



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

REDACTED,

Complainant

Docket No.: 23-06-CP

Reprisal for Disclosure Proceeding

v.

OIG: REDACTED

Prairie State College,

Grantee

Appearances: REDACTED, Complainant, for self.

James Ciesil and Edward J. Wong III, Del Galdo Law Group LLP, Berwyn, IL,
for Prairie State College

Before: Daniel J. McGinn-Shapiro, Administrative Law Judge

ORDER

This decision and order address a complaint filed with the U.S. Department of Education's Office of the Inspector General (OIG) by REDACTED (Complainant) against his former employer, Prairie State College (PSC), and the subsequent investigation completed by OIG agents. It concludes that Complainant did not substantiate any of the allegations made against PSC.

PSC is a publicly supported, two-year community college located in Chicago Heights, Illinois and is one of 39 community college districts (comprising 48 colleges) in Illinois.¹ Since

¹ U.S. Dep't of Educ., Office of Inspector General Report of Investigation (Feb. 24, 2023) (hereafter OIG Report) at 6, 139 [pages indicate the page number within the PDF in the official file on the Office of Hearings and Appeals (OHA) online filing system, OES]; Status Conference with REDACTED, James Ciesil, and Edward Wong (Feb. 28, 2023).

at least 2020, PSC has been a grantee of the TRIO - Student Support Services (TRIO SSS) grant program administered by the U.S. Department of Education (U.S. DoED).² Between 2020 and 2022, Complainant was a TRIO SSS Grant Coordinator and Academic Advisor at PSC.³

On March 10, 2022, OIG received Complainant's complaint.⁴ His complaint asserts that he reported concerns about noncompliance and fraudulent reporting to multiple PSC employees.⁵ Specifically, Complainant asserts that he found that PSC was reporting to the U.S. DoED that it was serving 150 students in the TRIO SSS program when records indicated that it was serving only thirty-one students.⁶ Complainant contends that, as a result of his disclosures, he faced disciplinary actions, including a suspension for one day without pay.⁷ Eventually, Complainant also faced additional disciplinary actions, including a second suspension for 10 days without pay,⁸ and then the termination of his employment.⁹ Complainant contends that these disciplinary actions were also acts of retaliation.¹⁰ At issue in this matter is whether these employment actions were reprisals by a grantee of the U.S. DoED, in violation of the protections provided by 41 U.S.C § 4712, the National Defense Authorization Act of FY 2013 (the NDAA). On February 24, 2023, OIG sent the Secretary of U. S. DoED (the Secretary) its report of the OIG's investigation.¹¹

The Secretary has delegated to the Office of Hearings and Appeals the responsibility of rendering a final agency decision and order on behalf of the Secretary in matters relating to

² See OIG Report at 228 - 229.

³ See OIG Report at 345, 405.

⁴ See OIG Report at 2.

⁵ See OIG Report at 38.

⁶ See OIG Report at 406.

⁷ See OIG Report at 39.

⁸ See OIG Report at 485-486.

⁹ See OIG Report at 345.

¹⁰ See OIG Report at 475.

¹¹ See Letter from Sandra D. Bruce to the Hon. Miguel Cardona (Feb. 24, 2023). OIG also attempted to send copies of the report to the parties that same day. See Letter from Sandra D. Bruce to REDACTED (Feb. 24, 2023); Letter from Sandra D. Bruce to Dr. Michael Anthony (Feb. 24, 2023). Because of technical issues, PSC, however, was not able to obtain a copy of the report until February 27, 2023. See Prairie State College Statement in Compliance with February 24, 2023 Order (Feb. 27, 2023).

whistleblower complaints filed pursuant to the NDAA.¹² The parties in this matter were offered the opportunity to appear in an in-person or video hearing to make arguments, confront adverse evidence, and cross-examine witnesses. Both parties waived the opportunity for such a hearing.¹³ Both parties were also provided the opportunity to submit initial written arguments, which both parties submitted. The parties were additionally permitted to submit relevant documents and responses to those initial filings, which PSC submitted.¹⁴

The NDAA addresses retaliation by a federal grant recipient (grantee) against an employee for whistleblowing. If an employee believes they have been subjected to retaliation in violation of the NDAA statute, the employee submits a complaint to OIG and if OIG determines that the complaint meets the requirements for investigation, then OIG will investigate the complaint and, upon completion of the investigation, submit a report of the findings of the investigation to the employee, the employer, and the Secretary.¹⁵ Upon receipt of the OIG report, the Secretary or designee must issue the agency decision and order within 30 days.¹⁶ In this matter, OIG's investigation concluded that only the one-day suspension without pay was a substantiated act of reprisal in violation of the NDAA.¹⁷ The evidence in the case, however, does not corroborate OIG's finding that the one-day suspension met the definition of a reprisal under the NDAA.

I. ISSUES

Complainant's initial complaint lists only the one-day suspension as an act of reprisal.¹⁸

¹² See 41 U.S.C. § 4701(a)

¹³ See Notice of Hearing and Order Governing Proceeding (Feb. 28, 2023) at 4.

¹⁴ See Complainant's Opening Brief (March 11, 2023); Prairie State College's Initial Brief (March 10, 2023); Prairie State College Reply Brief (March 17, 2023). Complainant indicated that he had technical challenges uploading his initial brief and it was submitted at approximately 12:25 am on March 11, 2023. This was 25 minutes after the deadline established in the Order Governing Proceedings. Comment 4 to Rule 2.2 of the Model Code of Judicial Conduct provides that reasonable accommodations can be made "to ensure pro se litigants the opportunity to have their matters fairly heard." Therefore, Complainant's brief will be admitted.

¹⁵ See 41 U.S.C. § 4712(b).

¹⁶ See 41 U.S.C. § 4712(c)(1).

¹⁷ See OIG Report at 2.

¹⁸ See OIG Report at 38-39.

He alleges that this action was taken to retaliate for the protected disclosures that he made to PSC employees. Specifically, Complainant contends that he was retaliated against for disclosing noncompliance and fraudulent reporting about PSC's TRIO SSS program data.¹⁹ In subsequent interviews with OIG agents, Complainant addressed other employment actions and asserted that some of these actions were done in retaliation for his whistleblowing.

PSC asserts that the employment actions were not reprisals for whistleblowing, but were justified responses to Complainant's insubordinate communications, attendance issues, and other work performance deficiencies.

The issues to be addressed are:

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

II. SUMMARY OF ORDER

Complainant has established that he made protected disclosures and those disclosures were contributing factors in the personnel actions on October 4, 2021, including issuing a one-day suspension, and on March 15, 2022, including suspending him for an additional ten days, and in the decision to terminate his employment on May 3, 2022. However, Complainant has not established that his disclosures contributed to any other personnel actions addressed by the NDAA. PSC has clearly and convincingly shown that Complainant would have faced the personnel actions taken on October 4, 2021, March 15, 2022, and May 3, 2022, even if he had not made protected

¹⁹ See OIG Report at 38.

disclosures.

III. FINDINGS OF FACT

A. Complainant's Employment at PSC

PSC has many departments, including the Student Affairs Department.²⁰ Within the Student Affairs Department is the Equity and Inclusion Office and within that office are the TRIO program offices.²¹ Complainant was hired in October 2020 in the TRIO SSS program office.²² Initially, Complainant reported to Jameta Rogers, the TRIO SSS Director.²³ Rogers reported to Dr. Tiffany Brewer, who was the head of the Equity and Inclusion Office until January 2022.²⁴ Brewer reported to Jaime Miller, the Interim Vice President of Student Affairs.²⁵ As discussed below, Rogers left PSC in December 2021. After Rogers left, Complainant reported to Dr. Jermaine Morales, who remained his supervisor until Complainant left PSC.²⁶ In the approximately 20 months he worked at PSC, Complainant was never given a yearly evaluation.²⁷

In his role as a Program Coordinator and Academic Advisor within the TRIO SSS office, Complainant had many duties. His duties included entering student data into PSC's electronic tracking system for the TRIO SSS program, which is called the Blumen tracking system. Complainant's responsibilities also included coordinating academic advising, facilitating student visits to other college and universities and attendance at on-campus and off-campus activities and events, acting as a liaison between students and faculty, and otherwise assisting students with tasks like transitioning to other colleges and universities and dealing with academic and other

²⁰ See Prairie State College Brief (March 10, 2023) (Hereafter PSC Initial Brief) at 4.

²¹ See PSC Initial Brief at 4.

²² See OIG Report at 405.

²³ See OIG Report at 405, 553.

²⁴ See OIG Report at 552-553; Prairie State College Brief at 4.

²⁵ See OIG Report at 847, 936.

²⁶ See OIG Report at 405, 414.

²⁷ See OIG Report at 937.

challenges.²⁸

B. History of Conflict Between Complainant and Rogers

Communication issues between Complainant and Rogers began within the first months after Complainant joined PSC.²⁹ The issues started in October 2020, the month Complainant joined PSC, and escalated around February 2021.³⁰ Charmaine Sevier, the Executive Director of human resources, said Rogers had initial concerns in 2020 about Complainant's response to Rogers and his deflecting accountability about his assigned work.³¹

Rogers asserted that she used email communication with Complainant because, during in person conversations, Complainant would become aggressive, accusatory, and would often misconstrue things that she told him.³² She felt that Complainant would be deflective and would respond to instructions and guidance by telling Rogers what she should be doing as the Director.³³ For example, Complainant was responsible for ensuring that students were tracked on sign-in sheets when they came into the computer labs, but Complainant would tell her that it was not his job and questioned why he was responsible for monitoring the sign in sheets. As a result, there were often no sign-in sheets.³⁴

Rogers also reported that Complainant was often combative in his communications with TRIO SSS tutors.³⁵ Complainant, himself, spoke about conflicts he had with another TRIO SSS employee, Shannon Jarrett. Specifically, Complainant stated that Jarrett once threatened him with violence when the two got into an argument.³⁶

²⁸ See OIG Report at 406.

²⁹ See OIG Report at 412, 556, 938.

³⁰ See OIG Report at 412.

³¹ See OIG Report at 938.

³² See OIG Report at 513.

³³ See OIG Report at 513.

³⁴ See OIG Report at 513.

³⁵ See OIG Report at 513.

³⁶ See OIG Report at 411, 460.

Rogers also stated that Complainant was not very capable with technology and did not understand how to do the basic functions of his job, including arranging for a bus to transport TRIO SSS students.³⁷ As noted, coordinating student attendance at off-campus events and visits to other schools was a part of Complainant's job.³⁸ Rogers also noted that Complainant failed to recruit students to meet the active student numbers that the school needed, and failed to collect financial information for the students who were recruited.³⁹ Rogers said that, as a result, she would often have to do the work that Complainant was not completing.⁴⁰ This included doing presentations and creating program flyers because Complainant thought this work was beneath him.⁴¹ Rogers told OIG that she was supportive of Complainant attending trainings, but that he expected her to register him for the trainings instead of registering himself.⁴² Finally, Rogers reported that Complainant would not complete budget estimates for the TRIO SSS student activities because he claimed that he did not have the time.⁴³

Rogers asserted that she brought her concerns about Complainant to Brewer, including bringing copies of emails he had sent, as early as 2020.⁴⁴ Rogers felt that Brewer did not support Rogers. Rogers additionally stated that Brewer told Rogers that if she brought her concerns to human resources, it would be detrimental to Rogers's career.⁴⁵ Rogers contended, however, that she felt like she had no other choice but to go to human resources because Brewer would not address Rogers's concerns. Rogers says she considered Sevier, the Director of Human Resources,

³⁷ See OIG Report at 513.

³⁸ See OIG Report at 406.

³⁹ See OIG Report at 513.

⁴⁰ See OIG Report at 513.

⁴¹ See OIG Report at 513.

⁴² See OIG Report at 514.

⁴³ See OIG Report at 514.

⁴⁴ See OIG Report at 513-514.

⁴⁵ See OIG Report at 514.

more neutral and objective and first contacted her in November 2020.⁴⁶

Rogers reported that when she first brought her concerns regarding Complainant's communications to Brewer in late 2020, Rogers recommended to Brewer that they consider terminating Complainant's employment before his 90-day probationary period ended.⁴⁷ Rogers was in regular contact with human resources during that period and has stated that human resources was supportive of dismissing Complainant.⁴⁸ Rogers asserted that, despite her concerns, Brewer would not let Rogers dismiss Complainant.⁴⁹

On March 17, 2021, Brewer sent Rogers an email noting that the first issue to discuss during their next one-on-one meeting was the "status of the current conflict within the office and how best to resolve it so that all parties can move forward."⁵⁰ The next month, in April 2021, Complainant, Rogers, and Brewer met to address conflicts within the office.⁵¹

On July 26, 2021, Rogers emailed Brewer and expressed that she had met with Complainant and he became "belligerent and disrespectful."⁵² Rogers further informed Brewer that Complainant became "very defensive" when Rogers asked him about specific tasks that were not completed and his arrival and departure times.⁵³ Rogers expressed that Complainant was "awesome" with ideas but not good with details on execution. She also stressed that they needed to work on communication because he was making decisions without talking to Rogers.⁵⁴

Brewer and Rogers met the next day,⁵⁵ and after meeting, Brewer emailed Rogers with

⁴⁶ See OIG Report at 514

⁴⁷ See OIG Report at 515.

⁴⁸ See OIG Report at 515, 941.

⁴⁹ See OIG Report at 515.

⁵⁰ See OIG Report at 603.

⁵¹ See OIG Report at 575-580.

⁵² See OIG Report at 627.

⁵³ See OIG Report at 627.

⁵⁴ See OIG Report at 627.

⁵⁵ See OIG Report at 626.

approaches Rogers and Complainant could take together to better their communications. Brewer, however, did not address any discipline for Complainant nor any approaches that directly addressed Complainant's unprofessional communications and actions.⁵⁶

C. Email Communications Between Complainant and Rogers

On November 5, 2020, Complainant sent Rogers a list of PSC professors who replied to their requests for progress reports.⁵⁷ Rogers replied, thanking him for the information and asking if he “could [] provide how many requests you sent out and how many replies you received.”⁵⁸ Complainant replied that it would be “[n]o problem” and that he had already “placed all of the replies in the file cabinet as well as scanned all documents and sent them to you electronically including individual student progress reports.” He then asked Rogers to “help me understand what you're looking for?”⁵⁹ Rogers replied that “this is not what I requested.” She also reminded Complainant that, early that day, they had discussed that he “would provide how many requests you sent out and how many did you receive back,” and that the information that he provided did not deliver this information. She also asked Complainant to “[p]lease supply the requested information by the end of the day tomorrow.”⁶⁰ Complainant responded to Rogers's email an hour later by criticizing Rogers for not having minutes from meetings to “backup your expectations” and to “clarify,” and to assert that it is “[v]ery confusing at times.” He also asked her to “[b]e fair and equitable in how you convey your messages,” and expressed that he did not “appreciate [Rogers] being condescending.” He stated that he would provide the information the next day, which he did.⁶¹

⁵⁶ See OIG Report at 625-626

⁵⁷ See OIG Report at 426-427

⁵⁸ See OIG Report at 426.

⁵⁹ See OIG Report at 426.

⁶⁰ See OIG Report at 426.

⁶¹ See OIG Report at 425.

