Description of document:	Correspondence between the Department of State (DOS) Inspector General (OIG) and United States Agency for Global Media (USAGM), 2017 to 2021
Requested date:	22-July-2021
Release date:	22-May-2025
Posted date:	09-June-2025
Source of document:	FOIA Officer Office of General Counsel Office of Inspector General U.S. Department of State 1700 North Moore Street Suite 1400 Arlington, VA 22209 Fax: (202) 261-8579 Email: FOIA@stateoig.gov FOIA.gov

Office of Inspector General
United States Department of State

May 22, 2025

SENT VIA EMAIL

Subject: Final Response - Department of State Office of Inspector General Freedom of Information Act Request No. 2021-F-044

This responds to your Freedom of Information Act (FOIA) request to the Department of State (DOS) Office of Inspector General (OIG), dated July 22, 2021, seeking, "A copy of all letter correspondence between the Inspector General of the Department of State and the US Agency for Global Media (formerly Broadcasting Board of Governors)." The time period for your request was between January 1, 2017, and July 22, 2021.

Your request was acknowledged by this office on August 2, 2021. Your request was given the FOIA Case number: 2021-F-044.

In response to your request, we conducted a search within DOS-OIG's front office and reporting offices. Based on that review, DOS-OIG is providing the following:

__9__ pages are released in full;
__42__ pages are released in part.

OIG redacted from the enclosed documents, names and identifying information of third parties to protect the identities of these individuals. Absent a Privacy Act waiver, the release of such information concerning the third parties named in these records would result in an unwarranted invasion of personal privacy in violation of the Privacy Act. Information is also protected from disclosure pursuant to Exemptions 3 and 6 of the FOIA further discussed below.

Exemption 3, 5 U.S.C. § 552(b)(3)

Exemption 3 protects "information specifically exempted from disclosure by [another] statute." 5 U.S.C. § 552 (b)(3). In this instance, 41 U.S.C. § 4712(b)(3) exempts from disclosure information about individuals who have filed a complaint under the contractor and grantee whistleblower program. Accordingly, DOS-OIG is withholding identifying information about whistleblower complainants.

Exemption 6, 5 U.S.C. § 552(b)(6)

Exemption 6 allows withholding of "personnel and medical files and *similar files* the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added). DOS-OIG is invoking Exemption 6 to protect the names of complainants and/or witnesses, third parties, and any information that could reasonably be expected to identify such individuals.

Appeal

You have the right to appeal this response.[1] Your appeal must be received within 90 calendar days of the date of this letter. Please address any appeal to:

Office of the General Counsel
Office of Inspector General
U.S. Department of State
1700 N. Moore Street
Suite 1400
Arlington, VA 22209
Email: FOIAAppeals@stateoig.gov

Both the envelope and letter of appeal should be clearly marked, "Freedom of Information Act/Privacy Act Appeal." Your appeal letter should also clearly identify DOS-OIG's response. Additional information on submitting an appeal is set forth in the DOS regulations at 22 C.F.R. § 171.15.

[1] For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. 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 all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Assistance and Dispute Resolution Services

For further assistance and to discuss any aspect of your request you may contact DOS-OIG's FOIA Public Liaison at:

FOIA Officer
Office of General Counsel
Office of Inspector General
U.S. Department of State
1700 North Moore Street
Suite 1400
Arlington, VA 22209
foia@stateoig.gov

Additionally, you may 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.

Sincerely,

Gina Goldblatt

Gina Goldblatt
Government Information Specialist

OIG Office of Inspector General
U.S. Department of State • Broadcasting Board of Governors

UNCLASSIFIED

September 6, 2017

TO: Kenneth Weinstein, Acting Board Chairman, BBG

FROM: Steve A. Linick, Inspector General

SUBJECT: Report of Investigation Pursuant to 41 U.S.C. § 4712
OIG Whistleblower Case 2016-0038 [redacted]

Please see the attached report of investigation of a whistleblower complaint filed under the program for enhancement of contractor protection from reprisal for disclosure of certain information (41 U.S.C. § 4712). As noted in the report, within 30 days after receiving an OIG report pursuant to Section 4712(b), the Broadcasting Board of Governors (BBG) is required to determine whether there is a sufficient basis to conclude that the grantee subjected the complainant to a reprisal prohibited by Section 4712(a) and to issue an order denying relief or taking one or more of the remedial actions specified in Section 4712(c)(1).

Please feel free to contact me at (202) 663-[redacted], or your staff may contact Jeffrey McDermott at (202) 663-[redacted] or [redacted]

cc: Ben Herman, General Counsel, RFE/RL

[redacted]

UNCLASSIFIED

September 6, 2017

MEMORANDUM

FROM: OIG – Jennifer L. Costello, Assistant Inspector General

TO: OIG – Steve A. Linick, Inspector General

SUBJECT: Report of Investigation Pursuant to 41 U.S.C. § 4712
OIG Whistleblower Case 2016-0038 (b)(3):41 U.S. Code § 4712; (b)(6)

The Office of Inspector General (OIG) is required to investigate complaints filed by employees of contractors, subcontractors, grantees, or personal services contractors who provide credible information alleging that they were subject to reprisal for whistleblowing activity.[1] Upon completion of the investigation, OIG is required to submit a report of the findings of its investigation to the complainant, the contractor or grantee concerned, and the head of the agency. Not later than 30 days after receiving the report of OIG's findings, the head of the agency concerned is required to determine whether there is a sufficient basis to conclude that the contractor or grantee subjected the complainant to a reprisal prohibited by law and to issue an order denying relief or taking one or more of the remedial actions specified in the law.[2]

As described below, OIG received a complaint from (b)(3):41 U.S. Code § 4712; (b)(6) an employee of a grantee of the Broadcasting Board of Governors (BBG), alleging that he was terminated from his position after having made a protected whistleblower disclosure. OIG's investigation found that (b)(3):41 U.S. Code § made a protected disclosure, but his employer showed by clear and convincing evidence that it would have taken the same action against (b)(3):41 U.S. Code § 4712; absent his disclosure.

Allegation

On September 21, 2016, (b)(3):41 U.S. Code § 4712; filed a complaint with OIG under Section 4712 alleging that he was terminated from his position as a journalist with Radio Free Europe/Radio Liberty's (RFE/RL) Tajik Service in retaliation for participating in a series of internal investigations regarding the Director of the Tajik Service. Shortly after the investigations concluded, the RFE/RL announced a restructuring of the Tajik Service, and (b)(3):41 U.S. Code § 4712; was not selected for continued employment. (b)(3):41 U.S. Code § 4712; alleges that the restructuring was a pretext for removing him.

[1] 41 U.S.C. § 4712. The original act was enacted on January 2, 2013, and applied to employees of contractors, subcontractors, and grantees. The act was amended on December 16, 2016, to include personal services contractors.
[2] 41 U.S.C. § 4712(c)(1).

OIG reviewed the complaint and determined that it contained sufficient details to allege a violation of the prohibition against retaliation for engaging in a protected activity. Consequently, OIG initiated an investigation of the allegations.

Background

(b)(3) 41 U S Code § 4712, (b)(6)

In January 2016, RFE/RL's General Counsel began an internal investigation of the Director of the Tajik Service after receiving allegations from the OIG hotline regarding her objectivity, favoritism toward employees from her region of Tajikistan, and potential conflicts of interest. As part of the investigation, the General Counsel interviewed several employees of the Tajik Service, including [(b)(3) 41 U.S]who presented information that he believed supported the allegations that triggered the investigation. The General Counsel conducted another, narrower investigation of the Tajik Service in May 2016, in which [(b)(3) 41 U.S]also participated. During and after these investigations, [(b)(3) 41 U.S]also independently reached out to the General Counsel to voice other concerns with the Director and with the Tajik Service generally.

On June 13, 2016, RFE/RL announced that the Tajik Service would undergo a restructuring. As part of the restructuring, all employees of the Tajik Service were required to participate in a video editing test and interview with the selection committee responsible for making staffing decisions as part of the restructuring process.[3]

[(b)(3):41 U.S. Code § 4712, (b)(6)] became concerned that Tajik Service management wished to fire him and that the restructuring would be used as a pretext to do so. [(b)(3):41 U.S.]contacted RFE/RL's General Counsel and then-Director of Human Resources several times during and after the restructuring, expressing concerns about retaliation for his participation in the investigations earlier that year.[4] [(b)(3) 41 U.S. Code § 4712:] also raised these concerns several times to the President of RFE/RL via email. On August 15, 2016, RFE/RL management notified [(b)(3):41 U.S. Code § 4712:] that he had not been selected for continued employment. [(b)(3):41 U.S.]employment was ultimately terminated on August 28, 2016.

Standard for Alleging a Claim of Reprisal

As an employee of a BBG grantee, [(b)(3) 41 U.S. Code § 4712:] is entitled to file a complaint under Section 4712. OIG initially reviewed his complaint to determine whether (1) he made a protected disclosure, (2)

[3] Members of the selection committee included the Tajik Service Director, the RFE/RL Regional Manager for Central Asia, RFE/RL's Human Resources Manager, and RFE/RL's Director of TV and Video Production. The then-Director of Human Resources attended the selection committee meeting and recorded notes of the decisions.

[4] [(b)(3):41 U.S.] also contacted OIG on June 26, 2016, to voice these concerns.

his employer took an action against him that could be an act of reprisal, and (3) his complaint was filed within 3 years of the alleged reprisal.

Protected Disclosure

The information provided by [(b)(3):41 U.S. Code § 4712;] to RFE/RL's General Counsel during the internal investigations qualifies as a protected disclosure under Section 4712 because it was made to an official with the responsibility to investigate, discover, or address misconduct and alleged improper activity and involved information that [(b)(3):41 U.S. Code § 4712;] reasonably believed was evidence of an abuse of authority relating to a Federal contract or grant.

Alleged Retaliation

The law defines reprisal as being "discharged, demoted, or otherwise discriminated against" as a result of a protected disclosure.[5] In this case, RFE/RL terminated [(b)(3):41 U.S. Code § 4712;] on August 28, 2016.

Timely Complaint

[(b)(3):41 U.S. Code § 4712; (b)(6)] filed his complaint on September 21, 2016, which is within the three-year statute of limitations from the date of the alleged reprisal.[6]

Burdens of Proof

Under 41 U.S.C. § 4712(c)(6), the legal burdens of proof specified in 5 U.S.C. § 1221(e) shall be controlling for the purposes of any investigation conducted by an Inspector General. Under 5 U.S.C. § 1221(e), an employee must present evidence that he or she made a protected disclosure, which was a contributing factor in a personnel action taken against him or her. The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that (a) the official taking the personnel action knew of the disclosure and (b) 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.

Once the employee has met this burden, the burden of proof shifts to the employer, which must present clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.[7] In *Carr v. Social Security Administration,* the court adopted the following test:

[5] 41 U.S.C. § 4712(a)(1).

[6] 41 U.S.C. § 4712(b)(4).

[7] *Ellison v. Merit Sys. Protection Bd.,* 7 F.3d 1031, 1034 (Fed. Cir. 1993).

> [W]hen determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the following factors [should be considered]: the strength of the agency's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.[8]

The courts have defined clear and convincing evidence as the degree of proof which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is highly probable.[9] However, an employer does not need to prove each of the factors by clear and convincing evidence. Rather, the three factors will be weighed together to determine whether as a whole the evidence is clear and convincing, and a strong showing on one factor may be sufficient.[10]

(b)(3):41 U.S. Code § 4712; (b)(6) presented evidence that his protected disclosure was a contributing factor in the personnel action taken against him by demonstrating that he had raised concerns about the Director of the Tajik Service with the General Counsel of RFE/RL. (b)(3):41 U.S. also presented evidence that the Director of Human Resources, who attended the selection committee meeting and signed off on his termination, was aware of his disclosure. Therefore, (b)(3):41 U.S. Code § 4712; met his burden of proof under 5 U.S.C. § 1221(e), and the burden shifted to RFE/RL to present clear and convincing evidence that it would have taken the same personnel action in the absence of (b)(3):41 U.S. Code § 4712 disclosure.

Results of Investigation

OIG reviewed emails and other records provided by RFE/RL and (b)(3):41 U.S. Code § 4712 to determine the basis for the decision to terminate (b)(3):41 U.S. Code employment. OIG also interviewed (b)(3):41 U.S. Code § 4712; (b)(6) and several relevant fact witnesses from RFE/RL. RFE/RL provided evidence showing both that its management planned on transforming the Tajik Service from radio-based content to video and television well before (b)(3):41 U.S. Code first protected disclosure and that it terminated (b)(3):41 U.S. based on his poor performance in the video editing test and interview process.

In August 2015, six months prior to (b)(3):41 U.S. s first disclosure, the Tajik Service Director's performance review contained a goal to "restructure Tajik Service both in Dushanbe and in

[8] 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Geyer v. Dep't of Justice*, 7 M.S.P.R. 682, 688, aff'd, 116 F.3d 1497 (Fed. Cir. 1997)).

[9] *Road & Highway Builders v. U.S.*, 702 F.3d 1365, 1368 (Fed. Cir. 2012).

