U.S. OFFICE OF SPECIAL COUNSEL

Memorandum

June 8, 2015

U.S. Office of Special Counsel
Report of Prohibited Personnel Practice
OSC File No. MA-13-0754 ([redacted] Complainant)

[redacted]
Attorney

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INTRODUCTION

This report contains the investigative findings in OSC File Number MA-13-1212, a complaint of prohibited personnel practice (PPP) filed by [redacted], a former Realty Specialist (Contracts Management), GS-1170-7, for the Bureau of Indian Affairs (BIA), Southwest Region, [redacted] Agency (Agency), [redacted] Colorado. [redacted]'s complaint alleged that BIA reassigned and eventually removed him from service because he and the [redacted], [redacted], disclosed information that they reasonably believed evidenced a violation of a law, rule or regulation, in violation of 5 U.S.C. § 2302(b)(8). Specifically, [redacted] and [redacted] disclosed that the [redacted] Indian Tribe (the Tribe) had included lease terms in right-of-way documents, which BIA approved as the Tribe's trustee, that violated 25 C.F.R. § 211 *et seq*. The nature of these irregularities is described *infra* at I.A.

OSC concludes that the directed reassignment and removal of [redacted] constituted PPPs. BIA directed [redacted]'s reassignment at the behest of the Tribe, knowing that the Tribe made this demand with retaliatory animus because some of its members were upset and embarrassed by [redacted]'s disclosure. When [redacted] refused to accept the improper reassignment, BIA removed him from service.

[redacted] first disclosed the lease term irregularities to [redacted], who agreed with his concerns. They both, in turn, disclosed the concerns to the [redacted], [redacted], who also agreed that the concerns were substantial and encouraged them to work on the issues with the Tribe. The Tribe, however, was not receptive to the concerns raised. On August 13, 2012, the Tribe demanded that BIA reassign [redacted] and [redacted] out of the [redacted] Agency. Although [redacted] and the [redacted], [redacted], originally expressed their intention to resist the Tribe's demands, they ultimately acquiesced. Their acquiescence arose after the Tribe's lobbying efforts apparently courted high-level attention and interest from senior BIA and Department of Interior officials in Washington, D.C. In the end, the office for the Assistant Secretary of Indian Affairs communicated that BIA should submit to the Tribe's demands.

As described in this report, OSC concludes that BIA reassigned [redacted] because he disclosed irregularities in the Tribe's leases that had been approved by BIA. Consequently, the directed reassignment violated 5 U.S.C. § 2302(b)(8), which prohibits an agency from taking personnel actions against an employee because the employee makes a protected disclosure. Furthermore, because BIA removed [redacted] for declining an improper reassignment, his removal from service was also a PPP.

In Section I, OSC details the factual background of this case. In Section II, OSC explains its conclusion that [redacted]'s reassignment and removal are PPPs. In Section III, OSC outlines the appropriate corrective action.

FACTUAL FINDINGS AND ANALYSIS

I. FACTUAL BACKGROUND

In October 2007, BIA hired Complainant as a GS-5 Realty Assistant in Anadarko, Oklahoma. On July 17, 2011, BIA selected him for a Realty Specialist position in [redacted], Colorado with the Agency. In that position, Complainant received superior job performance ratings and had no disciplinary history.

In [redacted], Complainant joined Coworker, who had arrived there approximately eight months earlier to serve as the [redacted] for the local Agency. Prior to their arrival, the Agency seemed to lack the proper resources to fulfill its trust obligations with regard to realty issues. BIA documents confirm that during the late 1990s and early 2000s the Agency was understaffed. Exhibits 1 and 2 (attachments to the emails in Exhibit 1 and 2). Thus, the Tribe had assumed responsibility for a number of functions that BIA had historically performed (i.e., initiation of the application process for realty transactions by drafting leases and right of way provisions). *Id.* During this time period, BIA's role had been reduced to approving documents submitted by the Tribe. *Id.* Many of these documents were signed by the Superintendent without review. Exhibit 2 at 2.

A. Complainant's Disclosure

After they joined the Agency, Complainant and Coworker conducted a review of the right-of-way documents and discovered several issues of concern. From their perspective, the Tribe had inserted language into the documents, for BIA approval, for "matters that [were] beyond BIA's scope of authority to approve and/or [were] not appropriate for inclusion in a BIA realty document." *Id.* at 1. For example, the lease agreements imposed on BIA an obligation to measure the volume of gas after it had been severed from the tribal lands to ensure there were no losses in the transport of the gas. This appeared to extend BIA's trust authority beyond its jurisdiction over tribal assets because, once severed from the tribal lands, these assets ceased to be in the trust.

In addition, the leases warranted that certain gas easements were exempt from the environmental impact statement requirement even though no environmental assessment had been done as required by the National Environmental Policy Act of 1969. Complainant and Coworker also disclosed that the agreements appeared to require that BIA enforce the Tribe's surface damage compensation policy, which required companies to pay for damages done to tribal lands, even though they believed the enforcement of such a private contract term was beyond BIA's authority.

Complainant and Coworker discussed with A the issues that they had discovered in the right-of-way documents. A agreed that the leases seemed to be out of compliance with the applicable regulations and he urged them to meet with the Tribe to seek a resolution.