On February 23, 2021, Rogers emailed Complainant. She noted that as they had discussed “the applicant review form needs to be completed in its entirety before a decision can be made about their admittance to the program,” and the applications that he had forwarded were “incomplete.” She offered to meet with him to answer any questions and asked that he “[p] lease refrain from verballing accepting students to the program.”⁶² Complainant responded that same day that “[i]n all due respect, the onboarding process varies from institution to another,” that he had “asked you about protocols and process as it pertains to the PSC TRIO SSS SCHOLARS program without clear directives,” that he had “kept you in the loop throughout the entire process,” that he “would appreciate it if you were able to communicate promptly and preferably in writing when we are processing students to prevent further confusion and delays.” He further expressed that he believed that they “need to expedite the onboarding process before students become discouraged,” and so he had conveyed messages to students based on their discussions. Finally, he noted that he did “not believe relying on memory serves any of us well, because things seem to slip through the cracks,” and so he would send her a meeting request “first thing in the morning.” He finished his email by wishing Rogers “a great day.”⁶³

On August 3, 2021, Complainant sent Rogers an email inquiring if he would be permitted to attend the “EOA conference” this year.⁶⁴ Rogers responded by requesting that Complainant provide the cost for the conference and other professional development opportunities. Rogers also noted that his attendance would “depend on what we have planned for the year and the cost associated with it.”⁶⁵ She additionally asked him to speak to her about this matter at their next meeting. Instead of providing the requested information, Complainant replied to Rogers by

⁶² See OIG Report at 429.

⁶³ See OIG Report at 428-429.

⁶⁴ See OIG Report at 65.

⁶⁵ See OIG Report at 65.

directing her to refer to a specific section in the Staff Support Union Contract Handbook prior to their next meeting “regarding the costs associated with professional development.”⁶⁶ Rogers replied, thanking Complainant for sending the information and noting that “this refers to what the union will reimburse for.” Complainant responded less than an hour later by stating that: (1) “[i]t also refers to my rights for professional development opportunities including costs associated;” (2) the dean supported growth and development; (3) he was “amenable” to other development opportunities; and (4) “we work in a community of lifelong learners and I don’t want to be stifled by a supervisor that does not understand the value of continuous educational improvement.”

Two days later, on August 5, 2021, Rogers sent Complainant an email asking him to confirm that he worked six hours one day, left early another day, and took vacation a third day.⁶⁷ Rogers asked Complainant to “please” complete a leave form for those days. In response, Complainant sent Rogers an email noting that he worked another unrelated day “even though I was out sick.”⁶⁸ He then continued by, among other things: (1) alleging that Rogers was “trying to trip [Complainant up];” (2) commenting about Rogers having “sporadic” working hours and contend that he had worked more hours during the pandemic than Rogers or anyone else; (3) accusing Rogers of “looking for trouble” rather than “lead[ing], guid[ing], or support[ing] his efforts;” (4) stating that he is “too busy to continue to respond to pettiness;” (5) contending that Rogers was “inappropriate” and “unprofessional” for questioning Complainant’s integrity while “creating false narratives;” and (6) telling Rogers that her approach is a form of harassment and that it needs to stop. He also informed Rogers that he had brought his concerns to others at PSC, including the Dean, and would next be speaking with the union. He said that if she wanted to

⁶⁶ See OIG Report at 65.

⁶⁷ OIG Report at 424.

⁶⁸ See OIG Report at 424.

continue “with this” they would need to schedule some time with the Dean and a union representative.⁶⁹ Complainant claimed that this was an example of how Rogers created a “false narrative” because he had already submitted leave request forms.⁷⁰ There is no evidence in the record on whether Complainant ever completed leave forms for his time out of the office.

On September 3, 2021, Rogers sent Complainant an email noting that, on August 5th, she had told Complainant that he had to take his lunch break during the day and could not take his break at the beginning or end of the day.⁷¹ Rogers also noted that on September 1, 2021, he left for lunch at 3:30 and did not return, which was against what they had discussed. She asked Complainant to “please take your lunch break between 12 pm and 2 pm.”⁷² She also asked that if he had to adjust his lunch break on a given day because of any “unforeseen circumstances” that he “please discuss it with me to get approval for the adjustment.” Finally, Rogers noted that it is important that they discuss any late arrivals or early departures to make sure that the office is covered. Complainant responded that Rogers: (1) should “[s]top harassing me;” (2) that he was taking the issue up with Brewer, human resources, and the union; (3) that her written communication is “often erroneous and [sic] misplaced apprehension;” (4) that Rogers “disregard[s] real work related issues, [Rogers] rarely contribute[s] to our daily work activities and [Rogers] pretty much delegate[s] everything.”⁷³ He also stated that “[a]s a leader” she is “responsible for more than [being] a time keeper,” and that she is out of the office more than in the office, and asked “where is the accountability?”⁷⁴ After asserting that he was “ready to escalate this matter to HR,” Complainant told Rogers to enjoy her weekend and that he would see her next

⁶⁹ OIG Report at 424

⁷⁰ See OIG Report at 412.

⁷¹ OIG Report at 439.

⁷² OIG Report at 439.

⁷³ OIG Report at 439.

⁷⁴ OIG Report at 439.

Tuesday. In his interview with OIG agents, Complainant said that he and Rogers had not previously discussed when he took his lunch break.⁷⁵

Also on September 3, 2021 Rogers sent Complainant an email noting that Complainant was taking personal time in four days and asked that “in the future let’s discuss this prior to scheduling the time.”⁷⁶ Rogers also asked that Complainant “[p]lease” complete a leave form with human resources.” Complainant responded that had Rogers not “disregarded” their scheduled meeting the day before he would have brought it to her attention then and that she was assuming or suggesting that he was dishonest. He finished by stating that he had rarely taken off time that year and that he had “sufficient time to cover it.”⁷⁷

Rogers explained to OIG that PSC’s policy was that when employees needed leave, the employee used an electronic form that went directly to human resources, but employees still had to communicate with their supervisors to report that they were taking leave.⁷⁸ This was confirmed by Sevier.⁷⁹ Rogers said that Complainant knew of this requirement because Rogers made it clear to all TRIO SSS staff that she needed to know who was unavailable to cover the office.⁸⁰ Rogers said she did not have issues with Complainant concerning leave, but that sometimes, without her approval, Complainant would come in late or leave work early and not take a lunch break. Rogers noted that this would lead to the computer lab, which required the presence of a full-time employee, to be closed.⁸¹ Rogers said that she talked with Complainant on several occasions about improving his time management skills.⁸²

⁷⁵ OIG Report at 414-415.

⁷⁶ OIG Report at 440.

⁷⁷ OIG Report at 440.

⁷⁸ See OIG Report at 511.

⁷⁹ See OIG Report at 938-939.

⁸⁰ See OIG Report at 511.

⁸¹ See OIG Report at 511.

⁸² See OIG Report at 511.

D. Complainant Contacts Union about Perceived Harassment

On September 3, 2021, Complainant contacted PSC's Grievance Manager, William Berkley to ask how to file a formal grievance.⁸³ On September 8, 2021, Complainant met with union officials.⁸⁴ On September 21, 2021, Complainant emailed Berkley and his union official to provide additional information about the amount of work assigned to him, and that he believed that Rogers was more flexible with other employees on scheduling issues.⁸⁵ On September 24, 2021, Complainant emailed his union representative and Berkley, noting that it had been two weeks since he contacted them and requested assistance completing the grievance form.⁸⁶

E. Background To Concerns about TRIO SSS Program Reporting Numbers

By 2020, Brewer supervised multiple functions, including the monitoring of the TRIO program data and submissions of Annual Performance Reports (APRs) to US DoED.⁸⁷ Brewer noted that, although she required annual audits as a routine practice, the TRIO internal audits in 2021 were also prompted by previous review findings that required corrective responses.⁸⁸ On April 5, 2021, Brewer emailed the Directors of the three TRIO programs proposing internal audits after the previous audits contained non-critical errors.⁸⁹ On May 20, 2021, Brewer sent an email to the Directors again noting that in May they would begin internal audits.⁹⁰ Brewer stated that, for the 2020-2021 award year, she implemented a routine of quarterly audits of student program files across all TRIO offices to take a more proactive approach.⁹¹

Under the TRIO program, PSC received federal funds based upon the number of students

⁸³ See OIG Report at 442.

⁸⁴ See OIG Report at 443-444.

⁸⁵ See OIG Report at 448.

⁸⁶ See OIG Report at 446.

⁸⁷ See OIG Report 553.

⁸⁸ See OIG Report at 553.

⁸⁹ See OIG Report at 619.

⁹⁰ See OIG Report at 582.

⁹¹ See OIG Report at 553.

served by the program, enrollment retention percentages, matriculation percentages, the number of students who transferred to four-year institutions and the number of services rendered by the program.⁹² Brewer requested that Rogers create a checklist and an audit reporting form for Brewer's review. Brewer expressed that, when Rogers provided Brewer with various revisions of the form, Brewer was concerned that the data was fluctuating, including the number of students being served and the percentages in relation to the program objectives.⁹³ Brewer said that when she questioned Rogers about the variant numbers, Rogers provided an inadequate response, namely that the problem was that the registration and enrollment database, Colleague, and the TRIO data management system, Blumen, were not communicating properly.⁹⁴ Brewer expressed that Rogers, as TRIO SSS Director, was ultimately responsible for ensuring that the data was entered into the system correctly.⁹⁵

Rogers felt that Complainant's allegations about inaccurate reporting was based upon his incorrect interpretation of the regulation.⁹⁶ Namely, Rogers believed that Complainant was failing to follow regulations and count students who matriculated within the last four years but who still worked with PSC. Rogers reported that she spoke with a TRIO program expert from outside PSC, Angelica Vialpando, who told Rogers that she was doing the corrections correctly.⁹⁷ Rogers also provided both Brewer and Vice President Miller explanations of her calculations.⁹⁸

F. Complainant's Initial Disclosures about TRIO SSS Program Data and Alleged Harassment in Response

Complainant told OIG investigators that, in early 2021, he was assigned to perform a file

⁹² See OIG Report at 553.

⁹³ See OIG Report at 554.

⁹⁴ See OIG Report at 554.

⁹⁵ See OIG Report at 554.

⁹⁶ See OIG Report at 516.

⁹⁷ See OIG Report at 516.

⁹⁸ See OIG Report at 518.

audit of the students being served under the TRIO SSS program.⁹⁹ He later told OIG investigators that he did not begin to do internal audit reviews until August 2021.¹⁰⁰ Finally, he clarified that he likely was assigned to begin the file reviews in June or July 2021 and began conducting the file review on August 5, 2021.¹⁰¹

While doing the review, Complainant cross-referenced the Blumen tracking system that contains student data specific to the TRIO SSS program and the school-wide Colleague database. Complainant stated that he noticed that there were students reported in the Blumen system who were not eligible to participate in the TRIO SSS program, including one student who had not been enrolled at PSC since 1995 and other students who were reported in the system who were not currently enrolled at the school.¹⁰² Complainant stated that the information he was auditing was used to support the data being reported in PSC's APR that was sent to US DoED.¹⁰³ He said he had sent weekly and biweekly reports of his findings to Rogers and then Morales.¹⁰⁴ Complainant also told investigators that he believed that the number of students being served under the TRIO programs as PSC was being inflated in the APRs.¹⁰⁵

Complainant asserted to OIG investigators that soon after he disclosed his findings to Rogers, she began to send him harassing emails.¹⁰⁶ The earliest email in the record containing his disclosure is from August 2021, which Complainant acknowledged was when he first told Rogers about his concerns, and she began the "harassment."¹⁰⁷

On August 17, 2021, Complainant sent an email to Rogers in which he noted that as a result

⁹⁹ See OIG Report at 406.

¹⁰⁰ See OIG Report at 411.

¹⁰¹ See OIG Report at 413.

¹⁰² See OIG Report at 406, 411.

¹⁰³ See OIG Report at 406.

¹⁰⁴ See OIG Report at 406.

¹⁰⁵ See OIG Report at 406, 411.

¹⁰⁶ See OIG Report at 407.

¹⁰⁷ See OIG Report at 411.

of cross-referencing the Blumen and Colleague systems he found, among other things, that: (1) twenty-three of the 109 TRIO SSS listed in the Blumen database were currently registered in classes; (2) one of the students listed in the Blumen database was not listed in the Colleague database; and (3) one of the students listed in the Colleague database as a TRIO student was not listed in the Blumen database.¹⁰⁸ Complainant expressed concerns in the email about needing more support and help with planning and division of labor.¹⁰⁹ When the OIG investigator noted to Complainant that he did not include any concerns about discrepancies in the reporting numbers in the email and its attachments, Complainant replied that he assumed Rogers understood the discrepancies he was outlining concerning the number of students in the two systems.¹¹⁰ He also stated that he addressed his concerns about discrepancies more directly with Rogers during one-on-one in person meetings.¹¹¹

On September 1, 2021, Complainant sent another biweekly report to Rogers. This report, among other things, reported that thirty-two out of 112 TRIO SSS participants had registered for classes in FY 2021.¹¹² Complainant characterized this report to OIG agents as continuing to identify discrepancies.¹¹³

Complainant told OIG agents that in a September 3, 2021 email to Brewer, Miller, and Sevier, Complainant escalated his concerns about (1) the inflated student numbers, (2) being harassed by Rogers for reporting his findings, and (3) the need for more assistance and personnel for the TRIO program department.¹¹⁴ Complainant noted that he copied Rogers on the email. OIG noted in its report, however, that Complainant never submitted any emails or other documentation

¹⁰⁸ See OIG Report at 434.

¹⁰⁹ See OIG Report at 434.

¹¹⁰ See OIG Report at 414.

¹¹¹ See OIG Report at 414.

¹¹² See OIG Report at 437.

¹¹³ See OIG Report at 414.

¹¹⁴ See OIG Report at 407.

indicating that he communicated his concerns to any PSC officials on September 3, 2021.¹¹⁵

G. The September 28, 2021 Email

On September 28, 2021, Rogers sent Complainant an email asking that when he stepped away from the office, he “please share with [Rogers and two other PSC employees] where you are going and how long you might be as students stop by to see you and have no idea when you will return.”¹¹⁶ Rather than agreeing to notify others when he was leaving in the future, Complainant responded with an email to Rogers which he also copied Brewer, Berkley, and his union representative, and in which he stated:

Are you aware that I get to take lunch every now and then? There is no established protocol in place, besides you don’t do what you are telling me to do. No one, I mean no one in the office has ever notified me at any time when they were stepping away from the area. Why do you constantly make up rules as you go? So let’s be clear, I am sick and tired of you harassing me about pettiness. I really need your help with doing some of the work around here. I’ve been working on the Progress Report Requests the entire morning. I hadn’t even been gone for the entire lunch break.¹¹⁷

Complainant went on to state that

I truly believe that you are harassing me due to whistleblowing, which is unlawful and against policy as well as violates my union contract agreement. Ever since I reported your behavior to Dean Brewer along with reporting disparate treatment and [a] hostile working environment, you have seemingly set out to sabotage my work efforts. . . . At this point I am choosing not to waive my rights and ready to proceed with grievance proceedings as soon as possible.¹¹⁸

Complainant also included the section of the PSC collective bargaining agreement that covered harassment and hostile work environments.

Rogers also brought this email to Brewer’s attention, seeking to discuss the “insubordinate

¹¹⁵ See OIG Report at 19.

¹¹⁶ OIG Report at 445.

¹¹⁷ OIG Report at 445.

¹¹⁸ OIG Report at 445.

communications.”¹¹⁹ Brewer emailed Complainant and Rogers thanking them for the update and expressing “regret that my previous interventions have not yielded more positive and long lasting results.”¹²⁰ She also told them that she supported their rights to go to human resources to “pursue formal remediation.”¹²¹

Brewer told OIG agents that, tone aside, Complainant’s allegations in the email, along with the variance in the numbers she saw from the internal audits, brought about concerns for her about the numbers, especially Complainant’s allegation that PSC was only serving a quarter of the students it reported being actively served by the TRIO SSS program.¹²² Brewer questioned Rogers about the allegations and Rogers told her that Complainant was wrong about the numbers.¹²³ In response to the allegations, Brewer ordered both Complainant and Rogers to provide reports from the Blumen system, and asked the Office of Financial Aid to provide a third party report.¹²⁴ Brewer told OIG investigators that between Complainant’s report and Rogers’s report, Complainant’s was more accurate. Brewer reported that she, in part because of concerns about Rogers’s reporting, later initiated the process to terminate Rogers’s employment.¹²⁵

H. October 4, 2021 Discipline Imposed

On October 4, 2021, Complainant was called into a disciplinary meeting.¹²⁶ At the end of the meeting Rogers issued Complainant a Notice of Suspension (First Discipline Memorandum) indicating that he was suspended for one day without pay on October 5, 2021.¹²⁷ The Notice noted

¹¹⁹ See OIG Report at 556.

