's finding that Complainant's disclosures may have been a contributing factor to his termination is supported, in part, by record evidence. The first disclosure occurred in April 2018, approximately 18 months before Complainant was terminated, and, therefore, was too remote in time to infer causation.⁵⁶⁹ However, Complainant's second disclosure was made sufficiently close in time, in February 2019, within approximately eight months of the termination action and within the same evaluation period, and, therefore, establishes sufficient temporal proximity to meet the timing test.⁵⁷⁰

⁵⁶⁵ OIG Report, Attachment 5 (Interview Report of Hunt) at 9; OIG Report, Attachment 11 to Attachment 5 (Interview Report of Hunt).

⁵⁶⁶ OIG Report at 10; OIG Report, Attachment 3 (Interview Report of Haller) at 17.

⁵⁶⁷ 41 U.S.C. § 4712(a)(1).

⁵⁶⁸ 41 U.S.C. § 4712(c)(6) (adopting the burdens of proof of 5 U.S.C. § 1221(e); *DuPage Regional Office of Education v. U.S. Dep't of Educ.*, 58 F. 4th at 350-351.

⁵⁶⁹ See *Kewley v. Dep't of Health and Human Servs.*, 153 F.3d at 1363 (noting that in S. Rep. No. 100-413 (1988), on enacting the Whistleblower Protection Act, Congress did not state a specific time period but suggested that an action taken within the same performance evaluation period normally be considered a reasonable time and gave clear guidance to use the reasonable time standard liberally).

⁵⁷⁰ See, e.g., *Smith v. Dep't of Agriculture*, 64 M.S.P.R. at 65 (knowledge/timing test satisfied where personnel actions were taken less than 1 year after protected disclosures made); *Woodworth v. Dep't of Navy*, 105 M.S.P.R. at 465 (disclosure made just over eight months before agency's personnel action was a contributing factor); *Powers v. Dep't*

Turning to the “knowledge” prong of the “knowledge/timing” test, record evidence shows that DuPage ROE decision makers responsible for Complainant’s termination, Haller and Ruscitti, but not Robey, had knowledge of Complainant’s second disclosure both before the EPP was implemented and before the termination action was taken.⁵⁷¹ Complainant thus satisfied the “knowledge” prong of the test.

Burden Shift to DuPage ROE

However, application of the *Carr* factors to the evidence leads me to the same conclusion as the OIG made, that DuPage ROE showed by clear and convincing evidence that it would have terminated Complainant from employment regardless of any protected disclosures.

DuPage ROE’s evidence in support of its termination of Complainant from its employment is strong. The activities listed in the EPP were clear and succinct. Further, the evidence shows that the activities of the EPP were developed to play to Complainant’s strengths and to allow him the opportunity to improve his performance. The evidence also shows that Haller provided feedback and guidance to Complainant during the EPP period.

DuPage ROE’s evidence also shows, clearly and convincingly, with supporting documentation, much of it contemporaneously written, Complainant’s significant performance failures both before and during the EPP period. The performance failures addressed in the EPP were aligned to the goals, expectations, and activities of the EPP. The performance failures included failing to develop boilerplate template language for ROE development proposals, failing to establish a formalized communication plan, failing to participate in discussions with partners every other month, failing to collaborate with the Project Director and IARSS on survey enhancements, failing to review all EIR invoices for their alignment to budget and ensure they included allowable costs and were properly documented, failing to communicate regularly with staff from grant partners, failing to keep project leaders informed of ongoing communications, failing to complete other project tasks as requested, and failing to send e-mails each Monday to Project Directors that provided his past week’s accomplished tasks and list of tasks for current weeks.

The existence and strength of any motive to retaliate on the part of the employer’s officials who were involved in the decision is weak. Complainant’s protected disclosure was made a year and a half before he was terminated. His disclosure involved one of his job functions, reviewing invoices to ensure their compliance with Uniform Guidance, the issue of which was resolved to DuPage ROE’s satisfaction and with written approval from the Department. Although there may have been motivation based on fear of loss of grant funding and animus on the part of Haller, the existence and strength of that motive was dissipated by the passage of time and the outcome of a resolution favorable to DuPage ROE.

of Navy, 97 M.S.P.R. at 561 (disclosure was contributing factor to personnel action taken approximately nine months after disclosure made).

⁵⁷¹ OIG Report at 14.

Finally, there is not any evidence that DuPage ROE has taken similar action against employees who are not whistleblowers but who are otherwise similarly situated.⁵⁷²

DuPage ROE showed by clear and convincing evidence that it would have terminated Complainant from employment regardless of any protected disclosures. That evidence demonstrates that DuPage ROE honestly believed that Complainant's performance was inadequate and that it terminated him based on that belief.

Complainant raises a litany of objections in an effort to show that DuPage ROE did not show by clear and convincing evidence that it would have terminated him regardless of his protected disclosures.

