



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

[Complainant],

Docket No. 21-36-CP

Complainant.

v.

Reprisal for Disclosure of
Certain Information Proceeding

DuPage Regional Office of Education #19,

OIG: REDACTED

Grantee.

Appearances: [Complainant], for Self.

Jennifer Dunn, R. Jason Patterson, Caroline Kane, Franczek, P.C. for
DuPage County Regional Office of Education.

Before: Angela J. Miranda, Administrative Law Judge

ORDER

This decision and order address a complaint filed with the U.S. Department of Education's (Department) Office of the Inspector General (OIG) by [Complainant] (Complainant) against his former employer, the DuPage Regional Office of Education (ROE). As indicated in the OIG's Report of Investigation (ROI), the ROE is a county-level local education agency (LEA) in Wheaton, IL that serves as an intermediary between the Illinois State Board of Education (ISBE) and various other LEAs in DuPage County and elsewhere in Illinois. It is one of 38 ROEs in the state that provides services, resources, and professional development for LEAs, LEA leaders, and students in their respective counties and regions.¹ The ROE is both a grantee and subgrantee of two grant programs administered by the Department. The ROE is a direct grantee of the federal Education Innovation and Research (EIR) Grant and a subgrantee of the Supporting Effective Educator Development (SEED) Grant funds from the Department. SEED was awarded to and administered through Illinois State University (University), who also administers the subaward funds set aside for the ROE. The ROE was included as a partnering subgrantee under SEED. The

¹ OES Document 14, p. 3 (Citations throughout this Order are indicated by the document number in the Office of Hearings and Appeals Electronic Filing System (OES) as found in the Documents/Events Listing, and the page within that document.)

EIR grant was a five-year grant awarded directly to ROE in 2017. Both the EIR and SEED grants were designed to support professional development and training for LEA leaders and educators with the goal of improving the quality of education for students through research grant projects.

Complainant was initially hired as a contractor in October 2017, and within a few months transitioned into a full-time employee with ROE in early 2018. As a contract employee, Complainant was hired to help set up financial systems and processes, and to help establish grant management and budget protocols for two federal education grants, EIR and SEED. When Complainant was converted to a full-time employee, it was in a combined position as a Budget Specialist and Data Specialist. His position was funded by both the EIR and SEED grants.

I. Jurisdiction and Procedural History

On September 23, 2020, the Department, Office of Inspector General (OIG) received a whistleblower complaint, wherein the Complainant alleged he was reprisal against in violation of Section 828 of the National Defense Authorization Act for Fiscal Year 2013 (NDAA).² The Complainant alleged he made protected disclosures and was then subject to various adverse employment actions, including removal of duties, a modification of duties, placement on an employee performance plan, issuance of a disciplinary notice known as a personnel action report (PAR), and termination for disclosures to ROE officials, including his supervisors, concerning alleged mismanagement of, and violation of rules regarding federal grant funds. Specifically, Complainant alleged that he made two disclosures wherein federal grant funds were used to pay expensive catering invoices that were unallowable expenses and federal funds from one grant were misallocated to pay contract expenses for another federal grant.³ Complainant alleged that his disclosures led to his employment termination from ROE on October 4, 2019.⁴ On September 20, 2021, OIG sent the Secretary of Education (Secretary) a report from OIG's investigation.⁵ That same day, redacted copies of the OIG report were sent to the Complainant and the ROE.⁶

The Secretary has delegated the responsibility of rendering a final agency decision and order on behalf of the Secretary in these types of whistleblower complaints to the Office of Hearings and Appeals (OHA). On September 20, 2021, the Director of the OHA received this matter for a hearing pursuant to 41 U.S.C. § 4712, as added in section 828 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. I was assigned this case and on September 22, 2021, I issued a Notice of Hearing and Order Governing Proceeding.

Consistent with the statute, I scheduled a hearing that afforded the parties the opportunity to submit additional evidence and to appear in a video hearing to make arguments, confront adverse evidence, and cross-examine witnesses. The statute directs that an order denying or granting the relief in these matters shall be issued no later than 30 days after the Secretary has received the Inspector General's report. Given this statutory requirement, on September 30, 2021, a pre-hearing conference was held with the parties. In the pre-hearing conference, I discussed general matters in relation to the statutory time requirements, general logistics for the scheduled hearing, the reasons

² OES Document 14, p. 23.

³ OES Document 14, p. 2.

⁴ OES Document 14, p. 2.

⁵ OES Document 3.

⁶ OES Documents 1 and 2.

why only a redacted copy of the OIG ROI was in the record, the concerns I had with gaining a full understanding of portions of the ROI due to the redactions, how to remedy that circumstance, and the option of proceeding only on written submissions, if both parties agreed to waive the hearing. I also took the opportunity to identify one potential deficiency in the record, notifying the parties my review of the file at that point had not specifically identified the guidelines and/or practices regarding the ROE's use of Employee Performance Plans (EPPs) and performance appraisals/evaluations and requested that if that information was not in the record, that it be either supplemented or addressed in the briefing or at the hearing, if not waived.

Counsel for the ROE expressed her client's desire to waive the hearing and indicated she did not intent to have any of her client's employees available for testimony at the hearing, despite that the Complainant clearly expressed his desire for a hearing to confront witnesses from the ROE, as well as other witnesses who may have relevant testimony. Initially the Complainant did not waive his opportunity for a video hearing, but he clearly understood my limits in issuing subpoenas to compel a witness' appearance to testify at a hearing under the NDAA.⁷

On October 1, 2021, ROE filed a motion to supplement the record to include an unredacted version of the OIG Report.⁸ Along with its motion, ROE filed Waivers Authorizing Disclosure Under the Privacy Act of 1974 for two employees of ROE who had been interviewed by the Department OIG but had not previously provided signed waivers. On October 1, 2021, ROE's motion was granted and an unredacted copy of the OIG Report was added to the record.

After the September 30, 2021, pre-hearing conference call the Complainant, realizing the Secretary's delegation to OHA limited the issuance of subpoenas to compel witnesses for a hearing, changed his position on having a video hearing. In an October 1, 2021, Order Further Governing Proceedings, both parties were ordered to file their statements waiving a video hearing and both parties waived the opportunity for such a hearing.⁹ The scheduling order was modified, allowing the parties to file documents/evidence to be considered, if done on or before October 4, 2021. The schedule for filing brief/arguments was extended to no later than October 8, 2021. Complainant timely filed additional documents on October 4, 2021, but ROE did not submit additional documents for my consideration. Both parties filed written briefs on October 8, 2021.

Without the benefit of having a hearing and receiving testimony in this matter, the statements from the Complainant and witnesses have been filtered through the interviews conducted by the OIG and committed to documentary evidence in the form of reports of the interviews.

II. Office of Inspector General's Report of Investigation (ROI) Investigation

A. OIG's Overall Finding

⁷ 20 U.S.C. § 1234(g) indicates that in some matters delegated to the Office of Administrative Law Judges (OALJ) at the U.S. Department of Education, the Administrative Law Judge has subpoena powers and authority to order other discovery. Matters under the NDAA were delegated to the Director of the Office of Hearings and Appeals, to be redelegated to either an Administrative Law Judge or an Administrative Judge. Because these matters do not need to be assigned to an Administrative Law Judge, however, 20 U.S.C. § 1234, which governs matters before OALJ, does not apply.

⁸ The redactions pertained to two interviewees who did not sign privacy waivers.

⁹ OES Documents 8 and 9.

The OIG's investigation "did not substantiate [the Complainant's] allegations of whistleblower reprisal."¹⁰

B. OIG's Identification of Protected Disclosures

The OIG's ROI identified two protected disclosures made by the Complainant. The first is a disclosure regarding unallowable expenses/invoices occurred in or about April 2018. These unallowable expenses were related to catering expenses that were paid by the ROE. The Complainant asserted he notified the Director of the SEED Grant that these invoices were not permissible expenses to be paid by federal grants and despite his protestations, the Director of the SEED Grant pressured him to process and pay expenses/invoices from SEED grant funds. The investigation confirmed that the catering expenses were paid by the ROE. The investigation established that the Complainant reasonably believed payment of these invoices was evidence of a violation of law, rule, or regulation related to federal grant; misappropriation of Department grant funds, and abuse of authority relating to a federal grant.¹¹

The second disclosure identified in the OIG's ROI occurred in about February 2019. This disclosure involved a report by the Complainant to ROE management officials that a contract and invoices were mischarged to the EIR Grant for work that he claimed was performed solely for the SEED Grant. He asserted that the Directors of the EIR and SEED Grants were misallocating grant funds by inappropriately rotating the vendor's contact and invoices from the SEED grant at the University and EIR grant at the ROE. In this disclosure, the Complainant asserted there were a series of invoices for a vendor under the EIR grant in January for work he claimed was not performed for that grant. The investigation established that the Complainant reasonably believed the disclosures to the ROE management officials was evidence of a violation of law, rule, or regulation related to federal grant; misappropriation of Department grant funds, and abuse of authority relating to a federal grant.¹²

C. OIG's Identification of Complainant's Asserted Retaliatory Actions

The OIG's ROI identified five alleged acts of reprisal. Those were: 1) Removal from financial oversight duties related to the SEED Grant at ISU (May 2018); 2) Change of duties/position (December 2018-March 2019); 3) Placement on an EPP (March 11, 2019); 4) Issuance of a Personnel Action Report (PAR) for harassment (August 20, 2019); and 5) Termination from his position at DuPage ROE (October 4, 2019).¹³

D. OIG's Findings on Burdens of Proof for each of the Alleged Acts of Reprisal

In relation to the first alleged act of reprisal, removal from financial oversight duties related to the SEED Grant at the University, which occurred in about May 2018, the OIG found the Complainant's removal from fiscal duties from the SEED Grant was not retaliatory. In assessing

¹⁰ OES Document 14, p. 2.

¹¹ OES Document 14, pp. 6-7.

¹² OES Document 14, p. 7.

¹³ OIG Report at 7.

the burdens of proof, the OIG found the claimant established by a preponderance of evidence that the disclosure regarding unallowable expenses may have been a contributing factor to this personnel action. The OIG ROI found that the ROE provided clear and convincing evidence that they would have taken this action regardless of his disclosure.¹⁴

In relation to the second alleged act of reprisal, the modification in his duties/positions, which occurred over the period between December 2018 through March 2019, the OIG found the Complainant did not show by a preponderance of the evidence that his disclosures were a contributing factor to this action. Nonetheless, the OIG found the ROE provided clear and convincing evidence that these changes in his duties/position would have been made regardless of any protected disclosures.¹⁵

In relation to the third alleged act of reprisal, the placement on an EPP on March 11, 2019, the OIG found the Complainant showed by a preponderance of the evidence that his disclosure about the vendor contract and invoice allegation issue may have been a contributing factor to this action. The OIG ROI found that the ROE provided clear and convincing evidence that they would have taken this action regardless of his disclosure.¹⁶

In relation to the fourth alleged act of reprisal, the issuance of a PAR for harassment in August 2019, the Complainant showed by a preponderance of the evidence that his disclosures may have been a contributing factor to the issuance of the PAR since they were known to the Directors of the EIR and SEED Grants and one Assistant Superintendent involved in issuing the PAR. The OIG ROI found that the ROE provided clear and convincing evidence that they would have taken this action regardless of his disclosure.¹⁷

In relation to the fifth alleged act of reprisal, the Complainant's termination from the ROE on October 4, 2019, the Complainant showed by a preponderance of the evidence that his disclosure about the vendor contract and invoice allocation issue may have been a contributing factor to his termination because it was a known disclosure to the ROE and University official involved in the action. The OIG ROI found that that ROE provided clear and convincing evidence that they would have taken this action regardless of his disclosure.¹⁸

For each of these alleged acts of reprisal, the OIG found there was no retaliation by the ROE due to any of the disclosures made by the Complainant.¹⁹

E. OIG's Identification of Interviewed Witnesses

1. Dr. Alicia Haller, EIR Grant Director at the ROE, hereinafter referred to as the EIR Grant Director.

¹⁴ OES Document 14, p. 16.

¹⁵ OES Document 14, p. 16.

¹⁶ OES Document 14, p. 16.

¹⁷ OES Document 14, p. 16.

¹⁸ OES Document 14, pp. 16-17.

¹⁹ OES Document 14, pp. 16-17.