¹²⁰ OIG Report at 623.

¹²¹ OIG Report at 623.

¹²² See OIG Report at 556. The September 28, 2021 email does not make specific reference to any student numbers or indicate the topic of the alleged whistleblowing. It is not clear where and when Brewer received this information.

¹²³ See OIG Report at 556.

¹²⁴ See OIG Report at 635.

¹²⁵ See OIG Report at 557.

¹²⁶ See OIG Report at 407.

¹²⁷ See OIG Report at 416, 455.

that it was intended to “document [Rogers’s] continued concern regarding [Complainant’s] email communications of insubordination.” The First Discipline Memorandum listed six specific dates of emails¹²⁸ and noted that under Section 23.1 of the support staff contract, PSC could move to suspension. Complainant stated to OIG agents that he “owns the tone” of his emails and that if Rogers had concerns she should have brought those concerns to his attention before issuing a formal disciplinary action.¹²⁹ Complainant also reported that, up until the October 4, 2021 discipline meeting, neither Rogers nor any other PSC official addressed with him about the tone of his emails.¹³⁰ The First Discipline Memorandum also noted that “[t]his continued insubordination can lead to additional disciplinary action up to and including termination.”¹³¹ The First Discipline Memorandum was signed by Rogers, Sevier, and Complainant’s union representative, but not Complainant.¹³²

In addition to issuing the First Discipline Memorandum and suspending Complainant, Rogers put Complainant on a Performance Action Plan noting that the issue was “[u]nprofessional emails and communication” and more specifically the “[l]anguage and tone in communications.”¹³³ The improvement plan within the Performance Action Plan required Complainant to use communication that is “professional and respectful” and to complete an online training in “Productive Conflict Resolution Skills in the Workplace.”¹³⁴ On October 15, 2021, Complainant completed the online training.¹³⁵ Sevier told OIG agents that by accepting the Performance Action Plan document and completing the training, Complainant indicated that he

¹²⁸ See OIG Report at 455. The dates listed were November 5, 2020, February 24 2021, August 3, 2021, August 5, 2021, September 3, 2021, and September 28, 2021.

¹²⁹ See OIG Report at 415.

¹³⁰ See OIG Report at 416.

¹³¹ See OIG Report at 455.

¹³² See OIG Report at 455.

¹³³ OIG Report at 456.

¹³⁴ See OIG Report at 407, 456.

¹³⁵ See OIG Report at 1354-1355.

was accepting the disciplinary action.¹³⁶

Complainant told OIG investigators that he was only told one minute before the meeting what it was about, and so did not have any documentation to defend against the suspension.¹³⁷ Complainant also told OIG investigators that his union representative and the Grievance Manager, William Berkley were present, but said that Berkley was Rogers's "purported friend" and told Complainant that if he filed a formal complaint about the discipline he would have a target on his back at the school.¹³⁸

Complainant asserted to OIG investigators that PSC had a four-step discipline process beginning with a verbal warning, then going to a written reprimand, and then to a suspension and finally to a recommendation for termination. Complainant told OIG investigators that, contrary to this plan, he was suspended without the prior steps in the process.¹³⁹ Complainant also noted that although he was due multiple performance evaluation meetings during his time at PSC he had not had one.¹⁴⁰

Brewer reported that the disciplinary memo and one-day suspension without pay issued to Complainant were done without her participation. She stated that Rogers worked with the human resources director, Sevier, directly and Brewer only learned about the actions after they had already occurred.¹⁴¹ Brewer said that she was not present at any meetings between Rogers and Complainant and that she primarily knew about the communication issues from Rogers letting her know about office dynamics.

¹³⁶ See OIG Report at 942.

¹³⁷ See OIG Report at 407.

¹³⁸ See OIG Report at 407.

¹³⁹ See OIG Report at 407.

¹⁴⁰ See OIG Report at 407.

¹⁴¹ See OIG Report at 555.

I. Complainant Files Grievance about Harassment

On October 12, 2021, after he had been disciplined, Complainant filed a grievance with PSC alleging acts of perceived harassment and retaliation for whistleblowing.¹⁴² On October 21, 2021, Complainant met with Rogers, his union representative, and Sevier concerning the allegations of harassment in Complainant's grievance.¹⁴³ Complainant told OIG agents that it was a short virtual meeting during which he brought up the October 4 disciplinary actions as further examples of harassment.¹⁴⁴

PSC's human resource department conducted an investigation of the allegations that Complainant made in his grievance.¹⁴⁵ On November 23, 2021, human resources issued their findings and conclusions from the investigation.¹⁴⁶ The investigation included a review of the emails presented to human resources and an interview of witnesses named in the grievance.¹⁴⁷ The human resource department concluded that reasonable grounds did not exist to support Complainant's allegations of harassment.¹⁴⁸ After the human resources department concluded that Complainant's grievances were not substantiated, Complainant asked the union president to request a meeting with the President of PSC.¹⁴⁹ Complainant told OIG agents that he wanted to escalate his grievance complaint to the PSC President, Michael Anthony. Complainant said this was because he did not believe that the union president had done an adequate job representing him and that both the union and human resources did not adequately address his harassment allegations.¹⁵⁰ On February 24, 2022, Complainant emailed Anthony asking for a one-on-one

¹⁴² See OIG Report at 459.

¹⁴³ See OIG Report at 417.

¹⁴⁴ See OIG Report at 417.

¹⁴⁵ See OIG Report at 466.

¹⁴⁶ See OIG Report at 466.

¹⁴⁷ See OIG Report at 466.

¹⁴⁸ See OIG Report at 466.

¹⁴⁹ See OIG Report at 467-468.

¹⁵⁰ See OIG Report at 417.

meeting.¹⁵¹ After a series of emails, Anthony mention that he wanted to talk with Sevier first and then would follow up with Complainant.¹⁵² Anthony told OIG that when Complainant asked for the one-on-one, Complainant was facing pending disciplinary measures and was already working with his supervisors and human resources. Under those circumstances, Anthony did not want to meet with Complainant.¹⁵³

J. Rogers Leaves PSC

As noted above, Brewer told OIG investigators that in response to the allegations in the September 28, 2021 email from Complainant to Rogers, Brewer obtained reports about student numbers from Complainant, Rogers, and the Office of Financial Aid. Brewer also told OIG that she felt that Complainant's report was more accurate and so Brewer initiated the process to terminate Rogers's employment.¹⁵⁴

Brewer told OIG investigators that Rogers termination meeting was held at the end of November or early December 2021 and that Brewer later learned that human resources allowed Rogers to immediately resign to avoid being terminated from her position.¹⁵⁵ In response to questions from OIG, PSC reported that Rogers resigned from PSC on December 1, 2021.¹⁵⁶

Complainant told OIG investigators that after Rogers left PSC, Jermaine Morales became Complainant's acting supervisor.¹⁵⁷ PSC reported that this happened shortly after Rogers left in December 2021.¹⁵⁸ Complainant also reported that he was assigned the role of temporarily supervising a federal work study student around that time.¹⁵⁹ On January 25, 2022, Morales

¹⁵¹ See OIG Report at 483.

¹⁵² See OIG Report at 483-484.

¹⁵³ See OIG Report at 1979.

¹⁵⁴ See OIG Report at 557.

¹⁵⁵ See OIG Report at 557.

¹⁵⁶ See OIG Report at 231.

¹⁵⁷ See OIG Report at 414.

¹⁵⁸ See OIG Report at 232.

¹⁵⁹ See OIG Report at 563.

officially became Complainant's supervisor.¹⁶⁰

K. Complainant Experiences Issues with Morales and Files Written Complaint to OIG

Complainant told OIG agents that after Morales became his supervisor, Morales required Complainant to submit weekly progress reports showing the work he was doing.¹⁶¹ On February 2, 2022, Morales sent Complainant an email stating “[c]an you please submit a weekly time and effort report the first report is due Thursday, February 10th by the close of business.”¹⁶² On February 4, 2022, Complainant responded agreeing to submit the weekly reports.¹⁶³

On February 17, 2022, Morales sent Complainant an email asking him to submit his weekly report.¹⁶⁴ Rather than submit the weekly report, Complainant responded that he had sent a bi-weekly report the week before and inquired if Morales was now requesting weekly reports.¹⁶⁵ Morales reminded Complainant that he had already informed him in emails on February 4 and 11 that Complainant needed to submit weekly reports.¹⁶⁶ Again, instead of submitting a report, Complainant asked “[w]as the report I provided you not sufficient?”¹⁶⁷

On February 24, 2022, Complainant was scheduled to file a weekly report.¹⁶⁸ After the report was not timely filed, Morales inquired about the report and asked that it be submitted by February 28.¹⁶⁹ Complainant submitted the report on Tuesday March 1, 2022.¹⁷⁰ Morales noted in response to the report that there were multiple deficiencies and missing information that needed to be addressed in the report.¹⁷¹ Complainant responded by email, thanking Morales for the

¹⁶⁰ See OIG Report at 232, 414.

¹⁶¹ See OIG Report at 419.

¹⁶² OIG Report at 499.

¹⁶³ See OIG Report at 499.

¹⁶⁴ See OIG Report at 497.

¹⁶⁵ See OIG Report at 497.

¹⁶⁶ See OIG Report at 497.

¹⁶⁷ OIG Report at 497.

¹⁶⁸ See OIG Report at 84.

¹⁶⁹ See OIG Report at 75.

¹⁷⁰ See OIG Report at 75.

¹⁷¹ See OIG Report at 76-77.

feedback but also complaining about not getting enough support.¹⁷² When Morales replied and outlined efforts to hire more employees and provide more training, Complainant responded to Morales with advice that (1) they should schedule a meeting but record it so that “nothing slips through the cracks,” and (2) Morales should format his emails with bullet points.¹⁷³

The next weekly report was due by 4:30 p.m. on Thursday March 3, 2022. At 4:45 p.m. that day, Morales sent Complainant a reminder after not receiving the report.¹⁷⁴ Complainant responded the next day saying that he was working on the report and blaming the delay on having too much work because the office did not have “adequate staffing.”¹⁷⁵ Morales reminded him that he should not do work that was not part of his job and only do the work assigned to Complainant.¹⁷⁶

Morales told OIG agents that he instructed Complainant multiple times to schedule time in PSC’s atrium to recruit eligible students for the TRIO SSS program.¹⁷⁷ Morales said that there were times where Complainant did not follow this directive and it resulted in ineffective recruitment.¹⁷⁸ Specifically, Complainant was scheduled to be in the atrium for recruitment on March 7, 8, and 9, 2022.¹⁷⁹ PSC asserts that Complainant did not show up to work on March 7, 2022, left work early on March 9 and was ineffective in the recruitment effort overall.¹⁸⁰ Miller told OIG that on the two days that Complainant did show up to work, he was only able to recruit 3 students and did not follow instructions.¹⁸¹

Before the event, Complainant had emailed with Morales expressing concerns that he

¹⁷² See OIG Report at 715-716.

¹⁷³ See OIG Report at 717.

¹⁷⁴ See OIG Report at 85.

¹⁷⁵ See OIG Report at 85.

¹⁷⁶ See OIG Report at 1033; 943

¹⁷⁷ See OIG Report at 675.

¹⁷⁸ See OIG Report at 675.

¹⁷⁹ See OIG Report at 72-73.

¹⁸⁰ See OIG Report at 94, 420.

¹⁸¹ See OIG Report at 850.

needed to present at a financial management webinar on March 8 from 1 to 2 and 5 to 6 pm and was supposed to be in the atrium at that time for recruitment and could not “be in two places at the same time.”¹⁸² Morales asked that he step away from the recruitment for one hour from 1 to 2 pm to present at the virtual event.¹⁸³

When asked by OIG agents about the three day recruitment effort Complainant initially said he had completed the required forms with human resources and had permission to leave early on March 9, but when confronted with the evidence Complainant retracted his statement.¹⁸⁴ He did, however, email Morales at 2:41 pm noting that he was planning on leaving at 3:30 pm that day.¹⁸⁵ In response to the email from Complainant noting that he was leaving early, Morales emailed asking for a list of TRIO students who attended the event and the times Complainant attended the financial management webinar.¹⁸⁶ Complainant provided the name of one student who attended and responded, “I didn’t attend, I presented at both sessions, 1pm and 5pm. You were already informed.”¹⁸⁷

Miller told OIG agents that Complainant was inconsistent when entering case notes into the Blumen system on behalf of TRIO students, and it left senior staff confused as to what he chose to include and chose to omit.¹⁸⁸ Miller further stated that Complainant admitted that he maintained some handwritten case notes on paper but did not always input them into the Blumen system.¹⁸⁹

Morales also expressed that he approved Complainant’s leave requests when they followed policy and procedure, but that Complainant did not always follow procedure and did not

¹⁸² See OIG Report at 725-726.

¹⁸³ See OIG Report at 726.

¹⁸⁴ See OIG Report at 420.

¹⁸⁵ See OIG Report at 708.

¹⁸⁶ See OIG Report at 708.

¹⁸⁷ OIG Report at 709.

¹⁸⁸ See OIG Report at 850.

¹⁸⁹ See OIG Report at 850.

consistently contact Morales, as required, about intended leave.¹⁹⁰ Sevier confirmed that PSC employees had to contact their managers and supervisors and receive approval for any leave taken.¹⁹¹ Morales also noted that Complainant, against PSC rules, would skip lunch and would leave work early.¹⁹²

L. Complainant Discloses Concerns about Student Numbers to Morales and Files Written Complaint to OIG

On February 23, 2022, Complainant met with Morales.¹⁹³ Complainant told OIG agents that it was a routine scheduled meeting to talk about the TRIO SSS program.¹⁹⁴ Complainant contends that during that meeting he raised his concerns with Morales about PSC being non-compliant with grant regulations and about discrepancies in the number of students being served that was reported to U.S. DoED. Complainant told OIG agents that this was the first time Morales was hearing about these issues directly from him.¹⁹⁵

Complainant worked with Morales on February 24, 2022. Complainant contends that he showed Morales how to retrieve data from the Blumen database to be used in the APR.¹⁹⁶ Complainant alleges that Morales was trying to find the best way to “squeeze” 154 students out of the Bluman database so that PSC could report that it was serving that number of students listed in the APR.¹⁹⁷ Complainant asserts that he “outed” Morales to Sevier and Miller over what Morales was trying to do with the APR reporting.¹⁹⁸

Morales reports that when Complainant told him about “purported discrepancies” with the

¹⁹⁰ See OIG Report at 677.

¹⁹¹ See OIG Report at 938-939.

¹⁹² See OIG Report at 677.

¹⁹³ See OIG Report at 420, 479-480.

¹⁹⁴ See OIG Report at 420.

¹⁹⁵ See OIG Report at 420.

¹⁹⁶ See OIG Report at 420.

¹⁹⁷ See OIG Report at 420-421.

¹⁹⁸ See OIG Report at 421.

number of students PSC claimed to be serving, Morales asked Complainant to attend “priority trainings” and prepare the data quickly because the APR was coming due.¹⁹⁹ Morales says that Complainant had told Morales that Complainant did not have experience working with APRs, so Morales did not know how Complainant was coming to his conclusions about data discrepancies in the APRs.²⁰⁰ Morales further told OIG that although there may have been some discrepancies with the numbers submitted in the APRs, Morales did not compile the data for the APR.²⁰¹ Morales told OIG agents that at the time he was talking to Complainant, PSC was only a week away from the deadline for submitting APR to U.S. DoED and if the data was not timely submitted they risked losing the grant.²⁰² Morales stated that he spoke with the U.S. DoED TRIO SSS program manager, and he understood that her advice was to just get the data submitted even if it had errors. He reported that, therefore, despite the potential inaccuracies in the data, Morales instructed Complainant to just submit the data as it was at that time.²⁰³

Morales explained that the process of submitting the APR was that the school uploaded the data to U.S. DoED’s website, and if there were inaccuracies, the system flags any discrepancies and rejects the report. Morales also said that the last submitted TRIO SSS report did not yield any notifications from the system.²⁰⁴

Morales also explained, like Rogers had said, that there are some students who are not actively enrolled, but have left the school in recent years and were supposed to be counted in the student numbers.²⁰⁵ Morales reiterated to that Complainant admitted that he did not have prior

¹⁹⁹ See OIG Report at 673.

