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Inspector General

United States
Department of Defense



Mr. Thomas A. Drake

WHISTLEBLOWER REPRISAL INVESTIGATION

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WHISTLEBLOWER REPRISAL INVESTIGATION
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NATIONAL SECURITY AGENCY/CENTRAL SECURITY SERVICE
FORT MEADE, MARYLAND

I. EXECUTIVE SUMMARY

~~(FOUO)~~ We conducted this investigation in response to complaints filed by the Government Accountability Project (GAP) on behalf of Mr. Thomas A. Drake (Complainant), former member of the Defense Intelligence Senior Executive Service (DISES), at the National Security Agency, Central Security Service (NSA/CSS), Fort Meade, Maryland (MD), alleging he was subjected to reprisal. Complainant alleged his participation in a 2003 Department of Defense Inspector General (DoD IG) audit of NSA programs resulted in personnel actions being taken against him. Specifically, that in 2004 and 2005 Complainant experienced progressive changes to his duties and responsibilities resulting in marginalization of his positions; and on November 28, 2007, his access to Top Secret/Sensitive Compartmented Information (TS/SCI) was locally suspended; on November 29, 2007, he was placed on paid administrative leave and recalled from a National Defense University (NDU) teaching position; on April 21, 2008, NSA proposed revocation of his security clearance and his termination from employment; and on April 23, 2008, he was constructively discharged. We limited our review to the alleged personnel actions and personnel security determinations that occurred in 2007 and 2008. The remaining personnel actions are outside the time period considered practical for investigation.

~~(FOUO)~~ We found Complainant made disclosures protected by statute, and the local TS/SCI suspension, paid administrative leave, NDU recall, security clearance revocation, and proposed employment termination were reviewable as personnel actions or personnel security determinations. We found the alleged constructive discharge was not reviewable as a personnel action.

~~(FOUO)~~ We concluded the responsible management officials (RMOs), ~~(b)(6), (b)(7)(C)~~, ~~(b)(6), (b)(7)(C)~~, and ~~(b)(6), (b)(7)(C)~~, had no knowledge of Complainant's protected disclosures, and, therefore, could not have reprised against Complainant.

We make no recommendation in this matter.

II. BACKGROUND

NSA is a U.S. Government Agency whose mission is to protect U.S. national security systems and to produce foreign signals intelligence information. NSA is headquartered at Fort Meade, MD.

~~(FOUO)~~ Complainant began work at the NSA as a member of the DISES in 2001. From 2001 through his resignation in 2008, Complainant served in four primary positions at NSA: Senior Change Leader, Software Implementation Technical Director, Engineering Directorate Portfolio Manager, and NDU Visiting Behavioral Science Professor.

~~(FOUO)~~ In 2003, DoD IG conducted an intelligence audit into NSA's acquisition of TRAILBLAZER and THINTHREAD. Complainant participated in the audit by interviewing with DoD IG auditors and providing them documents related to TRAILBLAZER and THINTHREAD.

~~(FOUO)~~ In July 2006, Complainant was offered and accepted a position as Visiting Professor of Strategic Leadership and Information Strategy at the National Defense University (NDU), Washington, D.C. Complainant's NDU position was a three year joint assignment with continued NSA employment.

~~(FOUO)~~ The NSA Associate Directorate of Security and Counterintelligence (ADS & CI) identified Complainant as a person of interest through its investigation of unauthorized disclosure of NSA information in a series of *Baltimore Sun* articles in 2006. ADS & CI coordinated with the Federal Bureau of Investigation (FBI), which executed a search warrant on Complainant's residence on November 28, 2007. Complainant voluntarily interviewed with the FBI, admitted to providing a *Baltimore Sun* reporter unclassified and for official use only information, and acknowledged the possibility Complainant may have provided the reporter classified information.

~~(FOUO)~~ On April 23, 2008, Complainant voluntarily resigned from NSA without prejudice, in lieu of termination.

~~(FOUO)~~ On December 8, 2010, GAP filed a complaint with this Office on behalf of Complainant alleging that NSA reprimed against him for his 2003 participation in the DoD IG audit. We declined to investigate as Complainant was pending criminal prosecution by the Department of Justice (DOJ), and DoD IG does not pursue administrative investigations of individuals pending criminal investigation or prosecution.

~~(FOUO)~~ On July 15, 2011, the DOJ dropped 10 felony counts against Complainant, who pleaded guilty to one count of exceeding authorized use of a government computer in violation of Title 18, United States Code, Section 1030.