2. Dr. Erika Hunt, SEED Grant Director at the University, hereinafter referred to as the SEED Grant Director.
3. Dr. Darlene Ruscitti, Regional Superintendent at the ROE. She is an elected official and serves as the senior official at the ROE, hereinafter referred to as the Regional Superintendent.
4. Dr. Jeremy Dotson, Assistant Regional Superintendent of Business Services/Director of Finance at the ROE.²⁰ His title identified on the OIG Interview Report is listed as Assistant Regional Superintendent of Finance.²¹ Hereinafter, he will be identified as the Assistant Regional Superintendent of Finance.
5. Dr. Mike Robey, Assistant Regional Superintendent of Operations at the ROE, hereinafter referred to as the Assistant Regional Superintendent of Operations.
6. Janet Gierman, Principal Account Clerk at the ROE, hereinafter referred to as the Account Clerk.
7. Dr. Gail Fahey, identified her position at the time of her interview with OIG as the Grant Coordinator for the EIR and SEED Grants, however she worked as a 1099 contractor for the ROE in the first year of the grants. Here in after she will be referred to as the Grant Coordinator.

III. Issues

The issues to be addressed are:

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

IV. Summary of Order

This Order finds that the Complainant established that at least one of his protected disclosures was a contributing factor to all of the alleged acts of reprisal. The ROE did not meet its shifted burden to show by clear and convincing evidence that it would have taken the personnel actions even in the absence of the protected disclosures. This Order establishes the Complainant is entitled to compensatory damages in the amount of \$210,000 to be paid by the ROE.

V. Legal Framework

²⁰ This title is taken from Attachment 1 to the interview notes for this person (OES Document 14, pg 195-200).

²¹ OES Document 14, p. 188.

The applicable statute in this matter is 41 U.S.C. § 4712 and was added to the code by Section 828 of the NDAA in January 2013.²² Commonly referred to as whistleblower protections afforded in the NDAA, this statute prohibits retaliation by a grantee, such as ROE, against an employee for whistleblowing in certain instances. Under this statute, an employee, who discloses “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” is protected from retaliation, including discharging, demoting or discriminating against the employee, if that employee made certain disclosures to among others, a “management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct.”²³

An employee who believes that he or she has been subject to a reprisal prohibited by the statute may submit a complaint to OIG within three years of the reprisal.²⁴ 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 head of the agency, in this case the Secretary of the Department. OIG must either determine 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.²⁵

After receiving the OIG report, the Secretary or 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 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”
- (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.”²⁷

²² Pub. L. No. 112-239, §828 (January 2, 2013).

²³ 41 U.S.C. § 4712(a).

²⁴ 41 U.S.C. § 4712(b).

²⁵ 41 U.S.C. § 4712(b).

²⁶ 41 U.S.C. § 4712(c)(1).

²⁷ 41 U.S.C. § 4712(c)(1).

The NDAA identifies the burdens of proof that must be met in these retaliation claims and the burdens of proof apply to the investigation conducted by an Inspector General, a decision by the head of an executive agency, or a judicial or administrative proceeding to determine whether discrimination prohibited under the NDAA has occurred. Specifically, the legal burdens of proof required in retaliation claims under the NDAA are controlled by the burden of proof specified in 5 U.S.C. § 1221(e).²⁸

Therefore, following the requirements of Section 1221(e)(1), as incorporated into the NDAA, a complainant alleging retaliation under the NDAA has the initial burden and complainant must 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. This standard has been held applicable to disclosures under the NDAA.²⁹ 5 U.S.C. § 1221(e)(1)(A)&(B) allows the complainant to establish the disclosure or protected activity by circumstantial evidence, including evidence that the official taking the personnel action knew of the disclosure or protected activity and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action. Again, this standard has been applied to disclosures under the NDAA.³⁰ It follows, however, that to show that a protected disclosure was a contributing factor in the adverse personnel action, the employee must show that the individual who initiated the personnel action had knowledge of the disclosures before ordering or initiating the personnel action.³¹

5 U.S.C. § 1221(e)(2) requires that once the initial burden is met, 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.” Because this section was incorporated into the NDAA, this same burden shift applies in complaints filed under the NDAA.

Guidance in evaluating if the employer has met the shift in burden by clear and convincing evidence can be found in *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999). The applicable statute in *Carr* was 5 U.S.C. § 1221 and the Court’s analysis specifically addressed the legal burdens of proof in section 1221(e), which are controlling in complaints filed pursuant to the NDAA. The Court identified factors to be considered when determining if, after the burden shift under 5 U.S.C. § 1221(e)(2), it has been shown by clear and convincing evidence that the same personnel action would have been taken in the absence of whistleblowing.³² 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

²⁸ 41 U.S.C. § 4712(c)(6). Section 1221 of Title 5 addresses individual right of action in certain reprisal cases when an employee, former employee, or applicant for employment, seeks corrective action from the Merit Systems Protection Board as a result of a prohibited personnel practice.

²⁹ 5 U.S.C. § 1221z9e)(1)(A)&(B). 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. 2019)

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

³¹ *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10th Cir. 2018)

³² In identifying the factors, the Court relied upon *Geyer v. Department of Justice*, 70 M.S.P.R. 682,688 (1996), *aff’d*, 116 F.3d 1497 (Fed.Cir 1997), indicting *Geyer* set forth an appropriate test.

employees who are not whistleblowers but who are otherwise similarly situated.”³³

Wondercheck v. Maxim Healthcare Servs., 495 F.Supp. 3d 472, 484 (W.D. Tex. 2020) provides additional guidance when a complaint is filed under the NDAA. The analysis required by the NDAA, incorporating the analysis of 5 U.S.C. § 1221, which allows individual right of action in certain reprisal cases, requires that the Complainant establish the asserted protected disclosure was a contributing factor to the alleged act of reprisal. The standard establishing the contributing factor test is broad and forgiving, and at least one district court acknowledged the test was specifically intended to overrule the prior standards, that required a “whistleblower to prove that his protected conduct was a ‘significant,’ ‘substantial,’ or ‘predominant’ factor in a personnel action in order to overturn that action.” *Wondercheck v. Maxim Healthcare Servs.*, 495 F.Supp. 3d 472, 484 (W.D. Tex. 2020), citing *Cejka v. Vectrus Sys. Corp.*, 292 F.Supp. 3d 1175, 1194 (D. Colo. 2018) (citing *United States ex rel. Cody v. Mantech Int’l Corp.*, 207 F.Supp.3d 610, 620-21 (E.D. Va. 2016), (quoting *Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014)).

The statute specifically allows a complainant to establish this by circumstantial evidence. In considering a circumstantial showing of causation, “temporal proximity between the protected activity and the adverse action is a significant factor in considering a circumstantial showing of causation, the causal connection may be severed by the passage of a significant amount of time, or by some legitimate intervening event.” *Id.*

VI. Arguments

A. Complainant’s Brief/Argument

The OIG ROI shows evidence the Complainant was represented by an attorney at the time his complaint was filed and during his interview by a Special Agent in the OIG. Following issuance of the OIG ROI, the Complainant and his attorney of record as identified in the ROI was served a copy of the Notice of Hearing and Order Governing Proceeding, dated September 22, 2021. The prior attorney of record did not file a Notice of Appearance and the Complainant proceeded as his own representative.

Complainant’s brief provides arguments related to some the acts of reprisals that were enumerated in the OIG ROI. Primarily he provides arguments in relation to the termination, placement on the EPP, and issuance of the PAR.

In relation to the termination, he argues that he was fired because of his attempts to stop ROE’s violations of the “Uniform Guidance” and that these violations included falsified contracts and invoices.

Closely connected to the firing was his placement on the EPP. He argues that the EPP was put in place in bad faith and points to three dates to support his argument.³⁴ Complainant states that although the EPP purportedly started on March 11, 2019, he did not learn of it until it was presented

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 Complainant Brief at 7.

to him and he signed it on April 26, 2019.³⁵ Complainant also asserts that the EPP contains an incident involving his alleged failure to submit an invoice to ISU on April 12, 2019 thus demonstrating that the EPP was backdated to include this incident undermining ROE's claim that it was designed to support him.³⁶ He argues that the EPP was put in place with a predetermined outcome that he would be terminated.³⁷

Complainant states he was not informed in advance about the purpose of the September 30, 2019 meeting was to discuss his performance appraisal and he was unprepared to respond to the claims made by Haller.³⁸ Complainant also asserts that he was never asked for, or given an opportunity to submit, evidence of his progress.³⁹ Complainant also argues that with regard to his alleged job performance he was always uncertain as to who his supervisor was. Complainant asserts that he had to make political calculations about who to listen to when there was a disagreement about what he should do or competition for his work time amongst the three individuals (the Regional Superintendent, and the Directors of the EIR Grant and SEED Grant) who all seemed to be his supervisors.⁴⁰

In addressing the issuance of the PAR, the Complainant argues that ROE's PAR process did not meet the requirements of the DuPage County Harassment Policy.⁴¹ Complainant also disputes two of the three incidents upon which the PAR is based, and he denies that he admitted to all of the allegations.⁴² Complainant states that ROE failed to conduct an investigation and that they merely rushed to judgment.

He briefly discusses the actions he took that protected disclosure. Complainant states he challenged Haller in January/February 2019 about a renewed/new vendor contract.⁴³

B. Grantee's Brief/Argument

ROE argues that no management official at ROE was notified of Complainant's first disclosure in or around April 2018 regarding the catering invoices submitted by a vendor. Although Complainant asserts that he notified the Director for the SEED Grant, she is an employee of ISU, therefore he failed to establish that any ROE management official knew of his raised concern and thus, failed to establish this disclosure was a contributing factor to any of the alleged retaliatory acts. Thus, ROE argues that Complainant failed to meet his burden under 5 U.S.C. § 1221(e). ROE states that because he failed to meet his burden, removing him from his SEED grant duties cannot be a retaliatory act. Notwithstanding Sanchez's failure to establish knowledge, ROE also argues that any reliance on the alleged timing between his disclosure to the Director of the SEED Grant

³⁵ OES Document 30, p. 7.

³⁶ OES Document 30, p. 7. The tribunal notes that Complainant appears to be mistaken in his statement that the EPP signed on April 26, 2019 mentions an April 12, 2019 incident. An incident on April 12, 2019 is mentioned in his performance evaluation, which was tied to the EPP according to ROE but not in the EPP document itself. Get further cites for this

³⁷ OES Document 30, p. 5.

³⁸ OES Document 30, p. 9.

³⁹ OES Document 30, p. 9.

⁴⁰ OES Document 30, p. 12.

⁴¹ OES Document 30, p. 10.

⁴² OES Document 30, p. 10.

⁴³ OES Document 30, p. 4.

without anything more to establish a connection between the alleged protected disclosure and the alleged retaliation, the removal of his duties on the SEED grant, is insufficient to establish retaliation.⁴⁴

In further support to show that the removal from the financial oversight duties was not retaliatory, ROE also relies on the University's decision that it would no longer allow non-University employees to provide day-to-day administration on the SEED grant applied to all ROE employees and thus, was not a retaliatory act directed towards Complainant.

ROE also asserts that Complainant failed to present evidence to support a finding that the shift in his duties away from data infrastructure work was based on his alleged disclosures.⁴⁵ ROE states that the evidence demonstrates that the change in work duties was the direct and sole result of Complainant's lack of knowledge and personal connections required to effectively perform this work.⁴⁶

ROE argues that since the prohibition on working on SEED oversight duties applied to all ROE employees, Complainant does not present any evidence to infer that a reasonable employee would have been dissuaded from engaging in protected activity based on the removal of these duties.⁴⁷ Moreover, ROE asserts that Complainant's stated excitement about his shift to data infrastructure work belies it as a perceived adverse action.⁴⁸ ROE argues that Complainant failed to show how the removal of these duties negatively affected the terms and conditions of his employment.⁴⁹ ROE concludes that these claims regarding the removal of SEED grant duties and the shift to data infrastructure duties should be rejected as they fail to allege materially adverse actions.⁵⁰

ROE argues that Complainant had persistent and well-documented performance deficiencies dating back to mid-2018. ROE asserts that these performance deficiencies included: "confusion with grant responsibilities; lack of understanding concerning basic accounting principles; lack of follow through on deliverables and sloppy deliverables; and difficulties with basic technological requirements for the SEED team projects (such as electronic schedules and project management software)."⁵¹ ROE states that it placed Complainant on an Employee Performance Plan (EPP) on March 11, 2019 and "reoriented [Complainant's] position in order to correlate with his strengths based on his prior experience and to best position [him] for success."⁵² ROE states that the effective period of the EPP was March 11, 2019 to September 30, 2019 and

⁴⁴ OES Document 29, p. 8. ("When evaluating claims under statutory retaliation provisions, courts have found that timing alone is insufficient to establish a retaliation claim. *See e.g., Culver v. Gorman & Co.*, 416 F.3d 540, 546 (7th Cir.2005); *Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein, P.C.*, 277 F.3d 882, 895 (7th Cir.2001); *Contreras v. Suncast Corp.*, 237 F.3d 756, 765 (7th Cir.2001); *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 506 (7th Cir. 2004).

