

CUI//PRIG//PRVCY

Report of Investigation:



Whistleblower Reprisal Investigation

August 28, 2025 | Report No. 25-N-0048

REDACTED VERSION FOR PUBLIC RELEASE

The full version of this report contained controlled unclassified information. This is a redacted version of that report, which means the controlled unclassified information has been removed. The redactions are clearly identified in the report.



Table of Contents

Report of Investigation

| | |
|--|-----------|
| Introduction and Summary..... | 1 |
| Findings of Fact..... | 1 |
| Analytic and Legal Framework..... | 12 |
| Legal Analysis | 14 |
| Conclusion | 20 |
| Recommendation | 20 |

Report of Investigation

Introduction and Summary

On January 11, 2024, the U.S. Environmental Protection Agency Office of the Inspector General received an allegation of whistleblower reprisal under 41 U.S.C. § 4712 from a former [REDACTED] of [REDACTED] Alaska. The complainant alleged that [REDACTED] was terminated from the tribe on December [REDACTED], 2023, in retaliation for making several disclosures regarding potential grant fraud and gross mismanagement of an EPA grant or subgrant. [REDACTED] made these disclosures starting in October 2023 to the tribe's [REDACTED], finance director, and chief operating officer, or COO, and in December 2023 to the tribe's chief executive officer, or CEO.

Our investigation first sought to determine whether the complainant made disclosures that are protected under 41 U.S.C. § 4712 and whether those disclosures were a contributing factor in any actions taken against [REDACTED] that are covered—in other words, prohibited—under the statute. We determined that the complainant made several protected disclosures to authorized officials and that a discharge from employment is a covered action under 41 U.S.C. § 4712. Furthermore, we identified that the tribe knew about the protected disclosures when it discharged the complainant from employment. We also found that the discharge occurred within a period of time such that a reasonable person could conclude that the complainant's protected disclosures were a contributing factor.

Next, we assessed whether the tribe could establish that it would have discharged the complainant from tribal employment even if [REDACTED] had not made the protected disclosures. After reviewing the evidentiary support for the covered action, as well as evidence related to retaliatory motive and how comparable employees were treated, we substantiated the complainant's retaliation allegations with respect to [REDACTED] termination. We recommend that the EPA administrator consider appropriate corrective action in light of these findings.

Findings of Fact

The [REDACTED] is a federally recognized Alaska Native tribal entity located in [REDACTED]. The tribe receives EPA grant funds through direct grants from the EPA's [REDACTED], as well as through a subgrant from the [REDACTED], which receives grant funds directly from the EPA's [REDACTED]. This means that the tribe is both a direct grantee and a subgrantee of EPA funds.

In [REDACTED] 2022, the tribe hired the complainant to be [REDACTED]. The complainant's duties included writing grant applications and managing the tribe's [REDACTED] grants, which constitute the bulk of the tribe's grants. The complainant had prior job experience regarding federal grants. [REDACTED] reported directly to the COO, who reports to the CEO.

The Complainant's Disclosures Regarding EPA Grant Funds

The complainant testified that, over the course of [REDACTED] employment with the tribe, [REDACTED] noticed inconsistencies in the financial data that [REDACTED] used to complete the required federal financial reporting forms for the tribe's EPA grants and subgrants. As [REDACTED] discovered these issues, [REDACTED] raised them to tribal leadership. Specifically, the complainant disclosed three main issues: (1) inaccurate fringe rates charged to the EPA through grants and subgrants, (2) over-expenditures of EPA grant funds, and (3) the COO's gross mismanagement of an EPA grant.

1. The Complainant's Disclosures Regarding Inaccurate Fringe Rates

The complainant testified that [REDACTED] first noticed issues with the tribe's financial data in approximately June or July 2023. By September or October 2023, it became apparent to [REDACTED] that something was "wrong" with the fringe rates that the tribe billed to its grants and subgrants. [REDACTED] defined the term *fringe rate* as the percentage of an employee's total compensation that comes from insurance, paid time off, and other non-salary expenses.

The complainant testified that [REDACTED] received spreadsheets from the COO that listed each employee's fringe rate. When the complainant compared the employee fringe rates from the COO against the tribe's prior revenue-and-expense reports, which contain recorded and tracked hours, [REDACTED] noticed that the fringe rates from the COO did not match what the tribe invoiced its EPA subgrant from [REDACTED]. For example, the complainant testified that [REDACTED] was the only tribal employee invoicing [REDACTED] time to the subgrant, and while [REDACTED] fringe rate from the COO was listed at 23 percent, the tribe invoiced the subgrant between 40 percent and 43 percent for [REDACTED] fringe rate. This led the complainant to believe that the tribe was overcharging the grant recipient, and therefore the EPA, by inflating the employee fringe rates. [REDACTED] questioned where this excess money was going if it was not actually being paid out in fringe costs. The complainant also explained that the tribe used the inflated fringe rates to calculate how much of the EPA subgrant funds it had spent, meaning the tribe was likely submitting false financial information to the EPA.

In approximately October 2023, the complainant disclosed [REDACTED] concerns about the fringe rates to [REDACTED] coworker, [REDACTED]. [REDACTED] testified that, after the complainant brought the issue to [REDACTED] attention, [REDACTED] observed similar inconsistencies. [REDACTED] testified that [REDACTED] had never seen employee fringe rates fluctuate "so high and so low" across different grants, either in [REDACTED] prior employment working on grant oversight or in [REDACTED] role as [REDACTED], in which [REDACTED] managed the tribe's grants from [REDACTED] and [REDACTED]. [REDACTED] testified that the fringe rates [REDACTED] observed in [REDACTED] prior federal grant work experience were consistent across grants instead of fluctuating for each project. [REDACTED] stated that the fact that the rates were not a fixed amount made [REDACTED] "alarmed."

The complainant also spoke to the finance director about the fringe rates in October 2023. The finance director declined to be interviewed by the OIG, but [REDACTED] corroborated that, after the complainant disclosed these concerns to [REDACTED] they discussed the matter with the finance

director. The complainant testified that the finance director could not explain the discrepancies. [REDACTED] stated that [REDACTED] and the finance director worked together to create a spreadsheet to track the fringe rates and, using this spreadsheet, confirmed that the fringe rates charged to the EPA grants were wrong. After the complainant and the finance director confirmed that the fringe rates were inconsistent, which bolstered [REDACTED] concerns that the tribe was submitting inaccurate federal financial reporting forms to the EPA, the complainant disclosed their observations regarding inconsistent fringe rates to the COO.