~~(FOUO)~~ On October 20, 2011, GAP re-filed the complaint on behalf of Complainant; we initiated this investigation on March 22, 2012.

III. SCOPE

~~(FOUO)~~ The scope of this investigation was limited specifically to the allegations that Complainant experienced whistleblower reprisal via personnel actions and personnel security determinations for participation in a 2003 DoD IG intelligence audit. This investigation focused on the personnel actions and personnel security determinations in November 2007 and April 2008. The alleged personnel actions that occurred in 2004 and 2005 are outside the time period considered practical for investigation and were not reviewed. The investigation included interviews of Complainant, DoD IG audit personnel, the RMOs, and six witnesses. In addition, we reviewed Agency-provided documentation, NSA investigative case information and DoD IG audit documentation, to include classified information.

IV. STATUTORY AUTHORITY

The DoD IG conducts whistleblower reprisal investigations involving civilian appropriated-fund employees of the Department under Section 7(a) and 8(c)(2) of The Inspector General Act of 1978, as amended. Further, under DoD Directive 5106.01, "Inspector General of the Department of Defense," DoD IG receives and investigates such complaints of reprisal generally in accordance with Title 5, United States Code, Section 2302 (5 U.S.C 2302).

Current guidance provides that the courts and the Merit Systems Protection Board lack authority under Title 5 to review security clearance determinations as personnel actions. Given the significance of such determinations to DoD employees, the DoD IG whistleblower protection program relies on the authority of subsections 7(a) and 8(c)(2) of the Inspector General Act, as amended, and DoD Directive 5106.01 to review security determinations as possible abuses of authority in the nature of reprisal. Under that authority, we review the following types of personnel security determinations:

A suspension, denial, or revocation of clearance for access to classified information, access to classified information, Special Access authorization (including access to Special Compartmented Information (SCI)); a recommendation to a Central Adjudication Facility or comparable entity to suspend, deny, or revoke clearance for access to classified information or Special Access authorization (including access to SCI); non-appointment to or non-selection for any other position requiring trustworthiness determination; and reassignment to a position of lesser sensitivity or to a non-sensitive position.

V. FINDINGS AND ANALYSIS

A. Did Complainant make a protected disclosure? Yes

~~(FOUO)~~ We found that Complainant made numerous protected disclosures from January 2003 through December 2004, when he participated as a source of information in a DoD IG

intelligence audit into NSA's acquisition of TRAILBLAZER and THINTHREAD. Complainant provided DoD IG auditors with documents (i.e., TRAILBLAZER and THINTHREAD test reports and emails) and assisted auditors in the identification of what complainant believed to be gross waste of taxpayer dollars and NSA noncompliance with financial recordkeeping and Congressional requirements. According to the DoD IG audit team, Complainant provided valuable insight that enabled DoD IG to obtain information not readily provided by NSA's TRAILBLAZER and THINTHREAD program personnel.

~~(FOUO)~~ A preponderance of evidence established that Complainant made protected disclosures to the DoD IG.

B. Was Complainant the subject of an actual or threatened personnel security clearance determination or personnel action? Yes

~~(FOUO)~~ We found that on November 28, 2007, Complainant's access to classified information was locally suspended in response to the FBI's ongoing investigation and preparation to execute a search warrant on Complainant's residence for suspected disclosures of NSA information to a *Baltimore Sun* reporter. Complainant was also placed on administrative leave and effectively recalled from NDU. We further found that on April 21, 2008, Complainant received notice of the proposed revocation of his security clearance and termination of his employment. Additionally, we determined that Complainant's alleged constructive discharge was not reviewable as a personnel action.

~~(FOUO)~~ *TS/SCI Access Suspension—Reviewable Action*

~~(FOUO)~~ The NSA Q-2, Continued Access Division, was responsible for NSA employee clearance access and actions. On November 28, 2007, ~~(b)(6), (b)(7)(C)~~ suspended Complainant's local access to TS/SCI. The suspension occurred after the Continued Access Division was notified the FBI was investigating Complainant and preparing to execute a search warrant on Complainant's residence for suspected disclosures of NSA information. Testimony established that suspending an employee's access while fully identifying facts surrounding potential misconduct was common Agency operating procedure. Testimony further established the Continued Access Division typically suspended an employee's clearance if they were knowledgeable of criminal activity allegations concerning the employee. In Complainant's case, the Continued Access Division suspended Complainant's clearance access after notification the FBI was preparing to execute a search warrant on Complainant's residence. ~~(b)(6), (b)(7)(C)~~