⁴⁵ OES Document 29, p. 9.

⁴⁶ OES Document 29, p. 9.

⁴⁷ OES Document 29, p. 10.

⁴⁸ OES Document 29, p. 10.

⁴⁹ OES Document 29, pp. 10 - 11.

⁵⁰ OES Document 29, p. 11.

⁵¹ OES Document 29, p. 4 citing OIG Report at 10.

⁵² OES Document 29, p. 4.

provided Complainant with specific directives regarding how to improve his work performance.⁵³ ROE also argues that an earlier March 4, 2019 ROE grant staff meeting provided him with a clear explanation of job expectations and his documented performance deficiencies.⁵⁴ ROE argues that despite its clear directives and explicit notice to Complainant of his performance deficiencies, his performance problems continued.⁵⁵

ROE points to the OIG Report's conclusion that ROE would have placed Complainant on an EPP and subsequently terminated his employment and the supporting documentation regarding Complainant's alleged performance deficiencies.⁵⁶ ROE states that Complainant's performance deficiencies both before and after his placement on the EPP were the basis for its termination. ROE asserts that Complainant failed to take advantage of the support offered during the EPP such as regularly communicating with him about his work and requesting regular work updates so that management could help him prioritize his time and/or otherwise provide additional support."⁵⁷ ROE notes the OIG Report's conclusion that Complainant's termination was based on multiple years of thoroughly documented performance issues.⁵⁸

ROE argues that the action it took in issuing a personnel action report (PAR) after it conducted an investigation regarding an ISU employee's August 14, 2019 email complaint⁵⁹ to the Director of the SEED Grant regarding a display of explicitly sexual wording on Complainant's personal computer that was seen by her and others at the University worksite on three occasions. ROE asserts that Complainant did not deny these allegations.⁶⁰ ROE also states that Complainant was aware of the ROE's policies on harassment and acceptable use.⁶¹ ROE states that the PAR was issued because of the three incidents identified in the University employee's August 14, 2019 email.⁶² ROE asserts that the OIG Report properly concluded that Complainant's violation of the ROE's sexual harassment and acceptable use policies of the ROE personnel manual was the reason for the ROE's issuance of the PAR, and that the PAR was issued in accordance with ROE disciplinary guidelines and past practice.⁶³ Thus, ROE concludes that it has presented clear and convincing evidence that it would have issued the PAR regardless of the alleged disclosures.⁶⁴

VII. Findings of Fact

1. On about September 27, 2017, the U.S. Department of Education (Department) notified the DuPage Regional Office of Education #19 (ROE) that they were directly awarded an

⁵³ OES Document 29, p. 4.

⁵⁴ OES Document 29, p. 4.

⁵⁵ OES Document 29, p. 4.

⁵⁶ OES Document 29, p. 12 citing OIG Report at 10 and Attachments 13 and 14.

⁵⁷ OES Document 29, p. 12 citing OIG Report at 10; Attachments 5 and 14.

⁵⁸ OES Document 29, pp. 12-13 citing OIG Report at 10-11; Attachments 13 and 14.

⁵⁹ The August 14, 2019 email complaint identifies the latest incident as occurring the day before the email was sent. This email also mentions two other incidents: the earliest being one that occurred when [Complainant] first joined the team but it does not identify when that was; and the third happened over the summer to another ISU employee and was told to the ISU employee who wrote the email. See OIG Report, Attachment 16 at 441.

⁶⁰ ROE Brief at 5 citing the OIG Report at 12.

⁶¹ ROE Brief at 11.

⁶² ROE Brief at 4.

⁶³ ROE Brief at 11.

⁶⁴ ROE Brief at 11.

Education Innovation and Research (EIR) Grant in the amount of \$4 million. The EIR was a five-year grant designed to support professional development and training for Local Education Agency's (LEA) leaders and educators with the goal of improving the quality of education for students through research grant projects. The ROE administers the EIR grant award.⁶⁵

2. On about September 29, 2017, the Department announced a Supporting Effective Educator Development (SEED) Grant to Illinois State University (University), which was a three-to-five-year grant in the amount of \$12 million for the first three years, with the prospect to be renewed for years four and five up to a total of \$17 million. The ROE was included as a partnering subgrantee of this SEED grant award. The University manages the SEED grant award. The SEED grant, like the EIR grant, was designed to support professional development and training for Local Education Agency's (LEA) leaders and educators with the goal of improving the quality of education for students through research grant projects.⁶⁶
3. On October 4, 2017, in an email response to the ROE's EIR Grant Director, a Program Officer for the Department, noted that leadership adjustments and how those adjustments will affect the ROE's EIR project will be discussed in the post award call that will take place after the post award webinar. In the email, the Program Officer reiterated the importance of closely monitoring the funds related to each of the three awards and maintaining clear and distinct funding streams given the potential for overlap of the recently announced EIR and SEED grants as well as a third federal grant that is currently housed at the University.⁶⁷
4. In October 2018, shortly after the Department announced the award of the EIR and SEED grants, the Complainant began working as a contractor to the ROE. (OIG rpts of interviews). Although not specifically identified with supporting documentation from the ROE but based on a broad review of the interview reports included in the Office of Inspector General Report of Investigation (OIG), the Complainant's responsibilities as a contractor were to develop a system of controls for administration of the newly awarded grant, which included identifying processes for contract and invoice review associated with the federal grant money.
5. In January 2018, the Complainant started as a full-time employee of the ROE. In their brief, the ROE identified the Complainant was hired in the dual role of Contract Specialist and Budget Specialist, however the assertion in the brief is contradicted by the OIG report of the ROE EIR Grant Director interview indicates that the Complainant discussed with the ROE Regional Superintendent and the Regional Superintendent agreed to make a full-time position for the Complainant by combining the duties of a Budget Specialist with the duties required of for a position in the grant that was responsible for Data Infrastructure. Although not an employee of the ROE, in her interview with the OIG, the Director of the SEED Grant at the University, explained that she oversaw the Complainant's work

⁶⁵ OES Document 14, p. 3.

⁶⁶ OES Document 14, p. 3.

⁶⁷ OES Document 14, p. 56.

responsibilities related to the Data Infrastructure work.

6. As evidenced by its 2018 Personnel Handbook, the ROE established a procedure for assessing job performance of its employees, whereby employees' performance will be evaluated annually and newly classified employees will have a 30, 60, and 90-day performance review. Furthermore, the ROE established its obligation to inform each employee of the evaluation process within the first month of employment. Consistent with the evaluation guidelines, it is the supervisor's responsibility to explain the evaluation process and conduct the performance evaluations.⁶⁸⁾
7. ROE's Personnel Handbook includes "General Rules of Conduct and Regulations" which specifically identifies the failure to obtain and maintain satisfactory productivity and quality of work as a violation of acceptable work behavior that is subject to disciplinary action, but it does not specifically discuss "Employee Performance Plans" in relation to disciplinary action or employee performance evaluations.⁶⁹
8. In 2018, the first year of both grants, the National School Administration Manager Innovation Project (NSIP), was a vendor of both the EIR and SEED grants. In about February and March 2018, NSIP held events and submitted invoices to the ROE for catering of a breakfast and lunch in the amount of \$3,562.27 and \$5,561.25, respectively (totaling \$9,123.52). An ROE expenditure report for 1/1/2018 to 12/31/2018 for the SEED Grant 1159 shows these invoices were paid from ROE's SEED grant and NSIP eventually returned the payment to the ROE.⁷⁰
9. When invoices for these catering events were submitted, the Complainant protested that these catering expenses were unallowable expenses. (OES Document 4, p 44) The ROE Assistant Regional Superintendent of Finance acknowledged in his interview with the OIG that there was a dispute about these catering invoices. In his interview he stated he believed the invoices were initially paid by the ROE but he asserted he was not sure the payment of these invoices was from federal grant money. He further reported that "after a couple of email exchanges, NSIP officials agreed they would reimburse [the ROE] for any costs related to the catering." Only after he was shown the ROE's SEED grant expenditure report for 1/1/2018 to 12/31/2018, did he confirm that the monies that were reimbursed from NSIP, in about May 2018, were deposited in the SEED grant account at the ROE. The Complainant's assertion regarding payment for these catering expenses is a protected disclosure.⁷¹
10. In October 2018, the Complainant commenced his second year of employment with the ROE. The Complainant reported he was not provided a performance evaluation near the end of the first year of the grants and he, like other grant employees, received a salary increase of about two percent going into the second year of the grant, making his annual salary \$109,000.⁷²

⁶⁸ OES Document 14, pp. 663-664.

⁶⁹ OES Document 14, p. 657.

⁷⁰ OES Document 14, pp. 268-269.

⁷¹ OES Document 14, p. 191

⁷² OES Document 14, p. 61

11. On December 20, 2018, the Director of the SEED Grant at the University, disclosed to the ROE Regional Superintendent and Director of the EIR grant at the ROE, that she began communicating with a consultant she believed had better skills and abilities to work on the Data infrastructure work required under the federal grants. About two weeks later, on January 2, 2019, she informed them she had a telephone call with the Complainant explaining she intended to contract with another contractor for the work on the Data Infrastructure project that was previously his responsibility. Notably, that contractor would not be available until about March 2019.⁷³
12. The Director of the EIR grant at the ROE reported in her interview with the OIG, that about the same time, in December 2018, the ROE began shifting the Complainant's work responsibilities from the data infrastructure work and toward development work on behalf of the partnering ROEs. The Director of the EIR Grant contends this was a change in the Complainant's responsibilities that appealed to the Complainant (Doc 4 p 318). Notably, the OIG interview report of the Director of the SEED Grant at the University, revealed with this change in responsibility she and two other University employees would now be monitoring the scope of this work performed by the Complainant.
13. In about January 2019, the Complainant began expressing concerns related to a renewed/new contract for a particular vendor who had been providing a variety of professional services for both the EIR and SEED grants. His concerns culminated in a memo to the Regional Superintendent at the ROE that was copied to the Assistant Regional Superintendent of Finance at the ROE. The Complainant asserted the renewed/new contract failed to meet the allocability standards under the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 U.S.C. §200 *et seq.*). The Complainant's assertions contradicted the recommendations of the EIR Grant Director at the ROE as well as the SEED Grant Director at the University. Both believed the renewed/new contract was necessary to allow payment to the vendor for services dating back to December 2018, continuing in January 2019, and through February of 2019, and to head-off a threat from the vendor to terminate services to both grants.⁷⁴ Furthermore, the EIR Grant Director specifically challenged the Complainant's interpretation of the federal regulation and its applicability to the EIR and SEED grants. the complainant's assertion regarding the renewed/new contract is a protected disclosure.
14. The Complainant's assertions somewhat slowed the ROE Regional Superintendent's approval of the renewed/new contract and spurred the scheduling of a teleconference with the Department's Program Officer that eventually addressed more broadly the issue of co-mingling grant funds and proportional sharing.⁷⁵ The Complainant alleges he was threatened to remain silent on the conference call with the Department's Program Officer

⁷³ OES Document 14, pp. 171-173.

⁷⁴ OES Document 14, pp. 66, 278-280.

