Description of document:	Pension Benefit Guaranty Corporation (PBGC) records re: Inspector General (OIG) Special Report Alleged Whistleblower Reprisal Investigation 2016
Requested date:	14-December-2020
Release date:	03-February-2021
Posted date:	14-June-2021
Source of document:	Disclosure Officer Pension Benefit Guaranty Corporation 1200 K Street, N.W., Suite 11101 Washington, D.C. 20005 Fax: (202) 229-4042 FOIAonline (preferred)

PBGC
Protecting America's Pensions
Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

VIA EMAIL:

PBGC 2021-000691

February 3, 2021

Re: Request for Special Report – Investigation of Alleged Whistleblower Reprisal

I am responding to your Freedom of Information Act (FOIA) request received in the Disclosure Division of the Pension Benefit Guaranty Corporation (PBGC) on December 14, 2020. You requested a copy of the "Special Report – Investigation of Alleged Whistleblower Reprisal, issued August 10, 2016". You authorized fees in the amount of $100.00. We processed your request in accordance with the Privacy Act, *as amended,* the FOIA and PBGC's implementing regulation. We apologize for the delay.

Pursuant to your request, we conducted a search of agency records and located 13 responsive pages. Our records indicate these records were previously released to you in response to your FOIA request assigned tracking number: **PBGC 2018-001245**. The Disclosure Officer has determined that all 13 pages maybe be released to you in full, or in part, as follows:

- PBGC Special Report – Investigation of Alleged Whistleblower Reprisal, issued August 10, 2016 (13 pages).

Unfortunately, it was necessary to withhold certain portions of the responsive records from disclosure.[1] The PBGC reasonably foresees that disclosure of this information would harm interests protected by the Privacy Act and the FOIA. I have relied on two Privacy Act Exemptions and three FOIA Exemptions to withhold this information.

The first applicable Privacy Act Exemption, 5 U.S.C. § 552a (j)(2) protects " information maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of

[1] We conducted a de novo review of the redactions applied previously invoked in PBGC's disclosure determination for PBGC 2018-001245. We determined the listed exemptions applied previously are still relevant to this disclosure determination.

identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision."

The second applicable Privacy Act Exemption, 5 U.S.C. § 552a (k)(2) protects " investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, that if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence."

The first applicable FOIA exemption, 5 U.S.C. §552(b)(4), permits the exemption from disclosure of matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The records you have requested contain "commercial or financial information" within the meaning of the above cited statutory language and PBGC's regulation 29 C.F.R. §4901.21(b)(2). Therefore, the Disclosure Officer has determined these records are exempt from disclosure.

The second applicable FOIA exemption, 5 U.S.C. § 552(b)(6), exempts from required public disclosure, "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Some of the records you requested contain "similar files" within the meaning of the above cited statutory language and the PBGC implementing regulation, 29 C.F.R. § 4901.21(b)(4). The FOIA requires agencies to conduct a balancing test. In applying Exemption 6, a balancing test was conducted, weighing the privacy interests of the individuals named in a document against the public interest in disclosure of the information. The public interest in disclosure is one that will "shed light on an agency's performance of its statutory duties." Dep't of Justice v. Reporters Committee, 489 U.S. 749, 773 (1989). We have determined disclosure of this information would constitute a clearly unwarranted invasion of an individual's personal privacy.

The third applicable exemption, 5 U.S.C. § 552(b)(7), permits the exemption from disclosure of "records compiled for law enforcement purposes" when disclosure would be detrimental to such purposes. Specifically, § 552 (b)(7)(C) prohibits disclosure if it could reasonably be expected to constitute an unwarranted invasion of personal privacy. The FOIA requires agencies to conduct a balancing test when invoking this exemption. In applying Exemption 7(C), a balancing test was conducted, weighing the privacy interests of the individuals named in a document against the public interest in disclosure of the information. The public interest in disclosure is one that will "shed light on an agency's performance of its statutory duties." Dep't of Justice v. Reporters Committee, 489 U.S. 749, 773 (1989). We have determined disclosure of this information would reasonably constitute and unwarranted invasion of an individual's personal privacy.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA, See 5 U.S.C. § 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to our requesters.