First, Complainant asserts that he is a seasoned professional, was a conscientious member of the grant leadership team, and a problem solver. Those assertions, without more, do not address the list of specific, ongoing performance problems that DuPage ROE documented, but only offer a description of how Complainant viewed himself.

Second, Complainant attributes his performance deficiencies to uncertainty about who his supervisor was. Complainant's professed uncertainty about who his supervisor is undercut by his stated understanding that he understood that he would be working under the supervision and management of Haller and Hunt as the grant directors/co-directors of the EIR and SEED Grants.⁵⁷³ Nonetheless, the evidence shows that for a time there was confusion about who supervised Complainant and to whom he reported. When Haller discovered this, she and Ruscitti agreed "to share supervisory duties over Complainant so that he could not play them off against one another."⁵⁷⁴ Contrary to Complainant's implication that the performance problems laid out in the EPP were attributable to uncertainty about who his supervisor was, that uncertainty had been resolved prior to when the EPP was put into place and, indeed, clarification of roles, responsibilities, and accountabilities, including supervision, was in large part why the EPP was initiated in the first instance.⁵⁷⁵

Third, Complainant asserts that he was destined to fail in the work assigned to him because he had no knowledge or experience in that field. However, the evidence shows that Complainant's duties were modified to assign him to this work based on experience he purported to have, including that listed on his resume.⁵⁷⁶

Fourth, he asserts he could not fulfill his EPP because Hunt and Haller ceased normal communications with him, did not provide feedback, and did not schedule in person meetings during his EPP period.⁵⁷⁷ However, the OIG determined and the evidence shows that Haller and

⁵⁷² OIG Report, Attachment 15 (DuPage ROE's Supplemental Response – July 9, 2021).

⁵⁷³ OIG Report, Attachment 2 (Interview Report of Complainant) at 6.; Compl. Exh. C-14, OHA Docket Entry No. 27, OHA Dkt. No. 21-38-CP

⁵⁷⁴ OIG Report, Attachment 3 (Interview Report of Haller) at 17.

⁵⁷⁵ *Id.* at 14-17.

⁵⁷⁶ OIG Report, Attachment 3 (Interview Report of Haller) at 12; OIG Report of Investigation, Attachment 2 (Interview Report of Complainant) at 2.

⁵⁷⁷ OIG Report at 10; OIG Report, Attachment 1 (Complainant's Filed Complaint) at (unnumbered) 11; OIG Report,

Hunt communicated with Complainant during the EPP period, both during meetings and after meetings, sometimes reiterating what had been said at meetings.⁵⁷⁸ Haller and Hunt's communications to Complainant during the EPP process included requests that he keep them updated so they could help him prioritize his tasks or get him support he needed.⁵⁷⁹ There is no evidence that shows Complainant responded to their overtures.

Fifth, Complainant generally disagrees with Haller's assessment of his work. He asserts that Haller took actions that reduced his ability to meet some work objectives, namely by removing Gierman from his supervision; by assigning him to take minutes in Grant Leadership meetings; by not receiving an agenda for the DuPage District Support Meeting from Haller but, instead from Ruscitti; and, by engaging in conversations with grant staff and stakeholders, which he suspected reduced their cooperation with his work.⁵⁸⁰ Record evidence shows that Complainant maintained some EIR grant budget oversight duties, including assisting Gierman and Dotson with invoice processing and contract renewals.⁵⁸¹ According to Gierman, whom Complainant supervised and worked with on a daily basis, Complainant was responsible for reviewing and approving invoices from vendors and obtaining or writing vendor contracts.⁵⁸² The evidence also shows that Gierman was removed from Complainant's supervision because Complainant was usually not physically present at the office when she was and would go to Dotson with questions and because it was murky as to what Complainant was doing on a day-to-day basis and as to who was doing what between Complainant and Gierman.⁵⁸³ Complainant's assignment to taking minutes, his not receiving an agenda from Haller, or Haller's talking with grant staff and stakeholders do not establish that Haller impeded his ability to meet the goals, perform the activities, or satisfy the Performance Expectations of the EPP. Without more, the negative impact on satisfying the EPP that Complainant attributes to these actions by Haller does not diminish DuPage ROE's clear and convincing evidence that it would have terminated Complainant from employment regardless of any protected disclosures.

Next, Complainant specifically disagrees with the Performance Review's ratings on the EPP's five Goals. He asserts that he submitted his daily activities for the entirety of his two year tenure at DuPage ROE.⁵⁸⁴ He asserts that he "completed all the tasks that he possibly could given the resources and authority" he had and that he could not complete other tasks because Haller and Hunt were slow to respond or did not communicate with him.⁵⁸⁵ He asserts that he could not provide accurate financial records and data spreadsheets because this task was taken away from him early on in the EPP period and given to Gierman.⁵⁸⁶ He asserts that his communications were professional and clearly written and that he added value to the projects and partnering ROEs by

Attachment 2 (Interview Report of Complainant) at 14.

