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Accounting and Information
Management Division

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July 10, 1997

The Honorable Strom Thurmond
Chairman
The Honorable Carl Levin
Ranking Minority Member
Committee on Armed Services
United States Senate

Subject: Inspectors General: Joint Investigation of Personnel Actions Regarding a Former Defense Employee

This letter responds to the request by Senator Strom Thurmond and former Senator Sam Nunn that we review a 1993 joint investigation by the Inspectors General (IGs) at the Departments of Defense (DOD) and State, and the Central Intelligence Agency (CIA). The investigation reviewed DOD actions to terminate the employment of a probationary[1] employee and to suspend the high-level security clearance necessary for his position as a Foreign Affairs Specialist. The employee alleged that these actions were a reprisal for DOD's concern that he would make unauthorized disclosures of national security information to the Congress. The joint investigation concluded that these actions did not constitute a reprisal covered under the Whistleblower Protection Act[2] and that DOD's termination actions were legally and factually sufficient. We were asked to determine (1) whether the investigative report's conclusions were adequately supported and (2) the basis for the former State IG's[3] disagreement with the joint investigative report's conclusions section.

[1]In general, federal career service employees serve up to 1 year in a probationary status before their appointment in the competitive service becomes final.

[2]The purpose of the Whistleblower Protection Act, as amended, is to strengthen protection for the rights of federal employees, prevent reprisals, and help eliminate prohibited personnel practices.

[3]The former State IG retired from State in 1994.

SCOPE AND METHODOLOGY

We reviewed the joint IGs' investigative files to determine if there was adequate documentation to support the investigative report's conclusions. We also reviewed the provisions of the Whistleblower Protection Act and the protections it provided to whistleblowers. We interviewed IG officials from DOD and State, the DOD employee, and other individuals involved with the results of the joint investigation. We also interviewed the former State IG to determine the basis for his disagreement with the investigative report's conclusions section and obtained written responses to our questions from the CIA IG. We did not reinvestigate the matters reviewed by the investigation and do not express an opinion on the legality of the personnel actions taken. We performed our review from March 1996 through March 1997 in accordance with generally accepted government auditing standards.

RESULTS IN BRIEF

We found that the investigative report and files did not fully support the report's conclusions that there was no reprisal and that the proposed termination notice was legally sufficient. In addition, the former State IG told us that he objected to the lack of emphasis in the investigative report's conclusions section regarding the potential effect of suspending the employee's security clearance.

BACKGROUND

In August 1989, DOD issued a termination notice to the employee citing performance deficiencies related to the employee's work. The investigative files included a memorandum written by the supervisor that explained the basis for the employee's proposed termination. In addition to discussing the performance deficiencies, the memorandum indicated that the employee's supervisor perceived that the employee might make an unauthorized disclosure of national security information to congressional staff. The memorandum states the following.

> "Finally, I have major concerns about [the employee's] reliability and judgment. . . regarding sensitive national security issues. . . . [The employee] told me he intended to meet and talk to two House Foreign Affairs Committee staff members concerning an Administration briefing given the previous week. He said he had learned that CIA and State representatives had created a misleading picture. . . . I told him he was not authorized to discuss intelligence information with them. He argued strenuously that because CIA and State had given him intelligence information, he too could discuss the information on the Hill. He said I would

> have to order him not to talk to Hill staff to prevent him. I obliged him, however, I am not confident he will not contact them in spite of my clear instructions. Providing intelligence information without an authorization would be in direct violation of CIA. . . restrictions and DOD instructions."

In August 1989, DOD suspended the employee's high-level security clearance, denied the employee continued access to "sensitive compartmented information,"[4] and performed a security investigation. The employee resigned his position and was reassigned by DOD as a program specialist on a temporary basis. In March 1990, DOD concluded that it did not have a basis to suspend the employee's security clearance and subsequently provided the employee with a top secret security clearance[5] but did not employ him as a Foreign Affairs Specialist. The employee resigned from DOD in 1992.

In March 1993, a member of the United States Senate asked the DOD IG to investigate the circumstances surrounding the proposed termination of the employee's employment. The investigation was led by the DOD IG who was assisted by the State and CIA IGs. The investigation reviewed whether the action taken against the employee constituted reprisal under the Whistleblower Protection Act, and whether the termination action was legally and factually sufficient.

