



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
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[Complainant]

Complainant

v.

Hawaii Department of Education

Defendant

Docket No.: 19-81-CP

Reprisal for Disclosure of
Certain Information Proceeding

OIG: REDACTED

Appearances: Andrew D. Stewart, Showa Law Office LLC, Honolulu, HI, for [Complainant].

Clare E. Connors and James E. Halvorson, Hawaii Department of the Attorney General, Honolulu, HI, for Hawaii Department of Education.

Before: Robert G. Layton, Administrative Law Judge

ORDER

This decision addresses a complaint filed by [Complainant], an employee of the Hawaii Department of Education (HDE). HDE is the statewide school district for Hawaii.¹ It participates in grant programs administered by the U.S. Department of Education (the Department), including the 21st Century Community Learning Center grants (CCLC). On December 7, 2018, the Department's Office of the Inspector General (OIG) received

¹ *Organization*, Hawaii Department of Education, <http://www.hawaiipublicschools.org/ConnectWithUs/Organization/Pages/Home.aspx> (last visited on Dec. 30, 2019); U.S. Dep't of Educ., Office of Inspector General Report of Investigation (Dec. 2, 2019) (hereafter *OIG Report*) at 3 [4] [Bracketed References to page in the PDF of the Redacted *OIG Report*, Docket Number 2].

[Complainant]’s complaint. [Complainant]’s complaint asserts that HDE took multiple adverse employment actions against her for reporting misuse of CCLC funds and that this retaliation violated whistleblower protections. OIG assessed [Complainant]’s allegations as made pursuant to the protections provided by 41 U.S.C § 4712, the National Defense Authorization Act of FY 2013 (The NDAA).² On December 2, 2019, OIG sent the Secretary of Education (the Secretary) a report from OIG’s investigation. On December 3, 2019, the Secretary ordered the Office of Hearings and Appeals to render a final agency decision on behalf of the Secretary and the undersigned was assigned to this matter.³ The parties were offered the opportunity to submit additional evidence and to appear in a live hearing to make arguments, confront adverse evidence, and cross-examine witnesses. Both parties waived the opportunity for a live hearing and were provided the opportunity to submit written arguments, which [Complainant] submitted on December 17, 2019.

The NDAA addresses retaliation by a federal grant recipient (grantee) against an employee for whistleblowing. 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 . . . grant, . . . or a violation of law, rule, or regulation related to a Federal . . . grant”.⁴ It protects employee’s disclosures to seven groups of individuals, including an Inspector

² OIG Report at 1 n1 [2]. [Complainant] checked the box on her whistleblower reprisal complaint indicating that she was alleging that there was a reprisal in violation of Section 1553 of the American Recovery and Reinvestment Act of 2009 (ARRA). [Complainant], ED-OIG Whistleblower Complaint Form (Dec. 5, 2018) (hereafter OIG Complaint) at 1 [23]. The CCLC grants at issue in this matter are not funded with ARRA funds. To “ensure that [Complainant]’s allegations were not dismissed because she checked the wrong box on the form,” OIG assessed [Complainant]’s allegations and conducted an investigation under the NDAA.

³ Correspondence to OHA 12/3/2019 (Item # 2 in OES electronic filing system).

⁴ 41 U.S.C. § 4712(a)(1).

General or a “management official or other employee of the . . . grantee who has the responsibility to investigate, discover, or address misconduct.”⁵

If an employee believes they have been subject to a reprisal in violation of the statute, the employee may submit a complaint to OIG within three years of the reprisal.⁶ If OIG 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, 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.⁷

Upon receipt of the OIG report, the Secretary or her designee must issue the agency decision within 30 days.⁸ The decision must address “whether there is sufficient basis to conclude that the contractor or grantee concerned has subjected the complainant to a reprisal.”⁹

The statute provides that if there was a reprisal, the Secretary will order the entity to:

- (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.”¹⁰

In this matter, the OIG’s investigation “did not substantiate [Complainant]’s allegations

⁵ 41 U.S.C. § 4712(a).

⁶ 41 U.S.C. § 4712(b).

⁷ Id.

⁸ 41 U.S.C. § 4712(c)(1).

⁹ Id.

¹⁰ Id.

of whistleblower reprisal.”¹¹ The OIG investigation found that [Complainant] made protected disclosures and that [Complainant] met her burden of showing that the disclosures was a contributing factor for all except one of the employment actions.¹² OIG’s investigation, however, concluded that HDE provided clear and convincing evidence that it would have taken the employment actions independent of the disclosures.¹³

ISSUES

[Complainant]’s complaint indicates that she was subjected to multiple employment actions that she believes were acts of reprisal. She alleges that these actions were taken to retaliate for disclosures that she made to high ranking officials at HDE. Specifically, [Complainant] contends that she was retaliated against for disclosing in June and November 2017 and August 2018 that HDE had paid an office assistant using CCLC grant funds while the office assistant was working at a school that was not eligible for the use of CCLC grant funds.¹⁴

HDE asserts that the employment actions were not retaliatory, but rather were done to address organizational, timeliness, and communication issues or to prepare for a significant audit and grant review.

The issues to be addressed are:

1. Did [Complainant] meet her initial burden of showing that (1) she was an employee of a grantee of a grant administered by the Department; (2) she 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 her by HDE?
2. Did HDE demonstrate, by clear and convincing evidence, that it would have taken the same employment actions in the absence of [Complainant]’s disclosures?

¹¹ OIG Report at 1 [2].

¹² OIG Report at 1 [2].

¹³ Id.

¹⁴ OIG Complaint at 2, 4 [25, 27]. Attachment to [Complainant], ED-OIG Whistleblower Complaint Form (Dec. 5, 2018) (hereafter OIG Complaint Attachment) at 1 [32].

SUMMARY OF ORDER

This decision finds [Complainant] has not met her initial burden to show her disclosures were a contributing factor for three categories of employment actions. This decision further finds that [Complainant] has met her initial burden to show that her disclosures were a contributing factors for the other five categories of employment actions, but concludes that HDE has met its shifted burden to show by clear and convincing evidence that it would have taken all challenged actions regardless of [Complainant]’s disclosures. Therefore, this decision finds that HDE did not subject [Complainant] to a reprisal in violation of the protections provided by the NDAA.

FINDINGS OF FACT

[Complainant]’s Background

Since September 1986, [Complainant] has worked for HDE in a number of teaching roles.¹⁵ HDE is the statewide school district. It is comprised of 15 regional complex areas in seven districts totaling 256 schools.¹⁶ Each of the complex areas has two to four school complexes, and each complex contains a high school and the elementary and middle/intermediate schools that feed into it.¹⁷

¹⁵ Verification of Employment, Hawaii Dep’t of Educ. (April 17, 2019) [75].

¹⁶ *Organization*, Hawaii Dep’t of Educ., <http://www.hawaiipublicschools.org/ConnectWithUs/Organization/Pages/Home.aspx> (last visited on Dec. 30, 2019); *Complex Area Superintendents*, Hawaii Dep’t of Educ., <http://www.hawaiipublicschools.org/ConnectWithUs/Organization/LeadershipProfilesAndStaff/Pages/Complex-Area-Superintendents.aspx> (last visited Dec. 30, 2019); OIG Report at 3 [4].

¹⁷ *Organization*, Hawaii Dep’t of Educ., <http://www.hawaiipublicschools.org/ConnectWithUs/Organization/Pages/Home.aspx> (last visited on Dec. 30, 2019).

[Complainant] currently works as a teacher at August Ahrens Elementary school, a role she has held since September 16, 2019.¹⁸ After a number of different roles as either a District Office Teacher or as an Elementary Teacher, [Complainant] was transferred into the role of Complex Area Teacher for the Campbell Complex effective April 11, 2016.¹⁹ The Campbell Complex is within the Campbell-Kapolei Complex Area, which in turn is one of three complex areas within the Leeward District.²⁰

[Complainant]’s Role as CCLC Project Director

[Complainant] described her role beginning in April 2016 as both a resource teacher and the project director for CCLC grants for the eleven schools receiving CCLC moneys in the Campbell-Kapolei Complex Area.²¹ Within Hawaii, a resource teacher “is used generally to describe non-classroom teaching positions that provide specialized support to other teachers, schools or programs.”²² [Complainant] asserted that when she was hired for the role, she was responsible for coordinating out-of-school time programs at schools in the Campbell and Kapolei Complexes, including handling payroll, hiring, and expenditure payments while leaving the scheduling to the site coordinator at each school.²³

¹⁸ Email from Wilfred Keola to Isabel Douroupis (Nov. 5, 2019) [83]. [Complainant] was moved into this role through the “Return to Work Priority Program” after HDE was unable to provide her with a reasonable accommodation that would allow her to perform the essential functions of her job in her prior role as a resource teacher. Letter from Christina Simpson to [Complainant] (Jan. 30, 2019) [84-85]; OIG Report at 3 [4].

¹⁹ Letter from Heidi Armstrong to [Complainant] (March 16, 2016) [76]; Verification of Employment, Hawaii Dep’t of Educ. (April 17, 2019) [75].

²⁰ OIG Notes from Interview with [Complainant] at 1 (Jan. 11, 2019) [64]; *Complex Area Superintendents*, Hawaii Dep’t of Educ., <http://www.hawaiipublicschools.org/ConnectWithUs/Organization/LeadershipProfilesAndStaff/Pages/Complex-Area-Superintendents.aspx> (last visited Dec. 30, 2019).

²¹ OIG Notes from Interview with [Complainant] at 1 (Jan. 11, 2019) [64]; OIG Notes from Interview of REDACTED (April 1, 2019) at 2 [87]; OIG Notes from Interview of REDACTED (March 27, 2019) at 1 [93].

²² Email from Sean Arai to Isabel Douroupis (Aug. 22, 2019) [80].

²³ OIG Notes from Interview with [Complainant] (Jan. 11, 2019) at 1 [64].

When [Complainant] was hired as the CCLC project director, her supervisor was Christina Shioi, the academic officer for the Kapolei Complex and the CCLC grant administrator.²⁴ Shioi reported to Heidi Armstrong, the Complex Area Superintendent for the Campbell-Kapolei Area.²⁵ The complex area superintendent controls the overall direction and implementation of the CCLC grant.²⁶ In July 2018, Armstrong was promoted to a statewide position and Sean Tajima replaced Armstrong as the Complex Area Superintendent for the Campbell-Kapolei Area.²⁷ On October 30, 2018, the CCLC grant program was removed from Shioi's portfolio²⁸ and [Complainant] began to report directly to Tajima.²⁹

Discovery of Misspent CCLC Grant Funds

In her role as a CCLC project director, [Complainant] was mentored by a more experienced project director for another complex area, Christina Smith.³⁰ [Complainant] also worked on the CCLC grant program with Teresa Miyasaki, a part time teacher with the CCLC grant office.³¹ In June 2017, Smith was showing [Complainant] and Miyasaki the financial reporting system when they noticed that Cindy Fuauli, the former office assistant for the CCLC grant, had continued to be paid using CCLC funds³² after she transferred to a position at Iroquois

²⁴ Id.; OIG Notes from Interview with [Complainant] at 1 (March 8, 2019) [69]; OIG Notes from Interview of Heidi Armstrong at 2 (April 5, 2019) [99]; OIG Complaint Attachment at 2 [33].

²⁵ OIG Notes from Interview with [Complainant] (Jan. 11, 2019) at 2 [65].

²⁶ OIG Notes from Interview with REDACTED (April 1, 2019) at 2 [87].

²⁷ OIG Notes from Interview with Redacted at 1 (March 27, 2019) [93]; OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 4 [67]; OIG Notes from Interview of Heidi Armstrong (April 5, 2019) at 1 [98].

²⁸ OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 4 [67].

²⁹ OIG Complaint Attachment at 4 [35]; OIG Notes from Interview of [Complainant] (March 8, 2019) at 1 [69]; Email from Sean Tajima to [Complainant] (Oct. 30, 2018) [92].

³⁰ OIG Notes from Interview with [Complainant] at 2 (Jan. 11, 2019) [65].

³¹ OIG Complaint Attachment at 1, 6-7 [32, 37-38];

³² In the attachment to her OIG complaint, [Complainant] indicates that approximately \$20,000 of CCLC grant money was improperly paid to Fuauli. OIG Complaint Attachment at 1 [32]. During her interview with the OIG investigator, however, [Complainant] estimated that the amount owed back to the CCLC grant was \$13,880.15. OIG Notes from Interview with [Complainant] at 2 (Jan. 11, 2019) [65].

Point Elementary School (IPES), a school that was not part of the CCLC grant program.³³ While working on the CCLC grants, Fuauli had been responsible for processing purchase orders and inputting hours for part-time teachers under the grant.³⁴

In a March 2018 memorandum, Shioi explained what happened.³⁵ To support the CCLC grant activity in the Campbell-Kapolei Complex Area, a part-time office assistant position was established with each complex sharing half of the cost.³⁶ Fuauli was in that position until November, 2016. Due to financial hardship, she requested and was granted a temporary assignment as a full time office assistant position at a school between November 28, 2016 and July 2, 2017.³⁷ On July 3, 2017, Fuauli transferred out of the grant office assistant position.³⁸ The error resulted from Fuauli continuing to be paid a portion of her salary using CCLC funds during her temporary assignment.³⁹ The memorandum indicates that two alternatives were considered to repay the CCLC grant but neither of those nor any other “systemic possibilities” could be executed.⁴⁰ Noting that the situation was “unfortunate but not intentional,” Shioi determined that, effective July 3, 2017, the CCLC grant funds would be withheld from the next allocation to each complex to recover the misspent funds to the grant.⁴¹ [Complainant] has

³³ OIG Notes from Interview with [Complainant] at 2 (Jan. 11, 2019) [65]; OIG Complaint Attachment at 1 [32].

³⁴ OIG Notes from Interview with REDACTED at 2 (April 1, 2019) [87].

³⁵ Letter from Christina Shioi through Heidi Armstrong to the Community Engagement Office for CCLC Grants (March 28, 2018) [52].

³⁶ Id..

³⁷ Id.

³⁸ Id. [Complainant] has indicated that she believes that Fuauli continued to improperly receive CCLC grant funds through August 2017 and that her transfer to a non-grant school occurred in June 2017. OIG Complaint Attachment at 1 [32]; Notes of OIG Interview with [Complainant] (March 8, 2019) at 1 [69]. The exact circumstances of Fuauli’s improper payments is not at issue in the matter, however. Rather this matter addresses only whether [Complainant] was retaliated against for making protected disclosures about erroneous payments of CCLC grant money to Fuauli.

³⁹ Letter from Christina Shioi through Heidi Armstrong to the Community Engagement Office for CCLC Grants (March 28, 2018) [52].

⁴⁰ Id.