⁵⁷⁸ OIG Report, Attachments 8 and 10 to Attachment 3 (Interview Report of Haller); OIG Report, Attachment 28 (Complainant's EPP Performance Activities 1-12-Evidence by DuPage ROE).

⁵⁷⁹ OIG Report at 10; OIG Report, Attachment 6 to Attachment 3 (Interview Report of Haller); OIG Report, Attachment 28 (Complainant's EPP Performance Activities 1-12- Evidence by DuPage ROE).

⁵⁸⁰ Compl. Exh. C-14 at 3-4, OHA Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

⁵⁸¹ OIG Report, Attachment 3 (Interview Report of Haller) at 13.

⁵⁸² OIG Report, Attachment 7 (Interview Report of Gierman) at 2-3.

⁵⁸³ OIG Report, Attachment 3 (Interview Report of Haller) at 6 and 13.

⁵⁸⁴ Compl. Exh. C-14 at 5-6, OHA Docket Entry No. 27, OHA Dkt. 21-38-CP.

⁵⁸⁵ *Id.* at 6-7.

⁵⁸⁶ *Id.* at 7.

demonstrating that pursuing foundation grants could not constitute a significant component of ROEs' development strategy.⁵⁸⁷ Finally, he asserts that he collaborated in problem-solving and decision-making with Ruscitti by consulting with her concerning Haller's attempts to circumvent internal controls and by drafting an Internal Controls document and with Haller and Hunt by responding to all their requests.⁵⁸⁸ Here, too, Complainant's assertions regarding his inability to meet EPP Goals is not borne out by the evidence and, to a great extent, do not focus on the 12 Activities aligned to the Goals in the EPP, which are discussed next.

Next are Complainant's specific disagreements with the Performance Review's ratings on the EPP's 12 Activities:

For Activity #1, "Create and execute four plans for ROE development support," Complainant asserts that he was unable to train the four ROE Grant Coordinators in grant development as planned because the plan became untenable because there were no grants available for the targeted project and he also was unable to complete boilerplate language for use in requests for proposals because no standard descriptive data on the ROEs was available.⁵⁸⁹ Evidence provided by DuPage ROE shows Haller sent numerous e-mails with reminders and explanations to Complainant, between April 24, 2019 and September 20, 2019, about deliverables and deadlines for a boilerplate proposal for each ROE.⁵⁹⁰ Included in the e-mails were reminders to Complainant on completing the boilerplate language to use in requests for proposals, suggestions and directions on how to work with the ROE grant coordinators on grant development, and also suggestions on alternative avenues to pursue for grants for the targeted project.⁵⁹¹ It was made clear to Complainant that he could leave some items blank in boilerplate templates, but he insisted on collecting all data available for the districts.⁵⁹² Additionally, information was provided to Complainant on how he could access the appropriate system and search for the data he was seeking, but he did not do so.⁵⁹³ Relatedly, Complainant admittedly made slow progress on data infrastructure and development work, which he attributed to the social aspects of how he needed to communicate and work with stakeholders.⁵⁹⁴ Complainant asserts that his attempts to express inherent difficulties in completing this work went unheard and opines that neither Haller nor Hunt understood this aspect of his work because they are academics.⁵⁹⁵ The evidence does not support Complainant's contention that he could not complete the Activity or produce the deliverables as directed by Haller. Instead, Complainant's assertions demonstrate that he decided not to complete the Activity because he had formed an opinion that grant funding for the ROEs was not viable.

For Activity #2, "Establish and maintain a formalized communication plan," Complainant asserts that dates of meeting with ROEs were changed at the request of ROE coordinators.⁵⁹⁶

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.* at 7-8.

⁵⁸⁹ Compl. Exh. C-14 at 8, OHA Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

⁵⁹⁰ OIG Report, Attachment 28 (Complainant's EPP Performance Activities 1-12 – Evidence by DuPage ROE) Activity # 1.

⁵⁹¹ OIG Report, Attachment 28 (Complainant's EPP Performance Activities 1-12 – Evidence by DuPage ROE) Activity # 1.

⁵⁹² OIG Report, Attachment 3 (Interview Report of Haller) at 17.

⁵⁹³ *Id.*

⁵⁹⁴ OIG Report, Attachment 2 (Interview Report of Complainant) at 14.

⁵⁹⁵ *Id.*; Comp. Reply Brief, OHA Dkt. No. 23-11-CP, at 6.

⁵⁹⁶ Compl. Exh. C-14 at 8-9, OHA Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

Complainant's assertion is not responsive to the requirement to establish and maintain a formalized communication plan, but merely addresses why a possible activity under such a plan may not have been executed.