²⁰⁰ See OIG Report at 673.

²⁰¹ See OIG Report at 673.

²⁰² See OIG Report at 674.

²⁰³ See OIG Report at 674.

²⁰⁴ See OIG Report at 674. Morales told OIG that PSC submitted the report on February 18, 2022. On February 23, 2022, however, he met with Complainant to discuss the numbers.

²⁰⁵ See OIG Report at 674.

experience with APRs and did not understand the rules guiding APR.²⁰⁶ In comparison, Morales had worked for four years on another TRIO program at PSC, the Upward Bound program. During his work there, that program tracked students for four years after they left PSC.²⁰⁷

On March 8, 2022, Complainant contacted the OIG hotline, and the representative told him that he should file his complaint online.²⁰⁸ On March 10, 2022, Complainant filed his formal complaint with OIG.²⁰⁹ The following day, on March 11, 2022, an OIG agent called Complainant and spoke to him about his allegations.²¹⁰

M. March 15, 2022 Disciplinary Action

On March 8, 2022, Miller emailed Sevier expressing concerns. These included that Complainant had failed to submit his weekly report the prior week and that Complainant had sent an email to Morales telling him how to better do his job as a supervisor.²¹¹ Miller asked to schedule a meeting, seemingly to address Complainant's discipline, that Friday, March 11, but Sevier said she was only available Monday March 14, 2022.²¹²

A disciplinary meeting concerning Complainant was scheduled to be held on March 14, 2022.²¹³ At the request of Complainant's union representatives, the March 14th meeting was rescheduled for the next day, March 15, 2022.²¹⁴ As part of the meeting, Complainant was given three options: (1) accept a 10-day suspension without pay; (2) resign his position on his own; or (3) receive a recommendation for termination.²¹⁵ Complainant's union representative indicated to

²⁰⁶ See OIG Report at 674.

²⁰⁷ See OIG Report at 674.

²⁰⁸ See OIG Report at 408.

²⁰⁹ See OIG Report at 2, 7.

²¹⁰ See OIG Report at 405.

²¹¹ See OIG Report at 1387.

²¹² See OIG Report at 1387.

²¹³ See OIG Report at 408.

²¹⁴ See OIG Report at 942.

²¹⁵ See OIG Report at 408.

PSC that Complainant's initial plan was to resign and seek unemployment.²¹⁶ Later that day, Complainant told his union representative that he was reconsidering and that he "truly believe[d] that their actions against me [are] harassment and reprisal for disclosing fraudulent reporting of TRIO participation by both Dr. Morales as well as [Rogers]."²¹⁷ On March 15, 2022, Complainant gave PSC his answer, and chose a 10-day suspension beginning on March 15, 2022 and extending through March 29, 2022.²¹⁸

When the parties met, PSC issued a disciplinary memorandum and notice of suspension (March 2022 Disciplinary Memorandum) intended to "document a pattern of behavior" that included insubordination in email communication, "ineffective work performance" and "inability to submit appropriate approval for time off requests."²¹⁹ The March 2022 Disciplinary Memorandum noted that Complainant had previously been placed on a one-day suspension due to concerns about communications and had completed a training on conflict resolution in the work place and asserted that despite the previous action and training, there "continues to be concern respective to communicating effectively with your supervisor."²²⁰ Finally, the memorandum presented specific incidents that supported the memorandum²²¹ and noted that "[c]ontinued actions can lead to additional disciplinary action up to and including termination."²²² Sevier told OIG agents that the emails attached to the March 2022 Disciplinary Memorandum demonstrated that Complainant continued to write insubordinate emails and that the problem went beyond not getting

²¹⁶ See OIG Report at 495, 1011.

²¹⁷ OIG Report at 496.

²¹⁸ See OIG Report at 408, 486, 702.

²¹⁹ OIG Report at 485.

²²⁰ OIG Report at 485.

²²¹ Before the meeting, Sevier sent to Complainant's union representative a list of six unprofessional communications Complainant had with Rogers between the time he returned from his first suspension and the time Rogers left PSC. Sevier noted that Complainant's 10-day suspension was based upon insubordination towards Morales but provided the information to the union as evidence of a pattern. See OIG Report at 859.

²²² OIG Report at 485.

along with Rogers.²²³

Morales told OIG that he had created a performance improvement plan (PIP) for Complainant, which he sent to Complainant in the email scheduling the disciplinary meeting. Morales said he also gave Complainant a copy of the PIP during the disciplinary meeting.²²⁴ Miller told OIG agents that Complainant objected to the PIP as soon as it was introduced and refused to read the PIP even when his union representative advised him to read the document.²²⁵

The PIP reminded Complainant about his obligation to submit weekly reports by 4:30 pm every Thursday.²²⁶ It also gave numerous other instructions, including being in the atrium every Monday and Thursday to recruit students for the program, that Complainant must notify Morales if he was absent or would be late for a work shift, and that he would maintain professional and reasonable responses in email communications.²²⁷

N. Complainant's Issues Continue After Returning From Suspension

On April 1, 2022, Morales emailed Complainant and asked him if he was able to secure union representation for a meeting on April 6, 2022.²²⁸ In response, Complainant sent Morales an email, copying Miller, stating that he would not accept his PIP and that there was “no way possible for you to assess my performance over the past 18 months without supervision.”²²⁹ Complainant then asserted that the disciplinary actions were based upon “erroneous and fabricated information.” Finally, Complainant stated that “I truly believe that the decisions are predicated by the fact that I disclosed fraudulent APR reporting to administration by [Rogers] and you, Sir to the Department of Education,” and that following his disclosure Complainant’s character had been questioned and

²²³ See OIG Report at 943.

²²⁴ See OIG Report at 677.

²²⁵ See OIG Report at 851.

²²⁶ See OIG Report at 1356.

²²⁷ See OIG Report at 1356-57.

²²⁸ See OIG Report at 731.

²²⁹ OIG Report at 731.

he was accused of recording a meeting without permission.²³⁰

On April 6, 2022, Morales emailed Complainant to send him another copy of his PIP.²³¹ Morales addressed his email to “Mr. REDACTED” and reminded Complainant that, although Morales understood that Complainant did not agree with the PIP, he was “expected to adhere to the terms of the document.”²³²

Two days later, on April 8, 2022, Complainant responded by email.²³³ Complainant noted that he felt that the disciplinary action leading to the two week suspension was “unwarranted . . . based on a false premise and appears to be retaliation for disclosing fraudulent reporting of the TRIO SSS grant’s APR.”²³⁴ Complainant’s response also argued that his previous one day suspension was “retaliation for disclosing the fraudulent reporting by my previous supervisor . . . Rogers,” and noted that she had been dismissed “due to the information that I provided to administration” and that he had a grievance in process at that time.²³⁵ Complainant commented that although Rogers was not at PSC anymore to held accountable, “the harassment and retaliatory treatment has not ceased,” especially in the time “since I reported that you informed me that you were able to submit 2022 APR as serving 153 students, which is not accurate and misleading.”²³⁶ Complainant additionally criticized Morales for not providing sufficient direction and guidance, responded to the incidents listed on the March 2022 Disciplinary Memorandum, and stated that he was writing to contest the March 15 disciplinary decision and to ask for an investigation of the matter and paid leave for the two weeks that he was suspended.²³⁷

²³⁰ See OIG Report at 731.

²³¹ See OIG Report at 475.

²³² See OIG Report at 475.

²³³ See OIG Report at 475-476.

²³⁴ OIG Report at 475.

²³⁵ OIG Report at 475.

²³⁶ OIG Report at 475-476.

²³⁷ See OIG Report at 476.

O. Complainant is Dismissed from PSC

On April 26, 2022, OIG agents met with Complainant for a second interview.²³⁸ During his second interview, Complainant told investigators that another disciplinary meeting had been scheduled for May 3, 2022. He noted that this meeting was originally scheduled for April 25, 2022, but re-scheduled upon his request for more time to retain legal representation for the meeting.²³⁹

On May 4, 2022, PSC issued a disciplinary memorandum terminating Complainant's employment.²⁴⁰ Morales told OIG that it was solely his decision to dismiss Complainant and that he had generated and issued the termination notice to Complainant.²⁴¹ In the report, PSC stated that the reasons for the action were Complainant's failure to adhere to the PIP, "[c]ontinued insubordination," and failure to follow the directive to staff the student recruitment table in PSC's atrium on six dates between April 11 and May 2 2022.²⁴² The memorandum was signed by Morales, Sevier, and a union representative, but not Complainant, who wrote "Refused" instead.

P. OIG Investigation

After receiving Complainant's written complaint, OIG began its investigation. OIG interviewed Complainant and at least six other people.²⁴³ As noted, OIG investigators interviewed Complainant by telephone on March 11, 2022, and then followed up with an in-person interview on April 26, 2022. The first conversation happened after Complainant had been suspended for one day but before he was suspended for ten days or had his employment terminated. The second conversation occurred after Complainant had been suspended for ten days but before he was

²³⁸ See OIG Report at 410.

²³⁹ See OIG Report at 410.

²⁴⁰ See OIG Report at 345.

²⁴¹ See OIG Report at 678, 680. Counsel for PSC informed OIG agents that he had met with Sevier to offer guidance on the termination of Complainant's employment.

²⁴² OIG Report at 345.

²⁴³ See OIG Report at 35-36.

dismissed from PSC.

In a Report of Investigation, dated February 24, 2023, OIG described its investigation and conveyed its findings. OIG “partially substantiated [Complainant’s] allegations of whistleblower reprisal.”²⁴⁴ Specifically, OIG concluded that Complainant met his initial burden of showing that that his disclosures were contributing factors in the decisions to take the disciplinary and corrective actions on October 4, 2021, March 15, 2022, and May 3, 2022.²⁴⁵ OIG further determined that PSC clearly and convincingly showed that it would have issued the disciplinary memorandum, put Complainant on a PIP, and imposed the 10-day suspension in March 2022, and terminated Complainant’s employment in May 2022 “absent his disclosures.”²⁴⁶ OIG, however, concluded that PSC did not clearly and convincingly prove that Complainant would have been subjected to the corrective and disciplinary actions on October 4, 2021 without the disclosures.²⁴⁷ OIG concluded that there was insufficient evidence to show that Complainant’s other alleged reprisals were negative personnel actions done in retaliation for his disclosures under the NDAA.²⁴⁸

Q. Hearing and Decision Process Before the Office of Hearings and Appeals

On February 24, 2023, OIG sent its report of investigation to the Secretary and attempted to send a copy to the parties.²⁴⁹ I was assigned to preside over this matter that same day. Also on February 24, 2023, I issued an order asking the parties to provide their availability for a status conference.²⁵⁰ On February 28, 2023, I held a virtual status conference with the parties, using Microsoft Teams. At that conference, Complainant was informed that he had a right to proceed

²⁴⁴ OIG Report at 2.

²⁴⁵ See OIG Report at 2.

²⁴⁶ OIG Report at 3.

²⁴⁷ See OIG Report at 2.

²⁴⁸ See OIG Report at 32-34.

²⁴⁹ See Letter from Sandra D. Bruce to the Hon. Miguel Cardona (Feb. 24, 2023); Letter from Sandra D. Bruce to REDACTED (Feb. 24, 2023); Letter from Sandra D. Bruce to Dr. Michael Anthony (Feb. 24, 2023).

²⁵⁰ See Order Scheduling Status Conference (Feb. 27, 2023).

without representation, but that he was also allowed to retain an attorney. Additionally, Complainant was informed that the Illinois State Bar Association provides a referral service if he wanted to contact that organization for the purpose of obtaining an attorney. The parties were also told that they were entitled to a live hearing with witnesses, but that hearing could be waived only if **BOTH** parties elected to waive the hearing and proceed based on documents filed in the case.²⁵¹ Complainant and the attorney for PSC affirmatively waived a live hearing and asked to proceed based upon documents filed in the case. That same day, I issued an Order Governing Proceedings, articulating the briefing schedule for the parties, explaining the process under the NDAA, and reiterating their rights.

On March 10, 2023, the parties filed their briefs²⁵² and PSC filed additional documentation.²⁵³ On March 17, 2023, PSC filed a response to Complainant's initial brief.²⁵⁴

1. Complainant's Initial Brief

Because Complainant is self-represented litigant and is seemingly unfamiliar with litigation, during the status conference on February 28, 2023, I explained to the parties that a brief is “an opportunity to explain what you believe happened” and to “put forth your arguments of why you believe you are correct” and provide their arguments why they believed that PSC did or did not violate the whistleblower protections in the NDAA.²⁵⁵ Complainant filed a short brief where he argues that the “preponderance of the evidence . . . clearly demonstrated that [PSC] officials retaliated against me for engaging in protected activity.”²⁵⁶ He further asserts that the accusations of performance issues were “neither properly documented nor substantiated by measurable

²⁵¹ See *Business Communications Inc. v. U.S. Dep't of Educ.*, 739 F.3d 374 (8th Cir. 2013).

²⁵² See Complainant's Opening Brief (March 11, 2023); Prairie State College's Brief (March 10, 2023).

²⁵³ PSC's additional documentation was submitted to demonstrate that the School did not learn about the OIG complaint until May 18, 2022. This fact was not material to the analysis in this case.

²⁵⁴ See Prairie State College Reply Brief (March 17, 2023).

²⁵⁵ See Status Conference with REDACTED, James Ciesil, and Edward Wong (Feb. 28, 2023).

²⁵⁶ Complainant's Opening Brief (March 11, 2023).

performance standards” and his PIP was “baseless.”²⁵⁷ Finally, Complainant stresses the importance of protections for whistleblowers.²⁵⁸

2. PSC’s Initial Brief

On March 10, 2023, PSC filed its initial brief with two attachments. In its initial brief, PSC first asserts that Complainant has failed to show that his disclosures were a contributing factor in Rogers’s decision to suspend Complainant for one day.²⁵⁹ More specifically, PSC notes that Rogers contacted the human resources department before any protected disclosures were made seeking to address Complainant communication issues, and only Brewer’s intervening stopped Complainant from being disciplined.²⁶⁰ PSC further notes that while the suspension was issued three months after Complainant made his first disclosure, it was only three days after the last “insubordinate email” on September 28, 2021, and after both Rogers and Brewer had counseled Complainant previously about his communications.²⁶¹ PSC asserts that “logic dictates that [] Rogers was solely motivated by the sixth and last insubordinate email sent by [Complainant] resulting in the one-day suspension issued a few days later.”²⁶²

PSC next contends that even if Complainant met his initial burden in relation to the one day suspension, PSC has demonstrated by clear and convincing evidence that he would have been suspended in the absence of his disclosure.²⁶³ PSC argues that it has “established without dispute that [Complainant] engaged in repeated insubordinate email communications with his direct supervisor,” that Rogers’s “primary motivation was her desire to make [Complainant] stop his

²⁵⁷ See Complainant’s Opening Brief (March 11, 2023).

²⁵⁸ See Congress seemingly recognized the need to protect whistleblowing by enacting the NDAA. Congress also recognized the importance of due process in establishing a burden of proof for both parties in these cases.

²⁵⁹ See PSC Initial Brief at 22.

²⁶⁰ See PSC Initial Brief at 22.

²⁶¹ See PSC Initial Brief at 23.

²⁶² See PSC Initial Brief at 23.