Complainant and Coworker met with the Tribe in August 2012 to go over the issues that they had uncovered in their review of the leases. According to Coworker and Complainant, the Tribe's reaction was hostile. The Tribe's attorney took personal offense and refused to consider modifying the leases. Complainant, Coworker, A, and B all commented that the issues raised seemed to particularly offend Tribe member C. At the time, C worked for the Tribe and had played a role in developing the lease documents. C, however, had previously served as BIA's [redacted] for the local Agency. A surmised that the disclosure embarrassed C because, as a former BIA employee, she had represented to the Tribe that she knew how the lease agreements should be prepared. A believed that C in particular played a role in demanding the reassignment of Coworker and Complainant because her husband, D, was a senior official of the Tribe. Indeed, Mr. D signed the tribal resolution that demanded Complainant's and Coworker's reassignment.

The concerns that Complainant and Coworker raised appear to have been substantial. Communications between A and BIA's attorneys confirmed that the issues were serious, that the Tribe appeared to have drafted the leases incorrectly, and that BIA had been wrong to approve them as written. On September 14, 2012, A requested that a panel of legal experts review the issues regarding the leases. Exhibit 1.

The documentary record shows that the realty issues identified by Complainant, and the Tribe's reaction thereto, gained high-level attention within BIA and the Department of Interior (DOI). On September 19, 2012, E, a senior advisor to the Secretary of the Interior, requested that either Michael Smith or Michael Black, both senior BIA officials, prepare a memorandum for then-Secretary of the Interior Ken Salazar in anticipation of his forthcoming visit to the region. E specifically identified the issue of the Tribe's resolution demanding the reassignment of Complainant and Coworker as an area of focus. *See* Exhibit 3 at 2 ("F has asked for additional information, particularly on the tribe he would like additional info about the realty issue including the background about the Tribe issuing the resolution, the DC meetings (with dates), the outcome/result of meetings, whether things are on track, etc.") (Note: F was also a senior advisor to Secretary Salazar).

In response to this request, A provided a memorandum that focused solely on the realty issues that Complainant and Coworker had uncovered. Exhibit 2. The memorandum communicated that it was clear that the Tribe had inserted language into the leases for BIA approval that were beyond the scope of BIA's authority to approve or enforce and A reiterated his request for a legal review of the issues. BIA attorneys eventually undertook the review and their draft report, as well as communications with A, confirmed that the issues that Complainant and Coworker raised were valid and warranted changes. Exhibits 1 and 4.

B. Tribe's Demand for Reassignments and BIA's Response

Even though A confirmed that Complainant and Coworker had properly raised complex legal concerns, and that they were faithfully executing their duties, BIA nonetheless came under immediate pressure from the Tribe to reassign them. On August 13, 2012, the Tribe forwarded a Tribal Resolution to A demanding that Complainant and Coworker be reassigned out of the local Agency. Exhibit 5. The Tribe explained that Coworker and Complainant had failed to engage in positive working relationships with the Tribe, obstructed the Tribe's priorities, and spread negative information about the Tribe. *Id.* The Tribal Resolution specified that Coworker and Complainant had "blocked transactions" and hindered the issuance of BIA's concurrence for granting drilling applications and approving leases "based upon inaccurate, personal interpretations of Federal laws and regulations and application of Federal regulations and policies in a petty and demeaning manner."[1] *Id.*

A's initial instinct was to resist the Tribe's demands. Exhibit 6. He felt that the Tribe's anger was misplaced and he wanted to negotiate and defuse the situation. He believed Complainant and Coworker were just doing their jobs and to remove them would imply that they had done something wrong. Furthermore, A felt that moving Complainant and Coworker would not resolve the underlying dispute between BIA and the Tribe because Complainant and Coworker's replacements would be expected to follow and apply the same regulations with the same result.

On August 14, A conveyed his views to his supervisor, the , B. At first, B agreed that BIA should resist the Tribe's demands. On August 15, B told A that he had no plans to move Coworker or Complainant and that he felt the resolution stemmed from an individual who fears her "rep is damaged" because she did not follow regulations. *Id.* This individual was identified by several witnesses to be former BIA employee and wife of the Tribe's a senior official, C.

According to A, the Tribe showed no interest in an alternative resolution to the situation. During this time, witnesses believed that the Tribe met with high-level officials from DOI and BIA to press their case for removing Complainant and Coworker. Witnesses noted that the Tribe had a powerful lobbying presence in Washington, D.C., and was amongst the wealthiest tribes in the country due to its Gulf Coast oil interests. Indeed, the agency's documents confirm that meetings were held in Washington on the issue, and the involvement of Secretary Salazar's senior advisors, E and F,

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[1] While OSC also believes that Coworker suffered a PPP, OSC does not seek corrective action on her behalf in this report. Although her directed reassignment to Oklahoma was extremely disruptive to her family, requiring her son to uproot during his senior year of high school and eliminating his eligibility for in-state tuition at universities in Colorado, Coworker has since relocated to an acceptable geographic area and position.

support the witness accounts that the Tribe elevated the issue to senior officials. Exhibit 3.

On August 24, 2012, Tribe officials met with B and issued a "remediation plan." The plan demanded that BIA honor the Tribe's request to transfer Coworker and Complainant in the immediate future. The plan further requested that the Tribe provide input on who BIA should select to replace Complainant and Coworker. The plan also requested that BIA permit the Tribe to orient any new BIA staff.

