United States Department of Energy
Office of Hearings and Appeals

In the Matter of Stephen Christopher	)	
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	)	Case No.: WBR-26-0002
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Issued: September 3, 2026

Decision and Order

On June 23, 2026, the Department of Energy's (DOE) Office of Inspector General (OIG) issued a report of its findings (Report) regarding a complaint (Complaint) filed by Stephen Christopher (Complainant) under the National Defense Authorization Act's Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information Act (NDAA-ECP) (codified at 41 U.S.C. § 4712). In the Complaint, Complainant alleged that he made protected disclosures concerning unlawful records destruction, storage, and retention; fraud, waste, and abuse; and mismanagement related to a Federal contract by TFE, Inc. (TFE), which was the subcontractor to Nuclear Waste Partnership, LLC (NWP), for records management at DOE's Waste Isolation Pilot Plant (WIPP). Complainant further alleged that TFE retaliated against him, including terminating his employment, for his protected disclosures. In its Report, OIG concluded that Complainant made disclosures protected under the NDAA-ECP, and TFE management was aware of his protected disclosures and terminated him in reprisal for those protected disclosures. For the reasons set forth below, the Department determines that Complainant is entitled to relief.

I. Background

A. The NDAA-ECP

The NDAA-ECP prohibits discharging, demoting, or otherwise discriminating against employees of contractors, subcontractors, grantees, and subgrantees of Federal agencies in reprisal for making protected disclosures. 41 U.S.C. § 4712(a)(1). An employee makes a protected disclosure under the NDAA-ECP when he or she provides information to one or more enumerated persons or bodies that the employee reasonably believes is evidence of:

> (1) gross mismanagement of a Federal contract or grant;
> (2) a gross waste of Federal funds;
> (3) an abuse of authority relating to a Federal contract or grant;
> (4) a substantial and specific danger to public health or safety; or
> (5) a violation of law, rule, or regulation related to a Federal contract.

Id.

An employee may file a complaint of unlawful retaliation for making a protected disclosure to the inspector general of the applicable agency. *Id.* § 4712(b)(1). The inspector general investigates the complaint—unless the inspector general determines that the complaint is frivolous, fails to allege unlawful retaliation for making a protected disclosure, or has previously been addressed in another forum—and issues a report to the employee, the contractor or grantee concerned, and the head of the applicable agency, concerning the merits of the complaint. *Id.* After receiving a report from an inspector general, the head of the agency[1] issues a determination granting or denying the employee relief. *Id.* § 4712(c)(1).

B. Relevant Facts

On October 1, 2019, TFE hired Complainant as a full-time deputy project manager for the NWP Records Management Services Contract at WIPP in Carlsbad,[2] New Mexico. OIG Investigative File (OIG File) at 681. As a new hire, he would be on probation for six months. *Id.* at 77, 101, 785. As deputy, he reported to Jacqueline Doward, his supervisor, who had been hired as project manager several months earlier on April 1, 2019. *Id.* at 337.[3] Complainant knew Ms. Downard prior to being hired at TFE. *Id.* at 682–83. He also knew that, soon after she had started her employment, she determined there were deficiencies with TFE's records management program because they had discussed these issues prior to Complainant being hired as her deputy. *Id.* at 349, 682–83.

According to Complainant, he was hired by TFE President Doug Heal to be a "change agent" who would address staffing issues with the program before shifting his focus to business development. *Id.* at 682, 684–85. Complainant came to TFE experienced in regulatory compliance, which he stated included the Code of Federal Regulations (CFR), change management, and business development. *Id.* at 682, 684–85, 707–09. He told OIG that his "people skills" as deputy complimented Ms. Downard's technical expertise. *Id.* at 683.

As project manager, Ms. Downard was expected to align WIPP's records management program with Title 36 of the Code of Federal Regulations, Chapter XII, Subchapter B, entitled Records Management (Subchapter B), and address existing personnel issues. *Id.* at 340. Within Subchapter B, 36 C.F.R. § 1220.1 "specifies policies for Federal agencies' records management programs relating to proper records creation and maintenance, adequate documentation, and records

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[1] At DOE, the Director of the Office of Hearings and Appeals (OHA) has been delegated the responsibility for making this determination. *See* DOE Redelegation Order S2-DEL-HG1-2019, ¶ 1.11.

[2] WIPP is often referred to as Carlsbad in the record.

[3] Ms. Downard was a senior manager and "responsible for . . . making sure work was performed consistent with applicable regulations, reviewing processes and making recommendations for improvement, and managing administrative and senior department level employees (who were responsible for the daily supervision of the employees in their department)." OIG File at 15.

disposition." Ms. Downard came to TFE with a National Archives and Records Administration (NARA)[4] certification in Records Management. OIG File at 341. TFE considered Ms. Downard its subject matter expert in the field of records management. *Id.* at 16.

Ms. Downard and Complainant supervised the following TFE employees: Michael Fox, Certified Records Manager (CRM); Sheila Pearcy, Central Characterization Project (CCP) Records Manager; Dondee Groves, CCP Records Analyst; and Debra Hughes, Administrative Assistant. Report at 2. When Complainant arrived at WIPP, he and Ms. Downard discussed the issues Ms. Downard had discovered regarding Subchapter B, and she asked Complainant to confirm whether her concerns were justified. OIG File at 432. Ms. Downard alleged that as early as April 2019 she reported to Mr. Heal that the records program was not compliant with Subchapter B. *Id.* at 359. Complainant viewed it as his responsibility to review and validate or disagree with Ms. Downard's conclusions. *Id.* at 707–09. According to TFE, it was their joint "responsibility to review and ensure regulatory compliance within TFE's operations." *Id.* at 43.

During his time at TFE, Complainant alleges that he made protected disclosures regarding deficiencies in the records management program and timecard irregularities to the following officials: Ms. Downard; Mr. Heal; Heather Phillips, TFE Human Resources (HR) Manager; and Margaret Gee, Carlsbad Field Office (CBFO) Records Management Officer. Report at 2–4. Complainant also contacted OIG before TFE terminated him and reported concerns related to TFE's records management program. OIG File at 3. Ms. Downard also contemporaneously contacted OIG, reported similar concerns, and TFE terminated her. *Id.* at 11. After Complainant's termination, a DOE Chief Information Officer (CIO) Assessment team conducted an assessment of the records program at WIPP, described below, which validated concerns raised by Complainant. *See id.* at 165.

1) Alleged Disclosure #1 – Records Violations Reported to CBFO in October 2019

Prior to Ms. Downard's arrival at WIPP, TFE relied on its CRM, Mr. Fox, to manage the records management program. *Id.* at 352. As a CRM, Mr. Fox had an international certification that established his qualification for that position, and he had worked at NWP for more than twenty years. *Id.* at 374, 502, 719. Mr. Heal told OIG investigators that one of the personnel issues Ms. Downard knew she would need to address as project manager was the performance of Mr. Fox. *Id.* at 510. Mr. Heal detailed a long period of concerns regarding the performance of Mr. Fox, including that he had survived a performance improvement plan under a former program manager. *Id.* at 558, 581. Almost immediately, Complainant began documenting issues with Mr. Fox's performance. *See id.* at 106 (Disciplinary Letter to Mr. Fox dated October 10, 2019, which documented a performance expectations discussion that predated Complainant's employment with TFE and performance issues that occurred between October 1, 2019, and October 7, 2019, including Mr. Fox's failure to execute duties and provide accurate, reliable reporting).

[4] NARA "is responsible for overseeing agencies' adequacy of documentation and records disposition programs and practices[,]" and the Archivist of the United States issues regulations and provides guidance and assistance to Federal agencies on records management programs. 36 C.F.R. § 1220.10.

Complainant told OIG that he raised on October 10, 2019, along with Ms. Downard, deficiencies related to Subchapter B. *Id.* at 734. Specifically, Complainant told OIG investigators that he and Ms. Downard informed Ms. Gee during a meeting that the "CRM had misled the project" and there were "significant violations" that could result in NARA fines. *Id.* Complainant said that they referenced issues with records being destroyed at WIPP given that Mr. Fox did not have authority to approve the destruction of records, that Ms. Gee was supposed to approve their destruction, and that WIPP was not a permanent records facility. *Id.* at 735. An email Ms. Downard received from NARA representative Steven Rhodes dated November 14, 2019, includes Mr. Rhodes's confirmation that WIPP is not a NARA Affiliated Archive and "should transfer permanent records to NARA according to the appropriate approved schedule." *Id.* at 956.

Ms. Downard also alleged that during the meeting she and Complainant disclosed deficiencies related to Subchapter B, but she stated she also disclosed issues related to managing emails as Federal records, compliance with Presidential memoranda, and issues regarding the altering, modifying, deleting, or concealing of records in violation of 36 C.F.R. Part 1230. *Id.* at 379, 382, 394. She allegedly disclosed that Mr. Fox was allowing records in the archive to be manipulated and, similar to Complainant's assertion, that Mr. Fox had been destroying records without the necessary disposition authority required by Subchapter B. *Id.* at 392, 394, 400.