Specifically, on October 24, 2023, the complainant emailed the COO describing [REDACTED] observations that employee fringe rates were consistently higher than expected. [REDACTED] email specified that the fringe rate for a particular EPA subgrant “was off by over \$8,500” when [REDACTED] compared the employee fringe rates from the COO with revenue-and-expense reports. The complainant also noted to the COO that it appeared the tribe was charging the EPA grant for the complainant’s dental insurance but that [REDACTED] did not have dental insurance through the tribe. The COO responded to the complainant’s email, explaining that fringe rates can change based on the hours allocated to the grant in a particular period. For example, if an employee only worked 20 hours one week, the tribe would still charge for the same overall amount as it would if the employee worked 40 hours to cover the insurance costs. That amount would be a different percentage of the employee’s pay charged each week to the grant, resulting in a different fringe rate. The COO wrote that “the reality is, you will never have a perfectly balanced budget in this world. ... There will always be a penny here, a penny there, a few thousand here and there.” However, the complainant testified that they believed an employee’s fringe rate should be a set percentage of the employee’s salary that does not vary based on variables, such as the number of hours worked. Two of the complainant’s coworkers, [REDACTED] and [REDACTED], held this same understanding. [REDACTED] testified that employee fringe rates should have been a fixed percentage, which [REDACTED] believed was set by the government, and that the tribe could not decide to change them. [REDACTED] added that because there were so many different employee fringe rates being charged, at least some of those rates “had to be ... incorrect.”

The complainant continued to speak with the COO and finance director about the fringe rates. The COO confirmed that the complainant informed [REDACTED] that the tribe was not correctly calculating fringe rates. In response to the complainant’s October 24, 2023 email voicing concerns about the fringe rates, the COO suggested that the complainant’s confusion was due to [REDACTED] failure to carefully monitor [REDACTED] monthly budgets. In testimony, the COO also characterized the complainant as struggling to understand grant reporting. However, as part of that same testimony, the COO contradicted these assertions by admitting that the tribe’s financial system was not calculating fringe rates correctly, stating that “the system was broken from day one.”

The complainant alleged that, after [REDACTED] and the finance director spoke with the COO, the COO told [REDACTED] “don’t look too hard into this.” [REDACTED] further testified that, after their conversation, the COO told the finance director in early December 2023 that [REDACTED] was no longer allowed to provide staff with full revenue-and-expense reports from prior years and that [REDACTED] should instead “zero out” prior year data on the revenue-and-expense reports that tribal employees used to complete federal financial reporting forms. The COO testified that [REDACTED] instruction to the finance director was a suggestion rather than an

order to withhold that information from all staff. The COO explained that [REDACTED] provided this suggestion because the revenue-and-expense reports were confusing the complainant. However, [REDACTED] also testified that in approximately November 2023, the COO instructed the finance director to no longer provide any of the tribe's directors who managed grants with that information and to alter the tribe's finance system so that it would no longer provide directors with those [REDACTED]. [REDACTED] specifically stated that this change was made because the complainant "was asking so many questions" and that afterward none of the tribe's directors received documentation of prior spending.

Per the complainant, [REDACTED] and the finance director continued to investigate the finances and discovered inconsistent fringe rates and inaccurate accounting across the tribe's other grants from the EPA and [REDACTED].

2. The Complainant's Disclosures Regarding Grant Over-Expenditures

In November 2023, the complainant learned that one of the tribe's EPA grants appeared to have an over-expenditure of \$30,000, and [REDACTED] emailed the COO about it. [REDACTED] testified that the COO told [REDACTED] that the tribe would have to "pull money from other funds" to cover the over-expenditure. The complainant testified that [REDACTED] felt uncomfortable with this and began to record [REDACTED] conversations with the COO, without the COO's knowledge, to "protect" [REDACTED]. The complainant testified that when [REDACTED] saw the grant's next federal financial reporting form, it had been "zeroed out" except for the awarded amount, as though the tribe had not spent anything from that grant.

The COO confirmed that the complainant came to [REDACTED] with concerns about the \$30,000 over-expenditure. According to the COO, at the time of the expenditure, the tribe had recently lost its finance director and did not have anyone capable of managing grant funds. The COO testified that the tribe needed to purchase a \$30,000 piece of equipment but that, because its bank account was low, [REDACTED] "drew down \$30,000 extra" of grant funds to cover the purchase. [REDACTED] stated that this was at the instruction of the CEO. [REDACTED] explained that the tribe could not pay the manufacturer until the equipment was received, and it was delayed. The EPA subsequently informed the tribe that it could not have more than \$5,000 in unspent grant funds on its books. The COO testified that, to rectify the situation, the tribe wrote the EPA a check for \$30,000 to return the funds, but the tribe's financial system still reflected that it spent the \$30,000 in grant funds. According to the COO, [REDACTED] told the complainant about the \$30,000 over-expenditure, explained the entire accounting issue, and made clear that nothing malicious had occurred. The COO testified that other tribal employees also raised concerns about how [REDACTED] handled the \$30,000 drawdown.

In December 2023, the complainant attended an in-person training program, which was also attended by the EPA grant manager, an EPA employee who is responsible for overseeing the tribe's EPA grants. During this program, the complainant told the EPA grant manager [REDACTED] concerns about the over-expenditure and the COO's handling of it. The complainant told the EPA grant manager that the COO had instructed [REDACTED] and the finance director to misrepresent the tribe's spending in the federal financial reporting forms to the EPA by zeroing out certain figures.

The EPA grant manager recalled meeting with the complainant in December 2023. She testified that the complainant brought up the \$30,000 over-expenditure, as well as other concerns, including large drawdowns, expenses that do not add up correctly, and an inability to get transparent financial data from the COO to complete [REDACTED] grant reporting duties and provide accurate financial reports to the EPA. The EPA grant manager testified that the complainant's predecessor had brought the \$30,000 over-expenditure to her attention at the time the drawdown occurred. Per the EPA grant manager, the tribe had informed her that the \$30,000 drawdown was an accident. The grant manager testified that this incident had been a "red flag" to her. She explained that she had very little insight into the tribe's finances outside of the federal financial reporting forms that it submitted to the EPA, but based just on those forms, she did not believe the tribe would pass a "very basic test" for good grant management. According to the EPA grant manager, the complainant often reached out to her via email to ask questions and voice concerns about the tribe's grant management. The EPA grant manager testified that she suspected that [REDACTED]. She believed that the complainant's misgivings about the tribe's management of EPA grant funds were reasonable.

The complainant testified that [REDACTED] informed only the finance director and another coworker, [REDACTED], about [REDACTED] disclosure to the EPA grant manager and the substance of their conversations. The complainant testified that [REDACTED] did not inform the COO about these conversations and that [REDACTED] did not believe the COO knew about them.

3. The Complainant's Disclosures Regarding Gross Mismanagement of an EPA Grant

Because the complainant felt that the COO was dismissing [REDACTED] concerns, [REDACTED] began speaking with [REDACTED] coworkers about the inconsistencies in the tribe's finances and the COO's handling of these issues. From October 2023 through December 2023, the complainant spoke with multiple coworkers about inconsistencies in the tribe's financial data, as well as other concerns. [REDACTED] worked with these coworkers, including the finance director, [REDACTED], [REDACTED], and [REDACTED], to document these issues. Ultimately, the complainant collaborated with [REDACTED] and [REDACTED] to draft a formal complaint letter to the CEO in early December 2023. The complaint letter was completed and dated December 11, 2023.

