UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202
TELEPHONE (202) 245-8300

[Complainant],

Complainant

v.

Eastern Florida State College,

Defendant

Docket No.: 19-82-CP

Reprisal for Disclosure of Certain Information Proceeding

OIG: REDACTED

Appearances: Joyce M. Gordon, Prospect, KY, for [Complainant].

Richard E. Mitchell and Jason A. Zimmerman, Orlando, FL and Michael Richey, Cocoa, FL, for Eastern Florida State College.

Before: Robert G. Layton, Administrative Law Judge

DECISION

This decision addresses a complaint filed by [Complainant] (Complainant or [Complainant]), an employee of Eastern Florida State College (EFSC). EFSC is a public institution of higher education in the State of Florida. EFSC participates in grant programs administered by the U.S. Department of Education (the Department), including the TRIO Program.[1] On December 17, 2018, the Department's Office of the Inspector General (OIG)

[1] See 20 U.S.C. § 1070a-11 et. seq. The Federal TRIO Programs are educational opportunity outreach programs designed to motivate and support students from disadvantaged backgrounds. TRIO now includes eight programs targeted to serve and assist low-income individuals, first-generation college students, and individuals with disabilities to progress through the academic pipeline from middle school to postbaccalaureate programs. TRIO also includes a training program for directors and staff of TRIO projects.

received [Complainant]'s complaint. The complaint alleges that EFSC took unlawful personnel actions against her in violation of the whistleblower protections provided by 41 U.S.C § 4712, the National Defense Authorization Act of FY 2013 (the NDAA). 41 U.S.C § 4712 (4712 complaint). Specifically, the Complainant alleged that she was demoted from her position as Director of the TRIO program and reassigned to a Student Advisor position in retaliation for disclosures she made regarding alleged mismanagement of the TRIO program funds.

Procedural History and Hearing Process Before OHA

On December 12, 2019, the OIG sent the Secretary of Education (the Secretary) and the Office of Hearings and Appeals (OHA) a report from OIG's investigation.[2] On December 12, 2019, the Director assigned this matter to the undersigned. The next day, on December 13, 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 12, 2019 Secretary's receipt of the OIG investigation report, in this case no later than January 13, 2020.[3] Additionally, the undersigned considered the decision 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) for guidance as to the due process requirements when rendering a final agency decision in a whistleblower case like this.[4] Because of the short

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TRIO grant recipients, depending on the specific program, are institutions of higher education, public and private agencies and organizations including community-based organizations with experience in serving disadvantaged youth and secondary schools. Combinations of such institutions, agencies, and organizations may also apply for grants. These entities plan, develop and carry out the services for students. While individual students are served by these entities, they may not apply for grants under these programs. Additionally, in order to be served by one of these programs, a student must be eligible to receive services and be accepted into a funded project that serves the institution or school that student is attending or the area in which the student lives.

[2] By delegation dated October 29, 2019, the Secretary has authorized the Director of the OHA to delegate this matter and assign an Administrative Law Judge to carry out all functions and duties to be performed by the "head of the executive agency" under 41 U.S.C. § 4712(c).

[3] 42 U.S.C. § 4712(c)(1).

[4] *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

timeline, a live hearing was scheduled for 14 days later, on December 27, 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. Because of the shortened timeline, the parties were permitted to retain counsel at any time before the start of the hearing. Additionally, an OHA attorney was made available to answer questions and assist the parties with procedural matters throughout the process.

Pursuant to the December 13, 2019 Order, a pre-hearing conference call was held on December 19, 2019. During this call, [Complainant] and her attorney Joyce Gordon, who had not yet entered an appearance before the tribunal as Complainant's counsel were present. Jason Zimmerman, Michael Richey, and Richard Mitchell appeared on behalf of EFSC. [Complainant] did not waive her right to a live hearing and the previously scheduled hearing date of December 27, 2019 was left in place. After the pre-hearing conference call, a supplemental order was entered requiring the parties to file witness lists on December 19, 2019 by 11:59 pm. The parties were directed to file any exhibits or supplemental materials by December 23, 2019. The parties complied, and the evidence was entered into the record.[5]

On December 27, 2019, [Complainant] and her counsel appeared in person before the tribunal and counsel for EFSC appeared via teleconference for a live hearing on the record to present additional evidence, facts and arguments in support of their positions.[6] Two witnesses testified for the Complainant: [Complainant] and EFSC Associate Vice President for Human Resources, Darla Ferguson. EFSC called no live witnesses, instead relying on the witness

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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).