⁴¹ Id.

acknowledged that Shioi made efforts to correct the situation and, in July 2017, had asked Dawn Young, Fuauli's replacement as office assistant, to get the CCLC funds repaid.⁴²

[Complainant] Reports Misuse of CCLC Funds

On June 21, 2017, [Complainant] emailed Tammy Keller, informing Keller that [Complainant] had noticed that, since leaving the CCLC office and while working at IPES, Fuauli has been paid with CCLC funds from Campbell and Kapolei Complexes and, in some instances, had been paid twice for the same pay period from both complexes.⁴³ Keller was the business manager for the complex area, overseeing the fiscal matters for all 17 schools in the complex area including managing the grant funds.⁴⁴ Keller is a supervisor, but she had no direct authority over [Complainant].⁴⁵ Keller was Fuauli's supervisor,⁴⁶ although [Complainant] signed off on Fuauli's time sheets because Fuauli was at the same worksite as [Complainant].⁴⁷

Keller responded within the hour, adding Shioi to the email, and informed [Complainant] that Keller did not approve payroll for Fuauli's time and attendance and so [Complainant] might need to ask Shioi to check with IPES's administration about the issue.⁴⁸ [Complainant] continued the email chain that night, asking Shioi if she wanted [Complainant] to follow up on the matter and expressing the urgency of resolving the issue because another pay period was coming up and [Complainant] did not want the CCLC grants erroneously charged for Fuauli's

⁴² Notes of OIG Interview with [Complainant] (Jan. 11, 2019) at 2 [65]; OIG Notes from Interview with Dawn Young (April 9, 2019) at 1 [110].

⁴³ Emails between [Complainant], Tammy Keller, Christina Shioi, and Heidi Armstrong (June 21 and 22, 2017) [122].

⁴⁴ OIG Notes from Interview with REDACTED at 2 (April 1, 2019) [87]; OIG Complaint Attachment at 1 [32]; OIG Notes from Interview with [Complainant] at 2 (Jan. 11, 2019) [65].

⁴⁵ OIG Notes from Interview of [Complainant] (March 8, 2019) at 1 [69].

⁴⁶ OIG Notes from Interview with [Complainant] at 2 (Jan. 11, 2019) [65]; OIG Notes from Interview with REDACTED at 2 (April 1, 2019) [87].

⁴⁷ OIG Notes from Interview with REDACTED at 2 (April 1, 2019) [87].

⁴⁸ Emails between [Complainant], Tammy Keller, Christina Shioi, and Heidi Armstrong (June 21 and 22, 2017) [122]

salary.⁴⁹ The following day, June 22, 2017, [Complainant] emailed Keller and Shioi thanking them for following up with IPES, indicating that IPES owed the CCLC grants \$13,880.50, and inquiring how the incident occurred and whether there was checks and balances in place to prevent it from happening again.⁵⁰ In her June 22, 2017, email, [Complainant] copied Armstrong, the Superintendent for the complex area, and Shioi's supervisor.⁵¹

Although [Complainant] had reported the issue to Shioi and Keller, [Complainant] apparently became concerned that the improper payments of CCLC grant money to Fuauli had not been rectified.⁵² [Complainant] asserts that during the first week of July, she followed up with Dawn Young, who had replaced Fuauli as the office assistant, to see what had been done.⁵³ [Complainant] also followed up with other HDE employees⁵⁴ and in November 2017, [Complainant] also spoke with Armstrong to express her concerns.⁵⁵

Armstrong indicated in her interview with an OIG investigator that [Complainant] expressed that she was very worried that Fuauli was receiving double-pay.⁵⁶ [Complainant] repeatedly contacted Armstrong expressing concern that [Complainant] would get in trouble.⁵⁷ Armstrong tried to reassure [Complainant] that it was okay, that they would fix the problem, that it was not like anyone was getting paid under the table, and that nobody did this on purpose.⁵⁸

⁴⁹ Id. [121-122]

⁵⁰ Id. [121].

⁵¹ Emails between [Complainant], Tammy Keller, Christina Shioi, and Heidi Armstrong (June 21 and 22, 2017) [121]; OIG Notes from Interview with [Complainant] (Jan. 11, 2019) at 2 [65].

⁵² Email from [Complainant] to Heidi Armstrong (Nov. 15, 2017); Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima at 1 (Aug. 30, 2018) [49].

⁵³ OIG Notes from Interview with [Complainant] (Jan. 11, 2019) at 2 [65].

⁵⁴ Id. at 3 [66].

⁵⁵ Email from [Complainant] to Heidi Armstrong (Nov. 15, 2017); Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima at 1 (Aug. 30, 2018) [49].

⁵⁶ OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 2 [99].

⁵⁷ Id.

⁵⁸ Id.

Issues with Timeliness and Communications

[Complainant] has expressed that as a result of her reporting the improper payments to Keller, Shioi, and Armstrong, starting February 2018, she was subjected to retaliation.⁵⁹

Armstrong, however, has noted that there were larger organizational and personality issues in the CCLC office for the Complex Area.⁶⁰ Armstrong had been receiving reports that items for the CCLC grants were not being turned in, bills were not being paid, and purchase order processes were not being followed.⁶¹ For example, after Armstrong told [Complainant] not to purchase slushies for one event, [Complainant] did so anyway.⁶²

Armstrong also noted that there were issues between Shioi and [Complainant], including that Shioi and [Complainant] would argue whether Shioi had told [Complainant] to do certain tasks, leaving Armstrong unsure whether [Complainant] was failing to do her job or Shioi was failing to give instructions.⁶³ Noting that [Complainant] had a large task running the grant program, Armstrong asked Michelle Suzuki, an HDE employee at Shioi's level, to assist and informally supervise [Complainant].⁶⁴ Armstrong has indicated that this was in part because of the issues between Shioi and [Complainant].⁶⁵ Suzuki also ended up becoming frustrated with [Complainant].⁶⁶

[Complainant]'s communication issues appear to have begun before the alleged retaliation. On multiple occasions, including during [Complainant]'s July 1, 2017 evaluation that happened over six months before [Complainant] alleges the retaliation began, Shioi told

⁵⁹ Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima at 1 (Aug. 30, 2018) [49]; OIG Complaint Attachment at 4 [35].

⁶⁰ OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 2 [99].

⁶¹ Id.

⁶² OIG Notes from Interview with REDACTED (April 15, 2019) at 2 [107].

⁶³ OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 2 [99].

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 3 [100]

[Complainant] that she needed to improve her relationship with others because [Complainant] was getting a reputation for saying negative comments about Leeward District.⁶⁷ At the beginning of the 2017-2018 school year, two resource teachers who worked with [Complainant] expressed frustration with the lack of communication and how disorganized things were with the grant.⁶⁸ [Complainant] also stated in her interview with the OIG investigator that her conflict with Keller began in June 2016 when Fuauli was hired and [Complainant] felt like Keller was trying to take over the CCLC grant program and control it.⁶⁹ This was a year before [Complainant] made her disclosures and more than 18 months before she alleged the retaliation began.

Multiple HDE employees, including [Complainant] and Dawn Young, expressed that [Complainant] and Dawn Young, the CCLC office assistant for a period of time, had a strained and contentious relationship.⁷⁰ [Complainant] told the OIG investigator that she did not experience any acts of reprisal by Dawn Young.⁷¹ Dawn Young worked with [Complainant] on the CCLC grant from July 2017 until March 2018 in the same work location until Dawn Young left to become Keller's office assistant.⁷² In the CCLC office, Dawn Young was responsible for entering purchase orders into the system and had expressed that she was unhappy with the timing of [Complainant]'s purchase orders.⁷³ Dawn Young also felt like she was caught in the middle between [Complainant] and Shioi when [Complainant] would ask to purchase items that were either not allowable or in the grey area. Shioi would deny permission for the purchases, and

⁶⁷ OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 2 [65]; OIG Complaint Attachment at 6 [37].

⁶⁸ OIG Notes from Interview with REDACTED (April 15, 2019) at 2 [107].

⁶⁹ OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 3 [66].

⁷⁰ Id.; OIG Notes from Interview with Dawn Young (April 9, 2019) at 2 [111]; OIG Notes from Interview with REDACTED (April 6, 2019) at 2 [115].

⁷¹ OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 4 [67].

⁷² OIG Notes from Interview of [Complainant] (March 8, 2019) at 3 [71].

⁷³ OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 3 [66].

Dawn Young would have to tell [Complainant].⁷⁴ Dawn Young told the OIG investigator that while she was initially happy to be the office assistant on the CCLC grant, she eventually quit because she felt that [Complainant] was difficult to work with, unreasonable, and her behavior was erratic and puzzling.⁷⁵ In an email exchange about purchasing food for an event in early February 2018, Dawn Young asked [Complainant] why she was being “pissy” and [Complainant] scolded Dawn Young for being unprofessional.⁷⁶ Later that month, there was another email chain addressing the return of a number of items where Dawn Young insinuated that [Complainant] would use Dawn Young’s approach to deal with the problem as a “weapon” against her and aired the “dirty laundry” between the two of them to an employee of an elementary school.⁷⁷ [Complainant] emailed Shioi complaining about Dawn Young’s professionalism and asked Shioi what was going to be done to address it.⁷⁸

[Complainant]’s Attorney’s Letter to the Superintendent of Education

In a letter dated August 30, 2018, [Complainant]’s attorney contacted the Hawaii Superintendent of Education, Christina Kishimoto, and Tajimi, who had replaced Armstrong as the Complex Area Superintendent the prior month, to file a notice of a whistleblower complaint.⁷⁹ A copy of the letter was also sent to the Hawaii Attorney General (Hawaii AG). The letter briefly recounts that [Complainant] discovered improper payments to an office assistant in the financial reporting system and that this information was brought to Armstrong, Shioi, and Keller in June 2017 and then again to Armstrong in November 2017. The letter

⁷⁴ OIG Notes from Interview with Dawn Young (April 9, 2019) at 2 [111].

⁷⁵ Id.

⁷⁶ C-9: Emails between [Complainant] and Dawn Young (Feb. 5-6, 2018).

⁷⁷ C-8: Emails among [Complainant], Dawn Young, Christina Shioi, Michelle Suzuki, Tammy Keller, and Stacey Chang (Feb. 8-12, 2018); OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 3 [66].

⁷⁸ C-8: Emails among [Complainant], Dawn Young, Christina Shioi, Michelle Suzuki, Tammy Keller, and Stacey Chang (Feb. 8-12, 2018).

⁷⁹ Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima (Aug. 30, 2018) [49-51].

asserts that “certain [HDE] employees” including Shioi and Keller, “began subjecting [Complainant] to retaliatory action after [Complainant] pressed the issue” and then lists four examples that [Complainant] asserts are retaliatory actions.⁸⁰ [Complainant]’s attorney contends that the actions violate the Hawaii statute prohibiting retaliation against an employee for reporting violations of the law.⁸¹ The letter indicates that, although [Complainant] has standing to file suit, at that point she sought to remedy the situation without court action.⁸² Specifically, the letter indicates that her work location was scheduled to be moved from Makakilo Elementary School to the main Complex Area office at Ilima Intermediate School, where Shioi worked.⁸³ [Complainant] requested that while they were trying to resolve the issue she be kept at Makakilo Elementary “for the time being to minimize her psychic injury and to minimize the hostile work environment she will be exposed to.”⁸⁴

[Complainant]’s Allegations of Retaliatory Actions

[Complainant] asserts that she was retaliated against by Keller, Shioi, and Tajima.⁸⁵ [Complainant] told an OIG investigator that she did not feel that Armstrong took reprisal actions against her, just that she allowed the treatment to continue.⁸⁶ [Complainant] alleges retaliation in eight areas:⁸⁷ (1) that the purchase orders she submitted were treated differently from others; (2) that [Complainant] was required to attend meetings with higher ranking administrators; (3) that

⁸⁰ Id. at 1-2 [49-50]. The examples are all actions [Complainant] raised in her complaint to OIG that is at issue in this matter.

⁸¹ Id. at 2 [50].

⁸² Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima (Aug. 30, 2018) at 2 [50]. [Complainant] has filed a lawsuit in the Oahu First Circuit Court. C-11 Suevon Lee, *Lawsuit: DOE Retaliated When Staffer Reported Misuse of Federal Funds*, Civil Beat (Dec. 9, 2019).

⁸³ Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima (Aug. 30, 2018) at 2 [50]; OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 1 [64].

⁸⁴ Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima at 2 (Aug. 30, 2018) [50].

⁸⁵ OIG Complaint Attachment at 5-8 [36-39].

⁸⁶ OIG Notes from Interview of [Complainant] (March 8, 2019) at 5 [73].

⁸⁷ Although [Complainant] addresses specific incidents that negatively affected other people, like failing to enter hours into the casual personnel system resulting in other people not being timely paid, this matter only addresses personnel actions allegedly done to harm [Complainant] in reprisal for protected disclosures.

[Complainant]'s emails were ignored; (4) that [Complainant] was placed on a Principal Directed Professional Development Plan (PDPDP); (5) that [Complainant]'s duties were changed; (6) that [Complainant]'s office was moved to a different school; (7) that purchases that she made with CCLC grant money and personal funds were singled out for audit; and (8) that the position [Complainant] was in was converted from a 12 month position to a 10 month position.

I. [Complainant]'s Purchase Orders

In her complaint, [Complainant] raises two allegations of retaliation related to her purchase order requests. First, she asserts that starting in February 2018, Keller and Shioi required her to give a 30-day advance notice for her purchase order requests while other purchase order requests were processed in less than 30 days.⁸⁸ Second, [Complainant] asserts that her purchase orders were processed too slowly, including that two of her requests were not approved and processed until more than five months after she made the request.⁸⁹

[Complainant] contends that when she began her role as project director for the CCLC grant program in the Complex Area, the process involved her submitting a completed worksheet and vendor documents for approval to Shioi for Kapolei Complex and to another HDE employee, Richard Fajardo, for Campbell Complex. Once approved, it was entered into the system by the office assistant.⁹⁰ Suzuki took over Fajardo's position eventually.⁹¹ A few months after [Complainant] began her position, the process was changed to be done

⁸⁸ OIG Complaint Attachment at 3,5,6 [34, 36, 37]; Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima (Aug. 30, 2018) at 2 [50]; OIG Notes from Interview of [Complainant] (March 8, 2019) at 2 [70].

⁸⁹ OIG Complaint Attachment at 3 [34].

⁹⁰ OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 3 [66].

⁹¹ OIG Notes from Interview of [Complainant] (March 8, 2019) at 2 [70]; OIG Notes from Interview with REDACTED (March 27, 2019) at 3 [95].

electronically, but otherwise the process remained the same.⁹² [Complainant] asserts that the process for approval used to take no more than a week.⁹³

[Complainant] alleges that starting in approximately February 2018,⁹⁴ she was required to provide 30 days' notice for her purchase requests, and two requests were not processed within five months, resulted in numerous negative consequences to the CCLC grant program, the enrichment classes, the schools, and the students in the schools.⁹⁵ [Complainant] asserts that, in contrast, Keller and her office assistant processed the majority of the purchase orders received between March 8 and June 22, 2018 from site coordinators within three to four days.⁹⁶

Multiple HDE employees stressed that the requirement that purchase orders be submitted 30 days in advance was a consequence of [Complainant] and others submitting last minute purchase orders and the frustration that it caused.⁹⁷ Fuauli had been serving as the office assistant for the CCLC grant program and after she left, Dawn Young was hired to be the new office assistant.⁹⁸ Dawn Young, who was tasked with entering the purchase orders into the system, had expressed displeasure with the timing of [Complainant]'s purchase orders to HDE supervisors.⁹⁹ Dawn Young told the OIG investigator that everything with [Complainant] was last minute and rushed and, because many of the items came from the mainland and needed more time, it made it frustrating to get things done.¹⁰⁰

⁹² OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 3 [66].

⁹³ Id.