Since this response constitutes a partial denial of your request for records, I am providing you your administrative appeal rights in the event you wish to avail yourself of this process. The FOIA provides at 5 U.S.C. § 552(a)(6)(A)(i) (2014) amended by FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 that if a disclosure request is denied in whole or in part by the Disclosure Officer, the requester may file a written appeal within 90 days from the date of the denial or, if later (in the case of a partial denial), 90 days from the date the requester receives the disclosed material. PBGC's FOIA regulation provides at 29 C.F.R. § 4901.15 (2017) that the appeal shall state the grounds for appeal and any supporting statements or arguments, and shall be addressed to the General Counsel, Attention: Disclosure Division, Pension Benefit Guaranty Corporation, 1200 K Street, N.W., Washington, D.C. 20005. To expedite processing, the words "FOIA Appeal" should appear on the letter and prominently on the envelope.

In the alternative, you may contact the Disclosure Division's Public Liaison at (202)326-4040 for further assistance and to discuss any aspect of your request. You also have the option to contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

This completes the processing of your request. There are no fees associated with its processing. You may submit future requests for PBGC records by accessing FOIAonline, our electronic FOIA processing system, at www.foiaonline.gov or by e-mail at Disclosure@pbgc.gov.

Sincerely,

Dooter Malu
Government Information Specialist

Office of Inspector General
Pension Benefit Guaranty Corporation

August 10, 2016

MEMORANDUM

TO: (b)(6) [redacted]
Complainant

(b)(6) [redacted]
(b)(4) [redacted]

Tom Reeder
PBGC Director

FROM: (b)(6), (b)(7)(c) [redacted]

WARNING PRIVACY ACT STATEMENT. This special report contains information subject to the provisions of the Privacy Act of 1974. Such information may be disclosed only as authorized by this statute. Questions concerning release of this report should be coordinated with the Pension Benefit Guaranty Corporation, Office of Inspector General.

SUBJECT: Special Report: Alleged Whistleblower Reprisal by (b)(4) [redacted] Inc., against (b)(6) [redacted] (Case No. 15-0010-I)

Our office received a complaint from (b)(6) [redacted] (Complainant) alleging PBGC contractor (b)(4) [redacted], in violation of 41 U.S.C. § 4712, terminated (b)(6) [redacted] from (b)(6) [redacted] pension benefits (b)(6) [redacted] position as a reprisal for her disclosure of certain information. We obtained documents from the Complainant, (b)(4) [redacted] and PBGC, and interviewed 17 witnesses, including the Complainant and the (b)(4) [redacted] official responsible for (b)(6) [redacted] termination. We also reviewed the applicable statutes and case law. This memorandum is to report our findings, analysis, and conclusion relating to the allegation of whistleblower reprisal. The scope of this special report is limited to the investigation of the allegation of whistleblower reprisal. The merits of any underlying disclosures or other information are not discussed in this report.

Section 4712 requires the Inspector General to investigate a whistleblower reprisal complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the complainant, the contractor, and the PBGC Director. Under the law, no later than 30 days after receiving this report, the PBGC Director is to determine whether there is a sufficient basis to conclude (b)(4) [redacted] committed whistleblower reprisal and either issue an order denying relief or requiring corrective action. Potential corrective action includes reinstatement with compensatory damages (including back pay) and the reimbursement of all costs reasonably associated with the Complainant's OIG complaint.

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Executive Summary

Based upon our evaluation of the facts and applicable law, we are unable to conclude that [redacted] terminated the Complaint in reprisal for her disclosures. Although the evidence shows that two of the Complainant's disclosures could reasonably be considered protected under Section 4712, we are unable to show they were a contributing factor in her termination. Even if we were able to establish her disclosures were a contributing factor, we find there is reasonable grounds to conclude that [redacted] can show by clear and convincing evidence that they would have terminated the Complainant on other grounds absent her disclosures. In sum, we have concluded there is insufficient evidence to substantiate the Complainant's allegation that [redacted] subjected her to a reprisal for whistleblowing.

