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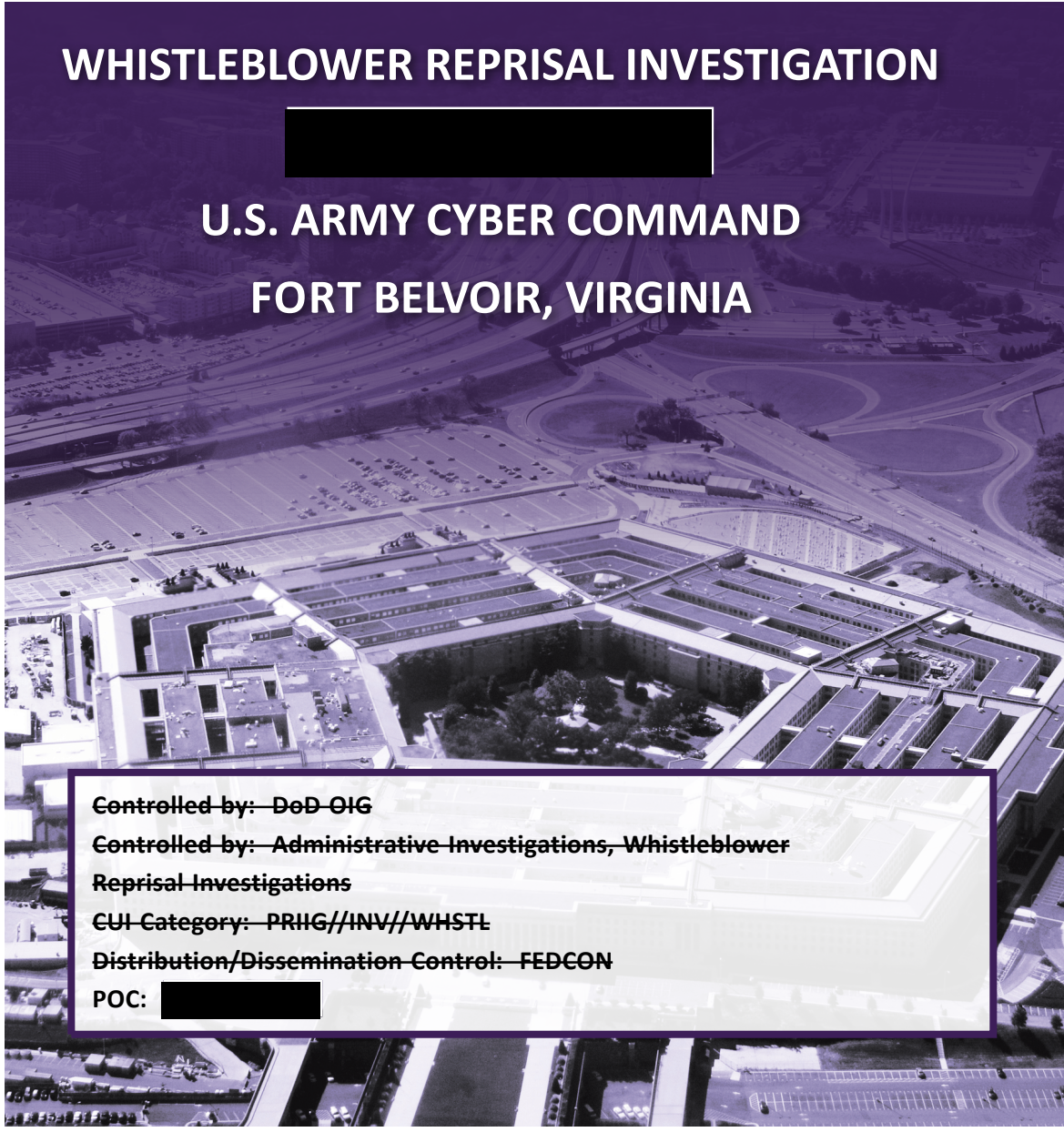
JANUARY 31, 2024



WHISTLEBLOWER REPRISAL INVESTIGATION



U.S. ARMY CYBER COMMAND FORT BELVOIR, VIRGINIA



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WHISTLEBLOWER REPRISAL INVESTIGATION

U.S. ARMY CYBER COMMAND FORT BELVOIR, VIRGINIA

Executive Summary

We conducted this investigation in response to a reprisal complaint alleging that [REDACTED] (Subject 1) and [REDACTED] (Subject 2), [REDACTED], took four personnel actions and one action affecting eligibility for access to classified information against [REDACTED] (the Complainant) in reprisal for filing complaints with an Inspector General (IG), participating in a command climate survey, providing testimony in a command investigation, and making protected disclosures to his supervisors. The following background information is provided for these individuals.

- Subject 1 served as the Government [REDACTED] [REDACTED] within the U.S. Army Cyber Command (ARCYBER) [REDACTED] at Fort Belvoir, Virginia.
- Subject 2 served as the ARCYBER [REDACTED] at Fort Gordon, Georgia.
- The Complainant served as the [REDACTED] [REDACTED] in the ARCYBER [REDACTED] at Fort Belvoir.

The Complainant made eight protected disclosures from June 15, 2018, through October 2, 2020.

- One to the ARCYBER Office of Inspector General (OIG), Subject 1, and other ARCYBER officials
- One to the ARCYBER OIG and Subject 1
- One to the ARCYBER OIG
- One to an ARCYBER investigating officer
- One to the ARCYBER chaplain
- Two to Subject 1
- One to Subject 2

After making these protected disclosures, the Complainant experienced personnel actions and an action affecting his eligibility for access to classified information taken by Subject 1 and Subject 2. Subject 1 removed the Complainant's supervisory duties, submitted derogatory information to the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS), proposed terminating the Complainant's employment, and issued

the Complainant a performance evaluation with an overall rating of 1 – Unacceptable.¹ Subject 2 terminated the Complainant’s employment. Furthermore, Subject 1 knew of five of the Complainant’s protected disclosures and Subject 2 knew of four, before taking the previously mentioned personnel actions and action affecting eligibility for access to classified information.

Therefore, we concluded that the Complainant established a *prima facie* allegation of reprisal against Subject 1 and Subject 2 in the first stage of our analysis because the Complainant’s protected disclosures were a contributing factor in Subject 1’s and Subject 2’s decisions to take four personnel actions and one action affecting eligibility for access to classified information, based on knowledge and timing.²

As a result, we proceeded to the second stage of our analysis. For Complainants who are Defense Civilian Intelligence Personnel System (DCIPS) employees and employees with access to classified information within the DoD, we must determine, by clear and convincing evidence, whether the personnel actions or the actions affecting eligibility for access to classified information would have been taken absent any protected disclosures. We found that Subject 1 and Subject 2 lacked clear and convincing evidence for taking four personnel actions against the Complainant and one action affecting the Complainant’s eligibility for access to classified information. In reaching this determination, we found that Subject 1 had relatively weak evidence supporting the personnel actions and the action affecting eligibility for access to classified information he took against the Complainant, and that he had a motive to reprise. We similarly found that Subject 2 had relatively weak evidence supporting her decision to terminate the Complainant’s employment, and that although she lacked a personal motive, she had an institutional motive to remove the Complainant from the organization. We were not able to analyze whether Subject 1 or Subject 2 treated the Complainant disparately when they took personnel actions and an action affecting eligibility for access to classified information against the Complainant, as we found no similarly situated employees to make such analysis. On these bases, we substantiated the allegations that Subject 1 removed the Complainant’s supervisory duties, submitted derogatory information to the DCSA CAS, proposed terminating the Complainant’s employment, and issued the Complainant a performance evaluation with an overall rating of 1 – Unacceptable, and that Subject 2 terminated the Complainant’s employment, in reprisal for the Complainant’s protected disclosures.

¹ At the time of Subject 1’s report, the DCSA CAS operated under the name DoD Consolidated Adjudications Facility. We refer to it in this report as the DCSA CAS.

² Black’s Law Dictionary defines a *prima facie* case as one that is “established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on [offered by] the other side.”

We recommend that the Secretary of the Army take the following remedial and corrective actions.

1. Direct the removal of the Complainant's termination and unsatisfactory performance evaluation from his personnel record.
2. Provide the Complainant with all appropriate back pay and restoration of lost benefits due to Subject 1's and Subject 2's retaliatory actions.
3. Adjust the Complainant's time-in-grade and step to restore the rank or seniority to which he would have been entitled absent the termination of his employment.
4. Provide the Complainant with all appropriate compensatory damages, including a [REDACTED] payment to fulfill the terms of his student loan repayment agreement.
5. Provide the Complainant compensation for reasonable attorney's fees and any other reasonable costs he incurred in this matter.
6. Consider appropriate action against Subject 2 for reprising against the Complainant.

Subject 1 retired from Federal service. Accordingly, we will forward our report to the Director, Washington Headquarters Services, for inclusion in Subject 1's personnel file.

Background

The Complainant worked in the ARCYBER [REDACTED] as the [REDACTED] from April 29, 2018, through November 4, 2020. As the [REDACTED], the Complainant conducted [REDACTED]; and supervised the work of subordinate employees.

The Complainant's supervisory chain consisted of Subject 1 and [REDACTED] (Witness 1), the [REDACTED]. The Complainant's third-line supervisor through June 2020 was [REDACTED] (Employee 1), [REDACTED], ARCYBER; from June through November 2020, the Complainant's third-line supervisor was Subject 2.

Although Witness 1 provided input for the decisions to remove the Complainant's supervisory duties and to propose the Complainant's termination from employment, and served as the higher-level reviewer for the Complainant's performance evaluation, the Complainant made no allegation against him.

The Complainant alleged that he was subjected to four personnel actions and one action affecting his eligibility for access to classified information.

- Subject 1 removed his supervisory duties, submitted derogatory information to the DCSA CAS, proposed terminating his employment, and issued him a performance evaluation with an overall rating of 1 – Unacceptable.
- Subject 2 terminated his employment.

The Complainant alleged that these personnel actions and the action affecting his eligibility for access to classified information were taken in reprisal for making the following nine disclosures.

- One to the ARCYBER OIG, Subject 1, and other ARCYBER officials, alleging that ARCYBER violated the terms of his hiring agreement
- One to the ARCYBER OIG and Subject 1, alleging that Witness 1 and Subject 1 violated Army DCIPS performance appraisal rules
- One to the ARCYBER OIG, alleging that Subject 1 violated normal hiring procedures by showing favoritism to an unqualified candidate

- One to the ARCYBER chaplain, alleging that [REDACTED] leaders fostered a toxic work environment and misused credit hours, overtime, and compensatory time
- One to an ARCYBER investigating officer, alleging that [REDACTED] leaders fostered a toxic work environment and retaliated against the Complainant
- Three to Subject 1, alleging that Subject 1 isolated him and that [REDACTED] leaders violated rules regarding time, attendance, and overtime
- One to Subject 2, alleging reprisal and summarizing previous disclosures

Scope

This investigation covered the period from June 15, 2018, the date of the Complainant's first protected disclosure, through November 4, 2020, the date of the Complainant's termination from employment. We interviewed the Complainant, Subject 2, and eight witnesses under sworn oath or affirmation. Subject 1 retired from Government service on [REDACTED], and declined to be interviewed. We reviewed documentary evidence regarding departmental and organizational policies, written communications, emails, timesheets, Defense Travel System (DTS) logs, DCSA CAS documents, hiring action records, IG records, reports of investigation, and official personnel files.³

³ DTS is a web-based DoD application that allows users to search for airline, hotel, and rental car reservations; prepare travel documents, including local travel vouchers; input and digitally sign trip information; and determine the status of an authorization or voucher.

Whistleblower Protection for DoD Employees

The DoD OIG conducts whistleblower reprisal investigations involving DCIPS employees and all employees with access to classified information within the DoD under Presidential Policy Directive 19 (PPD-19), "Protecting Whistleblowers with Access to Classified Information," October 10, 2012, as implemented within the DoD by Directive-type Memorandum (DTM) 13-008, "DoD Implementation of Presidential Policy Directive 19," July 8, 2013.

Legal Framework

Two-Stage Process

The DoD OIG employs a two-stage process in conducting whistleblower reprisal investigations under PPD-19, as implemented within the DoD by DTM 13-008. The first stage focuses on the alleged protected disclosures, the personnel actions or the actions affecting eligibility for access to classified information, the subject's knowledge of the protected disclosures, and the timing of the personnel actions or the actions affecting eligibility for access to classified information. The second stage focuses on whether the Subject would have taken or failed to take, or threatened to take or fail to take, the personnel actions or the actions affecting eligibility for access to classified information against the employee absent the protected disclosures.

Sufficient evidence, based on proof by a preponderance of the evidence, must be available to make three findings.⁴

1. The Complainant made a protected disclosure.
2. The Complainant experienced a personnel action or an action affecting eligibility for access to classified information.
3. The protected disclosure was a contributing factor in the personnel action or the action affecting eligibility for access to classified information.⁵

If a preponderance of the evidence supports these three findings, the analysis will proceed to the second stage. In the second stage, we weigh together three factors.

1. The strength of the evidence in support of the personnel action or the action affecting eligibility for access to classified information
2. The existence and strength of any motive to retaliate on the part of the subjects who were involved in the decision
3. Any evidence that the Subject took similar actions against similarly situated employees who did not make protected disclosures

⁴ A preponderance of the evidence is that "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." See title 5 Code of Federal Regulations section 1201.4(q).

⁵ A contributing factor need not be the sole, or even primary, factor. Rather, a contributing factor means "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (emphasis omitted) (citations omitted). In the absence of testimonial or documentary evidence of intent, one way to establish whether the disclosure was a contributing factor is through the use of the knowledge/timing test, meaning that the deciding official knew of the disclosure, and the adverse action was initiated within a reasonable time of the disclosure.

Once a contributing factor is established, the personnel actions or the actions affecting eligibility for access to classified information taken by the Subject against the Complainant are considered reprisal unless clear and convincing evidence demonstrates that the Subject would have taken or failed to take, or threatened to take or fail to take, the personnel actions or the actions affecting eligibility for access to classified information absent the protected disclosures.⁶

Protected Disclosure

A protected disclosure under PPD-19, as implemented within the DoD by DTM 13-008, is any disclosure of information by an employee that the employee reasonably believes evidences:

- a violation of any law, rule, or regulation;
- gross mismanagement;
- a gross waste of DoD funds;
- an abuse of authority; or
- a substantial and specific danger to public health or safety.⁷

Such disclosures are protected under PPD-19, as implemented within the DoD by DTM 13-008, when the Complainant makes the disclosures to qualified recipients, consisting of:

- a supervisor in the employee's direct chain of command up to and including the head of the employing agency;
- the IG of the employing agency or Intelligence Community Element;
- the Director of National Intelligence;
- the IG of the Intelligence Community; and
- an employee designated by any of the above officials for the purpose of receiving such disclosures.

Protected disclosures also include:

- exercising any appeal, complaint, or grievance with regard to a violation of Section A or B of PPD-19;
- lawfully participating in an investigation or proceeding regarding a violation of Section A or B of PPD-19;

⁶ "Clear and convincing evidence is 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. It is a higher standard than 'preponderance of the evidence,'" but a lower standard than beyond a reasonable doubt. See title 5 Code of Federal Regulations section 1209.4(e).

⁷ For PPD-19 cases, the DoD OIG adopts the definition of reasonable belief from title 5 Code of Federal Regulations section 1209.4(f), modified to fit the requirements of PPD-19: The Complainant may be said to have had a reasonable belief when a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the Complainant could reasonably conclude that one of the categories of wrongdoing protected by PPD-19 occurred.

- cooperating with or disclosing information to an IG, in accordance with applicable provisions of law in connection with an audit, inspection, or investigation conducted by the IG; and
- reporting an urgent concern to Congress, via an IG, in accordance with section 416 of the “Inspector General Act of 1978,” as amended (section 416, title 5, United States Code [5 U.S.C. § 416]).⁸

Personnel Actions

PPD-19, as implemented within the DoD by DTM 13-008, prohibits any officer or employee of a covered agency with authority to take, direct others to take, recommend, or approve any personnel action, from taking or failing to take, or threatening to take or fail to take, a personnel action in reprisal for making a protected disclosure.⁹ According to PPD-19, such actions include:

- an appointment, promotion, detail, transfer, reassignment, demotion, suspension, termination, reinstatement, restoration, reemployment, or performance evaluation;
- a decision concerning pay, benefits, or awards;
- a decision concerning education or training if the education or training may reasonably be expected to lead to an appointment, reassignment, promotion, or performance evaluation;
- a decision to order psychiatric testing or examination; and
- any other significant change in duties, responsibilities, or working conditions.

Personnel actions do not include actions taken with respect to an employee in a DCIPS position that the DoD Component head has designated, before the action, as being of a confidential, policy determining, policy making, or policy advocating character; terminations of an employee pursuant to 10 U.S.C. § 1609; and certain terminations of an employee pursuant to 50 U.S.C. §§ 3024(m) and 3036(e) or 5 U.S.C. § 7532.¹⁰

⁸ Section 416(a)(2) of the Inspector General Act of 1978, as amended, defines an urgent concern as “[a] serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters.”

⁹ PPD-19 defines covered agency as an executive department or independent establishment, as defined under 5 U.S.C. § 101, “Executive Department,” and 5 U.S.C. § 104, “Independent Establishment,” that contains or constitutes an intelligence community element. Additionally, PPD-19 defines intelligence community element as “any executive agency or unit thereof determined by the President under [5 U.S.C. § 2302(a)(2)(C)(ii), “Prohibited Personnel Practices,”] to have as its principal function the conduct of foreign intelligence or counterintelligence activities, including but not limited to the Office of the [Director of National Intelligence], the Central Intelligence Agency, the [NSA], the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, and the National Reconnaissance Office. For purposes of [PPD-19], the term ‘intelligence community element’ does not include the Federal Bureau of Investigation.”

¹⁰ 10 U.S.C. § 1609, “Termination of Defense Intelligence Employees,” authorizes the Secretary of Defense to terminate any DCIPS employee from their employment if the Secretary considers such an action to be in the interests of the United States; and 5 U.S.C. § 7532, “Suspension and Removal,” authorizes the head of an agency to suspend an employee of the agency without pay or terminate a suspended employee from employment when they consider the action necessary or advisable in the interests of national security. Section (m) of 50 U.S.C. § 3024, “Responsibilities and Authorities of the Director of National Intelligence,” and section (e) of 50 U.S.C. § 3036, “Director of the Central Intelligence Agency,” reference the authorities of the Director of National Intelligence and the Director of the Central Intelligence Agency.

Action Affecting Eligibility for Access to Classified Information

PPD-19, as implemented within the DoD by DTM 13-008, prohibits any officer or employee of an Executive Branch agency with authority to take, direct others to take, recommend, or approve any action affecting an employee's eligibility for access to classified information from taking or failing to take, or threatening to take or fail to take, any action affecting an employee's eligibility for access to classified information in reprisal for making a protected disclosure.

Findings of Fact

Contextual Events

Complaints About the Terms of the Complainant's Hiring Agreement

From June 2018 through September 2020, the Complainant made a series of disclosures alleging that ARCYBER violated the terms of his hiring agreement.

Under the terms of the hiring agreement, ARCYBER provided a student loan repayment incentive of [REDACTED], payable in bi-weekly installments in 2018 and 2019 to the Complainant's student loan provider. In return, the Complainant agreed to a 3-year employment obligation, to begin after the final student loan payment on December 31, 2019. The Complainant signed the agreement on March 30, 2018, and began employment at ARCYBER on April 29, 2018.