[10] *Lucchetti v. Dep't of Interior*, 2017 MSPB LEXIS 743 (Feb 15, 2017) (*citing Phillips v. Dep't of Transportation*, 113 M.S.P.R. 73, 77 (2010)).

Prague with the objective: cut back from radio and put saved resources in video and TV and web production..." In interviews with OIG, several RFE/RL employees stated that these restructuring efforts fit within a broader effort to transition from producing radio content to television and video content. They noted particularly that there is an increasing demand for video content, particularly through social media. The Regional Director for Central Asia told OIG that the Tajik Service restructuring had first been proposed in 2013.

As part of the restructuring, employees who were interested in retaining employment in the Tajik Service were required to apply for new positions. The application process included completing a video editing exercise and interviewing with the selection committee. All applicants were given the same video editing test, but because of the favoritism allegations raised against the Director, RFE/RL's General Counsel insisted that the test employ blind grading. In a June 13, 2016, email to the selection committee, he stated that "for legal reasons it is imperative that these tests be graded blindly—in other words, the graders cannot know the identity of the person whose test they are grading [emphasis in original]. Please make sure that the testing process is implemented in a way that preserves blind grading."

RFE/RL produced credible and well-documented evidence that it would have terminated [(b)(3) 41 U.S. Code § 4712;] regardless of his disclosure, based on his test score and his interview. Fourteen employees took the test, and [(b)(3) 41 U.S. Code § 4712;] received the lowest possible score. RFE/RL provided OIG with the selection panel's contemporaneous notes from [(b)(3) 41 U.S. Code § 4712;] interview, which confirm that the panel believed he was not a good fit for the position being discussed for various reasons, including his lack of vision for the Tajik Service and his disinterest in collaboration. The selection committee members told OIG that [(b)(3) 41 U.S. Code § 4712;] was a hard-working person but that they had concerns about his inability to adapt to the new media platform, potential bias in his reporting, and his disinterest in working on a team.

In addition, RFE/RL provided evidence that [(b)(3) 41 U.S. Code § 4712;] had a history of disciplinary issues that contributed to his termination. His personnel file demonstrates that he was suspended for one month without pay in 2015 for publishing a graphically violent video on the Tajik Service website and allowing inappropriate comments about the video to remain. [(b)(3) 41 U.S. Code § 4712;] was also disciplined in 2014 for raising his voice toward the Director in a meeting in which the entire Tajik Service staff was present.

Regarding motive to retaliate, the Director of the Tajik Service had an obvious motive to retaliate against [(b)(3) 41 U.S. Code § 4712;] if she knew of his participation in the internal investigations. However, the Director told OIG that she was not aware of [(b)(3) 41 U.S. Code § 4712;] participation, and OIG found no evidence to contradict this assertion. The Director of Human Resources, who attended the selection committee meeting and signed off on [(b)(3) 41 U.S. Code § 4712;] termination, was aware of his participation in the investigations, but she had little motive to retaliate because she was not the focus of the investigations.

Finally, with regard to treatment of other employees who were not whistleblowers, the General Counsel told OIG there were eight employees who reapplied for their positions during the reorganization. Six of these employees participated in the internal investigation, and two did not. One of the two employees who did not participate was not retained by RFE/RL, and four of the six employees who did participate retained their positions. Thus, there is no evidence that whistleblowing activity correlated with retention decisions. In addition, the fact that RFE/RL used blind grading for the video editing tests, which all Tajik Service employees were required to take, significantly diminished the possibility of disparate treatment.

Conclusion

(b)(3):41 U.S. Code § 4712 made a protected disclosure by participating in the internal investigations regarding the Director of the Tajik Service. Shortly thereafter, RFE/RL terminated his employment. Because (b)(3):41 U.S. Code § 4712 met his burden under Section 4712, RFE/RL must provide clear and convincing evidence that it would have taken the same action in the absence of his disclosure.

RFE/RL provided clear and convincing evidence that it would have terminated (b)(3):41 U.S. Code § 4712 regardless of his disclosure. RFE/RL decided upon a restructuring of the Tajik Service prior to (b)(3): (b)(3):41 U.S. disclosure and employed a video editing test with blind grading to rate its employees who applied for positions in the reorganized service. (b)(3):41 U.S. scored poorly on the test, and members of the interview panel raised concerns regarding his vision for the organization and his lack of collaboration. (b)(3):41 U.S. Code § 4712 also had a history of well-documented instances of misconduct.

Although there is some evidence of a possible motive to retaliate against (b)(3):41 U.S. Code § 4712 the strength of the evidence presented by RFE/RL, as well as the fact that other individuals who made similar disclosures were retained by the Tajik Service, supports a finding that (b)(3):41 U.S. Code § 4712: (b)(6) termination was unrelated to his protected disclosure. Therefore, based on the evidence presented, OIG concludes that RFE/RL did not commit retaliation as prohibited by 41 U.S.C. § 4712.

Should you or your staff require it, OIG can share any documentation and evidence from this investigation. My point of contact is Jeffrey McDermott, Whistleblower Protection Ombudsman, (b)(6)

UNCLASSIFIED

March 1, 2018

TO: Kenneth Weinstein, Chairman of the Board, BBG

FROM: Steve A. Linick, Inspector General

SUBJECT: Report of Investigation Pursuant to 41 U.S.C. § 4712
OIG Whistleblower Case 2017-0050 (b)(3):41 U.S. Code § 4712; (b)(6)

Please see the attached report of investigation of a whistleblower complaint filed under the program for enhancement of contractor protection from reprisal for disclosure of certain information (41 U.S.C. § 4712). As noted in the report, within 30 days after receiving an OIG report pursuant to Section 4712(b), the Broadcasting Board of Governors (BBG) is required to determine whether there is a sufficient basis to conclude that the contractor subjected the complainant to a reprisal prohibited by Section 4712(a) and to issue an order denying relief or taking one or more of the remedial actions specified in Section 4712(c)(1).

Please feel free to contact me at (b)(6) or your staff may contact Jeffrey McDermott at (b)(6)

cc: (b)(3):41 U.S. Code § 4712; (b)(6)
Ms. Natalie May, Chief Executive Officer, Chaise Management Group

March 1, 2018

UNCLASSIFIED

MEMORANDUM

FROM: OIG – Jeffrey D. McDermott, Acting Assistant Inspector General JDM

TO: OIG - Steve A. Linick, Inspector General

SUBJECT: Report of Investigation Pursuant to 41 U.S.C. § 4712
OIG Whistleblower Case 2017-0050 [(b)(3):41 U.S. Code § 4712; (b)(6)]

The Office of Inspector General (OIG) is required to investigate complaints filed by employees of contractors, subcontractors, or grantees, or personal services contractors who provide credible information alleging that they were subject to reprisal for whistleblowing activity.[1] Upon completion of the investigation, OIG is required to submit a report of its findings to the complainant, the contractor or grantee concerned, and the head of the agency. Not less than 30 days after receiving the report of OIG's findings, the head of the agency concerned is required to determine whether there is a sufficient basis to conclude that the contractor or grantee subjected the complainant to a reprisal prohibited by law and to issue an order denying relief or taking one or more of the remedial actions specified in the law.[2]

As described below, OIG received a complaint from [(b)(3):41 U.S. Code § 712; (b)(6)] a former employee of a Broadcasting Board of Governors (BBG) contractor, alleging he was terminated from his position as a broadcast journalist at the Office of Cuba Broadcasting (OCB) after having made a protected whistleblower disclosure. OIG's investigation found that [(b)(3):41 U.S.] made a protected disclosure under Section 4712 and that his employment was terminated. However, OIG concluded that his termination was solely prompted by OCB officials, rather than by a decision of the contractor, and thus he does not qualify for relief under the statute.

Allegation

On February 23, 2017, [(b)(3):41 U.S. Code § 4712;] filed a complaint with OIG under Section 4712 alleging that Chaise Management Group (Chaise), a BBG contractor, terminated his position as an independent journalist at OCB in retaliation for criticizing BBG's hiring practices and raising allegations of prohibited personnel practices, such as narrowly tailoring job announcements to ensure that a specific person was hired. [(b)(3):41 U.S. Code § 4712;] submitted his concerns in writing to the

[1] 41 U.S.C. § 4712. The original act was enacted on January 2, 2013, and applied to employees of contractors, subcontractors, and grantees. The act was amended on December 16, 2016, to include personal services contractors.
[2] 41 U.S.C. § 4712(c)(1).

Office of Human Resources (HR) at BBG, on December 22, 2016, and again on January 12, 2017, after having received no response. On January 18, 2017, Chaise advised (b)(3):41 U.S. Code § 4712 that his services at OCB were no longer needed and that his last day of employment would be January 31, 2017.

OIG reviewed the complaint and determined that it contained sufficient details to allege a violation of the prohibition against retaliation for engaging in a protected activity under Section 4712. Consequently, OIG initiated an investigation of the allegations.

Background

(b)(3):41 U.S. Code § 4712; (b)(6)

Chaise is a contractor providing staffing for programs of the BBG, including OCB. Prior to his employment with Chaise, (b)(3):41 U.S. Code § 4712 had a personal services contract directly with BBG. During the fourth quarter of 2016, BBG transitioned away from individual personal service contracts and instead contracted with Chaise to provide recruiting and staffing services.

In October 2016, (b)(3):41 U.S. Code § 4712 applied to a vacancy announcement for position at OCB at the GS-15 level. In December 2016, (b)(3):41 U.S. Code § 4712 learned that OCB had decided not to fill the position. Shortly thereafter, OCB posted a new vacancy announcement with an amended position description at a GS-14 level. (b)(3):41 U.S. Code § 4712 believed that the changes to the announcement suggested that the new announcement was targeted toward a specific candidate who was friendly with the then-Director at OCB.

(b)(3):41 U.S. Code § 4712; (b)(6) sent an initial letter to a BBG HR specialist on December 22, 2016, inquiring about the cancelled position and the modified vacancy announcement; he also included his concerns regarding potential prohibited personnel practices. Because he received no response, he re-sent a copy of the same letter to the Director of HR, in January 2017. On January 12, 2017, (b)(3):41 U.S. Code § 4712 spoke with the HR specialist regarding his complaints about BBG's hiring practices and provided other examples of hiring that he believed were improper. On January 18, 2017, Chaise notified (b)(3):41 U.S. Code § 4712 that his employment with Chaise would be terminated on January 31, 2017.

Standard for Alleging a Claim of Reprisal

As an employee of a BBG contractor, (b)(3):41 U.S. Code § 4712 is entitled to file a complaint under Section 4712. OIG initially reviewed his complaint to determine whether (1) he made a protected disclosure, (2) his employer took an action against him that could be an act of reprisal, and (3) his complaint was filed within 3 years of the alleged reprisal.

Protected Disclosure

It is a prohibited personnel practice for an agency official to "give an unauthorized advantage in order to improve or injure the employment prospects of any person."[3] [(b)(3) 41 U.S. Code § 4712;] raised concerns with BBG officials about improper hiring that he reasonably believed were an abuse of authority or a violation of law, both of which would qualify as a protected disclosure under Section 4712.[4]

Alleged Retaliation

The law defines reprisal as being "discharged, demoted, or otherwise discriminated against" as a result of a protected disclosure.[5] In this case, on January 18, 2017, [(b)(3) 41 U.S.] was notified by Chaise that his contract was being terminated because his services at OCB were no longer required.

Timely Complaint

[(b)(3) 41 U.S. Code § 4712;] filed his complaint with OIG on February 23, 2017, which is within the three-year statute of limitations from the date of the alleged reprisal.[6].

Results of Investigation

OIG reviewed documents provided by Chaise and BBG to determine the basis for the decision to terminate [(b)(3) 41 U.S.] employment. The documents do not state a reason for or explain the decision to terminate the contract; rather, they provide instructions to Chaise on logistical details regarding the termination.

OIG also interviewed OCB and BBG officials regarding the decision. OIG was unable to interview the primary decision-maker, as he had retired from OCB and OIG could not locate him. However, OCB's Chief of Staff and Director of Administration both said that as a general matter, OCB regularly reviews its staffing needs. The Director of Administration told OIG that based on the recommendation of the Division Chief and concurrence by senior management, he contacted Chaise and directed them to terminate [(b)(3) 41 U.S. Code § 4712;] OCB's Director of Administration is responsible for contracting and financial management for OCB and had the authority to mandate this action.

According to OCB officials, staffing decisions are made by Division Chiefs and discussed at weekly senior staff meetings. According to those officials, OCB conducted a routine review of

[3] 5 U.S.C. § 2302(b)(6).
[4] 41 U.S.C. § 4712(a)(1).
[5] 41 U.S.C. § 4712(a)(1).
[6] 41 U.S.C. § 4712(b)(4).

staffing needs in the fall of 2016 and determined that the services of [(b)(3) 41 U.S. Code § 4712] and another contractor were no longer needed. In correspondence to OIG, Chaise also noted that OCB had explained to Chaise that the agency no longer had funding to support the contractors' positions.

