EXECUTIVE SUMMARY

Case Number:	I15-USSS-SID-01777
Complainant:	[redacted] Senior Special Agent U.S. Secret Service, Minneapolis, MN
Investigation Under:	5 U.S.C. § 2302(b)(8) & (9), Whistleblower Protection Act; 50 U.S.C. § 3341(j), Retaliatory Revocation of Security Clearances and Access Determinations; and Presidential Policy Directive 19

I. Overview

Complainant [redacted] is a Senior Special Agent with the United States Secret Service. For 20 years, he worked in a variety of investigative and protective duties until his security clearance was suspended in 2013. Complainant reported to us that the Secret Service suspended and revoked his security clearance as retaliation for disclosing alleged violations of federal anti-discrimination laws and for separately reporting abuse of authority on the part of his former Special Agent in Charge and other officials. As a result of these security clearance actions, the Secret Service placed Complainant on administrative leave and then indefinite suspension without pay, his current status with the agency.

Underpinning this matter are allegations of whistleblower retaliation by adverse security clearance action. For the first time within the Department of Homeland Security, under Presidential Policy Directive 19 (PPD-19), we have substantiated an instance of retaliation related to security clearance actions.[1]

II. Legal Authorities

PPD-19 supplements the Whistleblower Protection Act of 1989, as amended, the primary whistleblower law that protects federal employees who reasonably report a broad spectrum of agency wrongdoing. On October 10, 2012, President Obama issued PPD-19, entitled "Protecting Whistleblowers with Access to Classified Information." PPD-19 explicitly gives these federal employee whistleblowers an Inspector General avenue to challenge adverse security clearance actions. PPD-19 states that executive branch employees shall not

[1] We also substantiated the placements on administrative leave and indefinite suspension without pay as retaliation. We did not substantiate the other allegations of retaliation.

"take or fail to take, or threaten to take or fail to take, any action affecting an employee's Eligibility for Access to Classified Information as reprisal for a Protected Disclosure."

As part of this review process, PPD-19 tasks the Inspector General with a mandatory review of adverse security clearance actions. Specifically, Part B instructs that "the agency Inspector General shall conduct a review to determine whether an action affecting Eligibility for Access to Classified Information violated this directive," and then that "[a]n agency head shall carefully consider the findings of and actions recommended by the agency Inspector General." Much of PPD-19 has recently been codified at 50 U.S.C. § 3341(j).

In reviewing whether Complainant suffered from reprisal as a result of protected whistleblower activity, we first had to determine whether the Complainant satisfied the four elements that constitute a *prima facie* case of whistleblower reprisal: (1) a protected disclosure; (2) knowledge by a responsible management official of the protected disclosure; (3) a personnel action taken; and (4) the protected disclosure was a contributing factor to the personnel action. Because we determined that these elements were met, the legal burden then shifted to the Secret Service to demonstrate that it would have taken these personnel actions even absent the protected disclosures. In determining whether the Secret Service met this burden, we were required to analyze the three factors set forth in *Carr v. SSA*[2]: (1) agency motive to retaliate; (2) strength of the agency case; and (3) how similarly situated employees were treated. We determined that the Secret Service failed to meet its legal burden with regard to the security clearance actions.

III. Factual Background and Analysis

Complainant was assigned to the Secret Service Minneapolis-St. Paul (Minneapolis) Field Office during the 5 year time frame at issue, 2009-2014. During this time, Complainant made multiple allegations of discrimination and filed Equal Employment Opportunity (EEO) claims. Unrelated to the EEO claims, Complainant also reported abuse of authority by a former Special Agent in Charge (SAIC1) and Assistant U.S. Attorneys in seizing $26 million of assets from Inter-Mark Corporation in an alleged Ponzi scheme investigation ("Inter-Mark disclosures").[3]

[2] 185 F.3d 1318, 1323 (Fed. Cir. 1999).

[3] Inter-Mark petitioned for return of those seized assets. The U.S. Attorney's Office settled the

Complainant's history with the Secret Service management was further complicated by numerous factors, including that on April 25, 2010, Complainant engaged in misconduct while driving in his government owned vehicle (GOV). Complainant had been speeding and his daughter was riding in the GOV at the time he was stopped by local police. Complainant self-reported this incident to the SAIC at that time, SAIC1. SAIC1 disciplined Complainant by taking away his GOV for 30 days. This matter appeared to be resolved.

However, two years later in 2012, this incident became the basis of a Secret Service internal affairs investigation that then formed the basis of Complainant's 2014 security clearance revocation. This alone is not necessarily irregular or noteworthy. However, when we put together the series of events with actions taken by Complainant's SAIC in 2012-2014 (SAIC2) and analyzed how the agency officials responsible for suspending and revoking complaint's security clearance handled other similarly situated employees, among other things, we concluded that the Secret Service retaliated against Complainant when it suspended and revoked his clearance.

A. Disclosures are Protected[4]

Allegations of discrimination and EEO filings are clearly protected disclosures under the law. The Inter-Mark disclosures required additional analysis to determine whether they are protected. Disclosures are protected if the employee reasonably believes that the disclosures are true. The standard is met if a "disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably could conclude that a violation did occur."

From the Summer of 2010 until October of 2011 Complainant reported this alleged abuse of authority to his chain of command, including sending an email to his supervisor, SAIC2, asserting that the seizure "lacked proper investigative foundation," that "our organization seized over 23 million dollars without establishing any victims," and that this ended in the "near destruction of this MN business entity with dozens of MLPS jobs eliminated." In November of 2011, Complainant filed a complaint with the Office of Special Counsel regarding this alleged abuse of power. This investigation was terminated without a statement of reasons. Then on June 2, 2012, Complainant filed an

matter and agreed to return the money to a court-appointed receiver.

[4] We concluded that Complainant's third disclosure alleging that the agency denied EAP services to a Secret Service agent who subsequently committed suicide, was not protected.

Individual Right of Action with the Merit Systems Protection Board in which he alleged that SAIC2 retaliated against him for making these protected abuse of authority allegations. The Administrative Judge dismissed the claim for failure to state a non-frivolous allegation of abuse of authority.

During our investigation, we obtained additional favorable evidence for the Complainant that was not available to this Administrative Judge. [redacted] told us that the Secret Service had "jumped the gun" and seized Inter-Mark's assets too soon before identifying victims. This squarely supports Complainant's reasonable belief that the seizure warrant was based on insufficient evidence and before the government had identified sufficient victims. [redacted] further opined that "there should have been much, much more investigation prior to the seizure of funds." Since [redacted] is a "disinterested observer with knowledge of the essential facts" and his statements corroborate Complainant's, we concluded that the disclosure was reasonable and met the "non-frivolous" legal standard, a low standard to meet. In making this conclusion, we made no finding as to whether there was an *actual* abuse of authority as alleged by Complainant. Our analysis does not require a conclusion on this point, and we recognize that reasonable minds can differ in areas concerning prosecutorial discretion. We did determine, however, that both the EEO and Inter-Mark disclosures provided motive and animus for management officials to retaliate against Complainant.

B. Knowledge of Disclosures

The responsible management officials all told us that they had knowledge of Complainant's EEO filings prior to suspending Complainant's security clearance. SAIC2 also told us that he had knowledge of and was alarmed by Complainant's Inter-Mark disclosures prior to the security clearance suspension. SAIC2 was so concerned about Complainant's abuse of authority disclosures causing problems between the Secret Service and the U.S. Attorney's Office (USAO) that he organized a meeting with senior USAO officials to request that the USAO take some action again Complainant, although SAIC2 could no longer remember the specific nature of his request. As important, SAIC2 controlled the information that was sent to the Security Clearance Division (SCD) Chief who was responsible for making security clearance determinations for all of the Secret Service and the Associate Counsel (Counsel) who was responsible for drafting and overseeing these determinations. On May 16, 2013, SAIC2 was in Washington, DC and met with the SCD Chief. SAIC2 told the SCD Chief that he thought Complainant was not fit for duty. That same day, SCD Chief suspended Complainant's Top Secret clearance based primarily on what SAIC2 had said and the materials he had provided. So while

the SCD Chief may not have had personal knowledge of the Inter-Mark disclosures, under the applicable law, we impute knowledge to the SCD Chief through SAIC2's knowledge and influence.

C. Personnel Action Taken and Contributing Factor

While Complainant raised concerns about a number of personnel actions taken against him, we found two actions – 1) Security Clearance Suspension and Administrative Leave with Pay, and 2) Security Clearance Revocation and Indefinite Suspension without Pay – to meet the criteria for a "personnel action" that might form the basis for retaliatory action. Further, we found that complainant's protected disclosures were a contributing factor to these personnel actions.

D. Suspension of Security Clearance as Whistleblower Reprisal

The Secret Service first retaliated against Complainant by suspending his security clearance in May of 2013. The Agency suspended Complainant's clearance based on the security clearance adjudicative guideline called "Psychological Conditions," meaning that the Agency believed he suffered from a mental condition that made him unfit for duty. The suspension was not based on the 2010 GOV incident or other alleged misconduct. SAIC2 and the SCD Chief told us that they were concerned about Complainant's mental state such that they believed Complainant may be a "danger" or was going to "snap." Yet, despite these statements, no one from the Secret Service referred Complainant for a fitness for duty examination. No one from the Secret Service attempted to verify the state of Complainant's mental health issues at all.

In order to meet its legal burden, the Secret Service provided six Special Agent comparators to us who were suspended by the SCD Chief based on "Psychological Conditions" and who were otherwise similarly situated. All six comparator Special Agents were referred for a fitness for duty examination. Complainant was not. That no one from the Secret Service referred Complainant for a fitness for duty examination, or followed up on his clearance health issues, is a noteworthy departure from the agency treatment of the other six comparator Special Agents.

In fact, when we asked the Counsel who oversaw all security clearance actions for the Secret Service whether she thought Complainant would be cleared if referred for a fitness for duty examination, she asserted, "I thought he'd be found fit for duty." The Counsel told us that this is the reason she did not proceed to revocation based on "Psychological Conditions," but rather on completely different bases. Thus, the Secret Service's use of "Psychological

Conditions" was a pretext for suspending Complainant's security clearance. We determined that the agency failed to demonstrate that it would have suspended Complainant's clearance absent the protected disclosures.

E. Revocation of Security Clearance as Whistleblower Reprisal

The Secret Service also retaliated against Complainant by revoking his clearance in February of 2014. The Secret Service revoked Complainant's security clearance on completely different adjudicative guidelines: Financial Considerations, Personal Conduct and Criminal Conduct. Absent was any mention of, or resolution of, "Psychological Conditions." The February 2014 revocation was instead based in large part on the internal investigation that began with the 2010 GOV incident and expanded to include other alleged GOV use and gas mileage misuses. Complainant was not provided any opportunity to rebut the findings in the revocation prior to its issuance.