~~(b)(6), (b)(7)(C)~~

Complainant's case, and who made the security clearance recommendation to ~~(b)(6), (b)(7)(C)~~. Testimony established ~~(b)(6), (b)(7)~~ reviewed the FBI search warrant information, and compared this information with adjudicator criteria in the Director of Central Intelligence Directive (DCID) 6/4,¹ requiring individuals with SCI access be "stable, trustworthy, reliable, of excellent character, judgment and discretion." ~~(b)(6), (b)(7)(C)~~ recommended Complainant's security clearance suspension until the

¹ DCID 6/4, "Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information"

Continued Access Division could further identify the facts surrounding the FBI's investigation and search warrant execution on Complainant's residence. (b)(6), (b)(7)(C) approved (b)(6), (b)(7)(C) proposal to suspend Complainant's security clearance, and forwarded the temporary clearance suspension package to (b)(6), (b)(7)(C) who concurred with the action. Complainant was notified of his TS/SCI access suspension when (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) met with him on November 29, 2007, informed him his access to TS/SCI was suspended pending further investigation, debriefed him on TS/SCI programs, and confiscated his NSA employee badge.

~~(FOUO)~~ *Paid Administrative Leave and Recall from NDU—Reviewable Actions*

~~(FOUO)~~ On November 29, 2007, (b)(6), (b)(7)(C), authorized Complainant's placement on administrative leave with pay as a result of his TS/SCI local access suspension. Administrative leave status meant Complainant could not report to work at NDU. (b)(6), (b)(7)(C) testified, "... suspension of access means they no longer have a badge to access NSA facilities. So they have to be placed on administrative leave." (b)(6), (b)(7)(C) further testified that, "Historically, NSA uses administrative leave as the 'preferred' option when Security suspends an employee's security clearance..." and that placing Complainant on administrative leave was in keeping with NSA practices. Once on administrative leave, an employee would not report to work; in this case, Complainant ceased reporting to work at NDU. (b)(6), (b)(7)(C) initiation of administrative leave was a common Agency operating procedure.

~~(FOUO)~~ Under certain circumstances paid administrative leave can be considered a reviewable personnel action. Further, once placed on administrative leave with pay, Complainant could not report to work, which included his NDU detail. While Complainant's recall from NDU was a function of the suspension of access to classified information and his placement on administrative leave, the recall can be viewed as a significant change in duties, responsibilities or working conditions. To provide broadest consideration, we will treat both paid administrative leave and recall from NDU as reviewable actions.

~~(FOUO)~~ *Security Clearance Revocation—Reviewable Action*

~~(FOUO)~~ On April 21, 2008, (b)(6), (b)(7)(C) administered Complainant a security clearance revocation decision package containing a memorandum dated April 21, 2008, informing Complainant that his clearance was revoked and that he was allowed 45 days to request an appeal/review of the revocation decision by the NSA Deputy Chief, Personnel Security. The memorandum notified Complainant that "failure to request a review of the decision to revoke your access to TS/SCI will constitute a final decision. The opportunity afforded you to appeal the access determination and to contest the proposed removal from employment will be forfeited." Also contained in the revocation decision package was an action memorandum dated April 4, 2008, detailing (b)(6), (b)(7)(C) revocation decision, based upon Director of Central Intelligence Directive (DCID) 6/4 criteria which required individuals with SCI access be "stable, trustworthy, reliable, of excellent character, judgment and discretion."² The action memo detailed Complainant's violations of NSA policies and DCID 6/4. Specifically, despite

² DCID 6/4, "Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information"

Complainant's numerous documented affirmations of obligation to safeguard NSA protected information from unauthorized disclosures, that he willfully passed such protected information to a *Baltimore Sun* reporter.

~~(FOUO)~~ *Proposed Termination Notice—Reviewable Action*

~~(FOUO)~~ Paragraph 18 of the April 4, 2008, action memo contained in the clearance revocation decision package was Complainant's notice of proposed termination from NSA employment for failing to maintain a clearance, a mandatory condition of employment under Public Law 88-290, "Personnel Security Procedures for the National Security Agency." Complainant's clearance revocation was suspended to become final 45 days from the day notice was provided to complainant (i.e., 45 days from April 21, 2008).