²⁶³ See PSC Initial Brief at 24.

demeaning and cruel email communications to her” and that Rogers had already sought his discharge well before Complainant made any disclosure.²⁶⁴ PSC further notes that the College had dismissed other similarly situated employees “with far less misconduct” who had not engaged in whistleblowing activities.²⁶⁵

PSC next argues that it has demonstrated by clear and convincing evidence that Morales would have suspended Complainant for ten days and dismissed him absent his disclosures.²⁶⁶ PSC asserts that Morales, had “little, if any” motivation to retaliate against Complainant while “the evidence strongly supports [Morales’s] disciplinary decisions against [Complainant.]”²⁶⁷ Specifically, PSC contends that the evidence is undisputed that Morales advised Complainant that he needed to complete his weekly reports in a timely manner and Complainant twice failed to do this, and when the reports were submitted they contained “serious deficiencies.”²⁶⁸ PSC also states that Complainant failed to show up for one day of a recruitment drive and left early another day.²⁶⁹

Finally, PSC argues that “the evidence firmly establishes that [Morales] was completely justified in terminating [Complainant] on May 3, 2022.”²⁷⁰ Specifically, PSC assert that Complainant had already received two suspensions and two performance improvement plans from two different supervisors and did not comply with “ordinary requests” and the directives of the PIP that was enforceable against Complainant.²⁷¹

3. Complainant’s Responsive Brief

Complainant did not file a responsive brief.

²⁶⁴ PSC Initial Brief at 24.

²⁶⁵ See PSC Initial Brief at 24-25.

²⁶⁶ See PSC Initial Brief at 25.

²⁶⁷ PSC Initial Brief at 25.

²⁶⁸ PSC Initial Brief at 26.

²⁶⁹ See PSC Initial Brief at 26.

²⁷⁰ PSC Initial Brief at 26.

²⁷¹ See PSC Initial Brief at 26-27.

4. *PSC's Responsive Brief*

On March 17, 2023, PSC filed a brief replying to Complainant's initial brief. In its brief, PSC argues that the NDAA itself provides for protections for whistleblowers and that the school took Complainant's disclosures seriously. It further reiterates the arguments it raised in its initial brief.

Having considered the OIG investigation report, those documents attached to that report, as well as the briefs and additional evidence submitted by the parties, the -record is closed and ready for decision.

IV. PRINCIPLES OF LAW

As noted, 41 U.S.C. § 4712 prohibits retaliation by a grantee such as PSC against an employee for whistleblowing. The grantee cannot retaliate against an employee by discharging, demoting, or discriminating against the employee for disclosing "information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant" to among others, a "management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct."²⁷²

When an employee believes that he or she has been subject to a reprisal prohibited by the statute, the employee may submit a complaint to OIG within three years of the reprisal.²⁷³ 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

²⁷² 41 U.S.C. § 4712(a).

²⁷³ See 41 U.S.C. § 4712(b).

initiated by the employee, OIG will investigate the complaint and, upon completion of the investigation, submit a report of the findings of the investigation to the employee, the entity, and the Secretary. OIG must either decide that an investigation is not warranted or submit its report of an investigation within 180 days after receiving the complaint. If the employee agrees, OIG can extend the time to investigate and report for an additional 180 days.²⁷⁴

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.²⁷⁵ The decision must address “whether there is sufficient basis to conclude that the . . . grantee . . . concerned has subjected the complainant to a reprisal prohibited by [the NDAA]”²⁷⁶ 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.” And
- (4) “[c]onsider disciplinary or corrective action against any official of the executive agency, if appropriate”²⁷⁷

The whistleblower statute requires this decision to use the burdens of proof found in 5 U.S.C. § 1221(e).²⁷⁸ First, the employee must show that (1) she or he was an employee of a federal

²⁷⁴ See 41 U.S.C. § 4712(b)

²⁷⁵ See 41 U.S.C. § 4712(c)(1).

²⁷⁶ Id.

²⁷⁷ Id.

²⁷⁸ 41 U.S.C. § 4712(c)(6).

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.²⁷⁹ This burden can be met through circumstantial evidence, including evidence that “the official taking the personnel action knew of the [whistleblower] activity” and that the “personnel action occurred within a period of time such that a reasonable person could conclude that the ‘whistleblower’ activity was a contributing factor in the personnel action.”²⁸⁰ It follows, however, that in order to show that a protected disclosure was a contributing factor in the adverse personnel action, the employee must show that the individual who initiated the personnel action had knowledge of the disclosures before ordering or initiating the personnel action.²⁸¹

If an employee meets that burden, then the burden shifts to the employer to demonstrate “by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.”²⁸² In *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999), the United States Court of Appeals for the Federal Circuit provided a guideline for analyzing whether an employer, in that case a federal agency, has met its burden of showing by clear and convincing evidence that it would have taken the same adverse personnel action absent a protected whistleblower disclosure. The factors to be considered are: “the strength of the [employer’s] evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the [employer’s] officials who were involved in the decision; and any evidence that the [employer] takes similar actions against employees who are not whistleblowers

²⁷⁹ See *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10th Cir. 2018); *Omwenga v. United Nations Found.*, 2019 WL 4860818, at *12 (D.D.C. Sept. 20, 2019); *Armstrong v. Arcanum Grp. Inc.*, 2017 WL 4236315, at *7 (D. Colo. Sept. 25, 2017).

²⁸⁰ See U.S.C. § 1221(e)(1); *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10th Cir. 2018).

²⁸¹ See *DuPage Regional Office of Educ. v. U.S. Dep’t of Educ.*, 58 F.4th 326, 351 (7th Cir. 2023); *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10th Cir. 2018); *In re Haw. Dep’t of Educ.*, Dkt. No. 19-81-CP, U.S. Dep’t of Educ. (Dec. 31, 2019) at 34-35, 41-42.

²⁸² See U.S.C. § 1221(e)(1); *Omwenga*, at *12; *Armstrong*, 2017 WL 4236315, at *7.

but who are otherwise similarly situated.”²⁸³

V. ANALYSIS

In his complaint to OIG, Complainant identifies one protected disclosure - that he told PSC leaders he believed the number of students being served by PSC’s TRIO SSS program that was reported to US DoED was inflated.²⁸⁴ Either through Complainant directly informing them or because emails or other communication containing the disclosure were shown to them, Rogers, Brewer, Miller, Morales, and Sevier were all aware of this disclosure.

OIG identified another potential disclosure, stating that Complainant alleged to OIG agents that PSC failed to hire or retain the appropriate number of TRIOP SSS personnel required by the TRIO grant guidelines.²⁸⁵ The notes from the interviews with Complainant and Complainant’s written complaint to OIG do not contain an allegation that he made such a disclosure or that such a disclosure was the incentive for retaliation.

A. Complainant’s Initial Burden

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

1. *Complainant has proven that he was an employee of a federal grantee during the relevant time.*

It is undisputed that Plaintiff was an employee of a recipient of Department-administered grants during the relevant time. PSC is a recipient of a grant under the TRIO SSS grant program administered by the Department.²⁸⁶ Complainant was a TRIO Program Coordinator and

²⁸³ *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)).

²⁸⁴ See OIG Report at 38.

²⁸⁵ See OIG Report at 4.

²⁸⁶ See OIG Report at 228 - 229.

Academic Advisor throughout the period when the alleged retaliations occurred.²⁸⁷

2. *Complainant has shown that he made protected disclosures related to incorrect numbers about the TRIO SSS program but not about the improper number of employees assigned to the TRIO SSS program.*

i. ONE OF COMPLAINANT’S ALLEGATIONS IS COVERED BY THE NDAA.

In his complaint to OIG, Complainant asserts that he made disclosures about reporting incorrect data about the number of students served by PSC’s TRIO SSS program.

The NDAA covers disclosures of

[I]nformation 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.²⁸⁸

TRIO SSS program funds are provided through federal grants.²⁸⁹ If PSC was providing inflated and inaccurate numbers to US DoED, it would reasonably be considered a violation of a law, rule, or regulation related to a Federal grant. In other words, the content of Complainant’s first allegation would make the disclosure applicable to the NDAA protection against reprisal.

OIG indicated that Complainant also asserted that he made allegations to his supervisors that the TRIO SSS program was in non-compliance with federal regulations by not having appropriate staffing levels.²⁹⁰ During their second interview with Complainant, the OIG investigator told Complainant that one of the purposes of the second interview was to get more information about the allegations of reprisal for this disclosure.²⁹¹ Although there are emails where Complainant asks for more support,²⁹² Complainant failed to establish that he had disclosed that

²⁸⁷ See OIG Report at 405.

²⁸⁸ 41 U.S.C. § 4712(a)(1).

²⁸⁹ See OIG Report at 121; 34 C.F.R. Part 646.

²⁹⁰ See OIG Report at 4.

²⁹¹ See OIG Report at 410.

²⁹² See OIG Report at 77-78, 85.

the staffing levels violated any rules, regulations, or laws related to the TRIO SSS program or that the alleged staffing disclosures resulted in reprisals. In fact, Complainant specifically told OIG agents that he complained to Brewer that Rogers was treating him with hostility because of the disclosure about the number of students. Similarly, he told Morales that he was harassing Complainant because Complainant had reported that Morales was reporting inaccurate numbers.²⁹³ Complainant never said and failed to establish that Rogers's or Morales's actions were related to any disclosures about staffing numbers.²⁹⁴

In its analysis of the case, OIG concluded that Complainant did not provide evidence or any specific examples of any communication he had with any PSC officials about PSC not hiring sufficient staff.²⁹⁵ OIG concluded that due to the lack of evidence, the “issue did not rise to the level of an allegation concerning gross mismanagement, gross waste of Federal funds, an abuse of authority related to a Federal contract or grant, a substantial and specific danger to the public health or safety, or a violation of law, rule or regulation related to a Federal contract or grant under the NDAA.”²⁹⁶

As OIG noted, there is a lack of any allegation of or evidence showing the existence of any specific communication from Complainant that can be interpreted as a disclosure about a lack of staffing being in violation of TRIO program rules. The NDAA protects against reprisal for disclosures of “information that the employee *reasonably* believes is evidence of gross mismanagement of a Federal contract or grant”²⁹⁷ There is an insufficient basis to conclude that Complainant had a reasonable belief that the staffing levels violated a TRIO rule or law and

²⁹³ See OIG Report at 475-476.

²⁹⁴ See OIG Report at 416.

²⁹⁵ See OIG Report at 21.

²⁹⁶ See OIG Report at 21.

²⁹⁷ 41 U.S.C. § 4712(a)(1).

or that Complainant made a protected disclosure about staffing levels.²⁹⁸ Therefore, Complainant's initial burden is addressed only as it relates to the disclosure specifically identified in Complainant's written complaint to OIG, that PSC reported incorrect numbers about students being served by its TRIO SSS program.

- ii. COMPLAINANT'S DISCLOSURE WAS MADE TO AUDIENCES COVERED BY THE NDAA.

Complainant's written complaint to OIG, his interviews with OIG investigators, and submitted emails and other documentation demonstrate that Complainant reported his concerns about the inaccurate student numbers to Rogers, Brewer, Morales, Miller and Sevier. The NDAA covers disclosures to, among others, a "management official or other employee of the [employer] who has the responsibility to investigate, discover, or address misconduct."²⁹⁹ The people who Complainant made aware of his concerns about the TRIO SSS student numbers are PSC management officials or employees who have the responsibility to investigate, discover, or address Complainant's concerns about inaccurate TRIO SSS program data.

3. *Complainant has met his burden of showing that the protected disclosures were contributing factors in the decisions to take personnel actions under the Act as to the some, but not all, allegations.*

As to the final prong, Complainant sufficiently demonstrated that his protected disclosures were contributing factors in the decisions to implement disciplinary and corrective actions on October 4, 2021, March 15, 2022, and May 3, 2022. As to the alleged actions that Complainant added during interviews with OIG personnel, however, Complainant did not meet his burden of showing that these were personnel actions which his disclosures were contributing factors under

²⁹⁸ *Cf. Fuerst v. Housing Authority of Atlanta*, 38 F.4th 860 (11th Cir. 2022) (noting that under whistleblower protections for employees of contractors, the NDAA does not apply if the complainant's belief about the contractor's misconduct is not reasonable).

²⁹⁹ 41 U.S.C. § 4712(a)(2).

the NDAA.

This case comes out of Illinois and, therefore, this decision may be appealed to the United States Court of Appeals for the Seventh Circuit.³⁰⁰ If there is a relevant decision from the United States Court of Appeal to which this proceeding may be appealed, then we are bound to follow that decision.³⁰¹ In *DuPage Regional Office of Education v. U.S. Department of Education*, the United States Court of Appeals for the Seventh Circuit described the complainant’s burden of showing that a disclosure was a contributing factor in a personnel action.

Congress has made very clear that this “contributing factor” element may be met with circumstantial evidence, such as evidence that the retaliating official “knew of the disclosure ... and ... the personnel action occurred within a period of time such that a reasonable person could conclude” that the disclosure was a contributing factor in it. We have described this “contributing factor” standard as requiring “something less than a substantial or motivating” factor standard. This element therefore does not impose upon the complainant a high hurdle: “[T]he circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, *prima facie*, that the disclosure was a contributing factor to the personnel action As the court in [*Kewley v. Dep’t of Health & Hum. Servs.*³⁰²] noted, Congress has suggested that “an action taken within the same performance evaluation period w[ill] normally be considered within a ‘reasonable time.’” Thus, Congress has given clear guidance that the adjudicators within the agency are to ‘use this reasonable time standard liberally.’”³⁰³

In addition, the protections under the NDAA only address actions that meet the definition of personnel actions covered by the NDAA.³⁰⁴ Therefore, Complainant must also show that the alleged retaliations meet such definition.

- i. COMPLAINANT HAS SHOWN THAT HIS DISCLOSURE WAS A CONTRIBUTING FACTOR IN ROGERS’S DECISION TO DISCIPLINE COMPLAINANT ON OCTOBER 4,

³⁰⁰ See 41 U.S.C. § 4712(c)(5)

³⁰¹ *Grant Medical Center v. Burwell*, 204 F.Supp.3d 68, 78 (D.D.C. 2016); see also *Grant Medical Center v. Hargan*, 875 F.3d 701, 708 (D.C. Cir. 2017); *Reich v. Contractors Welding of Western New York, Inc.*, 996 F.2d 1409, 1413 (2d Cir. 1993); *Anderson v. Heckler*, 756 F.2d 1011, 1013 (4th Cir. 1985); *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984); *Jones and Laughlin Steel Corp. v. Marshall*, 636 F.2d 32, 33 (3d Cir. 1980); *Mary Thompson Hospital v. NLRB*, 621 F.2d 858, 864 (7th Cir. 1980).

³⁰² 153 F.3d 1357 (Fed. Cir. 1998).

³⁰³ 58 F.4th at 351 (further citations and quotations omitted).

³⁰⁴ See *In re. Haw. Dep’t of Educ.*, Dkt. No. 19-81-CP, U.S. Dep’t of Educ. (Dec. 31, 2019) at 38-41.

2021 AND MORALES'S DECISIONS TO DISCIPLINE COMPLAINANT ON MARCH 15, 2022 AND MAY 3, 2022.

On September 30, 2021, Rogers sent Complainant notice of a meeting on October 4, 2021.³⁰⁵ At that meeting, Rogers and Sevier issued Complainant a disciplinary memorandum, imposed a one-day suspension without pay, and placed Complainant under a performance action plan.