For Activity #3, "Participate in discussions with partners every other month," Complainant asserts that he has no idea of what Haller means by erroneous information and that he was not a participant in any financial calls.⁵⁹⁷ Complainant's assertion is not responsive to the "Participate in discussions with partners every other month" requirement of Activity #3, but, instead, speaks to an e-mail colloquy concerning a statement about SBA Reports that he made at a meeting.⁵⁹⁸ Evidence provided by DuPage ROE shows that as of April 11, 2019, Complainant had missed three check-in calls and supports DuPage ROE's "Does Not Meet Expectations" rating for this Activity.⁵⁹⁹

For Activity #4, "Actively participate in every other week LEAD staff meetings," Complainant asserts that his work was usually last on the agenda and often not reached or raced through without him receiving adequate guidance.⁶⁰⁰ Evidence provided by DuPage ROE shows that Complainant's participation included stating that he was working on things, such as developing a list of sources of funding.⁶⁰¹

For Activity #5, "Actively participate in every other week LEAD Project progress webinars or summaries," Complainant asserts he could not actively participate in meetings because he was assigned the role of notetaker and notes that his ability to follow a complex conversation and take notes is excellent.⁶⁰² DuPage ROE's evidence on this includes samples of Complainant's minutes of meetings, which it described as of poor quality, pointing to grammatical and punctuation errors, as well as meeting discussions that were omitted but should have been included in the minutes.⁶⁰³

For Activity #6, "Collaborate with Project Director and IARRS on survey enhancements," Complainant asserts that he is not a researcher, that this task was inappropriate and not in his job description and should have been assigned to others.⁶⁰⁴ Complainant does not address whether he communicated with Haller at any time before the Performance Review about his inability to perform this activity or his view that the task was inappropriately assigned to him. Rather, the evidence shows that when Complainant was assigned to this work he did not raise concerns or object to the reassignment, but indicated he was excited about the work.⁶⁰⁵

⁵⁹⁷ *Id.* at 9.

⁵⁹⁸ OIG Report, Attachment 28 (Complainant's EPP Performance Activities 1-12 – Evidence by DuPage ROE), Activity #3.

⁵⁹⁹ *Id.*

⁶⁰⁰ Compl. Exh. C-14 at 9, OHA Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

⁶⁰¹ OIG Report, Attachment 28 (Complainant's EPP Performance Activities 1-12 – Evidence by DuPage ROE), Activity #4.

⁶⁰² Compl. Exh. C-14 at 9–10, OHA Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

⁶⁰³ OIG Report, Attachment 28 (Complainant's EPP Performance Activities 1-12 – Evidence by DuPage ROE), Activity #5.

⁶⁰⁴ Compl. Exh. C-14 at 10, OHA Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

⁶⁰⁵ OIG Report, Attachment 10 (Email Evidence of Complainant's Excitement to Shift Duties); OIG Report, Attachment 3 (Interview Report of Haller) at 13.

For Activity #7, “Review all EIR invoices for alignment to approved budget, ensure they include allowable costs and are properly documented,” Complainant asserts that an incident occurred on April 12, 2019, before the EPP was executed on April 26, 2019; that financial responsibilities had been removed from his responsibilities, and that he did not have access to the e-mail referred to by Haller.⁶⁰⁶ However, the evidence provided by DuPage ROE shows that Haller instructed Complainant to submit invoices for the period October 2018 through March 2019 to ISU as soon as an amended contract was executed, but that ISU did not receive the invoices.⁶⁰⁷ Complainant claimed to have sent them, but the e-mail he sent may not have been received due to the size of attachments and he did not follow-up to ensure ISU’s receipt of the invoices.⁶⁰⁸ Failure to send the invoices to ISU as soon as the amended contract was executed resulted in stop payments and delays in district schools not receiving their SEED grant school-based allocations.⁶⁰⁹ The evidence provided by DuPage ROE also shows that Complainant forwarded an invoice from ROE # 28, for the previous fiscal year, to Haller and Dotson on August 27, 2019, asking that they let Gierman know if it was okay to process and okay from him to approve in SDS.⁶¹⁰ Haller replied that the invoice was full of problems, including late submission without explanation and charges exceeding federal per diem rates.⁶¹¹

For Activity #8, “Communicate regularly with staff from grant partners,” Complainant asserts that he would have provided this information if he had been made aware that Haller was writing the Performance Evaluation.⁶¹² Evidence provided by DuPage ROE shows that Complainant cancelled a number of meetings with staff from grant partners, did not follow-up on items discussed with staff from grant partners, and did not discuss topics pertinent to work he was responsible for and also responsible for reporting to Haller on with staff from grant partners.⁶¹³ The evidence also shows, contrary to Complainant’s assertion, that Complainant was informed about the purpose of the Performance Review meeting in advance of the meeting.