⁷⁵ Despite the concerns raised, the ROE Regional Superintendent authorized the revised or new contract before the scheduled conference call with the Department's Program Officer. The EIR Grant Director's interview report indicates that it was the Assistant Regional Superintendent of Finance who expressed concern about approval of the revised new contract for this vendor before obtaining approval from the Department's Program Officer. (OES Doc 4 p. 82).

and the OIG interview with the EIR Grant Director confirmed she did not want the Complainant to speak in the conference call because she and the SEED Grant Director did not want him to “muddy the waters” over issues they had already discussed with the Department Program Officer about maximizing the grant funding between the EIR and SEED grant awards.⁷⁶

15. Following the February 23, 2019, telephone conference with the Department’s Program Officer, the Program Officer reviewed draft language provided by the ROE in relation to maximizing the grant funding and to prevent comingling of grant funds (OES document 4 pp. 165-167). The EIR Grant Director reported in her OIG interview she believed the Program Officer’s written approval modified the language constructed by the ROE (OES doc 4, p. 82-83). The Program Officer issued his written approval for sharing costs for joint events provided by the EIR and SEED grants in an email dated February 25, 2019. The approval addresses the sharing of costs for joint trainings, co-mingling, and the allowance of shifting costs by a non-Federal entity. Notably, the Program Officers’ approval may not have addressed the specific concerns raised by the Complainant in relation to the renewed/new contract offered to the established vendor.⁷⁷
16. The ROE Regional Superintendent, in her interview with the OIG reported that in the Winter/Spring of 2019, she discovered the Complainant was becoming frustrated and he confided in the Grant Coordinator for the ROE that he was feeling “harassed” at work. The Regional Superintendent reported that the Grant Coordinator encouraged the Complainant to discuss the situation with the Regional Superintendent. The Complainant did discuss the matter with her and she indicated he reported he was “feeling a lot of pressure” because “several people were asking him for things.” The Regional Superintendent reported that the Complainant requested a meeting with the relevant staff to discuss the issues. The Regional Superintendent reported that a meeting was scheduled so the grant team could establish greater clarity concerning roles and responsibilities regarding everyone’s respective work on the grant. Later in her interview she reported “they wanted to help clarify to the Complainant his role and responsibilities, and the tasks on which he needed to work to resolve the issues to help him with his performance.”⁷⁸
17. The record establishes this meeting occurred on March 4, 2019. The Regional Superintendent reported she felt good about the meeting and that “everyone left the meeting knowing what the Complainant would be doing and how he would be accountable for his work.”⁷⁹ The OIG report of the Complainant’s interview is silent in relation to the March 4, 2019, meeting.
18. The OIG interview notes with the Assistant Regional Superintendent of Finance at the ROE indicate he described the March 4, 2019 meeting as “awkward” but after “interjection by” legal counsel for the ROE, the Assistant Regional Superintendent did not elaborate on his description but only stated the meeting involved the ROE grant staff providing feedback to the Complainant about his work products and deliverables, performance, and his

⁷⁶ OES Document 14, p. 84.

⁷⁷ OES Document 14, p169.

⁷⁸ OES Document 14, pp. 149-150.

⁷⁹ OES Document 14, p. 150.

communication issues. He did elaborate that after the Complainant departed the meeting; the remaining staff began discussing the need to develop a performance monitoring plan for the Complainant, though he did not identify who initiated the conversation regarding the performance plan for the Complainant.⁸⁰

19. The OIG interview notes with the ROE's Director of the EIR Grant establish that she believed the purpose of the meeting was to get clarity around roles and responsibilities and it became clear that the Complainant was not properly following the chain of supervision. She explained previously that the Complainant told her that the Regional Superintendent was his supervisor and that the Regional Superintendent "assumed the grant directors were his supervisors" since his work was related to the EIR and SEED grants. She reported that she was directed by the Regional Superintendent and the Assistant Regional Superintendent to "put together a list of the Complainant's responsibility and the chain of supervision related to the grants." Lastly, she reported the issuance of the Employee Performance Plan was the "initiative that resulted from the March 4, 2019 meeting."⁸¹
20. Two other employees of the ROE mentioned a March 2019 meeting that may have been held on March 4, 2019. Both recalled that the Director of the SEED Grant at the University was in attendance along with other ROE supervisors. Both recall there were discussion regarding the Complainant's work, and both reported they were dismissed from the meeting prior to its conclusion.⁸²
21. About three months after the December 2018 shift in job responsibilities for the Complainant, on March 8, 2019, two job descriptions for the Complainant were created by the Director of the EIR Grant. One position, titled Budget Specialist, was funded 15% by the EIR Grant and the other position, titled Development specialist, was funded 85% by the SEED Grant. Both positions identified the Regional Superintendent as the supervisor with input from the Finance Director and the Project Director, indicated in parentheses.⁸³
22. An EPP was developed for the period March 11, 2019 to September 30, 2019.⁸⁴ The EIR Grant Director at the ROE reported that she and the Regional Superintendent met with the Complainant on or about March 11, 2019 and went over the document with him. She reported the Complainant only response to the EPP was that it looked reasonable, and it would help him to better understand his role. There is no documentation of the March 11, 2019 EPP meeting in the record. She recalled one subsequent telephone conversation with him regarding the EPP wherein the Complainant said he wanted more time to look over the document, but she provided no date of the phone call. There is no documentation in the record regarding this phone call. The document shows the Complainant signed the EPP on April 26, 2019, more than six weeks after the meeting purportedly held on March 11, 2019. She had no recollection when the Complainant signed the EPP and when she was asked what could have caused the delay in his signing, she could only speculate that he signed in

⁸⁰ OES Document 14, p. 193

⁸¹ OES Document 14, pp. 87-88.

⁸² OES Document 14, pp. 256 & 316.

⁸³ OES Document 14, pp. 98-101.

⁸⁴ The OIG ROI includes multiple copies of the EPP signed by the Complainant on April 26, 2011. They are found in OES Document 4, pp. 116-119, 295-298, and 319-322.

on that date and returned it to the ROE. She suggested that the Regional Superintendent may have asked him to sign it and return the EPP. Although the form EPP provides for two signature lines for supervisors, none of the documents included in this record are signed by a supervisor. Complainant reports the first time he saw the EPP was on the date he signed it, April 26, 2019.⁸⁵

23. Although there is no evidence that the Complainant signed or returned the EPP to the ROE before April 26, 2019, or that the Complainant's supervisor ever signed the EPP, on April 12, 2019, the record includes at least five documents, identified as Attachments 5-10, associated with her Interview notes that address the Complainant's performance issues. All of these notes or documents seem to cover a period March 3, 2019 through July 2019.
24. In an August 14, 2021 email to the SEED Director at the University, a University employee, reported an incident involving the Complainant. She reported that when the Complainant was "first joining our team" I was helping him with a Zoom conference set up and the login on his laptop showed up as "Hot Sex Puma." The employee reported she let him know so he could log off and fix it, which he did by dialing in. She further reported that "this summer" another employee told me something similar happened with her but the log in was something like "Sex Panther." Lastly, she reported that yesterday when she was helping him get onto the University wifi, she asked him to open a browser and go to a website to login. She reported when he did, "Disturbing Men Masturbating" came up in the autofill. He then quickly moved the laptop away from her view and decided to get help from the front desk person. (OES Doc 4, p. 181). The SEED Director forwarded the information to the Director of the EIR Grant at the ROE, inquiring if the Complainant was using an EIR funded laptop and asked for advice. (OES Doc 4, p.180). The next day, the Director of the EIR Grant responded by email, expressed appreciation for her forwarding the information, reassured her the ROE takes these complaints seriously, and an investigation of the complaint will be conducted in accordance with ROE policies and procedures. Both the Regional Supervisor and the Assistant Regional Supervisor of Finance were copied on the responding email.⁸⁶
25. Following this report, senior management at the ROE, specifically the Regional Superintendent, Assistant Regional Superintendent of Finance, and the Assistant Regional superintendent of Operations, determined the best course of action was to issue a Personnel Action Report (PAR) to the Complainant.⁸⁷
26. The PAR indicates there was a conference, with the Complainant, Assistant Regional Superintendent of Finance, and the Assistant Regional superintendent of Operations, on August 20, 2019, with a follow up on August 29, 2019. The complainant was issued a written reprimand, a category II level of discipline as described in a county employee policy manual. The reason for the action was described as unprofessional behavior and harassment. The description of the incident and impact on work environment relates to the report contained in the August 14, 2019, email from a University employee to the Director

⁸⁵ OES Document 14, pp. 89-90.

⁸⁶ OES Document 14, p. 180

⁸⁷ OES Document 14, pp. 435-444.

of the SEED Grant at the University, but substantially misstates the facts and events that were reported in the email.⁸⁸

27. The OIG interview report indicates the Assistant Regional Superintendent of Finance recalled that the complainant used his personal computer to perform his work for the ROE and he was made aware of an incident where the complainant allegedly had a pornographic website or other sexually explicit material visible on his computer and the incident was witnessed by people attending a workshop the Complainant was leading. He reported this event was a second time explicit material had been witnessed on the Complainant's laptop. He also reported he did not understand why the Complainant did not use the employer issued laptop for his work activities. The Assistant Regional Superintendent of Finance reported the incident could be viewed as sexual harassment by other employees and partners when witnessed and the matter was turned over to the Assistant Regional Superintendent of Operations, who was responsible for HR matters at the ROE. Lastly, he reported the Assistant Regional Superintendent for Operations lead the meeting and he only sat in as "an extra set of ears."⁸⁹
28. The Assistant Regional Superintendent for Operations reported in his OIG interview that he recalled there was a harassment complaint about the Complainant "having pornographic materials on his computer that flashed up on a screen during the meeting with the ROE partners", that several members of the meeting witnessed the inappropriate content on the presentation screen, and witnesses complained about the incident. He reported that he and the Assistant Regional Superintendent of Finance met with the complainant and ultimately issued a written reprimand. He elaborated on his understanding of the situation indicating that the Complainant was leading the meeting in question and that the presentation was on his personal computer. During the initial meeting the Complainant agreed to back up his working files on the ROE's servers and only use the ROE issued equipment going forward. He reported he was aware that the Complainant spoke with the Director of the EIR Grant at the ROE, admitting to the incident, and after that discussion, the Complainant returned to him. He described the Complainant as being contrite about the incident and he did not collect witness statements, documents, or photos and he did not complete any further investigation because he assumed the Complainant was being honest.⁹⁰
29. The Director of the EIR Grant at the ROE reported in her OIG interview that she did not participate in the creation of the PAR, she was not aware that any PAR was issued to the Complainant. She reported her only role in the matter was receiving the initial email from the Director of the SEED Grant at the University and forwarding it to the ROE management for review. She reported her understanding of the incident was that sexually explicit wording was witnessed by a University employee during a video conference call in which the Complainant was a participant.⁹¹
30. The record includes documentation of emails, beginning September 18, 2019, and continuing to September 25, 2019, among the Director of the EIR Grant at the ROE, the

⁸⁸ OES Document 14, pp. 293-294.

⁸⁹ OES Document 14, p. 194.

⁹⁰ OES Document 14, pp. 287-289.

⁹¹ OES Document 14, p. 91.

Regional Superintendent, the Assistant Regional Superintendent of Finance, and the Assistant Regional Superintendent of Operations. All the emails, and any attachments thereto, relate to the Complainant's EPP and upcoming Performance Evaluation. (OES doc 4, pp. 299-304, 313, 747-974). In response to an email from the Director of the EIR Grant, the Assistant Regional Superintendent of Operations replies "Hmm. This seems as just another step in his continued employment. I thought we had decided to terminate, pending attorney review of your documents."⁹²

31. On September 30, 2019, a review of the Complainant's performance was conducted. The record includes two documents related to this review. One document is titled "Performance Evaluation Aligned to Employee Performance Plan (EPP) and the second document is titled Performance Appraisal Aligned to the Employee Performance Plan (EPP). These documents are included in the record multiple times.⁹³ None of the OIG Interview Reports explain the difference between the Performance Evaluation and Performance Assessment, as they seem identical in form. On these forms, in the place to provide a summary, the unsigned Performance Evaluations include the notation "During the period of performance covered in the executed Employee Performance Plan (EPP), [the Complainant] has failed to make adequate progress toward goals and activities. Therefore [the Complainant's] employment with the [...] ROE will terminate effective Sept. 30, 2019." In the place to provide a summary on the signed and unsigned Performance Appraisals only the notation "To be completed after the evaluation conference and any response from [the Complainant.]" appears. Both the Performance Appraisal and the Performance Evaluation include an introductory paragraph that indicates "The purpose of the EPP is to define the scope of work, timeline, deliverables, and expectations for the performance of an employee's position, and allow the employee the opportunity to demonstrate competency and commitment to the project. The EPP agreement was discussed with [the Complainant] on 4/16/19 and executed on 4/26/19. What follows is an assessment of his performance to date."⁹⁴

⁹² OES Document 14, p. 732.

⁹³ OES Document 14, is the full OIG Report of Investigation without redactions. This document was uploaded to the record after counsel for the Grantee submitted Privacy Waivers from two witnesses who did not previously submit those waivers to the OIG. OES Document 4 is the OIG Report of Investigation with redactions. The Performance Evaluation is found in OES Documents 4 and 14 at pp. 120-125 (no signatures – identified as Attachment 12 to the interview report for the Director of the EIR Grant at the ROE) and 299-304 (no signatures – identified as Attachment 3 to the interview report for the Assistant Regional Superintendent of Operations). The Performance Appraisal is found in OES Documents 4 and 14 at pp. 126-131 (no signatures but with handwritten notes included – identified as Attachment 4 to the interview report for the Director of the EIR Grant at the ROE) and 305-310 (no signatures but with handwritten notes included – identified as Attachment 4 to the interview report for the Assistant Regional Superintendent of Operations). The Performance Appraisal is also in the record at pp. 713-718 and 721-727. The pages 713-727 are identified in the record as Attachment 22 to the OIG ROI and includes two pages of additional supporting evidence. The Performance Appraisal at pp. 713-718 is a clean copy (no handwritten notes) and signed by the Complainant and designated supervisors, the Director of the EIR Grant and the Assistant Regional Superintendent of Operations. The Performance Appraisal at pp. 721-727 includes the handwritten notes on five of the pages of the document, no signatures on the signature page, and includes what appears to be a scanned photo of the signature page with signatures.