There were three similarly situated comparators provided by the Secret Service. These Special Agents all had a fitness for duty examination, and their revocations by the SCD Chief included "Psychological Conditions" as one of the bases for revocation. Again, the Secret Service treated Complainant differently when it did not refer him for a fitness for duty examination and later revoked him on completely different grounds that did not include "Psychological Conditions." These three comparators, while not a large number,[5] serve as some evidence that the Secret Service treated Complainant differently from other employees.

The weakness in the Secret Service's case for revocation is also revealed by guidance we received from the Department of Homeland Security, Office of the Chief Security Officer, Personnel Security Division (PSD). This Office serves as the Department-wide expert on security clearance actions. When we interviewed two of PSD's subject matter experts, they opined that much of the conduct cited in Complainant's revocation appeared to be more appropriate for disciplinary proceedings than for security clearance revocation. The experts also identified procedural deficiencies in how the Secret Service handled Complainant's security clearance actions. PSD stated that an agency should give the employee an opportunity to rebut or submit mitigating evidence consistent with the "whole person" concept, as set forth in the Intelligence Community Policy Guidance (ICPG) 704.2, which states: "The adjudication

[5] According to the GAO report 14-640, Security Clearance Revocations, the Secret Service agency-wide did not revoke many clearances around that time. The GAO report determined that Secret Service revoked only 13 clearances in Fiscal Year 2012 and 9 clearances in Fiscal Year 2013.

process is the careful weighing of a number of variables known as the whole–person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching the determination." PSD maintained that when an agency fails to provide an opportunity for an employee to provide mitigating evidence, as was the case here, it is not employing the "whole person" concept. While any doubt concerning an employee's access to classified information is resolved in favor of national security, this does not absolve the agency of the responsibility of first collecting information vital to considering the "whole person," such as obtaining the employee's explanation and mitigating evidence on the events. As the Secret Service did not provide Complainant notice and an opportunity to provide mitigating evidence prior to revocation, it failed to apply the "whole person" concept as required by ICPG 704.2.

In sum, the weaknesses in the Secret Service's case for the security clearance actions, coupled with motive to retaliate, as well as comparisons with similarly situated employees that showed Complainant was treated differently, demonstrate that the agency failed in its burden of showing that that it would have taken these actions absent Complainant's protected disclosures.

IV. Recommendations[6]

PPD-19 sets forth that the Inspector General "may recommend that the agency reconsider the employee's Eligibility for Access to Classified Information . . . and recommend that the agency take other corrective action to return the employee, as nearly as practicable and reasonable, to the position such employee would have held had the reprisal not occurred." We therefore recommend that the Secret Service reinstate Complainant's security clearance and return him to a paid duty status. We also recommend that the Secret Service provide back pay and attorney fees to Complainant.

[6] The findings and analysis which underlie our conclusion that reprisal occurred, and which form the basis for these recommendations, are more fully detailed in the accompanying Whistleblower Reprisal Report of Investigation.

OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

WHISTLEBLOWER REPRISAL REPORT OF INVESTIGATION

Case Number:	I15-USSS-SID-01777
Complainant:	[redacted] Senior Special Agent U.S. Secret Service, Minneapolis, MN
Investigation Under:	5 U.S.C. § 2302(b)(8) & (9), Whistleblower Protection Act; 50 U.S.C. § 3341(j), Retaliatory Revocation of Security Clearances and Access Determinations; and Presidential Policy Directive 19

[redacted] (Complainant) began his career with the United States Secret Service as a Special Agent in April of 1993. Throughout his career, he served in a variety of investigative and protective assignments typical for Secret Service agents. In August of 2008, Complainant transferred to the Minneapolis-St. Paul Field Office (Minneapolis Field Office). On May 17, 2014, the Secret Service revoked his security clearance and later placed him on indefinite suspension without pay. This is the status he continues to hold with the agency.

Complainant alleges that the Secret Service reprised against him for whistleblowing concerning three categories of protected disclosures. The first category of disclosures is his Equal Employment Opportunity (EEO) claims. The second category is his disclosures of abuse of authority by a former Special Agent in Charge and Assistant U.S. Attorneys in seizing funds of and investigating Inter-Mark Corporation. The third category is allegations that the Secret Service violated rules when it denied Assistant Special Agent in Charge Rafael Prieto access to the Employee Assistance Program, which contributed to this co-worker's suicide. Complainant alleges that his supervisors and others took adverse personnel actions against him in reprisal. These Alleged Personnel Actions[1] are as follows: (#1) Referral of Complainant for internal investigation;

[1] We investigate and report on allegations ##1-5 pursuant to our authority under the Inspector General Act of 1978. Allegations ##1-5 also all potentially violate Title 5 U.S.C. § 2302, known as the Whistleblower Protection Act of 1989, P.L. No. 101-12, 103 Stat. 16 (April 10, 1989), subsequent 1994 amendments, and the Whistleblower Protection Enhancement Act, P.L. No 112-199, 126 Stat. 1376 (Nov. 26, 2012) (WPA or WPEA). The security clearance actions and corresponding administrative leave and indefinite suspension are addressed together, since the latter were the automatic consequences of the security clearance actions in this case. The security clearance parts of Allegations #4 and #5 also potentially violate Presidential Policy Directive-19, commonly referred to as "PPD-19."

(#2) Stayed promotion; (#3) Restriction of access to files; (#4) Suspension of security clearance and administrative leave with pay; and (#5) Revocation of security clearance and indefinite suspension without pay.

In reviewing whether Complainant suffered reprisal as a result of protected whistleblower activity, we are required to determine whether the following elements were present: (1) a protected disclosure (PD); (2) knowledge by a responsible management official (RMO) of the protected disclosure; (3) a personnel action (PA) and (4) the protected disclosure was a contributing factor to a PA. If these four elements are satisfied based on a preponderance of the evidence, a complaint will be found to be substantiated if the agency cannot demonstrate that it would have taken the personnel action absent the protected disclosure.

We do not substantiate Alleged Personnel Actions ##1-3 as whistleblower retaliation. We do substantiate Alleged Personnel Actions ##4-5 as whistleblower retaliation.

BRIEF FACTUAL OVERVIEW[2]

Complainant began his career with the Secret Service as a Special Agent (SA) assigned to the Tampa Field Office in 1993. In approximately 2007, Complainant attained the status of Senior Special Agent. In August of 2008, Complainant transferred from the Hong Kong Resident Office to the Minneapolis-St. Paul Field Office (Minneapolis Field Office). In May of 2009, Complainant filed his first of eleven EEO complaints (Category #1 Alleged Protected Disclosures).

2009

In June of 2009, the Secret Service began the Inter-Mark investigation, an alleged Ponzi scheme case. The agency assigned [redacted] and Complainant to this case. In August, Complainant told Assistant Special Agent in Charge, [redacted] (ASAIC1) that the case seemed questionable because Inter-Mark appeared to be more akin to a legal internet business like Amway than a fraudulent Ponzi scheme and that their investigation had not identified victims of fraud. (Category #2 Alleged Protected Disclosure).

[2] The factual findings detailed in this report were developed during our investigation and are documented in the 30 individual investigative activity reports listed in Appendix A.

2010

In February of 2010, [redacted] filed an affidavit for federal search warrants and seizure warrants in the Inter-Mark investigation. This resulted in the seizure of approximately 26 million dollars. This was one of the largest seizures in Minnesota history. However, Inter-Mark petitioned for return of those seized assets, and the U.S. Attorney's Office decided to settle this case in June of 2010. By final order dated June 23, 2011, the Minnesota U.S. District Court ordered return of the money to a court-appointed receiver pursuant to this settlement. This seizure and subsequent return of funds was followed in the local press.

April 2010 GOV Incident

On April 25, 2010, while driving in his government owned vehicle (GOV), Complainant was stopped by local police in Rice County, Minnesota. Complainant had been speeding and his daughter was riding in the GOV ("2010 GOV incident"). Complainant self-reported this incident to [redacted], the Minneapolis Field Office Special Agent in Charge (SAIC1) at that time. SAIC1 determined Complainant had misused his GOV and disciplined Complainant by taking away his GOV for 30 days. SAIC1 issued this decision orally in a meeting with Complainant. SAIC1 also memorialized this incident and discipline in written notes, dated April 27, 2010.

2011

In January of 2011, Complainant told his immediate supervisors, ASAIC1 and ASAIC2 [redacted],[3] that he believed the Inter-Mark seizure and investigation were improper and based on insufficient evidence of fraud. (Category #2 Alleged Protected Disclosure).

In the summer of 2011, ASAIC1 and ASAIC2 briefed [redacted], the new Minneapolis Field Office SAIC (SAIC2), on the 2010 GOV incident. This occurred during SAIC2's orientation on personnel matters and issues affecting the office. SAIC2 reviewed SAIC1's notes on the incident. SAIC2 further conducted his own investigation of the 2010 GOV incident. SAIC2 told us he did this because he was an experienced internal affairs investigator with the Secret Service. SAIC2 uncovered no new information through his own investigation.

[3] [redacted] was Assistant to the Special Agent in Charge (ATSAIC) and later ASAIC. Thus, we refer to him as ASAIC2 in this report.

On October 21, 2011, Complainant sent an email to SAIC2. In this email, Complainant again described the reasons why he believed the Inter-Mark seizure and investigation were improper, including that the seizure "lacked a proper foundation," that "our organization seized over 23 million dollars without establishing any victims," and that this ended in the "near destruction of this MN business entity with dozens of MLPS jobs eliminated." (Category #2 Alleged Protected Disclosure). In November of 2011, Complainant contacted the Office of Special Counsel (OSC) alleging AUSA abuse of power in seizing Inter-Mark assets based on insufficient evidence. (Category #2 Alleged Protected Disclosure).

2012

On June 2, 2012, Complainant filed a Merit Systems Protection Board (MSPB) Individual Right of Action against SAIC2. Complainant alleged that SAIC2 retaliated against him for "voicing USAO malfeasance" concerning the Inter-Mark investigation. (Category #2 Alleged Protected Disclosure).

On September 6, 2012, the Secret Service selected Complainant for promotion to a GS-14 supervisory position at the Buffalo, New York Field Office.

In October of 2012, the Secret Service Security Clearance Division (SCD), the division that handles all security clearances issued for the Secret Service, initiated Complainant's normal five year security clearance reinvestigation. On September 10, 2012, [redacted], Chief of the SCD (SCD Chief) contacted SAIC2 and requested that the Minneapolis Field Office conduct local police checks of Complainant as part of his normal five year reinvestigation. [redacted] (SA1) conducted the local police checks and found written documentation of the April 2010 GOV incident with three local police agencies. On September 14, 2012, SAIC2 notified his supervisor, Deputy Assistant Director [redacted] (DAD1) that the Minneapolis Field Office had discovered this documentation. SAIC2 told DAD1 that SAIC1 had previously disciplined Complainant for this incident two years earlier. SAIC2 also reported that he had conducted his own follow-up investigation and had developed no new information.