⁹⁴ OIG Complaint Attachment at 4 [35]; OIG Notes from Interview of [Complainant] (March 8, 2019) at 2 [70].

⁹⁵ OIG Complaint Attachment at 3, 10-11 [34, 41-42].

⁹⁶ OIG Complaint Attachment at 12-13 [43-44].

⁹⁷ OIG Notes from Interview with REDACTED (April 1, 2019) at 5 [90]; OIG Notes from Interview with REDACTED (March 27, 2019) at 3 [95]; OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 3 [100]; OIG Notes from Interview with REDACTED (April 8, 2019) at 2 [104]; OIG Notes from Interview with REDACTED (April 15, 2019) at 2 [107]; OIG Notes from Interview with Dawn Young (April 9, 2019) at 2 [111]; OIG Notes from Interview with REDACTED (April 9, 2019) at 2 [115].

⁹⁸ OIG Notes from Interview with REDACTED (April 1, 2019) at 3 [88].

⁹⁹ OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 3 [66]; OIG Notes from Interview with Dawn Young (April 9, 2019) at 2 [111].

¹⁰⁰ OIG Notes from Interview with Dawn Young (April 9, 2019) at 2 [111].

Additionally, others complained about untimely purchase orders.¹⁰¹ Once [Complainant] started coordinating more large events, she began a pattern of submitting last minute purchase orders.¹⁰² One HDE employee noted that because [Complainant] submitted last minute purchase orders, there was sometimes not enough time to properly plan events.¹⁰³ Armstrong told the OIG investigator that [Complainant] planned wonderful CCLC grant events but things were done at the last minute.¹⁰⁴ Armstrong received multiple complaints about [Complainant] submitting purchase orders and making changes to events at the last minute and putting a burden on both clerks and supervisors.¹⁰⁵ [Complainant] also submitted open purchase orders and told schools they could do the same.¹⁰⁶ Keller complained to Armstrong about the open purchase orders, which do not specify what item is being purchased, and put a great accountability burden on a business manager.¹⁰⁷ Armstrong informed the site coordinators and [Complainant] that open purchase orders were not allowed.¹⁰⁸

Although she did not file a formal complaint, Dawn Young had informal conversations with Armstrong where she complained about working with [Complainant] because things were not well planned and done at the last minute.¹⁰⁹ In a February 14, 2018 meeting, Armstrong asked Dawn Young how much time she needed to enter the purchase orders, and Dawn Young indicated she needed 30 days, after which Armstrong agreed that purchase orders should be made 30 days in advance.¹¹⁰ Site coordinators, however, were also required to submit purchase

¹⁰¹ OIG Notes from Interview with REDACTED (April 1, 2019) at 4 [89]; OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 2 [99].

¹⁰² OIG Notes from Interview with REDACTED (April 1, 2019) at 3 [88].

¹⁰³ OIG Notes from Interview with REDACTED (April 9, 2019) at 2 [115].

¹⁰⁴ OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 2 [99].

¹⁰⁵ OIG Notes from Interview with REDACTED (April 1, 2019) at 3 [88].

¹⁰⁶ OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 2 [99].

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ Id.; OIG Notes from Interview with Dawn Young (April 9, 2019) at 2 [111].

¹¹⁰ OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 3 [66]; OIG Notes from Interview with REDACTED (April 1, 2019) at 5 [90]; OIG Notes from Interview with REDACTED (April 9, 2019) at 2 [115].

orders 30 days in advance.¹¹¹ One HDE employee asserts that everybody, including those outside of the grant, are required to submit purchase orders 30 days in advance.¹¹²

[Complainant] also complains about the time it took to process her purchase orders, including that two of the purchase orders that she requested, for vendors Creating Change and Dimension U, took more than five months to process.¹¹³ On July 23, 2018, [Complainant] sent an email to Shioi, Keller, Suzuki, Miyasaki and another HDE employee inquiring about the status of the two purchase orders, both of which had been submitted over one month before.¹¹⁴ Minutes from meetings of the CCLC staff, however, indicate that the purchase orders were not ignored, but rather the purchase orders for Creating Change was still being addressed on October 4, 2018 and for Dimension U on October 23, 2018.¹¹⁵ Additionally, [Complainant] had been told that the Creating Change purchase order was not a priority item.¹¹⁶

There are a number of other indications why purchase orders could not always be processed rapidly. One HDE employee noted that for a month during the fall 2018, the financial management system crashed and, while it was down, none of the purchase orders were processed and none of the vendors were paid.¹¹⁷ Another employee noted that [Complainant] would purchase items without approval and then ask for reimbursement later, which caused delays.¹¹⁸

Finally, in some cases, [Complainant]’s purchase orders were processed in less than 30 days. On June 12, 2018 she submitted a purchase order for “Hawaiian Sealife” which was

¹¹¹ OIG Notes from Interview of [Complainant] (March 8, 2019) at 2 [70]; OIG Notes from Interview with REDACTED (April 1, 2019) at 5 [90]; OIG Notes from Interview with REDACTED (April 9, 2019) at 2 [115].

¹¹² OIG Notes from Interview with REDACTED (April 15, 2019) at 2 [107].

¹¹³ OIG Complaint Attachment at 3, 11-12 [34, 42-43].

¹¹⁴ Email from [Complainant] to Christina Shioi, Tammy Keller, Michelle Suzuki, Teresa Miyasaki, and Tonya Baetz (July 23, 2018).

¹¹⁵ 21st Century Community Learning Center Campbell-Kapolei Grant Staff Meeting Minutes [152-153].

¹¹⁶ OIG Complaint Attachment at 11 [42].

¹¹⁷ OIG Notes from Interview with REDACTED (March 27, 2019) at 3 [95].

¹¹⁸ OIG Notes from Interview with REDACTED (April 8, 2019) at 2 [104]

processed in 14 days,¹¹⁹ and for a large event on March 29, 2018, Dawn Young processed within three to five days.¹²⁰

2. Meetings with Administrators

In her complaint, [Complainant] asserts that, between April and November 2018, Shioi required [Complainant] to attend 12 meetings. Each meeting had between two and four educational officers, including Armstrong, Shioi, and Keller.¹²¹ An educational officer is an administrative position that serves as a supervisor.¹²² [Complainant] asserts that she told Armstrong that she felt it was unfair for her to have to attend meetings with all of the educational officers “on one side” and she the only resource teacher “on the other side.”¹²³ [Complainant]’s complaint, however, indicates that at seven of the twelve meetings, Miyasaki, who is not an education officer, was in attendance as well. [Complainant] alleges in her complaint that “she felt intimidated meeting with several [educational officers] who I already felt were not treating me fairly.”¹²⁴ During another interview with the OIG investigator, however, [Complainant] complained that she had been excluded from meetings in the fall of 2018 by Keller, and then was excluded again from a meeting in December with Suzuki, Keller, Dawn Young, and Christina Smith.¹²⁵

At one point, [Complainant] indicated to the OIG investigator that she felt like she was required to attend these meetings to put her in her place because she continued to press the

¹¹⁹ OIG Complaint Attachment at 11 [42].

¹²⁰ OIG Notes from Interview of [Complainant] (March 8, 2019) at 2 [70]; Email from [Complainant] to Isabel Douroupis (April 23, 2019) [165].

¹²¹ OIG Complaint Attachment at 3, 7, 14-15 [34, 38, 45-46]; Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima (Aug. 30, 2018) at 2 [50].

¹²² OIG Notes from Interview of [Complainant] (March 8, 2019) at 1 [69].

¹²³ OIG Complaint Attachment at 7 [38].

¹²⁴ OIG Complaint Attachment at 14 [45]

¹²⁵ OIG Notes from Interview of [Complainant] (March 8, 2019) at 5 [73].

Fuauli pay issue.¹²⁶ Specifically, [Complainant] felt that Shioi did not like that [Complainant] had gone over her head to talk to Armstrong about her concerns and so after [Complainant] spoke with Armstrong about the pay issue, Armstrong suggested having the meetings.¹²⁷

In January 2018, Armstrong had sent an email indicating that she wanted to hold regular meetings with [Complainant], Shioi, and Suzuki, because she wanted to improve communication between everybody.¹²⁸ That month, Dawn Young had indicated that she wanted to quit because of conflicts with [Complainant], including that [Complainant] had sent an email that cast Dawn Young in a negative light.¹²⁹ Armstrong decided to have meetings after learning about the conflict and because people were complaining about working with [Complainant] and about her untimely purchase orders.¹³⁰ One employee noted that the meetings began after Dawn Young left the CCLC office and Armstrong felt like [Complainant] needed help with planning and timeliness.¹³¹

3. [Complainant]'s Emails Are Not Answered

In her complaint, [Complainant] alleges that, starting in February 2018,¹³² Keller and Shioi ignored or were non-responsive to emails and calls from vendors and herself.¹³³ [Complainant] contends that this makes it difficult to “get her job done” and casts her in a “negative light.”¹³⁴

¹²⁶ OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 3 [66].

¹²⁷ Id. at 3-4 [66-67].

¹²⁸ Id. at 3 [66]; OIG Notes from Interview with REDACTED (April 1, 2019) at 5 [90].

¹²⁹ OIG Notes from Interview with REDACTED (April 1, 2019) at 3 [88].

¹³⁰ OIG Notes from Interview with REDACTED (April 1, 2019) at 3 [88]; OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 3 [100].

¹³¹ OIG Notes from Interview with REDACTED (April 9, 2019) at 2 [115]. That same employee indicated to the OIG investigator that she felt like [Complainant] did not need the meetings because her issues were really with her managers after the disclosure about Fuauli, although she offers no evidence to support her theory.

¹³² OIG Complaint Attachment at 4 [38]; OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 4 [67].

¹³³ OIG Complaint Attachment at 3, 4, 5, 6, 8 [34, 35, 36, 37, 39]; Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima (Aug. 30, 2018) at 2 [50].

¹³⁴ OIG Complaint Attachment at 3, 4 [34, 35]; *see also* Emails between [Complainant], Christina Shioi, Tammy Keller, Sean Tajima, Teresa Miyasaki, and Jeff Pagay (Sept. 18-19, 2018).

In relation to Keller, [Complainant] asserts that between March 21, 2018 and August 10, 2018, Keller failed to respond to her emails or emails and calls from vendors on at least 25 occasions and Shioi did the same on at least 18 occasions.¹³⁵ In contrast, [Complainant] claims that after examining 23 emails from other people on which she was copied, Keller responded to the majority within the same day and nearly all emails within one to two work days.¹³⁶ As an example of the consequences of Keller's non-responsiveness, [Complainant] asserts that after Dawn Young left her position as office assistant on the CCLC grants, [Complainant] needed the password for the financial management system to fulfill her responsibility to screen job applicants, but when she asked Keller for the password, and Keller's response did not work to give [Complainant] access.¹³⁷ [Complainant], however, did not pursue resolving the password issue.¹³⁸

[Complainant] asserts that Shioi was unresponsive to some emails resulting in vendors being paid late.¹³⁹ [Complainant] states, however, that she does not feel that Shioi was always non-responsive with emails.¹⁴⁰ [Complainant] additionally admitted that she does not know if others had problems with Shioi not responding to emails and that Shioi had a reputation for being scattered.¹⁴¹

HDE employees indicated that in early 2018, email correspondence began to get "nasty" with employees going back and forth in email exchanges. Armstrong called a meeting where she directed employees to stop using emails.¹⁴² Armstrong determined that she did not want emails

¹³⁵ OIG Complaint Attachment at 8 [39].

¹³⁶ Id. at 9 [40].

¹³⁷ OIG Notes from Interview of [Complainant] (March 8, 2019) at 4 (72).

¹³⁸ Id. at 1 [69].

¹³⁹ OIG Complaint Attachment at 6 [37].

¹⁴⁰ OIG Notes from Interview of [Complainant] (March 8, 2019) at 3 [71].

¹⁴¹ Id.

¹⁴² OIG Notes from Interview with REDACTED (March 27, 2019) at 3 [95]; OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 4 [101].

used because they were not the best way to resolve problems, they could unintentionally hurt feelings, and the staff needed to talk and figure things out.¹⁴³ Armstrong instructed the CCLC staff both verbally and through emails not to solve problems through emails.¹⁴⁴ Dawn Young recalls being at the meeting, where they learned that an email might come across to a person in an unintended way and that they should pick up the phone and talk about an issue instead of emailing.¹⁴⁵ Shioi appears to have repeatedly imposed Armstrong’s directive. Shioi “admonished” [Complainant] for sending emails about CCLC concerns, telling her “on more than one occasion not to communicate through email.”¹⁴⁶ Shioi also directed Miyasaki not to use emails to solve issues, but to discuss the issues in person during meetings.¹⁴⁷ Additionally, on May 25, 2018, [Complainant] participated in a Summary of Conference where one of the items discussed was that “emails should be kept to a minimum and other methods of communication used.”¹⁴⁸

4. [Complainant] is Placed on a PDPDP

[Complainant] asserts in her complaint that she was placed on a Principal Directed Professional Plan (PDPDP) by Shioi in September 2018 after receiving a highly effective rating on her Individual Professional Development Plan (IPDP) the prior May.¹⁴⁹ All teachers in HDE, including [Complainant], are required to develop an individual professional development plan, which is self-generated.¹⁵⁰ In addition, supervisors can place a teacher on a PDPDP when the

¹⁴³ OIG Notes from Interview with REDACTED (April 1, 2019) at 5 [90]; OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 4 [101]; OIG Notes from Interview with REDACTED (April 15, 2019) at 3 [108].

¹⁴⁴ OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 4 [101].

¹⁴⁵ OIG Notes from Interview with Dawn Young (April 9, 2019) at 2 [111].

¹⁴⁶ OIG Complaint Attachment at 6 [37]; *see also* Email from Christina Shioi to [Complainant] (March 8, 2018) [190]; Email from Christina Shioi to [Complainant] (Sept. 26, 2018) [245].

¹⁴⁷ Email from Christina Shioi to Teresa Miyasaki (April 5, 2018) [263].

¹⁴⁸ Summary of Conference Memorandum (May 25, 2018) [251].

¹⁴⁹ OIG Complaint Attachment at 4 [35].

¹⁵⁰ OIG Notes from Interview with REDACTED (April 1, 2019) at 5 [90].

teacher needs support in certain areas.¹⁵¹ The PDPDP indicates that it focuses on two areas for improvement, namely [Complainant]’s planning and timeliness skills and [Complainant]’s communication skills.¹⁵² As part of her PDPDP, [Complainant] was directed to attend workshops and trainings, and was to be informally observed.¹⁵³

[Complainant] has noted that Shioi told her that, although [Complainant] received “Highly Distinguished” ratings on evaluations, she needed to work on her relationships with other HDE employees and that Shioi was informed that [Complainant] was saying negative things about the Leeward District.¹⁵⁴ [Complainant] also notes that on multiple occasions, Shioi counseled her that she needed to work on her relationships with others.¹⁵⁵

The PDPDP also noted [Complainant]’s timeliness issues.¹⁵⁶ Armstrong indicated that she did not recall [Complainant] being placed on a PDPDP, but understood why she would have been. Armstrong notes that both Shioi and Suzuki expressed frustration with [Complainant]’s timeliness issues requiring them to do last minute scrambling.¹⁵⁷

[Complainant] expressed to Shioi that she did believe that it was not fair that she was placed on a PDPDP and expressed the reasons that she did not feel that this “punishment” was warranted.¹⁵⁸ Being placed on a PDPDP, however, did not result in a decrease in [Complainant]’s pay.¹⁵⁹ Additionally, as a tenured teacher who had in the past been rated

¹⁵¹ Id.; Educator Effectiveness System Manual at 6 [131] [hereafter EES Manual].