[5] Complainant's counsel submitted an additional exhibit, Statements of Character in support of [Complainant] on December 15, 2019. This submission was late and will not be considered as evidence in this proceeding.

[6] The hearing was intended to be conducted by Skype video. However, unresolvable technical issues necessitated that alternate arrangements via telephone conference call. An audio recording was made of the hearing, and that recording generated a written transcript for the hearing that was filed in the record.

statements included as attachments to the IG's ROI and cross-examination of Complainant's witnesses. EFSC also raised its objection to the jurisdiction of the tribunal, contending that as an arm of the State of Florida, it had immunity from this lawsuit under the Eleventh Amendment.

At the conclusion of the hearing, the parties were ordered to submit post-hearing briefs by December 31, 2019. The parties were directed to discuss the sovereign immunity argument raised by EFSC and were allowed to include any expanded arguments or positions they chose to present.[7] On December 31, 2019, the parties submitted their post-hearing briefs.

NDAA Law

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".[8] It protects employee's disclosures to seven groups of individuals, including an Inspector General or a "management official or other employee of the . . . grantee who has the responsibility to investigate, discover, or address misconduct."[9]

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.[10] If OIG determines that the complaint is not frivolous, that it alleges a violation of the statute, and that it has not

[7] Pursuant to my Order, on December 30, 2019, Gordon also submitted documentation regarding her attorney's fees and expenses. In her submission, Gordon requests $6,150 in attorney's fees and $962.95 in costs.
[8] 41 U.S.C. § 4712(a)(1).
[9] 41 U.S.C. § 4712(a).
[10] 41 U.S.C. § 4712(b).

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.[11]

After receiving the OIG report, the Secretary or her designee is required to issue the agency decision within 30 days.[12] The decision must address "whether there is sufficient basis to conclude that the contractor or grantee concerned has subjected the complainant to a reprisal."[13] 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."[14]

Burdens of Proof of the Parties

In order to obtain relief for reprisal under the NDAA, a Complainant bears the burden of showing, by circumstantial evidence or otherwise, that a protected disclosure was a contributing factor in the reprisal the employee suffered. The burden of proof articulated at 5 U.S.C. § 1221(e) is controlling in an OIG investigation into a complaint of reprisal under the NDAA. See 41 U.S.C. § 4712(c) (6). Under 5 U.S.C. § 1221(e), an employee

[11] Id.
[12] 41 U.S.C. § 4712(c)(1).
[13] Id.
[14] Id.

may demonstrate that her disclosure was a contributing factor in the personnel action taken against her through evidence that (i) the official taking the personnel action knew of the disclosure and (ii) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. To avoid an order for relief, an employer may demonstrate by clear and convincing evidence that it would have taken the personnel action in the absence of the disclosure.

OIG's Investigation Conclusions

In this matter, OIG's investigation did not sustain [Complainant]'s allegations of whistleblower reprisal. For purposes of the investigation, the OIG investigation presumed that the disclosures made by [Complainant] qualified as protected disclosures under the NDAA.[15] The OIG also stated that EFSC provided clear and convincing evidence that the decision to terminate [Complainant] from her position as TRIO Director was not the result of [Complainant]'s allegations of TRIO funds mismanagement. According to OIG, the evidence gathered during their investigation indicated that EFSC demoted [Complainant] for poor performance in her role as TRIO Director.

ISSUES

1. Is Eastern Florida State College protected from this action by sovereign immunity?

2. If sovereign immunity does not apply, has [Complainant] met 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 personnel actions taken against her by Eastern Florida State College?

3. If sovereign immunity does not apply, has Eastern Florida State College demonstrated, by clear and convincing evidence, that it would have taken the same personnel actions in the absence of [Complainant]'s disclosures?

[15] See ROI at p. 4.

SUMMARY OF ORDER

This decision finds that EFSC's Eleventh Amendment immunity protects the school from [Complainant]'s lawsuit in that the school is an entity of the State of Florida, EFSC has not waived its immunity either explicitly or by its participation in the TRIO Programs or its authorizing statutes. However, as a matter of administrative and judicial economy, this tribunal makes the alternative findings on the substance of [Complainant]'s complaint should in the event that a reviewing court determines EFSC has waived its immunity. For alternative findings, this decision finds [Complainant] has met her initial burden to show that her first disclosure regarding use of a TRIO-designated space by a non-TRIO program could be a contributing factor for the adverse personnel action taken against her. [Complainant] has not met her initial burden regarding her second and third alleged disclosures. For the second disclosure, the questioning of [Complainant] not admitting an allegedly unqualified student to the TRIO Program, the student was not admitted to the TRIO Program nor was there any evidence that [Complainant] was pressured into admitting this student to the TRIO Program. For the third disclosure, the conduct/incident (i.e. the extension of an employee's contract to the summer) that [Complainant] reported was not a misuse of TRIO grant funds, as [Complainant] conceded in her testimony before the tribunal.[16] It is illogical that an entity would take adverse action based on the communication of something that is permitted by the TRIO Program rules and that EFSC informed [Complainant] of this fact.[17] This decision further finds that EFSC has met its shifted burden to show by clear and convincing evidence that it would have taken the same actions even