A remained reluctant to accede to the Tribe's demands. On August 28, A confided to B that he did not want to be pushed around by the Tribe, especially when Complainant and Coworker were only doing their job.

In the end, BIA relented to the Tribe's demands. BIA's decision to acquiesce came from high levels within the agency. On September 13, B told A that Mike Black (Director, BIA), Mike Smith (Deputy Bureau Director, Field Operations), and even the office of the Assistant Secretary of the Department of Interior for Indian Affairs agreed that BIA should reassign Complainant and Coworker. Exhibit 7. Even so, A communicated to B that an agency attorney had agreed that it was correct to take a stand against the Tribe on the issues that were raised. *Id.* In later communications, A seemed unsettled by the decision to yield to the Tribe's demands. In a September 17, 2012, email to senior officials at BIA, including Black, Smith, and G (the [redacted] for the Assistant Secretary for Indian Affairs), A explained that "it is also very concerning that removing the employees as the Tribe requests, is implying that the employees have done wrong, while realistically they were only doing their job." Exhibit 1.

C. Finding a New Position

Faced with the Tribe's demand that BIA remove Complainant and Coworker from the local Agency, and given the Tribe's resistance to engaging in negotiations over the matter, both Complainant and Coworker began seeking alternative positions within BIA that would be acceptable for their individual situations.

On August 21, 2012, Complainant verbally informed Coworker and A that he was willing to transfer to an open Realty Assistant position in the Southern Plains Regional Office. Even though this would be a demotion from his Realty Specialist position (if not in grade, then in prestige and career advancement potential), he was willing to do this because of his extensive family ties in Oklahoma. Complainant also alerted them that his housing lease was ending and that he would appreciate an expedited relocation.[2] On August 27, 2012, Coworker emailed a proposal to B to relocate herself

[2] Complainant's lease was set to expire at the end of August. His landlord granted him a one-month extension. On October 1, 2012, the landlord granted Complainant a second 30-day extension, but he told Complainant that he had to vacate the premises by the end of the month.

and Complainant. Exhibit 8. The position that she identified for Complainant was the same Realty Assistant position (GS-1101-05/07) in Anadarko, Oklahoma. Complainant would have accepted this reassignment had BIA offered it. Neither Coworker nor Complainant, however, received a response with respect to the Realty Assistant position.[3]

On September 17, 2012, BIA identified a short-term fix for Complainant. He began a 120-day detail to Farmington, New Mexico, with the Federal Indian Minerals Office. Farmington is approximately 50 miles from [redacted]. Although Complainant agreed to the detail, the lengthy commute was not compatible with his family situation. As a single father responsible for school-age children, the commute took a toll.

Complainant informed A that he wanted a permanent fix to his situation and that the long commute was creating a hardship. Furthermore, Complainant communicated the urgency of finding a permanent solution because his lease was expiring at the end of October.

On October 15, at Complainant's request, A cancelled the detail to Farmington. From October 15, 2012, to November 15, 2012, A placed Complainant on administrative leave. During this time, Complainant relocated his family to Oklahoma at his expense because he had family and housing available there.

During the time that Complainant was on administrative leave, BIA endeavored to find him a new position. On October 17, 2012, H, the Regional Realty Office for the Southwest Region, sent an inquiry to all BIA Regional Realty Offices looking for an opening for Complainant. The next day, two possible positions were identified—the first was in North Dakota at Ft. Berthold. The second was with the Uintah & Ouray Agency in Utah. Both locations were interested in Complainant's experience with oil and gas leases.

B tasked I, a Program Analyst in the Southwest Region, to help facilitate a reassignment. According to I, she communicated both the North Dakota and Utah opportunities to Complainant. These reassignments were not presented to Complainant as formal directed reassignments, but rather they were presented informally to ascertain his willingness to move. Complainant, however, was not interested in either location. According to I, Complainant believed the North Dakota position was too isolated and too distant from his family.[4] He also expressed his disinterest in Utah because he believed the oil and gas records at the Uintah & Ouray Agency were in even

[3] Coworker expressed her frustrations to A on September 19, 2012. She stressed how Complainant and she had found open positions, but nothing was moving forward nor was anyone assisting in solidifying such positions. Exhibit 10.

[4] A BIA Human Resources official, J reacted to the proposal as follows: "[y]ikes – it's not the end of the world, but you can see it from there."

worse condition than those with the [redacted] Indian Tribe and he did not want to fight that battle again.[5]

[redacted] explained to Complainant that he would have to accept a reassignment or face removal. Complainant communicated to [redacted] his frustration about the reassignment and he highlighted the hardship of the relocation on his family. He also explained that, given his familial situation, he preferred to go to the Southern Plains Region (i.e., Oklahoma). [redacted], however, told Complainant that the Southern Plains Region did not have a place for him there. [redacted] explained to OSC that inquiries had been made to the Southern Plains Region, but that a [redacted] there expressed an unwillingness to accept Complainant back to the region, citing personality conflicts from when Complainant was at the Anadarko Agency. Indeed, according to agency documents, there was an opening in the Southern Plains Region that [redacted] had identified at the GS-11 level, but the Southern Plains Agency did not investigate reclassifying the position for Complainant. Furthermore, Complainant had identified a Realty Assistant Position in the region that he would have accepted, despite it being a less desirable position, but no action was taken.