¹⁵² OIG Notes from Interview with REDACTED (April 1, 2019) at 5 [90]; OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 4 [67]; Principal Directed Professional Development Plan for [Complainant] SY 1819 [225-228].

¹⁵³ Principal Directed Professional Development Plan for [Complainant] SY 1819 [225-228]

¹⁵⁴ OIG Complaint Attachment at 6 [37]; OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 2 [65]; Email from [Complainant] to Christina Shioi (March 5, 2018) [190-191].

¹⁵⁵ OIG Complaint Attachment at 6 [37].

¹⁵⁶ OIG Notes from Interview with REDACTED (April 1, 2019) at 5 [90].

¹⁵⁷ OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 3 [100].

¹⁵⁸ OIG Complaint Attachment at 4 [35].

¹⁵⁹ OIG Notes from Interview with REDACTED (April 1, 2019) at 6 [91].

effective, [Complainant] was on a streamlined track for performance reviews.¹⁶⁰ Because she was on a streamlined track, [Complainant]’s performance rating carried over year after year.¹⁶¹ [Complainant] was rated highly effective in the 2013-2014 school year and so that rating is carried over every year.¹⁶² [Complainant] could not be rated as less than highly effective unless she is taken off of the streamlined track and placed on the standard track.¹⁶³ Because it was too late in the year to move [Complainant] to a standard track, even with the PDPDP, she could not have been rated below a highly effective rating.¹⁶⁴

[Complainant] also asserted in her complaint that she had expressed to Shioi and Tajima that the PDPDP requirements and expectations were unrealistic and, in her opinion, were setting her up for failure.¹⁶⁵ Specifically, Shioi directed [Complainant] to attend four or five seminars for professional development and Tajima added a requirement to the PDPDP that [Complainant] meet with him for thirty minutes after each seminar.¹⁶⁶ [Complainant] states that she does not know of any other staff members who are required to debrief after each professional development seminar they attend.¹⁶⁷ The Educator Effectiveness System manual, however, notes that “every teacher is unique, therefore support and development should not look exactly the same for everyone.”¹⁶⁸

5. [Complainant]’s Duties Were Changed

[Complainant] asserts that in December 2018, Tajima took away many of her job responsibilities and asked her to focus on monitoring and evaluating the grant, which

¹⁶⁰ OIG Notes from Interview with REDACTED (April 1, 2019) at 5 [90].

¹⁶¹ Id.; EES Manual at 7 [132].

¹⁶² OIG Notes from Interview with Joseph Perez (April 24, 2019) at 1 [118].

¹⁶³ Id.

¹⁶⁴ Id.; EES Manual at 12 [137].

¹⁶⁵ OIG Complaint Attachment at 4 [35].

¹⁶⁶ OIG Complaint Attachment at 4, 7 [35, 38].

¹⁶⁷ Id. at 4 [35].

¹⁶⁸ EES Manual at 9 [134].

[Complainant] feels she was not authorized to do.¹⁶⁹ Specifically, Tajima sent [Complainant] an email on December 7, 2018 telling her to focus on the upcoming monitoring and annual report and not to work with schools unless it related to the monitoring and annual report.¹⁷⁰

[Complainant] believes that Tajima changed her duties to retaliate against her for making disclosures.¹⁷¹

HDE had a monitoring visit scheduled for January 2019.¹⁷² [Complainant] indicated during an interview with an OIG investigator that, in general, preparing for monitoring was a “huge task” requiring six to eight weeks of preparation.¹⁷³ In preparing for this specific monitoring, Tajima’s office realized that HDE was trying to prepare for changes.¹⁷⁴ Because of changes in administration at HDE, expectations had changed, including the state director of CCLC grants introduced new accountability requirements.¹⁷⁵ Additionally, the day before Tajima asked [Complainant] to focus only on preparing for the monitoring visit, [Complainant] sent Tajima an email expressing that she was overwhelmed by her workload and likely unable to complete them on time.¹⁷⁶

In her complaint, [Complainant] also alleges that she was asked not to handle the “day to day” fiscal matters and Keller and her office assistants took over all responsibilities related to

¹⁶⁹ OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 4 [67]; OIG Notes from Interview of [Complainant] (March 8, 2019) at 4 [72].

¹⁷⁰ OIG Notes from Interview of [Complainant] (March 8, 2019) at 4 [72]; Email from Sean Tajima to [Complainant] (December 7, 2018) [272]; *see also* Email from Sean Tajima to Michelle Suzuki, Tammy Keller, Christina Shioi, [Complainant], and Teresa Miyasaki (Dec. 7, 2018) [273]; Email from Sean Tajima to Jaclyn Riel et al (Dec. 7, 2018) [274].

¹⁷¹ OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 4 [67].

¹⁷² OIG Notes from Interview with REDACTED at 2 (April 1, 2019) [87].

¹⁷³ OIG Notes from Interview of [Complainant] (March 8, 2019) at 4 [72].

¹⁷⁴ OIG Notes from Interview with REDACTED (April 1, 2019) at 3 [88]; Email from Sean Tajima to Jaclyn Riel, et al. (Dec. 7, 2018) [274-275].

¹⁷⁵ OIG Notes from Interview with REDACTED (April 1, 2019) at 3 [88]; Email from Sean Tajima to Jaclyn Riel, et al. (Dec. 7, 2018) [274-275].

¹⁷⁶ Email from [Complainant] to Sean Tajima (Dec. 6, 2018) [276].

creating jobs for casual hires.¹⁷⁷ In an interview with an OIG investigator, [Complainant] noted that in January or February 2018, Armstrong had determined that [Complainant] was busy enough and stated that Keller would handle all fiscal matters related to the CCLC grant and [Complainant] could handle everything else.¹⁷⁸ In an interview with OIG investigators, two HDE employees noted that [Complainant] had a huge responsibility regarding her work on the grant program, had expressed that she was overwhelmed, and had previously hired a part-time teacher to help her.¹⁷⁹ One of the HDE employees also noted that [Complainant]'s position was a resource teacher, and it was not her role to handle payroll or purchasing orders because the office assistance were responsible for fiscal processing.¹⁸⁰ Similarly, both HDE employees noted that although [Complainant] had helped schools find part-time teachers and casual hires in the past, schools handled this hiring and it was not [Complainant]'s role or within her level of expertise.¹⁸¹

6. [Complainant] was Asked to Move Offices

[Complainant] asserts that when she began working on the CCLC grants program, she was asked which school she wanted to be based out of and she selected Makakilo Elementary (Makakilo). [Complainant] alleges that in September 2018, after the relationship between herself and the educational officers had become strained, Shioi sent an email to [Complainant] and Miyasaki asking them to move to the Ilima Intermediate School (Ilima), where the Complex Area Offices were and Shioi, Suzuki, and the CCLC office assistants were based.¹⁸² It appears

¹⁷⁷ OIG Complaint Attachment at 3 [34].

¹⁷⁸ OIG Notes from Interview of [Complainant] (March 8, 2019) at 2 [70].

¹⁷⁹ OIG Notes from Interview with REDACTED (April 1, 2019) at 3 [88]; OIG Notes from Interview with REDACTED (March 27, 2019) at 2 [94].

¹⁸⁰ OIG Notes from Interview with REDACTED (April 1, 2019) at 3 [88].

¹⁸¹ Id.; OIG Notes from Interview with REDACTED (March 27, 2019) at 2 [94].

¹⁸² OIG Complaint Attachment at 6, 15 [37, 46]; Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima (Aug. 30, 2018) at 2 [50]; OIG Notes of Interview with [Complainant] (Jan. 11, 2019) at 1 [64]; OIG Notes from Interview of [Complainant] (March 8, 2019) at 5 [73]; OIG Notes from Interview with Heidi Armstrong (April

that [Complainant] might not have actually moved, however.¹⁸³ After she resisted the move, [Complainant] may have been permitted to stay at Makailo.¹⁸⁴

Armstrong indicated that she made the decision to move [Complainant] and Miyasaki, and did so to facilitate communication and address timeliness of purchase orders.¹⁸⁵ Armstrong indicated that [Complainant] was asked to be moved after untimely paperwork caused Home Depot and Lowes not to be paid, resulting in late fees that HDE could not pay, and the complex area being banned from purchasing items from those stores.¹⁸⁶ The move also served to alleviate delays with purchase orders.¹⁸⁷ A lot of the paperwork needed to be signed by Shioi and Suzuki, both of whom were at Ilima, and couriers went to the schools no more than twice a week, so there were inefficiencies in having [Complainant] and Miyasaki at Ilima.¹⁸⁸

[Complainant] was allowed to remain at Makakilo, however, after her attorney raised concerns about having her work closely with the Complex Area leadership, but Miyasaki was not.¹⁸⁹ Armstrong and other HDE employees have indicated to the OIG investigator that the plan to move [Complainant] was because of her issues processing paperwork and concerns about her performance, not her disclosures.¹⁹⁰

7. [Complainant] is Asked about a Purchase with CCLC Grant and Personal Funds

5, 2019) at 3 [100].

¹⁸³ OIG Notes from Interview with REDACTED (April 15, 2019) at 3 [108].

¹⁸⁴ OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 3 [100]; Emails between [Complainant], Christina Shioi, Sean Tajima and Michelle Suzuki (Sept. 25-26, 2018) [244-245].

¹⁸⁵ OIG Notes from Interview with REDACTED (April 1, 2019) at 6 [91].

¹⁸⁶ OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 3 [100].

¹⁸⁷ OIG Notes from Interview with REDACTED (May 6, 2019) at 1 [117].

¹⁸⁸ OIG Notes from Interview with Dawn Young (April 9, 2019) at 3 [112]; OIG Notes from Interview with REDACTED (April 15, 2019) at 3 [108]; OIG Notes from Interview with REDACTED (May 6, 2019) at 1 [117].

¹⁸⁹ OIG Complaint Attachment at 6-7 [37-38]; Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima (Aug. 30, 2018) at 2 [50]; [Cite about reason she was moved back].

¹⁹⁰ OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 3 [100]; OIG Notes from Interview with REDACTED (April 8, 2019) at 2 [104]; OIG Notes from Interview with REDACTED (April 15, 2019) at 3 [108].

[Complainant] alleges that Tajima ordered an internal audit for the CCLC grants while [Complainant] was out of town, which included auditing specific purchases by [Complainant].¹⁹¹ On October 11, 2018, Tajima sent an email to [Complainant], Miyasaki, Suzuki, Shioi, Keller, and the new CCLC office assistant, notifying them of a scheduled audit “to help us identify any areas for improvement in preparation for the grant monitoring by the [Community Engagement Office] in January.”¹⁹² The audit, or at the least the portion of the audit alleged to be retaliatory, was conducted by Earlylne Harada, a Complex Area Business Manager for another complex within the Leeward District.¹⁹³ As part of the audit, Harada chose to audit the purchase of an outdoor soccer pool table that [Complainant] bought with CCLC funds and a number of small consumable items, like sand and ping pong balls, that [Complainant] had bought with her own money and for which [Complainant] was awaiting reimbursement.¹⁹⁴ [Complainant] contends that the site coordinators indicated that they were not contacted by Harada related to CCLC grant purchases.¹⁹⁵ Two HDE employees, however, both told the OIG investigator that the auditors did not target [Complainant], rather the audit was for everyone and it was to prepare for monitoring, not because of [Complainant]’s disclosures.¹⁹⁶

8. [Complainant]’s position is changed from a 12-month position to a 10-month position

As noted, OIG received [Complainant]’s whistleblower complaint on December 7, 2018 and conducted an investigation culminating with a report of the investigation sent to the Secretary on December 2, 2019. During the investigation, on April 30, 2019, [Complainant] sent an OIG

¹⁹¹ OIG Notes from Interview of [Complainant] (March 8, 2019) at 5 [73]; OIG Complaint Attachment at 4 [35].

¹⁹² Email from Sean Tajima to [Complainant] et. al (Oct. 11, 2018) [142-143].

¹⁹³ OIG Complaint Attachment at 4 [35].

¹⁹⁴ Id. at 4, 16 [35, 42]; Emails between Earlylne Harada, [Complainant], Christina Shioi, Michelle Suzuki, Tammy Keller, Sean Tajima, and Teresa Miyasaki (Oct. 22, 2018) [140-142].

¹⁹⁵ OIG Complaint Attachment at 4 [35].

¹⁹⁶ OIG Notes from Interview with REDACTED (April 1, 2019) at 6 [91]; OIG Notes from Interview with REDACTED (April 15, 2019) at 4 [109].

investigator an email “forwarding an email” that she had received from Tajima, her supervisor at that time.¹⁹⁷ [Complainant]’s email indicates that the “state has decided to switch me from a 12 month to a 10 month position for the next school year.”¹⁹⁸ [Complainant] indicated that the switch would result in her not being paid during July because she would be taking a summer break, which she felt was “another form of retaliation.”¹⁹⁹ Included in the chain is a February 24, 2019 email from Tajima to [Complainant] making her aware that her 12 month position might be changed by the Program Manager in the Community Engagement Office (CEO) in the Office of Strategy, Innovation and Performance, but he was unsure of when the CEO would be making the decision and he would let her know as soon as he “received any word of a decision by the CEO.”²⁰⁰ Two months later, on April 20, 2019, Tajima sent [Complainant] an email informing her that “we’ve received notification from the Community Engagement Office, who managed the 21st Century Learning Center Grants for [HDE], that your current position #602271 is changing to a 10-month position, effective 07/01/2019.”²⁰¹ The email then notes that this was “for informational purposes only,” because as a result of a determination that HDE could not provide a reasonable accommodation that would allow her to perform the essential functions of her job as CCLC program director and resource teacher, she was being moved into a new position by the start of the next school year that would not be changing to a 10-month position.²⁰²

On May 13, 2019, the OIG investigator emailed someone whose name is redacted, but

¹⁹⁷ Email from [Complainant] to Isabel Douroupis (April 30, 2019) [55].

¹⁹⁸ Id.

¹⁹⁹ Id. The email also notes that Tajima was requiring her to complete a work assignment in a short time frame which she felt was unreasonable and retaliatory. [Complainant] does not appear to provide any additional information about the reports that would allow for a judgment how onerous was the request.

²⁰⁰ Email from Sean Tajima to [Complainant] (Feb. 24, 2019) [57].

²⁰¹ Email from Sean Tajima to [Complainant] (April 30, 2019) [56].