Our review of emails sent by the Complainant, Subject 1, and other ARCYBER employees showed that as early as June 15, 2018, the Complainant raised concerns to Subject 1 and an ARCYBER Human Resources (HR) specialist that the first student loan payment was late and could impact the agreed-upon payment schedule. Two weeks later, the Complainant reported to Subject 1 and three ARCYBER officials, including the ARCYBER HR specialist, that the payments were too small and would result in an underpayment of [REDACTED]. Over the next 7 months, the Complainant raised the same issue with seven ARCYBER officials, including an ARCYBER supervisory HR specialist, a civilian pay administration specialist, the director of the civilian personnel advisory center, and the ARCYBER Deputy G-1 (Personnel and Manpower), always including Subject 1 as a courtesy copy.¹¹

One year after the Complainant first raised concerns about the student loan repayments, he filed a complaint with the ARCYBER OIG, on June 27, 2019, alleging that ARCYBER violated the terms of his hiring agreement. The Complainant reported an underpayment of [REDACTED] in 2018 and raised concerns that delayed payments would cause a delay in the start of his employment obligation, which could not begin until all payments were complete.¹²

The Complainant told us that, around this time, he noticed that ARCYBER stopped making student loan payments altogether. The Complainant's leave and earnings statements showed that ARCYBER did not make any student loan payments from June 8, 2019, through March 28, 2020. When the payments resumed, the Complainant emailed an ARCYBER supervisory HR specialist, a time and attendance customer service representative, the ARCYBER Deputy Chief of Staff Comptroller, the ARCYBER OIG, and Subject 1 to report

¹¹ ARCYBER received HR services from HR specialists within its in-house G-1 (Personnel and Manpower) office as well as from HR specialists at the civilian personnel advisory centers. In those cases when it was necessary to distinguish between the in-house HR specialists and the civilian personnel advisory center HR specialists, we have done so. In all other cases, we have simply referred to "ARCYBER HR."

¹² We reviewed the Complainant's leave and earnings statements for 2018. We found that ARCYBER made 15 payments of [REDACTED] to the Complainant's student loan provider in 2018, totaling [REDACTED], for an underpayment of [REDACTED].

that the bi-weekly payments were too small and would not total [REDACTED]. A series of emails followed between Subject 1, the ARCYBER OIG, the ARCYBER G-1 personnel, the civilian personnel advisory center personnel, the ARCYBER Chief of Staff, and the Complainant, culminating in the ARCYBER Chief of Staff directing Subject 1, on July 20, 2020, to issue the Complainant an updated student loan repayment agreement to provide a one-time, lump-sum payment of [REDACTED]. Shortly before his termination from employment, the Complainant emailed Subject 1 on September 15, 2020, that ARCYBER never paid the [REDACTED] lump sum.

IG Complaint About Performance Evaluations

The Complainant submitted a complaint to the ARCYBER OIG on December 26, 2019, alleging that Witness 1 and Subject 1 violated Army rules regarding DCIPS performance evaluations by dictating to the Complainant and other supervisors the numerical ratings to assign to their subordinates. The Complainant alleged that this “racking and stacking” of employees preempted the DCIPS appraisal process, which required employees to self-report their accomplishments and rating officials to provide their evaluations before higher-level reviewing officials approved or rejected the evaluations. The Complainant told us that before filing the IG complaint, he addressed the matter with Subject 1.

ARCYBER OIG records showed that IG personnel reviewed the complaint and referred the matter to the ARCYBER Commander in March or April 2020. ARCYBER subsequently conducted an Army Regulation (AR) 15-6 investigation into the Complainant’s allegations, which we discuss further in the section titled, [“Toxic Work Environment and Retaliation.”](#)¹³

IG Complaint About ARCYBER Hiring Action

From August 2019 through June 2020, ARCYBER conducted a series of recruitment events to hire a replacement for Subject 1. The Complainant submitted a complaint to the ARCYBER OIG on February 3, 2020, alleging that Subject 1 violated normal hiring procedures to ensure his favored candidate was hired. In investigating this matter, we reviewed internal ARCYBER HR documents; emails sent by Subject 1, the Complainant, and other applicants; and written testimony provided by Subject 1 to an ARCYBER investigator.

ARCYBER initially advertised Subject 1’s [REDACTED] supervisory position at its job fair at Fort Gordon, on August 20 and 21, 2019. However, according to a contemporaneous email from Subject 1, ARCYBER did not widely advertise the job fair, resulting in a “sparse pool” of applicants. In fact, documents provided by an ARCYBER HR specialist showed that the job fair resulted in a single applicant, a [REDACTED] employed by U.S. Army Europe. The Complainant and a [REDACTED] colleague later emailed Subject 1 that they did not learn of the job fair in time to attend, but wanted to apply for the position.

¹³ AR 15-6, “Procedures for Administrative Investigations and Boards of Officers,” April 1, 2016.

On October 4, 2019, ARCYBER then attempted to recruit candidates through an internal canvas. The internal canvas resulted in two interested candidates—the Complainant and the ██████ colleague. However, ARCYBER HR determined that an internal canvas could only accept ██████ applicants and that more than two applicants would be required to execute a ██████ hiring action. As a result, ARCYBER posted a public announcement on USAJOBS sometime between October 9 and December 31, 2019.¹⁴

After these recruitment efforts, Subject 1 scheduled an interview panel for January 10, 2020, composed of himself, Witness 1, and a third panel member. However, emails between them showed that the third panel member raised a concern to Subject 1 and Witness 1 about whether the ██████—recently promoted to ██████—was eligible to apply for a ██████ position, and on January 9, 2020, the panel was cancelled.¹⁵ ARCYBER then initiated a new hiring action, this time posting the position on USAJOBS from March 18 through March 23, 2020.

The Complainant filed an IG complaint on February 3, 2020, alleging that Subject 1 did not follow normal hiring procedures and showed “open favoritism to a candidate whom [sic] is not qualified.” The Complainant alleged that Subject 1 did not widely advertise the hiring action; rather, Subject 1 shared the vacancy announcement only with his friends. The Complainant also alleged that it was improper for Subject 1 to take part in reviewing resumes, and that after the cancellation of the initial hiring action, Subject 1 delayed the hiring action and rewrote the position description to enable him to hire his favored candidate.

According to testimony that Subject 1 later gave to an investigating officer in a separate matter, the Complainant’s ██████ colleague also accused Subject 1 of “playing favorites” with the hiring action.

Emails between Subject 1 and Witness 1 showed that, because of the Complainant’s IG complaint, Employee 1—Subject 2’s predecessor as the ARCYBER ██████—directed that Subject 1 be removed from the hiring action. Subject 1 discussed Employee 1’s decision in a March 30, 2020 email to Witness 1:

Did [Employee 1] talk to you? He came to me and said there was a complaint with IG about my “having a favorite[.]” ... [Employee 1] wants me to have nothing to do with the hiring process. [...] I am not guessing who started the complaint. I will only add that over the weekend [a colleague] sent me a text that [the Complainant] informed him he heard through the grape vine [sic] that I was excluded from the hiring process.

¹⁴ USAJOBS is the U.S. Government’s official employment site, which Federal agencies use to post job openings and match qualified applicants to these jobs.

¹⁵ We were unable to establish who specifically cancelled the panel.

Disputes over the Complainant's Travel Vouchers

From March 2020 through the Complainant's termination from employment, the Complainant and Subject 1 had an ongoing dispute over the Complainant's local travel vouchers.

The dispute began in March 2020, when Subject 1 provided the Complainant with six documents, including a memorandum template for requesting and receiving supervisor approval for local travel. On March 10, 2020, using the provided template, the Complainant sent five memorandums in four separate emails to Subject 1 for signature, covering travel conducted on January 22, January 30, February 14, March 9, and March 12, 2020. In a separate email, the Complainant also reminded Subject 1 that he had submitted two travel vouchers in September 2019 that Subject 1 never processed.

Subject 1 responded to the Complainant's email in which the Complainant provided the memorandums for travel conducted on February 14 and March 9, 2020, stating that he had told the Complainant that he would not approve the September 2019 travel vouchers. Subject 1 directed the Complainant to delete the September 2019 travel vouchers; however, Subject 1 did not address the memorandums for travel conducted in 2020. Over the next 3 weeks, the Complainant repeatedly reminded Subject 1 of the pending memorandum submissions for travel conducted in 2020. The Complainant also consolidated the memorandums and re-sent them to Subject 1 on March 18, 2020.

In early June 2020—with Subject 1 still not having signed the Complainant's five new travel memorandums—the Complainant bypassed Subject 1 and submitted vouchers in DTS for reimbursement. The Complainant attached to the vouchers the travel memorandums without Subject 1's signature.

Subject 1 later alleged that the Complainant falsified these travel vouchers and that the Complainant demonstrated a "lack of candor" by attaching the associated travel memorandums. Subject 1 included this allegation in his submission of derogatory information to the DCSA CAS and used the allegation as part of the basis for his proposal to terminate the Complainant's employment and his issuance of a performance evaluation with an overall rating of 1 - Unacceptable.

Isolation Complaint

On April 1, 2020, the Complainant sent Subject 1 an email accusing Subject 1 of isolating him, cutting him out of decisions, allowing other employees to task his subordinates, denying him opportunities for professional development, and leaving him off email threads in which his peers were included. The Complainant also expressed dissatisfaction that he had not received any honorary, monetary, or other recognition for his work, even though his subordinate earned a 40-hour time-off award for work the Complainant was responsible for. The Complainant wrote, "[I]t is a slap in the face that I am not being considered or included."

Time and Attendance Rules

The Complainant told us that at some point during the initial phase of the coronavirus disease-2019 (COVID-19) pandemic, he reported to Subject 1 at an all-hands staff meeting that ARCYBER was violating time and attendance rules regarding telework and the coding of hours on timesheets. The Complainant's disclosure had two elements. First, the Complainant reported to Subject 1 that because ARCYBER employees did not have situational telework agreements, they could not officially telework; instead, the employees should be on an excused absence status when sent home due to the pandemic. Second, the Complainant reported that ARCYBER violated time and attendance rules by directing employees to work at home, but to mark their timesheets as being on administrative leave.

Four of the Complainant's [REDACTED] colleagues with whom the Complainant worked every day told us that they never heard anyone on their team raise telework or time and attendance concerns. However, Witness testimony corroborated that ARCYBER did not complete required telework agreements with employees to formalize the pandemic-related work schedules.

Subject 2 said that she could not recall whether the Complainant raised telework or time and attendance concerns, but noted that these were widespread issues during the COVID-19 pandemic. Subject 2 told us that many ARCYBER employees had timesheet and telework issues and recalled that numerous discussions occurred about these topics from the chief of staff down. Subject 2 also told us that it would not surprise her if the Complainant participated in those discussions but that she did not specifically recall the Complainant making such a complaint.

To determine whether the Complainant made a disclosure regarding telework, time, and attendance, we assessed the conflicting testimony between the Complainant and his colleagues and weighed their relative credibility. We found no reason to call into question the credibility of either the Complainant or his colleagues. In fact, throughout the investigation, documentary evidence consistently supported the Complainant's recollection of events, weighing in favor of his credibility. We considered Subject 2's recollection to be a reasonable explanation for why the Complainant's colleagues either did not perceive or did not recall such a disclosure: during the pandemic, questions about how to conduct and administer telework were rampant. The very frequency of such discussions would make it less likely for the Complainant's colleagues to perceive or recall the Complainant's disclosure as distinct from the general conversation occurring throughout ARCYBER.

The Complainant Directs His Subordinate to Write an Award Nomination

On April 30, 2020, the Complainant emailed his subordinate employee, [REDACTED] (Employee 2), a [REDACTED], directing him to draft a Superior Civilian Service medal nomination and a 40-hour time-off award nomination for both the Complainant and Employee 2. The Complainant provided templates, the Army regulation on incentive awards, a list of his accomplishments, and two Microsoft Word documents describing the Complainant's performance. The Complainant told us that Employee 2 volunteered to assist with the write-up, as Employee 2 had more experience writing in a military style due to his background as a former military officer. Employee 2 has since left the Federal service, and we were not able to interview him to confirm the Complainant's statements. Employee 2 completed a draft of the award nominations on May 7, 2020.

On June 3, 2020, Subject 1 emailed an ARCYBER attorney, seeking input on whether the Complainant violated any policy when he tasked Employee 2 to write the award nominations. In his email, Subject 1 wrote that Employee 2 approached him about the matter and that Employee 2 said that he felt uncomfortable and found the request inappropriate. On June 24, 2020, Employee 2 emailed Subject 1 a narrative of the events surrounding the awards. Employee 2 wrote that he expressed to the Complainant that the achievements on which the awards were based were not yet complete; that some of the achievements were used the previous year for an award Employee 2 received; that using the achievements now might prevent them from using the achievements for a later award; and that the level of effort did not rate the award the Complainant directed. According to Employee 2, the Complainant did not agree with those objections and told Employee 2 to complete the award nominations. Employee 2 also stated that in June 2020, when he told the Complainant that the award nominations were written but not processed, the Complainant directed him to send the award packet to Subject 1.

While these events were ongoing, other ARCYBER leaders and supervisors engaged in similar or related actions. On May 18, 2020—approximately 3 weeks after the Complainant directed Employee 2 to write the award nominations—the ARCYBER Deputy Chief of Staff wrote an email reminding ARCYBER leaders that deputies were expected to write and submit award nominations for their bosses if their bosses were departing the organization. Email records showed that, during this same time period, Witness 1 tasked Subject 1 to write a Legion of Merit award nomination for his supervisor, Employee 1, a draft of which Subject 1 submitted 4 days after the Complainant's directive to Employee 2.¹⁶ In contemporaneous emails, Subject 1 demonstrated an awareness of this similarity, but argued that the situations

¹⁶ The Legion of Merit is a military decoration awarded to members of the Armed Forces who distinguish themselves by exceptionally meritorious conduct in performing outstanding services (10 U.S.C. § 1121, "Legion of Merit: Award").

were different because Employee 1 did not directly task Subject 1. However, email evidence showed that, even if Employee 1 did not directly task Subject 1, Employee 1 personally engaged with his subordinate, Witness 1, to edit the award nomination write-up.

Subject 1 later included information about the award nomination in his submission of derogatory information to the DCSA CAS. The Complainant's actions regarding the award nomination also formed part of the basis for Subject 1's proposal to terminate the Complainant's employment and Subject 1's issuance of a performance evaluation with an overall rating of 1 – Unacceptable.

Plans for the Complainant to Remain at Fort Belvoir

During the time period covered by this report, ARCYBER was in the midst of moving from Fort Belvoir to Fort Gordon. By the summer of 2020, much of the command, including the Complainant's subordinates, had already moved to Fort Gordon. Access to the Fort Gordon facilities required an additional security clearance provided by the National Security Agency (NSA). However, the NSA could not begin adjudicating the Complainant's access to the Fort Gordon facilities until after the DCSA CAS completed its own periodic reinvestigation of the Complainant's eligibility for access to classified information, which was underway at the time. Furthermore, according to an email exchange between Subject 1 and an ARCYBER attorney, the NSA adjudicators had flagged the Complainant for possible counterintelligence indicators. Witness 1 told us that those indicators were based on [REDACTED]. As a result of the delay in adjudicating the Complainant's access, the Complainant remained at Fort Belvoir while much of the rest of ARCYBER moved to Fort Gordon.

Witness testimony and email evidence showed that ARCYBER intended for employees who remained at Fort Belvoir to continue fulfilling their same duties. Witness 1 told us that ARCYBER secured office space at Fort Belvoir to provide access to classified servers, which would allow these employees to maintain their positions and conduct their work from Fort Belvoir until they were cleared to move to Fort Gordon. Witness 1 also told us that supervisors would retain their supervisory duties even if they remained at Fort Belvoir and noted that this was the case for Subject 1, who did not move to Fort Gordon but continued in his role in the [REDACTED].

Email evidence showed that this was the plan for the Complainant as well. On May 6, 2020, Subject 1 emailed an ARCYBER labor attorney and an ARCYBER HR specialist, informing them that the Complainant would be provided work space at Fort Belvoir. On May 15, 2020, the ARCYBER labor attorney replied that the Complainant would "remain in the [National Capital Region] performing his job" pending adjudication. On August 17, 2020, Subject 1 formally notified the Complainant that his duty location would remain at Fort Belvoir and that his "position remains with the [REDACTED]."

The DCSA CAS provided a favorable adjudication of the Complainant's eligibility for access to classified information on August 27, 2020. However, according to the ARCYBER security manager, the NSA adjudication process for accessing the Fort Gordon facilities would take an additional 36 months.

During August and September 2020, the Complainant repeatedly raised concerns to Subject 1 about whether the office space he would be provided at Fort Belvoir would provide the classified and technological capabilities necessary to conduct his duties. For example, the Complainant noted that he would require access to classified computer networks, as well as access to classified phone and video teleconferencing. When informed that the Complainant would not have access to a classified phone system, Subject 1 emailed an individual working on the technology systems that the Complainant "is going to have to learn to work with what he gets. [...] Do not let [the Complainant] push you too much. [...] It is [his] nature to bulldog what he is told he can't get."

Toxic Work Environment and Violations of Regulations

On May 6, 2020, Employee 1 requested that [REDACTED] personnel complete an anonymous command climate survey and submit their responses to the ARCYBER chaplain. The Complainant submitted his survey response to the ARCYBER chaplain by email on May 15, 2020.

In his survey response, the Complainant alleged that [REDACTED] leaders fostered "the most toxic environment I have ever worked in." The Complainant wrote that this toxicity was one of the primary reasons that high-performing employees left the [REDACTED] and that the workplace was "a powder keg waiting to explode." The Complainant further alleged that ARCYBER supervisors did not follow rules, policies, or regulations and misused credit hours, overtime, and compensatory time.¹⁷

In late June 2020, Employee 1 provided the results by email to his incoming replacement, Subject 2. Those results did not contain any identifying information or mention the Complainant.

Toxic Work Environment and Retaliation

As discussed previously in the section titled, "[IG Complaint About Performance Evaluations](#)," the Complainant filed a complaint with the ARCYBER OIG in December 2019 alleging that Witness 1 and Subject 1 violated Army DCIPS rules by dictating to the Complainant and other supervisors the numerical ratings to assign to their subordinates on their annual performance evaluations. The ARCYBER OIG referred the complaint to the ARCYBER Commander, and on April 22, 2020, the ARCYBER Chief of Staff appointed an investigating officer to conduct an

¹⁷ As defined by the Office of Personnel Management, credit hours are those hours that an employee elects to work in excess of their basic work requirement so as to vary the length of a workweek or workday. Overtime hours are those hours in excess of 8 hours in a day or 40 hours in a week that are officially ordered in advance. Compensatory time off is time off on an hour-for-hour basis in lieu of overtime pay. Federal agencies may grant compensatory time off in lieu of overtime pay at the request of the employee.

AR 15-6 investigation into whether Subject 1, Witness 1, and other [REDACTED] personnel engaged in prohibited personnel practices. The investigating officer interviewed approximately 30 individuals, including the Complainant, Subject 1, Witness 1, and Employee 1. We reviewed documents related to the initiation and closure of the investigation, evidence and testimony collected by the ARCYBER investigating officer, and the report of investigation.