Background

On August 13, 2009, PBGC entered into a labor hours contract ([redacted]) with [redacted] to provide Field Benefit Administration (FBA) services in Sarasota, Florida. An FBA is a field contract office that works with PBGC's Office of Benefits Administration to provide participant and benefit processing services and assistance to case processing. FBAs perform almost 100 percent of the participant administration for PBGC's trusteed plans. The work of the FBA typically begins when PBGC recommends a plan for termination. The FBA is responsible for participant administration of the plan from trusteeship until a plan goes to Post Valuation Administration (PVA). In some instances, the FBA also provides services during the PVA phase of processing. The case processing cycle lasts on average 2.5 to 3.5 years. Once the plan has gone through the Plan Closing Process, it is transferred to a PVA center. In 2014, there were four FBA offices and one PVA office.

The August 13, 2009, contract had a base year with a period of performance from August 14, 2009, through August 13, 2010, and four option years concluding August 13, 2014. The total value of the five-year contract award was $29 million. On September 13, 2014, PBGC entered into another labor hour contract ([redacted]) with [redacted] to provide services for the Sarasota FBA. The contract has a base year with a period of performance from September 13, 2014, through September 12, 2015, and four option years concluding September 12, 2019. The total value of the five-year contract award is $33 million.

On April 7, 2014, [redacted] hired [redacted] as a pension benefits supervisor for the Sarasota FBA. A benefits supervisor is responsible for oversight of the plan administration functions, including developing work plans, authorizing benefits payments, and overseeing the issuance of benefit determination letters. At the Sarasota FBA, pension benefits supervisors oversee one

team leader and several senior, junior and entry-level pension administrators. The teams are comprised of about 10 members, including the supervisor.

In 2014 at the Sarasota FBA, the pension benefits supervisors, including the Complainant, reported to the project manager, [redacted], and the assistant project manager, [redacted] In 2014, [redacted] was the PBGC's backup or alternate Contracting Officer's Representative (COR). Her responsibilities included oversight of the [redacted] contract to provide services for the [redacted] FBA. [redacted] terminated the Complainant's employment on October 24, 2014.

Complainant alleges [redacted] was terminated as reprisal for making disclosures protected under 41 U.S.C. § 4712, the "Pilot program for enhancement of contractor protection from reprisal for disclosure of certain information." Under this statute, a federal contractor may not discharge an employee in reprisal for making certain disclosures to, among others: (1) a Federal employee responsible for contract oversight or management at the relevant agency or (2) a management official of the contractor who has the responsibility to investigate, discover, or address misconduct.

To receive whistleblower protection under this section, a complainant must disclose information she reasonably believes is evidence of: (1) gross mismanagement of a Federal contract or grant; (2) a gross waste of Federal funds; (3) an abuse of authority relating to a Federal contract or grant; (4) a substantial and specific danger to public health or safety; or (5) a violation of law, rule, or regulation related to a federal contract or grant. The legal burdens of proof specified in 5 U.S.C. § 1221(e), the Whistleblower Protection Act, are controlling for the purposes of OIG's investigation. *See* 41 U.S.C. § 4712(c)(6).

Findings and Analysis

The Evidence Indicates the Complainant Made Six Disclosures; Two of Which About the Failure to Pay Her Overtime Could Reasonably be Considered "Protected."

Based upon our interviews of the Complainant, documents we obtained from her, PBGC, and [redacted], and our interviews of witnesses, we determined the Complainant made six disclosures. As described below, we conclude four of [redacted] disclosures were not "protected" disclosures as defined by the statute. [redacted] third and fourth disclosures about [redacted]'s failure to pay [redacted] overtime could reasonably be considered protected.

First Disclosure - changing expected resolution dates for participant "service requests"

In a May 12, 2014, email to, among others, [redacted] project manager [redacted] and assistant project manager [redacted] the Complainant wrote, in pertinent part:

> [redacted] was handling moving the dates on the CRM report daily to prevent things from going into over-due status up until now. However, to control and know what request we have with our plans on the daily report from [redacted] and to prevent things from being moved out on the calendar going forward we will handle this within our team.