Conclusion

The close proximity of [(b)(3):41 U.S] disclosure to the elimination of his position created an appearance that the termination was retaliatory in nature. As previously discussed, the documents produced to OIG do not explicitly support the BBG's explanation that a lack of funding was the reason for his contract termination. Nonetheless, [(b)(3):41 U.S. Code § 4712:] is not entitled to relief under Section 4712 because the evidence gathered by OIG demonstrates that the alleged retaliatory actions were taken solely by OCB officials, rather than by Chaise. Under the statute and the only judicial decision to have construed a comparable provision, employees who faced adverse personnel actions that are ordered by an authorized agency official do not quality for relief.[7] In this case, an authorized agency official, BBG's Director of Administration, directed Chaise to terminate [(b)(3):41 U.S.]and Chaise followed such direction. Therefore, [(b)(3):41 U.S.] does not qualify for relief under Section 4712.

[7] 41 U.S.C. § 4712(a)(3)(B) ("a reprisal ... is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request"); *Manion v. Nitelines Kuhana JV LLC*, No: 7:12-CV-247-BO, 2014 U.S. Dist. LEXIS 62663 (E.D.N.C May 6, 2014) (finding that a contractor employee does not qualify for relief under the Defense Contractor Whistleblower Protection Act, the statute upon which the pilot program was modeled, if the contractor merely effectuates a directive from the agency to terminate the contractor employee).

Office of Inspector General
United States Department of State

UNCLASSIFIED

May 9, 2019

TO: John F. Lansing, Chief Executive Officer, U.S. Agency for Global Media

FROM: Steve A. Linick, Inspector General

SUBJECT: **Report of Investigation Pursuant to 41 U.S.C. § 4712**
OIG Whistleblower Case 2018-0058 (b)(3):41 U.S. Code § 4712; (b)(6)

Please see the attached report of investigation of a whistleblower complaint filed under the program for enhancement of contractor protection from reprisal for disclosure of certain information (41 U.S.C. § 4712). As noted in the report, within 30 days after receiving an OIG report pursuant to Section 4712(b), the U.S. Agency for Global Media is required to determine whether there is a sufficient basis to conclude that the contractor subjected the complainant to a reprisal prohibited by Section 4712(a) and to issue an order denying relief or taking one or more of the remedial actions specified in Section 4712(c)(1).

Please feel free to contact me at (b)(6) or your staff may contact Jeffrey McDermott at (571) (b)(6)

cc: (b)(3):41 U.S. Code § 4712; (b)(6)
Ms. Anne Noble, General Counsel, Middle East Broadcasting Networks
Mr. Fermaint Rios, Procurement Executive, U.S. Agency for Global Media

Office of Inspector General
United States Department of State

UNCLASSIFIED May 9, 2019

FROM: OIG – Jeffrey D. McDermott, Assistant Inspector General (b)(6)

TO: OIG – Steve A. Linick, Inspector General

SUBJECT: Report of Investigation Pursuant to 41 U.S.C. § 4712
OIG Whistleblower Case 2018-0058 (b)(3):41 U.S. Code § 4712; (b)(6)

The Office of Inspector General (OIG) is required to investigate complaints filed by employees of contractors, subcontractors, grantees, or subgrantees or filed by personal services contractors who provide credible information alleging that they were subject to reprisal for whistleblowing activity.[1] Upon completion of the investigation, OIG is required to submit a report of its findings to the complainant, the contractor or grantee concerned, and the head of the agency. Not less than 30 days after receiving the report of OIG's findings, the head of the agency concerned is required to determine whether there is a sufficient basis to conclude that the contractor or grantee subjected the complainant to a reprisal prohibited by law and to issue an order denying relief or taking one or more of the remedial actions specified in the law.[2]

As described below, OIG received a complaint from (b)(3):41 U.S. Code a former employee of a U.S. Agency for Global Media (USAGM) grantee, alleging that he was suspended and then terminated from his position after having made a protected whistleblower disclosure. OIG's investigation found that Mr. (b)(3):41 did make a protected disclosure but that his employer, Middle East Broadcasting Networks (MBN), provided clear and convincing evidence that it would have taken the same personnel action absent (b)(3):41 U.S. disclosure.

Allegation

On May 14, 2018, (b)(3):41 U.S. filed a complaint with OIG under Section 4712 of Title 41 of the U.S. Code, alleging that he was suspended and then later terminated from his position at MBN in retaliation for raising various concerns regarding his former supervisor. In particular, (b)(3):41 U.S. Code § 4712; asserted that his supervisor had abused her authority by directing individuals she supervised to help her complete coursework for a master's degree she was seeking. (b)(3):41 U.S. stated that she directed them to assist her during their regular work time. (b)(3):41 U.S. Code § 4712; contended that, after he disclosed this purported

[1] 41 U.S.C. § 4712.

[2] 41 U.S.C. § 4712(c)(1).

(b)(3):41 U.S. Code § 4712; (b)(6)

a protected disclosure pursuant to 41 U.S.C. § 4712. This report similarly does not address any potentially related issues, which would likewise be outside of OIG's authority to investigate claims of retaliation under 41 U.S.C. § 4712.

misconduct to his management and others within MBN, his employment was suspended and then terminated in retaliation.

OIG reviewed [redacted] complaint and determined that it contained sufficient details to allege a violation of the prohibition against retaliation for engaging in a protected activity. Consequently, OIG initiated an investigation of his allegations.

Background

(b)(3):41 U.S. Code § 4712; (b)(6)

[redacted] stated that he worked with his supervisor throughout his tenure, including in Beirut. While there, she was in an administrative and budgeting role. When she came to the United States in September 2014, she was promoted to executive producer and thus became [redacted] supervisor. She promoted [redacted] to the role of senior development producer in September 2016. [redacted] told OIG that he understood, in this role, he would be responsible for developing new shows, helping to develop social media content, and coordinating with the Social Media Department. However, at the same time, his supervisor assigned [redacted] to produce a documentary about Arab satirists who use humor to diminish the influence of ISIS (hereinafter the "Satire Show").

Approximately eight months after he took on this role, [redacted] brought to senior management's attention alleged misconduct by his supervisor. In a series of May 2017 emails and meetings with MBN's Human Resources (HR) Director, Vice President for Administration, and General Counsel, [redacted] contended that his supervisor had assigned employees she supervised to complete coursework for a master's degree program on her behalf. [redacted] continued to raise these concerns throughout the remainder of his tenure.

In June 2017, [redacted] was suspended from his employment with MBN for 1 week. According to MBN, it suspended his employment because he failed to make a series of editorial changes to the "Satire Show" as directed by his supervisor. Then, in August 2017, MBN terminated [redacted] employment. MBN stated that it did so in connection with a broader restructuring of the Current Affairs Department in which the employment of several other individuals was also terminated.

Standard for Alleging a Claim of Reprisal

As an employee of a USAGM grantee, [redacted] is entitled to file a complaint under 41 U.S.C. § 4712. OIG initially reviewed his complaint to determine whether (1) he made a protected disclosure, (2) his employer took an action against him that could be an act of reprisal, and (3) his complaint was filed within three years of the alleged reprisal.

Protected Disclosure

Under 41 U.S.C. § 4712(a), information qualifies as a protected disclosure if it is made to, among other individuals and entities, a management official of the contractor or grantee or an employee with the responsibility to investigate, discover, or address misconduct. The protected disclosure must constitute

information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for, or negotiation of, a contract) or grant.

Based on the evidence that (b)(3):41 U.S. Code § 4712; provided, OIG determined that his statements to the HR Director, the Vice President for Administration, and the General Counsel qualified as protected disclosures because they were made to management officials of the grantee. In addition, his disclosures detailed information he reasonably believed constituted an abuse of authority relating to a Federal grant, because requiring subordinates to assist in personal business would qualify as a misuse of a supervisory position and an abuse of authority.[4]

Alleged Retaliation

The law defines reprisal as being "discharged, demoted, or otherwise discriminated against" as a result of a protected disclosure.[5] In this case, MBN suspended and then terminated (b)(3):41 U.S. from his employment on June 9, 2017 and August 23, 2017, respectively. Both events occurred after (b)(3):41 U.S. Code § 4712; raised concerns regarding his supervisor's purported abuse of authority.

Timeliness of Complaint

(b)(3):41 U.S. Code § 4712; filed his complaint on May 14, 2018, which is within the 3-year statute of limitations from the date of the alleged reprisal.

Burden of Proof

Under 41 U.S.C. § 4712(c)(6), the legal burdens of proof specified in 5 U.S.C. § 1221(e) are controlling for the purposes of any investigation conducted by an Inspector General. Under 5 U.S.C. § 1221(e), an employee must present evidence that he or she made a protected disclosure, which was a contributing factor in a personnel action taken against him or her. The employee may make this showing through direct or circumstantial evidence, such as evidence that (a) the official taking the personnel action knew of the disclosure and (b) 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.

Once the employee has met this burden, the burden of proof shifts to the employer, which must present clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.[6] In *Carr v. Social Security Administration*, the court adopted the following test:

> [W]hen determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, . . . the following factors [should be considered]: the strength of the agency's evidence in support of its

[4] *See, e.g., Singh v. U.S. Postal Service*, 2016 MSPB LEXIS 5835 (Sept. 20, 2016).

[5] 41 U.S.C. § 4712(a)(1).

[6] *Carr v. Social Security Admin.*, 185 F.3d 1318, 1322 (Fed. Cir. 1999).

> personnel action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.[7]

The courts have defined clear and convincing evidence as the degree of proof "which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is 'highly probable.'"[8] However, an employer does not need to prove each of the factors by clear and convincing evidence. Rather, the three factors will be weighed together to determine whether as a whole the evidence is clear and convincing, and a strong showing on one factor may be sufficient.[9]

Complainant's Burden

OIG obtained circumstantial evidence demonstrating that [(b)(3):41 U.S. Code § 4712] protected disclosures were a contributing factor in the personnel actions taken against him; in particular, the officials taking the actions were aware of his disclosures, and the personnel actions took place shortly after his disclosures.

[(b)(3):41 U.S. Code § 4712; (b)(6)] then-supervisor and senior MBN management were aware of [(b)(3):41 U.S. Code § 4712] concerns when they made the decision to suspend and then terminate his employment. On numerous occasions beginning May 11, 2017, [(b)(3):41 U.S.] expressed concerns about his supervisor's practice of soliciting other MBN employees to assist her with her graduate coursework and projects. For example, in a May 11, 2017, email to the HR Director, [(b)(3):41 U.S.] wrote that his supervisor "abused her authority when she asked four employees who work with her to help her in her courses and the graduate project at her school." According to MBN, from May 11, 2017, to June 1, 2017, the HR Director investigated Mr. [(b)(3):41 U.S. Code §] claims. MBN told OIG that the HR Director spoke with other employees who corroborated the allegations. Following this investigation, senior MBN officials met with the supervisor, and she acknowledged that she had engaged one of these employees for services outside of work.

MBN's HR Director, Vice President for Administration, and General Counsel then met with MBN's President and Vice President for Network News to discuss their findings. The officials decided, that as a result of her conduct, the supervisor would be required to participate in 6 months of mandatory management training. On June 2, 2017, [(b)(3):41 U.S.] was informed by MBN that his claims had been investigated but he was given no information concerning whether or to what extent they were substantiated. According to MBN, during this meeting, he reiterated his concerns. He again raised these concerns in a June 30, 2017, letter to the General Counsel and in an August 16, 2017, meeting with the General Counsel and HR Director. Thus, MBN management was well-aware of [(b)(3):41 U.S. Code § 4712] concerns when it decided to suspend and then terminate his employment on June 9 and August 23, 2017, respectively.

---

[7] 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Geyer v. Dep't of Justice*, 7 M.S.P.R. 682, 688, aff'd, 116 F.3d 1497 (Fed. Cir. 1997)).

[8] *Rood & Highway Builders v. U.S.*, 702 F.3d 1365, 1368 (Fed. Cir. 2012) (citing Am-Pro Protective Agency v. U.S., 281 F.3d 1234, 1240 (Fed. Cir. 2002)).

[9] *Lucchetti v. Dep't of Interior*, 2017 MSPB LEXIS 743 (Feb 15, 2017) (*citing Phillips v. Dep't of Transportation*, 113 M.S.P.R. 73, 77 (2010)).

MBN first suspended and then terminated [redacted] employment shortly after he raised concerns, which is evidence that the disclosure was a contributing factor in these actions. MBN asserted that, as described below, it suspended [redacted] employment on June 9 because he failed to follow his supervisor's editorial directions for the "Satire Show." [redacted] however, denied that he had been insubordinate and told OIG that he believed this proffered basis was pretextual. According to him, although he had disagreed with the requested editorial changes, he had attempted to discuss them with his supervisor [redacted] told OIG that, instead of engaging him on this topic, his supervisor cut him off during conversations and then sent email messages that made it incorrectly appear as though he had refused her requests. He agreed, however, that he did not ultimately make the requested changes.

[redacted] also told OIG that he believed that MBN's assertion that it had terminated his employment as part of a broader restructuring was similarly pretextual. According to [redacted] immediately following his termination, MBN began advertising for new positions with the same job responsibilities and in the same department as his previous role. In addition, OIG found that MBN retained – albeit temporarily – another Development Producer who had reported to [redacted] tenure.