On September 18, 2012, DAD1 instructed SAIC2 to refer the matter to the Secret Service Office of Professional Responsibility (RES) (Alleged Personnel Action #1). The Secret Service Inspection Division (ISP), which is the agency's internal affairs unit, then initiated an internal misconduct investigation based on this 2010 GOV incident. Through the regular course of its investigation, ISP learned that ASIAC1 and ASAIC2 had developed suspicion of, but had not

verified, complainant's potential GOV gas card misuse during routine reviews of the entire office. Based on these suspicions, ISP then expanded the scope of its investigation to include gas card misuse and time and attendance fraud, among other related issues. The ISP investigation was active for approximately nine months. In the interim, on October 4, 2012, DAD1 held Complainant's promotion to a GS-14 supervisory position in abeyance pending the outcome of the ISP investigation (Alleged Personnel Action #2).

On December 18, 2012, during the course of ISP's investigation of Complainant, he disclosed his allegations concerning ASAIC Prieto's suicide to ISP Inspectors. Complainant alleged that the Secret Service violated rules and regulations when it denied Prieto access to the Employee Assistance Program. (Category #3 Alleged Protected Disclosure). Complainant and Prieto were classmates in special agent training and had known each other for nearly twenty years.

2013

On January 9, 2013, SAIC2 restricted Complainant's access to all criminal, administrative and protective files in the field office (Alleged Personnel Action #3). On May 10, 2013, SAIC2 sent a memorandum to DAD [redacted] (SAIC2's direct supervisor at that time) concerning Complainant's self-reported stress and mental duress due to the ongoing ISP investigation. SAIC2 also requested his supervisor's assistance in resolving this matter. On May 16, 2013, SAIC2 met with SCD Chief in Washington, DC. SAIC2 told SCD Chief that he thought Complainant was not fit for duty. SAIC2 also provided SCD Chief with the May 10, 2013 memorandum. That same day, SCD Chief suspended Complainant's Top Secret security clearance based on the security clearance Adjudicative Guideline I called Psychological Conditions (Alleged Personnel Action #4). The suspension and revocation were closely reviewed by Secret Service Associate Counsel, [redacted] (Counsel).

SCD Chief issued the Notice of Suspension of Top Secret Security Clearance (NOS) based solely on "Psychological Conditions." Specifically, SCD Chief stated in the NOS that "[t]he decision to suspend your Top Secret security clearance is based upon information provided to me regarding your recent behavior that suggests you may be suffering from a physical and/or mental health issue." Complainant's NOS concluded: "Additional time is needed to resolve adverse information, such as through continued investigation, allow an individual to complete medical examinations or treatments." Contrary to the NOS, no one from the Secret Service requested medical or mental health records from Complainant. No one from the Secret Service referred him for a fitness for duty

examination. No one from the Secret Service attempted to resolve Complainant's clearance health issues at all.

2014

Instead, nine months later, on February 6, 2014, SCD Chief revoked Complainant's security clearance in a 20-page Notice of Determination – Security Clearance Revocation (NOD) based not on Psychological Conditions, but on three completely different grounds: Criminal Conduct, Personal Conduct and Financial Considerations (Alleged Personnel Action #5). This NOD was sent to Counsel and SAIC2 prior to issuance. SCD Chief made no mention of Complainant's previous suspension for physical and/or mental health issues in the NOD. The agency did not give Complainant prior notice of these new reasons for revocation nor an opportunity to rebut these new charges prior to revocation of his clearance on February 6th.

On April 3, 2014, at the appeal hearing before the Secret Service Chief Security Officer, Complainant's attorney presented a response to the security clearance revocation. This appeal was the first opportunity Complainant was given to rebut the facts and grounds of his clearance revocation. Secret Service Counsel advised the Chief Security Officer privately on Complainant's case and also provided the agency's position at this hearing. On May 17, 2014, the agency placed Complainant on indefinite suspension without pay, the status in which he remains today. On October 23, 2014, the Chief Security Officer upheld the agency's decision to revoke Complainant's clearance.

2016

At our request, the DHS Office of the Chief Security Officer, Personnel Security Division (PSD) also reviewed Complainant's Notice of Determination to assess whether the Secret Service complied with appropriate standards for security clearance proceedings. PSD was skeptical about the length and breadth of the revocation decision and the application of the Adjudications Guidelines, especially the application of Financial Considerations and Criminal Conduct. Very rarely, if ever, does PSD see a revocation of this scope. PSD opined that much of the conduct cited in the NOD appeared to be more appropriate for disciplinary proceedings rather than for security clearance revocation. PSD noted that the GOV gas card information seemed insufficient to support the revocation findings. PSD also stated that the self-reporting by Complainant of the April 2010 GOV incident and subsequent SAIC discipline for Complainant's conduct cited in the decision, did not appear to be given appropriate weight by the Secret Service in the NOD.

ANALYSIS

We employ a two stage process in conducting whistleblower reprisal investigations. The first stage focuses on the alleged protected disclosure; knowledge by a responsible management official of the protected disclosure; a personnel action taken; and the protected disclosure was a contributing factor to the personnel action. In the first stage, the burden is on the Complainant to demonstrate the elements based on a preponderance of the evidence.[4] The second stage focuses on whether or not the agency would have taken, withheld, or threatened the personnel action(s) absent the protected disclosure. In the second stage, the burden shifts to the agency to show it would have taken the same personnel actions with similarly situated non-whistleblowers. In determining whether an agency meets this burden, we analyze the three factors set forth in *Carr v. SSA*[5]: (1) agency motive to retaliate; (2) strength of the agency case; and (3) how similarly situated employees were treated.

STAGE ONE: Protected Disclosures[6]; Knowledge; and Contributing Factor to Personnel Actions

1. EEO Fillings (Alleged Protected Disclosure #1)[7]

[4] The employee must prove that he made a protected disclosure, that subsequent to the disclosure he was subjected to a personnel action and that the disclosure was a contributing factor to the personnel action based on a "preponderance of the evidence." *Carr v. SSA,* 85 F.3d 1318, 1322 (1999).

[5] *Id.* at 1323.

[6] The 2012 WPEA makes clear that the employee's motive is not relevant for determining why a Complainant made a disclosure or whether a disclosure is reasonable. *See* 5 U.S.C. § 2302(f)(1)(C). Thus, we do not consider what Complainant's motive was in making his disclosures. Moreover, a disclosure is protected if the employee reasonably believes that disclosure is true; the test is both objective and subjective. An employee need not prove an actual violation occurred. *Drake v. Agency for Int'l Dev.*, 543 F.3d 1377, 1382 (Fed. Cir. 2008).

[7] Under the WPEA, a disclosure is generally protected when made to any person, unless "specifically prohibited by law" or "required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." The WPEA is distinguishable from PPD-19, in which a disclosure must be made to specified officials. These specified officials include a supervisor in the employee's direct chain of command up to and including the head of the employing agency; the Inspector General of the employing agency; the Director of National Intelligence; the Inspector General of the Intelligence Community; or an employee designated by any of these officials for the purpose of receiving such disclosures.

Complainant filed eleven formal EEO complaints during the period of May 26, 2009 to July 12, 2014. The bases for these complaints were as follows: Religious discrimination (1 filing); Age discrimination (2 filings); Retaliation for prior EEO Activity (6 filings); Retaliation for prior EEO Activity, Race [White] and Parental Status (1 filing); Retaliation for prior EEO Activity and Hostile Work Environment (1 filing). The most prevalent issues cited in these complaints surrounded promotion and performance reviews (non-selection for promotion and poor performance evaluation scores). Complainant withdrew five of the eleven cases. According to Complainant, he elected to withdraw three EEO complaints after he was selected for promotion to a GS-14 supervisory special agent position on or about September 6, 2012.

EEO Complaint is a Protected Disclosure

All eleven EEO complaints were filed prior to Complainant's security clearance revocation (Alleged PA #5) and eight were filed prior to his security clearance suspension (Alleged PA #4). The two age discrimination complaints were filed on October 29, 2010. Complainant made these age discrimination disclosures prior to all alleged personnel actions in this case. These two age discrimination complaints concern a period when complainant was over 40 years old. As to the age discrimination complaints, we determined that these disclosures were objectively and subjectively reasonable. Additionally, Complainant filed EEO complainants in May 2012[8] and August 2013[9] alleging, among other things, reprisal for his prior EEO activity. In the Final Agency Decision (FAD) for the May 2012 complaint, the DHS Office for Civil Rights and Civil Liberties made a finding of fact that Complainant "engaged in protected EEO activity in 2009-2012"[10]; thus, we determined that his disclosure in the May 2012 Complaint was a protected disclosure. Similarly, as to the August 2013 Complaint, the FAD determined that he had engaged in previous EEO complaints, including the May 2012 complaint, as the basis for reprisal in the August 2013 Complaint. Thus, we similarly determined that Complainant's August 2013

[8] HS-USSS-22396-2012 (date of contact with DHS EEO Program Office March 20, 2012, formal complaint filed May 3, 2012) and consolidated with HS-USSS 21797-2012.

[9] HS-USSS-01688-2013.

[10] This finding does not mean that Secret Service actually discriminated against Complainant; in fact, there was a finding of no discrimination. However, the FAD correctly determined that Complaint engaged in this EEO activity and that this activity was protected such that Complainant cannot be retaliated against for it, even if he ultimately failed to prove discrimination on the merits.

EEO complainant, alleging reprisal for prior EEO filings, was a protected disclosure.

RMOs had Knowledge of EEO Disclosure

SAIC2, ASAIC1, ASAIC2, SCD Chief and Counsel had knowledge of Complainant's EEO filings prior to all alleged personnel actions that directly involve them. During the 2016 OIG interviews, all five of these potential responsible officials admitted that they knew that Complainant had filed multiple EEO complaints prior to their respective alleged personnel actions. All five potential responsible officials had participated in the EEO cases and provided affidavits in at least one of Complainant's EEO proceedings. In his January 13, 2014 EEO Affidavit, SAIC2 acknowledged he knew about Complainant's EEO actions as early as August 2, 2011. Complainant made EEO disclosures to the Secret Service EEO Office, and made these disclosures to his chain of command, including SAIC2. For example, on February 22, 2012, Complainant wrote a memo to SAIC2 in which Complainant highlighted three concerns, the third being "My EEO filings regarding promotion selections made by our senior management." Furthermore, according to an EEO affidavit by SAIC2, Complainant discussed his EEO filings with SAIC2 regularly throughout SAIC2's tenure at the Minneapolis Field Office, which ran from the Summer of 2011 through the revocation of Complainant's security clearance in February of 2014. Thus, we determined that ASAIC1, ASAIC2, SAIC2, SCD Chief and Counsel had knowledge of this category of protected disclosures.