²⁰² Email from Sean Tajima to [Complainant] (April 30, 2019) [56]; Letter from Christina Simpson to [Complainant] (Jan. 30, 2019) [84-85]; OIG Report at 3 [4].

appears to be an employee of HDE.²⁰³ In her email, the investigator noted that she had received information that [Complainant]’s position was changed to a 10-month position and that the decision came from the CEO and wanted assurance that this was true.²⁰⁴ The next day, on May 14, 2019, the recipient responded that it was true and indicated that he or she would look for supporting documentation.²⁰⁵ On May 15, 2019 an email was sent to the investigator that indicates that the change was made because making [Complainant]’s position a 12-month position was never authorized by the CCLC state level program manager.²⁰⁶ The email also indicates that it provides a timeline of events and snapshots of line items on the approved budget supporting the contention, but this information is redacted.²⁰⁷

[Complainant]’s Whistleblower Complaint

On December 7, 2018, OIG received [Complainant]’s complaint.²⁰⁸ In her complaint, she notes her disclosures to Keller and Shioi on June 21, 2017 and the State Superintendent of Education and Tajima on August 30, 2018 and asserts that she was retaliated against beginning in February 2018.²⁰⁹ [Complainant] asserts that the information she disclosed, that HDE paid an office assistant CCLC grant funds between December 2016 and September 2017 when she was at a school not eligible for CCLC grant funds was evidence (1) a violation of a law, rule, or regulation, (2) a gross mismanagement of a Department grant, (3) a gross waste of Department funds, and (4) an abuse of authority.²¹⁰

OIG Investigation

²⁰³ Email from Isabel Douroupis to REDACTED (May 13, 2019) [79].

²⁰⁴ Id.

²⁰⁵ Email from REDACTED to Isabel Douroupis (May 14, 2019) [78].

²⁰⁶ Email from Isabel Douroupis to REDACTED (May 15, 2019) [77].

²⁰⁷ Id. [77-78].

²⁰⁸ OIG Report at 1 [2].

²⁰⁹ OIG Complaint at 2-4 [25-27].

²¹⁰ Id.

OIG investigated the allegations in [Complainant]’s complaint. Specifically, OIG gathered significant amounts of documentation, provided in numerous emails with [Complainant] and with representatives from HDE, and interviewed nine HDE employees, including [Complainant], Armstrong, and Dawn Young.

At the end of its investigation, OIG issued a Report of Investigation dated December 2, 2019. In its report, OIG states that the investigation “did not substantiate [Complainant]’s allegations of whistleblower reprisal.”²¹¹ Specifically, OIG first concluded that [Complainant] failed to meet her burden of showing that her protected disclosures were a contributing factor in the decision to subject some of her purchases to an audit in October 2018.²¹² For the other seven allegations of retaliatory actions, OIG’s investigation concluded that [Complainant] met her initial burden, but that HDE also demonstrated by clear and convincing evidence that it would have taken the same actions independent of the disclosures.²¹³

Hearing and Decision Process Before OHA

On December 2, 2019, OIG delivered its report of the investigation to the Office of the Secretary of the U.S. Department of Education. On December 3, 2019, the Secretary asked the Office of Hearings and Appeals (OHA) to render a final agency decision on behalf of the Secretary in this matter, and that same day, the undersigned was assigned responsibility for overseeing this case and rendering a final agency decision.

The next day, on December 4, 2019, a Notice of Hearing and Order Governing Proceeding was issued establishing the schedule for filings and live testimony in this matter. The statute requires that this decision be issued within 30 days of the December 2, 2019 Secretary’s

²¹¹ OIG Report at 1 [2].

²¹² Id. [9].

²¹³ Id. at 1, 8, 11, 12, 13, 15, 17, 18, 19 [2, 9, 12, 13, 14, 16, 18, 19, 20].

receipt of the OIG investigation report, or by January 1, 2020.²¹⁴ Additionally, while not controlling, this decision was guided by the due process considerations from the United States Court of Appeals for the Eighth Circuit's decision in *Bus. Comm., Inc. v. U.S. Dep't of Educ.*, 739 F.3d 374 (8th Cir. 2013), which identified due process requirements when making a final agency decision in a whistleblower case like this.²¹⁵

Because of the short timeline, a live hearing was scheduled for 13 days later, on December 17, 2019. A week before the hearing, the parties were required to file and exchange their respective witness lists and the exhibits they would use in this matter. Additionally, an OHA attorney was made available to answer questions and assist the parties with procedural matters throughout the process.

On December 10, 2019, a telephonic prehearing conference was conducted, the contents of which were memorialized in an Order After Prehearing Conference issued the same day.²¹⁶ During that telephone conference, both parties affirmatively agreed to waive the live hearing.²¹⁷ Previously, the deadline to file exhibits was the end of the day on December 10, 2019,²¹⁸ and the undersigned also agreed to allow the parties three additional days to file exhibits in the case. Specifically, the undersigned ordered that all parties file any exhibits they wanted considered as part of the record by the end of the day on Friday, December 13, 2019.²¹⁹ Finally, the undersigned ordered that, in lieu of the live hearing, the parties had the option of filing a brief by

²¹⁴ 42 U.S.C. § 4712(c)(1).

²¹⁵ *Business Communications Inc.* addresses the whistleblower protections in Section 1553 of the American Recovery and Reinvestment Act, Pub.L. No 111-5, (ARRA) and not 41 U.S.C. § 4712. 41 U.S.C. § 4712, however, uses nearly identical language to Section 1553 of the ARRA. Additionally, 41 U.S.C. § 4712 was enacted in part because Section 1553 of the ARRA only applied to contracts funded by the stimulus bill and Congress wanted to expand the provisions of 1553 to all federal contractors and grantees it 41 U.S.C. § 4712. S. Rep. 114-270, at 2-3 (2016).

²¹⁶ Supplemental Order Governing Proceeding After Telephonic Prehearing Conference (Dec. 11, 2019).

²¹⁷ *Id.* at 1.

²¹⁸ Notice of Hearing and Order Governing Proceeding (Dec. 4, 2019) at 4.

²¹⁹ *Id.* at 2.

the end of the day December 17, 2019.²²⁰

On December 11 and 12, 2019, [Complainant] filed fifteen additional exhibits. HDE did not file any exhibits before the deadline. On December 17, 2019, [Complainant] filed a brief in support of her complaint. On December 17, 2019, days after the deadline for exhibits, HDE filed two exhibits with an exhibit list, but did not file a brief. The next day, on December 18, 2019, [Complainant] moved to strike the exhibits and exhibit list as a late filing.²²¹ The same day, the undersigned issued an order providing HDE an opportunity to respond by midnight Eastern Standard Time and noting that the deadline for filing simultaneous briefs had expired the prior day.²²² HDE did not respond to the scheduling order. [Complainant]'s motion to strike HDE's untimely exhibits is **GRANTED**. The exhibits are **ORDERED STRICKEN** from the record.²²³

Having considered the OIG investigation report, those documents attached to that report, as well as the brief and additional evidence submitted by [Complainant], the file is closed and ready for decision.

PRINCIPLES OF LAW

41 U.S.C. § 4712 prohibits retaliation by a grantee such as HDE against an employee for whistleblowing. The grantee cannot retaliate against an employee by discharging, demoting or discriminating against the employee for disclosing "information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and

²²⁰ Supplemental Order Governing Proceeding After Telephonic Prehearing Conference (Dec. 11, 2019).

²²¹ Complainant's Non-hearing Motion to Strike Hawaii Department of education's Exhibits (Dec. 18, 2019).

²²² Scheduling Order on Complainant's Motion to Strike (Dec. 18, 2019)

²²³ The parties were ordered to file the exhibits simultaneously. HDE did not comply, and instead submitted an untimely filing of an email from an HDE employee working on this case to Armstrong, Tajima and others. The email gave them copies of the exhibits filed by [Complainant] and asking them to respond to those exhibits. HDE Exhibit 1 at 3: Email from Albert Tiberi to Heidi Armstrong et. al. (Dec. 12, 2019). HDE's filing is unauthorized under the scheduling order. It is also inherently unfair for HDE to take the opposing exhibits and then invite its employees to submit late responsive exhibits.

specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant” to (1) a “Member of Congress or a representative of a committee of Congress;” (2) an Inspector General; (3) the GAO; (4) a “Federal employee responsible for contract or grant oversight or management at the relevant agency;” (5) an “authorized official of the Department of Justice or other law enforcement agency;” (6) a court or grand jury; or (7) a “management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct.”²²⁴

When an employee believes that he or she has been subject to a reprisal prohibited by the statute the employee may submit a complaint to OIG within three years of the reprisal.²²⁵ If OIG 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, OIG will investigate the complaint and, upon completion of the investigation, submit a report of the findings of the investigation to the employee, the entity, and the Secretary. 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.²²⁶

After receiving the OIG report, the Secretary or her 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.²²⁷

²²⁴ 41 U.S.C. § 4712(a).

²²⁵ 41 U.S.C. § 4712(b).

²²⁶ Id.

²²⁷ 41 U.S.C. § 4712(c)(1).

The whistleblower statute requires this decision to use the burdens of proof found in 5 U.S.C. § 1221(e).²²⁸ The first burden requires the employee to show that (1) she or he was an employee of a federal grantee or contractor; (2) she or he made a disclosure protected by 41 U.S.C. § 4712; and (3) the disclosure was “a contributing factor” in the action taken against the employee.²²⁹ This 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.”²³⁰ The Federal Circuit has called this the “knowledge/timing” test.²³¹ It follows, however, that in order to show that a protected disclosure was a contributing factor in the adverse personnel action, the employee must show that the alleged retaliation was a personnel action.²³² Additionally, the employee must show that the employer had knowledge of the disclosures before beginning the personnel action.²³³

If an employee adequately meets that burden, 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.”²³⁴ In *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999), the United States Court of Appeals for the Federal Circuit provided a guideline for analyzing whether an employer, in that case a federal agency, has met its burden of showing by clear and convincing evidence that it would have taken the same adverse personnel

²²⁸ 41 U.S.C. § 4712(c)(6).

²²⁹ See *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10th Cir. 2018); *Omwenga v. United Nations Found.*, 2019 WL 4860818, at *12 (D.D.C. Sept. 20, 2019); *Armstrong v. Arcanum Grp. Inc.*, 2017 WL 4236315, at *7 (D. Colo. Sept. 25, 2017).

²³⁰ See U.S.C. § 1221(e)(1); *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10th Cir. 2018).

²³¹ *Kewley v. Dep’t of Health and Human Servs.*, 153 F.3d 1357, 1362-63 (Fed. Cir. 1998).

²³² See *Hook v. NASA*, 2012 WL 1358171 (MSPB, April 3, 2012).

²³³ *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10th Cir. 2018).

²³⁴ See U.S.C. § 1221(e)(1); *Omwenga*, at *12; *Armstrong*, 2017 WL 4236315, at *7.

action absent a protected whistleblower disclosure. The factors to be considered are: “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.”²³⁵

In her brief, [Complainant] argues that once the employer has met its burden of production and provided a legitimate reason for an action, the burden shifts back to the employee to “create a genuine issue of material fact” that the reason is an untrue pretext or that the legitimate reason is only one of the reasons and the motive is mixed with the employees protected characteristic as other motivating factor.²³⁶ In support of this argument, [Complainant] cites two cases addressing discrimination claims under Title VII of the Civil Rights Act of 1964 and one case interpreting the Louisiana state anti-discrimination statute. [Complainant], however, provides no caselaw involving whistleblower retaliation where, unlike with a claim of Title VII discrimination, the court has permitted a burden shift back to the employee to have an opportunity to respond to a legitimate reason for an employment action.

After weighing the evidence, the Secretary, or her designee must issue an order either denying the relief requested by the employee or requiring one or more enumerated actions by the employer.²³⁷

ANALYSIS

[Complainant] argues she faced adverse personnel actions as a response to her allegations about misused CCLC grant funds. The evidence submitted indicates that HDE had legitimate

²³⁵ *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Greyer v. Dep’t of Justice*, 70 M.S.P.R. 682, 688 (1996), *aff’d*, 116 F.3d 1497 (Fed. Cir. 1997)).

²³⁶ Complainant Brief in Support of Complaint at 3-4.

²³⁷ 41 U.S.C. § 4712(c)(1).

reasons for the challenged employment actions.

[Complainant]’s Initial Burden

[Complainant] has the initial burden to show (1) she was an employee of a federal grantee or contractor; (2) she made a disclosure protected by 41 U.S.C. § 4712; and (3) the disclosure was “a contributing factor” in the action taken against her as an employee.

- I. [Complainant] has proven that she was an employee of a federal grantee during the relevant time.

It is undisputed that [Complainant] was and is an employee of a recipient of a Department administered grant during the relevant time. HDE is a recipient of the CCLC grant program administered by the Department. [Complainant] has worked since 1986 for HDE and continues to work for HDE.²³⁸ The personnel actions forming the basis for [Complainant]’s complaint all occurred in 2018 or 2019, while she was an employee of HDE.

- II. [Complainant] has shown that she made two protected disclosures in 2017 and 2018 respectively.

[Complainant] contends that she was retaliated against for disclosing that office assistant Cindy Fuauli was paid with CCLC grants after she was transferred to a school not eligible for funding through the CCLC grant program. The statute covers disclosures of “information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.”²³⁹ These allegations would be covered by the statute. [Complainant] could reasonably believe that paying an office assistant using CCLC grant funds when she is working

²³⁸ Verification of Employment, Hawaii Dep’t of Educ. (April 17, 2019) [75].

²³⁹ 41 U.S.C. § 4712(a)(1).

at a school that is not funded by the CCLC grant program is a violation of a “law, rule, or regulation related to a Federal . . . grant.”²⁴⁰

The statute protects disclosures made to one of seven peoples or entities. In this case, [Complainant] made disclosures to five people and one entity covered under 41 U.S.C. § 4712. First, [Complainant] engaged in an email exchange with Shioi, Keller, and Armstrong on June 21 and 22, 2017 in which she expressed her concerns about the ineligible CCLC payments.²⁴¹ Shioi was [Complainant]’s supervisor, the academic officer for the Campbell-Kapolei Complex and the administrator overseeing the CCLC grant program for the Complex.²⁴² Keller was the business management officer for the Complex Area.²⁴³ Armstrong was Shioi’s supervisor and the Superintendent for the Complex Area.²⁴⁴ Then, on August 30, 2018, [Complainant]’s attorney sent a letter to HDE’s Superintendent of Education, Christina Kishimoto, and Sean Tajima, Armstrong’s replacement as Complex Area Superintendent, and the Hawaii AG identifying the ineligible CCLC payments and complaining that [Complainant] was subject to retaliation by Shioi and Keller for raising and pressing the issue.²⁴⁵ The State Attorney General’s Office is an “authorized official of the Department of Justice or other law enforcement

²⁴⁰ Id.

²⁴¹ [Complainant] also indicates that several other people were informed through emails related to this email exchange, but none of the listed individuals are proper audiences under the NDAA, and furthermore [Complainant] does not indicate that any of these people had any role in any of the adverse personnel actions at issue in this matter. OIG Complaint Attachment at 2 [33].

²⁴² OIG Notes from Interview with [Complainant] at 1 (Jan. 11, 2019) [64]; OIG Notes from Interview with [Complainant] at 1 (March 8, 2019) [69]; OIG Notes from Interview of Heidi Armstrong at 2 (April 5, 2019) [99]; OIG Complaint Attachment at 2 [33].

²⁴³ OIG Notes from Interview with REDACTED at 2 (April 1, 2019) [87]; OIG Complaint Attachment at 1 [32]; OIG Notes from Interview with [Complainant] at 2 (Jan. 11, 2019) [65].

²⁴⁴ OIG Notes from Interview with [Complainant] (Jan. 11, 2019) at 2 [65].

