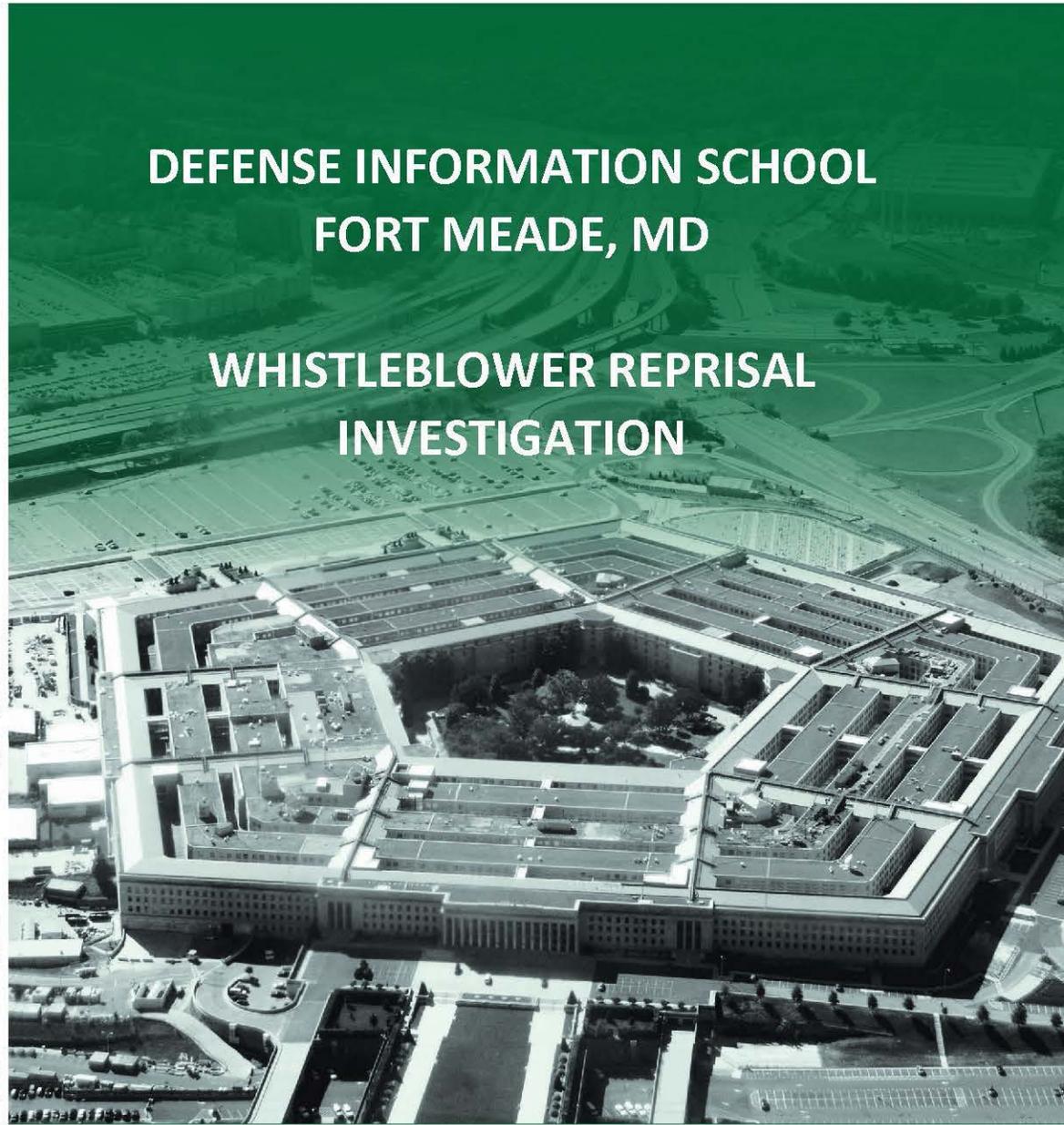




# INSPECTOR GENERAL

*U.S. Department of Defense*

September 22, 2016



## DEFENSE INFORMATION SCHOOL FORT MEADE, MD

## WHISTLEBLOWER REPRISAL INVESTIGATION

INTEGRITY ★ EFFICIENCY ★ ACCOUNTABILITY ★ EXCELLENCE

The document contains information that may be exempt from mandatory disclosure under the Freedom of Information Act.