The Complainant provided written replies to the investigating officer on May 21, 2020. The Complainant wrote that since he was “part of the reason this started,” he was “VERY concerned about retaliation.” The Complainant described what he considered to be a toxic work environment, in which [REDACTED] supervisors, including Subject 1, failed to properly implement the DCIPS evaluation process, did not appropriately recognize or reward accomplishments, mismanaged their teams, failed to effectively communicate, and did not follow regulations. When the investigating officer asked if he ever witnessed or experienced [REDACTED] personnel disrespect or berate employees in violation of 5 U.S.C. § 2301, “Merit System Principles,” the Complainant responded that he had observed and experienced such behaviors although he did not know the details of the referenced statute. The Complainant also wrote that after he filed complaints with the ARCYBER OIG, his supervisors counseled him and wrote him up “for things that blow my mind.”

Subject 1 also gave written testimony to the ARCYBER investigating officer in which he noted that the Complainant had filed multiple complaints against him. In his statement, Subject 1 did not identify specifically what the Complainant alleged and neither defended himself nor admitted to any misconduct.

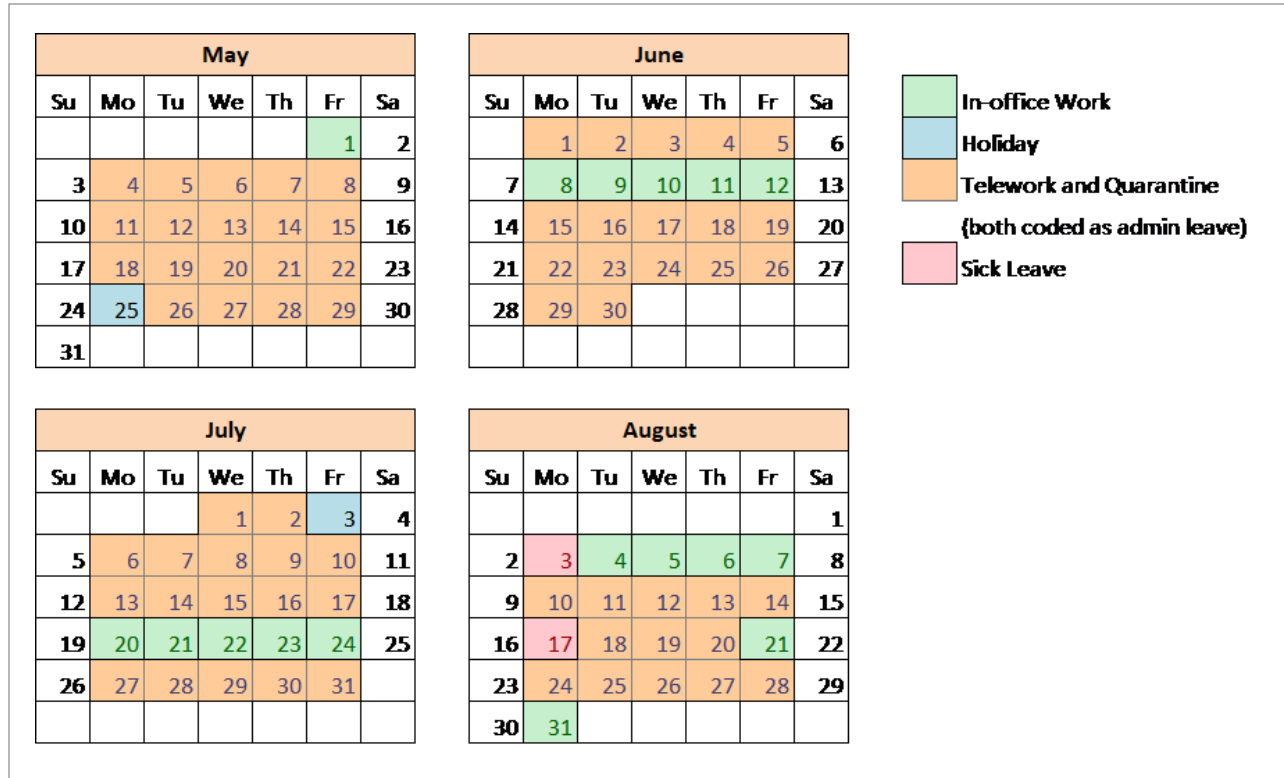
In their report of investigation, the ARCYBER investigating officer concluded that [REDACTED] leadership, including Subject 1, provided improper guidance on how employees should code their timesheets; exhibited counterproductive behaviors that had an adverse effect on subordinates and the mission; showed a general lack of trust in their subordinates; and conducted a “problematic” performance evaluation process by which subordinates were judged against the performance of their peers rather than against their performance objectives. However, despite the investigating officer’s findings, the ARCYBER Chief of Staff determined that [REDACTED] personnel did not engage in prohibited personnel practices.

Repeated Absences to Visit Dying [REDACTED]

Around the time that the Complainant tasked Employee 2 to write an award nomination and participated in the command climate survey and the command investigation, the Complainant also began a lengthy period of COVID-19-related quarantine and telework.

The Complainant’s timesheets showed that he spent the bulk of May, June, July, and August 2020 on administrative leave, as depicted in the calendar in Figure 1.

Figure 1. Complainant’s Administrative Leave Shown on Calendar for May Through August 2020



These absences occurred in the context of the early months of the COVID-19 pandemic, during which time ARCYBER required any civilian employee traveling outside a 100-mile radius to quarantine for 14 days on administrative leave. Additionally, the ARCYBER [REDACTED] was operating on a shift schedule, in which employees alternated working 1 week in the office and 1 week on telework. Given the nature of their work, [REDACTED] employees on telework primarily conducted administrative tasks and online training, rather than substantive, mission-related duties. [REDACTED] employees coded both their telework weeks and quarantine periods as administrative leave.

During this time, the Complainant’s [REDACTED], before dying in June 2020. As a result of this illness and other events, the Complainant made multiple trips to [REDACTED], outside the 100-mile radius—two to visit his [REDACTED] in May 2020; one at the death of his [REDACTED] in June 2020; and one to pick up his wife and child in July 2020. As these trips were outside the 100-mile radius, each trip triggered a 14-day quarantine period.

The Complainant also missed most of his second regularly scheduled workweek in August. Email evidence showed that the Complainant came down with a fever and had some symptoms of congestion and fatigue on Sunday, August 16; took a COVID-19 test on Monday, August 17; and then spent 3 days on quarantine awaiting the results of the COVID-19 test. When the test came back negative, the Complainant returned to work on Friday, August 21.

Overtime Rules

In July 2020, the Complainant twice emailed Subject 1 that it was unlawful to direct the use of credit hours in the place of overtime or compensatory time.

The Complainant first raised the issue in a July 22, 2020 email, in which he requested from Subject 1 the procedure or policy for an employee to request overtime or compensatory time. Subject 1 told the Complainant to request credit hours, as overtime requests required a justification related to an exceptional circumstance. The Complainant responded to Subject 1 that employees “[cannot] use credit time for upcoming suspenses where we do not have time in the standard 8 hour day to meet. By law, it is not appropriate to use credit time for that.”

The following week, the Complainant emailed Subject 1 to request that he grant compensatory time to two of the Complainant’s subordinates, explaining that the subordinates needed to prepare a briefing for the commanding general and that they could not complete this work during their standard tour of duty. The Complainant noted that credit hours would not be appropriate and provided a link to an Office of Personnel Management (OPM) handbook on the laws and regulations governing credit hours, overtime, and compensatory time.

Subject 1 forwarded the Complainant’s email to Witness 1, writing that he would not endorse the request and that he was consulting with an ARCYBER attorney. Subject 1 told Witness 1 that “if the lawyer finds [the Complainant] to be correct we have a lot of issues to deal with.” Subject 1 then notified the Complainant by email that he did not endorse the request and suggested that the Complainant discuss the request with a Subject matter expert in ARCYBER HR. Subject 1 wrote that he would support the request if the Subject matter expert agreed with the Complainant’s analysis. We found no evidence of any further communications or actions taken on this matter.

Actions Begin

Subject 1 Removes the Complainant's Supervisory Duties

On August 6, 2020, Subject 1 emailed Witness 1 a proposal to remove the Complainant's supervisory duties. Subject 1 wrote that the Complainant had taken extensive leave from work—spending 6 of 10 workweeks on COVID-19-related quarantine—and that he anticipated future absences, as the Complainant planned to attend a funeral and take parental leave. Subject 1 explained that these absences had an adverse impact on the team and the mission. Subject 1 noted that he consulted with an ARCYBER HR specialist, who informed Subject 1 that it was within his authority to remove the Complainant's supervisory duties and that no formal documentation was needed.

Subject 1 then met with Witness 1, Subject 2, an ARCYBER attorney, and an ARCYBER HR specialist. According to an email Subject 1 sent to ARCYBER HR, all participants concurred with removing the Complainant's supervisory duties.

Subject 1 removed the Complainant's supervisory duties on August 11, 2020. In his memorandum to the Complainant, Subject 1 described the decision as a nondisciplinary management action intended to correct morale and welfare issues on the Complainant's team. Subject 1 provided three reasons for taking the action: (1) the Complainant's recurring long-term absences during the COVID-19 pandemic; (2) the Complainant's need "in the near term" to "focus on taking care of [his] personal life"; and (3) the Complainant's intent to take parental leave. Based on Subject 1's contemporaneous emails, we inferred that the statement about "taking care of [his] personal life" referred to the Complainant's plan to attend his [REDACTED] funeral, which would trigger an additional 14-day quarantine period.

Subject 1 told the Complainant that they would discuss the return of the Complainant's supervisory duties once the Complainant completed his time away from work and returned to a "reliable and predictable schedule." Finally, Subject 1 noted that Subject 2, Witness 1, the Staff Judge Advocate, the ARCYBER personnel section, and ARCYBER HR all endorsed the decision.¹⁸

On September 4, 2020, Subject 1 emailed Witness 1 that he would continue the restriction of the Complainant's supervisory duties, writing, "I feel [the Complainant] needs to be on the ground in Georgia to perform the responsibility. Even if he gets the expanded coms [*sic*] package he requested I still think his effectiveness to manage from afar is deeply degraded."

¹⁸ The Staff Judge Advocate is a member of the Commander's staff, whose purpose is to provide counsel and mission-focused legal services to the command and staff; to Soldiers, families, civilians, and retirees; and to designated partner organizations.

Subject 1 Submits Derogatory Information to the DCSA CAS

Subject 1 submitted derogatory information about the Complainant to the ARCYBER security office for submission to the DCSA CAS on August 13, 2020. In a memorandum summarizing his concerns, Subject 1 wrote that the Complainant “has lost my confidence in his trustworthiness and integrity” and that “I do not trust him in a position of trust and responsibility to hold a security clearance.” Subject 1 made the following allegations in support of his conclusion.

- **Violation of Commissary Policy.** Subject 1 reported that, on May 1, 2020, the Complainant asked two Soldiers to shop for him at the base commissary, in violation of commissary policy. Subject 1 cited this as an example of the Complainant’s “consistent pattern of skirting the rules and regulations to his personal benefit.” In a rebuttal letter to the DCSA CAS, the Complainant acknowledged asking two individuals to shop for him at the commissary, although he denied knowing that his request was a violation of commissary policy.
- **Falsification of Timesheet and Issues with Time and Attendance.** Subject 1 reported three sets of concerns regarding the Complainant’s timesheet and issues with time and attendance. First, Subject 1 reported that the Complainant missed work on October 31 and November 1, 2019, but marked himself as present on his timesheet. Subject 1 alleged that even though he directed the Complainant to correct his timesheet, the Complainant never did. Next, Subject 1 reported that the Complainant frequently arrived late to work and left early. Subject 1 stated that the problem was so bad that the Complainant’s colleagues tracked his attendance and provided Subject 1 the results; Witness testimony and documentary evidence corroborated this statement. Finally, Subject 1 reported that the Complainant missed 4 days of work in February 2020 due to influenza, but did not provide a doctor’s note until the following month. Additionally, to avoid providing a doctor’s note, the Complainant marked his timesheet as 1 day of sick leave and 3 days of leave without pay. The evidence supported Subject 1’s claims regarding the Complainant’s time and attendance issues. For example, in a rebuttal letter to the DCSA CAS, the Complainant admitted that he mismarked his timesheet in November 2019, though he denied doing so intentionally, instead characterizing the incident as a one-time error.
- **Unexplained Affluence.** Subject 1 reported that the Complainant displayed unexplained affluence by purchasing an \$80,000 vehicle, showing his colleagues that he had up to \$3,000 on hand in cash, and bringing \$2,000 in cash with him on a work trip to Georgia. In his DCSA CAS rebuttal, the Complainant stated that his wife received cash at times for her [REDACTED]. On one occasion, the Complainant was supposed to deposit the cash in his bank account, but forgot to deposit the funds, which resulted in him carrying a large amount of cash. The Complainant denied that this occurred more than once. Regarding the vehicle, the Complainant

argued that he financed the purchase and that the loan was well within his budget. According to sale documents provided by the Complainant, he purchased the vehicle in April 2019, but then sold the vehicle back to the automaker in May 2020 under [REDACTED] Lemon Law.¹⁹ Shortly before selling the vehicle back to the automaker, the Complainant purchased a less expensive vehicle in April 2020 for \$53,897.

- **Directing a Subordinate to Write an Award Nomination.** Subject 1 reported that the Complainant required Employee 2 to submit both of them for awards with monetary value. Subject 1 wrote that Employee 2 reported to Subject 1 that he feared retaliation by the Complainant if he did not write the award nominations. We discussed this matter previously in the section titled, "[The Complainant Directs His Subordinate to Write an Award.](#)"
- **Falsification of Travel Vouchers.** Subject 1 reported to the DCSA CAS that the Complainant falsified his travel vouchers when he submitted three vouchers for payment after Subject 1 informed him that he would not authorize the vouchers, and when the Complainant submitted memorandums indicating that Subject 1 endorsed the vouchers.²⁰ We discussed this matter previously in the section titled, "[Disputes over the Complainant's Travel Vouchers.](#)"

ARCYBER forwarded Subject 1's memorandum to the DCSA CAS on September 2, 2020, and notified the DCSA CAS that it suspended the Complainant's access to sensitive compartmented information.

The DCSA CAS notified the Complainant on April 6, 2022, of its preliminary decision to revoke the Complainant's eligibility for access to classified information, assignment to duties that have been designated national security sensitive, and access to sensitive compartmented information. The DCSA CAS based its decision on Subject 1's memorandum and the supporting evidence that Subject 1 provided. The Complainant submitted a rebuttal to the DCSA CAS on July 5, 2022, and the DCSA CAS favorably adjudicated the Complainant's eligibility for access to classified information on July 20, 2023.

Subject 1 Proposes Terminating the Complainant's Employment

During the summer of 2020, Subject 1 began coordinating with his supervisors, ARCYBER legal counsel (ARCYBER legal), and ARCYBER HR to develop a packet of evidence and to propose disciplinary action against the Complainant.

¹⁹ [REDACTED] Lemon Law protects consumers who purchase vehicles that develop repeat defects or lengthy unusable periods during the first 2 years or 24,000 miles of consumer ownership. [REDACTED]

²⁰ In his report to the DCSA CAS, Subject 1 wrote that the Complainant falsified three travel vouchers. In his later packet of evidence for the proposed disciplinary action against the Complainant (discussed below), Subject 1 also included DTS screenshots of the Complainant's vouchers and attached memorandums for travel conducted on January 30, February 14, and March 9, 2020. However, in his later termination proposal, Subject 1 amended the total to two.

As early as June 10, 2020, Subject 1 discussed the award issue with an ARCYBER HR specialist, who informed Subject 1 that the Complainant's action was improper and a potential violation of Federal regulation. On June 17, 2020, Subject 1 informed the ARCYBER HR specialist and an ARCYBER attorney that he would like to pursue disciplinary action against the Complainant.

In July 2020, Subject 1 provided the ARCYBER HR specialist with various memorandums, emails, and other evidence of the Complainant's alleged misconduct and asked the ARCYBER HR specialist for a recommended course of action. The ARCYBER HR specialist informed Subject 1 that Army DCIPS policies permitted a disciplinary action ranging from a reprimand to removal, and Subject 1 then sought guidance from ARCYBER legal on which action was supportable. When Subject 1 told ARCYBER legal that he believed the Complainant's behavior did not "warrant[] a continuing position of trust and responsibility with the US [sic] Government," the ARCYBER attorney replied that Subject 1's "instinct" could be "well-defended." On September 1, 2020, the ARCYBER attorney emailed Subject 1 that they thought the evidence was sufficient to make a recommendation of adverse action.

Subject 1 proposed terminating the Complainant's employment on September 15, 2020, based on two charges.

1. *Abuse of Authority:* The Complainant directed a subordinate employee to submit an award nomination, which would have resulted in personal financial gain for the Complainant.
2. *Lack of Candor:* The Complainant submitted two travel vouchers for travels on January 22 and February 14, 2020, after Subject 1 told him to cancel the vouchers, and attached to the vouchers memorandums with Subject 1's signature block that contained the words "endorses travel."

Subject 1 explained that although this was the Complainant's first disciplinary offense, the "egregious nature of [his] misconduct" justified removal from Federal service.

Subject 1 Issues the Complainant an Unsatisfactory Performance Evaluation

On September 23, 2020, Subject 1 issued the Complainant a performance evaluation—for the evaluation period from October 1, 2019, through September 26, 2020—with an overall rating of 1 – Unacceptable.²¹ In the evaluation, Subject 1 criticized the Complainant's extended absences from work and below-par [below-average] supervisory performance, and wrote that the Complainant demonstrated poor leadership and integrity when he tasked a subordinate to write an award nomination for them and when he submitted false information in support of a travel voucher. Subject 1 also criticized the Complainant for applying for a joint duty assignment, which Subject 1 characterized as a "determined interest to delay or avoid his managerial responsibility."

²¹ DCIPS performance evaluations use a rating scale that runs from 1 – Unacceptable through 5 – Outstanding.

Although Subject 1 criticized the Complainant's conduct, he made generally favorable remarks about the Complainant's performance. Subject 1 wrote that the Complainant showed "mixed performance" as a manager, noting that while the Complainant missed deadlines and did not present some of his work to leadership, his work products also received a 100 percent acceptance rate, compared to an ARCYBER norm of 30 percent. Subject 1 described the Complainant's [REDACTED] products as "excellent," writing that their "quality was validated by many being operationalized," resulting in "high praise." Subject 1 wrote that the Complainant showed "excellent engagement skills," provided "excellent advice and assistance," and developed technical knowledge beyond that required by his position.

In writing the performance evaluation, Subject 1 sought input from an ARCYBER HR specialist on September 9, 2020, and an ARCYBER attorney on September 10, 2020. The ARCYBER HR specialist told Subject 1 that they could provide guidance on the evaluation process, but could not provide guidance as to the content of the evaluation.²² The ARCYBER attorney edited both the written evaluation and the proposed scores, recommending a slightly lower score on one of the performance elements than Subject 1 initially intended.

Termination Proceedings

The Complainant's Meeting with Subject 2

The Complainant met with Subject 2 on October 2, 2020, to rebut Subject 1's proposal and also provided Subject 2 a written rebuttal. In that rebuttal, the Complainant informed Subject 2 of three of his previous disclosures: (1) the IG complaint about his student loan repayment incentive, (2) the IG complaint about the DCIPS performance evaluation process, and (3) the statement he submitted as part of the AR 15-6 investigation into prohibited personnel practices. The Complainant also wrote that he believed his participation in that investigation led to retaliation.

In his written rebuttal, the Complainant further identified the possibility of retaliation as a mitigating factor that Subject 2 should consider in making her final decision.