Given the evidence described above, OIG concludes that [redacted] presented sufficient evidence to demonstrate that his protected disclosures were a contributing factor in the decisions to suspend and then terminate his employment. He presented evidence sufficient to demonstrate that MBN took personnel actions against him, at least in part because he raised concerns about his supervisor's abuse of authority in asking subordinates to aid in her college coursework. As such, he met the burden of proof under 5 U.S.C. § 1221(e) by the required preponderance of the evidence, and the burden shifts to MBN to present clear and convincing evidence that it would have taken the same personnel action in the absence of [redacted] disclosures.

Contractor's Burden

OIG found, however, that MBN presented clear and convincing evidence that it would have taken the same personnel actions against [redacted] in the absence of his protected disclosures. The first factor that the courts use to weigh whether an employer/agency has met its burden is the strength of the evidence.[10] In examining this factor, the Merit Systems Protection Board[11] examines the evidence supporting the personnel action and whether there were "legitimate reasons" for the personnel action.[12]

As stated above, MBN told OIG that it suspended [redacted] employment on June 9, 2017, because he had been insubordinate. Although [redacted] disputed this characterization of his conduct, OIG found that the weight of the evidence supported MBN's position. For example, although [redacted] believed that his supervisor's requested changes were subject to negotiation, she did send him an email with clear instructions. He ultimately chose not to follow those instructions and never made the changes to the show. In addition, MBN's HR Director, Vice President for Administration, and General Counsel all told OIG that, during their June 9 meeting with him, [redacted] was given repeated opportunities to

[10] *Carr*, 185 F.3d 1318, 1323.

[11] The Merit Systems Protection Board interprets the Whistleblower Protection Act in cases of alleged retaliation against Federal employees. 5 U.S.C. § 1221(a). Those factors are incorporated by reference in the statute protecting contractors from retaliation. 41 U.S.C. § 4712(c)(6).

[12] *Baker v. Dep't of Defense*, 2016 MSPB LEXIS 4567, p. 30 (2016).

agree to the "Satire Show" changes and was only suspended when he continually refused. Notably, the General Counsel and HR Director told OIG that before the meeting, they had believed [redacted] would agree to make the changes and had not been prepared to suspend his employment during that meeting. They told OIG that they had paused the meeting in order to prepare the letter of suspension. Indeed, by [redacted] own admission, the Vice President for Administration explicitly told him that he would be suspended if he failed to "do what [his supervisor] asked for."

With respect to the termination of his employment, MBN's HR Director, Vice President for Administration, and General Counsel told OIG that it had taken this action as part of a broader restructuring of the Current Affairs Department of which [redacted] had been a member. MBN appointed a new president in July 2017, and his focus was on producing more news programs and fewer cultural programs. One of the goals of the restructuring was to align MBN with the new president's focus, and positions connected with cultural programming, such as [redacted] were eliminated.

OIG reviewed evidence that supported MBN's assertions. First, MBN produced documentary evidence demonstrating that, on or about the same day that [redacted] employment was terminated, it terminated the employment of seven other members of the Current Affairs Department. Although Mr. [redacted] maintained that some of these individuals had also raised concerns regarding [redacted] then-supervisor, the HR Director denied that this was the case.[13] MBN also produced other documents (such as organizational charts) demonstrating the existence of a broader restructuring plan at this time. The HR Director and General Counsel acknowledged that, at the time [redacted] employment was terminated, MBN had retained some senior producer positions. They explained that [redacted] responsibilities were divided among these roles. They stated that [redacted] had been made aware that his position was being eliminated and that he had been given the opportunity to apply for these positions but had not done so. While [redacted] denied that he had been given this opportunity, he did indicate that he was aware at the time that the elimination of certain positions was being considered.

Based on the totality of the evidence, OIG concludes that MBN demonstrated that [redacted] conduct and a broader corporate restructuring, not [redacted] protected disclosures, were the reasons for the personnel actions that he alleged were retaliatory. OIG therefore concludes that, with regard to the first *Carr* factor, the strength of the evidence supporting the personnel action and whether there were "legitimate reasons" for the personnel actions, MBN provided evidence that clearly and convincingly supports its reasoning for the personnel actions it took with respect to [redacted]

Regarding the second *Carr* factor—existence and strength of any motive to retaliate on the part of the individuals who were involved in the decision—there is some evidence of retaliatory motive. As stated above, [redacted] supervisor was aware at the time of both his suspension and termination that he had raised concerns about her. Further, MBN's HR Director and General Counsel acknowledged that Mr. [redacted] supervisor had provided input with respect to both of these decisions.[14] They denied, however, that she was the ultimate decision-maker in either case. Their statements were supported by the fact that [redacted] supervisor was not present during the June 9 meeting at which it was determined

[redacted] told OIG that from approximately May 2017 to August 2017, he had disclosed to MBN's HR Director, Vice President for Administration, and General Counsel the identities of several other MBN employees who his supervisor had purportedly instructed to work on her graduate coursework. MBN did not terminate the employment of any of these individuals in August 2017, although it did terminate the employment of one of these individuals (his colleague on the "Satire Show") in 2018 in connection with another reorganization.

[14] MBN told OIG that [redacted] supervisor referred him to HR for insubordination, which led to the suspension, and that she prepared the initial reorganization proposal.

that his employment would be suspended and by the documentary evidence demonstrating that the termination of his employment was commensurate with a number of organizational changes and personnel reductions.

Finally, regarding the third *Carr* factor, there is substantial evidence that MBN took similar actions against similarly-situated employees who are not whistleblowers. With respect to the suspension of Mr. [redacted] employment, MBN told OIG that one of [redacted] colleagues on the "Satire Show" had also initially refused to follow editorial directions and would have also faced disciplinary action or suspension had he continued to do so. MBN's HR Director, Vice President for Administration, and General Counsel stated, however, that, unlike [redacted] this individual agreed to make the requested changes after they met with him. In addition, the HR Director told OIG that the suspension followed the discipline policy and was equivalent to discipline imposed on others at MBN for insubordination.

Regarding [redacted] termination, as stated above, MBN terminated seven other employees in the Current Affairs Department on or about the same day as [redacted] While the evidence supported [redacted] contention that a subordinate producer with a similar role was retained at this time, this individual's employment was also subsequently terminated in connection with further personnel changes in 2018.

Conclusion

[redacted] made a protected disclosure by communicating his supervisor's requests that subordinates complete personal tasks. Shortly thereafter, [redacted] employment was suspended and then terminated. Because [redacted] met his burden of showing that the disclosure was a contributing factor in these personnel actions under Section 4712, the burden shifted to MBN to provide clear and convincing evidence that it would have taken the same action in the absence of this disclosure.

MBN provided clear and convincing evidence that it would have taken these actions with respect to Mr. [redacted] absent his protected disclosure. MBN told OIG that [redacted] employment was suspended because he had refused to follow appropriate instructions from his supervisor and that his employment was terminated in connection with a corporate restructuring. OIG reviewed evidence that supported these statements. Accordingly, MBN met its burden, and based on the evidence presented, OIG concludes that there was insufficient evidence to demonstrate that MBN retaliated against [redacted] as set forth in 41 U.S.C. § 4712.

Office of Inspector General
United States Department of State

UNCLASSIFIED

February 6, 2020

TO: Grant Turner, Acting Chief Executive Officer, U.S. Agency for Global Media

FROM: Steve A. Linick, Inspector General

SUBJECT: Report of Investigation Pursuant to 41 U.S.C. § 4712
OIG Whistleblower Case 2019-0075 (b)(3):41 U.S. Code § 4712; (b)(6)

Please see the attached report of investigation of a whistleblower complaint filed under the program for enhancement of contractor protection from reprisal for disclosure of certain information (41 U.S.C. § 4712). As noted in the report, within 30 days after receiving an OIG report pursuant to Section 4712(b), the U.S. Agency for Global Media is required to determine whether there is a sufficient basis to conclude that the grantee subjected the complainant to a reprisal prohibited by Section 4712(a) and to issue an order denying relief or taking one or more of the remedial actions specified in Section 4712(c)(1).

Please feel free to contact Assistant Inspector General Jeffrey McDermott at (571) 349-(b)(6) with any questions.

cc: (b)(3):41 U.S. Code § 4712; (b)(6)
Mr. Benjamin Herman, Counsel for RFE/RL
Mr. Fermaint Rios, Procurement Executive, U.S. Agency for Global Media

UNCLASSIFIED February 6, 2020

(b)(6)

FROM: OIG – Jeffrey D. McDermott, Assistant Inspector General

TO: OIG – Steve A. Linick, Inspector General

SUBJECT: Report of Investigation Pursuant to 41 U.S.C. § 4712
OIG Whistleblower Case 2019-0075 (b)(3):41 U.S. Code § 4712; (b)(6)

The Office of Inspector General (OIG) is required to investigate complaints filed by employees of contractors, subcontractors, grantees, or subgrantees, and by personal services contractors who provide credible information alleging that they were subject to reprisal for whistleblowing activity.[1] Upon completion of the investigation, OIG is required to submit a report of the findings of its investigation to the complainant, the contractor or grantee concerned, and the head of the agency. Not less than 30 days after receiving the report of OIG's findings, the head of the agency concerned is required to determine whether there is a sufficient basis to conclude that the contractor or grantee subjected the complainant to a reprisal prohibited by law and to issue an order denying relief or taking one or more of the remedial actions specified in the law.[2]

As described below, OIG received a complaint from (b)(3):41 U.S. Code § 4712; (b)(6) an employee of a U.S. Agency for Global Media (USAGM) grantee, alleging that he was demoted and that his contract was not renewed after he made a protected whistleblower disclosure. OIG found that (b)(3):41 U.S. Code § 4712; did make a protected disclosure but that his employer, Radio Free Europe/Radio Liberty (RFE/RL), provided clear and convincing evidence that it would have taken the same personnel action absent (b)(3):41 U.S. Code § 4712; disclosure.

[1] 41 U.S.C. § 4712. The original act was enacted on January 2, 2013, and applied to employees of contractors, subcontractors, and grantees. The act was amended on December 16, 2016, to include personal services contractors.

[2] 41 U.S.C. § 4712(c)(1).

Allegation

(b)(3):41 U.S. Code § 4712; filed a complaint with OIG under Section 4712 alleging that RFE/RL demoted him and decided against renewing his contract after he raised concerns about RFE/RL's Kazakh Service. (b)(3):41 U.S. Code § 4712; alleged that the Kazakh Service coverage had an editorial bias that inappropriately favored certain political and religious groups in Kazakhstan. He also raised concerns to senior management about the use of grants funds. According to (b)(3):41 U.S. Code after he disclosed this purported misconduct and mismanagement of a federal grant to various senior RFE/RL officials, he was taken off an important assignment, removed from other RFE/RL activities, and was later told that his employment contract would not be renewed after 2019.

OIG reviewed (b)(3):41 U.S. complaint and determined that it contained sufficient details to allege a violation of the prohibition against retaliation for engaging in a protected activity. Consequently, OIG initiated an investigation of the allegations.

Background

(b)(3):41 U.S. Code § 4712; (b)(6)

In late 2017 (b)(3):41 U.S. Code § 4712; became concerned about what he believed to be impropriety in RFE/RL's Kazakh Service. (b)(3):41 U.S. believed that members of the service displayed an editorial bias that inappropriately favored certain political and religious groups in Kazakhstan. (b)(3):41 U.S. also had security concerns regarding the relationship between one senior member of the Kazakh Service and the country's government. Additionally, (b)(3):41 U.S. believed that other RFE/RL employees had been terminated in the past after making similar complaints.

(b)(3):41 U.S. Code § 4712; contacted the RFE/RL General Counsel in December 2017 to express these concerns and documented them in a memo to the General Counsel in February 2018. Following these initial conservations, (b)(3):41 U.S. Code § 4712; also spoke about these issues with

various other senior RFE/RL officials, including the Chief of Staff, Director of Human Resources, and Chief of Security, over the ensuing several months. Since his initial disclosure, he also raised similar concerns about other language services and the use of grant funds.

(b)(3):41 U.S. Code § 4712; claims that, as a result of expressing these concerns, he was removed from the NIION project in May 2018 before it was completed and was reassigned to the Uzbek Service, which he believed was a demotion.[3] [(b)(3):41 U.S.]also told OIG that his contract came under review in mid-2018 and that RFE/RL decided not to renew his contract, which was set to expire in January 2020. [(b)(3):41 U.S. Code § 4712;]believed when he arrived at RFE/RL that his employment there was open-ended because the extensions were formalities that were routinely granted, and he alleged that its nonrenewal was also retaliatory.

Standard for Alleging a Claim of Reprisal

As an employee of a USAGM grantee, [(b)(3):41 U.S. Code § 4712;]is entitled to file a complaint under Section 4712. OIG initially reviewed this complaint to determine whether (1) he made a protected disclosure, (2) his employer took an action against him that could be considered an act of reprisal, and (3) his complaint was filed within 3 years of the alleged reprisal.