## WHISTLEBLOWER REPRISAL INVESTIGATION

### ██████████ DEFENSE INFORMATION SCHOOL FORT MEADE, MARYLAND

#### I. EXECUTIVE SUMMARY

We conducted this investigation in response to allegations that ██████████, Department of Defense (DoD) ██████████, Defense Information School (DINFOS), Fort Meade, Maryland (MD), and ██████████, DoD, ██████████, DINFOS, administered a downgraded fiscal year 2014 (FY14) performance appraisal of ██████████ (Complainant), ██████████, former Instructor, DINFOS, in reprisal for communicating what he reasonably believed were violations of laws and DoD regulations regarding privacy, to DINFOS officials.

We determined that Complainant made a protected disclosure to ██████████, U.S. Army, ██████████, DINFOS, and ██████████, DINFOS, regarding reasonably believed Privacy Act violations (hereinafter referred to as privacy violations) in the workplace.

We substantiated the allegation that ██████████ downgraded Complainant's FY14 performance appraisal in reprisal for Complainant's disclosures to ██████████ and ██████████.

We did not substantiate the allegation that ██████████ concurred with Complainant's downgraded FY14 performance appraisal rating by ██████████ in reprisal for Complainant's disclosures to ██████████ and ██████████.

By letter dated August 2, 2016, we provided ██████████ the opportunity to comment on the results of our investigation. In his response, via email, dated August 22, 2016, ██████████ disagreed with our conclusion that he administered Complainant a downgraded FY14 performance appraisal in reprisal for his protected disclosures. ██████████ denied ever reprising against a subordinate who reported violations. After reviewing the matters presented by ██████████, we stand by our conclusions.<sup>1</sup>

We recommend that the Director of the Defense Media Activity review, reevaluate and implement appropriate remedial action with respect to Complainant's downgraded FY14 performance appraisal, and take appropriate action with respect to ██████████ for the substantiated reprisal against Complainant.

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<sup>1</sup> While we have included what we believe is a reasonable synopsis of ██████████ response, we recognize that any attempt to summarize risks oversimplification and omission. Accordingly, we incorporated ██████████ comments where appropriate throughout this report and provided a copy of his response to the Management Official together with this report.

## II. BACKGROUND

Complainant began employment at DINFOS on December 10, 2010, as a [REDACTED] Instructor for the Public Affairs Qualifications Course in the Public Affairs Leadership Department (PALD). Complainant's immediate supervisor was [REDACTED], his second level supervisor was [REDACTED], and his Non-Supervisory Team Lead was [REDACTED]. Complainant departed his position at DINFOS on November 15, 2014, and currently works as a [REDACTED], Senior Public Information Officer, Department of Homeland Security (DHS), Washington, D.C.

## III. SCOPE

This investigation covered the period of January 28 to July 29, 2014. The investigation included interviews of Complainant, [REDACTED], [REDACTED], and 12 witnesses. In addition, we reviewed comparator data on the Agency's FY14 performance appraisals, Agency-provided personnel file information, and relevant email messages.

## IV. STATUTORY AUTHORITY

The Department of Defense Inspector General (DoD IG) conducts whistleblower reprisal investigations involving civilian appropriated-fund employees of the Department under Section 7(a) of Appendix 3 of Title 5, United States Code, "Inspector General Act of 1978," as amended. Further, under DoD Directive 5106.01, "Inspector General of the Department of Defense," DoD IG receives and investigates such complaints of reprisal generally in accordance with Title 5, United States Code, Section 2302 (5 U.S.C. 2302).

## V. FINDINGS OF FACT

On January 28, 2014, [REDACTED] requested his team members (including Complainant), to provide updated telework agreements. Those telework agreements included Complainant's name and address, which constitutes personally identifiable information (PII)<sup>2</sup>. Subsequently, Complainant and [REDACTED], [REDACTED], former Instructor, DINFOS, questioned [REDACTED] at the same time as to why he requested and needed their telework agreements.

Complainant testified to us that he asked [REDACTED] why he needed their telework agreements, given that [REDACTED] was not his supervisor. Complainant told us that according to [REDACTED], [REDACTED] directed him to gather those agreements. Complainant and [REDACTED] provided [REDACTED] an updated telework agreement, and immediately reported the situation to [REDACTED]. Complainant said that based on his experience as a former

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<sup>2</sup> DoDD 5400.11 defines PII as Information used to distinguish or trace an individual's identity, such as name, social security number, date and place of birth, mother's maiden name, biometric records, home phone numbers, other demographic, personnel, medical, and financial information. PII includes any information that is linked or linkable to a specified individual, alone, or when combined with other personal or identifying information. For purposes of this issuance, the term PII also includes personal information and information in identifiable form.

[REDACTED]

supervisor, he knew only a supervisor could access his personal information, and therefore, [REDACTED] was not authorized to have his telework agreement.