The complainant testified that, although [REDACTED] and the other two individuals were collectively responsible for drafting the letter, they also spoke to other coworkers about their financial concerns. [REDACTED] testified that [REDACTED] was not sure exactly how many individuals within the tribe saw the letter prior to December 11, 2023. The letter outlined numerous grievances with their work environment, including the COO's dismissal of their financial concerns. The letter specifically referenced that, as a reaction to staff identifying errors in the federal financial reporting forms provided to the EPA, the COO ordered the removal of information from revenue-and-expense reports. The letter also referenced a December 8, 2023 email exchange between the complainant and the COO, in which the COO rejected the complainant's request for unredacted revenue-and-expense reports.

On the evening of December 11, 2023, the complainant contacted the CEO via a Microsoft Teams message to ask whether [REDACTED] had time to speak with [REDACTED] and other “concerned” colleagues. In response, the CEO asked for more information, and the complainant told [REDACTED] that the group was about to send [REDACTED] an email. The CEO asked what the email was about, and the complainant restated [REDACTED] request for a call. However, a call was not held, and the complainant never sent [REDACTED] an email with the letter.

The COO testified that the CEO called [REDACTED] that same evening, informed [REDACTED] of the complainant’s request for a meeting, and instructed [REDACTED] to call the complainant to find out what [REDACTED] wanted to talk about. On the call, the complainant stated that [REDACTED] wanted to speak directly to the CEO, but the COO insisted that the CEO would not take the complainant’s call, and the conversation ended.

The COO testified that [REDACTED] called the CEO back and informed [REDACTED] that the complainant refused to disclose the reason for [REDACTED] request and reiterated that [REDACTED] would only speak with the CEO. According to the COO, the CEO told [REDACTED] to get the complainant’s termination paperwork ready, stating, “I’m not dealing with this.” The COO testified that [REDACTED] asked the CEO whether [REDACTED] would consider any alternative action to firing the complainant, and [REDACTED] replied that [REDACTED] was “done with disruptors.” The COO testified that [REDACTED] believed the CEO thought of the complainant as a “disruptor” because of [REDACTED] request to meet with [REDACTED] on behalf of concerned colleagues. The COO explained that the CEO did not have tolerance for any employees who “seemed like they were making any kind of waves at the tribe.” [REDACTED] stated that [REDACTED] had brought concerns to the CEO in the past, and it was “clear” to [REDACTED] that [REDACTED] needed to “back off” or [REDACTED] would lose [REDACTED] job. In fact, [REDACTED] mused that if the CEO learned about [REDACTED] testimony to the OIG, “there would 100 percent be retaliation.”

The complainant testified that [REDACTED], December [REDACTED], 2023, [REDACTED] discovered [REDACTED] had been locked out of all tribal accounts on [REDACTED] laptop. The complainant attempted to contact the CEO, first via phone and then from [REDACTED] personal email, informing [REDACTED] that [REDACTED] was locked out of [REDACTED] tribal accounts, that it was [REDACTED] “federal and tribal responsibility” to follow federal regulations, and that [REDACTED] was being obstructed by the COO. That same day, [REDACTED] received a call from the head of human resources, who notified [REDACTED] that [REDACTED] had been terminated and who read aloud a termination letter to [REDACTED]

The Complainant’s Termination

The complainant alleged that the tribe terminated [REDACTED] employment in retaliation for the disclosures described above. While the CEO testified that the decision to fire the complainant had ultimately been [REDACTED], [REDACTED] also testified that the COO provided [REDACTED] with input about the complainant that factored into [REDACTED] decision. The complainant’s December [REDACTED], 2023 termination letter was written by the COO at the direction of the CEO and stated that the decision to terminate the complainant was not “made hastily” but rather had been forthcoming. The letter further said that during the complainant’s [REDACTED] tenure with the tribe, there had been several instances of performance and conduct that did not meet the tribe’s standards. The letter listed multiple categories of alleged misconduct but detailed only one specific instance of alleged misconduct. The letter stated that the complainant (1) mismanaged program budgets, leading to significant financial losses for the tribe and impacting the tribe’s ability to operate efficiently; (2) missed deadlines in grant submissions and budget reports; (3) lacked cultural sensitivity in

interactions; (4) mishandled the procurement process for [REDACTED]; and (5) displayed defiant and inciteful behavior, which undermined [REDACTED] supervisor's authority and created workplace tension.

Notably, tribal policy at the time required a "formal review panel" to review the circumstances surrounding an employee's misconduct and to recommend discipline. The OIG has no evidence to establish that such a review panel was formed for the complainant. In fact, the CEO testified that [REDACTED] did not consult human resources about the grounds for terminating the complainant, a necessary component of the termination review panel. The head of human resources testified that managers should document each issue related to an employee's performance or conduct at the time it occurs and that the tribe encourages employee education to address performance issues prior to discipline.¹ However, the complainant said that most of the alleged misconduct was not raised to [REDACTED] prior to the termination letter. [REDACTED] also said that, in the weeks before [REDACTED] termination, [REDACTED] was told by the COO on multiple occasions that [REDACTED] was doing a good job.

1. Mismanaged Program Budgets

The termination letter alleged that the complainant engaged in misconduct regarding the administration of program budgets, leading to the loss of over \$38,000.

The complainant believed that the \$38,000 loss cited in [REDACTED] termination may have been a reference to the \$30,000 grant over-expenditure that [REDACTED] discussed with the COO in November and December 2023. However, the COO testified that this over-expenditure occurred before the complainant began [REDACTED] employment with the tribe. The complainant testified that [REDACTED] was not counseled before [REDACTED] termination for mismanagement of program budgets leading to the cited loss and that [REDACTED] termination letter was the first time tribal leadership alleged [REDACTED] caused such a loss. The complainant testified that [REDACTED] did overspend \$1,000 on a grant from [REDACTED] when [REDACTED] first began in [REDACTED] position. However, the COO and the CEO did not explicitly mention this \$1,000 over-expenditure in the termination letter or in their testimony.

The CEO and the COO could not explain how the \$38,000 loss cited in the termination letter was calculated. The COO testified that the figure reflected overspending in the tribe's environmental grants. However, [REDACTED] also testified that the \$38,000 was a number that the CEO "threw out," so [REDACTED] put it in the termination letter. When asked if [REDACTED] had concerns with the figure, [REDACTED] testified that [REDACTED] "always [had] concerns that numbers are inaccurate with the tribe." The COO further testified that [REDACTED] did not verify the accuracy of the \$38,000 loss cited in termination letter. The CEO testified that the \$38,000 loss was

¹ The head of human resources testified that the tribe did not have documentation of discipline for most of its employees because those records were lost in a cyberattack [REDACTED]. [REDACTED] explained that all employee performance and disciplinary records were saved to a local software program on [REDACTED] computer and were not backed up to a shared site. In [REDACTED], [REDACTED] computer was wiped, and all records were lost. [REDACTED] also testified that the tribe did not provide disciplinary notices to employees via email, so no relevant human resources records would be retrievable from employee inboxes. However, [REDACTED] did recall one employee, [REDACTED], who received three warnings, and [REDACTED] testified that his director was contemplating further discipline at the time of [REDACTED] interview. [REDACTED] noted that this was the only instance [REDACTED] could recall of an employee receiving progressive discipline.