[16] [Complainant] Testimony at December 27, 2019 hearing. [Complainant] conceded that she learned that extending the employment contract of a former employee was an allowable use of TRIO funds.

[17] See [Complainant] Testimony at December 27, 2019 Hearing.

without [Complainant]'s disclosures. This decision concludes that EFSC has not subjected [Complainant] to a reprisal in violation of the protections provided by the NDAA.

FACTS

On December 17, 2018, the Department's OIG received a whistleblower reprisal complaint from [Complainant], an EFSC employee. In her complaint, [Complainant] alleged that she was demoted as Director of the TRIO program after she made disclosures to her supervisor, Dr. Sidoran concerning alleged mismanagement of TRIO funds. Specifically, the three disclosures are: (1) use of TRIO-funded spaces for non-TRIO purposes and/or by a non-TRIO employee reported by [Complainant] to her supervisor in December 2017, (2) admitting students to the TRIO program who do not qualify under TRIO guidelines,[18] and (3) paying an employee with TRIO funds who was not legitimately contracted to work for TRIO.

As a result of her disclosures, [Complainant] alleged she was removed from her position as TRIO Director and reassigned to a Student Advisor position. On April 23, 2019, [Complainant] agreed to a 180-day extension period to complete the investigation and submit the report.

[Complainant] began working at EFSC in 2011 as the Assistant TRIO Director at the Cocoa and Titusville EFSC campuses.[19] After the departure of the previous Director in July 2017, Dr. Sidoran appointed [Complainant] as the new TRIO Program Director in early October 2017.[20] [Complainant] was subject to a six-month probationary period before being considered

[18] The allegation as related by [Complainant] concerns the questioning of the denial of admission by [Complainant] of one student who was a relative of another EFSC employee. The other employee asked Dr. Sidoran about or otherwise objected to [Complainant]'s denial of admission to the TRIO Program for this student. [Complainant] believed she was being asked by Sidoran to bend the TRIO rules to admit the unqualified student. However, the record reflects that neither this student nor any other allegedly unqualified student was admitted to the TRIO Program.

[19] See ROI, Attachment A at p. 43.

[20] There is a minor factual dispute as to [Complainant]'s actual start date of the Director position in October. This dispute is inconsequential, as it is undisputed that [Complainant]'s mandatory six-month probationary period was

the permanent TRIO Program Director.[21] On April 12, 2018, Dr. Sidoran sent an email to Ferguson requesting a probation period extension for [Complainant]. According to EFSC, at the May 7, 2018 meeting, Sidoran informed [Complainant] that she needed to develop a Performance Plan aimed at improving her performance. [Complainant] states that Sidoran did not give her a specific explanation as to her performance deficiencies and that Sidoran never gave her a completed Performance Plan. EFSC asserts that [Complainant] did not take the form for the Performance Plan nor otherwise complete such a plan after the May 7, 2018 meeting.

In June 2018, Sidoran emailed Ferguson recommending that [Complainant] be terminated as an EFSC employee. According to both Sidoran and Ferguson, they were in touch regarding Sidoran's concerns about [Complainant]'s performance as Director of the TRIO Programs since [Complainant] assumed the position. Although Sidoran recommended firing, Ferguson felt that a recently opened Student Advisor position would be a better fit for [Complainant] and secured the authorization from Dr. Linda Miedema, EFSC Vice-President, to offer her this position.

On June 28, 2018, [Complainant] stated that she received a call from the EFSC Human Resources office instructing her to meet with Darla Ferguson, EFSC Associate Vice President of Human Resources. Ferguson informed [Complainant] that [Complainant] was demoted from the TRIO Program Director position effective immediately. Ferguson offered [Complainant] a reassignment to a Student Advisor position with a $35,000 annual salary and a six-month probationary period per EFSC personnel guidelines. [Complainant] was paid $50,000 annually as TRIO Program Director and consequently, this reassignment undisputedly was a demotion. Although [Complainant] disagreed with EFSC's decision to remove her as TRIO Program Director, she accepted the new Student Advisor position.