[REDACTED] corroborated Complainant's testimony to us and stated that on January 28, 2014, Complainant followed him to [REDACTED] cubicle where [REDACTED] told [REDACTED] that only [REDACTED] or [REDACTED] could collect their telework agreements, and not [REDACTED] because he was not their supervisor. [REDACTED] further testified that he told [REDACTED];

Hey, man, just so you know you can't do that. You're not our supervisor. [REDACTED] has to collect these. Because I don't have a problem doing my telework agreement but that's a personnel issue. That has to be done by [REDACTED] or [REDACTED].

[REDACTED] corroborated that he requested the telework agreements and that [REDACTED] complained that [REDACTED] should not be privy to that information. However, he stated that the decision for him to request those telework agreements "was 100 percent my decision." [REDACTED] could not remember asking [REDACTED] to collect those agreements. [REDACTED] said that [REDACTED] was in charge of the distance learning team and dealing with the team's telework agreements was something he expected him to do. He stated that did not realize until later that [REDACTED] was not allowed to have those and characterized it as an "honest mistake. Not anything nefarious."

[REDACTED] said "no" when asked if [REDACTED] told him that he [REDACTED] should not have the telework agreements. [REDACTED] said to us he knew "for a fact that [REDACTED] did not come to [him] and say, 'Hey, you should not be doing this.'" [REDACTED] stated that [REDACTED] or an HR department official told him about [REDACTED] complaints.

[REDACTED] also related to us that he did not remember if Complainant approached him about his collection of telework agreements or to convey that Complainant believed it was a privacy violation. [REDACTED] said he knew Complainant had discussed the situation with [REDACTED] but was not a party to their conversation.

[REDACTED] said that he had no knowledge that Complainant disclosed what he believe to be a privacy violation to [REDACTED].

According to Complainant, on January 28, 2014, he and [REDACTED] approached [REDACTED] for clarification after they questioned [REDACTED] regarding his access to their telework agreements containing PII. Complainant stated [REDACTED] told them that [REDACTED] was not authorized to have their telework agreements because he was not their supervisor. [REDACTED] corroborated Complainant's testimony to us.

[REDACTED] could not remember Complainant disclosing privacy violations regarding unauthorized access to telework agreements. However, she confirmed that a telework agreement is a contract between an employee and his/her supervisor, and she could not understand why anybody else would have a need for that information.

[REDACTED]

Although the above facts show inconsistency in [REDACTED] and [REDACTED] recollection of who disclosed the privacy violations, [REDACTED] January 28, 2014, email to [REDACTED] memorialized the events that took place and connected Complainant to the disclosure made to [REDACTED]. Specifically, the January 28, 2014, email from [REDACTED] to [REDACTED] stated:

[REDACTED], I would like to file a formal grievance against [REDACTED] [REDACTED]. I firmly believe he is engaging in retribution harassment because I used the open door policy to discuss the problems of the department with [REDACTED]. Additionally, I need to file a complaint over the telework paperwork issue because I am required to provide my telework paperwork to [REDACTED] [REDACTED], who is not my supervisor. That paperwork contains [PII] and must be stored in compliance with AI 15, which it is not. I advised [REDACTED] of that issue, which is what prompted [Complainant] to come to you about it. You were involved with it after that point. I will be filing that complaint through [REDACTED] [REDACTED], DINFOS, since [REDACTED] is the [REDACTED] [REDACTED]). Do I start this process through you?

We, again, contacted [REDACTED] regarding [REDACTED] January 28, 2014, email. [REDACTED] stated that she recalled forwarding [REDACTED] email to [REDACTED], and also referring Complainant to [REDACTED] regarding his concerns with [REDACTED] having access to his privacy information.

[REDACTED] testified that he would have had knowledge that Complainant went to [REDACTED], as he was on the same email chain between [REDACTED] and [REDACTED] that highlighted that the privacy violations were what prompted Complainant to visit [REDACTED] and he replied to [REDACTED] in that email chain. [REDACTED] added that he did not share that information with [REDACTED]. [REDACTED] further testified the only way [REDACTED] would know about Complainant's disclosure to [REDACTED] was through [REDACTED].

[REDACTED] corroborated [REDACTED] assertion that he knew that Complainant had discussions with [REDACTED] regarding his access to telework agreements, although he did not participate in the conversation. [REDACTED] stated that after he found out about the discussions and privacy violation concerns, he approached [REDACTED], acknowledged his own fault in creating the situation, and requested to fix the problem. [REDACTED] further testified to us that although [REDACTED] did not know who made the complaint, it would be "hard to fathom" that [REDACTED] did not surmise that Complainant disclosed the alleged privacy violations to [REDACTED].