“an estimate” representing the wasted “efforts” that the tribe put into the complainant and the mistakes that [REDACTED] made in grant reporting. When asked whether [REDACTED] knew what the specific loss to the tribe was, [REDACTED] testified that “sometimes you just make estimates ... if it was 5, 10, 20,000, 30,000, 38,000, 48,000.” The CEO could not recall who discovered the loss cited in the termination letter, nor could [REDACTED] point to any specific errors the complainant made that contributed to the \$38,000 estimate.

2. Missed Deadlines

The termination letter stated that the complainant’s “repeated failure to meet key deadlines, particularly in grant submissions and budget reports, has caused substantial disruptions.”

The complainant initially testified that, while [REDACTED] never missed a deadline, [REDACTED] had asked for extensions on a budget and a grant application because [REDACTED] was overloaded with work. The complainant later clarified that [REDACTED] believed the termination letter was referring to a letter of intent that [REDACTED] had been tasked with drafting for an unrelated government grant in October 2023. [REDACTED] explained that [REDACTED] had finished the letter and sent it to the CEO for [REDACTED] review on the day it was due to the government agency. Because [REDACTED] was not given an earlier internal deadline, because the letter was “super simple,” and because the CEO’s review did not take long, the complainant did not believe [REDACTED] did anything wrong. The complainant testified that the only other issue the termination letter could be referring to was a budget report that [REDACTED] ultimately submitted within the original deadline, although [REDACTED] had requested but was denied an extension.

The COO’s testimony contradicted the complainant. The COO testified that the complainant had not submitted the budget report referenced above by the due date; instead, the COO believed that the complainant turned it in the following week.² The COO also testified, however, that none of the tribe’s other directors submitted their budget reports on time, and [REDACTED] had to send them reminders. [REDACTED] testified that there were other budget reports that the complainant submitted late, but [REDACTED] subsequently clarified that these had not been late but instead required edits after they were submitted. Finally, the COO testified that [REDACTED] thought the complainant may have failed to submit one or more grant applications, but [REDACTED] did not know which ones. Although the termination letter stated that the complainant’s failure to meet deadlines was “repeated” and caused “substantial” disruptions, the COO could not recall any other specific deadlines that the complainant missed, nor could [REDACTED] clarify how the complainant had been disruptive, apart from stating that [REDACTED] had to spend a significant amount of time helping the complainant with [REDACTED] budget reports.

² While the complainant and the tribe provided conflicting assertions about whether [REDACTED] submitted the budget report referenced in [REDACTED] termination letter past the given deadline, neither provided additional detail or documentation to support their testimony. As such, we were not able to corroborate this charge.

3. Lack of Cultural Sensitivity

The termination letter alleged that the complainant demonstrated a lack of cultural sensitivity, particularly in [REDACTED] communications with the COO. The COO and CEO provided two different and unrelated explanations for this allegation.

The COO testified that [REDACTED] was directed by the CEO to include the cultural insensitivity charge in the complainant's termination letter. [REDACTED] testified that the complainant acted culturally insensitive when, on multiple occasions, [REDACTED] told the COO, [REDACTED], that [REDACTED] was acting [REDACTED]" and requested that [REDACTED] act [REDACTED]." The COO testified that the complainant would make these kind of statements "all the time." However, [REDACTED] stated that [REDACTED] would not have terminated the complainant for these comments and that if the tribe were to fire employees for cultural insensitivity, it would fire "a lot of the staff." The COO testified that [REDACTED] never witnessed the complainant act culturally insensitive to any other staff members.

The CEO testified that the charge of cultural insensitivity in the complainant's termination letter was a reference to an incident [REDACTED] observed in August 2023 when the complainant was supervising tribal youth members. [REDACTED] testified that [REDACTED] observed the complainant posing questions to the youths and then either answering without waiting for their responses or disregarding their answers. [REDACTED] found this insensitive because, in [REDACTED] experience, when "native people" are asked a question, they need a chance to formulate their thoughts. Although [REDACTED] testified that this cultural insensitivity was, for [REDACTED], the "tipping point" in [REDACTED] decision to fire the complainant, it occurred more than three months before [REDACTED] was ultimately terminated. The complainant testified that no one from the tribe mentioned anything to [REDACTED] about this incident prior to the termination letter. While the CEO stated that [REDACTED] talked about terminating the complainant in August 2023, [REDACTED] could not remember any specific discussions [REDACTED] had on the subject. The CEO did not provide any examples of the complainant displaying cultural insensitivity towards the COO.

4. Mishandled the Procurement Process for [REDACTED]

The termination letter cited the complainant's failure to follow appropriate procedures in August 2023 when purchasing [REDACTED] for a project funded by an EPA subgrant. The termination letter described the complainant's actions as undermining [REDACTED] supervisor's authority and obligating the tribe to use \$4,800 to pay for [REDACTED] instead of for critical tribal resources. The termination letter also characterized the complainant's actions as having violated federal procurement laws, signifying "a disregard for [the tribe's] policies and legal obligations."

The complainant testified that [REDACTED] followed appropriate procedures when purchasing and setting up [REDACTED] funded by the EPA subgrant. The complainant testified that [REDACTED] secured the necessary approvals for [REDACTED] project in August 2023, including approval from the grantee project manager, the tribe's finance department, and the EPA grant manager. An August 4, 2023 email from the grantee project manager corroborated this testimony. The complainant explained that past tribal practice for procurements dictated that after the EPA grant manager approved a purchase, all the complainant needed to do was submit a purchase order agreement for the COO's approval. Per the complainant,

once [REDACTED] had approval from the EPA grant manager, the COO typically signed off on the corresponding purchase order without incident.

The complainant testified that [REDACTED] sent the COO documentation of the EPA grant manager's and the grantee project manager's approvals for [REDACTED] in August 2023. Per the complainant, the COO did not take any action for several months after the complainant provided these approvals. However, on November 29, 2023, minutes after the complainant messaged the COO an unrelated question about the tribe's federal financial reporting form from the prior year, the COO messaged the complainant rejecting the purchase order for [REDACTED]. The complainant said that this incident exemplified a pattern [REDACTED] had observed, whereby [REDACTED] brought a financial concern to the COO and immediately afterward faced atypical resistance or repercussions from the COO on an unrelated matter. The complainant testified that the vendor proceeded to build [REDACTED], despite the fact that the complainant only asked the vendor for an estimate and never signed a contract.