⁹⁴ While the documents in this record confirm that the complainant did sign the EPP on April 26, 2019 but not otherwise signed by any supervisor, the record is less clear as to when the EPP was discussed with the Complainant and who was present for any meeting when the EPP was implemented.

32. The OIG Interview report with the Director of the EIR Grant, indicates the Reporting Agent (RA) showed her the Complainant’s “Final Performance Appraisal and EPP”, identified as Attachment 12 to her interview report.⁹⁵ However, the document at Attachment 12 to this interview report is the Performance Evaluation. Without a hearing it is impossible to determine if the Performance Evaluation or the Performance Appraisal was shared with the Complainant, during the meeting or at any other time. Notably, only the Performance Appraisals that are in the record include any signatures. The Director of the EIR Grant She reported that the Complainant should have understood that the meeting held on September 30, 2019, was his year-end performance review that this document, however, the record does not include any direct evidence that the meeting, as scheduled with the Complainant, notified him that the purpose of the meeting was his year-end performance review.⁹⁶ The Director reported that leading up to the September 30th meeting that the Assistant Superintendent of Operations “became more involved and took over the process” but she supported the decision for termination after the documents she compiled were reviewed by the Assistant Superintendent of Operations and an attorney. She reported the Complainant “did not say much during the performance appraisal meeting” but the Assistant Superintendent of Operations did ask him if he had any countering information he wanted to submit for a rebuttal to the EPP ratings.”⁹⁷ She reported that the Assistant Superintendent of Operations suggested that the Complainant could resign and the Complainant was given until the end of the week to make that decision or he will be terminated.⁹⁸ The Director of the EIR Grant reported that the Complainant did ask if it would be better to resign or be terminated and also inquired about health insurance coverage. The Director of the EIR indicated that later in the week the Assistant Superintendent of Operations asked her to “reach out” to the Complainant to collect his assigned office equipment and supplies, which she did and arranged to meet up with him on October 4, 2019, to collect the equipment and supplies. During the pickup of equipment, the Complainant engaged in some discussions with her. She reported those discussions to the Assistant Superintendent of Operations, who instructed her to avoid any further contact and meetings with the Complainant and to document the details of her interaction and conversations. The Director of the EIR Grant reported “the next thing she knew” was the Assistant Superintendent of Operations told her the complainant requested to be terminated.

33. The OIG interview report with the Assistant Superintendent of Operations indicates he was shown the Complainant’s final performance appraisal, identified as Attachment 3. This attachment is an unsigned copy of the Complainant’s Performance Evaluation. The report indicates Attachment 4, identified as the Performance Appraisal with handwritten notes,

⁹⁵ There are other misidentifications of the substance of the attachments within this interview report. Attachment 12 to this interview report is the document “Performance Evaluation Aligned to Employee Performance Plan” and not the Performance Appraisal and EPP. Attachment 13 is identified as the EPP with handwritten notes, but it is the Performance Appraisal with handwritten notes. Attachment 11 is the Employee Performance Plan.

⁹⁶ The only evidence of notice to the Complainant produced in this record is a September 24, 2019 email from the Director of the EIR Grant to the Assistant Superintendent of Operation where the Director informs the Assistant Superintendent that she “just sent a message to [the Complainant] about meeting on the 30th” and asked him to confirm. (OES Document 14, p. 749).

⁹⁷ The EPP does not include ratings and does not identify a rating scale. Both the Performance Appraisal and the Performance Evaluation identify a rating scale. Both forms indicate a rating of 1 equals does not meet expectations, a rating of 2 equals somewhat meets expectations, and a rating of 3 equals meets expectations.

⁹⁸ September 30, 2019 was on Monday, and the end of that week was Friday, October 4, 2019.

was shown to the Assistant Superintendent of Operations, and he acknowledged the notes were his handwritten notes, but he could not recall if the notes were taken during the September 30th meeting or made at another time or meeting. He reported the Director of the EIR Grant lead the conversation during the meeting on September 30th and he only asked follow-up questions to get clarification on the Complainant's responses. He reported that the Complainant agreed with many points being discussed during the September 30th meeting. He reported that in the situations when an employee receives a review of an EPP "there is nothing written in stone" at the ROE as to time allowed to respond to a performance appraisal and, any time allowed to respond, "typically depends on the issues." He did not recall if the Complainant was given a specific time to respond and although the Complainant did respond verbally during the meeting and other items may have been discussed "in a later conversation to which he was not party." The report also indicates that he "could not recall specifically whether the meeting he attended about the Complainant's EPP when he took notes included any opportunity for the Complainant to respond to the EPP ratings and performance appraisal at that point." He reports he "vaguely recalled that it may have been a longer process after that meeting" but he did not remember the details. Lastly, he reported he does not know if the Complainant ever provided a written response to the ROE but if he had, it would have been documented and included in his personnel file.

34. The report of the OIG interview with the Regional Superintendent shows she did not recall participating in the Complainant's final Performance Appraisal/Evaluation meeting and she does not know if he was given the opportunity to respond to the ratings on his "EPP and Performance Appraisal/Evaluation." She did confirm that the Assistant Superintendent for Operations was involved in the EPP process and termination of the Complainant. (OES Document 14, p. 152)
35. Attachment 16 to the OIG report of interview of the Director of the EIR Grant provides additional information identified as "Notes on Final Interactions with [the Complainant] After Termination Meeting" (ES Document 14, pp. 142-144). The interview report indicates this attachment was provided to the Director of EIR prior to the second interview session and the content of the notes confirm the notes are those of the Director of the EIR Grant. The document is undated, and the interview report does not provide any information as to when these notes may have been recorded.
36. The section of these notes titled "Agreements from the Performance Evaluation Meeting Held on 9/30/2019" document that only the Complainant, the Director of the EIR Grant, and the Assistant Superintendent of Operations attended the meeting on September 30, 2019. The notes suggest the Complainant was told he could resign or her would be terminated, and it was agreed that his last day would be 10/4/2019. The note further indicate that the Complainant requested, and it was agreed, that the Director of their Grant would meet him at his apartment to pick up his laptop and other ROE issued equipment. The notes are silent on the issue of whether the Complainant was given any opportunity to respond to the Performance Appraisal or Performance Evaluation after the conclusion of the September 30th meeting, though it seems clear he was informed of the decision on termination during the meeting.

37. The section of the notes titled “Post Performance Evaluation Meeting Communication” indicates that on October 3, 2019, the Assistant Superintendent of Operations sent an email to the Director of the EIR Grant to determine if she had “heard from” the Complainant and when she responded she had not, she was asked to follow up with the Complainant. The notes indicate the Director of the EIR Grant and her husband went to the Complainant’s apartment on October 4, 2019 to secure the return of the ROE issued equipment.
38. The document includes other notes titled “Summary of Conversation During Equipment Pick Up”, “Debrief conversation with [the Assistant Superintendent of Operations] at the [...] ROE”, “Text Exchange Regarding Missing Power Cord”, and “How we Told the Partners About [the Complainant’s] Departure”.
39. Throughout the OIG ROI, there are multiple references that discuss the supervisory chain of command. These references reflect inconsistencies in the supervisory chain inasmuch as the individuals identified as having supervision over Complainant either did not believe they were not his supervisor for some of the time he was employed at ROE or stated that they did not have a supervisory role. There is a readily apparent lack of clarity in the record and among the ROE management as to what the supervisory chain was over Complainant until at least the development of Complainant’s job descriptions and EPP that took place after the March 4, 2019 meeting. The OIG ROI identifies the Regional Superintendent as Complainant’s hiring official and top-line supervisor.⁹⁹ The Regional Superintendent also is identified as the person who approved Complainant’s timesheets and payroll. The OIG ROI identifies the EIR Grant Director as Complainant’s primary direct supervisor.¹⁰⁰ The Regional Superintendent stated that she and the EIR Grant Director shared supervisory duties over Complainant and that the Assistant Regional Superintendent of Finance supervised Complainant to some degree.¹⁰¹ Contrary to the Regional Superintendent’s statement, the Assistant Regional Superintendent of Finance stated that he did not exercise any supervisory role over Complainant.¹⁰² The Regional Superintendent also stated that her supervisory duties over Complainant were indirect and she believed the EIR Grant Director to be his primary supervisor since he was working on the grants. However, the EIR Grant Director stated that she began working at ROE at the beginning of the EIR Grant, that she has not directly supervised any other employees at ROE and has no other formal supervisory experience at ROE. The EIR Grant Director also stated that she initially assumed the Regional Superintendent was Complainant’s supervisor because Complainant told her the Regional Superintendent was his supervisor.¹⁰³ The SEED Grant Director at the University also assigned duties to Complainant and stated that she oversaw his work on the SEED Grant.¹⁰⁴ The EIR Grant Director stated that she later learned that the Regional Superintendent thought the EIR Grant Director was Complainant’s supervisor.¹⁰⁵ According to the EIR Grant Director’s interview, she did not learn of the Regional Superintendent’s assumption regarding who

⁹⁹ OES Document 14, p. 4.

¹⁰⁰ OES Document 14, p. 4.

¹⁰¹ OES Document 14, p. 147.

¹⁰² OES Document 14, p. 190.

¹⁰³ OES Document 14, p. 78.

¹⁰⁴ OES Document 14, p. 160.

¹⁰⁵ OES Document 14, p. 78.

supervised Complainant until alleged performance issues arose in the Fall of 2018.¹⁰⁶ The EIR Grant Director stated that one of the purposes of the March 4, 2019 meeting was to clearly delineate the supervisory chain for Complainant.¹⁰⁷ However, inconsistencies exist in the record after this March 4, 2019 meeting because the job descriptions developed for Complainant identify the Regional Superintendent as the supervisor for both and for the Budget Specialist position and the Development Specialist position.¹⁰⁸ The EPP signed by Complainant on April 26, 2019 states that the Regional Superintendent and the Project Director of each grant (EIR Grant and the SEED grant) are his supervisors.¹⁰⁹ The performance evaluation aligned to the EPP reiterates that the Regional Superintendent and the Project Director are Complainant's supervisors.¹¹⁰ The performance appraisal aligned to the EPP also identifies the Regional Superintendent and the Project Director as Complainant's supervisors. In terms of the SEED Grant, the record seems to suggest that the Project Director is the SEED Grant Director who is a non-ROE employee. This lack of clarity in the record is representative of the lack of clarity in the record over Complainant's supervisory chain over the course of his employment at ROE.

40. Attachment 31 to the OIG ROI is identified as the [...] County Notice of Employee Separation.¹¹¹ This document indicates the Complainant, in the job titled Budget/Data Specialist, was a full-time employee of the ROE, with a hire date of January 29, 2018. He was terminated on October 4, 2019, which is also the last date he worked. The reason for separation is identified as "discharge" with the further explanation of "job performance". The remarks indicate the complainant was an ROE grant paid employee and an IMRF employee. He was rated unsatisfactory with no defense given for lack of performance. The Notice is signed by the Regional Superintendent of the ROE, identified as the Department Head/Elected Official and dated October 7, 2019. A signature line and date if provided for the Director of Human Resources but the Notice is not signed by the Director of Human Resources.

VIII. Analysis

This analysis begins with evaluating whether the Complainant has met his initial burden under the NDAA. The evidence of this record establishes the Complainant was an employee of the ROE. The Complainant began his employ with the ROE as a contractor shortly after the Department announced the award of the EIR Grant to the ROE and he had the responsibility to develop a system of controls for administration of the grants. In January, he was hired as a full-time employee of the ROE. Initially his full-time position was a combination of the duties he performed as a contractor as well as working in data infrastructure related to the grants. As further discussed below, he made two protected disclosures. Whether the disclosure was a contributing factor in the action taken against the employee will be address in relation to each alleged act of reprisal and followed by analysis of the complainant's initial burden of proof and the burden of proof if shifted to the ROE as required by the NDAA.

¹⁰⁶ OES Document 14, p 78.

¹⁰⁷ OES Document 14, p.78.

¹⁰⁸ OES Document 14, pp. 99 & 100.

¹⁰⁹ OES Document 14, p. 116.

¹¹⁰ OES Document 14, p. 120.

¹¹¹ OES Document 14, p. 977.