[REDACTED] testified that he had a conversation with [REDACTED] about [REDACTED] access to telework agreements once he became aware of the alleged privacy

[REDACTED]

violations. [REDACTED] stated that he told [REDACTED] that he needed the telework agreements returned because of a "PII" concern. [REDACTED] said that [REDACTED] "may well have" approached him and opined that he [REDACTED] should not have requested the telework agreements, but [REDACTED] could not recall this specific conversation.

Regarding his knowledge of Complainant's disclosures, [REDACTED] testified that he did not have specific knowledge that Complainant disclosed alleged privacy violations. He surmised, however, that Complainant was the person who complained, as he noted past occasions where Complainant spoke openly at work about issues which bothered him. [REDACTED] stated that he had to "talk to" Complainant more than once about it.

On January 28, 2014, [REDACTED] emailed [REDACTED] and carbon copied [REDACTED], DINFOS regarding privacy violations. The email stated:

Good Morning, I was notified of a privacy act violation in PALD. Per DoD 5400.11-r and the Privacy Act of 1974, Personally Identifiable Information (PII) must be safe guarded. [REDACTED] is not entitled to view the PII on telework agreements (DD Form 2946). It is illegal for a non-supervisor to gather and store paperwork that contains PII. Please remove all telework agreements from [REDACTED]. This information must be stored in a locked file cabinet that is only accessible by the supervisor. If you have any questions please let me know.

[REDACTED] stated [REDACTED] notified [REDACTED] that [REDACTED] had telework forms containing PII information, which were unsecured. [REDACTED] explained that [REDACTED] informed him of the situation and directed him to correct the situation. As a result, [REDACTED] counseled [REDACTED] in writing.

On February 3, 2014, [REDACTED] administered [REDACTED] a counseling memorandum for record (MFR) for privacy violations<sup>3</sup> regarding [REDACTED] unauthorized access of telework agreements. The MFR stated:

I have been notified by our privacy act coordinator, [REDACTED], of a Privacy Act violation in your department. Per DoD 5400.11-r and the Privacy Act of 1974, personally identifiable

<sup>3</sup> The DoD 5400.11-R, Privacy Program, states a disclosure is defined as the transfer of any personal information from a system of records by any means of communication (such as oral, written, electronic, mechanical, or actual review) to any person, private entity, or Government Agency, other than the subject of the record, the subject's designated agent, or the subject's legal guardian. Personal information is information about an individual that identifies, links, relates, or is unique to, or describes him or her, e.g., a social security number; age; military rank; civilian grade; marital status; race; salary; home/office phone numbers; other demographic, biometric, personnel, medical, and financial information, etc. Such information is also known as [PII] (i.e., information which can be used to distinguish or trace an individual's identity, such as their name, social security number, date and place of birth, mother's maiden name, biometric records, including any other personal information which is linked or linkable to a specified individual).





By comparison, Complainant's FY12 and FY13 performance appraisal ratings were "Exceeded" in the critical elements of "Teamwork" and "Supports Organizational Goals and Mission," and an overall rating of "Level 5, Excellent."

██████████ testified that he did not question ██████████ appraisal of Complainant's FY14 performance because he trusted ██████████ assessment of his subordinates' performance. ██████████ stated that he reviewed Complainant's performance appraisal and believed the rating supported the verbiage. ██████████ further testified he only had periodic contact with Complainant while Complainant worked at DINFOS and did not oversee his daily performance. ██████████ related: "I just look at what the statements are and I can tell by looking at this these are not excellent. There's not enough there to justify an excellent bullet."

██████████ stated that he did not know what ██████████ discussed with Complainant, and did not question ██████████ action because he "had no basis for believing there was any type of discrimination or reprisal against [Complainant]. When ██████████ sent him the email referring to ██████████ and Complainant's "agendas," ██████████ was perplexed as to what ██████████ was referring and simply discarded the email." Pertaining to the MFR that he gave to ██████████ ██████████ stated that was not a disciplinary action, but merely an administrative remedy to correct an error. Lastly, ██████████ denied giving Complainant a downgraded performance appraisal in reprisal.

Between June 20 and July 3, 2014, Complainant applied to a ██████████ position, ██████████, Announcement ██████████, with DHS, Washington, D.C.

On July 14, 2014, Complainant received an official notification via USA JOBS that he was referred to the selecting official for job announcement ██████████.

In July 2014, ██████████, DHS, Customs and Border Protection, ██████████, ██████████, Washington, D.C., interviewed Complainant for USA JOBS announcement ██████████.