²⁴⁵ Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima (Aug. 30, 2018) [49-51]. [Complainant] also indicates that she sent the August 30, 2018 letter to an internal investigator at HDE and an equity specialist in the Civil Rights Compliance Office. OIG Complaint Attachment at 3 [34]. Neither of those persons are listed in the address line or the CC list on the letter, however, and whether those persons were sent a copy of the letter does not change the analysis whether there was a violation of the NDAA in this matter.

agency.”²⁴⁶ Every one of the other five individuals is a “management official or other employee of the . . . grantee who has the responsibility to investigate, discover, or address misconduct.”²⁴⁷

III. For five of the eight adverse personnel actions, [Complainant] has met her burden of showing that the protected disclosures were contributing factors.

As to the final prong, [Complainant] demonstrated her protected disclosures were contributing factors for five of the eight actions that she claims were retaliations. Two of the actions [Complainant] asserts were reprisals, that she was required to attend meetings with educational officers and that her purchases were audited as part of a larger audit, do not meet the definition of a personnel action covered under the NDAA. Additionally, [Complainant] fails to show that the individuals who caused her purchases were audited in October 2018 and her position to be converted from a 12-month position to a 10-month position had knowledge of the disclosures when they initiated the actions.

The NDAA dictates that this proceeding is controlled by the legal burdens of proof indicated in 5 U.S.C. § 1221(e).²⁴⁸ 5 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)].” Those provisions address either taking or failing to take a “personnel action.” A personnel action is defined in 5 U.S.C § 2302 as “(i) an appointment; (ii) a promotion; (iii) [a suspension, removal, furlough, or reduction in grade]²⁴⁹ or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under chapter 43 of this title or under title 38; (ix)

²⁴⁶ 41 U.S.C. § 4712(a)(2)(E).

²⁴⁷ 41 U.S.C. § 4712(a)(2)(G). In her complaint, [Complainant] asserts that she also spoke with an investigator at HDE in September and October 2018. OIG Complaint Attachment at 17 [48]. Although this would be a proper audience for a protected disclosure under the NDAA, there is no evidence that these conversations were known by any person involved with any of the personnel actions at issue in this matter.

²⁴⁸ 41 U.S.C. § 4712(c)(6).

²⁴⁹ 5 U.S.C § 75.

a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (x) a decision to order psychiatric testing or examination; (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and (xii) any other significant change in duties, responsibilities, or working conditions.”²⁵⁰

Requiring [Complainant] to submit purchase orders 30 days in advance and delaying the processing of her purchase order requests, ignoring [Complainant]’s emails and telephone calls, and changing [Complainant]’s work location²⁵¹ would result in a significant change in her working conditions. In addition, [Complainant]’s allegations that numerous duties and responsibilities were taken from her are a personnel action covered by the NDAA. Changing from a 12-month to a 10-month position, especially if, as [Complainant] contends, it results in her not being paid over the summer is also a significant change in her working conditions.²⁵² Finally, placing [Complainant] on a PDPDP, especially when it requires numerous trainings, would constitute a significant change in her duties and working conditions and would likely be a corrective action.

Armstrong called meetings of those people working on the CCLC grant program, including [Complainant], Shioi, Suzuki, and Keller, to address communication, timeliness, and

²⁵⁰ 5 U.S.C § 2302(a)(2)(A).

²⁵¹ Although it is not clear if [Complainant] was actually moved, the threat of a required change in work location constitutes a significant change in working conditions. *See Hook v. NASA*, 2012 WL 1358171 (MSPB, April 3, 2012).

²⁵² Although it is not clear that in [Complainant]’s case there would be a significant change to her position, as she was already planned to be moved out of the position and into a new position as a teacher in an elementary school by the next school year, when the change would be effective through the Return to Work Priority Program. Email from Sean Tajima to [Complainant] (April 30, 2019) [56]; Letter from Christina Simpson to [Complainant] (Jan. 30, 2019) [84-85]; OIG Report at 3 [4].

procedural issues with the administration of the CCLC grant program.²⁵³ Requiring [Complainant] to attend these meetings to discuss the CCLC grant work when she is the program manager for the Complex Area's CCLC grant program would not significantly change her duties, responsibilities, or working conditions or fit under any other definition of a personnel action. Similarly, being required to participate in a larger audit of the grant program over one or two days would not significantly change [Complainant]'s working conditions or meet any other definition of a personnel actions. In another context, the Equal Employment Opportunity Commission has looked to the United States Supreme Court's decision in *Burlington Northern & Santa Fe Railroad Co. v. White*, 548 U.S. 53 (2006), to draw the line between whether an action has a significant enough effect on a person's working conditions to rise to the level of a prohibited action of retaliation based upon whether it would deter a reasonable employee from acting.²⁵⁴ This standard has been applied to interpretations of whistleblower protections in different federal statutes²⁵⁵ and state laws.²⁵⁶ While [Complainant] may have found being part of the audit an annoyance, or preferred not to attend meetings with Shioi and Keller who she claims intimidated her, neither of those requirements would be onerous enough to dissuade a reasonable employee from making a protected disclosure.²⁵⁷

In addition to participating in the audit not being a personnel action, [Complainant] also

²⁵³ OIG Notes from Interview with REDACTED (April 1, 2019) at 3 [88]; OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 3 [100].

²⁵⁴ *EEOC Enforcement Guidance on Retaliation and Related Issues*, Equal Employment Opportunity Commission, available at https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#B._Materially (last visited Dec. 30, 2019); *See also Burlington Northern & Santa Fe Railroad Co. v. White*, 548 U.S. 53 67-68 (2006).

²⁵⁵ *Halliburton v. Administrative Review Bd.*, 771 F.3d 254, 259-260 (5th Cir. 2014) (applying the standard to the anti-retaliation provisions of the Sarbanes-Oxley Act); *McNeil v. Dep't of Labor*, 243 Fed. Appx. 93, 99-101 (6th Cir. 2007) (applying the standard to the whistleblower protections in the Energy Reorganization Act).

²⁵⁶ *Montgomery County, Tx v. Park*, 246 S.W. 3d 610, 612 (Texas 2007); *Franklin v. Pitts*, 349 Ga.App. 544, 547 (Ga. App. March 15, 2019)

²⁵⁷ *See St. John v. Potter*, 2011 WL 780685 (E.D. Penn. March 4, 2011) at *8-10 (concluding that subjective feelings of intimidation without a showing that a reasonable employee would have such feelings and other actions that do not in economic loss to the employee or changes in the terms of their employment are not prohibited personnel practices).

fails to show that the disclosures were a contributing factor in the decision to include her purchases in the audit. As [Complainant] argues, Tajima ordered the audit,²⁵⁸ but Earlyne Harada conducted the audit, or at least the portion of the audit at issue in this matter, and she chose to audit [Complainant]’s purchase of the soccer pool table and consumable items.²⁵⁹ [Complainant] fails to show that Harada had any knowledge of the disclosures when she made that decision.²⁶⁰ While converting [Complainant]’s position from a 12-month position to a 10-month position would constitute a significant change in her working conditions, [Complainant] again fails to show that the people that made the decision to convert her position had knowledge of the disclosures. [Complainant] raises the allegation that her position was changed to a 10-month position in an email to the OIG investigator.²⁶¹ In that email, [Complainant] asserts that the “**state** has decided to switch [[Complainant]] from a 12 month to a 10 month position for the next school year.”²⁶² Attached to [Complainant]’s email to the OIG investigator is a chain of emails indicating that the decision to change the position to a 10-month positions was made by the Community Engagement Office and dictated to Tajima. On February 24, 2019, Tajima sent [Complainant] an email notifying her of the possibility of the change in which he indicates that the decision to make the change might happen, that it would come from “the grant’s Program Manager in the Community Engagement Office (CEO) in the Office of Strategy, Innovation and Performance,” and that he is unsure of when that office will make the decision.²⁶³ Then on April

²⁵⁸ Complainant’s Brief in Support of Complaint at 10.

²⁵⁹ OIG Complaint Attachment at 4, 16 [35, 42]; Emails between Earlyne Harada, [Complainant], Christina Shioi, Michelle Suzuki, Tammy Keller, Sean Tajima, and Teresa Miyasaki (Oct. 22, 2018) [140-142].

²⁶⁰ [Complainant] argues that because Tajima and Shioi were supervisors, they had the authority to order HDE employees, like Harada, who might not have known about the protected disclosures to take certain employment actions. Complainant’s Brief in Support of Complaint at 10-11. There is no evidence that either Tajima or Shioi, however, did issue such an order, and the fact that a supervisor had the ability to retaliate is not proof that he or she did retaliate.

²⁶¹ Email from [Complainant] to Isabel Douroupis (April 30, 2019) [55].

²⁶² Id. (emphasis added).

²⁶³ Email from Sean Tajima to [Complainant] (Feb. 24, 2019) [57].

30, 2019, Tajima sent [Complainant] an email notifying her that the change had occurred, in which he states that he had received notification of the change from the Community Engagement Office.²⁶⁴ There, however, is no allegation or evidence to indicate that anyone from the Community Engagement Office knew of the disclosures or had any reason to retaliate against [Complainant]. To show that a protected disclosure is a contributing factor, [Complainant] must show that the person who initiated or implemented the action had knowledge of the disclosure.²⁶⁵ Because she cannot show that Harada or the Community Engagement Office had knowledge of the protected disclosures, she fails to show that the disclosures were contributing factors in decisions to include her purchases in the audit and to convert the position she previously held into a 10-month position.

HDE has Proven by Clear and Convincing Evidence That It Would Have Taken the Adverse Personnel Actions Regardless of the Protected Disclosures

Although [Complainant] has met her initial burden for five of the actions, HDE has established through clear and convincing evidence that HDE would have taken the same actions in the absence of her protected disclosures. The factors to be considered when determining if HDE has met its burden are the strength of HDE’s evidence in support of its personnel action, the existence and strength of any motive to retaliate on the part of the HDE officials who were involved in the decision, and any evidence that HDE has taken “similar actions against employees who are not whistleblowers but who are otherwise similarly situated.”²⁶⁶

[Complainant] has listed three individuals who she believes have retaliated against her as a result of her disclosures, Shioi, Keller, and Tajima.²⁶⁷ During her March 8, 2019 interview

²⁶⁴ Email from Sean Tajima to [Complainant] (April 30, 2019) [56].

²⁶⁵ *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1286-1287 (10th Cir. 2018)

²⁶⁶ *Carr*, 185 F.3d at 1323

²⁶⁷ OIG Complaint Attachment at 5-8 [36-39].

with an OIG investigator, [Complainant] specifically indicated that she did not believe that Armstrong took reprisal action against [Complainant], but only felt that Armstrong allowed the treatment to continue.²⁶⁸

Strength of HDE's Reasons for the Actions

The first *Carr* factor is the strength of HDE's evidence of a legitimate reason for taking the actions related to [Complainant]. There is clear and convincing evidence that HDE and its leaders had strong reasons for all eight of the actions, including those actions which [Complainant] failed to meet her initial burden.

1. [Complainant]'s Purchase Orders

In her complaint, [Complainant] alleges that starting, in February 2018, she was required to give a 30-day advance notice for her purchase order requests and her purchase orders were processed slowly in retaliation for her disclosures.²⁶⁹ Multiple HDE employees, however, stressed that the requirement that purchase orders be submitted 30 days in advance was a consequence of [Complainant] and others submitting last minute purchase orders and the frustration that it caused.²⁷⁰ [Complainant] even acknowledged to the OIG investigator that the CCLC office assistant, Dawn Young, had expressed displeasure with the timing of [Complainant]'s purchase orders to HDE supervisors.²⁷¹ Dawn Young told the OIG investigator

²⁶⁸ OIG Notes from Interview with [Complainant] at 5 (March 8, 2019) [73].

²⁶⁹ OIG Complaint Attachment at 3,5,6 [34, 36, 37]; Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima (Aug. 30, 2018) at 2 [50]; OIG Notes from Interview of [Complainant] (March 8, 2019) at 2 [70].

²⁷⁰ OIG Notes from Interview with REDACTED (April 1, 2019) at 5 [90]; OIG Notes from Interview with REDACTED (March 27, 2019) at 3 [95]; OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 3 [100]; OIG Notes from Interview with REDACTED (April 8, 2019) at 2 [104]; OIG Notes from Interview with REDACTED (April 15, 2019) at 2 [107]; OIG Notes from Interview with Dawn Young (April 9, 2019) at 2 [111]; OIG Notes from Interview with REDACTED (April 9, 2019) at 2 [115].

²⁷¹ OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 3 [66]; *see also* OIG Notes from Interview with Dawn Young (April 9, 2019) at 2 [111].

that [Complainant] submitting her purchase orders at the last minute made it frustrating to get things done.²⁷² Another HDE employee noted that because [Complainant] submitted last minute purchase orders, there was sometimes not enough time to properly plan events.²⁷³ Armstrong received numerous complaints about [Complainant] submitting purchase orders and making changes to events at the last minute and putting a burden on both clerks and supervisors.²⁷⁴ [Complainant] also submitted open purchase orders and told schools they could do the same, which Keller complained created a major accountability burden.²⁷⁵ Because of this, in a February 2018 meeting, Armstrong asked Dawn Young how much time she needed to enter the purchase orders, and Dawn Young indicated she needed thirty days, and Armstrong agreed that purchase orders should be made thirty days in advance.²⁷⁶ This standard was applied to site coordinators, and even those working outside the grant.²⁷⁷ In summary, the frustration caused by last minute purchase orders, including [Complainant]'s, created a compelling reason to put in place a policy that everyone had to submit their requests thirty days in advance.²⁷⁸

²⁷² OIG Notes from Interview with Dawn Young (April 9, 2019) at 2 [111].

²⁷³ OIG Notes from Interview with REDACTED (April 9, 2019) at 2 [115].

²⁷⁴ OIG Notes from Interview with REDACTED (April 1, 2019) at 3 [88]; OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 2 [99].

²⁷⁵ OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 2 [99].

²⁷⁶ OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 3 [66]; OIG Notes from Interview with REDACTED (April 1, 2019) at 5 [90]; OIG Notes from Interview with REDACTED (April 9, 2019) at 2 [115].

²⁷⁷ OIG Notes from Interview of [Complainant] (March 8, 2019) at 2 [70]; OIG Notes from Interview with REDACTED (April 1, 2019) at 5 [90]; OIG Notes from Interview with REDACTED (April 9, 2019) at 2 [115]; OIG Notes from Interview with REDACTED (April 15, 2019) at 2 [107].

²⁷⁸ In her unsigned declaration, [Complainant] attests that, to the best of her knowledge, she submitted approximately 55 to 65 purchase orders in 2017 and 2018. Declaration of [Complainant] (Dec. 17, 2019) at ¶ 10. [Complainant] notes that, when asked, Dawn Young identified only seven late purchase orders and argues that in comparison the amount of late orders is “negligible” at best and the actions taken were disproportionate and unjustified. Complainant Brief in Support of Complaint at 4-5. This argument, however, fails to consider any late purchase orders submitted during the sixteen months in 2017 and 2018 when Dawn Young was not working in the Complex Area’s CCLC grant office. See OIG Notes from Interview with Dawn Young (April 9, 2019) at 1 [110] (noting that Dawn Young worked in the CCLC office from July 2017 until March 2018). It also does not address the extent of frustration and negative consequences resulting from last minute orders. See e.g. OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 3 [100] (noting that because of late paperwork, and the unpaid bills that resulted, the Complex Area ended up being banned from purchasing items from either Home Depot or Lowes).