The Complainant contends [redacted] email shows that [redacted] pension benefits supervisors were directed by the project manager and the assistant project manager to change the expected resolution dates for participant "service requests," which includes requests for benefits applications, in the Customer Relationship Management (CRM) system – PBGC's computerized database that tracks the status of the requests. The Complainant did not allege, nor did we find, any evidence the Complainant made a disclosure about this to anyone else at any other time.

The Complainant's email does not say that managers directed the Complainant and other supervisors to change expected resolution dates for participant service requests in the CRM system. Even if we assume, however, the email does show this, this information must constitute wrongdoing covered by Section 4712. Ordering the change of expected resolution dates for participant service requests might, for example, constitute an abuse of authority, that is, an "arbitrary or capricious exercise of power ... that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *McCorcle v. Department of Agriculture*, 98 M.S.P.R. 363, 375 (2005). (Citation omitted.) However, the email and the Complainant's written explanation of it does not show how changing those dates adversely affected the rights of participants or provided a gain or advantage to anyone at [redacted]t. Therefore, we cannot show that this email constitutes a protected disclosure.

Second Disclosure - failure to properly train employees

In a July 2, 2014, email entitled, "The Application Tracking Tool has been updated – PAST DUE," to [redacted] employee [redacted] and copied to assistant project manager [redacted] and project manager [redacted], the Complainant wrote, in pertinent part:

> Just so I make sure that you and [redacted] and [redacted] are aware. My Senior staff members told me that they have never been trained on using this tool or even

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> how to access it.[redacted] and I and now [redacted] and [redacted] are the only people that went to the training provided by [redacted] right after we started but, at the time I assumed this was something everyone knew about. Especially the tenured people. I will ensure my staff is all trained on using this tool and that we work on getting the past due one's updated but it probably would be adventitious [sic] for all staff members to attend a training with [redacted]

The Complainant contends that this email evidences a disclosure of [redacted]'s failure, generally, to properly train all its employees. Such a failure might constitute gross mismanagement of the contract with PBGC to process participant applications. However, the disclosure is limited to the failure to train employees on the application tracking tool. For that failure to constitute gross mismanagement of the contract, it must create a "substantial risk of significant adverse impact on the agency's ability to accomplish its mission." *Swanson v. General Services Administration*, 110 M.S.P.R. 278, 285 (2008). (Citation omitted.) However, the Complainant did not present, nor did we find, evidence that this alleged failure created a "substantial risk of significant adverse impact" on the ability of [redacted] as a whole to accomplish its mission of processing participant benefits applications. Therefore, we cannot show this email constitutes a protected disclosure.

Third Disclosure – failure to pay overtime

In a September 10, 2014, email, the Complainant told [redacted]'s human resources director, [redacted], "I work more than 40 hours on a routine basis and always have to modify that because of unapproved overtime but that is what the job calls for to manage it effectively so I do so without complaint." The Complainant contends this email evidences [redacted]'s failure to pay her overtime for those hours she elected to work beyond 40. The failure to pay overtime for hours worked over 40 in a workweek might constitute a violation of law, that is, the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et. seq*. Therefore, we find it is reasonable to conclude that this disclosure was protected.

Fourth Disclosure – failure to pay overtime

In a September 15, 2014, email to human resources [redacted], the Complainant wrote, in pertinent part:

> [A]ll other Supervisors were paid time and a half and approved for Overtime <u>BUT</u> me per [redacted] and [redacted] I came in and worked straight time to help support the workloads and my peer supervisors and this was fine with [redacted] and [redacted] beforehand. It was changed and submitted and then I was asked to initial after

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> the fact. This is a pattern of timesheet altering and OT manipulation. I have never asked to be compensated even though I understand FLSA.

The Complainant contends this email also evidences (b)(4)'s failure to pay (b)(6) overtime for those hours she elected to work beyond 40. The failure to pay overtime for hours worked over 40 in a workweek might constitute a violation of the FLSA. Also, altering an employee's timesheet to avoid paying overtime might constitute an abuse of authority or a violation of law, rule, or regulation. Therefore, we find it is reasonable to conclude that this disclosure was protected.