On July 29, 2014, ██████████ contacted ██████████ as an employment reference because Complainant was a potential DHS hire. ██████████ testified that ██████████ told her Complainant "had problems learning and growing when he was – within the office." She also stated that ██████████ questioned whether Complainant had a Bachelor's degree and suggested that he confirm that. ██████████ testified that ██████████ said he would not rehire Complainant, but would not give a reason. ██████████ was skeptical of ██████████ statements to her as she had Complainant's Bachelor degree documentation before she discussed Complainant with ██████████. ██████████ provided a DHS reference check form which corroborated her testimony.

██████████ testified that a woman from DHS called him as an employment reference for Complainant, but he could not recall if she asked if he would rehire Complainant if the situation arose in the future. However, ██████████ testified that he would have advised her that he would not rehire Complainant if asked because he had not "found him to be a team player as much as I would have liked."

██████████

██████████ provided an unsigned memorandum, dated August 12, 2014, to support his assertion that Complainant complained about decisions in an open forum which did not create the collegial atmosphere he was looking for. The memorandum stated:

As you know, as part of an overall rotation in personnel, I have assigned you to the PAQC team for teaching this fall.

I understand that, following the initial objections you voiced, you have now, on a continuing basis, expressed objections to others about your specific role, e.g., line instructor, and have questioned the decision of the lead instructor to place someone other than yourself in the Journalism billet.

Cease and desist.

Such speech and conduct is not helpful to the collegial atmosphere we endeavor to nurture in the department – and it detracts from the important work we have been hired to accomplish.

██████████ could not remember if he presented that memorandum to Complainant, though he said he spoke with him about it.

On November 17, 2014, Complainant began working at DHS as a ██████████ ██████████, in Washington, D.C.

## VI. ANALYSIS

### A. Did Complainant make a protected disclosure? Yes

We determined that Complainant made two protected disclosures under 5 U.S.C. 2302.

*Disclosure to ██████████ regarding privacy violations (i.e., unauthorized access of telework agreements) on January 28, 2014*

As evidenced above, a preponderance of the evidence established that Complainant made a protected disclosure under 5 U.S.C. 2302(b)(8) when he disclosed to ██████████, what he reasonably believed were violations of privacy laws, rules, or regulations because ██████████ had access to his telework files. ██████████ actions may not have, in fact, violated DoD 5400.11-R. ██████████ was a “DoD Official” whose request for telework agreements may have been justified because he provided administrative support to the distance learning program and required knowledge of the telework schedules of his team members. However, we determined Complainant’s belief that ██████████ violated laws, rules, or regulations was reasonable after ██████████ concurred with him when he brought the issue to her.

██████████

Additionally, the subsequent email from [REDACTED] to [REDACTED] also corroborated Complainant's belief that [REDACTED] violated DoD 5400.11-R and the Privacy Act of 1974. Finally, [REDACTED], [REDACTED], and [REDACTED], all took the corrective actions directed by [REDACTED] and [REDACTED] in that they removed [REDACTED] access to those telework agreements, which evidences their reasonable belief that a violation occurred. We determined that, regardless of whether or not [REDACTED] and [REDACTED] determination and direction were accurate, Complainant had a reasonable belief a privacy violation occurred, as [REDACTED] and [REDACTED], two members of the DINFOS staff who should be knowledgeable regarding DoD Privacy Act Program policy, corroborated his belief that a privacy violation had occurred. Finally, under 5 U.S.C. 2302(b)(8) disclosures can be made to anyone. Therefore, [REDACTED] was an authorized recipient of a protected disclosure.

*Disclosure to [REDACTED] regarding privacy violations (unauthorized access of telework agreements) on January 28, 2014*

For the same reasons stated in the paragraph above, a preponderance of the evidence established that Complainant's disclosure to [REDACTED] regarding [REDACTED] access to his telework agreement was protected under 5 U.S.C. 2302(b)(8). Complainant had a reasonable belief that [REDACTED] collection of, and access to, his telework agreement violated a law, rule, or regulation. A subsequent email from [REDACTED] to [REDACTED] supports Complainant's reasonable belief that [REDACTED] violated DoD 5400.11-R and the Privacy Act of 1974 by his access to telework agreements containing PII. Finally, under 5 U.S.C. 2302(b)(8) [REDACTED] is an authorized recipient of a protected disclosure. We determined Complainant had a reasonable belief a privacy violation occurred.

**B. Was Complainant the subject of an actual or threatened personnel action? Yes**

We determined that Complainant was the subject of one personnel action.