Protected Disclosure

Under Section 4712, information qualifies as a protected disclosure if it is made to or among other individuals and entities, a Federal employee responsible for contract or grant oversight or management at the relevant agency or an employee of the contractor with the responsibility to investigate, discover, or address misconduct. The protected disclosure must constitute information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for, or negotiation of, a contract) or grant.

Based on the evidence that [(b)(3):41 U.S. Code § 4712;]provided, OIG determined that his statements to the RFE/RL General Counsel (as well as other senior RFE/RL management officials) qualify as a protected disclosure because they were made to an employee of the

[3] In September 2018, he filed a formal complaint of retaliation with RFE/RL's Office of Human Resources (HR).

grantee responsible for investigating, discovering, or addressing misconduct. Also, the disclosures were related to information that [redacted] reasonably believed to be evidence of a violation of law, rule, or regulation related to a Federal grant and abuse of authority relating to a Federal grant. Specifically, the disclosures pertained to abuse of authority and conflicts of interest in the Kazakh Service.

Alleged Retaliation

The law defines reprisal as being "discharged, demoted, or otherwise discriminated against" as a result of a protected disclosure. [4] In this case, RFE/RL removed [redacted] from his role on the NION project and decided not to renew [redacted] employment agreement after [redacted] had made several protected disclosures.

Timely Complaint

OIG received [redacted] complaint on April 11, 2019, which is within the three-year statute of limitations from the date of the alleged reprisal actions in May and June of 2018.

Burden of Proof

Under 41 U.S.C. § 4712(c)(6), the legal burdens of proof specified in 5 U.S.C. § 1221(e) shall be controlling for the purposes of any investigation conducted by an Inspector General. Under 5 U.S.C. § 1221(e), an employee must present evidence that he or she made a protected disclosure, which was a contributing factor in a personnel action taken against him or her. The employee may make this showing through direct or circumstantial evidence, such as evidence that (a) the official taking the personnel action knew of the disclosure and (b) 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.

Once the employee has met this burden, the burden of proof shifts to the employer, which must present clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.[5] In *Carr v. Social Security Administration,* the court adopted the following test:

[4] 41 U.S.C. § 4712(a)(1).

[5] *Carr v. Social Security Admin.*, 185 F.3d 1318, 1322 (Fed. Cir. 1999).

> [W]hen determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, . . . the following factors [should be considered]: the strength of the agency's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.[6]

The courts have defined clear and convincing evidence as the degree of proof "which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is 'highly probable.'"[7] However, an employer does not need to prove each of the factors by clear and convincing evidence. Rather, the three factors will be weighed together to determine whether as a whole the evidence is clear and convincing, and a strong showing on one factor may be sufficient.[8]

Complainant's Burden

OIG obtained documentary and testimonial evidence demonstrating that (b)(3):41 U.S. Code § 4712, (b)(6) protected disclosures may have been a contributing factor in the personnel action taken against him. In particular, the officials taking the action were aware of his disclosures, and the personnel action took place within a period of time after his disclosures such that a reasonable person could conclude that the disclosures were a contributing factor in the personnel actions taken against him.

RFE/RL's General Counsel and Director of HR were both aware of (b)(3):41 U.S. concerns when they made the decision that his contract would not be renewed. Beginning in December 2017, (b)(3):41 U.S. Code § 4712; expressed concerns about abuse of authority in the language services to these officials, as well as to the Chief of Staff and Chief of Security. For example, via Skype messages, (b)(3):41 U.S. Code § 4712; raised concerns to the General Counsel about abuse of authority and conflicts of interest in the Kazakh Service. These concerns

---

[6] *Carr*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Geyer v. Dep't of Justice*, 7 M.S.P.R. 682, 688, aff'd, 116 F.3d 1497 (Fed. Cir. 1997)).

[7] *Road & Highway Builders v. U.S.*, 702 F.3d 1365, 1368 (Fed. Cir. 2012)(citing Am-Pro Protective Agency v. U.S., 281 F.3d 1234, 1240 (Fed. Cir. 2002).

[8] *Lucchetti v. Dep't of Interior*, 2017 MSPB LEXIS 743 (Feb 15, 2017) (*citing Phillips v. Dep't of Transportation*, 113 M.S.P.R. 73, 77 (2010)).

also involved the Regional Director for Central Asia, who oversaw (b)(3):41 U.S. Code § 4712; (b)(6) performance.

The General Counsel stated that he shared (b)(3):41 U.S. Code § 4712; memo documenting these issues with the Chief of Staff and Chief of Security in February 2018. RFE/RL initiated an evaluation of the Kazakh Service, which it completed in May 2018. During that same month, the Editor-in-Chief notified (b)(3):41 U.S. Code § 4712; that he would be removed from the temporary NION project and return to the Uzbek Service as a Senior Editor. Although he was never formally given a different title at NION, (b)(3):41 U.S. Code § 4712; used the title of "Executive Editor" while working on the NION project and told OIG that he understood his return to the Uzbek Service as a Senior Editor to be a demotion. According to both (b)(3):41 U.S. and RFE/RL documentation, however, his return to the Uzbek Service did not result in a change of title, change of pay, or any administrative action such as a new contract.

In June 2018, (b)(3):41 U.S. emailed the Regional Director for Central Asia inquiring about his eligibility for home leave that year. The Regional Director for Central Asia responded that (b)(3):41 U.S. contract was due to expire in January 2019 and there would be "no guarantee" of renewal for January 2020. Based on this exchange and his reassignment to the Uzbek Service, (b)(3):41 U.S. Code § 4712; believed that he was being retaliated against and conveyed these concerns in a memo to the HR Director in October 2018. In December 2018, RFE/RL renewed his contract until January 2020 but included language in the employment agreement stating that the position of Senior Editor would not be available for further extension. The same document stated that (b)(3):41 U.S. Code § 4712; could apply for any open positions at RFE/RL and was eligible for continuing employment if selected for another role.

OIG concludes that (b)(3):41 U.S. Code § 4712; presented sufficient evidence to demonstrate that his protected disclosures were a contributing factor in the personnel actions taken against him. (b)(3):41 U.S. Code § 4712; demonstrated that RFE/RL officials who were involved in the personnel actions, such as the General Counsel and the Director of HR, were aware of his protected disclosures and that the personnel actions took place within a short period of time thereafter such that a reasonable person could conclude that the disclosures were a contributing factor in those actions.

Accordingly, (b)(3):41 U.S. Code § 4712; met his burden of proof under 41 U.S.C. § 4712, and the burden shifts to RFE/RL to present clear and convincing evidence that it would have taken the same personnel action in the absence of (b)(3):41 U.S. Code § 4712; (b)(6) disclosures.

Contractor's Burden

OIG found that RFE/RL presented clear and convincing evidence that it would have taken the same personnel action against (b)(3):41 U.S. Code § 4712; in the absence of his protected disclosures.

The first factor that the courts use to weigh whether an employer/agency has met its burden is the strength of the contractor's evidence in support of its personnel action. In examining this factor, the Merit Systems Protection Board[9] examines the evidence supporting the personnel action and whether there were "legitimate reasons" for the personnel action.[10]

RFE/RL officials provided evidence that (b)(3):41 U.S. Code § 4712; was reassigned from the NION project to the Senior Editor position because his work on the NION project was complete. (b)(3):41 U.S. Code § 4712; was brought onto the project to assist in its production, and once production was completed, he was reassigned because his work had concluded.

Similarly, RFE/RL officials provided evidence that they decided not to renew (b)(3):41 U.S. Code § 4712; (b)(6) contract in December 2018, because he had completed the tasks that he had been assigned and he was no longer needed in the Uzbek Service. According to RFE/RL officials, the company hired (b)(3):41 U.S. Code § 4712; to address ongoing problems in the Uzbek Service, but (b)(3):41 U.S. Code § 4712; and RFE/RL officials determined that the problems were relatively minor, and he was able to resolve them. RFE/RL management officials also stated that there was not enough work in the Uzbek Service for (b)(3):41 U.S. Code § 4712; after he was reassigned in May 2018 and had resolved the problems in the Uzbek Service that he was hired to address. (b)(3):41 U.S. Code § 4712; colleagues agreed that there was not enough work for him in the Uzbek Service. For example, one official stated that, although there was enough work in the Uzbek Service when RFE/RL hired (b)(3):41 U.S. Code § 4712;, over time it became difficult for RFE/RL officials to find work for (b)(3):41 U.S. Code § 4712; (b)(6)

Additionally, RFE/RL officials stated that they could not assign (b)(3):41 U.S. Code § 4712; to other tasks because his skillset did not align with what is normally required of a Senior Editor in the Uzbek Service. According to RFE/RL officials, the company typically fills senior editor positions with local journalists with knowledge of the service's language. OIG confirmed that the position description for (b)(3):41 U.S. Code § 4712; role, which he and an RFE/RL HR specialist signed, requires both skills. OIG confirmed that (b)(3):41 U.S. Code § 4712; did not have a journalism background, nor was he a native speaker of Uzbek; according to his resume, he does, however, read Uzbek at an advanced level and speak it conversationally.

[9] The Merit Systems Protection Board interprets the Whistleblower Protection Act in cases of alleged retaliation against Federal employees. 5 U.S.C. § 1221(a).

[10] *Baker v. Dep't of Defense*, 2016 MSPB LEXIS 4567 (2016).

Although RFE/RL did not renew [redacted] contract beyond January 2020, RFE/RL officials made it clear that he could apply for other positions. As noted previously, Mr. [redacted] contract extension for 2019 states that he "may apply for any open positions available at RFE/RL and may be available for continuing employment if selected for another role." As of January 2020, [redacted] had not applied for other positions at RFE/RL.

Thus, with regard to the first *Carr* factor, the strength of the evidence supporting the personnel action and whether there were "legitimate reasons" for the action, RFE/RL provided evidence that supports its reasoning for the personnel actions it took with respect to [redacted]

With respect to the second *Carr* factor—existence and strength of any motive to retaliate on the part of the individuals who were involved in the decision—OIG could find no evidence of retaliatory motive by the individuals responsible for the decision not to renew [redacted] contract. First, the individuals responsible for the decision not to renew his contract—RFE/RL's General Counsel and the Director of HR— were not the subject of the protected disclosures, and these individuals were responsive to Mr. [redacted] concerns. RFE/RL's General Counsel told OIG that he and the Director of HR made the decision to include a clause in [redacted] contract specifying that his current position would not be renewed in 2020. None of [redacted] complaints concerned either of these individuals, nor did he allege that they displayed any animus towards him. As stated previously, both individuals were aware at the time that [redacted] had made protected whistleblower disclosures. In fact, both individuals stated that they advocated for renewing [redacted] contract for at least one more year specifically to avoid creating the perception that he was being terminated in retaliation for his protected disclosures. The General Counsel told OIG that if there was any concern about the extension and nonrenewal of [redacted] contract, it was that "RFE/RL was being overly cautious in offering [redacted] a position for another year," despite the awareness that there was little work for him. Additionally, OIG reviewed emails and other communication between [redacted] and these individuals and found that the General Counsel and other RFE/RL officials were responsive to his concerns. For example, emails from February 2018 between [redacted] the General Counsel, and the Chief of Staff show that RFE/RL reviewed [redacted] concerns, provided feedback to him, and requested additional information. RFE/RL officials told OIG that it commissioned independent reviews of the Kazakh Service content in response to Mr. [redacted] allegations.

Second, while the individuals about whom [redacted] raised concerns (the Regional Director for Central Asia and the Editor-in-Chief) were likely aware that he had raised

concerns about the Uzbek Service, OIG could not determine whether they were aware that the allegations were directed at them. In any case, these individuals approved of RFE/RL extending (b)(3):41 U.S. Code § 4712; contract for an additional year, which weighs against evidence of retaliatory motive.[11]

Finally, the third *Carr* factor considers whether RFE/RL took similar action against individuals who were not whistleblowers but who were otherwise similarly situated. RFE/RL provided evidence that numerous employees (who were not whistleblowers) were given one-year or short-term contracts and that those contracts were not renewed or terminated once the tasks for which they were hired were completed. Thus, the decision to assign (b)(3):41 U.S. Code § 4712; to a short-term contract and not to renew it was not exceptional.

Conclusion

(b)(3):41 U.S. Code § 4712; made a protected disclosure by communicating his concerns regarding abuse of authority and conflicts of interest in the Kazakh Service. Shortly thereafter, RFE/RL management elected not to renew (b)(3):41 U.S. Code § 4712; contract beyond January 2020. Because (b)(3):41 U.S. Code § 4712; met his burden under Section 4712, RFE/RL was required to provide clear and convincing evidence that it would have taken the same action in the absence of this disclosure.