Careful review of the ROI, including the reports of the interviews with the Complainant and other relevant witness, provide good background information that facilitates understanding of events prior to the award announcement, immediately after the award announcements, and during the period of the grant until the October 2019. Prior to September 2017, the Director of the EIR Grant, while affiliated with the University, coordinated with the Director of the SEED Grant, also affiliated with the University or an employee of the University, engaged in grant writing proposals for two federal grants from the Department. The projects proposed in the grant applications were essentially identical and both grants service the same “sample schools”, but the application for the SEED Grant was written such that it was three to four times larger than the EIR Grant, which was about \$4 Million. The ROE was identified as the administrator for the EIR Grant, and the University was identified as the administrator for the SEED Grant. As explained by the Director of the EIR Grant, neither of the Directors expected that the Department would award both grants given the potential for overlap and similarity of purpose. When the Department announced the award late in September 2017, the EIR Grant was awarded to the ROE and the SEED Grant was awarded to the University. Upon the announced awards, and because there was a third federal School Leadership grant that was in its fifth year at the University, a Program Officer at the Department, informed the grantees that they must understand the need to mitigate the risks of co-mingling of funds between these federal grants. It was advised that one of the Directors be “transferred to” the ROE and the Directors decided that one of them would become the Director for the EIR Grant at the ROE and the other remain as the Director of the SEED Grant at the University.

The awareness of the need to mitigate risks of co-mingling was funds between these federal grants continued to be a concern and became factors the Complainant’s disclosures in the first year of the grants and at the beginning of the second year of the grants. As the Directors began moving forward with the work on the grants, it was critical that the Grant Directors and administrators (the ROE and the University) maintain good documentation and recordkeeping practices because often vendors provided the same or similar services to each the grants. This concern was well stated by the Department’s Program Officers and communicated to both Directors.

It was early in the first year of both grants that both grantees began experiencing problems with one vendor, when that vendor submitted invoices. The problems with that one vendor persisted and the Directors of each of the grant programs determined that the relationship with that vendor would not be renewed after the conclusion of the first grant year. Another vendor was recognized as an asset to each of the grant programs. However, the record establishes problems were encountered near the end of the first grant year that slowed processing of this vendors invoices submitted to the SEED Grant at the University. When it was time to renew or secure a new contract with this vendor, the Grant Directors proposed a renewed/new contact that was designed to head-off a threat from the vendor to terminate services to both grants. The new contract allowed payment from the ROE’s SEED Grant funds, as a sub-grantee to the University, to pay invoices to the vendor for services that dated back to December 2018, continued in January 2019, and continued through February 2019.

A. The First Protected Disclosure

In the first protected disclosure, the Complainant asserted federal funds were used to pay for expenses/invoices for catering services at training events and these types of expenses are not allowable expenses invoiced to federal grant funds. The catering events provided food for breakfast and lunch during training events that occurred in February and March of 2018. The record establishes invoices for the catering events were submitted to the ROE and when the Complainant, who at the time was part of the review process established to process and pay invoices submitted to the ROE, identified that these excessive catering invoices are unallowable, he informed the Director of the SEED Grant that he would not process the invoices for payment. Despite his protestations, these invoices were processed and paid by the ROE. The Assistant Regional Superintendent of Finance was questioned specifically about these invoices and whether they were paid with ROE federal grant funds. The report of his interview shows he would not confirm that the invoices were paid by the ROE, and then he indicated he believed the invoices were paid but he did not know if they were paid with federal grant funds. The report of his interview establishes that he then told the investigators that “after a couple of email exchanges the vendor official agreed they would reimburse the ROE for any costs related to the catering events” and that did happen. Only after he was shown a copy of the SEED subaward grant expenditure report did he acknowledge that the reimbursed funds were redeposited in an ROE SEED account.

The ROE expenditure Report for the SEED Grant, for the period January 1, 2018 to December 31, 2018, is included in the record. The ROE is a subgrantee on the SEED Grant and this expenditure report shows there were invoices submitted to the ROE for reimbursement from the SEED Grant, the expenses were related to catering for two training events in an amount of \$9,123.54, the invoices were processed, and a purchase order was issued by the ROE. Some time after the Complainant’s disclosure, measures were taken by the ROE to have the vendor return the payment that was sent by the ROE to the vendor. The vendor did in fact return the payment to the ROE but not until May of 2018. After the Complainant’s disclosure and after the vendor reimbursed the ROE for the payments that had been processed, the ROE did not renew the vendor’s contract for the next award year.

B. The Second Protected Disclosure

The second protected disclosure arose out of actions by the Directors of the EIR and SEED Grants in relation to a renewed/new contract for a particular vendor who had been providing a variety of professional service for both the EIR and the SEED Grants. This disclosure, like the first disclosure, did not occur at a single point in time, but was spread over a period that began in about December 2018 and continued into February 2019. Initially the Complainant began expressing concerns related to a renewed/new contract for another vendor of the EIR and SEED Grants that was favored by the Directors of the EIR and SEED Grants. The Complainant asserted that the renewed/new contract failed to meet the allocability standards under the federal regulation the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards. The Complainant’s assertions contradicted the recommendations of the EIR Grant Director. In January 2019, the complainant disclosed his concerns in a writing that was sent to the ROE’s Regional Superintendent and the ROE’s Assistant Regional Superintendent of Finance. The Complainant asserted the renewed/new contract with this vendor failed to meet the allocability standards under the Uniform Administrative Requirements, Cost Principles and Audit requirements for Federal Awards. The Complainant’s assertions contradicted those of the

Directors of the EIR Grant and the SEED Grant. Both wanted this contract to be signed by the Regional Superintendent for the ROE so the vendor could be paid for services dating back to December 2018, continuing in January 2019, and through February 2019. Payment for services dating back to December 2018 were purportedly necessary to head-off a threat from the vendor to terminate services to both grants. The Claimant's raised concerns culminated in a written disclosure to the ROE's Regional Superintendent and the Assistant Regional Superintendent of Finance on January 30, 2019. His disclosure may have caused a slight delay in the Regional Superintendent's approval of the renewed/new contract for this vendor and prompted the scheduling of a conference with the Department's Program Officer and the grantees.

The burden of proof analysis for each of the Complainant's asserted retaliatory actions is more fully discussed in the analysis of each alleged act of reprisal. When evaluating whether the ROE met its burden clear and convincing evidence three factors are considered. The first of these is the strength of the evidence supporting the personnel action. The second is evaluating the strength of the motive to retaliate. The last factor is whether there is evidence that similar actions were taken against employees similarly situated who are not whistleblowers. If there are, then the analysis must determine whether the ROE took similar actions against other employees similarly situated. In this case, there is no evidence that there were other employees at the ROE who were similarly situated.

C. First Alleged Act of Reprisal – Removal from Financial Oversight of the SEED Grant by the Director of the SEED Grant at the University

The Complainant alleged following his first disclosure he was removed by the Director of the SEED Grant from his financial oversight duties related to the SEED Grant. He alleges this action was taken in about May 2018 and he was informed of this change by the Director of the ROE EIR Grant. The record establishes this disclosure was not based on one point in time, but rather spanned from the earliest date of the trainings and catering events, which were late February and early March in 2018, and were not resolved until May 2018, when the ROE recorded receipt of the refund from the vendor. During this period the evidence shows that the alleged act of reprisal occurred nearly simultaneously with disclosure.

Clearly the Director of the EIR had knowledge of the disclosure contemporaneously with the events. The Director of the EIR Grant asserted she only knew of the events after they occurred, but her interview report does not provide an estimate of when she may have learned of the disclosure. The interview notes from the Assistant Regional Superintendent of Finance show he denied knowledge of at least one key fact related to the payment of the invoices, i.e. the source of the funds used to pay for the expenses, but he acknowledged he had notice of the disclosure since the notes from his interview establish there were some email communications that led to the refund from the vendor to the ROE and that he did acknowledge the refund from the vendor was deposited into ROE's account for the SEED Grant to which they were subgrantee.

The Complainant asserts he was removed from review of the financial oversight duties related to the SEED Grant at the University. In response to that allegation, the Director of the SEED Grant and the Director of the EIR Grant responded that action was not exclusive to the Complainant because the University changed its practices related to financial oversight of all University grants

by non-university employees. The information that is available based on the reports of the interviews of the Directors of the SEED and EIR Grants has gaps. The Complainant asserts he specifically told the Director of the SEED Grant that these invoices are not allowable, but it was that Director who insisted that the ROE process and pay these invoices. The report of the interview of the Director of the SEED Grant shows only that she believed the ROE paid these invoices but is silent in response to the Complainant's assertions that it was she who insisted that the ROE pay the invoices. The report of the interview notes of the Director of the EIR Grant establish she was informed of these events only after they occurred, and she agreed that the catering invoices were not allowable expenses. It is undeniable that this record establishes that the catering invoices were paid by the ROE, the payment was made from with funds from the SEED Grant, that the Complainant's disclosure revealed that federal grant funds were used to pay expenses that were not allowable, and that the Complainant's disclosure was instrumental in recovering the funds that were not allowable. All of this shows that the Complainant met his initial burden and established his first disclosure is a contributing factor to this personnel action. resulting in his removal from financial oversight of the SEED Grant.

When the burden shifted to the ROE, they relied upon the defense that the University's change was applicable to all non-University employees and not just the Complainant. They also argued that the ROE had no knowledge of his disclosure. The ROE's claim that they had no knowledge of the disclosure is completely contradicted by the report of the assistant Regional Superintendent of Finance. There is strong evidence that officials at the ROE had knowledge of this disclosure because the Assistant Regional Superintendent reported that there were emails exchanged with the vendor official, the vendor agreed to return the invoice payments, and the returned funds were deposited into ROE's SEED Grant account. Contrary to the ROE's argument this record provides documentation that evidence that whoever was involved in getting the ROE to process and pay the catering invoices had a reason to be challenged by the Complainant's disclosure. The OIG's ROI did not fully investigate whether this resulted in a prohibited act of reprisal, but it did establish that the ROE, and specifically the Assistant Regional Superintendent of Finance had knowledge of the disclosure, was part of the standard review process for submitted invoices/processed purchase orders, and his review was the final review before a purchase order was submitted to the Regional Superintendent for review and authorization. Consequently, the ROE has not met its shifted burden.

D. Second Alleged Act of Reprisal – Change in Duties

The record shows the Director of the SEED Grant decided in about December 2018 that she intended to engage another individual, whom she believed to be a better match for the demands related to the data infrastructure work to take over as lead for the data infrastructure work and that the Complainant would be assisting the new lead. She communicated this directly to the Director of the EIR Grant and the Regional Superintendent on December 20, 2018.¹¹² The record shows the Director of the SEED Grant communicated this decision to the Complainant by phone and followed up with an email to the ROE Regional Superintendent with a copy to the Director of EIR Grant on the same date, January 2, 2019. The email illustrates that the Director of the SEED Grant informed the Complainant of her intent bring in a consultant and the communication indicates her reason for the change is because the data infrastructure work is “too public” to roll out anything

¹¹² OES Document 14, pp. 171-172.

that “might come back to bite us” and the contractor “will know how to navigate the testy waters”, inferring that the data infrastructure work required some political knowledge, finesse, and connection. In the December 20, 2018, email she indicated funds were available and she intended to use SEED Grants funds to pay this individual as a contractor/consultant and she expressed her concern that the change was necessary because the Complainant “was learning on the job and not displaying much confidence.” In these communications she fully acknowledged the one drawback was the individual was not available to work on this aspect of the grant until March and therefore this portion of the project would be delayed until then.

After these communications the Director of the EIR Grant and ROE’s Regional Superintendent determined it would be a good time to change the job responsibilities for the Complainant from the data infrastructure work to development work. The Director of the EIR Grant communicated this to the Complainant sometime in December 2018 or January 2019, however OIG ROI does not include more specific information regarding the exact communication. As the only indication that this change in duties was communicated to the Complainant, the ROE provided an email from the Complainant to the Director of the EIR Grant, dated January 25, 2019, wherein the Complainant expressed his excitement in relation to the “switch” in duties. Seemingly, the ROE supplied this evidence to support their claim that the change in duties was not motivated by any of his protected disclosures, was not retaliatory in any manner, and the Complainant agreed with the changes.