For Activity #9, “Keep project leaders informed of on-going communication,” Complainant asserts that he e-mailed summaries of important meetings and phone calls with partners and also asserts that Haller and Hunt sent him verbatim transcripts of telephone conversations he had had, noting that their recording of conversations was in violation of state law, and also that he was not provided summaries of discussions cited by Haller.⁶¹⁴ Evidence provided by DuPage ROE shows that Complainant did not keep project leaders informed on an on-going basis.⁶¹⁵

⁶⁰⁶ Compl. Exh. C-14 at 10, OHA Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

⁶⁰⁷ OIG Report, Attachment 3 (Interview Report of Haller) at 15.

⁶⁰⁸ OIG Report, Attachment 3 (Interview Report of Haller) at 15.

⁶⁰⁹ OIG Report, Attachment 7 to Attachment 3 (Interview Report of Haller).

⁶¹⁰ OIG Report, Attachment 28 (Complainant’s EPP Performance Activities 1-12 – Evidence by DuPage ROE), Activity #7.

⁶¹¹ *Id.*

⁶¹² Compl. Exh. C-14 at 10, OHA Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

⁶¹³ OIG Report, Attachment 28 (Complainant’s EPP Performance Activities 1-12 – Evidence by DuPage ROE), Activity #8.

⁶¹⁴ Compl. Exh. C-14 at 11, OHA Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

⁶¹⁵ OIG Report, Attachment 28 (Complainant’s EPP Performance Activities 1-12 – Evidence by DuPage ROE), Activity #9.

For Activity #10, “Participate in other meetings as needed and determined by Regional Superintendent and/or Project Directors,” Complainant asserts that “we (presumably he and Haller) were at loggerheads” because the development work could not proceed because there were not grants to apply for and Haller would not engage in creative strategy with him.⁶¹⁶ Evidence provided by DuPage ROE shows that Haller sent suggestions to Complainant on alternative avenues to pursue for grants for the targeted project and that there was work identified that should be done, such as developing narratives, data, and boilerplate language, while potential grants were being identified.⁶¹⁷

For Activity #11, “Completion of other project tasks as requested by Regional Superintendent, Finance Director, or Project Directors, Complainant asserts that the HUB concept was not workable and that the foundation application he developed was a mismatch for DuPage ROE’s needs.⁶¹⁸ DuPage ROE’s evidence establishes that the Project Directors identified specific tasks to be completed, provided instructions for the tasks, gave deadlines for their completion, and that Complainant did not complete the tasks as instructed.⁶¹⁹ DuPage ROE’s evidence also shows that Haller sent suggestions to Complainant on alternative avenues to pursue for grants for the targeted project and that there was work identified that could and should be done, such as developing narratives, data, and boilerplate language, while potential grants were being identified.⁶²⁰

For Activity #12, “Each Monday, send an e-mail to the Project Directors that provides a list of work tasks accomplished in previous week, identify work still outstanding, and list tasks anticipated for current week,” Complainant asserts that Haller did not allow him the flexibility and authority to do the work needed, that he was not provided with Hunt’s e-mail address, that he discussed his planned activities and accomplishments in every staff meeting, that there were some Mondays when he did not “submit bullet points,” and that when he did submit descriptions of planned work for the next week it was criticized.⁶²¹ Complainant does not refute that he did not send e-mails each Monday to the Project Directors and the evidence shows that on May 31, 2019 and again on July 11, 2019, Haller sent e-mails to Complainant saying that she had not received the expected Monday e-mails from Complainant for several weeks.⁶²²

Additionally, Complainant specifically disagrees with the Performance Review’s ratings on the EPP’s seven Expectations, all of which are directly aligned to the 12 Activities and already addressed above. For the first Expectation, “Organize electronic files,” Complainant asserts that Haller did not ask to review his files before the Performance Review and that his files were given to DuPage ROE when he left.⁶²³ For the second Expectation, “Follow through on tasks assigned

⁶¹⁶ Compl. Exh. C-14 at 11, OHA Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

⁶¹⁷ OIG Report, Attachment 28 (Complainant’s EPP Performance Activities 1-12 – Evidence by DuPage ROE), Activity #1 and Activity #10.

⁶¹⁸ Compl. Exh. C-14 at 11, OHA Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

⁶¹⁹ OIG Report, Attachment 28 (Complainant’s EPP Performance Activities 1-12 – Evidence by DuPage ROE), Activity #11.

⁶²⁰ OIG Report, Attachment 28 (Complainant’s EPP Performance Activities 1-12 – Evidence by DuPage ROE) Activity #1 and Activity #10.

⁶²¹ Compl. Exh. C-14 at 11-12, OHA Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

⁶²² OIG Report, Attachment 28 (Complainant’s EPP Performance Activities 1-12 – Evidence by DuPage ROE) Activity #12.