Contributing Factor is Satisfied

Alleged Personnel Actions 1 through 5 satisfy the contributing factor element through the "knowledge/timing test" as set forth in 5 U.S.C. § 1221(e)(1).[11] Specifically, the statute states that complainants "may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial 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.* Merit Systems Protection Board (MSPB) case law has generally held that an approximate one-year period "per se" satisfies the

[11] *See also Marano v. Dep't of Justice*, 2 F.3d 1137, 1140-42 (Fed. Cir. 1993); *see also Powers v. Dep't of Navy*, 69 M.S.P.R. 150, 155 (1995).

knowledge-timing test. *See, e.g.*, *Jones v. Dep't of the Interior*, 74 M.S.P.R. 666, 673-76 (1997).[12] If a whistleblower demonstrates both that the deciding official knew of the disclosure and that the removal action was initiated within a reasonable time of that disclosure, "no further nexus need be shown, and no countervailing evidence may negate the petitioner's showing."[13] Thus, while evidence about the responsible management official's response to the protected disclosure or animus might be relevant to the agency's rebuttal, it is not to be considered when determining if the protected communication was a contributing factor.[14]

In attempting to identify a date by which a protected disclosure may reasonably be said to have occurred for purposes of applying the knowledge/timing test, we note that Complainant filed EEO Complaints in May of 2012 and August of 2013 alleging retaliation for prior EEO activity (including age discrimination), among other things. SAIC2 stated he had knowledge of this August 2013 Complaint. Thus, in applying the knowledge/timing test, we use both filing dates as the date of Complainant's protected disclosure.

Accordingly, the protected disclosure date of May 5, 2012 is less than a year from occurrences of the following personnel actions: (#1) Referral of the GOV incident (September 2012); (#2) Stayed Promotion (October 2012); (#3) Restriction of Access of Files (January 2013); and (#4) Suspension of Security Clearance (May 6, 2013). The protected disclosure date of August 2013 is less than a year from (#5) Revocation of Security Clearance (February 2014). Thus, we determined that all these personnel actions satisfy the knowledge/timing test for purposes of establishing that Complainant's protected activity was a contributing factor in the personnel actions.

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[12] The Federal Circuit has not addressed what period of time could satisfy a "per se" knowledge-timing test. Indeed, it has declined to "state a specific period of time for all cases" but has also cautioned to use the "'reasonable time standard liberally.'" *Kewley v. Dep't of Health and Human Svcs.*, 153 F.3d 1357, 1363 (Fed. Cir. 1998) (*quoting* S. Rep. No. 100-413, at 15 (1988)). Because the statutory language references a "reasonable person" standard, which suggests a subjective consideration of each case, and because the question remains unsettled in the Federal Circuit, the DHS OIG may determine in the future that the facts of a particular case do not warrant a finding that the knowledge-timing test is satisfied, despite falling within a similar time period to the present case.

[13] *Id.*

[14] *Id.*

It is also well established that "the knowledge/timing test is not the only way for an appellant to satisfy the contributing factor standard; rather, it is one of many possible ways to satisfy the standard."[15] We may also consider other factors including "the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding officials, and whether these individuals had a desire or motive to retaliate against the appellant. Any weight given to a whistleblowing disclosure, either alone or in combination with other factors, can satisfy the contributing factor standard."[16] There are a number of weaknesses in the Agency's case for suspending and revoking Complainant's security clearance, as described later in this report. ASIAC1, ASAIC2, and SAIC2 were all named officials in at least one of Complainant's EEO complaints such that they had motive to retaliate against Complainant.[17] Thus, we determined that Complainant satisfied the contributing factor element for Personnel Action #4 (Suspension of Security Clearance) and #5 (Revocation of Security Clearance) based on factors beyond the knowledge/timing test.[18]

[15] *See, e.g., Dorney v. Dep't of Army,* 117 M.S.P.R .480, ¶14 (Mar. 6, 2012); *Rubendall v. Dep't of Health & Human Servs*, 101 M.S.P.R. 599, ¶ 12 (Apr. 28, 2006); *Carey v. Dep't of Veterans Affairs,* 93 M.S.P.R. 676, ¶11 (Aug. 13, 2003).

[16] *Dorney v. Dep't of Army,* 117 M.S.P.R. 480, ¶15 (Mar. 6, 2012) (internal citations omitted).

[17] *See* ASAIC2's statement from the OIG May 2016 interview in which he stated that he and SAIC2 were more concerned about Complainant filing another EEOC complaint than Complainant's mental stability at the time of the Notice of Suspension.

[18] The MSPB has generally found that personnel actions taken within two years of the protected communication satisfy the test, while a two-year or more gap does not satisfy the test. *See, e.g., Salinas v. Dep't of Army,* 94 M.S.P.R. 54, ¶10 (Aug. 27, 2003). In some cases, complainants have been able to overcome a two-year period between the communication and personnel action under a "continuum" theory. *See, e.g. Agoranos v. Dep't of Justice,* 119 M.S.P.R. 498, ¶22 (June 7, 2013) ("Unlike *Salinas* and other IRA cases in which personnel actions, independent of one another, were taken more than 2 years after the protected disclosure, this case involves related performance-based actions that form one continuous chain as the appellant alleges, or in other words a continuum"). Thus, even if we were to apply an earlier protected disclosure date such as the date of the filing of the age discrimination cases, October 29, 2010, Complainant satisfies the knowledge/timing test under this continuum theory.

2. Inter-Mark Investigation Disclosures (Alleged Protected Disclosure #2)

Complainant also alleges that he was reprised against for repeatedly raising concerns about a high profile criminal investigation and what he believed was abuse of authority[19] by SAIC1 and AUSAs in seizing Inter-Mark funds without sufficient evidence and in handling this investigation.

The Minneapolis Field Office and other agencies (collectively the "Task Force") began an investigation into an alleged Ponzi scheme perpetuated by a company called Inter-Mark in 2009. Inter-Mark's business involved a pyramid-type sales structure for internet advertising that the Task Force believed was an illegal Ponzi scheme. [redacted] was lead case agent in the matter, and Complainant was assigned to the investigation. In August of 2009, Complainant told ASAIC1 that the case was questionable because Inter-Mark seemed more like a legal internet Amway-type business than a fraudulent Ponzi scheme.[20] The Task Force sought to prove that Inter-Mark was never a legitimate business and that Inter-Mark had made false representations to victims about its business. Yet, according to Complainant

[19] An "abuse of authority" within the meaning of the WPEA occurs when there is "an arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *D'Elia v. Dep't of the Treasury*, 60 M.S.P.R. 226, 232 (1993) (citation omitted). More notably, there is no *de minimus* requirement incorporated into "abuse of authority, as opposed to "gross" mismanagement. *Id.* at 232-33. "[T]he legislative history of the WPA indicates that Congress changed the term 'mismanagement' in the CSRA [Civil Service Reform Act] to 'gross mismanagement' in the WPA to establish a *de minimus* standard for disclosures of mismanagement by protecting them only if they involved more than 'trivial matters.' . . . In enacting the WPA, however, Congress did not alter the term 'abuse of authority' so as to indicate an intent to establish a *de minimus* standard for disclosures of abuse of authority." *Id.* Thus, "abuse of authority" does not require a showing of something blatant or out of the ordinary. *See id.; see also Pasley v. Dep't of Treasury*, 109 M.S.P.R. 105, 114 (2008) (holding that "[a] supervisor's use of his influence to denigrate other staff members in an abusive manner and to threaten the careers of staff members with whom he disagrees constitutes abuse of authority") (citations omitted).

[20] A Ponzi scheme is generally defined as a fraudulent investment opportunity where the operator pays returns to investors from new capital paid to the operator by new investors, rather than from profit earned through legitimate sources. Ponzi schemes occasionally begin as legitimate businesses, until the business fails to achieve returns expected. The business becomes a Ponzi scheme if it then continues under fraudulent terms. *See generally*, US Securities and Exchange Commission website, sec.gov, on the definition and types of Ponzi schemes, *available at* https://www.sec.gov/fast-answers/answersponzihtm.html [last visited July 19, 2017].

and [redacted], the Task Force could not determine what fraudulent conduct or representations Inter-Mark specifically made and failed to identify witnesses who believed they were victims.

Reportedly under pressure from management at the USAO and Secret Service, in February of 2010, the Task Force seized $26 million in Inter-Mark assets. This resulted in one of the largest seizures in Minnesota to date. The case garnered local press coverage. However, Inter-Mark petitioned for return of those seized assets, and the U.S. Attorney's Office decided to settle this case in June of 2010. By final order dated June 23, 2011, the Minnesota U.S. District Court ordered return of the money to a court-appointed receiver pursuant to this settlement. This subsequent return of funds was also followed in the local press.

In June of 2010, the Secret Service had assigned Complainant to this case as primary case agent, after [redacted]. In January of 2011, Complainant expressed his concerns again to ASAIC1 and ASAIC2 that the Assistant U.S. Attorneys and SAIC1 had improperly investigated and seized Inter-Mark assets. He objected to what he believed was a lack of evidence sufficient to show fraud and requested that he be removed from the case. Complainant told us that he had conducted several dozen interviews of witnesses and uncovered no real evidence of fraud or defrauded victims. On or about January 19, 2011, ASAIC1 removed Complainant as case agent [redacted].

Then, in September and October of 2011, Complainant again expressed his Inter-Mark concerns to SAIC2 in a series of three emails, the last one on October 21, 2011, reiterating his belief that the AUSAs and SAIC1 had improperly seized Inter-Mark funds based on insufficient evidence and then continued with an overzealous investigation. Complainant specifically alleged that the seizure "lacked a proper investigative foundation," that "our organization seized over 23 million dollars without establishing any victims," and that this ended in the "near destruction of this MN business entity with dozens of MLPS jobs eliminated."

During his 2016 OIG interview, SAIC2 told us he was worried that Complainant's abuse of authority allegations would impact his office's relationship with the U.S. Attorney's Office. SAIC2 maintained that if his office did not have a good collaborative relationship with the U.S. Attorney's Office, his office's "reason for being" was in jeopardy. Thus, in or about October 2011, SAIC2 met at the U.S. Attorney's Office with Deputy Criminal Chief [redacted]

[redacted], White Collar Section, and AUSA [redacted] to inform them of the allegations made by Complainant. At that meeting, SAIC2 reported that he asked [redacted] to take some action against Complainant; we do not know the nature of SAIC2's specific request. SAIC2 stated that he could not remember the nature of the request. Moreover, the U.S. Attorney's Office refused to be interviewed or to provide information for this investigation. SAIC2, however, wrote a contemporaneous memorandum to file, dated October 25, 2011, entitled "SAIC Notes" that memorialized this USAO meeting. In it, SAIC2 wrote as follows: "Deputy Criminal Chief [redacted] informed me that he has discussed this issue with USAO senior management and that it is the position of his office that this matter concerning [Complainant] is an internal Secret Service matter and that his office would not be taking any action."