Fifth Disclosure – 5,000 overdue service requests

In a September 25, 2014, email to (b)(6) and (b)(4) employee (b)(6) and copied to assistant project manager (b)(6) and (b)(4) employees (b)(6) and (b)(6) (b)(6), the Complainant told them, "The morning reports show over 5,000 overdue SR's." (An "SR" is a service request.) The term service request encompasses a range of actions sought by a participant from pension administrators. A service request includes, among other things, a participant's request for a benefits application, assistance in completing the application, or receipt of an address or telephone number. (b)(4)'s performance on some service requests, for example, "authorization of monthly benefits" and "benefit determination letter processing" are, pursuant to its contract with PBGC, measured.

The Complainant's September 25 email might evidence (b)(4) mismanagement of service requests. Not all mismanagement, however, rises to the level of "gross mismanagement." For example, a disclosure that agency officials failed to assist the appellant in ensuring that contractors were meeting their contractual duties did not rise to the level of "gross," because it failed to disclose a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. Lane v. Department of Homeland Security, 115 M.S.P.R. 342, 351-352 (2010). Further, to be protected "disclosures must be specific and detailed, not vague allegations of wrongdoing regarding broad, imprecise matters." *Kraushaar v. Department of Agriculture*, 87 M.S.P.R. 378, 381 (2000). (Citation omitted.) Here, the Complainant did not present specific and detailed information regarding how the 5,000 overdue service requests presented a substantial risk of significant adverse impact on (b)(4)'s ability to process participant benefits applications. Therefore, we are unable to show this disclosure was protected.

Sixth Disclosure - failure to authorize overtime for all teams and adequately train employees

At an October 23, 2014, meeting regarding pension benefits payment deadlines, the Complainant told PBGC COR (b)(6) that (b)(4) management selected other teams for approval to work overtime, but not (b)(6). The decision not to have every team work overtime, (b)(6) believed, was in part responsible for the backlog of service requests. (b)(6) also said (b)(6) told (b)(6) that (b)(6) believed the inadequacy of employee training at both the entry and managerial level caused the (b)(6) FBA's low "technical skills" and "soft skills" scores. (Scores for technical skills measure knowledge of the benefits application process. Soft skills scores measure the way an employee conducted a telephone conversation with a participant.) Also present at the meeting were project manager (b)(6) assistant project manager (b)(6) and (b)(4) employees (b)(6), and (b)(6).

The failure to authorize overtime for all teams and adequately train employees might constitute a disclosure of gross mismanagement if those things presented a substantial risk of significant adverse impact on (b)(4)'s ability to process participant benefit applications. However, the Complainant did not present, nor did we find, evidence that these alleged failures had such an impact. What the Complainant said appears to indicate only that she was displeased and disagreed with management's decisions about who received overtime and how much training was sufficient. We found evidence that (b)(4) employees received technical and soft skills training from PBGC and contractor instructors. As such, the disclosures were not protected disclosures of gross mismanagement. *See Downing v. Department of Labor*, 98 M.S.P.R. 64 (2004); *O'Donnell v. Department of Agriculture*, 120 M.S.P.R. 94 (2013), *aff'd*, 561 Fed. Appx. 926 (Fed. Cir. 2014). (Mere differences of opinion between employee and his agency superiors as to proper approach to a particular problem or most appropriate course of action do not rise to level of "gross mismanagement."); *Baker v. Department of Agriculture*, 131 Fed. Appx. 719 (2005), 2005 WL 790636, *rehearing en banc denied, cert. denied*, 546 U.S. 987 (2005). (Employee's disclosures to his supervisor that certain methods used in connection with work project were allegedly flawed were not protected, given that employee's disclosures did no more than voice his dissatisfaction with his supervisor's decision.)