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slated to end in April 2018.

[21] See ROI, Attachment A at p. 43.

Having considered the OIG investigation report, those documents attached to that report, as well as briefings and documents submitted by the parties including the post-hearing submissions, and the testimony given at the December 27, 2019, the record is closed and ready for a decision.

PRINCIPLES OF LAW

41 U.S.C. § 4712 prohibits retaliation by a grantee such as EFSC against an employee for whistleblowing. A grantee may not 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 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."[22]

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.[23] 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

[22] 41 U.S.C. § 4712(a).
[23] 41 U.S.C. § 4712(b).

proceeding initiated by the employee[24], 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 may extend the time to investigate and report for an additional 180 days.[25]

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.[26]

The whistleblower statute also specifies that this decision must use the burden of proof found in 5 U.S.C. § 1221(e).[27] The employee has the burden of first showing 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.[28] 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."[29] The

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[24] [Complainant] also filed a complaint with the Florida Commission on Human Relations (Commission)regarding her termination as TRIO Director. Her complaint was deemed insufficient due to [Complainant]'s failure to allege discrimination on one of the protected bases (i.e. race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.). The Commission permitted [Complainant] to amend her complaint by September 14, 2018. There is no evidence in the record that she amended her complaint or otherwise pursued any other judicial or administrative proceeding. See ROI at p. 31.
[25] 41 U.S.C. § 4712(b).
[26] 41 U.S.C. § 4712(c)(1).
[27] 41 U.S.C. § 4712(c)(6).
[28] *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).
[29] *See* U.S.C. § 1221(e)(1); *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10th Cir. 2018).

Federal Circuit has called this the "knowledge/timing" test.[30] 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 employer had knowledge of the disclosures before beginning the personnel action.[31]

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."[32] 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 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."[33]

As indicated above, 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.[34]

ANALYSIS

[30] *Kewley v. Dep't of Health and Human Servs.*, 153 F.3d 1357, 1362-63 (Fed. Cir. 1998).
[31] *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10th Cir. 2018).
[32] *See* U.S.C. § 1221(e)(1); *Omwenga*, at *12; *Armstrong*, 2017 WL 4236315, at *7.
[33] *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)).
[34] 41 U.S.C. § 4712(c)(1).

Sovereign Immunity & OHA's Subject Matter Jurisdiction

The Constitution does not provide for federal jurisdiction over nonconsenting States.[35] Although the tribunal does not have general jurisdiction like an Article III court, it has jurisdiction over controversies based on specific statutory or regulatory mandates.[36] Under the NDAA, at 41 U.S.C. § 4712, this tribunal is authorized with jurisdiction to "determine whether there is sufficient basis to conclude that the contractor or grantee concerned has subjected the complainant to a reprisal prohibited by subsection (a). However, EFSC has challenged this tribunal's jurisdiction over this matter. EFSC asserts it has status as a state entity that enjoys sovereign immunity from [Complainant]'s lawsuit. This issue is fundamental to determining the tribunal's jurisdiction over this matter. This tribunal cannot declare a statute unconstitutional, but it may rule on whether an agency's application of a statute to a particular entity satisfies constitutional requirements.[37]

EFSC argues that there is no dispute that EFSC is an arm of the State of Florida. Accordingly, EFSC argues that Florida law clearly describes entities such as EFSC as state entities entitled to be considered as if it is the State of Florida in lawsuits brought by private individuals. EFSC asserts that this decision differs from that presented in the tribunal's Kash decision. The NDAA does not contain any provision abrogating a state's sovereign immunity. EFSC further asserts that neither the TRIO Program statute, the Higher Education Act (HEA), nor the General Education Provisions Act (GEPA) contain an explicit abrogation of sovereign immunity in order to participate in the TRIO Program. This, EFSC asserts, distinguishes the present case from Kash. In Kash, the program at issue was the Individuals with Disabilities

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[35] *Coll. Sav. Bank v. Fla Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).
[36] *Laurel Kash v. Texas Education Agency,* Dkt. No. 19-73-CP, U.S. Dep't of Educ. (November 22, 2019) (Kash).
[37] See Kash citing *Martinez v. OPM*, 2016 WL 4425125, MSPB (Aug. 19, 2016).