In November of 2011, Complainant filed a complaint with the Office of Special Counsel (OSC) regarding, according to the OSC close-out letter, the allegation that "the U.S. Attorney's Office had engaged in abuse of power in the federal case involving Inter-Mark Corp. [and] [] that the Assistant United States Attorney assigned to the case had directed a search and seizure based on insufficient evidence in order to garner media coverage and potential gain under the USSS forfeiture of assets policy." This investigation was terminated without a statement of reasons.

On June 2, 2012, Complainant filed an Individual Right of Action with the MSPB, alleging retaliation by his supervisor, SAIC2, "for voicing USAO malfeasance."[21] Complainant alleged that SAIC2 retaliated for this protected disclosure by denying Complainant's request to volunteer for a Secret Service teaching assignment, reassigning Complainant from the best work space to the least desirable, and being given no new case assignments, among other things. This MSPB case is discussed at further length below.

Inter-Mark is a Protected Disclosure

Disclosures are protected if the employee reasonable believes that the disclosure is true. The standard is met if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably could conclude that a violation did occur.[22]

[21] Docket # [redacted].

[22] *Drake v. Agency for Int'l Dev.*, 543 F.3d 1377, 1382 (Fed. Cir. 2008).

Knowledge of facts known to by the employee

The November 2012 WPEA amended preexisting legislation at 5 U.S.C. § 2302 to explicitly codify the "reasonable belief" standard, including that the reference point for the standard is knowledge of facts known to *by the employee* as follows:

> [A] determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences . . . an abuse of authority . . . shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.

The case law and legislative intent is clear that an employee need not prove that an actual violation occurred.[23] Correspondingly, we too made no finding as to whether an actual abuse of authority occurred. We also made no finding as to whether the USAO appropriately sought the seizure warrant based on sufficient evidence. Reasonable minds can differ in areas concerning prosecutorial discretion. Furthermore, we made no finding as to whether the warrant affidavit was sufficient or accurate.

> Indeed a cornerstone of 5 U.S.C. §2302(b)(8) since its initial passage in 1978 has been that an employee need not ultimately prove any misconduct to qualify for whistleblower protection. All that is necessary is for the employee to have a reasonable belief that the information disclosed evidences a kind of misconduct listed in section 2302(b)(8).
>
> S. Rep. No. 112-155, 112th Cong., 2d Sess. 9 (2012).[24]

[23] *Drake,* 543 F.3d at 1382; S. Rep. No. 112-155, 112th Cong., 2d Sess. 9 (2012) .

[24] *See Hickey v. DHS*, 2017 WL 1848111 (initial decision) (finding that the employee's communication was protected because "[E]ven if the appellant's belief was ultimately incorrect, I find that it was reasonable. Given the sensitive nature of the investigation and the guidance he was receiving from E2C2, I find that a disinterested observer in the appellant's position could reasonably conclude that he was being ordered to enter classified information into TECS in violation of law.").

Consequentially, Complainant only needs to demonstrate that he reasonably believed the statement to be true for this disclosure to be protected, and we found that he has met this burden.

First, the MSPB has held that we can take the employee's personal knowledge, position and expertise as "some support" that he reasonably believed the statement to be true. *See Massie v. Dept. of Transp.*, 114 M.S.P.R. 155, 159 (2010) (employee's "position as an Aerospace Engineer afforded him personal knowledge of the information that formed the basis for his disclosures . . . and . . . it does provide support for his claim that he reasonably believed that the information he disclosed evidenced a violation of law, rule, or regulation and a substantial or specific danger to public safety."); *see also McCarthy v. Int'l Boundary & Water Comm: U.S. & Mexico*, 116 M.S.P.R. 594, 616 (2011) ("We find that the appellant was in a position to reasonably believe his disclosure because, as part of his duties as a Supervisory Attorney for the agency, he analyzed the issue and expressed his concerns. . . . In making this determination, however, we do not find that the appellant actually established a regulatory violation, but only that he met his burden of establishing that the matter disclosed was one which a reasonable person in his position would believe evidenced such a violation."). Complainant, as case agent, had personal knowledge of and expertise in the Inter-Mark investigation that is "some support" for the reasonableness of his disclosure, and more importantly, this disclosure is corroborated by SA2.

Second, this "reasonable belief" standard requires the disinterested observer to be a person with knowledge of the essential facts "known to and readily ascertainable to the employee," such as [redacted] SA2.[25] Thus, the appropriate "disinterested observer" in the instant case is not the federal Magistrate Judge who signed the warrant seizing Inter-Mark's funds, but rather a person in [redacted], such as SA2. The Magistrate Judge only had the information set forth in the affidavit. This factor illustrates the error made by the Administrative Judge (AJ) in the Initial Decision of Complainant's underlying MSPB[26] case. The AJ dismissed Complainant's IRA stating that Complainant had failed to make a non-frivolous allegation of abuse of authority, holding that his disclosure was not reasonable. The AJ found

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[25] *See Salerno v. Dept. of Interior*, 123 M.S.P.R. 230, 235 (2016).

[26] We note that the MSPB did not have the testimony of SA2, discussed below, to consider in determining whether the allegation was non-frivolous.

Complainant's disclosure unreasonable, positing that a "disinterested observer having knowledge that probable case was found by a United States District Court Judge for the search and seizure from Inter-Mark Corp. [] would not [] reasonably conclude the United States Attorney engaged in wrongdoing." The AJ did not consider that the disinterested observer in the case agent's position has a much broader knowledge of the case facts and the government's internal deliberations than the judge reviewing a seizure affidavit. It is SA2 who had the essential facts known to the Complainant, including access to the case file, potential Inter-Mark witnesses and victims and internal government deliberations. Hence, SA2 is an appropriate reference point for a disinterested observer with knowledge of the essential facts known to the case agent.

[redacted] *SA2*

During his 2016 OIG interview, SA2 expressed shortcomings in both the Complainant's performance[27] and the Secret Service/USAO handling of the Inter-Mark investigation. SA2 also expressed his belief that that based on the lack of evidence of criminal activity he observed from the outset: "I don't think it was a case that should have been opened." SA2 further stated that the Secret Service and the U.S. Attorney's Office had "jumped the gun" and seized Inter-Mark's assets too soon before identifying victims. SA2's statements squarely corroborate Complainant's disclosure that the seizure warrant was based on insufficient evidence and before the government had identified sufficient victims. While SA2 believed that Inter-Mark was culpable, he maintained that "there should have been much, much more investigation prior to the seizure of those funds." Thus, we found that Complainant reasonably believed his abuse of authority disclosure to be true when he made it. In contrast, we made no finding as to whether there was an actual abuse of authority—this is not a required finding of the whistleblower protection laws and reasonable minds can differ as to what constitutes a sufficient quantum of evidence to proceed with a seizure warrant.

RMOs had Knowledge of Inter-Mark Disclosure

[27] SA2 expressed criticism that Complainant had failed to complete some investigative steps during the investigation, such as interviewing certain witnesses and reviewing documents obtained from the search warrants and that Complainant was not helpful to SA2 [redacted]. This has no bearing on whether the disclosure was objectively reasonable or not. We raise this point to illustrate that SA2 gave fair and significant criticism concerning both Complainant and the agency. We found that SA2 did not favor one side over the other and was an unbiased observer.

SAIC2, ASAIC1, ASAIC2, Counsel and SCD Chief had actual or constructive knowledge of Complainant's Inter-Mark Disclosure at the time of the relevant personnel actions. SAIC2, ASAIC1, and ASAIC2 had close discussions and briefings on the Inter-Mark investigation as the investigation unfolded. During the 2016 OIG interviews, the three admitted knowing about Complainant's Inter-Mark disclosures prior to the suspension of Complainant's security clearance. As important, SAIC2 controlled the information that was sent to SCD Chief and Counsel. Both SCD Chief and Counsel stated that the decision to suspend on Psychological Conditions was based primarily on what SAIC2 told them and the materials he sent them. So while SCD Chief and Counsel may not have had personal knowledge of this protected disclosure, under the applicable law, we impute it to them through SAIC2's knowledge and influence.[28]

Contributing Factor is Satisfied

The protected disclosure date of June 2012 is less than a year from occurrences of the following personnel actions: (#1) Referral of the GOV incident (September 2012); (#2) Stayed Promotion (October 2012); (#3) Restriction of Access of Files (January 2013); and (#4) Suspension of Security Clearance (May 6, 2013). The protected disclosure date of June 2012 is more than a year but less than two years from (#5) Revocation of Security Clearance (February 2014). For the same reasons discussed above in the EEO section, all the personnel actions satisfy the contributing factor element through the knowledge/timing test alone. Even if Alleged Personnel Action #5 does not satisfy the knowledge/time test alone because it was more than one year from the June 2012 disclosure, it satisfies the contributing factor test through the other factors discussed in the EEO section.

[28] A Complainant may show constructive knowledge, even if the acting official did not have knowledge of the protected disclosure or a motive to retaliate; it is sufficient that a complainant demonstrate that another official acted with improper animus/motive to retaliate and knowledge of the protected disclosure and that the other official influenced the acting official who had no motive to retaliate. *See Aquino v. Dep't Homeland Security*, 121 M.S.P.R. 35, 45-47 (2014). This "cat's paw" theory has also been upheld by the U.S. Supreme Court in *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011), in which the Court held that the exercise of judgment by the final decision maker who did not have retaliatory animus/bias did not prevent or cure the animus/bias of the earlier supervisor's actions, nor did it prevent the earlier biased action from being the proximate harm to the employee.

3. Improper Treatment of Prieto Disclosure (Alleged Protected Disclosure #3)

On December 18, 2012, during a second interview in the ISP investigation, Complainant disclosed to ISP ASAIC [redacted] and an ISP Inspector [redacted] (ISP1) that he believed Rafael Prieto, a Secret Service ASAIC, had been improperly denied access to EAP services before he committed suicide on October 27, 2012. At the time, Prieto[29] was assigned to the President's Protective Detail and was under investigation for security clearance improprieties. Prieto committed suicide the day after his security clearance had been suspended. Complainant believed the Secret Service had failed to provide EAP services to Prieto, and thus was in part responsible for his suicide. ISP1 documented this disclosure in his reporting of the interview. Complainant also made this disclosure by email to [redacted], the Secret Service [redacted], on December 19, 2012. On December 20, 2012, DAD1 forwarded this email to SAIC2.

During his February 2015 OIG interview, Complainant acknowledged that he did not have direct knowledge of how Prieto was treated during his security clearance investigation. He believed, however, that Prieto was harshly interrogated to the point where Prieto despaired of losing his job. Complainant's belief was based on his own experience around the same time. On October 9, 2012, he himself underwent a difficult subject interview with ISP. Complainant stated that the Secret Service, especially ISP and Prieto's management, was obligated to offer Prieto the services of an EAP counselor, and they negligently or deliberately failed to do so. Thus, Complainant believed the Secret Service was partly responsible for Prieto's suicide. We determined that Prieto's security clearance investigation was not handled by ISP, but rather by SCD, in contrast to Complainant's investigation. We found that Prieto was offered EAP services at the time his security clearance was suspended, but declined them.