[Complainant] also included in her complaint that her purchase orders were being approved and processed too slowly, including two purchase orders that were not processed within five months, in reprisal for her disclosures.²⁷⁹ The evidence presented in this matter, however, indicates that there were reasons apart from any alleged effort to retaliate why purchase orders could not always be processed rapidly. For approximately one month in the fall 2018, the financial management system crashed and while it was down, none of the purchase orders were processed and none of the vendors were paid.²⁸⁰ Additionally, [Complainant]’s own actions delayed the processing of purchase orders when she would purchase items without approval and then ask for reimbursement later, which caused delays.²⁸¹

[Complainant] asserts that two of the purchase orders, for the vendors Creating Change and Dimension U, remained unapproved and not processed after five months. Examining the documents collected as part of the OIG investigation, there are explanations for the delays completely removed from any reprisal efforts. [Complainant] sent an email to, among others, Shioi and Keller in July 2018 inquiring about the status of the two purchase orders, both of which had been submitted over one month before.²⁸² Minutes from meetings of the CCLC staff, however, indicate that the purchase orders for Creating Change and Dimension U were still being addressed and worked on as of October 4, 2018 and October 23, 2018 respectively.²⁸³ Additionally, [Complainant] had been told that the Creating Change purchase order was not a priority item, and so it is logical that it would not be approved or processed as quickly.²⁸⁴

²⁷⁹ OIG Complaint Attachment at 3, 11-12 [34, 42-43].

²⁸⁰ OIG Notes from Interview with REDACTED (March 27, 2019) at 3 [95].

²⁸¹ OIG Notes from Interview with REDACTED (April 8, 2019) at 2 [104]

²⁸² Email from [Complainant] to Christina Shioi, Tammy Keller, Michelle Suzuki, Teresa Miyasaki, and Tonya Baetz (July 23, 2018).

²⁸³ 21st Century Community Learning Center Campbell-Kapolei Grant Staff Meeting Minutes [152-153].

²⁸⁴ OIG Complaint Attachment at 11 [42].

Finally, in some cases [Complainant]’s purchase orders were processed in less than 30 days. On June 12, 2018 she submitted a purchase order for “Hawaiian Sealife” which was processed in 14 days.²⁸⁵ Also, for a large event on March 29, 2018, Dawn Young processed the purchase orders within three to five days.²⁸⁶

The evidence presented in this matter shows that HDE had concrete and compelling reasons for requiring a 30-day notice for purchase orders and for delays in processing and approving purchase order requests. The evidence also shows that [Complainant]’s requests were not consistently delayed in processing.

2. Meetings with Administrators

In her complaint, [Complainant] asserts that Shioi required [Complainant] to attend meetings with educational officers, including Armstrong, Shioi, and Keller, which she felt was intimidating.²⁸⁷ During another interview with the OIG investigator, however, [Complainant] complained that she had been excluded from other meetings with HDE educational officers including Keller.²⁸⁸ [Complainant] complained that it was unfair for her to have to attend the meetings with all of the educational officers “on one side” and she the only resource teacher “on the other side.”²⁸⁹ In over half of the meetings [Complainant] listed in her complaint, however, Miyasaki, who was not an educational officer, attended.²⁹⁰ [Complainant] indicated to the OIG investigator that she felt like she was required to attend these meetings in retaliation for continuing to press the Fuauli pay issue.²⁹¹

²⁸⁵ Id.

²⁸⁶ OIG Notes from Interview of [Complainant] (March 8, 2019) at 2 [70]; Email from [Complainant] to Isabel Douroupis (April 23, 2019) [165].

²⁸⁷ OIG Complaint Attachment at 3, 7, 14-15 [34, 38, 45-46]; Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima (Aug. 30, 2018) at 2 [50].

²⁸⁸ OIG Notes from Interview of [Complainant] (March 8, 2019) at 5 [73].

²⁸⁹ OIG Complaint Attachment at 7 [38].

²⁹⁰ Id. at 14-15 [45-46].

²⁹¹ OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 3 [66].

Evidence presented, however, indicates that there was a concrete reason to call the meetings separate from any retributory intent. Armstrong called for the meetings to address communication issues and complaints about [Complainant]'s untimely purchase orders. In January 2018, Armstrong had sent an email indicating that she wanted to hold regular meetings with [Complainant], Shioi, and Suzuki because she wanted to improve communication among the CCLC grant staff.²⁹² Armstrong decided to have the meetings after learning about conflicts between [Complainant] and Dawn Young and because people were complaining about working with [Complainant] and her last minute purchase orders.²⁹³

3. [Complainant]'s Emails Are Not Answered

In her complaint, [Complainant] alleges that, starting in February 2018, Keller and Shioi ignored or were non-responsive to her emails making it difficult to complete her job and harming her reputation.²⁹⁴ [Complainant] asserts that in a little over four months of 2018, Keller and Shioi failed to respond to her emails on many occasions.²⁹⁵ In contrast, [Complainant] claims that after examining 23 emails from other people on which she was copied, Keller responded to the majority within the same day and nearly all emails within one to two work days.²⁹⁶ [Complainant], however, acknowledges that her conflict with Keller began in June 2016, a year before she made any disclosures.²⁹⁷ [Complainant] also admitted that she does not know if others also had problems with Shioi not responding to emails.²⁹⁸

²⁹² Id.; OIG Notes from Interview with REDACTED (April 1, 2019) at 5 [90].

²⁹³ OIG Notes from Interview with REDACTED (April 1, 2019) at 3 [88]; OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 3 [100].

²⁹⁴ OIG Complaint Attachment at 3, 5, 6, 8-10 [34, 36, 37, 39-41]; Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima (Aug. 30, 2018) at 2 [50].; OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 4 [67]. [Complainant] also asserts that Keller and Shioi were unresponsive to vendors' communications but fails to provide evidence to support that vendors were treated differently after the disclosures.

²⁹⁵ OIG Complaint Attachment at 8 [39].

²⁹⁶ Id. at 9 [40]

²⁹⁷ OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 3 [66].

²⁹⁸ OIG Notes from Interview of [Complainant] (March 8, 2019) at 3 [71].

Shioi and Keller had a significant reason not to reply to emails. Both were ordered not to use email by Armstrong. In early 2018, email correspondence began to get “nasty” with employees going back and forth through emails. In response, Armstrong, verbally and through email, directed employees to stop using emails to solve problems.²⁹⁹ Armstrong determined that she did not want emails used because they were not the best way to resolve problems, they could unintentionally hurt feelings, and the staff needed to talk and figure things out.³⁰⁰ Following Armstrong’s directive, Shioi “admonished” [Complainant] for sending emails about CCLC concerns on multiple occasions³⁰¹ and directed Miyasaki not to use emails to solve issues, but to discuss the issues in person during meetings.³⁰² Additionally, on May 25, 2018, [Complainant] participated in a Summary of Conference where one of the items discussed was that “emails should be kept to a minimum and other methods of communication used.”³⁰³ It follows that Shioi and Keller would be reluctant to use email against Armstrong’s directive.

4. [Complainant] is Placed on a PDPDP

[Complainant] complains that she was placed on a Principal Directed Professional Plan (PDPDP) by Shioi in September 2018 after receiving a highly effective rating on her Individual Professional Development Plan (IPDP) the prior May.³⁰⁴ [Complainant] further elaborates that she received a highly effective rating every year from the 2013/2014 school year through the 2018/2019 school year and should not have been put on a PDPDP, which are for professionals

²⁹⁹ OIG Notes from Interview with REDACTED (March 27, 2019) at 3 [95]; OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 4 [101]; OIG Notes from Interview with Dawn Young (April 9, 2019) at 2 [111].

³⁰⁰ OIG Notes from Interview with REDACTED (April 1, 2019) at 5 [90]; OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 4 [101]; OIG Notes from Interview with REDACTED (April 15, 2019) at 3 [108].

³⁰¹ OIG Complaint Attachment at 6 [37]; *see also* Email from Christina Shioi to [Complainant] (March 8, 2018) [190]; Email from Christina Shioi to [Complainant] (Sept. 26, 2018) [245].

³⁰² Email from Christina Shioi to Teresa Miyasaki (April 5, 2018) [263]

³⁰³ Summary of Conference Memorandum (May 25, 2018) [251].

³⁰⁴ OIG Complaint Attachment at 4 [35].

who receive a “Less than Effective” rating.³⁰⁵ [Complainant] also notes the accolades and praise she received for organizing well received events.³⁰⁶ Being placed on a PDPDP, however, did not result in a decrease in [Complainant]’s pay and, because she was on a streamlined track, did not result in [Complainant] receiving a rating below highly effective.³⁰⁷

[Complainant] is correct that, because she was on a streamlined track, her highly effective rating had automatically carried over every year since the 2013/2014 academic year.³⁰⁸ The Educator Effectiveness Manual, however, indicates that PDPDPs are not only for teachers with less than effective ratings. As [Complainant] also admits, supervisors can place a teacher on a PDPDP who has a highly effective rating when the teacher needs support in certain areas.³⁰⁹ [Complainant]’s PDPDP articulates two critical concerns addressed by putting [Complainant] on a PDPDP that are completely independent of her disclosures. The PDPDP addresses improving [Complainant]’s planning and timeliness skills and [Complainant]’s communication skills.³¹⁰ There is evidence in this matter that shows HDE’s need for [Complainant] to improve in these areas. [Complainant] notes that on multiple occasions, Shioi counseled her that she needed to work on her relationships with others.³¹¹ Additionally, as noted above, Armstrong directed CCLC grant staff to stop using emails and scheduled meetings because of communication issues. [Complainant]’s issues with timeliness and organization are also well documented. Armstrong indicated that she did not recall [Complainant] being placed on a PDPDP, but understood why

³⁰⁵ Complainant Brief in Support of Complaint at 5-6.

³⁰⁶ Id.

³⁰⁷ OIG Notes from Interview with REDACTED (April 1, 2019) at 5, 6 [90, 91]; OIG Notes from Interview with Joseph Perez (April 24, 2019) at 1 [118]; EES Manual at 7, 12 [132, 137].

³⁰⁸ Notes of OIG interview with Joseph Perez (April 24, 2019) [118].

³⁰⁹ Complainant Brief in Support of Complaint at 7, OIG Notes from Interview with REDACTED (April 1, 2019) at 5 [90]; Educator Effectiveness System Manual at 6 [131] [hereafter EES Manual].

³¹⁰ OIG Notes from Interview with REDACTED (April 1, 2019) at 5 [90]; OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 4 [67]; Principal Directed Professional Development Plan for [Complainant] SY 1819 [225-228].

³¹¹ OIG Complaint Attachment at 6 [37].

she would have been.³¹² Multiple HDE employees, including Shioi, Suzuki, and Dawn Young expressed frustration with [Complainant]’s disorganized, untimely approach and the problems it caused.³¹³

[Complainant] also asserted in her complaint that she had expressed to Shioi and Tajima that the PDPDP requirements to attend four or five seminars for professional development and to meet with Tajima for 30 minutes after each seminar were unrealistic and setting her up for failure.³¹⁴ [Complainant] states that she does not know of any other staff members who are required to debrief after each professional development seminar they attend.³¹⁵ The Educator Effectiveness System manual, however, notes that “every teacher is unique, therefore support and development should not look exactly the same for everyone.”³¹⁶ The PDPDP also shows that the seminars were related to organizational and communication skills,³¹⁷ which were areas that HDE had identified where [Complainant] had a crucial need for improvement.

[Complainant]’s challenges with timeliness and organization, and the CCLC grant office’s communication problems created a critical need for improvement by [Complainant] which could be pursued through putting her on a PDPDP.

5. [Complainant]’s Duties Were Changed

[Complainant] asserts that in December 2018, Tajima took away many of her job responsibilities in retaliation for her protected disclosures.³¹⁸ Tajima, however, provided a

³¹² OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 3-4 [100-101].

³¹³ OIG Notes from Interview with REDACTED (April 1, 2019) at 3 [88]; OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 2, 3 [99, 100]; OIG Notes from Interview with Dawn Young (April 9, 2019) at 2 [111]; OIG Notes from Interview with REDACTED (April 9, 2019) at 2 [115].

³¹⁴ OIG Complaint Attachment at 4, 7 [35, 38].

³¹⁵ Id. at 4 [35].

³¹⁶ EES Manual at 9 [134].

³¹⁷ PDPDP at 1-3 [225-227].

³¹⁸ OIG Notes from Interview of [Complainant] (Jan. 11, 2019) at 4 [67]; OIG Notes from Interview of [Complainant] (March 8, 2019) at 4 [72].

reason for changing her responsibilities completely separate from the disclosures in his December 7, 2018 email notifying [Complainant] of the changes. In that email, Tajima asked [Complainant] to focus on the upcoming monitoring and annual report and not to work with schools unless it related to the monitoring and annual report.³¹⁹

HDE had a monitoring visit scheduled for January 2019.³²⁰ [Complainant] acknowledged that, in general, preparing for monitoring was a “huge task” requiring six to eight weeks of preparation.³²¹ In preparing for this specific monitoring, Tajima’s office realized that there were specific challenges preparing their office for changes in expectations resulting in changes in the administration at HDE, including the fact that the state director of CCLC grants introduced new accountability requirements.³²²

Additionally, [Complainant] sent Tajima an email the day before Tajima asked [Complainant] to focus only on preparing for the monitoring visit expressing that she was overwhelmed by her workload and likely unable to complete them on time.³²³ Because [Complainant] was already overwhelmed by her work load and Tajima needed her assistance on a large and important project, it was appropriate for him to remove some of [Complainant]’s other responsibilities.³²⁴

³¹⁹ OIG Notes from Interview of [Complainant] (March 8, 2019) at 4 [72]; Email from Sean Tajima to [Complainant] (December 7, 2018) [272]; *see also* Email from Sean Tajima to Michelle Suzuki, Tammy Keller, Christina Shioi, [Complainant], and Teresa Miyasaki (Dec. 7, 2018) [273]; Email from Sean Tajima to Jaclyn Riel et al (Dec. 7, 2018) [274].

³²⁰ OIG Notes from Interview with REDACTED at 2 (April 1, 2019) [87].

³²¹ OIG Notes from Interview of [Complainant] (March 8, 2019) at 4 [72].

³²² OIG Notes from Interview with REDACTED (April 1, 2019) at 3 [88]; Email from Sean Tajima to Jaclyn Riel, et al. (Dec. 7, 2018) [274-275].

³²³ Email from [Complainant] to Sean Tajima (Dec. 6, 2018) [276].