The investigation concluded that there was no reprisal and that DOD's termination actions were legally and factually sufficient. The investigation's conclusions were based, in large part, on the view that the employee did not disclose or, notwithstanding the supervisor's written comments in the investigative files, threaten to disclose any information to the Congress. The investigation further concluded that even if such a disclosure had been threatened, it would not have been protected by the Whistleblower Protection Act if disclosure was made to the House Foreign Affairs Committee without the "appropriate clearances."[6]

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[4]Sensitive compartmented information refers to classified information concerning or derived from intelligence sources, methods, or analytical processes requiring handling exclusively within formal access control systems established by the Director of Central Intelligence.

[5]A top secret security clearance provides access to national security information that is at a lower security level than "sensitive compartmented information."

[6]Appropriate clearances were not defined by the joint investigation.

LACK OF ADEQUATE SUPPORT FOR INVESTIGATIVE REPORT CONCLUSIONS

Quality Standards for Investigations, which are guidelines developed by the President's Council on Integrity and Efficiency[7] for the IGs' investigative efforts, and DOD's Special Inquiries Investigative Policies and Procedures apply to the joint investigation. These standards require that objective evidence be gathered and reported without bias in an effort to support all the facts developed to prove or disprove an issue. Conclusions must be supported by the facts presented, and the investigator is required to continually evaluate whether sufficient facts and evidence have been collected to reach conclusions. In addition, the investigative report is to be logically organized and the information should be adequately verified to establish its validity. The investigative report is to depict the flow of logic, demonstrating the sorting, weighing, and ordering of facts for the sole purpose of reaching a conclusion. All notes taken by an investigator are to be retained in the case file.

The investigative report concluded that there was no reprisal against the employee for a protected disclosure under the Whistleblower Protection Act, and that the personnel actions against the employee were legally sufficient for termination of a probationary employee. The investigative report also concluded that DOD was not sufficiently diligent in assessing the credibility of security allegations before referring those allegations for investigation.

The Whistleblower Protection Act is part of the Civil Service Reform Act of 1978 (CSRA), which was a comprehensive reform of the federal civil service system. The Whistleblower Protection Act provides that employees who have the authority to affect personnel actions shall not use this authority for prohibited personnel actions.[8] An example of a prohibited personnel action is reprisal[9] against an employee for certain disclosures of information if such disclosures are not specifically prohibited by law and the information is not required by executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.[10] The act further provides that this

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[7]The President's Council on Integrity and Efficiency, established by executive order, includes Presidentially appointed inspectors general.

[8]5 U.S.C. 2302 (b).

[9]Reprisal, in a broad sense, includes any action designed to punish an employee for exercising his/her protected rights or to deter that employee from exercising those rights.

[10]5 U.S.C. 2302 (b)(8).

subsection[11] shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress. The conference report for the act states that it is not to be inferred that an employee is unprotected if statutorily protected information is disclosed to the appropriate unit of the Congress.

The legislative history of the Whistleblower Protection Act also makes clear that the act's protections are intended to cover not only individuals who make actual protected disclosures, but also those who threaten to make such disclosures. Further, our review of Merit Systems Protection Board (MSPB)[12] case law indicates that a threat of disclosure perceived by the employee's supervisor receives the same protection as does an actual disclosure or threat of disclosure made by the employee. Accordingly, the MSPB has concluded that the act's protections apply when a retaliatory personnel action is taken against an employee believed to have engaged in a protected activity, even though the employee may not have actually done so.[13]

We found that the investigative report and files lacked documentation to support the investigation's conclusion that there was no reprisal against the employee for a protected disclosure under the Whistleblower Protection Act. For example, the report states that there was no disclosure; but neither the report nor the files address how the threat of disclosure perceived by the

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[11]5 U.S.C. 2302 (b).

[12]CSRA established an independent agency, the MSPB, to protect the merit system principles and adjudicate conflicts between federal workers and their employing agencies, including reprisals against statutorily defined whistleblowers. CSRA also established an independent Special Counsel to investigate and prosecute, among other things, prohibited personnel practices within the federal civil service. The Whistleblower Protection Act Amendments of 1989 significantly amended CSRA to require more aggressive prosecution of certain prohibited personnel practices by the Special Counsel. The amendments also provide an individual right of action to employees victimized by reprisal as a result of whistleblowing. The type of action brought by the employee will determine the jurisdiction of the MSPB or the Office of Special Counsel, and the respective statute of limitations.