⁶²³ Compl. Exh. C-14 at 12, OHA Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

or promised,” Complainant asserts that he responded to this elsewhere.⁶²⁴ For the third Expectation, “Respond in timely and professional manner to requested communications,” Complainant asserts Haller and Hunt would not acknowledge the reality of his conclusion that funders do not want to fund leadership strengthening activities for school principals.⁶²⁵ For the fourth Expectation, “Demonstrate strong attention to detail,” Complainant asserts that he previously addressed this.⁶²⁶ For the fifth Expectation, “Effectively use technology,” Complainant asserts this has no merit because it is based on the PAR, which, too, was baseless.⁶²⁷ For the sixth Expectation, “Thoroughly proofread all communications,” which was rated “unable to score- Despite being directed to do so, Complainant does not routinely cc Directors on communications with partners,” Complainant asserts that there were some instances that “it would have been inappropriate or damaging to copy the Co-Directors” because copying them would have brought unhelpful interference.⁶²⁸ For the seventh Expectation, “Effectively collaborate with Reg. Supt., Finance Director, Project Directors, and Regional Coordinators, Complainant asserts that he attempted to communicate with them at several points that attempting to find foundation grants for principal leadership was fruitless but they refused to discuss his proposal for a revised development plan.⁶²⁹

Most of Complainant’s arguments against the assessments of his performance are the equivalent of disagreements with his supervisor’s assessments. For example, Complainant did not draft boilerplate language for proposals under Activity #1 as instructed by Haller because he had formed an opinion that grant funding for ROEs was not viable. For Activity #10, he did not proceed with development work as instructed by Haller because he concluded that there were no grants to apply for and Haller would not engage in creative strategy with him. For Activity #11, he did not complete specific tasks as instructed by Haller because he concluded that the underlying concept was not workable. The evidence establishes that Complainant did not perform work as instructed because he disagreed with his supervisor and now disagrees with his supervisor’s assessment about the work he did not perform. Complainant’s purported reasons for not performing work he was instructed to do, over and over, do not undercut DuPage ROE’s clear and convincing evidence of Complainant’s performance deficiencies and do not establish pretext on the part of DuPage ROE.⁶³⁰ Moreover, Complainant’s belief that he was performing his job adequately is not relevant to the question of whether DuPage ROE believed it had a legitimate, non-retaliatory basis to terminate him.⁶³¹

Other arguments advanced by Complainant over poor assessments of his performance also amount to “that was not my responsibility,” “that was a responsibility taken away from me,” or “I was blocked from carrying out that responsibility.” Complainant points to financial responsibilities set out in the EPP, asserting that he had been removed from those responsibilities

⁶²⁴ *Id.*

⁶²⁵ *Id.*

⁶²⁶ *Id.*

⁶²⁷ *Id.*; Compl. Exh. C-1, OHA Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

⁶²⁸ Compl. Exh. C-14 at 12, OHA Docket Entry No. 27, OHA Dkt. No. 21-38-CP.

⁶²⁹ *Id.*

⁶³⁰ See *Lauth v. Covance, Inc.*, 863 F. 3d 708, 715 (7th Cir. 2017) (affirming summary judgement where plaintiff merely contended “that he did not have the communication issues that his supervisors saw as problematic” but did not offer any other evidence that employer’s concerns were pretextual).

⁶³¹ See *Lauth v. Covance, Inc.*, 863 F.3d at 715-716.

or, at best, those responsibilities were unclear to him and other staff, and that Gierman had been removed from his supervision. But, record evidence shows that Complainant maintained some EIR grant budget oversight duties, including assisting Gierman and Dotson with invoice processing and contract renewals.⁶³² The evidence also shows that Gierman was removed from Complainant's supervision because he was usually not physically present at the office when she was and would go to Dotson with questions and because it was murky as to what Complainant was doing on a day-to-day basis and as to who was doing what between Complainant and Gierman.⁶³³

With respect to Complainant's complaints about the procedures DuPage ROE followed in terminating him, Complainant asserts that DuPage ROE did not inform him in advance of the purpose of the September 30th meeting, suggesting that he was blindsided and unable to prepare for the meeting. Contrary to Complainant's assertion, record evidence shows that Haller informed Complainant in advance, on September 24, 2019, by e-mail, that the purpose of the September 30, 2019 meeting was to conduct a performance review.⁶³⁴ Otherwise, the procedural irregularities that Complainant points to do not show that the performance appraisal was an act of retaliation or serve to refute DuPage ROE's evidence of his poor performance and reason for terminating him.

Complainant also asserts that had he been allowed an opportunity to respond to the Performance Appraisal, he would have pointed out he had drafted the DuPage Internal Controls Manual, organized weekly grant staff meetings, and developed a strategy to raise awareness about the principal grant project, all work he performed but that was not mentioned in his Performance Appraisal.⁶³⁵ But that work was not among the responsibilities covered by the EPP and would not have refuted DuPage ROE's clear and convincing evidence that it would have terminated him regardless of his disclosures.