By contrast, Ms. Gee recalled that during the October 10 meeting Ms. Downard wanted to terminate Mr. Fox because he was not competent; she did not recall Complainant or Ms. Downard allege that Mr. Fox was violating records management regulations. *Id.* at 310–14. Complainant also conceded that while they discussed issues with Mr. Fox, they did not address how his conduct specifically violated Subchapter B. *Id.* at 736.

Ms. Gee denied being provided specific information regarding violations of Subchapter B. Complainant conceded he did not specifically explain that Mr. Fox's conduct included violations of Subchapter B despite asserting he told Ms. Gee there were "significant violations," and Complainant's account of the rather narrow disclosures regarding destruction of records and WIPP's status as a permanent records facility contradicts the much broader list of additional violations Ms. Downard stated she disclosed during the meeting. We therefore conclude that Complainant failed to establish he made disclosures during the October 10 meeting. We find it unlikely that there were discussions of various Subchapter B violations without connecting them to Mr. Fox, the asserted cause of the noncompliance. This alleged disclosure will not be addressed further in the Decision.

2) Alleged Disclosure #2 – Records Violations Reported to Ms. Phillips, Mr. Heal, and Ms. Downard in October 2019

Ms. Downard emailed Complainant on October 17, 2019, to express concern that she could not locate any documentation showing that Mr. Fox had been delegated authority to authorize the destruction of records. *Id.* at 124. Complainant emailed Ms. Phillips and Ms. Downard on October 18 and stated that they needed to meet with Mr. Heal to discuss "implications of serious violations of 36 CFR [Chapter XII] that could result in a stop work order and/or disciplinary action." *Id.* at 966.

Then, in an October 21, 2019, email from Complainant to Mr. Fox, copied to Mr. Heal, Complainant states that Mr. Fox had been operating the records program since 1993 under the assumption that WIPP had the required approval from CBFO per Subchapter B to destroy records and that Mr. Fox could not confirm WIPP had received approval from CBFO to destroy records. *Id.* at 942–44. Earlier that week, Complainant had called Mr. Fox asking about WIPP's records destruction process and Mr. Fox told Complainant that he did not recall any destruction requirements in Subchapter B. *Id.* at 128. Subsequently, Complainant received an email from Mr. Fox where Mr. Fox confirmed that he had researched the issue and determined that Subchapter B requires the destruction of paper records to be witnessed by either a Federal employee or authorized contractor employee and that he was unsure whether the site had ever received that approval and had been operating under the assumption that WIPP had received it. *Id.* at 943–44. In other words, Complainant confirmed that Mr. Fox needed authorization from CBFO to destroy records without the participation of a Federal employee, Mr. Fox confirmed that he had no record or knowledge of whether WIPP had ever received such authorization, and Complainant by his October 21 email disclosed the issue that TFE had therefore been operating in violation of Subchapter B regarding the destruction of records.[5] *Id.* at 552.

Mr. Heal confirmed with OIG that Complainant had raised the issue that Mr. Fox had been destroying or directing the destruction of records without the proper disposition or approval in addition to failing to meet required metrics and providing incorrect reports. *Id.* at 551–53. Mr. Heal also recalled Ms. Downard raising this specific concern and agreed "there was no evidence we could provide that said DOE had ever granted that authority . . ." and TFE "needed to get that documentation in place." *Id.* at 603.

3) Alleged Disclosure #3 – Timekeeping Irregularities Reported to Mr. Heal and Ms. Phillips

Complainant told OIG that TFE did not have a specific policy in place for make-up time or paid time off, employees were accumulating compensatory time (comp time) that they self-recorded and used, and there was no way to validate their self-report. *Id.* at 750–56. He told OIG that the Government Accountability Office (GAO) required that contractors follow GAO standards on accounting for time. *Id.* at 750. He learned, though he could not recall how, that Mr. Fox, Ms. Hughes, Ms. Pearcy, and Ms. Groves were accumulating comp time based on their own calculations and that, based on his review of their time accounting, they had more vacation time than any other employees. *Id.* at 750–51. He stated that he reported his concerns to Mr. Heal and Ms. Phillips and told Ms. Phillips directly that there were GAO standards that governed how to record time but concluded that she did not understand the issue. *Id.* at 750, 752.

[5] Ms. Downard expressed the same concern in an email she sent to Ms. Phillips, copied to Mr. Heal and Mr. Christopher, on October 21 prior to Complainant's email and reported that she told Mr. Fox he needed to fix the fact that the records destruction process was out of compliance with Subchapter B by confirming with Ms. Gee whether he had ever received disposition authority from Ms. Gee. OIG File at 962.

The record contains an email chain that began on January 7, 2020, when Mr. Fox sent Complainant a request to work on a nonwork day in order to "make up some time" for a doctor's appointment he had just completed during the week that ran longer than expected. *Id.* at 161. Mr. Fox also stated therein that he expected to have several more doctor's appointments in the future . . . [and wanted] to make up some time so [he] doesn't run out of PTO [paid time off]." *Id.* Complainant responded that TFE did not have an "approved policy" on "make up and comp time" and that Mr. Heal would make the determination. *Id.* at 160. However, in a follow up email to Mr. Fox that includes Mr. Heal as a recipient, Complainant states that he had been instructed by Ms. Phillips to allow the make-up time and that it was being offered "as a courtesy and not an entitlement." *Id.* at 157. Then, in an email to Ms. Phillips, Complainant states that Mr. Fox "has been allowed to abuse this option and sees this as an entitlement instead of a courtesy." *Id.* at 155. Complainant alleged that Mr. Fox would make up the time by merely coming into work and then spending the time doing nonwork tasks like "play[ing] . . . on his phone." *Id.* at 753.

Complainant told OIG that he could not estimate the potential cost of the concerning accumulation of vacation time, which he referred to as fraud, but alleged that it could meet the threshold of "gross waste" because there could be several hundred hours, at eighty-dollars an hour, for high-earning employees. *Id.* at 754.[6]

Mr. Heal said that there was a comp time policy at the time. *Id.* at 524. However, he also conceded that there were probably managers who had allowed things to happen inconsistent with the "policy" and "that's why [they] wanted to tighten it up." *Id.* at 525; *see also id.* at 524–25 (Mr. Heal telling an investigator that TFE was evaluating its comp time policy "to try to clarify it[.]"). He also asserted Mr. Fox and the other individuals performed work on a "fixed price contract" and their time was charged to TFE and not the government. *Id.* He characterized the system as "confusing."[7] *Id.* He further stated that he counseled Ms. Downard and others numerous times on the fixed price system. *Id.* at 529. There is no written comp time policy included in the OIG investigative file. According to an email sent by TFE Chief Financial Officer Laura McKie, "[e]xempt employees are allowed to bank or 'comp' time. Non-exempt employees are not allowed to do that because we must pay them 1.5 X for any hours worked over 40. All TFE employees, it [sic] just WIPP employees are afforded this practice." *Id.* at 933.

4) Alleged Disclosure #4 – Complaints filed with OIG and NARA in December 2019

[6] The record also contains a May 24, 2019, email from Ms. Downard to Ms. Phillips and Mr. Heal regarding make-up time or comp time, which demonstrates she also had concerns. OIG File at 934. In the email, Ms. Downard asserted that some employees, including Mr. Fox, told her that they were allowed to make up time and bank this time to take later. *Id.* The email also stated that Ms. Downard could not identify any documented entitlement for this practice and that she was choosing to stop it. *Id.* at 933–34. The email asserted that "[i]n essence they're giving themselves a raise at the end of the year because balances over 300 hours are paid out." *Id.*

[7] Mr. Heal described a complex system where there was a distinction between exempt and non-exempt employees who worked on a fixed price and fixed unit rate and distinctions as to what employees with different statuses could do based on the type of work they did. OIG File at 524–25, 529. It is not clear from the record whether this is part of a written policy.

Complainant initiated his Complaint with OIG on December 17, 2019. *Id.* at 3. He then filed a complaint with NARA on December 26, 2019. *Id.* at 764. The information that he disclosed in the OIG Complaint is detailed below. On January 8, 2020, Complainant emailed Mr. Heal, Ms. Phillips, and Ms. Downard the following:

> I have reported the following to the appropriate agency(s): Unlawful Records Destruction (DOE OIG and NARA), Unlawful Records Storage (DOE OIG and NARA), Unlawful Records Transfer (DOE OIG and NARA), Fraud, Waste, Abuse, and Mismanagement (DOE OIG), Personal Conflict of Interest & Improper Business Practices (DOE OIG).