The COO's testimony contradicted the complainant's account of events. The COO testified that the complainant entered into a contract with the vendor for [REDACTED] without discussing it with the COO first or obtaining the CEO's authorization. The COO stated that, per [REDACTED] understanding of federal regulations, no matter how much money the tribe had budgeted for a particular project, it was required to purchase the lowest cost option, and there were less expensive options available. The COO testified that the complainant proposed the \$4,800 [REDACTED] to the COO, and when the COO did not approve the order, it became a "tug of war" for months. The COO testified that the complainant "started screaming at [REDACTED] during a call about [REDACTED] on December 5, 2023. The COO said that during that same call [REDACTED] realized the complainant had entered into a contract with the vendor and that the vendor had already built [REDACTED]. The COO testified that [REDACTED] verbally disciplined the complainant on the call. However, [REDACTED] also testified that, despite the issues surrounding the purchase of [REDACTED], [REDACTED] would not have chosen to terminate the complainant for them.

Because of [REDACTED] dual role as [REDACTED], the head of human resources was present for the call about [REDACTED]. [REDACTED] testified that the complainant "definitely raised [REDACTED] voice." However, the head of human resources testified that there had not been any formal warning or counseling directed toward the complainant on the call, although [REDACTED] did say the COO told the complainant that paying that much for [REDACTED] was irresponsible.

A recording of the December 5, 2023 phone call reflects that the COO verbally denied the purchase order request for [REDACTED].³ The complainant then clarified that the vendor had already built [REDACTED], despite the complainant only requesting an estimate and not signing a contract. The COO told [REDACTED] that [REDACTED] was not "not in trouble." The two continued to discuss how to proceed, with the COO stating that [REDACTED] would figure out where to pull funds from for [REDACTED] and instructing the complainant and the finance director to put together additional documentation justifying the expense.

³ As noted previously in this report, because the complainant felt uncomfortable with the grant-related directions [REDACTED] received from the COO, [REDACTED] recorded their conversations without the COO's knowledge to "protect" [REDACTED].

The EPA grant manager recalled that the complainant told her that the COO refused to pay for [REDACTED] on the grounds that the tribe was allegedly overspent on its EPA grants. In November 2023, the complainant notified the EPA grant manager via email that the COO had instructed [REDACTED] to look at cheaper [REDACTED] options. In her response to the complainant, the EPA grant manager clarified that, while less expensive options may have been available, the custom size and durability of [REDACTED] were important requirements, and purchasing the more expensive [REDACTED] was “not an issue” under federal procurement regulations. The EPA grant manager also testified that her understanding was that the complainant’s actions related to the purchase of this [REDACTED] were “completely in compliance” with federal procurement regulations.

5. Inciteful Behavior

The termination letter stated that the complainant “blatantly displayed defiant behavior” and engaged in “inciteful behaviors with colleagues to further undermine [REDACTED] supervisor’s authority,” which caused workplace tension.

When asked what inciteful behaviors the complainant engaged in, the COO testified that, at the time of the termination, [REDACTED] did not know what this allegation referred to but included it at the CEO’s instruction. The COO testified that [REDACTED] later learned that the complainant had been “having meetings with staff to basically try to get [the COO and the CEO] fired ... like, staging a coup.” When asked how [REDACTED] had learned this, the COO first testified that [REDACTED] heard it through the “[REDACTED] scuttlebutt rumor mill,” then clarified that a tribal council member told [REDACTED]. When pressed for specific examples of inciteful behavior, the COO testified that this allegation may have referred to the complainant’s December 11, 2023 request to speak with the CEO. The COO testified that [REDACTED] did not believe the complainant should have been terminated for attempting to bring concerns forward to the CEO.

The CEO testified that this allegation referred to the complainant’s refusal to follow “the procurement process [REDACTED] was told [REDACTED] needed to go through” for [REDACTED], stating that [REDACTED] had “blatantly displayed defiant behavior” by purchasing it without authorization. However, the complainant’s December 5, 2023 recorded phone call with the COO reflects that the complainant did not purchase [REDACTED]; rather, the vendor proceeded to construct it without a signed contract with the tribe. In addition, when asked about [REDACTED] rationale for the complainant’s termination, the CEO testified that the complainant was trying to create division and get staff to sign a letter. The CEO initially testified that [REDACTED] learned about the letter the week prior to the complainant’s termination. [REDACTED] explained that [REDACTED] heard from the tribal culture director, who was “very concerned” that the complainant was “trying to get other staff members to sign on to this letter” with “complaints about [the COO], and the finances, and the EPA grant.” The tribal culture director declined the OIG’s request for an interview.

When asked to confirm that [REDACTED] knew about the letter before the termination, the CEO changed [REDACTED] testimony and testified that it was not until after the termination that [REDACTED] first heard about the complainant’s letter and the allegations that [REDACTED] and [REDACTED] colleagues were making. [REDACTED] said that [REDACTED] heard

about these issues from [REDACTED] the tribal president.⁴ However, the CEO then restated that the complainant’s letter and “accusations” were a factor in [REDACTED] decision to terminate [REDACTED]. [REDACTED] stated that [REDACTED] wanted to keep the complainant as a tribal employee but that [REDACTED] continued to “make false allegations” about the tribe’s finances.

Two other tribal employees were also signatories to the December 11, 2023 letter: [REDACTED] and [REDACTED]. While neither employee received discipline, they were also differently situated than the complainant. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Throughout [REDACTED] testimony, the COO routinely mentioned that it was hard to address misconduct because people were well-connected within the tribe. [REDACTED] commented that “everybody is related to everybody else.” [REDACTED] explained that there was a particular hesitation to “go after” tribal members. [REDACTED]

Other witnesses similarly testified that tribal members are treated differently by tribal and staff leadership than nontribal members. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

Analytic and Legal Framework

Pursuant to 41 U.S.C. § 4712, “Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information,” an employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for making a protected disclosure. 41 U.S.C. § 4712(a)(1). Complaints may not be brought more than three years after the date on which the alleged reprisal occurred. 41 U.S.C. § 4712(b)(4). Unless the inspector general determines that the complaint is frivolous, the complainant fails to allege a violation of the prohibition in subsection (a), or the complaint has previously been addressed in another federal or state judicial or administrative proceeding initiated by the complainant, the inspector general shall investigate the complaint and, upon completing such investigation, submit a report of the findings of the investigation to the person, contractor, subcontractor, grantee, subgrantee, or personal services contractor concerned, as well as to the head of the agency. 41 U.S.C. § 4712(b). This report shall be provided within 180 days after receiving the complaint, unless the 180-day period is extended per

⁴ At another point in [REDACTED] testimony, the CEO stated that [REDACTED] learned about the letter from the COO prior to deciding to terminate the complainant.

agreement between the inspector general and the complainant. 41 U.S.C. § 4712(b)(2)(A)-(B). In this case, the complainant granted the EPA OIG an extension of the 180-day period.