Education Act (IDEA), which set forth a clear abrogation of state sovereign immunity. Because of that clear abrogation, the Texas grantee in Kash could not claim sovereign immunity to the whistleblower lawsuit under the NDAA. EFSC argues that the HEA's provision that participating institutions comply with all statutory and regulatory provisions governing their participation in higher education programs is not sufficiently clear and unambiguous to be considered a waiver of Eleventh Amendment sovereign immunity. [Complainant] asserts that EFSC's sovereign immunity does not prevent it from being sued under the NDAA's whistleblower retaliation provisions.

When Congress intends to waive sovereign immunity either of the Federal government or a State due to its agreed acquiescence by participating in a Federal program, it has no difficulty clearly expressing its intent. And, as seen in another NDAA whistleblower case before the tribunal, Congress explicitly expressed its intent for a State to waive its sovereign immunity as a condition precedent to its participation in the IDEA Federal Program.[38]

To determine whether a federal statute properly subjects States to suits by individuals, the Supreme Court has ruled that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."[39] State sovereign immunity as established by the Constitution's Eleventh Amendment protects states from suit by private citizens, in federal court.[40] The protection extends to state agents and state instrumentalities.[41] State sovereign immunity protections apply not only in federal court, but also in federal agency adjudications.[42]

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[38] See Kash at p. 26-27.
[39] *Dellmuth* v. *Muth,* 491 U. S. 223, 228 (1989) (quoting *Atascadero State Hospital* v. *Scanlon,* 473 U. S. 234, 242 (1985)); *Lane v. Pena*, 518 U.S. 187, 192 (1996); and *Robinson v. Pa. Higher Educ. Assistance Agency*, Case No.: GJH-15-0079, 7 (D. Md. Apr. 3, 2017). .
[40] *Williams*, 2019 WL 4752778, at *4.
[41] *Id*.
[42] *Federal Maritime Commission v. South Carolina State Ports Authority,* 535 U.S. 743 (2002).

For the doctrine of sovereign immunity to apply, the tribunal first must determine whether EFSC is a state instrumentality. EFSC is a state college institution in the State of Florida and is considered a political subdivision of the State.[43] It is readily apparent from Florida law that "EFSC is an arm of the State of Florida vested with Eleventh Amendment immunity."[44]

Next, the tribunal must examine whether Florida has voluntarily waived its sovereign immunity. Again, it is readily apparent that EFSC expressly did not waive its sovereign immunity in this case, as stated by EFSC's counsel. The corollary to this is whether Congress has abrogated Florida's sovereign immunity. This abrogation must be unequivocal.[45] Generally allowing lawsuits under a statute, or requiring a recipient of federal funds to comply with applicable law, is not "unmistakably clear . . . language" sufficient to abrogate sovereign immunity.[46] In *Williams v. Morgan State Univ*., a complainant brought a suit in part based on the anti-retaliation provisions of the American Reinvestment and Recovery Act (ARRA) and NDAA.[47] The Williams Court analyzed whether either the ARRA or NDAA contained unequivocal abrogation of sovereign immunity by Congress, and concluded that they did not. Regarding the NDAA, the court held that "Congress did not expressly condition receipt of NDAA funds on a waiver of sovereign immunity."[48] Additionally, the NDAA's whistleblower protections are not limited to funds distributed under the NDAA because Congress does not allocate funds under the NDAA.

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[43] As articulated by the Grantee in its post-hearing brief, "EFSC is a "Florida College System Institution" and "political subdivision" of the State of Florida. §§ 1000.21(3)(a), 1004.67, 1001.63, Fla. Stat. Accordingly, EFSC's proper legal name is "The District Board of Trustees of Eastern Florida State College."

[44] *See Williams v. Dist. Bd. of Tr's of Edison Cmty. Coll., Fla*., 421 F.3d 1190, 1194-1195 (11th Cir. 2005) ("A community college under the Florida K–20 Educational Code is an arm of the state for purposes of immunity under the Eleventh Amendment."); *England v. Hillsborough Cmty. Coll*., 546 F. App'x 881, 884 (11th Cir. 2013)

[45] *Williams*, 2019 WL 4752778, at *5. See also, *Slack v. Wash. Metro. Area Transit Auth*., 353 F. Supp. 3d 1, 11 (D.D.C. 2019). *See also, Dellmuth v. Muth*, 491 U.S.at 228.

[46] *Williams, 2019 WL 4752778, at *5.*

[47] *Id*. *2.

[48] *See Kash* citing *Williams* at *6.

Because the mere receipt of Federal funds does not establish a State's consent to a waiver of its sovereign immunity and because the NDAA does not contain a waiver of sovereign immunity, the tribunal next must consider whether Congress conditioned the receipt of TRIO funds on a waiver of sovereign immunity. This analysis must examine whether Congress expressly abrogated sovereign immunity in the statutes governing EFSC's participation in the TRIO Programs, which requires consideration of not only the TRIO statute but also the Higher Education Act and the General Education Provisions Act.