Absent an opportunity in Oklahoma, Complainant inquired whether the Southern California Agency was an option because he had family in the area. In the end, [redacted] was able to secure an opportunity for Complainant with the Southern California Agency in Riverside, California. The Southern California Agency agreed to reclassify a higher-graded vacancy so that Complainant would be eligible. On October 31, 2012, BIA formally directed Complainant's reassignment to that location. BIA informed Complainant that he could either accept the position or be separated from Federal Service.

On November 16, 2012, Complainant declined the position after determining that he could not afford to live in Southern California and support his family on a GS-7 salary. Although Complainant had previously told [redacted] that he would consider Southern California as an option, Complainant ultimately concluded that it was not a financially viable option for him.

D. Removal

Beginning November 19, 2012, BIA considered Complainant absent without leave (AWOL) for his failure to report for duty at the Southern California Agency. On February 1, 2013, [redacted] issued a notice of proposed removal. On February 25, 2013,

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[5] According to Complainant, he was also uninterested in the Utah position because he believed it was a Realty Assistant Position, GS-5/6/7, which he considered a demotion in prestige and advancement potential. [redacted], however, recalls having presented the opportunity to him as a Realty Specialist position. The documentation shows that the existing position was a Realty Assistant position but that the agency would convert it to a Realty Specialist position for Complainant. In any event, Complainant and [redacted] agree that the primary reason Complainant was uninterested in the reassignment was that he believed he would encounter the same problems in Utah that he had with the [redacted] Indian Tribe.

Michael Smith, Deputy Bureau Director, Field Operations issued a decision to remove Complainant from service. Exhibit 11.

II. OSC CAN ESTABLISH A PRIMA FACIE CASE OF WHISTLEBLOWER RETALIATION

Under the Whistleblower Protection Act (WPA), it is a PPP to take, threaten to take, or fail to take a personnel action against an employee because of any disclosure of information the employee reasonably believes evidences a violation of any law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health and safety. 5 U.S.C. § 2302(b)(8).

BIA's decision to acquiesce to the Tribe's demand to geographically reassign Complainant because of his disclosure undermines the goal of the WPA to "create an atmosphere within government agencies favorable to the disclosure and correction of improper illegal acts[.]" *Caddell v. Dep't of Justice*, 96 F.3d 1367, 1372 (Fed. Cir. 1996). BIA's failure to defend its employee and, instead, to cave to a retaliatory demand is a PPP. The chilling effect is clear: BIA employees are silenced from disclosing violations of law if they anticipate that such disclosures will be unpalatable to a Tribe and that BIA will simply bend to the Tribe's will.

OSC can readily establish a prima facie violation of § 2302(b)(8). OSC must show the following elements by a preponderance of evidence: (1) Complainant made a protected disclosure; (2) BIA took a personnel action against him; (3) the officials taking or recommending the personnel actions had knowledge of the disclosure; and (4) a causal nexus exists between the disclosure and the personnel action. *See Eidmann v. Merit Sys. Prot. Bd.*, 976 F.2d 1400, 1407 (Fed. Cir. 1992). Once OSC establishes these elements, the agency carries the burden to show by clear and convincing evidence that it would have taken the same action in the absence of the protected disclosure. 5 U.S.C. § 1214(b)(4)(B)(ii).

A. Complainant made a protected disclosure.

The first element of a whistleblower reprisal claim is that a complainant made a protected disclosure. "The proper test for determining whether an employee had a reasonable belief that his disclosures were protected is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced a violation of a law, rule, or regulation." *Lachance v. White*, 174, F.3d 1378, 1381 (Fed. Cir. 1999).

Here, OSC concludes that Complainant's disclosure was protected. Complainant disclosed to A and others that the Tribe appeared to have inserted language in the leases and agreements that went beyond BIA's scope of responsibility or authority to approve, and yet BIA had approved the leases and agreements anyway. Complainant reasonably believed that the lease terms violated BIA regulations (25 C.F.R. § 211 *et*

seq.), as well as the federal environmental statute, NEPA. Indeed, BIA's response to Complainant's disclosures confirms the reasonableness of his belief. First, A found that the issues Complainant raised were substantial enough that he directed Coworker and Complainant to discuss the issues with the Tribe. Second, senior BIA officials found the issues to be serious enough to require that A explain the issues in a memorandum to help prepare Secretary Salazar for his visit to the region. Third, the issues that Complainant identified were of sufficient concern that A requested that agency attorneys analyze the issues and advise on the legality of the lease terms. Finally, agency attorneys agreed that Complainant had identified legitimate and complex legal issues. Exhibit 4.

To take one example, Complainant disclosed that the Tribe had improperly included phrases in the leases, which were subsequently approved by BIA, that the gas easements did not have a significant impact on the environment and, thus, that an Environmental Impact Statement (EIS) was unnecessary. Such an assurance, however, may only be made if an environmental assessment is first completed. BIA is required to comply with the NEPA requirements. *See* 42 U.S.C. § 4332; 25 C.F.R. § 211.7 ("The Secretary shall ensure that all environmental studies are prepared as required by [NEPA]."). According to the agency's attorneys who were tasked with investigating the legal issues that Complainant raised, "[b]y automatically including the NEPA language in the [right-of-way] documents, without (presumably) conducting the requisite environmental studies, the Tribe is attempting to bypass an important Federal function and responsibility and by allowing such, the BIA is not fulfilling its NEPA obligations." Exhibit 4 at 6-7. Thus, the agency's own attorneys confirmed that Complainant had a reasonable basis for believing that he was disclosing a violation of law.