The legal burdens of proof set out in the Whistleblower Protection Act of 1989, 5 U.S.C. § 1221(e), are controlling for the purposes of any investigation conducted by an inspector general regarding whether there has been a prohibited reprisal. 41 U.S.C. § 4712(c)(6). To allege a violation under section 4712(a), complainants must allege that they made a protected disclosure and that the protected disclosure was a contributing factor in a covered action taken or threatened to be taken against them. A protected disclosure is defined as a communication about actual or suspected wrongful conduct “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.” 41 U.S.C. § 4712(a)(1). A reasonable belief exists if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence one of the categories of wrongdoing listed in the statute.⁵ Additionally, in order for a disclosure to be protected under the law, it must be made to a member of Congress or representative of a committee of Congress; an inspector general; the U.S. Government Accountability Office; a federal employee responsible for contract or grant oversight or management at the relevant agency; an authorized official of the U.S. Department of Justice or other law enforcement agency; a court or grand jury; or a management official or other employee of the contractor, subcontractor, or grantee, subgrantee, or personal services contractor who has the responsibility to investigate, discover, or address misconduct. 41 U.S.C. § 4712(a)(2).⁶

After it has been established that the complainant made a protected disclosure, the next step is to analyze whether a preponderance of the evidence establishes that one or more protected disclosures were a contributing factor in the decision to discharge, demote, or otherwise discriminate against the complainant.⁷ “Contributing factor” is defined as any factor that, alone or in connection with other factors, tends to affect in any way the outcome of the decision.⁸ The whistleblower can establish that a disclosure was a contributing factor through circumstantial evidence showing that (1) the official taking the action knew of the disclosure and (2) the action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1)(A)-(B).

⁵ *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

⁶ Individuals who are perceived as whistleblowers are still entitled to protection even if they have not made any protected disclosures. *King v. Dep’t of the Army*, 116 M.S.P.R. 689 ¶ 6 (2011).

⁷ A preponderance of the evidence is defined as “[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.” 5 C.F.R. § 1201.4(q).

⁸ *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

Once a preponderance of the evidence establishes that one or more protected disclosures contributed to the decision to discharge, demote, or otherwise discriminate against the employee, the retaliation allegation is substantiated unless clear and convincing evidence establishes that the covered action would have been taken in the absence of the protected disclosure.⁹ 5 U.S.C. § 1221(e)(2). In other words, if the evidence shows that it is highly probable that the employer would have taken the actions against the employee regardless of the protected disclosure, the retaliation allegation is not supported. The relevant factors to consider in this determination are (1) the strength of the employer's evidence in support of its decision, (2) the existence and strength of any retaliatory motive by the officials involved in the decision, and (3) any evidence that the employer has taken similar actions against employees who are not whistleblowers but are otherwise similarly situated.¹⁰

No later than 30 days after receiving an inspector general report, the head of the agency shall determine whether there is sufficient basis to conclude that the employer has subjected the complainant to a prohibited reprisal and shall issue an order denying relief or ordering the contractor or grantee to take appropriate corrective action. 41 U.S.C. § 4712(c)(1).

Legal Analysis

The complainant was an employee of the [REDACTED], which receives EPA funding through both grants and subgrants. The tribe received a subgrant via the EPA's [REDACTED] from 2020 through 2023, as well as grants from the EPA's [REDACTED] in 2022 and 2023. [REDACTED] alleged that the tribe discharged [REDACTED] from tribal employment in retaliation for making protected disclosures concerning an EPA grant or subgrant. We did not find the complainant's allegation to be frivolous, nor do we know of any instance in which [REDACTED] allegations have already been addressed in another federal or state judicial or administrative proceeding initiated by the complainant. The complaint is timely, as it was filed within three years after the date on which the alleged reprisal occurred. Also, as the complainant has alleged a violation of 41 U.S.C. § 4712, the OIG has jurisdiction over the complainant's allegations.

Did the Complainant Make Protected Disclosures?

A disclosure is protected under 41 U.S.C. § 4712 if the complainant has a reasonable belief that it evidences a covered wrongdoing and if it is made to a covered person or body. Alternatively, a disclosure is also protected if the complainant is *perceived* to have made a protected disclosure. The complainant alleges that [REDACTED] made protected disclosures under 41 U.S.C. § 4712 over a period of several months in 2023 regarding (1) inaccurate fringe rates charged to the EPA, (2) over-expenditures of EPA

⁹ Clear and convincing evidence is defined as "that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established," and it is a higher standard than preponderance of the evidence. 5 C.F.R. § 1209.4(e).

¹⁰ *Carr v. Social Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

grant funds, and (3) the COO's gross mismanagement of an EPA grant. We determined that the complainant made at least five protected disclosures under 41 U.S.C. § 4712.

1. Disclosures Regarding Fringe Rates

The complainant made a series of disclosures related to [REDACTED] concerns that the fringe rates used in the tribe's federal financial reporting forms were inaccurate, meaning the tribe was submitting false financial information to the government. We determined that the complainant's communications with the finance director and the COO regarding this topic constitute protected disclosures but that [REDACTED] communication with [REDACTED] does not constitute protected disclosures under 41 U.S.C. § 4712.

The complainant's disclosure to one of [REDACTED] coworkers, [REDACTED], in October 2023 does not constitute a protected disclosure. In October 2023, the complainant disclosed to [REDACTED] that the tribe's fringe rates were inconsistent. [REDACTED] is not responsible for investigating, discovering, or addressing financial misconduct and is thus not a covered person under 41 U.S.C. § 4712(a)(2)(G). Because the complainant's communication with [REDACTED] was not made to a covered person or body under 41 U.S.C. § 4712(a)(2), it does not constitute a protected disclosure.

The complainant's disclosures to the finance director from October 2023 through December 2023 constitute protected disclosures. The complainant disclosed to the finance director that the fringe rates provided by the COO were inconsistent with the fringe rates charged by the tribe, which in turn were inconsistent from month to month. Because of these inconsistencies, the complainant and other tribal employees with federal grant experience feared that the tribe's federal financial reporting forms to the EPA were inaccurate. The complainant's belief that the fringe-rate inconsistencies evidenced a covered wrongdoing was reasonable, as it was shared by some of [REDACTED] coworkers who examined the grant documentation. The finance director is a management official of the tribe who is responsible for investigating, discovering, or addressing financial misconduct and is thus a covered person under 41 U.S.C. § 4712(a)(2)(G). For these reasons, the complainant's conversations with the finance director about inconsistent fringe rates constitute protected disclosures.

The complainant's October 24, 2023 email to the COO constitutes a protected disclosure. The email noted that that fringe rates in the tribe's EPA grant were "off by over \$8,500." The email also mentioned that the tribe was charging the EPA grant for the complainant's dental insurance, which did not exist. It was reasonable for the complainant to believe that charging the EPA grant for [REDACTED] dental insurance when [REDACTED] did not receive dental insurance evidenced a covered wrongdoing. The COO is a management official of the tribe who is responsible for investigating, discovering, or addressing misconduct and is thus a covered person under 41 U.S.C. § 4712(a)(2)(G). For these reasons, the complainant's October 24, 2023 email to the COO constitutes a protected disclosure.

Accordingly, the complainant's communication with the finance director and the COO regarding fringe-rate inconsistencies constitute protected disclosures.

2. Disclosures Regarding Grant Over-Expenditures

The complainant made disclosures related to [REDACTED] concerns that an EPA grant had been over-expended by \$30,000 and that the COO had submitted false information accounting for this over-expenditure in the tribe's corresponding federal financial reporting forms. We determined that the complainant's disclosures regarding the over-expenditure constitute protected disclosures under 41 U.S.C. § 4712.