Id. at 162. Complainant was placed on administrative leave the following day, January 9, 2020. *Id.* at 788. Mr. Heal told OIG that Complainant was placed on leave because "he continued to send demeaning letters, emails, after being instructed not to, to Mr. Fox[.]"[8] *Id.* at 638.

The Complainant's initial outreach to OIG precipitated the CIO Assessment. *Id.* at 188 (January 24, 2020, email from OIG to CIO reporting that a complaint had been filed regarding TFE's records management violations and requesting the CIO provide an action plan to address complaint), 323 (statement from Ms. Gee).

Regarding the allegation of unlawful records storage, Mr. Heal told OIG investigators that "everybody knew" in 2019 that WIPP was not a permanent archive, including Complainant. *Id.* at 530, 546. According to Mr. Heal, WIPP could store permanent records, just not permanently. *Id.* at 531. He stated that he and Ms. Downard discussed "what would it take for us to get that classification" in reference to going from a "NARA approved storage facility to an archive . . . that allows you to permanently store records, permanently[.]" *Id.* at 543. However, the CIO Assessment report, described in greater detail below, indicates that in February 2020, over 5,000 permanent records had not been transferred to NARA as required by 36 C.F.R. § 1226.22 because "[t]he Contractor [TFE] was under the assumption that the 2006 Appropriations Bill that Congress approved for the building of a records facility [converted WIPP to] a NARA Affiliated Archives." *Id.* at 178. When questioned about that result, Mr. Heal claimed that Mr. Fox had corrected that misinformation during the assessment and told the CIO Assessment team that WIPP was not a permanent archive. *Id.* at 609. However, when confronted with the passage in the CIO Assessment report indicating that TFE believed that WIPP was a NARA-affiliated archive, he conceded that Mr. Fox may have made the incorrect statement regarding the 2006 Appropriations Bill to the CIO Assessment team outside of Mr. Heal's presence. *Id.* at 611. Ms. Gee recalled that she did not get confirmation that WIPP was not a permanent archive facility until February 2020 as a result of the CIO Assessment. *Id.* at 280.

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[8] We disagree with Mr. Heal's characterization of the communications between Complainant and Mr. Fox. During Mr. Heal's interview with OIG, he did not point to a specific email in which demeaning statement were made, but said he would send them later. OIG File at 638. We have reviewed the emails in the record between Complainant and Mr. Fox for the relevant time period and do not consider them to be "demeaning." *See*, *e.g.*, *id.* at 131–61.

5) TFE Employees File a Complaint Against Complainant and Ms. Downard

On November 12, 2019, prior to Complainant contacting OIG, six TFE employees filed a written complaint with NWP against Complainant, Ms. Downard, Mr. Heal, and TFE HR. *Id.* at 48, 64. NWP referred it to the TFE Employee Concerns Program (TFE-ECP). *Id.* at 64–65, 538. The complaint (ECP complaint) and accompanying written statements make a number of allegations against Complainant, including that he acted inappropriately towards staff, handled personnel issues poorly, asked employees to spy on one another, suggested employees refrain from associating with or providing information to other employees, and targeted employees for termination. *See, e.g.*, *id.* at 30–31, 33, 43–44. Complainant learned of the ECP complaint on November 24, 2019, and he was told that he would be working from home going forward as a result. *Id.* at 779.

TFE-ECP initiated an investigation related to the ECP complaint on December 10, 2019. *Id.* at 45. Mr. Heal selected the TFE-ECP investigation team, which included Ms. Phillips; John Ettien, Senior Consultant to TFE; and Yolanda Navarrette, NWP ECP Coordinator. *Id.* at 673. Mr. Heal said that he selected Ms. Phillips because although she had participated in the discipline of Mr. Fox and Ms. Hughes, "no one seemed to have an issue with her . . ." and she was "there to ensure that [they] follow a process[.]" *Id.* at 18, 632–33. He selected Mr. Ettien because Mr. Ettien was an "industry senior official professional[]" who had "done numerous technical assessments" and was "one of the more assessment qualified people[.]" *Id.* Ms. Navarrette participated because Mr. Heal requested that NWP participate. *Id.* at 631.

The undated TFE-ECP report includes reference to employee interview statements that support the several allegations cited in the report, and TFE-ECP relied upon those statements to conclude that many of the allegations had been substantiated. *Id.* at 45–58. The top signer of the joint written complaint is Mr. Fox. *Id.* at 30. Some of the allegations TFE-ECP substantiated were that "[e]mployees were tasked by Ms. Downard and [Complainant] to spy on other employees (*e.g.*, how many times they went to restroom, how long they were there, etc.)"; "Ms. Downard and [Complainant] targeted several employees that they wanted to 'get rid of,' so they tried to make work so difficult for them that they would quit"; and "Ms. Downard and [Complainant] created a chilled hostile work environment, lack of trust, and fear for retaliation for the contract staff." *Id.* at 46–47.

It also appears that Mr. Heal was interviewed during the TFE-ECP investigation and information he provided is included in the ECP report. The report states that "Mr. Heal, on several occasions, met with Ms. Downard and [Complainant] and provided counseling regarding their performance." *Id.* at 56. It further stated that "[Complainant's] style was described as aggressive, direct, forward, abrasive, insulting, and targeting. He was counseled on his behavior." *Id.*

Under the "Observations" section of the report, it states that the TFE-ECP investigation members Mr. Ettien and Ms. Phillips felt that witnesses, including Mr. Heal, "demonstrated that they were credible . . . and forthcoming." *Id.* at 56. It further stated that "[Complainant] seemed cooperative [during the investigation] but denied or rationalized his actions and thought he conducted himself properly." *Id.* Thus, Ms. Phillips's opinions regarding the witnesses impacted the outcome of the

TFE-ECP investigation because the conclusions reached in the report are based on the witness statements.

According to the report, TFE HR had to step in numerous times to prevent improper disciplinary actions proposed by both Ms. Downard and Complainant. *Id.* The only record of Complainant's counseling OIG received is an undated and unformatted Microsoft Word document that provides three dates of alleged meetings between Complainant and Mr. Heal on October 15, 22, and 28, 2019. *Id.* at 164. During those meetings, the single page document alleges Complainant was told to follow the discipline process for Mr. Fox, to not send negative and judgmental emails, and to be more supportive of Mr. Fox. *Id.* Ms. Phillips told OIG investigators that she created the document from her handwritten notes. *Id.* at 673.

According to Ms. Phillips, Mr. Fox was written up twice by Complainant, who pursued the disciplinary actions and requested to terminate Mr. Fox. *Id.* at 672–73. TFE characterized Complainant's efforts as "a plan to make Mr. Fox appear incompetent." *Id.* at 17.[9] Ms. Phillips felt that Complainant and Ms. Downard had not followed progressive discipline and that they needed to give Mr. Fox opportunity to improve. *Id.* Mr. Heal stated that, pursuant to TFE's progressive discipline process, employees are typically given two verbal warnings, two written warnings, and then terminated. *Id.* at 556. Mr. Fox continued to work for TFE until June or August of 2020, when the next incoming project manager secured his termination. *Id.* at 580–81, 672. Ms. Phillips recalled that Mr. Fox had been counseled regarding his behavior and interactions with WIPP employees. *Id.* at 672. TFE also reported that Ms. Downard provided a written discipline to Mr. Fox on one occasion when he inappropriately slammed materials on a desk in response to her asking a question. *Id.* at 17 (referencing this instance as "the first step in . . . a coordinated effort to manufacturer a reason to terminate Mr. Fox").

6) TFE's Decision to Terminate Complainant

Mr. Heal said he recused himself from the TFE-ECP investigation but received updates regarding the progress on two occasions. *Id.* at 633, 642. He said, as President, he still had to "look at, at resources, and approvals, and other things." *Id.* at 644. He received at least three updates. The first update was a status update and request by Mr. Ettien for more time to complete the investigation into Ms. Downard, which Mr. Heal granted. *Id.* at 644–45. The second and third took place after the investigation was completed to receive the results of the investigation. *Id.* at 645. Mr. Heal sat on TFE's Board of Directors with two other individuals. *Id.*

The Board met with Mr. Ettien on January 22, 2020, for an update on the investigation. *Id.* at 23. According to TFE, there was sufficient evidence in the record at that time to demonstrate that Complainant targeted employees and created a culture of fear and intimidation and they therefore had no use for his services. *Id.* Mr. Heal stated that he recused himself from the decision regarding Complainant's termination. *Id.* at 643. Complainant was terminated on January 24, 2020, while the investigation continued. *Id.* at 58, 645. Ms. Downard was later terminated on February 4, 2020. *Id.*

[9] In TFE's Position Statement, it asserts that Complainant disciplined Mr. Fox three times in a manner that raised concerns that Complainant and Ms. Downard were "fast tracking" Mr. Fox for termination. OIG File at 17–18.