The Evidence Does Not Show the Complainant's Disclosures Were a Contributing Factor in Her Termination

Given it appears at least two of the Complainant's disclosures were protected, (b)(6) can demonstrate reprisal by proving a causal connection between her disclosures and (b)(6) October 24, 2014, termination. Section 4712(c)(6) states the OIG must use the burden of proof provided in 5 U.S.C. § 1221(e) to establish such a causal connection. Under Section 1221(e), that burden

of proof requires a showing that a protected disclosure was a "contributing factor" in the personnel action the employee suffered.

According to Section 1221(e)(1), the whistleblower may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, including that the official taking the personnel action knew of the disclosure and the personnel action occurred within a period of time such that a "reasonable person could conclude that the disclosure ... was a contributing factor in the personnel action." This is known as the "knowledge-timing test" in reprisal for whistleblowing cases. Section 1221(e)(2) adds, however, that corrective action in the matter may not be ordered if, after a finding that a protected disclosure was a contributing factor, the employer demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

Evidence of knowledge and timing

To satisfy the first element of the "knowledge-timing test" provided in Section 1221(e)(1), the official responsible for terminating the Complainant, (b)(4) President and CEO (b)(6), must have had knowledge of her protected disclosures. The Complainant did not present nor did we find any evidence, however, that (b)(6) knew of her protected third and fourth disclosures – the September 10 and 15, 2014, emails about her not being paid for overtime work. And, (b)(6) denied having any knowledge that Complainant was not paid for overtime. Nonetheless, if there is evidence (b)(6) was aware of these disclosures, the evidence indicates the Complainant would be able to meet the "timing" part of the "knowledge-timing test."

The "reasonable time" element of the "knowledge-timing test" is satisfied if the Complainant's termination occurred within a period of time such that "a reasonable person could conclude that the disclosure was a contributing factor" in the personnel action. Here, the Complainant was terminated on October 24, 2014, approximately six to seven weeks after her disclosures about not being paid overtime. Although section 1221(e)(1) does not state how much time would cause a reasonable person to conclude the disclosure was a contributing factor in the reprisal, courts adjudicating Whistleblower Protection Act cases have established a lengthier reasonable time standard. In *Kewley v. Department of Health and Human Services*, 153 F.3d 1357, 1363 (Fed. Cir. 1998), for example, the Federal Circuit held a reasonable time could normally extend to an action taken within the employee's same performance evaluation period of one year. September 10 and 15, 2014, disclosures followed by an October 24, 2014, termination, a duration of six or seven weeks, would demonstrate a temporal proximity that supports an inference of reprisal.

Even if we could establish the Complainant's disclosures were a contributing factor in her termination, there is reasonable grounds to conclude that (b)(4) can show by clear and convincing evidence (b)(6) would have terminated her absent those disclosures.

Under Section 1221(e)(2), the presumption of reprisal may be overcome if (b)(4) can demonstrate by clear and convincing evidence it would have discharged the Complainant notwithstanding her disclosures. In Whistleblower Protection Act cases, 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." *Rychen v. Department of the Army*, 51 M.S.P.R. 179, 183 (1991) (citation omitted); 5 C.F.R. § 1209.4(e). It is a higher burden of proof than preponderance of the evidence. 5 C.F.R. § 1209.4(e).

In determining whether employers meet the clear and convincing standard, courts in Whistleblower Protection Act cases consider: (1) the strength of the employer's evidence in support of the termination; (2) the existence and strength of any retaliatory motive by the officials responsible for the termination decision; and (3) evidence concerning the employer's treatment of similarly-situated employees who were not whistleblowers. *See Redschlag v. Department of the Army*, 89 M.S.P.R. 589, 627 (2001); *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). The Merit Systems Protection Board does not view these factors as discrete elements, each of which the agency must prove by clear and convincing evidence. Rather, the Board will weigh the factors together to determine whether the evidence is clear and convincing as a whole. *Phillips v. Department of Transportation*, 113 M.S.P.R. 73, 77 (2010); *Yunus v. Department of Veterans Affairs*, 84 M.S.P.R. 78 (1999), *aff'd*, 242 F.3d 1367 (Fed. Cir. 2001).