Finally, Complainant asserts that upon his termination he was no longer able to access e-mails that would support his assertions and that OIG did not seek such e-mails, but, instead, accepted only those e-mails offered by DuPage ROE witnesses.⁶³⁶ Complainant does not state which of his assertions those e-mails would have supported or what the emails he could not access would have shown, but only implies they might have countered some of DuPage ROE's evidence. Nor does Complainant's assertion that the OIG Report did not include all documents he submitted serve to call into question the OIG's findings as Complainant has not explained what was missing but only stated, without more, that he lacked the time and resources to supply these exhibits at the next stage in the process.⁶³⁷

There is evidence that shows that Complainant and others at DuPage ROE characterized

⁶³² OIG Report, Attachment 3 (Interview Report of Haller) at 13.

⁶³³ *Id.* at 6 and 13.

⁶³⁴ OIG Report, Attachment 27 (DuPage ROE Internal Emails – Haller to HR); OIG Report, Attachment; OIG Report, Attachment 23 (DuPage ROE Internal Emails – Scheduling Complainant's PA Meeting) at (unnumbered) 4.

⁶³⁵ Compl. Suppl. Brief, OHA Dkt. No. 23-11-CP, at 7; OIG Report, Attachment 22 (Final Performance Appraisal Aligned with EPP – Provided by Complainant).

⁶³⁶ Compl. Brief, OHA Dkt. No. 21-38-CP, at 6 and 8.

⁶³⁷ *Id.* at 6.

Haller's behavior as intimidating and that Complainant regarded it as "workplace bullying."⁶³⁸ To the extent Complainant's "workplace bullying" allegation is in response to criticism of his performance, "(j)ob-related criticism can prompt an employee to improve (his) performance and thus lead to a new and more constructive employment relationship."⁶³⁹ Even alleged scolding and berating an employee, if that was the genesis of the "workplace bullying" allegation here, would not constitute harassment in a whistleblower reprisal action.⁶⁴⁰ Without more, Complainant's allegation does not detract from the evidence of his persistent and documented poor performance or that his poor performance was the basis for his termination.

When the evidence and parties' arguments are viewed in the aggregate, what becomes clear is that DuPage ROE's termination of Complainant was based on persistent and significant job performance deficiencies, not retaliation. Whether Complainant's job performance deficiencies were rooted in incompetence, which Complainant aggressively disputes, is, for the most part, unclear. There is evidence that Complainant was not competent in technology skills needed for project management and assigned projects not merely related to, but as also reflected in, the computer use incident(s) underlying issuance of the PAR wherein Complainant used his personal computer because he was unable to navigate the computer DuPage ROE had issued to him. Rather, the explanation that emerges from the evidence as well as Complainant's arguments concerning his other performance issues is that his performance deficiencies were rooted in Complainant's belief that he, not Haller and Hunt, had the know-how to run the grant programs as Haller and Hunt were only academics and they lacked experience in grant management⁶⁴¹; that he did not recognize Haller as his supervisor or follow her instructions, which may have been exacerbated by Ruscitti's suggestions that he was to serve as watch-dog over Haller and Hunt⁶⁴²; that he formed opinions about what work on the grant projects should and should not be done and did not perform tasks assigned to him that were inconsistent with his opinions; and, more generally, that his experience in a well-developed urban educational grant program office may not have provided him the skills needed for standing up and developing a rural educational grant program. Additionally, as the OIG noted, certain aspects of Complainant's performance problems may have been attributable to his remote work status and not having sufficient in person supervision.⁶⁴³

In short, there is no evidence that DuPage ROE supervisors' alleged desire to see Complainant terminated after he made protected disclosures rather than based on his unsatisfactory job performance was the cause of his termination. To the contrary, the evidence shows that DuPage ROE honestly believed that Complainant's performance was inadequate, terminated him based on that belief, and provided clear and convincing evidence that it would have terminated Complainant regardless of the disclosures. The record evidence, when considered in the aggregate and despite Complainant's evidence, does not detract from DuPage ROE's clear and convincing evidence that it would have terminated Complainant regardless of his disclosures.

⁶³⁸ OIG Report, Attachment 1 to Attachment 2 (Interview Report of Complainant) at 8 – 9, 14 - 15.

⁶³⁹ *Oest v. Ill Dep't of Corr.*, 240 F.3d 605, 613 (7th Cir. 2001).

⁶⁴⁰ *See Lam v. Springs Window Fashions, LLC*, 37 F. 4th 431, 438 (7th Cir. 2022).

⁶⁴¹ OIG Report, Attachment 2 (Interview Report of Complainant) at 4 and 6.

⁶⁴² *Id.*

⁶⁴³ OIG Report at 10.