RFE/RL provided clear and convincing evidence that it would have taken the same personnel actions with respect to (b)(3):41 U.S. Code § 4712; absent his protected disclosure. In addition, RFE/RL provided evidence indicating that the decision to reassign him and to not renew his contract was unrelated to his disclosure; rather, RFE/RL elected not to renew (b)(3) (b)(3):41 U.S. Code § 4712; contract for two reasons: (1) the special projects to which he was assigned ended, leaving him with relatively little work to do in the Uzbek Service; and (2) he was not a native Uzbek speaker and was not trained as a traditional journalist, as would typically be required of a senior editor in the Uzbek Service. Accordingly, RFE/RL met its burden and, based on the evidence presented, OIG concludes that there is not sufficient evidence to demonstrate that RFE/RL retaliated against (b)(3):41 U.S. Code § 4712; as set forth in 41 U.S.C. § 4712.

[11] The RFE/RL President had ultimate responsibility for approving the extension, which included the nonrenewal clause.

Office of Inspector General
United States Department of State

April 22, 2021

Kelu Chao
Acting Chief Executive Officer
U.S. Agency for Global Media

Catherine McMullen
Chief, Disclosure Unit
Office of Special Counsel

Dear Mses. Chao and McMullen:

This letter is in reference to the referral that the Office of Inspector General (OIG) received from the U.S. Agency for Global Media (USAGM) on February 18, 2021, requesting OIG investigate matters contained in a referral from the Office of Special Counsel (OSC) under 5 U.S.C. § 1213. OIG has begun or planned work on several of the matters in this referral and therefore wanted to lay out how it will review each of the allegations included in the referral.

Violations of the Firewall

The referral contained allegations regarding violations of the firewall. Similar work was also requested by Congress in the Joint Explanatory Statement accompanying the Consolidated Appropriations Act, 2021. This work will be handled by OIG's Office of Inspections (ISP) and is currently being scoped. ISP previously reported on USAGM's journalistic standards and principles and is familiar with these issues.[1] ISP plans its work in advance in cycles, and this review will commence with the fall 2021 inspection cycle.

Termination of the Boards and Presidents of USAGM Networks

The referral contained allegations regarding the termination by the former Chief Executive Officer (CEO) of the Boards and Presidents of USAGM's grantee networks. OIG received and reviewed complaints on these actions, but found that the National Defense Authorization Act for Fiscal Year

[1] OIG, *Targeted Inspection of the U.S. Agency for Global Media: Journalistic Standards and Principles* (ISP-IB-21-06, December 2020).

2017 states that these individuals "shall serve at the pleasure of" the CEO.[2] Therefore, OIG does not plan any further work on this matter.

Suspension of Six Career Employees

The referral contained allegations that the former CEO improperly suspended the security clearances of six USAGM career senior executives and placed them on administrative leave. OIG's Office of Evaluations and Special Projects is conducting investigations of these suspensions under Presidential Policy Directive-19 and plans to issue its findings in May 2021.

Indefinite Freeze on Spending, Hiring, and Contracting

The referral contained allegations that the former CEO indefinitely froze spending, hiring, and contracting actions, which threatened USAGM's mission. OIG received complaints on this issue and began reviewing the matter. As is our practice, we coordinated with the Government Accountability Office (GAO) to ensure that we did not duplicate work that they were performing. GAO informed OIG that it has two bodies of work on USAGM: an audit regarding USAGM governance and a review as to whether USAGM violated the Impoundment Control Act. According to GAO, issues with the freeze will be covered by both bodies of work, which are likely to be published this year. Therefore, OIG does not plan any further work on this matter.

Denial of J-1 Visas

The referral contained allegations that the former CEO's inaction on renewing J-1 visas threatened agency operations and the safety of some of the visa holders. OIG received complaints on this issue and began reviewing the matter. However, GAO informed OIG that its audit will cover this issue, and thus OIG does not plan any further work on this matter.

Contracts with External Law Firms

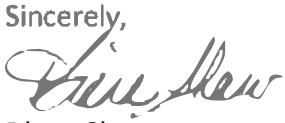
The referral contained allegations that the former CEO signed contracts with McGuireWoods and spent over $1 million in funds for work that could have been conducted for significantly less by agency employees or OIG. OIG's Office of Evaluations and Special Projects has begun preliminary work on this matter and has already requested and received hundreds of documents from

[2] 22 U.S.C. § 6209(d).

McGuireWoods. Due to resource constraints and the large number of documents to review, it will likely take OIG several months to complete this work.

I hope that this information is helpful. When we complete any of the reports referenced above, we will provide a copy to USAGM and OSC. If you have any questions about these matters, please feel free to contact Assistant Inspector General Jeff McDermott at (b)(6)

Sincerely,



Diana Shaw
Acting Inspector General
U.S. Department of State

UNCLASSIFIED

February 3, 2017

TO: Kenneth Weinstein, Acting Board Chairman, BBG

FROM: Steve A. Linick, Inspector General

SUBJECT: Report of Investigation Pursuant to 41 U.S.C. § 4712
OIG Whistleblower Case 2015-0021 (b)(3):41 U.S. Code § 4712; (b)(6)

Please see the attached report of investigation of a whistleblower complaint filed under the pilot program for enhancement of contractor protection from reprisal for disclosure of certain information (41 U.S.C. § 4712). As noted in the report, within 30 days after receiving an OIG report pursuant to Section 4712(b), the Broadcasting Board of Governors (BBG) is required to determine whether there is a sufficient basis to conclude that the grantee subjected the complainant to a reprisal prohibited by Section 4712(a) and to issue an order denying relief or taking one or more of the remedial actions specified in Section 4712(c)(1).

Should you have any questions, please feel free to contact me at (202) 663-0361, or Jeffrey McDermott at (b)(6)

cc: Ben Herman, General Counsel, RFE/RL
(b)(3):41 U.S. Code § 4712
Cherylynn Peters, Director, Office of Contracts, BBG
André Mendes, Chief Information Officer/Chief Technology Officer, BBG

UNCLASSIFIED

February 2, 2017

MEMORANDUM

TO: OIG – Steve A. Linick

FROM: AIG/ESP – Jennifer Costello (b)(6)

Subject: Report of Investigation Pursuant to 41 U.S.C. § 4712
OIG Whistleblower Case 2015-0021 (b)(3):41 U.S. Code § 4712; (b)(6)

Pursuant to the Pilot Program for Contractor Whistleblowers, 41 U.S.C. § 4712, the Office of Inspector General (OIG) is required to investigate complaints filed by employees of contractors, subcontractors, and grantees who provide credible information alleging that they were subject to reprisal for whistleblowing activity.[1] Upon completion of the investigation, OIG is required to submit a report of the findings of its investigation to the complainant, the contractor or grantee concerned, and the head of the agency. Not less than 30 days after receiving an inspector general report pursuant to Section 4712(b), the head of the agency concerned is required to determine whether there is a sufficient basis to conclude that the contractor or grantee subjected the complainant to a reprisal prohibited by Section 4712(a) and to issue an order denying relief or taking one or more of the remedial actions specified in Section 4712(c)(1).

As described below, OIG received a complaint from (b)(3):41 U.S. Code § 4712; (b)(6) an employee of a grantee, that he was reassigned from his position as Director of the Telecommunications and Network Department to the Director of Telecommunications, a position with significantly less responsibility, after having made protected whistleblower disclosures. OIG's investigation found that (b)(3):41 U.S. Code § 4712; (b)(6) was the subject of reprisal following his disclosures and that his employer did not provide clear and convincing evidence that it would have taken the same action absent (b)(3):41 U.S. Code § 4712; (b)(6) disclosures.

Allegation

On February 19, 2016 (b)(3):41 U.S. Code § 4712; (b)(6) filed a complaint with OIG under Section 4712 alleging that he was reassigned from his position as Director of the Telecommunications and Network Department for Radio Free Europe/Radio Liberty (RFE/RL), a grantee of the

[1] The requirements of the statute are set forth as an appendix.

Broadcasting Board of Governors (BBG), to the position of Director of Telecommunications in retaliation for disclosing information regarding alleged improprieties by L88, the corporation that owns the headquarters building of RFE/RL. OIG reviewed the complaint and determined that it contained sufficient details to allege a violation of the prohibition against reprisal for engaging in a protected activity under Section 4712.[2] Accordingly, in February 2016, OIG initiated an investigation of the allegations.

Background/Chronology

(b)(3):41 U.S. Code § 4712; (b)(6)

In May 2012, L88 purchased the headquarters building of RFE/RL and signed a lease with RFE/RL (with the BBG listed as co-obligor) that assigned RFE/RL responsibility for operation and maintenance of the building, a task that was assigned to the Technology Division. In March 2013, L88 denied the Technology Division access to invoices and documentation related to the maintenance and operations of the building, such as utility bills received by L88 that were needed to track RFE/RL expenses for building maintenance. Because RFE/RL senior officials took no action to resolve this problem, [(b)(3):41 U.S. Code] and two other complainants raised concerns about this issue to the Chief Information Officer/Chief Technology Officer (CIO/CTO) of the BBG in early 2014. The CIO/CTO discussed their concerns with RFE/RL's CFO, who in March 2014 became the Interim Co-Chief Executive Officer (CEO) of RFE/RL. However, after the CFO failed to resolve the concerns, the BBG CIO/CTO brought them, as well as other concerns about the activities of L88, to the attention of the BBG Board. In September 2014, the BBG Board ordered a review of the activities of L88 and the relationship between L88 employees and RFE/RL officials to be conducted by the then-General Counsel of the BBG with the assistance of the Acting General Counsel of RFE/RL. As part of this review, the Acting General Counsel interviewed Mr. [(b)(3):41 U.S. Code § 4712;] who explained his concerns about L88, including those about the relationship between the Interim Co-CEO and L88. On October 24, 2014, the BBG General Counsel sent a report to the BBG Board that was critical of the relationship between L88 and RFE/RL and concluded that some of L88's activities appeared to violate both Federal law and RFE/RL ethics

[2] Two other RFE/RL employees filed complaints with OIG based on the same disclosures. OIG issued a separate report for each complainant.

rules. The report included some of the concerns raised by (b)(3) 41 U.S. Code § 4712; (b)(6) and his colleagues in the Technology Division.

In October 2014, (b)(3) 41 U.S. Code § 4712; (b)(6) raised security concerns with the Interim Co-CEO about L88's plans to install Wi-Fi in the RFE/RL building, which (b)(3):41 U.S. Code § 4712; (b)(6) contended could interfere with the RFE/RL network. According to (b)(3) 41 U.S. Code § 4712; (b)(6) the Interim Co-CEO told him that he would raise these concerns with L88, but the Wi-Fi was still installed. (b)(3) 41 U.S. Code § 4712; (b)(6) and two of his colleagues in the Technology Division also raised concerns with the Interim Co-CEO about the propriety of several of L88's expenditures that were billed to RFE/RL.

In November 2014, the Interim Co-CEO requested that the HR Director at the time send him a list of employees in the Technology Division who received the highest performance ratings. Shortly after receiving the list, the HR Director instructed the Director of the Technology Division to retroactively downgrade the ratings of some of his staff. The Director selected five employees to downgrade, including (b)(3):41 U.S. Code § 4712; (b)(6), and the HR Director forwarded these names to the Interim Co-CEO, who objected to the two names on the list who had not raised concerns about L88.[3]

In January 2015, the Interim Co-CEO removed the Networks Division from under (b)(3):41 U.S. Code § 4712; (b)(6) authority. This action significantly reduced (b)(3) 41 U.S. Code § 4712; (b)(6) staff, responsibilities, and overall authority. (b)(3):41 U.S. Code § 4712; (b)(6) asked why this action was being taken, but the Interim Co-CEO refused to provide him with a justification.

In February 2015, (b)(3):41 U.S. Code § 4712; (b)(6) along with two of his colleagues in the Technology Division, sent a letter to OIG and the Federal Bureau of Investigation (FBI) that raised concerns about the interference by L88 in the work of RFE/RL and potential conflicts of interest involving RFE/RL and L88 officials, including the Interim Co-CEO.

In July 2015, RFE/RL created the position of CTO and hired into the position a former consultant who had been retained to write a report in 2014 with recommendations for improving RFE/RL.[4] Shortly after his hiring, he was tasked with reorganizing the Technology Division and was instructed by senior RFE/RL officials, including its current Vice President who was aware of some

[3] According to RFE/RL personnel records, this downgrading of ratings never actually occurred.

[4] The report had recommended creation of the CTO position.

of [(b)(3):41 U.S. Code § 4712; (b)(6)] disclosures,[5] to remove [(b)(3):41 U.S. Code § 4712; (b)(6)] and his two colleagues.[6] The CTO responded that he could not simply terminate all of them, because they had a great deal of institutional knowledge. [(b)(3):41 U.S. Code §] previous supervisor, the former head of the Technology Division (now a Special Advisor at RFE/RL), confirmed that the CTO had told him that Mr. [(b)(3):41 U.S.] was on a "kill list," but that the CTO had decided not to fire him.

In September 2015, the Interim Co-CEO was forced to resign from RFE/RL because of conflict of interest questions raised by his interactions with L88.