The [Complainant] had requested an investigation regarding issues that he observed within his Command. These were submitted after attempting to resolve them directly. There had been IG complaints filed against both Subject 1 and Witness 1. [...] Additionally, there was a large AR 15-6 investigation which [the Complainant] provided a substantial response to. These were all topics the [Complainant] attempted to resolve through his supervisory chain prior to taking drastic steps. In all instances, his first concern was retaliation from his immediate Chain of Command.

²² Witness 1 also told us that he consulted with the ARCYBER HR specialist on whether Subject 1 could assign such low scores to the Complainant and that the ARCYBER HR specialist said it was permissible to do so. The ARCYBER HR specialist told us that the guidance they gave was purely procedural and that they provided no input as to the specific scores or the substance of the written evaluation.

Finally, the Complainant provided an extensive rebuttal of Subject 1's allegations, writing that the charge of abuse of authority was "misrepresented completely" and that the charge of lack of candor was "completely lacking context and factual basis." Regarding the travel vouchers, the Complainant wrote that Subject 1 directed the cancellation of vouchers submitted in 2019, not the vouchers submitted in 2020, and noted that DTS converted the file format of his voucher submissions, creating an inaccurate representation of his submission. We discuss these matters at length in the section titled, "[Strength of the Evidence](#)."

Subject 2 Terminates the Complainant's Employment

Subject 2 notified the Complainant on November 3, 2020, of her decision to terminate the Complainant's employment effective November 4, 2020. In her notice to the Complainant, Subject 2 wrote that she based her decision on the Complainant's abuse of authority and lack of candor, which she said created a toxic climate and demonstrated an inability to perform his duties. Subject 2 also wrote that Army policies permitted her to choose from a range of penalties, from written reprimand to removal, but as the Complainant's potential for rehabilitation was very low, no lesser penalty than removal would deter future misconduct.

Analysis

As described in more detail in the “[Legal Framework](#)” section of this report, the Complainant must first establish that they made a protected disclosure; that subsequent to the disclosure, they were Subject to a personnel action or an action affecting eligibility for access to classified information; and that there is a *prima facie* case that the disclosure was a contributing factor in the personnel action or the action affecting eligibility for access to classified information taken against them. If the first part of the test is met, then we weigh the strength of the evidence in support of the personnel action, the subject’s motive to retaliate, and disparate treatment of others similarly situated who did not make protected disclosures to determine whether the Subject would have taken the same personnel action or action affecting eligibility for access to classified information absent the protected disclosure. If the evidence does not establish that the Subject would have taken or failed to take, or threatened to take or fail to take, the personnel action or the action affecting eligibility for access to classified information absent the protected disclosure, the complaint is substantiated. Conversely, if the evidence establishes that the Subject would have taken or failed to take, or threatened to take or failed to take, the personnel action or the action affecting eligibility for access to classified information absent the protected disclosure, then the complaint is not substantiated. Below, we analyze each of the elements.

Protected Disclosures

We determined, by a preponderance of the evidence, that the Complainant made eight protected disclosures under PPD-19. Table 1 shows the Complainant’s disclosures.

Table 1: Alleged Disclosures

#	Date	Disclosure	Recipient(s)	Protected?
1	June 2018 through September 2020	ARCYBER violated the terms of the Complainant’s hiring agreement	Subject 1, ARCYBER OIG, and other ARCYBER officials	Yes
2	December 26, 2019	Witness 1 and Subject 1 violated Army DCIPS performance evaluation rules	ARCYBER OIG and Subject 1	Yes
3	February 3, 2020	Subject 1 violated normal hiring procedures by showing favoritism to an unqualified candidate	ARCYBER OIG	Yes
4	April 1, 2020	Subject 1 isolated the Complainant	Subject 1	No
5	Spring 2020	█ leaders violated time and attendance rules	Subject 1	Yes
6	May 15, 2020	█ leaders fostered a toxic work environment and misused credit hours, overtime, and compensatory time	ARCYBER chaplain as part of a command climate survey	Yes

Table 1: Alleged Disclosures (cont'd)

#	Date	Disclosure	Recipient(s)	Protected?
7	May 21, 2020	█ leaders fostered a toxic work environment and retaliated against the Complainant	ARCYBER investigating officer	Yes
8	July 2020	█ leaders violated overtime rules	Subject 1	Yes
9	October 2, 2020	Summary of allegations from disclosures 1, 2, and 7, and a new allegation of reprisal	Subject 2	Yes

Source: The DoD OIG.

Disclosure 1: Complaints About the Terms of the Complainant's Hiring Agreement

From June 2018 through September 2020, in his numerous disclosures regarding the student loan repayment plan, the Complainant reported a reasonably believed violation of Federal regulations and DoD rules governing student loan repayment programs.²³ Although the Complainant did not cite a specific law, rule, or regulation, we assessed that he reported a reasonably believed violation of title 5 Code of Federal Regulations Part 575, "Recruitment, Relocation, and Retention Incentives; Supervisory Differentials; and Extended Assignment Incentives," and DoD Instruction (DoDI) 1400.25, Volume 537, "DoD Civilian Personnel Management System: Student Loan Repayment," May 7, 2020.²⁴ The Complainant made these disclosures to his first-line supervisor, the ARCYBER OIG, and other employees designated to receive such disclosures, all of whom were authorized recipients under PPD-19. Therefore, these disclosures were protected under PPD-19. For purposes of analysis, we treated the years-long email chain and IG complaint as a single protected disclosure; for purposes of chronology, we assigned the series of disclosures a date of June 15, 2018.

²³ In determining whether the Complainant possessed a reasonable belief, we considered whether it was possible that Subject 1, or another ARCYBER employee, reduced the student loan payments according to the terms of the hiring agreement. That agreement stated that employees could lose eligibility for the student loan repayment program if they were terminated from employment for reasons of misconduct or performance or if they failed to maintain an acceptable level of performance. At the time of the disclosure, the Complainant had not been terminated from employment. Additionally, Subject 1 assigned him an overall rating of 4—Excellent for the performance evaluation covering the time period in question—from October 1, 2018, through September 30, 2019. Moreover, we found no evidence that Subject 1, or any other employee, sought to reduce or eliminate the student loan payments on the basis of performance or misconduct. Therefore, we concluded that the Complainant possessed a reasonable belief that ARCYBER's management of the student loan payments violated the governing Federal regulations and DoD rules.

²⁴ DoDI 1400.25, Volume 537, took effect on May 7, 2020, incorporating and cancelling the Deputy Under Secretary of Defense for Civilian Personnel Policy Memorandum, "Department of Defense (DoD) Student Loan Repayment Program," September 30, 2004.

Disclosure 2: IG Complaint About Performance Evaluations

In his December 26, 2019 complaint to the ARCYBER OIG, the Complainant reported a reasonably believed violation of Army rules regarding DCIPS performance evaluations, specifically Department of the Army Policy, Volume 2011, “Defense Civilian Intelligence Personnel System Performance Management,” January 19, 2018. The Complainant made this disclosure to the IG of his employing agency and to his first-line supervisor, both authorized recipients under PPD-19. Therefore, this disclosure was protected under PPD-19.

Disclosure 3: IG Complaint About ARCYBER Hiring Action

In his February 3, 2020 complaint to the ARCYBER OIG, the Complainant reported a reasonably believed violation of normal hiring practices by showing favoritism to an unqualified candidate. Although the Complainant did not cite a specific law, rule, or regulation, our analysis of the complaint determined that he reported a reasonably believed violation of 5 U.S.C. § 2302, “Prohibited Personnel Practices,” and DoDI 1400.25, Volume 2005, “DoD Civilian Personnel Management System: Defense Civilian Intelligence Personnel System (DCIPS) Employment and Placement,” March 3, 2012 (Incorporating Change 1, Effective August 21, 2017), which prohibit employees from granting any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment. The Complainant made this disclosure to the IG of his employing agency, an authorized recipient under PPD-19. Therefore, this disclosure was protected under PPD-19.

Disclosure 4: Isolation Complaint

On April 1, 2020, the Complainant sent Subject 1 an email accusing Subject 1 of isolating him, cutting him out of decisions, allowing other employees to task his subordinates, denying him opportunities for professional development, and leaving him off email threads in which his peers were included.²⁵ This disclosure was not protected under PPD-19, as the Complainant did not report a reasonably believed violation of law, rule, or regulation. Although Federal law prohibits harassment on the basis of race, color, religion, sex, national origin, older age, disability, or genetic information, none of these protected categories were the basis of the Complainant’s complaint. Additionally, although DoDI 1020.04, “Harassment Prevention and Responses for DoD Civilian Employees,” June 30, 2020, prohibits harassing behaviors that are unwelcome or offensive to a reasonable person, that regulation took effect several months after the Complainant’s disclosure. Therefore, we did not analyze whether the Complainant’s disclosure constituted a report of a reasonably believed violation of DoDI 1020.04.

²⁵ The Complainant’s email could potentially be interpreted as a report of a significant change in duties or responsibilities and working conditions. We considered this information to provide context for the subsequent removal of the Complainant’s supervisory duties, which we determined was a qualifying personnel action in the section titled, “[Personnel Actions and Action Affecting Eligibility for Access to Classified Information](#).”

Disclosure 5: Violation of Time and Attendance Rules

The Complainant told us that at some point during the initial phase of the COVID-19 pandemic, he reported to Subject 1 at an all-hands staff meeting that ARCYBER was violating time and attendance rules regarding telework and the coding of hours on timesheets. Although the Complainant did not cite a specific law, rule, or regulation, we found that his descriptions reasonably described the telework procedures required by 5 U.S.C. § 6502, “Executive Agencies Telework Requirement,” and DoDI 1035.01, “Telework Policy,” April 4, 2012 (Incorporating Change 1, Effective April 7, 2020). We therefore considered it more likely than not that the Complainant made a disclosure protected under PPD-19 when he reported a reasonably believed violation of telework rules to his first-line supervisor, an authorized recipient of such disclosures under PPD-19.

Disclosure 6: Toxic Work Environment and Violations of Regulations

On May 15, 2020, the Complainant sent a survey response to the ARCYBER chaplain, alleging that ■■■ leaders fostered a toxic work environment that was one of the primary reasons that high-performing employees left the ■■■ and that created a workplace that was “a powder keg waiting to explode.” The Complainant also alleged that ARCYBER supervisors did not follow rules, policies, or regulations and that they misused credit hours, overtime, and compensatory time. In his report of a toxic work environment, the Complainant reported information reasonably believed to constitute gross mismanagement. The Complainant reported this information to an authorized recipient under PPD-19, as Employee 1—a supervisor in the Complainant’s direct chain of command—designated the ARCYBER chaplain to receive the command climate survey responses. Therefore, this disclosure was protected under PPD-19.

Disclosure 7: Toxic Work Environment and Retaliation

On May 21, 2020, the Complainant provided written testimony to an ARCYBER investigating officer. In his testimony, he described what he considered to be a toxic work environment, in which ■■■ supervisors, including Subject 1, failed to properly implement the DCIPS evaluation process, did not appropriately recognize or reward accomplishments, mismanaged their teams, failed to effectively communicate, and did not follow regulations. The Complainant also stated that he was very concerned about retaliation. Although the Complainant did not know the details of 5 U.S.C. § 2301, he reported a reasonably believed violation of the statute in his statement and of PPD-19’s prohibition of reprisal. The Complainant made this disclosure to an employee designated by the ARCYBER command to receive such disclosures. Therefore, this disclosure was protected under PPD-19.

Disclosure 8: Violation of Overtime Rules

In July 2020, the Complainant twice emailed Subject 1 that it was unlawful to direct the use of credit hours in the place of overtime or compensatory time. Although the Complainant did not cite a specific law, rule, or regulation, we found that in his July 2020 emails to Subject 1, the Complainant reported a reasonably believed violation of the statutes concerning flexible and compressed work schedules, located in 5 U.S.C. §§ 6120-6133. These statutes define credit hours as those hours worked in excess of an employee's basic work requirement that an employee "elects to work," whereas overtime hours are those hours worked in excess of 8 hours in a day or 40 hours in a week that are "officially ordered in advance." The Complainant made this disclosure to his first-line supervisor, an authorized recipient under PPD-19. Therefore, this disclosure was protected under PPD-19.

Disclosure 9: The Complainant's Meeting with Subject 2

On October 2, 2020, the Complainant met with Subject 2 to rebut Subject 1's proposed termination from employment and provided Subject 2 a written rebuttal. In his October 2, 2020 disclosure to Subject 2, the Complainant summarized previous disclosures in which he reported reasonably believed violations of Federal regulations and DoD rules governing student loan repayment programs, of Army rules governing the DCIPS performance evaluation process, and of PPD-19's prohibition of reprisal. The Complainant also revealed his participation in an AR 15-6 investigation into prohibited personnel practices, which he believed had led to retaliation. The Complainant made this disclosure to Subject 2, a supervisor in his direct supervisory chain and an authorized recipient under PPD-19. Therefore, this disclosure was protected under PPD-19.

Personnel Actions and Action Affecting Eligibility for Access to Classified Information

We determined, by a preponderance of the evidence, that the Complainant experienced four personnel actions and one action affecting eligibility for access to classified information under PPD-19.

Personnel Action 1: Removal of Supervisory Duties

Subject 1 removed the Complainant's supervisory duties on August 11, 2020. Removal of supervisory duties is a significant change in duties or responsibilities and is therefore a qualifying personnel action under PPD-19.

Action Affecting Eligibility for Access to Classified Information: Submission of Derogatory Information to the DCSA CAS

Subject 1 submitted derogatory information about the Complainant to the ARCYBER security office for forwarding to the DCSA CAS on August 13, 2020. Subject 1's submission of derogatory information affected the Complainant's eligibility for access to classified information, as the DCSA CAS made a preliminary decision to revoke his eligibility for access to classified information, and is therefore a qualifying action under PPD-19.

Personnel Action 2: Proposed Termination from Employment

Subject 1 proposed terminating the Complainant's employment on September 15, 2020. A proposed termination constitutes a threat to terminate an employee, and a termination is a qualifying personnel action under PPD-19.

Personnel Action 3: Unsatisfactory Performance Evaluation

On September 23, 2020, Subject 1 issued the Complainant a performance evaluation—for the evaluation period from October 1, 2019, through September 26, 2020—with an overall rating of 1 – Unacceptable. A performance evaluation is a qualifying personnel action under PPD-19.

Personnel Action 4: Termination from Employment

Subject 2 terminated the Complainant's employment effective November 4, 2020. A termination is a qualifying personnel action under PPD-19.

Contributing Factor

We determined that the Complainant's protected disclosures were a contributing factor in the personnel actions and the action affecting eligibility for access to classified information.

Whether protected disclosures were a "contributing factor" may be established when:

- the Subject had knowledge, actual or inferred, of the Complainant's disclosures, and
- the personnel actions or the actions affecting eligibility for access to classified information took place within a period of time subsequent to the disclosures,

such that a reasonable person could conclude that the disclosures were a contributing factor in the decision to take the actions.

Knowledge

A preponderance of the evidence established that it is more likely than not that Subject 1 knew of five of the Complainant’s protected disclosures before removing his supervisory duties, submitting derogatory information to the DCSA CAS, proposing his termination from employment, and issuing him a performance evaluation with an overall rating of 1 – Unacceptable.

A preponderance of the evidence established that it is more likely than not that Subject 2 knew of four of the Complainant’s protected disclosures before terminating his employment.

We summarize Subject 1’s and Subject 2’s knowledge of the protected disclosures in Table 2 and discuss it in detail following the table.

Table 2: Knowledge of Protected Disclosures

#	Date	Disclosure	Subject 1	Subject 2
1	June 2018 through September 2020	ARCYBER violated the terms of the Complainant’s hiring agreement	Yes	Yes
2	December 26, 2019	Witness 1 and Subject 1 violated Army DCIPS performance appraisal rules	Yes	Yes
3	February 3, 2020	Subject 1 violated normal hiring procedures by showing favoritism to an unqualified candidate	Yes	No
5	Spring 2020	█ leaders violated time and attendance rules	No	No
6	May 15, 2020	█ leaders fostered a toxic work environment and misused credit hours, overtime, and compensatory time	No	No
7	May 21, 2020	█ leaders fostered a toxic work environment and retaliated against the Complainant	Yes	Yes
8	July 2020	█ leaders violated overtime rules	Yes	No
9	October 2, 2020	Summary of disclosures 1, 2, and 7, and a new allegation of reprisal	Not applicable	Yes

Source: The DoD OIG.

Disclosure 1: Complaints About the Terms of the Complainant’s Hiring Agreement

The Complainant made this disclosure to the ARCYBER OIG and to Subject 1, and included Subject 1 on all correspondence related to this disclosure. The Complainant informed Subject 2 of this disclosure in his written rebuttal to Subject 1’s proposal to terminate his employment. Therefore, Subject 1 and Subject 2 knew of the Complainant’s June 2018 through September 2020 disclosure to Subject 1 and the ARCYBER OIG.

Disclosure 2: IG Complaint About Performance Evaluations

The Complainant made this disclosure to the ARCYBER OIG on December 26, 2019. The Complainant told us that he first raised these issues with Subject 1 before going to the IG. In Subject 1's testimony during the AR 15-6 investigation prompted by the Complainant's IG complaint, Subject 1 told the investigator that he knew the Complainant had filed complaints against him. The Complainant informed Subject 2 of this disclosure in his written rebuttal to Subject 1's proposal to terminate his employment. Therefore, it is more likely than not that Subject 1 knew of the Complainant's December 26, 2019 complaint to the ARCYBER OIG. The evidence established that Subject 2 knew of the Complainant's December 26, 2019 complaint to the ARCYBER OIG.

Disclosure 3: IG Complaint About ARCYBER Hiring Action

The Complainant made this disclosure to the ARCYBER OIG on February 3, 2020. Subject 1's March 30, 2020 email to Witness 1 revealed that Subject 1 knew about the IG complaint. Furthermore, we inferred from Subject 1's reference to the Complainant in this email that Subject 1 could have suspected that the Complainant was the source of the IG complaint. Therefore, it is more likely than not that Subject 1 knew of the Complainant's February 3, 2020 complaint to the ARCYBER OIG.

Subject 2 was not assigned to ARCYBER at the time of this complaint and told us that she did not know of this disclosure. We did not find any evidence that Subject 2 knew of this disclosure.

Disclosure 5: Violation of Time and Attendance Rules

The Complainant made a protected disclosure concerning time and attendance rules at some point during the initial phase of the COVID-19 pandemic. According to the Complainant, he made the disclosure to Subject 1 during an all-hands staff meeting. Subject 2 and four of the Complainant's colleagues said that they did not remember the Complainant making such a disclosure. Although we found it more likely than not that the Complainant did, at some point, raise this issue with Subject 1, we found no evidence that Subject 1 or Subject 2 perceived or recalled the Complainant's disclosure, or that they perceived the Complainant as having reported a violation as opposed to participating in a general conversation about time and attendance policies that was occurring throughout ARCYBER during that time period.

Disclosure 6: Toxic Work Environment and Violations of Regulations

The Complainant made this disclosure to the ARCYBER chaplain on May 15, 2020. He provided his survey response as an attachment to an email; that attachment did not include the Complainant's name or any other identifying information. The final compilation of survey responses also did not contain any identifying information and did not mention the Complainant. We found no evidence that Subject 1 or Subject 2 knew of this disclosure.