The TFE-ECP report listed several activities of the Complainant that, "due to their seriousness, may result in immediate dismissal without warning in accordance with the TFE Employee Manual." *Id.* at 58. Those activities included that he "acted in an unprofessional manner to the TFE employees . . . creating a hostile, divisive, intimidating, and uncomfortable work environment, acting in a demeaning, berating, and belittling manner to the TFE employees, and making inappropriate, offensive, and demeaning comments to [] staff[.]" *Id.* at 57. One of the witness statements included in the report is a February 20, 2020, email that reports that Complainant had responded to an employee in an aggressive tone during a meeting which made the atmosphere "very cold and uncomfortable" and that the Complainant later boasted about how he "shut [] down" that employee. *Id.* at 47. Given the date, this statement was received and included in the TFE-ECP report after Complainant had been terminated. *Id.*

In the termination email that Mr. Heal sent to Complainant, Mr. Heal stated that Complainant's introductory period of employment was ending based on "several conversations concerning [Complainant's] management style and interaction with employees." *Id.* at 101.

7) DOE CIO Assessment

The CIO Assessment team conducted its assessment at WIPP from February 3 to February 7, 2020. *Id.* at 165. Three people were interviewed during the assessment: Mr. Fox, Mr. Heal, and Donny Backer, Iron Mountain Operations Manager.[10] *Id.* at 182. The CIO Assessment described its purpose as follows:

> Assessments like this one are regularly conducted to comply with 36 CFR 1220.34 (j), which requires agencies [to] conduct formal evaluations to measure the effectiveness of records management programs and practices and to ensure compliance with Federal laws, regulations and [DOE] directives. In addition to this routine responsibility to assess records programs, DOE is conducting this assessment in response to referrals made in writing by both the [NARA] and the DOE [OIG], alleging specific concerns about the records management practices of NWP and of its subcontractor, TFE, Inc.

Id. at 165.

The summary of the CIO Assessment report identified ten findings related to, among other things, records management procedures, unauthorized destructions, and permanent record transfers to NARA. *Id.* at 166–67. The summary also noted that "[t]he NARA and [OIG] referrals identified scheduling, storage, transfer and destruction as concerns. Based on this assessment, these concerns were substantiated for scheduling, transfer and destruction in findings . . . ." *Id.* at 166. For example, the CIO Assessment found that "[t]he Contractor does not document the physical destruction nor who witnessed the destruction as required by 36 CFR 1226.24." *Id.* at 177. This finding is related to Complainant's concern that records were being destroyed without the

[10] Iron Mountain is the subcontractor that maintains the Records Storage facility on behalf of TFE. OIG File at 135, 166, 177, 350.

appropriate disposition. It found "evidence of records being scheduled improperly, which resulted in unauthorized destructions, based on documentation provided[.]" *Id.* It found that "[r]ecords destruction documentation lacks: . . . Federal approval outside of the Contractor Records Manager (*e.g.*, . . . DOE RMFO [Records Management Field Officer][[11]])" as required by 36 C.F.R. § 1226.24. *Id* at 178. This also matches with Complainant's concern that records were being destroyed without proper disposition authority. And it found "[p]ermanent records have not been transferred to NARA in accordance with the Records Disposition Schedule and required by 36 CFR 1226.22[,]" noting that "Carlsbad is not among the Affiliated Archives and is required to transfer permanent records to NARA according to the appropriate Records Disposition Schedule." *Id.* at 178–79. This matches up with Complainant's concern that records were being improperly held at WIPP and not transferred to the records archive based on the belief that WIPP was a permanent records archive, which, as seen below, Complainant raised as an issue in his OIG Complaint.

C. The Complaint

On December 17, 2019, Complainant contacted OIG via its complaint hotline and alleged that he documented Subchapter B unlawful records destruction, unlawful storage, unlawful transfer, fraud, waste, abuse, and violation of General Services Administration (GSA) and GAO guidelines for "Per Diem, Travel, Accounting . . . ." *Id.* at 3. He reported that he had discovered "multiple violations and irregularities to [TFE's] contract[,]" "[t]he Records Management portion of the WIPP project may have never been in compliance as required by 36 CFR and DOE orders[,]" and the CRM had "admitted to not ensuring proper verification before the destruction of nor proper oversight to ensure what records have been destroyed." *Id.* at 4. He also asserted that the CRM had, since 2006, "misled the project in stating that the pilot project is not required to follow the CFR on permanent record storage." *Id.* He also alleged, without providing additional detail, there is "strong evidence to support Fraud, Waste, and Abuse with the Personal Time off logs[,] . . compensated time accountings, and . . . government travel." *Id.* Complainant subsequently contacted the OIG complaint hotline on January 9, 2020, and alleged that he disclosed to Mr. Heal and Ms. Phillips "[u]nlawful records destruction, unlawful records storage, unlawful records retention, Fraud, waste, abuse, and mismanagement." *Id.* at 6, 11 (providing date of second contact). Finally, Complainant submitted through counsel a February 24, 2020, supplement to his previous complaints. *Id.* at 9–13. Complainant alleged that he was terminated in retaliation for reporting the deficiencies with TFE's records program. *Id.* at 9. Together, these documents constitute the Complaint.

Through its investigation, OIG developed Complainant's allegations to include protected disclosures concerning unlawful storage, destruction, and transfer of records, and timekeeping irregularities related to not having an appropriate accounting system for paid time off. Report at 3–5.

D. OIG's Report

OIG issued its Report on June 23, 2026. *Id.* at 1. Therein, OIG analyzed four instances of alleged protected activity and determined, for three, that Complainant had disclosed information that "he

[11] The DOE RMFO was Ms. Gee. OIG File at 271.

reasonably believed was 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; and a violation of law, rule, or regulation related to a Federal contract or grant by [TFE.]"[12] *Id.* The Report further concluded Complainant's disclosures were a contributing factor to his termination and TFE failed to meet its burden to provide "clear and convincing evidence it would have taken the same action in the absence of [Complainant's] disclosures." *Id.* at 8. Based on these determinations OIG "made a recommendation for action" regarding Complainant's allegations of retaliation. *Id.* at 9. When the OIG's conclusions differ from those we make, it will be noted in the Decision.

E. Briefs Submitted by the Parties

After receiving the Report, OHA requested briefing from each party concerning OIG's findings and whether OHA should grant relief. TFE failed to submit a brief in response to this request. Complainant filed an untimely brief in which it addressed OIG's findings and also supplemented a Requested Remedies letter he provided OIG on June 19, 2026, in which he identified his requested relief. Complainant's (Compl.'s) Brief (Br.) (July 11, 2026) at 7–11. We thereafter invited TFE to respond to Complainant's Requested Remedies, which TFE only received after the Report had been issued, as supplemented by Complainant's brief, and TFE filed its response thereto. TFE's Br. (July 20, 2026) at 4–9. We consider the parties briefs and discuss the parties' positions regarding remedies below in section II.D.

II. Analysis

The NDAA-ECP incorporates by reference the burdens of proof specified in the Whistleblower Protection Act, 5 U.S.C. § 1221, for establishing whether a contractor, subcontractor, grantee, or subgrantee has unlawfully retaliated against a whistleblower for making a protected disclosure. 41 U.S.C. § 4712(c)(6). Thus, in order to prevail, a complainant must show that his or her protected disclosure was a contributing factor in one or more adverse personnel actions. 5 U.S.C. § 1221(e)(1). The complainant may make this demonstration "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." *Id.*

If the complainant establishes that his or her protected disclosure was a contributing factor in an adverse personnel action, the burden then shifts to the contractor or grantee to demonstrate "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. § 1221(e)(2); *see also Miller v. DOJ*, 842 F.3d 1252, 1257–58 (Fed. Cir. 2016) (indicating that the clear and convincing evidence standard is a heavier burden of proof than preponderance of the evidence "but a somewhat lighter burden than that imposed by requiring proof beyond a reasonable doubt") (quoting *Buildex, Inc. v. Kason Indus., Inc.*, 849 F.2d 1461, 1463 (Fed. Cir. 1988)). In evaluating whether this burden has been met, courts consider "[1] the strength of the [] evidence in support of [the] personnel action; [2] the existence and strength of

[12] Although the Report cites to these various bases, they are not analyzed independently. Therefore, we rely upon our own analysis as determined by the facts provided in the Report.

any motive to retaliate on the part of the [] officials who were involved in the decision; and [3] any evidence [of] . . . similar actions against employees who are not whistleblowers but who are otherwise similarly situated." *Carr v. Soc. Sec. Admin*., 185 F.3d 1318, 1323 (Fed. Cir. 1999), *cited with approval in Miller,* 842 F.3d at 1257.