[13]Special Counsel v. Dept. of Navy, 46 M.S.P.R. 274 (1990). See also Zimmerman v. DHUD, 61 M.S.P.R. 75 (1994); Special Counsel v. Harvey, 28 M.S.P.R. 595, rev'd on other grounds, Harvey v. Merit Systems Protection Board, 802 F.2d 537 (D.C.Cir.1986).

supervisor affected the employee's protections under the act. Also, while the report stated that the act did not protect a disclosure to the House Foreign Affairs Committee without appropriate clearances, neither the report, the files, nor other documentation provided by officials we interviewed describe what is meant by "appropriate clearances" or discuss how such clearances as a matter of law relate to the act's protection of disclosures to the Congress.

Further, because the investigative report and files did not present adequate support to conclude that the perceived disclosure was not protected under the Whistleblower Protection Act, the investigation did not fully support its conclusion that DOD's personnel actions were legally sufficient or that DOD's actions did not constitute a reprisal under the act.

BASIS FOR THE FORMER STATE IG'S DISAGREEMENT WITH THE INVESTIGATIVE REPORT'S CONCLUSIONS SECTION

The former State IG disagreed with the investigative report's conclusions section. In his opinion, it should have included and emphasized information on the repercussions of suspending the employee's security clearance. The report did include a statement that the suspension of an employee's security clearance can have devastating and long-lasting implications to the employee even after a clearance has been restored, but the former State IG believed this statement should have also been included in the conclusions section. The former DOD IG[14] acknowledged that a few minor changes could have been made to the report's conclusions section, but believed that the conclusions section was consistent with the body of the report.

AGENCY COMMENTS AND OUR EVALUATION

In response to a draft of our report, we received written comments from the current DOD IG, the current State IG, and the former State IG. The CIA IG declined to comment. The text of all the responses, except for an enclosure to the former State IG's response that he wrote in September 1993, are reprinted in this letter in their entirety in enclosures I, II, and III.

In responding to our draft, the current DOD IG said that there was no actual disclosure of information to the Congress, that the employee denied that he intended to make such disclosure, that there was no reprisal for any threatened disclosure because the chronology of events indicated that actions to terminate the employee began prior to any such threat, and that as a result, given the standards for terminating a probationary employee, the proposed termination

[14]The former acting DOD IG retired from DOD in 1995.

notice was legally sufficient. The current State IG agreed with the comments of the current DOD IG.

In her comments, the current DOD IG did not address how the threat of disclosure perceived by the DOD supervisor affected the employee's protections under the Whistleblower Protection Act, did not describe what was meant by "appropriate clearances" in the investigative report, and did not explain how such clearances as a matter of law relate to the act's protection of disclosures to the Congress. Further, the DOD supervisor perceived a threatened disclosure prior to the date of the proposed termination notice, and the current DOD IG did not address how actions of the supervisor prior to the perceived threatened disclosure constituted a personnel action under the Whistleblower Protection Act. Accordingly, we continue to believe that the investigative report and files do not fully support the report's conclusions that there was no reprisal and that the proposed termination notice was legally sufficient.

The former State IG confirmed our conclusion that he objected to the investigative report's lack of emphasis on the career and personal impact regarding the suspension of the employee's security clearance. The former IG also stated that the joint investigation failed to adequately address the meaning of "appropriate clearances" in the case of perceived threats of disclosure of classified information to the Congress, and the degree to which such disclosures are protected against reprisal. The former IG provided us with a copy of a memorandum he wrote in September 1993 in which he expressed his initial disagreement with the investigative report's conclusion that the termination was legally sufficient.

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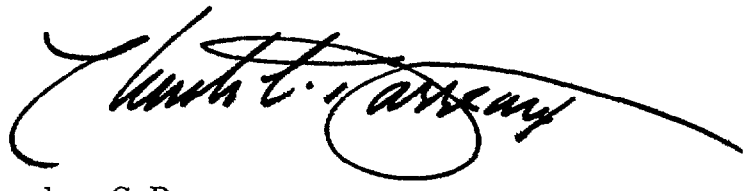
As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 7 days from the date of this letter. At that time, we will send copies to the Departments of Defense and State Inspectors General; the Central Intelligence Agency Inspector General; and the Director of the Office of Management and Budget.