In short, the agency's response to the issues that Complainant raised confirms the reasonableness of his belief that he was disclosing a statutory and/or regulatory violation. Consequently, OSC can establish the first element of a prima facie case.

B. BIA took personnel actions against Complainant.

The second element of a *prima facie* case is that the agency took a personnel action against the whistleblower. Here, BIA took two separate but related personnel actions against Complainant. First, in acquiescing to the Tribe's demands, BIA directed Complainant's reassignment from the local Agency to the Southern California Agency. Under the WPA, a "personnel action" includes a "detail, transfer or reassignment." 5 U.S.C. § 2302(a)(2)(A)(iv).

Second, when Complainant declined to accept the reassignment, BIA removed him from service. The removal is also a personnel action taken because of the protected disclosure, notwithstanding Complainant's intervening refusal to accept the reassignment. *See, e.g., Anderson v. Dep't of Agric.*, 9 M.S.P.R. 536, 539 (1982) (refusing to uphold removal for failing to report to reassignment, when reassignment was directed in retaliation for whistleblowing); *Curran v. Dep't of the Treasury*, 714 F.2d 913, 918 (9th

Cir, 1983) (noting an involuntary geographic transfer disrupts lives of employee and family members and reassignments cannot be made for improper purposes); *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986) (rejecting agency's argument that the issue of transfer was moot following employee's removal); *Miller v. Dep't of Interior*, 120 M.S.P.R. 426, 437 (2013) (reinstating employee who was removed for failing to accept a directed reassignment because the agency failed to prove the reassignment was directed for "bona fide management considerations in the interest of promoting the efficiency of the service.").

Indeed, it was reasonably foreseeable that Complainant would decline a reassignment to Southern California. Complainant had explained his personal circumstances to Coworker and A, including that he was a single father raising his children in Oklahoma. It was foreseeable that these circumstances would limit his relocation options. *Special Counsel v. Dep't of Transportation*, 71 M.S.P.R. 661, 665-67 (1996) (ordering corrective action for an employee who was removed for being AWOL, when the employee's unauthorized absences were a foreseeable consequence of an improper reassignment). Although Complainant initially indicated that he would consider the Southern California Agency, this was only under the coercive circumstances of having been told that he must accept an unwarranted reassignment or face removal.

Furthermore, although BIA endeavored to find a new assignment for Complainant, BIA's failure to secure him a position in the Southern Plains Region suggests that BIA as a whole did not make its best efforts to accommodate an employee who faced an improper and retaliatory reassignment demand. Complainant specifically had identified an open position in Oklahoma for which he was grade-eligible, in the hopes that the agency would relocate him to an economically viable location. The agency took no action. A also had identified a higher-graded Realty Specialist position in Oklahoma, but no consideration was given to reclassifying it so that Complainant was grade-eligible. This stands in contrast to the Southern California Agency's willingness to do just that.

It would appear that the inability to secure Complainant a position in Oklahoma stemmed from what I explained were personality conflicts, as described to her by the Southern Plains Region Deputy Regional Director. That BIA would allow such "personality conflicts" to stand in the way of accommodating an employee who had been performing successfully in his job, who lacked any disciplinary record, and who faced a retaliatory demand from a Tribe for raising substantial violations, undermines that BIA did all that it could have to protect its employee from retaliation.

C. Agency officials had knowledge of the disclosure.

The third element of a *prima facie* case is that the official responsible for the personnel decision at issue had actual or constructive knowledge of the disclosure. *See Bonggat v. Dep't. of Navy*, 56 M.S.P.R. 402, 407 (1993) (determining actual knowledge may be demonstrated directly or through circumstantial evidence); *see also McClelland v.*

Dep't of Defense, 53 M.S.P.R. 139, 147 (explaining constructive knowledge is when official accused of taking retaliatory action is influenced by an individual with actual knowledge of the disclosure). B was responsible for directing Complainant's reassignment and for proposing Complainant's removal. Smith made the final decision on the removal.

There is no dispute that both officials had actual knowledge of Complainant's disclosure. Although Complainant initially disclosed his findings of regulatory violations to A, A discussed the disclosure and the Tribe's reassignment demands with B. Indeed, B initially expressed his intention not to yield to the Tribe's demands. Finally, high level officials from BIA and DOI, up to the Secretary, were made aware of the disclosures and the Tribe's demands. Email communications confirm that Smith, and even the office of the Assistant Secretary for Indian Affairs, communicated that BIA should comply with the Tribe's demands and reassign Complainant and Coworker. Thus, both B and Smith were aware of the disclosure.

D. A causal nexus exists between Complainant's disclosure and the personnel actions taken against him.

The fourth element of a *prima facie* case is to establish a causal connection between Complainant's disclosure and the personnel actions. To establish this element, OSC must show by preponderant evidence that the disclosure was a contributing factor in the challenged personnel action. 5 U.S.C. § 1221(e)(1). The law presumes that a disclosure was a contributing factor when the official with knowledge of the disclosure took the personnel action within a period of time that would lead a reasonable person to conclude there was a connection. *See Reid v. Merit Sys. Prot. Bd.*, 508 F.3d 674, 678-79 (Fed. Cir. 2007) (explaining the knowledge/timing presumption).