Prieto is Not a Protected Disclosure

Complainant was not a party to the Secret Service internal information on the conduct of Prieto's September-October 2012 security clearance investigation and the manner in which Prieto was questioned. The only information available to Complainant was that on October 26, 2012, Prieto's security clearance was suspended and he was made a "Do Not Admit" to all Secret Service facilities.

[29] Complainant and Prieto were classmates in Secret Service agent training and had known each other for almost 20 years.

The facts underlying this determination were kept confidential in the Secret Service, and Complainant acknowledged not having personal knowledge of these facts. Complainant thus had no reasonable basis to conclude Prieto was denied EAP access or services. Thus, we determined that Complainant's disclosure regarding Prieto was not objectively reasonable and was not a protected disclosure.

PERSONNEL ACTIONS

Under the WPEA, Complainant must show that the agency took a "personnel action" against Complainant. 5 U.S.C. § 2302(a)(2)(A) defines personnel action to include the following: a disciplinary or corrective action; a detail, transfer or reassignment; a performance evaluation; a decision to order psychiatric testing or examination; a decision concerning pay, benefits, or award; or any other significant change in duties, responsibilities, or working conditions. "The legislative history of the 1994 amendment to the WPA indicates that the term 'any other significant change in duties, responsibilities, or working conditions' should be interpreted broadly, to include 'any harassment or discrimination that could have a chilling effect on whistleblowing. . . .'" *Savage v. Dep't. of Army*, 122 M.S.P.R. 612, 627 (2015) (citations omitted).

Section 104(c) of the WPEA also provides remedial authority for retaliatory investigations of whistleblowers under 5 U.S.C. § 1221(g)(4). Thus, we consider whether the referral to investigation was a personnel action.[30] The ISP, which is the agency's internal affairs unit, initiated an internal misconduct investigation based on Complainant's 2010 GOV incident. However, the ISP investigation expanded its investigation to include GOV gas card misuse and time and attendance fraud, among other issues. The ISP investigation was active for approximately nine months, during which time Complainant was interviewed three times. Moreover, ISP interviewed many of his fellow co-workers concerning Complainant's conduct. The revocation of Complainant's security clearance was based almost entirely on the ISP investigation findings. Thus, the Referral of the April 2010 GOV incident for internal investigation (Alleged PA #1) led to a significant change in working conditions and constitutes a personnel action.

[30] *See Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 325 (1997) (retaliation by investigation can be a personnel action under the WPA).

The Stayed Promotion to a supervisory position (Alleged PA #2) is clearly a significant change in working conditions. Restriction of Access to All Files (Alleged PA #3) is a significant change in working conditions in that Complainant was not able to freely access any of his work files. Complainant's placements on administrative leave with pay and indefinite suspension without pay (Alleged PAs #4 & 5) are also considered "a significant change in duties" (and suspension without pay is clearly a decision involving pay). Thus, Alleged Personnel Actions 4 and 5 are personnel actions.

As to personnel actions under PPD-19, Complainant must show that the agency took an "action affecting [his] eligibility for access to classified information." Complainant's suspension and subsequent revocation of his security clearance are actions which have affected, and continue to this day to affect, his eligibility for access to classified information. Thus Alleged Personnel Action #4 (Suspension) and #5 (Revocation) are personnel actions for PPD-19 purposes.

I. Referral of 2010 GOV Incident for Investigation (Alleged Personnel Action #1) and Stayed Promotion (Alleged Personnel Action #2)

Complainant further alleged that his disclosures regarding Inter-Mark (June of 2012) were so close in time to DAD1's referral of the 2010 GOV incident to ISP (September 2012) that the Secret Service must have taken this action in reprisal for his disclosures. DAD1 was also the official who stayed Complainant's promotion (October 2012). Moreover, the Secret Service relied primarily on findings from Complainant's ISP investigation[31] in its determination to revoke his security clearance in February of 2014. The cascading effect of this 2010 GOV incident referral is of note. However, as discussed below, we determined DAD1 had no knowledge of the protected communications so we did not substantiate this referral to ISP as reprisal.

Lack of Knowledge

DAD1 stated that he did not recall when he learned of Complainant's EEO activity. However, DAD1 did not think he was aware of the EEO matters during his involvement with Complainant's ISP investigation. DAD1 was involved with the ISP investigation from its inception in September 2012 to February 2013,

[31] *See infra* for review of the circumstances surrounding the initiation of complainant's misconduct investigation.

when he left the position to become SAIC in Jacksonville. He believed it was likely that Complainant's EEO activity came to his attention after he had transferred to Jacksonville. Furthermore, because DAD1 was never named in any of Complainant's EEO actions, unlike several other senior managers, he had much less insight on the EEO specifics. DAD1 also asserted that he was unaware that Complainant had filed a complaint with the OSC regarding abuse of authority in the Inter-Mark investigation. DAD1 stated he was sure the issue never reached his level. He believed this was because any controversy surrounding Inter-Mark predated his tenure as DAD. We found no documentary evidence or witness testimony that contradicts DAD1's assertions. Most of the information DAD1 received concerning the referral of the April 2010 GOV incident to ISP, was from SAIC2. However, DAD1's explanation seems reasonable, and there was an absence of evidence that DAD1's decision to stay the promotion or to refer the April 2010 GOV incident to ISP was based on SAIC2's influence.

Based on the lack of evidence suggesting DAD1 was aware of Complainant's protected disclosures or that SAIC2 influenced him with regard to these Alleged Personnel Actions such that SAIC2's knowledge can be imputed to DAD1 as constructive knowledge, we found that DAD1 did not have knowledge of the protected disclosures. Thus, we did not substantiate Alleged Personnel Action #1 (Referral of 2010 GOV incident) and #2 (Stayed Promotion).

II. Restriction of Access to Files (Alleged Personnel Action #3)

On January 9, 2013, SAIC2 restricted Complainant's access to all administrative, protective and investigative files. During his 2016 OIG interview, SAIC2 stated that it was unclear to him who requested him to do so, but he believed the request originated within ISP. We were unable to determine the circumstances surrounding this request due to the retirement of the key ISP Inspector, [redacted] (ISP1), who would only agree to a limited phone interview with us. At the time of the file restriction, the ISP team had just arrived in Minneapolis to conduct the local portion of the Complainant's internal investigation for the GOV and related misconduct. SAIC2 claimed, and we found no information to the contrary, that the request was based on ISP's desire to preserve information in these files that might be material to the misconduct investigation. Furthermore, SAIC2 and ASAIC2 told us they did not prevent Complainant from accessing the files, but rather limited his access to a supervised environment in order to ensure the integrity of the files. We found this evidence preservation rationale to be reasonable and do not substantiate this personnel action.

STAGE TWO: Agency Must Demonstrate That It Would Have Taken Personnel Actions Absent the Protected Disclosures

Complainant has met his burden of demonstrating that his disclosures regarding EEO complaints and Inter-Mark were protected, that SAIC2 and SCD Chief had actual or constructive knowledge of these disclosures, and that this was a contributing factor to the two remaining alleged personnel actions, Alleged Personnel Actions #4 (Suspension/Administrative Leave with Pay) and #5 (Revocation/Indefinite Suspension without Pay). We thus proceed to Stage Two of the whistleblower reprisal analysis regarding Alleged Personnel Actions #4 and #5. The burden now shifts to the Secret Service to demonstrate that it would have taken these personnel actions absent the protected disclosures.

III. Suspension of Security Clearance (Alleged Personnel Action #4)

The Agency did not demonstrate clear and convincing[32] evidence that it would have suspended Complainant's security clearance absent the protected disclosures

We found that the agency provided little explanation or evidence,[33] let alone clear and convincing evidence, that the agency handled Complainant's

[32] "Clear and convincing" is the standard that the agency must meet in demonstrating that it would have taken the personnel action absent the protected disclosure under the WPA. *Carr*, 185 F.3d at 1322; *See also* 5 U.S.C. § 2302(b) and 5 U.S.C. § 1221(e). The General Provisions of PPD-19 state that this directive shall be implemented in a manner consistent with and "does not restrict available rights, procedures, and remedies under section 2302(b) of Title 5, United States Code." Thus, we apply the "clear and convincing" standard from the WPA to PPD-19. It appears that 50 U.S.C. § 3341 was amended and codified sections of PPD-19 effective July 7, 2014; this amendment sets forth a "preponderance of the evidence" standard on the agency. This amendment also states that we must give the "utmost deference to the agency's assessment of the particular threat to the national security interests of the United States in the instant matter."

The Complainant's suspension occurred before July 7, 2014, and there is no indication that § 3341 is retroactive. *See, e.g.*, *Landgraf v. USI Film Products*, 511 U.S. 244, 265-68 (1994) (discussing the strong presumption against retroactivity, unless, for example, Congress makes clear that retroactivity is intended). Thus, "clear and convincing" is the applicable standard on the agency for the Notice of Suspension. As to the Notice of Revocation, we are not restricted by the § 3341 amendment, as the OIG has authority and discretion under the WPA and Section 7 of the Inspector General Act of 1978 to apply the "clear and convincing" standard to the security clearance or the administrative leave/indefinite suspension personnel actions. However, we do not belabor this point, as the agency has failed to meet its burden under both the § 3341 amendment and PPD-19 standards.

suspension similar to other employees who were not whistleblowers, as discussed below. In determining whether the agency has demonstrated that the personnel actions would have been taken absent the protected disclosure, we considered the three factors set forth in *Carr v. SSA*[34]: 1) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated; 2) the strength of the agency's evidence in support of its personnel action; and 3) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision.

Fitness for Duty Medical Examination

On May 16, 2013, SCD Chief issued the Notice of Suspension based solely on Guideline I[35]: Psychological Conditions.[36] Specifically, SCD Chief stated in the Notice of Suspension that "[t]he decision to suspend your Top Secret security clearance is based upon information provided to me regarding your recent behavior that suggests you may be suffering from a physical and/or mental health issue." Secret Service policy SAF-03(01) Mandatory Medical Examination Program states that the agency may at any time order covered employees to submit to a "fitness for duty" medical examination whenever there is a direct question about an employee's capacity to meet the needs of the profession. When SCD Chief suspended Complainant based on psychological grounds, there was a direct question about his capacity to meet the needs of the profession. Yet, no one from the Secret Service referred Complainant for a fitness for duty examination. No one from the Secret Service requested medical or mental health records before or after the Notice of Suspension. No one from

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[33] "[I]t behooves an agency, when faced with the 'clear and convincing evidence' standard of proof, to fully explain all of its potentially questionable actions in order to meet that burden. *Cosgrove v. Dep't of the Navy,* 59 M.S.P.R. 618, 625 (1993).