A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate a State's sovereign immunity under the Eleventh Amendment. It is a high bar for a private litigant to meet. The State must make a clear declaration of its intent to waive its sovereign immunity. A waiver of sovereign immunity is constitutional only if it manifests a clear Congressional intent to condition participation in the Federal program on a State's consent to waive its sovereign immunity.[49]

The question then moves to whether the HEA or GEPA contain a clear expression of Congress' intent to require a State entity to waive its sovereign immunity to participate in the TRIO Program. Nowhere in either statute does Congress even state, much less clearly express its intent to mandate that a State submit itself to private suit by virtue of its participation in the programs authorized and at issue in this proceeding. In the HEA, Congress conditioned the receipt of federal education funding on institutions complying with both statutory and regulatory requirements for its programs.[50] This provision requires program compliance as a condition to receiving HEA funding, but it is not a clearly expressed waiver of a State's sovereign immunity.

[49] *See Barbour v. Wash. Metro Area Transit Auth.*, 374 F.3d 1161, 1163 (DC Cir. 2004); *Coll. Sav. Bank v. Fla Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).
[50] See 20 U.S.C. § 1094.

All purported waivers of sovereign immunity must be “strictly construed, in terms of [their] scope, in favor of the sovereign.”[51] This decision finds that EFSC is immune from private suit in this proceeding and the tribunal is prohibited from exercising jurisdiction over this matter.

ALTERNATIVE FINDINGS

It must be emphasized that this decision is exclusively controlled by the determination set forth above on EFSC’s sovereign immunity from NDAA claims for this sort of grant funding. While the basis for this decision is recognition that EFSC has sovereign immunity from the NDAA claims that has not been specifically waived in the statutes, in the event that a reviewing court finds otherwise, it is prudent for this decision to make an administrative record and alternative findings on [Complainant]’s claims, her initial burden, and EFSC’s shifted burden. As noted, [Complainant] argues she faced an adverse personnel action as a response to her allegations about misused TRIO funds. EFSC asserts that [Complainant] was demoted from her position of TRIO Director due to performance deficiencies.

[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 the her as an employee.

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

It is undisputed that [Complainant] was an employee of a recipient of a Department administered grant during the relevant time. EFSC is a recipient of the TRIO grant program administered by the Department. [Complainant] has worked at EFSC since 2011 and continues to work there presently. The personnel action that was the basis for [Complainant]’s complaint

[51] *Lane v. Pena*, 518 U.S. 187, 192 (1996).

occurred while she was an employee of EFSC.

2. <u>[Complainant] has shown that one of her three complaint items is a protected disclosure</u>.

[Complainant] contends that she was demoted and then reassigned for three disclosures she made:

> **"Disclosure 1 - Use of TRIO-funded space for non-TRIO purposes.**
> In December 2017, [Complainant] visited one of the EFSC TRIO Program-funded sites and saw a representative from the University of Central Florida (UCF) utilizing the facilities. [Complainant] learned that the UCF representative worked two days a week as a UCF liaison for students interested in pursuing baccalaureate and graduate degrees at the university. According to [Complainant], TRIO Program regulations state that TRIO Program facilities may only be used to carry out TRIO Program-related activities. [[Complainant] believed that the individual was not employed by the TRIO Program at EFSC.] [Complainant] stated she reported the incident to Dr. Sidoran, and shortly thereafter, the UCF representative was moved to another office location.
>
> **Disclosure 2 – Admitting students to the TRIO program who do not qualify per TRIO grant provisions.**
> The second incident described by [Complainant] was related to an inquiry made to [Complainant] in or about May 2018 by an EFSC faculty employee about whether a particular student could enter the TRIO Program. On May 3, 2018, [Complainant] emailed the EFSC faculty employee explaining that the student did not qualify to enter the program. Shortly thereafter, Dr. Sidoran called [Complainant] to ask her about the incident. [Complainant] told Dr. Sidoran that her ([Complainant]'s) impression was that the EFSC faculty employee wanted a favor by placing an ineligible student in the TRIO Program. After discussing the incident with Dr. Sidoran, [Complainant] also got the impression that Dr. Sidoran wanted
> [Complainant] to do a favor to the EFSC faculty employee by insisting in accepting the ineligible student. Although Dr. Sidoran did not agree with [Complainant]'s decision, she did not instruct [Complainant] to place the student in the TRIO Program.
>
> **Disclosure 3 – Paying employees with TRIO funds who were not legitimately contracted to work for TRIO.**
> The third incident was related to retaining and paying a TRIO Program employee Angela Arteaga, whose contract had expired. In or about June 2018, [Complainant] informed Arteaga that her contract had expired and could not be extended over the summer because the TRIO Program provisions did not allow for summer employment. Arteaga complained to Dr. Sidoran, who later emailed [Complainant] instructing her not to have contact with the Arteaga. On June 27, 2018, [Complainant] sent a detailed email to Dr. Sidoran about the situation and her decision not to extend Arteaga's

contract."[52]