The complainant's November 2023 disclosure to the COO constitutes a protected disclosure. The complainant communicated to the COO that the tribe's EPA grant appeared over-expended by \$30,000. The COO confirmed that the tribe had drawn down an additional \$30,000 from the EPA grant and later paid it back to the EPA. The complainant's belief that overspending EPA grant funds evidences a covered wrongdoing was reasonable. The COO is a management official of the tribe who is responsible for investigating, discovering, or addressing misconduct and is thus a covered person under 41 U.S.C. § 4712(a)(2)(G). For these reasons, the complainant's November 2023 disclosure to the COO constitutes a protected disclosure.

The complainant's December 2023 disclosure to the EPA grant manager about the over-expenditure constitutes a protected disclosure. The EPA grant manager testified that the complainant informed her of the \$30,000 over-expenditure. The complainant's belief that overspending EPA grant funds evidences a covered wrongdoing was reasonable. The EPA grant manager is a federal employee responsible for grant oversight and is thus a covered person under 41 U.S.C. § 4712(a)(2)(D). For these reasons, the complainant's December 2023 disclosure to the EPA grant manager constitutes a protected disclosure.

Accordingly, the complainant's November 2023 communications with the COO and [REDACTED] December 2023 conversation with the EPA grant manager regarding the overspent grant constitute protected disclosures.

3. Disclosures Regarding Grant Mismanagement

The complainant and other tribal employees drafted a letter to the CEO concerning the COO's mishandling of the tribe's finances. The letter outlined multiple grievances, including that after employees identified errors in the federal financial reporting forms to the EPA, employees no longer had access to prior spending documentation. We determined that the complainant's letter to the CEO constitutes a protected disclosure under 41 U.S.C. § 4712.

The letter, dated December 11, 2023, and addressed to the CEO, raised that the COO was engaging in gross misconduct related to an EPA grant, including that after staff identified errors in the tribe's federal financial reporting forms to the EPA, the COO reduced the information available to the staff. The complainant's belief that the COO was engaged in gross mismanagement of a federal grant, which would be a covered wrongdoing, was reasonable, as it was shared by other coworkers who signed the letter. The CEO is a management official of the tribe who is responsible for investigating, discovering, or addressing misconduct and is thus a covered person under 41 U.S.C. § 4712(a)(2)(G). Although the CEO did not receive the letter, [REDACTED] testimony supports that [REDACTED] was aware of it and the complainant's intent to make disclosures relating to the EPA grant prior to [REDACTED] decision to terminate the complainant's

employment. Individuals who are perceived as whistleblowers are still entitled to protection even if they have not made any protected disclosures.¹¹ For these reasons, the complainant's December 11, 2023 letter constitutes a protected disclosure under 41 U.S.C. § 4712.

Covered Actions: Was the Complainant Discharged, Demoted, or Otherwise Discriminated Against?

Federal law at 41 U.S.C. § 4712 prohibits retaliatory discharge, demotion, or other discrimination against employees of contractors and grant recipients. On December [REDACTED], 2023, the complainant was discharged from tribal employment. [REDACTED] discharge was documented in a letter from the tribe as well as confirmed by testimony from the COO and the CEO. Discharge is among the covered actions specifically enumerated in the statute. Accordingly, a covered action was taken against the complainant.

Were the Complainant's Protected Disclosures Contributing Factors in the Discharge?

A protected disclosure is considered a contributing factor in a decision to take a covered action if the official taking the covered action knew of the protected disclosure and if the action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor. 5 U.S.C. § 1221(e). We determined that, based on knowledge and timing, the complainant's protected disclosures were contributing factors in the tribe's decision to discharge the complainant.

The COO, who drafted the complainant's termination letter and exerted influence over the CEO's decision to terminate the complainant, had direct knowledge of the complainant's disclosures at the time of the discharge because many of the disclosures were made to [REDACTED]. The complainant first made disclosures to the COO in October 2023. The complainant was discharged on December [REDACTED], 2023. The CEO testified that the COO provided input that factored into [REDACTED] decision to terminate the complainant. The COO confirmed that [REDACTED] wrote the termination letter on the CEO's behalf and included an allegation of cultural insensitivity that the COO explained related to rude comments the complainant made to the COO. The timing between the complainant's first protected disclosure and [REDACTED] discharge from tribal employment was two months, which is a reasonable amount of time to conclude that the disclosures were a contributing factor.¹² Because the COO had knowledge of the complainant's disclosures when [REDACTED] influenced the CEO's decision to terminate the complainant and because the discharge was less than a year after the complainant's first disclosure, we determined that the complainant established by a

¹¹ *King v. Dep't of the Army*, 116 M.S.P.R. 689 ¶ 6 (2011); *Mausser v. Dep't of the Army*, 63 M.S.P.R. 41 ¶ 8 (1994) (noting that an employee who drafted but never disclosed a list of fraud, waste, and abuse to the Inspector General would be covered by whistleblower protections if the deciding official in his termination was aware of the list and the employee's intention to disclose it).

¹² The U.S. Merit Systems Protection Board has found time periods longer than a year between the protected disclosure and an adverse action to be reasonable in establishing that a disclosure was a contributing factor. *See e.g., Redschlag v. Dep't of the Army*, 89 M.S.P.R. 589, ¶87 (2001) (holding that a suspension proposed 18 months after an employee's protected disclosure was a sufficient time period where a reasonable person could conclude that the disclosure was a contributing factor in the suspension).

preponderance of the evidence that [REDACTED] protected disclosures were a contributing factor in the CEO's decision to discharge [REDACTED] from tribal employment.¹³

The CEO, who made the decision to terminate the complainant, provided inconsistent testimony regarding [REDACTED] knowledge of the complainant's disclosures. The majority of [REDACTED] testimony, however, supports the conclusion that, although [REDACTED] did not receive the complainant's December 11, 2023 letter, [REDACTED] was aware of it prior to [REDACTED] decision to terminate [REDACTED] employment. [REDACTED] initially testified that *before* [REDACTED] fired the complainant, [REDACTED] told [REDACTED] that the complainant was trying to get other staff members to sign a letter and was making "complaints about the [COO,] the finances, and the EPA grant." When [REDACTED] was asked to confirm that [REDACTED] knew about the complainant's letter before [REDACTED] termination, the CEO testified that [REDACTED] did not learn about the letter until *after* the complainant was fired. However, the CEO then restated that the complainant's letter and "accusations" were a factor in [REDACTED] decision to terminate the complainant. [REDACTED] said that [REDACTED] wanted to keep the complainant as a tribal employee but that [REDACTED] continued to "make false allegations" about tribal finances. Because the CEO testified multiple times that [REDACTED] was aware of the letter before the complainant's termination and because [REDACTED] specifically cited it as a reason for the termination, we determined that the letter was a contributing factor in the CEO's decision to discharge the complainant from tribal employment.