A. Complainant Established that He Made a Protected Disclosure

A disclosure of alleged misconduct is protected under the NDAA-ECP, even if the alleged misconduct never took place, so long as the disclosure reveals information that the employee "reasonably believes is evidence" of misconduct. 41 U.S.C. § 4712(a)(1). A reasonable belief is one that a disinterested observer with the employee's knowledge of essential facts could reasonably conclude was evidence of a violation or misconduct. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

1) Complainant's Disclosures Regarding Records Management Violations are Protected

Although Complainant is not a subject matter expert regarding Subchapter B, there is no dispute that Ms. Downward was experienced and qualified to evaluate the performance of WIPP's records management program. She was hired specifically to run the program and to improve the performance of the CRM, who had been responsible for operating the program. She was identified as a subject matter expert and she had qualifications from NARA in Records Management. Nobody disputes her qualifications to determine whether the program operated in compliance with Subchapter B. Therefore, Complainant could have reasonably relied upon his discussions with her regarding requirements of Subchapter B and whether the program was in compliance with the same. Furthermore, TFE, by its own admission, expected Complainant to ensure, along with Ms. Downard, that the records management program operated in compliance with Subchapter B.

There is no dispute that, in reality, Mr. Fox did not have the required disposition authority but nonetheless authorized the destruction of records, and Mr. Heal acknowledged, at the time the issue was raised, there was no evidence to undermine the concern regarding the absence of disposition authority. Complainant raised issues regarding WIPP's records management program on October 21, 2019, when he reported to Mr. Heal that WIPP had not been performing its deliverables in accordance with Subchapter B because Mr. Fox could not confirm that records had been destroyed in accordance with authority delegated from CBFO. The facts that Ms. Downard also expressed the same concern after failing to identify where Mr. Fox had been delegated the appropriate authority and told Complainant the same, and Mr. Fox admitted to Complainant that he was unsure whether he had the appropriate authority, indicate that Complainant reasonably believed that he was reporting a violation of Subchapter B. Thus, his reports to Mr. Heal and OIG of these issues constituted protected disclosures. *See* 41 U.S.C. § 4712(a)(2) (identifying "Inspector General[s]" and "management official[s] . . . of the contractor who ha[ve] the responsibility to . . . address misconduct" as examples of the persons or bodies to whom a whistleblower may disclose information in order for it to be protected under the NDAA-ECP).

Additionally, filing the OIG Complaint certainly constituted a protected disclosure because therein he reported the issues raised by Mr. Fox's performance at WIPP and the improper treatment of WIPP as a permanent archive, which he alleged violated specific regulations. From the analysis above, it is clear that Complainant possessed information that a reasonable person would conclude supported his report to OIG that TFE's operations violated Subchapter B. Complainant's allegations were sufficient to prompt the CIO Assessment, which discovered practices that substantiated his disclosures.

2) Complainant's Disclosures Regarding Timecard Issues are not Protected

Regarding the timecard irregularities, the record indicates that Complainant reported Mr. Fox asserting the right to comp time despite there being no written policy in place that covered make-up time or written procedure to validate the accuracy of those requests. Complainant specifically disclosed to Mr. Heal and Ms. Phillips that Mr. Fox was inappropriately accumulating comp time. He also asserted that he told Ms. Phillips that there were GAO standards that must be followed, however, there is no corroborating evidence in the record to confirm the same. Furthermore, Complainant references the fact that make-up time could be used as a courtesy even though he asserted that Mr. Fox abused that ability.

As a supervisor, Complainant was responsible for approving requests for comp time from his subordinates as evinced by the January 7, 2020, email chain related to Mr. Fox. The information he provided in the emails expresses dissatisfaction with Mr. Fox, and perhaps others, being able to abuse the unwritten policy in place for accruing comp time. While he did reference GSA and GAO guidelines regarding the accumulation of per diem, travel, and "accounting" in his written OIG hotline submission, he never identified specific guidelines that he believed were applicable to Mr. Fox's conduct, and his statements to OIG mainly referenced his general concern regarding the accumulation of comp time and vacation time without citation to any particular law, rule, regulation, or guideline.

OIG concluded that Complainant reasonably believed that "his disclosure of timecard irregularities presented evidence of gross mismanagement; abuse of authority; or a violation of law, rule, or regulation[.]" Report at 7.

"[G]ross mismanagement has been defined as a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." *Mentzer v. Metropolitan Police Department*, 677 F. Supp. 2d 242 (D.D.C. 2010) (internal quotations omitted). The record does not establish that Complainant had a reasonable belief that a gross level of mismanagement occurred given his observations of Mr. Fox requesting comp time, other employees' alleged vacation time accumulation, and his concern that several employees were engaged in the practice over an indeterminate number of years. Complainant did not supply a theory as to how this timekeeping issue presented such serious problems that it could have a substantial risk of compromising the WIPP's mission. We therefore disagree with OIG's conclusion that his disclosure of the timecard irregularities constituted a protected disclosure of gross mismanagement.

Abuse of authority related to a Federal contract is defined in the NDAA-ECP as "an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract or grant of such agency." 41 U.S.C. § 4712(g)(1). Given our above reasoning, we disagree with OIG's conclusion that Complainant's communications regarding timecard irregularities could constitute disclosure of an abuse of authority. The record does not support finding that Complainant reasonably believed the information he reported about comp time, or his concern that there was no official policy in place, indicated an exercise of authority inconsistent with successful performance of the contract since he did not indicate any alleged impact on DOE or the performance of the contract besides his speculation that employees may have accumulated several hundred comp time hours or that some employees had higher amounts of vacation time than others. There is no indication as to the extent of unjustifiable costs that might have been incurred as a result of TFE's lenience or whether those costs would be borne by DOE.

Lastly, we conclude that Complainant did not reasonably believe he was disclosing a violation of law, rule, or regulation related to a Federal contract. There is no indication in the email that Complainant sent regarding Mr. Fox that he considered the posture of TFE to be in violation of a law, rule, or regulation as it pertains to timekeeping—only that Mr. Fox had abused the policy, to the extent it existed. While Complainant referenced unnamed GSA and GAO guideline violations in the OIG hotline form he submitted on December 17, 2019, he did not provide any detail describing the violations. And while he did provide details regarding his concern when discussing it with OIG, he did not provide any reference to a particular regulation or guidance to support the conclusion that TFE's posture violated a law, rule, or regulation regarding timekeeping.

B. Complainant's Protected Disclosures Were a Contributing Factor in TFE's Termination of His Employment

In order to establish that his protected disclosures were a contributing factor in an adverse personnel action, Complainant must satisfy the "knowledge/timing" test demonstrating that an official with knowledge of his disclosures took a personnel action within such a period of time that a reasonable person could conclude that the disclosures were a contributing factor. *Kewley v. Dep't of Health & Human Servs*., 153 F.3d 1357, 1361–62 (Fed. Cir. 1998). Furthermore, a complainant "may establish constructive knowledge by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking the retaliatory action." *Dorney v. Dep't of the Army*, 2012 M.S.P.B. 28, 11 (2012).

We conclude that the "knowledge" element for determining the contributing factor is satisfied by the facts in this case. As an initial matter, Complainant established that TFE's President, Mr. Heal, knew of his disclosures and so did the HR manager, Ms. Phillips, and both participated in the TFE-ECP investigation. It would seem highly unlikely that the two other Directors would have no knowledge of, at the very least, Complainant's OIG Complaint given that their co-Board member and President knew and the HR Manager knew. However, Complainant has demonstrated that Mr. Heal and Ms. Phillips had actual knowledge of his disclosures and, through their participation in the TFE-ECP investigation, impacted the outcome of the TFE-ECP report that the Board members relied upon in their decision to terminate Complainant. Ms. Phillips was part of the TFE-ECP investigation and made credibility determinations that necessarily influenced the outcome of the TFE-ECP report, which appears to be primarily based on witness statements, to Complainant's detriment. If Ms. Phillips had found a particular witness to be unreliable, certainly that would be referenced in the report and the information would be weighed accordingly when determining whether to substantiate an allegation. Furthermore, Mr. Heal provided information as a witness that was factored into the outcome of the TFE-ECP investigation to the detriment of Complainant—specifically, telling the TFE-ECP investigators that he counseled Complainant for his conduct on several occasions. Both TFE officials knew of Complainant's protected activity and impacted the outcome of the TFE-ECP report through their participation described above, and the two alleged deciding officials, Mr. Heal's co-Board members, relied upon that same report to terminate Complainant. Thus, the record demonstrates that TFE officials with actual knowledge of Complainant's protected disclosures and that he had filed an OIG Complaint influenced the deciding officials and therefore Complainant has carried his burden to demonstrate they had constructive knowledge of his disclosures. *See id.*; *see also Marano v. Dep't of Justice*, 2 F.3d 1137, 1143 (Fed. Cir. 1993) (interpreting the burden of proof standard set out in 5 U.S.C. § 1221(e), adopted by NDAA-ECP, as requiring that an "employee only needs to demonstrate by preponderant evidence that the fact of, or the content of, the protected disclosure was one of the factors that tended to affect in any way the personnel action") *and McCarthy v. Int'l Boundary & Water Comm*, 2011 M.S.P.B. 74, 41 (2011) (holding that "although there is no evidence in the record that [an agency official] knew the details contained within [an employee's] written disclosures, the fact that the [employee] told [the official] that he had made the disclosures was sufficient to establish the "knowledge" element of the knowledge/timing test").