Strength of (b)(4)'s Evidence in Support of the Complainant's Termination

(b)(6) told OIG investigators he terminated the Complainant for (b)(6) "unprofessional behavior that was consistently exhibited towards my client" – PBGC. (b)(6) said he terminated Complainant after being copied on an email dated October 23, 2014, from (b)(6), the backup or alternate PBGC COR, to project manager (b)(6) entitled, "Unacceptable Behavior." In the email, (b)(6) wrote in reference to the Complainant:

> Please know that I did not appreciate the rudeness, aggressiveness or unprofessional behavior of one of your Supervisors in the meeting today. (b)(6) (b)(6)'s behavior did not portray a good image of professionalism required from any (b)(4) employee. I was trying to help the contract perform better based on the feedback from some TPDs [Trade Processing Divisions] on processing

> Benefit Applications and Submission cutoff date[s]. [redacted] did not only twist my word[s], but accused me of setting unrealistic expectation[s] when my message was based on PBGC policies and procedures. [redacted] got up from my meeting and [was] ready to walk out and I had to tell [redacted] that [redacted] has to sit down and listen to my message. I suggested that [redacted] needs to use [redacted] listening skills. I informed [redacted] that I had no control over how much [redacted] is paying [redacted] and [redacted] group. I suggested [redacted] stops polarizing the office and take [redacted] grievances to [redacted]. [redacted] was very aggressive and uncontrollable and [redacted] thinks [redacted] is speaking out for [redacted] group. I informed [redacted] that there are four groups with Supervisors and other Supervisors are not throwing [a] temper tantrum about [a] raise or overtime to Federal staff. I have been in the office since Monday and have witnessed three outbursts from [redacted]. [redacted] is not ready to learn this job, but here to foment trouble.

Approximately an hour and half before receiving the email from [redacted], [redacted] received an email from [redacted], a [redacted] benefits supervisor, entitled, "Unhappy Client." In it, [redacted] told [redacted] that [redacted] and another PBGC employee (who we learned was [redacted] – [redacted]) had approached him:

> in reference to [redacted] and the way [redacted] represented [redacted] and the Management Team in Tier One training on [sic] yesterday. They stated that they was [sic] not happy with [redacted] professionalism and the way [redacted] conducted [redacted]. [redacted] asked about incentives, overtime and other things that should be addressed with [the] [redacted] Management Team only. I apologized to [redacted] and [redacted] and informed them that I will report it to the appropriate individuals. I just wanted to give you a heads up.

Within minutes of receipt of the email from [redacted], [redacted] emailed [redacted] human resources manager [redacted] and project manager [redacted] about the Complainant. He wrote, "This is a serious offense and must be firmly managed. It's my preference to terminate [redacted] for [redacted] unprofessional behavior which is contrary to [redacted]. I say we obtain statements from [redacted] [redacted], and anyone else who witnessed the conversation."

[redacted] provided a written statement. She wrote, in pertinent part:

> On October 23, 2014, [redacted] requested that [redacted] gather all the supervisors for a quick meeting about the benefit payment deadlines [redacted] started to speak and before she could finish [redacted] started to interrupt

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> [redacted]. Both [redacted] and I requested that [redacted] let [redacted] finish. [redacted] attempted to interrupt [redacted] three more times during [redacted] s discussion and each time was asked to wait until the end of the discussion. [redacted] stood up and stated [redacted] was supposed to be at lunch and was not going to be yelled at. I asked [redacted] to sit down and listen and [redacted] [said] I was not supporting the management team against [redacted] and from a business process we were not being given enough time. ... Both [redacted] and I expressed to [redacted] that [redacted] needs to learn to listen.

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> [redacted] s behavior was disrespectful and argumentative to [redacted] and her management team. [redacted] fails to adjust [redacted] approach for different audiences, does not select the correct forum for discussion issues, and is confrontational to others who do not share [redacted] views.