Disclosure 7: Toxic Work Environment and Retaliation

The Complainant submitted a written statement to an investigating officer on May 21, 2020. We found no evidence that Subject 1 knew the specific contents of the Complainant's statement. However, the Complainant told us that Subject 1 would have perceived that he took part in the investigation. We found it more likely than not that Subject 1 knew of the Complainant's participation, given the number of witnesses interviewed by the investigating officer, Subject 1's own participation in the investigation, and Subject 1's knowledge that the Complainant filed complaints against him. The Complainant's participation in that investigation qualified for protection under PPD-19 if he disclosed, or was perceived as disclosing, a violation of law, rule, or regulation. We found it more likely than not that Subject 1 perceived that the Complainant made such a disclosure, as the investigation concerned allegations that Subject 1 violated Army regulations and as Subject 1 knew that the Complainant had made similar allegations previously.

The Complainant informed Subject 2 of this disclosure in his written rebuttal to Subject 1's proposal to terminate his employment. Therefore, Subject 2 knew of the Complainant's May 21, 2020 disclosure.

Disclosure 8: Violation of Overtime Rules

The Complainant reported to Subject 1 on July 22, 2020, that it was unlawful to use credit hours when the standard tour of duty was insufficient to complete assigned work. We found no evidence that either the Complainant or Subject 1 shared this disclosure with Subject 2, and Subject 2 denied knowing about this disclosure. Therefore, Subject 1 knew of the Complainant's July 22, 2020 disclosure and Subject 2 did not.

Disclosure 9: The Complainant's Meeting with Subject 2

In his written rebuttal to Subject 1's proposal to terminate his employment, the Complainant summarized previous disclosures in which he reported reasonably believed violations of Federal regulations and DoD rules governing student loan repayment programs, of Army rules governing the DCIPS performance evaluation process, and of PPD-19's prohibition of reprisal. The Complainant also revealed his participation in an AR 15-6 investigation into prohibited personnel practices, which he believed had led to retaliation. During her interview with this office, Subject 2 told us that she did not remember or did not know of the Complainant making any of these disclosures. However, Subject 2's handwritten notes from her October 2, 2020 meeting with the Complainant—which she provided to this office during the investigation—indicate that the Complainant discussed with her at least one IG complaint and his fear of retaliation. Specifically, Subject 2 wrote, “DCIPS ~ rack + stacking of employees for payout ... Reporting to IG w/ fear of retaliation [emphasis added].”

Furthermore, Subject 2 told us that she carefully read the Complainant’s written rebuttal and spent 2 full days reviewing the case documents. As the Complainant’s written rebuttal included the above described disclosures—including a clear statement that he feared retaliation for having made those disclosures—and as Subject 2’s handwritten notes contained a reference to the Complainant’s fear of retaliation for making a report to an IG, we concluded that Subject 2 knew of the Complainant’s October 2, 2020 disclosure, despite her testimony to the contrary.

As Subject 1 did not take a personnel action or an action affecting eligibility for access to classified information after this date, his knowledge or lack of knowledge of the disclosure is irrelevant.

Timing of Actions

The Complainant made protected disclosures from June 2018 through October 2020. These protected disclosures occurred in the weeks and months preceding each of Subject 1’s and Subject 2’s actions. Table 3 summarizes the timing of the Complainant’s protected disclosures, the personnel actions and the action affecting eligibility for access to classified information taken against him, and Subject 1’s and Subject 2’s knowledge of the protected disclosures.

Table 3: Timing of Protected Disclosures, Personnel Actions, and Action Affecting Eligibility for Access to Classified Information

PD	PA	Date	Description	Knowledge	
				Subject 1	Subject 2
x		June 2018 through September 2020	ARCYBER violated the terms of the Complainant’s hiring agreement	Yes	Yes
x		December 26, 2019	Witness 1 and Subject 1 violated Army DCIPS performance appraisal rules	Yes	Yes
x		February 3, 2020	Subject 1 violated normal hiring procedures by showing favoritism to an unqualified candidate	Yes	No
x		May 21, 2020	█ leaders fostered a toxic work environment and retaliated against the Complainant	Yes	Yes
x		July 2020	█ leaders violated overtime rules	Yes	No
	x	August 11, 2020	Subject 1 removed the Complainant’s supervisory duties	–	–

Table 3: Timing of Protected Disclosures, Personnel Actions, and Action Affecting Eligibility for Access to Classified Information (cont'd)

PD	PA	Date	Description	Knowledge	
				Subject 1	Subject 2
	x	August 13, 2020	Subject 1 submitted derogatory information to the DCSA CAS	-	-
	x	September 15, 2020	Subject 1 proposed terminating the Complainant's employment	-	-
	x	September 23, 2020	Subject 1 issued the Complainant a performance evaluation with an overall rating of 1 – Unacceptable	-	-
x		October 2, 2020	Summary of disclosures 1, 2, and 7, and a new allegation of reprisal	N/A	Yes
	x	November 3, 2020	Subject 2 terminated the Complainant's employment	-	-

LEGEND

- PD Protected Disclosures
- PA Personnel Actions

Source: The DoD OIG.

Based on Subject 1's and Subject 2's knowledge and the close timing between the protected disclosures and the personnel actions, a preponderance of the evidence established that the protected disclosures were a contributing factor in the personnel actions. Additionally, based on Subject 1's knowledge and the close timing between the protected disclosures and the action affecting the Complainant's eligibility for access to classified information, a preponderance of the evidence established that the protected disclosures were a contributing factor in the action affecting the Complainant's eligibility for access to classified information.

Because the Complainant successfully established the elements of a *prima facie* allegation by a preponderance of the evidence, the question then became whether there was clear and convincing evidence that Subject 1 or Subject 2 would have taken the same actions even absent the protected disclosures. In so doing, we considered the following factors: strength of the evidence, motive to retaliate, and disparate treatment of the Complainant.

Strength of the Evidence

Stated Reasons for Subject 1 Taking Three Personnel Actions Against the Complainant and One Action Affecting the Complainant's Eligibility for Access to Classified Information

Subject 1 declined to be interviewed for this investigation and, therefore, did not provide us with his reasons for taking three personnel actions against the Complainant and one action affecting the Complainant's eligibility for access to classified information. We relied

on Subject 1's contemporaneous emails and written memorandums to identify and analyze his reasons for taking these personnel actions and action affecting eligibility for access to classified information.

Removal of Supervisory Duties

STATED REASONS FOR SUBJECT 1 REMOVING THE COMPLAINANT'S SUPERVISORY DUTIES

Subject 1 removed the Complainant's supervisory duties on August 11, 2020. In his memorandum to the Complainant, Subject 1 provided three reasons for taking the action: (1) the Complainant's recurring long-term absences during the COVID-19 pandemic; (2) the Complainant's need "in the near term" to "focus on taking care of [his] personal life"; and (3) the Complainant's intent to take parental leave. Based on Subject 1's contemporaneous emails, we inferred that the statement about "taking care of [his] personal life" referred to the Complainant's plan to attend his [REDACTED] funeral, which would trigger another 14-day quarantine period.

Subject 1 told the Complainant that they would discuss the return of the Complainant's supervisory duties once the Complainant completed his time away from work and returned to a "reliable and predictable schedule." However, on September 4, 2020, Subject 1 notified Witness 1 of his intent to continue the restriction of the Complainant's supervisory duties because his work location of Fort Belvoir, Virginia, limited his ability to effectively manage his subordinates in Fort Gordon, Georgia.

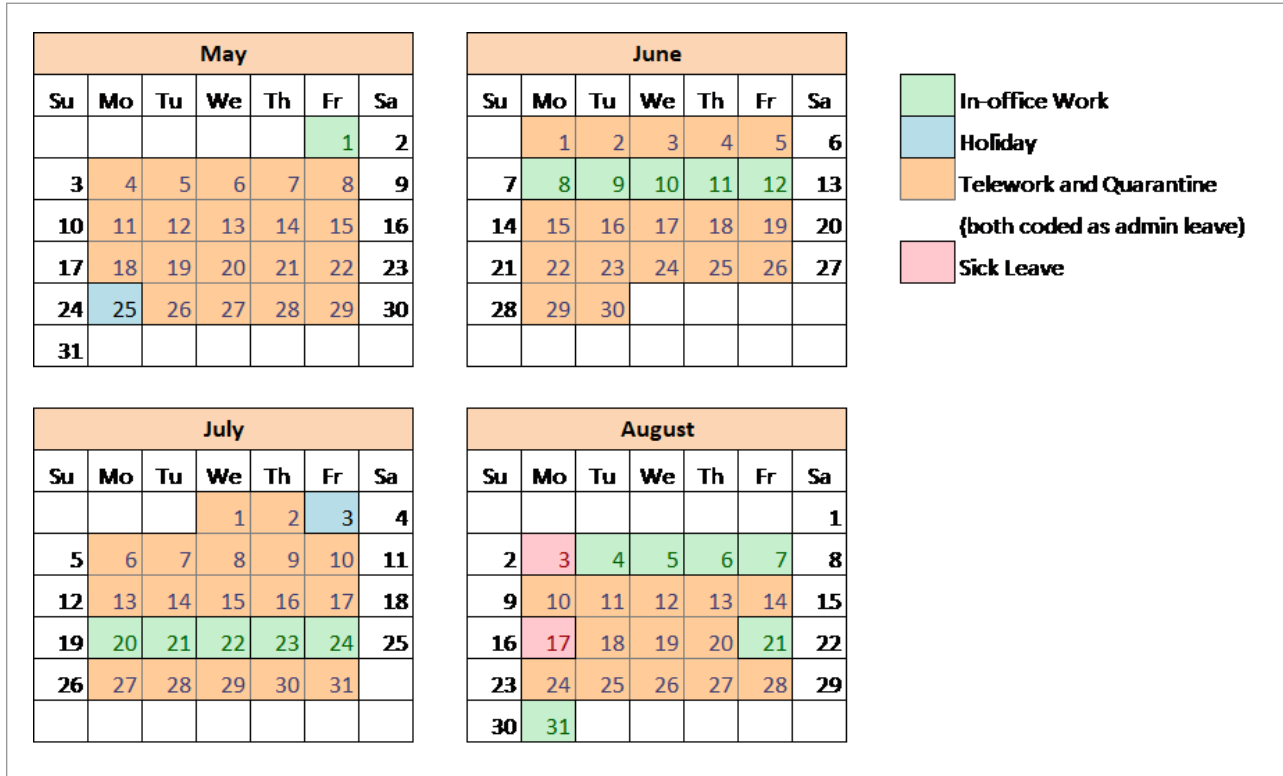
Finally, Subject 1 noted that Subject 2, Witness 1, the Staff Judge Advocate, the ARCYBER personnel section, and ARCYBER HR all endorsed the decision.

Witness 1 provided corroborating testimony in support of Subject 1's stated reasons for suspending the Complainant's supervisory duties, noting that the Complainant's frequent absences and working remotely meant that he could not access the classified documents necessary to supervise his subordinates. Subject 2 said that she was aware of concerns about the Complainant's supervisory duties but did not recall the specifics, and told us that she was not directly involved in the decision. Subject 2 also told us that Witness 1 and Subject 1 handled the removal of the Complainant's supervisory duties.

The ARCYBER HR specialist confirmed that they informed Subject 1 that it was within his authority to remove the Complainant's supervisory duties and that no formal documentation was needed.

We reviewed the Complainant’s timesheets to validate Subject 1’s statements regarding the Complainant’s alleged long-term absences from work. As discussed in the section titled, “[Repeated Absences to Visit Dying ██████████](#)” and illustrated in the calendar in Figure 2, we confirmed that the Complainant spent the bulk of May, June, July, and August 2020 on administrative leave and that the Complainant missed most of the workweeks immediately following the removal of his duties.

Figure 2. Complainant’s Long-Term Absences from Work Shown on Calendar for May Through August 2020



EVIDENCE AGAINST SUBJECT 1’S STATED REASONS FOR REMOVING THE COMPLAINANT’S SUPERVISORY DUTIES

As described above, Subject 1 provided three reasons for removing the Complainant’s supervisory duties: (1) the Complainant’s recurring long-term absences, (2) the Complainant’s need to focus on taking care of his personal life, and (3) the Complainant’s intent to take parental leave. The evidence we reviewed called into question each of these rationales.

First, Subject 1 lacked a reasonable basis on which to believe that the Complainant’s previous recurring long-term absences from work would continue. Subject 1 knew that these absences were the result of the Complainant’s visits to see his dying ██████████. Subject 1 also knew that the Complainant’s ██████████ passed away in June 2020. As the Complainant’s ██████████ had already passed away, the primary cause of the recurring long-term absences no longer existed.

In fact, at the time of Subject 1's action, the Complainant had already returned to his regularly scheduled week-on, week-off shifts for the 3 weeks immediately preceding the removal of his supervisory duties—July 20 through August 7, 2020—including 2 weeks of in-office work.

Second, shortly after removing the Complainant's duties, Subject 1 learned new information that should have made him reconsider the other two reasons he gave for taking this action.

- **Funeral:** Subject 1 stated that he removed the Complainant's supervisory duties to allow him to focus on taking care of his personal life, which we interpreted as a reference to the Complainant's plan to attend his funeral. At the time, Subject 1 believed that attendance at his funeral would trigger another 14-day quarantine period. However, email evidence showed that Subject 1 learned on either August 11, 2020—the day he removed the Complainant's supervisory duties—or August 12, 2020, that attendance at the funeral would *not* trigger a quarantine period, due to a change in policy.
- **Parental Leave:** Subject 1 stated in the memorandum to the Complainant that removing his supervisory duties would allow him to take parental leave. However, according to Subject 1's emails to ARCYBER HR, Subject 1 did not know when the Complainant planned to take parental leave, and on August 21, 2020, the Complainant informed Subject 1 that he did not intend to take parental leave until after October 1, 2020.

The change in quarantine policy and the clarification of the Complainant's parental leave plans undercut Subject 1's basis for removing his duties. Although Subject 1 did not know this information at the time of taking the action, he learned of it shortly after. If Subject 1 was sincere in the reasons he gave, one would expect this new information to prompt a reconsideration of whether the Complainant's duties should be returned, especially considering that Subject 1 stated that the action was nondisciplinary in nature. However, we found no evidence that Subject 1 ever reconsidered his decision.

Third, Subject 1's lack of clarity concerning the criteria for returning the Complainant's duties called into question his sincerity in describing the action as nondisciplinary. Subject 1 told the Complainant that they would discuss the return of the Complainant's supervisory duties once the Complainant returned to a "reliable and predictable schedule." However, as stated above, the Complainant had already returned to his regularly scheduled week-on, week-off shifts for the 3 weeks immediately preceding the removal of his supervisory duties, including 2 weeks of in-office work. When we asked an ARCYBER attorney about this, they concurred that Subject 1's criteria were not clear and lacked a means to validate when the Complainant would be ready for his duties to be returned. We found that the Complainant repeatedly emailed Subject 1 to request the specific criteria for what would qualify as a reliable and predictable work schedule. Witness 1 emailed Subject 1 on September 8, 2020, reminding him that he still had not provided an "official response to [the Complainant's] question about

what he needs to meet to regain supervisory duties.” Email evidence suggested that Subject 1 told the Complainant that he was awaiting feedback from ARCYBER legal before providing the criteria; however, we found no evidence that Subject 1 ever provided the requested criteria, nor did we find any emails between Subject 1 and ARCYBER legal discussing the matter.

Moreover, Subject 1 had by this point already notified Witness 1—though not the Complainant—of his intention to continue the restriction of the Complainant’s duties indefinitely due to his work location of Fort Belvoir. Subject 1 also resisted the Complainant’s effort to ensure that he had the technology necessary to conduct his duties from Fort Belvoir, such as by describing the Complainant as a “bulldog” in his efforts to obtain a classified phone system. These statements called into question whether Subject 1 ever intended to return the Complainant’s duties and also conflicted with statements made by ARCYBER officials, including Witness 1, that supervisors located in Fort Belvoir would continue to supervise employees located in Fort Gordon.

Fourth, although Subject 1 coordinated this decision with ARCYBER HR, an ARCYBER attorney, and his supervisors, the evidence indicated that he did not provide them with all available evidence and made misleading statements regarding the Complainant’s attendance. For example, the ARCYBER HR specialist told us that they did not recall Subject 1 providing them with the Complainant’s timesheets or schedule. Regarding the Complainant’s attendance, we found that when Subject 1 emailed the ARCYBER attorney about removing the Complainant’s supervisory duties, he wrote that the Complainant had been absent from the workplace for 16 of the last 20 workweeks. This statement was misleading in that [REDACTED] employees only worked every other week from the workplace at the time—a fact of which Subject 1 was well aware, as he sent a similar email the day before to Witness 1 in which he wrote that the Complainant had been scheduled to work 10 workweeks since the pandemic began, not 20. Subject 1 also gave a misleading description of the Complainant’s attendance to Witness 1, writing that the Complainant “has established a pattern of one week on and three weeks off,” a statement that was inaccurate at the time Subject 1 wrote the email.

Finally, Subject 1’s antipathy towards the Complainant’s use of leave conflicted with the OPM’s general stance on leave for Federal employees. The OPM affords wide latitude to Federal employees in the use of annual, sick, bereavement, and parental leave. For example, the OPM states that a Federal employee “has a right to take annual leave, Subject to the right of the supervisor to schedule the time at which annual leave may be taken.” The OPM also states that employees are entitled to use sick leave to care for a family member who is incapacitated or to attend the funeral of a family member. Subject 1’s decision to remove the Complainant’s supervisory duties on the basis of the Complainant’s use of entitled leave and agency-directed quarantine, at the height of the COVID-19 pandemic, appeared on its face to be a pretext, intended to provide a basis for future disciplinary action.

Submission of Derogatory Information to the DCSA CAS

STATED REASONS FOR SUBJECT 1 SUBMITTING DEROGATORY INFORMATION TO THE DCSA CAS

Subject 1 submitted derogatory information about the Complainant to the ARCYBER security office for submission to the DCSA CAS on August 13, 2020, writing that the Complainant “has lost my confidence in his trustworthiness and integrity” and that “I do not trust him in a position of trust and responsibility to hold a security clearance.”

DoD regulations require supervisors to report any derogatory information that falls within the Intelligence Community adjudicative guidelines.²⁶ Those guidelines include conduct involving questionable judgment or an unwillingness to comply with rules and regulations; evidence of significant misuse of Government or other employer’s time or resources; and affluence that cannot be explained by known sources of income.²⁷

Subject 1 made the following allegations against the Complainant.

- The Complainant asked multiple military personnel to shop for him at the base commissary, in violation of commissary policy.
- The Complainant falsified his timecard.
- The Complainant frequently arrived at work late or left work early.
- The Complainant violated time and attendance regulations by failing to provide a doctor’s note to justify his sick leave.
- The Complainant displayed unexplained wealth by purchasing an \$80,000 automobile and by carrying \$2,000 to \$3,000 in cash.
- The Complainant required a subordinate employee to submit the Complainant and the subordinate employee for awards with monetary value.
- The Complainant falsified three DTS travel vouchers.

As discussed in the “[Findings of Fact](#)” section, the evidence supported the factual bases for several of Subject 1’s claims. The evidence showed that the Complainant asked two Soldiers to shop for him at the commissary; the Complainant admitted to mismarking his timesheet; the Complainant’s colleagues tracked his arrivals and departures at work; the Complainant carried a large quantity of cash, although he denied that this occurred more than once; the Complainant owned an \$80,000 automobile; and the Complainant tasked a subordinate employee to write an award nomination.

²⁶ DoD Manual 5200.02, “Procedures for the DoD Personnel Security Program (PSP),” April 3, 2017.

²⁷ Intelligence Community Policy Guidance 704.2, “Personnel Security Adjudicative Guidelines for Determining Eligibility for Access to Sensitive Compartmented Information and Other Controlled Access Program Information,” October 2, 2008. See also Security Executive Agent Directive 3, “Reporting Requirements for Personnel with Access to Classified Information or Who Hold a Sensitive Position,” June 12, 2017.