*April 18, 2014, Downgraded FY14 Performance Appraisal*

On April 18, 2014, [REDACTED], as the rater, and [REDACTED], as the reviewer, signed Complainant's FY14 performance appraisal. Complainant received "Met" ratings for the critical elements of "Teamwork" and "Supports Organizational Goals and Mission," resulting in an overall Level 3, "Acceptable" rating. Complainant's two previous ratings for FY12 and FY13 were the highest possible in all critical elements and he received Level 5 "Excellent" ratings for those two appraisal periods. 5 USC 2302(a)(2)(A)(viii) states that performance evaluations are personnel actions.

As described above, we determined based on a preponderance of evidence that Complainant was the subject of a personnel action which is likely to negatively affect his career when [REDACTED] and [REDACTED] administered Complainant the FY14 performance appraisal that contained lower ratings than the previous two years, evidencing diminished performance capabilities

[REDACTED]

**C. Did the responsible management official(s) have knowledge of Complainant's protected disclosures or perceive Complainant as making or preparing protected disclosures? Yes**

*January 28, 2014, Disclosure to [REDACTED] regarding privacy violations involving the unauthorized access of telework folders*

As described above, [REDACTED] testified that he did not have any knowledge that Complainant disclosed privacy violations regarding unauthorized access of telework folders to [REDACTED] and we have no reason to doubt his credibility; therefore, that protected disclosure could not have been a contributing factor in [REDACTED] concurrence on Complainant's FY14 performance appraisal.

As described below, we determined that [REDACTED] knew that Complainant disclosed alleged privacy violations regarding unauthorized access to telework folders to [REDACTED].

On January 28, 2014, Complainant advised [REDACTED] that he violated privacy regulations by having unauthorized access to telework agreements of employees. Specifically, Complainant told [REDACTED], because he was not Complainant's supervisor he was not authorized to have his telework agreement. [REDACTED] testified that he told [REDACTED] in the presence of Complainant during the same conversation, "Hey man, just so you know, you can't do that. You're not our supervisor. [REDACTED] has to collect these. Because I don't have a problem doing my telework agreement, but that's a personnel issue. That has to be done by [REDACTED] or [REDACTED]." [REDACTED] testified that he was aware Complainant had complained about him ([REDACTED]) for having unauthorized access of his telework agreement. Subsequently, [REDACTED] then approached [REDACTED] and acknowledged that he caused the problem. [REDACTED] testified that he had a conversation with [REDACTED] about his unauthorized access of telework agreements once he became aware of the alleged privacy violation.

On March 13, 2014, [REDACTED] emailed [REDACTED] and [REDACTED], and stated "Boss, Wish I'd worded it a little differently. Have since emailed a couple notes to [REDACTED] [REDACTED]. Suffice to say, [REDACTED] [Complainant] and [REDACTED] continue to stay busy w/their [with their] agendas."

*Timing*

[REDACTED] became aware Complainant's January 28, 2014, protected disclosure 80 days prior to when he issued Complainant his FY14 performance appraisal.

We conclude Complainant's January 28, 2014, disclosure of privacy violations to [REDACTED] could have been a contributing factor in [REDACTED], but not [REDACTED], decision to administer Complainant a downgraded FY14 performance appraisal.

[REDACTED]

*January 28, 2014, Disclosure to [REDACTED] regarding privacy violations involving the unauthorized access of telework folders*

We determined that [REDACTED] and [REDACTED] knew that Complainant disclosed privacy violations regarding unauthorized access of telework folders to [REDACTED].

On January 28, 2014, [REDACTED] emailed [REDACTED], [REDACTED], and [REDACTED] advising them of privacy violations involving [REDACTED]. [REDACTED] email also reflected that Complainant met with [REDACTED] and disclosed the same PII violations. Although [REDACTED] did not testify to having knowledge that the Complainant disclosed PII violations, [REDACTED] admitted that it was possible that Complainant did disclose PII violations to [REDACTED]. Furthermore, [REDACTED] testified that he had discussions with [REDACTED] acknowledging his contribution to the alleged privacy violation. [REDACTED] further testified that [REDACTED] was aware that Complainant had discussions with [REDACTED], and it would be “hard to fathom” [REDACTED] did not surmise that Complainant disclosed PII violations to [REDACTED]. Additionally, [REDACTED] testified that he had knowledge that Complainant disclosed privacy violations to [REDACTED] through [REDACTED] email.

#### *Timing*

[REDACTED] and [REDACTED] knowledge of Complainant’s January 28, 2014, disclosure occurred 80 days prior to [REDACTED] and [REDACTED] administering Complainant’s FY14 performance appraisal.

We conclude Complainant’s January 28, 2014, disclosure of alleged privacy violations to Agency officials could have been a contributing factor in [REDACTED] and [REDACTED] decision to administer Complainant a downgraded FY14 performance appraisal.