The record shows the act of changing the Complainant’s job duties from the data infrastructure work to the development specialist occurred over a period. While the topic of position change for the Complainant arose in December 2018, it may not have been discussed with the Complainant until sometime in January 2019 or even as late as April 2019. Although the Director of the SEED Grant informed the Complainant the data infrastructure work would be paused until about March of 2019, the record shows a new job description related to the development work was not created until about March 8, 2019.¹¹³ Given that the job description for the development specialist was not created until March, the record does not fully explain what specific duties were assigned to the Complainant for the period beginning in December 2018 and continuing until at least March 2019. The record shows the Complainant signed the EPP on April 29, 2019.¹¹⁴ Based on that date, it is reasonable to infer that the Complainant may not have had access to, or at least knowledge of the new position description since that is the date the EPP was signed by the Complainant. Based on this information, the change in position to development specialist may have commenced as early as December 2018 but could not have been fully implemented until the job description was created in March 2019 and even may not have been fully implemented until April 26, 2019, the date the Complainant signed the EPP.

The determination that a protected disclosure was a contributing factor to the act of reprisal may be established circumstantially, therefore, the proximity of the disclosure to the action must be assessed along with a showing that the official taking the action had knowledge of the disclosure.

The first established disclosure occurred in and around February 2018 but remained a liability for the ROE until May of 2018, when the ROE received reimbursement for the federal funds that

¹¹³ OES Document 14, pp. 98-101.

¹¹⁴ OES Document 14, pp. 319-322.

were improperly paid for the catering invoices. The change in position duties from data infrastructure to development specialist started in December 2018 but a position description for a development specialist was not created until March 2019. Counting the months between the May 2018 and March 2019, this action occurred about ten months after the first disclosure.

The issues related to the second established disclosure regarding the renewed/new contract for a vendor seems to have been a topic of discussion since at least December 2018, because the new contract indicates services were provided by this vendor in December 2018 but could/would not be paid until the ROE Regional Superintendent approved the renewed/new contract for this vendor, which did not occur until February 7, 2019.¹¹⁵ The ROE had knowledge of the second disclosure on January 30, 2019, when the Complainant expressed his concerns related to the renewed/new contract for this vendor to in an email to the Regional Superintendent and the Assistant Regional Superintendent of Finance.¹¹⁶

While the span of ten months weakens the causal connection between the first disclosure and this personnel action, the second disclosure is deemed to be a contributing factor to this personnel action, because the changes in the Complainant's duties was only formalized after and close in time to when the second disclosure occurred. The ROE had knowledge of the second disclosure on January 30, 2019, which is after the ROE began to consider a job change for the Complainant but before the new job description for the development specialist was created and implemented. This timing is sufficient to establish the second disclosure is a contributing factor for this personal action.

The burden now shifts to the ROE. The ROE's argument in its brief that the removal of the data infrastructure work was the direct and sole result of his lack of knowledge and personal connections required to effectively perform the job. They also argue that the OIG's finding that the second disclosure occurred after the change in his job duties and therefore the second disclosure could not possibly be a contributing factor to this personnel action. The OIG's finding that this personnel action occurred before this disclosure is undercut by the analysis that shows the discussion to change his job duties may have started prior to this disclosure, but the job description of for the new duties was not created until after this disclosure and was created only after the Director of the EIR Grant had discussions with the Regional Superintendent and the Assistant Regional Superintendent of Finance that the Complainant needed to be put on an EPP. That alone is enough to find the ROE has not met its burden by clear and convincing evidence.

E. Third Alleged Act of Reprisal – Placement of the Complainant on an Employee Performance Plan

The record shows the period identified for this EPP is March 11, 2019 to September 30, 2019. Both disclosures occurred prior to the identified period for the EPP and the record establishes that the management officials at the ROE had knowledge of the disclosures prior to this period. Relying on, while not repeating here, the analysis of the A and B sections of Part VIII of this Order, I find the Complainant has met his burden to show at least one of his disclosures is a contributing factor to this personnel action.

¹¹⁵ OES Document 14, pp. 256-257.

¹¹⁶ OES Document 14, 63-64.

Again, the burden now shifts to the ROE. The ROE broadly argues that the Complainant's placement on the EPP and his termination were "based on well-documented performance deficiencies" and therefore the ROE has established by clear and convincing evidence that the ROE would have taken these actions in the absence of the Complainant's disclosure. Although the ROE's brief addresses two alleged acts of reprisal in one section of their brief, I must address those personnel actions separately.

The sequencing of events prior to the Complainant's placement on the EPP must be fully understood and evaluated. The record establishes a meeting was held in early March. Many of the OIG reports of interviews discuss this meeting, though not all of them, provide the same information or the specific date of the meeting. Some of the interview reports suggest that the meeting on March 4, 2018, had two components. The two components were described as the meeting that included the Complainant, the Directors of the EIR and SEED Grants, the Regional Superintendent, the Assistant Regional Superintendent of Finance, and at least two other ROE employees who were in non-management positions. The second component of the meeting continued after the Complainant and the two non-management employees were dismissed from the meeting.

The report of the Regional Superintendent shows she recalled a meeting in the "winter or early spring of 2019" that was scheduled so the "grant team could establish greater clarity concerning roles and responsibilities regarding everyone's respective work on the grants."¹¹⁷ Later in her interview she indicated "they wanted to clarify to [the Complainant] his role and responsibilities and the tasks he needed to work to resolve the issues with his performance" and that "she felt good about the meeting and that everyone left the meeting knowing what [the Complainant] would be doing and how he would be accountable for his work." Lastly, she added that the Complaint "was pleased with the results of the meeting and left it with a better understand and more clarity about what he was supposed to do."

When the Assistant Regional Superintendent of Finance was asked about the early 2019 meeting, the report of his interview indicates he participated in the meeting and recalled that it seemed "awkward."¹¹⁸ When he was asked to explain his perspective on how the meeting went, or why he considered it awkward, ROE's legal counsel in attendance interjected and he did not elaborate on his description of the meeting. Instead, he reported the meeting involved the ROE grant staff providing feedback to the Complainant about his work products and deliverables, performance, and his communication issues.

The report of the Director of the EIR Grant interview established the meeting occurred on March 4, 2019, and the reason for the meeting was "to get clarity around roles and responsibilities."¹¹⁹ The report of her interview in response to questions about the March meeting shows she revealed the Complainant told her many times the Regional Superintendent was his supervisor, but the Regional Superintendent assumed he was supervised by the grant directors since his work was related to the EIR and SEED grants. She added that it became clear the

¹¹⁷ OES Document 14, pp. 149-150.

¹¹⁸ OES Document 14, p. 193.

¹¹⁹ OES Document 14, pp. 87-88.

Complainant was not “properly following the chain of supervision.” She also indicated she understood this meeting was scheduled at the Complainant’s request. She reported she took notes to document the meeting and stated she did so because the Regional Superintendent and the Assistant Regional Superintendent of Finance wanted her to document the Complainant’s performance. The OIG interview notes on this meeting concluded with her report that the issuance of an EPP was the “initiative that resulted from” this meeting. There is no evidence that the Complainant or the other two non-management ROE employees had any knowledge that the discussion regarding the need for an EPP for the complainant occurred on this date. Presumably any discussion regarding the EPP occurred after the Complainant and the two other non-management employees were dismissed.

Interview reports from two other non-management employees of the ROE discuss this meeting. One interview report indicates the employee recalled meeting in 2019 where discussion regarding the Complainant’s work performance was a topic of discussion.¹²⁰ She recalled that the Director of the SEED Grant was also in attendance, and she recalled conversations and comments exchanged among staff indicated that the Complainant was not getting reports completed. The other interview report indicates a meeting that took place sometime in the Spring of 2019, and she recalled that the Directors of the EIR and SEED Grants were upset, and the discussion involved things the Complainant had done wrong or did not complete.¹²¹ The first employee reported she and the other employee were dismissed prior to the end of the meeting. The second employee reported she took notes from the meeting “to form an agenda” but she did not believe the notes were converted to meeting minutes.

The report of the Complainant’s interview does not show he had any knowledge that the meeting continued after he left the meeting and it was in that portion of the March 4, 2019, meeting that the remaining attendees addressed the need of an EPP for the Complainant. The attachment to the report of his interview, a chronology of events prepared by him on November 10, 2020, indicate he understood the March 4, 2019, meeting was scheduled by the Regional Superintendent so that the “Directors of the EIR and SEED Grants would be told to stop bullying him and other grant employees” and to direct that all staff were to “adhere to control environment procedures.” His chronology indicates that the meeting did not include a discussion of staff adhering to control environment procedures. His chronology indicates that the Directors of the EIR and SEED Grants became enraged during the meeting, and he reports in his chronology of events that their hostile conduct increased after the meeting. His chronology shows that he came to believe “an intense campaign of retaliation would probably ensue.”¹²²

Notably, four days after the March 4, 2019, meeting, the Director of the EIR Grant created the new job descriptions for the Complainant. The EPP that was prepared sometime after the March 4th meeting is specifically aligned to the new job descriptions that were created four days after the meeting. Since the period of the EPP began on March 11, 2019, the EPP was developed seven days after the March 4th meeting. Although there are reports a meeting was held with the Complainant upon implementation of the EPP, no documentary evidence of any such meeting has been provided. The record is devoid of any documented evidence that establishes the Complainant was

¹²⁰ OES Document 14, p. 316.

¹²¹ OES Document 14, p. 256.

¹²² OES Document 14, pp. 69-70

given the EPP prior to April 26, 2019, the date he signed it. Although the Director of the EIR Grant, and other management officials at the ROE were asked to explain the lapse of time after the start date for the EPP and the Complainant's signature acknowledging receipt, none provided a response that was definitive. The record does not include a copy of the EPP that was signed and dated by an ROE official.

In terms of proximity of this personnel action to the protected disclosures, using the start date of the EPP review period, this action occurred only 39 days after January 30, 2019, the date the ROE had knowledge of the Complainant's second disclosure. Accepting the Director of the EIR Grant's assertion that the EPP was the "initiative that resulted" from the March 4th meeting, and using that date as the start of this personnel action, this action occurred only 32 days after the ROE formed an intent to place the Complainant on an EPP. The proximity of this action to the Complainant's second disclosure establishes the Complainant met his burden that the second disclosure was a contributing factor for this personnel action.

The sequencing of these events undermine the ROEs argument that his placement on the EPP would have occurred even in the absence of these disclosures. The vagueness regarding key details of when the EPP was created and why there was a delay of nearly two months before the Complainant signed the EPP reduces the probative value of the evidence to support ROEs assertions that the implementation of the EPP was only to help improve his work performance and not for any other reason. The responses recorded in the reports of the interviews of the Regional Superintendent, the Director of the EIR Grant, and the Assistant Regional Superintendent of Finance are concerning and create doubt. The conflict between the Regional Superintendent's report that she felt good about the March 4th meeting and the Assistant Regional Superintendent's failure to further explain his description of the March 4th meeting (on the advice of Counsel) also show that the ROE has not meet its burden by clear and convincing evidence. Although the Director of the EIR Grant extensively documented the asserted failures by the Complainant, there is no documentation of when the EPP was created or why it was not signed by the Complainant until April 26, 2019. This shows that the implementation of the EPP was for reasons other than to assist the Complainant to become successful in his work activities. The loss of memory by these three ROE officials regarding these key facts further undercuts the persuasiveness of their arguments. For these reasons, I find the ROE has not met its burden after it is shifted to them.

F. Fourth Alleged Act of Reprisal – Issuance of the Personnel Action Report (PAR) in August 2019

The record shows the ROE issued a PAR after a conference on August 20, 2019 and a follow up on August 29, 2019. The ROE issued a written reprimand for unprofessional behavior and harassment. The identified trigger for this action is an email sent by an employee at the University to the Director of the SEED Grant. The date of the email is August 14, 2019.¹²³ A careful reading of the email establishes that the employee indicates she is uncomfortable sharing this information, but she believes it important to share. The employee reports that when the Complainant first joined "our team" which is presumably the University SEED Grant team, she was helping him with a zoom conference and the set up and login on his laptop showed up as "Hot Sex Puma." The message does not indicate when this occurred except it occurred when he first joined the team.

¹²³ OES Document 14, pp. 180-181.

That date could have been anytime after the award of the SEED Grant, on or about September 29, 2017. The email indicates the employee let him know so he could log off and fix it. The Complainant fixed it by dialing into the zoom conference. The employee explains next that “this summer” another employee told me it happened to her as well, but the login name was something like “Sex Panther.” The employee’s statement is unclear as to whether the other employee merely told her about this incident “this summer” or that the incident occurred this summer or both. The employee continued to report that yesterday, which is identifiable as August 13, 2019, when the employee was helping the Complainant get onto the University wifi, she asked him to open a browser and “go to a website to get prompted to login.” She reports that the words “Disturbing Men Masturbating” “came up in the autofill.” Notably, this report only indicates these words were in the autofill and does not report that any graphics nor the loading of a web page were observed. She then reported he moved his laptop from me and went to get help from the front desk person. She concludes the email by indicating that she is not sure if he was using a personal laptop or not and then reports “anybody could have seen what I did at our All Partner meeting.” The message does not specify when the “All Partner” meeting occurred and if it was yesterday when she observed the words in the “autofill” or when she observed the name associated with the Zoom account when he first joined the team.