As for timing, the Individual was placed on administrative leave on January 9, 2020, the day after he filed his OIG Complaint, and terminated on January 24, 2020, two weeks thereafter—ten days before the CIO Assessment team arrived. Furthermore, all of his disclosures occurred within the approximately four months he was employed by TFE. Thus, Complainant made protected disclosures during a period in which a reasonable person could conclude that the disclosures were contributing factors in TFE's decision to terminate his employment. *See Inman v. Dep't of Veterans Affairs*, 112 M.S.P.B. 280, 283 (2009) (finding that "a period of more than 1 year between a protected disclosure and a personnel action can satisfy the knowledge/timing test."). As Complainant has satisfied both prongs of the knowledge/timing test, he has demonstrated that his protected disclosures were a contributing factor in TFE's determination to terminate his employment because, as we concluded above, Mr. Heal and Ms. Phillips had knowledge of his disclosure that WIPP had been destroying records in violation of Subchapter B and that Complainant had filed a Complaint with OIG in which he reported that he disclosed various violations regarding TFE's records management program.

C. TFE Has Not Established that it Would Have Terminated Complainant's Employment Regardless of His Protected Disclosures

TFE claimed that it terminated Complainant's employment because the TFE-ECP investigation substantiated that he engaged in several unacceptable activities that violated the Employee and Policy Manual, including that he created a culture of fear and intimidation and acted in an unprofessional manner.

The findings documented in the TFE-ECP report establish that Complainant was engaged in improper behavior that warranted a response. However, one factor that detracts from the strength of TFE's assertion that Complainant's behaviors outlined in the TFE-ECP report were the reason for his termination is that the report is undated and includes at least one witness statement that was received after Complainant had been terminated. Furthermore, TFE terminated Complainant before concluding its full investigation or finalizing its report.

However, there are stronger issues that undermine the weight that we place on TFE's assertion that the TFE-ECP report justified Complainant's termination. The employee manual referenced in the

TFE-ECP report to describe the severity of Complainant's alleged behavior does not describe the type of "extreme" conduct that warrants immediate termination instead of the "two verbal warnings and two written warnings" an employee "may be given . . . before termination for cause is approved." Compl.'s Br. Exhibit (Ex.) 3 at 32.[13] According to Mr. Heal, employees are typically given two verbal warnings, two written warnings, and then terminated. That comports with Ms. Phillips' statements to investigators that she had previously counseled Complainant that he needed to follow the progressive discipline process with Mr. Fox, who had a history of concerning performance, including having survived a performance improvement plan under a former program manager. Mr. Fox continued to have performance issues after the fact and beyond Complainant and Ms. Doward's employment. Mr. Fox was also disciplined at least once, by Ms. Downard, for conduct when he slammed the desk after she asked him about an overhead light. And Ms. Phillips recalled that Mr. Fox had been counseled regarding his behavior with other WIPP employees. In other words, he was disciplined for conduct issues that included an act of aggression and performance issues. By contrast, the only documentation TFE produced that Complainant was disciplined is a Microsoft Word document that provides the three dates he was allegedly counseled in October. Notably, that counseling included being told to follow the progressive discipline process to discipline Mr. Fox and therefore it documented Complainant being counseled on the very thing that was not done in his case. These facts undermine the strength of TFE's argument that the outcome of the ongoing ECP investigation justified Complainant's immediate termination, even if he was under a probationary period. Further still, the performance of Mr. Fox, or lack thereof, directly impacted TFE's performance under its contract, and therefore its business liability, as his deficiencies were the subject of Complainant's disclosures to TFE and OIG, which the CIO Assessment validated. However, Mr. Fox continued to work for TFE until June or August 2020, up to six months after Complainant was terminated. This comparison undermines TFE's professed reliance on the severity of Complainant's behavior to immediately terminate him.

Lastly, Complainant was placed on administrative leave the very next day after he disclosed that he had filed an OIG Complaint which unquestionably raises the inference that that action was a direct response to the fact he had contacted OIG despite Mr. Heal's assertion that it was based on his demeaning email communications to Mr. Fox. Ms. Downard was also terminated shortly after Complainant—the day after the CIO Assessment team arrived. Neither were therefore available to participate in the CIO Assessment, but Mr. Fox was available and the assessment team left with the erroneous impression that WIPP had been operating under the mistaken belief that it was a permanent archive. That conclusion could make TFE look less culpable on related compliance issues because TFE could therefore be perceived as mistakenly violating the Subchapter B requirements as opposed to knowingly continuing to do the same after Complainant and Ms. Downard confirmed and informed TFE of its noncompliance. The timing of his suspension and termination gives rise to the clear concern that Complainant was removed so that he could no longer highlight issues with TFE's operations.

We think it also appropriate to note here that Mr. Heal's credibility regarding his statements around the TFE-ECP investigation and the reason to suspend and terminate Complainant is dubious. He told the OIG investigators, for example, that he did not think the TFE-ECP report would come out as badly as it did for Complainant and that the report might exonerate him. OIG File at 634.

[13] Reference to the parties' exhibits are to the exhibit number or letter and the page number of the combined .pdf of the exhibit book.

However, he also told the OIG investigators later in the same interview that "based on [Complainant's] behavior in October, I was ready to terminate him in November and would have done so if this ECP [report] had not come out." *Id.* at 542 (referencing, in part, the "continued counseling" Complainant and Ms. Downard allegedly received "about how you treat people, and don't target people").

We conclude that while the TFE-ECP report may have provided strong evidence to support disciplining Complainant, it did not provide strong evidence to support TFE's decision to immediately terminate Complainant when weighed against the factors outlined above.

Regarding the second *Carr* factor, Complainant's protected disclosures were significant to the point that, after they were reported directly to the OIG, the DOE CIO Assessment team conducted its investigation. Complainant's disclosures reflected poorly on TFE's contract performance as a whole given that its sole purpose was to manage NWP's records. *See Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1370–71 (Fed. Cir. 2012) (recognizing that a whistleblower's allegations may give rise to an institutional motive to retaliate on the part of high-level officials of an organization, even if the allegations do not personally implicate the officials, if the allegations would negatively affect external perceptions of the organization and thus the reputations of the officials as representatives of the organization). Accordingly, TFE had a strong motive to retaliate against Complainant. Further evidencing this motive is the fact that, by removing him, he was unable to participate in the very investigation that his protected disclosures precipitated. It stands to reason that an organization that wanted to decrease the chance that its poor performance would come to light would have strong interest in removing the person that could point investigators to the very same. In reaching this conclusion, we do not suggest that Complainant's value to an investigation or any fallout from his complaints should have justified retaining a manager who behaved in an unprofessional, threatening, and intimidating manner; but as indicated above, we have serious concerns that undermine TFE's argument that Complainant's documented conduct justified immediate suspension after he disclosed his protected activity or his termination prior to the full TFE-ECP investigation being completed. We conclude that TFE had a strong motive to retaliate.

Lastly, regarding the final *Carr* factor, TFE did not submit any evidence of comparator employees. The absence of evidence of comparator employees "adds little to the overall analysis in this case, but if anything, tends to cut slightly against the [employer]." *Miller*, 842 F.3d at 1262. The record does include Ms. Downard who similarly filed an OIG complaint and alleged records management violations. She too was terminated shortly thereafter and the day after the CIO assessment team arrived, and we concluded after the OIG investigated her complaint that she was the subject of unlawful retaliation under the NDAA-ECP for making similar protected disclosures. *Jacqueline Downard*, OHA Case No. WBR-26-0001 (2026). If anything, this factor weighs in favor of Complainant.

Based on our analysis of the *Carr* factors as described above, we find that TFE has not established by clear and convincing evidence that it would have terminated Complainant's employment regardless of his protected disclosures.

D. Remedy and Enforcement

Under the NDAA-ECP, an agency is required to render a decision on whether relief is appropriate and, if so, the form it should take. The NDAA-ECP identifies the following three categories of relief: (1) ordering the contractor to take affirmative action to abate the reprisal, (2) ordering the contractor to reinstate the complainant to the position held prior to the reprisal with compensatory damages, to include back pay, employment benefits, and other terms and conditions of employment that would apply had the reprisal not been effectuated, and/or (3) ordering the contractor to pay the complainant an amount equal to the total of all costs and expenses, to include attorneys' fees, that were reasonably incurred by the complainant in pursuing the complaint. 41 U.S.C. § 4712(c).