The knowledge/timing presumption is applicable here. Complainant made his disclosure in August 2012. On August 13, 2012, the Tribe demanded his reassignment. On October 31, 2012, B directed Complainant's reassignment, which ultimately precipitated Smith's February 2013 decision to remove Complainant. Accordingly, less than three months transpired between the disclosure and the reassignment and less than six months transpired between the disclosure and the proposed removal. The Merit Systems Protection Board has applied the knowledge/timing presumption to circumstances involving significantly longer timeframes than the one present here. *See Inman v. Dep't of Veterans Affairs*, 112 M.S.P.R. 280, 283-4 (2009) (personnel action occurred 15 months after disclosure); *see also Redschlag v. Dep't of Army*, 89 M.S.P.R. 589, 626-27 (2001) (personnel action occurred 18 months after disclosure). Three and six months are well within the timeframe that raises a presumption of a causal nexus.

Although the knowledge/timing presumption plainly applies here, additional evidence reinforces that the disclosure was a contributing factor in the personnel actions. The Tribe demanded the reassignment within days of Complainant and Coworker raising their concerns about the leases. On its face, the Tribe's resolution identifies

Complainant's and Coworker's legal interpretations as a basis for the demands. The resolution states that Coworker and Complainant have "repeatedly demonstrated disrespect and disregard for the policies, practices and decisions of the Tribe and its representatives, and have blocked transactions, including without limitation the issuance of rights-of-way, the issuance of BIA concurrence for the granting of applications for permits..., and the approval of tribal surface leases...*based on inaccurate, personal interpretations of Federal laws and regulations and application of Federal regulations and policies in a petty and demeaning way.*" Exhibit 5 (emphasis added). The Tribe further stated that Coworker and Complainant "have sought to undermine, rather than uphold, tribal policies, such as the Tribe's long-established surface damage policy." *Id.* The Tribe also accused Coworker and Complainant of telling third parties that "the historic practices of the Tribe have been unlawful and that the BIA is in the process of forcing the Tribe into compliance with Federal law, as personally interpreted by Ms. Coworker and Mr. Complainant." *Id.*

The day after receiving the Tribe's resolution, A told B that Complainant and Coworker were only doing their jobs and that their reassignment would not accomplish anything. Exhibit 6. Rather, A confirmed that Complainant and Coworker were simply following the required regulations and that removing them would not change anything. A also informed the solicitors office he was concerned "that removing the employees as the Tribe requests, [implies] that the employees have done wrong, while realistically they were only doing their jobs." Exhibit 1. Thus, the link between the disclosures and the reassignment demand were plain to the officials who recommended and took the personnel actions.

E. BIA cannot establish by clear and convincing evidence that it would have reassigned Complainant in the absence of his disclosure.

After OSC establishes a prima facie case, BIA carries the burden to establish by clear and convincing evidence that it would have reassigned Complainant even in the absence of his disclosure. "Clear and convincing evidence" is "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Rychen v. Dep't of the Army*, 51 M.S.P.R. 179, 184 (1991); *McDaid v. HUD*, 46 M.S.P.R. 416, 421 (1990); 5 C.F.R. § 1209.4(d).

The legislative history of the WPA informs OSC and executive agencies of the purpose behind the heightened standard for the agency's defense. Prior to the WPA, past practice had shown that it was too easy for agencies to comb whistleblowers's work records for conduct that would justify the disciplinary action and that it was too "difficult for employees to refute the agency's contention that it would have taken the personnel action anyway." S. Rep. No. 413 at 5, 100th Cong., 2d Session at 14 (1988). The Senate Report explained that Congress modified the defense so that "the agency would be required to show by 'clear and convincing evidence' that the whistleblowing was not a 'material factor' in the personnel action." *Id.* at 15. The Report explained that standard would allow "bona fide whistleblowers to prevail, while allowing agencies to

appropriately sanction employees where whistleblowing was not a material factor in the personnel action." *Id.* In short, Congress did "not intend that employees who are poor performers escape sanction by manufacturing whistleblowing; at the same time, whistleblowers must not be discouraged by agencies being able to use any possible flaw in an employee's work record as an excuse for retaliation." *Id.* In other words, if there were clear performance or conduct reasons, apart from the whistleblowing, that justified the personnel actions, the agency would be entitled to prove it by clear and convincing evidence.

Here, BIA cannot meet this exacting standard for the simple reason that the disclosure and the Tribe's reassignment demand are inextricably linked, such that BIA cannot demonstrate that it would have even received the demand in the absence of the disclosure. The evidence shows that Complainant's disclosure immediately prompted the Tribe's demand and that BIA officials were fully aware of the link between the disclosure and the reassignment demand. The evidence shows that A and B were aware of the Tribe's anger toward Complainant because of the disclosure and that they acted to appease the Tribe with full knowledge of the situation. BIA cannot defend its action by demonstrating that it often, or even always, accedes to demands from the Tribe to reassign employees. Even if this were true, on the facts presented here, the Tribe's demand cannot be separated from the disclosure and, therefore, BIA cannot meet the standard to show that the disclosure was not a material factor in the reassignment and subsequent removal. *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367-68 (Fed. Cir. 2012) (finding that the evidence supporting the agency's defense cannot be evaluated in isolation from the entire record).