³²⁴ In her brief, [Complainant] raises allegations of another situation where, in August 2019, Tajima removed [Complainant]’s duties as project director but allowed her to maintain her title. Complainant’s Brief in Support of Complaint at 8-9. This allegation was not raised in the December 2018 complaint. There is no evidence that [Complainant] ever brought these allegations to the OIG investigator. In short, this allegation was not part of the OIG investigation. The NDAA provides that after receipt of the OIG’s investigative report the head of the agency will determine if there is a sufficient basis to conclude that there was reprisal against the employee. 41 U.S.C. § 4712(c)(1). Allegations of incidents that are not part of the investigation are not before the Secretary when making

In her complaint, [Complainant] also asserts that she was asked not to handle the “day to day” fiscal matters and that Keller and her office assistants took over all responsibilities related to creating jobs for casual hires.³²⁵ In an interview with an OIG investigator, [Complainant] noted that in January or February 2018, Armstrong had determined that [Complainant] was busy enough and stated that Keller would handle all fiscal matters related to the CCLC grant and [Complainant] could handle everything else.³²⁶ [Complainant] had a lot of responsibilities working on the grant program, and had in the past expressed that she was overwhelmed, and that a part-time teacher was hired to help her.³²⁷ Additionally, one HDE employee noted that as a resource teacher, it was not [Complainant]’s role to handle payroll or purchasing orders because the office assistance were responsible for fiscal processing.³²⁸ Similarly, multiple HDE employees noted that although [Complainant] had helped schools find part-time teachers and casual hires in the past, schools handled this hiring and it was not intended to be [Complainant]’s role or her area of expertise.³²⁹ In summary, the evidence indicates that [Complainant] was overwhelmed with her work load and so Armstrong took away [Complainant]’s responsibility to do work that was not intended to be part of her job.

6. *[Complainant] was Asked to Move Offices*

[Complainant] alleges that in September 2018, after the relationship between herself and the educational officers had become strained, Shioi sent an email to [Complainant] and Miyasaki asking them to move from Makakilo Elementary to the Ilima Intermediate School. Ilima was where the Complex Area Offices were located and was where Shioi, Suzuki, and the CCLC

this determination.

³²⁵ OIG Complaint Attachment at 3 [34].

³²⁶ OIG Notes from Interview of [Complainant] (March 8, 2019) at 2 [70].

³²⁷ OIG Notes from Interview with REDACTED (April 1, 2019) at 3 [88]; OIG Notes from Interview with REDACTED (March 27, 2019) at 2 [94].

³²⁸ OIG Notes from Interview with REDACTED (April 1, 2019) at 3 [88].

³²⁹ Id.; OIG Notes from Interview with REDACTED (March 27, 2019) at 2 [94].

office assistants were based.³³⁰ HDE provided a concrete reason for asking [Complainant] and Miyasaki to make the move. Armstrong indicated that she made the decision to move [Complainant] and Miyasaki, and did so to facilitate communication and address timeliness of purchase orders.³³¹ Specifically, [Complainant] was asked to be moved after untimely paperwork resulted in the complex area being banned from purchasing items from certain stores.³³² The move served to alleviate delays with purchase orders.³³³ Much of the paperwork needed to be signed by Shioi and Suzuki, both of whom were at Ilima, and couriers went to the schools no more than twice a week, so there was efficiencies in having [Complainant] at Ilima.³³⁴ Additionally, as noted above, the Complex Area's CCLC grant office faced significant communications challenges that Armstrong sought to address in multiple ways. It is reasonable that if, in addition to the ongoing communication issues, there are issues with paperwork being processed and those issues are resulting in significant negative consequences, Armstrong would want to move the Complex Area's CCLC grant employees to one location to facilitate communication and address the timeliness of processing purchase orders.

7. *[Complainant] is Asked about a Purchase with CCLC Grant and Personal Funds*

[Complainant] alleges that Tajima ordered an internal audit for the CCLC grants while [Complainant] was out of town that included an audit of specific purchases by her, including a soccer pool table purchased with CCLC grant money and consumable items which

³³⁰ OIG Complaint Attachment at 6, 15 [37, 46]; Letter from Andrew Stewart to Christina Kishimoto and Sean Tajima (Aug. 30, 2018) at 2 [50]; OIG Notes of Interview with [Complainant] (Jan. 11, 2019) at 1 [64]; OIG Notes from Interview of [Complainant] (March 8, 2019) at 5 [73]; OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 3 [100].

³³¹ OIG Notes from Interview with REDACTED (April 1, 2019) at 6 [91].

³³² OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 3 [100].

³³³ OIG Notes from Interview with REDACTED (May 6, 2019) at 1 [117].

³³⁴ OIG Notes from Interview with Dawn Young (April 9, 2019) at 3 [112]; OIG Notes from Interview with REDACTED (April 15, 2019) at 3 [108]; OIG Notes from Interview with REDACTED (May 6, 2019) at 1 [117].

[Complainant] paid for and sought reimbursement with CCLC grant funds.³³⁵ On October 11, 2018, Tajima sent an email to [Complainant], Miyasaki, Suzuki, Shioi, Keller, and the new CCLC office assistant, notifying them of a scheduled audit “to help us identify any areas for improvement in preparation for the grant monitoring by the [Community Engagement Office] in January.”³³⁶ As noted above, the grant monitoring visit was a major event for the Complex Area’s CCLC grant program. Two HDE employees told the OIG investigator that the audit did not target [Complainant] specifically, but covered everyone.³³⁷ Preparing for monitoring of the CCLC grant provides a strong reason to audit purchase made with CCLC grant funds.

8. [Complainant]’s position is changed from a 12-month position to a 10-month position

On April 30, 2019, during the OIG investigation, [Complainant] sent an OIG investigator an email indicating that she had received an email from Tajima notifying her that the “state has decided to switch me from a 12 month to a 10 month position for the next school year,” which she felt was a form of retaliation.³³⁸ Tajima’s email also notes that the change would not apply to [Complainant]. The reason it would not apply is that [Complainant] had requested reasonable accommodations and HDE could not provide one that would allow her to perform the essential functions of her job as CCLC program director and resource teacher. As a result, [Complainant] was moved into another position.³³⁹

After an exchange of emails, on May 15, 2019, an email was sent to the OIG investigator

³³⁵ OIG Complaint Attachment at 4, 16 [35, 42]; OIG Notes from Interview of [Complainant] (March 8, 2019) at 5 [73]; Emails between Earlyne Harada, [Complainant], Christina Shioi, Michelle Suzuki, Tammy Keller, Sean Tajima, and Teresa Miyasaki (Oct. 22, 2018) [140-142].

³³⁶ Email from Sean Tajima to [Complainant] et. al (Oct. 11, 2018) [142-143].

³³⁷ OIG Notes from Interview with REDACTED (April 1, 2019) at 6 [91]; OIG Notes from Interview with REDACTED (April 15, 2019) at 4 [109].

³³⁸ Email from [Complainant] to Isabel Douroupis (April 30, 2019) [55].

³³⁹ Email from Sean Tajima to [Complainant] (April 30, 2019) [56]; Letter from Christina Simpson to [Complainant] (Jan. 30, 2019) [84-85]; OIG Report at 3 [4].

by an HDE employee whose name has been redacted. That email indicates that the change was made because making [Complainant]'s position a 12-month position was never authorized by the CCLC state level program manager and it would financially impact the grant.³⁴⁰ The email also indicates that it provides a timeline of events and snapshots of line items on the approved budget supporting the contention, but this information is redacted.³⁴¹ Changing the position back to a 10-month position would have a financial impact on the grant, and the 12-month position was never authorized. Both of these are strong reasons to revert the position back to a 10-month position.

Strength of Motive to Retaliate

The second *Carr* factor is the existence and strength of any motive to retaliate on the part of the HDE officials who were involved in the decision. There is no strong reason for Keller, Shioi, Tajima or any other HDE leader or employee to retaliate against [Complainant] for her disclosures. As Armstrong reassured [Complainant] and as Dawn Young indicated in interviews with the OIG investigator, the accidental payment of CCLC funds to Fuauli was not a major issue.³⁴² The improper payment was caused by an unintentional error in the system and was an oversight.³⁴³ There was no effort to defraud the federal government or commit wrongdoing. While HDE took a longer than ideal period of time to remedy the situation, the improper payments to Fuauli were stopped and the Complex Area made the grant program whole by withholding allocations beginning in July 2017.³⁴⁴ There is no evidence of any negative

³⁴⁰ Email from REDACTED to Isabel Douroupis (May 15, 2019) [77].

³⁴¹ Id.

³⁴² OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 2 [99]; OIG Notes from Interview with Dawn Young (April 9, 2019) at 1 [110].

³⁴³ OIG Notes from Interview with Heidi Armstrong (April 5, 2019) at 2 [99]; Letter from Christina Shioi through Heidi Armstrong to the Community Engagement Office for CCLC Grants (March 28, 2018) [52].

³⁴⁴ Letter from Christina Shioi through Heidi Armstrong to the Community Engagement Office for CCLC Grants (March 28, 2018) [52].

repercussions to Keller or Shioi. For Armstrong, not only is there no evidence of any harm, but she was in fact promoted. Finally, Tajima was not harmed by the mistaken payments or the efforts to remedy the situation. He could not be harmed when he did not become involved until long after the incident was discovered. The evidence presented in this matter clearly and convincingly indicates that the protected disclosures did not create a compelling reason for the HDE leadership accused of retaliation to retaliate.

Treatment of Other Similarly Situated Employees

The final *Carr* factor is comparing the action taken against [Complainant] with other HDE employees who were not whistleblowers but who are otherwise similarly situated. This applies to two actions: the decision to move [Complainant]'s location from Makakilo Elementary School to the Campbell-Kapolei School Support Center at Ilima Intermediate School and the decision to place [Complainant] on a PDPDP. As [Complainant] indicates in her complaint, another employee, Teresa Miyasaki, was also subjected to the exact same move.³⁴⁵ When [Complainant] expressed that she might suffer harm from the move, she was permitted to return to Makakilo Elementary, while Ms. Miyasaki was not.³⁴⁶ In other words, [Complainant] was treated more favorably than a similarly situated co-worker and granted a requested exception to the employment action while her colleague was not. Additionally, Shioi placed another resource teacher on a PDPDP who was not identified as making any protected disclosures.³⁴⁷ Comparing [Complainant] to other similarly situated HDE employees only makes it more clear and convincing that HDE and its leaders would have initiated the same actions independent of the disclosures.

³⁴⁵ OIG Complaint Attachment at 6-7 [37-38].

³⁴⁶ Id.

³⁴⁷ OIG Notes from Interview with [Complainant] (March 8, 2019) at 5 [73].

HDE's Reputation

In an injudicious effort to justify her claims, [Complainant] seeks to argue that HDE's reputation, as demonstrated by selected news articles, is evidence that HDE retaliated against her in this case.

In her brief, [Complainant] asserts that "federal case law recognizes that an employer's reputation may be used to prove the employer's bias."³⁴⁸ In support, [Complainant] cites *EEOC v. Hall's Motor Transit*, 789 F.2d 1011 (3rd Cir. 1986) and indicates that in that case the "EEOC introduced considerable evidence regarding the employer's reputation for being biased."³⁴⁹ This is, at best, a strained interpretation of the *Hall's Motor* decision. To show racial bias in that case, the EEOC introduced incidents where white employees were reinstated after being discharged for failing to report an automobile accident, when the black employee at issue in the case was not given the same treatment.³⁵⁰ Evidence that employees of another race were treated more favorably under the same circumstances goes to the question of how similarly situated employees were treated, essentially one of the inquiries asked when examining whether the employer proved its case under the *Carr* test.³⁵¹ It is not the same as a recognition that an employer's reputation is evidence of bias or any other bad action.

Moreover, although the Federal Rules of Evidence are not controlling in this proceeding, there is good reason to consider the policies reflected in the rules. Under the rules, courts with good reason have demonstrated an extreme reluctance to allow reputational evidence to be admitted for proof that a person or entity acted in accordance with that evidence.³⁵²

³⁴⁸ Complainant's Brief in Support of Complaint (Dec. 17, 2019) at 11.

³⁴⁹ *Id.*

³⁵⁰ 789 F.2d at 1014.

³⁵¹ 185 F.3d 1318, 1323

³⁵² See *Mussallihattillah v. McGinnis*, 684 Fed. Appx. 43, 46 (2d. Cir. 2017) (prohibiting plaintiff from introducing evidence of his own reputation as proof that he acted in accordance with the reputation when his character had not been placed at issue in the case); *Thalji v. Teco Barge Line*, 2007 WL 7702719 (W.D. Ken. July 13, 2007)

Finally, even assuming reputational evidence was admissible to “support the presumption of retaliation,” [Complainant] inadvisably bases that reputation on a series of news articles that [Complainant] asserts indicate that HDE “has a recent history of mismanagement, ethical violations, and non-transparency.”³⁵³ Media reports are rarely appropriate to submit as evidence.³⁵⁴ In this case, one of the articles [Complainant] relies upon is an article about this case for which [Complainant] and her attorney both gave interviews. Creating an echo chamber of allegations to a reporter does not prove that the allegations are true. Second, even if [Complainant]’s assertion is correct that the articles show HDE has a recent history of mismanagement and ethical violations and a lack of transparency, those qualities do not support an assumption that HDE would seek to retaliate against [Complainant] for discovering a mistaken payment of grant money. Other than the article that is about this case, none of the articles address any reprisal actions or indicate they address any incidents involving Shioi, Keller, Tajima, Armstrong, or any other HDE employees in the Campbell-Kapolei Complex Area.

CONCLUSIONS OF LAW

1. [Complainant] has met her burden of showing that she was an employee of a federal grantee.
2. [Complainant] has met her burden of showing that she made protected disclosures to Five members of HDE leadership and the Hawaii Attorney General’s Office.
3. [Complainant] has failed to show that her protected disclosures were contributing

(prohibiting introduction of opinion about a company’s industry reputation because Rule 608 of the Federal Rules of Evidence, which governs introduction of reputation evidence, only permits reputation evidence to address the reputation for truthfulness).

³⁵³ Complainant’s Brief in Support of Complaint (Dec. 17, 2019) at 12.

³⁵⁴ *State Farm v. Bell*, 30 F. Supp. 3d 1085, 1102-1103 (D. Kan. July 8, 2014);

factors to personnel actions in the decisions to require her to attend meetings with HDE leadership, to request information about her expenditures during the October 2018 internal audit, and to convert the position she had occupied from a 12-month position to a 10-month position.

4. [Complainant] has met her burden of showing that her protected disclosures were contributing factors related to five other personnel actions.

5. The Hawaii Department of Education has proven by clear and convincing evidence that it would have taken all challenged employment actions in the absence of [Complainant]'s protected disclosures.

6. There is an insufficient basis to conclude that the Hawaii Department of Education retaliated against [Complainant] for disclosing a misuse of 21st Century Community Learning Center Grant funds.

ORDER

The relief requested by [Complainant] is **ORDERED DENIED**.

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 of the Department of Education on the matter. The statute does not authorize motions for reconsideration. The following language summarizes adversely affected parties' rights to appeal this order as set forth by the NDAA. This paragraph is not intended to alter or interpret the applicable rules or to provide legal advice. Because a final agency order has been issued denying the complainant her requested relief, she has exhausted all administrative remedies and may, within two years of this decision, bring a de novo action at law or equity

against HDE “to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.”³⁵⁵

Additionally, 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. No petition for review may be filed more than 60 days after issuance of this order. Review shall conform to chapter 7 of Title 5. Filing an appeal shall not act to stay the enforcement of this order, unless a stay is specifically entered by the court.³⁵⁶

DATE OF DECISION: December 31, 2019

Robert G. Layton
Judge

³⁵⁵ 41 U.S.C. § 4712(c)(2).

³⁵⁶ 41 U.S.C. § 4712(c)(5).