EVIDENCE AGAINST SUBJECT 1'S STATED REASONS FOR SUBMITTING DEROGATORY INFORMATION TO THE DCSA CAS

We found evidence that called into question Subject 1's motive for making his report to the DCSA CAS, as well as evidence that either disputed or, in some cases, directly contradicted several of his allegations.

Regarding the violation of commissary policy, falsification of timesheet, issues with time and attendance, and unexplained affluence, we found that the significant gap in time between the events in question and Subject 1's report to the DCSA CAS called into question his motive for making that report. Email evidence showed that Subject 1 learned of the commissary incident the same day it occurred, on May 1, 2020, more than 3 months before his report to the DCSA CAS. The timesheet and attendance issues occurred from November 2019 through February 2020, approximately 6 months before Subject 1's report. According to sale documents provided by the Complainant, he purchased the vehicle in April 2019, but sold the vehicle back to the automaker in May 2020 under New Jersey's Lemon Law. The Complainant, therefore, purchased the vehicle 16 months before Subject 1 reported the matter to the DCSA CAS and sold the vehicle 3 months before Subject 1 made his report. Although we could not determine when Subject 1 learned of the vehicle purchase, the purchase and sale dates suggest a delay of between 3 and 16 months. If Subject 1 believed that these events constituted violations of the adjudicative guidelines, he was obligated to make an immediate report. Subject 1's delay in doing so called into question his motive for doing so.

Directing a Subordinate to Write an Award Nomination. The Complainant disputed Subject 1's characterization of his direction to Employee 2 to write him up for an award. In his rebuttal to the DCSA CAS, the Complainant argued that Employee 2 offered to help write the award nomination in "more military-style writing," that he never pressured or forced Employee 2 to write the award, and that the Complainant and Employee 2 had a close working and personal relationship. In his interview with this office, the Complainant told us that Employee 2 volunteered to assist with the write-up, as Employee 2 had more experience writing in a military style due to his background as a former military officer. Employee 2 has since left Federal service, and we were not able to interview him to confirm the Complainant's statements.

Falsification of Travel Vouchers. Our investigation found substantial evidence that contradicted Subject 1's claim that the Complainant falsified three travel vouchers.

Subject 1 made two allegations to the DCSA CAS regarding these vouchers: (1) The Complainant submitted three vouchers for payment after Subject 1 directed him to cancel the vouchers; and (2) the Complainant included memorandums that stated that Subject 1 endorsed the submission.

To assess these allegations, we first had to determine whether Subject 1 intended to refer to the vouchers submitted in September 2019 or those submitted in June 2020. We noted that Subject 1 wrote that the Complainant "recently submitted" the vouchers and that the

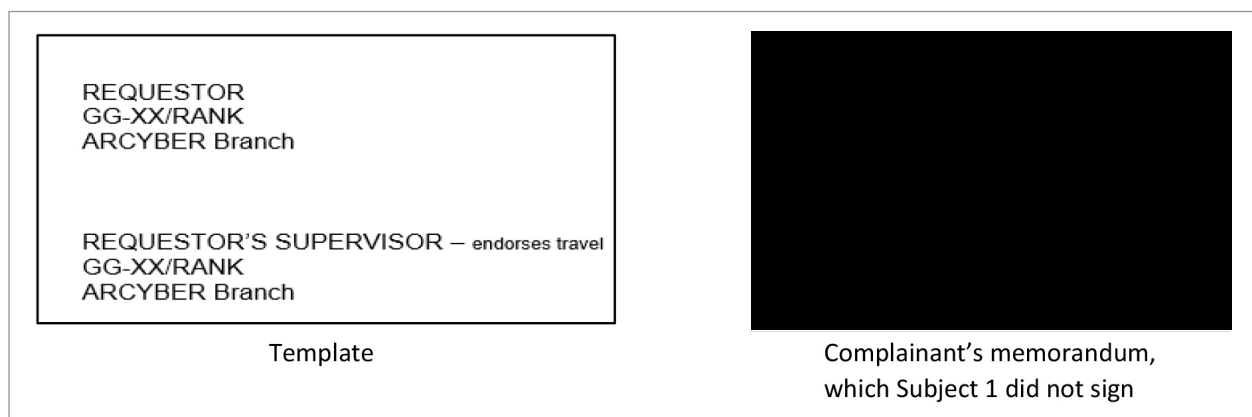
vouchers were “several months old.” We also noted that when Subject 1 later proposed the Complainant’s termination from employment, partially on the basis of the same travel voucher allegations, Subject 1 attached as evidence two of the Complainant’s June 2020 vouchers. Therefore, we concluded that Subject 1’s allegations pertained to the Complainant’s June 2020 voucher submissions, rather than his September 2019 vouchers.

We found no evidence to support Subject 1’s statement that he directed the Complainant to cancel the June 2020 vouchers. We reviewed Subject 1’s email correspondence with the Complainant and found that Subject 1 only directed the Complainant to cancel the vouchers submitted in September 2019. Subject 1 issued this directive to the Complainant in an email sent on March 10, 2020, approximately 3 months *before* the Complainant submitted the vouchers for travel conducted in 2020. Subject 1’s directive could not have constituted a directive to cancel the 2020 vouchers, as no such vouchers existed at the time of Subject 1’s email.

Regarding Subject 1’s allegation that the Complainant submitted memorandums that stated that Subject 1 endorsed the submissions, the Complainant argued that this was a matter of a technical glitch creating a misunderstanding. We found the Complainant’s argument persuasive and supported by the evidence.

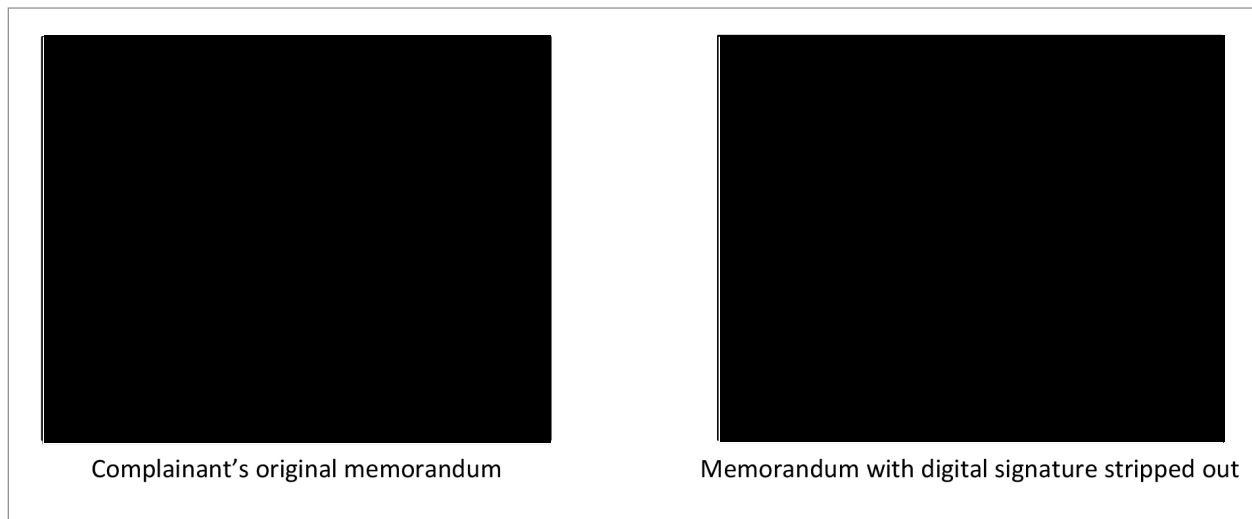
The Complainant told us that the words “endorses travel” next to the supervisor signature block came from an ARCYBER template, which, as we discussed in the section titled, “[Disputes over the Complainant’s Travel Vouchers](#),” the Complainant received from Subject 1. The Complainant signed the memorandums; Subject 1 did not. The Complainant said that he believed it would be evident to a reviewer that Subject 1 had not signed the memorandums and that the reviewer could then decide whether to approve the voucher for payment. See the original template on the left in Figure 3, showing the words “endorses travel,” and the Complainant’s submitted memorandum on the right, showing Subject 1’s unsigned signature block.

Figure 3. Original Template and Complainant’s Submitted Memorandum



When the Complainant submitted the digitally signed memorandums into DTS, the system automatically converted the file format from PDF [Portable Document Format] to PNG [Portable Network Graphic], stripping out the digital signatures, which are only viewable in PDF format.²⁸ When the memorandums went to Witness 1 for approval, it gave the appearance that neither the Complainant nor Subject 1 signed and, therefore, undermined the Complainant’s intended purpose to show that he signed the memorandums while Subject 1 did not. Witness 1 told us that he did not know that DTS stripped out digital signatures. See the DTS version of the Complainant’s memorandum on the right in Figure 4, with the digital signature stripped out, creating the impression that the signature block alone indicated approval.

Figure 4. Complainant’s Original Memorandum and DTS Version of Complainant’s Memorandum



Therefore, we concluded that Subject 1 was technically correct that the Complainant submitted memorandums with the words “endorses travel” next to Subject 1’s signature block, but that the Complainant did not insert these words himself. We also concluded that the original intent of the Complainant’s submissions was undercut when DTS stripped out the Complainant’s digital signature, leaving the impression that neither the Complainant nor Subject 1 signed the memorandums, and that the signature block with the words “endorses travel” alone indicated approval. The Complainant argued that his original memorandums—which the Complainant signed and Subject 1 did not—showed that Subject 1 did *not* endorse the travel, whereas the DTS versions of the memorandums, by removing all signatures, implied that Subject 1 *did* endorse the travel.

²⁸ PNG files are image files used by web designers for depicting graphics with transparent or semi-transparent backgrounds without any loss of quality during compression. PNG is an “open” file format, meaning it can be viewed in a wide range of programs without a license. PDF files, in contrast, require licensed software, which enables the use of certificate-based digital signatures to verify document authenticity and integrity.

Proposed Termination from Employment

STATED REASONS FOR SUBJECT 1 PROPOSING THE COMPLAINANT'S TERMINATION FROM EMPLOYMENT

Subject 1 proposed the Complainant's termination from employment on September 15, 2020, based on two charges.

1. *Abuse of Authority:* The Complainant directed a subordinate employee to submit an award nomination, which would have resulted in personal financial gain for the Complainant.
2. *Lack of Candor:* The Complainant submitted two travel vouchers for travels on January 22 and February 14, 2020, after Subject 1 told him to cancel the vouchers, and attached to the vouchers memorandums with Subject 1's signature block that contained the words "endorses travel."

Subject 1 explained that although this was the Complainant's first disciplinary offense, the "egregious nature of [his] misconduct" justified removal from Federal service.

EVIDENCE AGAINST SUBJECT 1'S STATED REASONS FOR PROPOSING THE COMPLAINANT'S TERMINATION FROM EMPLOYMENT

We discussed the evidence against Subject 1's allegations regarding the award nomination and the travel vouchers in the context of Subject 1's submission of derogatory information to the DCSA CAS. That evidence also applied to Subject 1's termination proposal.

We provide additional evidence against Subject 1's stated reasons in the following sections.

Abuse of Authority. In his submission to the DCSA CAS, Subject 1 reported that the Complainant directed a subordinate to nominate him for an award. In his termination proposal, Subject 1 alleged that this directive constituted an abuse of authority.

An abuse of authority occurs when an employee exercises their power in an arbitrary or capricious manner, resulting in personal gain or advantage to themselves. Although the evidence supported that the award nomination, if approved, would have resulted in personal gain or advantage to the Complainant, the evidence did not support that the Complainant's action was arbitrary or capricious. Rather, the Complainant's actions were consistent with ARCYBER leadership's directives and workplace norms. As discussed in the "[Findings of Fact](#)" section, during this same time period, the ARCYBER Deputy Chief of Staff sent an email reminding ARCYBER leaders that deputies were expected to write and submit award nominations for their bosses if their bosses were departing the organization. In line with this guidance, Witness 1 tasked Subject 1 to write a Legion of Merit award nomination for his supervisor, Employee 1, a draft of which Subject 1 submitted 4 days after the Complainant's directive to Employee 2. Although Employee 1 did not directly task Subject 1, email evidence showed

that Employee 1 personally engaged with his subordinate, Witness 1, to edit the award nomination write-up, further demonstrating a workplace culture in which superiors and subordinates collaborated on awards.

We compared the Complainant's directive to Employee 2 with the ARCYBER Deputy Chief of Staff's directive and Subject 1's writing an award nomination for Employee 1. We identified several differences between the analogues: (1) Employee 1 did not directly task Subject 1, whereas the Complainant directly tasked Employee 2; (2) a Legion of Merit award does not carry a monetary value, whereas the Complainant's proposed award did; and (3) Employee 1's award was an end-of-tour military award, whereas the Complainant's was a civilian award for employees who would be continuing in the same positions. Despite these differences, we also found a compelling similarity: In each case, a superior engaged with a subordinate in drafting their own award nomination. Given this example, the Complainant could have concluded that it was reasonable to work with his subordinate employee on an award nomination intended to reward both their efforts. At a minimum, the Complainant's action was not so disconnected from workplace norms or expectations as to be considered arbitrary or capricious, as would be required for an abuse of authority charge.

Separately, the Complainant noted that Subject 1 never attempted to resolve the matter, provide guidance, or seek clarification from the Complainant before proposing his termination from employment. In his rebuttal to his proposed termination from employment, the Complainant wrote, "I did not intend for this award to be only about me, I wanted it to be for the team's benefit, and if instructed or advised I would have left myself off of the list of personnel to receive the award."

Lack of Candor. Subject 1 alleged that the Complainant committed a lack of candor when he submitted two vouchers for payment after Subject 1 directed him to cancel the vouchers and when he included memorandums indicating that Subject 1 endorsed the vouchers. In our discussion on Subject 1's submission to the DCSA CAS, we identified two significant pieces of evidence against this allegation. First, we determined that Subject 1 never directed the Complainant to cancel the vouchers in question. Second, we determined that DTS stripped out the Complainant's digital signature from the travel voucher memorandums, leaving the impression that neither the Complainant nor Subject 1 signed the memorandums. The Complainant argued that his original memorandums—which the Complainant signed and Subject 1 did not—showed that Subject 1 did *not* endorse the travel, whereas the DTS versions of the memorandums, by removing all signatures, implied that Subject 1 *did* endorse the travel.

In investigating Subject 1's proposal to terminate the Complainant's employment, we found additional evidence that refuted Subject 1's allegations regarding the Complainant's travel vouchers.

First, we found that Subject 1 did not direct the cancellation of the specific vouchers for which he recommended the Complainant's termination from employment. In the proposal, Subject 1 alleged that the Complainant demonstrated a lack of candor on two specific travel vouchers for travel conducted on January 22 and February 14, 2020. Subject 1 claimed that he had directed the Complainant to cancel these voucher submissions and provided two emails as evidence. However, a review of these emails showed that Subject 1 did *not* direct the Complainant to cancel the January 22 and February 14, 2020 travel vouchers, but rather directed the cancellation of vouchers submitted in September 2019. We interviewed the ARCYBER HR specialist and ARCYBER attorney who originally reviewed the materials, and when we showed them the discrepancy between the dates in Subject 1's email and the dates in the termination proposal, they agreed that the dates did not match.²⁹ The ARCYBER attorney told us that the mismatched dates could lead the Merit Systems Protection Board (MSPB) to "hold us to task" and to make a finding against ARCYBER. Subject 1 did not provide, and we did not find, any evidence that he ever directed the Complainant to cancel the vouchers for travel conducted on January 22 and February 14, 2020.

During our review of the termination proposal, we found a related problem regarding the dates of the alleged violations and the evidence that Subject 1 provided. Specifically, we found that the dates of the vouchers provided as evidence by Subject 1 did not match the dates of the vouchers listed in the termination proposal. As discussed above, Subject 1 alleged that the Complainant demonstrated a lack of candor on his travel vouchers for travel conducted on January 22 and February 14, 2020. However, Subject 1 did not provide any evidence regarding the January 22, 2020 voucher. Rather, Subject 1 provided copies of vouchers for travel conducted on January 30 and February 14, 2020. The termination proposal contained no evidence at all regarding the January 22, 2020 travel voucher.

We found similar date mismatches when comparing the evidence that Subject 1 provided to ARCYBER HR and the ARCYBER attorney with the final termination proposal. When Subject 1 initially sent evidence to ARCYBER HR and the ARCYBER attorney, he included three vouchers for review, for travel conducted on January 30, February 14, and March 9, 2020. Once again, the dates did not match the dates used in the termination proposal. Subject 1 provided no evidence to ARCYBER HR and the ARCYBER attorney regarding the January 22, 2020 travel voucher, and although Subject 1 provided a March 9, 2020 travel voucher, the termination proposal made no mention of this travel voucher. Subject 1's evidence did not provide any basis for making an allegation about the January 22, 2020 travel voucher.

²⁹ The ARCYBER HR specialist initially stated that the 2019 and 2020 vouchers were the same submissions, but then reversed themselves and stated that the vouchers were not the same. The ARCYBER attorney suggested that Subject 1 could have made the error because the Complainant's travel vouchers were an ongoing issue, but agreed that the dates did not match.

Finally, we found that Subject 1 did not provide all available evidence during the termination process. In Subject 1's emails to ARCYBER attorneys, ARCYBER HR, and Witness 1, and in the evidence attached to the proposal, Subject 1 only provided the copies of the travel voucher memorandums with the digital signature stripped out.³⁰ Subject 1 did not provide the Complainant's original memorandums, which the Complainant signed and Subject 1 did not, even though the Complainant twice emailed Subject 1 the original memorandums, on March 10 and March 18, 2020. By not providing the original memorandums, Subject 1 gave an inaccurate portrayal of the Complainant's actions to ARCYBER HR, the ARCYBER attorney, and, ultimately, Subject 2.

We asked the ARCYBER HR specialist and the ARCYBER attorney if they would have provided different guidance if Subject 1 had provided them with the original memorandums. The ARCYBER HR specialist stated that they would have provided the same guidance, because the Complainant committed a lack of candor when he submitted a voucher after being told the voucher would not be approved. As we determined that Subject 1 did not tell the Complainant that his voucher would be disapproved, we did not credit the ARCYBER HR specialist's statement. The ARCYBER attorney indicated that the Complainant's primary misconduct was that he submitted his travel vouchers more than 5 days after completing his travels when Subject 1 had placed him on notice that late vouchers would not be approved. As the timeliness of the vouchers was not one of the bases for the Complainant's termination from employment, we did not consider this to be an argument in favor of Subject 1's stated reasons.

Unsatisfactory Performance Evaluation

STATED REASONS FOR SUBJECT 1 ISSUING THE COMPLAINANT AN UNSATISFACTORY PERFORMANCE EVALUATION

On September 23, 2020, Subject 1 issued the Complainant a performance evaluation—for the evaluation period from October 1, 2019, through September 26, 2020—with an overall rating of 1 – Unacceptable. In the evaluation, Subject 1 criticized the Complainant's extended absences from work and below-par supervisory performance, and wrote that the Complainant demonstrated poor leadership and integrity when he tasked a subordinate to write an award nomination for them and when he submitted false information in support of a travel voucher. Subject 1 also criticized the Complainant for applying for a joint duty assignment, which Subject 1 characterized as a “determined interest to delay or avoid his managerial responsibility.”

³⁰ We asked the ARCYBER HR specialist and the ARCYBER attorney if Subject 1 had ever provided them with the original versions signed by the Complainant. The ARCYBER HR specialist stated that they had never seen the original version. The ARCYBER attorney could not remember if they had or not.