If you would like to discuss these issues, please contact me at (202) 512-3029, or Jackson Hufnagle, Assistant Director, at (202) 512-9470.



Theodore C. Barreaux
Associate Director, Audit Oversight and Liaison

(911751)

COMMENTS FROM THE DEPARTMENT OF DEFENSE INSPECTOR GENERAL

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-2884

JUN – 6 1997

Mr. Gene L. Dodaro
Assistant Comptroller General
Accounting and Information Management Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Dodaro:

This is the Department of Defense (DoD) response to the General Accounting Office (GAO) draft report, "Joint Investigation of Personnel Actions Regarding a Former Defense Employee," dated May 1997 (GAO Code B-276950/OSD Case 1355). The GAO reviewed DoD actions to terminate the employment of a probationary employee and suspend his security clearances in order to determine if there was adequate documentation to support the joint investigative report's conclusions. The GAO review was also for the purpose of determining the basis for the State Department Inspector General's disagreement with the conclusions section in the joint investigative report.

The GAO draft report concluded that the joint investigative report and files lacked documentation to support the conclusion that there was no reprisal. We would like to address this finding.

The joint investigation established that there was no actual disclosure of information by the employee (unlike the prior 1991 DoD investigation, the joint investigation concluded that the discussions between the employee and his supervisor did not constitute a disclosure of information). We agree that the "threat" of a disclosure can form the basis for a reprisal complaint. However, the investigative file contains documentation that the employee, in his own statements, steadfastly denied that he ever intended to make a disclosure to Congress. Finally, the investigative report concluded that the matter was not within the ambit of the Whistleblower Protection Act at the end of page 6, wherein the report states:

> Finally, the chronology of events indicated that [the supervisor's] actions to terminate the employment of [the employee] had begun prior to their discussion of the testimony to Congress.

Clearly, there can be no reprisal for a "threatened" disclosure where the termination action is effected or initiated prior to the communication of such "threatened" disclosure. We acknowledge that our report could have been more thorough in its analysis and documentation of the reprisal issue.

ENCLOSURE I

Instead, we devoted a significant portion of the report to a discussion of the employment termination and revocation of the security clearance. In our view, the employee's performance deficiencies, as documented by his supervisors, provided an adequate independent basis for terminating the probationary employee's employment. The joint investigative report stated on page 11:

> We concluded that there was no reprisal, and the termination was legally sufficient given the minimal regulatory standards required to terminate a probationary employee.

We believe this conclusion is fully supported in the report and the investigative file and do not find any basis in the GAO draft report to call the conclusion into question.

Thank you for the opportunity to review and comment on the draft report.

Sincerely,

Eleanor Hill
Inspector General

COMMENTS FROM THE DEPARTMENT OF STATE INSPECTOR GENERAL

United States Department of State
U.S. Arms Control and Disarmament Agency
United States Information Agency, including the
Broadcasting Board of Governors

The Inspector General
June 10, 1997

Mr. Gene L. Dodaro
Assistant Comptroller General
U.S. General Accounting Office
Accounting and Information
Management Division
Washington, D.C. 20548

Dear Mr. Dodaro:

Thank you for the opportunity to comment on the GAO draft report titled, "Joint Investigation of Personnel Actions Regarding a Former Defense Employee".

With respect to the issue of adequacy of support for the investigative report's conclusions, we endorse and support the comments of the Office of Inspector General of the Department of Defense.

With respect to the concerns expressed by the (then) State Department Inspector General, we have no information to offer in addition to that discussed in the GAO draft. We understand that GAO has communicated directly with the (then) Inspector General on this issue.

Sincerely,

Jacquelyn L. Williams-Bridgers
Inspector General

COMMENTS FROM THE DEPARTMENT OF STATE'S FORMER INSPECTOR GENERAL

SHERMAN M. FUNK
5000 BATTERY LANE #504
BETHESDA, MD 20814-2645 -USA

June 5, 1997

Mr. David L. Clark
Director, Audit Oversight and Liaison
U.S. General Accounting Office
Washington, DC 20548

Dear Mr. Clark:

With the exceptions noted below, I concur with and commend the findings and conclusions of the draft report, "Joint Investigation of Personnel Actions Regarding a Former Defense Employee." [GAO/AIMD-97-81R]

I particularly commend the material relating to the Whistleblower Protection Act. This clearly indicates that the 1993 joint investigation failed to adequately address either the meaning of "appropriate clearances" in the case of perceived threats to disclose sensitive classified information to the Congress, or the degree to which such perceived threats are protected against reprisal when they involve potential disclosure to the Congress. It is my strong hope that this report will trigger legislative clarification.