[redacted] and [redacted] confirmed for us the accuracy of their written statements. Witnesses [redacted] [redacted] and [redacted] did not provide [redacted] a written statement, but their descriptions to us of [redacted] 's behavior was consistent with that provided by [redacted] and [redacted]

[redacted] also told us he was aware of previous instances of similar behavior by the Complainant toward a PBGC employee and [redacted] employees. He told us he perceived these incidents as exhibiting a continuing pattern of misconduct and they factored into his decision to terminate her. He cited the Complainant's conduct toward PBGC employee [redacted] at an October 21, 2014, training session conducted by [redacted]. [redacted] confirmed for us that the Complainant had been "very aggressive" in complaining about the timing of the meeting, and described [redacted] behavior as "rude," and "not professional." [redacted] also cited Complainant's conduct toward other [redacted] employees. Human resources manager [redacted] reported to [redacted] on October 16, 2014, that the Complainant's team was "very upset by [redacted] behavior that continues to be an issue everyday."

Given the above, the evidence to support the reason for Complainant's termination appears strong. And, we found no evidence to refute [redacted] 's reason for terminating [redacted]. Further, the [redacted] employee handbook, which the Complainant signed, notes the Complainant's employment was "at will." Moreover, according to the handbook, the type of conduct the Complainant reportedly engaged in on October 23 with PBGC's [redacted], and on October 21 with PBGC's [redacted], that is, "displaying unprofessional behavior to the client," can be grounds for termination. In terminating the Complainant, [redacted] said the Complainant's behavior negatively impacted the success of [redacted] 's relationship with PBGC.

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The Merit Systems Protection Board has held that rude and discourteous behavior toward supervisors, coworkers, and non-agency personnel is a proper basis for imposing discipline. *See, e.g.,* Kirkland-Zuck v. Department of Housing and Urban Development, 90 M.S.P.R. 12, 18-20 (2001). In Whistleblower Protection Act cases, the MSPB's function is not to displace management's responsibility or to decide what penalty it will impose. Rather, the MSPB must assure that management's judgment has been properly exercised and the penalty selected does not exceed the maximum limits of reasonableness. *Dunn v. Department of the Air Force*, 96 M.S.P.R. 166, 170 (2004). Given the strength of the evidence supporting (b)(6)'s findings of unprofessional conduct, such conduct is a proper basis for imposing discipline, and (b)(4)'s employee handbook notified the Complainant she could be terminated for such behavior, we cannot show her termination exceeded the bounds of reasonableness.

Existence and Strength of Any Retaliatory Motive by (b)(6)

Concerning retaliatory motive, courts in whistleblower retaliation cases have considered, among other things, the effect of the whistleblower's disclosure on those responsible for taking action against the whistleblower. *See, e.g., Whitmore v. Department of Labor*, 680 F.3d 1353, 1370-1372 (Fed. Cir. 2012). The Complainant's protected disclosures about (b)(4)'s failure to pay her overtime essentially accused (b)(6), as (b)(4)'s (b)(6), of violating the law and, as such may have had a motivating effect on him. Nonetheless, even if (b)(6) had a motive to retaliate against the Complainant based on those disclosures, the evidence indicates, on balance, (b)(6)'s primary motive for terminating the Complainant's employment was his concern over her unprofessional conduct rather than any animus or ill will.

Evidence concerning (b)(4)*'s treatment of similarly-situated employees*

We did not find any evidence that (b)(6) did not terminate another (b)(4) employee who was not a whistleblower for misconduct similar to the Complainant's. We found that (b)(6) terminated another employee, (b)(6), for behavior similar to the Complainant's. And, like the Complainant, (b)(6) alleged that she was terminated in reprisal for whistleblowing. OIG previously found, however, there was insufficient evidence to conclude her termination was in reprisal for whistleblowing.

Conclusion

Although the evidence shows that two of the Complainant's disclosures could reasonably be considered protected under 41 U.S.C. § 4712, we are unable to show (b)(6), the (b)(4) official who terminated her, knew of them. Even if we could establish the Complainant's disclosures were a contributing factor in her termination, we find there is reasonable grounds

to conclude that (b)(4) can show by clear and convincing evidence (b)(6) would have terminated her on other grounds absent her disclosures. In sum, we have concluded there is insufficient evidence to substantiate the Complainant's allegation that (b)(4) subjected the Complainant to a reprisal for whistleblowing.

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