[34] 185 F.3d 1318, 1323 (Fed. Cir. 1999).

[35] SCD Chief told us she mistakenly used the letter "E" in the Notice of Suspension but meant "I".

[36] Psychological Conditions is one of the Adjudicative Guidelines that sets forth a basis for disqualifying an individual for access to classified information. Intelligence Community Planning Guidance (ICPG) 704.2: *Personnel Security Adjudicative Guidelines for Determining Eligibility for Access to Sensitive Compartmented Information and Other Controlled Access Program Information, Annex A* (October 2, 2008) ("Adjudicative Guidelines"). The Adjudicative Guidelines are established for all U.S. Government civilian and military personnel and others, who require access to classified information. They apply to persons being considered for initial or continued eligibility for access to classified information.

the Secret Service attempted to "resolve"[37] Complainant's clearance health issues at all.

Similarly Situated Employees

While SAF-03(01) does not mandate that the agency refer an employee for a fitness for duty examination or review a fitness for duty examination, we look to the agency-provided comparators to determine how the agency implemented this fitness for duty policy. The Secret Service provided ten comparator Special Agents in response to our request for comparators who were suspended by SCD Chief based on a psychological condition or mental health reason during the July 2011-January 2015 timeframe. Of these ten Special Agents, four are not similarly situated because one Special Agent was suspended on Personal Conduct[38] and three Special Agents retired or settled with the agency prior to a NOD or other final clearance action. The remaining six Special Agents are similarly situated. All six of them were referred for a fitness for duty examination. Complainant was not. That no one from the Secret Service referred Complainant for a fitness for duty examination or followed up on his clearance health issues, is a noteworthy departure from agency implementation of this fitness for duty policy and agency treatment of the other six Special Agents. Thus, this *Carr* factor weighs heavily in Complainant's favor.

Strength of the Case for Suspension

[37] According to Secret Service security clearance policy in effect at the time of Complainant's suspension, RPS-02(02), May 30, 2003, Complainant was entitled to a written Notice of Suspension and "Procedural Rights Afforded Individuals Subject to Access Suspension," which included "a brief statement of the reason(s) for the suspension action…." This policy allowed for a suspension when one of the following, or similar, bases is present: (1) The suspension is in response to a forthcoming revocation; (2) Additional time is needed to resolve adverse information, such as thorough continued investigation; and (3) The individual is pending administrative removal resulting from an adverse personnel action. Complainant's Notice of Suspension cites to Number (2): "**Additional time is needed to resolve adverse information, such as through continued investigation, allow an individual to complete medical examinations or treatments**" as the basis for suspension. (Emphasis added).

[38] The Agency provided SA G.C. among its ten comparators, although the agent's clearance was not suspended under Guideline I, Psychological Conditions, but rather under Guideline E, Personal Conduct. However, four months prior to the suspension, the agent received a clearance suspension warning under Guideline I. Thus, we understand why this SA was included even though G.C. was not suspended for Psychological Conditions. It is of note that the agency directed G.C. to engage in EAP counseling and participate in any program EAP recommended, while the agency did not direct Complainant to engage in any mental health program or follow-up on Complainant's mental health issues at all.

Complainant self-reported to SAIC2 that he was under extreme stress and mental duress due to the ongoing ISP internal investigation on Complainant. This may be a legitimate basis for suspending a Special Agent. However, the facts surrounding Complainant's suspension puts the agency's case in question. First, when we asked Counsel whether she thought Complainant would be cleared if referred for a fitness for duty examination, she asserted, "I thought he'd be found fit for duty." She told us that this is the reason she did not proceed to revocation on Psychological Conditions, but rather proceeded on completely different bases. That Counsel believed Complainant would be found fit for duty if referred for an examination and that none of the RMOs followed up on health issues after Complainant's suspension for health issues, supports his allegation that the suspension based on Psychological Conditions was not proper.

In the Notice of Suspension, SCD Chief provided only a generic basis for suspension, with no identifying incidents or examples of specific behavior. Therefore, it is unclear from the NOS how serious the Secret Service believed his psychological condition was at the time of the suspension. SCD Chief merely stated that, "The decision to suspend your Top Secret security clearance is based upon information provided to me regarding your recent behavior that suggests you may be suffering from a physical and/or mental health issue." Presumably, the Complainant would surmise that his Notice of Suspension involved his self-reported duress and stress during that timeframe. However, during the 2016 OIG interviews, SAIC2 and SCD Chief enhanced their reasons for suspending Complainant beyond the description in the NOS or any self-reported statement of the Complainant. ASAIC2 and SCD Chief explained to us that their primary basis for suspending Complainant was beyond him being stressed and mentally taxed. They asserted that by May 2013, they believed Complainant was a potential "danger" to himself or others and that workplace violence was a concern. SAIC2 elaborated that a California federal agent had snapped and shot his supervisor around the time of the NOS. SAIC2 insisted that this event struck him hard such that he was concerned that Complainant too may "snap." Yet, SAIC2's 2016 statement seems at odds with his February 12, 2013 email statement. In this email to SCD Chief, ISP1 and DAD [redacted], SAIC2 stated as follows:

> Despite his repeated advisements of the increasing mental duress, at this time, we have **not observed, or been advised** of observations by anyone else in the office consistent behavior on the part of [Complainant] that would cause us to

> believe he is a danger to himself or others.
> (Emphasis added).

Although we queried SAIC2, SCD Chief and Counsel, they could not identify any specific incident or type of behavior that occurred between February 2013 and May 2013 to explain why Complainant was not a potential danger in February 2013 but became a danger three months later. This demonstrates some weakness in the agency's case against Complainant.

Furthermore, SAIC2 and SCD Chief's 2016 assertions that Complainant was a potential "danger" or going to "snap," also run counter to other witness testimony. We interviewed three neutral employees [redacted] who had regular contact with Complainant during the entire relevant period: [redacted]. None of them believed that Complainant was a potential danger, on the verge of a nervous breakdown or had heard anything to that effect. [redacted] reported that he likely had more interaction on the ground with Complainant than anyone else [redacted]. When asked if he ever had concerns about Complainant's psychological stability, [redacted] responded, "no, never," and expounded that he really "never saw any issues, of any kind" with Complainant.

Complainant's direct supervisor at the time of the suspension, ASAIC2, also told us that he did not recall any behavior that caused him to believe Complainant was on the verge of a nervous breakdown. ASAIC2 recalled being more concerned that Complainant would file another EEO complaint than being concerned about his potential dangerousness, as follows:

> [DHS OIG Investigator]: During this time, and…going forward to May of 2013 when his clearance was suspended and he was put on admin leave, during this time or even going all the way forward were you or anybody that you remember ever concerned or expressed concern that he was a danger to himself or to others?
>
> [ASAIC2]: I think you are always concerned with somebody who's going through some of this. I probably would say **more the concern was that it's going to be another EEO complaint** against me for something that I'm doing or that [SAIC2's] doing, or something like that. I think we had thoughts of that, yes.

Emphasis added.

In sum, our investigation found nothing to support the idea that the agency's purported suspension basis cited in the Notice of Suspension, i.e. "time to investigate, complete medical examinations or treatments," was actually a legitimate basis or concern, since the Secret Service did no follow-up investigation to resolve Complainant's cited "physical and/or mental health issue." This fact, followed by SCD Chief's revocation of Complainant's clearance nine months later on completely different grounds that did not include health issues or make any mention of his mental health issues, supports Complainant's allegation that the Notice of Suspension was not legitimately based on Psychological Conditions or health issues.

Motive to Retaliate

We lastly address whether the RMOs had a motive to retaliate against Complainant and the strength of any motive. SAIC2 had some motive to retaliate against Complainant. Complainant had filed an EEO complaint and MSPB action against SAIC2, in which SAIC2's conduct was at issue.[39] At the time of the Notice of Suspension, SAIC2 had also been alarmed that Complainant's Inter-Mark Protected Disclosures concerning potential abuse of authority by Assistant U.S. Attorneys had caused SAIC2 problems with the U.S. Attorney's Office. SAIC2 insisted that if his office did not have a good collaborative relationship with the U.S. Attorney's Office, his office's "reason for being" was in jeopardy.[40] This indicates some animus or motive to retaliate.

Ultimately, the strength of SAIC2's animus and motive, is not critical, as the agency comparator evidence weighs firmly in the Complainant's favor and the lack of strength in the agency case tips in Complainant's favor. Taken together, the agency has failed to demonstrate that it would have suspended Complainant based on Psychological Conditions and placed him on administrative leave, absent his protected communications.

IV. Revocation of Security Clearance (Alleged Personnel Action #5)

[39] *See Redschlag v. Dep't of Army*, 89 M.S.P.R. 589, 634-36 (2001) (motive may exist if an official was named in grievances and complaints).

[40] *See Chambers v. Dep't of Interior*, 116 M.S.P.R. 17, 49-55, 2011 M.S.P.B 7 (2011) (finding strong motive because acting officials were extremely concerned about effect disclosures had on relationship with Congress).

The Agency did not demonstrate that it would have revoked Complainant's security clearance absent the protected disclosure

On February 4, 2014, nine months after suspending Complainant's security clearance, SCD Chief revoked Complainant's Top Secret security clearance in a 20-page Notice of Determination memorandum that did not include Guideline I, Psychological Conditions.[41] Complainant's health issues were not addressed at all within the Notice of Determination. SCD Chief instead relied on three completely different Adjudicative Guidelines for revocation: Adjudicative Guideline E (Personal Conduct), Guideline F (Financial Considerations) and Guideline J (Criminal Conduct). The Secret Service did not give Complainant any prior notice of these reasons for revocation, prior to revoking his clearance. We again considered the three *Carr* factors and determined that the agency did not demonstrate that it would have revoked Complainant's security clearance and placed him on indefinite suspension without pay absent the protected disclosure.

Similarly Situated Employees

While the agency was not required to proceed in the Notice of Determination on Psychological Conditions, we look again to the agency-provided comparators to determine how the agency handled other employees who were suspended based on Psychological Conditions through to revocation of clearance. As discussed above, the Secret Service provided ten comparator Special Agents in response to our request for comparators who were suspended by SCD Chief based on a psychological condition or mental health reason during the July 2011-January 2015 timeframe. Of these ten Special Agents, one was suspended on Personal Conduct, three retired or settled with the agency prior to a NOD, and an additional three were reinstated for duty after having a fitness for duty examination and after SCD Chief reviewed their treatment provider reports.