Because unauthorized disclosure of sensitive classified information, even to the Congress, is a matter that must never be taken lightly, I suggest that any such legislation should specify:

(1) A limited number of individuals in the Congress to whom unauthorized disclosures may be made, e.g., the chairs and ranking minority members, and/or the staff directors and senior minority staff members of the Senate and House intelligence committees and of the Senate and House armed services committees. These four committees regularly handle classified information and have procedures in place to assure its protection. (If material under the normal jurisdiction of another committee is involved, I suggest it should go to one of the intelligence committees, which should then determine whether it is appropriate to be passed on to the chair of that committee and, if so, under what safeguards.)

(2) The limited conditions under which unauthorized disclosures can be made to the above individuals, e.g., when a government employee

ENCLOSURE III

has reason to believe that:

(a) the very act of requesting permission to disclose the classified information to the Congress will generate reprisal action against the employee, and/or

(b) the supervisors who must approve the disclosure to the Congress are involved in, or are attempting to cover up, illegal activity by themselves or other officials, or activities which are contrary to established administration or expressed congressional policy.

Regarding my disagreement as (then) State IG with the conclusions in the joint investigation report, I believe it is misleading to say that the "State IG did not object to the facts presented in the report...." In my memorandum dated September 17, 1993 (well before publication of the report) to the Deputy IG of Defense, I specifically questioned the report's conclusion that the termination of the Defense employee was both justified and legally sufficient. After a detailed discussion of the three reasons advanced by the employee's supervisor for dismissal, I concluded that "...of the three deficiencies cited in the termination notice, the report itself concedes by clear implication that two were not intrinsically supportable and the third was, at very least, questionable." I went on to say "I therefore am baffled by the report's conclusion...that the termination was 'legally sufficient.'"

My wording at the end of this section of the memorandum was unequivocal: "...the truth of [the Defense employee's] termination, as borne out by the report is – simply put and without circumlocution – that it was unfair and unwarranted." (A copy of this memorandum is enclosed.)

In view of these documented reservations, it is manifestly unfair to say that the "State IG did not object to the facts presented in the report." Such a statement, without any qualifiers, clearly implies that I agreed with that part of the language in the report's Summary and Conclusions which says: "The employment termination of [the Defense employee] for performance deficiencies was supported by the evidence...." That is a "factual" statement and is false; the evidence in the report leads to no such conclusion.

To be sure, the major thrust of my disagreement with the report focused on its failure to cite the severe career and personal impact when an intelligence analyst (which the employee was, despite the formal job title of Foreign Affairs Specialist) unjustifiably lost his security clearances, in particular his access to compartmented data. This emphasis reflected the prevailing opinion then of personnel experts that a probationary employee lacked the protections accorded to a career employee and therefore virtually any dismissal, except

ENCLOSURE III

for those explicitly based on illegal discrimination, was "legally sufficient." Had I been aware at the time of *Special Counsel v. Dept of Navy* (cf footnote 13 in the GAO Report), I would have reacted even more strongly to the alleged "legal sufficiency" of the termination, inasmuch as that decision opens the door, even to a probationary employee, of possible corrective action by the Merit Systems Protection Board.

Nevertheless, my opinions about the questionable nature of the Defense employee's termination are a matter of record, clearly set forth in my September 17, 1993 memorandum. Because one of the two stated purposes of the GAO review was to determine "the basis for the State IG's disagreement with the joint investigative report's conclusions section," I recommend that the language of your final report be adjusted accordingly and that this letter be included in the appendix to the report.

Thank you for the opportunity to comment on the report. Again, I want to commend the GAO and the authors of the report. In addition to identifying a procedural barrier to the receipt by the Congress of what might be important and needed sensitive classified information, you have flagged a grave inequity which has been allowed to stand for too long.

Sincerely,

Sherman M. Funk

cc:
Honorable Jackie Bridger-Williams
Inspector General, Dept of State

Honorable Fred Hitz
Inspector General, CIA

Honorable Eleanor Hill
Inspector General, Dept of Defense

Jackson Hufnagle
Asst Director, Audit Oversight & Liaison
GAO

Encl.

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