~~(FOUO)~~ (b)(6), (b)(7)(C) initiated the security clearance revocation and proposed termination notice because Complainant violated NSA policies and DCID 6/4 by willfully passing protected NSA information to a *Baltimore Sun* reporter. (b)(6), (b)(7)(C) testified the security clearance revocation and proposed termination were administered once the FBI released their investigative information to NSA.

~~(FOUO)~~ *Constructive Discharge—Not Reviewable Action*

~~(FOUO)~~ On April 23, 2008, Complainant voluntarily resigned without prejudice in lieu of termination from NSA. Complainant testified he resigned under what he considered as compelling circumstances, but that he was not pressured to or forced to resign. A voluntary resignation, absent other factors, is not a reviewable personnel action.

~~(FOUO)~~ A preponderance of the evidence established that Complainant's access to classified information was locally suspended on November 28, 2007; on November 29 Complainant was placed on paid administrative leave and recalled from NDU, and on April 21, 2008, he received notice of the revocation of his security clearance and proposed termination of his employment. These are reviewable as personnel security clearance determinations and personnel actions.

C. Were the protected disclosures a contributing factor in the Agency's decision to take, not take, threaten to take, or threaten not to take the personnel security determinations or personnel actions? No

~~(FOUO)~~ We found that Complainant's disclosures during the 2003 DoD IG intelligence audit were not a contributing factor in the local suspension of his access to classified information, his placement on administrative leave with pay and recall from NDU, or revocation of his security clearance and proposed employment termination.

~~(FOUO)~~ In December 2002, NSA emailed employees announcing DoD IG was conducting an audit on the TRAILBLAZER and THINTHREAD programs. Complainant testified he believed NSA knew about his participation in the 2003 DoD IG audit because he

openly visited DoD IG's temporary audit office located at NSA Headquarters approximately 12 times over an 18-month period. Complainant testified he believed NSA had knowledge of his participation because he would badge out of the main office complex and badge into DoD IG's temporary office space. Complainant further testified he believed NSA monitored his email communication to DoD IG auditors.

(FOUO) (b)(6), (b)(7)(C) testified he did not know who Complainant was, he had never met him, and he had no knowledge of Complainant's 2003 protected disclosures to DoD IG.

(b)(6), (b)(7)(C) testified he was aware Complainant made communications to a *Baltimore Sun* reporter, and his knowledge of those communications came from the FBI and NSA Q2 investigative reports. The fact Complainant was under investigation by the FBI for unauthorized disclosure of NSA information and the FBI would execute a search warrant at Complainant's house, and the findings of the classified FBI and NSA Q2 investigations triggered common Agency security clearance determination and personnel action processes (i.e., TS/SCI access suspension, paid administrative leave, recall from NDU, security clearance revocation, and proposed termination notice).

(FOUO) (b)(6), (b)(7)(C) testified he had no knowledge of Complainant's 2003 protected disclosures to DoD IG. Further (b)(6), (b)(7)(C) testified he did not know who Complainant was until being notified by NSA Security in November 2007 that a Senior Executive had his access suspended. (b)(6), (b)(7)(C) then placed Complainant on administrative leave as was NSA's preferred practice when an employee's security clearance was suspended. The actions of the NSA Security Office triggered common Agency personnel action processes (i.e., placement of Complainant on administrative leave with pay and recall from NDU and proposed termination notice).

(FOUO) (b)(6), (b)(7)(C), and (b)(6), (b)(7)(C) all testified they had no knowledge of any Agency officials discussing Complainant's 2003 disclosures to DoD IG. (b)(6), (b)(7)(C) further testified he believed (b)(6), (b)(7)(C) had no knowledge of Complainant's 2003 disclosures to DoD IG.

(FOUO) A preponderance of the evidence established that (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) had no knowledge of Complainant's protected disclosures prior to their administering the TS/SCI access suspension, placement of Complainant on administrative leave with pay and recall from NDU, proposed security clearance revocation, and proposed termination notice, and we received no evidence to the contrary. Therefore, (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) could not have reprised against Complainant.

VI. CONCLUSION

(FOUO) We concluded (b)(6), (b)(7)(C) did not reprise against Complainant through the suspension of Complainant's local access to TS/SCI, proposing revocation of Complainant's security clearance, and approving a proposal to terminate Complainant's employment, and that (b)(6), (b)(7)(C) did not reprise against Complainant through his placement on administrative leave with pay and recall from NDU.

VII. RECOMMENDATION

~~(FOUO)~~ We make no recommendations in this matter.

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