Because the COO and the CEO had knowledge of the complainant's disclosures regarding fringe rates, an over-expenditure, and grant mismanagement and because the complainant's discharge from tribal employment occurred mere months after [REDACTED] began making disclosures, we determined that the complainant established by a preponderance of the evidence that the protected disclosures were contributing factors in the discharge.

Would the Tribe Have Discharged the Complainant from Tribal Employment in the Absence of the Complainant's Protected Disclosures?

Once a preponderance of the evidence establishes that one or more protected disclosures contributed to a decision to discharge, demote, or otherwise discriminate against a complainant, a retaliation allegation is substantiated unless clear and convincing evidence establishes that the action would have been taken in the absence of the protected disclosure. To make this determination, our analysis weighs the following factors: (1) the strength of the evidence in support of each action; (2) the existence and strength of any motive to retaliate on the part of the officials who were involved in the decision, referred to as *animus evidence*; and (3) any evidence that the employer has taken similar actions against employees who are not whistleblowers but are otherwise similarly situated, referred to as *comparators*. After analyzing these three factors, we determined that the tribe cannot establish by clear and

¹³ A subject official can carry out retaliation by influencing the individual who ultimately takes an adverse action against an employee. *Grimes v. Dep't of Navy*, 99 M.S.P.R. 7 (2004) (holding that an attorney carried out retaliation against a whistleblower through his influence over an investigation involving the individual and through recommendations he made to agency officials, who later took the adverse actions against the individual).

convincing evidence that it would have terminated the complainant's tribal employment in the absence of [REDACTED] protected disclosures.

The tribe gave five overarching reasons for the complainant's termination. These reasons were largely unsupported by testimony and evidence. For example, while the tribe cited financial mismanagement leading to losses exceeding \$38,000, no witness could articulate how this figure was calculated. The CEO testified that it was an estimate and did not discuss any specific losses. Similarly, despite the termination letter stating that the complainant *repeatedly* failed to meet key deadlines, the COO could recall only one specific deadline that the complainant missed. The termination letter also stated that the complainant mishandled the procurement process for the purchase of [REDACTED] in violation of federal procurement regulations. A transcript of a call between the complainant and the COO shows not only that the vendor built [REDACTED] before the complainant signed a contract with the vendor but also that the COO told the complainant that [REDACTED] was not in trouble for this situation. Further, the EPA grant manager testified that the complainant's actions related to the purchase of [REDACTED] were in compliance with federal procurement regulations.

While the tribe cited the complainant's lack of cultural sensitivity as a reason for [REDACTED] termination, witnesses provided conflicting testimony about this allegation. The COO testified that that allegation referenced disrespectful comments the complainant made about the COO [REDACTED]. However, the COO stated that [REDACTED] would not have fired the complainant for these comments. The CEO provided an entirely different explanation for the allegation, stating that [REDACTED] observed one instance in which the complainant had lacked patience with tribal youth. Finally, when discussing the complainant's termination, the CEO referenced one of the complainant's protected disclosures. When asked to explain [REDACTED] termination, the CEO discussed the December 11, 2023 letter written by the complainant. [REDACTED] stated that the letter contained accusations, mislead staff members, and caused disruption. The CEO specifically stated that [REDACTED] wanted to keep the complainant as an employee but that [REDACTED] kept making "false allegations."

The COO testified that, in writing the complainant's termination letter, [REDACTED] relied on input from the CEO, who expressed animus related to one of the complainant's protected disclosures. The COO repeatedly testified that [REDACTED] included specific allegations and language in the termination letter because the CEO directed [REDACTED] to do so. The CEO testified that one of the allegations included in the letter—the complainant's December 11, 2023 letter, which was a protected disclosure—was a factor in the complainant's termination. [REDACTED] specifically cited the complainant's "false allegations" about the tribe's finances, which [REDACTED] stated caused "disruption." The COO testified that, when discussing the complainant's termination, the CEO called the complainant a disruptor.

Although the tribe lacks comparator data, tribal policy indicates that any tribal employee comparators would have received more due process than the complainant. The tribe's employee handbook requires that a "formal review panel" examine the circumstances surrounding an employee's misconduct and recommend discipline. No such review panel was formed for the complainant. Additionally, the head of human resources testified that tribal managers should document each issue related to an employee's

performance or conduct at the time it occurs and that the tribe encourages employee education to address performance issues prior to discipline. Our investigation found no such contemporaneous notes from either the COO or the CEO relating to the conduct issues cited in the complainant's termination letter. The head of human resources also discussed an employee who received progressive discipline in the form of multiple formal warnings and was not terminated.¹⁴

We find that the lack of evidence to support many of the charges in the termination letter, the considerable animus evidence, and the departure from tribal human resources policy outweighs the evidence of some misconduct on the part of the complainant. While the complainant may have spoken disrespectfully to the COO and failed to meet one budget deadline, there is no evidence of [REDACTED] conduct being addressed at the time. Further, [REDACTED] termination letter is rife with allegations that are unsupported by evidence. Finally, the CEO's testimony specifically citing the complainant's "allegations" about tribal finances constitutes strong animus evidence. After reviewing the tribe's support for discharging the complainant, the animus evidence, and the comparator evidence, we have determined that the tribe cannot establish by clear and convincing evidence that it would have discharged the complainant from tribal employment in the absence of [REDACTED] protected disclosures.

Conclusion

We determined that the complainant made at least five separate protected disclosures to tribal employees, including the COO and CEO. We found that these protected disclosures were contributing factors in the complainant's termination. We also determined that the tribe cannot demonstrate by clear and convincing evidence that it would have terminated the complainant in the absence of [REDACTED] protected disclosures. As such, we substantiated the complainant's retaliation allegations.

Recommendation

Given the conclusions discussed above, we recommend that the EPA administrator consider appropriate corrective action in light of these findings. No later than 30 days after receiving an inspector general report, the head of the agency shall determine whether there is sufficient basis to conclude that the employer has subjected the complainant to a prohibited reprisal and shall issue an order denying relief or ordering the contractor or grantee to take appropriate corrective action.

¹⁴ It is noteworthy, however, that this employee [REDACTED]. [REDACTED]. Similarly, the tribe did not terminate the other two signatories to the complainant's letter, [REDACTED], unlike the complainant.



Whistleblower Protection

U.S. Environmental Protection Agency

The whistleblower protection coordinator's role is to educate Agency employees about prohibitions against retaliation for protected disclosures and the rights and remedies against retaliation. For more information, please visit the OIG's whistleblower protection [webpage](#).

Contact us:



Congressional & Media Inquiries: OIG.PublicAffairs@epa.gov



EPA OIG Hotline: OIG.Hotline@epa.gov



Web: epaoig.gov

Follow us:



X: [@epaoig](https://twitter.com/epaoig)



LinkedIn: [linkedin.com/company/epa-oig](https://www.linkedin.com/company/epa-oig)



YouTube: [youtube.com/epaoig](https://www.youtube.com/epaoig)



Instagram: [@epa.ig.on.ig](https://www.instagram.com/epa.ig.on.ig)



www.epaoig.gov