The remaining three Special Agent comparators are similarly situated. They were suspended based on Psychological Conditions, and the agency revoked their clearance in a Notice of Determination. For these three similarly situated employees, their NODs included Psychological Conditions as one of the bases for revocation. Complainant's NOD did not include Psychological Conditions as one of the bases for revocation. These three comparator Special Agents also had a fitness for duty examination, while Complainant did not. These three

[41] This NOD was drafted with input and guidance from Counsel and was also sent to SAIC2 prior to issuance.

comparators, while not a large number,[42] serve as some evidence that Complainant was treated differently than other similarly situated employees.[43]

Strength of Agency Case

In 2016, we interviewed two subject matter experts at the DHS Office of the Chief Security Officer (OCSO), Personnel Security Division (PSD). PSD is the subject matter expert that directs and oversees the Personnel Security program for the Department. It represents the Department and Office of the Chief Security Office within the federal personnel security community. PSD works with leadership in establishing Department-wide standards, policies and procedures impacting personnel security. PSD also adjudicates all security clearance matters for DHS Headquarters employees and contractors.

At our request, PSD reviewed Complainant's Notice of Determination[44] to assess whether it complied with appropriate standards for security clearance proceedings. PSD was skeptical about the length and breadth of the revocation decision and the application of the Adjudications Guidelines, especially the application of Financial Considerations and Criminal Conduct. Very rarely, if ever, does PSD see a revocation of this scope. PSD opined that much of the

[42] According to the GAO report 14-640, Security Clearance Revocations, the Secret Service agency-wide did not revoke many clearances around that time. The GAO report determined that Secret Service revoked only thirteen clearances in Fiscal Year 2012 and nine clearances in Fiscal Year 2013.

[43] In their respective 2016 OIG interviews, SCD Chief and Counsel both acknowledged that under security clearance authorities, there is a significantly higher standard to a revoke a security clearance under the Psychological Conditions Guideline than to suspend it under the other bases. The psychological revocation requires a formal diagnosis of a mental health disorder for the revocation, while the suspension does not. Intelligence Community Policy Guidance (ICPG) 704.2 states in relevant part that a condition under Guideline I, "that could raise a security concern and may be disqualifying include(s):…An opinion by a duly qualified mental health professional that the individual has a condition not covered under any other guideline that may impair judgment, reliability or trustworthiness." Further, it states that a condition "that could mitigate security concerns include(s):…[a] Recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by the U.S. Government that an individual's previous condition is under control or in remission and has a low probability of recurrence or exacerbation."

[44] We also did an analysis of the NOD as set forth in the investigative activities referenced in Appendix A entitled "Review and analysis of Complainant's revocation determination," "Review and analysis of Complainant's GOV gas card purchases" and "Review and analysis of Complainant's 2008 passport issue used in revocation."

conduct cited in the NOD appeared to be more appropriate for disciplinary proceedings than for security clearance revocation. PSD noted that the GOV gas card information seemed insufficient to support the revocation findings. PSD also stated that the self-reporting by Complainant of the April 2010 GOV incident and subsequent SAIC discipline for Complainant's conduct cited in the decision did not appear to be given appropriate weight by the Secret Service. The PSD observations weigh in Complainant's favor.

Intelligence Community Policy Guidance 704.2 - "Whole person" concept

PSD further explained that security officers should give the employee an opportunity to rebut or submit mitigating evidence consistent with the "whole person" concept, as set forth in the Intelligence Community Policy Guidance (ICPG) 704.2 (see Appendix B). This policy sets forth the "whole person" analysis as follows: "The adjudication process is the careful weighing of a number of variables known as the whole–person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching the determination."

We agree with PSD that when a security office fails to provide notice of the grounds for revocation and opportunity for an employee to provide mitigating evidence, the agency is not employing the "whole person" concept.[45] While any doubt concerning personnel being considered for access to classified information is resolved in favor of national security, this passage in ICPG 704.2 does not absolve the agency of first collecting information vital to considering the "whole person," such as obtaining the employee's explanation and mitigating evidence on the events. This overarching premise of the "whole person" concept in relation to national security is expressed clearly in the next passage of ICPG 704.2:

> The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security and is an overall common sense judgment based on careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person.

[45] According to GAO-14-640, the typical process to revoke clearances at DHS provides a stage for the employee to receive a "proposal to revoke clearance" after which the employee "has 30 days to respond and refute, clarify or explain the adverse information" prior to revocation.

PSD explained that its practice, which is a best practice that is designed to allow greater due process for the individual, is not to put any specific act or security concern in the revocation decision until the clearance holder has been given a chance to address it. If the clearance holder provides significant mitigating evidence, the conduct or incident will be excluded from the decision completely. According to PSD, it did not appear Complainant was afforded this opportunity to provide mitigating evidence. During our investigation, we confirmed that the Secret Service failed to give him an opportunity to rebut or mitigate prior to revocation.

Motive to Retaliate

By this point in time, in addition to SAIC2, Complainant had named SCD Chief[46] in an EEO complaint. Thus, SAIC2 and SCD Chief had some motive to retaliate. Again, the strength of the motive is not critical because the similarly situated analysis and the lack of strength of the agency case weigh in Complainant's favor.

In sum, the agency has failed to demonstrate based on clear and convincing evidence or a preponderance of the evidence[47] that it would have revoked Complaint's clearance and placed him on indefinite leave without pay absent the protected disclosures.

CONCLUSION

We did not substantiate the allegations that the referral of Complainant to ISP for investigation, Complainant's stayed promotion, or restriction of access to files was in reprisal for making protected disclosures.

We substantiated the allegations that the suspension and revocation of clearance, and corresponding administrative leave status with pay and then indefinite suspension without pay, were in reprisal for making protected disclosures.

[46] SCD Chief submitted an EEOC affidavit, dated January 29, 2014, in Complainant's EEOC case, HS-USSS-01688-2013.

[47] Since the DHS PSD experts expressed skepticism of many aspects of the Notice of Determination and we, too, identified many procedural and substantive weaknesses in the NOD, the agency does not meet its burden even if we give the "utmost deference to the agency's assessment of the particular threat to the national security interests of the United States in the instant matter."

RECOMMENDATION

We recommend that the Secret Service reinstate Complainant's security clearance and return him to a paid duty status. We also recommend that the Secret Service provide back pay and attorney fees to Complainant.

Appendix A

Listing of Individual DHS OIG Investigative Reports

Documented Investigative Activity[48]	***Date Conducted/ Completed***
Investigation predication and receipt of 1st set of Complainant documents	1/5/2015
Case agent's initial review of documents	2/18/2015
Receipt of 2nd set of Complainant documents	2/25/2015
Interview of Complainant and receipt of 3rd set Complainant documents from complainant	2/25/2015
Initial Secret Service document receipt	3/30/2015
Review of ASAIC Raphael Prieto's SCD security file	3/30/2015
Review of Complainant's EEO filings	4/23/2015
Review and analysis of Complainant's revocation determination	9/23/2015
Review and analysis of Secret Service law enforcement officer discipline, 2010 – 2015	12/21/2015
Review and analysis of Complainant's GOV gas card purchases	12/22/2015
Review and analysis of Complainant's 2008 passport issue used in revocation	1/13/2016
DHS Office of Security subject matter expert review of Complainant's revocation notice	1/20/2016
Review and analysis of Complainant's September 2012 background reinvestigation and subsequent misconduct referral	2/5/2016
Review and analysis of Complainant's mental health issues cited in security clearance proceedings	2/18/2016
Interview of SCD Chief [redacted]	3/3/2016
Interview (telephone) of retired Inspector/SAIC [redacted]	3/14/2016
Interview of former Associate Counsel [redacted]	3/18/2016
Interview of former ISP ASAIC (now DAD) [redacted]	4/15/2016
Interview of former INV DAD (now SAIC) [redacted]	4/29/2016
Interview of former MFO ATSAIC (now ASAIC) [redacted]	5/10/2016
Interview of MFO [redacted]	5/10/2016
Interview of MFO [redacted]	5/10/2016
Interview of MFO [redacted]	5/11/2016

[48] All interviewees are current or former Secret Service employees. All abbreviations refer to Secret Service titles or internal entities.

Documented Investigative Activity[48]	***Date Conducted/ Completed***
Review of MFO [redacted] official email	5/31/2016
Interview of MFO [redacted]	6/15/2016
Similarly situated Secret Service employee analysis	6/21/2016
Interview of former MFO [redacted]	8/3/2016
Review of Miscellaneous Follow-up Information Provided by Complainant	9/12/16
Review of Complainant's OSC and MSPB Documents	9/19/16
Additional Review of Complainant's EEO filings	6/8/17

Abbreviations

ASAIC	Assistant Special Agent in Charge
ATSAIC	Assistant to the Special Agent in Charge
DAD	Deputy Assistant Director
GOV	Government Operated Vehicle
[redacted]	[redacted]
INV	Office of Investigations
ISP	Inspection Division
MFO	Minneapolis-St. Paul Field Office
RES	Office of Professional Responsibility
SA	Special Agent
SAIC	Special Agent in Charge
SCD	Security Clearance Division

Appendix B

Top Security Clearance Requirements

According to Intelligence Community Planning Guidance 704.2, which is binding on all executive branch personnel security clearance decisions and incorporated into Secret Service policy, a person's top security clearance eligibility is determined by:

> [A]n examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for national security positions is predicated upon the individual meeting these personnel security guidelines. The adjudication process is the careful weighing of a number of variables known as the *whole-person concept* (emphasis added). Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:
>
> 1. The nature, extent and seriousness of the conduct;
> 2. The circumstances surrounding the conduct, to include knowledgeable participation;
> 3. The frequency and recency of the conduct;
> 4. The individual's age and maturity at the time of the conduct;
> 5. The extent to which participation is voluntary;
> 6. The presence or absence of rehabilitation and other permanent behavioral changes;
> 7. The motivation for the conduct;
> 8. The potential for blackmail, pressure, coercion, exploitation, or duress; and
> 9. The likelihood of continuation or recurrence.
>
> B. Each case is judged on its own merits and final determination remains the responsibility of DHS. Any doubt concerning personnel being considered for access to classified information is resolved in favor of national security.
>
> C. The ability to develop specific thresholds for action under these guidelines is limited by the nature and complexity of human behavior. The ultimate determination of whether the granting or

continuing of eligibility for a security clearance is clearly consistent with the interests of national security and is an overall common sense judgment based on careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person[.]

(1) GUIDELINE A: Allegiance to the United States; (2) GUIDELINE B: Foreign Influence; (3) GUIDELINE C: Foreign Preference; (4) GUIDELINE D: Sexual Behavior; (5) GUIDELINE E: Personal Conduct; (6) GUIDELINE F: Financial Considerations; (7) GUIDELINE G: Alcohol Consumption; (8) GUIDELINE H: Drug Involvement; (9) GUIDELINE I: Psychological Conditions; (10) GUIDELINE J: Criminal Conduct; (11) GUIDELINE K: Handling Protected Information; (12) GUIDELINE L: Outside Activities; (13) GUIDELINE M: Use of Information Technology Systems.