OIG concluded that Complainant met his burden of showing that his disclosures were a contributing factor in the disciplinary actions he received on October 4, 2021.³⁰⁶ In its report, OIG notes that the discipline occurred approximately one month after September 3, 2021, when Complainant asserts that he notified Brewer of his concerns, and four days after September 28, 2021, when Complainant sent an email to, among others, Brewer and Rogers. OIG, therefore, concluded that Complainant met the knowledge and timing requirements to show that his disclosures were a contributing factor to the discipline issued on October 4, 2021.³⁰⁷

OIG concluded that Complainant met his burden of showing that his disclosure was a contributing factor in the disciplinary actions imposed on March 15, 2022. This was based upon OIG's determination that there is evidence that Complainant and Morales discussed compiling data for the APR in late February 2022.³⁰⁸ OIG found that, based upon this evidence, Complainant met the knowledge and timing requirements to make his prima facie case.³⁰⁹ It is not clear that OIG ever did an analysis of whether Complainant's disclosure specifically contributed to the decision to terminate his employment on May 3, 2022. Rather, it appears that OIG may have treated the termination as a continuation of the March 15, 2022 disciplinary actions for which OIG

³⁰⁵ See OIG Report at 449.

³⁰⁶ See OIG Report at 2.

³⁰⁷ See OIG Report at 20.

³⁰⁸ See OIG Report at 20-21

³⁰⁹ See OIG Report at 21.

concluded that Complainant met his initial burden of showing that his disclosure was a contributing factor.³¹⁰

As discussed below, the NDAA covers “[a suspension, removal, furlough, or reduction in grade] or other disciplinary or corrective action . . . and [] any other significant change in duties, responsibilities, or working conditions.”³¹¹ Issuing a disciplinary memorandum, imposing suspensions, placing Complainant on a performance action plan and then a performance improvement plan and dismissing Complainant all clearly meet this definition.

As noted above, the contributing factor standard should be construed “liberally” and not impose a high burden. If there is evidence that the official who imposed the personnel action knew of the protected disclosure and there is “a reasonable relationship between the time of the protected disclosure and the time of the personnel action” the burden is met. In early August, Complainant informed Rogers about his concerns about the number of students served by the TRIO SSS program. On September 30, 2021, within two months of first learning about the numbers Rogers scheduled a disciplinary meeting where she imposed the first set of discipline against Complainant. In February 2022, Complainant told Morales about his concerns about the numbers. Within one month, Morales issued a disciplinary memorandum, suspended Complainant and put him on a PIP. Two months later, seemingly “within the same performance evaluation period” and relatively close in time, Morales terminated Complainant’s employment at PSC. In short, based on the timing and knowledge of Rogers and Morales, Complainant has met his burden of showing that his disclosures were “contributing factors” in personnel actions on October 4, 2021, March 15, 2022, and May 3, 2022.

ii. COMPLAINANT DID NOT SUBSTANTIATE THAT ROGERS CREATED A HOSTILE WORK ENVIRONMENT, THAT THE UNION AND HUMAN RESOURCES

³¹⁰ See OIG Report at 21, 31.

³¹¹ 5 U.S.C § 2302(a)(2)(A).

DID NOT ADEQUATELY RESPOND TO HIS ALLEGATIONS OF HARASSMENT, OR THAT HE WAS FALSELY ACCUSED OF RECORDING A MEETING WITH UNION OFFICIALS NOR DID HE DEMONSTRATE THAT THOSE WERE PERSONNEL ACTIONS COVERED BY THE NDAA.

During his initial interview with OIG investigators, Complainant asserted that he first informed Rogers about his concerns that an inflated number of students being served by the TRIO SSS program was reported to US DoED and soon after Rogers began sending him harassing emails. Complainant asserted to investigators that Rogers continued to harass him through email until she left PSC in December 2021.³¹² Complainant, however, also told OIG investigators that he had issues with communications between Rogers and himself from October 2020 and they escalated in February 2021, long before he made any protected disclosures.³¹³ He also asserted that Rogers harassed him by making him provide detailed notes on students he was meeting with to justify his work.³¹⁴ Complainant further asserted that Rogers “singl[ed] him out” over being a couple minutes late on occasions while others teleworked most of the time.³¹⁵

In his grievance to PSC, Complainant alleges that Rogers (1) did not provide Complainant with enough training; (2) made inappropriate comments about the TRIO SSS program; (3) created rules that Complainant found “contrary” to PSC’s goals in the TRIO SSS program; (4) did not intervene in a dispute between Complainant and another employee; and (5) sent emails that omitted facts or held him to a higher standard than other employees on accountability of working hours.³¹⁶ As OIG noted,³¹⁷ in the emails submitted, the language used by Rogers is professional and appropriate for a workplace, often using “please” when making a request.³¹⁸ There does not

³¹² See OIG Report at 407.

³¹³ See OIG Report at 412.

³¹⁴ See OIG Report at 407.

³¹⁵ See OIG Report at 411.

³¹⁶ See OIG Report at 459-464.

³¹⁷ See OIG Report at 32.

³¹⁸ See OIG Report at 424, 426, 429, 439, 440.

appear to be any hostility in the emails. Moreover, Complainant admitted that communication issues between himself and Rogers began in October 2020, soon after he was hired and escalated in February 2021. In other words, months before Complainant made any disclosures in August 2021 there was already issues with communications between Rogers and Complainant.

Complainant asserts that the emails created a hostile work environment. It is not enough for a person to label conduct hostile or harassment in “*conclusory* language.”³¹⁹ Rather, Complainant needs to show “specific facts” displaying harassment.³²⁰ The Illinois Human Rights Act defines harassment as requiring the creation of “an intimidating, hostile, or offensive working environment.”³²¹ The United States Court of Appeals, in a different context, noted that being berated or scolded is not harassment.³²² Failing to provide Complainant with the training he desired, criticizing the program, creating rules that Complainant did not agree were in the interest of the program, failing to effectively intervene in a dispute between Complainant and another employee; and holding Complainant to a higher standard than other employees on accountability of working hours, all while using polite language and not threatening or imposing any negative consequences is not the creation of an intimidating work environment or more harsh than being openly berated or scolded.

As noted, Complainant asserts that he was required to provide detailed notes about students with who he was meeting but Complainant did not submit any evidence of this requirement. He also did not provide any basis for concluding, if he was required to provide these notes, that they were not a normal part of his job rather than an effort by Rogers to harass him. He also did not provide any support for his accusation that Rogers was “singling him out” when she asked him

³¹⁹ See *Burgess v. Chicago Sun Times*, 476 N.E. 2d 1284, 1289 (Ill. App. Ct. 1985).

³²⁰ See *Id.*

³²¹ 775 Ill.Comp. Stat. 5/2-101.

³²² See *Lam v. Spring Window Fashions, LLC*, 37 F.4th 431, 438 (7th Cir. 2022).

about arriving late. Moreover, Complainant even told OIG investigators that one of the reasons he complained about harassment was because he wanted OIG to intervene and help save his job.³²³

Complainant also raised concerns that human resources and the union did not adequately investigate his claims of harassment. During his initial interview, Complainant also told OIG investigators that although he had a union representative and PSC's Grievance Manager, Berkley, at the first disciplinary meeting where Complainant was suspended for one day, Berkley was Rogers's "purported friend" and discouraged Complainant from filing an official complaint. During his second interview, Complainant told OIG agents that when he initiated his first grievance with the union about experiencing what he thought was harassment, Berkley and the Union President, Cheron Ricks, did not respond to his complaint for 15 days and did not address his grievance before the October disciplinary meeting.³²⁴ Complainant also stated that that he did not have confidence in PSC's human resources department to adequately investigate the matters he brought to their attention or review actions taken against him by his superiors.³²⁵ He also told the investigators that he does not think that his assigned union representatives handled his grievances appropriately and did not have confidence in the union representing him.³²⁶ Complainant told OIG agents that he wanted to escalate his grievance complaint to the PSC President because he did not believe that the union president did an adequate job representing him or pursuing the harassment issues or that human resources adequately investigated his allegations.³²⁷

Complainant did not adequately show that the union and the human resources Department

³²³ See OIG Report at 412.

³²⁴ See OIG Report at 412.

³²⁵ See OIG Report at 410.

³²⁶ See OIG Report at 410.

³²⁷ See OIG Report at 417.

failed to adequately investigate his claims of harassment. In response to his concerns, the union and human resources met with Complainant, and human resources conducted an investigation that included a review of the emails presented to human resources and an interview of witnesses named in the grievance.³²⁸ Complainant has not provided evidence that their actions were inadequate. Rather, all that is in this case is the summary of his allegations that his grievance was not appropriately addressed.

Finally, Complainant expressed that he was upset that he was accused of recording a meeting without the permission of the attendees. On March 15, 2022, Complainant met with two union representatives, seemingly about the disciplinary action being taken against him that eventually led to a ten-day suspension. The union president, Ricks, emailed Complainant informing him that it came to her attention that he had been recording the meeting without her permission which was against the law in Illinois and asking that he delete the recording.³²⁹ Sevier, on behalf of human resources, also sent Complainant an email informing him that he “may have been recording” the disciplinary meeting that day without the permission of the participants, that such action was against PSC rules and potentially illegal, and asked that if he did record the meeting to destroy copies made of the recording and inform meeting participants of the recording and the destruction of the recording.³³⁰ It is not clear, however, whether these accusations were true.

Additionally, Complainant’s allegations of being harassed, that the union and human resources did not investigate his allegations sufficiently, and that he was accused of potentially improperly recording a union meeting and asked to destroy the recordings and notify the

³²⁸ See *OIG Report* at 466.

³²⁹ See *OIG Report* at 493.

³³⁰ See *OIG Report* at 347.

participants do not meet any of the definitions of personnel actions covered by the NDAA. As this tribunal said in *In re Hawaii Dep't of Education*:³³¹

The NDAA dictates that this proceeding is controlled by the legal burdens of proof indicated in 5 U.S.C. § 1221(e).³³² 5 U.S.C. § 1221(e) addresses cases “involving an alleged prohibited personnel practice as described under 5 U.S.C §§ 2302(b)(8) and 2302(b)(9)(A)(i), (B), (C), or (D)].” Those provisions address either taking or failing to take a “personnel action.” A personnel action is defined in 5 U.S.C § 2302 as “(i) an appointment; (ii) a promotion; (iii) [a suspension, removal, furlough, or reduction in grade]³³³ or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under chapter 43 of this title or under title 38; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (x) a decision to order psychiatric testing or examination; (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and (xii) any other significant change in duties, responsibilities, or working conditions.”³³⁴

None of the allegations would constitute a significant change in Complainant’s working conditions or otherwise be a personnel action covered by the NDAA.

In *In re Hawaii Department of Education*, this tribunal noted that in other contexts, the line between whether an action has a significant enough effect on a person’s working conditions to rise to the level of a prohibited action of retaliation was whether it would deter a reasonable employee from acting.³³⁵ Complainant has not established that Rogers’s emails, being accused of improperly recording a union meeting, or the thoroughness of an investigation of Complainant’s harassment allegations would be onerous enough to dissuade a reasonable employee from making a protected

³³¹ Dkt. No 19-81-CP, U.S. Dep’t of Educ. (Dec. 31, 2019) at 39-40.

³³² 41 U.S.C. § 4712(c)(6).

³³³ 5 U.S.C § 75.

³³⁴ 5 U.S.C § 2302(a)(2)(A).

³³⁵ See Dkt. No 19-81-CP (citing to *Burlington Northern & Santa Fe Railroad Co. v. White*, 548 U.S. 53 67-68 (2006); *Halliburton v. Administrative Review Bd.*, 771 F.3d 254, 259-260 (5th Cir. 2014); *McNeil v. Dep’t of Labor*, 243 Fed. Appx. 93, 99-101 (6th Cir. 2007); *Montgomery County, Tx v. Park*, 246 S.W. 3d 610, 612 (Texas 2007); and *Franklin v. Pitts*, 349 Ga.App. 544, 547 (Ga. App. March 15, 2019).

disclosure.³³⁶ In fact, Complainant continued to repeat his allegation that there were issues with PSC's TRIO SSS data long after Rogers left PSC and the other events occurred.³³⁷

B. PSC's Burden of Showing by Clear and Convincing Evidence That It Would Have Imposed the Personnel Actions Regardless of Complainant's Disclosures.

Because Complainant met his initial burden of showing that his disclosures were contributing factors in the decisions to discipline Complainant and address his work deficiencies on October 4, 2021, March 15, 2022, and May 3, 2022, PSC must justify its actions by demonstrating by clear and convincing evidence that it would have taken these same actions in the absence of Complainant's disclosures. As has been stated, "[e]mployees who engage in protected activity are not granted immunity from the ordinary consequences of misconduct or poor performance."³³⁸ The *Carr* decision provides the factors to be considered when determining if PSC has met its burden.³³⁹

1. PSC has Proven by Clear and Convincing Evidence That Complainant Would Have Been Suspended for One Day Without Pay Regardless of the Protected Disclosures

As noted, Complainant has met his initial burden of showing that he made protected disclosures that were "contributing factors" in the decision to issue a disciplinary memorandum, suspend Complainant for one day, and put complainant on a performance action plan in October 2021. Therefore, PSC has the burden of demonstrating that it would have disciplined Complainant

³³⁶ See *St. John v. Potter*, 2011 WL 780685 (E.D. Penn. March 4, 2011) at *8-10 (concluding that subjective feelings of intimidation without a showing that a reasonable employee would have such feelings and other actions that do not result in economic loss to the employee or changes in the terms of their employment are not prohibited personnel practices).

³³⁷ Complainant also told OIG that had not yet had a request to telework approved by PSC management and that he did not receive compensation he believe was owed to him for additional work. Complainant never alleges that these decisions were acts of retaliation, however. In other words, there is no allegation of a violation of the NDAA related to these two personnel actions.

³³⁸ *Jha v. Dep't of Veterans Affairs*, 2023 W.L. 2293771 (MSPB 2023) at *4 (citing *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-86, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999)).

³³⁹ *Carr*, 185 F.3d at 1323; see also *DuPage*, 58 F.4th at 352.

in October 2021 even if Complainant had not made his disclosures.³⁴⁰ OIG concluded that PSC did not meet its burden of demonstrating, by clear and convincing evidence, that Rogers would have imposed the disciplinary action that she did independent of Complainant's disclosures.³⁴¹

Brewer told investigators that Rogers worked with the human resources director, Sevier, directly to issue the disciplinary memo and suspend Complainant for one day without pay in October 2021.³⁴² The evidence in this case shows that Rogers's legitimate reasons for acting to address Complainant's behavior eclipsed any motivation for wanting to retaliate. Additionally, other PSC employees who repeatedly acted unprofessionally were disciplined. PSC has, therefore, met its burden of clearly and convincingly demonstrating that Rogers would have issued the disciplinary memo, suspended Complainant without pay for one day, and put Complainant on a performance action plan in the absence of his whistleblowing.

i. STRENGTH OF PSA'S REASONS FOR THE ACTIONS

The first *Carr* factor is the strength of PSC's evidence of a legitimate reason for suspending Complainant without pay for one day in October 2021. The reason provided in the First Discipline Memorandum was "concern[s] regarding [Complainant's] email communications of insubordination."³⁴³ The First Discipline Memorandum listed six specific dates of such emails.³⁴⁴ In other words, the decision to discipline Complainant was not based on a single incident, but rather on reaching a "critical mass" of incidents.³⁴⁵

On the first of the dates listed, November 5, 2020, Complainant eventually complied with

³⁴⁰ See *DuPage*, 58 F.4th at 351.

³⁴¹ See OIG Report at 26.

³⁴² See OIG Report at 555.

³⁴³ OIG Report at 455.

³⁴⁴ See OIG Report at 455.

³⁴⁵ See *Brown v. Corrections Corp. of America*, 942 A.2d 1122, 1124 (D.C. Ct. of App. 2008); *Harker v. District of Columbia Dep't of Employment Servs.*, 712 A.2d 1026, 1029 (D.C. Ct. of App. 1998); see also *Cannici v. Dep't of Employment Security Bd. Of Review*, 196 N.E.3d 619, 630 (Dec. 23 2021) (noted that the employee's conduct that was not a one-time occurrence but continued for three years).

Rogers's request of Complainant to provide the number of requests he sent to professors and how many replies he received. But, before doing that, Complainant first criticized Rogers, saying that her communications are "[v]ery confusing at times," asking her to "[b]e fair and equitable in how you convey your messages," and expressing that he did not "appreciate [Rogers] being condescending."