B explained to OSC that it was not just the content of the disclosure, but also the manner in which Complainant and Coworker raised their concerns, such that it created a personality conflict with the Tribe's members. OSC does not believe the agency can establish with clear and convincing evidence that the personality conflicts can be untangled from the content of the disclosure. Indeed, even after Complainant and Coworker had been removed from the local Agency, the Tribe pressed hard to have its interpretations of the existing regulations prevail. The high-level meetings between the Tribe and DOI/BIA persisted after A informed the Tribe that BIA intended to move Complainant and Coworker. This history contradicts BIA's position that the Tribe was more concerned with the manner of Complainant's delivery of the disclosure than its content; rather, the Tribe forcefully advocated to BIA officials that its interpretations of the regulations were correct even after BIA had committed to reassigning Complainant. *See, e.g.*, Exhibit 9. Thus, it seems that the content of the disclosure was what troubled the Tribe, not merely the personality clash behind it (even assuming one existed that was independent from the disagreement over the lease provisions).

In scrutinizing the agency's justification, the MSPB will consider the following factors:

(a) the strength of the agency's evidence in support of its personnel action decision;

(b) the existence and strength of any motive to retaliate on the part of the agency officials responsible for the personnel action decision; and

(c) evidence regarding the agency's treatment of similarly situated employees who were not whistleblowers.

See, e.g., Smith v. Dep't of Agric., 64 M.S.P.R. 46, 66 (1994); *see also Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 324 (1997).

i. BIA Lacks Strong Evidence to Support the Reassignment.

With respect to the first factor, BIA's main defense appears to be two-fold: First, BIA did not act in retaliation to the disclosure, but rather to maintain positive working relationships with the Tribe, in recognition of BIA's trust responsibilities toward the Tribe. Second, BIA acquiesced in deference to the Tribe's sovereign right to exclude individuals from the reservation lands. OSC concludes that these rationales are lacking both legally and as a matter of public policy.

While BIA has a legitimate interest in maintaining positive working relationships with the Tribe, this interest cannot be advanced at the expense of BIA's legal obligations to its employees. As a federal employer, BIA owes its employees the same protections as any other federal agency under the WPA. An agency cannot knowingly ratify and implement an improper request simply to maintain positive working relations with third parties. *See, e.g., Galdamez v. Potter*, 415 F.3d 1015, (9th Cir. 2005) (finding that a federal employer could be held liable for sexual harassment committed by third party on theory of ratification and negligence if the agency fails to remedy harassment after it becomes aware of it). Thus, the maintenance of good relations with the Tribe was an insufficient justification for BIA to implement a personnel action that it knew the Tribe demanded out of retaliatory animus.

Similarly, OSC finds lacking BIA's excuse that it acquiesced to the Tribe's demand because the Tribe has a sovereign right to exclude individuals from reservation land. While the Tribe does have the general right to exclude nonmembers from the reservation, there are exceptions to that right. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141, 149 (1982) (explaining that "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands," but that this rule can be limited by congressional action). In particular, the Tribe does not have the right to exclude federal government officials who require access to reservation lands to discharge their lawful duties. *See* Opinion of Solicitor for the Department of the Interior on Powers of Indian Tribes, Decisions of the Department of the Interior, Vol. 55, p.14 (explaining that the Indian Reorganization Act of 1934, Public Law No. 383, 73d Congress, noted that the powers of local self-government vested in the Tribes included the power "[t]o remove or exclude

from the limits of the reservation non-members of the tribe, excepting authorized Government officials...").[6] There is some disagreement among circuits as to how explicit Congress must be to divest a Tribe of the power to exclude federal officials through a statute of general application. *Compare Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009) (finding that, even in the absence of express language, the Fair Labor Standards Act (FLSA) applied to Indian tribes and federal officials were permitted access to reservation lands to enforce the FLSA) *with Donovan v. Navajo Forest Products Inds.*, 692 F.2d 709 (10th Cir. 1982) (finding that a tribe could exclude Department of Labor officials who sought access to enforce OSHA because OSHA did not expressly apply to Indian tribes). In cases where a generally applicable statute clearly applies to Indian tribes, however, even the Tenth Circuit has found the power to exclude authorized federal officials does not apply. *See Osage Tribal Council v. Dep't of Labor*, 187 F.3d 1174 (10th Cir. 1999) (rejecting a tribe's claim to immunity, rooted in the right to exclude, from enforcement of whistleblower provisions of the Safe Drinking Water Act (SDWA) when Congress specifically applied the SDWA to Indian tribes).

Here, BIA employed Complainant to perform functions under a statute and regulations that plainly applied to Indian tribes. *See, e.g.,* 25 U.S.C. § 9 (authorizing the President to promulgate regulations applicable to Indian tribes); 25 U.S.C. § 2106 (authorizing the Secretary of Interior, through federal officials, to provide advice and assistance to Indian tribes in entering mineral agreements); 25 C.F.R. § 225 (detailing the federal government's role in oil and gas agreements). Accordingly, the Tribe lacked the power to exclude Complainant.

For all the aforementioned reasons, OSC determines that the purported basis for BIA's reassignment of Complainant lacked strong evidence. Furthermore, as a matter of public policy, OSC concludes that allowing BIA to ratify and implement a personnel action that it knew was motivated by retaliatory animus would establish a dangerous precedent. The whistleblower protections exist, in part, to encourage employees to identify illegal practices without fear of reprisal. Allowing a federal agency to avoid liability simply because it acted at the behest of a third party, knowing that the third party harbored a retaliatory motive, would have a broad chilling effect on other federal employees. Not only would this discourage other BIA employees from coming forward, but such a principle could extend to other agencies as well; for example, a federal agency should not be permitted to direct the reassignment of an employee who discloses wrongdoing by the agency and a government contractor, just because the government contractor may demand such a result.