In Complainant's Requested Remedies and brief, he requested (1) reinstatement or front pay in lieu thereof; (2) back pay and lost benefits; (3) abatement of the hostile work environment; (4) damages for emotional distress; (5) interest on the damages award; (6) reasonable attorney's fees and costs; (7) an order enjoining the employer from engaging in unlawful employment practices; and (8) "[a]ny affirmative action as may be appropriate." Compl.'s Remedies Request; Compl.'s Br. Ex. 1 at 3–8.

We have determined that relief is appropriate, but not to the extent requested by Complainant. As explained below, we will order back pay, including compensation for PTO, and attorneys' fees.

1) Ordering Affirmative Action to Abate the Reprisal and Enjoin From Engaging in Unlawful Employment Practices

Although the NDAA-ECP provides for the grant of affirmative action to abate the reprisal, it does not expressly identify specific types of affirmative action contemplated by the section. In this case, Complainant does not specify the type of affirmative action he is seeking beyond enjoining TFE from engaging in further unlawful employment practices. We decline to consider fashioning an order based on Complainant's vague request.

2) Reinstatement and Compensatory Damages

Under the NDAA-ECP, an agency can order reinstatement and compensatory damages (including back pay, employment benefits, and other terms and conditions of employment that would apply if the action had not been taken). 41 U.S.C. § 4712(c). As explained below, we have determined that TFE must provide Complainant with back pay and attorneys' fees.

a. Reinstatement

As a general matter, reinstatement has the benefit of returning an employee to the position the employee would have been in had the retaliation not occurred. Reinstatement is also a visible sign to the workforce that retaliation will be redressed.

TFE argues that reinstatement is inappropriate as a remedy given Complainant's behavior during his employment with TFE and because Complainant engaged in criminal conduct after he was terminated by TFE. TFE's Br. at 6–8. Regarding the first argument, we have already concluded that while Complaint's behavior justified discipline, we are not persuaded that it justified immediate termination. Regarding the second argument, we find it more persuasive, as discussed below.

While reinstatement is often a preferred remedy in discrimination or retaliation cases, a former employee's post-termination misconduct may be so egregious that it precludes an award of reinstatement or front pay. *See, e.g.*, *Sellers v. Mineta*, 358 F.3d 1058, 1064 (8th Cir. 2004) ("hold[ing] that a plaintiff's post-termination conduct is relevant in determining whether a front pay award is available, and if so, in determining the extent of the award[,]" and remanding for further findings as to whether the employer had demonstrated "by a preponderance of the evidence that Sellers' post-termination conduct renders her ineligible for reinstatement under the [agency's] employment regulations, policies, and actual employment practices") *and Medlock v. Ortho Biotech*, 164 F.3d 545, 555 (10th Cir. 1999) (refusing to foreclose the possibility that in appropriate circumstances post-termination conduct may permit certain limitations on relief).

Even if reinstatement or front pay is not precluded, reinstatement is not always appropriate: courts must examine the circumstances of each case to reach a determination. *Olivares v. Brentwood Indus.*, 822 F.3d 426, 429 (8th Cir. 2016) (discussing the remedy of reinstatement within the context of a Title VII of the Civil Rights Act of 1964). For example, reinstatement may be inappropriate where there is "evidence of extreme animosity between the parties." *Id.* Reinstatement has also been deemed inappropriate when the employee "would not enjoy the confidence or respect of current management[.]" *Tennes v. Mass., Dep't of Revenue*, 944 F.2d 372, 381 (7th Cir. 1991). And courts have refused to award reinstatement when they conclude that the remedies awarded absent reinstatement sufficiently compensate a complainant and therefore other equitable relief is unnecessary to make them whole. *Zakre v. Norddeutsche Landesbank Girozentrale*, 541 F. Supp. 2d 555, 571 (S.D.N.Y. 2008).

The alternative to reinstatement is front pay. *Sellers v. Mineta*, 358 F.3d 1058, 1063 (8th Cir. 2004). When appropriate, courts may award front pay "to make a victim of discrimination whole and to restore [them] to the economic position [they] would have occupied but for the unlawful conduct of [their] employer." *Lloyd v. Holder*, Civil Action No. 97-1287 (PLF), 2010 U.S. Dist. LEXIS 153338, at *5–6 (D.D.C. 2010) (internal quotations omitted) (citing *Barbour v. Merrill*, 48 F.3d 1270, 1279, (D.C. Cir. 1995)). Front pay applies prospectively and compensates the Individual for their lost future earning as opposed to back pay which, as discussed below, compensates a person for their accumulated lost wages. *See Barbour v. Medlantic Mgmt. Corp.*, 952 F. Supp. 857, 863 (D.D.C. 1997) (stating the purpose of front pay is "to compensate a victim of discrimination for the continuing future effects of discrimination until the victim is made whole" and "generally ends when a victim has had a reasonable amount of time to secure comparable employment").

We have reviewed the New Mexico State Court records from the Fifth Judicial District submitted by TFE. TFE's Br. Ex. B at 49, 79. Those records indicate that in 2022 the Complainant was charged with felony Attempted Fraud, he subsequently pled no contest to the charge, and the court sentenced him to probation. *Id.* Furthermore, TFE provided a news article that reports that the felony charge stemmed from Complainant's attempt to defraud his employer, Roswell Air Center, by creating falsified invoices and submitting them to his employer, an entity of the City of Roswell, for products and services he never provided.[14] *Id.* at 85; *see id.* at 84 (probation letter from New Mexico Corrections Department identifying Complainant's victim as the City of Roswell); Compl.'s Br. Ex. 5 at 59 (Complainant's application letter for the position of Deputy Director at Roswell Air Center addressed to the City of Roswell Human Resources Department).

In short, Complainant pled no contest to a charge that he attempted to defraud his government employer by falsifying records while holding a senior leadership position. In light of those facts, we have considered TFE's assertion that Complainant's "own actions may prevent him from obtaining the relief he seeks," TFE's Br. at 6, and that his criminal charge is one of moral turpitude involving credibility and handling of finances.[15] *Id.*

As an initial matter we note that the record developed by the OIG in this case is devoid of information regarding how TFE would apply its employment policies and practices with respect to an individual who had engaged in Complainant's criminal conduct, be they an applicant or a current employee. TFE's brief is similarly lacking argument or evidence that specifically addresses this point. Consequently, we cannot conclude that TFE has carried its burden to demonstrate that reinstatement or front pay is entirely precluded under an after-acquired evidence defense or post-termination misconduct defense.

We instead find the record sufficient to conclude that reinstatement is inappropriate under the specific equitable circumstances of this case. There is no question that the position Complainant occupied with TFE is one that would requires a high level of confidence, trust, and integrity. The records managed by TFE directly dealt with the operation of DOE's WIPP, which entails the transportation, handling, and storage of nuclear waste. OIG File at 810. Furthermore, these records contain confidential information that is in some cases Unclassified Nuclear Information (UCNI) and Official Use Only (OUO). *Id.* at 107 (discipline letter documenting that Mr. Fox failed to accurately communicate "program compliance and requirements for the adequate protection of the UCNI-OUO records"). Because Complainant's position was as a senior manager for this program,[16] TFE not only relied upon him to ensure the successful operation of the records management program—including providing accurate reporting of TFE's operations—but also expected him to professionally represent TFE when communicating with officials at NWP (Ms. Harkness) and DOE (Ms. Gee).

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[14] The rdrnews.com article reports that Complainant owned a company that produced branded clothing and other items and Complainant created the false invoices to give the impression that he had supplied products from this company to the city staff for which he had not yet been compensated. TFE's Br. Ex. D at 86.

[15] TFE also argued that Complainant's post-termination criminal conduct would make reinstatement to a position requiring a Federal security clearance difficult if not impossible. TFE's Br. at 6. However, while Complainant's work involved sensitive matters at TFE, there is no documentation in the record that the Complainant held a security clearance in connection with his employment with TFE or that the position would require one.

[16] In its Position Statement, TFE referred to Complainant, along with Ms. Downard, "as the senior TFE leadership for the NWP Records Management Service Contract in Carlsbad" and stated that they "were charged with ensuring compliance with all federal regulations and preventing waste, fraud, abuse, and mismanagement within TFE's operations." OIG File at 15.

TFE would undoubtedly have low trust and confidence in Complainant's ability to represent TFE to its clients, including DOE, and maintain those relationships given the nature of his criminal conduct. Pleading no contest to a felony involving fabricated records and attempted fraud against a local government gives TFE legitimate cause to question whether he should encumber a high-confidence position where he would be responsible for ensuring the accurate maintenance of confidential, nuclear-related records for the Federal government. Furthermore, reinstating Complainant to his former leadership position could seriously jeopardize TFE's business competitiveness given its viability as a service provider necessarily depends on confidence in its ability to maintain Federal records. The prospect of having Complainant in the position of deputy program manager could therefore be particularly damaging to TFE given that TFE would need NWP and DOE officials to have confidence and trust in Complainant.