It is not clear that Complainant ever complied with the requests Rogers made on the other listed dates. These requests, like sending completed applicant review forms and costs associated with trainings or completing leave forms and making sure the office is covered, were all reasonable requests. But rather than just comply, Complainant responded with excuses and deflections, advice for Rogers on how to improve her work, and accusations that Rogers was (1) "stifl[ing];" (2) "a supervisor that does not understand the value of continuous educational improvement;" (3) "trying to trip [Complainant] up;" (4) worked "sporadic" hours; (5) harassing; (6) petty; and (7) "inappropriate" and "unprofessional;" and that Rogers (1) "disregard[s] real work related issues;" (2) "rarely contribute[s] to our daily work activities and [Rogers] pretty much delegate[s] everything;" and (3) makes up rules as she goes. Complainant even told OIG investigators that he was aware that his emails were unprofessional and that he was ashamed of his tone in the September 28, 2021 email.

Illinois courts have made clear that insubordination is a major issue for employers. More specifically, Illinois law recognizes that "[i]n an employer-employee relationship insubordination [is] a willful disregard of express or implied directions of the employer and refusal to obey reasonable orders."³⁴⁶ In the emails identified by Rogers, Complainant repeatedly responds

³⁴⁶ *deOlivera v. State Bd. Of Educ.*, 511 N.E.2d. 172, 181-182 (Ill. App. Ct. 1987) (quoting *Blacks Law Dictionary*, 942 (4th ed. 1968)); *see also Burgess v. Ill. State Bd. Of Educ.*, 144 N.E.3d 110, 131 (2020) (In context of authority to terminate a teacher, court stated that "insubordination connotes a willful or intentional disregard of a reasonable rule existing in an employment relationship").

negatively to reasonable requests. Similarly, the United States Court of Appeals for the Seventh Circuit has specifically stated that “[a]n employee’s insubordination towards supervisors and coworkers . . . is justification for adverse employment action.”³⁴⁷

In the context of unemployment benefits, Illinois courts have noted that an employee loses such benefits for misconduct, including “serious and deliberate disregard of standards of behavior which [the supervisor] has a right to expect.”³⁴⁸ It is reasonable that Rogers and PSC should expect civility in response to simple requests like submitting leave requests or notifying coworkers when a person will be out of the office. Additionally, “insubordinate behavior that was harmful to [the employer’s] interest in maintaining an orderly workplace” is especially problematic.³⁴⁹ Repeatedly reacting to requests with hostility and defensiveness would likely be disruptive to the orderly workings of PSC’s TRIO SSS office.

Sevier confirmed that Rogers brought issues about Complainant’s communications and behavior to human resources in 2020, long before Complainant made any disclosures about the reporting of TRIO student numbers. Rogers sought to address these issues from early in Complainant’s time at PSC, but she did not receive support from Brewer. Rogers told OIG agents that Brewer overall held an inappropriate bias towards Complainant. When Rogers approached Brewer with concerns about Complainant’s communications and suggested that he be removed during his probationary period, Brewer resisted the action. When Rogers approached Brewer again about Complainant’s hostility and defensiveness, Brewer asked Rogers to work on communications in the office but did not directly address Complainant’s unprofessional behavior. Brewer, herself, told OIG agents that her response to Complainant’s unprofessional

³⁴⁷ *Culver v. Gorman & Co.*, 416 F.3d 540, 548 (7th Cir. 2005)

³⁴⁸ *Carroll v. Board of Review*, 477 N.E. 2d. 800, 804 (Ill. App. Ct. 1985).

³⁴⁹ *Hurst v. Dep’t of Employment Security*, 913 N.E.2d 1067, 1073 (2009).

communications was to offer general coaching and provide strategies to improve group dynamics and effective communication.³⁵⁰ Finally, Rogers reported to OIG that when she suggested going to human resources about Complainant, Brewer attempted to dissuade her.

Illinois law has recognized that a harm to an employer includes “damage or injury to other employees’ well-being or morale or to the employer's property, operations or goodwill.”³⁵¹ By the time Rogers went to human resources and scheduled the disciplinary meeting, she was facing a critical mass of incidents of unprofessional and hostile responses to reasonable work requests. In short, Rogers had a compelling reason to discipline Complainant and address his actions.

OIG’s report expressed that the failure to follow PSC policy of escalating discipline and move straight to suspension is evidence that the discipline imposed by Rogers was not truly motivated by a desire to address Complainant’s conduct.³⁵² Whether PSC followed its policies on only issuing a suspension after a verbal warning and written reprimand may be an issue if the question was whether the discipline chosen was proper. But the matter before this tribunal is only the strength of the reason for imposing a personnel action, the strength of the motive for retaliating, and how were other, non-whistleblowing employees treated. Whether a lesser disciplinary action could have, and should have, been taken is not before me. Moreover, as indicated above, before moving to suspension, Rogers approached Brewer to address concerns about Complainant’s conduct and Brewer did not agree to support Rogers’s efforts.

ii. STRENGTH OF MOTIVE TO RETALIATE

The second *Carr* factor is the existence and strength of any motive to retaliate on the part of the PSC officials who were involved in the decision. Brewer and Complainant both reported to

³⁵⁰ See OIG Report at 556.

³⁵¹ 56 Ill. Adm. Code. 2840.25(b).

³⁵² OIG Report at 22-23.

OIG investigators that the two PSC officials involved in the decision to issue a disciplinary memorandum and suspend Complainant for one day were Rogers and Sevier.³⁵³

Complainant has not argued that Sevier, the head of human resources, had any reason to retaliate against him for his disclosures. Moreover, the record does not provide any clear evidence that she was harmed by the disclosure or would have any real reason to retaliate.

OIG concluded that Rogers had a strong motivation to retaliate because Complainant's September 28, 2021 email resulted in extra scrutinization by Brewer of Rogers's work.³⁵⁴ The evidence in the case, however, demonstrates that it is too speculative to draw this conclusion.

First, the evidence indicates that Rogers was not initially concerned about Brewer seeing the September 28, 2021 email. Brewer claimed that, even though Brewer was a recipient of the September 28 email, Rogers brought it to her attention.

Second, the evidence indicates that Rogers had reason not to be concerned that the email would cause Brewer to examine the student numbers being reported. Rogers believed that she was correct in her calculations and that Complainant, and not Rogers, was incorrectly calculating the data.³⁵⁵ More specifically, Rogers believed that Complainant's concerns about number of students being inflated was because Complainant misinterpreted the regulations governing the TRIO programs, and failed to include in the calculations some students who had left the TRIO SSS program within the last four years. Rogers had spoken to a TRIO program expert who worked outside of PSC and that expert had confirmed that Rogers was correct to count students who had left the program in recent years. Miller, who was a vice president at PSC, told OIG investigators that her understanding was that Complainant's concerns were unwarranted and based upon his

³⁵³ See OIG Report at 408, 555.

³⁵⁴ See OIG Report at 24.

³⁵⁵ See OIG Report at 516.

misinterpretation of regulations.³⁵⁶ And Morales, who was the director of another TRIO program at PSC at that time told OIG agents that his program, like TRIO SSS under Rogers, included students who had left within recent years in the calculation of students served by the TRIO program.³⁵⁷ In short, it is not clear that Rogers would feel threatened by a disclosure that she and multiple other people believed was based on an incorrect understanding of the law.

Additionally, before the September 28, 2021 email, Brewer had already been asking Rogers to explain fluctuating student numbers.³⁵⁸ Brewer told OIG agents that she eventually used the reports that came from Complainant and Rogers, which she asked for as a response to the September 28, 2021 email, as the basis for terminating Rogers's employment. The evidence in this case does not show that Rogers knew that her numbers would be wrong. The evidence also does not demonstrate that Rogers would have known or suspected that, unlike the previous times Brewer asked Rogers questions about student numbers,³⁵⁹ the consequence of Brewer's request in late September would eventually be the loss of Rogers's job.

It is unclear that Rogers would have thought of Complainant's disclosure as anything more than a disagreement about how to calculate numbers. It follows that it is also uncertain that Rogers would have known that Complainant's allegations would cause her or PSC any problems. In short, it is too speculative to conclude that, at the end of September, when Rogers went forward with disciplining Complainant, Rogers was strongly motivated by Complainant's disclosure.

iii. TREATMENT OF OTHER SIMILARLY SITUATED EMPLOYEES

The final *Carr* factor is comparing the action taken against Complainant with other PSC employees who were not whistleblowers but who are otherwise similarly situated. PSC identified

³⁵⁶ See OIG Report at 847, 849-850.

³⁵⁷ See OIG Report at 674.

³⁵⁸ See OIG Report at 554.

³⁵⁹ See OIG Report at 592-598.

three other former PSC employees who were all terminated or forced to resign in lieu of termination without any prior verbal or written warning or any other discipline.³⁶⁰ One employee was terminated for “inappropriate behavior toward co-workers, insubordination and poor job performance.”³⁶¹ More specifically, he was “argumentative” with co-workers and left work without authorization,” he made “inappropriate comments and sent inappropriate text messages to colleagues,” and he engaged in “multiple acts of insubordination” and failed to “perform job duties as assigned to him by his supervisor.”³⁶² The second employee was permitted to resign rather than being dismissed after the employee failed to complete multiple assignments and failed to “perform any meaningful work remotely for several weeks.”³⁶³ The final employee was terminated for failing to perform any work remotely on three days when he said he was working, failing to submit sick leave documents, and for receiving pay for almost 40 hours of work that he was not entitled to receive.³⁶⁴

Complainant officially was disciplined for his emails where he replied unprofessionally to reasonable work requests. Like the first employee Complainant was argumentative, insubordinate, and sent inappropriate messages to a co-worker, namely his supervisor. The first employee was dismissed for similar behavior. Rogers did not say that Complainant did not perform any work, so the other employees are not as useful for a comparison. But comparing Complainant to the first employee, a similarly situated non-whistleblower was also significantly disciplined for inappropriate communications.

- iv. OVERALL, IT IS HIGHLY PROBABLE THAT ROGERS WOULD HAVE DISCIPLINED COMPLAINANT ON OCTOBER 4, 2021 REGARDLESS OF HIS DISCLOSURES.

³⁶⁰ See OIG Report at 232, 1091-1092.

³⁶¹ OIG Report at 1091.

³⁶² OIG Report at 1091-1092.

³⁶³ OIG Report at 1092.

³⁶⁴ OIG Report at 1092.

For over a year and a half, Rogers and Complainant had communication issues. The record does not show that Rogers disciplined Complainant throughout that time. For over a month between early August and early September 2021, Complainant brought Rogers his concerns about the student numbers. Throughout this time Complainant sent Rogers unprofessional emails and resisted complying with her directions. Yet, Rogers did not discipline Complainant during August or most of September. OIG concluded that the September 28, 2021 email and Brewer’s scrutiny of the student numbers motivated Rogers to act. Brewer, however, had already been asking Rogers about issues with the student numbers. It seems more likely that after Rogers once again brought an example of Complainant’s unprofessional communications to Brewer’s attention and Brewer did not discipline Complainant but instead stayed neutral in her response to both parties Rogers felt like she had to act. In other words, the September 28th email and the lack of a response from Brewer hit a critical mass. Even if Rogers was slightly motivated by Brewer’s extra scrutiny over the student numbers after the September 28th email, that motivation pales in comparison to the strong non-retaliatory reasons Rogers had to suspend Complainant and otherwise address his communications. The *Carr* factors do “not impose an affirmative burden on the [employer] to produce evidence as to each of the *Carr* factors to weigh them individually in the [employer’s] favor.”³⁶⁵ And, weighing the evidence that was before me, on the whole, PSC has met its burden.

The clear and convincing standard requires “significant proof,” but it does not require the “highest levels of proof,” rather, it requires the there is a “highly probability that a fact is true.”³⁶⁶ In this case, the combination of a strong reason to act and a questionable motivation to retaliate

³⁶⁵ *Chaudhuri v. Dep’t of Veterans Affairs*, 2023 WL 2333178 (MSPB 2023), at *1 (citing to *Whitmore v. Department of Labor*, 680 F.3d 1353, 1374 (Fed. Cir. 2012)).

³⁶⁶ See *In Re Dekalb County School District*, Dkt. No. 21-26-CP, U.S. Dep’t of Educ. (July 23, 2021) at 54 (internal citations omitted); see also *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *U.S. v. Owens*, 854 F.2d 432, 435-436 (11th Cir. 1988); *Cornell v. Nix*, 119 F.3d 1329, 1334-35 (8th Cir. 1997); *Flores v. Spearman*, 2016 WL 8136629, at *6, 9 (C.D. Cal. Nov. 17, 2016)).

makes it highly probable that the reason that Rogers disciplined Complainant on October 4, 2021 was his communications and his resistance to follow instructions.

2. *PSC has Clearly and Convincingly Proven that Morales Would Have Issued a Disciplinary Memorandum and Suspended Complainant and Put Complainant on a PIP Without Complainant's Disclosures*

As noted, Complainant has met his initial burden of showing that he made protected disclosures that were “contributing factors” in the decision to issue a second disciplinary memorandum, place Complainant on a performance improvement plan (PIP) and suspend Complainant for 10 days on March 15, 2022. Therefore, PSC has the burden of clearly and convincingly demonstrating that Morales would have taken these actions even if Complainant had not made the disclosures.

OIG concluded that PSC met its burden.³⁶⁷ OIG noted that, even after returning from his one day suspension, Complainant continued to have communication and work performance issues under Rogers before she left and then Morales once he became Complainant’s supervisor.³⁶⁸ Additionally, OIG did not find that Morales had any significant motive to retaliate.³⁶⁹ OIG concluded that, therefore, PSC met its burden of clearly and convincingly showing that Morales would have issued a disciplinary memorandum, suspended Complainant, and placed him on a PIP regardless of his disclosures.³⁷⁰

i. STRENGTH OF PSC’S REASONS FOR THE ACTIONS

The first *Carr* factor is the strength of PSC’s evidence of the school’s legitimate reason for acting on March 15, 2022. In the March 2022 Disciplinary Memorandum, PSC notes that there is a “pattern of behavior” that included insubordination in email communication, “ineffective work

³⁶⁷ See OIG Report at 30.

³⁶⁸ See OIG Report at 27-28.

³⁶⁹ See OIG Report at 27-28.

³⁷⁰ See OIG report at 29-30.

performance”³⁷¹ and “inability to submit appropriate approval for time off requests.” The Memorandum also highlights that Complainant had previously been placed on a one-day suspension due to concerns about communications and had completed a training on conflict resolution in the workplace and asserted that despite the previous action and training, there “continues to be concern respective to communicating effectively with your supervisor.” Finally, the memorandum presents five specific incidents that supported the memorandum³⁷² and noted that “[c]ontinued actions can lead to additional disciplinary action up to and including termination.”³⁷³

Specifically, the Memorandum notes that on February 24 and on March 3, Complainant failed to timely submit his weekly reports. As to the February 24 incident, Complainant told Morales that Morales did not request the weekly report until 8:05pm and that he was out of the office unexpectedly after that and submitted the report the next business day that he was in the office.³⁷⁴ He also tried to excuse his lack of timeliness by asserting that he was “very busy with assisting [Morales] with collecting information for the TRIO SSS APR.”³⁷⁵ On February 2, 2022 and again on February 17, 2022, however, Morales emailed Complainant about emailing a weekly report every Thursday, and so Complainant knew of the requirement weeks before 8:05 pm on February 24, 2022. In his April 8, 2022 email to Morales, Complainant seeks to excuse his tardiness on March 3, 2022 by stating that he was out of the office that day on sick leave and that

³⁷¹ On October 28, 2021, Complainant received a salary increase. Sevier and Morales both confirmed that this was an increase given to all employees, however, and not a reflection of Complainant's achievement. *See* OIG Report at 677, 941, 992.