Almost immediately after receiving that email from the employee, the Director of the SEED Grant forwarded the employee’s email to the Director of the EIR Grant at the ROE.¹²⁴ The next day, August 15, 2019, the Director of the EIR Grant forwarded the information to the Regional Superintendent and the Assistant Regional Superintendent of Finance. Following the August 15th communications within the ROE, it was decided to proceed with a PAR.¹²⁵

The PAR as issued was included as Attachment to the interview report of the Assistant Regional Superintendent of Business Operations.¹²⁶ The PAR description of the incident indicates the Complainant has been using his personal computer for ROE related business. The description outlines three occasions when sexually explicit material or website names appeared while the complainant was working as a ROE employee. The specific descriptions of the three occasions do not report the same information that was provided in the August 14th, email authored by the University employee. The incidents described suggest the occasions were more significant than what was reported, misidentify that the report from the other employee made this summer actually occurred this summer, and misreport that the event when the autofill including the words “Disturbing Men Masturbating” were witnessed by a number of individual at the “All Partner meeting” at the University. The PAR indicates that the Complainant acknowledged that the first reported occasion happened but did not recall anything related to the second occasion as described in the PAR. There is no notation on the PAR whether the Complainant acknowledged, denied, or did not recall the third reported occasion. The PAR included suggesting for improvement or to avoid future occurrences. They indicate the Complainant was told to only use ROE issued laptop(s) or equipment and not allow “friend” or non-ROE employees access to the equipment. He was told to transfer all work related documents from his personal computer to the ROE network folder, use only ROE issued email for work related business, and disengage from any sexually related material on devices used for ROE work.

¹²⁴ *Id.*

¹²⁵ OES Document 14, pp. 435-444.

¹²⁶ OES Document 14, pp. 293-294.

The issuance of this PAR occurred during the period that the ROE placed the complainant on the EPP. Although this personnel action occurred about seven months after the ROE had knowledge of the second disclosure, there is still reason to conclude the Complainant has met his burden establishing this personal action was a contributing factor to his filing of the NDAA complaint. This record shows that this PAR was used in support of the ROE's determination that he was rated unsatisfactory on his EPP, he provided no defense, and his failure on the EPP is directly tied to his termination.¹²⁷

In terms of meeting its burden of proof in relation to this act of reprisal, the record undermines ROE's argument that they would have ultimately taken this personnel action against the Complainant, and that they met that burden with clear and convincing evidence. The description of the occurrences listed in the PAR are a clear amplification of the report included in the August 14, 2018 email that set this entire process in motion. The amplification of the initial report suggests the occurrences and actions by the Complainant were more significant than they were. Furthermore, when the Assistant Regional Superintendent of Business Operations was questioned about the PAR, the process, and the outcome - a written reprimand - he reported that he conducted no investigation of the initial report because the Complainant admitted the occurrences.¹²⁸ His report to the investigating agent is not supported by the PAR, which he completed and indicates that the Complainant only acknowledged the first occurrence. Without an investigation or any other reasonable review prior to the issuance of the PAR, this Assistant Regional Superintendent of Business Operations failed to confirm his rendition of the occurrences were accurate. Lastly, the interview reports from the Assistant Regional Superintendent of Business Operations and the Assistant Regional Superintendent of Finance include some inconsistencies when discussing this PAR. The Assistant Regional Superintendent of Business Operations reported that the Assistant Regional Superintendent of Finance "sat down with [the Complainant] regarding the matter and ultimately issued a written remand" but the Assistant Regional Superintendent of Finance reported he was only at the meeting discussing the PAR as "an extra set of ears" and Assistant Regional Superintendent of Business Services "did the taking during" the meeting. Notably the PAR was signed only by the Assistant Regional Superintendent of Business Services. There is no other documentary evidence to explain why these two management officials are pointing to each other as the main actor related to this PAR and each downplays their role in the action. For these reasons, I find the ROE did not meet its burden by clear and convincing evidence for this act of reprisal.

G. Fifth Alleged Act of Reprisal – Termination on October 4, 2019

The Complainant asserts his termination was the final act of reprisal taken against him by the ROE. While the termination was not discussed with the Complainant until the date of his performance evaluation meeting on September 30, 2019, this personnel act was purportedly implemented based on the unsatisfactory rating of his EPP. The nexus of this final act of reprisal is so closely tied to the act of reprisal of placing the Complainant on the EPP, that it would be unreasonable to conclude that the Complainant has not met his initial burden of proof on this act of reprisal when it has already been established that he met his burden of proof on the EPP. Stated in another way, had the Complainant not been placed on an EPP and subsequently rated

¹²⁷ OES Document 14, p. 726.

¹²⁸ OES Document 14, p. 288.

unsatisfactory, the ROE would not have had reason to proceed with the Complainant's termination. Therefore, I find that the Complainant has met his burden of proof to establish at least one of his protected disclosures is a contributing factor for this personnel action.

In its brief, the ROE essentially argues that because the placement of the Complainant on the EPP was not a violation of the NDAA, his termination was justified. The ROE submitted multiple documents they compiled to support their decision that his performance on his EPP was unsuccessful. Some of the documentation explain his failures in excruciating detail. For example, one document explained that at a project staff meeting on May 14, 2019, he gave only a broad overview of the development work and conversations he had with ROEs.¹²⁹ The Director of the EIR Grant then critiqued his presentation and both she and the Director of the SEED Grant gave him very specific directions of what they wanted him to do and when the work should be performed. She then spent more time discussing that a calendar invite was sent to him to further discuss his job duties and he accepted the invite but never participated in the scheduled meeting. When he made inquires to the Director of the SEED Grant about the directives he was given in the meeting on May 14th, she again repeated the directives given in the meeting. This same level of note taking was performed when the Director of the EIR grant was asked about notes relating to calls she had with the Complainant on April 17, 2018 and July 30, 2019.¹³⁰ Her explanation for those notes was that she did that to show the Complainant the level of detail she expected from him when he had conversations with partner organizations. It is reasonable to conclude that by developing all these notes, the ROE was micromanaging the Complainant's work activities more than they were supporting his performance while he was subject to the EPP. The overall thrust of all this documentation was to be presented for the ROE to show that they comprehensively documented his unsuccessful ratings on his EPP when his performance was evaluated at the end of his review period.

While I have considered the evidence as presented, I have also considered inconsistencies that weigh against the ROE. One inconsistency is some of the gaps in the evidence supporting its position. While the ROE asserts it has followed all its policies related to his placement on the EPP and in relation to the employee performance assessments, those assertions are not supported by this record. The policy requires that new ROE employees be provided with performance assessments 30, 60, and 90 days from the date they start employment and annually thereafter.¹³¹ This record is devoid of any evidence that those required performance assessments were conducted at the required intervals after the Complainant was hired as a full-time ROE employee in January of 2018. The Complainant asserts the ROE never conducted a performance assessment until the performance appraisal was performed on September 30, 2019, about four days prior to his termination. ROE's stated policy is that these assessments are conducted by the employee's supervisor. This record establishes that the supervisory chain as related to the Complainant was not clear to the Complainant or to the ROE employees who would/could/or should have been identified as his supervisor or in his supervisory change. The Director of the EIR Grant admits this confusion in her interview with the OIG. She reports that the Complainant asserted the Regional Superintendent was his immediate supervisor, but she claims she did not learn that the Regional

¹²⁹ This document is Attachment 8 to the interview report of the Director of the EIR Grant. It is found in the record at OES Document 14, p.

¹³⁰ OES Document 14, pp. 113-115.

¹³¹ OES Document 14, pp. 663-664.

Superintendent believed the Grant Directors were his supervisors until the meeting on March 4, 2019. The record does not clarify if the Regional Superintendent believed that the SEED Grant Director, who was not a ROE employee was his supervisor.

In the prehearing conference held on September 30, 2021, the ROE was asked to specifically address the supervisory chain in their brief or submit documentation that would clarify that issue. In their brief the ROE asserts that the Director of the EIR Grant provided supervision to the Complainant regarding budget and invoice approval work performed by the Complainant and the Director of the SEED Grant at the University- while not a ROE employee, and thus not the Complainant's supervisor, did provide performance feedback to ROE and directed his work on the SEED Grant.

It is notable that the supervisor's signature is required on certain documents, like the EPP, the Performance Evaluation, and the Performance Assessments. Multiple copies of these documents are included in the record but none of the EPPs included in this record have a supervisor signature. None of the Performance Evaluations included in the record include a supervisor's signature. Only one of the Performance Assessments in the record include a signature of a supervisor and that one document was signed by the Director of the EIR Grant.¹³² The PAR identifies the Complainant's supervisors in attendance at the PAR meeting as the Assistant Regional Superintendent of Business Operations and the Assistant Regional Superintendent of Finance as the Complainant's supervisors. This documentation is directly contradicted by the report of the interview of the Assistant Regional Superintendent of Finance who reported to the OIG investigator that he is not the Complainant's supervisor. The Director of the EIR Grant asserted in her interview that she was not involved in the issuance of the PAR, although this conflicts with the information that she is his supervisor. The Director of the EIR continues to send mixed and confusing statement about his supervisory change. In her interview with the OIG, she said she discovered she is the Complainant's supervisor at the March 4, 2019, meeting. Despite that revelation, four days later, on March 8, 2019, when she is creating the new job descriptions she identified the Regional Superintendent as the supervisor, but she and Finance Director provide input to the Regional Supervisor. All this inconsistent information undercuts that assertion the ROE followed the policies that require an employee's supervisor to participate in EPPs, Performance Assessments and Performance Evaluations. These failures also undercut the ROEs argument that they have established by clear and convincing evidence that the Complainant's termination was not a violation of the NDAA.

H. Remedies Allowed by the NDAA Upon a Finding that the NDAA was Violated

The NDAA requires that after a finding is made that a grantee has subjected the complainant to a reprisal prohibited by this act, any or all specified actions shall be taken. Among those actions, I find it is reasonable and necessary to identify and order certain compensatory damages, which may include back pay. While the statute also allows payment to the complainant an amount equal to the aggregate amount of all costs and expenses including attorneys' fees, I do not find it reasonable to grant attorney fees in this matter.¹³³

¹³² OEs Document 14, pp. 713-718.

¹³³ The record establishes the Complainant was represented by an attorney when filing the complaint and when the Complainant was interviewed by the OIG. That attorney an no other attorney filed a notice of appearance in this

The Complainant asserts his annual salary going into the second year of the grant, in about October 2018, was \$109,000. Aside from his assertion, there is no documentation supporting his assertion. The notice of termination, included in the record¹³⁴ reports his annual salary as \$105,000. Had the complainant not been terminated he would have been compensated in the amount of \$210,000 for this period from October 5, 2019, to the date of this Order. It is therefore reasonable to assess compensatory damages to be paid by the ROE to the Complainant for lost wages due to the acts of reprisals found in the matter.

IX. Conclusion and Order

The Complainant has met his initial burden as related to the first (removal from financial oversight of the SEED Grant) second (change in duties), third (placement on an Employee Performance Plan), fourth (issuance of the Personnel Action Report), and fifth (termination) reprisals. The ROE has failed to meet its shifted burden by clear and convincing evidence. The ROE is **ORDERED** to pay to the Complainant compensatory damages in the amount of \$210,000.

Should the ROE fail to comply with this award of compensatory damages, the NDAA indicates the Secretary of the U.S. Department of Education shall file an enforcement action in the United States district court for a district in which the reprisal was found to have occurred. The Complainant may also file an enforcement action as so indicated in the NDAA.

X. 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.

If a complainant has been adversely affected by this order, the following information summarizes the rights to appeal this order as set forth by the NDAA. **This information is not intended to alter or interpret the applicable rules or to provide legal advice.**

- **Following 41 U.S.C. § 4712(c)(2)**, a complainant who has been denied the requested relief, shall be deemed to have exhausted all administrative remedies and may, within two years of this decision, bring a de novo action at law or equity against the grantee, subgrantee, contractor, subcontract 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.
- **Following 41 U.S.C. § 4712(c)(5)**, 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

proceeding.

¹³⁴ OES Document 14, p. 977.

appeal shall not act to stay the enforcement of this order, unless a stay is specifically entered by the court.

Date: October 20, 2021

Angela J. Miranda
Administrative Law Judge