#### **D. Would the same personnel action have been taken, withheld, or threatened absent the protected disclosures? No**

Once a preponderance of the evidence establishes that one or more protected disclosures could have contributed to the decision to take the personnel action, the case is substantiated unless clear and convincing evidence establishes that the personnel action would have been taken even in the absence of the protected disclosures.

#### *April 18, 2014, Downgraded FY 14 Performance Appraisal*

We determined that [REDACTED] would not have given Complainant an overall rating of Level 3, “Acceptable” in his FY14 performance appraisal absent Complainant’s protected disclosures.

We determined that [REDACTED] would have concurred on Complainant’s FY14 performance appraisal absent Complainant’s protected disclosure.

[REDACTED]



Complainant's FY14 performance appraisal, which reflected negatively on [REDACTED] lack of oversight of his personnel.

In addition, as described above, [REDACTED] actions and comments expose a possible motive to reprise. Specifically, [REDACTED] stated that Complainant's disclosures to coworkers and Agency officials were disruptive to [REDACTED] department. [REDACTED] testified Complainant and [REDACTED] were "stirring things up and causing [my] department not to be able to function smoothly."

Additionally, [REDACTED] statement in the March 13, 2014, email to [REDACTED] also reflected strong motive to reprise against Complainant. Specifically, [REDACTED] believed Complainant's reporting of privacy violations constituted an "agenda." [REDACTED] email stated:

Boss, Wish I'd worded it a little differently. Have since emailed a couple notes to [REDACTED] [REDACTED]. Suffice to say, [REDACTED] [Complainant] and [REDACTED] continue to stay busy w/their [with their] agendas.

Further, [REDACTED] denigrated Complainant in his discussion with [REDACTED] knowing full well that his negative comments could hinder the Complainant's ability to obtain a promotion and future employment. [REDACTED] testified that [REDACTED] questioned if Complainant actually had a bachelor's degree and his learning potential, and stated that he would not rehire Complainant, if the situation presented itself, because he was not the "team player" [REDACTED] hoped he would be.

[REDACTED] *Stated Reasons*

[REDACTED] testified he only had periodic contact while Complainant worked at DINFOS and did not oversee his daily performance. As a result of [REDACTED] being Complainant's second-line supervisor, he did not question [REDACTED] rating for Complainant's FY14 performance appraisal and that [REDACTED] narratives for "Supports Organizational Goals and Mission," and "Teamwork" matched the "Met" critical element ratings. [REDACTED] testified, "I just look at what the statements are and I can tell by looking at this these are not excellent. There's not enough there to justify an excellent bullet."

[REDACTED] *Motive to Reprise*

Complainant's protected disclosure to [REDACTED] could have motivated [REDACTED] in his decision to concur on Complainant's FY14 performance appraisal because Complainant's disclosure resulted in a PALD privacy violation, which fell under [REDACTED] as the [REDACTED]. Additionally, as a result of [REDACTED] and Complainant's disclosures, [REDACTED] had to take action against [REDACTED] by administering him a counseling MFR outlining the supposed privacy violations and proper safeguarding procedures. However, the MFR was not disciplinary, and [REDACTED] supported [REDACTED] actions. Additionally, we

found no evidence to suggest that [REDACTED] was so personally close to [REDACTED] that he would reprise against Complainant to support [REDACTED]

[REDACTED], however, testified that [REDACTED] narratives supported Complainant's overall performance appraisal rating and that because he was only a second line supervisor who did not have the opportunity to observe Complainant's performance, he trusted [REDACTED] judgment. In addition, [REDACTED] denied that Complainant's protected disclosure motivated his decision to concur with Complainant's FY14 performance appraisal rating.

### *Disparate Treatment*

DINFOS HR provided comparator data documenting FY13 and FY14 performance appraisals for PALD GS employees. In FY13, the data showed that [REDACTED] and [REDACTED], as Rating and Reviewing Officials, respectively, rated five [REDACTED] PALD [REDACTED] (including Complainant), and two [REDACTED] PALD [REDACTED] as Level 5 "Excellent." In FY14, [REDACTED] and [REDACTED] rated four [REDACTED] (including Complainant) and two [REDACTED]. Out of six performance appraisals listed in the DINFOS HR data showing ratings by [REDACTED] and [REDACTED] in FY14, Complainant and [REDACTED]<sup>4</sup>, the only two whistleblowers, received downgraded performance appraisals from a Level 5 "Excellent" to a Level 3 "Acceptable."

As described above, we determined by clear and convincing evidence that [REDACTED] would not have taken the same personnel actions against Complainant absent his protected disclosures, and that [REDACTED] would have taken the same personnel action against Complainant absent his protected disclosures.