³⁷² Before the meeting, Sevier sent to Complainant's union representative a list of six unprofessional communications Complainant had with Rogers between the time he returned from his first suspension and the time Rogers left. Sevier noted that Complainant's 10-day suspension was based upon insubordination towards Morales but provided the information to the union as evidence of a pattern. OIG Report at 859.

³⁷³ OIG Report at 485.

³⁷⁴ *See* OIG Report at 476.

³⁷⁵ OIG Report at 476.

he had communicated with Morales and notified him that Complainant would provide the report as soon as he returned to the office.³⁷⁶ When Complainant emailed Morales on March 4, 2022, the day after the report was due, Complainant told Morales that he was still working on the report and blaming the delay on having too much work because the office did not have “adequate staffing.” For two consecutive weeks, Complainant failed to timely submit his weekly report, and instead tried to explain his tardiness with flawed and inconsistent excuses.

Additionally, when Complainant did file the first of the tardy emails, Morales responded with an email addressing multiple deficiencies in the weekly report. Despite having already been suspended for insubordinate communications and having taken a training on professional communications, Complainant responded to Morales’s email with instructions to Morales on how Morales could better do his own job as a supervisor. An Illinois court has noted, and this decision finds, that continued disobedience even after being warned that it could result in disciplinary actions is insubordination.³⁷⁷

The Memorandum noted that on March 7, 2022 Complainant failed to show up to work or call about his absence.³⁷⁸ In his April 8, 2022 email to Morales, Complainant responded that he tried calling Morales and the call went straight to voicemail and Complainant contacted another PSC employee as backup at the event that day. There is no indication, however, that Complainant ever left a voicemail or in any way left any communication to Morales explaining his absence from work. Sevier confirmed that PSC employees had to contact their managers and supervisors and receive approval for any leave taken.³⁷⁹

³⁷⁶ See OIG Report at 476.

³⁷⁷ See *deOlivera v. State Bd. Of Educ.*, 511 N.E.2d. 172, 182 (Ill. App. Ct. 1987).

³⁷⁸ See OIG Report at 69.

³⁷⁹ See OIG Report at 938-939.

The Memorandum notes that during the March 7th through 9th recruitment event in the atrium, Complainant failed to follow instructions and was ineffective in recruiting students.³⁸⁰ In his April 8, 2022 email, Complainant does not respond to this alleged deficiency. Miller told OIG that on the two days that Complainant did show up to work, he was only able to recruit 3 students and did not follow instructions.³⁸¹

Finally, the Memorandum notes that on March 9, 2022, Complainant left work without his supervisor's permission.³⁸² In his April 8, 2022 email to Morales, Complainant addressed leaving early on March 9 incident by stating that he had not left for the day but was in the atrium talking to students about the TRIO Program.³⁸³ Complainant, however, initially told OIG agents he had left early but completed the required forms with human resources and had permission to leave early on March 9, but when confronted with the evidence retracted his statement.³⁸⁴ Also contrary to the statement that he did not leave early, Complainant emailed Morales at 2:41 on March 9 noting that he was planning on leaving at 3:30 that day.³⁸⁵

In the context of Illinois unemployment benefits, the harm to an employer that could result in an employee being dismissed for misconduct, and ineligible for benefits, includes “[a]bsences and tardiness [which] always cause harm to the employer, even if a worker is allowed to make up the time. This is because absences and tardiness cause disruption to the general operations of any business.”³⁸⁶ Here, Complainant was repeatedly untimely with his work and absent from work when he was needed at a recruitment fair. He also does not dispute that he failed to follow directions at the recruitment fair and that the end result was unsuccessful recruitment of students.

³⁸⁰ See OIG Report at 69.

³⁸¹ See OIG Report at 850.

³⁸² See OIG Report at 69.

³⁸³ See OIG Report at 421, 476.

³⁸⁴ See OIG Report at 420.

³⁸⁵ See OIG Report at 708.

³⁸⁶ 56 Ill. Adm. Code. 2840.25(b).

The March 2022 Discipline Memorandum notes that there was a “pattern of behavior” that included insubordination in email communication, “ineffective work performance” and “inability to submit appropriate approval for time off requests.” These are all strong reasons to issue a disciplinary memorandum and impose a suspension.

In addition to the suspension and disciplinary memorandum, Complainant was also placed on the PIP. The PIP directly addressed Complainant’s work deficiencies, including professional communications, attendance, and timely submissions of work.³⁸⁷ Given the repeated issues in these areas, Morales had a strong legitimate reason to create and impose the PIP.

ii. STRENGTH OF MOTIVE TO RETALIATE

The second *Carr* factor is the existence and strength of any motive to retaliate on the part of the PSC officials who issued the discipline. Miller asked that the meeting where Complainant was disciplined be scheduled. There is no indication of any reason she would have been motivated to retaliate against Complainant for his disclosures. Moreover, Morales told OIG it was Morales who created and issued the disciplinary memorandum suspending Complainant and who created and put Complainant on a PIP.

Complainant told OIG agents that on February 24, 2022, Morales was trying to find the best way to “squeeze” 154 students out of the Bluman database so that PSC could report that it was serving that number of students in the APR and Complainant “outed” Morales to Sevier and Miller over what he was trying to do with the APR reporting.³⁸⁸ But, like Rogers, Morales believed that Complainant was incorrect in his allegations and, so was not motivated by a disclosure that was based on an incorrect understanding of the law.

³⁸⁷ See OIG Report at 1356-1357.

³⁸⁸ See OIG Reporting at 420-421.

Brewer appears to be the one PSC official identified by OIG agents who agreed with Complainant about the numbers. In January 2022, when Morales was taking over the TRIO SSS program, Brewer left PSC.³⁸⁹ As noted, Miller, who was a Vice President and a higher ranking official than Morales, told OIG investigators that her understanding was that Complainant's concerns were unwarranted and based upon his misinterpretation of regulations.³⁹⁰ And Morales stated that, when he previously was a director of another TRIO program at PSC, the program included students who had left within recent years in the calculation of students served by the TRIO program.³⁹¹ Additionally, Morales noted that Complainant had little or no experience working with TRIO programs and Complainant admitted that he did not understand the rules governing reporting in the APRs.³⁹² Morales is unlikely to be motivated by Complainant expressing concerns about reporting in the APR when Complainant had little or no experience and does not understand the rules surrounding TRIO reporting. This is especially true when Morales had four years of experience in the area and disagreed with Complainant's calculations.

Furthermore, Morales noted that when he submitted the APR, he understood the instructions that he had been told by an official at U.S. DoED were to just get the data submitted even if there were some issues with the numbers.³⁹³ Morales also told OIG agents that when the TRIO SSS program did submit its numbers, the U.S. DoEd system did not flag any discrepancies or reject the report.

It is unlikely that Morales would fear or be motivated to retaliate by disclosures that the TRIO SSS program had inaccurate numbers when: (1) the numbers were calculated based on the

³⁸⁹ See OIG Report at 553.

³⁹⁰ See OIG Report at 847, 849-850.

³⁹¹ See OIG Report at 674.

³⁹² See OIG Report at 673-674.

³⁹³ See OIG Report at 674.

understanding of the rules Morales had used for four year with another TRIO program; (2) Complainant’s concerns were based on his different understanding of the law when he admitted to Morales that he did not understand the rules governing APR reporting; (3) the system did not flag any issues with the numbers; and (4) he believed that he was following the advice of a U.S. DoED employee.

iii. TREATMENT OF OTHER SIMILARLY SITUATED EMPLOYEES

As noted, the final *Carr* factor is comparing the action taken against Complainant with other PSC employees who were not whistleblowers but who are otherwise similarly situated. PSC identified three other former PSC employees who were all terminated or forced to resign in lieu of termination. As noted above, one employee was terminated for being “argumentative” with co-workers and leaving work without authorization, for making “inappropriate comments” and sending “inappropriate text messages to colleagues,” and for “engag[ing] in multiple acts of insubordination and failure to perform job duties as assigned to him by his supervisor.”³⁹⁴ Complainant was issued a memorandum, suspended for ten days and put on a PIP for similarly using inappropriate communications and failing to perform job duties successfully and in a timely manner. Because Complainant is not alleged to have failed to perform any meaningful work, the other two former PSC employees identified by PSC are not good comparisons. But even after having been suspended for one day and put on a performance action plan, Complainant continued to have communication and job performance challenges. Like one of the non-whistleblowing former PSC employees, Morales responded to inappropriate communications and a failure to perform job duties with significant discipline.

iv. OVERALL, IT IS HIGHLY PROBABLE THAT MORALES WOULD HAVE DISCIPLINED COMPLAINANT ON MARCH 15, 2022 REGARDLESS OF HIS DISCLOSURES.

³⁹⁴ See OIG Report at 1091-1092.

Morales had little or no reason to retaliate based on a disclosure that he believed was wrong. He, however, had a strong reason to discipline and help better an employee who had a pattern of insubordination and ineffective work. And like another PSC employee who did not make a protected disclosure, Morales acted affirmatively to address inappropriate communications and work deficiencies. On the whole, PSC has clearly and convincingly shown that Morales would have taken the same actions without Complainant's disclosure that he disagreed with the student numbers being reported.

3. *PSC has Clearly and Convincingly Proven that Morales Would Have Terminated Complainant's Employment in May 2022 Regardless of Complainant's Disclosure.*

As noted, Complainant has met his initial burden of showing that he made protected disclosures that were "contributing factors" in the decision to terminate Complainant's employment on May 3, 2022. Therefore, PSC has the burden of clearly and convincingly demonstrating that Morales would have done so even if Complainant had not made the disclosures.

OIG concluded that PSC met its burden.³⁹⁵ OIG found "various email exchanges" between Complainant and Morales that demonstrated "what [] Morales and PSC officials deemed to be a continued pattern of insubordinate communications and ineffective job performance that warranted [Complainant's] termination."³⁹⁶ Having found clear and convincing evidence of a legitimate reason for terminating Complainant's employment, and again finding no evidence that Morales had a motive to retaliate, OIG concluded that PSC met its burden and Complainant's firing did not violate the NDAA.³⁹⁷

i. STRENGTH OF PSA'S REASONS FOR THE ACTIONS

When dismissing Complainant on May 3, 2022, Morales issued a disciplinary

³⁹⁵ See OIG Report at 31.

³⁹⁶ OIG Report at 30.

³⁹⁷ See OIG Report at 31.

memorandum that stated the reasons for the termination was a failure to adhere to the PIP and insubordination. The memorandum then provides six dates in April and May where Complainant failed to follow instructions to staff recruitment tables in the atrium.³⁹⁸ Complainant's PIP required him to be present at a recruitment table in the atrium every Monday and Thursday.³⁹⁹ After returning from a ten-day suspension, on six occasions within four weeks, or six out of seven or eight occasions, Complainant failed to follow the instruction in the PIP to be present at the recruitment tables. This would appear to be a very clear example of insubordination or "a willful or intentional disregard of a reasonable rule existing in an employment relationship."⁴⁰⁰ And as the United States Court of Appeals for the Seventh Circuit has noted, "[w]e would hardly be so foolish as to suggest that insubordination is not a legitimate reason for an employer to fire an employee."⁴⁰¹

ii. STRENGTH OF MOTIVE TO RETALIATE

As noted above, the circumstances of Complainant's disclosure would have given Morales little reason fear repercussions or motivation to retaliate. This is because (1) the disclosure was that the TRIO SSS program had inaccurate numbers; (2) the submitted numbers were calculated based on the understanding of the rules that Morales, with four years' experience believed were correct; (3) Complainant's concerns were based on his different understanding of the law when he admitted to Morales that he did not understand the rules governing APR reporting; (4) U.S. DoED's system did not flag any issues with the numbers; and (5) Morales believed that he was following the advice of a U.S. DoED employee in submitting the numbers with a possibility of discrepancies.

³⁹⁸ See OIG Report at 91.

³⁹⁹ See OIG Report at 1356.

⁴⁰⁰ *Burgess v. Ill. State Bd. Of Educ.*, 144 N.E.3d 110, 131 (2020).

⁴⁰¹ *Culver v. Gorman & Co.*, 416 F.3d 540, 547 (7th Cir. 2005).

iii. TREATMENT OF OTHER SIMILARLY SITUATED EMPLOYEES

As noted, the final *Carr* factor is comparing the action taken against Complainant with other PSC employees who were not whistleblowers but who are otherwise similarly situated. Two employees failed to do any meaningful work. There is no allegation that Complainant failed to do any meaningful work. His repeated insubordination and failure to, at least 75% of the time, attend the recruitment events in the atrium, as required by his PIP, makes him similar to the employee who “engag[ed] in multiple acts of insubordination and failure to perform job duties as assigned to him by his supervisor.” And like that employee, Complainant was dismissed.

iv. OVERALL, IT IS HIGHLY PROBABLE THAT MORALES WOULD HAVE FIRED COMPLAINANT ON MAY 3, 2022 REGARDLESS OF HIS DISCLOSURES.

Morales had a strong legitimate reason to address that Complainant, after twice being suspended for insubordination, failed to attend assigned recruitment events at least 75% of the time. That fact, combined with little motivation for Morales to retaliate makes it highly likely that Morales would have terminated Complainant’s employment regardless of Complainant’s disclosure, much like the past PSC employee who was not a whistleblower but was insubordinate and failed to perform job assigned duties.

VI. CONCLUSIONS OF LAW

1. Complainant has met his burden of showing that he was an employee of a federal grantee.

2. Complainant has met his burden of showing that he made protected disclosures about the TRIO SSS student number data to numerous management officials or PSC employees with the responsibility and authority to address her concerns.

3. Complainant failed to show that his concerns about the staffing of the TRIO SSS office were disclosures covered by the NDAA whistleblower protections.

4. Complainant has met his burden of showing that his protected disclosure was a contributing factor in the decisions to suspend him without pay for one day, to issue disciplinary letters, to suspend him without pay for ten days, to place him on a performance action plan and a performance improvement plan, and to terminate his employment.

5. Complainant has not shown that his disclosures were contributing factors in decisions to take personnel actions covered by the NDAA in relation to the alleged harassment he suffered, his perceived inadequate response by human resources and the union to that alleged harassment, and the allegation against him of improperly recording a meeting.

6. Prairie State College has clearly and convincingly proven that Rogers would have suspended Complainant for one day, issued a disciplinary memorandum, and placed Complainant on a performance action plan even if he had not made protected disclosures.

7. Prairie State College has clearly and convincingly proven that Morales would have issued Complainant a disciplinary letter, put Complainant on a performance improvement plan, and suspended him for ten days in the absence of his protected disclosures.

8. Prairie State College has clearly and convincingly proven that Morales would have terminated Complainant's employment in the absence of his protected disclosures.

VII. ORDER

The relief requested by REDACTED is **DENIED**.

VIII. APPEAL RIGHTS

This order constitutes an order denying relief issued by the head of the executive agency under 41 U.S.C. § 4712(c)(1), pursuant to the authority delegated by the Secretary of Education. This is the final decision of the Department of Education on the matter. The statute does not

authorize motions for reconsideration. The following language summarizes adversely affected parties' rights to appeal this order as set forth by the NDAA. This paragraph is not intended to alter or interpret the applicable rules or to provide legal advice. Because a final agency order has been issued denying the Complainant his requested relief, he has exhausted all administrative remedies and may, within two years of this decision, bring a de novo action at law or equity against Prairie State College "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."⁴⁰²

Additionally, any party adversely affected or aggrieved by this order may obtain review in the United States court of appeals for a circuit in which the reprisal is alleged to have occurred. No petition for review may be filed more than 60 days after issuance of this order. Review shall conform to chapter 7 of Title 5. Filing an appeal shall not act to stay the enforcement of this order, unless a stay is specifically entered by the court.⁴⁰³

DATE OF DECISION: March 24, 2023

Daniel J. McGinn-Shapiro
Administrative Law Judge

⁴⁰² 41 U.S.C. § 4712(c)(2).

⁴⁰³ See 41 U.S.C. § 4712(c)(5).