EVIDENCE AGAINST SUBJECT 1'S STATED REASONS FOR ISSUING THE COMPLAINANT AN UNSATISFACTORY PERFORMANCE EVALUATION

We found that Subject 1's written evaluation did not support an overall rating of 1 – Unacceptable. Although Subject 1 criticized the Complainant's conduct, he made generally favorable remarks about the Complainant's performance. Subject 1 wrote that the Complainant showed "mixed performance" as a manager, noting that while the Complainant missed deadlines and did not present some of his work to leadership, his work products also received a 100 percent acceptance rate, compared to an ARCYBER norm of 30 percent. Subject 1 described the Complainant's [REDACTED] products as "excellent," writing that their "quality was validated by many being operationalized," resulting in "high praise." Subject 1 wrote that the Complainant showed "excellent engagement skills," provided "excellent advice and assistance," and developed technical knowledge beyond that required by his position. These descriptions of the Complainant's performance were not consistent with an overall rating of 1 – Unacceptable, or with a rating of 1 on the "manage and direct the [REDACTED]" performance objective.

This conclusion was supported by the fact that the final scores that Subject 1 issued on September 23, 2020, differed significantly from the draft scores he submitted 2 weeks earlier to the ARCYBER HR specialist and the ARCYBER attorney. The draft scores, when input into the DCIPS performance evaluation formula, would have resulted in an overall rating of 3 – Successful, a score that would have been supported by Subject 1's written evaluation of the Complainant's mixed performance. The draft scores and final scores are provided in Tables 4 and 5.

Table 4: Comparison of the Draft and Final Performance Objective Scores (60 Percent of Overall Evaluation)

Performance Objectives	Draft Scores to HR	Draft Scores to Attorney	Final Scores
Manage and Direct the [REDACTED]	3	3	1
[REDACTED] Production and Product Development	4	4	4
Staff Support to ARCYBER [REDACTED]	4	4	4
Overall Performance Objectives Rating	3.7	3.7	1.0*

* The score of 1 for the first performance objective automatically rendered the overall performance objective rating 1.0, despite the mathematical average being 3.0.³¹

Source: The DoD OIG.

³¹ The overall rating formula for DCIPS performance evaluations is (average performance objective rating x 0.6) + (average performance element rating x 0.4). Scores are rounded to the nearest whole number. An overall score lower than 2.0 is automatically considered unacceptable and assigned a 1.0 rating, as is any evaluation for which a score of 1 is given for any single performance objective.

Table 5: Comparison of the Draft and Final Performance Element Scores (40 Percent of Overall Evaluation)

Performance Elements	Draft Scores to HR	Draft Scores to Attorney	Final Scores
Accountability for Results	3	3	3
Communication	3	3	3
Critical Thinking	4	4	2
Engagement and Collaboration	4	Not Scored	4
Leadership and Integrity	1	2	1
Managerial Proficiency	4	1	1
Overall Performance Elements Rating	3.2	2.8*	2.3

* In calculating the overall performance element rating for the draft scores that Subject 1 sent to the ARCYBER attorney, we used a score of 4 for the “engagement and collaboration” performance element, as that was the score that Subject 1 used in both the draft evaluation that he sent to the ARCYBER HR specialist and in the final performance evaluation.

Source: The DoD OIG.

We asked the ARCYBER HR specialist if they gave Subject 1 any guidance regarding the content of the evaluation. The ARCYBER HR specialist denied doing so and told us that when Subject 1 emailed them the proposed scores, they called Subject 1 and told him that they could not provide input on employee performance evaluation content.

Email evidence showed that the ARCYBER attorney provided guidance to Subject 1, recommending that he decrease the “leadership and integrity” performance element score from 2 to 1 in light of the Complainant’s “determined interest to delay or avoid the transition to Fort Gordon.” However, the ARCYBER attorney did not recommend changing any of the performance objective scores, and the change in the leadership and integrity score did not account for the decline in the overall rating, as the attorney’s recommended scores would have resulted in an overall rating of 3 – Successful.

Moreover, although Subject 1 significantly changed the overall rating, he did not significantly change the written evaluation, which continued to praise the Complainant’s performance. For example, although Subject 1 made a single edit to the written evaluation for the “manage and direct the [REDACTED]” performance objective—removing the word “outstanding” from a description of the Complainant’s team—Subject 1 lowered the score for the performance objective from 3 to 1.

We compared the version of the performance evaluation that Subject 1 sent to the ARCYBER attorney to the final version issued to the Complainant. Subject 1 made three substantive changes. First, he removed the word “outstanding” as discussed above. Second, he deleted a reference to the Complainant’s “expert knowledge in both [REDACTED] disciplines” on the written evaluation for the “staff support to ARCYBER [REDACTED]” performance objective. Third, based on language recommended by the ARCYBER attorney, Subject 1

added two sentences describing the Complainant's "determined interest to delay or avoid his managerial responsibility to transfer his team [to] Fort Gordon" on the written evaluation for the "managerial proficiency" performance element. However, the bulk of the evaluation remained the same, describing the Complainant's performance variously as "mixed" and "excellent" and noting the 100 percent acceptance rate of the Complainant's team's products.

Therefore, the documentary evidence did not provide a basis for Subject 1's decision to significantly reduce the Complainant's overall rating. Just 2 weeks before issuing the evaluation, Subject 1's draft scores gave the Complainant an overall rating of 3 – Successful, including "successful" or "excellent" marks on all performance objectives. Although the ARCYBER attorney recommended decreasing one of the performance element scores, they recommended maintaining an overall rating of 3 – Successful. However, in the final evaluation, Subject 1 reduced the Complainant's overall rating to 1 – Unacceptable. The significant decrease in the overall rating and the generally favorable remarks in the written evaluation called into question Subject 1's motive for assigning an overall rating of 1 – Unacceptable.

Stated Reasons for Subject 2's Decision to Terminate the Complainant's Employment

Subject 2 terminated the Complainant's employment effective November 4, 2020. Subject 2 told us that, in arriving at her decision, she reviewed the Douglas Factors, Subject 1's proposal, evidence in support of the proposal, and the Complainant's written rebuttal.³² Subject 2 also provided a hearing for the Complainant to make his case. Subject 2 told us that, in conducting her review, she received guidance from an ARCYBER HR specialist and ARCYBER attorneys; however, Subject 2 could not recall what guidance those individuals gave.

We found that Subject 2's process followed the guidelines established in the relevant laws and regulations governing disciplinary actions; in particular, the procedures directed by Department of the Army Policy, Volume 2009.³³

After reviewing the relevant materials, Subject 2 determined that the Complainant lost the trust and confidence of his superiors and subordinates and that his actions called into question his trustworthiness, reliability, character, honesty, and judgment. Subject 2 noted that although this was the Complainant's first offense, the charges were so severe that no alternative sanction existed to deter further misconduct.

³² The Douglas Factors refer to 12 factors, established in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), which are used to judge the reasonableness of a penalty. Army policy required Subject 2 to consider these factors when determining the appropriate penalty.

³³ Department of the Army Policy, Volume 2009, "Defense Civilian Intelligence Personnel System Disciplinary, Performance-Based, and Adverse Action Procedures," March 25, 2012 (Incorporating Change 2, December 18, 2017); DoDI 1400.25, Volume 2009, "DoD Civilian Personnel Management System: Defense Civilian Intelligence Personnel System (DCIPS) Disciplinary, Performance-Based, and Adverse Action Procedures," May 20, 2012 (Incorporating Change 2, March 10, 2017); and 5 U.S.C. § 7513, "Cause and Procedure."

In her interview with this office, Subject 2 denied terminating the Complainant's employment in reprisal for making protected disclosures. Subject 2 emphasized to us that she took 2 full days to read the proposal and to consider the Complainant's rebuttal. Subject 2 also noted that this was the first time that she adjudicated the termination of a civilian employee.

EVIDENCE AGAINST SUBJECT 2'S STATED REASONS FOR TERMINATING THE COMPLAINANT'S EMPLOYMENT

The evidence against Subject 2's stated reasons for terminating the Complainant's employment was largely the same as that discussed in the case of Subject 1's termination proposal. During our investigation, we found several additional pieces of evidence that called into question the validity of Subject 2's stated reasons for her actions.

- *Knowledge of Protected Disclosures.* Subject 2 testified that she did not recall the Complainant making any claim of retaliation and stated variously that she either did not recall or did not know of any of the Complainant's other protected disclosures. However, the Complainant's written rebuttal contained multiple references to his past IG complaints and his participation in the AR 15-6 investigation, and explicitly stated that he feared retaliation. Additionally, Subject 2's handwritten notes show that the Complainant also raised similar issues during their meeting. Given Subject 2's duty as the deciding official to carefully weigh the evidence, her handwritten notes, and her testimony that she took 2 full days to review the evidence, we found that Subject 2 knew of the Complainant's statements about fearing retaliation and his detailing of his past IG complaints at the time of the personnel action in question.
- *Travel Voucher Dates.* Subject 2 testified that she terminated the Complainant's employment, in part, because the Complainant submitted travel vouchers in DTS that Subject 1 told him to cancel. However, as discussed above, we determined that Subject 1 in fact did not direct the Complainant to cancel the vouchers in question, and noted that the dates of the vouchers provided by Subject 1 as evidence did not match the dates of the vouchers listed in the termination proposal. When we asked Subject 2 about this mismatch, she defended her decision-making by claiming that the evidence was "out of timing and sequence" and that "none of it's in any sort of chronological order or something that you can marry up." Subject 2 then admitted that she did not review the individual vouchers and "did not adjudicate to say this TDY [temporary duty assignment] or that TDY," even though the Complainant specifically distinguished between the 2019 vouchers and the 2020 vouchers in his written rebuttal, and even though Subject 2 told us that she recalled the Complainant making this argument. We therefore concluded that Subject 2, by her own admission, did not consider whether the vouchers referenced in Subject 1's termination proposal were the same vouchers referenced in the underlying evidence.

- *Digital Signatures.* Subject 2 testified that the Complainant submitted memorandums in DTS implying that Subject 1 endorsed his travel. When we asked Subject 2 about the stripping out of the Complainant's digital signature, Subject 2 told us that she could not recall the Complainant making this argument and did not understand how digital signatures could be stripped off a document. We found that these arguments were central to the Complainant's rebuttal of the lack of candor charge and that the Complainant provided all relevant documents necessary to understand the argument. In his written rebuttal to Subject 2, the Complainant explained his original intent in submitting the memorandums without Subject 1's signature and the fact that the words "endorses travel" came from the template. The Complainant also explained that DTS stripped out his digital signature in the memorandums. In support of his argument, the Complainant provided copies of the original memorandums with his signature, copies of the memorandums from DTS with the digital signature stripped out, the original template provided by Subject 1, and Subject 1's email providing that template to the Complainant.

Next, we found Subject 2's analysis of the abuse of authority charge to be contradictory. In the section titled, "[Evidence Against Subject 1's Stated Reasons for Proposing the Complainant's Termination from Employment](#)," we discussed the evidence that the Complainant's directive to Employee 2 was not arbitrary or capricious, given ARCYBER workplace norms. In her testimony, Subject 2 showed awareness of this evidence. Subject 2 told us that at ARCYBER, when someone departs the command, their deputy writes the award nomination. Subject 2 said that award nominations are written this way because higher-level supervisors typically do not have time to write award nominations themselves, so the subordinate then ghostwrites the award nomination, based on their close relationship with the supervisor, for a higher-level supervisor's adjudication and approval.

Subject 2's description of the award nominations writing process seemed to describe the process that the Complainant undertook, except that the Complainant was not departing ARCYBER. We asked Subject 2 to explain the difference between the example she gave and the Complainant's actions. Subject 2 told us that the key difference, rather than the timing of the award, was that normally "the deputy ... doesn't benefit from the award. [...] [The deputy is] not a recipient of anything with regards to that award. [...] ... there's no personal gain for the deputy" However, when we then asked whether the key element that made the Complainant's action an abuse of authority was that Employee 2, his deputy, stood to benefit from the award, Subject 2 changed her rationale, stating, "No. No, no. The abuse—it was that [the Complainant] stood to gain."

We found Subject 2's response to be contradictory. In defending ARCYBER's practice of subordinates writing award nominations on behalf of their supervisors, Subject 2 explained that subordinates do not stand to benefit. However, Subject 2's criticism of the Complainant's actions was not based on whether his subordinate stood to benefit, but rather on the fact that

the Complainant would benefit from the award, a benefit that Subject 2 believed constituted an abuse of authority. Yet in Subject 2's own examples, the supervisor also stood to benefit by being the recipient of an award based on an award nomination drafted by their subordinate. Subject 2 did not provide a rational distinction between the Complainant's action and the examples she provided, and the one distinction Subject 2 did provide—the question of whether the subordinate stood to benefit—she said was not relevant to whether the Complainant abused his authority.

Motive to Retaliate

Subject 1

Evidence for motive generally exists when protected disclosures allege wrongdoing that, if proven, would adversely affect the subject. This could be true in this case, since the Complainant's protected disclosures could have reflected poorly on Subject 1.

- **Disclosure 1: Complaints About the Terms of the Complainant's Hiring Agreement.** The Complainant alleged that ARCYBER violated the terms of his hiring agreement. Over the course of 2 years, the Complainant sought a remedy from his supervisory chain, ARCYBER HR officials, and the ARCYBER OIG to correct an underpayment of approximately [REDACTED], as well as a gap in payments of approximately 1 year. This ultimately led to the intervention of the ARCYBER Chief of Staff, who directed Subject 1 to correct the situation by providing the Complainant with a lump-sum payment, which the Complainant never received. The Complainant's disclosure called into question Subject 1's competency as a manager and could have professionally embarrassed him.
- **Disclosure 2: IG Complaint About Performance Evaluations.** The Complainant alleged that Witness 1 and Subject 1 violated Army rules regarding DCIPS performance evaluations. This allegation led the ARCYBER Chief of Staff to initiate an AR 15-6 investigation, naming Subject 1 a subject. The Complainant's allegation, and the ensuing investigation, reflected poorly on Subject 1 and called into question his ethics, leadership, management, and communication. Although the ARCYBER Chief of Staff determined the allegations were not substantiated, the report of investigation detailed substantive errors made by Subject 1 and other [REDACTED] leaders that could have professionally embarrassed him.
- **Disclosure 3: IG Complaint About ARCYBER Hiring Action.** The Complainant alleged that Subject 1 did not follow normal hiring procedures and showed favoritism to an unqualified candidate during the process to hire Subject 1's replacement. The Complainant's allegation reflected poorly on Subject 1 and resulted in Employee 1 removing Subject 1 from the hiring action. After his removal, Subject 1 demonstrated hostility towards the Complainant, such as when he emailed Witness 1 about being removed from the hiring action, and implied that he suspected

the Complainant had filed the complaint. Being accused of violating merit system principles by playing favorites with a hiring action, and then being removed from the hiring action, could have created motive for Subject 1 to retaliate against the Complainant.

- **Disclosure 7: Toxic Work Environment and Retaliation.** We determined that Subject 1 likely perceived that the Complainant made a disclosure to the AR 15-6 investigating officer, who was investigating allegations that Subject 1 and other ■■■ leaders took prohibited personnel actions. As mentioned above, Subject 1 acknowledged to the investigating officer that the Complainant had filed multiple complaints against him, and the investigation itself reflected poorly on Subject 1, calling into question his ethics, leadership, management, and communication.
- **Disclosure 8: Overtime Rules.** The Complainant alleged that ARCYBER generally and Subject 1 specifically unlawfully violated overtime rules by directing the use of credit hours to complete assigned work. When Subject 1 sought guidance from Witness 1, Subject 1 noted that “if the lawyer finds [the Complainant] to be correct we have a lot of issues to deal with.” The Complainant’s allegation reflected poorly on Subject 1’s management and had the potential to create professional repercussions for Subject 1 and other ■■■ leaders. Subject 1 began taking personnel actions against the Complainant and an action affecting the Complainant’s eligibility for access to classified information in the weeks immediately after this disclosure.

Subject 2

Unlike in the case of Subject 1, the Complainant’s protected disclosures did not reflect poorly on Subject 2, and we found no evidence during our investigation that Subject 2 exhibited hostility toward the Complainant because of his protected disclosures. However, although Subject 2 lacked a personal motive, we found that she had an institutional motive to reprise against the Complainant. We based this analysis on the MSPB’s ruling in *Chambers v. Department of the Interior* (2011 MSPB 7), in which the MSPB found that protected disclosures can provide a retaliatory motive even when those disclosures do not implicate or harm the subject. Specifically, the MSPB held that protected disclosures provide a retaliatory motive when such disclosures clearly reflected on subjects as representatives of the general institutional interests of the agency by addressing the inability of the agency to effectively perform its mission.

In this case, we found that Subject 2 had an institutional motive to reprise against the Complainant for his repeated disclosures that exposed fault with ARCYBER in general, and specifically for his IG complaint that led to a command investigation into prohibited personnel practices within the ■■■. The resulting command investigation found that

█ leaders provided improper guidance on how employees should code their timesheets; exhibited counterproductive behaviors that had an adverse effect on subordinates and the mission; showed a general lack of trust in their subordinates; and conducted a problematic performance evaluation process by which subordinates were judged against the performance of their peers rather than against their performance objectives. On August 14, 2020, the ARCYBER Chief of Staff endorsed the command investigation and directed multiple corrective actions, including that all █ leaders take a communications course to address topics such as fostering positive work environments and building trust with employees. Although these findings did not directly implicate Subject 2, the investigation and corrective actions reflected poorly on the █ as an office, and specifically on the █ leadership, calling into question the █'s ability to effectively perform its mission.

The Complainant supported this argument during his interview with this office, telling us that his multiple protected disclosures amounted to “rocking the boat.” The Complainant said, “I was trouble and they wanted to get me out of the command.” The Complainant acknowledged that he did not know whether Subject 2 would retaliate against him, but argued that Subject 2 was “a newly promoted █ coming into a new org [sic], and this was a hot mess. [...] I highly doubt she would retaliate other than wanting to get a continuous shit show out of her org [sic] so she can focus in on building the new structure of the █” We found this argument persuasive. The Complainant’s repeated protected disclosures—many of which revealed violations of law, rule, or regulation and reflected poorly on the █ as a whole—gave Subject 2 motive to remove the Complainant from the organization.

Finally, we considered Subject 2’s statement during her interview that she could not clearly remember the investigation and that she did not know of any direct correlation between the investigation and the Complainant. However, as previously discussed, the Complainant reported to Subject 2 in writing and in person that he feared retaliation for his IG complaints. Moreover, the Complainant specifically linked the █ investigation to possible retaliation, writing in his rebuttal to Subject 2, “I will be up front, I am VERY concerned about retaliation and I feel since I was part of the reason [the investigation] started it has already started happening.” We therefore found that Subject 2 knew of the Complainant’s protected disclosures and that those disclosures gave her an institutional motive to reprise against the Complainant at the time she took the personnel action against him.

Disparate Treatment of the Complainant

Subject 1

We considered whether Subject 1 took similar personnel actions or actions affecting eligibility for access to classified information against other civilian employees alleged to have committed similar forms of misconduct; however, neither the Complainant nor Witness 1 recalled any similar misconduct issues with any other employees. Therefore, we were not able to analyze whether Subject 1 treated the Complainant disparately when he took the three personnel actions against the Complainant and one action affecting the Complainant's eligibility for access to classified information, as we found no similarly situated employees to make such analysis. For this reason, we lacked a basis on which to conduct a disparate treatment analysis.