## **VII. DISCUSSION**

[REDACTED] knew of Complainant's disclosures involving privacy violations to [REDACTED] and [REDACTED]. As a result of Complainant's disclosures, [REDACTED] administered [REDACTED] a counseling MFR for PII violations. We found by a preponderance of evidence that Complainant's protected disclosures contributed to [REDACTED] downgrade of Complainant's FY14 performance appraisal. Further, [REDACTED] did not provide clear and convincing evidence that he would have downgraded Complainant's appraisal absent the protected disclosures. [REDACTED] failed to provide any specific instances of complainant's "whining" other than the PII violation and how it affected the department. We, therefore, found that he did so in reprisal for Complainant's protected disclosure to Agency officials.

[REDACTED] demonstrated animus toward Complainant in his discussion with [REDACTED] because he did not consider Complainant a team player and in his email to [REDACTED] and [REDACTED] when he stated that the [REDACTED] continue to stay busy w/their agendas." [REDACTED] also stated that [REDACTED] and Complainant were "stirring things up" in a way that prevented his

<sup>4</sup> As stated in the findings of fact, [REDACTED] left DINFOS by April 6, 2014, for a [REDACTED] position, before the FY14 appraisal was approved. He did not receive the FY14 appraisal, it was not entered in his official personnel file, and it has not affected his career.

[REDACTED]

department from functioning smoothly. However, he did not provide evidence that Complainant's actions were actually detrimental. As [REDACTED] did not provide any justification on Complainant's FY14 appraisal for downgrading him on the two critical elements, and he failed to provide evidence that Complainant's "whining" detrimentally affected the organization, we found that Complainant's protected disclosures were, at least, a part of the reason [REDACTED] downgraded the Complainant's appraisal. Further, [REDACTED] downgraded only Complainant's and [REDACTED] appraisals; the only employees who could be considered whistleblowers. While it is possible that both Complainant's and [REDACTED] performance diminished, [REDACTED] did not provide clear or convincing evidence to demonstrate that in his testimony or on the Complainant's appraisal. Although [REDACTED] stated that he addressed Complainant's performance with him, he could not remember any specific conversations. [REDACTED] provided only one MFR to support his downgrade of Complainant's appraisal, which was prepared after Complainant's FY14 performance appraisal.

[REDACTED] interim appraisal of Complainant did not provide any indication that Complainant's performance was worse than the previous year. Lastly, [REDACTED] stated that "you've got to really have some pretty profound and detailed justification for an "exceeds" and that he submitted Complainant for "Rookie of the year" in 2012. When further questioned why Complainant's performance dropped to a "met" in teamwork for FY14, [REDACTED] stated only that it was "not an "F" on his report card," and mentioned that he put Complainant in for a cash award.

By letter dated August 2, 2016, we provided [REDACTED] the opportunity to comment on the results of our investigation. In his response, [REDACTED] wrote that he disagreed with the conclusion of the report of investigation and that he never reprimed against any subordinate who reported violations. However, he offered no additional evidence supporting his reply. After carefully considering [REDACTED] response, we stand by our conclusion that he administered Complainant a downgraded FY14 performance appraisal in reprisal for his protected disclosures.

[REDACTED] knew of one disclosure Complainant made to [REDACTED] alleging privacy violations. As a result of Complainant's disclosure, [REDACTED] administered [REDACTED] a counseling MFR for privacy violations. Since [REDACTED] was Complainant's second-line supervisor, he did not oversee Complainant's daily work performance and did not question [REDACTED] rating of Complainant. [REDACTED] supported Complainant's FY14 performance appraisal because he believed the narratives provided by [REDACTED] matched the critical element ratings and he trusted [REDACTED] judgment. In addition, he definitively denied that Complainant's protected disclosures motivated him to reprimed against him, and we found no reason to doubt his credibility. We found by clear and convincing evidence that [REDACTED] concurrence with Complainant's FY14 performance appraisal was not in reprisal for Complainant's protected disclosure to [REDACTED].

[REDACTED]

**VIII. CONCLUSION(S)**

We conclude that:

- A. [REDACTED] administered Complainant a downgraded FY14 performance appraisal in reprisal for his protected disclosures.
- B. [REDACTED] concurrence of Complainant's downgraded FY14 performance appraisal was not in reprisal for his protected disclosures.

**IX. RECOMMENDATIONS**

- A. We recommend that the Director of the Defense Media Activity review, reevaluate and implement appropriate remedial action with respect to Complainant's downgraded FY14 performance appraisal.
- B. We recommend that the Director of the Defense Media Activity take appropriate action with respect to [REDACTED] for the substantiated reprisal against Complainant.

[REDACTED]



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