In November 2015, the CTO informed [(b)(3):41 U.S. Code § 4712; (b)(6)] of the reorganization, which removed Mr. [(b)(3):41 U.S. Code § 4712] from the position of Director of the Telecommunications and Network Department and re-assigned him to the position of the Director of Telecommunications. This action essentially ratified the removal of responsibilities that occurred in January 2015.[7] [(b)(3):41 U.S. Code § 4712] now reports to the individual who will hold his previous position. According to [(b)(3):41 U.S. Code § 4712; (b)(6)] he currently has a staff of two employees (as compared to ten before the January 2015 removal of the Networks Division), and his only responsibility is managing the telephones of RFE/RL.

Standard for Alleging a Claim of Reprisal

As an employee of a BBG grantee, [(b)(3):41 U.S. Code] is entitled to file a complaint under Section 4712. OIG initially reviewed his complaint to determine whether (1) he made a protected disclosure, (2) his employer took an action against him that could be an act of reprisal, and (3) his complaint was filed within 3 years of the alleged reprisal.

Protected Disclosure

Beginning in early 2014, [(b)(3):41 U.S. Code § 4712; (b)(6)] made numerous protected disclosures in reporting to RFE/RL and BBG officials, as well as to OIG and the FBI. His disclosures regarded the interference of L88 with RFE/RL's mission, the propriety of L88 expenditures, and alleged conflicts of interest between L88 and RFE/RL officials. These disclosures qualify as protected disclosures under section 4712, because (1) they were made to RFE/RL management and legal officials with the responsibility to investigate, discover, or address misconduct; a Federal employee responsible for grant oversight or management at the relevant agency which is BBG; the Inspector General

[5] The current Vice President told OIG that he was aware of [(b)(3) 41 U.S] disclosures and that his disclosures were well known among senior RFE/RL management. The Vice President stated that [(b)(3) 41 U.S] had the right to raise concerns about L88, but he wished that he would have done so internally first.

[6] The CTO was not given a reason as to why these three employees should be removed other than the three had formed a "tight group" that tried to control situations, which was perceived to be a problem by management. The CTO told OIG that he was unaware of the protected disclosures.

[7] According to RFE/RL, [(b)(3):41 U.S. Code § 4712] salary was not affected by his new title or lessened responsibilities.

for the United States Department of State and the Broadcasting Board of Governors; and an authorized official at the FBI which is a Department of Justice law enforcement agency, and (2) they concerned the possible violation of a law, rule, or regulation related to a Federal grant, as well as gross mismanagement of a Federal grant.

Alleged Reprisal

In January 2015, RFE/RL removed the Networks Division from under (b)(3) 41 U.S. Code § 4712; (b)(6) authority. In November 2015, RFE/RL reassigned (b)(3) 41 U.S. Code § 4712; (b)(6) from Director of the Telecommunications and Network Department to the Director of Telecommunications, a position with much less responsibility and fewer employees. This reassignment ratified the earlier removal of responsibility.

Timely Complaint

(b)(3) 41 U.S. Code § 4712; (b)(6) filed his complaint on February 19, 2016, which is within 3 years of the alleged reprisal.

Burdens of Proof

Under 41 U.S.C. § 4712(c)(6), the legal burdens of proof specified in 5 U.S.C. § 1221(e) shall be controlling for the purposes of any investigation conducted by an Inspector General. Under 5 U.S.C. § 1221(e), an employee must present evidence that he or she made a protected disclosure, which was a contributing factor in a personnel action taken against him or her. The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that (a) the official taking the personnel action knew of the disclosure or protected activity and (b) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

Once the employee has met this burden, the burden of proof shifts to the employer, which must present clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure. 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" and is a higher standard than preponderance of the evidence.[8] It is an "intentionally high standard of proof."[9] This heightened burden of proof recognizes that when it comes to

[8] 5 C.F.R. § 1209.4(e).

[9] *Chambers v. Department of the Interior*, 2011 M.S.P.B. 7 (January 11, 2011).

proving the basis for a personnel decision, the employer "controls most of the cards" and thus "bears a heavy burden to justify its actions."[10]

(b)(3):41 U.S. Code § presented credible evidence that he made several protected disclosures beginning in early 2014, which were contributing factors in a personnel action taken against him. The evidence showed that the former Interim Co-CEO to whom he made some of his disclosures removed the Networks Division from under his command. In addition, the Vice President of RFE/RL, who was also aware of some of his disclosures, instructed the CTO to terminate him the same month that the CTO was hired and within a short time after the latest disclosures occurred in February 2015. Therefor(b)(3):41 U.S. Code § 4712; (b)(6) met his burden of proof, and the burden shifted to RFE/RL to present clear and convincing evidence that it would have taken the same personnel action in the absence of Mr. Hanspeter's disclosures.

Results of Investigation

OIG reviewed personnel and other records provided by RFE/RL and interviewed RFE/RL officials to determine the basis for(b)(3):41 U.S. Code § 4712; (b)(6) reassignment. According to both the current Vice President of RFE/RL and the CTO, the CTO was the decision-maker on the re-assignment. According to the CTO, (b)(3):41 U.S. Code § 4712; had few accomplishments at RFE/RL and lacked knowledge regarding network management. The CTO stated that he wanted to reunite the network and telecommunications divisions because they are usually under the same leadership in media organizations. However, he did not want to place (b)(3):41 U.S. Code § 4712; (b)(6) as head of both divisions because he was aware that RFE/RL management had previously removed responsibility for the networks from(b)(3):41 U.S. Code § 4712; (b)(6)

RFE/RL provided OIG with testimonial evidence and a copy of the CTO's report, which later would become the basis for the reorganization of the Technology Division. The report may fairly be read as support for the reorganization, but it does not address individual performance issues. The only other documentary evidence OIG obtained contradicts the testimony of RFE/RL officials. As noted above, (b)(3):41 U.S. Code § 4712; (b)(6) performance appraisals demonstrate a history of high performance over a number of years.[11] In addition, his previous supervisor told OIG that he was a consistently exceptional employee and that his reassignment was likely the result of his protected disclosures. In addition, the CIO/CTO of BBG, who serves as program administrator for

---

[10] *Chambers v. Department of the Interior*, 2011 M.S.P.B. 7 (January 11, 2011) (quoting 135 Cong. Rec. S2780 (Mar. 16, 1989) (statement by Sen. Levin)).

[11] According to the RFE/RL General Counsel, "RFE/RL management explicitly reproached (b)(3):41 U.S. previous supervisor] for giving [him] undeservedly high marks." While that may be true, (b)(3):41 U.S. has received excellent reviews since 2001 from several different supervisors, which were reviewed and approved by several different senior officials.

the grants made to RFE/RL and has worked closely with the Technology Division staff, told OIG that the three complainants are skilled, dedicated, and hard-working employees who have served RFE/RL well and have numerous accomplishments at RFE/RL, such as moving its headquarters from Munich to Prague. The CIO/CTO described (b)(3):41 U.S. Code § 4712; (b)(6) as a very good network administrator and told OIG that it made no sense to him that this responsibility was removed from (b)(3):41 U.S. Code § 4712; (b)(6). Finally, the CIO/CTO told OIG that he believed that the reorganization was a pretense for taking retaliatory action.

Although the CTO and the Vice President of RFE/RL told OIG that the CTO was the decision-maker on the reassignment of (b)(3):41 U.S. Code § 4712; (b)(6) the Vice President, who is the CTO's supervisor, had previously instructed the CTO to fire (b)(3):41 U.S. Code § 4712; (b)(6). At the time he gave that instruction, the Vice President knew of at least some of (b)(3):41 U.S. Code § 4712; (b)(6) disclosures, which the Vice President described as being well known among senior RFE/RL management. The Vice President expressed the wish that (b)(3):41 U.S. Code § 4712; (b)(6) had raised his concerns internally before raising them outside the organization. In addition, the CTO relied in part on a decision by the former Interim Co-CEO, to whom (b)(3):41 U.S. Code § 4712; (b)(6) made some of his disclosures, to remove the network responsibilities from (b)(3):41 U.S. Code § 4712; (b)(6).

While RFE/RL was able to articulate a non-retaliatory reason for (b)(3):41 U.S. Code § 4712; (b)(6) reassignment, it has not produced clear and convincing evidence of this justification or of the fact that it would have taken the same action absent (b)(3):41 U.S. Code § 4712; (b)(6) disclosures. RFE/RL produced little, if any, written documentation justifying (b)(3):41 U.S. Code § 4712; (b)(6) reassignment. Furthermore, the CTO's assessment of (b)(3):41 U.S. Code § 4712; (b)(6) skills and accomplishments is contradicted by over a decade of exceptional performance appraisals and by the testimony of his former supervisor and the CIO/CTO of the BBG, both of whom had observed his performance over a longer period of time than the CTO.

Findings

(b)(3):41 U.S. Code § 4712; (b)(6) made numerous protected disclosures throughout 2014 and 2015, to various internal and external parties regarding his concerns about L88 and the relationship between L88 and RFE/RL employees. (b)(3):41 U.S. Code § 4712; (b)(6) suffered retaliation in January 2015 when the Networks Division was removed from his authority, and again in November when he was reassigned to the position of Director of Telecommunications. Because (b)(3):41 U.S. Code § 4712; (b)(6) made a protected disclosure that was a contributing factor (as explained below) in his reassignment, RFE/RL must provide clear and convincing evidence that it would have taken the same action in the absence of his disclosure.

Although the CTO was the official who reassigned [(b)(3):41 U.S. Code § 4712; (b)(6)] the reassignment occurred after the CTO's supervisor, the Vice President, had instructed the CTO to fire him. When giving that instruction, the Vice President was aware of [(b)(3):41 U.S. Code § 4712; (b)(6)] disclosures, the most recent of which had occurred only a few months prior. The Vice President expressed the wish that Mr. [(b)(3):41 U.S. Code § 4712; (b)(6)] had made his disclosures internally first. In addition, the CTO relied upon the decision by the former Interim Co-CEO, to whom [(b)(3):41 U.S. Code § 4712; (b)(6)] made some of his disclosures and who was forced to resign because of his relationship with L88, to remove the network responsibilities from [(b)(3):41 U.S. Code § 4712; (b)(6)]. Indeed, the reorganization and [(b)(3):41 U.S. Code § 4712; (b)(6)] new title were essentially a ratification of the earlier removal of responsibilities by the former Interim Co-CEO. All of these circumstances taken together demonstrate that [(b)(3):41 U.S. Code § 4712; (b)(6)] disclosures were contributing factors in the motivation of senior RFE/RL management to take personnel actions against him.

The CTO of RFE/RL stated that the reassignment was based on [(b)(3):41 U.S. Code § 4712; (b)(6)] lack of accomplishments and skills. However, [(b)(3):41 U.S. Code § 4712; (b)(6)] long history of exceptional performance appraisals, as well as assessments of his work by his previous supervisor and the CIO/CTO of BBG who had observed his performance longer than the CTO had, contradicts this justification. Thus, RFE/RL did not meet its high burden of proof to provide clear and convincing evidence that it would have taken the same action absent [(b)(3):41 U.S. Code § 4712; (b)(6)] disclosures.[12]

[12] In letters dated December 29, 2016, and January 13, 2017, counsel for the complainant requested that OIG consider three issues: (1) an assessment of damages for all three RFE/RL complainants, (2) direction of OIG's report to the Secretary of State rather than the Chairman of BBG, and (3) recommendations for corrective action. OIG considered the information submitted by complainant's counsel but determined that OIG has met its responsibility under Section 4712 by investigating this matter and preparing this report.

APPENDIX

Pilot Program for Contractor Whistleblowers

In 2013, Congress enacted a pilot program in which an employee of a contractor, subcontractor, or grantee may file a complaint with the relevant OIG alleging that he or she was subject to reprisal (a discharge, demotion, or other act of discrimination) for making a protected disclosure.[13] A protected disclosure is information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant; a gross waste of Federal funds; an abuse of authority relating to a Federal contract or grant; a substantial and specific danger to public health or safety; or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant. The disclosure must be made to:

- A Member of Congress or a representative of a committee of Congress;
- An Inspector General;
- The Government Accountability Office;
- A Federal employee responsible for contract or grant oversight or management at the relevant agency;
- An authorized official of the Department of Justice or other law enforcement agency;
- A court or grand jury; or
- A management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct.

The OIG is required to investigate the complaint unless the complaint is frivolous, fails to allege a violation of the prohibition against reprisal, or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant. After the investigation is completed, the OIG must submit a report of its findings to the head of the agency, who is required within 30 days to determine whether there is sufficient basis to conclude that the contractor or grantee has subjected the complainant to a prohibited reprisal. The head of the agency may then order the contractor or grantee to take action to remedy the reprisal.

The burden of proof in an investigation under Section 4712 initially rests with the complainant to demonstrate that the protected disclosure was a contributing factor in the reprisal. The burden then shifts to the contractor or grantee to show by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.[14]

[13] 41 U.S.C. § 4712.

[14] 41 U.S.C. § 4712(c) (6) (incorporating 5 U.S.C. § 1221(e)).