Disclosure 1

For Disclosure 1, [Complainant] contends that she was retaliated against for disclosing that the UCF liaison was using TRIO Program facilities. 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." These allegations would be covered by the statute. [Complainant] could reasonably believe that the TRIO space being used by the UCF liaison is a violation of a "law, rule, or regulation related to a Federal . . . grant."[53]

The second step of Disclosure 1 analysis is whether the disclosure was made to one of seven covered peoples or entities. Disclosure 1 was made to Dr. Sidoran, who as a "management official of the grantee has the responsibility to investigate, discover or address misconduct," and was therefore a covered entity under 41 U.S.C. § 4712.[54]

3. <u>[Complainant] has met her burden of showing Disclosure 1 was a contributing factor in her alleged retaliation.</u>

The final prong of Disclosure 1 analysis is whether [Complainant] demonstrated the protected disclosure was a contributing factor for the claimed retaliation. The NDAA dictates that this proceeding is controlled by the legal burdens of proof indicated in 5 U.S.C. § 1221(e).[55]

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[52] See ROI at p. 5 – 6.
[53] Id.
[54] 41 U.S.C. § 4712(a)(2)(G).
[55] 41 U.S.C. § 4712(c)(6).

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, in turn address either taking or failure 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][56] 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) 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."[57]

For Disclosure 1, [Complainant] alleges her reassignment to the lower-paying position of student advisor was because of the claimed retaliation. [Complainant] can meet her initial burden 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."[58] The Federal Circuit has called this the "knowledge/timing" test.[59] This decision finds that for Disclosure 1, [Complainant] has adequately met her burden for showing the whistleblower activity was a contributing factor in the personnel action.

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[56] 5 U.S.C § 75.
[57] 5 U.S.C § 2302(a)(2)(A).
[58] *See* U.S.C. § 1221(e)(1); *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10th Cir. 2018).
[59] *Kewley v. Dep't of Health and Human Servs.*, 153 F.3d 1357, 1362-63 (Fed. Cir. 1998).

Disclosure 2 and 3

The analysis for Disclosures 2 and 3 is the same. Disclosure 2 was [Complainant]'s decision to deny a potential student admission, and Disclosure 3 was [Complainant]'s decision to extend an employment contract. [Complainant] asserts both decisions were done to comply with TRIO (although she later conceded that she was wrong about the contract extension not being allowable under TRIO). Accepting [Complainant]'s assertions at face value, both Disclosure 2 and Disclosure 3 fail the first two prongs. Neither was an unlawful act, and neither involved a disclosure to a covered person or entity. Both items were simply [Complainant] making decisions and carrying out her understanding of her duties under the TRIO program. For Disclosures 2 and 3, [Complainant] has failed to meet her burden of proof.

EFSC Has Proven By Clear and Convincing Evidence That It Would Have Taken the Adverse Personnel Actions Regardless of the Protected Disclosures

For Disclosure 1, [Complainant] has met her burden regarding the actions; therefore, the burden shifts, and EFSC is required to show by clear and convincing evidence that it would have taken the same actions in the absence of her protected disclosure. The factors to be considered when determining if EFSC has met its burden are the strength of EFSC's evidence in support of its personnel action, the existence and strength of any motive to retaliate on the part of the EFSC officials who were involved in the decision, and any evidence that EFSC has taken "similar actions against employees who are not whistleblowers but who are otherwise similarly situated."[60]

[Complainant] has listed one individual to whom she made the disclosures and who she believes has retaliated against her as a result of her disclosures, Dr. Sidoran. [Complainant] states

[60] *Carr*, 185 F.3d at 1323

she was given the news regarding her demotion from TRIO Program Director to Student Advisor by Ferguson.[61] According to [Complainant], Sidoran moved the employee [Complainant] identified as not being a TRIO employee without further discussion.[62]