Subject 2

We considered whether Subject 2 took similar disciplinary action against other civilian employees alleged to have committed similar forms of misconduct; however, neither the Complainant nor Witness 1 recalled any similar misconduct issues with any other employees. Additionally, Subject 2 told us that the Complainant was the only civilian employee for whom she served as the deciding official for a disciplinary action. Therefore, we were not able to analyze whether Subject 2 treated the Complainant disparately when she terminated him from employment, as we found no similarly situated employees to make such analysis. For this reason, we lacked a basis on which to conduct a disparate treatment analysis.

Totality of the Evidence

Weighed together, the evidence analyzed in the factors above did not clearly and convincingly establish that Subject 1 or Subject 2 would have taken the same personnel actions and action affecting eligibility for access to classified information absent the protected disclosures.

Subject 1

Strength of the Evidence in Support of the Personnel Actions and the Action Affecting Eligibility for Access to Classified Information

Weighed together, the evidence did not generally support Subject 1's stated reasons for removing the Complainant's supervisory duties, submitting derogatory information to the DCSA CAS, proposing the Complainant's termination from employment, and issuing the Complainant a performance evaluation with an overall rating of 1 – Unacceptable. We summarize the evidence for each personnel action and action affecting eligibility for access to classified information below.

Removal of Supervisory Duties. Subject 1 removed the Complainant's supervisory duties to address the Complainant's long-term absences from work, stating that those duties would be returned once the Complainant established a reliable and predictable work schedule. In making this decision, Subject 1 consulted with Subject 2, Witness 1, the Staff Judge Advocate, the ARCYBER personnel section, and ARCYBER HR, all of whom endorsed the decision.

However, the evidence showed that the Complainant had returned to a reliable and predictable work schedule for the 3 weeks preceding Subject 1's action. Although Subject 1 was concerned about future absences due to the Complainant attending a funeral and taking parental leave, Subject 1 found out relatively soon after removing the Complainant's duties that the Complainant's attendance at the funeral would not trigger a 14-day quarantine period and that the Complainant did not intend to take parental leave until after October 1, 2020. Moreover, despite repeated requests from the Complainant and a reminder from Witness 1, Subject 1 never provided criteria for a reliable and predictable work schedule.

At the time that Subject 1 consulted with his supervisors and other advisors, the Complainant had spent significant time on administrative leave due to his multiple trips related to his [REDACTED] impending death. However, by the time Subject 1 removed the duties, the Complainant had returned to work and his [REDACTED] had already passed away, removing the primary cause of the absences. Subject 1 learned shortly thereafter that the Complainant would not need to quarantine and would not take parental leave until later in the year.

The evidence established that Subject 1 withheld relevant information from his supervisors and others from whom he sought counsel, undermining his ability to rely on the resulting counsel. For example, Subject 1 did not provide timesheets or schedules to support his description of the Complainant's absences, and misrepresented the Complainant's absences in emails to an ARCYBER attorney and Witness 1, especially by omitting the fact that the Complainant had returned to a reliable and predictable work schedule for the previous 3 weeks.

Finally, in removing the Complainant's supervisory duties on the basis of the Complainant's use of entitled leave and agency-directed quarantine, Subject 1 demonstrated an antipathy that conflicted with the wide latitude afforded to Federal employees in the use of leave. The contrast between Subject 1's actions and the OPM's general stance on leave for Federal employees suggested that Subject 1's actions were a pretext, intended to provide a basis for future disciplinary action.

These facts undercut Subject 1's stated reasons for removing the Complainant's supervisory duties.

Submission of Derogatory Information to the DCSA CAS. Subject 1 submitted derogatory information to the DCSA CAS on the basis of allegations that the Complainant violated DoD commissary policy, falsified his timesheets, had issues with time and attendance, demonstrated unexplained affluence, directed a subordinate to nominate him for an award, and falsified his travel vouchers. DoD regulations required Subject 1 to report any derogatory information that fell within the Intelligence Community adjudicative guidelines, including information demonstrating questionable judgment or an unwillingness to comply with rules and regulations; evidence of significant misuse of Government or other employer's time or resources; and affluence that cannot be explained by known sources of income.

On several counts, we found that the evidence generally supported Subject 1's statements. For example, the Complainant admitted that he asked two individuals to shop for him at the commissary, asked Employee 2 to submit him for an award, mismarked his timesheet, carried several thousands of dollars in cash on one occasion, and purchased an \$80,000 vehicle. Although the Complainant provided characterizations of these actions that placed them in a more favorable light than that portrayed by Subject 1, it is nonetheless true that the Complainant confirmed some of the facts in Subject 1's report.

However, we found significant evidence that directly contradicted Subject 1's allegation that the Complainant falsified his travel vouchers. Additionally, we found that Subject 1 waited months, and potentially more than a year, to report this information to the DCSA CAS. For example, the Complainant purchased the automobile in April 2019 and mismarked his timesheet in November 2019, but Subject 1 did not report these events to the DCSA CAS until August 2020, by which date the Complainant no longer owned the vehicle in question.

It may be the case that Subject 1 reasonably believed that the information he reported to the DCSA CAS fell within the adjudicative guidelines. However, the relevant question in a reprisal analysis is not merely whether the submission fell within those guidelines, but whether the Complainant's protected disclosures were contributing factors in Subject 1's decision to make such a submission. Subject 1 must show, by clear and convincing evidence, that he would have made the same submission absent the Complainant's disclosures. In this case, the factual inaccuracy in Subject 1's allegation that the Complainant falsified his travel vouchers, and the lengthy delay in making the submission to the DCSA CAS, called into question Subject 1's contentions, and established that Subject 1 lacked clear and convincing evidence in support of his action.

Termination Proposal. Subject 1 proposed terminating the Complainant's employment for abuse of authority and lack of candor. Army policy required Subject 1 to assess all available evidence and mitigating factors and to conclude that a preponderance of the evidence supported the charges, before he made the proposal.

Two factors weighed in favor of Subject 1's proposal. First, Subject 1 extensively coordinated this proposal with his supervisors, ARCYBER legal, and ARCYBER HR, all of whom supported the proposal. Second, the Complainant admitted to asking Employee 2 to write them both up for an award, an action that formed the basis of Subject 1's allegation of abuse of authority.

However, significant evidence weighed against Subject 1's proposal. Regarding the abuse of authority charge, we found that the Complainant's actions were not arbitrary or capricious within the context of ARCYBER workplace norms. In fact, at the same time that the Complainant was working with Employee 2 on their team award nominations, Subject 1 was writing an award nomination for his own second-line supervisor, Employee 1.

Even more significantly, regarding the lack of candor charge, Subject 1 withheld relevant evidence during the termination process when he only submitted for review the versions of the memorandums with the digital signatures stripped out. Moreover, we found that Subject 1 never directed the cancellation of the travel vouchers in question and also that the dates of the vouchers provided as evidence did not match the dates of the vouchers listed in the termination proposal. In light of the withheld evidence and the mismatch in dates, Subject 1 did not have clear and convincing evidence to substantiate that the Complainant committed a lack of candor.

Performance Evaluation. Subject 1 issued the Complainant a performance evaluation with an overall rating of 1 – Unacceptable on the basis of the Complainant's extended absences from work and below-par supervisory performance. As examples of the Complainant's below-par supervisory performance, Subject 1 referenced the Complainant's decision to task a subordinate to write an award nomination for them, his submission of allegedly false information in support of a travel voucher, and his effort to apply for a joint duty assignment.

Two factors weighed against Subject 1's stated reasons for issuing the Complainant a performance evaluation with the lowest possible overall rating. First, in the written portion of the evaluation, Subject 1 made generally favorable remarks about the Complainant's performance and described the Complainant's work products, engagement skills, and advice as excellent.

Second, just 2 weeks before issuing the performance evaluation, Subject 1 intended to issue the Complainant an overall rating of 3 – Successful. Subject 1 provided no rationale for changing the scores, and neither ARCYBER HR nor ARCYBER legal recommended the change. Moreover, despite the significant change to the overall rating, Subject 1 did not significantly change the written evaluation. The significant decrease in the overall rating and the generally favorable remarks in the written evaluation called into question Subject 1's motive for assigning an overall rating of 1 – Unacceptable.

Existence and Strength of Any Motive to Retaliate

Evidence for motive generally exists when protected disclosures allege wrongdoing that, if proven, would adversely affect the subject. We determined that the Complainant's disclosures gave Subject 1 a motive to reprise against him.

In the 2 years before Subject 1 took these actions, the Complainant made a series of protected disclosures that could have reflected poorly on Subject 1. The Complainant's disclosure regarding ARCYBER's violation of the terms of his hiring agreement could have called into question Subject 1's competency as a manager and required the direct intervention of the ARCYBER Chief of Staff. The Complainant's IG complaints regarding performance evaluations and the hiring action for Subject 1's replacement resulted in a command investigation and in Subject 1's removal from the hiring action, both of which could have caused Subject 1 professional embarrassment. Similarly, the Complainant's disclosure regarding overtime rules prompted Subject 1 to warn Witness 1 that, if the Complainant was correct, "we have a lot of issues to deal with."

Disparate Treatment

We were unable to compare Subject 1's treatment of the Complainant to his treatment of any other similarly situated nonwhistleblowers, as we found no other civilian employees alleged to have committed similar forms of misconduct, and therefore lacked a basis for conducting a disparate treatment analysis.

Conclusion

A preponderance of the evidence established that the Complainant's protected disclosures were contributing factors in the personnel actions and the action affecting eligibility for access to classified information that Subject 1 took against him. Clear and convincing evidence did not exist that Subject 1 would have taken these same actions absent the Complainant's

protected disclosures. Rather, we found that the evidence did not support Subject 1's stated reasons and that the Complainant's protected disclosures gave Subject 1 a motive to reprise. We therefore concluded that Subject 1 took these actions against the Complainant in reprisal for his protected disclosures.

Subject 2

Weighed together, the evidence did not clearly and convincingly establish that Subject 2 would have terminated the Complainant's employment absent the Complainant's protected disclosures.

Strength of the Evidence in Support of the Personnel Action

Subject 2 terminated the Complainant's employment after determining that the Complainant abused his authority and demonstrated a lack of candor regarding his travel vouchers. Weighing in favor of Subject 2's decision was the fact that she followed the procedures established by Army policy, such as providing a forum for the Complainant's rebuttal, and sought guidance from ARCYBER HR specialists and ARCYBER attorneys.

However, our investigation found substantial fault with the allegations of abuse of authority and lack of candor. We also found additional evidence against Subject 2's stated reasons for terminating the Complainant's employment. Specifically, given Subject 2's testimony that she took 2 full days to review the evidence, we found it unlikely that she would have missed the Complainant's contemporaneous statements about fearing retaliation or his detailing of his past IG complaints. Additionally, we noted her testimony that, in reviewing the Complainant's case, she did not validate whether the individual travel vouchers referenced in Subject 1's termination proposal were the same vouchers referenced in the underlying evidence, even though the Complainant specifically raised the issue of the mismatched dates in his written rebuttal. Similarly, we found that the Complainant's argument about digital signatures was central to the Complainant's rebuttal, and the Complainant provided substantial evidence to Subject 2 in support of the argument.

Finally, we found Subject 2's analysis of the abuse of authority charge to be contradictory. She defended the ARCYBER practice of subordinates writing award nominations on behalf of their bosses by arguing that in these cases the subordinate did not stand to benefit, as it would be the supervisor who would receive the award. Yet it was this very benefit—that the Complainant would receive an award based on an award nomination written by his subordinate—that Subject 2 labeled an abuse of authority.

Existence and Strength of Any Motive to Retaliate

Unlike in the case of Subject 1, the Complainant's protected disclosures did not reflect poorly on Subject 2. However, the Complainant's repeated disclosures included allegations of violations of law, rule, or regulation that reflected poorly on the [REDACTED] as a whole.

The Complainant also argued that these disclosures amounted to "rocking the boat" and would have provided Subject 2 with motive to reprise. As a result, we concluded that the Complainant's repeated disclosures gave Subject 2 an institutional motive to remove the Complainant from the organization.

Disparate Treatment

We were unable to compare Subject 2's treatment of the Complainant to her treatment of any other similarly situated nonwhistleblowers, as the Complainant was the only civilian employee for whom she served as the deciding official for a disciplinary action.

Conclusion

A preponderance of the evidence established that the Complainant's protected disclosures were contributing factors in Subject 2's decision to terminate his employment. Clear and convincing evidence did not exist that Subject 2 would have taken the same action absent the Complainant's protected disclosures. Rather, we found that the evidence did not support Subject 2's stated reasons and that the Complainant's protected disclosures gave Subject 2 an institutional motive to reprise. We therefore concluded that Subject 2 terminated the Complainant's employment in reprisal for his protected disclosures.

Preliminary Conclusion

In the absence of clear and convincing evidence to the contrary, a preponderance of the evidence established that Subject 1 removed the Complainant's supervisory duties, submitted derogatory information to the DCSA CAS, proposed terminating the Complainant's employment, and issued the Complainant a performance evaluation with an overall rating of 1 – Unacceptable, and that Subject 2 terminated the Complainant's employment, in reprisal for the Complainant's protected disclosures.

Subjects' Responses to Preliminary Conclusion

We provided a preliminary report of investigation to Subject 1 and Subject 2 on October 25, 2023, and afforded them the opportunity to respond to our preliminary conclusion. Subject 1 did not respond. Subject 2 responded in writing on November 22, 2023.³⁴ In her written response, Subject 2 disagreed with our findings, offered a number of arguments in rebuttal, and requested that we reverse our preliminary conclusion. After carefully considering Subject 2's response, our conclusion remains unchanged. We address three arguments from Subject 2's response below.

Passage of Time

In her response to our preliminary report of investigation, Subject 2 wrote that we unfairly focused on her inability to recall certain details during her interview with this office, especially considering that we did not provide her with our line of questioning in advance. She wrote that her nonrecollections should be recognized as a reasonable limitation, not dishonesty, and urged us to view her openness, including sharing of files, emails, and documents, as a demonstration of her candor and integrity. We recognize the inherent difficulty of remembering events in detail after the passage of 2 or 3 years. However, our conclusion that Subject 2 reprised against the Complainant was heavily based on documentary evidence from the time of the actions in question, the totality of which weighed strongly against her stated reasons for terminating the Complainant's employment. When provided the opportunity to respond to our preliminary report of investigation, Subject 2 provided minimal information to rebut this evidence. For example, Subject 2 did not address our findings that Subject 1 never directed the Complainant to cancel the vouchers in question and that the dates of the vouchers Subject 1 provided as evidence did not match the dates of the vouchers listed in the termination proposal. We therefore found no basis to amend our conclusion.

Motive

In our preliminary report of investigation, we found that the Complainant's protected disclosures gave Subject 2 an institutional motive to terminate the Complainant's employment. Subject 2 disagreed, writing that she had no motive to protect the organization or any practices within the organization, particularly if those practices created a negative work environment. She stated that the fact that she was new to ARCYBER, combined with the significant organizational change occurring with approximately 40 percent of the workforce relocating to Georgia, meant that she would not have had an institutional motive to protect the organization. We found neither argument to be sufficient to overcome our finding in this matter. The fact that Subject 2 was new to ARCYBER did not change the fact that her

³⁴ We incorporated in this report what we believe is a reasonable synopsis of Subject 2's response.

role as the [REDACTED] made her a representative of the general institutional interests of the agency. Relatedly, the Complainant's protected disclosures addressed the inability of the agency to effectively perform its mission; such disclosures provide an institutional motive even in the context of organizational change.

Finally, our finding that Subject 2 had an institutional motive to reprise against the Complainant was not the deciding element in the outcome of this case. Rather, we based our conclusion on the totality of the evidence, which strongly weighed against Subject 2's stated reasons for terminating the Complainant's employment. Had Subject 2 presented clear and convincing evidence in support of those reasons, we could have come to a different conclusion, despite the existence of an institutional motive to reprise against the Complainant. However, Subject 2 did not present such evidence and we found no basis to change our conclusion.

Withheld Evidence

In her response, Subject 2 observed that our preliminary report of investigation found that Subject 1 withheld information and provided an inaccurate portrayal of the Complainant's actions to Subject 2 as well as to ARCYBER HR and legal, on whom she heavily relied for advice and review of the evidence. In some cases, the withholding of evidence can indeed impact a deciding official's ability to serve as an objective adjudicator of a personnel action. However, we do not find that this is the case here. In this case, Subject 1 withheld the original travel voucher memorandums that showed that the Complainant digitally signed the memorandums while Subject 1 did not. However, the Complainant provided these original memorandums to Subject 2, along with an explanation of their relevance, in his rebuttal to the termination proposal. Therefore, although it is true that Subject 1 provided an inaccurate portrayal of the Complainant's actions to Subject 2, it is not the case that Subject 2 lacked the evidence from which to draw an objective conclusion. We therefore found no basis to conclude that Subject 1's withholding of evidence could serve as a basis for changing our conclusion as to Subject 2.

Other Matters

Subject 2 raised several arguments in addition to the three addressed here. We found these arguments unpersuasive and unsupported by the evidence. As we already address these matters comprehensively in the report of investigation, we found it unnecessary to respond here, and we conclude that Subject 2's submission did not provide clear and convincing evidence that she would have terminated the Complainant's employment absent his protected disclosures.

Overall Conclusion

After providing the subjects an opportunity to respond to our preliminary report of investigation, and having carefully considered Subject 2's response, our conclusion remains unchanged. In the absence of clear and convincing evidence to the contrary, a preponderance of the evidence established that:

- Subject 1 removed the Complainant's supervisory duties, submitted derogatory information to the DCSA CAS, proposed terminating the Complainant's employment, and issued the Complainant a performance evaluation with an overall rating of 1 – Unacceptable; and
- Subject 2 terminated the Complainant's employment,

in reprisal for the Complainant's protected disclosures.

Recommendations

We recommend that the Secretary of the Army take the following remedial and corrective actions.

1. Direct the removal of the Complainant's termination and unsatisfactory performance evaluation from his personnel record.
2. Provide the Complainant with all appropriate back pay and restoration of lost benefits due to Subject 1's and Subject 2's retaliatory actions.
3. Adjust the Complainant's time-in-grade and step to restore the rank or seniority to which he would have been entitled absent the termination of his employment.
4. Provide the Complainant with all appropriate compensatory damages, including a [REDACTED] payment to fulfill the terms of his student loan repayment agreement.
5. Provide the Complainant compensation for reasonable attorney's fees and any other reasonable costs he incurred in this matter.
6. Consider appropriate action against Subject 2 for reprising against the Complainant.

Subject 1 retired from Federal service. Accordingly, we will forward our report to the Director, Washington Headquarters Services, for inclusion in Subject 1's personnel file.

Acronyms and Abbreviations

AR	Army Regulation
ARCYBER	U.S. Army Cyber Command
	[REDACTED]
	[REDACTED]
	[REDACTED]
COVID-19	Coronavirus disease–2019
DCIPS	Defense Civilian Intelligence Personnel System
DCSA CAS	Defense Counterintelligence and Security Agency Consolidated Adjudication Services
DoDI	DoD Instruction
DTM	Directive-type Memorandum
	[REDACTED]
	[REDACTED]
GG	Government Grade
HR	Human Resources
	[REDACTED]
IG	Inspector General
MSPB	Merit Systems Protection Board
NSA	National Security Agency
OIG	Office of Inspector General
OPM	Office of Personnel Management
PPD-19	Presidential Policy Directive 19
U.S.C.	United States Code

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