In light of the foregoing, we find the record sufficient to conclude that reinstatement is not an appropriate remedy in this case, given TFE's specialized business purpose, the sensitive responsibilities of the position that Complainant seeks to be reinstated to, and the specific nature of Complainant's post-termination criminal conduct.

Regarding the alternative of front pay, the documentation Complainant provided regarding his subsequent employment demonstrates he currently earns more at his present employer than he did when employed by TFE. *See infra.* Because there is no prospective future loss of wages to remedy, the purpose of front pay is not served here. We, therefore, decline to award front pay.

b. Compensatory Damages

i. Back Pay and Lost Benefits

Complainant requests back pay, lost retirement and PTO benefits, and interest thereon. TFE argues that Complainant's request should be denied because he failed to prove that he made "any effort" to find suitable employment after his termination. TFE's Br. at 6. We reject this assertion since Complainant's request for relief identifies periods of subsequent employment. Complainant provided a calculation for back pay that accounts for both his periods of employment and unemployment since the date he was terminated by TFE. Compl.'s Br. Ex. 1 at 3–4. He also provided his annual salary as $84,000 at the time of his termination. *Id.* at 3. In his Requested Remedies letter, he used that number to calculate his back pay damages from the date of his termination to July 2026 to be $153,000. Compl.'s Requested Remedies at 1. That amount includes the assumption that his TFE salary would have increased to $90,000 in 2026 and accounts for his periods of unemployment and underemployment, and his most recent position which compensates him at a higher rate than his position with TFE. *Id.* at 1. However, in the attachments to his brief, Complainant instead calculated the number to be $323,031.85 after correcting his employment timeline to include approximately two years of self-employment, from September 2022 to December 2024, that provided zero net income. Compl.'s Br. Ex. 1 at 4.

Complainant did not provide an explanation for the period of self-employment that began in September 2022. However, TFE provided the aforementioned news article that demonstrates his self-employment was the result of leaving a salaried position because he engaged in criminal conduct independent from his relationship with TFE. The article from rdrnews.com reported that the Individual was embroiled in a law enforcement investigation with his then employer, Roswell

Air Center, in September 2022. TFE's Br. Ex. D at 85. The following month, Complainant resigned from that employer, and he was arrested and charged with Attempted Fraud related to that same employer several weeks later. *Id.* at 86. The clear implication is that Complainant resigned from his position given that he had attempted to defraud that employer. Thus, we conclude that Complainant's award of back pay should exclude the period following the date he resigned from his position with Roswell Air Center because his own actions at that time resulted in his loss of position and likely severely impacted his ability to obtain comparable employment thereafter. As a result, we conclude that the period of back pay should only cover the period between TFE's retaliatory termination and Complainant's resignation from his position at Roswell Air Center.

Complainant's submissions demonstrate that he was unemployed after his termination by TFE from January 2020 to February 2021, which represents $85,615.20 in lost wages. Compl.'s Br. Ex. 1 at 4. Thereafter, he was employed by Roswell Air Center from February 2021 through the end of September 2022, which, according to Complainant, represents $20,000 in lost wages. *See id.* (providing his income at Roswell Air Center to be $72,000). Accordingly, we conclude it is appropriate to award Complainant $105,615 in back pay which accounts for the period after his termination by TFE to his resignation from Roswell Air Center.

Regarding lost benefits, Complainant requested lost employer 401(k)-match contributions and accrued PTO that he would have received but for his unlawful termination. Compl.'s Br. at 7. However, Complainant did not provide evidence that he had or intended to participate in his employer's 401(k)-match contribution plan. We therefore decline to award that lost benefit. Regarding PTO, we have considered Complainant's request for payment of the cash value of the PTO benefits he would have accrued while employed with TFE over an approximately fourteen-month period. *Id.* Complainant provided the PTO benefit for a new employee with zero to five years of service as ten hours per month and indicated that his hourly wage was $40.38 per hour. *Id.* Thus, we find it appropriate to award Complainant the value of 140 hours of PTO which we have calculated at $5,656.

Finally, Complainant requests that we provide interest on the back pay and benefits using the current Applicable Federal Rate (AFR). Compl.'s Br. Ex. 1 at 5. The total interest Complainant requested is $70,987, assuming a total compensatory damages award of $1,014,096 and applying a simple 7% AFR. *Id.* at 5. However, we will use the methodology to calculate back pay for federal employees as we have in other cases under the NDAA-ECP and 10 C.F.R. Part 708 (Part 708), a comparable contractor whistleblower protection program. *See Sandra C. Black,* OHA Case No. WBR-17-0001 (2017) at 19; *Denise Hunter*, OHA Case No. WBX-12-0004 at 4 (2013). Using the back pay award of $105,615, we award $28,710 in interest on the back pay award. Using the PTO award of $5,656, we award $1,462 in interest on the PTO award.

ii. Emotional Distress

OHA has ordered compensatory damages for mental and emotional distress where the complainant demonstrated that her wrongful termination caused that distress. *Black* at 19. The award "may be supported by the circumstances of the case and testimony about physical or mental consequences of retaliatory action." *Id.* We require proof of "the existence and magnitude of subjective injuries with competent evidence." *Id.* (citing *Lederhaus v. Paschen,* 1992 WL 752761 (DOL Off. Adm. App.)). Here, Complainant did not submit any documentation to support his allegation that he experienced emotional distress or other negative symptoms as a result of his termination beyond a written declaration of his former supervisor Ms. Downard and his own declaration. Compl.'s Br. Exs. 2, 9. Accordingly, we conclude that Complainant's retaliatory termination does not justify an award for emotional distress.

3) Attorney's Fees and Costs

The NDAA-ECP provides for the award of attorney's fees for a prevailing complainant. In calculating attorney's fees, we are guided by OHA precedent in proceedings under Part 708, which are similar to the instant proceeding in that they involve complaints of retaliation by DOE contractor employees against DOE contractors. *See, e.g., Hunter,* WBH-12-0004; *Denise Hunter*, OHA Case No. WBX-12-0004 (2013). Attorneys' fees in Part 708 cases have generally been calculated using the "lodestar" approach described by the U.S. Supreme Court in *Blanchard v. Bergeron*, 489 U.S. 87 (1989). Under the lodestar methodology, the "starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The amount to be awarded depends on the unique facts of each case. *Id.* at 429. The party seeking an award of fees bears the burden of submitting evidence supporting the hours worked and the rates claimed. *Webb v. Board of Education of Dyer County, Tennessee*, 471 U.S. 234, 242 (1985). The fee applicant also has the burden of producing satisfactory evidence that the hourly rates requested are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984). Therefore, "a reasonable hourly rate" must be "calculated on the basis of rates and practices prevailing in the relevant market." *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989).

Complainant asserts that the amount of attorneys' fees he seeks is $44,376, which is "based on prevailing market rates as reflected in the Laffey Matrix." Compl.'s Br. Ex. 1 at 5. He provides the following fee breakdown:

- Senior Attorney with 20+ years out of law school (2020)
    - 20 hours x $899/hour = $17,980
- Middle Attorney with 4-7 years out of law school (2020)
    - 15 hours x $458/hour = $6,870
- Senior Attorney with 20+ years out of law school (2026)
    - 12 hours x $1,227/hour = $14,724
- Junior Attorney with 1-3 years out of law school (2026)
    - 4 hours x $508/hour = $2,032
- Paralegal/Law Clerk (2026)
    - 10 hours x $277/hour = $2,770

Id.

TFE argues that Complainant did not provide an evidentiary basis for an award of attorneys' fees and costs. TFE's Br. at 7. We disagree. We have reviewed the attorneys' time sheets that Complainant submitted with his brief. Compl.'s Br. Ex. 10 at 247–50. We find that the attorney hours Complainant asserts were spent on this matter are reasonable. *See Hunter* at 5 (finding $136,128.75 reasonable attorneys' fees for 432.75 billable hours which reflected the work of a law school graduate, a middle attorney, and a senior attorney in a successful whistleblower complaint). Accordingly, we award Complainant attorneys' fees in the amount of $44,376.

III. Conclusion

It is therefore ordered that:

(1) The complaint filed by Stephen Christopher (Case No. WBR-26-0002) is hereby GRANTED.

(2) TFE, Inc. shall remit to Mr. Christopher no later than October 5, 2026, a total of $185,819 which represents the sum of the following award:

   a. $111,271 for back pay and paid time off;

   b. $30,172 for interest on back pay and paid time off; and

   c. $44,376 for attorneys' fees and expenses.

(3) This a final agency Decision and Order which may be appealed in the appropriate United States Court of Appeals within 60 days after the issuance of this order, in accordance with 41 U.S.C. § 4712(c)(5).

Poli A. Marmolejos
Director
Office of Hearings and Appeals