As to the second disclosure regarding the denial of admission to the TRIO Program by [Complainant], [Complainant] states that Sidoran asked her about the denial after a colleague questioned [Complainant]'s decision.[63] Although [Complainant] asserts that she believed Sidoran wanted her to be "flexible" regarding the admission of the student, [Complainant] also states that Sidoran did not overrule her decisions or in any way countermand the decision and admit the student.[64]

The first *Carr* factor is the strength of EFSC's evidence of a legitimate reason for taking the personnel actions related to [Complainant]. In interviews with the Inspector General and in emails with [Complainant], EFSC documented [Complainant]'s shortcomings. [Complainant] was disorganized, lacked attention to detail, and often missed deadlines. Also documented was her failure to apply grant funds that were authorized by the program budget, her failure to set meetings and interviews in a timely manner, and her failure to meet the target number of students enrolled in the TRIO program.[65]

The record shows that [Complainant] lacked knowledge of the TRIO Grant program, did not communicate with the program accounting department, could not navigate the grant proposal process, failed to take notes during staff meetings, often submitted incomplete work, failed to prepare for interviews of candidates for the Assistant Director position, and lacked attention to

[61] See OIG ROI, Attachment A at p. 19.
[62] See Id.
[63] See Id.
[64] See Id.
[65] *See* Sidoran email dated January 22, 2018 (OIG Rep., p. 83), McCullough email dated January 30, 2018 (OIG Rep., pp. 85-86).

detail. An EFSC accounting department employee advised Sidoran that she felt [Complainant] was "in over her head" and not ready to be the director of a grant program.[66]

[Complainant] repeatedly did not show attention to detail or any sense of urgency for TRIO program deadlines and budget requirements.[67] In January, 2018, the federal procurement officer wrote [Complainant], noting that over 90 percent of the funds for TRIO remained unspent and in the account, and also noting that TRIO funds are required to be drawn down in a regular and consistent manner, and asking why there was such a large available balance.[68] Substantial additional evidence and documentation of [Complainant]'s additional shortcomings is contained in this decision's evidentiary record, but specifically enumerating all those additional items is cumulative, unnecessary and serves no purpose. EFSC has met the requirements of the first *Carr* factor and has submitted strong evidence of many legitimate reasons for taking the personnel actions related to [Complainant].

Moving to the second *Carr* factor, the existence and strength of any motive to retaliate on the part of the EFSC officials who were involved in the decision, there does not appear to be a strong reason for Sidoran to retaliate against [Complainant] for her disclosures. Disclosure 1 itself was not a significant nor an intentional violation of the law pertaining to TRIO grants. It was involving a non-TRIO use of facilities for a UCF liaison, and was ended immediately after the disclosure was made. In such a situation, there is no additional threat of harm that is likely to motivate any official to retaliate, particularly when, as here, [Complainant] was facing a large volume of objective deficiencies in her work performance.

The third and final *Carr* factor is not determinative in this decision. That factor involves

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[66] Sidoran Interview (OIG Rep., pp. 46-47).
[67] Ferguson Hearing Testimony. See also email correspondence in OIG Report, pp. 80-97.
[68] Hamblin-Johnson email dated January 30, 2018 (OIG Rep., pp. 85-86).

comparing the action taken against [Complainant] against other EFSC employees who were not whistleblowers but who are otherwise similarly situated. There is no evidence brought by [Complainant] to substantiate that she was treated differently than any other non-whistleblower EFSC employees. In fact, EFSC could have terminated [Complainant] based on these deficiencies, but chose instead to demote her to another position to keep her employed as a staff member. EFSC has demonstrated by clear and convincing evidence that it would have taken the same personnel actions in the absence of [Complainant]'s disclosures.

CONCLUSIONS OF LAW

1. Eastern Florida State College is protected from this action by sovereign immunity.

2. Alternatively, if sovereign immunity does not apply, for Disclosure 1, [Complainant] has met her 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 personnel actions taken against her by Eastern Florida State College. For Disclosures 2 and 3, [Complainant] has not met her initial burden.

3. Alternatively, if sovereign immunity does not apply, Eastern Florida State College has met its burden, and has demonstrated by clear and convincing evidence that it would have taken the same personnel actions in the absence of [Complainant]'s disclosures.

DECISION

EFSC did not retaliate against [Complainant] for disclosing a misuse of TRIO Program Grant funds. 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 compliant 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."[69]

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.[70]

DATE OF DECISION: January 13, 2020

Robert G. Layton
Judge

[69] 41 U.S.C. § 4712(c)(2).
[70] 41 U.S.C. § 4712(c)(5).