XI. CONCLUSIONS OF LAW

1. Complainant satisfied the first requirement of his initial burden of proof required in 41 U.S.C. § 4712, by establishing he was an employee of a federal grantee and subgrantee.
2. Complainant satisfied the second requirement of his initial burden of proof by establishing he made disclosures protected by 41 U.S.C. § 4712(a)(2), concerning misuse of Department grant funds.
3. Complainant has met his burden of showing that he experienced five personnel actions, including a removal of fiscal duties from the SEED Grant at ISU, a modification in duties/position at DuPage ROE, placement on an EPP, issuance of a PAR, and termination from his position at DuPage ROE, that the NDAA prohibits a grantee or subgrantee from taking against an employee as reprisal for making a protected disclosure.
4. Complainant failed to show that his protected disclosure was a contributing factor in removal of his fiscal duties on the SEED Grant. Additionally, DuPage ROE provided clear and convincing evidence that it would have taken this action regardless of his disclosure.
5. Complainant showed by a preponderance of evidence that his first disclosure was a contributing factor to DuPage ROE's modification of his duties to development work. However, DuPage ROE provided clear and convincing evidence that it would have changed Complainant's duties regardless of any protected disclosures.
6. Complainant provided evidence that showed by a preponderance that his disclosures about the vendor contract and invoice allocation issues were a contributing factor to DuPage ROE placing him on an EPP. However, DuPage ROE provided clear and convincing evidence of Complainant's numerous and significant job performance issues and that it would have placed him on a performance plan regardless of any protected disclosures.
7. Complainant provided evidence that showed by a preponderance that his second disclosure was a contributing factor to the PAR's issuance. However, DuPage ROE provided clear and convincing evidence that it would have issued the PAR to Complainant regardless of the disclosure.
8. Complainant provided evidence that showed by a preponderance that his second disclosure was a contributing factor to his termination. However, DuPage ROE provided clear and convincing evidence that it would have terminated Complainant regardless of any protected disclosures based on Complainant's numerous and significant job performance issues.

9. There is an insufficient basis to conclude that DuPage ROE retaliated against Complainant for disclosing a misuse of Department grant funds. Rather, record evidence has demonstrated clearly and convincingly that DuPage ROE would have taken the personnel actions even if Complainant had not made the protected disclosures.

XII. Order

The Findings of the Office of Inspection General's Report of Investigation, as modified herein and as reflected in the above Conclusions of Law section, are supported by substantial evidence and, therefore, are **AFFIRMED**. Accordingly, the relief requested by Complainant is **DENIED**.

XIII. APPEAL RIGHTS

This order constitutes an order denying relief issued by the head of the executive agency under 41 U.S.C. § 4712(c)(1), pursuant to the authority delegated by the Secretary of Education. This is the final decision, on remand, of the Department of Education in this matter. Information on appeal rights is contained in the Notice of Final Agency Decision and Order and Appeal Rights on the next page.

DATE OF DECISION: March 20, 2024

Elizabeth Figueroa
Chief Administrative Law Judge

NOTICE OF FINAL AGENCY DECISION AND ORDER
AND
APPEAL RIGHTS

This is the final Department decision on the matter addressing whether there is sufficient basis to conclude that Complainant was subjected to reprisal following a protected disclosure in violation of 41 U.S.C. § 4712(a). The following language summarizes the statutory appeal rights and enforcement as set forth in 41 U.S.C. §§ 4712(c)(2),(4), and (5). The statute does not authorize motions for reconsideration. **This information is not intended to alter or interpret the statute or controlling law and does not provide legal advice.**

RIGHT TO *DE NOVO* ACTION AT LAW OR EQUITY: If the complainant has been denied the relief sought, the complainant may bring a *de novo* action at law or equity against the contractor, subcontractor, grantee, subgrantee, or personal services contractor to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, provided the action is brought no more than two years after the date relief has been denied. The appropriate district court shall have jurisdiction without regard to the amount in controversy. 41 U.S.C. § 4712(c)(2).

JUDICIAL REVIEW: Any person adversely affected or aggrieved by this order may obtain review in the United States court of appeals for a circuit in which the reprisal is alleged to have occurred, provided that the appeal is filed no more than 60 days after the issuance of the order. The court of appeals review shall conform to Chapter 7 of Title 5 of the United States Code. Filing an appeal shall not act to stay the enforcement of this order unless a stay is specifically entered by the appropriate court of appeals. 41 U.S.C. § 4712(c)(5).

ENFORCEMENT: The Secretary of the Department shall file an action for enforcement of this order in the United States district court for a district in which the reprisal was found to have occurred whenever a person fails to comply with this order. In the enforcement action, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs. The person upon whose behalf an order was issued may also file an enforcement action or may join in an action filed by the Secretary of the Department. 41 U.S.C. § 4712(c)(4). Only the appropriate court of appeals may stay the enforcement of this order. 41 U.S.C. § 4712(c)(5).