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[6] The Brunot Agreement of 1874 between the United States and the [redacted] Tribe, which was ratified by Congress and signed into law President Grant, provided that the "United States now solemnly agrees that no persons, except those herein authorized to do so, and *except officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law*, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article." 18 Stat. 291, 292, 43rd Cong., Sess. II, ch. 2 (1874) (emphasis added).

ii. [C]'s Motive to Retaliate is Imputed to Agency Officials.

Here, the existence of a motive to retaliate was strong on the part of the Tribe. [A] explained that [Complainant]'s disclosure particularly upset [C], the wife of the Tribe's [a senior official], because the disclosure called into question her realty expertise. [B] also confirmed that the disclosure had placed [Complainant] "cross-ways" with [C]. Although BIA officials did not personally harbor the motive to retaliate, they knew that the Tribe's demand for BIA to move [Complainant] was rooted in animus directly related to the disclosure. Thus, the Tribe's retaliatory intent should be imputed to BIA because BIA allowed itself to be an agent for implementing that intent.[7] In any event, although "evidence of a retaliatory motive would still suffice to establish a violation of [ ] rights under the WPA...a whistleblower *need not* demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993) (emphasis in original) (internal citations omitted). Rather, "[r]egardless of the official's motives, personnel actions against employees should quite [simply] not be based on protected activities such as whistleblowing." *Id. citing* S.Rep. No. 413, 100th Cong., 2d Sess. 16 (1988).

iii. Similar Treatment of Other Employees Does not Justify Personnel Actions.

The Agency provided OSC with evidence that BIA has reassigned four other employees over the years at the Tribe's insistence. Even assuming none of these employees were whistleblowers (although one of the four was [Coworker]), this information does not help the agency carry its defense.

Public policy requires that agencies not punish federal employees because of their protected disclosures. Congress has declared that whistleblowers "serve the public interest," and that "protecting whistleblowers leads to a more effective civil service." *Marren v. Dep't of Justice*, 51 M.S.P.R. 632, 636 (1991). To this end, the WPA mandates that Federal employees not suffer adverse consequences as a result of their

[7] The imputation of bad motive to BIA in this case is a variation on the "cat's paw" theory of liability. Under the cat's paw theory, an employee "can demonstrate that a prohibited animus toward a whistleblower was a contributing factor in a personnel action by showing by preponderant evidence that an individual with knowledge of the [employee's] protected disclosure influenced the deciding official accused of taking the personnel action." *See Aquino v. Dep't of Homeland Sec.*, 121 M.S.P.R. 35, 45-47 (2014) (citing *Dorney v. Dep't of Army*, 117 M.S.P.R. 480, 485-86 (2012)). Thus, even if the deciding official lacked animus or even knowledge of the whistleblowing, imputation is appropriate when the deciding official was influenced by someone with knowledge and animus. Resort to the cat's paw theory of liability is not required in this case, however, because BIA acted with full knowledge of [Complainant]'s disclosure and the Tribe's resulting retaliatory animus.

whistleblowing: "Whistleblowing should never be a factor that contributes in any way to an adverse personnel action." *Gergick v. Gen. Servs. Admin*, 43 M.S.P.R. at 660 and n.10, *quoting* from legislative history of WPA; *see* Pub. L. No. 101-12, §2(a), 103 Stat. 16 (1989). Thus, Complainant's situation—wherein BIA knew that the Tribe demanded his reassignment because of his disclosure—is not the same as any other situation involving a Tribe's reassignment demand for a non-whistleblower.

In sum, OSC concludes that BIA will be unable to establish a defense by clear and convincing evidence that it would have reassigned Complainant in the absence of his disclosure. Similarly, because BIA premised Complainant's removal on his refusal to accept an improper reassignment, BIA will not be able to prove that it would have removed Complainant in the absence of his disclosure.

III. CORRECTIVE ACTION

OSC's investigation found that reassignment and removal of Complainant constituted PPPs in violation of 5 U.S.C. § 2302(b)(8). The remedy for this violation is to return Complainant to the status quo ante position where he would have been in the absence of the PPPs and to provide him with appropriate compensatory damages.

The appropriate remedy for a removal following an improper reassignment is to return the employee to the position that he occupied prior to the reassignment. *See Special Counsel v. Dep't of Transportation*, 71 M.S.P.R. 661, 665-67 (1996) (ordering reinstatement of employee who was removed for being AWOL, when the employee's unauthorized absences were a foreseeable consequence of an improper reassignment). In addition to reinstatement, the law requires BIA to reimburse Complainant for any reasonable and foreseeable consequential damages he may have suffered as a result of the PPPs. 5 U.S.C. § 1214(g)(2). Complainant's consequential damages include, at a minimum:

- Back pay and related benefits;
- Moving expenses;
- Loss of annual and sick leave; and
- Medical expenses.

Finally, because Complainant's proposed removal and removal took place in 2013, after the enactment of the Whistleblower Protection Enhancement Act of 2012, he is entitled to recover any compensatory damages suffered as a result of his removal, including compensation for emotional distress. *Id.*