January 14, 2021

The Honorable Diana Shaw
Deputy Inspector General
Office of Inspector General
U.S. Department of State
SA-39, 1700 North Moore St.
Arlington, VA 22209

Dear Honorable Shaw:

On June 4, 2020, I became the first ever U.S. Senate-confirmed Chief Executive Officer of the U.S. Agency for Global Media (USAGM)—the independent federal entity responsible for managing and overseeing U.S. civilian international broadcasting. Already, in this early stage of my three-year term, I have become aware of a number of exceptionally serious issues at USAGM and its components, which I have outlined below under four categories: 1) security; 2) Open Technology Fund (OTF); 3) spending, and; 4) J-1 visas and hiring foreign nationals. These issues are also delineated in Agency Statements, which are both attached and publically available at USAGM.gov.

Today, I am formally requesting that the Office of Inspector General (OIG) undertake comprehensive investigations of these issues. OIG is best positioned to perform this vital task of government oversight on behalf of the American people, not least because it possesses unique authorities, including the power to subpoena individuals and documents. This referral draws upon findings from not only internal USAGM investigations, but also a series of independent investigations performed by McGuireWoods LLP into pertinent issues and individuals, namely USAGM personnel placed on administrative leave, and later, on investigative leave. Please see the attached files to access McGuireWoods LLP's independent investigations.

For the sake of safeguarding both the national interest and trust in our public institutions, I believe it is crucial that OIG elicit transparency by continuing to shine a light upon USAGM and its components.

Thank you for your time and consideration.

Sincerely,

Michael Pack

Michael Pack
Chief Executive Officer
U.S. Agency for Global Media

1) Security

- Previous USAGM senior management had repeatedly failed to adhere to national security protocols and essential federal government personnel security practices for at least a decade.

- Previous USAGM senior management left largely unaddressed myriad deep-seated and persistent security problems identified in multiple assessments conducted by both the U.S. Office of Personnel Management (OPM) and the Office of the Director of National Intelligence (ODNI) between 2010 and 2020.

- The aforementioned assessments revealed that, in June 2020, at least 1,500 employees at USAGM – around 40 percent of the agency's entire workforce – had been improperly vetted, including dozens of individuals given security clearances at the confidential level or above and/or access to secure federal government systems and facilities despite having invalid background investigations, adjudicative actions, and government access cards.

- Previous USAGM officials had cleared the more than 1,500 employees even though the agency's delegated authority to conduct investigations lapsed back in 2012—due to what was already a list of numerous and egregious security violations and deficiencies.

- This delegated authority was never reinstated and USAGM management failed to take decisive action to resolve this issue during the entire ten-year period of OPM and ODNI assessments, despite the fact that the issue was repeatedly brought to its attention by career USAGM security professionals.

- In the face of all this, USAGM, under previous senior management continued to issue invalid access, security clearances, and suitability determinations. The agency was taking fingerprints, but neglecting to submit them to the appropriate authorities—or, in other instances, failing to take fingerprints, altogether. It was accepting aliases and fake social security numbers. It was not requiring the disclosure of foreign travel and foreign contacts. And on many occasions, USAGM was hiring individuals who left entire fields of background-check forms blank. Even the number of employees with secret and top-secret clearances was unknown.

2) Open Technology Fund

- New USAGM senior management soon discovered numerous, alarming preexisting and ongoing instances of mismanagement and security and personnel violations.

- The former Broadcasting Board of Governors (BBG) and Libby Liu, OTF's Executive Director – and the former President of Radio Free Asia (RFA) – had broken off OTF from RFA in September 2019. Taking the entire annual appropriation of U.S.-taxpayer funding, Ms. Liu incorporated OTF under her own name as an independent non-profit in the District of Columbia.

- OTF then moved out of RFA and spent a significant amount of grant money to lease office space in the high-rent district of the capital's "K Street corridor." It proceeded to spend over $2 million dollars to inflate staff salaries and benefits and host a lavish overseas conference. Further, as a separate entity, OTF immediately became a duplicative level of bureaucracy. It provided grants to civil-society organizations and causes that were not only already funded by other parts of the federal government, but unrelated to internet freedom.

- USAGM – again, OTF's singular funding source – requested basic information from OTF about the way that it was spending millions of dollars generously provided by the American taxpayer. It repeatedly refused to provide this information in direct violation of its most elementary contractual obligations.

- To this day, USAGM and the rest of the federal government know little about OTF's use of U.S.-taxpayer money. As recently as 2020, OTF was apparently paying foreign nationals as "technology fellows" up to $65,000 a year, and a number of their identities remain unknown.

- USAGM further received a referral from OIG for the U.S. Department of State and USAGM concerning conflicts of interest at OTF. When the BBG and Ms. Liu broke off OTF as an independent non-profit in September 2019, they did so without adequate authorization from Congress. This created a conflict of interest. OTF already had a history of conflicts of interest, first documented in the 2015 OIG audit of RFA expenditures.

- In 2020, OTF materially breached its grant agreement by refusing to provide reasonably-requested information necessary to conduct proper agency oversight. Perhaps most importantly, in direct violation of its grant agreement, OTF used grant funds for projects that had nothing to do with internet freedom, exceeding the authorized purposes of the Congressional appropriation for internet freedom programs. Further dealings with OTF as well as its principals and corporate officers were deemed to present a risk to the federal government.

3) Spending

- USAGM's human relations office and contracting processes, in particular, were in disarray. They were simply unable to provide fundamental information about the relatively-small federal agency, such as the total number of people employed by USAGM.

- While it was known that a significant percentage of USAGM personnel were employed as Personal Services Contractors (PSC), the agency was unable to actually provide the work agreements, making it virtually impossible to determine, for instance, the number, location, and duties of contractors—many of whom are foreign nationals. Further, chains

of command were broken and jumbled throughout USAGM, leaving PSCs and Full-time Equivalent (FTE) employees alike unsure of their own reporting structures.

- Reviews conducted by both the U.S. Government Accountability Office (GAO) and OIG, and additional investigations of agency operations, revealed a striking amount of questionable activity. Frequent "emergencies" were used to justify the ramming through of some contracts without normal, regulatory-required reviews and timelines. Other contracts were being forced through to cover disparate items, including some that were partisan and involved the hiring of friends and companies owned by personal acquaintances.

- When reviewing the financial environment, USAGM's senior management uncovered issues that further necessitated a freeze on new hiring. It learned that previous agency senior management had been repeatedly violating national security protocols and essential federal government personnel security practices for at least a decade. The myriad problems impacting the agency were identified in the multiple assessments conducted by OPM and ODNI between 2010 and 2020.

4) J-1 visas and hiring foreign nationals

- When reviewing budgetary operations, new USAGM senior management learned that the agency was relying heavily upon the U.S. Department of State's J-1 visa program to fulfill what were considered to be journalistic and technical needs that could not be first met by U.S. citizens. This was deemed to be an improper use of J-1 visas, for USAGM is required to follow Presidential Executive Order 13788 on Buy American and Hire American.

- USAGM's new senior management was also concerned to discover that, in violation of many federal government security protocols and personnel practices, the agency was rubber stamping J-1 visa applications and renewal requests—that is processing them without any semblance of a systematic procedural review.

- Upon request, the agency was entirely unable to determine the number of foreign nationals it was employing through the J-1 visa program, let alone supply vital biographical details of those individuals. Previous USAGM senior management and the BBG had not disclosed this issue.

- The use of J-1 visas was wrapped up in the severe security violations and deficiencies left unaddressed by previous USAGM senior management that were identified in the multiple assessments conducted by OPM and ODNI between 2010 and 2020.

UNCLASSIFIED

October 29, 2020

The Honorable Michael Pack
Chief Executive Officer
U.S. Agency for Global Media
330 Independence Ave., SW
Suite 3300
Washington, DC 20237

Dear Mr. Pack:

There are a number of items that have been requested in support of the FY 2020 U.S. Agency for Global Media (USAGM) Financial Statement Audit that have not yet been received. A full list is provided below. One or more of these outstanding items will negatively impact the auditors' ability to render an opinion on the financial statements. The most pressing issue is the receipt of USAGM's analysis of "Statement of Federal Financial Accounting Standards 47: Reporting Entity" (SFFAS 47), which outlines the criteria for which external parties (i.e., USAGM's grantees) are reported in an agency's financial statements. In addition, the auditors have requested documentation related to the Office of Management and Budget's (OMB) review of the analysis and concurrence with USAGM's determination (SFFAS 47 states that "Any uncertainty as to what to consider as a reporting entity would be resolved by OMB…"). Unfortunately, there is no other audit evidence or documentation that can be substituted for the analysis.

Without USAGM's SFFAS 47 analysis and OMB's documented concurrence, the auditors will be required to issue a disclaimer of opinion on the FY 2020 financial statements. According to generally accepted auditing standards (AU-C§705.10), a disclaimer of opinion is required when "the auditor is unable to obtain sufficient appropriate audit evidence on which to base the opinion, and the auditor concludes that the possible effects on the financial statements of undetected misstatements, if any, could be both material and pervasive." Because SFFAS 47 is the basis for the inclusion or exclusion of USAGM's grantees' financial information in its consolidated financial statements, USAGM's analysis and OMB's concurrence on the determination must be provided or the auditors will be unable to conclude as to whether the financial statements are complete and free from material misstatement.

Outstanding audit documentation requests (tracking numbers are listed for reference):

- #84 – SFFAS 47 Analysis
- #139 – Assurance Statement
- #170 – Follow up on Legal Letter
- #172 – Office of General Counsel's Legal Analysis on Reprogramming of Funds

#174 – OMB's concurrence on USAGM's SFFAS 47 position
#175 – OMB's Analysis on Reappropriation of Funds

The OIG audit team and the external auditors are happy to meet with you or your staff to discuss the audit requirements and answer any questions. Please contact Director Beverly J.C. O'Neill, Financial Management Division, at (b)(6) or Norman P. Brown, Assistant Inspector General for Audits, at (b)(6) to arrange a mutually convenient date and time.

Sincerely,

Ambassador Matthew S. Klimow
Acting Inspector General
Office of Inspector General, U.S. Department of State

cc: Kelly E. Gorrell, Kearney & Company, P.C.

U.S. AGENCY FOR
GLOBAL MEDIA

330 Independence Avenue SW | Washington, DC 20237 | usagm.gov

March 22, 2021

Ms. Diana Shaw
Acting Inspector General
Office of the Inspector General
U.S. Department of State

Dear Ms. Shaw:

Thank you for the opportunity to provide the U.S. Agency for Global Media's (USAGM) input to the Office of Inspector General's (OIG) Work Plan for Fiscal Years (FY) 2022-2023. After reviewing your memo dated March 4, 2021, and consulting with my senior staff, we have identified the following areas of USAGM operations that could benefit from an OIG inspection or audit. Please note that the second and third suggestions below are the same as in the letter that USAGM sent to the OIG last year regarding the FY 2021-2022 Work Plan:

- **Internet Freedom Funding**. USAGM oversees a substantial investment of funding aimed at providing our audiences unfettered access to the internet. We do this in part by incubating open source firewall circumvention and privacy tools which are used by our audiences, reporters/sources, and other stakeholders worldwide. During the tenure of USAGM's prior CEO, Michael Pack, over $3M in internet freedom funding was moved without the lawfully required notice to Congress and without regard to the agency's financial internal controls. OIG assistance in documenting and tracking the series of events surrounding this illegal transfer of funds would assist USAGM in building more resilient processes and safeguards that ensure taxpayer dollars are always used appropriately.

- **USAGM Infrastructure**. USAGM's networks face severe technical and production challenges stemming from the agency's eighty-plus-year-old headquarters building, which has not been well maintained. The building presents numerous challenges, including outdated studios, information technology, and production and distribution technology infrastructure. These challenges not only present limitations to the networks' output and collaboration opportunities, but also make it more difficult for USAGM to compete globally in a heavily saturated international broadcast, digital, and social media environment. USAGM would

appreciate the OIG's evaluation of whether USAGM's facilities and infrastructure are sufficient to support the agency's crucial mission.

- **Authorities**. USAGM is called upon to operate a global media organization in line with the highest standards of professional journalism while abiding by federal rules governing the acquisition and management of human capital and other services. Such rules are in contrast to USAGM's private sector media counterparts, who can continually adjust their workforce and structure to fit their evolving strategies to maintain and expand their audience, or to ramp up in the event of a crisis. It is also in contrast to adversaries like RT, Sputnik, CCTV, etc., who have no such restrictions in creating the propaganda and messaging that USAGM works so hard to debunk with truthful, honest, and accurate journalism. Our agency would welcome an independent review of whether it has sufficient authorities to hire and manage its workforce; utilize current year funds to budget across fiscal years; and otherwise obtain, maintain, or upgrade the technologies, goods, services, and facilities that are required to operate a global 24/7 media organization.

In your memo, you mentioned that you are available to discuss USAGM's suggestions. I would appreciate an opportunity to discuss with you: (1) the suggested projects mentioned above; (2) how OIG's review of these topics would help USAGM address some of its most significant challenges; and (3) how these topics might fit with OIG's strategic goals.

If you have any questions about this letter, please do not hesitate to contact me directly. In addition, your staff is always welcome to contact Oanh Tran, Executive Director, at [(b)(6)], or Daniel Rosenholtz, OIG Liaison, at [(b)(6)]

Sincerely,

Kelu Chao
Acting Chief Executive Officer